

On Pointe: The Right of Children to Explore their Gender Identity

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Marie-Amelie George, *Exploring Identity*, 54 Fam. L. Q. __ (Forthcoming, 2021), available at [SSRN](#).

I recently came across a pilot podcast series from Scottish Ballet called [Scottish Ballet's Half Hour Call](#). The premise of the podcast is to discuss how ballet and ballet companies fit the world we currently live in. In the second episode, dedicated to masculinity in ballet, Myles Thatcher (choreographer and dancer at *San Francisco Ballet*) shared a story that made me think of Professor M.A. George's captivating latest article, *Exploring Identity*.

Thatcher relates how exciting it was that while he was choreographing a piece for [Ballet22 \(two•dos\)](#), a body type, gender identity, and race inclusive company that performs dances that break gender normative traditions, he started [looking at pointe shoes in a new way](#). Even though he has been aware that gender exists beyond the binary, that collaboration made him realize that "a pointe shoe is not a gender object." Transcending ballet's common binary understanding of gender opened up for Thatcher new avenues of creativity and experimentation in his choreography.

This is precisely what *Exploring Identity* does. George's work paves the way for all legal actors and operators (*i.e.*, parties, practicing attorneys, advocates, activists, policymakers, judges, law professors, and law students) to think about gender in the law in new, expansive, and more inclusive ways. The article surveys and discusses custody disputes involving "gender expansive" children. George employs this last term as an umbrella to refer to "transgender, nonbinary, and children exploring non-traditional gender identities." By analyzing the disputes between parents who disagree on how to address their child's expansive gender identity, George makes us realize that often, much like ballet, the law does not transcend the gender binary.

After comprehensively surveying the available custody cases in which parents dispute how to manage the child's gender identity (which in itself is a great contribution), George concludes that judges, no matter the result of the case, frame the issue incorrectly. Judges erroneously understand gender identity as fixed and binary. Consequently, even when they try to address a child's evolving and/or non-binary gender identity, they mistakenly focus in the custody battles on determining which parent is correct about the child's (future) identity or best suited to support such gender identity.

Instead, George argues that courts should be focusing on determining which parent is best suited to support their child's *exploration* of their gender identity. George arrives at this conclusion by examining our current understanding of gender identity, the arguments parents make in the custody cases, and courts' rationales in such cases.

Regarding the first aspect, the article explains our developing understanding that gender is a spectrum in which identities may range from woman to man, including nonbinary, agender, and individuals with other types of gender expansive identities. However, as George points out, nonbinary identities are almost invisible in today's society, even if they represent a sizeable group of individuals. This erasure, the article explains, could be due in part to the mismatch narrative (about being born in the wrong body) from early transgender rights advocacy, which accepts rather than challenges the binary view. In

addition to explaining how we have moved away from binarism, the article recounts the emerging insights from recent scientific studies that show that gender identity in pre-adolescent children, contrary to teenagers, is not stable.

These two explanations about gender help contextualize parental arguments and legal rationales in custody cases. On the one hand, George points out that, in parental disputes about their child's gender, parents opposing the new identity, surprisingly, do not typically make anti-transgender arguments. Rather, most parents cannot escape their binary understanding of gender or the inner workings of their own transitioning process into accepting their child's gender. For that reason, they typically argue either that their gender non-conforming children are not transgender or gender expansive because they do not embrace all the characteristics of their opposite natal gender or that the child's gender expansive identity was created by external pressures.

On the other hand, what drives the misguided response of the courts is their lack of awareness that gender in preadolescent children is not stable. George explains that the three approaches that courts follow in awarding custody correspond to the imprecise approaches thus far developed to work with gender expansive pre-adolescents: reparative, affirmative, and watchful waiting. Although only one of these approaches pathologizes gender expansiveness (*i.e.*, reparative), courts' application of all three is predicated on the wrong premise that the current gender of the child will be their future one. As gender is not fixed nor stable at that stage, George argues that the determination of custody should be based instead on the best interest of the child to explore their gender identity. It should not be based in a determination of what is (or will be) the gender of the child.

This proposed approach would remove the binarism as well the idea of gender stability from the legal determinations. As such, the law could open new spaces for experimentation to children and parents by conveying that gender is much more diverse than the traditional categories and its final form could be unknown.

George posits that this proposal is not foreign to what courts have been long doing in custody cases in which the decision of awarding custody hinges on the race, religion, or sexual orientation of the children. By a comprehensive review of the case law in these three areas, the article shows that courts across the United States have recognized as basic to children's well-being their capacity to explore their racial, religious, and sexual identities irrespective of their final definition and with independence of their parents' preferences. This is just a new iteration of an old principle, like men and non-binary individuals on pointe.

Perhaps there lies the greatest impact of the article for me. It forced me to examine if, like the judges awarding custody to a gender affirmative parent, I, like Thatcher, have been reverting to traditional understandings of gender instead of ungendering the law. As such, George's piece, like *Ballet 22* for Thatcher, has opened new opportunities for me and my work.

I am sure reading George's article will invite similar and more profound reflections from legal actors and operators. I cannot wait to read some of those reflections when I assign the article in my classes to discuss gender but also to serve as a primer to discuss custody cases and children's identity in general. But most importantly, I hope the article reaches judges, advocates, lawmakers, and attorneys so that the much needed revamping of gender binarism in the law takes place.

Editor's note: for another review of *Exploring Identity*, please see Erez Aloni,