

PINK AND BLUE IN BLACK AND WHITE: WHY BINARY, PRESCRIPTIVE APPROACHES TO HUMAN CATEGORIZATION STILL WON'T YIELD THE DESIRED RESULT

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INTRODUCTION: SAME-SEX MARRIAGE AND MISCEGENATION

A Texas court asked “can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?”¹ The Kansas Supreme Court echoed this inquiry.² What the Texas Court characterized as a deep, philosophical question,³ others have called “loaded question.”⁴ The court’s framing of the issue previewed its ruling from the opinion’s first page. But the court’s terminology indicated just how complicated the question was.

The question arose in a suit under Texas’ wrongful death statute.⁵ Christie Littleton lost her husband Jonathon in 1996. To have standing as his beneficiary, she had to be his surviving spouse. But Texas law threatened the validity of their marriage.⁶ This is because forty-four years earlier, Christie was born a “physically healthy male” named Lee Cavalos, Jr.⁷ Thus the court posed, “[i]f Christie is a woman, she may bring this action. If Christie is a man, she may not.”⁸

When Christie was fifteen years old, Texas was one of fifteen states whose anti-miscegenation laws were overturned by the Supreme Court in *Loving v. Virginia*.⁹ In the years

¹ Littleton v. Prange, 9 S.W.3d 223, 224 (Tex. App. San Antonio 1999).

² In re Estate of Gardiner, 42 P.3d 120, 124 (Kan. 2002).

³ Littleton, 9 S.W.3d at 223.

⁴ Abigail Loyd , Defining The Human: Are Transgendered People Strangers To The Law?, 20 Berkeley J. Gender L. & Just. 150 (2005).

⁵ Littleton, 9 S.W.3d at 225.

⁶ At the time of the decision, no state except Hawaii had ever ruled in favor of same-sex marriages. See *id.* at 225-26.

⁷ *Id.* at 223.

⁸ *Id.*

⁹ *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) .

prior to this, the majority of states promulgated statutes preventing white people from marrying, or at least procreating, with people of color.¹⁰ In these states, the desire to prevent miscegenation was rivaled only by the challenge of categorizing the races.

The Littleton opinion showed a court grappling with biological and social factors in an attempt to categorize Christie Littleton.¹¹ The court framed the issue as determining her gender: male or female. But gender, like race, is a social construction.¹² And like race, while it is heavily associated with biological characteristics, it lacks a true biological definition.¹³ Still, these constructions are firmly rooted in our society, and have served as a predicate to social citizenship. This citizenship, or the “status bestowed on those who are full members of a community,” has been conditioned on race as well as conforming to a specific set of sexual norms.¹⁴ But the state’s continuous attempts to define its populace, thus regulating its citizens, are as complicated when the categories are male and female as when the categories are black and white.¹⁵

¹⁰In the first case to decide that anti-miscegenation laws violated equal protection, the California Supreme Court articulated this aim. “[California’s], like most miscegenation statutes ... prohibits marriages only between ‘white persons’ and members of certain other so-called races... all other ‘races’ may intermarry freely.” *Perez v. Lippold*, 32 Cal.2d 711, 721 (CA 1948).

¹¹ In addition to identifying as a woman her entire life, Christine underwent full genital and breast construction surgery and amended her birth certificate to say Female. See *Littleton*, 9 S.W.3d at 224, 226.

¹² Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 Cal. L. Rev. 1231, 1239 (1994)

¹³ Alex M. Johnson, Jr., *The Re-Emergence Of Race As A Biological Category: The Societal Implications--Reaffirmation Of Race*, 94 Iowa L. Rev. 1547 n.18 (2009);

¹⁴ Eileen McDonagh, *Citizenship and Women’s Election to Political Office: The Power of Gendered Public Policies*, citing T. H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950).

¹⁵ I frame the issue of race as “black and white” to illustrate how the binary paradigm has been so ingrained in racist and race-conscious rhetoric that it frequently excludes large segments of the population. See *Latino/as In the Mix: Applying Gotanda’s Models of Racial Classification and Racial Stratification*, 4 *Asian L.J.* 39, 39 (1997) (noting the “Black-White, bi-polar framework that dominates discussions of race in the United States”).

BLACK AND WHITE: CLASSIFYING GRAY

In 1912, United States Congressman Seaborn Roddenbery proposed a radical amendment to the federal Constitution that would forbid interracial marriage. It provided that “intermarriage between negroes or persons of color and Caucasians or any other character of persons within the United States or any territory under their jurisdiction, is forever prohibited.”¹⁶ In his attempt to define the regulated class, the draft provided that “the term ‘negro or person of color,’ as here employed, shall be held to mean any and all persons of African descent or having any trace of African or negro blood.”¹⁷

For laws separating the races to be effective, legislators had to define what made, as it were, a “negro” a “negro.” And when lawmakers sought to divide black from white, they had to decide which category would include gray. This generally resulted in the phenomenon of hypodescent, exemplified in Roddenbery’s proposal. This is “the practice by which racially mixed persons are assigned to the status of the subordinate group.”¹⁸

The Virginia statute overturned in *Loving* criminalized marriage between a “white person” and a “colored person.”¹⁹ This left to the Virginia legislature the task of defining those terms. For “white persons,” it provided the following framework: “the term ‘white person’ shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons.” Similarly, the legislature defined “colored persons” as follows:

¹⁶ Congressional Record, 62nd Congress, 3rd session, Dec. 11, 1912. Vol 49, p. 502.

¹⁷ *Id.*

¹⁸ Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 Mich. L. Rev. 1161, 1265 n.3 (1997).

¹⁹ *Loving*, 388 U.S. at 4.

Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes ... having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.

While anti-miscegenation laws remained on the books well into the twentieth century, the legal issue of racial categorization was hardly limited to this subject. In *United States v. Bhagat Singh Thind*, the Supreme Court struggled to define a “white person” for naturalization purposes.²⁰ Acting as gatekeeper to “the privilege of citizenship,” it sought to classify a “high-caste Hindu, of full Indian blood, born at Amritsar, Punjab, India.”²¹ The Court held that although *Caucasian* and *white* had come to be synonymous, “‘white persons’ ... are words of common speech and not of scientific origin.”²² The Court emphasized common speech and legislative intent in deciding whom to exclude from the benefits of naturalization.²³ The Court stated:

as used in the science of ethnology, the connotation of the word [Caucasian] is by no means clear, and the use of it in its scientific sense as an equivalent for the words of the statute ... would simply mean the substitution of one perplexity for another.²⁴

Even there, the Court acknowledged the ambiguity and lack of a true scientific basis for its white/non-white categorization. Today, the state’s focus on binary distinctions is no clearer.

²⁰ 261 U.S. 204 (1923).

²¹ *Id.* at 206-07. The appellee argued that common ancestry between people of Aryan descent deemed both *Caucasians*. The court responded that even if “the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, ... the average man knows perfectly well that there are unmistakable and profound differences between them.” *Id.* at 209-10.

²² *Id.* at 208.

²³ *Id.* at 214-15.

²⁴ *Id.* at 208-09.

PINK AND BLUE: DEFINING AND DISTINGUISHING SEX AND GENDER

The state's attempts to define people according to sex and gender are no simpler than its attempts with race.²⁵ The first hurdle is distinguishing between the two categories. The difference between the terms themselves is significant. For example, the Texas court's perplexity with Christine Littleton's gender was misplaced; the court's true issue was with her sex. In his dissent in *J.E.B. v. Alabama*, Justice Scalia provided a linguistic contrast of the two terms.²⁶ He stated:

The word *gender* has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, *gender* is to *sex* as *feminine* is to *female* and *masculine* is to *male*.²⁷

This observation provided valuable insight in a visible opinion. As indicated, there is a difference between the two terms. But knowing that there is a difference does not obviate the challenge of legally classifying people within the categories, nor does it speak to the harmful effects of doing so.

The terms' prevailing distinction in feminist legal theory is that "*sex* refers to the anatomical and physiological distinctions between men and women," and *gender* refers to "the cultural overlay on those anatomical and physiological distinctions."²⁸ Phrased another way, "[s]ex refers to the classification of being either male or female and is usually determined by the

²⁵ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 293 (1999).

²⁶ 511 U.S. 127, 157 n1 (Scalia, J., dissenting) (1994).

²⁷ *Id.* (emphasis added).

²⁸ Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *Yale L.J.* 1, 10 (1995).

external genitalia,” whereas “[g]ender refers to the culturally determined *behavioral, social, and psychological* traits that are typically associated with being male or female.”²⁹

With the concept of sex primarily rooted in the physiological, the presumed sexual dichotomy in Euro-American culture has led to the binary treatment of gender. Indeed, “American law generally mandates that there are only two genders ... that each person be labeled at birth, and that the label may not be changed.”³⁰

However, this binary understanding of gender is in no way culturally universal.³¹ For example, the “two-spirit” people documented in nearly 150 Native American societies in North America have a unique gender status and role.³² These individuals, formerly referred to by historians as “berdache,” have since been recognized to occupy a third and fourth gender category.³³ Nor is this understanding historically pervasive. English common law in the seventeenth century recognized legal categories of *male, female, and hermaphrodite*—the latter extending to people with “ambiguous genitalia” as well as “effeminate men” and “cross-dressing women.”³⁴

Contrasted with the social construction of gender, one might consider one’s natal sex to be a clear biological fact. But the common heuristic for sex assignment at birth is far from equivocal. In her dissent to the Littleton opinion, Judge Lopez challenged the premise underlying many individuals’ initial sex determination. She observed:

²⁹ Mildred L. Brown & Chloe Anne Rounsley, *True Selves* 19 (1996) (hereinafter Brown & Rounsley).

³⁰ Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 *Law & Sexuality* 123, 125 (2001).

³¹ See Mary Ann Case, *Unpacking Package Deals: Separate Spheres are Not the Answer*, 75 *Denv. U. L. Rev.* 1305 (1997) (discussing the “legal and cultural constraints on an individual’s freedom to express gendered traits”).

³² Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other”*, 48 *Hastings L.J.* 1223, 1242 (1997).

³³ *Id.*

³⁴ Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 *Cardozo J.L. & Gender* 213, 239 (2005).

after a visual inspection of the newborn's genitalia[,] if the child has a penis, scrotum, and testicles, the attendant declares the child to be male. If the child does not ... the attendant declares the child to be female. This declaration is then memorialized by a certificate of birth, without an examination of the child's chromosomes or an inquiry about how the child feels about its sexual identity.³⁵

In 1970 the English case of *Corbett v. Corbett* influenced American law by providing factors to help determine an individual's "sexual condition."³⁶ Medical experts suggested, and the court considered, the following:

- (i) Chromosomal factors;
- (ii) Gonadal factors (i.e., presence or absence of testes or ovaries)
- (iii) Genital factors (including internal sex organs)
- (iv) Psychological factors; [and]
- (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc., which are thought to reflect the balance between the male and female sex hormones in the body).³⁷

Some consider as an additional factor the "assigned sex and gender of rearing[] and gender identity."³⁸ Since the *Corbett* decision, courts including Texas' and Kansas' have taken these into account.³⁹ The Littleton court acknowledged that as a result of surgery and hormone therapy, Christine had the body of a natal female after a hysterectomy.⁴⁰ Still, over Judge Lopez's dissent, the Littleton court effectively treated chromosomal sex as dispositive. It decided, "[t]he body that Christie inhabits is a male body in all aspects other than what the physicians have supplied ... Biologically a post-operative female transsexual is still a male."⁴¹

³⁵ Littleton, 9 S.W.3d at 233 (Alma, J., Dissenting).

³⁶ 2 All E.R. 33, 2 W.L.R. 1306, 100 (P.1970).

³⁷ Id.

³⁸ John Money, *Sex Errors of the Body and Related Syndromes: A Guide to Counseling Children, Adolescents and Their Families* 4 (2d ed. 1994).

³⁹ The Kansas Supreme Court stated, "J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male for purposes of marriage under [Kansas law]." *In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002).

⁴⁰ See Littleton, 9 S.W.3d at 230-31.

⁴¹ Id.

DEFINING THE SEXUALLY MARGINALIZED

Christine Littleton was one of many people marginalized by binary legal classifications.⁴² A person's genotypic sex⁴³ does not always match that person's phenotypic sex.⁴⁴ I will discuss three general groups of people who may face the same issues of legal categorization as Christine. But I caution that the use of labels even in this context can be harmful and perpetuate artificial categorization. I recognize and wish to emphasize that these categories do not fully represent or encompass the entire universe of individuals who marginalized by these classifications.

TRANSGENDER

Transgender is generally understood to be an umbrella term, "defined by its inclusions rather than its boundaries."⁴⁵ A clear definition of the word was provided by LGBT advocacy group Lambda Legal:

Transgender is an umbrella term used to describe a person whose self-image of their gender differs from the norms traditionally associated with the sex assigned to them at birth based upon their physiological anatomy. For example, a transgender woman is a person who identifies as a female, but was assigned *male* at birth. Conversely, a transgender man is a person who identifies as a male, but was assigned *female* at birth. The term is also used to describe a person who may be gender nonconforming — that is, whose behaviors, mannerisms or clothing are perceived by others to be inappropriate for their birth sex based on societal beliefs or standards.⁴⁶

⁴² Despite its ruling, even the Kansas Supreme Court acknowledged that "there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal." Gardiner, 42 P.3d at 137.

⁴³ This refers to a person's chromosomal makeup, where a female is assumed to have the combination XX, and the male is assumed XY. Jill Pilgrim, David Martin & Will Binder, *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 *Fordham Intell. Prop. Media & Ent. L.J.* 495, 497-98 (2003).

⁴⁴ This refers to "anatomical and/or biochemical features which are distinctly different in males and females; for example, gonads (testes versus ovaries), hormonal dominance (androgens versus estrogens), internal genitalia (sperm ducts versus Fallopian tubes and uterus), external genitalia (penis and scrotum versus clitoris and labia majora), and secondary sex characteristics (variably developed body hair and breasts)." *Id.*

⁴⁵ Riki Ann Wilchins, *Read My Lips: Sexual Subversion and the End of Gender* (1997). Wilchins notes that the phrase was "coined to embrace anyone who was ... 'transgressively' gendered."

⁴⁶ Lambda Legal, *Working with Transgender Youth: Getting Down to Basics Tool Kit*, 12/06/06

TRANSSEXUAL

The *transgender* umbrella may cover transsexual individuals whose natal sex conflicts with their sexual identity.⁴⁷ *Transsexual* a term applied to a person with this dissonance;⁴⁸ it is not a gender identity in and of itself.⁴⁹ Under a medical model, transsexual individuals may be labeled according to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) as having gender identity disorder (GID).⁵⁰ A GID diagnosis can serve as a prerequisite to sex reassignment—the process by which someone, like Christine Littleton, undergoes surgery or hormone therapy to match her physical body to her sexual identity.⁵¹ But the choice to undergo these procedures is extremely personal and by no means a universal decision.

DIFFERENCES OF SEX DEVELOPMENT

Differences of Sex Development—also called Disorders of Sex Development— (DSD) refers to the *physical intersex condition* mentioned in the gender identity disorder diagnostic

⁴⁷ This is distinct from transvestites, who “have a male gender identity, enjoy their male bodies, including their genitals, and have no desire to change their sex.” Brown & Rounsley, NOTE *supra*.

⁴⁸ Leslie I. Lax, Is the United States Falling Behind? The Legal Recognition of Post-Operative Transsexuals' Acquired Sex in the United States and Abroad, 7 *Quinnipiac Health L.J.* 123, 127 (2003).

⁴⁹ Susan Etta Keller, Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity, 34 *Harv. C.R.-C.L. L. Rev.* 329 (1999) (“Seldom did the transsexuals we interviewed refer to themselves as *transsexual*. Instead, they thought of themselves in terms of gender identity—man or woman.”)

⁵⁰ The diagnostic criteria are as follows:

- I. A Strong and Persistent Cross-Gender Identification (Not Merely a Desire for Any Perceived Cultural Advantages of Being the Other Sex)
In adolescents and adults, the disturbance is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex
- II. Persistent Discomfort With His or Her Sex or Sense of Inappropriateness in the Gender Role of That Sex
In adolescents and adults, the disturbance is manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics (e.g., request for hormones, surgery, or other procedures to physically alter sexual characteristics to simulate the other sex) or belief that he or she was born the wrong sex.
- III. The Disturbance Is Not Concurrent With a Physical Intersex Condition.
- IV. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994).

⁵¹ Demonstrating another conflation of the terms, this process is sometimes incorrectly referred to as “gender reassignment surgery,” a misnomer because the medical procedure does not change a person’s gender. Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 *Law & Sexuality* 123, 133 n.29 (2001).

criteria.⁵² It is considered a “disorder” in the context of natal sex determined by genital appearance. Thus individuals with DSD are those who have “ambiguous or noncongruent sex features.”⁵³ In some cases, cosmetic surgery is used to make the infant appear more “normal.” The protocol regarding children with DSD has fallen under three approaches.

The first model advocates surgically and hormonally altering the child to conform the child’s body to societal norms. Under this model, relatively little is disclosed to the parents or the child. This protocol has been prevalent over the last 40 years.⁵⁴ While many individuals with DSD are not transgender, a procedure in which a physician sculpts a child to one of two conventional sexual forms has resulted in “incorrect” sex assignment.⁵⁵ But the largest criticism stems from “the physical, emotional and sexual hazards that may result” from medically unnecessary cosmetic surgery.⁵⁶ Thus the second model urges gaining parents’ informed consent before subjecting the child to surgery for aesthetic purposes.⁵⁷ And the third model advocates ceasing medically unnecessary surgeries or hormonal treatments, leaving for the child the choice of whether or not to undergo them later in life.⁵⁸

⁵² See note (above this one) supra.

⁵³ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 267 (1999).

⁵⁴ Julie Greenberg, *International Legal Developments Protecting the Autonomy Rights of Sexual Minorities: Who Should Decide the Appropriate Treatment for an Intersex Infant?*, *Ethics and Intersex* 87 (2006).

⁵⁵ Emi Koyama, *From “Intersex” to “DSD”: Toward a Queer Disability Politics of Gender*, *Translating Identity Conference* (Feb 2006). available at <http://intersexinitiative.org/articles/intersectodsd.html>.

⁵⁶ *Id.*

⁵⁷ See *Advocates for Informed Choice: Informed Consent* available at <http://aiclegal.org/know-your-rights/informed-consent>.

⁵⁸ Julie Greenberg, *Legal Aspects of Gender Assignment*, 13 *The Endocrinologist* 277 (2003).

THE UNCLEAR QUESTION OF SEX

Placing people within a dichotomous sex paradigm is imprecise whether using the Corbett court's factors or a chromosome-only approach.⁵⁹ When determining an individual's genotypic sex, the female is identified as having a chromosomal makeup of XX; the male is identified by XY.⁶⁰ Thus the presence of the Y chromosome is treated as determinative. But this hardly represents the totality of human genetics. For example, individuals with Klinefelter's syndrome—one of many conditions marked by an atypical chromosomal combination—have a pattern of XXY.⁶¹ Klinefelter's syndrome is a relatively common condition resulting in phenotypic male features.⁶² It is thus estimated to affect between one of every 500 to 1000 “males,”⁶³ although the very classification of the population affected begs the question.

Bodies governing athletic competitions have demonstrated the complexity and ineffectuality of attempting to classify by sex. Contestants in women's sporting events with high levels of muscular definition and strength have long been the target of accusations that they were in fact, men.⁶⁴ This has come to light most recently with South African runner Caster Semenya. Caster won a gold medal in the women's 800-meter competition at the 2009 Berlin World

⁵⁹ Michael L. Rosin, *Intersexuality and Universal Marriage*, 14 *Law & Sexuality* 51, 70 (2005) (observing that under Littleton's chromosome standard, “[p]hysically intersexed persons with either XX or XY chromosomes are simply the sex of their [] chromosomes ... Their sex role from birth, even if it is the one on their birth certificate, does not matter”).

⁶⁰ Jill Pilgrim, David Martin & Will Binder, *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 *Fordham Intell. Prop. Media & Ent. L.J.* 495, 497-98 (2003).

⁶¹ Klinefelter's syndrome is a relatively common condition resulting in phenotypic male features. It is thus estimated to affect between one in every 500 to 1000 “males,” although the very classification of the population affected begs the question.

⁶² Jill Pilgrim, David Martin & Will Binder, *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 *Fordham Intell. Prop. Media & Ent. L.J.* 495, 504 (2003).

⁶³ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 283 (1999).

⁶⁴ Yael Lee Aura Shy, “Like Any Other Girl”: Male-to-Female Transsexuals and Professional Sports, 14 *Sports Law. J.* 95, 103-04 (2007).

Championships in Athletics.⁶⁵ Her time beat the previous record by more than two seconds.⁶⁶ Caster's sex status was questioned in part based on her athletic build, skill, and deep voice.⁶⁷ The International Association of Athletics Federations (I.A.A.F.) required her to undergo sex verification⁶⁸ testing, blocking her from further competing until it reached a conclusion.⁶⁹ Despite the I.A.A.F.'s refusal to publicize her results, media outlets claimed she had female genitalia but internal testes which produced large amounts of testosterone.⁷⁰ Her humiliating public scrutiny raised international outrage.⁷¹ But her case is familiar.

Organizations such as the I.A.A.F. and the International Olympic Committee (I.O.C.) have employed a host of examinations to determine whether contestants were bona fide females. Sex determination tests evolved from visual genital inspection⁷² to a buccal smear testing hormone levels to a complete chromosomal and gynecological examination.⁷³ For decades, these tests ran as a matter of course.⁷⁴ Contestants have been publicly stripped of their medals

⁶⁵ Ariel Levy, *Either/Or*; Sports, sex, and the case of Caster Semenya. *The New Yorker* November 30, 2009.

⁶⁶ *Id.*

⁶⁷ "Semenya became accustomed to visiting the bathroom with a member of a competing team so that they could look at her private parts and then get on with the race. 'They are doubting me,' she would explain to her coaches, as she headed off the field toward the lavatory." *Id.*

⁶⁸ This is frequently and incorrectly referred to as "gender verification," a misnomer because it tests the athletes' physiological and hormonal construction, not their social femininity. See note 48, *supra*.

⁶⁹ Owen Gibson, *Semenya furious after competitive return is blocked: World 800m champion turned away from meeting I.A.A.F. accused of infringing 19-year-old's human rights*, *The Guardian* (London), March 31, 2010.

⁷⁰ *Runner's dad irate over hermaphrodite report*, NBC Sports, Sept 12, 2009, Available at http://nbcsports.msnbc.com/id/32785120/ns/sports-olympic_sports.

⁷¹ See e.g., David Smith, *Caster Semenya row: 'Who are white people to question the makeup of an African girl? It is racism'*, *The Observer*, August 23 2009, available at <http://www.guardian.co.uk/sport/2009/aug/23/caster-semenya-athletics-gender>.

⁷² Jill Pilgrim, David Martin & Will Binder, *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 *Fordham Intell. Prop. Media & Ent. L.J.* 495, 499 (2003).

⁷³ *Id.* at 509-10.

⁷⁴ A women's Olympic diving contestant at the 1984 games said, "[o]f course, I wasn't bothered by the test at all, but I've seen a couple of women walking around the village that should be bothered. They really look like men, complete with Adam's apples. Every time we see one, we always wonder if she will pass the fem test." Dianne Klein, "Gender verification" makes sex explicit, *United Press International*, July 30, 1984.

following test results that were far from definitive.⁷⁵ The earliest casualty of chromosome glorification, sprinter Ewa Klobukowska traded her 1964 world record for the dehumanizing title of “first athlete to fail a sex test.”⁷⁶ After Olympic sprinter Stella Walsh (Stanislawa Walasiewicz) was shot and killed in 1980, sex chromosome tests were ordered to clarify autopsy reports of ambiguous genitalia.⁷⁷ Pending the results, the I.O.C. then reserved the right to posthumously strike the medals she had won more than forty years earlier.⁷⁸

The I.A.A.F. finally abandoned routine, compulsory sex verification in 1991, and the I.O.C. in 1999, when it became clear that defining sex with certainty was an impossible task with potentially devastating results.⁷⁹ But both organizations reserve the right to test in certain circumstances, as was the case with Caster Semenya.⁸⁰ The I.O.C. recently employed medical experts in an attempt to develop a protocol for athletes with “masculinizing disorders.”⁸¹ It was proposed to the committee that individuals with DSD be “further investigated and treated,” possibly through surgery or hormonal therapy.⁸² The I.I.A.F.’s suspicion-based testing policy now acknowledges “gender ambiguity” and recognizes post-operative MTF transsexuals who

⁷⁵ For example, the chromosome tests only revealed whether two X chromosomes were present, presumably identifying the XX female genotype. This would fail to account for many atypical chromosomal patterns such as XO, and would count as female natal, phenotypic males with conditions such as Klinefelter’s syndrome. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 273 n.34 (1999).

⁷⁶ *Barcelona Games: Women’s Track at a Glance*, *Chicago Sun-Times*, July 21, 1992

⁷⁷ Malcolm Collins & Ross Tucker, *The science and management of sex verification in sport*, *South African Journal of Sports Medicine*, December 1, 2009

⁷⁸ Neil Amdur, *Women Facing More Than an Athletic Struggle*, *The New York Times*, December 21, 1980.

⁷⁹ See Malcolm Collins & Ross Tucker, *The science and management of sex verification in sport*, *South African Journal of Sports Medicine*, December 1, 2009; Julie A. Greenberg & Marybeth Herald, *You Can’t Take It With You: Constitutional Consequences of Interstate Gender Identity Rulings*, 80 *Washington Law Review* 819 (2005) (internal citations omitted).

⁸⁰ *Id.*

⁸¹ Gina Kolata, *I.O.C. Panel Calls for Treatment in Sex Ambiguity Cases*, *New York Times*, January 20, 2010 available at <http://www.nytimes.com/2010/01/21/sports/olympics/21ioc.html>.

⁸² Ian O’Reilly, *Gender testing in sport: A case for treatment?*, *BBC News*, February 15, 2010, available at <http://news.bbc.co.uk/2/hi/8511176.stm>.

transitioned before puberty.⁸³ The I.A.A.F. emphasizes a focus not on chromosomes, but on hormones, stating that “[t]he crux of the matter is that the athlete should not be enjoying the benefits of natural testosterone predominance normally seen in a male.”⁸⁴

THE UNCLEAR QUESTION OF RACE

While sports governing organizations have demonstrated the pitfalls of attempted binary classification of sex, our nation has struggled through binary classification of race. The United States has documented its attempts to maintain racial and ethnic categorization through the United States census process. The evolution of how people of color have been defined evinces the recognition of difference and the desire to understand instead of dictate. In addition to being more humanizing, this approach is a more effective route to reaching the departmental goals such classifications attempt to serve.

In our society’s sexual dichotomy, people are funneled into one of two options for sex or gender. The increasing recognition of our nation’s interracial population and the complexity of self-identification have heavily disrupted these binary perceptions for race.

The 1960 Census marked the first time that people were allowed to racially self-identify; previously, the information was collected and determined by the census workers themselves.⁸⁵ This does not allow for or mandate “bona fide uniformity,”⁸⁶ which is logical in a world where people are not uniform. Prior to this, the census’ incorporated and discontinued a motley

⁸³ Those whose identity is challenged are “asked to attend a medical evaluation before a panel comprising gynecologist, endocrinologist, psychologist, internal medicine specialist, expert on gender/transgender issues International Association of Athletics Federations Medical and Anti-Doping Commission, IAAF Policy on Gender Verification (2006) available at <http://www.iaaf.org/mm/document/imported/36983.pdf>.

⁸⁴ Id.

⁸⁵ Floyd James Davis, *Who is Black? One Nation’s Definition*, 11 (1994).

⁸⁶ Gloria J. Liddell , Pearson Liddell, Jr., & Donald Shaffer, *Is Obama Black? The Pseudo-Legal Definition of the Black Race: A Proposal for Regulatory Clarification Generated from a Historical Socio-Political Perspective*, 12 *Scholar* 213, 246 (Winter 2010).

assortment of classifications, including “colored,” “Chinese,” “Negro,” “Philipino,” “Quadroon,” “Octoroon,” and “Mulatto.”⁸⁷

But following the passage of antidiscrimination laws in the 1960s and 1970s,⁸⁸ the Office of Management and Budget’s (OMB) sought to provide “standard classifications for record keeping, collection, and presentation of data on race and ethnicity in Federal program administrative reporting and statistical activities.”⁸⁹ Directive No. 15’s categories included American Indian or Alaskan Native,⁹⁰ Asian or Pacific Islander,⁹¹ Black,⁹² Hispanic,⁹³ and White.⁹⁴ Although the Office emphasized that the categories were neither scientific nor anthropological, they drew criticism. For example:

“Black” was the only group defined by reference to “race,” whereas “Hispanic” was defined by reference to national origin. “Asian or Pacific Islander” and “White” were characterized by geographic origin, while categorization as “American Indian or Alaskan Native” was appropriate only for those who maintain cultural identification with the community.⁹⁵

⁸⁷ Sharona Hoffman, *Is There a Place for “Race” as a Legal Concept?*, 36 *Ariz. St. L.J.* 1093, 1134, 1135 n.280 (2005).

⁸⁸ Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 *Law & Ineq.* 7, 10 (1997).

⁸⁹ Appendix E Office of Management and Budget Directive No. 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting (adopted on May 12, 1977) Available at <http://aspe.hhs.gov/datacncl/RaceRpt/appende.htm>.

⁹⁰ Defined as “[a] person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.” *Id.*

⁹¹ Defined as “[a] person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.” *Id.*

⁹² Defined as “[a] person having origins in any of the black racial groups of Africa.” *Id.*

⁹³ Defined as “[a] person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.” *Id.*

⁹⁴ Defined as “[a] person having origins in any of the original peoples of Europe, North Africa, or the Middle East.” *Id.*

⁹⁵ Sharona Hoffman, *Is There a Place for “Race” as a Legal Concept?*, 36 *Ariz. St. L.J.* 1093, 1133 (2005).

Twenty years later, the Office addressed the mounting concerns with these classifications in its Federal Register Notice.⁹⁶ It took recommendations from many groups concerning terminology to use, definitions thereof, and which categories to add, subdivide, and refrain from adding.⁹⁷ It rejected the proposition of incorporating a “multiracial” category, in favor of allowing individuals to choose multiple boxes to indicate their racial identity.⁹⁸ But most importantly, in reaching its decisions, the Office continued with its caveats, emphasizing that its decisions for collecting racial and ethnic data “do not establish criteria or qualifications (such as blood quantum levels) that are to be used in determining a particular individual’s racial or ethnic classification; and do not tell an individual who he or she is, or specify how an individual should classify himself or herself.”⁹⁹

Following this Notice, the 2000 Census marked the first time that individuals in the United States were allowed to check more than one box to indicate their race. The inability to specify a multiracial identity was for many the inability to accurately and authentically represent themselves.¹⁰⁰ Individuals with parents of ostensibly different races may define their racial identities as they choose—perhaps as a combination of the two or as only one component

⁹⁶ Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58782-01 (October 30, 1997).

⁹⁷ *Id.*

⁹⁸ Some commentators raised concerns about the drastic changes a multiracial category would cause. See e.g. Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 *Berkeley Women's L.J.* 16 (1995) (“We have to acknowledge that if we count people as mixed race rather than Black when the census is taken, it is going to mean that social services to Black communities will be decreased even further than they have been already.”)

⁹⁹ Revisions, note 95, *supra*.

¹⁰⁰ See Haya El Nassar, *Multiracial no longer boxed in by the Census*, USA Today, March 2, 2010; Hope Yen, *Who's American? It's Not Black and White*, ABC News, May 28, 2009.

thereof.¹⁰¹ But the former requirement that a person choose one of a finite number of identity categories signified either an institutional lack of awareness or indifference.

In a recent and prolific example, President Barak Obama identified himself during the first census of his presidency as “Black, African Am., or Negro.”¹⁰² He declined to also check “white” box on his 2010 Census form, despite the fact that he was born to “a white woman from Kansas.”¹⁰³ Among a flurry of speculations as to his reasons, some have suggested that this reflects social placement, which trumps self-identity.¹⁰⁴ Still others have observed that this action carries political and social significance beyond his self-classification.¹⁰⁵

The census’s racial categories in no way created a perfect solution, as attempting to classify human beings according to a sociopolitical construct could never yield a perfect result. The continued use of the term *Hispanic* serves as a constant reminder of this—an artificial category that melded nationalities without regard for distinct cultures. *Hispanic* has been accurately described as a “legal fiction” that “neither describes an authentic subcultural group within American society, nor [helps] society achieve the goals that laws requiring governmental notice of so-called ‘Hispanic identity’ are meant to achieve.”¹⁰⁶

¹⁰¹ Jesse Washington, Black or biracial? Census forces a choice for some, Yahoo! News, http://news.yahoo.com/s/ap/20100419/ap_on_re_us/us_i_m_not_biracial (April 19, 2010)

¹⁰² Oscar Avila, Obama’s census-form choice: ‘Black’, Los Angeles Times, April 4, 2010. Available at <http://articles.latimes.com/2010/apr/04/nation/la-na-obama-census4-2010apr04>.

¹⁰³ Id.

¹⁰⁴ “Being black in this country is a political construct,” she said. “Even though my father is white and I have half his genes, when I apply for a loan, when I walk into the car lot, when I apply for a job, they don’t see me as half white, they see me as black. If you have any identifying characteristics, you’re black.” Washington, note 101, supra.

¹⁰⁵ “[E]verybody is entitled to self-identify.... That being said, I think that the multiracial community feels a sense of disappointment that he refuses to identify with us.” Avila, note 102 supra.

¹⁰⁶ Luis Angel Toro, “A People Distinct From Others”: Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15, 26 Tex. Tech. L. Rev. 1219, 1223 (1995).

CATEGORIZATION AND IDENTITY

Categorizations of this sort are social heuristics created to define a phenomenon or experience. As Trina Grillo stated, “[t]he confusion that a biracial child feels does not derive from being classified as Black, but from essentialist notions that being Black is one particular experience, and that this experience is not hers or his.”¹⁰⁷ This sort of forced classification not only places individuals within a social construct through for the allocation of privileges¹⁰⁸ and citizenship,¹⁰⁹ it impinges on notions of identity and self-definition.

The dissonance between classification and experience is also articulated in Taylor Flynn’s observation that “[s]tatements of identity, without more, have long been a potent form of demand for inclusion and equal treatment.”¹¹⁰ She elaborates:

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.¹¹¹

While segregation led the racially marginalized to refer to an understood sexual paradigm, no such paradigm remains for the sexually marginalized. Indeed, our correlations between phenotypic sex, genotypic sex, and gender performance have been “enshrined into law, transforming a social custom into a legal control mechanism, a sort of “natural law” theory of

¹⁰⁷ Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 *Berkeley Women’s L.J.* 16 (1995).

¹⁰⁸ See *U.S. v. Bhagat Singh Thind*, note 20, *supra*.

¹⁰⁹ See McDonagh note 14, *supra*.

¹¹⁰ Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 *Temp. Pol. & Civ. Rts. L. Rev.* 465 (2009).

¹¹¹ *Id.*

gender.”¹¹² But while the social constructs surrounding race and gender are incredibly pervasive, the law’s presumptive insistence that all individuals fit a binary mold is misplaced.

RECENT CONCERNS FOR THE SEXUALLY MARGINALIZED

Forced sex/gender categorization has long led to harmful treatment and inaccurate results in many situations.¹¹³ But two recent administrative and technological developments in airline travel also raise particular concerns. First is Secure Flight, a screening program through which the federal government compares the identities of airline passengers with individuals on government watch lists.¹¹⁴ Secure Flight requires each passenger’s full name as listed on a government identification document, date of birth, and gender.¹¹⁵ One stated purpose of Secure Flight is to “prevent misidentification of passengers,” thus making travel “safer and easier.”¹¹⁶

This aspect of the Transportation Security Administration’s response to September 11 relies on binary classifications to meet its objectives. But structuring its initiative this way does not mean individuals will fit into the boxes provided. When the government functions as “regulator of identity,” it tends to classify people by the sex determined at birth, however that sex

¹¹² Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 *Law & Sexuality* 123, 124 (2001).

¹¹³ Forced categorization and ignorance of sex and gender identity wreak havoc in many areas. The prison system is perhaps the starkest example of such a system, as “individuals who are both crossing and changing gender categories...are incompatible with a system that relies on rigidly demarcated gender boundaries to function.” Sydney Tarzwell, *The Gender Lines are Marked With Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 *Colum. Hum. Rts. L. Rev.* 167, 170 (2006). Unfortunately, a frequent “solution” to the rampant sexual assault of gender variant inmates has been merely to place them in solitary confinement. Gabriel Arkles, *Safety And Solidarity Across Gender Lines: Rethinking Segregation Of Transgender People In Detention*, 18 *Temp. Pol. & Civ. Rts. L. Rev.* 515, 517 n.11, 518 (2009). Difficulties are rampant outside of the prison system as well, such as when a fifteen-year-old transgender girl was it prevented from enrolling “if she wore girl’s clothes or accessories.” *Doe v. Yunits* 2000 WL 33162199 (Mass 2000).

¹¹⁴ Transportation Security Administration Public Affairs, *TSA’s Secure Flight Program Enters Next Public Phase* (2009) available at <http://www.tsa.gov/press/releases/2009/0812.shtm>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

was determined.¹¹⁷ The power of the information on a birth certificate has increased the pressure to subject babies with DSD to medically unnecessary cosmetic surgery.¹¹⁸ This, combined with the strict (and occasionally misplaced) adherence to it birth certificates has led some to advocate removing the sex identifier from birth certificates entirely.¹¹⁹

In addition to Secure Flight’s propensity to “make an already vulnerable group even more likely to be singled out for harassment,”¹²⁰ it creates doubt as to its suitability for the stated purpose. By seeking this particular category of information—gender instead of sex—the Secure Flight initiative places transgender people in a double bind.¹²¹ While Secure Flight requires a passenger’s name to match what is listed on an accompanying identification document, there is no such requirement for gender.¹²² So passengers must decide whether to truthfully indicate their gender identity even when it does not match the sex indicated on their identification documents.

To illustrate the outcome, imagine a passenger whose birth certificate indicates he was born female then receives a state driver’s license with the female designation. Today, this passenger has a full beard, shaved head, and no visible breasts. Indicating his gender as M for Secure Flight purposes would conflict with his driver’s license, and this discrepancy could result in additional screenings or the denial of a boarding pass.¹²³

¹¹⁷ Weiss, *supra* note _ at 134.

¹¹⁸ James McGrath, *Are You a Boy or a Girl? Show Me Your Real ID*, 9 Nev. L.J. 368, 370 (2009).

¹¹⁹ Elizabeth Reilly, *Radical Tweak – Relocating the Power to Assign Sex*, 12 *Cardozo J.L. & Gender* 297, 323, 328 (2005).

¹²⁰ Ina Fried, *TSA plan could make travel particularly unsafe for some*, CNet News, http://news.cnet.com/8301-13860_3-9825846-56.html, November 29, 2007.

¹²¹ A double bind is defined as a “situation in which a person must choose between equally unsatisfactory alternatives; a punishing and inescapable dilemma.” Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, Michele Goodwin, 9 *J. Gender Race & Just.* 1, 7 (2005) citing *American Heritage Dictionary* 538 (2000).

¹²² Also, Secure Flight does not require any indication of race or ethnicity. See *TSA Public Affairs*, note 108, *supra*.

¹²³ Ryan Singel, *Secure Flight Comes to Southwest Airlines, Six Years Later*, <http://www.wired.com/threatlevel/2009/10/secure-flight-southwest/>, Oct. 2009.

If instead this same passenger chose to indicate his gender as F for Secure Flight purposes, it would match his driver's license. But this information would then raise alarm for the official physically checking him into his flight. Certainly, asking passengers instead to indicate their sex instead of their gender would not obviate these sorts of discrepancies. And unlike the I.O.C.'s and I.A.A.F.'s goals for determining who is female, the state's interests in Secure Flight documentation have nothing to do with passengers' testosterone levels or physical abilities. The interest is solely one of identification: verifying that people are who they claim and can be recognized as such. But requiring an official disclosure of a debatable classification creates a dilemma that extends even beyond the disregard for self-identification. Jillian Weiss explains:

Imagine for yourself having to explain the "M" or "F" on your drivers' license every time you produced it for identification, and the astonishment, ridicule or outright refusal to accept your I.D. which would attend such an explanation. A few encounters would quickly convince you of the need to avoid or finesse activities requiring identification.¹²⁴

Further, the red flags raised by discrepancies of this sort would not correspond to actual security threats. This protocol would mandate a personal and complicated disclosure, the resolution of which would demand TSA time and resources and subject the traveler to further scrutiny. And where discrepancies between documents were absent, the TSA would not have gained helpful or accurate identifying information.

The fact that identification discrepancies might yield additional screening is compounded by the second development in airline travel: Whole-Body Imaging (WBI) technology.¹²⁵

Detractors have likened these body-scanning machines, being installed widely at airports, to

¹²⁴ Id.

¹²⁵ William Saletan, Digital Penetration: Invasion of the Naked Body-Scanners, Slate, Mar. 3, 2007, <http://www.slate.com/id/2160977>; Paul Giblin and Eric Lipton, New Airport X-Rays Scan Bodies, Not Just Bags, Feb 23, 2007 <http://www.nytimes.com/2007/02/24/us/24scan.html>.

“virtual strip searches.”¹²⁶ Their proponents view the procedure as a highly effective, minimally invasive measure applied only to passengers deemed to warrant screening in addition to the usual metal detector.¹²⁷ Much of this effectiveness comes from its ability to screen sensitive areas where a pat-down would not be permitted.¹²⁸

Proponents emphasize that the image screeners see will not show an individual’s face and that screeners will only view travelers of their same sex.¹²⁹ But for a transgender passenger, concerns include that the image will show “whether you have a penis, whether you have a vagina, whether you have breasts, whether you have breasts strapped down because you are a trans-man, [and] whether you have ... a penis prosthesis.”¹³⁰ The National Center for Transgender Equality has issued an advisory concerning WBI scanners.¹³¹ The Center cautions that “[s]ecurity personnel are able to see what genitals you have as well as any binding or prostheses.” TSA’s attempted nod to privacy concerns carry no comfort; the Center also warns that “security personnel will only view scans of ‘same sex’ passengers, causing serious issues for many transgender people.... We will be working with the TSA to develop procedures and sensitivities around searching transgender passengers, but as of now we are not confident that these searches will be handled sensitively.”¹³²

¹²⁶ Electronic Privacy Information Center, *Transportation Agency’s Plan to X-Ray Travelers Should Be Stripped of Funding* (June 2005) available at <http://epic.org/privacy/surveillance/spotlight/0605>.

¹²⁷ Tobias W. Mock, *The TSA’s New X-Ray Vision: The Fourth Amendment Implications of “Body-Scan” Searches at Domestic Airport Security Checkpoints*, 49 *Santa Clara L. Rev.* 213, 245-47 (2009).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Mara Keisling, *Keynote Address: Eighth Annual Symposium, Sex, Gender and Crime: The Politics of the State as Protector and Punisher*, 7 *Geo. J. Gender & L.* 287, 296 (2006).

¹³¹ National Center for Transgender Equality: *Travel*, (2009), available at <http://www.transequality.org/Issues/travel.html>.

¹³² *Id.*

A TSA spokesperson has stated that no one will be forced to go through the scanners.¹³³ But problems arise when there are discrepancies between a stated policy and its administration. TSA documents released in 2009 under the Electronic Privacy Information Center's Freedom of Information Act¹³⁴ request reveal passenger complaints stemming from the use of these scanners at airports.¹³⁵ Travelers claim that they were never informed as to what the scanning process entailed or that they had any alternative to it.¹³⁶

The alternative for those who object to this security measure is a pat-down frisk.¹³⁷ And as with many such procedures, TSA's asserted privacy countermeasure is that "[p]hysical pat-downs will be conducted by a TSA screener of the same sex."¹³⁸ As with the assignment of the screeners themselves, the concerns of invasion and scrutiny are sought to be allayed by further adherence to a binary paradigm.

These recent developments in airline travel demonstrate an encroachment on the privacy interests and personal liberties of the sexually marginalized. But they also show how our nation's adherence to the binary paradigm, even in matters of social construction, might impede its handling of matters of national security. Where the goal is accurate identification, effective results cannot be mandated by a prescriptive dichotomy.

¹³³ Kristin Mack, Full-body scanner arriving at O'Hare, Chicago Tribune February 24, 2010 <http://www.chicagotribune.com/travel/ct-met-airport-body-scanner-20100223,0,3580465.story>.

¹³⁴ 5 U.S.C. § 552 (2009).

¹³⁵ Jaikumar Vijayan, Travelers File Complaints Over TSA Body Scanners, BusinessWeek, March 8, 2010 available at <http://www.businessweek.com/idg/2010-03-08/travelers-file-complaints-over-tsa-body-scanners.html>.

¹³⁶ Electronic Privacy Information Center, EPIC v. DHS: EPIC Obtains Complaints About Airport Body Scanners, Mar. 8, 2010 <http://epic.org/privacy/airtravel/backscatter/>.

¹³⁷ Mack, note 124, *supra*.

¹³⁸ *Id.*