THE CONSTITUTIVE IN/VISIBILITY OF THE TRANS LEGAL SUBJECT: A Case Study

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About the Author

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Introduction: The Shade of the Law

Explicit references to trans people are rare in legislative texts. Yet, the language of statutes and case law produces the transgender legal subject, as much through provisions that apply specifically to trans people as through provisions applying to everyone and which often overlook trans existence. Trans lives being marked by the need to navigate an increasingly administrative world,[1] it is in the narrow interstice between individual identity and the legal language of gender that the trans legal subject takes form.

Although the notion of a trans legal subject is an abstract one emanating from juridical texts, it impacts the lived experiences of trans people by influencing the social imaginary and informing state action. In this paper, I analyze the conception of the trans legal subject found in Québec law to draw out two historical conceptual phases—the medical and minoritizing phases—set against the same background *ius commune*.[2]

Following in the wake of Critical Race Theory and trans, queer, and feminist legal studies, I approach the law less as a legal text than as a narrative and social one.[3] I tend to the law as a locus

1. *See* Béatrice Hibou, La bureaucratisation du monde à l'ère néolibérale (2012).

2. A translation of "*droit commun,*" the *ius commune* refers to the set of general legal rules that form the foundation of the legal system, atop which more specific laws are added. For a discussion of the notion of *ius commune* in the preliminary provision of the *Civil Code of Québec*, *see* H. Patrick Glenn, *La Disposition Préliminaire du* Code civil du Québec, *le Droit Commun et les Principes Généraux du Droit*, 46 Cahiers de Droit 339 (2005). It is worth noting, however, that both article 71 of the *Civil Code* and section 10 of the *Québec Charter* are part of the *ius commune* according to the preliminary provision. I, however, use the term in a narrower sense that views these provisions as too specific to take part in the general legal rules forming the foundation of the legal system.

3. *See* Patricia J. Williams, The Alchemy of Race and Rights (1991); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory,*

of stories and narratives, the analysis of which can reveal the rapport it entertains to marginalized people. I am also influenced by the expressivist theory of law, according to which laws express attitudes, beliefs, and feelings that may contribute to stigmatization.[4] I embark on an attentive reading of the legal texts that apply to trans people living in Québec in the hopes of revealing these texts' relationship to the lives and stories of the latter.[5] Law lies at the origin of social context as much as it emerges from it. Law orders social context and influences the social imaginary, and, in turn, social forces push the law to evolve. Critiquing law as a narrative and social text is thus criticizing both the image of the trans legal subject offered by the law and the social imaginary that has led to its formation.[6] Because I am concerned with trans lives first and foremost, I place the emphasis of my reading on the encounter of trans people with the law, rather than on the state power whose brush strikes the canvas.

In line with the foregoing genealogy, my analysis is erected on an autoethnographic foundation: I am one of those people that the laws I discuss purport to define, and my experience serves to

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Narrative Theory, Feminist Theory, Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership 25 (1994); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 Buff. L. Rev. 141 (1997); Kendall Thomas, *Practicing Queer Legal Theory Critically*, 6 Critical Analysis of Law 8 (2019); Joseph J. Fischel, *Social Justice for Gender and Sexual Minorities: A Discussion with Paisley Currah and Aeyal Gross*, 6 Critical Analysis of Law 82 (2019); Stephen Whittle & Lewis Turner, *"Sex Changes"? Paradigm Shifts in 'Sex' and 'Gender' following the Gender Recognition Act?'*, 12 Soc. Res. Online 1 (2007); Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. Rev. L. & Soc. Change 79 (2013). I owe my understanding and adoption of this approach to the classes of Professor Adelle Blackett, which she discusses in *Follow the Drinking Gourd: Our Road to Teaching Critical Race Theory and Slavery and the Law, Contemplatively, at McGill*, 62 McGill L.J. 1251 (2017).

4. *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503 (2000); Alan Strudler, *The Power of Expressive Theories of Law*, 60 Md. L. Rev. 492 (2001); Paul Gowder, The Rule of Law in the Real World (2016).

5. *See* Sylvio Normand, *État Civil et Identité Élective*, *in* La personne humaine, entre autonomie et vulnérabilité: Mélanges en l'honneur d'Édith Deleury 491, (Christelle Landheer-Cieslak & Louise Langevil eds., 2015) (highlighting the role of civil status in the definition of the trans legal subject, creating a narrative mould in which they must fit themselves).

6. *Id.* at 509 (the social imaginary refers to the shared symbolic and narrative vocabulary of a society, which Sylvio Normand describes as a "symbolic order having a structuring effect on the ordering of law and on society"); *see also* Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (1983); Gowder, *supra* note 4.

guide my analysis.[7] I cannot but see this autoethnographic contribution as integral to the value of my paper. The perspectives of trans people are so rare in publications. Trans people have historically been underrepresented in the academic world, including in law.[8] Although trans communities are anything but homogenous, an autoethnographic perspective offers insight into the understandings that trans people may entertain of the legal edifice. Because the law's consequences on self-conception are one of its major effects, autoethnography offers a salient point of entry for my analysis. My reading of the legal text will be marked by my intimate relationship to the definitions and categorizations offered by the law.

I chose to focus on the law applicable in Québec for two reasons. First, it is the legal system which I am the most familiar with. I am trained in civil law, have lived in Québec for the quasi-totality of my life, and am interpellated by the legal situation that prevails there.[9] Second, Québec demarcates itself as one of the few legal systems that has removed all medical prerequisites for changing gender markers on adults' birth certificates.[10] Other provinces have also removed surgical prerequisites but typically ask for a letter by a mental health professional before proceeding with the change.[11] As this article will demonstrate, Québec law continues to entertain a problematic rapport to trans people as legal subjects despite the de-medicalization enshrined in the new gender marker change regime.[12] I will speak of both provincial law and the federal law

7. *See* Carolyn Ellis & Tony E. Adams, *The Purposes, Practices, and Principles of Autoethnographic Research*, *in* The Oxford Handbook of Qualitative Research (Patricia Leavy ed., 2014); for a response to criticisms of autoethnography as self-centred, *see also* Elaine Campbell, *"Apparently Being a Self-Obsessed C**t Is Now Academically Lauded": Experiencing Twitter Trolling of Autoethnographers*, 18 Forum: Qualitative Soc. Res. 3 art. 16 (2017).

8. *See* Alexandre Baril, *Trouble dans L'identité de Genre: le Transféminisme et la Subversion de L'identité Cisgenre: Une Analyse de la Sous-représentation des Personnes Trans* Professeur-es dans les Universités Canadiennes*, 44 Philosophiques 285 (2017).

9. Vivian Namaste's studies of the experiences of trans people in Québec indubitably influence my appreciation of trans realities under the yoke of law. *See, e.g.*, Viviane K. Namaste, C'était du spectacle! L'histoire des artistes transsexuelles à Montréal, 1955–1985 (2005); Viviane K. Namaste, Invisible Lives: The Erasure of Transsexual and Transgendered people (2000).

10. *See* Zhan Chiam et al., Trans Legal Mapping Report 2019: Recognition before the law 255 (3d ed. 2020).

11. *See* ServiceOntario, *Changing Your sex designation on your birth registration and birth certificate* (2019), https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate [https://perma.cc/WZP3–4T95] (last updated Sep. 1, 2020).

12. For further discussion of de-medicalization of trans people in law, *see*

applicable in Québec because I am primarily interested in the relationship between the law and trans people, who habitually find little interest in knowing whether the relevant law arises from the federal or provincial government.

Although I focus on Québec law, my inquiry could readily stand for an analysis of other jurisdictions. While far from universal, the features I emphasize are nevertheless common in the Americas, Europe, and Oceania. One limitation of focusing on Québec is that it is a mixed civilian jurisdiction, in contrast to the common law tradition prevalent in the rest of Canada and the United States, except Louisiana.[13] However, the differences between civil law and common law are attenuated in trans law since the rules I discuss are found in statutes rather than judge-made law. With multiple states embarking on the move away from the medical model towards the minoritizing model, I hope that my paper will offer a point of comparative insight into its limits and lacunas—an exercise in comparative advocacy analysis, if you will.

This paper is divided into three Parts. In Part I, I describe the background of invisibilization that underlies both the medical and minoritizing models. This background is characterized by the non-recognition of trans realities in the *ius commune*, which defines sex on a biological, and thus cisgender, basis and excludes trans people as habitual subjects of law. This background of invisibilization can be observed through the legal understanding of sex at birth and among parents, as well as through the misgendering of trans people in statutes and jurisprudence.[14]

In Part II, I discuss the medical model, which prevailed before medical requirements for changing gender markers on birth certificates were abrogated in 2015. This model recognizes the existence of the trans subject only to facilitate a return to invisibility through conformity to cisgender ideals. Here, the subject only appears in law to better disappear once it sufficiently accords with the biological expectations of the law regarding sex. This model emerges from the gender marker change regime as well as the jurisprudential treatment of gendered name changes that was in force until 2015.

Part III describes the minoritizing model that has prevailed since the 2015 changes. This model defines the trans legal subject

Pieter Cannoot, *'#WontBeErased': The Effects of (De)Pathologisation and (De) Medicalisation on the Legal Capacity of Trans* Persons*, 66 Int'l J.L. & Psychiatry 101478 (2019).

13. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 La. L. Rev. 677 (2000).

14. Misgendering refers to the use of gendered terms that do not correspond to those used by the person, especially trans ones.

as essentially identarian and marginal, re-inscribing the unmarked nature of the cis subject. Under the minoritizing model, trans people are always *trans* people, never people *full stop*. The model reveals itself in the new gender marker change regime as well as the accretion of gender identity and gender expression as protected grounds under the antidiscrimination provision of the Québec Charter of Human Rights and Freedoms, a quasi-constitutional human rights statute.[15]

The adoption of the medical model has had important positive consequences for many trans people. The 1977 "Act respecting the change of name and of other particulars of civil status" was adopted out of humanitarian concern.[16] Similarly, the adoption of the minoritizing model, however imperfect it may be, put into operation changes that were long requested by trans communities of the province and vastly expanded access to gender marker changes.[17] Nonetheless, the model's adoption is an unfinished progression insofar as trans people remain fixed by law to their marginalization and invisible in the discussions of sex under the *ius commune*. By preserving the background of invisibilization in its description and operationalization of the notion of sex, and by fixing the trans legal subject to its marginality, current Québec law remains gravely reductive. In concluding, I will offer some reflections towards realizing this narrative progression. It does not suffice that the trans legal subject be recognized in law: it must also be recognized as a *habitual* subject of it.

A. *Terminology*

A quick terminological note before I begin. A trans, or transgender, person has a gender identity that does not correspond to the sex they were assigned at birth. A cis, or cisgender, person has a gender identity that corresponds to the sex they were assigned at birth. Trans and cis are antonyms.

"Being trans" and "being cis" are gender modalities. Gender modality refers to the relationship between a person's gender

15. Charter of Human Rights and Freedoms, C.Q.L.R. c C-12 (June 16, 2019), https://canlii.ca/t/542k6 [https://perma.cc/BPL4-TRUB].

16. 2nd Reading, Bill 87 - Loi modifiant la Loi du changement de nom, 31–2, no 135 (19 December 1977) *in* Débats de l'Assemblée nationale, 4976; Act Respecting the Change of Name and of Other Particulars of Civil Status, R.S.Q., c C-10 (Can.); Robert P. Kouri, *Certain Legal Aspects of Modern Medicine (Sex Reassignment and Sterilization)* (1976) [https://perma.cc/9AX7-VYMC].

17. Mickael Chacha Enriquez, *La Contestation des Politiques de Changement D'identité de Genre par les Militantes et Militants Trans Québécois*, Lien social et Politiques 181 (2013) [https://perma.cc/ZR2Y-YD7C].

and the sex they were assigned at birth.[18] The fact of being trans is termed 'transitude.'[19] A trans woman is a woman even if she was assigned male at birth. The same applies for trans men.

A non-binary person is a person whose gender identity is neither completely male nor completely female. They are non-binary regardless of the sex they were assigned at birth.

Gender identity refers to the deeply felt internal and individual sentiment of belonging to a gender, including one's gendered relationship to the body.[20] Gender identity is distinct from gender expression, which refers to the relationship between one's chosen appearances and social aesthetic norms of masculinity and femininity.[21] Gender expression includes being masculine, feminine, or androgynous, but also includes other notions, such as being butch or femme in lesbian communities.

An intersex person is someone who was born with, or naturally developed at puberty, bodily characteristics that do not fit the sociomedical model of male/female bodies, which presumes a binary convergence of sexual traits.[22]

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18. Florence Ashley, *'Trans' is My Gender Modality: a Modest Terminological Proposal*, *in* Trans Bodies, Trans Selves (Laura Erickson-Schroth ed., 2 ed. forthcoming 2021) [https://perma.cc/27SL-VKXW].

19. Office québécois de la langue française, *Transitude*, Le grand dictionnaire terminologique (2019), http://gdt.oqlf.gouv.qc.ca/ficheOqlf.aspx?Id_Fiche=8359852 [https://perma.cc/944W-3SJX]; Florence Ashley, *Don't be so Hateful: The Insufficiency of Anti-discrimination and Hate Crime Laws in Improving Trans Well-being*, 68 U. Toronto L.J. 1, 4 (2018); Alexandre Baril, *Hommes Trans et Handicapés : une Analyse Croisée du Cisgenrisme et du Capacitisme*, Genre, sexualité et société (2018), http://journals.openedition.org/gss/4218 [https://perma.cc/9VWE-JESH]. The term "transness" is also common, although I favour "transitude" for primarily aesthetic reasons, as well as to operationalize a dialogic influence from French to English in overt resistance to the overwhelmingly unilateral influence of English to French in trans community language.

20. I primarily draw on the definition adopted in The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007), http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf [https://perma.cc/9RKL-G5WY]. I have however removed the component of the definition referring to gender expression because it no longer reflects current usage. Currently, gender identity and expression are more rigidly distinguished, conceptually, a fact that is reflected in the supplementary principles of 2017.

21. The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles 6 (2017), http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf [https://perma.cc/ME8W-AQQH].

22. I base my definition on a definition shared by Janik Bastien-Charlebois

Throughout the paper, I use the terms "sex" and "gender" interchangeably, save for indication to the contrary. This choice is motivated by personal reasons, as well as by the fact that the terms are used as synonyms in everyday life.[23] Let us begin.

I. The Background of Invisibility: Neither Shadow nor Reflection[24]

In this Part, I explore the conception of gender or sex that can be found in laws of general application in Québec. This conception invisibilizes trans people by defining gender in biological terms and can be seen lurking in the background of laws that apply more specifically to trans people, such as antidiscrimination and gender marker change laws, under either the medical or minoritizing model. This Part is divided into three Subparts discussing the legal conception of sex: (A) at birth; (B) among parents; and (C) revealed in instances of statutory and jurisprudential misgendering.

A. *Sex At Birth*

In this Subpart, I expound how Québec law constructs gender as a biological fact at the time of birth. This understanding emerges from the provisions of the Civil Code of Québec on the attestation of birth and from the Criminal Code provisions enabling non-consensual surgeries on intersex newborns.

Gender or sex, as it is termed in the Civil Code of Québec, is a legal and administrative category to which we are confronted as early as our birth. Article[25] 111 of the Civil Code dictates: "The accoucheur draws up an attestation of birth. An attestation

through personal communication. *See also* Janik Bastien-Charlebois, *Femmes Intersexes: sujet Politique Extrême du Féminisme*, 27 Recherches féministes 237 (2014) [https://perma.cc/D3EZ-3AMN]; The GenIUSS Group, Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys (Jodie L. Herman ed., 2014) [https://perma.cc/TV5F-W4AY]. I choose to foreground a personal communication by someone who is active in intersex advocacy communities in explicit recognition of the authority of the concerned communities and of communal knowledges on the matter, regardless of publications recognised by the academic community. The rapid evolution of community vocabulary, common to trans, queer, and intersex issues, highlights the importance of recognizing the validity of communal knowledges in our scientific publications. Any inaccuracy remains wholly mine.

23. Florence Ashley, *XY*, *in* Dictionnaire critique du sexisme linguistique 234 (Suzanne Zaccour & Michaël Lessard eds., 2017).

24. I intend my colourful Part titles as an homage to Williams, *supra* note 3.

25. Even in English, provisions of the *Civil Code* are termed 'articles.' Provisions of statutes are called 'sections.'

states the place, date and time of birth, the sex of the child, and the name and domicile of the mother." Those who have seen The Lion King—my childhood favorite—can picture how I imagine the scene. The doctor-Rafiki holds up the child-Simba, arms fully extended on the hill overlooking the savannah and declares: "It's a boy" or "It's a girl." The crowd gathered for this magical moment roars with delight.

Upon birth—and this affirmation carries legal weight—our sex must be registered. All of us can guess that this 'sex' is not based on the newborns' self-identification.[26] The child is still years from developing a gender identity. It is instead a summary observation of the newborn's genitalia which typically grounds this act of administrative categorization.

The act of categorization is held in sufficiently high regard in the normative imaginary to justify imposing 'normalizing' genital surgeries, which are unnecessary and unconsented, on intersex newborns. Protecting the traditional understanding of gender is at the heart of the justification of intersex surgeries, as revealed by the urologist Anne-Marie Houle of Sainte-Justine Hospital who discusses intersex births as "bombs that we must disarm" through surgical interventions.[27] Intersex people are violently erased from administrative declarations.[28] Of course, a distinction must be made between intersex and trans people—though many intersex people are also trans. But the treatment of intersex people under the law is equally related to sex and cannot be wholly severed from our analysis of the trans legal subject. How the law treats intersex people

26. Kouri, *supra* note 16, at 139.

27. Mylène Tremblay, *Ni Fille ni Garçon: de Plus en Plus de Bébés Intersexes*, Châtelaine (Nov. 5, 2014), https://fr.chatelaine.com/societe/intersexualite-un-phenomene-meconnu-mais-repandu [https://perma.cc/DBV8-SHNB].

28. On the topic of the violence of these surgeries, *see* Alesdair Ittelson, Sylvan Fraser & M. Dru Levasseur, Providing Ethical and Compassionate Health Care to Intersex Patients: Intersex-Affirming Hospital Policies (2018), https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_20180731_hospital-policies-intersex.pdf [https://perma.cc/QJG3-PDJN]; Janik Bastien-Charlebois, *Sanctioned Sex/ualities: The Medical Treatment of Intersex Bodies and Voices* (2015); Cheryl Chase, *'Cultural Practice' or 'Reconstructive Surgery'? U.S. Genital Cutting, the Intersex Movement, and Medical Double Standards*, *in* Genital Cutting and Transnational Sisterhood: Disputing U.S. Polemics 126 (Stanlie M. James & Claire C. Robertson eds., 2002); Morgan Holmes, *Rethinking the Meaning and Management of Intersexuality*, 5 Sexualities 159 (2002); Off. of the U.N. High Commissioner for Hum. Rts., *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/29/23 (May 4, 2015); *Malta Declaration*, OII Europe (2013), https://oiieurope.org/malta-declaration [https://perma.cc/462G-XH87].

reveals not only its inhumanity, but also how it understands sex as an anatomical and biological category that does not account for the existence of trans people.

The importance of genitalia in establishing legal sex is consecrated by section 268 of the Criminal Code. The Code creates an intersex-specific exception to its prohibition against "excis[ing], infibulat[ing] or mutilat[ing], in whole or in part, the labia majora, labia minora or clitoris of a person."[29] A surgical intervention will be carved out of the purview of the prohibition, if it is consented to by the parent, "for the purpose of [the child] having normal reproductive functions or normal sexual appearance or function."[30] Conjuring a racist dichotomy between unacceptable genital cutting primarily associated with Africa and Canadian surgeries deemed scientific and necessary, the Canadian state designates its own practices as morally innocent despite their non-consensual and frequently damaging nature. Yet, nonconsensual surgeries on intersex newborns are in many ways comparable to practices of genital cutting that the Canadian government prohibits for being 'barbaric.'[31] This understanding persists even though genital surgeries on intersex youth are frequently experienced as a form of sexual assault, exposing the normative function played by the criminal law.[32]

The notion of "normal sexual appearance," much more than that of reproductive or sexual function, serves as a justification for surgeries imposed on intersex people, who frequently find themselves deprived of reproductive or sexual functions because of these very surgeries. Indeed, many intersex people lose their ability to have children or to achieve orgasm as a consequence of these nonconsensual, state-promoted procedures.[33] If intersex bodies are termed 'abnormal,' it is because dyadic or endosex[34] bodies are set as the norm, in the normative sense of the word. Dyadic bodies are encouraged by the law and by medical practice, because bodies that do not fit a binary socio-medical conception of male and female anatomy are judged undesirable, even if it means having to eradicate intersex bodies' differences.[35]

29. Criminal Code, R.S.C. 1985, c C-46, s. 268 (Can.).

30. *Id.*

31. The scare-quotes are intended as a challenge the racially loaded language of 'barbaric' rather than as a condemnation of the prohibition itself.

32. Chase, *supra* note 28.

33. *Id.* at 133; Tiffany Jones et al., Intersex: Stories and Statistics from Australia 190 (2016).

34. Antonyms of intersex.

35. Although quantitative data on these surgeries are hard to come by, Sainte-Justine Hospital is known in the Québec context for defending them: Tremblay, *supra* note 27.

Through such attestations of birth and criminal law exemptions for surgeries on intersex newborns, the law sustains a biological conception of sex that excludes trans people and legitimates violations of bodily integrity for intersex newborns.

B. *Parental Sex*

Besides appearing in legal provisions surrounding newborns, the law deploys sex by conceptualizing parental roles in terms of reproductive function. In this Subpart, I will explore Québec law's conception of parental sex and highlight how it erases trans and queer parents, rigidly ties motherhood to womanhood, and imposes a cisheteronormative order on the family.

The provision cited earlier, article 111 of the Civil Code, does not place the weight of gender solely on the shoulders of the child, but also on those of the parents. Mentioned in the article is "the name and domicile of the mother."[36] Yet some children have multiple mothers, whether genetically related or not. Couples composed of trans and cis women can lead to a child being genetically related to two mothers. Here, which mother is the article talking about? As you may guess, we are talking about the mother who bore the child.

The most glaring absurdity arises in somewhat different circumstances: when trans men or non-binary people who have a uterus become pregnant. In these situations, the parent having given birth to the child is not the mother, but the father or other chosen designation. When applying article 111, it is this person who would be named on the attestation of birth—though they may be named as father. In the Civil Code, the word "mother" sometimes refers to the father. What a peculiar terminological choice!

Pursuant to this provision, trans men and non-binary people who give birth to children are erased, forced into the category of women by the law. Until 2019, it was, furthermore, impossible to change parental designations on the birth certificates of children who were born before the parental gender marker change.[37] While the birthing parent could be listed as father, if giving birth after their gender marker was changed, they would forever be the mother if the birth occurred prior to the change. A court's discussion of this categorization spoke dismissively of the difficulties that arose

36. Civil Code of Québec, C.C.Q. 1991 [C.C.Q.], art. 111 (Can.) [https://perma.cc/75GB-YHH5].

37. The policy change by the Directeur de l'état civil in 2019 is tributary of a lawsuit against the Québec government led by the Center for Gender Advocacy: Philippe Mercure, *Omettre le Sexe sur les Actes de Naissance: L'ouverture de Québec Jugée «Insuffisante»*, La Presse (Jan. 17, 2019) [https://perma.cc/5SUU-WNTG].

from it: "[t]hat there may be annoyances of some kind and inconveniences, maybe, but juridically speaking a father will always remain father and a mother will always remain mother independently from medical modifications physically made on someone."[38] Since the 2019 change, the paternity of trans men is recognized on the child's birth certificate, if their own birth certificate bears a male designation, but non-binary parents are not yet recognized as such.[39]

The gendered logic of article 111 is also found in labor and employment law. Though the English version of section 81.4 of the "Act respecting labour standards" refers to "[a] pregnant employee," a gender-neutral expression that struck me as much more accurate than "mother," the French version reads "[l]a salariée enceinte," terms marked by a feminine grammatical gender.[40] In both languages, the section sets up entitlement to "maternity leave." As we say in French: so close, yet so far.[41]

By speaking of maternity in inextricable juxtaposition with pregnancy, the law reifies the reproductive role of the mother. The mother, and by inference the woman, is the person who gives birth. The father is the parent who provided the sperm. In sharp contrast to Ontario, which allows for more than two parents,[42] Québec only allows for two parents to be listed on the child's birth certificate and speaks of them as mother and father.[43] In so doing, the law grounds itself on a bionormative model of filiation, that is, a model which edicts reproductive biology as a familial norm.[44] The bionormative model essentially conceives parenthood in terms of cisheterosexual reproductive dyads, only subsequently expanding outwards to

38. Re JM, [2004] RJQ 2491 (Can. Q.C. C.S.): "Qu'il y ait des tracasseries quelconques et des inconvénients peut-être, mais juridiquement parlant un père restera toujours un père et une mère restera toujours une mère indépendamment des modifications médicales apportées sur quelqu'un physiquement."

39. On 28 January 2021, after the writing of this article, the Superior Court of Québec declared unconstitutional the law that limited parents to the designations "mother" and "father": Center for Gender Advocacy c. Attorney General of Quebec, 2021 QCCS 191 (Can.). How the judgment will be implemented remains to be seen.

40. Act Respecting Labour Standards, C.Q.L.R. c N-1.1, s. 81.4 (Can.) [https://perma.cc/8NCV-QKYR].

41. That's the joke.

42. Children's Law Reform Act, R.S.O. 1990, c C-12, s. 10(2) (Can.) [https://perma.cc/87L6-N89R].

43. C.C.Q., art. 114 (Can.). *See also* Droit de la famille - 18968, 2018 CanLII 1900 (Can. Q.C. C.S.) [https://perma.cc/Z6AH-6EDM]; Droit de la famille - 191677, 2019 Can LII 1386 (Can. Q.C. C.A.) [https://perma.cc/7W39-QUPE].

44. Charlotte Witt, *A Critique of the Bionormative Concept of the Family*, *in* Family-Making: Contemporary Ethical Challenges 49 (Françoise Baylis & Carolyn McLeod eds., 2014) [https://perma.cc/H764-WZJE].

recognize same-sex parenthood in light of same-sex couples' usual inability to procreate without external aid. The diversity of parental arrangements beyond romantic dyads is also overlooked, a fact that may have nefarious consequences for trans and queer families, who are disproportionately polyamorous.[45]

Outside of their expected reproductive functions, mothers are deprived of their womanhood and assimilated to men. The female coparents of women who give birth are classified as fathers under the law and become eligible to the "paternity leave" bequeathed by section 81.2 of the "Act respecting labour standards."[46] That the law recognizes the gendered distribution of reproductive labor and offers additional latitude to the person carrying the child is a positive thing, but its language, unfortunately, essentializes women to reproductive function. Women are only mentioned within a familial reproductive structure that is cognizably cisgender, heterosexual, monogamous, and nuclear.[47] The Civil Code ensures as much by providing, at article 539.1, that "[i]f both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child."[48] Once we leave the field of familial organization and of reproduction, we return to the adage "*le masculin l'emporte sur le féminin*."[49] The masculine prevails over the feminine.

Overall, a cisheteronormative familial order reigns. Throughout the law, we find provisions speaking of father and mother as forming the natural familial structure. According to article 525 C.C.Q., "if a child is born during a marriage or a civil union between persons of opposite sex, or within 300 days after its dissolution or annulment, the spouse of the child's mother is presumed to be the

45. Ethan Czuy Levine et al., *Open Relationships, Nonconsensual Nonmonogamy, and Monogamy Among U.S. Adults: Findings from the 2012 National Survey of Sexual Health and Behavior*, 47 Archives of Sexual Behav. 1439 (2018) [https://perma.cc/H65G-J4BZ].

46. Act Respecting Labour Standards, C.Q.L.R. c N-1.1, s. 81.2 (Can.).

47. This contrasts with queer, polyamorous, or communal models of familial organization that could offer egalitarian options for child custody and education by avoiding attribution of the entire responsibility to the mother-father dyad.

48. C.C.Q., art. 539.1 (Can.).

49. The expression refers to the grammatical rule whereby a group of mixed-sex persons is described with the masculine grammatical gender, regardless of the group's gender composition. On the politics of French grammatical gender and gender-inclusive writing, *see* Michaël Lessard & Suzanne Zaccour, Grammaire non sexiste de la langue française: le masculin ne l'emporte plus! (2017) [https://perma.cc/547W-BUZN].

father."[50] Under these binary terms, same-sex and trans 'opposite' sex partners do not benefit from the same presumption. Further, article 599 C.C.Q. tells us that, "[t]he father and mother have the rights and duties of custody, supervision and education of their children," even though it could just as easily have referred to parents.[51] This vision of the couple is reproduced throughout the Civil Code, which speaks time and time again in terms of "father and mother."[52]

Synthesizing from these various provisions, we see that the law's understanding of sex as biological—as revealed in provisions surrounding birth—is inextricable from the law's normative interest in reproduction and the familial order. Through each of those components, trans people are rendered invisible.

C. *Misgendering*

In this Subpart, I discuss how the law misgenders trans people in statutes that do not acknowledge non-binary people's genders, and case law that insists on describing parties based on their sex assigned at birth. The law's misgendering of trans people reveals an attachment to gender as binary and biological through the fabrications of language and legal sex. Here too, trans people are noticeably absent from the law's understanding of gender.

As I have alluded to earlier, Québec law does not make room for non-binary people.[53] Many feminists, including myself, criticize the use of masculine terminology in reference to people of every gender. The section of the Interpretation Act that ushers the convention of writing using masculine terms, section 53, also constrains us to two genders: "The masculine gender shall include both sexes, unless the contrary intention is evident by the context."[54] By assuming the exhaustiveness of "both sexes," the law excludes the existence of people who are neither entirely men, nor entirely

50. C.C.Q., art. 525 (Can.).

51. C.C.Q., art. 599 (Can.).

52. *See generally*, C.C.Q. (Can.) (containing references to "father and mother" in arts. 54, 61, 62, 66.1, 80, 93, 113, 116, 119, 132.0.1, 171, 192, 193, 195, 196, 199, 199.2, 205, 207, 218, 223, 225, 226, 544, 559, 576, 583, 597, 598, 599, 600, 605, and 670).

53. On 28 January 2021, after the writing of this article, the Superior Court of Québec declared the gender marker change provision unconstitutional because it did not provide for gender markers other than "man" and "woman": Center for Gender Advocacy c. Attorney General of Quebec, *supra* note 39. How the judgment will be implemented remains to be seen, but I doubt that the general treatment of gender as binary will be altered throughout the *ius commune*.

54. Interpretation Act, C.Q.L.R., c I-16, s. 53 (Can.) [https://perma.cc/B9U5-E4R2].

women, fastening them to a legal gender that is usually determined based on genitalia observed at birth.[55] Sole source of comfort, the expression "man or woman" was replaced by "person" in multiple laws when, in 1999, *de facto* same-sex spouses were granted legal recognition.[56] Still, overall, non-binary people find themselves misgendered, impossible, and invisible under Québec law.

In addition to the denial of non-binary existence, the misgendering of transgender people is ubiquitous in the jurisprudence. Throughout the case law, we can find many references to the trans party in terms that do not correspond to their gender identity, nor their chosen pronouns and grammatical agreement.[57] This usage denies the primacy of gender identity and re-inscribes that of anatomy. Although my analysis moves at this point from legislative to judicial power, the latter also contributes to the constitution of the trans legal subject because judgments are an integral part of the juridical landscape.

The following cases demonstrate the judicial misgendering of trans people:

In *Montreuil c. Québec*, the judgment describes a trans woman as "[t]he appellant [who is of] masculine sex."[58]

In *Montreuil c. Directeur de l'état civil*, the court clearly misgenders the same trans woman by stating: "[t]he appellant [masculine grammatical gender is used] demands," and even questions "can a man who has adopted the appearance of a woman use a first name traditionally attributed to the feminine sex?"[59] In a separate opinion for the same decision, we find further misgendering in the judge's unilateral proclamation that "[t]he person who appeals to this court is a man. I will designate them as the appellant

55. Not all non-binary people are in this situation, however. I, for instance, have a female legal gender marker although I was assigned male at birth and am non-binary. Although I would prefer no gender marker or, if not possible, a different one, I much prefer a female gender marker to a male one.

56. An Act to Amend Various Legislative Provisions Concerning De Facto Spouses, S.Q. 1999, c 14 (Can.) [https://perma.cc/F7MP-DVJY].

57. Grammatical gender agreement refers to the process whereby the grammatical gender of a word is determined based on the gender of the person it relates to. While not strictly speaking a matter of grammatical agreement, nouns are also often marked by the gender of the person it is being applied to—a feature known as grammatical gender inflection.

58. Montreuil c. Québec, 1999 CanLII 14648 (Can. Q.C. C.A.), my translation [https://perma.cc/D3GH-BZLK].

59. Montreuil c. Directeur de l'état civil, 2002 CanLII 41257 (Can. Q.C. C.A.), opinion of Jacques Delisle J.C.A., my translation [https://perma.cc/4NHM-EGSH].

[masculine], conforming myself to the rules of the French language relative to genders."[60]

In *Protection de la jeunesse—0968, 2009*, the tribunal writes about a trans boy: "She even requested that the Tribunal refers to her as a boy. It is with great respect that the Tribunal explained to her that sex is also a juridical reality. The Tribunal should not add to the confusion, and will therefore treat a juridical reality as it is; which will not prevent the president of the Tribunal of being empathetic to her difficult situation."[61]

Courts offer a simple justification for the kind of institutional transantagonism embodied in misgendering: sex is a legal reality predicated upon a biological fact, and the rules of the French language require that everyone designate people according to their bio-legal sex.[62] While the explanations vary between the three cases, we find ourselves in one way or another back to the body—whether walking the path beaten by language, law, or biology. The cited excerpts, which date from 1999 to 2009, understand legal sex in a way that renders trans people invisible, even though the judges cannot but be aware of the possibility of legal gender marker change. Yet, to the contrary, little is mentioned about this possibility, what it would imply for their views of gender, or whether they would respect a legal gender change of the parties—a change which, prior to 2015, hinged on surgical interventions. Although misgendering seems less frequent in today's courts, the preceding passages highlight the biological conception of sex that still rears its head throughout the Civil Code and to which article 71, which allows people to change their gender marker, serves as a rare exception. Let us also take note that misgendering is not entirely absent from judgments today; some recent opinions are proof of it.[63]

It is this legal background, from birth to parenthood to the "rules of the French language relative to genders," that defines the contours of the invisibility of trans subjects.[64] Statutes and judicial opinions demonstrate an understanding of sex as a medico-legal,

60. *Id.*, opinion of Benoît Morin J.C.A., my translation.

61. Protection de la jeunesse—0968, 2009 CanLII 3146 (Can. Q.C. C.Q.), my translation [https://perma.cc/32LF-L8EM].

62. Transantagonism refers to acts and ways of thinking that demonstrate a hostility or lack of acceptance towards trans people: Ashley, *supra* note 19, at 3–4.

63. R. c. Tremblay, 2016 CanLII 9170, 41 (Can. Q.C. C.Q.) [https://perma.cc/SFJ6-K2K5]; Droit de la famille – 18968, *supra* note 43. This latter judgment also denied the equivalence of trans paternity to that of the father having provided the sperm, but it was infirmed on appeal.

64. Montreuil c. Directeur de l'état civil, *supra* note 59, opinion of Benoît Morin J.C.A., my translation.

reproductive, anatomical, and binary fact determined at birth based on genitalia. None of these characteristics recognize, let alone celebrate, trans existence. Unsurprisingly for those having been confronted by institutional cisnormativity, these characteristics fall perfectly in line with the "natural attitude about gender" theorized by ethnomethodologist Harold Garfinkel and subsequently taken up by trans thinkers such as Talia Mae Bettcher, Kate Bornstein, and Jacob Hale.[65] The term "natural," alluding to Husserlian phenomenology,[66] refers as much to the prevalence of the attitude as to how it designates exceptions to the rules as aberrations, thereby reinscribing the normative importance of its vision of sex/gender.

In the eyes of the law, gender is binary, invariant, and determined from genitals, or it is nothing. Exceptions are all-too-often simply denied, or reluctantly acknowledged while simultaneously emphasizing their unacceptability. Cis people are the only people worth mentioning when discussing gender in general, just as we speak of humans as 'naturally' having two hands, two legs, and a capacity for rational thinking. Exceptions do not count. Therefore, given their absence from the *ius commune* of Québec, trans people cannot exist as habitual legal subjects. This invisibility is constitutive of their existence as legal subjects. It is only by reference to special rules, which exist only for us, that we can reappear as subjects. It is to this "exceptionalizing" visibility—if you will allow me the neologism—that we now turn.

II. The Medical Model of Pre-2015: And a Few Snips of the Scissors

In this Part, I sketch the medical model of trans legal subjecthood which emerges from the old gender marker change regime. The medical model proposes a vision of the trans legal subject as one that must fall in conformity with cisgender ideals and, thus, become socially invisible. The invisibility of the trans legal subject, under this model, consists in promoting trans subjects who blend in the masses and are not read as trans in everyday life. Although many trans people wish to live without being visibly trans, it is neither possible nor desired by a plurality of trans people, under this legal regime. I will first consider the gender marker change regime

65. Talia Mae Bettcher, *Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion*, 22 Hypatia 43 (2007) [https://perma.cc/3TXM-YUJZ]; Jacob Hale, *Are Lesbians Women?*, 11 Hypatia 94 (1996) [https://perma.cc/2PXV-H7PF].

66. Talia Mae Bettcher, *Full-Frontal Morality: The Naked Truth about Gender*, 27 Hypatia 319 (2012) [https://perma.cc/XU2S-V26E].

before turning to the jurisprudential treatment of gendered name change requests.

A. *The Gender Marker Change Regime*

In this Subpart, I discuss how the gender marker change regime prior to 2015 embodied a medical model of trans legal subjecthood that seeks to erase bodies and lives that do not conform to cisgender ideals.

Prior to October 2015, article 71 of the Civil Code read as follows:

> Every person who has successfully undergone medical treatments and surgical operations involving a structural modification of the sexual organs intended to change his secondary sexual characteristics may have the designation of sex which appears on his act of birth and, if necessary, his given names changed. Only a person of full age who has been domiciled in Québec for at least one year and is a Canadian citizen may make an application under this article.[67]

The article reproduces the crux of section 16 of the "Act respecting the change of name and of other particulars of civil status," which governed gender markers changes between 1977 and 1994.[68]

The text of the article is strikingly vague, making it difficult for jurists to agree on what would satisfy the text's enumerated requirements. The expression "secondary sexual characteristics" appears in the French text as "*caractères sexuels apparents*," which can be literally translated as "apparent sexual characteristics," which only adds to the confusion.[69] Both the English and French versions are legally authoritative yet appear to mean entirely different things. The notion of secondary sexual characteristics refers to traits such as breasts or beards, whereas primary sexual characteristics are genitalia.[70]

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67. C.C.Q., art 71 (Can.).

68. The debates of the Sous-commission des institutions does not explain why the old formulation was preserved instead of the formulation proposed by the Office de révision du Code Civil: 31 JOURNAL DES DÉBATS DE LA SOUS-COMMISSION DES INSTITUTIONS, NO 5, 34–1 (1991) (Can.) [https://perma.cc/A2LT-PKAT]; the Office de révision du Code civil, in 1 RAPPORT SUR LE CODE CIVIL DU QUÉBEC (1977) (Can.) proposed the following formulation: "Any Canadian citizen, unmarried, residing in Québec for one year, and having successfully completed the medical and surgical treatments seeking to modify the appearances of sex has the right to obtain from the Directeur de l'état civil the modification of their act of birth" (my translation) [https://perma.cc/SN5H-4YDE].

69. C.C.Q., art. 71 (Can.).

70. Connaissance d'office.

Despite the selected wording, the article's interpretation by the Directeur de l'état civil (who oversees gender marker changes) was largely limited to surgeries on external genitals. Changing a gender marker without a vaginoplasty, metaoidioplasty, or phalloplasty was rare, and typically occurred following a hysterectomy.[71] For much of that time, taking hormones was a strict criterion of access to genital surgeries.[72] On an anecdotal level, it appears that some people have succeeded in changing their gender marker by submitting a letter from a healthcare professional that reproduced the wording of article 71, citing privacy rights to circumvent follow-up questions.[73]

The interpretation is unsurprising. By understanding trans people as people who change sex, the phrasing "structural modification of the sexual organs" seeks to reinscribe trans bodies within a cisnormative social architecture by legally recognizing the gender of trans individuals only inasmuch as they comply with cisgendered bodily ideals.[74] The law attempts to eradicate trans bodily non-conformity by promising trans people the benefits of civil status. Consequently, many a trans person who did not otherwise desire genital surgery nevertheless pursued one to obtain a gender marker change.[75]

The academic scholarship also attests to the tendency towards medical invisibilization—the invisibilization of discernibly trans bodies through medical means.[76] For example, in his doctoral dis-

71. Jacob Hale, *Consuming the Living, Dis(re)membering the Dead in the Butch/FTM Borderlands*, 4 GLQ: A J. OF LESBIAN AND GAY STUD. 311, 338 (1998).

72. *See* Stephen B. Levine et al., *The Standards of Care for Gender Identity Disorders*, 11 J. OF PSYCHOL. & HUM. SEXUALITY 1 (1999). The hormone requirement was partly relaxed in the sixth version of the standards of care. *See* Walter Meyer et al., *The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version*, 13 J. OF PSYCHOL. & HUM. SEXUALITY 1, 28 (2002). However, some people struggle to be approved for genital surgery without taking hormones even today.

73. I have learned this from individuals who helped other members of the community access gender marker changes prior to 2015. I am confident that such evidence is admissible under one of the infinite exceptions to the hearsay rule.

74. C.C.Q., art. 71 (Can.).

75. I am unaware of statistics on the issue but have met a few people who were in that situation over the years. *See also* XY v. Ontario (Government and Consumer Services), 2012 CanLII 726 at ¶ 56–61(Can. H.R.T.O.).

76. Civilian jurisdictions, though perhaps less so in Québec than in continental Europe, hold academic writing, known as doctrine, in high regard and frequently refer to it much in the same way as one would cite prior, non-binding court decisions at common law.

sertation, Robert P. Kouri notes three potential approaches to gender marker changes: (1) changes based on gender identity; (2) changes based on medical bodily alterations; or (3) total refusal of gender marker changes.[77] Writing two years before the 1977 law that adopted it, he favored the second approach of allowing legal changes following medical bodily alterations, on account that it preserves the "conformity" of law to biology.[78] According to Kouri, such a solution deployed a "legal fiction of an extraordinary nature" to stabilize trans people's "*modus vivendi*" while maintaining the biological nature of sex at law.[79] For Ethel Groffier, a contemporary of Robert Kouri, the aim of gender marker changes is to "normalize" the lives of trans people, exposing the irreducibly normative aspects of the process.[80]

Their perspective appears to be shared by Judge Michèle Rivet who wrote in a law review article a dozen years later that the ultimate objective of the law is the triumph of biological truth.[81] Although she accepts gender marker changes for some trans people, she rejects its possibility without surgical intervention: without surgery, gender identity would redefine sex contrary to biology, and trans people would be stuck "between two laws, between two realities."[82] From the foregoing, what I learn is that anatomical changes enable gender marker changes precisely because they do not perturb and indeed reinscribe the biological conception of sex.[83]

The promise of gender markers extends to human rights law. From 1982 to 1998, gender markers determined which trans people were protected from discrimination. Indeed, the first Canadian

77. Kouri, *supra* note 16. Kouri is a highly respected professor of law who has written seminal textbooks on health law but has not revisited trans legal issues much throughout his career.

78. *Id.* at 140.

79. *Id.*

80. Ethel Groffier, *De Certains Aspects Juridiques du Transsexualisme dans le Droit Québécois*, 6 Revue de Droit de l'Université de Sherbrooke 114, 116 (1975).

81. Michèle Rivet, *La Vérité et le Statut Juridique de la Personne en Droit Québécois*, 18 Revue générale de droit 843, 845 (1987).

82. *Id.* at 855, my translation. The language is conspicuously similar to the jurisprudential discourse surrounding Micheline Montreuil in the late 1990s and early 2000s.

83. *See* Jean-Louis Baudouin, *La Vérité et le Droit des Personnes: Aspects Nouveaux*, 18 Revue générale de droit 801 (1987). For Jean-Louis Baudouin, then professor and shortly thereafter judge on the Québec Court of Appeal, even this approach is too detached from biology. He wholly rejects the possibility of a legal gender change, punctuating his words of incendiary terminology. His reasoning is anchored in a conservative vision of sex and does not dare call into question its essentialist premises.

case recognizing discrimination against trans people as illegal did so under the guise of civil status, a notion that includes legal sex.[84] Selecting civil status as the basis of protection, instead of sex, echoes the proposal of Robert Kouri to anchor the law in biology while appealing to a "legal fiction of an extraordinary nature" to protect some trans people.[85] In that case, *Québec c. Anglsberger*, a restaurant refused to serve a trans woman, associating transitude to sex work, even though she had changed her gender marker.[86] Rendering his decision, the judge amply distinguished between the victim of discrimination, who had obtained a gender marker change and was "soberly dressed, with all the characteristics of a person of the feminine sex," and the sex workers with whom the defendant had associated her.[87] The fact of their occupation, which made accessing vaginoplasty more difficult,[88] notionally excluded them from trans womanhood. Instead, they were described as "transvestites," and associated with mental illness and sexual deviance. By articulating trans womanhood through sartorial and vocational respectability, the judge's words reveal the moral judgment and aspiration to invisibility that underpins the promise of civil status and its benefits. Because sex work, especially when done without having had genital surgery, cannot satisfy the law's desire for social invisibility, the law refuses change of civil status. The principle that people cannot dispose of civil status as they wish justifies the stranglehold over it.[89]

By offering gender recognition in exchange for medical and social gender conformity, the pre-2015 gender marker change regime instantiated the medical model's logic of in/visibility, making the trans legal subject legally visible to better guide it towards social invisibility.

B. *Jurisprudential Treatment of Gendered Name Changes*

The law's promotion of medicalized transitude that approximates the law's cisgender ideals is revealed in the jurisprudential treatment of gendered name changes. In this Subpart, I compare how courts treated Micheline Montreuil's name change requests

84. Québec (Comm. des droits de la personne) c. Anglsberger, 1982 CanLII 4924 (Can. Q.C. C.Q.).

85. Kouri, *supra* note 16, at 140.

86. *See* Québec (Commission des droits de la personne) c. Anglsberger, *supra* note 84.

87. Québec (Commission des droits de la personne) c. Anglsberger, *supra* note 84. My translation.

88. Namaste (2000), *supra* note 9 at 206ff.

89. *See* Denis Salas, Sujet de chair et sujet de droit: la justice face au transsexualisme (Presses Universitaires de France 1994); *see also* Affaire A.P., Garçon et Nicot v. France, Eur. Ct. H.R. (2017).

in various decisions between 1998 and 2002 with how Thompson's name change request was treated by the Superior Court in 2002.[90] Given that Micheline Montreuil resisted the law's medical model of transitude whereas Thompson conformed to it, comparing both cases illustrates the law's articulation of trans legal subjecthood through the medical model.

1. The 1998–1999 Micheline Montreuil Name Change Decisions

In 1998, Micheline Montreuil sought a judicial review of the Directeur de l'état civil's refusal to add the first name Micheline and remove two first names from her birth certificate, keeping the name Pierre.[91] She wished to have only the first names Micheline and Pierre on her birth certificate.[92] According to the Directeur de l'état civil, this request fell under the gender marker change regime, and wishing to change one's name without submitting to surgical requirements did not constitute the kind of serious motive that would allow for a name change without a corresponding change in gender marker.[93]

Superior Court Judge Claude Rioux rejected the judicial review application.[94] In his view:

> We must conclude that the presence of a feminine first name in the name of a man who has not changed sex according to the conditions set by the law would create a flagrant contradiction in the designation of this person and violate the spirit and letter of the law, which demands that the absence of any legal ambiguity regarding the sex of the first names that individuals may include in their name.[95]

Judge Rioux's reasoning exemplifies the same logic of invisibilization as article 71 did prior to October 2015. He refused to grant the requested name because Micheline Montreuil had no intent to acquiesce to the law's demand for bodies that conform to gender-as-biological-reality.[96]

Micheline Montreuil appealed. The Court of Appeal dismissed her appeal, albeit on different grounds. Contrary to Judge Rioux, Judge France Thibault noted that adding the first name

90. Thompson c. Directeur de l'état civil, 2002 CanLII 39945 (Can. Q.C. C.S.).

91. Montreuil c. Québec (Directeur de l'état civil), 1998 CanLII 11918 (Can. Q.C. C.S.).

92. *See id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

Micheline would create no significant confusion, since there are many exceptions to the rule that certain first names are gendered and, for that reason, names do not juridically serve to note gender.[97] However, Micheline Montreuil had to prove general use of the first name Micheline over five years.[98] According to Judge France Thibault, Micheline's usage of the first name Pierre in some social spheres was an obstacle to demonstrating general use of the name Micheline, even though she expressly wished to use both first names.[99] By refusing to remove her two deadnames,[100] and by preventing her from modifying her first name because she did not wish to completely erase her gendered past, the Court of Appeal affirms the invisibilizing logic of the institutions of name and gender marker change at the time.[101]

2. The 2002 Thompson Name Change Decision

In 2002, Thompson, a trans woman, asked the court to allow her name change. In contrast to Micheline, Thompson was pursuing surgical interventions that would eventually open the door to a gender marker change, though she had not yet fulfilled its requirements.

Although she had already proven her general usage of her first name over five years, as required by law, Judge Paul Jolin spent much time discussing her transition.[102] The importance of the name change, in his eyes, lied in large portion in the fact that the Standards of Care of the Harry Benjamin International Gender Dysphoria Association[103] required that trans people live socially in their gender for at least two years before accessing vaginoplasty.[104] The name change, an aspect of social life, was stationed as a preliminary to surgical interventions that would later give her access to the gender marker change enabled by article 71.[105]

The judge adopted as his own the comments of the Service du changement de nom of the Directeur de l'état civil:

> Finally, in my opinion and according to my experience, we must at all cost avoid ending up with cases like that of Pierre

97. Montreuil c. Québec, *supra* note 58, opinion of France Thibault J.C.A., my translation.

98. *Id.*

99. *Id.*

100. Previous first names of a trans person that they no longer use and are generally associated with the gender they were assigned at birth.

101. Montreuil c. Québec, *supra* note 58.

102. *See* Thompson c. Directeur de l'état civil, *supra* note 90.

103. Now the World Professional Association for Transgender Health.

104. *See* Thompson c. Directeur de l'état civil, *supra* note 90.

105. *See id.*

> (Micheline) [sic] Montreuil. We must avoid the opportunity that some people live under two sexes. A comparative law study (United States, Europe) demonstrated that the experience of living under the other sex (while the first name and indication of sex remain unchanged) and that, for some years, is an integral part of the criteria of real transsexualism.[106]

In granting the name change, including removing her deadname, the judge observed that nothing suggested that Thompson wished to "live under the two sexes," a desire attributed to Micheline Montreuil.[107] A conspicuous parallel can be made between these words and those of Judge Michèle Rivet when she stated, in her article published some 15 years earlier, that the law could not tolerate people living, without surgery, "between two laws, between two realities."[108]

3. The 2002 Micheline Montreuil Decision

Micheline Montreuil returned to the Court of Appeal in 2002, the same year that *Thompson c. Directeur de l'état civil* was adjudicated in Superior Court.[109] She was again requesting to add the first name Micheline and remove two deadnames from her birth certificate, now on the grounds that she satisfied the requirement of five years of general usage.[110] Unlike Thompson, who wished to undertake surgical interventions that would eventually open the door to a gender marker change, Micheline Montreuil did not desire such interventions.

In the 2002 decision *Montreuil c. Directeur de l'état civil*, the Court of Appeal granted the applicant's request to add the first name Micheline to her birth certificate but refused to remove her deadnames.[111] In their respective judgments, Judges Thérèse Rousseau-Houle and Jacques Delisle allowed the name Micheline because she had almost satisfied the requisite five years of general use and it would have been excessive to await a fourth name change request less than a year later.[112] However, in keeping her deadnames on the birth certificate, the judges ostensibly held that the five years rule could only be used to add names, not to subtract them.

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106. *Id.* at 27, my translation.

107. *See* Thompson c. Directeur de l'état civil, *supra* note 90 at ¶ 27–28.

108. Rivet, *supra* note 81 at 855, my translation.

109. *See* Montreuil c. Directeur de l'état civil, *supra* note 59; Thompson c. Directeur de l'état civil, *supra* note 90.

110. *Id.*

111. *Id.*

112. *Id.*

4. Understanding the Internal Logic of the Decisions

Despite allowing the name change in both cases, a comparison of the decisions reveals the courts' disciplining of gender. The contrasting treatments of Micheline Montreuil and Thompson can be understood through the law's desire to promote trans people's social invisibility, a logic that underpins article 71 of the Civil Code.[113] This logic of invisibilization grounded Judges Rousseau-Houle and Delisle's refusal to remove Micheline Montreuil's deadnames, even though Thompson's deadname was removed by the Superior Court earlier in the same year.

Specifically, according to Judge Thérèse Rousseau-Houle, Micheline Montreuil had not "definitively [undertaken] the process of sex change" and, by identifying as a "trans*gender*" person,[114] wished to "remain in transition," changing her appearance and first name "without changing sex."[115] By contrast, Thompson was, in the opinion of the Superior Court, an example of "true transsexualism."[116] In fact, according to Judge Jolin, Thompson thus stood in contrast to Micheline Montreuil who wanted to "live under the two sexes."[117] Read side by side, the decisions reveal that it was likely because Micheline's bodily desires did not *accord* with the law's logic of invisibility that her request to remove her deadnames was rejected, limiting her to the rule of five years of general usage in order to add her desired first name. Although Thompson was equally visible, even appearing in a publicly accessible judgment, her anticipated invisibility justified making her intelligible under the law and invisible in civil status records.

By employing the terminology of sex in contrast to the trans*gender* identity of Montreuil, Judge Rousseau-Houle recalls us to the discussion of the body and anatomy. Sex being inextricably linked to anatomy and to reproductive capabilities in the social imaginary, the dominant social discourse on sex facilitates the exclusion of trans people and the rejection of a psychosocial conception of gender. At the same time, the psychosocial concept of gender had already been accepted in the context of antidiscrimination law in the 1998 case of *CDPDJ c. Maison des jeunes A . . . .*[118] In that decision, which arose from the firing of a trans woman, the ground of sex in the Québec Charter was interpreted as protecting

113. C.C.Q., art. 71 (Can.).

114. My emphasis.

115. Montreuil c. Directeur de l'état civil, *supra* note 59, my translation.

116. Thompson c. Directeur de l'état civil, *supra* note 90 at 27–28.

117. *Id.*

118. *See* Commission des droits de la personne et des droits de la jeunesse c. Maison des jeunes A . . ., 1998 CanLII 28 (Can. Q.C. T.D.P.).

trans people against discrimination.[119] Unfortunately, its psychosocial conception of gender did not extend to the jurisprudence on individual sex which, contrary to abstract discourses on the concept of sex, calls for the attribution of a sex label, man or woman, to an individual. This attribution reveals itself more difficult to accept for many, which creates a dissonance in the jurisprudence: it is easier to accept that gender identity falls under the concept of sex than to accept that a trans woman is really a woman.

Just as the Criminal Code encourages dyadic bodies at birth, the Civil Code discourages visibly trans bodies. Specifically, it dissuades those bodies that deviate too much from the biological and anatomical conception of gender. In fact, the identification of sex with genitalia, obligatory at birth, is paternalistically confirmed through a logic of eradication of difference. Because trans people call into question the natural attitude about gender, they are pushed to conform as much as possible to anatomical diktat. Momentaneously abandoning the invariability of gender, the trans legal subject only appears in Québec law's article 71 to become invisible and re-inscribe the binary and anatomic character of gender. Article 71 of the Civil Code and section 268 of the Criminal Code share the same impetus of eradicating divergent bodies. Thus, under both provisions, trans and intersex subjects become visible to only better disappear.

Without much surprise, given the interactions between law and society, this medical model of trans existence as a body needing correction is found among many trans people. The perspective finds attestation in Ethel Groffier's article, who affirms that after having "resolved the [gender identity] conflict by physiological, biological, and social conversion, there is no more transsexuality."[120] The vision can also be discerned in the words of Dr. Marci Bower when she tells us that she is not a transsexual woman because "that's all in the past; I am a woman."[121] In this understanding, less common today, the trans subject disappears as soon as the body conforms to cisgender ideals, and conformity is the defining end of the trans subject. Although few people today see conformity to cis ideals as the goal of trans people *qua* trans people,[122] this narrative has long

119. *Id.*

120. Groffier, *supra* note 80 at 116, my translation.

121. Finn Enke, *The Education of Little Cis: Cisgender and the Discipline of Opposing Bodies*, Transfeminist Perspectives in and beyond Transgender and Gender Studies 60, 73 (2012).

122. *See* Evan Vipond, *Resisting Transnormativity: Challenging the Medicalization and Regulation of Trans Bodies*, 8 Theory in Action 21 (2015); Florence Ashley & Carolyn Ells, *In Favor of Covering Ethically Important Cosmetic*

defined trans community discourses and has had a lasting impact on their internal dynamics.

Although desires for invisibility still exist within trans communities, they are principally justified by a desire for security and for attenuation of bodily dysphoria, a form of distress about one's gendered bodily traits, rather than by the logic of becoming 'just a woman' or even 'a real woman.'[123] The aspiration towards invisibility has also been displaced in the law. Under the minoritizing model that appeared in Québec law around 2015 and to which we now turn, the trans legal subject is no longer be defined by invisibility and the abnegation of transitude, but by marginality.

III. The Minoritizing Model of Post-2015: National Geographic[124] and Exoticization of Difference

In this Part, I explore the minoritizing model currently applicable in Québec. This model defines the trans legal subject by its marginality, re-inscribing the unmarked nature of the cisgender subject. The model is exemplified by two recent changes to Québec law from 2015 and 2016, namely the removal of surgical criteria from article 71 of the Civil Code and the addition of gender identity as a protected ground to section 10 of the Québec Charter.

These changes make room for a greater diversity of trans people by severing civil status change from anatomy and by making trans communities' right to equality explicit. By allowing broader access to gender marker changes, the model stands as net progress compared to the medical model. Nevertheless, it is marked

Surgeries: Facial Feminization Surgery for Transgender People, 18 The Am. J. of Bioethics 23 (2018); Dean Spade, *Mutilating Gender*, *in* The Transgender Stud. Reader 315 (Susan Stryker & Stephen Whittle eds., 2006).

123. *But see* Eric Plemons, The look of a woman: facial feminization surgery and the aims of trans- medicine (2017); Viviane K. Namaste, Sex change, social change: reflections on identity, institutions, and imperialism 20 (2005). The opposition between abnegation of transitude and the desire to avoid dysphoria is, in reality, often complicated by the ineluctable messiness of human experience.

124. The title of this Part alludes to the exoticizing narrative propagated by anthropology and the National Geographic magazine. For the use of the term in the trans context and for a critique of the exoticizing of trans people. *See* Florence Ashley, *L'Effet National Geographic et l'Inclusion des Personnes Trans : Une Critique*, Fugues (Sept. 6, 2017), https://www.fugues.com/249499-article-leffet-national-geographic-et-linclusion-des-personnes-trans-une-critique.html [https://perma.cc/V36E-PPLV]; Amy Marvin, *Transsexuality, the Curio, and the Transgender Tipping Point*, *in* Curiosity Studies: Toward a New Ecology of Knowledge 188 (Perry Zurn & Arjun Shankar eds., 2020); Perry Zurn, *Puzzle Pieces: Shapes of Trans Curiosity*, 18 APA Newsletter on LGBTQ Issues in Philosophy 10 (2018).

by imperfection, defining the trans subject as essentially identarian and marginal, and preserving the background of invisibility described in the first Part.

Because the jurisprudence has yet to add much atop these statutory changes, I will not extensively discuss it.[125] Let us review the changes to the gender marker change regime and Québec Charter. I will consider them in order.

A. *Gender Marker Change Regime*

In this Subpart, I briefly discuss the current gender marker change regime, which no longer requires medical interventions and instead relies on gender identity. By centering the notion of gender identity, the regime maintains a distance between trans people and the law's understanding of sex—a dynamic that I will explore at greater length in the next Subpart.

Currently, article 71 reads as follows:

> Every person whose gender identity does not correspond to the designation of sex that appears in that person's act of birth may, if the conditions prescribed by this Code and by government regulation have been met, have that designation and, if necessary, the person's given names changed. These changes may in no case be made dependent on the requirement to have undergone any medical treatment or surgical operation whatsoever.[126]

Rejecting the early suggestion that two years of "real-life experience" should be required before gender marker changes, the National Assembly chose to promote a view of gender based on self-identification.[127] A declaration under oath, confirmed by a witness, that "the sex designation requested is the designation that best corresponds to [the trans person's] gender identity" suffices, give or take a few administrative details and a racist exclusion.[128] The legal

125. The most interesting development is, in my view, the interpretation of gender expression as a protected ground. However, it is still too early to offer an analysis of it in the Québec context.

126. C.C.Q., art. 71 (Can.).

127. The option of requiring two years of "real life experience" was mentioned by the Justice Minister of the time, Bertrand St-Arnaud, when Bill 35 was being considered. *See* JOURNAL DES DÉBATS DE LA COMMISSION DES INSTITUTIONS, VOL. 43, NO 54, 40–1 (22 May 2013), 19. It was strongly opposed by community organisations, including the trans committee of the Conseil Québécois LGBT, which was represented by Gabrielle Bouchard and Julie-Maude Beauchesne before the Commission des institutions. *See* JOURNAL DES DÉBATS DE LA COMMISSION DES INSTITUTIONS, VOL. 43, NO 55, 40–1 (23 May 2013), 31–32.

128. Access to gender marker changes was extended to trans minors in June 2016, who must provide a letter by a healthcare professional confirming that the change is appropriate and, before 14 years old, obtain parental consent.

change is a manifestation of significant progress, extending gender marker changes to a far larger number of trans people.

Despite this progress, the shift to the language of "sexual identity," from October 2015 to June 2016, and "gender identity," from June 2016 onwards, divulges the development of the minoritizing model in equality rights law, a model that distances trans people from the materiality of sex and defines them as quintessentially marginal subjects. In line with the logic of the minoritizing model and the terminological transition from "transsexual" to "transgender," the current provision places the accent on the notion of gender, understood as a social construction. This understanding of gender is in contrast to sex, which is understood as separate from gender and as tangible and biological.[129] This change, unfortunately, distances trans people from the notion of sex even though many of them desire their sex to be recognized—that is, trans women wish to be recognized as equally female, trans men as equally male, and non-binary people as being of non-binary sex.[130] This conceptual

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The letter requirement was struck down on 28 January 2021 for those aged 14 or older in the decision Center for Gender Advocacy c. Attorney General of Quebec, *supra* note 39. Up until that ruling, the Québec government did not allow those without citizenship to change their name or gender marker, unlike other Canadian provinces and territories. *See* Dalia Tourki, *I'm an Arab Trans Woman and a Canadian Immigrant – But I Don't Technically Exist in Either of My Countries*, The Independent (Aug. 24, 2017, 5:03 PM), https://www.independent.co.uk/voices/arab-tunisia-move-immigration-canada-language-in-arabic-to-describe-being-transgender-qtipoc-a7909951.html [https://perma.cc/BN39-KH2T]. This prerequisite was maintained in part because of the fear that changes will be used towards criminal or even terrorist ends, conjuring the spectre of racialized, immigrant criminality. Yet, citizens do not commit any less crimes. The racial dimension of policies and sentiments based on immigration is omnipresent in Canadian history. *See* The History of Immigration and Racism in Canada: Essential Readings (Barrington Walker ed., 2008); Discrimination based on citizenship is illegal in Canada. *See* Andrews v Law Society of British Columbia, [1989] 1 S.C.R. 143 (Can.); The Ontario Law Reform Commission was already recommending, in 1971, removing the prerequisite of citizenship for name changes. *See* Ontario Law Reform Commission, Report on the Change of Name Act (1971). Insofar as the lack of a citizenship prerequisite does not appear to pose problems in other provinces, it would seem difficult to establish the requisite justification under the *Oakes* test, which governs when otherwise discriminatory laws may be constitutionally justified and upheld. Indeed, the judgment invalidating the requirement found that it lacked even a pressing and substantial objective.

129. I have previously criticized this vision of sex as biological in Ashley, *supra* note 23.

130. Ido Katri, *Sex Reclassification for Trans and Gender Nonconforming People: From the Medicalized Body to the Privatized Self*, *in* The Oxford Encyclopedia of LGBT Politics and Policy (Don Haider-Markel ed., 2019) [https://perma.cc/P3NL-YGQC].

distance between gender identity and sex is manifest in equality rights law, to which I now turn.

B. *Equality Rights*

In this Subpart, I explain how antidiscrimination law's deployment of gender identity, instantiating the minoritizing model, maintains trans legal subjects as quintessentially identarian and marginal, thereby stabilizing the categories "man" and "woman" as cisgender and unmarked.

The minoritizing model of trans legal subjecthood is best embodied in the June 2016 change to the Québec Charter, which was altered to read: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on . . . gender identity or expression . . . ."[131]

The provision makes explicit the protection of transgender people who were, since 1998, protected under the ground of sex.[132] The ground of gender identity was chosen as the distinctive feature of trans people and of discrimination towards them. The choice of terminology may surprise. Gender identity? But! I identify as a non-binary person, not as trans; my transitude is only an incident of the fact that I am non-binary and was assigned male at birth. How is the gender identity of a trans woman different from that of cis women? Both have "woman" for gender identity. The feature distinguishing trans from cis people would instead be gender modality—that is, the relationship between someone's gender identity and their sex assigned at birth. The notion of gender modality was invented recently, notably in response to the limits of gender identity as an organizing notion in law.[133] As Ido Katri points out:

> [C]onsidering that everybody has a gender identity and everybody expresses their gender, it seems that these categories

131. Charter of Human Rights and Freedoms, *supra* note 15.

132. Commission des droits de la personne et des droits de la jeunesse c. Maison des jeunes A . . ., [1998] RJQ 2549; 33 CHRR 263; according to Jean-Sébastien Sauvé, this protection may not have covered non-binary people. Thus, adding gender identity and expression to the law perhaps had the unexpected material benefit of extending protections to non-binary people: Jean-Sébastien Sauvé, *L'interdiction de Discriminer les Personnes Trans* Dans la Charte des Droits et Libertés de la Personne : pour Son Amélioration par L'ajout de l'« Identité de Genre » et de l'« Expression de Genre » à la Liste des Motifs de Distinction Illicites*, 23 Enfances, Familles, Générations 108, 118 (2015) [https://perma.cc/Q75P-KQNS]; *see also* Florence Ashley, *Qui est-ille ? Le Respect Langagier des Élèves Non-binaires, aux Limites du Droit*, 63 Service social 35 (2017).

133. Ashley, *supra* note 18.

> should not apply just to trans people . . . . [T]he existence of gender identity as distinct protected classes reflects an assumption that "sex" only refers to "real" men and women; otherwise, trans people would already be included.[134]

What distinguishes the gender identity of trans people from that of cis people is that the former's identity is marked. Just as the race of a Black person is marked because they are Black whereas white people—though they are white—are socially situated as neutral, unmarked in their racial belonging,[135] so is the trans woman, by analogy, marked as a *trans* woman whereas the cisgender woman is situated as neutral, unmarked, as simply 'woman.' By speaking of gender identity—instead of transitude, gender modality, or sex—as the source of harassment, discrimination, and violence experienced by trans people, cis people's gender identity disappears behind the 'reality' of their sex. Trans people alone are visible in the terminology of gender identity. As a decision of the Human Rights Tribunal of Ontario explains in the clearest of terms, the protected ground of gender identity under antidiscrimination law serves to "protect people whose gender identity does not conform to traditional social norms, e.g., transgender people."[136]

Within this logic, trans subjects are defined by reference to identity and discrimination in contrast to cis persons who do not experience discrimination based on gender identity. Being trans means living with discrimination because of how we identify. Our experiences of discrimination confirm our difference. Far from the medical model, under which trans existence appeared only to be better erased, it is under the hyper-visible cloud of identity that trans existence transpires from the legislative texts that incarnate the minoritizing model. The trans subject serves as a contrast to the cis subject, who is not identarian: we do not speak of the gender identity of the cis person, but of their sex. Sex is fixed, immutable, stable, whereas identity is adopted, dynamic, fluid. The minoritizing model depicts trans people with the superficiality of identity. We identify, they *are*. This contrast allows the cis subject to be configured as stable and, therefore, normal.[137] Because cis subjects are

134. Ido Katri, *Transgender Intrasectionality—Rethinking Anti-Discrimination Law and Litigation*, 20 U. Pa. J.L. & Soc. Change 51, 75 (2017) [https://perma.cc/52QW-FC5A].

135. Devon W. Carbado, *Colorblind Intersectionality*, 38 Signs: Journal of Women in Culture and Society 811 (2013) [https://perma.cc/LVJ6-E47C].

136. Leach v. Ontario (Advanced Education and Skills Development), [2017] HRTO 1263, au para 23 (Can.).

137. A parallel may be drawn, here, to the minoritizing view of sexuality in Eve Kosofsky Sedgwick, Epistemology of the Closet (2008). Sedgwick

not defined by the exceptionality of identity, they do not experience discrimination based on gender identity and are, hence, safe.

As was argued by Finn Enke, contemporary conceptions of cis subjecthood reinforce the categories of "woman" and "man" as cisgender and unmarked, whereas the trans subject is reduced to its oppression and its fight for institutional recognition.[138] Pushing further along this footpath, we arrive upon the faux-progressive expression "men, women, and transgenders," corruption of the accepted expression "men, women, and non-binary people." In the end,[139] trans people remain cloaked in abjection[140]—others' abjection, never that of self-declared allies[141]—and are repeatedly forced out of the closet, whether through appearances or words. Trans people are confined to the margins.

Conclusion: Returning to Just the Same

Contrary to what may be expected, the invisibility of the trans subject, within the *ius commune* of Québec, does not clash with the visibility of the trans subjects dictated by the minoritizing model. It is, on the contrary, an integral component of the philosophy of the minoritizing model than to designate trans people as exceptions. From the anatomical aberration of the medical model, trans people become the marginalized exception of the minoritizing model.

While the progress from the medical model to the minoritizing model is evident, especially when we look at those trans people who may now change their birth certificates without surgical interventions and who can more readily demand legal equality, the model is not without criticism. Trans people remain invisible and their existence oftentimes impossible under Québec law. While the minoritizing model is more faithful to trans people's experiences of omnipresent marginalization, we cannot see it as a finality. By

positions sexual orientation as a circumscribed category that concerns only sexual minorities and therefore does not pose a problem for cisheterosexual society. However, this view of the minoritized subject is also present in the medical model of the trans subject, though it was defended against accusations of subjectivism by appealing to the objectivity of psychiatry and of corporeal changes.

138. *See* Enke, *supra* note 121 at 76.

139. It doesn't even matter. One thing, I don't know why. It doesn't even matter how hard you try.

140. I use the term here in its usual sense, linked to degradation, and not in the more precise sense of an exclusionary process of subjects rendered unintelligible. R. Phillips, *Abjection*, 1 TSQ: Transgender Studies Quarterly 19 (2014) [https://perma.cc/28L8-NAZM]. Although a link could be made to this understanding of abjection, it would be even more blatant under the medical model than the minoritizing model.

141. Whereas we need allies less than we do a*cis*tants.

understanding the trans legal subject, articulated around gender identity, as uniquely identarian, in contrast to the materiality of sex, the model justifies trans people's invisibility as habitual subjects of law. Identity legitimates our relegation to the margins. By reducing trans existence to such experience of harassment, discrimination, and violence, and by linking transitude to an identarian process instead of a material one, the model affixes the trans subject to its marginality and raises barriers to its emancipation. By speaking of gender identity solely in relation to trans people, the law's reliance on sex assigned at birth is further naturalized, becoming/remaining sex *simpliciter*.

Less progressive than some purport, the minoritizing model reflects a neoliberal economy of identity that erases the role of the state as an ideological facilitator of (cis)gendered violence, and denounces harassment, discrimination, and violence towards trans people as irrational even though these acts materialize in large part out of capitalist forces, the ultimate metric of neoliberal rationality.[142] If the state recognizes trans people more and more, recognition is represented as a gift motivated by humanitarian considerations, rather than as a corrective to state contributions to anti-trans violence. This latter position would warrant material analyses towards eradicating the social and economic precarity of trans people as well as direct our collective attention to the capitalist foundations of the modern division of sexes.[143] As academics and people imbued with moral sentiment, we must imperatively rethink the institutional power that dictates the impossibility of some under the *ius commune*. Instead of fastening ourselves to identity, tying ourselves to the materiality of gender and of transitude would help us to recognize the law's contributions to the marginalization of trans people. So long as trans individuals are not habitual, nonexceptional subjects of law, the law will legitimize confining them to the margins of society. Trans people—we—deserve a law-as-text that writes us as fully-fledged characters in the story.

Rendering trans lives at the center of the law cannot be an isolated endeavor. Moving away from the minoritizing model

142. Ashley, *supra* note 18; Florence Ashley, *"X" Why?*, *in* Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons (Isabel c. Jaramillo Sierra & Laura Carlson eds., forthcoming); Katri, *supra* note 130; Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law (rev. ed. ed. 2015); Alison M. Jaggar, Feminist politics and human nature 207ff, 303ff (1983); Marie Moran, *Identity and Identity Politics: A Cultural Materialist History*, 26 Historical Materialisms (2018) [https://perma.cc/CP2W-EHTL].

143. Jaggar, *supra* note 142 at 51ff.

cannot succeed in bringing about liberation without being attuned to the complex assemblages of oppression under the neoliberal settler state. Questioning the cissexism inherent to the legal system unearths linkages within a broader network of contestations of oppressive state institutions. Sex, as a category, is inextricable from racism and colonial imposition. Many societies do not operate under the binary and reproductive conceptions of sex that prevail in Euro-American societies, and in many cases, the binary was imposed onto them by colonizing powers.[144] Our conception of sex and of its binarity comes from Euro-American ideology.[145] It serves the development and consolidation of a national identity predicated upon whiteness.[146] Interrogating the strictures of gender in law is not an isolated endeavor and has deep ramifications for the organization of social life in Canada and the United States, and our advocacy must reflect a sensitivity to these interlinkages.

I offer the following suggestions to improve existing statutory schemes and further trans rights. I do not hold these suggestions to any degree of exhaustiveness, my goal in this paper having primarily been one of description and critique. To push back against such characterization of trans people, I suggest replacing gender identity (being a man, a woman, a non-binary person, etc.) with gender modality (being cis, trans, etc.) in antidiscrimination law. This change would contribute to conceptual clarity, fight the myth that gender identity is the province of trans people and distinct from sex—which could imply that trans women are male—and better capture the political desire to prevent discrimination by virtue of the fact that trans people have a gender that does not correspond to the one they were assigned at birth. Emphasizing that gender modality is a component of the larger abstraction of sex—just like

144. Qwo-Li Driskill, *Doubleweaving Two-Spirit Critiques: Building Alliances between Native and Queer Studies*, 16 GLQ 69, 84 (2010); María Lugones, *Heterosexualism and the Colonial/Modern Gender System*, 22 Hypatia 186 (2009) [https://perma.cc/V74U-YVXX]; Andrea Smith, Conquest: Sexual Violence and American Indian Genocide 12 (2005).

145. Sarah Hunt, *An Introduction to the Health of Two-Spirit People: Historical, Contemporary and Emergent Issues* (2016) [https://perma.cc/QF8Q-2MSS]; Michelle Cameron, *Two-Spirited Aboriginal People: Continuing Cultural Appropriation by Non-Aboriginal Society*, 24 Canadian Woman Studies 123 (2005); Aiyyana Maracle, *A Journey in Gender*, 2 torquere: J. Can. Lesbian and Gay Stud. Ass'n 36 (2000).

146. Ido Katri, *The Banishment of Isaac: Racial Signifiers of Gender Performance*, 68 U. Toronto L.J. 118 (2018); Aeyal Gross, *Rape by Deception and the Policing of Gender and Nationality Borders*, 24 Tulane J.L. & Sexuality 1 (2015) [https://perma.cc/J996–3LVW]; C. Riley Snorton, Black on Both Sides: A Racial History of Trans Identity (2017); Jules Gill-Peterson, Histories of the Transgender Child (2018).

gender assigned at birth, gender identity, and gender expression—rather than a separate category would ensure that sex does not become, or remain, a cis-normed category from which trans people are excluded. In addition to changes to human rights law, the gendered language of all statutes should be revised to unconditionally include trans people: the prevailing background of invisibility cannot satisfy.[147]

Furthering trans equality requires us to move beyond superficial changes to legal language and question the necessity of sex as a juridical and administrative category. The existence of gender markers must be interrogated and contested. Why are they inscribed at birth? Are they truly necessary? What are their concrete consequences? As Cheryl Chase notes, the autonomy and integrity of intersex people should not be violated "for the comfort and convenience of others."[148] When will we stop supporting the imposition of unnecessary and non-consensual surgeries on intersex children?

For trans people, as for other marginalized populations, the language of law is not a purely theoretical matter. Legal provisions create tangible administrative and juridical difficulties for trans people, contribute to their alienation from civil society, and participate in the maintenance of a range of oppressive ideological structures. By making trans people impossible within the legal imaginary of the *ius commune*, the law engenders discursive and material violence. I dare dream of a day when words will only serve towards our emancipation.

147. Much like cis men. Don't @ me.
148. Chase, *supra* note 28.