

RUPTURE, LEAKAGE, AND RECONSTRUCTION: THE BODY AS A SITE FOR THE ENFORCEMENT AND REPRODUCTION OF SEX-BASED LEGAL NORMS IN THE BREAST IMPLANT CONTROVERSY

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*I wanted desperately . . . to be . . . a girl, a definite
indisputable girl. And nothing would do that for me,
I felt, but breasts.¹*

*"He doesn't know the sentence that has been
passed on him?"
"No," said the officer. . . . "He'll learn it on his body."²*

"When is a man a man, and when is a woman a woman?"³ So asked the Texas Court of Appeals when confronted with a case involving a post-operative transsexual who sought to recover under the state's wrongful death statute for the death of her spouse, to whom she had been married for seven years.⁴ Christie Littleton had been born Lee Cavazos, Jr., a

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¹ Nora Ephron, A Few Words About Breasts, in Crazy Salad: Some Things About Women 3 (1975).

² Franz Kafka, In the Penal Colony, in The Metamorphosis, In the Penal Colony, and Other Stories, 191, 197 (Willa Muir & Edwin Muir trans., Schocken Books 1995) (1948). The author is indebted to Mary Dudas for bringing this passage to her attention.

³ Littleton v. Prange, 9 S.W.3d 223, 223 (Tex. App. 1999); see also Jody Lynce Madeira, Law as Reflection of Her/History: Current Institutional Perceptions of, and Possibilities for Protecting, Transsexuals' Interest in Legal Determinations of Sex, 5 U. Pa. J. Const. L. 128, 129 (2002) (describing the Littleton case).

⁴ Littleton, 9 S.W.3d at 223.

"physically healthy male."⁵ But, at the age of twenty-seven, Christie underwent sex assignment surgery and became an anatomical female. About ten years later, she married Jonathon Littleton and lived with him until his death in 1996. After he died, Christie filed a medical malpractice claim against her husband's doctor in her capacity as the surviving spouse. The doctor argued, however, that the case should be dismissed because Christie was not a "real" woman and therefore could not be the surviving spouse of Jonathon Littleton. The trial court agreed and entered summary judgment for the doctor.⁶

On appeal, the court noted that since Texas did not recognize marriages between persons of the same sex, the key question before the court was: "Is Christie a man or a woman?"⁷ In attempting to answer this question, the court acknowledged that Christie currently had the "anatomical and genital features" of a female and that she had "the capacity to function sexually as a female."⁸ The court also acknowledged that many physicians would consider her a female.⁹ For the court, however, the most important question was not what Christie looked like now but whether Christie was "created and born a male."¹⁰ Because Christie's female anatomy was "all man-made," the court reasoned, she was not a real woman.¹¹ As a result, her marriage to Jonathon Littleton was illegal and she could not recover as his surviving spouse.¹²

In dissent, Justice Alma Lopez protested the court's reliance on Christie's gender at birth. She noted, among other things, that a Texas court had just a few years before amended Christie's birth certificate to change her gender.¹³ "If Christie's evidence that she was female was satisfactory enough" to amend her birth certificate, Lopez asked, why was it not satisfactory enough to satisfy the court in this case?¹⁴

⁵ *Id.* at 224.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 225.

⁹ *Id.* at 231.

¹⁰ *Id.*

¹¹ *Id.* at 230.

¹² *Id.*

¹³ *Id.* at 233.

¹⁴ *Id.*

Indeed, there is considerable confusion in American jurisprudence over what it means to be a man or a woman.¹⁵ One problem that courts face is that sex is not immutable.¹⁶ As cases involving transsexuals illustrate so well, individuals can and do reconstruct and/or amplify their sex on a regular basis. Thus, “[a]n individual may cast herself as a feminine female or a masculine female, she may reject her sexual identity and seek to become ‘male’ in dress or mannerism, or she may reject both her sex and her sexual identity and undergo sexual reassignment surgery to become a ‘physical male.’”¹⁷ In other words, sex can be faked or, put differently, performed—and, because of advances in plastic surgery, the performance of sex can now appear more “real” than ever.

More fundamentally, many bodies, even in nature, simply do not fit very well into the rigid boundaries of male/female classification. Doctors observe physical characteristics that defy a binary categorization of sex on a regular basis: men with breasts, women with facial hair, and, of course, intersex individuals, previously known as hermaphrodites, whose genitalia cannot be distinguished clearly as either male or female.¹⁸ In short, contrary to conventional wisdom, “there are not two . . . categories of sex, but rather a continuum of sexes with people distributed across the spectrum.”¹⁹

¹⁵ See, e.g., Madeira, *supra* note 3, at 129 (noting that, in the context of litigation involving transsexuals, courts have produced a “conflicting body of opinions hydra-like in its complexity”); see also Tracy E. Higgins, “By Reason of Their Sex”: Feminist Theory, Postmodernism, and Justice, 80 Cornell L. Rev. 1536, 1536 (1995) (arguing that “‘woman’ is a troublesome term, in feminism and in law”).

¹⁶ See, e.g., Littleton, 9 S.W.3d at 223; see also *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (involving an action brought by a post-operative transsexual against spouse for support and maintenance).

¹⁷ Madeira, *supra* note 3, at 136.

¹⁸ It is unknown how many intersexuals exist naturally, since most intersexuals undergo surgery to reconstruct themselves to fit within the binary categorization of males and females. According to one estimate, however, “approximately one in every 2,000 children is born with an intersex condition.” Sara A. Aliabaid, *Gender Assignment Surgery for Intersexed Infants: How the Substantive Due Process Right to Privacy Both Supports and Opposes a Moratorium*, 12 Va. J. Soc. Pol’y & L. 170, 172 (2004) citing Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 Ann. Health L. 195 (2002). By another estimate, approximately 1.7 percent of people have bodies that differ from the standard traits of a male or a female. Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 Am. J. of Human Biology 151, 159 (2000). Moreover, even in seemingly unambiguous cases, different classification systems can result in conflicting or dual classifications. A “classic example” of this is Olympic sex typing, “which can result in the disqualification of women with female external genitalia” and Y chromosomes. Jennifer L. Nye, *The Gender Box*, 13 Berkeley Women’s L.J. 226, 229 (1998).

¹⁹ Nye, *supra* note 18, at 229; see also Madeira, *supra* note 3, at 138 (“[S]exual identity or gender . . . is essentially a qualitative spectrum of social construction that spans from the completely ‘feminine’ female at one extreme to the ultimately ‘masculine’ male at the other.”).

Despite these realities, judges and legal regulators continue to rely on an understanding of sex as “naturally” binary and associated with particular biological characteristics. In Michael M. v. Superior Court,²⁰ for example, the United States Supreme Court ruled that biological differences between boys and girls provided an adequate justification for sex-based differences in California’s statutory rape law.²¹ In Nguyen v. INS,²² the Court upheld different rules for attainment of citizenship by children born abroad out of wedlock, depending on whether the mother or the father was the American, on the ground that “basic biological differences” between men and women affect parent-child relationships in meaningful ways.²³

Rulings like these suggest the extent to which American law continues to enforce sex- and gender-based distinctions which are believed to be grounded in “nature” or a pre-political biological reality.²⁴ They are also indicative of the extent to which the law itself is playing a part in both enforcing and generating norms of sexual identity. The emphasis on “natural” or biological sexual differences in American jurisprudence reveals an important way in which the law plays a role in shaping what it means to be a man or a woman. Furthermore, these cases indicate the importance of the body in the enforcement and reproduction of legal norms.

What does it mean to say that the body is an important site for the *enforcement* of legal norms? On the one hand, this is a relatively easy concept to grasp. In many ways, it is quite familiar to think of the body as an object of legal regulation, especially when it comes to enforcement. Bodily torture, imprisonment, capital punishment, and threats of physical violence are all common components of legal regimes. Shame, moral persuasion, and contrition also play a role in ensuring compliance with legal authority but, as Robert Cover has pointed out, ultimately, “most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk.”²⁵

²⁰ 450 U.S. 464 (1981).

²¹ *Id.* at 496.

²² 533 U.S. 53 (2001).

²³ *Id.* at 57; see also Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding sex-based differences in federal draft law on grounds that males and females are not similarly suited for combat); Higgins, *supra* note 15, at 1550-54 (arguing that assumptions about biological difference continue to guide much legal decision-making, particularly in sex discrimination jurisprudence).

²⁴ For a full discussion of the nature versus nurture debate, see Bailey Kuklin, Evolution, Politics and Law, 38 Val. U. L. Rev. 1129, 1176-82 (2004).

²⁵ Robert Cover, Violence and the Word, in Narrative, Violence and the Law: The Essays of Robert Cover 203, 211 (Martha Minow et al. eds., 1995).

To conceive of the body as a site for the *reproduction* of legal norms requires a bit more imagination. An example of how law might operate in this way is provided in the excerpt from Franz Kafka's *In the Penal Colony* quoted at the beginning of this Article. In this excerpt, a prison officer suggests that the best way to teach a prisoner the norms of a community is to have the prisoner "learn [them] on his body."²⁶ The passage is an interesting one because it is suggestive of a way in which the body is not simply a site for the enforcement of legal norms (although it is clearly that as well), but also a means by which legal norms may be *corporeally enacted*. This notion is made more explicit in another passage of the essay in which the officer explains how the principles that the prisoner has violated will be literally written on the prisoner's body.²⁷ Thus, it is not enough that the prisoner will be punished bodily for his legal infractions; he must also "learn" the legal norms which he has violated by having them reproduced in some way on his body.

In Kafka's story, and in the examples of bodily punishment cited above, the body acts as a site for the enforcement and reproduction of legal norms primarily in the context of violations of criminal law. In some instances, however, the body also acts as a site for the enforcement and reproduction of legal norms in the context of civil law. Some of the most graphic examples of the body acting as a site for the enforcement and reproduction of legal norms in the civil context can be found in regulation and litigation which touches upon questions of sexual identity, such as cases involving transsexuals. There are many other instances, however, in which the law plays a role in regulating both the practices and the physical make-up of the human body in the context of civil law, where sexual identity is not at issue. The regulation of drugs, smoking laws, and federal guidelines on diet and exercise are all such instances.

This Article illustrates how the body operates as a site for the enforcement and reproduction of sex-based legal norms through a case study of the controversy surrounding silicone gel breast implants, which resulted in regulatory action by the Food and Drug Administration and tens of thousands of women filing suit against breast implant manufacturers for the rupture and leakage of implants which had been surgically inserted into their bodies. The Article argues that the legal response to the breast implant controversy seeks not only to enforce a set of norms about what it means to

²⁶ Kafka, *supra* note 2, at 197. It is worth noting that Butler specifically rejects this analogy as an explication of her theory. See Judith Butler, *Gender Trouble* 186 (1990). Butler observes that gender is not "written on the body as the torturing instrument of writing in Kafka's 'In the Penal Colony' inscribes itself unintelligibly on the flesh of the accused. The question is not: what meaning does that inscription carry within it, but what cultural apparatus arranges this meeting between instrument and body . . ." *Id.*

²⁷ Kafka, *supra* note 2, at 144-45.

be female but to also *reproduce* or “learn” those norms on the human body itself. Because of this, the breast implant controversy serves as an illustration of the ways in which the body is an important site of legal contestation more broadly.

The breast implant controversy is of particular interest for two reasons. First, it provides an important example of the role of law in regulating sexual identity in cases where sexual identity is not directly at issue. In contrast to the *Littleton* case, no court in the breast implant litigation ever directly attempted to determine what constitutes a woman.²⁸ Because of this, the breast implant controversy reveals how the law may act more subtly to enforce and reproduce sex and gender norms in litigation that does not ostensibly address such questions.

Second, the artificiality of the implants exposes the limitations of court rulings, like the *Littleton* case, which rely on biological indicators of sexual difference. Like genitalia, breasts serve to differentiate male and female bodies. To be a “real” woman is to have breasts, yet the breast implant controversy glaringly shows that many bodies categorized as female feel compelled to employ artificial help to fully comply with this expectation. As a result, the controversy provides an interesting opportunity to observe how the law responds when social practices reveal a gap between assumptions about biologically-based sexual differences and the physical experience of attempting to live up to the expectations of a particular sexual category.

This Article contends that in the context of the breast implant controversy, the law operates to enforce and, ultimately, reproduce a highly naturalized conception of sexual identity, in which sex is determined biologically and femininity is equated with breasts that look as real as possible. This response was necessary because the rupture of breast implants quite literally exposed a rupture in the conception of biologically-based sex itself by exposing the artificiality of both the breasts and the female sex that they purport to signify. So long as the silicone gel enhanced breasts remained intact and seemed real to all observers, the experience of being female posed no serious challenges to the notion that females can be distinguished from males by the fact that they naturally have breasts of a particular size and shape. Once the breasts ruptured, however, it became clear that some individuals classified as female could not naturally meet the anatomical demands of their categorization. Essentially, the rupture and leakage of the implants denaturalized the categorization of sex by revealing a gap between the widely accepted assumption of biologically-based sexual categories as “natural” and the physical experience of being male and female.

²⁸ Compare *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

The law's response to this gap is to enforce and reproduce the notion that real women are born with real breasts. In the context of the breast implant controversy, the law plays this role in a number of different ways, but most importantly by valuing the claims of those who sought to replace a breast lost to mastectomy more highly than those who used breast implants to augment or alter their natural state. In so doing, the law effectively works to reconstruct the notion that sex is biologically determined and associated with certain natural characteristics with which one is born. Thus, in the context of the breast implant controversy, sex and gender norms mimic the experiences with rupture, leakage, and reconstruction that the breast implant recipients themselves underwent.

Part I sets the stage for analyzing the enforcement and reproduction of sex and gender norms in the breast implant controversy by providing a theoretical foundation for the analysis. It begins with a discussion of how the terms "sex" and "gender" are commonly defined differently and then argues that conceptions of sex and gender are more appropriately understood as interlinked processes of both biological and cultural construction. After this introduction, Part II provides some background on the breast implant controversy. Part III analyzes how the law responded to rupturing and leaking implants and discusses how this operated to both enforce and produce a particular conception of what it means to be a woman. In this conception, real breasts or breasts that look as real and natural as possible are highly privileged, as is the reconstruction of a natural state of affairs.

Part IV considers an important counter-argument to the thesis, which is that breast implantation practices are a form of resistance to rigid, biologically based conceptions of sexual identity and that, as a result, the role of the law in the breast implant controversy might be read as providing some protection for this practice. This counter-argument is rejected for two reasons. First, breast implantation practices embrace a dominant gender norm about what it means to be female and, as a result, simply cannot be read as a form of resistance. Second, even if these practices could be considered as a form of resistance, the legal response to the failing implants ultimately either prohibited or penalized the most socially transgressive implantation practices and therefore cannot be read as leaving space for resistance to dominant norms.

Part V turns to a discussion of how courts and legal regulators might approach the questions of defining sexual identity somewhat differently. Part V asserts that greater emphasis should be placed on the performance of sex, rather than on biological indicators, which are ultimately unreliable. This part also argues for a move away from a conceptualization of sex and gender in terms of rigid, binary categories and towards a more workable understanding of sexual identity, which might start with the observation that sex and gender are more commonly

experienced along a continuum of difference. Part VI concludes by summarizing the argument.

I. THE REGULATION OF SEX AND GENDER IN THE LAW AND ELSEWHERE

In everyday discourse, the terms "sex" and "gender" are used as if they are interchangeable. There are, however, distinct meanings for the two terms. "Sex," as it is typically understood, refers to a stable and pre-political biological reality that may be assessed and verified through a visual assessment.²⁹ According to this definition, some people are born female and others are born male. "Gender," by contrast, is defined in more socially contingent terms. Thus, what it means to be "masculine" or "feminine" varies with time and place. In short, sex is viewed as an immutable, physical quality, while gender is conceived as a culturally constructed set of qualities that reflects the values of a particular community.³⁰

This understanding of the difference between sex and gender has been of particular importance in the struggle to advance the rights of women in the workplace. One of the key goals of the feminist movement was to decouple sex from gender expectations that effectively excluded women from jobs that were deemed too "masculine" for the female sex. It is tempting to think that those days are behind us and to say that women and men are no longer expected to perform the gender roles associated with their designated sex. But, even as our society grows increasingly more tolerant of women and men engaging in non-traditional roles at home and in the workplace, we still expect that males will be masculine and females will be feminine, however those terms may be presently defined.

In today's world, for example, it is considered natural for a female to want a high-paying, professional career but, at the same time, it is also considered natural for her to embody more traditional notions of what it means to be feminine, such as wearing dresses or bearing children. But the connection between sex and gender role expectations is most clearly exposed by how we react when someone transgresses gender boundaries. While we are much less likely to express shock at seeing a man in drag today than we were fifty years ago, it is telling that transvestites still operate on the margins of society. What has changed is not the linkage between sex and gender expectations, but rather the nature of the expectations themselves.

²⁹ Nye, *supra* note 18, at 229.

³⁰ One of the best examples of the socially contingent nature of gender roles is the fact that, "at the turn of the [twentieth] century, boys wore pink and girls wore blue." *Id.* at 230.

The notion that there is some sort of natural relationship between sex and gender also has a long history in American jurisprudence. At one point in time, the linkage was so strong that biology was all but determinative of court-sanctioned gender roles. The “low water mark”³¹ for this view was Bradwell v. Illinois,³² where Justice Bradley wrote that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”³³ Things have improved a bit since then, of course, and today courts readily denounce discrimination that is based on rigid gender expectations that are associated with a particular sex.³⁴

In Craig v. Boren,³⁵ for example, the Supreme Court proclaimed that there is a “weak congruence between gender and the characteristic or trait that gender purport[s] to represent.”³⁶ The Court held that, because of this, gender-based distinctions should be scrutinized closely to ensure that sex-based generalizations comport with factual realities.³⁷ At the same time, courts have adhered strictly to sex-based generalizations that embody popular assumptions about “natural” or biological differences between males and females.

In these cases, courts remain committed to the notion of biologically-determined sexual difference, even as they reject discrimination on the basis of cultural stereotypes. One important example of this in the area of women’s rights is the use of an intermediate scrutiny standard, rather than a strict scrutiny standard, in sex discrimination cases.³⁸ The use of the lower intermediate scrutiny is often justified by the

³¹ Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 6 (1995).

³² 83 U.S. (16 Wall.) 130 (1872).

³³ *Id.* at 141.

³⁴ See, e.g., Frontiero v. Richardson, 411 U.S. 677, 685 (1973); see also Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (barring discrimination not just on the basis of sex but also on the basis of failing to conform to sex stereotypes).

³⁵ 429 U.S. 190 (1976).

³⁶ *Id.* at 199 (striking down sex-based beer consumption law on the grounds that it relied upon impermissible stereotypes about differences in male and female behavior).

³⁷ *Id.*; see also Frontiero, 411 U.S. at 682 (establishing sex as a “suspect classification” for purposes of equal protection analysis).

³⁸ Sex discrimination is the only form of discrimination analyzed under the intermediate scrutiny standard. For an explanation of the three different levels of judicial scrutiny of government action under which Constitutional discrimination analysis proceeds, see generally 2 Laurence H. Tribe, American Constitutional Law (3d ed. 2000) (1978).

proposition that there are meaningful, biological differences between men and women that apply to every individual.³⁹

Similarly, courts have continued to draw upon traditional notions about natural sexual differences in cases involving transsexuals.⁴⁰ In a 1993 case decided by the Washington Supreme Court, for example, a corporate dress policy that required a pre-operative transsexual to dress in a unisex fashion was upheld as an acceptable policy for the employer to enforce, even though the transsexual's doctor had instructed her to live as much as possible in the social role of a female.⁴¹ Central to the court's reasoning was the fact that the transsexual plaintiff was still a "biological male."⁴² Similarly, until changes in state law required them to do so, most courts refused to allow postoperative transsexuals to change their birth certificates to reflect their new sex.⁴³ In Littleton v. Prange, the Texas Court of Appeals voided Christie Littleton's marriage to Jonathon Littleton because her female anatomy was "all man-made."⁴⁴

What these cases have in common is an understanding of sex as biologically determined and immutable. Yet, we know scientifically and experientially that this is not entirely the case. On the contrary, the evidence indicates that, rather than a rigid, binary division of sexes, there is a wide range in sexual difference. This spectrum includes differences not only in the physical manifestations of sex but also among the ways in which both gender and sex are performed (or expressed).

When viewed in this way, the courts' enforcement of biologically-based sex and gender norms in legal controversies, such as those involving transsexuals, is akin to the attempts of courts in a previous era to categorize people according to a limited set of racial classifications. In these cases, which typically involved a slave seeking her freedom, courts employed what many now refer to as "biological essentialism" to determine who was black and who was white, as a first step in evaluating whether the person

³⁹ Higgins, *supra* note 15, at 1550-54.

⁴⁰ Leslie Pearlman, Transsexualism as Metaphor: The Collision of Sex and Gender, 43 Buff. L. Rev. 835, 837, 863-64 (1995).

⁴¹ Doe v. Boeing Co., 846 P.2d 531, 532-33, 537 (Wash. 1993).

⁴² *Id.* at 533.

⁴³ See, e.g., Anonymous v. Weiner, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966) (upholding state health department's refusal to issue a new birth certificate to a postoperative transsexual). Statutory law now allows transsexuals to change their name and sex on their birth certificate in all fifty states. Madeira, *supra* note 3, at 149.

⁴⁴ 9 S.W.3d 223, 230 (Tex. App. 1999).

could be legally enslaved.⁴⁵ This assessment relied in part on scientific experts who attempted to offer testimony on the biological indicators of racial difference.⁴⁶

Ultimately, however, many courts recognized that the “performance” of race was at least as important, if not more important, in racial classifications as the supposedly objective biological criteria. This was because, for many Southern whites, the “essence” of race had more to do with conduct and behavior than the color of one’s skin.⁴⁷ Thus, in many courts, “[d]oing the things a white man or woman did became the law’s working definition of what it meant to be white.”⁴⁸

As the courts discovered in their race analysis, biological indicators of sex and gender are of questionable utility. Moreover, as with race, the physical and social experience of sex and gender do not fit neatly into a binary categorization. As a result, it makes more sense to view sex and gender as interrelated concepts which span a continuum of diverse social and physical experience, from tomboy to “girlie man”⁴⁹ and everything in between (and beyond).

To conceive of sex and gender in this way is to question the categorical distinction between nature and culture, even at the level of bodies.⁵⁰ In this different way of viewing sex and gender, the body is no longer an “independent ‘biological’ given” but, rather, an organism that is, at least in part, “socially constructed.”⁵¹ In other words, there is a close relationship between the physical performance of a sexual category and the expectations that individuals bring to it.

⁴⁵ Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 Yale L.J. 109, 113 (1998).

⁴⁶ See, e.g., *Gary v. Stevenson*, 19 Ark. 580, 582 (1858) (quoting the testimony of Dr. Brown, who examined the plaintiff’s eyes, mouth, jaws, and hair in an attempt to determine the extent of his “negro blood”).

⁴⁷ Gross, *supra* note 45, at 112.

⁴⁸ *Id.*

⁴⁹ The phrase “girlie man” was used by California Governor Arnold Schwarzenegger, who, frustrated over his inability to get a budget approved, called his Democratic opponents “girlie men” in the summer of 2004. See John M. Broder, *Schwarzenegger Calls Budget Opponents ‘Girlie Men’*, N.Y. Times, July 19, 2004, at A11. The phrase is a reference to a series of Saturday Night Live skits parodying the then-actor. See Peter Nicholas, *Schwarzenegger deems opponents ‘girlie-men’—twice; Governor’s rhetoric incites mall crowd, infuriates others*, San Francisco Chronicle, July 18, 2004, at A7. It has since entered into the popular lexicon.

⁵⁰ See generally Kuklin, *supra* note 24.

⁵¹ Madeira, *supra* note 3, at 133.

Judith Butler has described the construction of sex and gender as the practice of "girling."⁵² "Girling" is a process that is compelled by the naming of a "girl" as a "girl."⁵³ According to Butler, the symbolic power of this naming effectively "governs the formation of a *corporeally enacted* femininity."⁵⁴ This is because a "girl" (and, by extension, a "boy" as well) is "compelled to 'cite' the [gender/sex] norm in order to qualify and remain a viable subject."⁵⁵ In other words, social survival requires males and females to enact the expectations of their designated sex, not only in terms of social performance but also by constructing bodies that fit the physical demands of their categorization.

Thus, an individual that is named a "boy" may feel compelled to exercise in ways that enhance the indicators of his masculinity and, in some instances, to undergo surgery or take drugs to change the size or appearance of his body. Similarly, an individual designated as a "girl" may feel compelled to get hair extensions or undergo breast augmentation surgery to meet the demands of her classification. And, perhaps most dramatically, the parents of intersex individuals may feel compelled to subject their children to surgery to comply with the expectation that sex occurs "naturally" in only one of two categories. Seen in this way, gender and sex are not exclusively the products of one's biological nature, or even a particular choice, but are instead the effects of particular social practices and understandings.⁵⁶

In making this argument, Butler effectively asks us to transform our thinking about the stability of biological matter. In her analysis, the category of "matter" becomes a process of materialization, in which matter

⁵² Judith Butler, *Bodies That Matter* 232-33 (1993).

⁵³ *Id.* at 232.

⁵⁴ *Id.* (emphasis added).

⁵⁵ *Id.*

⁵⁶ See *id.* at 223-26. At first glance, Butler's argument seems quite radical. The argument is grounded, however, in some of the key precepts of critical (or Marxist) theory, which has long recognized that it is often difficult to distinguish between what is "real" and what is not. Here, it is helpful to recall Marx's important argument about the fetishization of commodities, wherein Marx points out the illusory way in which the social character of labor appears to us as an objective character of the products themselves. Because of fetishization, Marx claims that we are seeing things through a "mist," in which we view labor as an object rather than a process. Karl Marx, *Capital, Volume One*, in *The Marx-Engels Reader* 294, 322 (Robert C. Tucker ed., W.W. Norton & Co. 2d ed. 1978) (1867); see also George Lukács, *History and Class Consciousness* (Rodney Livingstone trans., The MIT Press 1968) (1967) (noting the obstacles that stand in the way of understanding the difference between appearance—consciousness—and material reality). Much like Marx, Butler is asking us to "tear[]" away "the veil that masks the[se] processes," but this time in the context of sex and gender. *Id.* at 199.

is materialized as an effect of cultural practices.⁵⁷ In other words, the shape and the sex of a body are, at least in part, a response to cultural demands.

Butler also points out that the process of materializing sexed and gendered bodies is a forcible act.⁵⁸ This is revealed by the fact that there are gaps between the normative demands of sex and gender and the performance of those demands. In other words, the performance of sex and gender is imperfect; there are sex and gender categories and norms by which we understand what it means to be “male” and “female,” but the actual experience of sex and gender does not quite match up to these normative categories. Nevertheless, society still demands and expects “girls” to be “girls” and “boys” to be “boys.”

At the same time, the gap between the norm and the performance of gender opens up possibilities for resistance to the norm by, among other things, exposing the norm as artificially constructed. One of the best examples of this artificial construction is in the performance of “drag.” Butler writes: “[i]n imitating gender, drag implicitly reveals the imitative structure of gender itself—as well as its contingency.”⁵⁹ And, in doing so, Butler suggests, transvestites and other cross-dressers engage in a kind of resistance to society’s attempt to regulate the boundaries of sex and gender.⁶⁰

If Butler’s arguments are accepted, then two propositions follow. First, sex must be understood as a product of both biological and cultural practices. Second, the body must be viewed as an important site of political, and potentially legal, contestation in the enforcement and reproduction of sex and gender norms.

Importantly, the second proposition may be accepted without embracing Butler’s theory about the social construction of sex. As Foucault notes in *The History of Sexuality*, we need not deny the biologically established existence of sex and sexual functions to appreciate how “deployments of power are directly connected to the body.”⁶¹ In other words, we can view the body as having a materiality that is biologically based while still recognizing that it is a battleground of political and legal contestation.

As we see below, both propositions have relevance in the breast implant controversy, where federal regulators and the courts hearing breast

⁵⁷ See Butler, *supra* note 52, at 34-35.

⁵⁸ *Id.* at 232.

⁵⁹ Butler, *supra* note 26, at 137.

⁶⁰ *Id.*

⁶¹ 1 Michel Foucault, *The History of Sexuality: An Introduction* 151-52 (Robert Hurley trans., Vintage Books ed. 1990) (1976).

implant cases adopted and reproduced a highly naturalized conception of female sexual identity, in which breasts of a particular size and shape that looked and felt as "real" as possible played a prominent role. Moreover, the breast implant controversy provides us with an excellent case study of how the body can operate as a site for the enforcement and reproduction of legal norms.

II. THE BREAST IMPLANT CONTROVERSY

Breasts have tremendous symbolic import in the differentiation of sexes. They both signify women's specific reproductive role and are objects of male heterosexual desire.⁶² For the recipients of silicone gel breast implants, the symbolic power of breasts was so great that they were willing to undergo major surgery to implant artificial breasts, so as to "emphasize something specifically *female* about themselves."⁶³ Notably, only twenty percent of the implant recipients underwent surgery to replace breasts lost to cancer or to correct other so-called "deformities."⁶⁴ Most recipients "thought they would look or feel better with bigger breasts."⁶⁵

Large breasts have not always been associated with greater femininity. In the 1920s, smaller breasts were in vogue and women with large breasts bound them to make them appear smaller.⁶⁶ For the last several decades, however, larger breasts have been fashionable and flat-chested women have gone to great lengths to more closely approximate this norm. Before the invention of silicone gel breast implants, a variety of methods were employed for augmentation purposes, including padded bras, the Mark Eden Bust Developer, saline implants, and, ultimately, experimentation with the direct injection of silicone into women's breasts. Because of the health risks associated with exposure to silicone, however, direct silicone injections were banned in the United States in the 1950s.⁶⁷

⁶² See generally Kimberly J. Winbush, Annotation, Regulation of Exposure of Female, But Not Male, Breasts, 67 A.L.R. 5th 431 (1999) (noting that the ordinances regulating female, but not male, breasts have been upheld as constitutionally valid on the ground that female breasts are more commonly associated with sexual desire).

⁶³ Charlotte Allen, Jurisprudence of Breasts, 5 Stan. L. & Pol'y Rev. 83, 84 (1994).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Julie M. Spanbauer, Breast Implants As Beauty Ritual: Woman's Sceptre and Prison, 9 Yale J.L. & Feminism 157, 167 (1997).

⁶⁷ Judy Foreman, Women & Silicone: A History of Risk, Boston Globe, Jan. 19, 1992, at 1.

The first silicone gel breast implants were created and marketed by the Dow Corning Corporation (Dow) in the early 1960s.⁶⁸ Silicone implants were believed to be superior to direct injection methods because they encased the silicone in a sack and therefore reduced the risks associated with silicone migrating to other parts of the body. Silicone implants also looked and felt more “real” than other options, such as saline implants, which, as one plastic surgeon explained, “ripple and hang like a bag of fluid.”⁶⁹

Shortly after Dow developed its silicone breast implant prototype, several other manufacturers entered the market, each claiming to offer the most “natural”-looking implants.⁷⁰ By the mid-1970s, silicone implants were used widely for the reconstruction of breasts lost to mastectomies and for the enlargement of breasts for cosmetic purposes. By the 1980s, more than one million women in the United States had undergone surgical breast augmentation.⁷¹

The increased number of women undergoing surgery was in part a product of a campaign by plastic surgeons. In 1983, the American Society of Plastic and Reconstructive Surgeons distributed literature stating that flat-chested women suffered from a disease called “micromastia” and that breast implants were “essential” for their mental health and well-being.⁷² Similarly, in a petition to the Food and Drug Administration (FDA), plastic surgeons argued that breast implants were necessary to correct physical deformities.⁷³ Plastic surgeons also distributed literature to their patients, which promised that augmentation would make small breasts appear more “normal” and described the implants as “natural” and “real.”⁷⁴

Breast implant surgery typically does not require an overnight stay in the hospital but is a major procedure nonetheless. The implantation process takes an hour or two to complete and leaves a two- to three-inch

⁶⁸ Laurens Walker & John Monahan, Scientific Authority: The Breast Implant Litigation and Beyond, 86 Va. L. Rev. 801, 803 (2000).

⁶⁹ Ruth Conniff, It's All in Your Head, *The Stranger*, May 29, 1997, at 14 (quoting plastic surgeon Marcia Ormsby).

⁷⁰ Spanbauer, *supra* note 66, at 181.

⁷¹ Barnaby J. Federer, Dow Corning's Bankruptcy: The Impact on Implant Suits, *N.Y. Times*, May 21, 1995, at F9.

⁷² Spanbauer, *supra* note 66, at 182-83.

⁷³ Kerith Cohen, Truth & Beauty, Deception & Disfigurement: A Feminist Analysis of the Breast Implant Litigation, 1 Wm. & Mary J. Women & L. 149, 169 (1994).

⁷⁴ Spanbauer, *supra* note 66, at 183.

scar under each breast.⁷⁵ Up to fifty percent of women undergoing surgery have immediate complications, including the loss of nipple sensation and nerve damage in their breasts.⁷⁶ Another common complication is "capsular contracture," in which scar tissue collects in the breasts, thereby causing them to become very hard.⁷⁷ Finally, all implants are likely to rupture or leak eventually and at least one study demonstrates that seventy percent of implants rupture or leak after only ten years.⁷⁸

The health effects associated with the seepage of silicone into the body after rupture or leakage are still being debated. Many women and their doctors claim that the silicone has caused a variety of ailments, including fatigue, flu-like symptoms, and immunological disorders, such as lupus and connective tissue disease.⁷⁹ A number of scientific studies, however, suggest that there is no connection between the leaking and ruptured silicone implants and these conditions.⁸⁰

Despite the potential health risks, silicone breast implants did not enter the regulatory ambit of the FDA until 1976, when Congress amended the Federal Food, Drug, and Cosmetic Act to include medical devices.⁸¹ Even at that point, there was no review of the implants' safety. Instead, because breast implants had already been on the market for several years, their safety was assumed and approval of the devices was granted under a so-called "grandfather" clause; this allowed medical devices that were already on the market to remain without going through a process of testing and approval.⁸² By 1988, however, word of a potential problem with the implants began to emerge and the FDA asked implant manufacturers to submit evidence of their safety. Later that year, the FDA held hearings on the issue.

Meanwhile, a number of breast implant recipients had begun to sue implant manufacturers in state and federal courts, and they were meeting

⁷⁵ *Id.* at 168.

⁷⁶ *Id.*

⁷⁷ Cohen, *supra* note 73, at 169 (noting that up to seventy-five percent of women with breast implants experience capsular contracture).

⁷⁸ Frank B. Vasey, M.D., & Josh Feldstein, The Silicone Breast Implant Controversy 30 (1993); see also Donna L. de Camara et al., Rupture and Aging of Silicone Breast Implants, 91 Plastic and Reconstructive Surgery 828, 832 (Apr. 1993).

⁷⁹ See Daniel Q. Posin, Silicone Breast Implant Litigation and My Father-in-Law: A Neo-Coasean Analysis, 70 Tul. L. Rev. 2565, 2567-68 (1996).

⁸⁰ Walker & Monahan, *supra* note 68, at 810.

⁸¹ See Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-92 (1998).

⁸² *Id.*

with increasing success.⁸³ Most of these cases settled before trial under conditions of secrecy and, as a result, little is known about the plaintiffs who sued or the evidence in the cases. In the 1980s, only six cases involving breast implants went to trial. The most important of these cases was filed by Maria Stern against Dow, the leading manufacturer of breast implants.⁸⁴ In the course of litigation, Stern's attorney discovered a number of Dow internal memoranda indicating that the company was aware of the health risks associated with the implants before the implants were sent to market. After seeing these documents, a jury awarded Ms. Stern \$1.7 million in damages. Once again, the judge sealed the trial documents so that they could not be made public.⁸⁵

In the fall of 1991, two things happened that led to some significant changes in the pace of the litigation. First, the attorney handling Ms. Stern's case took a second case against Dow to trial. At the end of the trial, a California jury awarded the implant recipient more than \$7 million in damages and an anonymous correspondent provided documents from the trial to the FDA.⁸⁶ After reviewing the documents, the FDA called for a voluntary forty-five day moratorium on the implantation of silicone gel breast implants. At the FDA's insistence, Dow made the trial documents public. The information contained in the documents was unsettling. Dow had known for nearly twenty years that its implants could rupture and leak silicone gel into recipients' bodies.⁸⁷ During this time, Dow had been informing implant recipients that its implants were safe.⁸⁸

A few months after the FDA imposed the moratorium, the agency modified its position in a final ruling and began to permit the use of implants for purposes of reconstruction after mastectomy and for the correction of biological deformities.⁸⁹ The moratorium was kept in effect,

⁸³ Dow lost its first breast implant case in 1977, with a verdict against it for \$170,000. Evan Caplan, "Milking the Dow": Compensating the Victims of Silicone Gel Breast Implants at the Expense of the Parent Corporation, 29 Rutgers L.J. 121, 124 (1987).

⁸⁴ *Stern v. Dow Corning Corp.*, No. 83-2348 MHP (N.D. Cal. Nov. 15, 1984), *appeal dismissed, cross-appeal dismissed*, Nos. 85-2345, 85-2346, 1987 U.S. App. LEXIS 6517 (9th Cir. 1987).

⁸⁵ *Id.*

⁸⁶ *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116 (9th Cir. 1994).

⁸⁷ *Id.* at 1119.

⁸⁸ *Id.*

⁸⁹ David A. Kessler, M.D., Special Report: The Basis of the FDA's Decision on Breast Implants, 326 New Eng. J. Med. 1713 (1992); *see also* Malcolm Gladwell, FDA Will Allow Limited Use of Silicone-Gel Breast Implants, Wash. Post, Apr. 17, 1992, at A2.

however, for the use of implants for cosmetic purposes.⁹⁰ Although the FDA acknowledged that it had no proof of the implants' safety, the agency justified its decision to keep implants on the market for purposes of reconstruction by noting the greater physical and psychological need for women who had lost their breasts to mastectomy to have access to the silicone implants.⁹¹ The FDA reached this conclusion even though alternatives to silicone implants, such as saline implants and prostheses, were readily available.

These developments were followed by an explosion in the filing of breast implant-related cases. Tens of thousands of women filed suit against Dow and other breast implant manufacturers. The plaintiffs described their reasons for undergoing augmentation surgery in strikingly similar manners. In *Livshits v. Natural Y Surgical Specialties, Inc.*,⁹² for example, the plaintiff testified that she had the surgery so that she would feel more like a "woman."⁹³ Eventually, many of these cases were consolidated into one class action lawsuit in Alabama federal court.⁹⁴

In 1994, some of the defendant breast implant manufacturers, not including Dow, offered a \$4.25 billion global settlement of all the implant suits in the class action.⁹⁵ Under the settlement, breast implant recipients were eligible for \$3,000 in explantation (implant removal) funds, provided they had already removed the ruptured implant or could provide evidence that a surgeon was planning to perform the explantation surgery.⁹⁶ Meanwhile, a separate settlement was reached with the remaining manufacturers in 1995 with similar terms.⁹⁷

The Dow settlement fell apart in 1995 when the number of claims on the money turned out to be much greater than expected. Subsequently, some 15,000 class members elected to proceed on their own in individual

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Livshits v. Natural Y Specialties, Inc.*, No. 87-2403, 1991 WL 261770 (S.D.N.Y. Nov. 27, 1991).

⁹³ *Id.* at *8.

⁹⁴ See *Lindsey v. Dow Corning Corp.*, No. 92-P-10000-S, No. 94-P-11558-S, 1994 WL 578353 (N. D. Ala. Sept. 1, 1994).

⁹⁵ *Lindsey v. Dow Corning Corp.*, No. 92-P-10000-S, No. 94-P-11558-S, (N.D. Ala. Dec. 22, 1995) (approving of the revised settlement program and injunctions).

⁹⁶ *Id.* at Section D, entitled "Benefits for Current Claimants," subsection "Compensation" 2(a)(3) and Section E "General Benefits for Participants" Section 1.

⁹⁷ *Breast Implants on Trial: Chronology of Silicone Breast Implants*, Frontline, at <http://www.pbs.org/wgbh/pages/frontline/implants/cron.html> (last visited Apr. 20, 2005).

litigation.⁹⁸ Facing the possibility of liability in tens of thousands of lawsuits, Dow filed for bankruptcy, which caused all litigation against Dow to be automatically stayed until the bankruptcy court worked out a reorganization plan. In June of 1999, Dow reached a global settlement with more than 100,000 claimants for \$3.2 billion.⁹⁹ Once again, under the terms of the settlement, implant recipients whose implants had ruptured or had to be removed were eligible for extra compensation.¹⁰⁰

Despite the early litigation successes, public opinion began to turn against the implant recipients. Between 1996 and 1998, manufacturers won fourteen out of seventeen breast implant verdicts in cases brought by implant recipients who elected to opt out of the class-wide settlements.¹⁰¹ Some speculate that these defense verdicts were due to jurors' perception that women who undergo breast augmentation surgery for cosmetic reasons are "stupid" or "frivolous."¹⁰² Indeed, there is ample evidence that litigants who underwent surgery for cosmetic reasons were less successful in court than plaintiffs who had reconstructive implants.¹⁰³ As one prominent plaintiff's lawyer explained, "juries tend to be more sympathetic" to women who undergo breast implant surgery for reconstructive rather than cosmetic purposes.¹⁰⁴

The breast implant litigation differed from other personal injury litigation in significant respects. First, unlike other mass personal injury cases, the breast implant cases were consolidated and converted into a class action fairly rapidly. Because class actions necessarily involve less individual control over the litigation, courts are usually slow to certify a class. This was not the case, however, with the breast implant litigation, which evolved into class litigation shortly after large numbers of cases

⁹⁸ Marcia Angell, Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case 22 (1996).

⁹⁹ Jean Hellwege, Plaintiff Lawyers Weigh Impact of Breast Implant Study, 35 Trial 14, Aug. 1999, at 14.

¹⁰⁰ *Id.*

¹⁰¹ Michael Higgins, Mass Tort Makeover?, 84 A.B.A. J. 52 (Nov. 1998).

¹⁰² Spanbauer, *supra* note 66, at 194 n.240.

¹⁰³ In Turner v. Dow Corning Corp., for example, a topless dancer who underwent surgery for "cosmetic" purposes lost her case against Dow after the defense suggested that her decision to undergo breast augmentation was part of a frivolous lifestyle. See Jennifer Mears, Dancer Loses Implant Lawsuit: Dow Corning Says Damage Unproven, Detroit Free Press, June 12, 1993, at 6A.

¹⁰⁴ Cindy Collins, Product Liability . . . Bristol-Myers Squibb the Latest Winner in Breast Implant Controversy, 11 Inside Litig. 11 (Oct. 1997).

began to be filed.¹⁰⁵ Second, the breast implant litigation has seen the active involvement of several breast implant support groups, such as the Coalition of Silicone Survivors and the Command Trust Network.¹⁰⁶ Although the formation of such support groups has been witnessed in other litigation, both the strength and influence of the breast implant support groups seem significant, particularly in light of the fact that the individual plaintiffs previously had little else in common.¹⁰⁷

III. ANALYSIS

Like the cases involving transsexuals, the breast implant controversy exposes the artificiality of sex and gender and illustrates the difficulty of trying to maintain a clear line between sex and gender norms in legal practice. This difficulty exists because breasts embody both sex and gender. On the one hand, breasts are normally thought of as a physiological attribute of the human body. Because of this fact, breasts are conceived of as a natural, biological attribute of the female sex. At the same time, the widespread practice of breast implantation (and other methods of “faking” breasts) undermine this conclusion and suggest the degree to which breasts are being constructed artificially in response to societal demands about what a female should look like. Under these circumstances, breasts as a sexual attribute begin to look a lot like the performance of gender.

Because of this difficulty, it makes sense to talk about sex and gender as closely related terms with foundations in both biological and cultural processes. For similar reasons, it is appropriate to analyze the breast implant controversy in terms of the role of the law in enforcing both sex and gender norms, with the understanding that the difference in meaning between the two terms essentially collapses in the context of practices that, like breast implantation, involve the performance of *both* sex and gender. Accordingly, this analysis uses both terms interchangeably but will speak primarily in terms of gender norms, so as to emphasize the socially constructed nature of the practices (and bodies) involved.

What sex and gender norms, if any, did the breast implant controversy enforce and/or reproduce? And what role did the law play in

¹⁰⁵ By way of comparison, the asbestos litigation—perhaps the largest mass tort in American history—was not consolidated for several years, despite repeated requests from the legal community.

¹⁰⁶ See Lynda Roth, *Newsletter*, Coalition of Silicone Survivors (Nov. 2001), at <http://www.siliconesurvivors.net/newsletters/nov.01.news.html> (last visited Apr. 7, 2005).

¹⁰⁷ For example, unlike many asbestos victims, the claimants in the breast implant litigation do not share similar occupational histories and/or membership in the same labor union.

this process? To answer these questions, it is helpful to examine the controversy in two stages, looking first at what norms were enforced and produced by breast implantation practices and then turning to an examination of the role of the law. As we will see, both the breast implantation practices and the legal response to these practices operated to enforce the notions that “real” women have breasts and that these breasts should either be or seem as natural as possible.

Initially, breast implant surgery had contradictory implications as regarding the cultural enforcement of sex and gender norms. An implant surgery was successful where the artificial breasts seemed real to all observers, thereby enforcing, through artificial means, a “natural” concept of the female gender that includes breasts of a certain shape and size. On the other hand, breast implant surgery denaturalized this gendered concept of the female because it revealed a discrepancy between the biological norms associated with the feminine and the requirement of artificial assistance for these women to “fully approximate the norm.”¹⁰⁸

Arguably, the rupture and leakage of the implants exacerbated the denaturalization process by further exposing the artificiality of both the breasts and the female gender that they purport to signify. Ultimately, however, the rupture and leakage of the silicone gel breast implants are more fairly read as having sent a *re-naturalizing* message. This is because many people read the failure of the breast implants as confirmation of their views that the implants were “in poor taste” and that a more female body “cannot be bought.”¹⁰⁹

Thus, in the end, silicone breast implantation practices operated to enforce the notions that real women have breasts and that these breasts should either be or seem as natural as possible. A more loosely regulated corollary of this message is that sex is something one is born with, and attempts to imitate it simply won’t work. It is perhaps for this reason that public opinion began to turn against breast implant recipients who had not undergone surgery to replace or reconstruct a pre-existing, biological breast.

The FDA’s regulation of breast implants and the breast implant litigation played a role in the regulation and production of these norms by both echoing and reproducing the socio-cultural norms in regulations. This is most clearly seen in the FDA’s April 1992 decision that, despite concerns about the safety of silicone implants, the FDA would continue to allow restricted use of silicone gel implants for those women seeking reconstruction of breasts lost to mastectomy. As more than one commentator noted, the FDA’s ruling was, from a safety perspective,

¹⁰⁸ Butler, *supra* note 52, at 232.

¹⁰⁹ Allen, *supra* note 63, at 84.

difficult to understand.¹¹⁰ If there was a problem with the safety of silicone implants, then the agency should have pulled silicone implants from the market for all purposes.¹¹¹

The only conceivable explanation for the FDA's ruling is that the available alternatives did not provide women with breasts that appeared sufficiently real and natural (even though, of course, the implants were in fact neither). That the FDA was concerned with how real the implants looked and felt is evidenced by their implicit rejection of saline implants as an adequate alternative. Plastic surgeons claimed that silicone implants were necessary because saline implants and prostheses were not sufficiently convincing. This argument turned out to be key to the FDA's conclusion.¹¹² There is simply no other reason for the FDA to have continued to allow access to the implants to women who underwent mastectomy, especially given the FDA's concerns about the implants' safety.

But why should the FDA be more concerned about providing implants that looked real to individuals seeking to replace a biological breast than to those who were seeking the implants for augmentation? One obvious answer is that the FDA considered it more important to allow women who underwent mastectomy to reconstruct their natural breasts. A more subtle corollary of this view, to use a colloquialism, is that those who were seeking augmentation were inappropriately seeking to "mess with nature." In short, by banning breast implants for cosmetic purposes but not for reconstruction, the FDA enforced its own understanding of gender as something that is best understood as biologically-based.

Like the FDA's regulatory pronouncements, the valuation of claims in the breast implant litigation further enforces a conception of gender as natural. For one thing, claimants who underwent surgery to replace a breast are seen as having stronger and more valuable claims than claimants who underwent surgery for cosmetic purposes. The implicit message of this differential valuing is, again, that implant recipients who underwent surgery solely for enlargement purposes would be viewed by juries as having done something wrong by interfering with nature. The implant recipients who underwent surgery to replace a biological breast, on the other hand, are viewed as simply trying to reconstruct a natural state of affairs and, as a result, are more worthy claimants. The more successful litigation rates of

¹¹⁰ See, e.g., Benson Yang, The Breast Implant Controversy: A Prism for Reform, 12 RISK 121, 123-24 (2001).

¹¹¹ *Id.*

¹¹² As noted above, plastic surgeons complained that saline implants were unacceptable because they "ripple and hang like a bag of fluid." Conniff, *supra* note 69, at 14.

implant recipients who underwent surgery for purposes of reconstruction enforces a message that real gender is natural.

Like those claimants who underwent surgery for purposes of reconstruction, implant recipients whose implants actually rupture, rather than simply leak, also tend to receive greater compensation for their injuries.¹¹³ The reasons for this are not immediately obvious. Although it is possible to argue that a recipient who has experienced a rupture is more likely to experience ill health effects from silicone exposure, implants that leak may pose an equivalent risk. Moreover, experience suggests that the risks associated with rupture and leakage vary from individual to individual.¹¹⁴ Consequently, there is no medical basis for distinguishing damages between claimants on the basis of whether they have experienced a rupture, or simply leakage, of an artificial breast.

The higher compensation paid to rupture victims begins to make more sense, however, when we conceptualize the recipients' injuries in terms of the failed imitation of a natural conception of gender. If the function of breast implants is to approximate biological breasts as closely as possible, the rupture of an implant involves a much more significant injury than an implant that leaks. This discrepancy is based on the fact that a breast with a ruptured implant will appear much less natural and real. By valuing the claims of rupture victims more than the claims of other implant recipients, the implant litigation signifies that the real injury at issue in the litigation is the failed imitation of a naturalized conception of gender.

A similar issue arose in a case that sought to determine whether a claim for strict liability based on design defects should be available as a potential cause of action for implant recipients who did not undergo implant surgery to replace a breast lost to mastectomy.¹¹⁵ The arguments in this context took on a slightly different hue. The availability of strict liability in cases involving defectively designed products is premised on the notion that neither party was negligent but that the defendant, who has benefited economically from the distribution of the faulty product and was in the best position to know of its defects, should bear the loss.¹¹⁶ Arguments that

¹¹³ For example, in the class action litigation, one settlement proposal set aside approximately \$220 million for "rupture" victims and only \$75 million for all other claimants. Am. Coll. of Rheumatology, Breast Implant Settlement Update, Hotline 1 (Dec. 16, 1996).

¹¹⁴ As plaintiff's attorney Sal Liccardo noted in the breast implant context, "[t]he disease process itself affects every woman differently." Interview With Sal Liccardo, Product Liability Lawyer, San Jose, California, Corp. Crime Rep., Sept. 1993, at 19 [hereinafter Liccardo Interview].

¹¹⁵ See, e.g., Artiglio v. Superior Court, 27 Cal. Rptr. 2d 589 (1994).

¹¹⁶ See Dan B. Dobbs, The Law of Torts, § 353 (2001).

attempt to exempt implant recipients from the legal protection afforded by strict liability suggest implicitly that the implant recipients who underwent the surgery were, in some way, more blameworthy than those who underwent the surgery to replace a breast lost to mastectomy. Ultimately, these arguments were rejected, and implant recipients were allowed to proceed with strict liability based claims, without regard to the implant recipients' motivations for obtaining the implants. The court acknowledged, however, that there were important differences between using the implants for purposes of "restoring the body to natural form" and using them to "enhance esteem and add to life's enjoyment."¹¹⁷ In this way, the court once again signaled that real gender is natural.

A final way in which the breast implant litigation reproduced a natural (or biologically-based) conception of gender is through the employment of the class action device. As noted, the breast implant litigation is somewhat unusual in that individual cases were consolidated and converted into a class action very early on. This alacrity was contrary to usual practice because courts are ordinarily quite reluctant to certify class actions in personal injury cases. Why were the breast implant cases considered an exception to this rule?

One answer to this question may be because the injuries at issue in the breast implant litigation are gendered.¹¹⁸ Although the implant recipients' experiences with implants varied widely (some implants ruptured, some did not; some people became very sick, while others remained relatively healthy), their motivations for obtaining the implants in the first place were largely the same. In each instance, the recipient underwent implant surgery in an attempt to look and feel more feminine. And, when the implants did not adequately perform this function, the implant recipients shared a common experience in the failure of the implants to help them successfully approximate a feminine ideal. The rapid consolidation of their claims into a class action acknowledged these shared experiences and once again suggested that the real injury at issue in the breast implant litigation was not the health effects associated with leaking and ruptured implants, but rather the failed imitation of a particular

¹¹⁷ *Artiglio*, 27 Cal. Rptr. 2d at 592. It is perhaps significant that the precedent relied upon by the court to treat all breast implant recipients the same was a penile implant case, in which the court determined that it was "irrelevant" whether the patient had "obtained a penile prosthesis for procreation, alleviation of an impotency problem or cosmetic purposes." See *Hufft v. Horowitz*, 4 Cal. App. 4th 8, 18, 5 Cal. Rptr. 2d 377, 383 n.9 (1992).

¹¹⁸ Another explanation for the rapid consolidation of the breast implant litigation into a class action is that the breast implant class action was part of a broader trend toward global settlements of mass torts that was occurring at that time. See generally, John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 (2000).

conception of gender—one in which women have breasts of a particular size and shape.¹¹⁹

IV. BREAST IMPLANTS AS RESISTANCE TO SEX AND GENDER NORMS

So far in this essay, I have argued that breast implantation practices, the regulatory response of the FDA, and the breast implant litigation all operated primarily to reify a natural conception of gender. Because breast implants also expose the artificiality of gender, the decision to undergo breast implant surgery might be read as a form of resistance to a rigid notion of femininity. According to this argument, breast implants would be viewed as a symbol of liberation because, much like drag, breast implants allow you to choose your gender and exercise autonomy and control over your own body.

Instead of creating gender victims, breast implants, at least arguably, allow individuals to play a role in constructing (or reconstructing) their individual concept of gender. From a similar point of view, breast implants might also be seen as an important opportunity for women to experience themselves as “whole,” which many feminists view as “central” to re-imagining gender along less patriarchal lines.¹²⁰ While the law is usually viewed as an institution that tends to reinforce gender stereotypes, it can also be viewed as a “protector” of the performative space that women need for this reimagining to take place.¹²¹

There is a fundamental problem with the argument that breast augmentation surgery essentially buys into the dominant gender norm, which defines femininity, at least in part, by breasts of a certain size. Understood in this way, the practice of augmentation seems more like another form of social control, in which the implant recipients are

¹¹⁹ Because of the disparate and varied health effects of the implants, some plaintiffs’ attorneys opposed both the use of a class action device in the breast implant litigation and the global settlements that attempted to resolve their claims. As one attorney put it, “every individual is damaged in a different way To throw them all into a pot . . . is not justice or fairness.” Liccardo Interview, *supra* note 114, at 19. On the other hand, the various support groups that cropped up in conjunction with the litigation suggest that the implant recipients themselves viewed their respective situations as more similar than different.

¹²⁰ Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography & Sexual Harassment* 43 (1995). The statements of implant recipients provide some support for this view. As one implant recipient put it, “[b]reast implants can make a woman feel like a whole person, or a whole new person.” David O’Reilly, *No Moratorium on Worry*, *The Philadelphia Inquirer*, Jan. 10, 1992, at D1.

¹²¹ Cornell, *supra* note 120, at 43.

essentially self-regulating in an attempt to comply with gender expectations. In this respect, breast implantation is quite similar to drag.

Here, it is important to note that, while drag is, from one perspective, a form of resistance to mainstream culture, it is also an attempt to emulate that culture. The drag ball scenes portrayed in Jennie Livingston's critically acclaimed documentary of the Harlem drag clubs, *Paris is Burning*, illustrate this desire to imitate quite well.¹²² Contestants at the balls win prizes for "realness," which is defined in terms of how closely the contestants resemble mainstream images of males, females, corporate executives, military personnel, etc. Similarly, the so-called "legends" of the circuit achieve their status by looking more "real" than anyone else.¹²³

Like drag, the practice of surgical breast augmentation is an attempt to fake "realness."¹²⁴ This desire is evident in both the literature distributed by plastic surgeons to their patients, which promises that the implants will appear natural and real,¹²⁵ and in the implant recipients' own understanding of why they are undergoing surgery. For virtually all of these women, what it means to be "real" is defined by a dominant gender norm that dictates that real women have breasts of some minimum size. Because of the predominance of this conception, it is difficult to take seriously the claim that breast augmentation is primarily an act of resistance against dominant gender norms.¹²⁶

Moreover, even if breast implantation could be viewed as an act of resistance, it is clear that the law did not, in fact, act to provide a protective space for this resistance in the context of regulating breast implants. Instead, both the FDA and the courts acted in a variety of ways both to limit breast implantation practices to those who were employing breast implants in non-transgressive ways and to punish (through lower compensation rates)

¹²² For a fuller discussion of drag in the context of *Paris is Burning*, see Butler, *supra* note 52, at 124-40.

¹²³ One of the most moving moments of the film occurs when one of the contestants explains that the most important test of "realness" is whether you can make it home after the ball without getting beat up. *Paris is Burning* (Prestige Films 1990).

¹²⁴ Not surprisingly, most of the legends featured in *Paris is Burning* have surgically implanted breasts.

¹²⁵ Spanbauer, *supra* note 66, at 183.

¹²⁶ In *The Jurisprudence of Breasts*, Charlotte Allen offers a second reason why the breast implant controversy has not been liberating in terms of gender roles. According to Allen, the breast implant litigation has operated to reify stereotypes of women as the weaker sex in need of special protection. In her words, women "who had once marched proudly to the plastic surgeons' offices" are now rushing to the courthouse to "recast themselves as victims." Allen, *supra* note 63, at 85. Implicit in this argument is a view that the tort system tends to position women as victims. Because the author does not share this view, Allen's argument is not discussed here.

those who sought to use implants to challenge traditional sex and gender norms.

V. RECOMMENDATIONS

This analysis of the breast implant controversy illustrates the extent to which American courts and regulators rely upon, enforce, and reproduce sex and gender norms that embrace a version of “biological essentialism.”¹²⁷ It is now apparent, however, that biological indicators are unreliable for assessing sexual identity. Moreover, as we learned many years ago with race, it is increasingly clear that the physical and social experiences of sex and gender do not fit neatly into a binary categorization.¹²⁸

In light of these realities, how might courts and legal regulators approach cases involving questions of sexual identity differently? One solution might be to place greater emphasis on the performance of sex, rather than on biological indicators, as many courts ultimately did in cases that required them to determine a litigant’s race.¹²⁹ Another, more satisfying, option would be to move away from conceptualizations of sex and gender in terms of rigid, binary categories and toward a more realistic understanding of sexual identity, which starts with the observation that sex and gender are more commonly experienced along a continuum of difference.

Taking such an approach in the law would have important implications for legal decision-making on an array of issues that touch on questions of sexual identity and gender. In the context of the breast implant controversy, for example, viewing sex and gender as a continuum might have prompted the FDA to take a different approach in determining which groups of people could have access to the implants while the FDA continued to assess the safety of the devices. This is because, if we take seriously the notion that sex is at least partially socially constructed, there is no apparent reason to distinguish between a prospective implant recipient who wants to use a silicone implant to replace a breast lost to mastectomy and a relatively flat-chested woman who wants access to the implants so that she can look “more female.” In both cases, the risks and benefits of the surgery are the same: each recipient faces the same array of potential health problems and, assuming the surgery is successful, both will enjoy the same social and economic benefits that accompany the successful performance of

¹²⁷ Gross, *supra* note 45, at 113.

¹²⁸ *Id.*

¹²⁹ *Id.* at 112.

"femininity" in a culture that equates female sexual identity with breasts of a particular size and shape.

Similarly, in cases involving transsexuals, the legal analysis would likely look quite different if courts recognized that many people, including intersex individuals and transsexuals, simply do not fit into the binary categorization of males and females. This, in turn, might lead to different legal outcomes. For example, in cases involving cross-dressing at work, it would defy logic for a court to conclude that it is reasonable for an employer to expect that employees dress according to the gender expectations associated with either the male or female sex when the sex of the employee does not fit clearly into either of these two categories. Similarly, cases involving transsexual marriage might be analyzed quite differently if courts focused less on biological indicators of sex and more on the performance of sex and gender roles.

Finally, by recognizing the at least partially culturally constructed nature of sex, courts and other legal regulators may become more aware of their own role in reproducing artificial sex and gender boundaries, and ultimately decline to enforce laws and social practices that assume that sex is "naturally" binary and that sex and gender are "naturally" linked. For courts to do so would be to recognize that, while in the breast implant controversy legal institutions played a role in both enforcing and reproducing dominant gender norms at play in the broader cultural arena, this was not a preordained conclusion. In a different context, the law might provide opportunities for the reimagining of sex and gender categories in ways that defy traditional stereotypes.

Under these circumstances, the rupture, leakage, and reconstruction of sex and gender norms that take place in legal contexts like the breast implant controversy might more closely resemble the experience of those individuals who choose not to reconstruct breasts that, because of either mastectomy or the rupture of artificial implants, no longer fit the norm. Just as the willingness to undergo surgical alteration displays an understanding and support for dominant sex and gender norms, the refusal to reconstruct one's breasts in accordance with those norms might be viewed as a form of resistance, or even reconstruction of the norms themselves. In a similar way, the law might respond to the rupture and leakage of sex and gender norms with a different kind of normative reconstruction process—one in which once-dominant norms are resisted and new, less restrictive norms are erected in their place.

VI. CONCLUSION

This Article has examined the history of the breast implant controversy to expose how gender, sex, and other seemingly "real" categorizations may be, at least in part, an artifact of legal practices. More

specifically, it has argued that the breast implant litigation, and the FDA's response to the litigation, operated to regulate, enforce, and produce a highly naturalized conception of gender, which states that it is biologically normal and natural for women to have breasts of a particular size and shape. More broadly, it has asserted that the regulation of sex and gender norms in the breast implant controversy speaks to the somewhat neglected role of the body in legal contestation over cultural norms.

For Judith Butler and those who share her view of the socially constructed nature of human bodies, the processes of regulating breast implants—through the FDA's pronouncements and the legal rulings of the courts—may be viewed as operating, quite literally, not only to expose the body as an object of regulation but actually to produce and materialize sexed and gendered bodies themselves. But it is not necessary to adopt Butler's more radical position to appreciate the importance of the body as an object of regulation.