

# GENDER OUTLAWS BEFORE THE LAW: THE COURTS OF THE BORDERLAND\*

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*This Article considers four trials held in the United States, United Kingdom, and Israel, in which gender outlaws were accused and convicted in a criminal court for fraudulent gender presentations. These trials raise questions at a number of junctures that touch on the regulation and politics of sex, gender, and sexuality. I argue that these cases manifest not only the unresolved tension between sexual and gender identities, but also the internal conflicts within the identities themselves, as well as the difficulty of maintaining boundaries amongst them. Furthermore, I argue that, contrary to the rhetoric used by the various courts, the primary goal of the law in all of these cases was not to protect sexual autonomy against fraudulent solicitation of sex, but rather to protect gender norms and compulsory heterosexuality. I will assert that the convicting judgments in the four trials represent instances of the law attempting to restore compulsory heterosexuality against what I will call the queer reality that emerges from the facts of these cases. The stories of the trials analyzed in this Article challenge not only compul-*

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*sory heterosexuality, but also the identity politics of both sexual orientation and gender identity, which seek to separate the questions of sexuality and of gender into distinct categories.*

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#### I. INTRODUCTION

Between 1991 and 2003, four trials took place in the United States, the United Kingdom, and Israel involving individuals who were accused of sexual fraud. Sean O'Neill and Christopher Wheatley were tried in the United States, Jennifer Saunders in the United Kingdom, and Hen Alkobi in Israel, all for conducting romantic and sexual relationships with women while presenting themselves as men. Doing so was considered a form of criminal sexual deception since they were actually biological females. In a fifth case, a young person was charged in Israel in 2007 for similar crimes, and, at the time of writing, is undergoing trial. The four cases that did go to trial all ended in convictions, but the fates of defendants O'Neill, Wheatley, Saunders, and Alkobi were far better than those of two others who were similarly accused, albeit not in court: Brandon Teena was murdered by people who believed he had engaged in deception by living as a man and dating women, although he had been born a biological female; Gwen Araujo was also murdered for living and dating as a woman, although born a biological male.

This Article considers four cases in which gender outlaws were accused and convicted in a criminal court for fraudulent gender presentation. These trials raise questions at a number of junctures that touch on the regulation and politics of sex, gender, and sexuality. Political approaches and stances that are usually aligned find themselves at odds in the context of these cases, as was demonstrated most prominently in the public debate that arose in Israel around the *Alkobi* trial, the most recent of the cases. One hub of dispute is the clash of the feminist approach, which views sex as a site of danger for women in a patriarchal society and seeks to ensure women full

information and control with regard to their partners in intimate relations, with the queer approach and similarly-oriented feminist streams of thought, which question the existence of clear boundaries of sex, gender, and sexuality and the need or ability to identify such boundaries. In the *Alkobi* case, lesbian feminists and transgender activists collided at this junction, with the debate spreading to the question of who is a real woman — if such a thing even exists — and which interactions require consent. As background to my reading of the cases, I will explore in detail how feminism and queer theory both diverge and converge in addressing these and related issues.

A second focus of the dispute is the borderline between lesbian masculinity and transgenderism: in these particular cases, individuals and relationships may be interpreted through either a lesbian or transgender lens. A third, related site of conflict is between the transsexual approach — which seeks to ensure that people who experience incongruence between their bodies and biological sex, on the one hand, and their gender identity, on the other, are able to change their bodies to completely conform to their sense of gender — and approaches that reject the idea of a need for such correspondence between the body and gender identity, sometimes as part of a general rejection of the idea of binary gender identity. The conflicting and stormy nature of these three focal points of the debate stems, to a large extent, from the multiplicity of different categories of identity involved in understanding and conceptualizing the cases in question (femininity, masculinity, lesbianism, transsexuality, transgenderism). I will argue that these cases manifest not only the unresolved tension between all of these identities, but also the internal conflicts within the identities themselves, as well as the difficulty of maintaining boundaries amongst them.

Critically analyzing these cases in the specific context of these intersections of conflict will show that, in all of these cases, the primary goal of the law, contrary to the rhetoric used by the various courts, was not to protect sexual autonomy against fraudulent solicitation of sex; rather the goal was to protect gender norms and, relatedly, heterosexuality, indeed, compulsory heterosexuality, in itself. In this sense, the judgments in the four trials represent instances of the law attempting to restore the compulsory heterosexual order, whose very existence and dominance mandates binary categories of sex (male/female), gender (man/woman), and sexuality (heterosexuality/homosexuality), against what I will call the queer reality that emerges from the facts of these cases. The stories of the analyzed trials challenge not only compulsory heterosexuality, but also the identity politics of both sexual orientation and gender identity, which seek to separate the questions of sexuality and of gender into distinct categories. This model, I will show, may constrict the possible understanding of the events that led to these trials.

One feature common to all four trials is that the protagonist is a young person living at the periphery of society, in a small city or town, far from urban metropolises. I will therefore argue that these trials are also about the particular shape taken by queer forms of gender and sexuality outside the

global and globalized cities; they tell stories of queer existence in the geographic, social, and economic peripheries and must be understood in this context. Yet at the same time, the similarities between the cases, as well as the impact of the feature film *Boys Don't Cry* on the involved individuals' interpretations of the *Alkobi* trial, attest to the complex global and local conceptualizations of gender and sexuality, to the reaches, and limits, of globalization beyond the metropolis, and to the "translocal" quality of these cases.

The discussion proceeds as follows: Part II describes the circumstances and events of the four tried cases as well as the most recent indictment in Israel, pointing to the similarities and divergences between the five cases; Part III addresses in detail the *Alkobi* indictment and conviction for impersonation through the prism of the detailed reasoning in the court's judgment; Part IV considers the questions of gender and recognition of gender identity that emerged in all of the trials; Part V focuses on the issue of consent to sexual relations; Part VI looks beyond the legal discourse of the trials and judgments themselves to explore the discourse that has evolved within gay, lesbian, and transgender politics around these issues; Part VII continues this discussion, considering the fact that, while all four stories originated in the geographical, social, and economic peripheries, they are at the same time not detached from global narratives of gender and sexuality; and the coda offers a broader perspective for thinking about questions of sex, gender, boundaries, and walls.

## II. GENDER ON TRIAL: THREE CONTINENTS, FIVE CASES

Many of the facts of the Hen Alkobi case are controversial and disputed. There is no question that Alkobi was born in 1981 with female genitalia and was perceived by the external environment as female.<sup>1</sup> There is also no question that, at a certain stage, Hen Alkobi began, at least some of the time, to live as a male and present himself as such.<sup>2</sup> According to the amended indictment filed as part of his plea bargain, Alkobi and another defendant were charged with conspiring between the years 2001 and 2002 to introduce Alkobi to young girls for the purpose of romantic relations in which, as stated in the indictment, "the [female] defendant impersonated a man."<sup>3</sup> According to the indictment, Alkobi introduced himself as "Kobi,"

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<sup>1</sup> In light of the fact that Hen Alkobi presents himself as having always felt to be a boy, I will refer to him in this article in masculine form. However, in any quote or reference taken directly from the sentencing judgment, Alkobi will be referred to in the feminine form, as done by the trial court itself. Alkobi himself noted that, in interviews, he speaks of himself in the feminine form, but that this is out of respect for his parents. See Dana Shabbat & Meir Tourjeman, *Ha'asiriya hapotahat* [*The Opening Ten*], 35 HAZMAN HAVAROD [PINK TIME] (Isr.), June 2004, at 35, 36.

<sup>2</sup> Lior El-Hai & Amira Lem, *Razhu et hashem sheli* [*They Slaughtered My Name*], YEDIOT AHARONOT (Isr.), May 23, 2003, at 33.

<sup>3</sup> Third Amended Indictment § 2 (first charge, para. A), CrimC (Hi) 389/02 Israel v. Alkobi, [2003] (unpublished, on file with Harvard Law School Library).

“Kobi Biton,” or “Kobi Alkobi,” all male names, dressed as a man, and spoke of himself in the masculine form.<sup>4</sup> The indictment stated that when suspicion arose that Alkobi might be a woman, an explanation was given that he had a female cousin named Hen Alkobi who strongly resembled him and whom people mistook for him.<sup>5</sup> The amended indictment related to four different relationships that developed between Alkobi and female complainants. With regard to the first complainant, the indictment charged Alkobi (identified with the female form of “the accused” in the indictment<sup>6</sup>) with impersonating a young man named “Kobi” and claimed that the complainant had fallen in love with “Kobi” and that a relationship of the kind that transpires between “a young man and a young woman” developed between the two.<sup>7</sup> The indictment claimed that the second complainant and Alkobi had been in a dating relationship, while the third complainant and Alkobi had developed a platonic friendship. Finally, it was alleged that the fourth complainant had fallen in love with Alkobi while believing him to be a man and “they” (using Hebrew feminine form) had become a couple.<sup>8</sup> On the basis of these claims, Alkobi was charged with the offense of false impersonation of another person with the purpose to deceive, in violation of the Israeli Penal Code.<sup>9</sup> He was also charged with additional offenses related to intimate contact with two of the young complainants. With regard to the first complainant, who allegedly “had fallen in love . . . with ‘Kobi’ while believing . . . that she [was] a man,” Alkobi was accused of penetrating her mouth with his tongue while the two had been kissing, resulting in the charge of committing an indecent act when consent was secured through deceit as to the actor’s identity.<sup>10</sup> The indictment also charged that, in the

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<sup>4</sup> *Id.* § 3 (first charge, para. A). It should be noted that in Hebrew the first name “Hen” can be either a male or a female name, whereas the first name “Kobi” would usually be used only as a male name.

<sup>5</sup> *Id.* § 5 (first charge, para. A).

<sup>6</sup> Hebrew is not gender-neutral, and hence the linguistic form for “the accused” would differ based on the perceived gender of the person in question. When referring to Alkobi, the indictment and the trial court used the female form. *See, e.g., id.*

<sup>7</sup> *Id.* § 9 subsection B (first charge, para. A).

<sup>8</sup> *Id.* §§ 8–12 (first charge, para. A).

<sup>9</sup> *Id.* § B (first charge, para. B); *see also* Penal Code, 5737–1977, Special Volume LSI 1, § 441, at 110 (1977) (Isr.) (providing that anyone who falsely represents himself as another person, living or dead, with the intent to deceive will be sentenced to three years imprisonment). Alkobi was also charged with the offense of conspiring to commit a misdemeanor under section 499(a)(2) of the Penal Code. Third Amended Indictment, *supra* note 3, (first charge, para. B); *see also* Penal Code § 499(a)(2), at 124. Alkobi’s friend, Oren Sinai, was also charged with this offense, as well as the offense of abetting in the impersonation of another person, in violation of sections 31, 32, and 441 of the Penal Code. Third Amended Indictment, *supra* note 3, (first charge, para. B); *see also* Penal Code §§ 31, 32, at 17, § 144, at 110.

<sup>10</sup> Third Amended Indictment, *supra* note 3, (first charge, para. B); *see also* Penal Code § 345(a)(2–5), at 91 (dealing with situations in which consent to the act was obtained through deceit regarding the identity of the actor or the nature of the act); *id.* § 348(a), at 92 (providing that committing an indecent act in any of the circumstances enumerated in section 345(a)(2) to (5) of the Code is a criminal offense); *id.* § 348(f), at

course of the romantic relationship that had developed between Alkobi and the second complainant, “Kobi” had attempted to have intercourse with her on three different occasions, each time attempting “to penetrate her genitalia with an object unknown to the prosecution, which was attached in some way to ‘Kobi’s’ body.”<sup>11</sup> In addition, he allegedly kissed the complainant and stroked her chest. It was further asserted that, at the time of these acts, the complainant had been a minor under the age of sixteen and that “Kobi” had known this fact. Based on these allegations, Alkobi was charged not only with committing an indecent act where consent was secured through deceit as to the actor’s identity, but also with attempted rape under the Penal Code, which provides that sexual intercourse with a woman whose consent was secured through deceit regarding the actor’s identity or nature of the act constitutes rape.<sup>12</sup> The original charge in the indictment had been rape, but was amended to the lesser offense of attempted rape in the framework of the plea bargain.<sup>13</sup>

Interestingly, one of the original four complainants accusing Alkobi wrote a letter to the trial judge in which she recanted her testimony to the police. The young woman wrote that she had been forced to file a complaint against Alkobi despite the fact that she had known all along that Alkobi is a woman, in her words, and not a man, due to her fear of being exposed as a lesbian to her family and friends. “Now, for the first time, I am prepared to admit to you,” she wrote, “as well as to myself, that I am a lesbian . . . .”<sup>14</sup>

Hen Alkobi did not take the witness stand at his trial. Nonetheless, it is noteworthy that in an interview with the press, he denied having ever engaged in any sexual contact with the second complainant, claiming that only kissing and hugging had occurred: “The entire issue of a sexual act is a complete fabrication.”<sup>15</sup> He further asserted that he had described himself to

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92 (defining an indecent act as “an act for the purpose of sexual arousal, satisfaction, or debasement”).

<sup>11</sup> Third Amended Indictment, *supra* note 3, § 4.

<sup>12</sup> *Id.*; see also Penal Code § 345(a)(2), at 91 (providing that someone who has sexual intercourse with a woman whose consent is obtained through deceit regarding the identity of the actor or nature of the act commits an act of rape); Penal Code § 345(c), at 91 (defining sexual intercourse as the penetration of a woman’s genitalia with a body organ or object). Alkobi was charged under both section 345(a)(2) and section 345(b)(1) of the Penal Code, which punish sexual intercourse with a minor under the age of 16 or any one of a number of alternative circumstances, including deceit with regard to the identity of the actor or nature of the act, and in conjunction with sections 25 and 34D of the Penal Code, which deal with attempt to commit an offense. Third Amended Indictment, *supra* note 3, (third charge, para. B); see also Penal Code § 345(a)(2), (b)(1), at 91, § 25, at 16, § 34D, at 17.

<sup>13</sup> CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para. 1 [hereinafter Alkobi Sentencing Judgment] (author’s translation, on file with Harvard Law School Library). See generally Aeyal Gross, *Hithazut ke’adam aher: Hikuy umery migdari bamishpat shel Hen Alkobi [Impersonation as Another Person: Imitation and Gender Insubordination in the Trial of Hen Alkobi]*, in TRIALS OF LOVE 365 (Orna Ben-Naftali & Hannah Nave eds., 2005) (published in Hebrew only).

<sup>14</sup> El-Hai & Lem, *supra* note 2, at 33–35.

<sup>15</sup> *Id.* at 36.

the second complainant as a “girl-boy” and had told her about “my problem and my confusion.”<sup>16</sup>

As a consequence of the plea bargain in which Alkobi pled guilty to all of the amended charges, the trial court was not required to reach any factual finding in these controversial matters.<sup>17</sup> In September 2003, following the court judgment and after a sentencing hearing in which transgender rights activists testified on his behalf, Alkobi was sentenced to six months in prison, commuted to six months of community service and twenty-four months probation, in addition to a requirement that Alkobi pay damages to two of the complainants.<sup>18</sup> In sentencing Alkobi, the court took into consideration, amongst other things, the fact that he had spent almost an entire month in prison in addition to nine months under house arrest.<sup>19</sup> The sentence that was handed down was grounded on the factual foundation of the amended indictment.<sup>20</sup> However, as discussed below, during the sentencing hearing Alkobi’s defense lawyer tried to recant some parts of Alkobi’s guilty plea by arguing that the conviction for the impersonation offense had no legal basis.<sup>21</sup> This led the court, in its sentencing judgment, to address in detail the relevance of this offense to the case in question.<sup>22</sup>

In its judgment, the *Alkobi* court noted that the indictment had presented “a set of facts that are rare and exceptional in our parts, which seem to be unprecedented in Israel and in foreign countries”<sup>23</sup> with no parallel in case law.<sup>24</sup> However, less than a decade before the *Alkobi* trial, between 1994 and 1995, the surprisingly similar case of Sean O’Neill was tried in Colorado.<sup>25</sup> O’Neill had been born female, but had dated four teenage girls while living as a young man. After the girls and their parents discovered the facts of Sean’s past, what had been young love turned into a rape charge, with the girls claiming they had not known Sean to be a “biological woman.”<sup>26</sup> As in *Alkobi*, the *O’Neill* case involved a young man as the defendant and female complainants who were under the age of sixteen, with no

<sup>16</sup> *Id.*

<sup>17</sup> *Alkobi*, IsrDC 3341(3) paras. 2–3.

<sup>18</sup> *Id.* paras. 8–9.

<sup>19</sup> *Id.* para. 7.

<sup>20</sup> *Id.* para. 1.

<sup>21</sup> See *infra* notes 44–50 and accompanying text.

<sup>22</sup> See *infra* notes 53–63 and accompanying text.

<sup>23</sup> *Alkobi*, IsrDC 3341(3) para. 1; see also *R v. Saunders*, (1992) (EWCA Crim.) (unpublished, available from Cornell Library reference no. HCA/EPHEMERA/1031) (echoing the *Alkobi* Sentencing Judgment in Judge Crabtree’s expression of disbelief at the facts of the case); *R v. Saunders*, (1991) (Doncaster Crown Ct.) (unpublished, available from Cornell Library).

<sup>24</sup> *Alkobi*, IsrDC 3341(3) para. 7.

<sup>25</sup> Docket, *People v. Clark*, No. 1994CR003290 (Colo. Dist. Ct. Feb. 16, 1996) (on file with Harvard Law School Library) (explaining Sharon Clark was the name given to O’Neill at birth); see also Jennifer L. Nye, *The Gender Box*, 13 *BERKELEY WOMEN’S L.J.* 226 (1998) (detailing the facts of the case and trial). For more on the O’Neill trial, see PAT CALIFIA, *SEX CHANGES: THE POLITICS OF TRANSGENDERISM* 234–37 (2d ed. 2003).

<sup>26</sup> Nye, *supra* note 25, at 226–27.

contention that the relationships had been anything other than consensual when they took place. Also, as in *Alkobi*, O'Neill was charged with false impersonation and sexual assault but entered into a plea bargain in which he pled to lesser offenses;<sup>27</sup> here, too, transgender rights activists were involved in the case and testified at the pre-sentencing stage.<sup>28</sup> O'Neill's sentence, however, was harsher than the community service Alkobi received: ninety-days imprisonment and probation.<sup>29</sup>

Even harsher was the fate of Christopher Wheatley. Twenty-year-old Wheatley was tried in 1997 in Franklin County, Washington for having sex with a fifteen-year-old girl, who alleged that she had initially believed Wheatley to be a male, but later discovered otherwise.<sup>30</sup> Wheatley, who according to published reports was undergoing gender transition and taking hormones, was convicted of third-degree rape and sentenced to twenty-seven months in prison.<sup>31</sup>

In 1991, a trial was conducted on similar background facts in the United Kingdom. Jennifer Saunders was charged with and convicted of indecent assault for sexual relations she had between the ages of sixteen and seventeen with two young women, aged fifteen and sixteen, who claimed they had consented to the sex based on Saunders' representation of herself as a man.<sup>32</sup> Saunders' line of defense was different from those taken in the Alkobi and O'Neill trials: she claimed that the complainants had known she was a woman, but she denied having ever engaged in sexual relations with the two.<sup>33</sup> While she did admit to having presented herself as a man when she first met one of the complainants, Saunders claimed the representation was in the context of a joke made by a friend of hers who was present at the time and that she soon after disclosed her female gender.<sup>34</sup> Saunders alleged

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<sup>27</sup> *Id.* at 244–46.

<sup>28</sup> James Green, *Predator?*, S.F. BAY TIMES, Feb. 22, 1996 (“The sentencing hearing was set for February 16, and the defense decided to base their argument on Sean’s transgendered condition, a risky tactic given the uninformed and potentially hostile response they would likely encounter. They invited The Transexual Menace, Menace Men, Lesbian Avengers, and all interested parties to demonstrate on Sean’s behalf outside the courthouse to convey the message that this case was not occurring in a vacuum and the court could not make an example of Sean and then forget about him.”).

<sup>29</sup> *Id.* (“Sean received a sentence of 90 days in the county jail, deferred until accommodations could be made so that Sean will not have to be housed with women or with men, in consideration of his transgender status. He also will be on probation for 6 years, and will have a record as a sex offender. He must undergo counseling with a gender specialist while on probation, and he may not have unsupervised contact with females under 17 except for his younger sisters.”).

<sup>30</sup> *State v. Wheatley*, No. 97-1-50056-6 (Wash. Superior Ct. May 13, 1997).

<sup>31</sup> *Id.*; Gender Pub. Advoc. Coalition, *Transsexual Man Convicted on Rape Charge*, June 16, 1997, <http://www.gpac.org/archive/news/notitle.html?cmd=view&archive=news&msgnum=0076> (discussing Wheatley’s guilty plea and additional facts of the case).

<sup>32</sup> *R v. Saunders*, (1991) (Doncaster Crown Ct.) (unpublished, available from the Cornell Library).

<sup>33</sup> *See id.* at 210, 220, 222.

<sup>34</sup> *Id.* at 207–08.

that after this particular complainant had finally accepted her as a “girl,” she only presented herself as a man in the presence of the complainant’s friends and relatives; she said this had been at the request of the complainant, who asked Saunders to “pass” as her boyfriend as she did not want them to know the “truth” about her sexuality.<sup>35</sup> Saunders was convicted in 1991 and sentenced to six years imprisonment, which the court of appeals later reduced to two years probation. Saunders was released after spending almost nine months in prison.<sup>36</sup>

More recently, a twenty-year-old individual was indicted in Israel in September 2007 for dating a young girl while presenting herself as a sixteen-and-a-half-year-old male.<sup>37</sup> The indictment accused the defendant of using a male name and having sexual contact with the complainant by, amongst other things, inserting her fingers into the complainant’s vagina.<sup>38</sup> The indictment alleged that, at some stage, the complainant found the defendant’s Identity Card and noticed a female name and indication of female sex, but that the defendant claimed that the Identity Card was not hers.<sup>39</sup> The relationship continued following this event, until the complainant became suspicious again after seeing a text message the defendant had sent in which she used her female name; at this point, according to the indictment, the complainant realized she had been deceived.<sup>40</sup>

Nonetheless, the relationships and sexual contact continued, with the two meeting two more times after that event.<sup>41</sup> On the basis of these claims and the same sections of the Penal Code under which Alkobi was indicted, the defendant was charged with statutory rape, as well as with committing indecent acts, the consents to which were secured through deceit as to the actor’s identity.<sup>42</sup> Unlike in *Alkobi*, however, the prosecution did not resort to the charge of impersonation.<sup>43</sup> At the time of publication of this Article, the proceedings in this case are still ongoing.

<sup>35</sup> *Id.* at 212.

<sup>36</sup> R v. Saunders, (1992) (EWCA Crim.) (unpublished, available from the Cornell Library); R v. Saunders, (1991) (Doncaster Crown Ct.) (unpublished, available from the Cornell Library); see also Anna Marie Smith, *The Regulation of Lesbian Sexuality Through Erasure: The Case of Jennifer Saunders*, in *LESBIAN EROTICS* 164 (Karla Jay ed., 1995) (providing a detailed analysis of the *Saunders* judgments).

<sup>37</sup> Indictment, CrimC (KS) 2372/07, Israel v. X, [2007] (unpublished, on file with Harvard Law School Library); see also Raanan Ben-Zur, *Hasahd: Hitchazata LeGever VeAnsa Neara* [Suspicion: Impersonated as a Man and Raped a Young Woman], YNET (Isr.), Aug. 30, 2007, <http://www.ynet.co.il/articles/0,7340,L-3443762,00.html>; Raanan Ben-Zur, *Ishum: Hitchazta Lenaar VeBitza Maasim Megunim BeNaara* [Indictment: Impersonated as a Young Man and Conducted Indecent Behavior Toward a Young Woman], YNET (Isr.), Sep. 25, 2007, <http://www.ynet.co.il/articles/0,7340,L-3453359,00.html>.

<sup>38</sup> Indictment, CrimC (Kfar Saba) 2372/07, Israel v. X, [2007] (unpublished, on file with Harvard Law School Library).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *id.*

In the discussion of the Alkobi, O'Neill, Wheatley, and Saunders trials, I will not seek (nor is it possible) to arrive at factual findings on the many issues that remained in dispute. Moreover, my focus will not be on the particular individuals involved, but rather on the trials and court judgments and the questions they raise regarding the legal regulation of sex, gender, and sexuality. Much of my legal analysis will focus on the *Alkobi* court's sentencing judgment. Not only is this the most recent of the four cases, but the court's ruling also presents the most detailed legal analysis of the case and attempts to address the related questions of gender identity. The other trials will, however, also be discussed and compared, and the issues addressed and considered in the *Alkobi* context are relevant to each case discussed.

### III. "IMPERSONATION OF ANOTHER PERSON": THE LEGAL ANALYSIS IN THE ALKOBİ TRIAL CRITIQUED

Even though Hen Alkobi pled guilty to false impersonation of another person in the framework of a plea bargain, his defense attorney, Ronen Bendal, argued at the opening of the pre-sentencing hearing that Alkobi could not, in fact, be convicted of that offense.<sup>44</sup> Bendal based this claim on section 441 of the Israeli Penal Code, entitled "Impersonation of Another Person," which defines the offense as falsely representing oneself as another person, living or dead, with the intent to deceive,<sup>45</sup> and on the existing case-law rule that requires the false impersonation to relate to a *specific* person. In this context, Bendal cited the Israel Supreme Court decision in *Al-Sha'abi v. State of Israel*, a case in which a married Druze man who had represented himself to a young Jewish girl as an unmarried Jewish man and had promised to marry her; on the basis of this promise, the girl had sexual intercourse with him and became pregnant.<sup>46</sup> The Supreme Court ruled that Al-Sha'abi could not be convicted of false impersonation as the impersonation must relate to a specific person; it could not relate simply to a person in general, to a fictitious person, or to someone who belongs to a group or association of people.<sup>47</sup> Rather, the impersonation must relate to a person who, as per section 441, "is living or dead," who exists or did exist in reality.<sup>48</sup> This language notwithstanding, the Supreme Court upheld Al-Sha'abi's conviction, basing it on the criminal offense of receiving a benefit by way of deceit.<sup>49</sup>

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<sup>44</sup> See Hearing Protocol, CrimC (Hi) 389/02, Israel v. Alkobi, [2003] 1, 1–2 (unpublished, on file with Harvard Law School Library) (containing the argument made by the defense attorney); CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para.2 (same).

<sup>45</sup> Penal Code, 5737–1977, Special Volume LSI 1, § 441, at 110 (1977) (Isr.).

<sup>46</sup> CrimA 499/72, Al-Sha'abi v. Israel, [1973] IsrSC 27(1) 602.

<sup>47</sup> *Id.* at 605.

<sup>48</sup> *Id.*

<sup>49</sup> CrimA 499/72 Al-Sha'abi v. Israel, [1973] IsrSC 27(1) 602, 606; see also Penal Code 5737–1977, Special Volume LSI 1, § 441, at 106 (1977) (Isr.) (defining the crime of obtaining a benefit by deceit).

The Court ruled, among other things, that “there can be absolutely no doubt that leading a woman to offer herself and the sexual and emotional satisfaction that the man derives from this are within the scope of ‘benefit’ in the law’s sense.”<sup>50</sup>

The Haifa District Court, which tried Alkobi, dismissed the defense attorney’s claim and upheld the conviction for false impersonation.<sup>51</sup> In its sentencing judgment, the court was critical of the attorney’s attempt to reopen the discussion of this offense after judgment had been rendered in the case, and added that Alkobi could indeed be convicted for false impersonation.<sup>52</sup> Pointing to the dictionary definition of “impersonation,” the court stressed that, from a linguistics perspective, the expression “impersonating another person” can encompass impersonating a person of another sex.<sup>53</sup> Simply read, “representing oneself as a male, despite the fact that one has female genitalia — without a doubt one of the currently accepted criteria for distinguishing between male and female — satisfies the factual element of ‘impersonation,’”<sup>54</sup> on the condition that the mental element of special intent to defraud is established.<sup>55</sup>

In reference to the *Al-Sha’abi* rule, cited by Alkobi’s attorney, requiring that impersonation relate to a specific person, the court noted that much had changed since the rendering of that decision and, under an interpretation that looks to the purpose of the law, false impersonation need not be of a specific person: “impersonation of a fictitious person is sufficient to establish the elements of the offense,” the court determined.<sup>56</sup> The interpretation given in the *Al-Sha’abi* decision, it stated, is inconsistent with the value being protected by the law, namely, protecting people from fraud committed by way of false representation of the actor’s identity.<sup>57</sup> The court also referred to academic criticism of the *Al-Sha’abi* judgment, expressed by criminal law specialist Miriam Gur-Aryeh. Her claim, as paraphrased by the court, was that “the offense arises when a person takes on a certain identity that is different from his own identity, and this identity is not necessarily contingent on the existence of an owner of that identity.”<sup>58</sup>

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<sup>50</sup> *Al-Sha’abi*, IsrSC 27(1) at 606 (author’s translation).

<sup>51</sup> Hearing Protocol, *supra* note 44, paras. 2–5.

<sup>52</sup> See CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para. 3 (detailing the court’s objection to the defense attorney’s attempt to “have his cake and eat it,” that is, to keep intact the plea bargain with its lesser charge of attempted rape, instead of rape, but to recant Alkobi’s guilty plea to impersonation).

<sup>53</sup> *Id.* (author’s translation, on file with Harvard Law School Library).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* para. 5.

<sup>56</sup> *Id.* para. 3.

<sup>57</sup> *Alkobi*, IsrDC 3341(3).

<sup>58</sup> *Id.* (citing Miriam Gur-Aryeh, *Hithazut lidmut fictivit – hitra’ut ke’aher o mirma* [Impersonating a Fictitious Person—Appearing as Another or Deceit], 5 MISHPATIM 673 (1974)).

The *Alkobi* court further relied on the Israeli Supreme Court's analysis in *Pelach v. Israel*<sup>59</sup> of the element of "deceit with regard to the nature of the act" as ground for invalidating consent in sexual offenses in the Penal Code.<sup>60</sup> This decision revolved around the matter of Eliyahu Pelach, who had been convicted for a series of indecent acts performed through deceit on female patients during therapy in his work as a clinical psychologist.<sup>61</sup> The Supreme Court ruled that presenting the erotic acts as part of the course of psychological therapy was deceit, finding that the sole reason the patients had granted consent was because they believed that the sexual acts were a part of the therapy.<sup>62</sup> The *Alkobi* court derived from this that "in the case before us, as well, there was 'consent' to performing erotic acts on the bodies of the complainants, who, had they known the facts as they truly were, would not have consented to this."<sup>63</sup>

What is not clear is why the court deemed the *Pelach* analysis of deceit with regard to the *nature of the act* to be material to the discussion of whether or not Alkobi could have been convicted for impersonating another person to induce sexual consent. It seems that, at best, this could have been relevant to the charges of attempted rape and of indecent behavior with invalidated consent, although in this context, as well, it is important to note that Alkobi was accused of fraud with regard to the *identity of the actor* and not with regard to the nature of the act.<sup>64</sup> This important distinction between the *Pelach* and *Alkobi* charges alters the *Alkobi* court's final determination, which, though possibly well grounded, at least in the court's mind, on new interpretation principles and Gur-Aryeh's critique, seems to deviate from Supreme Court case law and the *Al-Sha'abi* rule. This is a problematic move given that under Israeli law, Supreme Court rulings bind all courts except for the Supreme Court itself.<sup>65</sup> Regardless, in summing up its analysis of this issue, the court noted that even had it accepted the defense attorney's claim that Alkobi should not be convicted for false impersonation, he could have been convicted for fraud under the Penal Code, similar to the *Al-Sha'abi* outcome, the very case law relied on by the defense to support its contention.<sup>66</sup>

Even if the Haifa District Court's new interpretation of impersonation is accepted, the question arises as to whether it was justified to convict Alkobi for the offense of *impersonating another person with the intent to deceive*. Miriam Gur-Aryeh developed the possibility of convicting someone for this offense even when the impersonation is of a fictitious, nonspecific person, in

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<sup>59</sup> CA 7024/93 *Pelach v. Israel*, [1995] IsrSC 49(1) 2.

<sup>60</sup> *Alkobi*, IsrDC 3341(3) paras. 4–5.

<sup>61</sup> *Id.* para. 4 (citing CA 7024/93 *Pelach v. Israel*, [1995] IsrSC 49(1) 2).

<sup>62</sup> CA 7024/93 *Pelach v. Israel*, [1995] IsrSC 49(1) 2.

<sup>63</sup> *Alkobi*, IsrDC 3341(3) para. 5.

<sup>64</sup> *Id.* para. 13.

<sup>65</sup> See Basic Law: The Judiciary, 1984, S.H. § 20(b), at 78 no.1110.

<sup>66</sup> *Alkobi*, IsrDC 3341(3) para. 5.

the same article upon which the court relied to justify Alkobi's conviction.<sup>67</sup> Following the *Al-Sha'abi* decision, Gur-Aryeh criticized the Supreme Court's failure to recognize the impersonation of a fictitious person as giving rise to the offense of false impersonation of another person. She asserted that the Court's interpretation did not sufficiently recognize the impact of the impersonation on the victim of the fraud.<sup>68</sup> The existence or non-existence in reality of the person impersonated, she claimed, does not add to, or diminish from, the effect on the victim.<sup>69</sup>

Accordingly, Gur-Aryeh proposed the following test for the offense of false impersonation: if the actor, in representing himself, takes on a specific identity that 1) differs from his own identity; 2) distinguishes him from others; and 3) gives the new identity features that could influence the victim of the fraud, then the actor has falsely represented himself as another.<sup>70</sup> This is unrelated to the question of the physical existence, in the past or present, of the owner of the represented identity. To determine "identity," Gur-Aryeh proposed relying on the designators established in the Israeli Population Registry Law of 1965;<sup>71</sup> this Registry includes a person's name, national origin, religion, marital status, place and date of birth, address, and so on.<sup>72</sup> It is important to note at this juncture that, under section 2(a)(4) of the Israeli Population Registry Law, sex is also registered in the Population Registry.<sup>73</sup> Should Alkobi have been convicted for false impersonation on the basis of appropriate interpretation of the offense or, alternatively, according to the test suggested by Gur-Aryeh? Did Alkobi impersonate another person? Did he impersonate a fictitious person?

In ruling that Alkobi was rightly convicted for the offense, the court in essence determined that the young man who presented himself as "Kobi" is a fictitious person, a person who is not real. The court — which, it should be stressed, consistently referred to Alkobi in the feminine form — ruled that the young woman Hen Alkobi had impersonated a fictitious person, that is, the young man Kobi. This impersonation had amounted to a sort of assumption of a specific identity that differs from Hen's true identity. This treatment of Kobi the young man as a fictitious person was reinforced by the court's presentation of the facts in the sentencing judgment: "The [female] accused," opined the court, "who was dressed like a man, introduced herself to girls by the name 'Kobi,' while the [male] defendant [Hen's friend] addressed her in the masculine as 'Kobi' and she referred to herself in the masculine."<sup>74</sup> "The [female] defendant," continued the court, established

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<sup>67</sup> Gur-Aryeh, *supra* note 58.

<sup>68</sup> *Id.* at 673–78.

<sup>69</sup> *Id.* at 676.

<sup>70</sup> *Id.* at 678.

<sup>71</sup> Population Registry Law, 1965, S.H. 270, 466.

<sup>72</sup> Gur-Aryeh, *supra* note 58, at 677–78.

<sup>73</sup> Population Registry Law § 2(a)(4).

<sup>74</sup> CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para. 1.

with the complainant “romantic and platonic relations while impersonating a man.”<sup>75</sup> The court further recalled that “when concern arose as to the defendant’s identity as a woman, she warded off these suspicions by explaining that she has a female cousin named Hen Alkobi who strongly resembles her and that people confuse them.”<sup>76</sup>

The question remains as to whether these facts justify a conviction for the offense of false impersonation, which requires intent to defraud. Recall that the court ruled that “representing oneself as a male, despite the fact that one has female genitalia — without a doubt one of the currently accepted criteria for distinguishing between male and female — satisfies the factual element of ‘impersonation.’”<sup>77</sup> It seems that the court focused on what it called Kobi’s representation of himself as male, and not on his representing himself with a different name from his registered name.

It is important to note that the court cautiously referred to genitalia as *one* of “the currently accepted criteria” for distinguishing between male and female, and thereby left open the question of the additional criteria. It is possible that this reference is a manifestation of its awareness of what it termed elsewhere in the sentencing judgment as “the phenomenon of unclear sexual identity and crossing between the sexes” and of theoretical development in the area of gender studies and queer theory.<sup>78</sup> But despite the fact that it specified genitalia as only *one* such criterion, this ultimately emerged as the determinative criterion for the court.

Moreover, the court, familiar with the term “gender,” nonetheless resorted to genitalia to distinguish between *male and female* and as a ground for Alkobi’s conviction. In the court’s words, Hen dressed as a *man*, represented “herself” as a *man*, impersonated a *man*, and spoke in the *masculine* form.<sup>79</sup> But does dressing like a man and presenting oneself as a man amount to representing oneself as male? Again, according to the court, genitalia are one of the parameters for distinguishing between *male and female*, in other words, between the *sexes*. Alkobi, the court told us, played a *gender* role of a man (clothing, speech, behavior). Did “she” thereby represent herself to be male? Did “she,” under the court’s approach, represent “herself” to be a fictitious person whom “she” was impersonating? The perception that “Kobi” is a fictitious person whom Alkobi was impersonating and that, since “she” has female genitalia, Alkobi’s gender representation as a man was impersonation, is embedded in the conception that reduces gender to sex, as determined by genitalia, and holds the gender role to naturally stem from genital sex. Therefore, according to the court, playing a gender role

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* para. 3.

<sup>78</sup> *Id.* para. 12; see also *infra* notes 129–30 and accompanying text.

<sup>79</sup> *Alkobi*, IsrDC 3341(3) para. 1.

that differs from that which is designated by the genitalia amounts to impersonating a fictitious person.<sup>80</sup>

Indeed, the court's approach mixed the category "sex," which is commonly understood as relating to biological differences, for which genitalia are likely to be relevant, and the category of "gender," which relates to social-cultural differences and for which dress, representation, and language are relevant.<sup>81</sup> Underlying the treatment of "Kobi" as a "fictitious person" because "Hen" has female genitalia is the conception of the primacy of biological sex, which is perceived as "natural" and determinative of the true gender and true identity of a person. This approach grants biological sex a decisive status relative to the secondary status of gender identity in determining a person's supposed true identity. Thus, gender is completely subordinated to biological sex and derived therefrom in a seemingly precise and perfect manner. Gender analysis and queer theory have criticized and challenged this approach.<sup>82</sup>

Judith Butler's work reveals the flaws in the *Alkobi* court's analysis. Whereas a considerable part of the feminist theory preceding Butler dealt with the need to distinguish between the category of sex, which was seen as natural, and the category of gender, which was seen as a social construct, Butler proposed a new reading of the relation between the two.<sup>83</sup> In her view, sex does not exist in a natural and autonomous way, but is in fact produced by the social institution of gender.<sup>84</sup> Traditionally, the theoretical distinction between sex and gender assisted in the development of the claim that gender, as opposed to the biological category of sex, is a social construct and therefore neither a random, "natural" outcome of biological sex, nor permanent and stable like biological sex. From this conception of gender it follows that even under a binary conception of sex, a "man" will not exclusively derive from a male body and a "woman" will not derive only from a female body. Moreover, as Butler claims, even under a binary conception of sex as comprised solely of the polar dichotomy of male/female, it does not necessarily follow that there are only two genders.<sup>85</sup> The premise of a binary system of gender is based on the conception of gender as a mirror-image of sex. Under a conception of gender as autonomous from sex, "man" or

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<sup>80</sup> See generally Stephen Whittle, *The Becoming Man: The Law's Ass Brays*, in RECLAIMING GENDERS: TRANSSEXUAL GRAMMAR AT THE FIN DE SIECLE 15, 18–21 (Kate More & Stephen Whittle eds., 1999) (discussing the confusion of "male" and "female" with "man" and "woman" in the case law dealing with people who have changed their sex).

<sup>81</sup> See generally SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH (1978) (providing a classic analysis of gender as a social construct).

<sup>82</sup> See e.g. Judith Lorber, *Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender*, 66.2 SOC. INQUIRY 143, 143 (2007) (acknowledging that gender is not synonymous with biology).

<sup>83</sup> JUDITH BUTLER, GENDER TROUBLE (1990). Butler is one of the preeminent thinkers in the areas of gender and queer theory.

<sup>84</sup> *Id.* at 6, 112.

<sup>85</sup> *Id.*

“masculine” does not necessarily designate a male body, and “woman” or “feminine” does not necessarily designate a female body.<sup>86</sup>

Butler takes this insight one step further, claiming that even the category of sex itself is not a “natural” thing in the pre-social sense. The category of sex is always gendered from the outset and does not exist before gender. In her view, gender should not be understood solely as the cultural contents given to sex, but also as part of the production apparatus that establishes the category of sex itself.<sup>87</sup> The gender apparatus, which divides us into women and men, is also a discursive-cultural system in which sex is produced as though it is pre-discursive or pre-cultural, as though it is supposedly unconstructed and “natural.”<sup>88</sup>

Butler suggests understanding gender as performative and as an effect of corporeal designation: gender is constituted by means of actions and gestures, by way of performances.<sup>89</sup> These performances produce the illusion of an internal core to gender. The performance produces the identity that the gender purports to be — the expressions that are supposedly the result of gender in fact performatively constitute the gender identity.<sup>90</sup> When a woman wears women’s clothing and speaks in feminine form, she constitutes herself as a woman.<sup>91</sup> If the gender designators in effect constitute the identity that they are claimed to reveal, there can be no basis to the claim that there is an identity that is different from, prior to, or more real than the one being performed.<sup>92</sup> According to Butler, “drag,” in driving a wedge between anatomical sex and gender performance, reveals the basic imitative structure and the imitative practice of gender itself and enables the understanding that gender is always imitation.<sup>93</sup> Drag, in Butler’s view, is not an imitation or copy of a gender that is prior to it or more real; rather, drag reproduces the very same imitative structure by which any gender is acquired.<sup>94</sup> There is no “correlating” gender, a gender that is suited to one sex but not the other or that is the cultural property of one sex; every appropriation of gender is a type of imitation. Gender, Butler continues, is a type of imitation that has no origin.<sup>95</sup> When one plays a man’s gender role, one is imitating “being a man” and not doing something that naturally stems from biological fact. A man who plays the gender role of a man always performs an “imitation” of masculinity, whether his genitalia are male or female. Accordingly, for Butler, the performance of masculinity that a male performs

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 6–7.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 25, 135–40.

<sup>90</sup> *See id.* at 141.

<sup>91</sup> *Id.* at 25, 135–40.

<sup>92</sup> *Id.* at 141.

<sup>93</sup> *See* Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13 (Diane Fuss ed., 1991); BUTLER, *supra* note 83, at 137–38.

<sup>94</sup> *See id.*

<sup>95</sup> *Id.*

and the performance of masculinity that a female performs have the same ontological status, since both are equally an imitation and neither is more authentic or real than the other.

Nonetheless, the gender performance is a compelled performance, and therefore behavior that does not correspond with the gender norms — heterosexual norms — leads to ostracization, punishment, and violence.<sup>96</sup> The acts and gestures that constitute the performance are subject to a most rigid social regime that restricts and organizes them around bipolar and stable gender identities, that is, woman and man. The gender regulation, which Butler calls the “regulatory fiction of heterosexual coherence,” is what gives birth to the norm that imposes a correlation between biological sex, gender, and desire.<sup>97</sup> Butler thus points to gender as being a *norm*, with a restrictive discourse on gender that insists on the man-woman binary as the exclusive way to understand the gender field. This societal normative component performs a regulatory operation of power that naturalizes the hegemonic instance and forecloses the thinkability of its disruption.<sup>98</sup> But this production of that coherent binary is contingent and comes at a cost.<sup>99</sup>

The regulatory fiction of heterosexual coherence is thus presented as a natural state, as though biological sex necessarily and spontaneously generates an internal psychological essence of gender that is reflective of that biological sex, and this internal essence in turn generates — supposedly spontaneously — sexual desires and behaviors that suit that particular sex/gender.<sup>100</sup> Following Monique Wittig, Butler points to the idea that the category of (supposedly natural) sex is imperative for the existence of (compulsory) heterosexuality as an institution that facilitates the exploitation of women, since only if one assumes the existence of an essentialist and distinguishing (“natural”) difference between the sexes can one assume a necessary and inevitable link between the two, an assumption that is an axiom of heterosexuality.<sup>101</sup> Thus the system that Butler describes, constructed on gender binarism and on the conception of the gender role as “naturally” deriving from also-binary biological sex, is part of the matrix of compulsory heterosexuality.<sup>102</sup>

Butler’s suggestion that we understand gender as an identity that is always performative and imitative exposes the flaw in the court’s determination that Hen Alkobi, the woman, impersonated a fictitious person. The

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<sup>96</sup> JUDITH BUTLER, UNDOING GENDER 55, 214 (2004); Butler, *supra* note 95. These negative consequences are powerfully illustrated by the cases discussed in this Article.

<sup>97</sup> BUTLER, *supra* note 83, at 134–41.

<sup>98</sup> BUTLER, *supra* note 96, at 42–43.

<sup>99</sup> *Id.*

<sup>100</sup> BUTLER, *supra* note 83, at 134–41.

<sup>101</sup> See *id.* at 1–34, 110–28. For elaboration on these issues, see JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” 223, 223–42 (1993).

<sup>102</sup> The term “compulsory heterosexuality” was coined by Adrienne Rich in her essay *Compulsory Heterosexuality and Lesbian Existence*, in BLOOD, BREAD, AND POETRY 23 (1986).

court's approach rested on the assumption that the feminine gender role naturally derives from Alkobi's female genitalia. This stance gives ontological priority (if not exclusivity) to the female who plays the gender role of a woman over the female who plays the gender role of a man. The former is regarded as genuine, or real, the latter as fictitious or an imitation. Butler disputes this imposed dichotomy and suggests regarding both as equally genuine or fictitious. Under her approach, Hen Alkobi as a young woman is no less performance and no less impersonation — and no more so — than Hen Alkobi as a young man. Convicting Alkobi of false impersonation represents the court's endorsement of compulsory heterosexuality as Butler describes it. Clearly emerging from the analysis of the offense of false impersonation in the sentencing judgment is the notion of gender as binary and deriving from sex, and of the feminine gender role as genuinely and naturally deriving from female genitalia. Compulsory heterosexuality depends on these conceptions, and they continuously impose the heterosexual order on Hen Alkobi; therefore, it is possible to understand the court's reliance on female genitalia as determinative of identity — even though it did concede that this is only *one* criterion and failed to explain why it was given such decisive weight.<sup>103</sup> Genitalia are perceived as vital to heterosexual sex, which is based on the penetration of the female genitalia by the male genitalia. Thus, choosing genitalia as a decisive parameter ensures the preservation of the heterosexual order. In the context of the *Alkobi* case, to describe Hen Alkobi as “imitating” another person is to describe Hen Alkobi, as he presented himself, as unreal. To be labeled unreal is to become other, and as argued by Butler, the other is often defined in opposition to the definition of humanity; thus, to be called a copy, or unreal, is to be denied status as human.<sup>104</sup>

This choice of genitalia as the determinative factor in gender identity raises difficult questions regarding Alkobi's conviction for false impersonation. It is important to note that, in the indictment, except for the reference to Alkobi as the defendant in the feminine form and the fact that the second (male) defendant, Alkobi's friend, “knew that the defendant is a girl,”<sup>105</sup> nowhere was it claimed that Alkobi, who impersonated a man according to the indictment, is a woman. In fact, there was not even an allegation that her biological sex is female. Under Israeli law, a person's sex is registered in the Population Registry,<sup>106</sup> and this record is the *prima facie* proof of the verity of the registered details.<sup>107</sup> By law, any notification of a birth, which in-

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<sup>103</sup> CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para. 3.

<sup>104</sup> See BUTLER, *supra* note 83, at 30, 217–18; see also ELENA LOIZIDOU, JUDITH BUTLER: ETHICS, LAW, POLITICS 165 (2006) (discussing the denial of humanness to “foreclosed subjects,” and the resistance these subjects present by exposing, through their practices, that they live counter-normatively).

<sup>105</sup> *Alkobi*, IsrDC 3341(3) para. 1.

<sup>106</sup> Population Registry Law, 1965, S.H. § 2(A)(4).

<sup>107</sup> *Id.* § 3.

cludes details of the sex of the newborn (male or female), is made to the registration clerk at the Population Registry by the relevant accountable person at the institution at which the birth took place or, if it occurred elsewhere, by the parents, doctor, or midwife attending the birth.<sup>108</sup> Registration on the basis of the information provided to the Population Registry is *prima facie*, and not *conclusive, proof*. Therefore, the question of Hen Alkobi's sex was not proven in court, even though the registration provided *prima facie* proof of Alkobi's sex as female. But even if he was recognized at birth, as documented by his birth certificate, as a female, this *prima facie* proof does not address whether Hen Alkobi is a man or woman in terms of gender identity. In order to convict Alkobi for false impersonation, even according to the court's interpretation of the offense, these issues should have been argued; however, because Alkobi pled guilty to amended charges, they were never raised for discussion.

Determining the sex — or gender — of a person for legal purposes is a particularly complex matter when dealing with people who do not act in accordance with the gender identity expected of them. The term “transsexual” is used to describe people who “change their sex” from the biological sex into which they were born (the term is historically linked to people who have had or intend to have medical treatment, including surgery, for the purpose of changing their sex). The term “transgender” is used as a general overarching term to describe people who, in one way or another, cross or transcend the sex and gender boundaries, whether or not they undergo a medical sex change, and is also a category that is regarded as having emerged from the community itself, rather than from the medical profession.<sup>109</sup>

It is important to understand that the registration of sex has ramifications not only for those who change their sex; there is an inherent problem with a rule that requires every person to register as either male or female. This determination reflects the binary conception of sex, which is produced, according to Butler, by the principle of compulsory heterosexuality, and which is vital for its perseverance. The law assumes a binary view of sex and of gender, even though reality is more complex. Sex, which is conceived of as biological and “simple,” and is registered in the Population Registry, is generally designated according to the newborn's genitalia; however, complications arise with identifications based upon genitalia in cases of intersex individuals (once termed “hermaphrodites”), who are born with

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<sup>108</sup> *Id.* § 6; Population Registry Regulations: Forms for Notification of Birth and Death, 1972, KT 2858, 1267. The Population Registry Law also includes provisions for changing an existing registration.

<sup>109</sup> See Paisley Currah, Richard M. Juang & Shannon Price Minter, *Introduction to TRANSGENDER RIGHTS*, at xii, xiv–xvi (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006); Susan Stryker, *(De)Subjugated Knowledge: An Introduction to Transgender Studies*, in *THE TRANSGENDER STUDIES READER* 1, 4–6 (Susan Stryker & Stephen Whittle eds., 2006) (providing an introduction to the topic of transgender studies).

anatomy and organs that cannot be classified as either exclusively male or female. Intersex newborns often undergo operations to “fix” their genitalia and make them “distinctly” male or female.<sup>110</sup> Moreover, even though sex is usually assigned according to genitalia, there are actually a number of factors that determine a person’s biological sex: 1) chromosomal or genetic sex — XY or XX chromosomes; 2) gonadal sex — testicles or ovaries; 3) internal morphological sex (including the existence of a uterus); 4) external morphological sex, that is, external genitalia — penis or vagina; 5) hormonal sex — androgens or estrogens; and 6) phenotypic sex — facial hair or breasts. Beyond these biological factors, a person’s sexual identity is also determined by both one’s assigned gender and self-perception of one’s sexual identity. These various factors overlap for most people, but not for all.<sup>111</sup> For intersex individuals, for example, there is ambiguity or ambivalence with regard to one of the six biological elements or, alternatively, incompatibility amongst these elements.<sup>112</sup> The terms “transsexual” and, more broadly, “transgender” serve to describe people whose gender and self-perception of their sexual identity do not correspond with their biological sex as it arises from the aforementioned factors.<sup>113</sup>

Just as variations within the factors that determine biological sex undermine the binary notion of sex, historical and anthropological research undermines the binary conception of gender and reinforces Butler’s claim that this binarism is a product of a particular social agenda and constitutes, rather than reflects, an order that is perceived to be natural.<sup>114</sup> In reality, there are many more variations of sex and gender than can be manifested in a binary system. These variations have, to a large extent, been erased from modern Western consciousness in favor of sexual dimorphism.<sup>115</sup>

The dominant binary conception of sex and gender has been put to the test in the context of the legal identity of people who have undergone a sex change. The courts of various countries have deliberated extensively the issue of recognizing the sex identity of transsexuals. The matter has arisen in various contexts, including identification on official documents, such as passports and drivers licenses, as well as with respect to the validity of marriages — in countries that recognize marriage as only valid between a man and woman, recognition of the sex identity of a transsexual or transgender person is essential to a determination of the validity of his or her marriage.<sup>116</sup>

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<sup>110</sup> Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 271–75 (1999).

<sup>111</sup> *Id.* at 278.

<sup>112</sup> *Id.* at 281.

<sup>113</sup> *Id.* at 289–91.

<sup>114</sup> See THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (Gilbert Herd ed., 1996).

<sup>115</sup> *Id.*

<sup>116</sup> See STEPHEN WHITTLE, RESPECT AND EQUALITY: TRANSSEXUAL AND TRANSGENDER RIGHTS 1–18, 131–72 (2002) (reviewing and analyzing comprehensively the comparative case law on the subject of transsexual and transgender individuals’ rights); ANDREW

In the past, comparative case law has tended not to recognize transsexuals' new gender identities, especially in relation to marriage;<sup>117</sup> however, a trend has recently emerged in the case law of certain national courts,<sup>118</sup> as well as the European Court of Human Rights,<sup>119</sup> of requiring states to recognize the new identity, including for purposes of marriage. This new approach has been primarily limited to the context of transsexuals who have undergone some form of medical sex-change procedure.<sup>120</sup> The two cases involving female-to-male transsexuals where the courts did not require surgical construction of male genitalia have proven to be the exception rather than the

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SHARPE, *TRANSSEXUAL JURISPRUDENCE* 1–2, 39–134 (2002); Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families*, in *TRANSSEXUAL RIGHTS*, *supra* note 109, at 32; Julie A. Grinberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in *TRANSSEXUAL RIGHTS*, *supra* note 110 at 51, 63–68; Grinberg, *supra* note 110, at 296–318; Marybeth Herald, *Transgender Theory: Reprogramming Our Automated Setting*, 28 T. JEFFERSON L. REV. 167 (2005); Susan Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.–C.L. L. REV. 329 (1999); Dylan Wade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 265–88 (2005); Whittle, *supra* note 80; Transgender Law & Policy Inst., *Litigation: Case Law* (January 27, 2006), <http://www.transgenderlaw.org/cases/index.htm>; see also Jason Allen, *Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169 (2008) (discussing and suggesting statutory solutions in the United States). A comprehensive discussion of the case law on this matter is beyond the scope of this Article.

<sup>117</sup> See *Corbett v. Corbett*, (1970) 2 All E.R. 33 (U.K.). This approach continues to hold strong in U.S. courts. In 2002, the Texas Supreme Court held that for the purpose of marriage, a post-operative male-to-female transsexual would not be considered to be of the “opposite sex” from a man, that is, a woman. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. 1999), *certification denied*, 531 U.S. 872 (2000). Thus, a marriage between such a transsexual and a man was declared void, thereby denying the transsexual inheritance rights in her spouse’s estate, which instead went to his estranged son. *Id.*; see also *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002) (holding no recognition of a marriage involving a transsexual). *But see* *M.T. v. J.T.*, 355 A.2d 204, 355 (N.J. Super. Ct. App. Div. 1976), *certification denied*, 364 A.2d 1076 (N.J. 1976) (recognizing a marriage involving a transsexual). See generally Terry Kogan, *Transsexuals, Intersexuals and Same-Sex Marriage*, 18 BYU J. PUB. L. 371 (2004).

<sup>118</sup> See, e.g., *Att’y Gen. v. “Kevin and Jennifer”* (2003) 172 FAM. L.R. 300 (Austl.) (granting recognition as male to an individual who had undergone a sex-change surgery, but not an operation to create a penis), available at <http://www.transgenderlaw.org/cases/InReKevinAppealDecision.pdf>; *Kantaras*, No. 98-5375CA, *rev’d*, 884 So.2d 155 (2004); Arthur S. Leonard, *Transsexual Dad Wins Custody*, GAY CITY NEWS, Mar. 3, 2003 [http://www.gaycitynews.com/site/index.cfm?newsid=17002621&BRD=2729&PAG=461&dept\\_id=568864&rft=8](http://www.gaycitynews.com/site/index.cfm?newsid=17002621&BRD=2729&PAG=461&dept_id=568864&rft=8) (discussing the *Kantaras* Court of Appeals decision as one in which a transgender man “born genetically female, [was found to be] a man for purposes of Florida marriage law; [was declared] the legal father of the two children born to his wife Linda; and should be awarded primary custody of the children.”). The defense attorney in the *Alkobi* trial cited “*Kevin & Jennifer*” and the trial court’s decision in *Kantaras* (which, at the time, had not been overturned); however, the *Alkobi* court found these cases irrelevant. *CrimC (Hi) 389/02 Israel v. Alkobi*, [2003] IsrDC 3341(3) para. 7.

<sup>119</sup> *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18 (2002) (obligating the states to recognize the new identity of transsexuals in a way that deviated substantively from the previous rulings of the European Court of Human Rights); see also *Grant v. United Kingdom*, 44 Eur. Ct. H.R. 1 (2007).

<sup>120</sup> See Flynn, *supra* note 109, at 44.

rule.<sup>121</sup> This is a problematic position, not least of all because most female-to-male transsexuals choose not to undergo surgical construction of a phallus, a procedure that medical experts counsel against as it involves significant risks and cannot result in a functioning penis.<sup>122</sup>

From this perspective, the Haifa District Court's reference to Alkobi as a woman in its decision essentially corresponds with the majority of the comparative case law (there is no Israeli case law on the matter), in that absent some sort of medical sex-change procedure, a person is deemed as belonging to the biological sex into which he or she was born. This approach is anchored in the same binary conception of sex discussed above and the concept of gender as "naturally" deriving from biological sex and reflective of that sex, at least so long as the scalpel has not intervened. Surgical intervention reinstates the regime of correlation between the body — and, for the most part, the genitalia itself — and gender and marks the limits of the law's encompassment of crossing sexes. This approach also bolsters the regime of heterosexuality, a regime constituted by a social order in which, in Catharine MacKinnon's words, "man fucks woman."<sup>123</sup> This order requires each individual to have the genitalia appropriate to his/her sex/gender in a binary sex-gender regime which is an integral part of compulsory heterosexuality. This approach is contested by feminist and queer theory insights regarding sex, gender, and the link between them, as well as by the historical and anthropological research that has examined the issue and modalities of crossing the sex boundaries that do not seek to recreate a correlation between body and gender.

This Part has discussed the problematic nature of the *Alkobi* court's determination that it was possible to convict Alkobi for false impersonation,

<sup>121</sup> See "*Kevin and Jennifer*" 172 Fam. L.R. 300; *Kantaras*, No. 98-5375CA, *rev'd*, 884 So.2d 155 (2004) (granting recognition to people who have undergone sex-change surgery but not an operation to create a penis). *But see* Flynn, *supra* note 109, at 37–39 (noting that courts usually grant recognition of the acquired gender identity only in cases of surgery to reconstruct the genitalia).

<sup>122</sup> See Flynn, *supra* note 109, at 39; *see also* Andrew Sharpe, *From Functionality to Aesthetics: The Architecture of Transgender Jurisprudence*, in THE TRANSGENDER STUDIES READER, *supra* note 109, at 621 (pointing to a trend in some of the case law, specifically in Australia and New Zealand, where courts recognized that surgery does not create what they call "a fully functional male" and shifted the analysis of whether a transgender person should be recognized as a man from "function" to "aesthetics," that is, focused on whether the post-operative person would have what appeared to be male genitals; also noting this "aesthetic" approach shares the "functional" approach's requirement for surgical intervention and anxiety over proximity to the homosexual body).

<sup>123</sup> CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 124 (1989); *see also* Ruthann Robson, *Reinscribing Normality?: The Law and Politics of Transgender Marriage*, in TRANSGENDER RIGHTS, *supra* note 109, at 299–300 (reading the relevant case law as holding "it is heterosexual intercourse, rather than birth certificates, chromosomes, or expert testimony about gender dysphoria, that is the talisman for sex/gender identity"); Andrew Sharpe, *Endless Sex: The Gender Recognition Act 2004 and the Persistence of A Legal Category*, 15 FEMINIST L. STUD. 57, 81 (2007) (reflecting on the desire to insulate heterosexuality from the stain of homosexuality as structuring transgender reform jurisprudence).

both in its deviation from the *Al-Sha'abi* rule and in its stance that Hen Alkobi is an intentionally deceptive impersonator when he presents himself as a man. Recall that the court noted “beyond what is required” that, even had it accepted the defense attorney’s claim that Alkobi could not be convicted for false impersonation, it would have been possible to convict him for fraud under the Israeli Penal Code, as in *Al-Sha'abi*.<sup>124</sup> Under the *Al-Sha'abi* rule, it is indeed possible to convict for fraud in circumstances in which sexual intercourse occurs based on false information. However, taking this avenue would still not have resolved the substantive snag in the determination that it would have been fraudulent on the part of Hen Alkobi to present himself as a man.<sup>125</sup>

#### IV. QUESTIONS OF GENDER

In concluding its detailed judgment and after holding that it was possible to convict Alkobi for the offense of false impersonation and handing down his sentence, the Haifa District Court included “a comment on gender and consent in sex offenses.”<sup>126</sup> In the framework of the discussion of the offense, the court referred to Alkobi’s masculine identity as impersonation and as the identity of a fictitious person. In its so-called “comment” on the issue of gender, the court referred to witness testimony made at the presentencing hearing: the testimony of Dr. Ilana Berger, Director of the Center for Sexuality and Sexual Identity, who had stressed that gender and sexual identity are not contingent solely on genitalia; the testimony of Nora Grinberg, who recounted that she had been born and lived as a male and that, in her forties, had undergone a sex-change process and today is a woman; and the testimony of A.T., who had served in the Israeli Army as a hand-to-hand combat instructor and whose masculine and muscular appearance, the court stressed, belied the fact that hiding behind that appearance was someone who is still designated as “female” on his Identity Card.<sup>127</sup> The court noted that the witnesses had not been called for the purposes of providing expert testimony, and it therefore did not see fit to explore transgenderism and its implications for the legal and social planes.<sup>128</sup> Nonetheless, the court stated, it felt the subject warranted a few words.<sup>129</sup> In this context, the court noted that society, the legislature, and the courts will increasingly be occupied with the phenomena of “ambiguous sexual identity and the transition between sexes,” adding that, “in recent years, academic departments and chairs have been established that deal with the nature and substance of gender, and such linguistic innovations as ‘gender’ and ‘queer

<sup>124</sup> CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para. 5.

<sup>125</sup> The issue of fraud will be further discussed later in this Article. See *infra* Part V.

<sup>126</sup> *Alkobi*, IsrDC 3341(3) first charge, paras. 11–15.

<sup>127</sup> *Alkobi*, IsrDC 3341(3) first charge, paras. 11.

<sup>128</sup> *Id.* para. 12.

<sup>129</sup> *Id.* paras. 11–12.

theory' already roll off our tongues as a matter of rote."<sup>130</sup> The court recalled several movies that presented, in its words, the fracturing of sexual identity and the blurring of the gender boundaries, such as *Madame Butterfly*, *The Crying Game*, *All About My Mother*, and *The Adventures of Priscilla, Queen of the Desert*, but not, interestingly enough, the most relevant films — *The Brandon Teena Story* (1998) and *Boys Don't Cry* (1999), the respective documentary and dramatization of the story of Brandon Teena.<sup>131</sup> It then stated that it is willing to accept the statements of the witnesses, as well as of the "female defendant," that Alkobi feels, as a transgender individual, like a man in every sense — that is, like a man trapped in the body of a woman.<sup>132</sup>

Nonetheless, the court rejected the claim that transgender individuals bear no obligation to reveal to someone with whom they seek intimacy "the fact that they have male or female genitalia."<sup>133</sup> The court explicitly stressed its distinction that a person will not generally be accused of false impersonation if he has a male appearance and acts or dresses like a male, even if he has female genitalia (and vice versa).<sup>134</sup> Rather, he will be considered to be someone who is acting according to his internal emotional identity and feeling. This behavior must be respected and permitted, stated the court.<sup>135</sup> However, this tolerance holds only outside of the framework of a social-intimate relationship, in which a duty to disclose arises as to whether the person is a "male" or "female" in what the court termed "the narrow and accepted sense in society today"; otherwise, the partner cannot give his or her free consent to the relations.<sup>136</sup>

On its face, this part of the sentencing judgment seems to reveal acceptance of the transgender model of identity in general and of Alkobi's specifically. The court remarked here that Alkobi suffers from a problem with "her" sexual identity, which emerges both from what "she" says and from "her" external appearance, in the court's words, as "a young boy-young man."<sup>137</sup> This was supported, in the court's view, by the probation officer's report, which noted that Alkobi experienced confusion between "her" inclination to behave according to the masculine gender and "her" understanding that in certain situations "she" must act like a young woman.<sup>138</sup> Presumably,

<sup>130</sup> *Id.* para.12.

<sup>131</sup> *Id.* On the significance of Brandon Teena and the film *Boys Don't Cry* for the *Alkobi* case, see *infra* notes 325–35 and accompanying text.

<sup>132</sup> *Alkobi*, IsrDC 3341(3) para. 12. The Court also mentioned the novel *Trumpet* by Jackie Kay, which, in its words, "tells the story of love, including sexual and corporal, towards a loving husband who was actually a woman." *Id.* *Trumpet* is generally considered to be modeled on the life of U.S. jazz musician Billy Tipton. See JUDITH HALBERSTAM, IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES 48, 56–61 (2005).

<sup>133</sup> *Alkobi*, IsrDC 3341(3) para. 12.

<sup>134</sup> *Id.* para. 13.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* para. 7.

<sup>138</sup> *Id.*

the court should have allowed and respected this behavior. Yet, despite the court's determination that a person can live in the gender identity that corresponds with his or her internal emotional identity and feeling until entering into a social-intimate bond, it treated Alkobi like a woman over the entire course of the sentencing judgment, referring to him, in the same way the *O'Neill* court referred to the defendant in its judgment,<sup>139</sup> in the female grammatical form throughout.<sup>140</sup> This stands in complete contrast to the court's position on the need to allow and respect a person's gender behavior in accordance with his or her feeling and identity. The sentencing judgment begins with a quote from a popular song by Israeli singer Shalom Hanoch, "It's not a Lady, It's a Gentleman", which recounts how a man meets a woman in a bar and subsequently discovers that she is, in his perception, actually a "gentleman"; the court declares that "in the instance before us, it emerges that the gentleman is a lady."<sup>141</sup> Thus from the outset of the judgment, the court's message is that not only does Alkobi have female genitalia, but also that she is a "lady." The conviction for false impersonation of another person, a fictitious person, also negates the existence of either Hen or Kobi, as well as Alkobi's gender identity that correlates with his internal emotional identity and feeling.

The court determined that under ordinary circumstances, a person will not be convicted for the offense of false impersonation for living according to his chosen gender identity, unless he has entered into a social-intimate relationship with another person.<sup>142</sup> It should be stressed that implicit in this determination, the court seemingly expresses reservations about the false impersonation conviction. However, this ruling seems at odds with the court's analysis of the offense in its judgment, which does not distinguish the situation of a social-intimate relationship from other situations in the elements of the offense, as the court interpreted them. Although the offense does include the element of "intent to deceive,"<sup>143</sup> such a charge is unlikely to be limited to situations of a sexual or romantic relationship. The court's determination regarding the offense of impersonation thereby opens the door to the possibility of charging someone who professes a sexual identity that does not correlate with his or her genitalia for false impersonation, even in situations that do not involve intimate relations. Although Alkobi's conviction should be read as closely in line with the court's comment on gender changes, it is doubtful whether this alters its interpretation of the offense. Moreover, the court did not limit the duty to disclose to situations of sexual relations, speaking rather of a "social-intimate relationship." A broad duty thus arises from Alkobi's conviction for false impersonation not just in connection with

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<sup>139</sup> Nye, *supra* note 25, at 254.

<sup>140</sup> However, the court referred to the witnesses Nora Grinberg and A.T. in the grammatical forms that correspond with their gender identities. See *Alkobi*, IsrDC 3341(3).

<sup>141</sup> *Id.* para. 1.

<sup>142</sup> *Id.* para. 13.

<sup>143</sup> Penal Code, 5737-1977, Special Volume LSI 1, § 441, at 110 (1977) (Isr.).

the charge of attempted rape, but also in relation to the complainants (one of whom he kissed) with whom a friendship and romantic relations emerged.

In light of the sentencing judgment's reference to Alkobi as a "lady," and in light of the determination that Alkobi the young man is a fictitious person, an impersonation, it seems that, to a great extent, "gender" and "queer theory" did indeed find their way into the judgment, consciously or unwittingly, although perhaps solely as "linguistic innovations" and "a matter of rote," as the court labeled them.<sup>144</sup>

In this context, there is also cause to ponder the court's determination that, as a rule, people are not required to disclose their genital sexual identity except when entering into an intimate relationship. Why did the court specifically single out this sphere as the only context in which a duty to disclose applies? It seems to reflect the understanding that in sexual relations, society attributes great importance to the sex of one's partner and is a manifestation of homophobia. In essence, allowing people with male genitalia to have sexual intercourse with men or people with female genitalia to have sexual intercourse with women, without requiring that they reveal the "truth" about their genitalia to their partners, is likely, under the court's approach, to expose the latter to non-voluntary and undesired homosexuality.<sup>145</sup> In this respect, the court's conception of gender fluidity is limited and reminds us that compulsory heterosexuality is threatened by crossing gender boundaries. For this reason, the court needs to maintain a sharp distinction between a *gender identity* that it contends one can choose, on the one hand, and the *core essence* of one's sex, on the other.

## V. QUESTIONS OF CONSENT

As described above, Alkobi was convicted of attempted rape and indecent behavior, as well as false impersonation. The latter convictions were based on the Israeli Penal Code provision that an act of sexual intercourse will be considered rape even if the woman consented to it, when that consent was obtained through deceit with regard to the actor's identity or nature of the act.<sup>146</sup> Moreover, an indecent act will also be criminal if consent was obtained through deceit regarding the actor's identity or nature of the act.<sup>147</sup> Accordingly, the indictment referred to deceit with regard to the identity of

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<sup>144</sup> *Alkobi*, IsrDC 3341(3) para. 12.

<sup>145</sup> Indeed, in discussing the question of consent and its cultural-contingency, the court referred to judicial judgments and academic articles that deal with the rights of gays and lesbians, emphasizing its understanding of the matter as a case of homosexual sex. *Id.* para. 14; see also SHARPE, *supra* note 116, at 10–12, 89–134; Andrew Sharpe, *Institutionalizing Heterosexuality: The Legal Exclusion of "Impossible" (Trans)sexualities*, in LEGAL QUERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 26 (Leslie Moran, Daniel Monk & Sarah Beresford eds., 1998) (analyzing the way that homophobia impacts recognition of transgender individuals).

<sup>146</sup> See *supra* note 10 and accompanying text.

<sup>147</sup> See *supra* note 9 and accompanying text.

the actor.<sup>148</sup> Since conviction on these charges was part of the plea bargain and, in contrast to the conviction for false impersonation, Alkobi's attorney did not contest it at the pre-sentencing hearing, the court was not required to give a reasoned decision as to the applicability of these charges in this particular instance. Nonetheless, in its "comment on gender and consent in sex offenses" concluding the sentencing judgment, the court referred to this matter.<sup>149</sup>

As discussed above, the court determined that although a person is not usually obligated to "identify" "his sex" to others, he must do so when he enters into social-intimate relations with another person; an individual must therefore reveal to intimate partners whether he is "male" or "female" in "the narrow and accepted sense in society today."<sup>150</sup> The court stated that when romantic or intimate relations develop, any "consent" given by the partner without his or her knowledge of this "essential fact" will be grounded in impairing his or her autonomy and will not constitute "free consent."<sup>151</sup> In the eyes of the law, the court continued, failure to clarify one's biological-genetic sex to one's intimate partner will be regarded as fraud and deception vis-à-vis the "identity of the actor."<sup>152</sup> The court stated that even the justified demand for social change with regard to the treatment of the phenomenon of transgenderism is not sufficient to counterbalance the justified demand to provide legal protection to women when necessary,<sup>153</sup> concluding:

Whenever an erotic-intimate-romantic relationship develops between two people, the sexual-biological identity of each of the partners is a fundamental element in their relationship. In such circumstances, concealing one's sexual identity is viewed to be an unfair act, as misleading on a relevant point that goes to the root of the relations between the two and amounting to deceit and fraud regarding the nature of the act and the identity of the actor. Failure to intervene on the part of the criminal law in such instances would not mean that romance has prevailed but, rather, that victims have been abandoned in the face of fraud.<sup>154</sup>

This comment, the court stressed, is intended to both address the circumstances of the present case as well as constitute a "warning" for similar cases in the future.<sup>155</sup> In the context of fraud, it should be recalled that the court noted in the sentencing judgment that even were it to accept the claim

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<sup>148</sup> See *supra* note 3 and accompanying text.

<sup>149</sup> See *supra* note 126.

<sup>150</sup> CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para. 13.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* para. 14.

<sup>154</sup> *Id.* para. 15.

<sup>155</sup> *Id.*

that Alkobi could not be convicted for false impersonation, it would be possible to convict him for fraud.<sup>156</sup>

When, then, does fraud arise with regard to the actor's identity? In its sentencing judgment, the court set a requirement for Alkobi and others like him to declare at a certain point their "biological-genetic identity" and to reveal the fact that they are "male" or "female" in the narrow sense currently accepted in society.<sup>157</sup> This ruling rests on the premise that somehow, despite everything stated, genitalia are the determinative factor, at least in the framework of social-intimate relations, and anyone who lives in a gender identity that deviates from the one designated by his or her genitalia must state this at some stage in the development of a romantic-intimate-erotic relationship.

This ruling raises questions on at least two levels. The first level revisits the question of "truth" that arose in the context of the discussion of the offense of false impersonation. Do people's genitalia tell the truth about their identities, a truth that they can never escape? What is the truth about Alkobi? A.T., who testified before the court in the pre-sentencing hearing and recounted his own change from woman to man, referred to these issues in his testimony: "In my opinion, there is no impersonation at issue here. Since I can remember myself, I remember myself as a man."<sup>158</sup> He continued, "I always present myself as a man. Even when I introduce myself to a girl who is completely heterosexual. I present myself as a man, completely, despite the fact that I have the organs of a woman. I have not yet undergone sex-change surgery. I have documents in which the Army has accepted me as a man, so where is the impersonation?"<sup>159</sup> When questioned about his relations with women, he replied,

"Why on the first date when I meet someone would I tell her 'I was born a girl?' Never in my life was I a girl. I present myself as a man. When it gets to the point that I take my pants off, it arrives. In response to the question what happens if a girl thinks I am man and then sees I have female genitalia, I say that I have an answer that is several minutes long."<sup>160</sup>

A.T. further testified that there have been girls who have gone out with him and have not known "this."<sup>161</sup> In his words, "I do not feel myself to be female and have never felt myself to be female."<sup>162</sup> And when asked by the prosecutor if his partner has the right to know that she is not getting involved

<sup>156</sup> See *supra* notes 64–66 and accompanying text.

<sup>157</sup> *Alkobi*, IsrDC 3341(3) para. 13.

<sup>158</sup> Hearing Protocol, *supra* note 44, at 12.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 13.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

with a man, he responded, “Explain to me what a ‘woman’ is.”<sup>163</sup> A.T.’s testimony therefore brings to the fore the question of a person’s determinative sex — or gender. Recall that the court did not discuss the question of whether a duty to disclose also applies to a transsexual who has undergone a sex-change operation, whose genitalia have been altered and now correlate with his or her new gender identity. In some countries, including Israel, the official identity documents of such a transsexual will be amended to reflect his new gender identity.<sup>164</sup> But is he or she obliged, according to the sentencing judgment, to disclose the fact that he or she underwent a sex change when he or she enters into an erotic-intimate-romantic relationship? At first glance, it seems that the ruling regarding such a duty will not be applicable to a transsexual, for the court stressed the existing genitalia as determinative of identity. But, as noted, this is only one of the criteria determining a person’s biological sex. A sex-change operation may transform the actual genitalia and lead to official registration of the new sex, but it is certainly possible that the operated-upon transsexual will also belong, in other aspects of biological sex, to his or her previous sex — and the court spoke of the need to clarify the *genetic-biological* sex. Is this transsexual then required to reveal that his or her chromosomal sex does not correlate with his or her genitalia and gender identity? Or perhaps genitalia, rather than “genetic-biological” sex, are the determinative factor, as more than any other factor it determines the nature of the sexual act as *heterosexual*?

The second level relates to a broader issue: What are we required to reveal about ourselves in an erotic-intimate-romantic relation with another? Are we always obligated to provide a full representation of ourselves? What is the relevant information that we are obliged to provide, and what will be considered deceit (in the sense of deceit with regard to the identity of the actor in rape or, alternatively, as a ground for conviction for fraud)? The question of “rape by fraud” rather than “rape by coercion” (i.e., fraud as a basis for negating consent to intercourse and thus turning a supposedly consensual act into a criminal one) is fraught with complexities.<sup>165</sup> It is interesting to note, however, that Patricia Falk, in her comprehensive study on the matter, did include “Fraud as to the Defendant’s Identity” as one of the categories of cases where U.S. courts found fraud to be a basis of negation of

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<sup>163</sup> *Id.*

<sup>164</sup> See Merav Sarig, *A Transgender Agenda*, HA’ARETZ.COM ISRAEL NEWS ENGLISH EDITION (2008) (last visited Dec. 2, 2008) <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=290851&contrassID=2&subContrassID=20&sbSubContrassID=0&listSrc=Y> (stating the “Interior Ministry permits individuals to alter the sex listed on their identity card after presentation of a certificate that confirms that they have had the operation.”).

<sup>165</sup> See Patricia Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998); see also DAVID ARCHARD, *SEXUAL CONSENT* 46–50 (1998) (offering a philosophical perspective on the issue). An exhaustive discussion of these issues is beyond the scope of this Article.

sexual consent, but the cases she analyzed all involved impersonation of a real person.<sup>166</sup>

As context to the *Alkobi* judgment and its legal analysis, it is worthwhile to mention some other cases decided in Israel under the same statutory framework in which this question has arisen. One well-known case is *Ben-Avraham v. Israel*,<sup>167</sup> which revolved around a man who lied to several women about his wealth, family, and profession. Ben-Avraham represented himself under fictitious names (Dr. Nimrod Meidan, Gil Assaf, Dr. Eran Assaf) and assumed different identities: a neurosurgeon, an air-force pilot, a wealthy man with property and funds, a pianist, a lecturer at the Tel-Aviv University Medical School — all, in the words of the court, for the purpose of self-aggrandizement and self-promotion.<sup>168</sup> Some of the women testified at Ben-Avraham's trial to the effect that it had been these "facts," including that he was supposedly a wealthy doctor, that had won their affections.<sup>169</sup> The court maintained that Ben-Avraham had woven a web of lies and falsehoods in a cunning and manipulative way and had continued to do so even while on the witness stand. Furthermore, the court found a causal link between his false representation and the outcome of sexual intercourse because the women who entered into a relationship with him believed his lies and agreed to have sexual intercourse with him only on the basis of those lies.<sup>170</sup> In the end, Ben-Avraham was convicted for obtaining something by fraudulent means, with the court ruling that the "something" he received had been full sexual relations.<sup>171</sup> Similarly, Al-Sha'abi, the married Druze man who had presented himself as an unmarried Jewish man, was convicted for the same offense.<sup>172</sup> Note that in the relevant Penal Code provision, there is no requirement that the fraud relate to any particular context or subject matter, in contrast to the provision on rape by deceit, where the deceit must relate to the actor's identity or the nature of the act.<sup>173</sup>

A number of Israeli court judgments have addressed deceit with regard to the nature of the act. One such case is the Supreme Court decision in *Pelach* discussed earlier, involving a psychologist who performed erotic acts on the bodies of patients while leading them to believe that the acts were part of therapy. Here, the Court ruled that the performance of a purely sexual act when consent was deceptively secured for an allegedly therapeutic act constitutes rape by deceit with regard to "the nature of the act," which encompasses also the "character" of the act from the actor's subjective

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<sup>166</sup> Falk, *supra* note 165, at 65–70.

<sup>167</sup> CrimA (TA) 157/98 Ben-Avraham v. Israel, [1998] IsrDC 32(2) 96.

<sup>168</sup> *Id.* at 3.

<sup>169</sup> *Id.* at 4.

<sup>170</sup> *Id.* at 14.

<sup>171</sup> *Id.* at 12.

<sup>172</sup> See CrimA 499/72, Al-Sha'abi v. Israel, [1973] IsrSC 27(1) 602.

<sup>173</sup> Penal Code, 5737–1977, Special Volume LSI 1, 110 (1977) (Isr.).

mental perspective.<sup>174</sup> Courts dealing with deceit vis-à-vis the actor's identity have held that consent was not freely given for indecent acts when the actor falsely represented his identity. One such case revolved around a man who represented himself as a doctor even though his medical license had been revoked;<sup>175</sup> another involved a man who represented himself as a senior official in the Ministry of Housing.<sup>176</sup> In yet another case, a man represented himself as a rabbi, who performs religious services and assists people;<sup>177</sup> another case dealt with a man who represented himself as an astrologer.<sup>178</sup> All of these cases involved acts of deceit with regard to the defendants' occupations, which led to the complainants' consent to sexual acts.

The only judgment I have found in Israeli case law that addresses the impersonation of a member of the other sex is the matter of an air-force officer who impersonated a young woman when having oral sex with two male soldiers serving in his unit.<sup>179</sup> In this case, the officer propositioned the soldiers, offering oral sex with a female soldier who supposedly refused to reveal her identity. In fact, the officer himself performed the oral sex, while wearing a perfumed padded flak jacket.<sup>180</sup> The soldiers' hands were bound and their eyes blindfolded so that they could not see that the officer, not a female soldier, performed the act. In one of two episodes, after the sexual act, the officer asked one of the soldiers if he had enjoyed it. Following his answer in the affirmative, they repeated the act. However, the soldiers became suspicious, the true identity of the "female soldier" was revealed, and the officer was court-martialed.<sup>181</sup> The parties reached a plea bargain, under which the original charge of indecent behavior was reduced to the lesser charges of wrongful behavior in a public place<sup>182</sup> and improper behavior.<sup>183</sup> The officer did not claim (or at least there was no evidence of such a claim in the judicial decisions) that he identifies as or feels that he is a woman, and the psychiatric opinions that were presented in court attributed his actions to emotional crises. The Military Appeals Court called the plea bargain and lesser charges "mystifying" and, deviating from the plea bargain, sentenced

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<sup>174</sup> See CA 7024/93 Pelach v. Israel, [1995] IsrDC 49(1) 2; see also CrimA 3583/05 Zeider v. Israel, [2005] IsrDC 2006(1) 3048 (involving a psychotherapist who solicited sexual relations supposedly as part of his professional work and was convicted on similar grounds).

<sup>175</sup> CrimA 616/83 Fleishman v. Israel, [1985] IsrSC 39(1) 449.

<sup>176</sup> CrimA 2411/06, Saliman v. Israel, [2008] (unpublished, on file with Harvard Law School Library).

<sup>177</sup> CrimC (TA) 549/90 Israel v. Jarbi, [1992] IsrDC 42(3) 494.

<sup>178</sup> CrimC (TA) 4042/98, Israel v. Yerushalmi, [2002] (unpublished, on file with Harvard Law School Library).

<sup>179</sup> Mil.C. (AF)134/96, Military Prosecutor v. Captain Y.A., [1996] (unpublished, on file with Harvard Law School Library).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*; see also Penal Code, 5737-1977, Special Volume LSI 1, 63 (1977) (Isr.).

<sup>183</sup> Mil.C. (AF)134/96, *Captain Y.A.*; see also Military Justice Law, 1955, S.H. 189, § 130, at 171.

the officer to four months in prison, which he served doing military work.<sup>184</sup> This case, though obviously similar to the *Alkobi*, *O'Neill*, *Wheatley*, and *Saunders* cases, is unique in that it involved a one-time incident and not continued behavior.

In addressing cases of alleged impersonation of a member of the opposite sex, it is important to consider the need to ensure extensive protection of women in the sexual sphere, as noted by many scholars. In a study of cases involving fraud in sexual relations, Dana Pugatch claims that the law tends to delineate too narrowly situations in which deception invalidates the consent allegedly given by the victim.<sup>185</sup> According to Pugatch, the law must be interpreted (and even amended) to include the victim's perspective as one of the elements of the offense, in order to protect women's sexual freedom and their free consent as central to realizing that freedom.<sup>186</sup> Thus, with respect to deceit regarding the actor's identity, Pugatch suggests a conception of a person's identity as comprised of those characteristics that are of particular significance for the other side — that is, the female rape victim. Even if the perspective of the accused man is adopted, it should be comprised of those features he thinks would be particularly significant to the woman.<sup>187</sup> Thus, in respect to the offense of rape by deceit, Pugatch proposes a finding of deceit with regard to the actor's identity when the deceit involves the aspects of his character considered most relevant by the female victim. Under her approach, recognition of women's sexual freedom mandates recognition of women's freedom to define the characteristics that are important to them and the material elements of the identity of their partners in intimate relations. Pugatch considers the victim, and the victim's assessment of which facts are fundamental, to be more important than the actual occurrence of the sexual act.<sup>188</sup> In her opinion, criminal conviction is possible if there was deceit with regard to these fundamental facts and a causal link can be shown between the deceit and the consent, so long as the required mental element for the accused can be demonstrated (that is, the man is shown to have at least suspected the woman would not consent).<sup>189</sup> According to Pugatch, who was quoted approvingly by the *Alkobi* court,<sup>190</sup> failure on the part of the court to intervene in this area would not mean that romance prevails, but that the victims are left exposed to deceit.<sup>191</sup> Pugatch was also critical of the fact that

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<sup>184</sup> Mil.C. (AF)134/96, *Captain Y.A.*; Mil.A. 241/96, *Captain Y.A. v. Chief Military Prosecutor* (1996) (unpublished, on file with Harvard Law School Library).

<sup>185</sup> Dana Pugatch, *Criminalizatzya shel ginuney hizur mekubalim? Mirma, ta'ut hakorban vehascama le'inyan averot min* [*Criminalization of Accepted Courting Etiquette? Deceit, Victim's Error, and Consent in Sex Offenses*], in *CRIMINAL TRENDS* 149, 150–54 (Eliezer Lederman ed., 2001).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 171–72.

<sup>188</sup> *Id.* at 176–77, 185–87, 193–94.

<sup>189</sup> *Id.* at 196; see also Penal Code, 5737–1977, Special Volume LSI 1, § 19–20, at 14–15 (1977) (Isr.) (dealing with the requirement of criminal intent and its definition).

<sup>190</sup> CrimC (Hi) 389/02 *Israel v. Alkobi*, [2003] IsrDC 3341(3) para. 15.

<sup>191</sup> Pugatch, *supra* note 185, at 185.

Ben-Avraham, who had impersonated a pilot and a doctor, amongst other professions, was prosecuted only for fraud, maintaining that he should have been charged with and convicted of a sex offense in which deceit invalidates consent.<sup>192</sup> The need to protect women from manipulation by men and a fundamental conception of women's freedom justify in such instances a finding that deceit invalidated the consent. When the law includes offenses of a clear sexual nature that can be applied to protect these unique interests, fraud should not be the only charge.<sup>193</sup>

The existing case law and Pugatch's proposal to expand the protection of women in this context, a suggestion that was adopted by the court in *Alkobi*, raise doubts about the convictions in all four cases discussed in this Article. In contrast to the cases in which the defendants falsely represented themselves as a pilot, doctor, rabbi, astrologist, or unmarried Jewish man, the court in the *Alkobi* case did not dispute that the defendant had presented himself in accordance with what he felt himself to be — a man. The claim that he presented a falsehood, that his behavior was deceitful as to his identity, assumes that behind the facade of Alkobi is a woman who is a real person, the real Alkobi. It is questionable how possible it is to compare this situation with that of someone who actively deceives and assumes identities that he later admits to be false. Certainly the *Alkobi* case, and probably the *O'Neill* and *Wheatley* cases, appear to diverge in this respect from the case of the officer who impersonated a female soldier.<sup>194</sup>

It is possible to conceive of additional situations in which a person would likely not be found to have a duty to reveal, of his own initiative, miscellaneous details about himself, even if those details are significant in the eyes of the woman with whom he is in a relationship. Suppose, in the Israeli context, that someone is a *Mizrahi* Jew (a Jew of North-African or

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<sup>192</sup> *Id.* at 176–80.

<sup>193</sup> *Id.*

<sup>194</sup> Nonetheless, I do not seek here to propose any uniqueness to the sexual-gender identity. It is possible that a person will feel and live as a Jew even though he is legally a non-Jew, and the circumstances of such a case would perhaps resemble those of the *Alkobi* case. It is doubtful, however, that the same could be said regarding a person who feels he is a doctor or feels single. It should also be noted that, in the *Ben-Avraham* case, the District Court asserted that the offense of obtaining sexual relations through deceit is problematic with respect to acts of courtship. The legal system must be wary of imposing moral behavior norms or “courting rules.” However, the court stressed:

[W]here we are dealing with a bad faith system of interchangeable lies that is used to “hunt” innocent or not-innocent women, and the line between what is permissible and what is forbidden is crossed, morality becomes the law and the enforcement systems must enter . . . . Such instances should be brought before the courts with caution, for the majority of the instances seem to be deserving of social moral sanction, and it is entrusted to the prosecuting institutions to know when courtship turned into hunting and the women into victims . . . . It appears that only the extreme cases, such as that before us, should be brought before the courts.

CrimA (TA) 157/98 Ben-Avraham v. Israel, [1998] IsrDC 32(2) 96, 15. The question we must ask is whether the case of Hen Alkobi passed this test.

Middle-Eastern origin) who has adopted *Ashkenazi* (Jewish-European) culture and has an *Ashkenazi* appearance. Or in the American context, someone who is black or Latino and can pass as white. Are they obligated to reveal these details to the people they date? Will the person not providing "full disclosure" be criminally liable if he fails to reveal his ethnic or racial origin to his partner? What if these facts are fundamental and relevant to the latter in choosing her sexual partners and she seeks intimate relations only with *Ashkenazis* or whites (for racist reasons)? When it is revealed to her that the person she is dating is of the "wrong" ethnic group, will it be possible to say that she had been deceived as to the identity of the actor?

Under Pugatch's test, it is necessary to show that the non-disclosing man at least suspected that the woman would not consent; however, does a rule that allows a man who suspected his ethnic origin to be relevant to his female partner to be convicted of rape legitimize prejudice and racism? For Pugatch, every woman has the right to choose partners with the characteristics she deems material without the law passing judgment on the morality of her considerations; a woman whose value system is deemed "immoral" should not be denied legal protection, but should instead be sanctioned through non-legal means such as education.<sup>195</sup> Nonetheless, Pugatch posits this approach in the context of instances like *Ben Avraham*, where the "problematic" aspect of the woman's considerations was the fact that she saw sex as a type of transaction in which she gives her body in exchange for social or economic benefits. According to Pugatch, a woman's decision to prefer a pilot or doctor in no way abrogates her legal protection, especially in an unequal society in which women rely on men to advance socially.<sup>196</sup>

I agree with Pugatch that a woman whose only "sin" is to prefer a partner who is a pilot or a doctor is entitled to legal protection, and that the "educational" solution in this case is not refusing her legal protection, but rather use of extra-legal avenues. It is questionable, however, whether this approach applies to instances in which a woman's considerations were racist or discriminatory, because legal protection would legitimize prejudice and the protection of women would, thus, come at the expense of injury to the accused.<sup>197</sup> If a consideration that discriminates on the basis of ethnicity or nationality is deemed unacceptable, then should the same hold true with regard to prejudice of the type manifested in *Alkobi*? The latter prejudice manifests on two levels: in the fact that the complainant claiming "deceit" deprived Alkobi of his masculinity and self-definition and in the fact that she "discriminates" in her intimate relations on the basis of sex. The second prong of discrimination does not, at first glance, appear as such since we are

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<sup>195</sup> Pugatch, *supra* note 185, at 183–87.

<sup>196</sup> *Id.* at 183.

<sup>197</sup> In addition, it should be noted that Pugatch's analysis deals with the relations between men and women and the need to protect women. The question of to what extent this analysis is applicable in the *Alkobi* matter depends on the extent to which Hen Alkobi is recognized as a man.

accustomed to living in a world where the sex of the object of our desire is central to us and to our identities. Ours is the world of modern sexuality, which divides us into heterosexuals and homosexuals.<sup>198</sup> This extremely dominant division of people into these two categories makes discrimination regarding the objects of our desire transparent and endows it with a legitimacy that is denied to ethnicity-based discrimination.

The question that arises is whether in both aspects of sex-based discrimination — the rejection of relations with someone who has changed his sex and sex-based discrimination in relations — Alkobi's, O'Neill's, and Wheatley's convictions extend protection against injury that is perceived or experienced as such only because we live in a transphobic and homophobic society.<sup>199</sup> Is the injury to the complainants (assuming that we accept their versions of the facts) an injury only because they did not know about the genitalia of the defendants in these cases? Or did it originate in the fact that they were exposed to sex that is perceived as homosexual? Is the injury rooted in what the complainants actually experienced, or does the social conception of the type of relations that they experienced compel them to understand the experience as injury? Was the attraction and love the complainants felt towards Alkobi, which led them into relationships with him, contingent on Kobi's genitalia?

The same questions and issues arise in the context of all of the cases discussed in this Article. In *Saunders*, for example, one of the complainants stated that when she first met Saunders and thought that he was a man by the name of James, she was attracted to him.<sup>200</sup> Did whatever made "James" attractive to the complainant and, by her claim, led her to conduct a relationship with James/Jennifer dissipate once the "truth" about his genitalia was revealed? Even if we assume that the complainants in these cases had wished to engage in relations only with a "man," is the thing that attracts us to "masculinity" or "femininity" necessarily a person's genitalia or, instead, the entirety of gender behavior? What is latent to the ideology that designates genitalia as determinative of sexual identity? Is the injury that the complainants experienced a product of their own transphobia and homophobia, and, if so, does such an injury warrant legal protection? These questions are not raised to negate the sense of injury experienced by the

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<sup>198</sup> See generally DAVID HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY* (1990) (describing the emergence of the modern conception of sexuality that divides people into categories of identity (heterosexual and homosexual) according to the sex of their objects of desire).

<sup>199</sup> See CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para. 14 (noting that the question of consent is contingent on culture and cultural and social conventions and that it is possible that this will change along with the times and values and sexual practices); Victoria Steinberg, *A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Cases*, 25 B.C. THIRD WORLD L.J. 499, 510–14 (2005) (discussing the limits of the concept of "sexual fraud" in the context of the argument that not disclosing one's biological sex amounts to such fraud).

<sup>200</sup> R v. Saunders, (1991) (Doncaster Crown Ct.) (unpublished, available at the Cornell Library).

complainants, who claimed to have felt deceived and whose sexual autonomy and world of desire are also deserving of protection. However, recognizing these injuries cannot eliminate the question of how we define injury in our societies and why, the question of when recognizing injury to one person leads to the injury of another, or the question of the role of the courts in this complex order.

Similar questions also arise in the context of the Air Force officer who impersonated a female soldier to have oral sex with two male soldiers.<sup>201</sup> There is no dispute that there was deceit on the part of the officer. However, the fact that the complainants had oral sex while blindfolded raises the question of why, especially in the circumstances described in the court decision, the sex of the soldiers' partner in this act is in any way material. Recall that one of the soldiers even said to the officer that he had enjoyed the act and therefore engaged in a second act. Why, as soon as it became clear that the mouth that had given pleasure to the soldiers' genitalia belonged to a male officer and not a female soldier, did the act transform from an episode of gratifying anonymous sex to an episode of "indecent behavior"? What is the importance of the sex or gender identity of the partner in anonymous sex or relations in general?

It is not my intention to deny the soldiers' justified sense of deception, nor do I seek to deconstruct the sexual or romantic relationship into separate, detached body parts. Rather, this situation illustrates the social mechanisms that enabled the officer to be convicted because the "female soldier" was revealed to be a man, but would not lead to his conviction for providing bad oral sex when he had promised the soldiers gratifying, good oral sex. In this case, like the other cases discussed in this Article and despite their divergences, the injury is a product of the social regime that seeks to differentiate between heterosexuality and homosexuality and to ensure the predominance of the former. Moreover, even if we assume that the sex of their partner was important to the complainants in all of these cases and that they would have chosen only partners whose sex fit their sexual desires, the question remains of the significance of their retrospective determinations after they engaged in the relations, that those relations did not fit the models of their desires. The purpose of this discussion is not to challenge people's right to choose their romantic or sexual partners or their right to choose partners according to, amongst other things, their sex. Rather, it is worth considering how, after one has had satisfying relations with a person of his or her choosing, his or her interpretation of these relations and of the extent of their suitability to his or her desire can suddenly and retroactively change when new facts emerge regarding the biological or other sexual identity of a partner. A further question is how and why this change ends up conceptualized as injury.

This brings us to the question of what, then, is an injury deserving of legal protection? If there was a basis to the charge made in *Alkobi* regarding

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<sup>201</sup> See *supra* text accompanying notes 179–81.

the penetration of a complainant's genitalia with an object she was certain to be male genitalia, then this complainant certainly could have an interest warranting protection. Alkobi denied any sexual contact, while also claiming that this particular complainant knew the entire story of his identity. But, if for present purposes we accept the factual foundation in the amended indictment (the basis of Alkobi's guilty plea and conviction under the plea bargain), it is quite possible that a girl who thought that she was having sexual intercourse with a man with a penis when, in fact, her body was penetrated with an artificial device, would feel severe and real injury. Moreover, in a world constructed on the division between heterosexuality and homosexuality and between men and women, a partner's sex is usually of great importance. Consequently, if the complainant was convinced that Alkobi was a man who was born a male with male genitalia, and these were relevant facts for her, not only could her relations with Alkobi be an injury from her viewpoint, but it could also be an injury Alkobi could have or should have foreseen and suspected — even if he feels himself to be a man.<sup>202</sup>

But are we not ourselves falling into the trap of essentialism and phallocentrism when we assume that the existence or absence of a penis is what determines Alkobi's identity, as well as O'Neill's or Wheatley's?<sup>203</sup> Is a man who has a particularly small penis required to convey this fact to partners? Furthermore, what is the extent of this injury relative to the extent of injury to the defendant in such instances? Does imposing a duty to disclose on someone like the defendants in these trials not cause injury to him — to both his self-identity and his ability to meet young women and have sexual intercourse with them? Even if one was to accept that penetration with an artificial penis without the knowledge of one's partner is an injury that should be protected against, it seems that this would constitute deceit with regard to the nature of the act, not the identity of the actor. Moreover, in any event, Alkobi should not have been convicted for committing an indecent act (nor, most certainly, for impersonation), but rather, only for attempted rape in the alleged penetration act.<sup>204</sup> In addition, it should be recalled that the trials in

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<sup>202</sup> Moreover, one may claim that when one asks what a person's identity is in the intersubjective framework of relations, the perceptions of the *Alkobi* complainants, once they discovered the facts about his genitalia, should have equal weight to Alkobi's perception of himself as a man. Nonetheless, it seems that, at the very least, in the criminal context, preference should be given to Alkobi's self-definition in this case.

<sup>203</sup> Saunders is not relevant in this context, as she did not claim, in her defense, that she is a transgender or transsexual.

<sup>204</sup> It is interesting to ponder what the outcome would have been in reverse circumstances: what if a woman were interested in engaging in lesbian relations with another woman, and she suddenly realized that that other woman had male genitalia? Alternatively, what if a man in a relationship with a woman were to discover to his surprise that his partner had male genitalia? Would the injury in such situations also warrant legal protection? The second example, in which the supposedly injured person is a man, especially gives us even greater cause to wonder about the way in which the law would respond to such cases, since the *Alkobi* circumstances and conviction represent a case of paternalistic protection of women. For similar ruminations, see Smith, *supra* note 36, at 167.

question all involved minors, a fact that — beyond the question of statutory rape — likely has ramifications vis-à-vis consent and injury.

Considering the need to recognize injuries to the complainants in these trials reflects the feminist trend towards giving broad protection to victims of sex offenses and ensuring that they are able to realize their consent in full. Pugatch admits that her approach can be criticized from what she calls the “post-feminist” perspective for presenting a “feminism of victims,” which treats women as helpless victims rather than freedom-holders.<sup>205</sup> However, she claims broad protection of women is vital precisely for ensuring their true sexual freedom.<sup>206</sup> Pugatch, therefore, tries to integrate radical feminist insights with what is at times referred to as “pro-sex feminism.” Radical feminism, which is identified with the thoughts and writings of Catharine MacKinnon,<sup>207</sup> relates to sexuality as a site of male dominance: even heterosexual intercourse that is not rape is, in MacKinnon’s eyes, a form of male dominance.<sup>208</sup> The need to protect women from exploitation, harassment, and rape, and the anchoring of this need in the broader concept of sex and sexuality as a site of male domination, has impacted the development and expansion of the requirement for consent in sex offenses. Specifically, the development of the concept of “deception” in sexual relationships as a legal cause of action was part of the feminist project to change the prevailing liberal concept of “sexual consent,” which feminism considered inadequate for safeguarding the sexual freedom of women.<sup>209</sup> While no one denies the need to protect women from nonconsensual sex, the sex-positive feminist school of thought maintains that the radical feminist struggles, especially the battle against pornography, represent a distrustful and negative approach to sex and leave no space alongside diminishing the danger to women for expanding their possibilities, opportunities, and license for sexual pleasure.<sup>210</sup> In this spirit, Katherine Franke points to the fact that legal feminism, which was extensively influenced by MacKinnon, has expounded a broad theory of the right to say “no” to sex but left it to others — especially gay and queer

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<sup>205</sup> See Pugatch, *supra* note 185, at 182.

<sup>206</sup> *Id.*

<sup>207</sup> See, e.g., CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987); CATHARINE MACKINNON, *TOWARD A FEMININE THEORY OF THE STATE* (1989) [hereinafter *MACKINNON, FEMININE THEORY OF THE STATE*].

<sup>208</sup> MACKINNON, *FEMININE THEORY OF THE STATE*, *supra* note 207, at 174.

<sup>209</sup> See Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 796–97, 830–35 (1988) (describing the development of a civilian tort for sexual deception and considering the possible criminal implications); see also Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986) (advocating the expansion of the legal definition of rape to other cases beyond “real” rape by force, including sex by fraud). I am, of course, by no means suggesting that these specific feminist writers would necessarily support conviction in cases like the ones described in this Article.

<sup>210</sup> See Carole Vance, *More Danger, More Pleasure: A Decade After the Barnard Sexuality Conference*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (Routledge & Kegan Paul Books, 1986), at xvi, xvi–xvii.; see also LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* (Lisa Duggan & Nan D. Hunter eds., 10th ed. 2006) (describing the debate within feminism).

theorists — to develop the thinking on the significance of saying “yes” to sex.<sup>211</sup> Sex, under the MacKinnon-inspired approach, has become a site of danger alone. Franke believes that feminism must not leave it solely up to queer theory to elaborate the positive in regards to sex or to consider the complexity of ways in which desire and pleasure are enabled by denial, shame, domination, prohibition, objectification, and power.<sup>212</sup>

A feminist analysis of the cases in question might, indeed, find that the complainants possibly did not have all of the necessary information regarding the precise identity of Alkobi, O’Neill, Wheatley, or Saunders and were thereby stripped of full control and choice. Yet we might also consider the extent to which uncertainty about identity, blurring of gender lines, and loss of control over all the information are part of the world of desire, and the extent to which their elimination can restrict sexuality — including feminine sexuality. In Franke’s words,

Desire is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation. It is also what makes pleasure, not a contradiction of or a haven from danger, but rather a close relation. These aspects of desire have been marginalized, if not vanquished, from feminist legal theorizing about women’s sexuality.<sup>213</sup>

Pugatch’s feminist analysis attempts to express the expansion of the sexual possibilities for women and thereby integrate the different feminist perspectives. However, accepting her elaboration of the consent requirement — a requirement that assumes the existence of fundamental and important information a woman should have when making a decision to have sexual relations as well as a duty to disclose information — returns us to a very “clean” model of sex and desire and to the difficulties highlighted by pro-sex feminism and by Franke. Janet Halley has posited that MacKinnon’s model is constructed on an understanding of a hierarchy between men and women and that her entire analysis of the issue of sex takes the perspective of domination of women while precluding any possibility of a more complex phenomenon of desire, such as that described by Franke.<sup>214</sup>

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<sup>211</sup> Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 207–08 (2001).

<sup>212</sup> *Id.* at 181–82, 197–208.

<sup>213</sup> *Id.* at 212.

<sup>214</sup> Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown & Janet Halley eds., 2002) [hereinafter Halley, *Sexuality Harassment*]; Janet Halley, *Take a Break from Feminism?*, in GENDER AND HUMAN RIGHTS 57 (Karen Knop ed., 2004).

Moreover, MacKinnon's model of feminism, with its totalistic analysis of the question of sex, may be blind to other justice interests and the injuries likely to arise if every instance of sex is analyzed through its prism.<sup>215</sup> More generally, in Halley's analysis, feminism — at least as developed in the United States — is typified by a distinction between “m” (male) and “f” (female), a commitment to working against a theory about the subordination of f to m (m>f), and by “carrying a brief for f.”<sup>216</sup> According to Halley, unless feminism “takes a break” from itself, it will not be able to see injury to others or justice projects other than the feminist one.<sup>217</sup> Thus, the feminist rallying around the expansion of the consent requirement in sex and criminalization of “sexual fraud,” made concrete in the public debate over the *Alkobi* case, can be seen as part of the feminist justice project, in that the situations are understood in terms of the m/f dichotomy, and a brief is carried for the subordinated f, the complainants. This seems, therefore, to reflect what Halley describes as feminist blindness to injury done to others — in this specific instance, to the transgender justice project as well as to any more general queer project aimed at deconstructing the binary divisions of gender and sexuality. However, it is important to note that, under this model, the complainants in all of the cases were women deserving of protection, which is usually conceived of as safeguarding against male dominance, despite the non-recognition of Alkobi, O'Neill, and Wheatley as men.

In *Alkobi*, for example, we can understand the conviction for attempted rape as situating Alkobi alongside men who injure women and extending protection to the women he injured on the basis of the male domination model, thereby turning him into a man and relating to him like a man, but solely for this purpose.<sup>218</sup> Or perhaps we should see here an alignment of forces seeking Alkobi's conviction — an alliance between the compulsory heterosexuality apparent in the court's judgment and the feminist justice project focused on rescuing women from sexual injury. On the one hand, that these forces should coalesce is ironic, given that compulsory heterosexuality is part of the very system subjugating women; on the other hand, this coalition can also be understood as a result of the incorporation of the m/f division and hierarchy into much of feminist thought itself. Regardless, the injury to Alkobi can be regarded as one of the injuries that Halley claims MacKinnon's feminism will likely be blind to if it adheres to its premise that the model of male domination of women is the only correct way to understand sex issues.

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<sup>215</sup> *Id.*

<sup>216</sup> JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 4–5, 17–20 (2006).

<sup>217</sup> *Id.* at 33.

<sup>218</sup> My thanks to Amalia Ziv for this insight. Cf. Smith, *supra* note 36, at 176 (discussing the way the English court transformed Jennifer Saunders into a pseudo-male rapist).

In contrast is the queer approach, which views both the heterosexual/homosexual division and the male/female division as cultural constructs.<sup>219</sup> This approach does not deny the existence of these divisions or their very real impact on people's lives, but instead rejects them as rigid categories and holds that they can be, and often are, transgressed.<sup>220</sup> Indeed, queer theory even values the collapse of these dichotomies, since they are in themselves part of the problem.<sup>221</sup>

It is not my intention to join the chorus of cries mourning the "death of romance" due to the laws of sexual harassment and expansion of the consent requirement. There is no doubt that women must be protected against injury. Pugatch's analysis is a commendable attempt at ensuring such protection while retaining a conception of the value of sexuality for women. However, notwithstanding this and the circumstances and people of the four concrete cases, an analysis of the questions that arose in these cases that applies the insights of pro-sex feminism and queer theory should leave at least some room for the possibility that lack of knowledge, confusion with regard to gender, and gender incongruence can sometimes be part of desire.<sup>222</sup> A completely "rationalistic" conception of desire is likely to erase this possibility and designate cases like the ones discussed in this Article as clear and unequivocal instances of deceit.

The traditional feminist voice was sounded in the public debate that raged within the gay, lesbian, bisexual, and transgender communities in Israel over the *Alkobi* affair. Stormy emotional discussions were conducted on the community's internet forums, exposing inter-community tensions.<sup>223</sup> Some of the posts, especially those from female users, stressed women's right to choose with whom they wish to have sexual relations.<sup>224</sup> Others pointed to the right of transgender individuals to live in the identity that suits them.<sup>225</sup> These debates returned also to the question of who is a "man" and who is a "woman," with those siding with the complainants claiming that a person who changes his or her sex is not a real "man" or "woman" and must reveal his or her sex-change to partners.<sup>226</sup> An active transsexual par-

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<sup>219</sup> See Cressida Heyes, *Feminist Solidarity after Queer Theory: The Case of Transgender*, 28(4) SIGNS: J. OF WOMEN IN CULTURE & SOC., 1093, 1094 (2003).

<sup>220</sup> *Id.* at 1094–95.

<sup>221</sup> *See id.*

<sup>222</sup> *See* BUTLER, *supra* note 83, at 122–23 (discussing dissonance as part of desire). These kinds of options are precluded by the court decisions.

<sup>223</sup> The central forums in which these discussions were conducted are the Nana lesbian forums and Tapuz's transgender and friends forum. Nana Lesbian Forums, <http://forums.nana.co.il/Forum/?ForumID=2049> (last visited Nov. 26, 2008); Tapuz Transgender & Friends Forum, <http://www.tapuz.co.il/tapuz/forum/main/anashim.asp?forum=496&pass=1> (last visited Nov. 26, 2008).

<sup>224</sup> *See* Yael Rozin, *The Socializing Dimension of the Virtual Sphere in Founding a Lesbian Community*, in VISION OF THE HUMAN IN CYBERCULTURE, CYBERSPACE AND SCIENCE FICTION (Marcus Leaning & Birgit Pretzsch eds., forthcoming) (discussing the internet debates on the Alkobi matter in online forums).

<sup>225</sup> *See id.*

<sup>226</sup> *See id.*

ticipant on a lesbian forum quit the forum, posting that the positions taken regarding Alkobi excluded transgender women not only from the group of “real” or “natural” lesbians but also from the group of “real” women.<sup>227</sup> The discord and debate continued at a meeting with Alkobi at the Israeli Gay, Lesbian, Bisexual, and Transgender Association (“GLBT Association”) and then on the pages of the community newspaper *Hazman Havarod* (“*Pink Time*”).<sup>228</sup> The paper quoted Orit Putoshnik, a feminist lesbian who attended the meeting with Alkobi, as saying that the acts that Alkobi was accused of and to which he pled guilty amount to a divestment of the right to free choice of the identity of your partner in sex; moreover, she stressed that the consent requirement and deceit provision in the law were achieved through great efforts to ensure the protection of women and this right to free choice.<sup>229</sup>

In contrast, the same article quoted female activists who supported Alkobi, such as attorney Maya Rosenshtein, as criticizing the problematic assumption that Alkobi is a woman and not a man.<sup>230</sup> The *Alkobi* case thus set radical feminism and the queer theory approach to sex and gender on a collision course. The feminist approach represented by Putoshnik offers an extension of protection to women but injury to Alkobi. Her analysis of the case applies the model of the woman as potential victim of sex offenses. Some feminist and queer criticism has pointed to the inherent difficulties in this view, which paints female identity as constructed on injury and women as victims.<sup>231</sup> Wendy Brown, one of the prominent critics from this orientation, has also asserted the problematic nature of the feminist appeal for justice to the state and its legal and disciplinary power.<sup>232</sup> The implications of such an appeal are apparent in the verdicts in the Alkobi, O’Neill, Wheatley, and Saunders trials: they grant protection to women, who are perceived as victims, but at the cost of reinstating the gender regime. The inherent para-

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<sup>227</sup> *Id.* These arguments recall, to a certain extent, disputes between the transsexual movement and feminism and at times even the lesbian movement in the United States, which in part revolved around disagreement as to who is a “real woman.” For example, the Womyn’s Music Festival in Michigan, a lesbian-feminist event, set as its official policy in 1991 that the event is open only to “womyn-born-womyn.” See CALIFIA, *supra* note 25, at 86–119, 227–29; JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* 256–62 (2002) (discussing the conflict between transsexuality and feminism, the lesbian movement, and the gay movement, and the music festival in Michigan); see also Surya Monro, *Transgender: Destabilizing Feminisms?*, in *SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS* 125 (Vanessa E. Munro & Carl Stychin eds., 2007) (exploring the challenges posed by transgender thought to feminism).

<sup>228</sup> Tamara Schreiber, *Nire ot’ha gever* [*Show Us Man*], *HAZMAN HAVAROD* [PINK TIME] (Isr.), July 2003, at 26.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See HALLEY, *supra* note 216, at 319–47 (describing an “injury triad” that lies at the heart of the contemporary politics of injury: namely, women do not cause any social harm and are injured, and men who injure women are immune to harm).

<sup>232</sup> WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY*, at ix–xiii, 21–29, 43–47, 52–95 (1995); see also Halley, *Sexuality Harassment*, *supra* note 215, at 65–66.

dox is that the gender regime imposed by the courts is the very same social regime of patriarchal compulsory heterosexuality that undermines the status of women.<sup>233</sup>

In sum, the convictions in the four cases in effect restored the heteronormative regime against the complex queer reality that blurs the lines of gender and sexuality, of male identity and female identity, of heterosexual sex and homosexual sex,<sup>234</sup> and of the principle of correlation in the sex-gender-sexuality order.<sup>235</sup> Despite this reality, the courts reestablished the binary regime of men and women; despite everything, there is, in the words of the *Alkobi* court, an “accepted” sense to the notion of sex, according to which *Alkobi* is a woman. However, as noted, the sentencing judgment in that case speaks in two voices: on the one hand, the “comment” on gender relates to the move between the sexes, of gender and queer theory, and of every person’s right to act in accordance with his or her internal emotional feeling. On the other hand, *Alkobi* is continuously related to as a woman and “she” is convicted of impersonation. So while the *Alkobi* court did indicate that an erotic-intimate-romantic relationship can exist between two people/men/women,<sup>236</sup> thereby covering all possible forms of couplehood, in its reasoning for the severity of *Alkobi*’s sentence, it noted that “she” exploited (in its words) the complainants’ “natural and accepted yearning at these ages . . . to enter into romantic relationships with the opposite sex.”<sup>237</sup> In the end, then, the court saw the yearning for relations with the opposite sex as the natural (as well as the accepted) yearning. The threat to heterosexuality and the entire regime of sex-gender-desire correlation jeopardizes the social structure built on hierarchical binarism (male/female, man/woman, heterosexual/homosexual). The presentation of a third option, or a multiplicity of options, rather than two hierarchical options, also threatens this social regime.<sup>238</sup>

Similarly, in its sentencing remarks, the Crown Court in the *Saunders* case stated that *Saunders*’ alleged assaults on the complainants constituted an offense far more serious than heterosexual rape, as she had violated the heterosexual identities of the alleged victims. “You have called into question

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<sup>233</sup> See RICH, *supra* note 102, at 23 (discussing the connection between compulsory heterosexuality and patriarchy and its influence on the status of women).

<sup>234</sup> See SHARPE, *supra* note 116, at 5 (exploring the regulatory role of the law, which, in its encounter with the transgender body, seeks to produce legal-medical binary conceptions of sex, gender, sexuality, and the relationship amongst them).

<sup>235</sup> See EVE K. SEDGWICK, TENDENCIES 5–9 (1993) (identifying queerness as challenging the “natural order,” under which everyone’s sex is identical to his or her gender, and the desire and sexuality that derive from sex entail attraction to the opposite sex).

<sup>236</sup> CrimC (Hi) 389/02 Israel v. *Alkobi*, [2003] IsrDC 3341(3) para. 15.

<sup>237</sup> *Id.* para. 7.

<sup>238</sup> See MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY 9–13 (1992) (elaborating on the “third” option in the context of gender as threatening the social regime constructed on binarism); Gilbert Herdt, *Preface* to THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 11, 19 (Gilbert Herdt ed., 1996).

their whole sexual identity,” declared the judge, “and I suspect both those girls would rather have been actually raped by some young man than have happened to them what you did.”<sup>239</sup> This, together with the determinations made by the Court in the *Alkobi* sentencing judgment, is clear evidence of the courts’ respective attempts to preserve heterosexuality and stable sex/gender identities in these cases rather than the notion of sexual consent. The judge in *Saunders* saw a need precisely in “these days of openness about lesbianism and sexual behavior” for punishment that would deter anyone tempted “to try and copy” Saunders’ actions and accordingly sentenced her to six years imprisonment.<sup>240</sup> The Court of Appeal subsequently deemed the sentence “substantially too long, even for a case of this gravity, in view of the youth of the offender,” and commuted it to two years’ probation.<sup>241</sup> The court decisions in these cases not only precluded the lesbian possibility but also the possibility, discussed above, of gender blending or incongruity in itself being attractive. That is to say, the court rejected both the possibility that the young complainants had lesbian desires and the possibility of (in Judith Halberstam’s words) “girls who like their boys to have been genetic girls.”<sup>242</sup>

#### VI. THE POLITICS OF REPRESENTATION AND THE BORDER WARS: BETWEEN LESBIANISM AND TRANSEXUALITY

The *Alkobi* case stirred disagreement within the gay, lesbian, bisexual, and transgender communities in Israel. This disagreement involved the tension between the feminist approach seeking to protect women from sex without their full consent and the approach of maintaining a person’s right to live in a gender identity of that person’s choice and to reject any disclosure duty, based not only on the right to privacy and to legal and social protection of a person’s identity, but also based on a questioning of the very existence of rigid and binary boundaries to gender that can be identified and disclosed. This discord, as illustrated above, also focused on the crossing of gender lines. Transgender individuals interpreted the demand made of *Alkobi* and others like him to reveal the facts of their genitalia as an assertion that a woman who is born male is less of a “real” woman than are “biological women,” thereby negating the former’s identity as a woman and, in the case of a transgender attracted to women, also her identity as a lesbian. *Alkobi*

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<sup>239</sup> R v. Saunders, (1991) (Doncaster Crown Ct.) (unpublished, available from the Cornell Library); see also Smith, *supra* note 36, at 165–66.

<sup>240</sup> R v. Saunders, (1991) (Doncaster Crown Ct.) (unpublished, available from Cornell Library); see also Smith, *supra* note 36, at 278.

<sup>241</sup> R v. Saunders, (1992) (EWCA Crim.) (unpublished, available from the Cornell Library).

<sup>242</sup> Judith Halberstam, *F2M: The Making of Female Masculinity*, in *THE LESBIAN POSTMODERN* 210, 220 (Laura Doan ed., 1994). As Halberstam notes, there are “women who have always been searching for a woman with a dick or a dyke with a dick.” *Id.*

was classified in this dispute as a case of transgender identity, namely, where a sex change or crossing of the gender lines has occurred. This was also the defense's leading line of argument in Alkobi's trial, at least at the pre-sentencing stage; however, as noted, the complainant who recanted her testimony against Alkobi stated in her letter to the court that she had known all along that Hen is a "woman." She had decided to keep this fact a secret and even file a complaint against Alkobi due to her fear of being exposed as a lesbian: "I knew that this was a girl because she had a very feminine voice . . . but this in no way bothered me and I even fell in love with her. And now, for the first time, I am prepared to admit to you, Your Honor, as well as to myself, that I am a lesbian."<sup>243</sup> This raises the possibility of understanding the case, at least from the perspective of this particular complainant, as a story of lesbian relations. Alkobi, however, openly identified as transgender, as someone who regards himself as a man. As he declared to the media at the conclusion of the trial, "Never in my life have I been a lesbian or gay."<sup>244</sup> He claimed not to identify with women who love women, but, rather, to have felt from an early age, as noted in the newspaper article published during the trial, that "I want to be a boy" and that "[t]here is a boy inside of me."<sup>245</sup> There were times that Alkobi presented himself to his family as a lesbian;<sup>246</sup> however, in a letter to his parents that was also published in the newspaper at the end of his trial, he stressed that his love for girls is not a product of lesbianism "because there is a difference. Usually, lesbianism is a girl who loves a girl. In my case, I do not feel a girl inside. I speak of myself in the masculine, I think of being a boy . . . my inner soul is male."<sup>247</sup>

As I have noted, it is not my intention to analyze Hen Alkobi, the specific person, whose mode of self-identification must be respected. Rather, I focus on two of the depictions presented by Alkobi and others interpreting the events that were the subject of his trial: one portrays the story as a case of lesbian relations (as described by the recanting complainant), and the other portrays someone who feels he is a boy having, at least from his perspective, heterosexual relations with girls. Recall that, in the sentencing judgment, the court noted that it was prepared to accept the "female" defendant's and the witnesses' statements that, as transgender individuals, they feel like men in every respect, but are trapped in the bodies of women.<sup>248</sup> Moreover, the court noted that "Alkobi suffers from a problem with her sexual identity," which arose from both her statements and letter to the court in which she stated that she feels like a "man inside the body of a woman."<sup>249</sup>

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<sup>243</sup> El-Hai & Lem, *supra* note 2, at 33–34 (quoting complainant's original letter).

<sup>244</sup> Shabbat & Tourjeman, *supra* note 1.

<sup>245</sup> El-Hai & Lem, *supra* note 2, at 35.

<sup>246</sup> *Id.* at 38, 74.

<sup>247</sup> *Id.* at 74.

<sup>248</sup> CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para. 12.

<sup>249</sup> *Id.* para. 7.

Indeed, Alkobi's external appearance, the court remarked, is that of "a young boy-young man."<sup>250</sup> This fact was supported, in the court's opinion, by the probation officer's observation that Alkobi was experiencing confusion between "her" disposition to behave according to the male gender and "her" understanding that, in certain situations, "she" must act like a young woman.<sup>251</sup>

This conception of Alkobi also arose from the line of defense taken in his case and was reinforced by the witness testimony presented at the presentencing hearing. One such witness was Nora Grinberg, at the time a board member of Israel's GLBT Association. Grinberg testified that she herself had been born a male and had undergone a sex-change operation.<sup>252</sup> Grinberg recounted that she had made contact with Alkobi due to her position within the Association, for it had been completely clear to her that Alkobi was a person with a non-normative gender identity in need of the Association's protection. As she told the court, when she met Alkobi, she knew,

This is a woman-to-man transsexual, even if he himself is unaware of the definition of his situation, but both by the way in which he presents himself and the way in which he behaves, he speaks of himself, we spoke much about his identity problems, it is completely clear that this is a person with a male identity. This is a transsexual who has been charged and convicted due to a complete lack of understanding of his situation and his identity.<sup>253</sup>

Grinberg further spoke to the fact that,

Under our society's approach, genitalia are perceived as the designators of biological sex, and biological sex is perceived as determining gender identity, and this is what determines whether someone is a man or woman. This is also how children are raised, that is, they are educated into a certain gender role, and for the majority of children, things work out. But there are some children for whom there is a lack of correlation with identity . . . .<sup>254</sup>

Later in her testimony, Grinberg stressed that gender identity and sexual orientation are two different things. "Transsexuals have sexual orientation in either direction . . . . There is no connection between sexual orientation towards who attracts you and gender identity." "Hen and I," she added, "are not in the same situation. I am a person who reached a crisis in the situation, I overcame it. I am in another place. Hen is in a place where he has not even begun to contend with his problem. And we cannot be com-

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* para. 8.

<sup>253</sup> *Alkobi*, IsrDC 3341(3)

<sup>254</sup> *Id.* para. 9.

pared.”<sup>255</sup> Grinberg also discussed the fact that a transsexual who wants to undergo a sex-change procedure must live for a certain period in the gender role he feels he belongs to and present a credible image of someone who belongs in that gender role; that is, in her words, he is obligated to “impersonate.”<sup>256</sup> But Alkobi, she noted, has yet to reach this stage of awareness: “He lives his life, is not accountable even to himself, does not understand that he is deceiving someone . . . . He does not explicitly clarify to himself.”<sup>257</sup> In response to the defense attorney’s question, “When Hen presented herself as ‘Kobi,’ did she believe herself to be Kobi?,” Grinberg replied, “In my estimation that is the situation.”<sup>258</sup>

Testimony was also given by Dr. Ilana Berger, a therapist specializing in sexuality and gender. In testifying, Berger spoke of a gender identity disorder in which there is a strong experience of self-perception and internal images of the desire to belong to a certain sex, as well as the experience of incongruence — dysphoria — between the gender identity and the biological sex defined by genetic, endocrinal, and physiological-anatomical sex.<sup>259</sup> Gender identity is not determined according to genitalia alone, and the biological sex that appears in one’s official identity documentation is immaterial. In response to the court’s question regarding disclosure of the facts of one’s genitalia, Berger noted that in a significant relationship, she assumes disclosure is inevitable because the question would “come up.”<sup>260</sup> She stressed, however, that a person’s failure to disclose does not necessarily reflect an intention to deceive, as in her words:

for . . . transsexuals . . . experience and perceive themselves in the most essentialist, subjective, and primary way in the experience of their being boys or girls . . . . They see themselves in a very profound and true and genuine way just as everyone who gets up in the morning and is asked who he is.<sup>261</sup>

Berger’s explanation is, to a significant extent, reminiscent of the concept of Gender Identity Disorder as defined in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”).<sup>262</sup>

<sup>255</sup> *Id.* para. 10.

<sup>256</sup> *Id.* para. 11. Under the treatment protocol accepted by the medical community in Israel and generally in the world with regard to transsexuals, it is common practice that transsexuals live a certain period of time, prior to the sex-change operation, in the new sex they seek. See Walter Meyer III et al., *The Standards of Care for Gender Identity Disorders*, 5 INT’L J. TRANSGENDERISM, ch. IX (2001), available at [http://www.symposium.com/ijt/soc\\_2001/index.htm](http://www.symposium.com/ijt/soc_2001/index.htm).

<sup>257</sup> *Alkobi*, IsrDC 3341(3) para. 12.

<sup>258</sup> Hearing Protocol, *supra* note 44, at 10–11.

<sup>259</sup> *Id.* paras. 14–18.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> This refers to the definition that appears in the DSM IV. Transsexuality, which appeared in the DSM III, was replaced by “Gender Identity Disorder” in the DSM IV. This diagnosis is comprised of four components:

This conception certainly left its imprint on the sentencing judgment — in the determination that Alkobi “suffers” from a sexual identity problem and feels to be “a man in a woman’s body.”<sup>263</sup> Despite the differences between the psychiatric approach that pathologizes non-normative gender identity and the therapeutic paradigm presented by Berger, the two describe the phenomenon of “dysphoria” in a comparable manner. Similarly, a medical model of transgenderism was used by the defense in the O’Neill trial, where transgender activists and a psychiatrist also testified, with the latter applying the Gender Identity Disorder (“GID”) model in describing O’Neill as “a male somehow buried in a woman’s body.”<sup>264</sup>

Clearly the transgender politics discourse, represented by Nora Grinberg, and the therapeutic approach to transsexuality, represented by Ilana Berger, both set Alkobi as a man imprisoned in the body of a woman, regardless of whether Alkobi himself is aware that he is a transsexual. To a great extent, the court accepted this model.

Thus, Alkobi’s case was categorized as one of transsexuality and transgenderism, that is, a case of crossing the sex lines, and not of relations between members of the same sex. It should be stressed that this approach was consistent with Alkobi’s feelings, needs, and self-identification as they emerged from his statements. In contrast, the recanting complainant interpreted her relations with Alkobi as lesbian in nature, an interpretation that obviously cannot be disregarded. Alkobi also recounted that one of his relationships had been with a girl whom he understood to be a lesbian and who presented him to her parents as “Kobi” because they are “primitive and unable to accept [her lesbianism],”<sup>265</sup> echoing the line of defense taken in *Saunders*. Thus, two different interpretations of the relations were presented

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1. A strong and persistent cross-gender identification.
  2. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.
  3. The disturbance is not concurrent with a physical intersex condition.
  4. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS — DSM IV 532–38 (4th ed. 1994). The fourth element limits the psychiatric diagnosis to cases in which the person’s functioning is impaired. This is a common condition in many of the diagnoses in the Manual. See MEYEROWITZ, *supra* note 227, at 254–55 (detailing the changes in the DSM).

<sup>263</sup> CrimC (Hi) 389/02 Israel v. Alkobi, [2003] IsrDC 3341(3) para. 7.

<sup>264</sup> Nye, *supra* note 25, at 249; see also James Green, *supra* note 28 (recounting, from a first-person perspective, the involvement of transgender activists in the O’Neill trial); BUTLER, *supra* note 96, at 75–101 (analyzing the GID model and its effects); Franklin Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005) (discussing a further critique of the GID model); Dean Spade, *Mutilating Gender*, in THE TRANSGENDER STUDIES READER, *supra* note 109, at 315; Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15 (2003) (giving a first-person account and the discussion of the effects of the GID model on people’s lives).

<sup>265</sup> El-Hai & Lem, *supra* note 2, at 3.

in Alkobi's defense: Alkobi and those who testified on his behalf explained his behavior as deriving from the fact that he feels himself to be a man in every respect, yet the recanting complainant explained her original complaint as a need to hide the lesbian nature of the relations, and Alkobi himself was aware that at least one of the complainants is lesbian.

Similar to the *Alkobi* trial, in the *O'Neill* case, the sentencing was preceded by a hearing in which both transgender activists and a psychiatrist who had treated Sean O'Neill gave testimony explaining his situation.<sup>266</sup> Furthermore, like Alkobi, O'Neill viewed his relations with the young women he had dated as "a boy-girl relationship," and he indicated that he did not see himself as a lesbian.<sup>267</sup> In response to one of the woman's statements in a television appearance, that she sometimes wonders whether she is a lesbian, O'Neill said that he does not like this line of thought, emphasizing the heterosexual nature of the relationship: "No I am not [a lesbian] . . . I actually see myself as a man."<sup>268</sup> This, of course, stands in contradiction to Jennifer Saunders' self-identification as a woman and her construction of the relationships for which she was brought to trial as a lesbian. Recall that, under her own interpretation of the events, Saunders' partners had produced their narrative of her deception out of fear of homophobic parental pressure.<sup>269</sup> While testifying in court, Saunders admitted to passing for a boy when she first met one of the complainants, but she claimed it was only because of the way she was dressed and only in response to a joke made by a friend.<sup>270</sup> Although denying having actually had relations with the complainant, Saunders did give an explanation for continuing to represent herself as a man: she was trying to conceal the fact that she had a connection with the complainant from the complainant's parents and preserve their understanding of their daughter as a heterosexual.<sup>271</sup>

The narrative that emerges here, while denying the existence of a relationship, constitutes a lesbian line of defense — that is, Saunders portrayed herself as a man to reassure the complainant's parents of her heterosexuality, apparently in contrast to the more complex reality. After the trial, Saunders effectively admitted to some kind of relationship with the complainant by writing in a letter to her supporters that she had gone along with the complainant's request as she was living with her and did not want to hurt her.<sup>272</sup>

<sup>266</sup> Nye, *supra* note 25, at 246–47.

<sup>267</sup> *Id.* at 249.

<sup>268</sup> *Id.* at 248–49.

<sup>269</sup> See Smith, *supra* note 36, at 168.

<sup>270</sup> *R v. Saunders*, (1991) (Doncaster Crown Ct.) (unpublished, available from the Cornell Library). Saunders noted that she was wearing a pair of light blue jeans, a green striped shirt, and a pair of Reebok trainers and her hair was cut short. *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> Smith, *supra* note 36, at 165 (citing Cherry Smyth, Out News, City Limits, Nov. 21–28, 1991 (quoting Letter from Jennifer Saunders to OutRage!)). In a subsequent interview, Saunders described a lesbian relationship she had in prison, in a way that, in the words of Smith, portrays her as a confident lesbian. *Id.* The court, by rejecting her version, transformed her into a "perverted rapist." Anna Marie Smith, *The Regulation of*

The Senior Probation Officer who testified at Saunders' trial described her — recalling the depiction of Alkobi by his probation officer — as on occasion dressing “as a young man,” while, at other times, dressing as a woman, a “very attractive young woman.”<sup>273</sup> When asked whether wearing what she described as “unisex” clothing, not owning any skirts or dresses, or wearing makeup indicated that she sought to look like a boy, Saunders responded, “[n]o, I wanted to look like myself.”<sup>274</sup>

Therefore, while a transgender line of defense was taken in the O'Neill trial and a lesbian line of defense in the Saunders trial (notwithstanding the apparent gender-bending by Saunders), the Alkobi trial involved *both*: the transgender line of defense was taken by Alkobi's attorney at the urging of the intervening transgender activists, whereas the lesbian line was presented by the recanting lesbian complainant, which somewhat resounded in Alkobi's own account of his relationship with her. These two lines of argument — the one constructed on a claim from the area of sexuality (lesbianism) and the other on a claim from the area of gender (transsexuality) — are presumably on colliding trajectories or, alternatively, meet at the intersection of the questions of gender and sexuality. My underlying premise in the discussion in this Article has been that every person interpreted the events as he or she understood and experienced them. We cannot ignore the fact that the transsexual line of defense raised the problematic issue of people with gender identities that do not correlate with their genitalia before the *Alkobi* and *O'Neill* courts, and this can be assumed to have contributed to the defendants' receiving a more lenient sentence than otherwise would have been expected.<sup>275</sup>

This notwithstanding, I wish to inquire into the significance of conceptualizing the issue in these two cases as a matter of *gender alone*, the line taken by the defense in both, especially in light of the diverging conception of the recanting complainant in *Alkobi*. The relation between the interpretations of the events and the parallel lines of defense is a concrete manifestation of the important questions raised by these trials. First, are sexual orientation and gender identity indeed two completely different things? Are

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*Lesbian Sexuality through Erasure: The Case of Jennifer Saunders*, in *RESISTING THE POLITICAL* 181, 182 (Jodi Dean ed., 1997) (This article is a revised version of the Smith article at *supra* note 36.). As noted by Smith, a discrepancy exists between Saunders' denial in court of actually being in a relationship with the complainant and her description later to the press of acting out of love for her. See Anne Marie Smith, *The Hegemonic Regulation of Butch Performance: R v. Saunders*, in *BUTCH/FEMME: INSIDE LESBIAN GENDER* 177 (Sally Munt ed., 1998). However, in both accounts, Saunders claimed that the complainant in question knew she is a woman and that she passed as a man at her request.

<sup>273</sup> *R v. Saunders*, (1991) (Doncaster Crown Ct.) (unpublished, available from Cornell Library).

<sup>274</sup> *Id.* at 224.

<sup>275</sup> However, a dispute revolved around the presentation of Alkobi's trial as a transsexual matter, with concern expressed that such a presentation and the disclosure requirement set by the court would be detrimental to transsexuals in the future. See sources cited *supra* note 223 (discussions on the different internet forums).

relations of the type that developed between Alkobi and O'Neill and the respective complainants indeed heterosexual, as Alkobi and O'Neill apparently viewed them, or lesbian, as the recanting complainant in *Alkobi* regarded them? Or both? Or neither? Were the defendants in these trials, in the eyes of the complainants, lesbians, heterosexual men, transsexuals, or transgenders? What can explain the similarity in the probation officers' descriptions of certain aspects of Alkobi's and Saunders' gender behavior, given their differing self-identifications? Perhaps these cases in fact concretize the problematic nature of these categories both as imposed categories and as constituting the basis of our identities. Does this problematic nature point to a need to free ourselves of these categories?

In answering these questions, it is vital to keep in mind that, as subjects, individuals often feel "lesbian," "transsexual," and/or "transgender." However, it is also important to examine the functioning of the ideology that makes individuals — or in Althusser's words, "interpellates" individuals — as subjects.<sup>276</sup> Althusser asserts that ideology functions in a way that constitutes concrete individuals into subjects and drives them "to work all by themselves."<sup>277</sup> Here, we see the dual character of the subject: he is simultaneously in subjection and free. He is created out of the ideological discourse and submits to that discourse (subjected), while the same discourse situates him as an autonomous and free-willed individual in the social field of action (subject). Our existence as subjects is not, accordingly, solely a product of self-constitution, but a result of the submission to what Althusser describes as an ideological "interpellation."<sup>278</sup> The dominant ideology divides us into heterosexuals and homosexuals, into men and women, into "non-transsexuals" (the neologism "cissexual" is now used for this category, a parallel of the neologism "cisgender" which is now used for "non-transgender" people) and transsexuals. Does this ideology make those of us who do not fit the dominant gender conception transsexuals? Is the category of "transsexuals" not in fact a product of a world of sexual binarism, in which we must decide on which side of the gender line to situate ourselves? Is the transsexual — or lesbian — identity not in fact a product of ideological interpellation?

It is not only the dominant gender and sexuality ideologies that divide us into these categories: social movements opposing the hegemony are also likely to participate in the interpellation activity and the constitution of the concrete subject, such as those that struggle in the various arenas of identity

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<sup>276</sup> Louis Althusser, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS II* at 127, 175–83 (Ben Brewster trans., 1971). In Althusser's famous example of interpellation, a man is walking in the street and suddenly hears a policeman hail him with "Hey, you there!" The minute he turns around, he becomes a subject—he recognized that the interpellation was directed "exactly" at him. *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

politics, including the legal sphere, for reform.<sup>279</sup> And while the rise of the newer category of “transgender” implies a broader, supposedly less rigid category than “transsexual,” through which various people and practices can become comprehensible to themselves and to others (to the courts in the *Alkobi* and *O’Neill* cases, through the mediation of activists and therapists), it is important to understand, as David Valentine notes, that “transgender” does not merely explain non-normative genders, it is also in itself a productive category.<sup>280</sup> Indeed, the emergence of “transgender” as a category that is considered progressive, as it facilitates more accurate self-identity, may clash with the reality that not everyone experiences and understands homosexual and transgender identification as so radically distinct. The use of “transgender” restricts the possibilities available to explain gender variance no less than it enables such clarification.<sup>281</sup>

In the cases discussed in this Article, people and events were interpreted as either strictly “transgender,” a category with strong explanatory force, or strictly “lesbian.” To what extent does the need to understand — and explain — the events that transpire in cases such as *Alkobi* and *O’Neill* as strictly transgender in nature obliterate not necessarily the lesbian option, but rather the option of people who do not inevitably fit into these neat categories? Valentine’s ethnographic study shows that the question of whether people define themselves as gay or transgender is a complex one that relates, inter alia, to the intersection of gender and sexuality with race and class.<sup>282</sup> As he notes, asserting an ontological separation of gender and sexuality ignores the complexity of lived experience, the historical construction of the categories themselves, and the racial and class locations of different experiences; it transforms an analytic distinction into a naturalized fact.<sup>283</sup> Thus, the transgender category (like the category of homosexuality) has the institutional power to order certain experiences, even as it erases their complexity.<sup>284</sup> It is important to realize that the law, given its operation through the categorization and conceptualization of people and events, is uniquely invested in the project of fitting people and events into these categories. When appearing before the law, we are often seduced into placing

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<sup>279</sup> Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 116–17 (David Kairys ed., 3d ed. 1998). Halley contrasts identity politics of this type with the queer theory claim that identity is not a core and certain truth that represents authenticity and authority with regard to ourselves but, rather, is socially constructed and part of the problem itself. *Id.*; see JUDITH BUTLER, *THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION* 83–131 (1997) (pointing to the way in which interpellation turns us into part of the social category and to the paradox of identity politics that is forced to use the categories that, on the one hand, are part of the injury but, on the other hand, socially constitute us).

<sup>280</sup> DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* 14, 29–57 (2007).

<sup>281</sup> *Id.* at 14–17.

<sup>282</sup> *See id.* at 16.

<sup>283</sup> *Id.* at 62.

<sup>284</sup> *Id.* at 132.

ourselves and others into these pigeon-holes, but trying to fit lives, queer lives, into these categories is a risky business.

In this context, it should be recalled that transgender is not the only new category. Indeed, the modern category of transsexuality as an identity emerged in the wake of the technological and cultural developments of the twentieth century.<sup>285</sup> The term “transsexual” first appeared in its present sense in 1949, in conjunction with the first institutionalized sex-change operations, and signified a new identity and new minority.<sup>286</sup> Of course, many earlier equivalents of this category can be identified in behaviors that crossed known gender lines in various societies, but it is important to stress transsexualism’s emergence in the Western modern world as part of a binary system of sex, since it affirms and reproduces this binarism by way of medical surgery that recreates congruence between genitalia and gender.

While labeling O’Neill and Alkobi as transsexual or as transgendered individuals highlights this identity as completely distinct from their sexual orientation (as expressed in, among other things, their statements that they are not gay or lesbian), it also places a wedge between the question of sexuality and that of gender, a barrier that, to a large extent, has featured in the politics of identity, both gay and transgender, over the past few years. This partition is not total. For example, for quite a few years now, the Israel GLBT Association has welcomed transgenders, and for a certain period of time, it was headed by Nora Grinberg, a transsexual, whose activism in this capacity particularly illustrated the connection between the matters of sexuality and gender.<sup>287</sup> Nonetheless, it seems that the two groups take care to maintain a distinction. Gays, perhaps particularly “masculine” gay men, want to prevent being perceived as feminine, and therefore it is important to them to differentiate between the questions of their sexuality and their gender: they differ from heterosexual men solely in terms of their sexual orientation. Transsexuals — and often transgenders more generally — seek to avoid being perceived as gays and lesbians; therefore it is also important to them to differentiate between the matters of their gender and their sexuality: they differ from others solely in their gender identity. The first model is embodied by the image of the gay man who is “straight acting” or “straight appearing,” that is, different from heterosexual men only in his attraction to men. This model diverges from models in which questions of gender and sexuality are interrelated.<sup>288</sup>

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<sup>285</sup> See MEYEROWITZ, *supra* note 227 (detailing a historical account of transsexuality).

<sup>286</sup> *Id.* at 5–8, 43–44.

<sup>287</sup> See Nora Grinberg: Personal Biography, <http://www.gayart.info/noraen.htm>.

<sup>288</sup> See HALPERIN, *supra* note 198, at 9 (tracking models of gender and sexuality and their ascendancy); see also LISA DUGGAN, *THE TWILIGHT OF EQUALITY: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* 50–51, 65–66 (Beacon Press Boston 2003) (critiquing homonormativity); VALENTINE, *supra* note 280, at 62–65, 133 (discussing the rise of the category of transgender and its relation to the rise of the model of homosexuals as being the same as heterosexuals, but for their privately experienced sex-

In the nineteenth century, prior to the ascent of the “straight acting” gay model, thinking on gender and sexuality was dominated by the concept of sexual inversion, a model relating both to attraction between members of the same sex and to crossing gender boundaries.<sup>289</sup> Many practices and models, past and present, Western and non-Western, attest to the fact that the questions of gender and sexuality are not always completely discrete. Be it in the context of the “mollies” in eighteenth-century England,<sup>290</sup> the “berdache” of Native American society,<sup>291</sup> the drag-queens and drag-kings of present-day gay society,<sup>292</sup> or even “butch lesbians,”<sup>293</sup> there seems to be a connection between gender and sexuality in the definition of these identities. The “feminine” homosexual and the “masculine” lesbian are both evidence of a continuum and interstitial area where sexuality and gender intermix. And although the newer term “transgender” may suggest a more open space of sexual continuity than the sexual binarism often associated with transsexuality, it is also constituted around the gender/sexuality dichotomy. Thus, Valentine suggests that we consider in what ways “transgender” not only explains non-normative genders but also produces their effect by erasing other forms of non-normativity; moreover, he claims, we should look to how the conception of gender and sexuality as separate experiences underpinning discrete identities also reproduces a set of social relationships, whereby those who arguably have the greatest need for a progressive politics of sexuality and gender are excluded from its explanatory purview by being made to seem, in Valentine’s words, confusing and confused.<sup>294</sup>

It is important, therefore, to be aware of the fact that detaching the questions of gender and sexuality leaves no space for some of the identities discussed above, which cannot exist or be represented (legally or otherwise) under the dichotomy of either gender-normative (but gay or lesbian), or sex-

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ual desire and practice, in a way that stabilizes the gender of, in particular, white, middle-class gay men and lesbians).

<sup>289</sup> DAVID HALPERIN, *HOW TO DO THE HISTORY OF HOMOSEXUALITY* 121–30 (Univ. Chi. Press 2002); HALPERIN, *supra* note 198, at 9, 15–16.

<sup>290</sup> The “mollies” are an example of “sexual inversion”: they were men in eighteenth-century London who had relations with other men while imitating female behavior. See HALPERIN, *supra* note 289, at 127.

<sup>291</sup> The “berdache” in Native American society were a type of “third sex,” people who played a social and gender role that diverged from their biological sex, and usually, though not always, who engaged in relations with members of the same sex. See Will Roscoe, *How to Become a Berdache: Toward a Unified Analysis of Gender Diversity*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 329, 335 (Gilbert Herdt ed., 1996).

<sup>292</sup> See, e.g., ESTHER NEWTON, *MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA* 3 (1979).

<sup>293</sup> See generally Gayle Rubin, *Of Catamites and Kings: Reflections on Butch, Gender and Boundaries*, in *THE PERSISTENT DESIRE: A FEMME-BUTCH READER* 466 (Joan Nestle ed., 1992); Esther Newton, *The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman*, 9 *SIGNS* 558 (1984).

<sup>294</sup> David Valentine, “*I Went to Bed With My Own Kind Once*”: *The Erasure of Desire in the Name of Identity*, in *THE TRANSGENDER STUDIES READER*, *supra* note 109, at 407, 417.

ual-orientation-normative (but transsexual or transgender). This separation has received some theoretical expression and certainly political expression and is represented by mainstream gay politics.<sup>295</sup>

This separation is also manifested in the transgender conception that Grinberg and Berger presented to the court during the Alkobi trial, and was also brought into the courtroom in the O'Neill trial. The separation approach makes transgenderism the only site challenging gender boundaries, as though heterosexuality and homosexuality are stable categories that do not involve questions of gender.<sup>296</sup> Moreover, this approach disregards a number of issues, including the evolution of transsexuality as a category in response to the development of the medical technology that enables intergender crossing. Medical technological developments have altered the arrangement of sex, gender, and sexuality, and identities that, in the past, had been pathologized as "sexual inversion" and, subsequently, were appropriated in the development of the "butch lesbian" identity, are now likely to be associated with crossing the gender boundaries.<sup>297</sup> Transsexualism's emergence as a category in the twentieth century contributed to the evolution of the discourse on biological sex, gender, and sexuality as discrete categories. It led to the use of concepts of gender and sexuality to signify a differentiation between people attracted to the same sex, but with normative gender (that is, homosexuals), and those with the desire to cross over to another sex due to a gender identity that does not correlate with what is expected of them from birth (transsexuals). The analytical distinction was maintained even in the face of links and shifts between the different groups in day-to-day life.<sup>298</sup> Although the evolution of the transgender category in recent years has presented a more flexible option, not necessarily identified with sex-change and surgery (as opposed to "transsexuality"), crossing gender boundaries in the era of transsexuality/transgenderism has been divorced from the matter of sexuality in the dominant discourse. The current commonly-used category of transsexuality and transgender disregards, to a great extent, boundary-crossing queer formations that identify themselves as "gay" or "lesbian" despite the fact that they entail gender boundary-crossing. Gay and lesbian politics and the groups' struggle for rights contributed greatly to this separation, in that the mainstream movement adopted the described model of gender-normative homosexual behavior. The ramifications of the insistence on a theoretical and political divorce between sexuality and gender are likely to exclude the "femme" gay and "butch" lesbian from repre-

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<sup>295</sup> See Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion*, in TRANSGENDER RIGHTS, *supra* note 109, at 141 (discussing comprehensively the relationships between gay identity and gender nonconformity).

<sup>296</sup> *But see* Susan Stryker, *Transgender Studies: Queer Theory's Evil Twin*, 10 GLQ: J. LESBIAN & GAY STUD. 212, 214 (2004).

<sup>297</sup> Judith Halberstam, *Transgender Butch: Butch/FTM Border Wars and the Masculine Continuum*, 4 GLQ: J. LESBIAN & GAY STUD. 287, 288 (1998).

<sup>298</sup> See MEYEROWITZ, *supra* note 227, at 98–129, 168–207.

sensation, for on the one hand they are not normative homosexuals and lesbians, yet on the other, they are not transsexuals and (probably) not transgender. Thus, the rigid division of the questions of sexuality and gender is a modern phenomenon and reflects a certain ideology that produces, in turn, a subject through interpellation (in the Althusserian sense). The modern gay and lesbian subjects, on the one hand, and heterosexual and, to a certain extent, transgender subjects, on the other, are the products of this ideology.

In this context it is important to recall that the transgender category, though incorporating a spectrum of gender variances and supposedly broader than the category of transsexuality, rests on a distinction between sexuality and gender.<sup>299</sup> This outcome is good and suitable for some people, but not for others. It reclassifies individuals into binding categories in terms of sexuality — with regard to transsexuals — and in terms of gender — with regard to homosexuals. It is important to consider who is excluded by these categories.

There is no denying that many understand themselves as belonging to the different categories, such as homosexual or transsexual, on the basis of an absolute distinction between the questions of gender and sexuality. However, it is important to consider that a separation of the two questions is not the only existing model, and can in fact reproduce rigid identities rather than liberating one from them.<sup>300</sup> The distinction between sexuality and gender and the emergence of the category of transsexuality have generated a paradox in which transsexuality both undermines and reinforces the binary and natural concept of sex. The view that the solution to a sense of gender-crossing is a complete surgical sex-change and a complete crossing over to the other sex undercuts the notion of sex as a uniform and natural thing, but at the same time supports the conception of a person as uniformly either a man or a woman and of genitalia's determinative role in this context.<sup>301</sup>

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<sup>299</sup> See VALENTINE, *supra* note 280, at 4.

<sup>300</sup> See Arlene Stein, *From Gender to Sexuality and Back Again: Notes on the Politics of Sexual Knowledge*, 10 GLQ: J. LESBIAN & GAY STUD. 254, 256–57 (2004); David Valentine, *The Categories Themselves*, 10 GLQ: J. LESBIAN & GAY STUD. 215 (2004). The question of the connection between the analysis of gender and the analysis of sexuality has occupied the theoretical literature for many years. See, e.g., Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY, at 267, 307–08 (articulating the need for an analytical separation between the two analyses in order to enable an autonomous analysis of the question of sexuality); Riki Wilchins, *Deconstructing Trans*, in GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY 55 (Joan Nestle, Clare Howell & Riki Wilchins eds., 2002) (discussing the political and social contexts of the separation and the connection between the questions of sexuality and gender); Judith Butler, *Against Proper Objects*, 6 DIFFERENCES: J. FEMINIST CULTURAL STUD., Summer-Fall 1994, at 1, 90 (exploring the complex relations between the question of gender and the question of sexuality). Gayle Rubin's reasoning as to the need for a separate analysis of sexuality retains its validity, in my opinion, and there is nothing in what is stated above that is intended to negate this need.

<sup>301</sup> Judith Shapiro, *Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex*, in BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 248, 252–55 (Julia Epstein & Kristina Straub eds., 1991).

Different trends have also evolved within the transsexuality discourse. Sandy Stone has proposed the post-transsexual model, in which the transgender personifies a true story and not the clinical narrative in which the past is discarded.<sup>302</sup> Stone posits that, in order to present an anti-discourse to the gender discourse, transsexuals must talk outside the boundaries of gender and must realize the potential of productive interruption for the existing structure of gender and sexuality.<sup>303</sup> In her opinion, this requires “visible” transsexuals, as opposed to transsexuals who attempt “to pass” in the new sex identity (that is, to live in this identity without anyone identifying him as someone who has changed his sex).<sup>304</sup> This attempt to “pass” erases the commixture in transsexuals, of the role of their previous sex and of part of their previous lives.<sup>305</sup> In Stone’s eyes, this destroys any possibility of challenging the essentialist discourse in which the body of thought on sexuality and transsexuality evolved.<sup>306</sup> Thus, for example, the “wrong-body” transsexuality discourse, which appeared in *Alkobi*, is based on the binary and phallogocentric conception of gender distinction and should be treated with suspicion. This discourse internalizes the concept that there is only one “right” body for each gender.<sup>307</sup> Stone, in her *Posttranssexual Manifesto*, calls on transsexuals to take responsibility for their entire history and to articulate their lives not as a series of erasures but as political action taken through appropriation of difference. In this way, they will achieve more authentic relations, devoid of lies.<sup>308</sup>

The transgender category that evolved in the 1990s to a great extent offered a more flexible approach than that embodied in the transsexual model, with the capacity to encompass Stone’s queer post-transsexuality. This category produced the possibility of gender continuity rather than binarism.<sup>309</sup> Nonetheless, “transgender” is sometimes used interchangeably with “transsexual.” While transgender may be used queerly to signify the challenge to gender binarism and the interruption of the regime of correlation between body and desire, it can also be used to uphold or restore the regime of uniformity between physical morphology and gender identity.<sup>310</sup> But even the first option entails maintaining a line of who fits into this category and who does not, who is “transgender” and who is “gay” or “lesbian.”

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<sup>302</sup> See Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in *BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY*, at 280.

<sup>303</sup> *Id.* at 295.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 295–97.

<sup>307</sup> *Id.* at 297.

<sup>308</sup> *Id.* at 295; see also Whittle, *supra* note 80 (examining the visibility of transsexuals).

<sup>309</sup> MEYEROWITZ, *supra* note 227, at 248.

<sup>310</sup> Halberstam, *supra* note 297, at 291; see also Susan Stryker, *The Transgender Issue: An Introduction*, 4 *GLQ: J. LESBIAN & GAY STUD.* 145 (1998) (offering a similar model of transgenderism with detailed analysis of the categories of “transsexual,” “post-transsexual,” “transgender,” and “queer”).

Jay Prosser has articulated the transsexual need — which certainly has a homosexual counterpart — specifically for stability, clear categories, security, and recognition of needs and feelings (and, for this purpose, it is irrelevant whether or not they are the product of ideology).<sup>311</sup> Prosser expresses the transsexual politics that stress the importance of the body and the need for gender stability through the development of a transgender approach that opposes queer theory, especially Butler's "gender troubles."<sup>312</sup> In contrast to queer boundary-crossing, Prosser speaks of the transsexual's need to live not in the borderland but in a home of his own, on one or the other side of that border, and of the fact that many transsexuals do feel dysphoria, the incongruence that dissociates the self from its body.<sup>313</sup> From the perspective of transsexuals, sex-change surgery is of paramount importance. In Prosser's "politics of home," importance is given to the transsexual's need "to pass" in the new gender identity, for success signifies the correlation of gender identity and social identity.<sup>314</sup> Post-transsexuality, he claims, forgoes in advance what has yet to be gained, namely, recognition of the new gender identity and the right to make a home in that identity. Queer theory erases, in his eyes, the genuine experiences of the transsexual and transgender subjects.<sup>315</sup>

Prosser's approach is a reminder that many transgender individuals live in distress due to their feelings, and it goes without saying that these are feelings that must be addressed. The actual needs and conditions of their lives mandate, at times, creation of a correlation between the body and gender identity and the possibility of "passing" and living a stable and safe life in the desired gender identity. We should also not underestimate the transformative potential for both individuals and society that is latent in the very idea of "sex change." There is, however, a whole spectrum of gender outlaws who do not conform to normative masculinity or femininity.<sup>316</sup>

Accordingly, Judith Halberstam asserts that Prosser's analysis fails to recognize the "butch," who has decided for any number of reasons — such as fear of surgery or a desire to remain part of the lesbian community — "to make her home in the body with which she was born."<sup>317</sup> Moreover, Pros-

<sup>311</sup> See JAY PROSSER, *SECOND SKINS: THE BODY NARRATIVES OF TRANSSEXUALITY* 154, 200–05 (1998).

<sup>312</sup> JAY PROSSER, *supra* note 311, at 171–77, 200–05 (1998); see also Heather K. Love, "Oh, the Fun We'll Have": Remembering the Prospects for Sexuality Studies, 10 *GLQ: J. LESBIAN & GAY STUD.* 258, 259–60 (2004) (contrasting Prosser's stance and the queer stance); Vernon Rosario, *The Biology of Gender and the Construction of Sex?*, 10 *GLQ: J. LESBIAN & GAY STUD.* 280, 281–82 (2004). See generally Jay Prosser, *No Place Like Home: The Transgendered Narrative of Leslie Feinberg's Stone Butch Blues*, 41 *MODERN FICTION STUD.* 483 (1995).

<sup>313</sup> See Jay Prosser, *Exceptional Locations: Transsexual Travelogues*, in *RECLAIMING GENDERS: TRANSSEXUAL GRAMMARS AT THE FIN DE SIÈCLE*, *supra* note 80, at 88, 92–93.

<sup>314</sup> See *id.*, at 95–96.

<sup>315</sup> *Id.*, at 85–86.

<sup>316</sup> Halberstam, *supra* note 297, at 291–92.

<sup>317</sup> *Id.* at 305.

ser's analysis does not recognize the fact that many transsexuals live and die in the "in-between" territory: while many do wish to change their sex and part with the ambiguity of their identities, there are many others, even some who have undergone surgery, who remain "in-between," whether because they are unable to "pass" in the new sex or lack the means for a sex-change operation, or because they identify as transsexuals but feel no need to change their genitalia.<sup>318</sup> Prosser's mapping, Halberstam claims, rests on a conception of two territories, male and female, that are encompassed in one clear body, separated by a border that is "crossed by surgery and endocrinology."<sup>319</sup> The queer mapping that Prosser rejected recognizes hybrid categories and gives legitimacy and visibility to the hybridity of those who never have a home, who cannot cross gender boundaries, who prefer to be "gender-queer," and who live with the instability of their identities.<sup>320</sup> Indeed, under the new transgender model, or the "gender-queer" model that extends it, we see people who are challenging the boundaries of gender not by crossing to the other side but by living in the borderland, refusing to identify as belonging to one of the genders or identifying as belonging to both or, sometimes, even rejecting completely the idea of gender.<sup>321</sup>

Halberstam, in contrast to Prosser, does not conceive of the border as sharply demarcated in a way that causes us to always be — or always want

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 304–07. Janet Halley proposes reading Prosser's discussion of the need for safety, normality, a home, and firm inhabitation of one's sex as requirements for things that, if we attach them to normativity and coercive regulatory force, lead us to what liberalism, the regulatory family, and compulsory heterosexuality have been doing for centuries. Thus, she sets Prosser's transsexual project against feminist queer theory, which deconstructs these very ideas. See HALLEY, *supra* note 216, at 260–79. This is true, of course, when one contrasts Prosser's transsexual project with Butler's feminist queer project. However, a transgender or gender queer project of the sort advocated by Halberstam, Hale, Stone, Stryker, and others would actually find itself in alignment with the feminist queer project, and *against* feminism of the MacKinnon type, as discussed in *supra* notes 207–09 and accompanying text. This attests to the divergences within transsexual/transgender theories, on the one hand, and feminist theories themselves, on the other. Thus, whereas Halley, *supra* note 216, at 293, assumes we live in a world where gains for transsexuality might come at the expense of feminism because safety and home for transsexuals might require the reaffirmation of precisely those social forms that have been deployed to make heterosexuality compulsory, my reading of the cases discussed in this article — although also showing the need to weigh the balance of gains and losses between transgenderism and feminism — shows how it is in fact in this very context that feminism affirms social norms of compulsory heterosexuality such as safety and demarks gender lines, whereas transgenderism challenges them. Both cases may be what Halley points to as evidence of the need to decide, under conditions of theoretic incommensurability and radical uncertainty, between theories that diverge rather than converge. *Id.* at 25–26, 81–82, 279.

<sup>321</sup> See generally KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* (1994); Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in *TRANSGENDER RIGHTS*, at 171; LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE* (1998); Elizabeth Cline, *Transmale Nation: Remaking Manhood in the Genderqueer Generation*, *VILLAGE VOICE*, June 22, 2004, available at <http://www.villagevoice.com/issues/0425/cline.php>.

to be — on one or the other side. This discussion of the different modalities of gender outlaws and the borderland of hybridity leads to the insight that the very existence of the distinct categories of “butch” and “FTM transsexual” (the former referring to a masculine lesbian and the latter to a person who has changed his sex from female to male) is indicative of the gender fiction of clear distinctions between the various categories.<sup>322</sup> Of course, Halberstam argues, there is a difference between genetic females who are comfortable with female masculinity and genetic females who identify themselves as men.<sup>323</sup> There are differences between “butches” who live in gender ambiguity and someone who takes hormones, is operated on, and lives as a man. But there are also many sites where these differences are less unambiguous: there are “butches” who “pass” as men; there are transsexuals who live in gender ambiguity; and there are those who cannot be classified into any of these categories.<sup>324</sup> In this respect, beyond the question of self-definition, classifying *O’Neill* or *Alkobi* as cases of “transsexuality” (with all the essentialism of the model of a man trapped in the body of a woman even if unaware of his identity, in the words of witnesses at the *Alkobi* trial), and presenting the issues as related solely to gender and not sexuality, eliminates the possibility of blurring the gender lines that are realized in masculine femininity — that is, in “butchness.” A possible reading of these cases that understands the relations as lesbian — and in the case of *Alkobi*, this was indeed one of the complainant’s understanding of the events — is constructed on a remixing of the questions of gender and sexuality.

#### VII. BOYS DO CRY: BETWEEN GLOBAL AND LOCAL, BETWEEN FILM AND REALITY

The case of Hen *Alkobi* has been compared to that of Brandon Teena, who, like Hen, was born with female genitalia but lived at least part of his life as a male and had relations with girls who thought he was a biological male. When these details were revealed, Teena was raped and murdered in Nebraska in 1993.<sup>325</sup> *Alkobi* spoke of his identification with Teena and, dur-

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<sup>322</sup> See Rubin, *supra* note 293 (reflecting on the connection and blurred lines between butch lesbians and FTM transsexuals). “FTM” signifies “Female-to-Male,” that is, transsexuals who cross from the female sex to the male sex (in contrast to “MTF”—from male to female).

<sup>323</sup> See generally JUDITH HALBERSTAM, *FEMALE MASCULINITY* (1998) (discussing gender expressions among masculine women).

<sup>324</sup> Halberstam, *supra* note 297, at 300–01.

<sup>325</sup> See JoAnn Brandon, Pers. Representative of the Estate of Teena Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2002) (detailing facts in the judgment filed by Teena’s family against the police for failing to provide Teena with proper protection); Neb. v. Lotter, 586 N.W.2d 591 (Neb. 1998) (recounting the details of the murder as provided by Teena’s killer); APHRODITE JONES, *ALL SHE WANTED* (1996) (discussing the events surrounding Brandon Teena’s rape and murder); see also Patricia A. Cain, *Toward Intersexuality: Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U.L. REV. 1321 (1998) (raising the question of the need to provide protec-

ing his house arrest, repeatedly watched the movie *Boys Don't Cry*, based on the latter's life.<sup>326</sup> "In Haifa they did not do to me what they did to Brandon Teena in Nebraska, but they murdered my name," he told the media.<sup>327</sup> Hen even believed that the movie had inspired one of the complainants to fabricate the claim that they had engaged in a sexual act, when according to Alkobi, they had only kissed and hugged: "There was no sexual act between us," he stated to the media concerning this complainant, "she invented everything. Maybe she had by then already seen the movie *Boys Don't Cry*. I have a feeling that her depictions are taken from there and not from what really happened between us."<sup>328</sup> Alkobi's mother also claimed that the complainants had built their accusations on what they had seen in the film; among other things, she pointed to some of the details they described that appear in the film as well (for example, that Alkobi had worn a checked shirt). "Go all through my house, there are no checked shirts, except an old one belonging to my husband." According to Alkobi's mother, this detail, like others, had been drawn directly from the film.<sup>329</sup>

But this is not the only feature common to the stories of Hen Alkobi and Brandon Teena. Along with the *O'Neill*, *Saunders*, and *Wheatley* cases, these are stories that transpired at the periphery, far from the big global gay cities of New York, San Francisco, London, and Tel Aviv. They are thus stories of queer lives being lived far away from the metropolis;<sup>330</sup> stories involving, at least in some of the cases, working-class people who live at the geographical, social, and economic margins.<sup>331</sup> In addition to similarities in

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tion to people with a non-normative gender identity in the context of Brandon Teena's specific case); Nye, *supra* note 25, at 240–41.

<sup>326</sup> El-Hai & Lem, *supra* note 2, at 34.

<sup>327</sup> *Id.* at 33.

<sup>328</sup> *Id.* at 36.

<sup>329</sup> *Id.* at 36, 74; see also Judith Halberstam, *The Brandon Teena Archive*, in *QUEER STUDIES: AN INTERDISCIPLINARY READER* 159 (R. Corber & S. Valocchi eds., 2003) (discussing the Brandon Teena story, its cinematic representation, and the questions it raises); JUDITH HALBERSTAM, *IN A QUEER TIME & PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES* 22–96 (2005).

<sup>330</sup> See HALBERSTAM, *supra* note 323, at 22–46; see also LISA DUGGAN, *Crossing the Line: The Brandon Teena Case and the Social Psychology of Working-Class Resentment*, in *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE*, *supra* note 210, at 210 (discussing the significance of the rural setting of the Brandon Teena story).

<sup>331</sup> There are a number of indications of the socio-economic backgrounds of the defendants in these cases: Sean O'Neil's appearance on the Jerry Springer Show, where he appeared together with some of the other people involved in the case, Nye, *supra* note 25, at 245; Alkobi's background of coming from what the press described as a conservative, traditional, and modest home, where amulets and pictures of Jewish saints are routine parts of the environment, El-Hai & Lem, *supra* note 2; and Saunders' working-class background, which emerges from the court records and accounts for her contact with housing authorities, social workers, and the juvenile justice system, Anna Marie Smith, *Preface to R v. SAUNDERS*, at ii (unpublished, available from the Cornell Library). While we should be wary of stereotypes in considering these activities, we cannot ignore the fact that they are indicators of social groups. See Smith, *supra* note 36, at 169–76 (discussing the class aspects of the *Saunders* trial). As noted by Valentine, age, race, and class shift the very boundaries of what "gender" and "sexuality" can mean in particular contexts. VALENTINE, *supra* note 280, at 98–101; see also Richard Phillips & Diane Watt, *Introduction to*

class and geography, the defendants and complainants were all young men and women, making age one of the many intersecting factors in the stories. The events leading up to these trials — and, in fact, the trials themselves — are a window through which we catch glimpses of spaces far from the queer spaces of the big cities and from *both* the gender-normative and gender-bending sub-cultures of those cities.

In this context, Alkobi's identification with Teena — as well as the connection he and his mother made between the events depicted in *Boys Don't Cry* and the accusations against Alkobi — may be an instance of the “translocal,” a term introduced by Halberstam to the discussion of Brandon Teena. Following Tom Boellstorff, Halberstam suggests using the notion of “translocal” in examining the level of correspondence amongst *nonmetropolitan* sexual systems in different places.<sup>332</sup> This notion moves beyond the proliferating discussion of the globalization of sexuality and demonstrates how, alongside the growing similarities between gay identities in the global cities,<sup>333</sup> the local stories of Alkobi, Saunders, and Teena constitute “translocal” stories (transpiring in the non-metropolis) and correspond with each other. The courts that deliberated the cases discussed in this Article (and the scholarly literature that followed in the wake of their decisions) did not address other, similar cases. As noted, the *Alkobi* trial court even went so far as to assert that such a case was yet to arise not only in Israel but in the world, despite the fact that the other trials discussed here all preceded *Alkobi*. Moreover, the Israeli court, in mentioning movies it found relevant to the case, ignored the two films depicting the life of Brandon Teena. By contrast, Alkobi and his mother understood the “translocal” context of his story, and they alluded to the fact that in order to fully understand the translocal context of his story, one must grasp not necessarily what happened in Nebraska, but the global representation of these events in the movies that presented them. This is because movies, like law, are a dominant discourse through which society narrates and creates itself;<sup>334</sup> movies are “public fantasies” that “contribute to the shaping of the social imaginary.”<sup>335</sup>

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DE-CENTERING SEXUALITIES: POLITICS AND REPRESENTATIONS BEYOND THE METROPOLIS 1, 1–2 (Richard Phillips, Diane Watt & David Shuttleton eds., 2000) (noting geographical factors including the way that in the periphery, at a material and metaphorical distance from both the regulation and liberation of the metropolitan center, sexual subjects are less stable, in a way that may enable transformations of sexuality but also make sexual subjects more vulnerable).

<sup>332</sup> HALBERSTAM, *supra* note 132, at 38 (following Tom Boellstorff, *The Perfect Path: Gay Men, Marriage, Indonesia*, 5 GLQ: J. LESBIAN & GAY STUD. 475, 480 (1999)).

<sup>333</sup> See generally THE GLOBAL CITIES READER (Neil Brenner & Roger Keil eds., 2006).

<sup>334</sup> ORIT KAMIR, *FRAMED: WOMEN IN LAW AND FILM*, at xii (2006).

<sup>335</sup> Teresa De Lauretis, *The Stubborn Drive*, 24 CRITICAL INQUIRY 866 (1998); see Madelyn Detloff, *Gender Please, Without the Gender Police: Rethinking Pain in Archetypal Narratives of Butch, Transgender and FTM Masculinity*, 10 J. LESBIAN STUD. 87 (2006) (envisioning *Boys Don't Cry* as one such “public fantasy”).

“Border wars” between the butch and the FTM have revolved and are still revolving around the image of Brandon Teena: should Teena be regarded as a butch lesbian or a transsexual FTM?<sup>336</sup> The battle over where he “belongs” and which community can claim him as its “hero” has been fraught with controversy and emotions.<sup>337</sup> Halberstam and Jacob Hale claim that there is a price to the endeavor (attempted in the debate over the Teena case) to stabilize the transsexual, transgender, and butch categories. They maintain that there is a much wider margin between these categories and assert that people — including Brandon Teena in his/her short life — have passed through a number of categories.<sup>338</sup> Hale claims that the transgender agenda, which holds any instance of relating to Teena as “butch lesbian” to be transphobic, erased different aspects of Teena’s life that did not accommodate the transsexual model.<sup>339</sup> Thus, he asserts, recognition that Brandon Teena lived in the borderland is denied. We do not know what Teena would have done had he not been murdered: would he have chosen to remain in the borderland, or would he have preferred a more stable category?<sup>340</sup> Hale does not negate the possibility of FTMs who might not want to live in the borderland and would prefer stability and the home Prosser espouses; however, he does object to Prosser’s binary model and his presentation of the rejection of life in the borderland territory in favor of a safe home as the right thing for all transgender individuals. This approach excludes anyone who does not belong to the transgender narrative that Prosser posits.<sup>341</sup>

In 2002, Gwen Araujo, a teenage transgender woman, was murdered by four men. Some of the defendants on trial for her murder followed the defense strategy of “transgender panic,” arguing that they had killed her “in the heat of passion” after the sudden and traumatic discovery that she was biologically male and had deceived them about her sex.<sup>342</sup> The defendants claimed that Araujo had caused them to have sex with her when they thought she was a woman, but they discovered that she was “actually a man” when her male genitalia were exposed.<sup>343</sup> This defense echoes the similar accusations levied against Alkobi, O’Neill, Saunders, and Wheatley, and it resonates with the genitalia-focused logic underlying the court’s reasoning in

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<sup>336</sup> See Nan A. Boyd, *Bodies in Motion: Lesbian and Transsexual Histories*, in THE TRANSGENDER STUDIES READER, at 420, 422–27; VALENTINE, *supra* note 280, at 151–53.

<sup>337</sup> On controversy over another famous FTM, see HALBERSTAM, IN A QUEER TIME & PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES, *supra* note 329, at 47–61 (discussing famous FTM, Billy Tipton, and his posthumous representation).

<sup>338</sup> Judith Halberstam & Jacob Hale, *Butch/FTM Border Wars: A Note on Collaboration*, 4 GLQ: J. LESBIAN & GAY STUD. 283 (1998).

<sup>339</sup> Jacob Hale, *Consuming the Living, Dis(re)membering the Dead in the Butch/FTM Borderlands*, 4 GLQ: J. LESBIAN & GAY STUD. 311, 313–14 (1998).

<sup>340</sup> *Id.* at 318; see also *id.* at 73–75 (discussing Teena as not fitting into the recognized categories).

<sup>341</sup> Hale, *supra* note 339, at 339–40.

<sup>342</sup> See Steinberg, *supra* note 199, at 499–501.

<sup>343</sup> *Id.* at 499–503, 509–10, 514.

*Alkobi*. The defendants in the Araujo case were all convicted, two for second-degree murder.<sup>344</sup>

Teena and Araujo are not the only victims of the neglect of transgender life.<sup>345</sup> The debate that emerged in Israel in the wake of the *Alkobi* affair focused on the tension between the queer and transgender approaches, on one side, and the feminist approach seeking to protect women, on the other. There is, however, room to reflect on *Alkobi* and its counterparts in light of the different interpretations and conceptualizations of the events, the link between the questions of gender and sexuality, and the ideologies that turn us into subjects, which are repeated and, at times, reproduced by identity politics movements.

This Part has explored how transsexuality challenges the stability of gender by showing that it is possible to cross genders, while at the same time reinforcing the stability of gender by insisting on a choice between two distinct gender categories. Stone's post-transsexuality, like Halberstam's and Hale's approaches, posits a more queer transsexuality (or transgenderism) of boundary-crossing and life in the borderland.<sup>346</sup> Prosser claims, however, that this approach fails to respond to people's needs for stability, security, and home.<sup>347</sup> *Alkobi*, *Saunders*, *O'Neill*, and *Wheatley* create a good framework to conduct this discussion and consider what has been lost in the separation of the gender question from the sexuality question. Does presenting *Alkobi* as solely an instance of transgenderism erase the lesbian interpretation, given by at least one complainant, or the sexual-gender ambiguity, with its unique potential for desire? Did the conceptualization of the case as that of a transsexual who is not yet aware of his identity, alongside the elucidation of *Alkobi*'s distress to the court, play a role in interpellating the transsexual subject, thereby adopting a truth discourse regarding identity based anew on the model of binary sexual identity and the distinction between sexuality and gender? Do individuals have to choose between being

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<sup>344</sup> Posting of Christopher Daley to Justice for Gwen Araujo, [http://gwenaraujo.blogspot.com/2005\\_09\\_01\\_archive.html](http://gwenaraujo.blogspot.com/2005_09_01_archive.html) (Sept. 14, 2005, 25:53 EST). Following this case, California enacted the Gwen Araujo Justice for Victims Act, which prohibits defendants' use of societal bias against their victims to reduce their own culpability for a crime. Assemb. B. 1160, 2006 Leg., 2005–2006 Sess. (Cal. 2006), available at [http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_1151-1200/ab\\_1160\\_bill\\_20060928\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1151-1200/ab_1160_bill_20060928_chaptered.pdf); see also David L. Annicchiarico, *Consistency, Integrity and Equal Justice: A Proposal to Rid California Law of the LGBT Panic Defense*, 5 *DUKEMINIER AWARDS* 121 (2006) (discussing the Araujo case and the Gwen Araujo Justice for Victims Act); Steinberg, *supra* note 199; Kendall Thomas, *Afterword: Are Transgender Rights Inhuman Rights?*, in *TRANSGENDER RIGHTS*, *supra* note 109, at 310, 317–19; Press Release, The Billy DeFrank LGBT Community Center, California Governor Signs Gwen Araujo Justice for Victims Act into Law (Aug. 29, 2006), available at [http://www.defrank.org/news/2006\\_0928\\_araujo-law.pdf](http://www.defrank.org/news/2006_0928_araujo-law.pdf).

<sup>345</sup> See sources cited, *supra* note 344; see also Tarynn Witten and Evan Eyler, *Hate Crimes and Violence Against the Transgendered*, 11:3 *PEACE REV.* 461 (1999) (discussing hate crimes against transgendered individuals).

<sup>346</sup> See *supra* note 303 and accompanying text.

<sup>347</sup> See *supra* notes 311–14 and accompanying text.

transgender and being “butch” lesbians, or do cases like *Alkobi* — where the formal transsexual line of defense appeared alongside a lesbian defense — point to the need to discard the categories of straight/lesbian and man/woman? Or perhaps these cases actually attest to the very opposite, that recognition of *Alkobi* as a man means granting him the home and safe place he supposedly needs. Many people, like the protagonists of the stories discussed in this Article, suffer from this lack of recognition and pay the price of living in the dangerous borderland. Indeed, recognizing their male gender identity gives them a home and haven from the perils of the borderland. Society’s normative desire to rigidly categorize and label makes the borderland dangerous for these individuals.

#### CODA: WALLS OF SEPARATION

In the discussion of the “border wars” between the “butch” and FTM, I suggested that perhaps we should not try to determine whether to interpret people like Brandon Teena or Hen Alkobi as lesbians or transsexuals. These wars are evidence of the limitations of these definitions and the need to reform them.<sup>348</sup> The transsexual conception, which espouses the model of sexual confusion, or gender dysphoria, and resembles the psychiatric-pathological model, was expressed at the *Alkobi* trial, in *Alkobi*’s probation officer’s report, and in the pre-sentencing witness testimony of Ilana Berger and Nora Grinberg, as well as in the testimonies given at the *O’Neill* trial.

In *Borderlands/La Frontera*, Gloria Anzaldua opposes this model and states that being “half-and-half” does not mean suffering from a confusion of gender identity or sexuality identity.<sup>349</sup> She claims that what we suffer from is the “despotic duality” that dictates that we can be only one or the other.<sup>350</sup> In Anzaldua’s eyes, queer people, like herself, are two in one body, a body that contains both male and female.<sup>351</sup> Following this principle of “two in one body,” she proposes releasing ourselves from this division.<sup>352</sup> Anzaldua’s choice of the “half-and-half” identity was not accidental; her work deals entirely with the borderland, in which various worlds meet, where boundaries are crossed, and where the *mestiza*, a woman of mixed

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<sup>348</sup> I side with Judith Halberstam’s argument about the futility of stretching terms like “lesbian” or “gay” or “straight” or “male” or “female” across vast fields of experience, behavior, and self-understanding. Halberstam notes that examining the context of the “transsexual lesbian,” particularly the female-to-male transsexual, points to a more general fragmentation of the concept of sexual identity. See Halberstam, *supra* note 242, at 210-12.

<sup>349</sup> GLORIA ANZALDUA, *BORDERLANDS/LA FRONTERA* 41 (2d ed. 1999).

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 216–17. In the poem *To Live in the Borderlands Means You*, Anzaldua writes, “To live in the borderlands means you/ . . . / half-and-half both woman and man, neither — / a new gender.” *Id.*; see also LINDA GARBER, *IDENTITY POETICS: RACE, CLASS, AND THE LESBIAN-FEMINIST ROOTS OF QUEER THEORY* 147–75 (2001) (exploring the queer aspects of Anzaldua’s work).

<sup>352</sup> ANZALDUA, *supra* note 349, at 41.

race, is created.<sup>353</sup> Anzaldua's borderland is the U.S.-Texas border, a land that was created when the Anglo-Americans invaded Texas, which, until then, had been part of Mexico, and which gradually expelled all Texans of Mexican origin from their lands.<sup>354</sup> They became strangers in their own homes. On February 2, 1848, a treaty was signed establishing the southern border that divided the Mexican nation.<sup>355</sup> This figurative fence left 100,000 Mexicans on the American side, annexed through occupation.<sup>356</sup> Anzaldua's borderland and seam-zone experience gave birth to her mixed and hybrid consciousness, the *mestiza* consciousness, which includes tolerance for contradictions and ambiguity, a plural personality, and a connection to queerness with regard to sex, gender, and sexuality;<sup>357</sup> however, the trials discussed in this Article attest to a harsh regulation of the borderlands. The convicting judgments in these trials sought to restore and enforce order in the identification of men and women.

On May 23, 2003, a picture of Hen Alkobi appeared on the cover of the *Seven Days* weekend supplement of Israel's most widely-read daily newspaper, *Yediot Aharonot*, accompanied by the blurb "A Man's Heart — Hen Alkobi, the girl accused of impersonating a man and of seducing girls, speaks for the first time about her identity misgivings, the lies, the shame, the humiliation, and the long months of house-arrest."<sup>358</sup> Above the story was another caption: "The Salami System — Disguised as the Separation Fence Plan, the canton scheme is taking shape on ground, dissecting the West Bank's territories into narrow sausages surrounded by a wall. The ramifications: neither security nor peace."<sup>359</sup> Next to the article describing the trial of someone who crossed the gender boundaries was the story of the boundaries between nations and of the separating wall that is intended to regulate those boundaries. This wall creates the borderland, known in Israel as the "seam zone,"<sup>360</sup> which is the area lying between the wall and the Green Line.<sup>361</sup> The wall and its complex permit regime to regulate the movement of people in these areas, all based on ethnic criteria, and consti-

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<sup>353</sup> See, e.g., *id.* at 44–45 ("And if going home is denied me then I will have to stand and claim my space, making a new culture — *una cultura mestiza* — with my own lumber, my own bricks and mortar, and my own feminist architecture."); *id.* at 102 ("As a *mestiza* I have my country, my homeland cast me out, yet all countries are mine because I am every woman's sister or potential love.").

<sup>354</sup> See *id.* at 28, 112.

<sup>355</sup> *Id.* at 29.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 101–02, 107.

<sup>358</sup> El-Hai & Lem, *supra* note 2, at front cover.

<sup>359</sup> *Id.*

<sup>360</sup> The "seam zone" refers to the area in which the wall is being installed, especially the part of the territories lying between the Green Line and the fence. See Israel's Security Fence, <http://www.seamzone.mod.gov.il/Pages/ENG/default.htm>; see also YEHEZKEL LEIN, B'TSELEM, BEHIND THE BARRIER: HUMAN RIGHTS VIOLATIONS AS A RESULT OF ISRAEL'S SEPARATION BARRIER (Zvi Shulman, trans., Yael Stein, ed., 2003), available at [http://www.btselem.org/Download/200304\\_Behind\\_The\\_Barrier\\_Eng.rtf](http://www.btselem.org/Download/200304_Behind_The_Barrier_Eng.rtf).

<sup>361</sup> The Green Line is the border between Israel and the Occupied Territories.

tute both a means of control over the body and its free movement as well as a means of separating Jew from Arab. The regulation of who is allowed to be in the borderland, in the seam zone, and the matter of which regulations affect whom are based on ethnic identity: Israeli or Palestinian, Jew or Arab. Border regulation, which designates us as belonging to one of two categories, is thus manifested not only in the areas of sex, gender, and sexuality, but also in the framework of the Israeli territorial borderland, which has no place for the *mestiza* and harshly regulates who is and who is not a Jew.<sup>362</sup>

The logic of separation (which is not necessarily territorial separation but, at times, the legal separation of statuses), and the logic of definitions — of designating our identities in a rigid way and regulating behavior according to these identities — is shared by the Israeli separation fence project and the heteronormative gender project. “Crossing the Gender Boundaries, Betraying the Nation’s Boundaries” was a slogan shouted by the “Black Laundry” group in the 2003 Gay Pride Parade in Israel, held shortly after Alkobi’s conviction.<sup>363</sup> The gender rigidity of the division of men and women is vital not only to compulsory heterosexuality, but also to national gender projects, which require clear demarcations of who belongs and who does not.<sup>364</sup> In this respect, the appearance of Hen Alkobi and the separation fence alongside one another on the same newspaper cover tells the story of the boundaries that both encircle us and separate us from one another.<sup>365</sup> The borderlands are dangerous for people living in them; however, the danger derives solely from the logic of separation.

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<sup>362</sup> Aeyal M. Gross, *The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 LEIDEN J. INT’L L. 393 (2006) (discussing the wall, the regulations concerning it, and the judicial decisions concerning it rendered by both the International Court of Justice and the Israeli High Court of Justice).

<sup>363</sup> See *Yerushakayim*: “Kvisa Sh’hora” tafgin bemitzad haga’ava [Jerusalem: “Black Laundry” Will March in the Pride Parade], GOGAYNEWS, June 10, 2003, <http://www.gogay.co.il/today/Item.asp?CMID=2909> (Hebrew).

<sup>364</sup> See Jacqueline Stephens, *The Politics of LGBTQ Scholarship*, 10 GLQ: J. LESBIAN & GAY STUD. 220 (2004) (arguing for the need to integrate thought on national politics and sexual politics, both in general and specifically with regard to Zionism). It is perhaps no coincidence that Butler has lately begun to engage in an examination of the place of bi-nationality in Jewish and Zionist thought. See Judith Butler, *Jews and the Bi-national Vision*, 3.1 LOGOS, (2004), <http://www.logosjournal.com/butler.htm>.

<sup>365</sup> An alternative to this concept of separation can be found in the case of Israeli transsexual singer Dana International, who melds sex and gender boundary-crossing with ethnic and national boundary-crossing. See Aeyal Gross, *Globalizatzya quirit vezchuyot adam: Dana International/Amnesty International* [*Queer Globalization and Human Rights: Dana International/Amnesty International*], 23 TEORIA UVIKORET [THEORY AND CRITICISM] 227 (2003).

