Drag: Art. Obscenity. Crime

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INTRODUCTION

On March 2, 2023, the Governor of Tennessee, Bill Lee, signed a bill into law which banned drag performances in certain circumstances.[1] The law contained the following language:

> (c)(1) It is an offense for a person to perform adult cabaret entertainment:
> (A) On public property; or
> (B) In a location where the adult cabaret entertainment could be viewed by a person who is not an adult.
> (2) Notwithstanding§ 7-51-1406, this subsection (c) expressly:
> (A) Preempts an ordinance, regulation, restriction, or license that was lawfully adopted or issued by a political subdivision prior to the effective date of this act that is in conflict with this subsection (c);
> (B) Prevents or preempts a political subdivision from enacting and enforcing in the future other ordinances, regulations, restrictions, or licenses that is in conflict with this subsection (c).
> (3) A first offense for a violation of subdivision (c)(1) is a Class A misdemeanor, and a second or subsequent such offense is a Class E felony.[2]

The law defines "adult cabaret entertainment" as "adult-oriented performances that are harmful to minors, as that term is defined in § 39-17-901, and that feature topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers" and "[i]ncludes a single performance or multiple performances by an entertainer."[3] This would supplement the definition of "adult cabaret," which the statute only defines as "a cabaret that features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or

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[1] Matt Lavietes, *Tennessee Governor Signs First-of-its-Kind Bill Restricting Drag Shows*, NBC NEWS (Mar. 2, 2023), https://www.nbcnews.com/feature/nbc-out/tennessee-governor-signs-first-its-kind-bill-restricting-drag-shows-n1303262.

[2] TENN. CODE ANN. § 7-51-1407 (2021).

[3] TENN. CODE ANN. § 7-51-1401 (2021).

similar entertainers."[4] Although the ban was subsequently struck down as a violation of the Constitution,[5] it was only one of a number of attempts by states to severely restrict, ban, or even criminalize drag performances.[6]

What we now call drag has existed, in various forms and various cultures, for centuries.[7] This has included the male portrayal of female characters in classical Greek theatre, Japanese Kabuki theatre, and of course, Shakespearean theatre.[8] The invention of motion pictures created a new medium for drag, with such notable drag performances as Tony Curtis and Jack Lemon in Some Like It Hot,[9] Robin Williams in Mrs. Doubtfire,[10] Mary Martin in Peter Pan,[11] Tyler Perry in the Medea movies,[12] and Matt Damon in The Good Shepherd.[13] All of this speaks to the widespread use, and indeed acceptance, of drag as an art form.

At the same time, drag has proved an important piece of LGBTQ culture, especially among African Americans involved in New York's Ballroom scene,[14] recently brought to mainstream attention by the award-winning TV show, Pose.[15] Equally important, drag—through brunches, library readings, and the incredible efforts of RuPaul—has helped introduce many heterosexual individuals to their own LGBTQ community.[16]

Unsurprisingly, there have been attempts to use the law as a means of suppressing gender nonconforming behavior.[17] Indeed, moral panic and gender-bending attire are old acquaintances in the United States. Beginning

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[4] *Id.*

[5] Micaela A. Watts & Omer Yusuf, *Federal Judge Tosses Tennessee's Controversial Anti-Drag Law, Declares it Unconstitutional*, USA TODAY (June 3, 2023), https://www.dispatch.com/story/news/local/2023/06/03/tennessees-unconstitutional-drag-ban-struck-down-by-federal-judge/70281619007/.

[6] *Restrictions on Drag Performances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/criminaljustice/drag_restrictions (last visited Mar. 6, 2024).

[7] *See* JAKE HALL, THE ART OF DRAG 11–13, 16, 23 (2020).

[8] *Id.* at 11–13, 16.

[9] SOME LIKE IT HOT (Mirisch Company 1959).

[10] MRS. DOUBTFIRE (20th Century Fox Blue Wolf Productions 1993).

[11] PETER PAN (National Broadcasting Company 1960).

[12] *See, e.g.,* MADEA'S BIG HAPPY FAMILY (Tyler Perry Studios 2011).

[13] THE GOOD SHEPHERD (Morgan Creek Productions 2006).

[14] SUSAN STRYKER, TRANSGENDER HISTORY THE ROOTS OF TODAY'S REVOLUTION 75–76 (2d ed. 2017).

[15] *See Pose*, TELEVISION ACADEMY, https://www.emmys.com/shows/pose (last visited Feb. 9, 2024) (noting various awards and nominations the television show *Pose* has received). *See generally Pose*, IMDB, https://www.imdb.com/title/tt7562112/ (last visited Feb. 10, 2024) (detailing the show is about ball culture in the gay and trans community).

[16] *See, e.g.*, Steven Schacht, *Beyond the Boundaries of the Classroom: Teaching Students About Gender and Sexuality at a Drag Show*, 46 J. HOMOSEXUALITY 225 (2004).

[17] WILLIAM N. ESKRIDGE, JR., GAYLAW CHALLENGING THE APARTHEID OF THE CLOSET 1, 338–41 (1999).

in the mid 1800's, cities like Columbus,[18] Chicago,[19] St. Louis,[20] and Fargo[21] all passed ordinances criminalizing an individual's wearing of clothing not appropriate to their sex.[22] Drag bans are simply a reinvention of these prior ordinances targeted at a narrower community.

Standing in the way of these bans is nothing less than the Constitution of the United States. Tennessee's ban was deemed "unconstitutionally vague,"[23] a finding which, though accurate, may not hold up. Instead, advocates bring the weight of the First Amendment to bear on other drag bans.

Before proceeding to summarize this article, a brief word on language. This piece uses "queer" and "LGBTQ" interchangeably, although to some readers they may not mean the same thing. Some other language, "cross-dressing" for example, is used begrudgingly. At times this piece substitutes "gender non-conforming" as a less loaded term. Finally, this piece attempts to refrain from language which invokes the transgender community. To be sure, there are transgender drag performers, but this piece does not wish to give the impression that drag and a performer's gender identity are necessarily linked.

Section II provides a brief history of drag—and historical performances—by artists in attire which may be considered gender non-conforming.[24] This begins by seeking to define "drag", which is no easy task.[25] Next, it looks at historical theatre practices which required that female roles be performed by men, a practice with wide geographic roots which helped lay the groundwork for modern day drag.[26] Next, it looks at the role of drag as a cultural phenomenon, both in the LGBTQ community at large, as well as in the black queer community.[27] Then it discusses drag in film and television.[28] Finally, it argues that drag is an expressive form of art.[29]

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[18] *See* City of Columbus v. Zanders, 266 N.E.2d 602, 603–04 (Ohio Mun. Ct., 1970) (citing COLUMBUS, OHIO, CODE OF ORDINANCES § 2343.04 (1970)) (holding the section of the Columbus City Code "has a real and substantial relation to the public safety and is therefore constitutional and a valid exercise of the police power").

[19] *See* City of Chicago v. Wilson, 357 N.E.2d 1337, 1339, 1342 (Ill. App. Ct. 1976) (holding "Section 192–8 of the Municipal Code of the City of Chicago, which prohibits a person from wearing the clothing of an opposite sex with the intent to conceal his or her sex" is constitutional).

[20] *See* District of Columbia v. City of St. Louis 795 F.2d 652, 652–53, 655 (8th Cir. 1986) (holding Ordinance 15.30.010, which prohibited cross-dressing, that the ordinance was "unconstitutionally vague insofar as it attempts to proscribe conduct by use of the words 'indecent or lewd act of behavior'").

[21] *See* City of Fargo v. Goss, 302 N.W.2d 404, 404–05 (N.D. 1981) (using § 10–0302 of the city of Fargo Revised Ordinance of 1965, that prohibits, in part a person appearing "in dress not belonging to his or her sex . . .").

[22] For a comprehensive list, *see* ESKRIDGE, *supra* note 17, at 338–41.

[23] Order Granting Temporary Restraining Order, Friends of George's, Inc. v. Tennessee, No. 2:23-CV-02163-TLP-tmp, 2023 WL 2755238 at *1, *12 (W.D. Tenn. Mar. 31, 2023).

[24] *See infra* Section II.B.i.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

Section III addresses the history of criminalizing gender non-conforming attire in the United States.[30] It begins by discussing the rash of municipal ordinances criminalizing public appearances by individuals in attire not considered suit to their sex.[31] Next, it discusses the leading obscenity case and examines how drag bans are structured to satisfy the obscenity requirements.[32] It then discusses a number of the attempted restrictions or bans on drag performances.[33] In doing so, it takes the position that drag bans are nothing more than a re-packaging of attacks on queer bodies rather than an attempt to protect children.[34]

Section IV argues that established constitutional principles do not support the passage of bans on drag performances.[35] First it does so by arguing that drag does not fall within the purview of the leading obscenity case, *Miller v. California*,[36] which addresses materials rather than performances.[37] It also argues that proposed restrictions on drag performances impermissibly restrict expressive speech.[38] Finally, it reviews the recent Tennessee case finding that the Tennessee drag ban was vague and overly broad.[39]

I. A HISTORY OF DRAG

A. *Defining Drag*

"Drag" is not an easily defined term: it may mean different things in different circumstances to different people. Professor Susan Stryker, a well-known transgender activist, defines "drag" as "clothing associated with a particular gender or activity, often worn in a parodic, self-conscious or theatrical manner."[40] Merriam-Webster, on the other hand, defines drag as, "entertainment in which performers caricature or challenge gender stereotypes (as by dressing in clothing that is stereotypical of another gender, by using exaggeratedly gendered mannerisms, or by combining elements of stereotypically male and female dress) and often wear elaborate or outrageous costumes."[41]

An alternative Merriam-Webster definition defines drag as, "the costumes worn by drag performers performing in drag" also, "stereotypically gendered clothing worn by someone who is of a different

[30] *See infra* Sections III.A, III.B.i.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See infra* Section IV.
[36] *See generally* Miller v. California, 413 U.S. 15 (1973).
[37] *See infra* Sections IV.A.iii–iv.
[38] *Id.*
[39] *Id.*
[40] STRYKER, *supra* note 14, at 34.
[41] *Drag*, MERRIAM-WEBSTER (Oct. 6, 2023), https://www.merriam-webster.com/dictionary/drag.

gender."[42] This certainly highlights one element of drag, the often-elaborate costumes worn by queens during their performances.[43] These costumes include carefully selected wigs, shoes, accessories, and props.[44]

However, drag features more than just costuming. Makeup also fills an important role in distinguishing the appearance of drag performers.[45] Queens and kings use makeup to exaggerate facial features or create the illusion of being a different gender.[46] As a result, it is important that a performer's makeup is flawless.[47]

Music also plays a significant role in many drag performances.[48] Through the selection of music, performers set the tone of their performance and engage their audiences.[49] For those performers who dance or lip-sync, music is indispensable.

Taken together, drag is fundamentally about performance. Queens and kings "must be able to command the stage, engage the audience, and create a memorable experience that will be talked about long after the performance is over."[50] At the end of the day, a good performance includes humor, if not outright comedy, a little drama, and a whole lot of spectacles.[51]

One important thing to note is that drag is neither a sexual kink,[52] nor is it an attempt to "pass" as a member of a different sex.[53] Instead, Sasha Velour writes, it is "a mirror that reflects, and attempts to expand, our culture's view of gender, beauty, and of queer and trans people."[54] In this sense, drag is a celebration. At the same time, it is transgressive, challenging gender hierarchies through the idea that "all expressions of gender could be worthy and useful."[55] It is this idea, writes Velour, that makes drag powerful and threatening.[56]

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[42] *Id.*

[43] Sarawin Mungmee, *The Art of Drag: A Breakdown of the Elements That Make a Drag Performance Unique*, CELEBRITYCURRY (Feb. 1, 2023), https://celebritycurry.com/the-art-of-drag-a-breakdown-of-the-elements-that-make-a-drag-performance-unique/.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Mungmee, *supra* note 43.

[50] *Id.*

[51] *Id.*

[52] *See, e.g.,* Verta Taylor & Leila J. Rupp, *Chicks with Dicks, Men in Dresses: What It Means to Be a Drag Queen*, 46 J. HOMOSEXUALITY 113, 114–15 (2004) (noting drag queens are "gay men who dress and perform as not to be women or have women's bodies").

[53] Mayer Nissim, *Transvestite, Transsexual, Transgender: Here's What You Should Actually Call Trans People*, NORDA HOUSE PROJECT (Mar. 20, 2018), https://nordahouse.org/transsexual-transgender-transvestite-heres-what-you-should-actually-call-trans-people/.

[54] SASHA VELOUR, THE BIG REVEAL: AN ILLUSTRATED MANIFESTO OF DRAG, 10 (2023).

[55] *Id.* at 11.

[56] *Id.*

B. *Drag as Performance*

1. *A brief herstory*

"There isn't a corner of the world that hasn't seen a little drag at some point."[57] Drag as we understand it today has ancient roots. Jake Hall traces its roots to at least ancient Greece, where the over-the-top performances and comedic exaggerations of mimes helped lay the foundations for the camp of drag performances.[58] Drag queen and author Sasha Velour goes back even farther, arguing that performances of Mesolithic-era spiritual healers included cross-gender attire in order to "dance for luck, to remember the dead at yearly festivals, and more."[59]

More well-known is the role of drag in Shakespearean theatre, in which male performers would cross-dress in order to perform female roles.[60] As Hall relates, male performers "slicked their faces with white paint, lipstick and rouge" dressing in the "elaborate, full-skirted, flouncy gowns popular at the time."[61] A lot of these male performers were young boys.[62] Interestingly, at least one Shakespeare play, *Twelfth Night*, features drag as part of its plot, as the female character Viola cross-dresses as a man after a shipwreck.[63]

In 1603, a Japanese woman named Izumo no Okuni gathered together a troupe of female performers for a new style of dance, resulting in the birth of Kabuki theatre.[64] These women, who wore traditional male clothing, saw their popularity grow until in 1629 women were banned from Kabuki.[65] Male performers took over the female roles, with many dedicating themselves to "femininity, mastering soft, delicate movements and mannerisms."[66] To this day, male performers paint their faces white and perform in geisha wigs.[67]

Kathakali is a type of dance originating in southern India and based on Hindu folklore.[68] It includes the use of music, singing, choreographed dance, elaborate costumes, and makeup.[69] While more women have begun to study Kathakali, early roles were entirely filled by men.[70]

The Ottoman Empire is well known for the performances of the çengi or female belly dancers.[71] Less well known is that the çengi shared space

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[57] *Id.* at 1.
[58] HALL, *supra* note 7, at 11.
[59] VELOUR, *supra* note 54, at 2–3.
[60] HALL, *supra* note 7, at 12.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 13.
[64] *Id.* at 16.
[65] *Id.*
[66] HALL, *supra* note 7, at 16.
[67] *Id.*
[68] *Id.* at 18.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 19.

with another type of performer called the köçek.[72] These young, male performers, like their female counterparts, were skilled in dance and music.[73] Androgynous in appearance, köçek performers had carefully curled hair, wore long silk shirts, covered their faces in heavy make-up, and performed erotic dances.[74]

One of the more famous and longest lived examples of male performances in female attire is Chinese opera.[75] The best known of these is the Peking Opera, where performers are split into several categories.[76] Leading female roles, a category of performers known as Dan are among the best known.[77] Until 1912, when women were allowed to perform in the theater, these roles were filled by men wearing eyeliner, red eyeshadow, red lipstick, and boldly patterned clothing.[78] Jake Hall estimates Dan performers to be among the world's first true drag performers.[79]

Apart from these examples of cross-dressing/drag performance in diverse locations and different eras, drag also draws inspiration from more contemporary European sources. One example is pantomime with its slapstick nature and history of cross-dressing roles.[80] Another is the Vaudeville, with its satirical, comedic, and tongue-in-cheek nature.[81]

2. *Drag as performance*

Drag, like other art forms, has its own cultural aspects and movements. Some crass commenters may be inclined to dismiss drag as merely a man in a dress. In truth, drag consists of various types of performers and performances. The result is a rich art form with its own culture, language, and movements.

There are several ways to classify different types of performers.[82] One means of classification is to divide performers into the categories of High Camp and Low Camp.[83] High Camp has been described as "the kind of drag that wants to impress – those queens who are so flawless and beautiful that they make you gag."[84] Low Camp, on the other hand "includes pastiches of celebrities, drag that blurs gender roles, and drag that moves beyond mere impersonation of the opposite gender to something else entirely."[85]

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[72] HALL, *supra* note 7, at 19.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 20.
[76] *Id.*
[77] *Id.*
[78] HALL, *supra* note 7, at 20.
[79] *Id.*
[80] *Id.* at 23.
[81] *Id.* at 22.
[82] Daniel Wren, *A Fool's Guide to Drag 'Types'*, VADA MAG. (July 25, 2014), https://vadamagazine.com/features/opinions/guide-drag-types.
[83] *Id.*
[84] *Id.*
[85] *Id.*

Another method is to classify various types of performers based on their type of performance. Club Queens are performers whose drag is often inspired by music and features outlandish themes.[86] Pageant Queens on the other hand are competitors with big looks, lip synching talents, and impressive wardrobes.[87] Faux Queens, on the other hand, are subversive females impersonating female impersonators.[88] Fish Queens look as close to traditionally female as they possibly can, casting a spotlight on femininity.[89]

It is well acknowledged that performance artists perform for different reasons. For some, like Sasha Velour, it is a coping mechanism through which they deal with tragedy.[90] Others view it as a political statement.[91] All have something to communicate in some manner.

Just as there are different types of performers, there are different types of drag performances. Pageants, such as the Miss Gay America Pageant, are similar to beauty pageants and are the domain of pageant queens.[92] Other venues might include Pride parades, clubs, or cabarets.

3. *Drag subculture*

i. *Language*

Like many artistic and social movements, drag has its own language. For example, a queen preparing to perform may say that she is "beating her face" which means to apply make-up.[93] A hyper-feminine queen may be described by peers as "fishy,"[94] while a fabulous look might be described as "sickening."[95]

A group of queens may get together to "read" one another, that is, to verbally insult someone with minimal effort.[96] This can be preceded by the facilitator declaring that "the library is open."[97] A particular, more subtle version of reading is referred to as throwing shade.[98]

Sometimes a group of queens may come together and create what is called a family. Families are led by "drag mothers," experienced queens

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[86] *Id.*
[87] *Id.*
[88] Wren, *supra* note 82.
[89] *Different Types of Drag Performers*, DRAGICKA (Nov. 16, 2022), https://www.dragicka.com/post/different-types-of-drag-performers.
[90] VELOUR, *supra* note 54, at 10.
[91] Keegan Williams, *What is it Like to Break into Drag in the Age of Drag Bans?*, LGBTQ NATION (June 23, 2023), https://www.lgbtqnation.com/2023/06/what-is-it-like-to-break-into-drag-in-the-age-of-drag-bans/.
[92] *See, e.g.*, MISS GAY AMERICA, http://www.missgayamerica.com/ (last visited Mar. 24, 2024).
[93] HALL, *supra* note 7, at 109.
[94] *Id.* It is important to note that "fishy" has derogatory origins. *See also* Andrea James, *Transgender Slang, Slurs, and Controversial Words,* TRANSGENDER MAP, https://www.transgendermap.com/guidance/resources/words/slang-slurs/ (Dec. 19, 2023).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*

willing to teach the art of drag to newcomers.[99] Those new drag queens are called "drag daughters."[100] A family will usually take the last name of the mother.[101]

ii. *Ballroom*

One of the more fascinating areas of drag subculture is the Ballroom scene. Beginning in the 1970's when Crystal LaBeija founded the House of LaBeija, ballroom created an underground subculture for African American and Latino gay and trans men.[102] Drawing largely from pageant culture, ballroom performers compete for prizes, trophies, titles, and cash.[103] Competitors are judged on categories such as "voguing, pretty boy realness, butch queen, face, body, Wall Street, best dressed, pop fashion and sex siren."[104]

Another integral aspect of ballroom is its relationship to house culture.[105] Houses form units within the ballroom scene, with each participant being a member of a house.[106] Successful houses can rise to prominence within the drag community.

Although ballroom started in New York City, it experienced rapid growth into New Jersey and Philadelphia.[107] Soon after, Atlanta, Chicago, Los Angeles, and San Antonio followed, until ballroom spread into nearly every state.[108] Now, ballroom can be found internationally in places like London, Paris, and Berlin.[109]

Even as ballroom has expanded across the United States and around the globe, it has begun to shed some of its underground mystique. Many people were introduced to ballroom through the 1990 documentary, *Paris is Burning*.[110] More recently, the television show *Pose*, which garnered multiple Emmy Award nominations including a Best Drama Actor win for Billy Porter, dramatized the experiences of gay and trans house members competing in the Ballroom scene.[111]

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[99] *The Fabulous Guide to Drag Terminology*, HOMOCULTURE (July 29, 2020), https://www.thehomoculture.com/the-fabulous-guide-to-drag-terminology/.

[100] *Id.*

[101] *Id.*

[102] Laura Smythe, *The Ballroom Scene Has Been a Place for LGBTQ People of Color to Grow for Decades*, LGBTQ NATION (Oct. 15, 2019), https://www.lgbtqnation.com/2019/10/ballroom-scene-place-lgbtq-people-color-grow-decades/.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Smythe, *supra* note 102.

[109] *Id.*

[110] *Id.*

[111] Evan Real, *Emmys: 'Pose' Star Billy Porter Nominated for Best Drama Actor, Trans Actresses Snubbed*, THE HOLLYWOOD REP. (July 16, 2019), https://www.hollywoodreporter.com/tv/tv-news/pose-star-billy-porter-nominated-emmy-trans-actresses-snubbed-1224617/.

iii. *Activessle*

"[A]ctivessle's are drag collectives who typically dress alike and serve a particular purpose in their community."[112] Oftentimes Activessle Queens are involved in charitable civil rights work.[113] One particularly well-known activessle is the Sisters of Perpetual Indulgence.[114] The Sisters have "devoted ourselves to community service, ministry and outreach to those on the edges, and to promoting human rights, respect for diversity and spiritual enlightenment" by using "humor and irreverent wit to expose the forces of bigotry, complacency and guilt that chain the human spirit."[115]

Activessle Queens have a long history of rallying and supporting the LGBTQ community, including during its darkest moments. For example, The Sisters of Perpetual Indulgence provide information on Mpox through their website.[116] Another group known as the Armorettes have donated over $2 million to HIV/AIDS research over several decades.[117]

Many drag queens use their performances to engage in philanthropy.[118] Activessle drag uses numbers to multiply those efforts.[119] Through their work, Activessles use drag to provide important social services to the LGBTQ community[120]. This will become relevant later in this article.

II. CRIMINALIZATION AND THE POLICING OF QUEER BODIES

A. *Historical Bans on Gender Non-Conforming Attire*

Bans on people making public appearances in gender non-conforming attire are not new in the United States. Beginning in the mid-1800s, municipalities began passing ordinances penalizing people of all genders who appeared in attire not suitable to their sex.[121] This article examines two representative approaches to bans on gender non-conforming attire, one from San Francisco and one from New York.

1. *San Francisco, California*

San Francisco's Board of Supervisors chose to criminalize cross-dressing through a public order in 1863.[122] The text of the order stated that:

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[112] Wren, *supra* note 82, at 10.

[113] DRAGICKA, *supra* note 89, at 8.

[114] *See* THE SISTERS OF PERPETUAL INDULGENCE, https://www.thesisters.org/ (last visited Oct. 14, 2023).

[115] *Id.*

[116] *See Joy*, THE SISTERS OF PERPETUAL INDULGENCE, https://www.thesisters.org/joy (last visited Feb. 26, 2024).

[117] Ryan Lee, *Your Guide to Atlanta's Sub-Genres of Drag*, GA. VOICE (Aug. 13, 2017), https://thegavoice.com/community/guide-atlantas-countless-sub-genres-drag/.

[118] *Id.*

[119] *Id.*

[120] *Id*.

[121] CLARE SEARS, ARRESTING DRESS: CROSS-DRESSING, AND FASCINATION IN NINETIETH-CENTURY SAN FRANCISCO 45, 64, 66 (Jack Halberstam & Lisa Lowe eds., 2015).

[122] *Id.* at 41.

If any person shall appear in a public place in a state of nudity, or in a dress not belonging to his or her sex, or in an indecent or lewd dress, or shall make any indecent exposure of his or her person, or be guilty of any lewd or indecent act or behavior, or shall exhibit or perform any indecent, immoral or lewd play, or other representation, he should be guilty of a misdemeanor, and on conviction, shall pay a fine not exceeding five hundred dollars.[123]

Similarly worded ordinances appeared in other U.S. cities such as Columbus, Ohio.[124] These ordinances did not target cross-dressing or gender non-conforming behavior per se, instead they were aimed at public nuisances such as prostitution.[125]

What makes San Francisco—now considered a hub LGBTQ culture such an interesting case study is its history with gender-bending attire prior to the institution of its ban. San Francisco's history (at least during its time as a city in the United States, rather than its earlier history) is closely tied to the gold rush.[126] So too is its history with cross-dressing.[127]

Professor Clare Sears has documented the fascinating role of cross-dressing and gender-non-conforming behavior in gold rush San Francisco, finding that "multiple cross-dressing practices proliferated in gold rush San Francisco among men who wore women's clothing at predominantly male dances,"[128] women who lived and dressed as men while working in the gold mines,[129] female prostitutes who dressed as men in order to advertise their services,[130] and feminist dress reformers.[131]

It is the first of these groups that is particularly interesting. Professor Sears writes that during the gold rush years, the population of San Francisco was overwhelmingly male.[132] Indeed, in 1849 women constituted 2% of the population, a number which rose to 15% by 1852.[133] As a result, European American miners sought to create gender diversity in otherwise homosocial spaces.[134] One method of doing so involved using clothing to create the fantasy of a gender binary.[135]

It bears noting that the history of cross-dressing in gold rush era San Francisco involved an element of racism. While women were indeed a small demographic, there were many non-European American women present in

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[123] *Id.*; *see also* S.F., CAL., ORDINANCE No. 1587, § 20(7) (1898).

[124] *See* City of Columbus v. Zanders, 266 N.E.2d 602, 603 (Ohio Mun. Ct., 1970) (citing COLUMBUS, OHIO, CODE § 2343.04 (1970)).

[125] SEARS, *supra* note 121, at 41.

[126] *Id.* at 23–25.

[127] *Id.* at 23; *If You Are Gay or Lesbian, Chances Are You've Already Visited San Francisco. San Francisco Has Long Been Considered a Hub of Gay and Lesbian Life in North America*, GAYTRAVEL https://www.gaytravel.com/gay-guides/san-francisco/ (last visited Mar. 7, 2024).

[128] SEARS, *supra* note 121, at 23.

[129] *Id.* at 24.

[130] *Id.*

[131] SEARS, *supra* note 121, at 24.

[132] *Id.* at 27.

[133] *Id.*

[134] *Id.* at 28.

[135] *Id.* at 29–30.

San Francisco.[136] Instead, these indigenous, Mexican, and Chinese women were deemed unsuitable for marriage,[137] and sexual relationships outside of prostitution between European American men and these women were condemned.[138] Thus, in racially segregated mining camps, the role of women would have to be assumed by men.[139]

Eventually, the gold rush ended, and the thousands of miners had to decide what to do.[140] Many left, and many stayed.[141] Among those who stayed were many who then sent for their wives to join them.[142] As a result, the number of women in the city is thought to have increased by around 262%.[143]

With the arrival of more European American women, moral antivice sentiment resulted in a new focus on one of the other demographics engaging in the wearing of gender non-conforming attire: prostitutes.[144] Cross-dressing took on the label of "indecency,"[145] and the San Francisco Board of Supervisors was able to institute a ban.[146] Ultimately, San Francisco's cross-dressing ban became one of a number of similarly worded bans appearing in various parts of the country.

i. *State of New York*

The state of New York provides a different approach. *People v. Simmons*[147] involved a statute that read, "A person is guilty of criminal impersonation when he . . . (1) [i]mpersonates another and does an act in such assumed character with intent . . . to injure or defraud another."[148] Gene Simmons, not the rock star, was arrested while wearing a woman's wig, a dress, women's shoes, and makeup.[149] Simmons faced three charges, two of which—larceny and prostitution—were common charges in cases involving men dressed as women.[150]

The third charge, criminal impersonation, resulted from a complaint by a man named Luberoff, who alleged that after agreeing to pay Simmons $10 to "take care" of Luberoff, he drove with Simmons to a secluded area.[151] Luberoff claimed to have felt something in his pocket, and upon searching

[136] *Id.* at 27–28.
[137] SEARS, *supra* note 121, at 27–28.
[138] *Id.* at 28.
[139] *Id.* at 29.
[140] *Id.* at 45–46.
[141] *Id.* at 46.
[142] *Id.*
[143] SEARS, *supra* note 121, at 46.
[144] *Id.* at 49.
[145] *Id.* at 59.
[146] *Id.*
[147] People v. Simmons, 357 N.Y.S.2d 362, 364 (1974).
[148] N.Y. PENAL § 190.25 (1) (Consol. 2021).
[149] *Simmons*, 357 N.Y.S.2d at 363.
[150] *Id.* at 364.
[151] *Id.*

his pocket, found only a few dollars and some facial tissue.[152] Luberoff flagged down a passing police car, and Simmons was arrested.[153] Although the court ultimately decided that the criminal impersonation statute did not proscribe cross-dressing,[154] *People v. Simmons* presents another example of a statute being repurposed to target gender non-conforming behavior.

This was not New York's first time repurposing a statute to target gender non-conforming behavior. In *People v. Archibald,*[155] the defendant, Mauricio Archibald, was convicted of violating a vagrancy law by impersonating a woman.[156] As cited in the case, the statute stated, "that one is a vagrant * * * who * * * [has] his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified."[157] The court, in a fairly routine order, affirmed the conviction.[158]

The dissent, however, provides interesting background on the vagrancy law. Historically, the statute in the case had nothing to do with gender non-conforming attire.[159] Instead, it was enacted as "An Act to Prevent Persons Appearing Disguised and Armed."[160] As it turns out,

> the original section was enacted as part of an overall policy aimed at ending the Anti-Rent Riots, an armed insurrection by farmers in the Hudson Valley. The rioting had reached such intensity that a state of insurrection had been declared. This particular statute was addressed to a specific group of insurrectionists who, while disguised as "Indians," murdered law enforcement officers attempting to serve writs upon the farmers. The "Indians" were in fact farmers, who as part of their costumes, wore women's calico dresses to further conceal their identities. The only connection this section had with men attired in female clothing was the fact that the attire was used in furtherance of a scheme of murder and insurrection. Indeed, males dressed in female attire for purposes other than discussed above were not even considered by the Legislature adopting the section. It thus would appear that the appellant's conduct herein was neither within the meaning of the section nor within the contemplation of the Legislature which first enacted the statute.[161]

Yet again, a statute was repurposed to target an LGBTQ individual.

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[152] *Id.*
[153] *Id.*
[154] *Id.* at 368.
[155] People v. Archibald, 296 N.Y.S.2d 834 (1968).
[156] *Id.* at 835.
[157] *Id.*
[158] *Id.* at 837.
[159] *Id.*
[160] *Id.*
[161] *Archibald*, 296 N.Y.S.2d at 837.

A. *Drag Bans*

1. *Structuring drag bans*

In order to understand the structure and text of many laws that effectively ban drag performances, it is important to understand their legal underpinning, which comes from the Supreme Court obscenity precedent. *Miller v. California* is the leading obscenity case.[162] Mr. Miller facilitated the mass mailing of brochures advertising the sale of illustrated books described as "'adult' material."[163] Following a jury trial, he was convicted of a misdemeanor for knowingly distributing obscene material.[164] In particular, Miller was convicted for "causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures."[165]

Writing for the majority, Chief Justice Warren Burger framed the case thus, "[t]his case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials."[166] Burger also invoked the Supreme Court's long history of recognizing the legitimate interest of states in prohibiting dissemination or exhibition of obscene material when that dissemination carries with it "a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[167]

Miller limited the regulation of obscene materials to works depicting or describing sexual conduct.[168]

That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.[169]

The majority further attempted to define what considerations a trier of fact must apply:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual

[162] Miller v. California, 413 U.S. 15 (1973) (internal citations omitted).
[163] *Id.* at 16.
[164] *Id.*
[165] *Id.* at 18.
[166] *Id.*
[167] *Id.* at 18–19.
[168] *Miller*, 413 U.S. at 24.
[169] *Id.*

> conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[170]

What constitutes "prurient interest" or "patently offensive" is left to the individual states.[171]

The statutes examined below are representative rather than exhaustive. Looking at the text, it becomes clear that some are designed to withstand a challenge under *Miller*.[172] Others take a more explicit approach to targeting drag performers.[173]

2. *Arkansas*

Arkansas is an example of a state that has sought a more opaque attack on drag. The relevant statute prohibits adult-oriented business activity in close proximity to places frequented by children. [174] A recent bill would amend the statute to include the following language:

Arkansas Code § 14-1-302, concerning definitions related to adult-oriented businesses, is amended to add additional subdivisions to read as follows:

> (26) "Adult-oriented performance" means a performance that is intended to appeal to the prurient interest and that features:
> (A) A person who appears in a state of nudity or is seminude;
> (B) The purposeful exposure, whether complete or partial, of:
> (i) A specific anatomical area; or
> (ii) Prosthetic genitalia or breasts; or
> (C) A specific sexual activity;
> (27) "Minor" means an individual who is less than eighteen (18) years of age; and
> (28) "Public funds" means funds, moneys, receivables, grants, investments, instruments, real or personal property, or other assets, liabilities, equities, revenues, receipts, or disbursements belonging to, held by, or passed through a governmental body.[175]

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[170] *Id.* (internal citations omitted).
[171] *Id.* at 30.
[172] *See* S.B. 43, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); 2023 Fla. Laws 2023-94.
[173] H.B. 0359, 68th Leg. (Mont. 2023).
[174] ARK. CODE ANN. § 14-1-301 (2023).
[175] S.B. 43, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

The provision including "prosthetic genitalia or breasts" specifically brings drag performers, who often use prosthetic breasts in their attire, within the purview of this law.

Lending further credence to the argument that this bill specifically targets drag performers was its original subtitle: To Classify A Drag Performance As An Adult-Oriented Business; And To Add Additional Location Restrictions To An Adult-Oriented Business.[176] It is difficult to countenance the argument that this law is about anything other than targeting the expression of drag performers. By extension, it is an attack on the LGBTQ community.

3. *Florida*

In early 2023, Florida joined the number of states targeting drag performances with the passage of a bill for the "Protection of Children."[177] Much like Arkansas's bill, the Florida law amends a previously existing statute by adding language that, seemingly innocuous on its face, implicates drag performances.[178] The text reads:

> Section 1. Section 255.70, Florida Statutes, is created to read:
> 255.70 Public permitting.—
> (1) As used in this section, the term "governmental entity" means any state, county, district, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, or corporation or business entity acting on behalf of any public agency.
> (2) A governmental entity may not issue a permit or otherwise authorize a person to conduct a performance in violation of s. 827.11.
> (3) If a violation of s. 827.11 occurs for a lawfully issued permit or other authorization, the individual who was issued the permit or other authorization commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
> . . .
> Section 4. Section 827.11, Florida Statutes, is created to read:
> 827.11 Exposing children to an adult live performance.—
> (1) As used in this section, the term:

[176] S.B. 43, 94th Gen. Assemb., Reg. Sess. amend. 1 (Ark. 2023).
[177] 2023 Fla. Laws 2023-94.
[178] *Id.*

> (a) "Adult live performance" means any show, exhibition, or other presentation in front of a live audience which, in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, or specific sexual activities as those terms are defined in s. 847.001, lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts when it:
> 1. Predominantly appeals to a prurient, shameful, or morbid interest;
> 2. Is patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and
> 3. Taken as a whole, is without serious literary, artistic, political, or scientific value for the age of the child present.
> (b) "Knowingly" means having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:
> 1. The character and content of any adult live performance described in this section which is reasonably susceptible of examination by the defendant; and
> 2. The age of the child.
> (2) A person's ignorance of a child's age, a child's misrepresentation of his or her age, or a bona fide belief of a child's consent may not be raised as a defense in a prosecution for a violation of this section.
> (3) A person may not knowingly admit a child to an adult live performance.
> (4) A violation of subsection (3) constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.[179]

The language is consistent with *Miller*, and the intent is clearly to bring drag performances within the realm of obscenity. While drag is not specifically named in the statute, the inclusion of prosthetic breasts would bring many drag performances within the scope of the bill. It promises fines for offenses, as well as the potential for businesses hosting shows to lose their licensure.[180]

Florida's law has already run into trouble in the courts. A federal judge blocked the law on the grounds that it is overly vague and likely

[179] *Id.* at §§ 1, 4.
[180] *Id.* at § 2.

unconstitutional.[181] While the law was not overturned, a lawsuit challenging the law will go forward.[182]

4. *Montana*

Montana was the first state to weaponize the law against drag performers. Legislation passed by the Montana legislature, House Bill 0359, takes the typical approach of claiming to protect children.[183] The statute contains the following prohibitions:

> (1) A library that receives any form of funding from the state may not allow a sexually oriented performance as defined in [section 1] on its premises.
> (2) A school or library that receives any form of funding from the state may not allow a sexually oriented performance or drag story hour, as defined in [section 1], on its premises during regular operating hours or at any school-sanctioned extracurricular activity.
> (3) A sexually oriented performance is prohibited:
> (a) on public property in any location where the performance is in the presence of an individual under the age of 18; and
> (b) in a location owned by an entity that receives any form of funding from the state.
> (4) A library, a school, or library or school personnel, a public employee, or an entity described in subsection (3)(b) or an employee of the entity convicted of violating the prohibition under this section shall be fined $5,000 and, if applicable, proceedings must be initiated to suspend the teacher, administrator, or specialist certificate of the offender under 20-4-110 for 1 year. If an offender's certificate has previously been suspended pursuant to this subsection (4), proceedings must be initiated to permanently revoke the teacher, administrator, or specialist certificate of the offender under 20-4-110 on a subsequent violation of this section.[184]

Again, the legislature seeks to tie inappropriate sexual conduct and related harm to minors to drag performances. Interestingly enough, the

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[181] Brandon Girod, *New Florida Laws Go into Effect July 1 but a Handful Have Already Met Legal Hurdles*, PENSACOLA NEWS J. (June 29, 2023, 9:12 AM), https://www.pnj.com/story/news/politics/2023/06/29/florida-laws-on-transgender-care-stop-woke-drag-shows-face-challenge/70363961007/.

[182] Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1 (2023) (denying Florida's application for a stay of District Court order enjoing enforcement of the anit-drag ban).

[183] H.B. 0359, 68th Leg. (Mont. 2023).

[184] *Id.* § 3.

statute's definition of "drag story hour" contains no references to sexual behavior; instead, it is defined as "an event hosted by a drag queen or drag king who reads children's books and engages in other learning activities with minor children present."[185] Indeed, the very definitions of "drag king"[186] and "drag queen"[187] are also lacking in any reference to sexual behavior.

Drag bans are susceptible to First Amendment Free Speech challenges. As is well known, the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech. . . ."[188] This means that "[A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[189] Historically, courts have found that the First Amendment "permitted restrictions upon the content of speech in a few limited areas."[190] One of those areas is obscenity.[191]

That drag bans violate the First Amendments Free Speech protection is the most obvious, and likely strongest, argument. At least one court has found this persuasive.[192] But this article offers a second argument, that drag bans also constitute sex-based discrimination based on gender stereotyping.

A. *Drag as Protected Free Speech*

1. *Drag is speech*

While the outer limits of what constitutes "speech" are unknown, a body of case law exists that provides guidance. "Pure speech," for example, is speech that "includes written and spoken words, as well as other media such as paintings, music, and film 'that predominantly serve to express thoughts, emotions, or ideas.'"[193] Things like words, paintings, and pictures become speech when they are used as a means of self-expression.[194]

Getting narrower, there is a body of case law finding that conduct can be a form of speech. This could include refusing to salute the flag,[195] marching in a parade,[196] or staging a sit-in.[197] While none of these acts is "speech" in a verbal sense, all convey a message of some type. Instead, these

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[185] *Id.* § 1(3).

[186] *Id.* § 1(1) ("'Drag king' means a male or female performer who adopts a flamboyant or parodic male persona with glamorous or exaggerated costumes and makeup.").

[187] *Id.* § 1(2) ("'Drag queen' means a male or female performer who adopts a flamboyant or parodic feminine persona with glamorous or exaggerated costumes and makeup.").

[188] U.S. CONST. amend. I.

[189] Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983)).

[190] R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

[191] Roth v. United States, 354 U.S. 476, 483 (1957).

[192] Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1 (2023).

[193] Brush & Nib Studio, L.C. v. City of Phoenix, 448 P.3d 890, 905 (Ariz. 2019) (quoting Coleman v. City of Mesa, 284 P.3d 863, 869 (Ariz. 2012)).

[194] *Id.* at 906.

[195] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[196] *See* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos, 515 U.S. 557, 559 (1995).

[197] *See* Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

non-verbal actions are referred to as expressive speech.[198] Courts determine whether speech is expressive by determining "whether the plaintiff's symbolic acts constitute expressive speech which is protected."[199] This is done by applying the *Spence-Johnson* test, which requires evaluation of (1) whether the speaker intends for the conduct to convey a "particularized message," and (2) the "likelihood [is] great" that a reasonable third-party observer would understand the message.[200] When the speech is expressive, the court must decide whether the defendant's conduct was impermissible because it was meant to suppress that speech.[201]

Arguably, choices of attire may constitute protected speech.[202] In *Tinker v. Des Moines*, a group of students and adults decided to wear black armbands throughout the holiday season as a means of showing their objection to hostilities in Vietnam.[203] After the principals of the Des Moines schools became aware of this plan, they "adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband."[204]

After litigation commenced, both the District Court and the 8th Circuit sitting *en banc* found that wearing an armband constitutes symbolic speech.[205] The United States Supreme Court granted certiorari and affirmed, writing that:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.[206]

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[198] *See Hurley*, 515 U.S. at 569.

[199] Doe *ex rel*. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000).

[200] *See* Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington, 418 U.S. 405, 410–11 (1974).

[201] *See Johnson,* 491 U.S. at 403 (citing United States v. O'Brien*,* 391 U.S. 367, 377 (1968)); *see also Spence,* 418 U.S. at 414 n.8.

[202] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969).

[203] *Id.* at 504.

[204] *Id.*

[205] *Id.* at 505.

[206] *Id.* at 513.

Because "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred," the Court found that a First Amendment violation had occurred.[207]

Similarly, in *Doe v. Yunits*,[208] a Massachusetts court dealt with a similar issue when plaintiff Jane Doe, a 15-year-old student diagnosed with gender identity disorder.[209] Yunits filed suit seeking a preliminary injunction to prevent her school from barring her from wearing attire consistent with her gender.[210] In ruling for Yunits, the court found that there was a substantial likelihood that she would prevail on the merits because (1) her attire was an expression of herself and her gender identity;[211] (2) she was "likely to establish, through testimony, that her fellow students are well aware of the fact that she is a biological male more comfortable wearing traditionally 'female'-type clothing because of her identification with that gender";[212] and (3) the schools conduct was suppression of Yunits's speech.[213]

Finally, in *Schacht v. United States*,[214] the United States Supreme Court addressed the wearing of American Military Uniforms in a theatrical skit.[215] Daniel Jay Schacht was indicted and convicted for violating 18 U.S.C. § 702, "which makes it a crime for any person 'without authority [to wear] the uniform or a distinctive part thereof . . . of any of the armed forces of the United States. . . ."[216] The Court read the statute at issue as being related to another statute "which authorizes the wearing of military uniforms under certain conditions and circumstances including the circumstance of an actor portraying a member of the armed services in a 'theatrical production.'"[217] The Court found that limiting the interpretation of "theatrical performance" to professionally produced works, as the government argued it should, would run afoul of the First Amendment's free speech protections.[218]

2. *Drag bans impermissibly limit expressive speech*

The Supreme Court has been clear about the circumstances in which the government may regulate expressive speech. In *United States v.*

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[207] *Id.* at 514.
[208] Doe *ex rel*. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000).
[209] *Id.*
[210] *Id.*
[211] *Id.* at *3.
[212] *Id.* at *4.
[213] *Id.*
[214] Schacht v. United States, 398 U.S. 58 (1970).
[215] *Id.* at 59–60.
[216] *Id.* at 59.
[217] *Id.* at 61 (citing 10 U.S.C. § 772(f)).
[218] *Id.* at 61–62.

O'Brien,[219] the court developed a test for evaluating such restrictions. The test requires that a government regulation may be sufficiently justified:

> [(1)] if it is within the constitutional power of the Government; [(2)] if it furthers an important or substantial government interest; [(3)] if the governmental interest is unrelated to the suppression of free expression; and [(4)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[220]

The *O'Brien* test has been justifiably criticized for being incomplete, as well as for being removed from considerations of time, manner, and place restrictions.[221] Regardless, it remains good law.

Consider a not uncommon scenario: a public library hosts a drag story hour for children. The children read an age-appropriate book about a topic, such as accepting others who are different from them. The reader is a 45-year-old man, performing in his drag character Ms. Kaleigh Velvet. This performance requires extensive makeup, a wig, a ball gown that shows a small amount of prosthetic breasts, and high-heeled shoes. Nothing about reading involves adult content.

How would this event fare under the Arkansas ban? Assume for the sake of argument that the first prong of the *O'Brien* test, if it is within the constitutional power of the Government, is satisfied. Leaving aside for a moment the question of intent to appeal to a prurient interest, the partial expose of Ms. Kaleigh Velvet's prosthetic breast may be enough to bring this library reading within the definition of "adult oriented performance."

What about the second prong? The legislation itself contains no stated government interest. As a result, this prong would necessarily weigh against the government.

The third prong of the *O'Brien* test requires that the regulation be unrelated to the suppression of free speech. But, as argued above, drag is expressive speech. Furthermore, as discussed above in Section III, the original subtitle of the legislation manifested a clear intent to target drag performers.

3. *Drag does not fall under* Miller

Even if drag bans did not impermissibly limit free speech under *O'Brien*, it is arguable that drag performances do not fall within the purview of *Miller*. As Chief Justice Burger pointed out, the materials in *Miller* were

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[219] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[220] *Id.*

[221] Kristie LaSalle, *The Other 99% of the Expressive Conduct Doctrine: The Occupy Wall Street Movement and the Importance of Recognizing the Contribution of Conduct to Speech*, 18 TEX. J. C. L. & C. R. 1, 16 (2012).

mailed without the recipient's consent.[222] Drag performances, on the other hand, are often ticketed events. Even when they are not ticketed, they tend to be well-advertised. The point is that consumers of drag performances choose to attend those performances, rather than being unwilling viewers.

4. *Even if* Miller *applied, drag is not inherently obscene*

Assuming arguendo that drag does fall under *Miller*, it would be difficult to describe drag as appealing to "prurient interest."[223] A *simple* look at drag's constituent parts should suffice. No court has found the application of makeup alone to be an appeal to the prurient interest.[224] What about dancing? The Supreme Court has found that "nude dancing is not without its First Amendment protections from official regulation."[225] Drag, by its very nature, does not go so far. How about lip-synching?

Now consider a different type of drag performance: a book reading in a public library. Here is a simple framing of the underlying question: is a person in a dress reading a book likely to be arousing or appealing to sexual desire in children? Apparently, in the legislatures of Tennessee and other states, the answer is "yes, if that person is a man." The question these legislatures can't seem to answer is: why?[226]

There is nothing inherently prurient about drag as a form of performance art. It is true that some drag performances may include sexual elements, just as many comedy routines, novels, songs, or movies do as part of the overall presentation, but it is unusual for these elements to be the point of the performance.

The consent of consumers to view performances, even those involving nudity, has been relevant to some courts' obscenity analysis. In *Commonwealth v. Plank*,[227] the Massachusetts Supreme Judicial Court set aside a finding of guilty in an obscenity case in which the defendant:

> wearing a "babydoll see-through negligee," open in front, revealing her breasts, pubic area and buttocks. She was dancing and "gyrating" to music from a jukebox. One of the officers watched her for about five minutes, and during that

[222] Miller v. California, 413 U.S. 15, 18 (1973).

[223] Prurient is defined as "marked by or arousing an immoderate or unwholesome interest or desire *especially*: marked by, arousing, or appealing to sexual desire." *Prurient*, Merriam-Webster, https://www.merriam-webster.com/dictionary/prurient#:~:text=%3A (last visited Oct. 14, 2023).

[224] In United States v. Pryba, 900 F.2d 748, 751 (4th Cir. 1990), the Fourth Circuit wrote of one magazine called *Tender Shavers* that "[b]obby socks, ponytails and makeup are employed to underscore, if not create, the appearance of adolescence, presumably to appeal to hedophiles." The jury did reach the decision that *Tender Shavers* was obscene, but it is unclear the extent that makeup itself was relevant to that conviction.

[225] Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

[226] The author sees two possible reasons for this failure to answer: (1) that members of these legislatures are incapable of distinguishing between gender non-conforming behavior and sexuality; or (2) anti-LGBTQ animus.

[227] Commonwealth v. Plank, 392 N.E.2d 841 (Mass. 1979).

> time saw her hands "touch her bust area and also her pubic areas" three or four times.[228]

In setting aside the finding of guilty, the court found that "patent offensiveness [should] be decided in context" before pointing out that the performance took place in front of "willing adult patrons."[229]

In *Ginzburg v. United States*,[230] a case dealing with the publication and dissemination of written materials, Ralph Ginzburg was convicted for violating the obscenity statute.[231] Like in *Miller*, the materials were mailed indiscriminately.[232] After granting certiorari, the United States Supreme Court found that "the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity."[233]

5. *Drag has serious artistic and social value*

Assuming that one could find that drag performances are obscene, it is difficult, if not impossible, to argue that drag lacks serious artistic value. "Art" and "artistic value" defy objective definition or assessment.[234] In *Pope v. Illinois*, the United States Supreme Court tried to clarify, finding that the determination of artistic value should be made with reference to the opinion of an average reasonable person.[235]

That does not mean that expert witnesses have not tried to provide tests to determine artistic value. In *Tipp-It, Inc. v. Conboy*, an expert proposed either a "four-corners test," which included evaluating "space, composition, design, color, harmony, and form and balance" or, alternatively, a "'Dickey' analysis, which considers where the art has been exhibited as well as whether the work, or the putative artist, has achieved a certain degree of respect and recognition in the artistic community."[236]

B. *Drag Bans as Unconstitutionally Vague*

Both Florida and Tennessee have seen their anti-drag laws challenged in court. In Tennessee, the ban was challenged in the case of *Friends of George's, Inc. v. State of Tennessee*.[237] In granting a temporary restraining order, the court found a likelihood of success on the merits on three grounds:

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[228] *Id.* at 842.
[229] *Id.* at 844.
[230] Ginzburg v. United States, 383 U.S. 463 (1966).
[231] *Id.* at 463.
[232] *Id.* at 469.
[233] *Id.* at 465–66.
[234] Anne Salzman Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L. L. REV. 437, 442 (1999).
[235] Pope v Illinois, 481 U.S. 497, 500–01 (1987).
[236] Tipp-It, Inc. v. Conboy, 596 N.W.2d 304, 314 (Neb. 1999).
[237] Friends of George's, Inc. v. Tennessee, No. 2:23-cv-02163-TLP-tmp, 2023 WL 2755238, at *1 (W.D. Tenn. Mar. 31, 2023).

content-based regulation, facially content-neutral but considered content-based regulation, and vagueness and overbreadth.[238]

The court emphasized that not only is the law content-based, but also viewpoint-based because whether the conduct violated the law is based on the identity of the performer.[239] Furthermore, the penalties are directed at the performers rather than the owners of offending establishments, as a similar law does.[240] As a result, the court found that the plaintiff made a strong case for evaluating the law under strict scrutiny.[241]

The court also looked at the legislative history of the law.[242] In its review, the court found that the law traced its origins to a lawsuit, filed by the law's sponsor, asking a court to declare a drag performance at a pride festival as a public nuisance.[243] Furthermore, floor speeches drew attention to the law's genesis in this lawsuit.[244] As a result, even if the law were assumed to be content neutral on its face, it still targeted specific content.

Finally, the law was deemed to likely be overbroad.[245] The plaintiff argued, and the court agreed, that the language of the statute could affect performers virtually anywhere.[246] Similarly, the court rejected an argument that the law is a time, manner, and place restriction as it mentions no time or manner and could apply anywhere.[247] Florida's law fared no better.[248]

CONCLUSION

Laws targeting queer individuals, whether directly (sodomy laws, same-sex marriage bans, drag bans, etc.) or indirectly (repurposing laws to target queer bodies), are not a new phenomenon. Nor is the stoking of moral panic in order to target the LGBTQ community.[249] As a result, drag bans are merely the latest attempt to use moral panic to target LGBTQ culture.

Yet even as drag bans have been instituted in a number of states, they have already stumbled in the face of constitutional challenges. Given its history, elemental makeup, and expressive nature, drag is clearly expressive speech. Its diverse origins, role in different cultural settings, and colorful subcultural aspects—from faux queens to ballroom extravaganza—speak to both its artistic and social value.

The First Amendment is clear in its protection of speech. Through a long history of precedent, the courts have defined various types of speech,

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[238] *Id.* at *4–6.
[239] *Id.* at *4.
[240] *Id.*
[241] *Id.*
[242] *Id.* at *10
[243] *Id.* at *5.
[244] *Friends of George's, Inc.*, 2023 WL 2755238, at *5.
[245] *Id.* at *6.
[246] *Id.*
[247] *Id.*
[248] Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1 (2023).
[249] *See, e.g.,* JAMES KIRCHICK, SECRET CITY: THE HIDDEN HISTORY OF GAY WASHINGTON (Henry Holt & Co. 2022).

such as pure speech and expressive speech. Whatever the outer limits of protected speech are, it is clear that drag falls within the First Amendment's protection. Drag bans, then, violate protected free speech.