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The *Numerus Clausus* of Sex

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There is a fundamental revolution under way regarding the relationship between gender and the state, both domestically and internationally. Across the world, the rise and visibility of transgender rights movements have forced a persistent rethinking of the cornerstone legal presumptions associated with science, sex, and gender. As many people, along with multiple courts, colleges, and workplaces, now recognize, the binary presumptions of male and female identity are largely outdated and often fail to capture the complexity of identity and expression. The question for legal scholars and legislatures is how the law can and should respond to this complexity.

Taking this observation as an invitation, this Article provides a different way to conceive of the relationship between sex and gender that might provide another vantage point in demonstrating the limits of our jurisprudence. Drawing on Professor Cheryl Harris's groundbreaking article exploring whiteness as property published in the Harvard Law Review *over twenty years ago, this Article argues that, in order to understand the relationship between sex and gender, it might be helpful to explore a parallel type of affiliation between identity, property, and intellectual property. My thesis is that sex is to gender as property is to intellectual property. Unpacking this further, this Article argues that, instead of thinking of sex as a construct of biology alone, it might be helpful for us to reconceptualize state-assigned*

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sex along the lines of tangible property—bordered, seemingly fixed, rivalrous, and premised on a juridical presumption of scarcity in terms of its rigid polarities of male and female. In contrast, regarding gender, I argue that thinking through gender as a performance, if taken seriously, also suggests that gender is more akin to intellectual property—permeable, malleable, unfixed, nonrivalrous—and ultimately deeply nonexclusive. Normatively, I argue that a model of gender pluralism is an important framework with which to examine the importance of gender diversity and fluidity.

INTRODUCTION

There is a fundamental revolution under way regarding the relationship between gender and the state, both domestically and internationally. Across the world, the rise and visibility of transgender rights movements have forced a persistent rethinking of the legal presumptions associated with science, sex, and gender. For years, the law has largely maintained a steadfast commitment to the idea that one's assigned sex—referring to the binary polarities of male and female—operated as a relatively stable fixture, capable of being mapped onto one's gender identity

and self-perception. This expectation of stability translated into a basic presumption within law and policy that gender identity and assigned sex almost always align with one another—that the binary formation of sex operated as a basic organizing principle to formalize and reify gender expression, sexuality, and so forth. In turn, antidiscrimination jurisprudence reflects these principles and, with the exception of a minority of cases, has historically labored under the perception that gender identity and assigned sex rarely conflict with one another. The myriad of legal regulations that deploy sex classifications rest on this presumption; everything from the procurement of passports to access to social services to the gathering of data relies on the presumption of the binary, fixed nature of assigned sex.

Today, these perceptions are increasingly confronted with the reality that the relationship between gender and sex is far more complicated than the law currently recognizes. Our global culture and legal landscape are replete with examples that continually demonstrate the discontinuity of the relationship between gender and sex, calling for a more complex representation of reality.[1] In 2014, Facebook decided to offer its users more than fifty terms for gender self-identification, recognizing that many people use a multiplicity of terms other than male or female to describe themselves.[2] As of 2017, at least three people in the United States have been able to obtain "nonbinary" or "intersex" as their legally designated gender.[3] Indeed, the transgender

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1 In the introduction to their pathbreaking volume published in 2006, *Transgender Rights*, the authors observed that more than sixty colleges and universities now include gender identity as part of their nondiscrimination policies. Paisley Currah, Richard M. Juang, and Shannon Price Minter, *Introduction*, in Paisley Currah, Richard M. Juang, and Shannon Price Minter, eds, *Transgender Rights* xiii, xiii (Minnesota 2006). Today, eleven years later, that number has grown to over 999 colleges and universities that have nondiscrimination policies that include gender identity or gender expression, including those that forbid gender discrimination. See *Colleges and Universities with Nondiscrimination Policies That Include Gender Identity/Expression* (Campus Pride), archived at http://perma.cc/BP99-2NHN.

2 See Daniel Funke, *Facebook Adds New Gender Identification Options, Gender Rights Continue to Grow* (Red & Black, Feb 24, 2014), archived at http://perma.cc/W7YD-588X.

3 New York City issued the first birth certificate with intersex in the gender field in December 2016 after receiving a court order from a state court. See Sam Levin, *First US Person to Have "Intersex" on Birth Certificate: "There's Power in Knowing Who You Are"* (The Guardian, Jan 11, 2017), archived at http://perma.cc/3NKX-MYU8. The California legislature is currently considering legislation to allow the state to issue birth certificates, drivers' licenses, and court orders specifying a "nonbinary" gender.

rights movement is—and has always been—global in scope; many courts, countries, and municipalities throughout the world have faced similar pushes toward pluralism, leading some nations to offer a third category for those who identify as something other than male or female.[4]

Popular culture, too, has begun to reflect these identities.[5] Even before Caitlyn Jenner and Laverne Cox captured the mainstream's attention with a particular representation of transgender identity, there were rapidly increasing numbers of people who identified as neither male nor female, in addition to agender, bigender, nonbinary, or genderqueer individuals, and those relying upon other categories of gender nonconformity.[6] Many view gender as fluid, as transitory, or as something that does not necessarily need to be assigned at all.[7]

California Senate SB-179, California State Senate, 2017–2018 Regular Sess (Jan 24, 2017), archived at http://perma.cc/UMM6-49AQ. See also *CA Court Issues Nonbinary Gender Change to Transgender Law Center Client* (Transgender Law Center, Feb 10, 2017), archived at http://perma.cc/XDB9-55W3.

4 Examples of such nations include India, Nepal, Australia, New Zealand, and Germany, and also Argentina, which guarantees fair access to transitional health care. See Valentine Pasquesoone, *7 Countries Giving Transgender People Fundamental Rights the U.S. Still Won't* (Identities.Mic, Apr 9, 2014), archived at http://perma.cc/SF34-MDT3; *English Translation of Argentina's Gender Identity Law* (Global Action for Trans Equality), archived at http://perma.cc/GZU9-CAAK. Note, however, Professor Susan Stryker's trenchant observation that "'[t]ransgender' is, without a doubt, a category of First World origin that is currently being exported for Third World consumption." Susan Stryker, *(De)Subjugated Knowledges: An Introduction to Transgender Studies*, in Susan Stryker and Stephen Whittle, eds, *The Transgender Studies Reader* 1, 14 (Routledge 2006). See also Sonia Katyal, *Exporting Identity*, 14 Yale J L & Feminism 97, 133–48 (2002).

5 See Matt Kane, *Transgender Characters That Changed Film and Television #TransWK* (GLAAD, Nov 12, 2013), archived at http://perma.cc/PMK3-G3GP; Jacob Bernstein, *In Their Own Terms: The Growing Transgender Presence in Pop Culture* (NY Times, Mar 12, 2014), online at http://www.nytimes.com/2014/03/13/fashion/the-growing-transgender-presence-in-pop-culture.html (visited Nov 6, 2016) (Perma archive unavailable).

6 See Shawn Thomas Meerkamper, Note, *Contesting Sex Classification: The Need for Genderqueers as a Cognizable Class*, 12 Dukeminier Awards J *2–11 (2013), archived at http://perma.cc/4KUW-P38A; Lori Duron, *The New Gender Binary* (Huffington Post, Feb 21, 2016), archived at http://perma.cc/96JL-LZJW (describing the author's son, who displays typically feminine characteristics but prefers male pronouns and identifies not as transgender but instead as gender nonconforming).

7 See Jessica Bennett, *She? Ze? They? What's in a Gender Pronoun* (NY Times, Jan 30, 2016), online at http://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html (visited Oct 26, 2016) (Perma archive unavailable) (noting developments in gender pronouns on college campuses and in the wider culture in response to changed understandings of gender).

At the same time, in the United States and elsewhere, despite these cultural strides toward greater inclusivity, judges and political leaders continue to display a pervasive confusion regarding transgender equality, at times using the language and history of sex discrimination law and other areas to unwittingly craft one of the most protracted—and ironic—exclusions of transgender individuals from equality-based protections. In New Jersey, Governor Chris Christie vetoed a bill that would have removed a surgical requirement for changing one's gender assignment on a birth certificate, arguing that it could lead to fraud and abuse.[8] At one point, Arizona's House Appropriations Committee approved an amended bill that would make it illegal for local governments to pass laws or regulations that would have ensured access to public "privacy areas," that is, restrooms, based on "gender identity or expression."[9] The original bill actually would have made it a crime for transgender individuals to use a bathroom other than one specified for use by people of the sex they were assigned at birth.[10] As of early 2017, a total of fourteen states—Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Mississippi, Missouri, New York, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming—had considered actions that essentially sought to ban transgender individuals from using bathrooms consistent with their gender identity.[11] In Kentucky, a proposed bill would permit students to file lawsuits if they see transgender students using school restroom and locker facilities that do not conform to their "biological sex"; another bill in Texas would authorize payments to students who prove "mental anguish" upon finding someone not of the same

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[8] See Amy Rappole, Comment, *Trans People and Legal Recognition: What the U.S. Federal Government Can Learn from Foreign Nations*, 30 Md J Intl L 191, 214 (2015).

[9] Brynn Tannehill, *Why Arizona's Bathroom Bill Is Unconstitutional* (Huffington Post, Feb 2, 2016), archived at http://perma.cc/N64C-3UM6.

[10] *Arizona Panel OKs Transgender Bathroom Bill That Lets Businesses Bar Transgendered Customers from Using the Bathroom of Their Choice* (Daily News, Mar 28, 2013), online at http://www.nydailynews.com/news/politics/arizona-panel-oks-transgender-bathroom-bill-article-1.1301429#ixzz2OxLCCN8u (visited Oct 26, 2016) (Perma archive unavailable).

[11] See Joellen Kralik, *"Bathroom Bill" Legislation* (National Conference of State Legislatures, Feb 23, 2017), archived at http://perma.cc/3GM6-J8SL.

"biological sex" in a school restroom facility.[12] And in North Carolina, the Public Facilities Privacy & Security Act,[13] otherwise known as HB2, essentially requires individuals to use restrooms that are consistent with the sex on their birth certificates, thereby deleteriously affecting transgender individuals whose self-identities might conflict with the sex they are assigned at birth.[14]

These battles are being played out in the Supreme Court as well as the White House. In July 2016, a coalition of thirteen states, led by Texas, asked a federal judge to block the enforcement of a set of guidelines issued by the Department of Education and the Department of Justice that would have prevented schools from discriminating against transgender and other gender nonconforming students.[15] Despite the guidelines' definition of "sex" under Title IX, which includes a more capacious view of gender identity,[16] a district court concluded that "[i]t cannot be disputed that the plain meaning of the term sex . . . meant the biological and anatomical differences between male and female students as determined at their birth."[17] The Supreme Court also, in another related case, initially granted certiorari in a Fourth Circuit ruling that required a school district to accommodate a transgender student's request to use a particular bathroom.[18]

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12 Suzanne E. Eckes and Colleen E. Chesnut, *Transgender Students and Access to Facilities*, 321 Educ L Rptr 1, 5–6 (2015) (describing these and other bills).

13 North Carolina House Bill 2 (HB2), 2016 NC Sess Laws 3.

14 Harold Lloyd, *McCrory's House Bill 2: A Brief Outline of Its Five "Parts"* (Huffington Post, May 16, 2016), archived at http://perma.cc/5ZQF-TXUM.

15 Cristian Farias, *Texas, 12 Other States Push to Block Feds from Enforcing Trans Bathroom Guidance* (Huffington Post, July 6, 2016), archived at http://perma.cc/T638-DQ5N; Mark Reagan, *Texas Federal Judge Issues Nationwide Injunction against School Protections for Transgender Students* (San Antonio Current, Aug 22, 2016), archived at http://perma.cc/J62X-FYLV.

16 See, for example, Catherine E. Lhamon and Vanita Gupta, *Dear Colleague Letter on Transgender Students* *2 (Department of Justice and Department of Education, May 13, 2016), archived at http://perma.cc/WH7D-R37P ("The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations."). See also *Texas v United States*, 2016 WL 4426495, *1 n 4 (ND Tex).

17 *Texas*, 2016 WL 4426495 at *14.

18 *Gloucester County School Board v G.G.*, 136 S Ct 2442, 2442 (2016) (granting a stay on the lower court's ruling); *Gloucester County School Board v G.G.*, 137 S Ct 369, 369 (2016) (granting certiorari). See also Caitlin Emma and Josh Gerstein, *Supreme Court Blocks Ruling That Let Transgender Va. Student Use Boys' Bathroom* (Politico, Aug 3, 2016), archived at http://perma.cc/X8R4-QNWR.

Just before the case was argued, however, the new presidential administration, despite the objections of the new secretary of education, decided to rescind the prior administration's interpretation of Title IX, leaving transgender students unprotected by the federal interpretation.[19]

Part of the reason for this trend, I would argue, is attributable to the dearth of empirical and policy research on gender pluralism, including the multiplicity of issues and identities within the transgender community and the impact of our legal system on gender self-determination. But part of it is also due to a deeper issue regarding the law's inability to critically reimagine the regulation of gender in a more capacious manner.

Consider an example. In 2006, in a flurry of media attention, New York City's Board of Health decided to validate what the transgender community had argued for years: that individuals can and should have the right to change the sex on their birth certificates without being required to undergo a particular type of gender reassignment surgery.[20] Under the rule change initially explored by the board, individuals would have been able to change the sex on their birth certificates, so long as they provided affidavits from a doctor and a mental health professional outlining the reasons for the change and documenting their intention to live permanently as members of the opposite sex.[21]

At the time of the announcement, the decision was met with enormous praise from transgender rights advocates, who felt that the proposed rule confirmed the need to correct a disjunction between one's assigned sex and one's gender identity without the need for prohibitively expensive (and, at times, medically

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[19] Jeremy W. Peters, Jo Becker, and Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students* (NY Times, Feb 22, 2017), online at http://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html (visited Mar 4, 2017) (Perma archive unavailable); Sandra Battle and T.E. Wheeler II, *Dear Colleague Letter* (Department of Justice and Department of Education, Feb 22, 2017), archived at http://perma.cc/PX5Q-7APH. See also *Statement by Attorney General Jeff Sessions on the Withdrawal of Title IX Guidance* (Department of Justice, Feb 22, 2017), archived at http://perma.cc/YS5U-4YZK.

[20] Damien Cave, *New York Plans to Make Gender Personal Choice* (NY Times, Nov 7, 2006), online at http://www.nytimes.com/2006/11/07/nyregion/07gender.html (visited Oct 27, 2016) (Perma archive unavailable).

[21] Id.

unsafe) surgery.[22] For those who face similar struggles, this right—a right to represent oneself by gender self-determination, rather than by legal prescription—is a right that is at the heart of notions of gender equality.[23] Yet, just as public health advocates were nearing victory, the board abruptly abandoned its decision, citing "broader societal implications" and concerns about fraud and abuse.[24] It took another eight years (and more than one lawsuit) for New York City to finally adjust its approach to a more inclusive one that did not require proof of surgical treatment.[25]

As this example illustrates, the laws that regulate gender assignation continually have a disparate impact on the transgender community. But there is a deeper irony: at the same time that the law reflects lingering confusion over gender categories, the literature outside the law—and public culture, more generally—has never before reflected such a momentous dismantling of the codes of both sex and gender altogether.[26]

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[22] Robin Finn, *Battling for One's True Sexual Identity* (NY Times, Nov 10, 2006), online at http://www.nytimes.com/2006/11/10/nyregion/10lives.html (visited Jan 15, 2017) (Perma archive unavailable). See also generally Paisley Currah and Lisa Jean Moore, *"We Won't Know Who You Are": Contesting Sex Designations in New York City Birth Certificates*, 24 Hypatia 113 (Summer 2009) (detailing the historical background leading up to the 2006 change as well as the response by media and community members).

[23] Cave, *New York Plans to Make Gender Personal Choice* (cited in note 20) (noting that the law would accommodate some who "may not feel the need to undergo the procedure and are simply defining themselves as members of the opposite sex").

[24] Russell Berman, *Change of Course on Transgender Identification* (New York Sun, Dec 6, 2006), online at http://www.nysun.com/new-york/change-of-course-on-transgender-identification/44702 (visited Jan 15, 2017) (Perma archive unavailable). See also Damien Cave, *City Drops Plan to Change Definition of Gender* (NY Times, Dec 6, 2006), online at http://www.nytimes.com/2006/12/06/nyregion/06gender.html (visited Oct 27, 2016) (Perma archive unavailable); Kenji Yoshino, *Sex and the City* (Slate, Dec 11, 2006), archived at http://perma.cc/L2AD-VKUH. Later, in 2011, a series of lawsuits were filed by the Transgender Legal Defense and Education Fund on behalf of a group of individuals who wished to change the gender on their birth certificates without undergoing surgery. See John Eligon, *Suits Dispute City's Rule on Recording Sex Changes* (NY Times, Mar 22, 2011), online at http://www.nytimes.com/2011/03/23/nyregion/23gender.html (visited Oct 27, 2016) (Perma archive unavailable).

[25] Curtis M. Wong, *New York's Transgender Residents Will Now Be Able to Change Birth Certificate Sex Designation without Surgery* (Huffington Post, Feb 2, 2016), archived at http://perma.cc/CRS8-WJAN.

[26] For an excellent summary of this literature, see generally Stryker, *(De)Subjugated Knowledges* (cited in note 4). See also Margot Adler, *Young People Push Back against Gender Categories* (NPR, July 16, 2013), online at http://www.npr.org/templates/story/story.php?storyId=202729367 (visited Oct 27, 2016) (Perma archive unavailable).

Drawing from Professor Judith Butler's seminal work, *Gender Trouble*, today's scholarly thought critiques both sex and gender as seemingly "necessary" fictions—social constructs that operate to divide, classify, and polarize society into standard, but not always universal, categories.[27] In turn, by exploring the external markers of identity, this body of work has also helped to deconstruct the internal aspects of identity. Even within public culture, there has been a huge shift in gender's terrain. The same week that the Department of Justice reversed the guidelines on Title IX, for example, French *Vogue* featured a transgender model on its cover.[28]

Interestingly, despite these accounts, law—one of the principal devices of social change—has only just begun to grapple with these insights regarding the construction of identity.[29] The end result is the development of two relatively vast stand-alone regimes in silent conflict with one another, one that recognizes the constructed dimensions of identity, and another that largely requires the existence of these identities—both virtual and real—for its regulatory functions to function successfully.

The result of this confluence of moments inscribes the gender studies movement with a degree of irony: at the very moment at which it has revolutionized academic thought on gender

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[27] See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 8–17, 30–34 (Routledge Classics 2006).

[28] Dana Thomas, *French Vogue's March Cover Features a Transgender Model* (NY Times, Mar 1, 2017), online at http://www.nytimes.com/2017/03/01/fashion/paris-fashion-week-french-vogue-transgender-model.html (visited Mar 4, 2017) (Perma archive unavailable). Additionally, the Boy Scouts now allow any applicant who identifies as a boy to join their ranks. *BSA Addresses Gender Identity* (Boy Scouts of America, Jan 30, 2017), archived at http://perma.cc/NL49-T2KP?type=image. As another example, a toy company in upstate New York recently unveiled plans to market a transgender doll. Jacey Fortin, *Transgender Doll Based on Jazz Jennings to Debut in New York* (NY Times, Feb 17, 2017), online at http://www.nytimes.com/2017/02/17/business/transgender-doll-jazz-jennings.html (visited Mar 4, 2017) (Perma archive unavailable).

[29] There are, of course, many exceptions within legal academia, as opposed to legal doctrine. See generally, for example, Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 Stan L Rev 691 (1997); Kathryn Abrams, *Performing Interdependence: Judith Butler and Sunaura Taylor in* The Examined Life, 21.2 Colum J Gender & L 72 (2012); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 Harv CR–CL L Rev 1 (2000); Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 Harv L Rev 1973 (1995); Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 Colum L Rev 640 (2001); Kenji Yoshino, *Covering*, 111 Yale L J 769 (2002); Devon W. Carbado and Mitu Gulati, Book Review, *The Law and Economics of Critical Race Theory*, 112 Yale L J 1757 (2003).

and sexuality, it has never before faced such yawning obstacles within the law's superlative commitment to categorization. Yet as the transgender rights movement takes firm hold, it exposes a variety of limitations to antidiscrimination jurisprudence, particularly the limits of the legal categories that animate sex and gender. For this reason, any account of gender identity must embrace the importance of *not* viewing transgender individuals as merely a "means to an end or an intellectual curiosity," as Professor Paisley Currah, Professor Richard Juang, and Shannon Minter have noted; it must focus on the importance of ensuring gender self-determination as a matter of well-being in the law, rather than as an intellectual exercise.[30]

Toward that end, this Article attempts both to provide a theoretical starting point to reanalyze the relationship between sex and gender, and to offer another vantage point in demonstrating the limits of our jurisprudence. In this Article, I seek to introduce a new layer to the dynamic between gender and sex by suggesting the need for a reconceptualization of gender, both descriptively and normatively, through the lens of property and intellectual property theory. My thesis is that sex is to gender as property is to intellectual property. Unpacking this further, instead of thinking of sex as a construct of biology or medicalization alone, this Article argues that it might be helpful for us to reconceptualize the assignation of sex as it functions in the law along the lines of tangible property—something that is bordered, seemingly fixed, rivalrous, and premised on a juridical presumption of scarcity in terms of its rigid polarities of male and female. In this way, the Article draws on Professor Cheryl Harris's

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[30] Currah, Juang, and Minter, *Introduction* at xxii (cited in note 1). This admonition is especially pertinent to cisgender authors, like myself, writing on transgender issues. See Julia Serrano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* 209–12 (Seal 2007); Jacob Hale, *Suggested Rules for Nontranssexuals Writing about Transsexuals, Transsexuality, Transsexualism, or Trans___*. (Nov 18, 2009), archived at http://perma.cc/9T6W-8ERX (observing the importance of interrogating one's subject position and goals in writing about the trans community); M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 Vt L Rev 943, 947 (2015) ("For transgender people to be recognized as full human beings under the law, the legal system must make room for the existence of transgender people—not as boundary-crossers but as people claiming their birthright as part of a natural variation of human sexual development.").

important work on race and property[31] as well as other scholarship on antiessentialism and antidiscrimination. But it also draws parallels to the *numerus clausus* principle that has foregrounded property law's commitment to established categories of entitlement; this analogy, I argue, is particularly salient because it demonstrates how the law's commitment to standardization has essentially foreclosed alternative modes of identification.[32]

In contrast, regarding gender, I argue that thinking through gender as a performance, if taken seriously, also suggests that gender functions in the law more akin to intellectual property—a creation which is by its nature intangible, permeable, malleable, nonrivalrous, and, ultimately, deeply nonexclusive. An account of gender performance suggests that gender is not something tangible, or fixed, but constitutes a sort of expression that is intangible, borderless, and suffused through cultural regulation and social norms rather than "biological" imperative. As I argue, this account moves gender away from a set of social constructions—and instead recharacterizes its function in the law as a series of intangible possibilities of expression, an essence that is not natural or fixed, but instead resembles the mutable, highly expressive, and transitory qualities of intellectual property.

If we reconceptualize the relationship between gender and sex and the law, I argue, we map an entirely new host of normative possibilities for gender relations to operate outside the boundaries of law's fixedness on identity. This leads us to a broader set of possibilities regarding the regulation and policy of gender altogether.

This Article is constructed in three parts. Part I explores the parallels between the function of property and state-assigned sex, arguing that the regulation of sex can be analogized to a number of property law–like formations, paralleling the *numerus clausus* principle. I also explore early transgender jurisprudence, showing how the polarities of male and female operated to seriously disadvantage broader approaches to gender regulation. In Part II, drawing on Butler, I argue that gender, like intellectual property, carries an expressive nature that is also entirely

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[31] See generally Cheryl I. Harris, *Whiteness as Property*, 106 Harv L Rev 1707 (1993).

[32] See Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 Yale L J 1, 9–11, 20–23 (2000).

nonrivalrous in the sense that one can occupy the spheres of both male and female, masculine and feminine, or neither. I also show how the law has slowly shifted, in some ways, to embrace this vision through its jurisprudence on gender nonconforming behavior in the workplace. However, despite these changes, there are a number of areas of transgender equality that are deeply in need of a shift—particularly the case law regarding bathroom facilities, grooming codes, and sex-segregated facilities. In each of these areas, I argue that the law's approach to gender discrimination has severely limited the possibilities for transgender equality.

Part III offers a normative framework that focuses on gender pluralism in order to reexamine the regulation of gender and state-assigned sex. Returning to the parallels between property and identity, this Part offers a metaphorical and doctrinal reconceptualization of gender regulation that enables individuals to achieve a stronger entitlement to gender self-determination.[33]

I. SEX AS SCARCITY

Typically, the *numerus clausus* principle represents a maxim that the law will allow the creation of only a certain number of property formations. It is the most powerful organizing principle in property law to date, and I would argue that it also illuminates both the limits and the possibilities behind identity categories. In the law of tangible property, the *numerus clausus* principle dictates that there are only four different categories of estates, and those estates must serve as the basic building blocks for future transactions.[34] It serves as one of the most foundational and basic propositions in property law because it forms the very basis for classifying legal entitlements—and disallowing any deviations. As one court put it, "'incidents of a novel kind,' cannot 'be devised and attached to property at the fancy or

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[33] For an insightful treatment of the related concept of gender autonomy, see generally Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 Tulane J L & Sexuality 123 (2001); Jillian T. Weiss, *Gender Autonomy, Transgender Identity and Substantive Due Process: Finding a Rational Basis for* Lawrence v. Texas, 5 J Race, Gender & Ethnicity 2 (Feb 2010).

[34] The categories described by Professors Thomas Merrill and Henry Smith are the following: fees simple, leases, defeasible fees, and life estates. Merrill and Smith, 110 Yale L J at 3 (cited in note 32).

caprice of an[ ] owner.'"[35] The *numerus clausus* principle has not only framed real property estates—as Professors Thomas Merrill and Henry Smith point out, the same idea has served as a foundation in other areas of property, including landlord-tenant law, intellectual property, and the law's system of easements and servitudes.[36] While it is possible for skillful lawyers to design transactions to accomplish their client's goals, the *numerus clausus* principle militates against challenging or changing the basic categories of property entitlements.[37]

The same observation might also be made of gender regulation, which assigns individuals to either male or female categories but rarely explores the levels of privilege inherent in either categorization. Back in 1993, Professor Harris punctured the worlds of property theory and antidiscrimination when she published an article in the *Harvard Law Review* titled *Whiteness as Property*.[38] In that article, Harris argued powerfully that the system of slavery facilitated the merging of white identity and property, investing whiteness with a kind of proprietary value. "Whiteness has functioned as self-identity in the domain of the intrinsic, personal, and psychological," she wrote, "as reputation in the interstices between internal and external identity; and, as property[,] . . . moving whiteness from privileged identity to a vested interest."[39] She argued that not only has the law accorded white individuals the same privileges that are extended to other holders of property, but whiteness has operated historically as a

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35 Id, quoting *Keppell v Bailey*, 39 Eng Rep 1042, 1049 (Ch 1834).

36 Merrill and Smith, 110 Yale L J at 3–4 (cited in note 32). For an excellent discussion of *numerus clausus*, see generally Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 Vand L Rev 1597 (2008); Bernard Rudden, *Economic Theory v. Property Law: The* Numerus Clausus *Problem*, in John Eekelaar and John Bell, eds, *Oxford Essays in Jurisprudence: Third Series* 239 (Clarendon 1987); Abraham Bell and Gideon Parchomovsky, *Of Property and Federalism*, 115 Yale L J 72 (2005); Henry Hansmann and Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J Legal Stud S373 (2002). See also Michael A. Heller, *The Boundaries of Private Property*, 108 Yale L J 1163, 1176–78 (1999).

37 For an alternative view of the rigidity of property entitlements, see Davidson, 61 Vand L Rev at 1610–16 (cited in note 36) (arguing that there is more dynamism in the *numerus clausus* system than property scholarship recognizes).

38 See generally Harris, 106 Harv L Rev 1707 (cited in note 31). Others have also noted a similar parallel between gender and property. See generally, for example, Davina Cooper and Flora Renz, *If the State Decertified Gender, What Might Happen to Its Meaning and Value?*, 43 J L & Society 483 (2016).

39 Harris, 106 Harv L Rev at 1725 (cited in note 31).

form of "status property," a type of reputational property that is based on racial hierarchy, vesting some with rights and others without.[40]

Drawing on foundational cases like *Plessy v Ferguson*,[41] *Brown v Board of Education of Topeka*,[42] and others, Harris also notably argued that whiteness has operated instrumentally as property by excluding all others from certain privileges, like the right to vote, travel, attain an education, obtain work, and occupy a higher social status.[43] In the modern era, Harris applied her theories to affirmative action and showed that, even after the civil rights movement, the metric of constitutional injury is still measured by the injury to whites' settled expectations of admission (rather than its effect on minority admissions), further amplifying the privileged, proprietary status of whiteness.[44]

At the time of Harris's publication, it was the first of its kind to link conceptions of property theory—and its concomitant rights of exclusion, alienation, use, and enjoyment—to human identity. "As whiteness is simultaneously an aspect of identity and a property interest, it is something that can both be experienced and deployed as a resource," Harris wrote.[45] "Whiteness can move from being a passive characteristic as an aspect of identity to an active entity that—like other types of property—is used to . . . exercise power."[46]

In this Part, I draw on a similar analogy operating within the confines of the sex/gender system.[47] A basic system of property rights has three main components. The first component is the creation of a basic legal status, one that usually provides that an asset or entitlement "belongs" to an owner.[48] The second component involves the legal system's definition of the status in question—that is, its design of a constellation of powers and

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40 Id at 1734–36.

41 163 US 537 (1896).

42 347 US 483 (1954).

43 Harris, 106 Harv L Rev at 1745–57 (cited in note 31).

44 Id at 1757–91.

45 Id at 1734.

46 Id.

47 See generally Cooper and Renz, 43 J L & Society 483 (cited in note 38) (describing a similar system).

48 Abraham Bell and Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L Rev 531, 554 (2005).

privileges associated with the performance of that status.[49] And the third aspect of a system of property is that it attaches consequences to those who violate property rules, like the punishment of trespassers.[50]

The same might also be true of our system of sex and gender classifications. The law "sexes" individuals upon birth, according them a certain social status and offering each a set of privileges and entitlements that vests upon the classification. As many scholars have already shown in antidiscrimination jurisprudence, society often reflects a hierarchical distinction between males and females, underscoring a kind of "male privilege" that closely parallels the proprietary white privilege that Harris wrote about.[51] But there is also another kind of privilege as well, a "cis privilege" that extends to those whose gender identities or performances match the sex they are assigned at birth.[52] The law assigns sex so that it functions within the law as a type of property, offering a particular sex classification to individuals whose features correlate to a constellation of characteristics (gonadal, anatomical, chromosomal) that people generally identify as male or female.[53] Normally, this approach to sex (what I call the "morphological model of sex") is rarely questioned or challenged within the law, and as a result it has taken on significance as a central organizing principle.[54]

But the morphological model, I argue, also suffers from severe limitations. Although most individuals presume that this

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49 Id.

50 Id.

51 See generally Harris, 106 Harv L Rev 1707 (cited in note 31); Cooper and Renz, 43 J L & Society 483 (cited in note 38).

52 See Kristen Schilt and Laurel Westbrook, *Doing Gender, Doing Heteronormativity: "Gender Normals," Transgender People, and the Social Maintenance of Heterosexuality*, 23 Gender & Society 440, 443–44 (2009). I use the term "cis" and "cisgender," following the Merriam-Webster dictionary, to refer to "a person whose gender identity corresponds with the sex the person had or was identified as having at birth." *Cisgender* (Merriam-Webster), online at http://www.merriam-webster.com/dictionary/cisgender (visited Mar 4, 2017) (Perma archive unavailable).

53 For an excellent treatment of the morphological and performative dimension of race, see Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 NYU L Rev 1134, 1145–71 (2004).

54 See Abrams, 21.2 Colum J Gender & L at 78 (cited in note 29) ("In most legal discourse (indeed probably in most social or cultural conceptions) gender is something you can easily have by yourself: it comes with your biological sex.").

model relies on an objective set of criteria, many scholars and scientists have shown that a determination of sex can be far more complicated than the law readily suggests. Not only do countless individuals possess characteristics associated with both sexes, but also many individuals transition from one sex to another, and still other individuals challenge the binary system altogether. The morphological model, however, tends to traditionally overlook these narratives, rendering them invisible under the law unless individuals undertake certain affirmative acts—surgery, hormone injections, and the like—in order to receive recognition. Under this construct, the binary system is never questioned or challenged. Moreover, the morphological model of assigned sex—with its focus on fixity, stability, and objectivity—tends to foreclose the possibility of interrogating these categories altogether or imagining an alternative.[55]

This is the point at which the parallel between property and the morphological model becomes so instructive. Like Harris, I do not argue that gender or sex functions formally or technically as property in the sense that these entitlements can be purchased or alienated, but instead I argue that our gender and sex classification system functions as a regulatory network of entitlements that illuminates the functions of property and identity.[56] Taking the analogy between the morphological approach and property even further, we see a clear parallel between the definition of tangible property—fixed, immutable, and informed by the notion of scarcity—and the way that the law has historically treated the categories of male and female. Even more than the comparison of entitlements between males and females, Harris's observations, when applied to the concept of assigned sex itself, tend to suggest that the very ascription of sex as male *or* female—and nothing else—operates as itself a kind of status-based property that excludes those who fall outside of its system.[57]

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[55] See Martine Rothblatt, *The Apartheid of Sex: A Manifesto on the Freedom of Gender* 13 (Crown 1995) ("Labeling people as male or female, upon birth, exalts biology over sociology.").

[56] See Cooper and Renz, 43 J L & Society at 490 (cited in note 38) (reaching similar conclusions).

[57] See id at 493 (noting that gender's organizing principles determine "where we belong and who we belong with") (citation omitted).

In making this suggestion, I make two specific arguments. First, I argue that the ascription of sex[58] resembles the *numerus clausus* principle. Just as the *numerus clausus* principle operates in property to classify entitlements into a fixed, stable, and rigid set of categories, leaving no room for deviant entitlements, the same is true for the categories of sex and gender. Like tangible property's focus on fixedness, the law regarding sex assignation has historically tended to operate from a presumption of scarcity, meaning that there are only two poles of sex—male and female—and that there are no other choices of identification.

Second, I argue that the morphological model, like property itself, functions in an *allocative* fashion. Like Harris argued concerning whiteness, I argue that the "sexed" nature of identity operates to offer privilege and status to some and not others. Those who operate outside the polarities of male and female, or who view themselves as crossing between these polarities, are in a situation similar to the one that Harris argued was facing nonwhite individuals;[59] they can face a troubling sort of exclusion from legal recognition. Individuals who do not fit in either category can be left legally unrecognized, partially erased from legal personhood, unless and until they undergo surgical treatment.[60] At times, even when they do undertake such treatments, they can still be barred from changing their birth certificates, parenting, or being legally recognized in other ways as well.[61]

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58 Professor Jessica A. Clarke has made a similar observation regarding sex classifications. See Jessica A. Clarke, *Identity and Form*, 103 Cal L Rev 747, 757–62 (2015).

59 Harris, 106 Harv L Rev at 1761–66 (cited in note 31).

60 See *Know Your Rights: Transgender People and the Law* (ACLU), archived at http://perma.cc/6AMW-DU8X (describing how state requirements for changing the gender designated on a birth certificate vary widely and are often vague).

61 See Janell Ross, *How Easy Is It to Change the Sex on Your Birth Certificate?* (Wash Post, May 18, 2016), archived at http://perma.cc/28RD-25B9 (noting that Idaho, Ohio, and Tennessee "do not allow changes to birth certificates"). See also generally Charles Cohen, Note, *Losing Your Children: The Failure to Extend Civil Rights Protections to Transgender Parents*, 85 Geo Wash L Rev (forthcoming 2017), archived at http://perma.cc/9XVC-PQ65.

A. The Ascriptive Function of Assigned Sex

In the *numerus clausus* of sex, the law dictates that there are only two possibilities—male or female.[62] Sex is constructed as both a function of scarcity (in the sense that one's choices are limited between male and female) and a rivalrous one (in the sense that one can be either male or female, but not both or neither). As one author points out, "Courts and administrative agencies make two demands of bodies—that they be *legible* as male or female, and that they be so designated and classified."[63] The state's system of sex classification is often elaborate—from birth certificates, to drivers' licenses, passports, and other identity-related documents, to the federal collection of data—and has been used to enforce bans on same-sex marriage, to exclude women from military combat positions, and to administer institutional systems of sex segregation, among other actions.[64]

Just as the *numerus clausus* principle in property law operates to erase the possibilities of alternative formations, the availability of only two categories of gender identity—male and female—tends to erase the possibility of anything that does not fit into either one.[65] Yet, in many cases, the presumption of polarities between male and female is deeply fraught with empirically unwarranted presumptions.[66] Every year, for example,

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62 See Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 Hastings L J 1131, 1132–39 (1979).

63 Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—the Need for Strict Scrutiny*, 20.1 Colum J Gender & L 141, 160 (2011) (emphasis added).

64 Id at 160–61 (enumerating these and other means of sex classifications).

65 See, for example, Michael Boulette, *That Kind of Sexe Which Doth Prevaile: Shifting Legal Paradigms on the Ontology and Mutability of Sex*, 50 Jurimetrics 329, 336–39 (2010) (listing eight determinants of individual sex: "[g]enetic or chromosomal sex (XX or XY)," "[g]onadal (testes or ovaries)," "[i]nternal morphologic sex (seminal vesicles-prostrate or vagina-uterus-fallopian tubes)," "[e]xternal morphologic (penis-scrotum or clitoris-labia)," "[h]ormonal sex (androgens or estrogen)," "[p]henotypic sex (extensive body hair or breasts)," "[a]ssigned sex and gender of rearing," and finally "[s]exual identity," and discussing how legal sex distinctions become unclear when these determinants do not align).

66 There is a wealth of commentary critiquing the binary nature of gender and sex. See generally, for example, Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 Temple Polit & CR L Rev 465 (2009); Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 Colum Hum Rts L Rev 713 (2005); Darren Rosenblum, *"Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*,

thousands of individuals are born intersex, meaning that their chromosomes, hormones, gonads, genitals, internal sex organs, and secondary sex characteristics are not all associated with either the male or female sex.[67] The moment a child is born, the child is automatically assigned an identity that is congruent with the physician's determination of the sex of the child as male or female.

Despite the fact that most believe that sex is determined by chromosomes—XX for females, XY for males—sex tends to be assigned at birth by a simple visual inspection of the baby's genitals.[68] Anyone who fails to fit within these visual parameters—for example, individuals with large clitorises or small penises—

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6 Mich J Gender & L 499 (2000); Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 Temple Polit & CR L Rev 573 (2009); Andrew Gilden, *Toward a More Transformative Approach: The Limits of Trangender Formal Equality*, 23 Berkeley J Gender, L & Just 83 (2008); Julie Greenberg, Marybeth Herald, and Mark Strasser, *Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence?*, 17 Mich J Gender & L 13 (2010).

67 Ezie, 20.1 Colum J Gender & L at 142–43 (cited in note 63). See also Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 Ariz L Rev 265, 278–89 (1999); Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, in Stryker and Whittle, eds, *Transgender Studies Reader* 300, 305–10 (cited in note 4) (discussing the activism surrounding the intersex movement); Anne Fausto-Sterling, Cynthia Garcia Coll, and Meghan Lamarre, *Sexing the Baby: Part 1—What Do We Really Know about Sex Differentiation in the First Three Years of Life?*, 74 Soc Sci & Med 1684, 1687–88 (2012) (describing the biological sex differences observable in the first three years of life); Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination "Because of . . . [Perceived] Sex"*, 34 NYU Rev L & Soc Change 55, 62–69 (2010) (describing the evidence involved in some designations of intersexuality); Mark E. Berghausen, Comment, *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 Nw U L Rev 1281, 1286–94 (2011). See also generally Erin Lloyd, *From the Hospital to the Courtroom: A Statutory Proposal for Recognizing and Protecting the Legal Rights of Intersex Children*, 12 Cardozo J L & Gender 155 (2005); Sara R. Benson, *Hacking the Gender Binary: Recognizing Fundamental Rights for the Intersexed*, 12 Cardozo J L & Gender 31 (2005); Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 Harv J L & Gender 51 (2006).

68 Ezie, 20.1 Colum J Gender & L at 146–47 (cited in note 63). If a child is born with a "normal" clitoris (defined as less than three-eighths of an inch), she is designated as a girl; if a child is born with a penis length of one inch or longer and appears to be potentially capable of penetrative sex, he is designated a boy. Id at 147. This is so even though the chromosomal identity of the child may differ from their external organs. Id at 147–48. Chromosomal identity is also quite complex, based on research into the molecular genetics of sex determination. See generally, for example, Vernon A. Rosario, *The Biology of Gender and the Construction of Sex?*, 10 GLQ: J Lesbian & Gay Stud 280 (2004).

can be subjected to corrective surgery to ensure that their bodies conform to an expectation of what is male and what is female, often according to the physician's overwhelming power of determination.[69] For this reason, intersex children are almost uniformly habilitated into one gender, even though there is mounting evidence that suggests that nonconsensual genital "normalization" surgery may cause more psychological harm than good.[70] In addition, growing evidence of healthy psychosocial development among intersex children who have not had surgery suggests that the procedures can be successfully delayed or may even be unnecessary.[71]

Even aside from the intersex population, the *numerus clausus* of sex also operates to shoehorn other types of gender identities into male or female, irrespective of the complexity of human identity formation and expression. In some cases, the standardization of male and female categories acts to impose regulatory categories on something as complex as private self-identity. Like the critiques leveled at *numerus clausus* in property, which suggest that the principle restrains individual autonomy[72] and leads to imposed standardization and conformity, the same is also true of our systems of sex classification and discrimination law. Here, the law—and many others—overwhelmingly categorize transgender persons as people in the process of becoming something else, as uniformly "transitioning" from one sex to another,

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69 Pediatric genital surgery is also not always successful. Some infants require three to five surgeries, and others have had many more during the course of a lifetime—twenty-two in one case. Ezie, 20.1 Colum J Gender & L at 150 (cited in note 63). In addition, these surgeries are often performed without the consent of the patient, and parents are not always made fully aware of the range of choices and alternatives to medical surgery. Id at 150–51. Equally troubling is the fact that many intersex patients are not even made aware of their condition, a factor that has caused many intersex patients significant challenges, both physical and psychological. See id at 152 n 34 (detailing the case of David Reimer, who committed suicide due, in part, to issues surrounding his involuntary gender-related treatments).

70 Id at 151–54.

71 Id at 153 & n 38.

72 See Davidson, 61 Vand L Rev at 1623, 1643–44 (cited in note 36) (noting how the standardizing function of *numerus clausus* engrafts public regulatory goals onto private legal relations and, thus, "instantiates a variety of normative and pragmatic priorities").

even though that is not always an accurate description of many people's self-identities or expressive preferences.[73]

Today, more and more evidence suggests that there is a myriad of transgender identities that do not always track the crossing of male to female, or the reverse, that the law demands or envisions.[74] For example, in a recent, powerful article, Professors Dean Spade and Rori Rohlfs critiqued the project of compiling statistics on the LGBT community for the purposes of rights-based advocacy, pointing out that some survey questions tend to overemphasize transition at the cost of people who do not engage in certain body modification practices.[75] These practices, they argue, reinscribe the same problematic assumptions that transgender advocates critique and also overlook the role of race and class in identity formation.[76] Many individuals undergo no medical treatment but do take other steps to conform to their

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[73] See Elizabeth M. Glazer and Zachary A. Kramer, Trans*itional Discrimination*, 18 Temple Polit & CR L Rev 651, 663–67 (2009) (describing the reductionist approach courts and antidiscrimination laws have taken to identity); Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity under Title VII*, 104 Nw U L Rev 1147, 1174–76 (2010) (recommending a "consistency" test to protect transgender plaintiffs on the grounds that "most people—both transgender and cisgender—seem to experience their gender identity, whether or not it corresponds with their birth-assigned sex, as something fairly fixed").

[74] In this Article, I use the term transgender to broadly include individuals who, for one reason or another, do not conform their gender identity or expression to the social expectations that generally accompany the sex assigned at their birth. See Currah, Juang, and Minter, *Introduction* at xiv (cited in note 1). The term transgender, as Judge Phyllis Frye has noted, is a "political term created to fill the need for self-definition by the transgender community." Paisley Currah, *Gender Pluralisms under the Transgender Umbrella*, in Currah, Juang, and Minter, eds, *Transgender Rights* 3, 4 (cited in note 1). At the same time, however, it is also important to note the proliferation of multiple categories within this umbrella term. As Professor Susan Stryker has noted, the term refers to "all identities or practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender boundaries," and is often used to denote a pluralistic variety of differing identities. Susan Stryker, *My Words to Victor Frankenstein above the Village of Chamounix: Performing Transgender Rage*, in Stryker and Whittle, eds, *Transgender Studies Reader* 244, 245 n 2 (cited in note 4). For a very eloquent account of transgender identity construction and its varying forms, see Currah, *Gender Pluralisms* at 4 (cited in note 74). See also Jennifer L. Levi and Bennett H. Klein, *Pursuing Protection for Transgender People through Disability Laws*, in Currah, Juang, and Minter, eds, *Transgender Rights* 74, 80 (cited in note 1).

[75] Dean Spade and Rori Rohlfs, *Legal Equality, Gay Numbers and the (After?)Math of Eugenics* (Scholar & Feminist Online, Spring 2016), archived at http://perma.cc/JS74-L6X3.

[76] Id.

gender identity.[77] Some reject their birth-assigned sex in favor of another, whereas others may reject the binary system of sex classification entirely.[78] As Professor Currah, Professor Juang, and Minter have noted, "As new generations of body modifiers and new social formations of gender resisters emerge, multiple usages coexist, sometimes easily, sometimes with much generational or philosophical tension."[79] Of course, even the term transgender can be limiting; while it is often a useful term in many contexts, at other times, it can be too imprecise.[80]

However, despite the proliferation of identities that transgress the polarities of male and female, the law often forecloses the possibility of legal recognition of these categories, due again to the *numerus clausus* of sex.[81] As Professor Judith Lorber has wisely observed, "Every social institution has a material base, but culture and social practices transform that base into something with qualitatively different patterns and constraints."[82] In order to fit into the assigned categories of male and female, the law has historically recognized transgender persons' identity only when they undertake gender confirmation surgery considered "permanent and irreversible."[83] Because of the tremendous cost

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77 Levi and Klein, *Pursuing Protection* at 80 (cited in note 74).

78 See Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 Mich J Gender & L 253, 273–78 (2005) (identifying and describing a plethora of diverse gender identities). There are also significant racialized dimensions to the terms that individuals adopt. See, for example, Julia C. Oparah, *Feminism and the (Trans)Gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA Women's L J 239, 245 (2012) (noting a proliferation of other terms promulgated by people of color who may not identify as transgender).

79 Currah, Juang, and Minter, *Introduction* at xiv–xv (cited in note 1). This category may include "transsexuals, transvestites, cross-dressers, drag kings and drag queens, butch and femme lesbians, feminine gay men, intersex people, bigendered people," two-spirited individuals, "and others who 'challenge the boundaries of sex and gender.'" Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion*, in Currah, Juang, and Minter, eds, *Transgender Rights* 141, 141 n 1 (cited in note 1), quoting Leslie Feinberg, *Transgender Warriors: Making History from Joan of Arc to RuPaul* x (Beacon 1996).

80 Currah, Juang, and Minter, *Introduction* at xvi (cited in note 1).

81 See Meerkamper, Note, 12 Dukeminier Awards J at *17–23 (cited in note 6).

82 Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U Pa L Rev 1, 39 (1995), quoting Judith Lorber, *Paradoxes of Gender* 17 (Yale 1994).

83 *In the Matter of Heilig*, 816 A2d 68, 86–87 (Md 2003) (discussing how the courts and agencies have approached "sexing" a transgender individual).

associated with genital surgery, advocates have utilized the categories of disability in order to seek coverage, as Section C describes.[84] As Spade writes, "In order to get authorization for body alteration, the scripted transsexual childhood narrative must be performed, and the GID [now known as gender dysphoria] diagnosis accepted, maintaining an idea of two discrete gender categories that normally contain everyone but occasionally are wrongly assigned, requiring correction to reestablish the norm."[85]

B. The Allocative Function of Assigned Sex

On a deeper level, the very act of classifying human identity, like the *numerus clausus* principle, operates to reinforce the centrality of the state as the sole source of legal personhood, particularly in matters of sex classification. Consider Merrill and Smith on the *numerus clausus* point:

> [I]f the code recognizes certain forms of property, but not others, it follows logically that the forms enumerated in the code are the only types of property that the judiciary may enforce. The parties may not create a new type of property by contract, nor may the judiciary on its own authority invent new property rights, because this would contradict the code's status as the exclusive source of legal obligation.[86]

The same can also be said for the legal regulation of sex, which cumulatively and completely establishes the determinative power of the state—and its codes—in determining, recognizing, and ultimately administering identity. Through its design of legal entitlements, the state gains a monopoly power in assigning one's sex, obviating the power of alternative interpretations. This entitlement is deeply and intimately connected to political recognition and personhood. Even if the goals of our regulatory system

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[84] Ezie, 20.1 Colum J Gender & L at 158–60 (cited in note 63). In the past, private insurers and Medicaid agencies have also denied coverage under broad exclusion policies or because the applicant has failed to demonstrate "medical necessity." Id. These denials have particular impact on youth, people of color, and individuals who are in the foster system or other institutional structures, like prisons or immigration detention. Id.

[85] Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 Berkeley Women's L J 15, 25–26 (2003).

[86] Merrill and Smith, 110 Yale L J at 10 (cited in note 32) (citation omitted).

lie in (seemingly) efficient standardization, it creates a hierarchy of privilege for those who fall outside of its parameters. In this sense the "property" of being sexed operates allocatively and instrumentally, in the sense that the law accords a certain type of privilege and entitlement to those who are cisgender, conforming to either male or female identities assigned at birth, or those who undergo a particularized type of gender transition. These privileges determine tangible and intangible entitlements—including access to education, employment, and public accommodations, among others.[87]

In addition to the scientific difficulties associated with the very classification of assigned sex under the morphological model, there is the added difficulty posed by the presumption of fixedness and immutability that informs this model. The classification of assigned sex, therefore, translates to a differentiation of privilege. Just as Harris suggested that the status of whiteness operates as a type of property, here I suggest that the status of "sexedness"—that is, being "sexed" or classified by the state—performs the same function, conferring the benefits of recognition on individuals who fit the morphological model and denying certain entitlements, particularly recognition, to those who transgress or who do not fulfill the regulatory requirements for transition.

Gender classification is a primary power of the state, but as scholars have shown, it is an inordinately messy, shifting, complex, and contradictory set of rules, demonstrating a near total absence of coherence.[88] For example, the formal rule of the Social Security Administration used to be that individuals could apply to have their gender reclassified upon a showing of proof that they had undergone gender confirmation surgery.[89] Yet reports suggested that these rules were enforced inconsistently, and that some transgender individuals were able to get their gender changed by showing a court decree of a name change and a doctor's letter simply stating that the transition is "complete,"

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87 Dunlap, 30 Hastings L J at 1147 (cited in note 62).

88 See Dean Spade, *Documenting Gender*, 59 Hastings L J 731, 733–39 (2008).

89 See id at 762. This rule has now changed. For the new policy, see *How Do I Change My Gender on Social Security's Records?* (Social Security Administration), archived at http://perma.cc/WM67-TNDZ.

without specifying further.[90] Passports, which are provided by the Department of State, also required proof of confirmation surgery in the past (that has now changed).[91] However, in the past, some individuals had been able to receive new passports simply by convincing the State Department employee that the gender assignation is a "mistake."[92]

Birth certificates, for example, are regulated by the states, not the federal government, and, despite the difficulties or ambivalence many associate with gender confirmation surgery, over a quarter of states specifically require evidence of surgery in order to change the designated gender.[93] Here, too, there is significant variation, among both the statutes themselves and their application, leading to marked levels of inconsistency.[94] Some states do not require surgery but instead require other forms of medical evidence.[95] Others require a court order confirming gender change.[96] Some states ban transgender individuals from changing their assigned sex altogether.[97] Still others require a new birth certificate to change assigned sex on other

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90 Spade, 59 Hastings L J at 763 (cited in note 88).

91 See Kerry Eleveld, *Passport Rules Eased for Transgender People* (Advocate, June 10, 2010), archived at http://perma.cc/X7LW-6RCT. For a description of the current policy, see *Gender Transition Applicants* (Department of State, Bureau of Consular Affairs), archived at http://perma.cc/QLL3-499K.

92 Spade, 59 Hastings L J at 775 (cited in note 88). Federal regulations since September 11, 2001, have made this much more difficult. Id at 746, 775. See also Nan D. Hunter, *"Public-Private" Health Law: Multiple Directions in Public Health*, 10 J Health Care L & Pol 89, 93–99 (2007) (discussing the increase in federal security regulations regarding health).

93 Rappole, Comment, 30 Md J Intl L at 196–97 (cited in note 8). See also Spade, 59 Hastings L J at 767–70 (cited in note 88).

94 See Spade, 59 Hastings L J at 736 (cited in note 88). Forty-six states plus a handful of other jurisdictions allow people to correct their gender marker, and a handful of states do not have clear policies. See Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 Mich J Gender & L 373, 381–83 (2013) (noting that "Oklahoma, Texas, and American Samoa do not have clear policies," and that, while only Tennessee has an explicit ban, "Idaho, Ohio, and Puerto Rico also do not allow individuals to correct gender").

95 California, New York, Oregon, Vermont, Washington, and the District of Columbia require that a doctor certify "appropriate clinical treatment." Rappole, Comment, 30 Md J Intl L at 197 (cited in note 8).

96 See, for example, *Birth Certificate: Court Order of Change of Sex* (Oregon Health Authority), archived at http://perma.cc/VL89-83AK.

97 Spade, 59 Hastings L J at 768 & n 181 (cited in note 88). See also Tenn Code Ann § 68-3-203(d); *In re Ladrach*, 513 NE2d 828, 831 (Ohio Probate 1987); Idaho Code § 39-250.

state documents.[98] Indeed, the policies—and the way they are interpreted and applied—can lead to such marked variation that some transgender persons have, again, reported success in simply visiting the DMV and then complaining that the sex listed on their drivers' licenses is an error.[99]

Even aside from the state and federal matrices that govern the assignation of sex, researchers report a similar pattern of inconsistency in sex-segregated facilities, for which there is often no formal policy to determine gender classification in cases of transgender clients.[100] The absence of formal policies can have dramatic effects on the lives and well-being of transgender persons, who can be especially vulnerable when placed in facilities that are inappropriate to their gender identities.[101] Like the issues surrounding documentation of identity, the law tends to avoid recognizing other forms of gender nonconforming behavior without evidence of gender confirmation surgery or a gender dysphoria diagnosis. Moreover, the state's centrality in sex classification—and its concomitant reliance on the polarities of male and female—is rarely critiqued or questioned. The state's purpose in official sex designations is for information gathering and juridical enforcement of sex-specific laws and policies; these government interests effectively override individual gender self-determination.[102]

Admittedly, just like property's *numerus clausus* system, our systems of gender and sex regulation do offer important benefits. One key interest, which Merrill and Smith point out in the real property context, is to economize on information costs—allowing third parties and future transaction participants to decrease information-processing costs.[103] Although Merrill and Smith recognize the value of the fluidity of language for generative or expressive purposes—in other words, to derive new possibilities

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98 See Spade, 59 Hastings L J at 773 (cited in note 88).

99 Id at 772.

100 See id at 752–53, 775–76.

101 See id at 753, 775–82 (noting that the rules regarding gender classification for purposes of sex segregation significantly injure nonconforming and transgender individuals).

102 Dunlap, 30 Hastings L J at 1132 (cited in note 62).

103 See Thomas W. Merrill and Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L J 357, 387 (2001) ("If in rem rights were freely customizable—in the way in personam contract rights are—then the information-cost burden would quickly become intolerable.").

of entitlement formation—they clearly note that the *numerus clausus* principle strongly cuts against building any flexibility within the basic categories themselves.[104] The result, it seems, maintains standardization at the cost of individual autonomy.

The same observation may also be made for the regulation of sex. Very often the presumption of the fixed, binary, stable formation of male and female categories enables people to make quick assumptions about individual preferences and entitlements. At times, these assumptions can be largely benign or rebuttable based on future interaction.[105] Yet when these ascriptive elements translate into assumptions about the intellectual, emotional, or physical capacities of an individual based on assigned sex, the constructs can be deeply problematic and a cause for concern under antidiscrimination laws.[106]

Yet the absence of legal possibilities for deviation—while certainly economizing on standardization—also creates marked costs that are borne by individuals who fall outside of these categories. So the benefits of standardization might actually create measurable costs that are internalized by gender nonconforming populations. Here, the *numerus clausus* principle of sex operates to disadvantage members of both the transgender and intersex communities, first, by foreclosing the possibility of alternative identity formations and, second, by forcing individuals who may not fit into either category to change themselves—sometimes physically and sometimes psychologically—in order to avail themselves of legal recognition. For intersex persons, they may be involuntarily subjected to medical intervention, sometimes irrespective of their potential preferences and without their informed consent. In contrast, transgender individuals may desire treatment, including hormones or surgery, but might be prevented from getting treatment, due to the insurance or regulatory issues surrounding gender transition. Or, as the data suggests,

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104 Merrill and Smith, 110 Yale L J at 37–38 (cited in note 32).

105 See Rich, 79 NYU L Rev at 1148 (cited in note 53) (making similar observations with respect to race).

106 See, for example, *United States v Virginia*, 518 US 515, 542–45 (1996) (applying intermediate scrutiny to the sex-based prohibitions at bar and drawing parallels between the prohibitions and archaic assumptions about the sexes); *City of Los Angeles Department of Water and Power v Manhart*, 435 US 702, 704–09 (1978) ("Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.").

many others may not desire medical intervention at all, and thus may face legal invisibility.[107] Yet in either case, the individuals' preferences and ability to determine, for themselves, their own gender are foreclosed by the dominance of the polarities of male and female, erasing other possibilities of legal self-identification.

C. The Evolution of the "Properties" of Gender

The allocative function of the morphological model of sex, as I suggest above, necessarily leads to a degree of state surveillance and regulation of the entitlements associated with assigned sex. Most of these classifications and entitlements are rarely questioned, even though they do function, in some ways, similarly to racial classifications and thus as status-based properties, as Harris has suggested. Those who are classified "successfully" by the state are able to exercise the privileges and entitlements associated with their birth-assigned sex as a vested interest. Yet those who experience a disjunction between their assigned sex and their own self-identity may face a myriad of legal challenges stemming primarily from the state's inordinately powerful role in their identity classification.[108]

Of course, there are obvious advantages offered by the centrality of the state. Ideally, state-sponsored regulations offer some degree of uniformity to sex classifications, and they also provide notice to the public, thereby reducing information costs. Yet, under this model, the state alone carries a rarely challenged monopoly power over sex classifications and also, relatedly, over

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[107] See Laura E. Kuper, Robin Nussbaum, and Brian Mustanski, *Exploring the Diversity of Gender and Sexual Orientation Identities in an Online Sample of Transgender Individuals*, 49 J Sex Rsrch 244, 248–50 (2012) (noting that the majority of transgender survey participants either did not desire or were unsure about whether to pursue certain medical interventions, like hormones or gender confirmation surgery). See also Ezie, 20.1 Colum J Gender & L at 156–57 (cited in note 63) ("While intersex persons are figured to have *a disorder of the body*, transgender people are classified as having *a disorder of the mind*."); Rhonda Factor and Esther Rothblum, *Exploring Gender Identity and Community among Three Groups of Transgender Individuals in the United States: MTFs, FTMs, and Genderqueers*, 17 Health Sociology Rev 235, 237–42 (2008) (noting a multiplicity of identity categories and a substantial reluctance among some populations to pursue medical intervention).

[108] For a compelling personal account, see generally Eli Clare, *Resisting Shame: Making Our Bodies Home*, 8 Seattle J Soc Just 455 (2010).

gender reassignment. Particularly in these realms, in which public health considerations are so intimately tied to the range of possibilities for identity management, it is notable that many classificatory decisions have been made without significant deference to transgender individuals themselves.

In these ways, transgender communities offer an important critique of the law's regulation of sex and gender from both a minoritizing and universalizing perspective.[109] For members of the transgender community, this project is largely self-constitutive, because it demonstrates the need to rethink some of the classifications that disenfranchise them from access to medical services, equal treatment, and full-fledged citizenship.[110] At the same time, because they engage with the deepest presumptions that the law holds regarding the classifications of sex and gender, and the cultural expectations that underlie each, transgender communities offer a universalizing critique of the role of gender in our everyday lives and also underscore the need for a reimagination of the relationship between sex and gender altogether.[111]

While studies of transgender-related theories have existed since the mid-nineteenth century in academia, many scholars, particularly Professor Sigmund Freud, tended to conflate transgender identity with repressed homosexuality, leading to a focus on psychoanalytic therapy that persisted well into the 1970s.[112] At the same time, however, medical advances in endocrinology and surgical techniques began to slowly decouple the conflation of transsexuality with transvestism (cross-dressing)

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[109] See, for example, Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 Pierce L Rev 1, 1 & n 2, 23–29 (2007). See also Stryker, *(De)Subjugated Knowledges* at 9 (cited in note 4) ("Transgender phenomena call into question both the stability of the material referent 'sex' and the relationship of that unstable category to the linguistic, social, and psychical categories of 'gender.'").

[110] For excellent writing on transgender identity and related issues involving race, class, and other categories, see the work of Spade. See generally, for example, Spade, 59 Hastings L J 731 (cited in note 88); Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in Currah, Juang, and Minter, eds, *Transgender Rights* 217 (cited in note 1); Dean Spade, *Mutilating Gender*, in Stryker and Whittle, eds, *Transgender Studies Reader* 315 (cited in note 4); Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke rev ed 2015).

[111] See Knauer, 6 Pierce L Rev at 44–50 (cited in note 109).

[112] Andrew N. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* 24–25 (Cavendish 2002).

and homosexuality, leading to the emergence of new models of transgender identity.[113]

Eventually, experts also began using the term *gender dysphoria*, which slowly began to replace the previous category of transsexuality.[114] Many of the key issues that transgender people face—both historically and even today—center around the role of medical treatment and the advantages and disadvantages of a diagnosis of Gender Identity Disorder (GID), now referred to as gender dysphoria.[115] In 1980, the American Psychiatric Association (APA) added a category of gender identity disorders, including transsexualism, to the third edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-III).[116] By 1994, the criteria for a GID diagnosis included the following: "(A) strong and persistent cross-gender identification, (B) persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex, (C) lack of a physical intersex condition, and (D) clinically significant distress or impairment in social, occupational, or other important areas of functioning."[117] In 2013, the fifth edition (DSM-5) removed GID entirely and replaced it with a new diagnosis of gender dysphoria.[118]

Gender dysphoria has had a long and tumultuous history, leading to the birth of what has been called the "medical model" of transgender identity.[119] Following the much-publicized transition of Christine Jorgensen, an ex-GI formerly named George

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113 Id at 26.

114 Id at 30–31.

115 For a very helpful summary of these developments in the past few years, see Kevin M. Barry, et al, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 BC L Rev 507, 516–26 (2016).

116 See Jonathan L. Koenig, Note, *Distributive Consequences of the Medical Model*, 46 Harv CR–CL L Rev 619, 623–25 (2011). See also *Diagnostic and Statistical Manual of Mental Disorders* 261–66 (American Psychiatric Association 3d ed 1980).

117 Koenig, Note, 46 Harv CR–CL L Rev at 624 (cited in note 116), quoting *Diagnostic and Statistical Manual of Mental Disorders* 532–33 (American Psychiatric Association 4th ed 1994) (DSM-IV) (quotation marks omitted).

118 *Diagnostic and Statistical Manual of Mental Disorders* 451–59 (American Psychiatric Association 5th ed 2013).

119 Whitney Barnes, *The Medicalization of Transgenderism* (TransHealth, July 18, 2001), archived at http://perma.cc/9D98-XNBE. See also generally Heino F.L. Meyer-Bahlburg, *From Mental Disorder to Iatrogenic Hypogonadism: Dilemmas in Conceptualizing Gender Identity Variants as Psychiatric Conditions*, 39 Arch Sexual Behav 461 (2010).

Jorgensen who in 1953 returned to the United States as a woman, many more individuals began to seek out medical treatment.[120] This culminated in the 1966 founding of a program at Johns Hopkins University for those with gender identity issues, along with a specialized protocol developed by an endocrinologist, Dr. Harry Benjamin, who sympathized with his patients and prescribed hormones, among other options.[121] Within just ten years of the opening of Hopkins's inaugural clinic, forty others opened.[122]

Yet, many of these clinics relied on a model that was so narrow that it risked excluding a wide variety of gender variant individuals. As one scholar reports:

> To qualify for treatment, it was important that applicants report that their gender dysphorias manifested at an early age; that they have a history of playing with dolls as a child, if born male, or trucks and guns, if born female; that their sexual attractions were exclusively to the same biological sex; that they have a history of failure at endeavors undertaken while in the original gender role; and that they pass or had potential to pass successfully as a member of the desired sex.[123]

As a result of this pathologizing tendency, many individuals were turned away for spurious reasons:

> because they were "too successful" in their natal gender roles, because they were married, because they had read too much about transsexualism, because they had the "wrong" sexual orientation, because clinic staff didn't consider them sexually attractive in the cross-gender role, or because they wouldn't comply with lifestyle requirements imposed on them by the clinics.[124]

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120 Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in Currah, Juang, and Minter, eds, *Transgender Rights* 171, 174–75 (cited in note 1).

121 Id at 175–76.

122 Id at 176.

123 Id at 177, citing generally Dallas Denny, *The Politics of Diagnosis and a Diagnosis of Politics: The University-Affiliated Gender Clinics, and How They Failed to Meet the Needs of Transgender People*, 98 Transgender Tapestry 3 (Summer 2002).

124 Denny, *Transgender Communities of the United States* at 177 (cited in note 120).

Those accepted for treatment were pressured to avoid socializing with other transgender individuals on the grounds that they were "now normal men and women."[125]

Today, the World Professional Association for Transgender Health, which provides guidance to the medical community for the treatment and management of gender dysphoria, requires that individuals receive the diagnosis and live full-time as their self-identified gender prior to receiving certain forms of medical treatment, such as hormones and surgery.[126] Until the early 1990s, the medical model was the dominant approach to transgender care.[127] Like the *numerus clausus* principle's disallowance of deviation, this model has operated under the presumption that all transgender individuals were literally "in transition" from male to female, or the reverse, largely disallowing any forms of deviation.

Of course, one significant advantage of using the language of dysphoria involves the simple fact that a gender dysphoria diagnosis has enabled individuals to receive access to medical care for the purposes of surgery or hormone treatments.[128] Similarly, it has allowed courts and medical professionals to view transgender individuals as facing a conflict over their gender identity, one that is successfully treatable and resolvable with the right combination of medical interventions.[129]

At the same time, however, an overreliance on this medical model tends to suggest that "trans-identified individuals suffer from a psychological condition" requiring medical intervention.[130] Further, the medical model tends to reify, rather than challenge, pervasive stereotypes about sex and gender. One scholar observed:

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125 Id.

126 See Koenig, Note, 46 Harv CR–CL L Rev at 624–25 (cited in note 116).

127 Denny, *Transgender Communities of the United States* at 178–79 (cited in note 120).

128 See Koenig, Note, 46 Harv CR–CL L Rev at 625 (cited in note 116).

129 To date, "[c]ourts or administrative agencies in at least seven states have found that transgender people are protected under state civil rights statutes that prohibit discrimination on the basis of disability." Levi and Klein, *Pursuing Protection* at 74 (cited in note 74). The seven states are: Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York, and Washington. Id at 74 n 1.

130 Koenig, Note, 46 Harv CR–CL L Rev at 625 (cited in note 116).

> The medical model of transsexualism supposed that there were but two sexes, and that the only alternative to remaining unhappily in the original gender role was to work hard to conform to the only available alternative. That is, one "changed sex," going from male to female or from female to male. The model didn't question the society that created such restrictive gender roles or examine the possibility of living somewhere outside those binary roles. . . . Transsexualism itself was considered a liminal state, a transitory phase, to be negotiated as rapidly as possible on one's way to becoming a "normal" man or "normal" woman.[131]

Another significant disadvantage involves the disparate implications of the diagnosis requirement. By carving out a class of transgender individuals who have been diagnosed with gender dysphoria and are receiving treatment or surgical intervention, the medical model tends to risk unwittingly excluding those who are not receiving treatment from legal recognition.[132] Individuals who do not believe that they have a medical condition, who identify as genderqueer or with some other gender nonconforming category, who opt for nonmedical modes of transformation, like binding breasts or using cosmetics or wigs, or who otherwise choose not to physically transform, risk exclusion from these models.[133] By implicitly suggesting that individuals need to first receive a diagnosis in order to receive particular forms of treatment, gender dysphoria has had the effect of actually limiting access to treatment because those who cannot afford medical treatment (or who lack health insurance coverage) can be left unable to address their situation through any other form of managed care if they lack a gender dysphoria diagnosis.[134] As a result, many individuals seek hormones and other treatments

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131 Denny, *Transgender Communities of the United States* at 179 (cited in note 120).

132 See Oparah, 18 UCLA Women's L J at 247 (cited in note 78).

133 Id.

134 This is particularly an issue given the low rate of insurance coverage for transgender individuals. One 2003 study found that 43 percent of the transgender-identified individuals interviewed lacked health insurance, a rate that was double the proportion in the general population. Id at 247 n 38. For a discussion of steps that can be taken to ensure greater coverage, see Ilona M. Turner, *Pioneering Strategies to Win Trans Rights in California*, 34 U La Verne L Rev 5, 14–18 (2012).

extralegally, outside of the medical system, posing risks to their well-being and safety.[135]

Another result of the emphasis on gender dysphoria is slightly more ephemeral. Focusing on gender dysphoria as a variant of a disability lends itself to the suggestion that gender nonconformity is something experienced by only a small minority of individuals, cast as in need of treatment and therapy. Yet this myth could not be further from the truth. To be sure, gender nonconformity is different from gender dysphoria, but the law tends to recognize only a particular subset of the latter category and may fail to protect the former category as a result.[136]

Of course, the observation above is not meant to suggest that the desire to obtain gender confirmation surgery or hormone treatments is not a real, deeply felt need by some transgender-identified individuals. Professor Jennifer Levi and Ben Klein, for example, have argued that the purpose of seeking disability protection is not to pathologize individuals but rather to obligate institutions to ensure that transgender individuals are able to participate fully in society by providing them with medical options for transition when appropriate.[137] Many individuals focus on the materiality of the body in seeking a congruence between their self-identity and gender presentation, and much of the surrounding discourse often uses, either directly or indirectly, the language of property in articulating claims for

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[135] Olivia Smith and Justine Quart, *Underground: Why This Transgender Woman Used Black Market Drugs to Transition* (ABC News, May 10, 2016), archived at http://perma.cc/ZB88-2PNQ; Melissa Dunn and Aisha C. Moodie-Mills, *The State of Gay and Transgender Communities of Color in 2012: The Economic, Educational, and Health Insecurities These Communities Are Struggling with and How We Can Help Them* (Center for American Progress, Apr 13, 2012), archived at http://perma.cc/H23M-THL6 (noting that transgender women of color "are at risk of serious health complications from taking black market hormone and silicone injections"). Should any of these individuals face arrest or imprisonment, they may be placed in the facility that corresponds to the sex they were assigned at birth and may often be denied certain types of medical treatment. Oparah, 18 UCLA Women's L J at 247–48 (cited in note 78).

[136] See *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* *4 (World Professional Association for Transgender Health 2011), archived at http://perma.cc/VA6E-8YLN (discussing the difference between the two classifications).

[137] See Sharon M. McGowan, *Working with Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on* Schroer v. Billington, 45 Harv CR–CL L Rev 205, 221 (2010), citing Levi and Klein, *Pursuing Protection* at 80–83 (cited in note 74) (discussing the influence of the Levi and Klein work).

medical intervention on this basis. Consider, for example, Dr. Jay Prosser on this point:

> I do not recognize as proper, as my property, this material surround; therefore I must be trapped in the wrong body. Since inappropriateness is located in the material body, the entire configuration explains why the subject seeks surgical intervention to alter the flesh rather than psychological intervention to transform body image. If the body is not owned, it is in this experience of body—not *my* body—that surgery intervenes.[138]

For some, as Prosser suggests, surgical intervention might be a desirable goal. Yet there are dangers in presuming that all people who identify as transgender seek the same thing, a presumption that is categorically flawed and yet often imposed by the law and the state itself. My point here is simply to suggest that the minoritizing language of a gender dysphoria diagnosis lends itself to obscuring the significant need for a deeper and more structural critique of gender itself—highlighting its political role in creating and consecrating the categories of male and female, and exposing the presumption that there is something deeply wrong with gender nonconforming behavior that needs to be "fixed."

D. The Path of Transgender Jurisprudence

While these medical advances were unfolding in the 1950s and afterward, the law had only just begun to face the question of how to address sex changes in a variety of different contexts, ranging from the validity of marriages between trans- and cisgender-identified individuals, to the question of "gender fraud," to birth certificate questions, to cases involving employment.[139] Similar cases were also unfolding on a global scale, and each of these trajectories initially effectively cemented the centrality of one's assigned sex at birth, rejecting the possibility

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[138] Jay Prosser, *Second Skins: The Body Narratives of Transsexuality* 77–78 (Columbia 1998).

[139] This discussion of transgender legal history is only a fraction of a much richer and more complex chronology. For an excellent book on the topic, see generally Susan Stryker, *Transgender History* (Seal 2008).

that the law recognized transitions from male to female and vice versa.

Here, the morphological model of sex characterizes early jurisprudence on transgender issues. Again, the two polarities of male and female are all that is offered, at times limiting the chance of a successful transition between them, let alone the possibility of identifying outside of these polar categories. Sex operates here like a type of tangible property under the law—fixed, immutable, and rivalrous. Because the law treats sex through a lens of scarcity, it functions like a kind of nontransferable property, limiting the possibility of more malleable approaches. Here, the idea of sex operating as a kind of nontransferable property gives rise to two main approaches in the law: (1) early cases that rejected the possibility of a change in assigned sex, and (2) later cases that recognized the possibility of a change in sex assignation but relied on a mode of analysis that employed stereotypical views of male and female, thus reifying a binary system that failed to take into account the malleability of changed roles regarding gender. Both of these trends had negative effects on transgender equality, though for very different reasons.

Consider the first line of cases, which rely heavily on policing the boundaries between male and female, allowing for little crossover between them. In 1957, a Scottish court rejected a transgender woman's application to alter her birth certificate by stating that "skin and blood tests still show X's basic sex to be male and that the changes have not yet reached the deepest level of sex determination."[140] This observation that biology was essentially immutable pervades early transgender jurisprudence, and it also operated to suggest a deep-seated similarity between conceptions of sex and conceptions of property—both were cast as fixed, stable, and largely immutable under the law. Gender fraud, too, played a key thematic role.

By the 1970s, the first cluster of legal cases involving transgender individuals began to make their way to the courts,

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[140] Sharpe, *Transgender Jurisprudence* at 40 (cited in note 112), quoting *X—Petitioner*, 1957 Scots L Times 61, 62 (Sheriff Ct 1957). The court also noted that, even if a change of sex had taken place, the relevant statute would not have permitted a change to the birth certificate, which was "a record of fact at a fixed time" and "not . . . a narrative of events." *X*, 1957 Scots L Times at 62.

both in the United States and elsewhere. Prior to the 1970s, in the United Kingdom, transgender persons were able to legally marry members of the opposite gender.[141] However, in 1970, an English court handed down *Corbett v Corbett*,[142] a case that held that sex was determined at birth.[143] The case involved a challenge to the validity of a marriage between a cisgender male petitioner, Arthur Corbett, and a postoperative transgender woman, April Ashley.[144] Although the husband was aware of Ashley's history, in order to avoid paying her alimony, he sought an annulment on the grounds that Ashley was actually a "person of the male sex" and therefore the marriage was invalid.[145]

Although her status as a "transsexual" had not been challenged by the defense, Ashley was examined multiple times by medical experts—her vagina was examined to determine whether it could accommodate a male penis, for example.[146] In their recommendations, one expert classified her as "a male homosexual transsexualist," and yet another concluded that "the pastiche of femininity was convincing."[147] A third expert classified Ashley as intersex, and said she should be assigned to the female sex.[148] In the end, however, the judge concluded that sex is determined at birth by a congruence of chromosomal, gonadal, and genital factors.[149] After reviewing all of these factors, the judge, himself a medical doctor,[150] concluded, "It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed. . . . [Ashley's] operation, therefore, cannot affect her

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141 See *Corbett v Corbett*, 2 All ER 33, 47 (High Probate Divorce and Admiralty 1970).

142 2 All ER 33 (High Probate Divorce and Admiralty 1970).

143 Sharpe, *Transgender Jurisprudence* at 40–41 (cited in note 112), citing *Corbett*, 2 All ER at 48–49.

144 Sharpe, *Transgender Jurisprudence* at 40 (cited in note 112), citing *Corbett*, 2 All ER at 34.

145 *Corbett*, 2 All ER at 34, 37, 40. A related issue in the case involved allegations that the marriage had never been consummated. See id at 34.

146 Id at 41–42.

147 Id at 43, 47.

148 Id at 43.

149 Sharpe, *Transgender Jurisprudence* at 41–42 (cited in note 112). See also *Corbett*, 2 All ER at 40–47.

150 *Ladrach*, 513 NE2d at 832.

true sex."[151] The court further concluded that "[m]arriage is a relationship which depends on sex and not on gender."[152]

Corbett, by nearly all accounts, had a profound and lasting effect on transgender equality around the globe. *Corbett* was followed in other countries as well, specifically Canada, Singapore, and Australia.[153] The central proposition of the case—that sex is determined at birth—became the conclusion that foreclosed transgender equality claims in multiple areas, specifically regarding birth certificates, social security, sex discrimination, unfair dismissal, equal pay, criminal law, and marriage, throughout England—and elsewhere—for many years.[154]

Moreover, the presumption that sex was inevitably fixed at birth continued to inform the development of early transgender jurisprudence in the United States. The *numerus clausus* of sex functioned here to deny alternative classifications or transitions between the sexes. Consider the observations by a Texas appellate court that refused to recognize the marriage between Christie Lee Littleton, a transgender woman, and Jonathan Mark Littleton, a cisgender man:

> The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?[155]
>
> There are some things we cannot will into being. They just are.
>
> . . .
>
> We hold, as a matter of law, that Christie Lee Littleton is a male. As a male, Christie cannot be married to another male.[156]

After *Littleton* and *Corbett*, appellate courts in Kansas, Ohio, and Florida ruled that marriages involving transgender individuals were null and void.[157]

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[151] *Corbett*, 2 All ER at 47.

[152] Id at 49.

[153] Marybeth Herald, *Transgender Theory: Reprogramming Our Automated Settings*, 28 Thomas Jefferson L Rev 167, 172–73 (2005).

[154] Sharpe, *Transgender Jurisprudence* at 43 (cited in note 112).

[155] *Littleton v Prange*, 9 SW3d 223, 224 (Tex App 1999).

[156] Id at 231.

Although many courts still cling to the presumption that sex cannot be changed, a growing body of jurisprudence has come to conclude otherwise. For example, after *Corbett*, courts in the United States, Australia, and New Zealand began to respond to calls for reform, and so began to carve out legal recognition for individuals who transitioned into another identity by focusing on the importance of "psychological and anatomical harmony."[158] For example, in a 1968 New York case, *In re Anonymous*,[159] a judge permitted a transgender woman to change her birth certificate, on the grounds that, postoperation, her anatomy (originally assigned male) had been successfully conformed to her self-identity (female).[160] The judge rejected any concern over fraud, noting "the probability of so-called fraud, if any, exists to a much greater extent when the birth certificate is permitted . . . to classify this individual as a 'male.'"[161]

Despite the growing importance accorded to psychological self-identification, however, the law still tended to reflect a preoccupation with the tangible manifestations of genital anatomy. This preoccupation, unusually, also manifested itself through a growing focus on the applicant's postoperative capacity to engage in heterosexual intercourse.[162] The issue came up in *Corbett* and also, inexplicably, in *Anonymous*, although it is extremely difficult to understand why such an observation would even be necessary on a change of birth certificate.[163] The focus on postoperative "genital performance" turned out to be a central factor in a case from New Jersey, *M.T. v J.T.*,[164] which held a postoperative

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157 *In the Matter of the Estate of Gardiner*, 42 P3d 120, 136–37 (Kan 2002); *Kantaras v Kantaras*, 884 S2d 155, 161 (Fla App 2004); *In the Matter of a Marriage License for Nash*, 2003 WL 23097095, *9 (Ohio App).

158 Sharpe, *Transgender Jurisprudence* at 3 & n 5 (cited in note 112) (emphasis omitted) (listing cases). An Australian court, for example, held that one's psychological gender identity played a considerably more powerful role than one's anatomical sex at birth. See Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families*, in Currah, Juang, and Minter, eds, *Transgender Rights* 32, 35 (cited in note 1), citing generally *Re Kevin: Validity of Marriage of Transsexual*, 28 Fam L 158 (Fam Australia 2001).

159 57 Misc 2d 813 (NY City Civ 1968).

160 Id at 816–17.

161 Id at 817.

162 Sharpe, *Transgender Jurisprudence* at 59–60 (cited in note 112).

163 *Anonymous*, 57 Misc 2d at 815.

164 355 A2d 204 (NJ App 1976).

transgender woman to be female, at least for the purposes of marriage.[165] Here, the court noted the medical expert's testimony that the woman's vagina and labia were "adequate for sexual intercourse."[166] The reasoning suggested that it was because she could no longer perform sexually as a male in sexual intercourse, and because the surgery provided her with the capacity to perform sexually as a woman, that the court validated the change.[167]

Admittedly, the recognition of sex changes within the law was a tremendous benefit to transgender individuals seeking legal recognition. At the same time, however, these decisions, by limiting the recognition of transgender bodies to those who had undergone surgery, began to explicitly and implicitly suggest that surgical confirmation was an imperative to a successful transition.[168] Again, like in the context of physical property, these cases tended to ground themselves in an overwhelming focus on the tangible manifestations of one's anatomical genitalia, by always remaining fixed to a polarity of male or female. After all, these courts reasoned, without genital surgery, how could there be a change of sex?[169] Adding to this view, one scholar explained, referring to surgery, that "it is hard to see an earlier point at which legal sex reassignment could take place," due to "the need for 'objective' evidence of a subjective state of mind, and the need for a clear-cut point at which the legal sex-change takes place."[170]

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[165] Sharpe, *Transgender Jurisprudence* at 60 (cited in note 112), citing *M.T.*, 355 A2d at 211. The sex/gender distinction has intersected with the question of mixed-sex requirements for marriage, which were common before *Obergefell v Hodges*, 135 S Ct 2584 (2015), at times leading to a variety of approaches that failed to question the justification behind these requirements. See David B. Cruz, *Getting Sex "Right": Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 Duke J Gender L & Pol 203, 210–15 (2010).

[166] *M.T.*, 355 A2d at 206.

[167] Id at 206–08. See also Sharpe, *Transgender Jurisprudence* at 61–62 (cited in note 112).

[168] Sharpe, *Transgender Jurisprudence* at 3 (cited in note 112).

[169] Echoing this view, one scholar, for example, wrote that anatomical sex had to play a determinative role, noting that "[s]ociety would consider a fully anatomical male to be male regardless of a convincing feminine appearance or the individual's inner beliefs." Id at 60, quoting Douglas K. Smith, Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L Rev 963, 969 (1971).

[170] Sharpe, *Transgender Jurisprudence* at 60 (cited in note 112), quoting John Dewar, *Transsexualism and Marriage*, 15 Kingston L Rev 58, 62–63 (1985).

Again, as these scholars suggest, the tangible fixedness of ascriptive sex—coupled with a presumption of polarity—can operate to disadvantage transgender parties even further. During this period, and even today, judges engaged in a kind of scientific scrutiny of genitalia that was unparalleled compared to many other areas of law.[171] In many cases, often those resulting in positive outcomes for transgender individuals, courts engage in a detailed, and often problematic, examination of what counts as "normal" versus "abnormal" physiological characteristics, overlooking the dangers of definitional over- and underinclusivity. In performing these analyses, courts reduce the transgender plaintiff and his or her marriage to a specific set of behaviors and anatomical differences, allowing little room for fluidity, variability, or negotiation of the categories themselves, just as the *numerus clausus* doctrine dictates.[172]

An overly rigid dichotomy between preoperative and postoperative status has disparate effects based on social status, gender, and race, further obscuring the more complicated medical choices faced by transgender individuals, particularly transgender men who face a lower probability of surgical success in metoidioplasty or phalloplasty.[173] Given this instability, courts' focus on body parts often has the unintended result of conferring far more legal recognition on trans women than on trans men.[174] As Professor David Cruz points out, "Medicalization encourages a delegation of authority over gender not to individuals, but to medical professionals, a class that has largely maintained itself as gatekeepers over, hence deniers of, access to various gender confirming treatments."[175]

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171 See, for example, *Gardiner*, 42 P3d at 133–34; *Richards v United States Tennis Association*, 400 NYS2d 267, 269 (NY Sup 1977).

172 See Flynn, *The Ties That (Don't) Bind* at 35–37 (cited in note 158).

173 For example, Michael Kantaras, a transgender man who faced a custody battle regarding his children (who were biologically fathered by his brother), faced a three-week trial in which the main object of discussion concerned whether Kantaras had a penis that was sufficient for the purposes of penetration. Id at 38–39. The court failed to recognize that Kantaras's choice not to undergo surgical construction of a penis is like the choice made by many—indeed, most—trans men. Id at 39. The surgery, known as phalloplasty, is often prohibitively expensive (costs can exceed $100,000) and carries substantial physical risks of loss of orgasmic capability, scarring, or irreversible damage to the urethra. Id.

174 Id at 39.

175 Cruz, 18 Duke J Gender L & Pol at 222 (cited in note 165).

There are, of course, larger difficulties with this approach. On this point, Professor Alex Sharpe has commented:

> In this way sex, albeit in refashioned form, continues to provide a foundation for, and to make sense of, the social system of gender. In other words, only one body per gendered subject is "right" . . . and the "rightness" of that body is to be understood in relation to heterosexual function. In this regard, the view that anatomy determines destiny is taken to somatic limits.[176]

Thus, it is not just enough for the court to know that certain transgender individuals have a "functional" vagina or penis; courts also need to be further implicitly reassured of the heterosexuality of each in order to recognize them.

E. The Legal Presumption of Polarity

The dominant theme of the cases above is their focus on a kind of polarity between male and female: one can be one or the other, or perhaps cross over successfully with gender confirmation surgery, but never rest between the two or challenge the poles altogether. Just as the *numerus clausus* doctrine dictates, other forms of gender nonconformity are simply not protected by applicable law.

Consider, for example, cross-dressing. In the mid-1800s, a variety of American cities began to adopt ordinances that prohibited cross-dressing. St. Louis, for example, adopted a law in 1864 that declared that whoever appeared in a public place "in dress not belonging to his sex" would be guilty of a misdemeanor.[177] Similar statutes were adopted in Columbus, Cincinnati, Miami, Detroit, Los Angeles, Dallas, and Houston.[178] State laws, too, were employed to prevent cross-dressing under the use of statutes to prevent "disguise."[179]

These statutes were employed to target both men and women who cross-dressed, and often remained on the books until well

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176 Sharpe, *Transgender Jurisprudence* at 62 (cited in note 112).

177 William N. Eskridge Jr and Nan D. Hunter, *Sexuality, Gender, and the Law* 1425 (Foundation Press 2d ed 2004) (brackets omitted).

178 Id.

179 Id at 1425–28, citing generally *People v Archibald*, 296 NYS2d 834 (NY App 1968).

into the 1980s.[180] In several cases, transgender individuals were targeted even though they were actually required to wear clothing of the opposite gender in preparation for their reassignment surgery.[181] Later, several courts overturned these statutes on the grounds that they were overly vague or that they interfered with the liberty interests of the individuals; one court observed that "the aesthetic preference of society must be balanced against the individual's well-being," noting that it would be inconsistent for the law to permit gender confirmation surgery and then impede the therapy necessary in preparation.[182]

While these cross-dressing statutes remained on the books, more and more individuals began to turn to other areas of the law for recognition and protection. As more cases involving transgender individuals made their way through the courts, a number of judges were asked to consider whether Title VII's prohibition against discrimination on the basis of sex applied to the individuals' situations. Early cases, again, followed the "sex as scarcity" model, leaving transgender persons unprotected due to a preoccupation with the fixedness associated with state-assigned sex. According to one commentator, these early decisions, around the 1970s and 1980s, generally offered the following observations: (1) that "sex discrimination laws were not intended to protect transgender individuals," and (2) that the term "sex" referred only to one's assigned sex, "not to change of sex."[183]

These two conclusions led to a variety of presumptions that further grounded sex in property-like formations. First, they reified the dominant model of sex discrimination as a system of polarity between male and female, again underscoring the presumption of scarcity between gender choices. Second, they engaged in a type of "sex scripting," by forcibly assigning a particular sex to someone who may have self-identified with another (often opposite) identity. Third, they foreclosed the possibility of mutability, leaving assigned sex a tangible, unchangeable

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180 Joanne Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* 136–37, 149–50, 247 (Harvard 2002).

181 See, for example, *City of Chicago v Wilson*, 389 NE2d 522, 522–23 (Ill 1978).

182 Id at 525.

183 Kylar W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, in Currah, Juang, and Minter, eds, *Transgender Rights* 93, 95 (cited in note 1).

manifestation, not of a person's self-identity, but of the *state's* inability to accept change and transition. Finally, the cases ascribed identities to members of the transgender population that were no longer congruent with their self-identification.

For example, in 1975, two federal courts—one in California and another in New Jersey—held that Title VII did not protect transsexual employees. In one of those cases, *Voyles v Ralph K. Davies Medical Center*,[184] an employee was fired after she announced that she wished to transition; the court held that Congress enacted Title VII to protect women, not "transsexuals," and that nothing in the legislative history of Title VII suggested any desire to protect transgender individuals.[185] Similar reasoning was employed in the case of *Grossman v Bernards Township Board of Education*,[186] in which a teacher was fired after undergoing gender confirmation surgery "*not* because of her status as female, but rather because of her *change* in sex from the male to the female gender."[187]

Here, the court suggests that what lacks protection is the volitional nature of gender choice. Under these cases, any changes or crossovers between the two polarities of male and female did not have to do with sex, per se; they were merely the result of a personal choice. Sex, here, becomes scripted as a kind of unchangeable reality, an entrenched, tangible property that informs an immutable identity. The result of these decisions is a form of "sex scripting"—the idea both that sex is biologically assigned from birth and that the state's protection simply flows from a presumption of polarity and immutability. Consider, for example, the famous 1984 case of *Ulane v Eastern Airlines, Inc*,[188] in which a federal court of appeals found that the plaintiff, a transgender woman, did not suffer discrimination on the basis of sex, because (according to the court):

> Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance

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184 403 F Supp 456 (ND Cal 1975).

185 Id at 456–57 & n 1. See also Broadus, *The Evolution of Employment Discrimination Protections for Transgender People* at 95 (cited in note 183) (discussing this case).

186 1975 WL 302 (D NJ).

187 Id at *4. See also Broadus, *The Evolution of Employment Discrimination Protections for Transgender People* at 95 (cited in note 183).

188 742 F2d 1081 (7th Cir 1984).

> changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. . . . It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is a female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.[189]

Other courts also concluded that discrimination against transgender persons did not constitute discrimination based on sex.[190] Again, in these cases, the implicit presumption of scarcity—that one can be assigned male or female but cannot transition into something else—suggests that sex, like property, is fixed, unchangeable, unalterable, and tangible. To suggest otherwise invites charges of fraud.[191] Even in cases that do recognize a change in assigned sex, the judicial focus on the tangibility of the change (for example, the focus on genitalia) further forecloses the possibility of recognizing sex changes outside of genital surgery.

These cases represent a particularly strident point of view that persists, even today. Many of the assumptions explored above—the idea that sex is biologically determined at birth, for example—have continued to circulate in contemporary discussions of transgender protection and identity. Consider, for example, a full-page newspaper ad taken out by the Campaign for California Families to oppose the redefinition of the term "gender" to include transgender individuals in California's employment discrimination statute:

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189 Id at 1087 (citation omitted).

190 See, for example, *Holloway v Arthur Andersen and Co*, 566 F2d 659, 663–64 (9th Cir 1977) (holding that transgender people are not a suspect class and that discrimination on the basis of transgender identity is not actionable under Title VII, the Fifth Amendment, or the Fourteenth Amendment); *Sommers v Budget Marketing, Inc*, 667 F2d 748, 750 (8th Cir 1982) (per curiam) (noting that the plain meaning, legislative history, and subsequent debates surrounding Title VII all support the conclusion that Congress did not envision Title VII's protections extending to transgender individuals).

191 See Sharpe, *Transgender Jurisprudence* at 64 (cited in note 112).

> The State should not promote the transsexual agenda upon society. Little girls should not be influenced in any way to think they are boys, nor little boys influenced to think they are girls. This bill makes the State approve of transsexuality and sets up an unnatural standard for adults and children. . . . [It] is an attack on nature. People are born with 46 chromosomes, XX for females, XY for males. You are either born male or female, and there are no in-betweens.[192]

Similarly, a columnist for a conservative magazine put forth the observation that "expectations and notions of gender may evolve, but gender itself is permanent. Sorry."[193]

II. EXPLORING THE INTELLECTUAL PROPERTIES OF GENDER

Whereas the morphological model functions in the law under a *numerus clausus* model that presumes the fixedness, immutability, and tangibility of assigned sex, gender, which is typically defined as the cultural expectations and social roles that accompany sex,[194] offers an opposite set of possibilities. In this Part, I turn to a second, alternative model of gender: a performative model. In contrast to the morphological model's presumption of polarity, a performative model of gender focuses on subjectivity, malleability, and fluidity in offering a set of possibilities for identity formation and expression. Further, a performative model, I argue, demonstrates an intimate and overlooked connection to intellectual property, because it highlights the intangible, nonexclusive, nonrivalrous, and malleable elements of gender, in contrast to assigned sex. Put another way, as they function in the law, the relationship between property and intellectual property tracks a similar connection between sex and gender. If assigned sex operates as a tangible marker of identity within the law, then gender operates as an intangible overlay, a fluid performance over the seemingly tangible "property" of assigned sex.

In constructing this argument, I rely heavily on Professor Butler's theory of gender performativity, which argues that gender

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192 Currah, *Gender Pluralisms* at 15 (cited in note 74) (brackets in original).

193 Id at 16.

194 See, for example, *Definitions Related to Sexual Orientation and Gender Diversity in APA Guidelines and Policy Documents* *1, archived at http://perma.cc/QRR6-T2E4.

is constituted by a series of external, ritualized performances that, over time, help to construct an image of gender as something that is intrinsically tied to sex.[195] For Butler, there is no cognizable gender identity behind its external expressions, social constructions, and expectations; rather, "identity," she argues, "is performatively constituted by the very 'expressions' that are said to be its results."[196] In this Part, following Butler, I introduce two ways of thinking about gender and performance through the lens of intellectual property, one descriptive, and the other normative.

In Section A, I show how gender performance, following Butler's theory, demonstrates an intrinsic connection to intellectual property through its focus on expression. Like intellectual property, gender, according to Butler's account, is not something natural, tangible, or fixed, but constitutes a sort of expression that is deeply intangible and suffused through with cultural regulation and social norms rather than biological imperative. Unlike other forms of tangible property, gender lacks a sovereign border—instead, it constitutes an intangible expression, an ongoing performance—in much the same way as traditional formulations of intellectual property display these attributes. Indeed, the performative dimensions of gender suggest that, instead of thinking of gender as a type of fixed identity, one should view it as more akin to intellectual property—permeable, unfixed, malleable, and ultimately expressive.

In Section B, I argue that a performative model—if taken seriously—allows us to reimagine the relationship among law, gender nonconforming behavior, and sex discrimination. When gender becomes viewed as an intangible set of expressions, rather than a set of expectations scripted onto a state-assigned identity, as we see in the morphological model, we see an entirely new host of possibilities for gender relations to operate outside the boundaries of law's fixedness on tangibility.[197] I argue that,

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195 Butler, *Gender Trouble* at 34 (cited in note 27).

196 Id.

197 See Suzanne J. Kessler and Wendy McKenna, *Toward a Theory of Gender*, in Stryker and Whittle, eds, *Transgender Studies Reader* 165, 174–76 (cited in note 4) (noting that gender attribution is a function of genitals, secondary sex characteristics, dress, accessories, and paralinguistic behavior).

with the advent of *Price Waterhouse v Hopkins*[198] and its progeny, which banned employment decisions based on gender stereotyping,[199] the law of sex discrimination has moved, appreciably so, toward a focus on gender performance. Such accounts of gender performativity move gender from a set of cultural expectations to an intangible form of expression, a performance that is not natural or fixed but mutable, highly expressive, and transitory.

In Section C, I analyze the performative model and its possibilities in the law and policy regarding gender discrimination. Following *Price Waterhouse* and a constellation of new cases embracing transgender equality in the workplace, I argue that the main contribution of a performative model lies in its ability to transgress the fixed, stable, property-like formations of state-assigned sex and to instead embrace the broader, malleable, and expressive dimension to gender.

A. Performative Model of Gender

When we think of a "performance," we tend to conjure up an image of a scripted set of statements, actions, and activities that are fully anticipated, planned, and enacted down to every last detail—stage, costume, antics, language—with an audience in rapt attention. We imagine a performance to be something separate from everyday life and behavior: we tend to think of actors stepping outside their everyday roles as individual beings and adopting particular identities that are assertively divorced from their own.

Performance theory at once both supplements and fractures this understanding in multiple ways. At its most basic level, performance theory actively distances itself from the idea of a clear delineation between the performances of life and the performances of art, and argues instead that everyday life and activities both capture and enable elements that bear a stark resemblance to theatrical rendition and expression. The terms "performance" and "performativity," here, are thought to apply to an admittedly wide range of behavior—from the most sophis-

198 490 US 228 (1989).

199 Id at 258 (Brennan) (plurality).

ticated and stylized of rituals to the most mundane of cultural behavior.[200]

Butler's theories of gender performativity comprise the most powerful rethinking of gender and social norms in the past several decades. Her work has ruptured current, identity-based theories of gender and sexuality, forcing theorists to ask whether the act of categorization replicates the very structures feminists hope to challenge. Here, Butler's contribution has not only lent itself to a new and fuller understanding of the modes of social construction in gender expression, but also helped theorists to recognize the powerful role of performance in everyday life, lending itself to a host of possibilities for civil rights activism both inside and outside the world of gender norms.

For Butler, traditional feminism both presumes and relies upon a kind of distinction between sex and gender that is deeply problematic.[201] Thus, in her first work, *Gender Trouble*, Butler punctured the traditional formulations of sex and gender by instead emphasizing the need to question binary categories of being.[202] She argued that gender is produced and performatively constituted by a series of repetitive acts, which, if taken seriously, would show "that there was no natural core or essential nature of gender categories, that 'gender' instead constituted a series of performative acts that, taken together, created the appearance of an authentic 'core' of gender identity."[203] Antidiscrimination advocates, she argued, subverted many of the interests of their movement by relying on clearly demarcated categories of gender, sex, or sexuality.[204] Thus, instead of normalizing or essentializing same-sex sexual desires or conduct into categories that suggest that they are fundamental, immutable aspects of human identity, which is the traditional strategy of lesbian and gay rights activists, Butler argued that gay rights advocates should

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200 Diana Taylor, *The Archive and the Repertoire: Performing Cultural Memory in the Americas* 5–6 (Duke 2003).

201 Butler, *Gender Trouble* at 8–10 (cited in note 27).

202 Id at 10–47.

203 Katyal, 14 Yale J L & Feminism at 118 (cited in note 4). See also Butler, *Gender Trouble* at 33 (cited in note 27). For a longer discussion of Butler and performativity, see Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 J Gender, Soc Pol & L 461, 489–92 (2006).

204 Butler, *Gender Trouble* at 2–8 (cited in note 27).

seek to challenge, rather than replicate, the concept of gender altogether.[205]

She argued that individuals are driven to perform certain behaviors associated with gender norms, and thus are always yearning for, but not quite representing, an ideal vision of masculinity or femininity.[206] Over time and repetition, however, these performances give the impression that gender is a foundational aspect of personhood:[207] "[G]ender is always a doing. . . . There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results."[208] In other words, she wrote, these acts and gestures help to create an illusion of an interior "gender core" that is maintained for the purpose of regulating sexuality.[209]

A cornerstone of her theory, then, lies in a complete refusal to disassociate the biology of sex and the social construction of gender.[210] Traditional feminism actively distinguishes between sex and gender; it suggests that sex is biologically intractable but gender is culturally constructed.[211] Butler takes issue with this distinction and argues instead that biological sex, the very materiality of the body, is totally inseparable from the cultural and regulatory norms that govern gender.[212] In other words, sex is not a function of the body and a construct upon which to impose gender assumptions but actually a cultural norm that itself governs the body.[213]

This altogether brief explication of performativity and gender leads to two normative observations: First, Butler's approach

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205 Id at 7–8. See also Katyal, 14 Yale J L & Feminism at 118 (cited in note 4) (discussing Butler's performative theory and subsequent divisions between civil rights activists and queer theorists); Katyal, 14 J Gender, Soc Pol & L at 489–92 (cited in note 203).

206 Butler, *Gender Trouble* at 186 (cited in note 27).

207 Kath Weston, *Gender in Real Time: Power and Transience in a Visual Age* 58 (Routledge 2002).

208 Butler, *Gender Trouble* at 34 (cited in note 27).

209 Id at 185–86.

210 Other prominent legal scholars have taken similar approaches. See, for example, Franke, 144 U Pa L Rev at 39 (cited in note 82); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Cal L Rev 1309, 1331–35 (2011).

211 Butler, *Gender Trouble* at 8–9 (cited in note 27).

212 Judith Butler, *Bodies That Matter: On the Discursive Limits of "Sex"* 1–4 (Routledge 1993).

213 Id.

suggests a need to revisit and examine the complex codes and norms (legal, technological, cultural) that help us contextualize meaning through a focus on the material body and its performing potential. The success of the gender performativity model necessarily requires an audience to actively embrace gender codes and norms and also to eventually mobilize these codes to ensure that others read the performances in the same manner.[214] However, gender performance itself can be a site for either resistance or conformity; much depends on the intention of the speaker, the reception of the audience, and the context in which the performance is offered.[215]

Second, performance theory suggests that all language becomes a series of activities, a set of "doings" and performances, a process of action and reaction that embodies behavior and expression. As Butler suggests, following the codes of gender often requires significant effort in managing one's aesthetic appearance, particularly regarding hair, clothing, and other forms of expression.[216] Gender's deeply expressive, transitory nature thus suggests that it is nonrivalrous, akin to a kind of intellectual property. As Professor Kath Weston has commented on Butler's work, "the reification of 'woman' and 'man,' 'masculine' and 'feminine,' implies essence where none exists. . . . A person 'is' not feminine, apart from the play of eyeliner and fingernails that points to an interior essence and makes it seem so."[217] In later work, Butler goes so far as to argue that the very materiality of the body is actually the effect of power.[218]

B. Gender Resistance and Parodic Properties

This model is deeply and implicitly reflective of intellectual property in three significant ways. First, Butler's explication of the nature of gender mirrors, in major ways, the definition of intellectual property. Unlike real property, which is fixed, rivalrous, and tangible, intellectual property, like other types of expression,

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214 See Rich, 79 NYU L Rev at 1178 (cited in note 53).
215 See Butler, *Gender Trouble* at 186–90 (cited in note 27).
216 See id at 191–92.
217 Weston, *Gender in Real Time* at 40 (cited in note 207).
218 Butler, *Bodies That Matter* at 2 (cited in note 212).

is intangible, expressive, and nonrivalrous,[219] meaning that one person's use of a resource does not deprive another of the same resource. As such, it has none of the dangers of scarcity that are associated with tangible resources. Also, because it is expressive, it allows for a multiplicity of different types of performances and recodings and is essentially unlimited in its expressive possibilities.

Many of the same things are also true of gender. Butler's theory of performativity is deeply and intimately entwined with the notion of gender as a sort of intangible property or expression that can be created, expressed, and even subverted, according to the audience's expectation. The performative model's divergence from the tangibility and scarcity associated with property suggests that gender functions in an unlimited declarative capacity, opening up manifold possibilities of articulation and transference. As scholars have argued with respect to gender and property, both are performed, and both function as signals to others, communicating a set of expectations about how others must behave.[220]

Second, like intellectual property, Butler's treatment of gender also suggests that its expressive nature is entirely nonrivalrous in the sense that one can occupy the spheres of both male and female, masculine and feminine, at the same or different times.[221] But she also argues, implicitly, that gender identity can be transferred between the sexes—not only can a person occupy the spheres of masculine and feminine at the same time, but a person can perform femininity and be classified as a male, and vice versa. In other words, the process of regulating gender, and its concomitant performance, produces slippages, or openings, between expectation and behavior, between the ideal of masculinity or femininity and the assigned sex of the subject. These slippages, she argues, are seeds that enable an unconventional set

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[219] R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 Colum L Rev 995, 1001 (2003) ("In intellectual property, of course, we deal in intangible, nonrivalrous goods.") (citation omitted).

[220] Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 Cardozo L Rev 93, 153–55 (2002). See also generally Cooper and Renz, 43 J L & Society 483 (cited in note 38) (reaching similar observations).

[221] Butler, *Gender Trouble* at 184–86 (cited in note 27).

of performances that demonstrate the transferable nature of gender expression.[222]

A third major point of complementarity between the performative model of gender and intellectual property is the subject's own agency in performing gender parody, which demonstrates gender's expressive qualities. Here, law can act in powerful ways to constrain, silence, or enable the performative model. Because gender comprises neither the causal result of sex nor a seemingly fixed aspect of sex,[223] Butler argues that we must also extend recognition to those individuals who fall somewhere in the interstices of male and female binary systems, to recognize those "bodies that have been regarded as false, unreal, and unintelligible."[224] As she argues, "The cultural matrix through which gender identity has become intelligible requires that certain kinds of 'identities' cannot 'exist'—that is, those in which gender does not follow from sex and those in which the practices of desire do not 'follow' from either sex or gender."[225]

To resignify gender, Butler argued strenuously for individuals to use their agency and autonomy to engage in a series of "subversive repetition[s]" of gender, in order to decouple and recode the fictive unity of sex and gender.[226] In many cases, these expressions take the form of parody or pastiche—all of which aim to offer subversive readings of the same script.[227] These repetitions, for Butler and others, lie in the range of activities, identities, and expressions that transgress, rather than follow, the cultural expectations associated with assigned sex and gender.[228] For example, Butler suggested that drag performance reveals the true nature of gender: that there is no realness associated with gender; it comprises a seductive illusion that can be reframed and rearticulated to suggest the need for its subversion.

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[222] Id at 186–88.

[223] Id at 9–10. She writes: "If gender consists of the social meanings that sex assumes, then . . . sex is relinquished[,] . . . and gender emerges, not as a term in a continued relationship of opposition to sex, but as the term which absorbs and displaces 'sex.'" Butler, *Bodies That Matter* at 5 (cited in note 212).

[224] Butler, *Gender Trouble* at xxv (cited in note 27).

[225] Id at 24.

[226] Id at 201.

[227] Id at 188–89, 200.

[228] See Butler, *Gender Trouble* at 200 (cited in note 27); Gail L. Hawkes, *Dressing-Up—Cross-Dressing and Sexual Dissonance*, 4 J Gender Stud 261, 266–70 (1995).

Taking her argument to its logical conclusion implies that if gender is a performance, then "gender cannot be said to follow from a sex in any one way," suggesting a separation between gender and sex that is full of radical possibilities of expression.[229]

Butler's exploration of drag and other forms of gender parody suggests that the performative dimensions of gender comprise a sort of expressive property—one that can be mimicked, reframed, and recast as a different text, all depending on the performer's position. Drag allows for assigned sex to become literally transformed from an item of tangible property (exclusive, fixed, bordered, and sovereign) into *performance*, an item akin to intellectual property (intangible, expressive, nonexclusive, nonsovereign, and deeply prone to commentary and critique). In this process, gender becomes reframed as a particular kind of speech act that can be transferred, performed, acquired, and commented upon: in short, it comprises the marriage of an idea and an expression. "When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice," she writes, "with the consequence that man and masculine might just as easily signify a female body as a male one, and woman and feminine a male body as easily as a female one."[230]

Like the nature of intellectual property, gender acts as a set of qualities that take shape through ideas and intangible qualities but that can be changed and altered, revealing a world of infinite possibilities of expression.[231] And, through these performances, the codes of gender become delegitimized as illusory, confining, and deeply in need of parodic subversion.

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[229] Butler, *Gender Trouble* at 9–10 (cited in note 27).

[230] Id at 9 (emphasis omitted).

[231] Note that I am suggesting, as Butler has, that "[t]he critical promise of drag does not have to do with the proliferation of genders, as if a sheer increase in numbers would do the job, but rather with the exposure of the failure of heterosexual regimes ever fully to legislate or contain their own ideals." Judith Butler, *Critically Queer*, 1 GLQ: J Lesbian & Gay Stud 17, 26 (1993). See also Sheila "Dragon Fly" Koenig, *Walk like a Man: Enactments and Embodiments of Masculinity and the Potential for Multiple Genders*, in Donna Troka, Kathleen LeBesco, and Jean Bobby Noble, eds, *The Drag King Anthology* 145, 152 (Harrington Park 2002) ("Butler's discussion of drag focuses only on the enactment of heterosexual gender categories, ignoring the ways that drag can expose 'Gender' to consist of many genders.").

C. Unscripting Gender

At first glance, when one considers the wide range of outcomes on transgender issues, it may seem that Butler's performative model, admittedly abstract and theoretical, has not directly influenced the outcome of case law or policy. However, to reach such a conclusion might be unwarranted.[232] Specifically, her work has forced legal scholars to reckon with the expressive, transitory nature of gender performance, forcing us to reformulate, for example, current approaches to transgender equality to recognize some pragmatic limitations of the antidiscrimination model based on sex.[233]

In addition, I argue that the notion of gender performance has a deep and lasting significance in the law due to the Supreme Court's *Price Waterhouse* decision, which implicitly analyzed the performance-related aspects of gender in demanding that employers refrain from basing employment decisions on gender scripting or stereotyping under Title VII.[234] As I show in this Section, *Price Waterhouse* and its progeny suggest an implicit prohibition on employers engaging in "gender scripting" in making employment decisions, thus implicitly embracing a performative model of gender. In addition, by protecting gender nonconforming behavior, the performative model, quite unlike the morphological one, also enables a greater diversity of gender expression in the workplace. As I suggest, the performative model dictates that employers not only refrain from imposing identity-related scripts, but also embrace rethinking the concept of discrimination "because of sex."[235]

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[232] Indeed, Butler's influence on legal scholarship has been substantial. A recent Westlaw search (conducted on February 15, 2016) revealed that her work has been cited well over a thousand times in the law review literature.

[233] Judith Butler, *Undoing Gender* 6 (Routledge 2004).

[234] For excellent discussions of the history of sex discrimination and Title VII, including the role of *Price Waterhouse*, see generally Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv L Rev 1307 (2012); Zachary R. Herz, Note, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L J 396 (2014); Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins*, and the Prospect of ENDA*, 66 Stan L Rev 1333 (2014).

[235] 42 USC § 2000e(k) ("The terms 'because of sex' . . . include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all

In this Section, I argue that *Price Waterhouse* has given rise to two distinct approaches in protecting transgender employees, each of which emphasizes the intangible expressions of gender, rather than solely focusing on state-assigned sex. The first approach, which I call the "extrinsic" approach, essentially prohibits gender stereotyping and identity scripting in the workplace, thus leading to a greater degree of expressive diversity in the workplace. In the second approach, which I call the "intrinsic" approach, transgender individuals receive protection from sex discrimination not because they have been the victim of gender stereotyping, but because their decision to transition—and an employer's reaction—implicates concerns about the essence of discrimination based on sex. Each of these strategies has significant implications for our understanding of antidiscrimination approaches to sex and gender in the law, but for very different reasons.

1. An extrinsic approach: Prohibiting identity scripting.

"Identity scripting" is the term that I use to refer to the expectations that surround individuals based on their perceived identities.[236] For example, Part I suggested that the *numerus clausus* of assigned sex often implicitly demands congruence between a male-assigned sex and masculinity and a female-assigned sex and femininity. As Professor Holning Lau has explained, ascribed scripts are very difficult to reject because psychologists have found that individuals tend to register only those instances in which individuals conform to stereotypes, overlooking situations in which individuals resist the ascribed stereotype.[237] Due to these cognitive biases, identity scripts are extremely difficult to alter or change, and convincing others that individuals do not (or should not have to) follow a certain script takes enormous dedication and work.[238]

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employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons.").

[236] See Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 Minn L Rev 897, 902–10 (2010) (describing "identity scripts" as the aggregation of distinct stereotypes, which collectively form a script to which individuals are expected to conform).

[237] Id at 904.

[238] For example, Professors Devon W. Carbado and Mitu Gulati have suggested that, due to scripts that associate African American males with laziness, some African

In the past, courts were extremely reluctant to interpret "sex" in a way that would protect transgender individuals, leaving them with very little chance of success in stating a claim.[239] However, *Price Waterhouse* changed the landscape of gender-related jurisprudence. In that case, the Court considered a broader meaning of "gender" than it had in the past, implicitly revealing a view of gender as a particular kind of performance.[240] The defendant-employer had failed to recommend a heterosexual female plaintiff for a partnership at the accounting firm because some partners thought that she was too masculine, observing her "aggressiveness" and lack of "interpersonal skills."[241] Others, along similar lines, described her as "macho" and stated that she "overcompensated for being a woman."[242] One partner indicated that the plaintiff could have improved her chances of making partner if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[243]

The Court took these suggestions to demonstrate that the employer clearly violated Title VII's prohibition against sex discrimination. In response, the Court stated that it did not "require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."[244] The Court found that Title VII reaches claims of discrimination based on "sex stereotyping," noting "we are beyond the day when an employer could evaluate employees by assuming or insisting

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American males work longer hours than necessary. Id at 905 & n 29, citing Devon W. Carbado and Mitu Gulati, *Working Identity*, 85 Cornell L Rev 1259, 1292–93 (2000).

239 For the most part, "federal courts have narrowly construed the meaning of 'sex' under Title VII, restricting it to the plain meaning of the word." Meredith R. Palmer, Note, *Finding Common Ground: How Inclusive Language Can Account for the Diversity of Sexual Minority Populations in the Employment Non-discrimination Act*, 37 Hofstra L Rev 873, 879 (2009), quoting Tiffany L. King, Comment, *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 UC Davis L Rev 1005, 1020 (2002).

240 See *Price Waterhouse*, 490 US at 239–42 (Brennan) (plurality).

241 Id at 234–36 (Brennan) (plurality).

242 Id at 235 (Brennan) (plurality).

243 Id (Brennan) (plurality).

244 *Price Waterhouse*, 490 US at 256 (Brennan) (plurality).

that they matched the stereotype associated with their group."[245] Looking to congressional intent, the Court stated that "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[246]

The impact of *Price Waterhouse* for the LGBT community cannot be overstated. By expanding the definition of sex discrimination to embrace claims of gender stereotyping, the Court opened up the possibility that individuals could sue under a theory that discrimination on the basis of sexual orientation or gender identity could be considered similar types of gender-related stereotyping, because many LGBT-identified individuals in the workplace are often targeted because their behavior or identity fails to conform to expectations regarding gender. Thus, a man who is targeted for appearing more feminine is often also perceived to be gay, and *Price Waterhouse* opened up the possibility of Title VII's protection for him, despite the fact that sexual orientation (as a category) is not covered.[247]

At the same time that this decision opened up a host of possibilities to protect gender nonconforming individuals in the workplace, however, there were still serious obstacles within Title VII's jurisprudence. Most federal courts have clearly held that discrimination on the basis of sexual orientation or transgender identity is not protected under Title VII.[248] As a result, LGBT plaintiffs had to craft claims of gender stereotyping without relying on evidence that they were targeted due to their sexual orientation, real or perceived.[249] The results were mixed. In one case, for example, the Second Circuit held that a gender-stereotyping claim could not be used to "bootstrap protection for sexual orientation into Title VII."[250]

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[245] Id at 251 (Brennan) (plurality).

[246] Id (Brennan) (plurality) (brackets omitted).

[247] Palmer, Note, 37 Hofstra L Rev at 881 (cited in note 239). See also *Montgomery v Independent School District No 709*, 109 F Supp 2d 1081, 1090–93 (D Minn 2000).

[248] See, for example, *Montgomery*, 109 F Supp 2d at 1090; *Fitzpatrick v Winn–Dixie Montgomery, Inc*, 153 F Supp 2d 1303, 1306 (MD Ala 2001). See also Case, 66 Stan L Rev at 1342–43 (cited in note 234).

[249] Palmer, Note, 37 Hofstra L Rev at 881–82 (cited in note 239).

[250] Id at 882, quoting *Dawson v Bumble & Bumble*, 398 F3d 211, 218 (2d Cir 2005). Another court went so far as to observe that recognizing such claims "would have the

Despite these challenges, however, equally significant to the doctrinal shift in *Price Waterhouse* was its implicit embrace of gender nonconformity in the workplace. When an employer suggests that a woman behave more "femininely," and the Court finds that to be prohibited behavior under Title VII, the Court is implicitly protecting gender nonconforming plaintiffs—masculine women, effeminate men, and potentially a host of transgender plaintiffs—from discrimination based on sex. Here, the gender-stereotyping model implicitly tracks many of the differences between property and intellectual property because it places a primary value on the intangible, expressive value of gender performance, instead of assigned sex. It also, in some ways, "frees" individuals from the scripted or stereotypical requirement that state-assigned sex dictate one's gender performance (that is, that males behave in a masculine fashion, and the corollary for women), enabling individuals to challenge the expectations of gender, in true Butlerian fashion.

Not surprisingly, after *Price Waterhouse*, a slow shift occurred in the transgender rights case law from the 1980s to the 1990s. In at least a few early cases, courts began to switch their choice of pronoun—from the state-assigned sex of the plaintiff to his or her gender self-identity.[251] Yet despite this discursive adoption of the plaintiff's own representation in court documents, courts still continued to deny claims under Title VII.[252] These early cases, it seems, failed to recognize the primary value of the intangible, psychological, and expressive aspects of gender expression and performance, contrary to *Price Waterhouse*. Instead, these cases continued to emphasize the tangible, anatomical aspects of an individual's identity, according them an immutable, fixed status.

In one case, an Amtrak employee who began to transition from a male to a female through hormone injections faced a

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effect of de facto amending Title VII" to include sexual orientation, fearing that "any discrimination based on sexual orientation would be actionable under a sex stereotyping theory . . . as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." Palmer, Note, 37 Hofstra L Rev at 882 (cited in note 239) (ellipsis in original), quoting *Vickers v Fairfield Medical Center*, 453 F3d 757, 764 (6th Cir 2006).

[251] See, for example, *Dobre v National Railroad Passenger Corp ("Amtrak")*, 850 F Supp 284, 285 n 1 (ED Pa 1993).

[252] See, for example, id at 286–87.

number of sex-related employment decisions: she was required to dress as a male, was addressed by her male name, had her office moved out of public view, and was not permitted to use the women's restroom.[253] Yet the court rejected her sex discrimination charge on the grounds that it was not discrimination against her sex, but rather "because she was perceived as a male who wanted to become a female."[254]

Yet several years after *Price Waterhouse*, plaintiffs were better able to employ gender-stereotyping theories to their advantage. By the year 2000, at least two circuits had embraced a gender-stereotyping claim in cases of transgender plaintiffs. In *Rosa v Park West Bank & Trust Co*,[255] a case brought under the Equal Credit Opportunity Act,[256] the First Circuit allowed the claim to proceed against a bank that had allegedly discriminated against a birth-assigned male when it refused to provide her with a loan on the grounds that her "attire did not accord with his male gender."[257] In that case, the court characterized the plaintiff as a cross-dressing male, rather than a transgender female.[258] The plaintiff was told that she would not receive a loan until she "went home and changed."[259] In defense of its decision, the bank argued that the laws against discrimination on the basis of sex did not apply to cross-dressers, and that it genuinely could not identify the plaintiff without a change of clothing.[260] The district court adopted this argument, concluding, in the plaintiff's words, that there was "no relationship . . . between telling a bank customer what to wear and sex discrimination."[261]

Note the contrast between the Supreme Court's *Price Waterhouse* approach and the district court's approach in *Rosa*. In *Price Waterhouse*, the plaintiff was expressly told what to

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253 Id at 286.

254 Id at 287. See also *Grossman*, 1975 WL 302 at *4 (rejecting a Title VII claim because the termination was based on the plaintiff's identity as a transgender individual and not on sex).

255 214 F3d 213 (1st Cir 2000).

256 Pub L No 94-239, 90 Stat 251 (1974), codified in various sections of Title 15.

257 *Rosa*, 214 F3d at 215–16.

258 I do not adopt the court's use of pronouns and instead conform with the plaintiff's self-identification.

259 *Rosa*, 214 F3d at 214.

260 Id at 214–15.

261 Id at 214.

wear and how to dress. Even though the plaintiff in *Rosa* was subjected to the same treatment, she faced a dramatically different outcome at the lower court. One could surmise that the district court, here, was drawing a line between cross-dressing and other types of gender nonconformity in the workplace, allowing the latter to receive protection but not the former. Nevertheless, the First Circuit reversed on this point, concluding that, although the prohibited bases of discrimination do not include "style of dress or sexual orientation," it was possible that the plaintiff could still state a claim based on the possibility of disparate treatment, that is, that the bank treated "a woman who dresses like a man differently than a man who dresses like a woman."[262]

That same year, the Ninth Circuit in *Schwenk v Hartford*[263] took a different approach by explicitly embracing a gender-stereotyping approach in the case of Crystal Schwenk, a transgender female.[264] In that case, Schwenk sued under the Gender-Motivated Violence Act[265] on the grounds that a state prison guard in an all-male penitentiary had targeted and attacked her after he realized that she identified as a female and had adopted a feminine appearance.[266] The Ninth Circuit explicitly adopted the reasoning of *Price Waterhouse*, concluding that the evidence showed that "[the guard]'s actions were motivated, at least in part, by Schwenk's gender—in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor."[267] The Ninth Circuit concluded that discrimination against transgender females "as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity" could constitute actionable sex discrimination.[268] (Note, here, that Schwenk received protection as an assigned male, rather than a transgender female.)

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262 Id at 215–16.

263 204 F3d 1187 (9th Cir 2000).

264 See generally id.

265 Civil Rights Remedies for Gender-Motivated Violence Act, Pub L No 103-322, 108 Stat 1941 (1994), codified in various sections of Title 42.

266 *Schwenk*, 204 F3d at 1193–94.

267 Id at 1202.

268 Id at 1201, 1205.

These cases raise a foundational question that continues even today: whether, under Title VII, it is preferable for the plaintiff to claim that the discrimination is based on his or her assigned birth sex or that the discrimination is based on his or her own gender identity. In other words, can a plaintiff successfully employ both the morphological and performative models in a single case? For example, if a state-assigned male transitions to a transgender female and faces discrimination during that transition, is it preferable for her to claim discrimination based on her identity as an effeminate male, or as a gender nonconforming female? In many cases, it seems as though the former approach has a greater potential for success, despite the unfairness of the imposed classifications altogether under the *numerus clausus* of sex.[269] As Stevie Tran and Professor Elizabeth Glazer have pointed out, the result of these cases essentially requires a kind of "perfect" gender nonconformity—that is, individuals must "behave like women . . . [while] 'really' [being] . . . men."[270]

Further, there remains some uncertainty over whether *Price Waterhouse* has overruled the prior reasoning of cases like *Ulane*, which distinguished discrimination based on transgender identity from other types of sex discrimination. It also took some time for the reasoning of *Schwenk* and *Rosa* to be adopted in the Title VII context. However, case law eventually began to turn toward employing a gender-stereotyping rationale to protect transgender plaintiffs. For example, in *Smith v City of Salem, Ohio*,[271] a transitioning female firefighter was subjected to a number of psychological evaluations and ultimately suspended.[272] Although the lower court dismissed the plaintiff's claim on the grounds that she was discriminated against based on her transgender status, not her sex, the Sixth Circuit reversed the decision, noting that *Ulane*'s reasoning had been "eviscerated"

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269 See Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U Pa L Rev 757, 785 (2013) ("When, however, is a male-to-female transsexual expressing a feminine gender identity in the same way as a biological woman, and when is she occupying some third gender category?"). See also generally Kimberly A. Yuracko, *Gender Nonconformity and the Law* (Yale 2016).

270 Stevie V. Tran and Elizabeth M. Glazer, Trans*genderless*, 35 Harv J L & Gender 399, 400 (2012).

271 378 F3d 566 (6th Cir 2004).

272 Id at 568–69.

by *Price Waterhouse*.[273] The court stated that "a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."[274] The Sixth Circuit defined "transsexuality" as someone who "fails to act and/or identify with his or her gender" and found that discrimination on these grounds "is no different from the discrimination" in *Price Waterhouse*, the case in which the Supreme Court held that a valid Title VII claim existed for a plaintiff "who, in sex-stereotypical terms, did not act like a woman."[275] The court reasoned that Smith was discriminated against based on "his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance."[276]

While *Smith* represented perhaps the most sweeping critique of the earlier Title VII reasoning on transgender discrimination, it does, however, offer a few causes for concern. First, by defining transgender identity as something intrinsically gender nonconforming, the case raises the question of how the law should respond when a transgender person does not engage in gender nonconforming behavior (such as, for example, a transgender woman who is fired due to animus against her transgender status, as opposed to her appearance in the workplace).[277] In such a situation, there is the risk—always present—that her case would be characterized as falling within the case law that holds that discrimination on the basis of one's transgender status is not discrimination based on sex.[278] Because of these holdings, transgender individuals face an added degree of vulnerability in stating a claim for discrimination, because an employer could argue that the person was victimized based solely on her transgender status, rather than her gender nonconforming behavior. For example, at least one district court has maintained

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[273] Id at 569–70, 573.

[274] Id at 575.

[275] *Smith*, 378 F3d at 575.

[276] Id at 572. See also *Barnes v City of Cincinnati*, 401 F3d 729, 733–38 (6th Cir 2005) (upholding a jury award in favor of a transgender plaintiff's sex discrimination claim under Title VII).

[277] See Jason Lee, Note, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination under Title VII*, 35 Harv J L & Gender 423, 444–46 (2012).

[278] Id at 439–41.

that *Ulane* is still good law and granted the defendant's motion for summary judgment in a case in which the plaintiff failed to make a gender stereotyping claim but instead argued that she was terminated because of her intent to change her sex.[279]

There is a further issue that is significant, however. The gender-stereotyping approach, in both theory and practice, actually reifies and entrenches the very stereotypes regarding gender that Title VII is supposed to resist.[280] As one scholar has explained, this approach forces courts to employ antiquated notions of sex and gender roles in order to determine gender "nonconforming" behavior.[281] Moreover, to win under Title VII, the plaintiff has to construct her identity as no different than any other gender nonconforming person—thus ignoring or erasing her transgender status altogether. A transgender woman, for example, has to construct a case that represents her as a gender nonconforming male, instead. Consider *Smith* as an example—the plaintiff, a transgender woman, made the decision with her lawyer to refer to herself as a male and use male pronouns throughout the litigation, even though it is likely that Smith saw herself completely differently.[282]

2. An intrinsic approach: Scripting "based on sex."

A second approach takes a more literal view of transgender discrimination by viewing it as per se violative of Title VII.[283] I call this approach "intrinsic" because it defines discrimination against transgender individuals as inherently related to their sex

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[279] See *Sweet v Mulberry Lutheran Home*, 2003 WL 21525058, *2–3 (SD Ind). The opinion uses the pronoun "he" and does not include any information regarding the plaintiff's activities regarding gender transition, see generally id, but I have changed the pronoun to accord with the plaintiff's apparent self-identity in my discussion.

[280] See Lee, Note, 35 Harv J L & Gender at 444–45 (cited in note 277). See also Flynn, 18 Temple Polit & CR L Rev at 472–73 (cited in note 66) (noting that, for transgender plaintiffs whose identities fall outside binary categories, "making a claim as only 'male' or 'female' could require a plaintiff to undergo an injury similar to the one she is attempting to redress").

[281] Lee, Note, 35 Harv J L & Gender at 444–45 (cited in note 277).

[282] See *Smith*, 378 F3d at 570. See also Lee, Note, 35 Harv J L & Gender at 446 (cited in note 277), citing Anna Kirkland, *What's at Stake in Transgender Discrimination as Sex Discrimination?*, 32 Signs: J Women Culture & Society 83, 94–95 (2006).

[283] For a longer discussion of this approach, see Lee, Note, 35 Harv J L & Gender at 447–55 (cited in note 277).

(as opposed to their gender expression). In *Schroer v Billington*,[284] the employer, the Library of Congress, rescinded a job offer to a highly qualified transgender applicant after she informed the Library of her intention to transition from a male to a female when the job began.[285] After she met with a Library representative in order to explain her transition and assure the Library that her transition would not interfere with any of the aspects of her job, the Library rescinded her offer the following day.[286]

The district court concluded that it did not matter whether the decision was made because the employer perceived Diane Schroer as an "insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."[287] Rather, the main issue for the court was that discrimination on the basis of transitioning from one sex to another is literally discrimination on the basis of sex.[288] Consider the court on this point:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion.[289]

An Equal Employment Opportunity Commission (EEOC) opinion established a similar approach.[290] In that opinion, the EEOC clearly stated that, when an employer discriminates against a person because of his or her transgender status, that employer has engaged in discrimination "related to the sex of the

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284 577 F Supp 2d 293 (DDC 2008).

285 Id at 296–99.

286 Id.

287 Id at 305.

288 *Schroer*, 577 F Supp 2d at 306–08. See also Lee, Note, 35 Harv J L & Gender at 447–49 (cited in note 277). Schroer's lawyer, Sharon McGowan, has also written an excellent article on this topic. See generally McGowan, 45 Harv CR–CL L Rev 205 (cited in note 137).

289 *Schroer*, 577 F Supp 2d at 306.

290 See *Macy v Holder*, EEOC Doc No 0120120821, 2012 WL 1435995, *4–11.

victim."[291] For these purposes, the EEOC expressly stated, it does not matter whether it is because the individual has expressed his or her gender in a nonstereotypical fashion, or because the employer is uncomfortable with the process of gender transition, or because of some discomfort with an individual's transgender identity. Each of those narratives, for the EEOC, is enough to establish discrimination based on sex.[292]

The Eleventh Circuit, too, reached similar conclusions regarding a transgender woman who had been diagnosed with "Gender Identity Disorder" and was taking steps to transition to a female under the advice and supervision of her health-care providers.[293] She was terminated based on "the sheer fact of the transition,"[294] which the supervisor described as "inappropriate," "disruptive," "unsettling," and "unnatural," referring to her as a "man dressed as a woman and made up as a woman."[295] When the head of her office learned of her transition, he called her into his office to ask whether she had "formed a fixed intention to become a woman."[296] When she answered in the affirmative, she was terminated.[297]

The Eleventh Circuit reasoned that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," noting the "congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms."[298] Significantly, the court also concluded that there is essentially no difference between discrimination against gender nonconforming behavior experienced by a nontransgender person and discrimination experienced by a transgender person, concluding that they "differ in degree but not in kind."[299]

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[291] Id at *7, quoting *Schwenk*, 204 F3d at 1202.

[292] *Macy*, 2012 WL 1435995 at *7–8.

[293] *Glenn v Brumby*, 663 F3d 1312, 1314 (11th Cir 2011).

[294] Id at 1321.

[295] Id at 1314.

[296] *Glenn v Brumby*, 724 F Supp 2d 1284, 1292 (ND Ga 2010) (brackets omitted).

[297] See Lee, Note, 35 Harv J L & Gender at 449–50 (cited in note 277), citing *Glenn*, 724 F Supp 2d at 1292.

[298] *Glenn*, 663 F3d at 1316.

[299] See Lee, Note, 35 Harv J L & Gender at 449–50 (cited in note 277), quoting *Glenn*, 663 F3d at 1319. Interestingly, the *Smith* court initially reached the same conclusion but then retreated from this approach in an amended decision, eventually adopting

In each of these opinions, we see a consistent theme: the idea that gender transition, and discrimination on that basis, constitutes literal discrimination based on sex. Yet, commentators have noted that this conclusion directly conflicts with prior law such as *Ulane*, which expressly concludes that individuals who are undergoing gender confirmation surgery are not protected under Title VII on that basis.[300] At this date, it is not clear whether a plaintiff must allege a gender-stereotyping theory in addition to alleging simple sex discrimination, because courts tend to look for evidence of both kinds in order to state a claim.

But this approach, too, has flaws. One commentator, Jason Lee, has suggested that this approach, while helpful in addressing "first generation" discrimination, which involves overt acts of exclusion—comments, segregation, actions clearly based on animus—is not helpful in addressing "second generation" discrimination, which takes the form of "us[ing] unprotected traits as proxies for discrimination" (such as using grooming codes instead of discriminating against a group directly).[301] In such cases, it is difficult to prove that the rule was motivated by transgender animus, a point that I discuss further in the next Part. Courts have, for example, upheld grooming standards even though they affect transgender employees in a specific way.[302]

Perhaps the largest problem with the intrinsic approach, however, involves its inordinate emphasis on a surgical imperative of gender transition in fashioning a claim under Title VII. Of course, it is true that most of the case law involves individuals who wish to transition from one sex to another. However, this misses the myriad other ways in which transgender individuals relate to their own identity and presentation. Empirical evidence shows that a significant portion of people who identify as transgender do not want to identify, full-time, in the sex opposite

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a narrower, gender-stereotyping approach. Lee, Note, 35 Harv J L & Gender at 450 (cited in note 277) (quoting the original opinion as stating, "Even if Smith had alleged discrimination based only on her self-identification as a transsexual her claim is actionable pursuant to Title VII") (brackets and ellipsis omitted).

300 See *Ulane*, 742 F2d at 1086–87.

301 Lee, Note, 35 Harv J L & Gender at 451–52 (cited in note 277).

302 See, for example, *Creed v Family Express Corp*, 2009 WL 35237, *8–10 (ND Ind).

that which they were assigned at birth.[303] In fact, large numbers of transgender-identified individuals do not plan or desire to have gender confirmation surgery.[304] Again, however, the *numerus clausus* of sex rears its head, due again to the law's insistence on a polarity between male and female identities. In each of these examples, the fluidity of their identities can be unprotected by the law, leaving plaintiffs still vulnerable to discrimination.

In sum, while *Price Waterhouse*'s legacy has mostly offered significant change with respect to employment discrimination, it has not been extended to other areas that represent equally or more pressing needs for transgender individuals. Some of these more prominent issues include challenging placements in sex-specific facilities, enabling individuals to gain legal recognition of a change in gender, and acquiring coverage for gender-related medical care.[305] Again and again, the term "biological sex" is used in ways that facilitate discrimination against transgender individuals. In 2001, for example, the Minnesota Supreme Court held in *Goins v West Group*[306] that an employer who refused to allow a transgender woman to use the women's restroom did not violate a Minnesota human rights statute that included protections based on gender identity.[307] In that case, tellingly, the court found nothing objectionable about the employer's delineation of restrooms based on "biological gender," ruling that, unless a transgender woman could prove that she was "biologically" a female, the employer could deny her access to female restroom facilities.[308] The reasoning in *Goins* was also adopted in a New York case involving a landlord who attempted to ban transgender people from using the building's restrooms on the grounds that restricting such access based on whether a person is a "biological male" or a "biological female" did not violate the

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303 See Lee, Note, 35 Harv J L & Gender at 454 (cited in note 277) (citing a discrimination survey that showed 18 percent of transgender individuals "do not wish to live full time in a gender other than the one assigned at birth").

304 Id at 455 (reporting that 72 percent of transgender men report no interest in phalloplasty, and 14 percent of transgender women express no desire for vaginoplasty).

305 Romeo, Note, 36 Colum Hum Rts L Rev at 742–43 (cited in note 66).

306 635 NW2d 717 (Minn 2001).

307 Romeo, Note, 36 Colum Hum Rts L Rev at 743 n 109 (cited in note 66), citing generally *Goins*, 635 NW2d 717.

308 *Goins*, 635 NW2d at 723. See also id at 726 (Page concurring specially).

city's human rights law.[309] Other states have prohibited Medicaid funding from being used toward gender-related medical care.[310] These limitations suggest that *Price Waterhouse*'s legacy is, at best, mixed.

III. RESCRIPTING GENDER(S)

Both models that I have discussed—the morphological model and the performative model—have serious shortcomings. While the morphological model focuses to an extreme extent on the presumption of fixedness and objectivity associated with assigned sex, the performative model, with its emphasis on the intangibility of gender performance, might overlook some of the material ways in which transgender individuals might approach the question of transition. Further, the case law that surrounds gender nonconforming behavior, while offering some cause for optimism, still risks reifying, rather than challenging, basic gender stereotypes based on the continuing vitality of the *numerus clausus* of sex. As I argue, this is the case in three areas in which law interfaces with gender nonconformity: in some kinds of gender nonconforming behavior (for example, cross-dressing), in sex-segregated institutions, and in bathroom facilities.

A. Implications of the Morphological and Performative Models

On a very basic level, as I have suggested, the morphological model generally allows for sex reclassification as long as the person successfully "passes" in their chosen sex (through either surgery or a reliance on hormones), leaving the rigid gender binary essentially intact and unchallenged. By implicitly requiring transgender plaintiffs to seek a gender dysphoria diagnosis and to undergo gender confirmation surgery, the morphological model fails to engage with the shortcomings of our system of gender classification and instead depicts transgender persons as deviants in need of medical care and intervention, rather than as the victims of gender prejudice. As Professor Andrew Gilden has

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[309] See Harper Jean Tobin and Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 Wis J L, Gender & Society 301, 319 (2013), citing *Hispanic AIDS Forum v Estate of Bruno*, 792 NYS2d 43, 46–48 (NY App 2005).

[310] Romeo, Note, 36 Colum Hum Rts L Rev at 743 n 110 (cited in note 66) (noting Alaska, Massachusetts, New York, and several others).

eloquently observed, "If sex is the construction of gender norms, and sex remains unquestioned in transgender legal discourse, then this discourse similarly fails to question the ways in which restrictive gender norms construct the category of sex."[311] The morphological model, in some ways, relocates the blame for "deviance" onto the transgender body, as opposed to society's adherence to the binary model, which is the underlying cause of harm.[312] Consider Professor Katherine Franke's insightful treatment of the *Rosa* case, in which she links the treatment of transgender persons in the workplace to all gender stereotypes:

> Rather than understand Rosa's experience as lying well beyond the bounds of laws relating to sex-stereotyping, she is better understood as a sort of canary in the sartorial coal mine: She was simply the most visible victim of systemic gender norms that regulate all of us in the ways in which we coherently present ourselves to the world as "men" or "women."[313]

In another very powerful piece, lawyer Sharon McGowan recalls her experiences representing Schroer, who told her, "I haven't gone through all this only to have a court vindicate my rights as a gender non-conforming man."[314] Because the earlier case law tended to protect transgender women as gender nonconforming men, McGowan explained that lawyers framed their cases in the way most likely to fit *Price Waterhouse*'s theory.[315] Yet this strategy, understandably, makes transgender advocates deeply uncomfortable; as McGowan explained, "It felt as though we would be disavowing Ms. Schroer's identity *as a woman*, and accepting society's discriminatory conception that transgender women are just men who want to dress as women."[316] Schroer's lawyers instead utilized another strategy: they argued that Schroer had a female gender identity, but was likely to be perceived as a

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311 Gilden, 23 Berkeley J Gender, L & Just at 96 (cited in note 66). See also Vade, 11 Mich J Gender & L at 262–63 (cited in note 78) (making similar observations).

312 See Mara Shulman Ryan, Note, Fields v. Smith*: For Transgender Rights, a Battle Won; For Gender Equality, an Opportunity Lost*, 34 U La Verne L Rev 113, 131–32 (2012).

313 Katherine M. Franke, *Introduction:* Rosa v. Park West Bank*; Do Clothes Really Make the Man?*, 7 Mich J Gender & L 143, 144 (2001).

314 McGowan, 45 Harv CR–CL L Rev at 205 (cited in note 137).

315 Id at 212.

316 Id.

male at the time of her hiring based on her appearance and name.[317] Yet, tellingly, even this framing demonstrates the limitations of antidiscrimination law.

1. Materiality and morphology.

Consider, for example, a legal essay entitled Trans*itional Discrimination*.[318] In that essay, the authors, Professors Glazer and Zachary Kramer, employ what they call a "transitional identity" model in describing transgender individuals.[319] They argue that "[a] transgender person has a transitional identity because the person's identity has aspects of the gender or sex from which the person is transitioning as well as the gender or sex to which the person will transition."[320] They describe transgender identity as an identity that is "inchoate, in that the identity does not express fully any of those extant identities."[321]

While I agree with Glazer and Kramer that some transgender plaintiffs view their identities as "in transition" in terms of crossing over to another gender or sex,[322] I think it may be inaccurate to categorize *all* transgender plaintiffs in this manner. Indeed, for some transgender individuals, as I have suggested, their choices to cross-dress or evoke gender nonconforming behavior might not rise to the level of a "transitioning" practice; it might be an intermittent choice or perhaps some other form of individualized gender expression. But under the binary system, these individuals might not receive recognition, because the model suggests that transgender persons must, in some fashion, be in the process of crossing over, somewhere along the spectrum from male to female, for their claims to be intelligible.

These outcomes suggest that gender expression can almost never be a matter of volitional choice—although sex can be reversed, gender identity must remain stable. As Professor Currah has pointed out, within this discourse, "[t]he relation between sex and gender is reversed: biological sex characteristics are cast

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317 Id at 218.

318 See generally Glazer and Kramer, 18 Temple Polit & CR L Rev 651 (cited in note 73).

319 Id at 663–66.

320 Id at 664.

321 Id.

322 Glazer and Kramer, 18 Temple Polit & CR L Rev at 664 (cited in note 73).

as aspects of genders, and largely mutable ones at that. It is gender identity and often even expressions of gender identity, however, that are described as unchangeable, set from an early age."[323] Missing from this description is the reality that many individuals lead gender nonconforming lives deserving of legal protection from discrimination and yet do not necessarily wish to transition into the opposite sex.

Consider, for example, the data produced by the landmark National Transgender Discrimination Survey, performed in 2008 and then again in 2015.[324] In 2008, four categories of identity were presented in response to the question of the survey respondent's primary gender identity: "male/man"; "female/woman"; "part time as one gender, part time as another"; and "a gender not listed here."[325] Among the respondents, 20 percent listed themselves as occupying the third category, and 13 percent listed themselves as falling into the last category, describing themselves as "'genderqueer,' 'queer,' . . . 'neither,' 'both,' 'nonbinary,' 'androgynous,' 'gender does not exist,' and 'gender is a performance' (a specific reference to Judith Butler's work)."[326] By

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[323] Currah, *Gender Pluralisms* at 18 (cited in note 74). For further proof, consider the treatment employed by transgender advocates in a recent case: "While individuals can alter the way they dress and can change their appearance to some degree through the use of make-up and other accessories, there is a core aspect of gender identity and gender expression that is deeply rooted and that cannot be changed." Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 Colum J Gender & L 90, 111 (2006), quoting Brief of Amici Curiae the National Center for Lesbian Rights and Transgender Law Center in Support of Plaintiff-Appellant, *Jespersen v Harrah's Operating Co*, Case No 03-15045, *5 (9th Cir filed June 8, 2005) (available on Westlaw at 2005 WL 1501598) ("NCLR-TLC Brief") (emphasis omitted). See also Levi, 15 Colum J Gender & L at 111 n 104 (cited in note 323), citing NCLR-TLC Brief at *5 n 13 (cited in note 323).

[324] See generally Jack Harrison, Jaime Grant, and Jody L. Herman, *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ Pol J 13 (2012); *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality, Dec 2016), archived at http://perma.cc/N33V-9UPC.

[325] Harrison, Grant, and Herman, 2 LGBTQ Pol J at 13–14 (cited in note 324).

[326] Meerkamper, Note, 12 Dukeminier Awards J at *7 (cited in note 6), citing Harrison, Grant, and Herman, 2 LGBTQ Pol J at 20 (cited in note 324) (noting these observations). Genderqueer respondents, despite the fact that they had completed college or obtained graduate degrees at rates that were higher than other survey respondents, were much more likely to live on less income. See Meerkamper, Note, 12 Dukeminier Awards J at *8 (cited in note 6), citing Harrison, Grant, and Herman, 2 LGBTQ Pol J at 19–20 (cited in note 324) (noting these observations).

2015, although 88 percent of respondents described themselves as transgender, 12 percent described themselves in some other fashion.[327] In addition to terms like "transgender," 20 percent to 30 percent described themselves as nonbinary, genderqueer, or gender nonconforming or gender variant.[328] But even noting the role of these terms, it is still important to recognize how different communities within the transgender umbrella can strive for alternate forms of legal recognition and also face disproportionate effects from the *numerus clausus* of sex.

In contrast, one might offer a similarly situated criticism of the performative model, though in reverse. While the performative model does appear to take issue with the foundational import of the binary systems of sex and gender, one might argue that the performative model, in its attempt to normalize all forms of gender nonconformity—drag, cross-dressing, gender transition, and the like—tends to overlook some of the key differences between these experiences. As Professor Weston points out, "Performatively gendered bodies are like onions whose layers peel back to reveal no core truths, no seeds of authenticity, no deeply buried masculinity, femininity, or for that matter, hermaphroditic sensibility. . . . There is no 'there' there; the layering, like the performance, is the thing."[329]

Consider, for example, the contrast between Professor Butler's work and the work of Professor Henry Rubin, who argues that identity is Janus-faced: it is both socially constructed and absolutely real at the same time.[330] In this sense, as Rubin explains, it matters not how constructed an identity actually is, because it always feels real to the person who claims it.[331] According

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[327] *Report of the 2015 U.S. Transgender Survey* at *44 (cited in note 324).

[328] Id (noting also that, in addition to a list of twenty-six terms, respondents wrote in more than five hundred other unique gender terms to describe themselves). For particular discussions of identity variance among trans-identified people of color, see generally Z Nicolazzo, *'It's a Hard Line to Walk': Black Non-binary Trans* Collegians' Perspectives on Passing, Realness, and Trans*-Normativity*, 29 Intl J Qualitative Stud Educ 1173 (2016); Hugh Ryan, *Ballroom Culture's Rich Alternative to the Trans/Cis Model of Gender* (Slate, Aug 12, 2016), archived at http://perma.cc/K8T4-W8BW.

[329] Weston, *Gender in Real Time* at 82 (cited in note 207).

[330] Henry Rubin, *Self-Made Men: Identity and Embodiment among Transsexual Men* 150–52 (Vanderbilt 2003).

[331] Id. For Rubin, as well as Rubin's subjects of analysis, "[b]odies are far more important to (gender) identity than are other factors, such as behaviors, personal styles, and sexual preferences." Id at 11. He continues:

to Rubin, some transgender men describe their bodies as the products of an "expressive error" ("ranging from the belief that God had made a mistake, to genetic mutations, to chemical imbalances, to underdeveloped or hidden male anatomy"), in which their innermost core conflicts with their bodily attributes.[332] Commenting on the absence of transgender male visibility and an increasing politicization within transgender scholarship, Rubin observes, "[M]y fear is that in the name of politics, those transsexuals who do favour surgery or who are not homosexual or who claim an essential identity (apart from what they tell their physicians) will be considered illegitimate transgenderists."[333] In making this observation, Rubin notes the risk of replicating hierarchies within a diverse community.[334]

> Bodies matter for subjects who are routinely misrecognized by others and whose bodies cause them great emotional and physical discomfort. One would do well to remember this when theorizing about the body. To get our heads around "the body," we must come to terms with the experiences that subjects have of their bodies. Simply stated, *subjectivity matters*.

Id.

[332] Id at 150–51.

[333] See Henry S. Rubin, *Trans Studies: Between a Metaphysics of Presence and Absence*, in Kate More and Stephen Whittle, eds, *Reclaiming Genders: Transsexual Grammars at the Fin de Siècle* 173, 189 (Cassell 1999). Others, like Professor Cressida J. Heyes, have noted that "so much academic literature over-determines and erases the agency of the trans subject in favor of the grasp of technology, medical discourses, history qua regimes of power, or false consciousness. On the other hand," Heyes also notes that "much popular literature" on transgender experiences is also "naively essentialist," relying on "tropes of wrong body [and] being 'born that way'" and thus "feed[ing] into essentializing" approaches to sex and gender itself. Heather Love, Book Review, '*The Right to Change My Mind': New Work in Trans Studies*, 5 Feminist Theory 91, 94 (2004) (emphasis omitted), quoting Cressida J. Heyes, Book Review, *Reading Transgender, Rethinking Women's Studies*, 12 Natl Women's Stud Assoc J 170, 178–79 (Summer 2000).

[334] Rubin's focus on the invisibility of transgender men is echoed by other scholars working in the field. See generally, for example, Jason Cromwell, *Transmen and FTMs: Identities, Bodies, Genders, and Sexualities* (Illinois 1999). See also Jamison Green, *Look! No, Don't!: The Visibility Dilemma for Transsexual Men*, in Stryker and Whittle, eds, *Transgender Studies Reader* 499, 505–06 (cited in note 4):

> Now I feel as if I'm being told by Gender Studies theorists that biology is not destiny unless you are transsexual. I cannot say that I was a man trapped in a female body. I can only say that I was a male spirit alive in a female body, and I chose to bring that body in line with my spirit, and to live the rest of my life as a man. Socially and legally I am a man. And still, I am a different kind of man.

In later works, such as *Bodies That Matter*, Butler notes the materiality of the body, but maintains that gender is socially constructed and rife with the possibility for recoding and resistance.[335] Yet one of the most powerful critiques of the performative model, offered by both transgender advocates and scholars outside the law, echoes Rubin's concern: the gender-stereotyping theory may overlook or devalue the importance of gender identity and the importance of changing the material body. Professor Levi, for example, criticizes Butler and others for "the post-modern perspective that all gender is socially constructed and that there is nothing essential about gender identity."[336] Taken to its logical conclusion, she argues, a postmodern view of gender suggests that "transsexualism" does not exist because masculinity could be redrawn to include female parts, and the reverse.[337] Others note that Butler's later works often fail to include dissenting perspectives, and still others argue that "in queer and feminist discourses on 'transgender' a history is being written of and for trans people, one that privileges an abstracted rubric of identity and with it the experiences and concerns of middle-class and largely white, university-based and queer-identified trans people."[338]

2. Rescripting gender expression.

Perhaps the most demonstrative area of underinclusivity stems from the case law regarding cross-dressing. Consider *Oiler*

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335 Butler, *Bodies That Matter* at 9–10 (cited in note 212).

336 Ilona M. Turner, *Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 Cal L Rev 561, 592 (2007), quoting Levi, 15 Colum J Gender & L at 108 (cited in note 323).

337 Levi, 15 Colum J Gender & L at 108 (cited in note 323):

> [T]his perspective implies that if people could fully embrace their masculinity (from the female-to-male ("FTM") perspective) or femininity (from the male-to-female perspective), despite the social construction of biologically female traits as feminine or biologically male traits as masculine, no one would ever need to take hormones or have surgery to fully express their gender identity.

Instead, Levi favors a disability approach, although she notes some of its dominant criticisms, namely, that it stigmatizes transgender plaintiffs, that it is underinclusive and overly medicalized, and finally that it essentializes gender. Id at 104–08.

338 Trish Salah, Book Review, *Undoing Trans Studies*, 17 Topia 150, 153 (2007), reviewing Viviane Namaste, *Sex Change, Social Change: Reflections on Identity, Institutions and Imperialism* (Women's Press 2005).

v Winn–Dixie Louisiana, Inc:[339] in 1979, Peter Oiler was hired by Winn-Dixie as a loader and later promoted to be a truck driver.[340] Oiler was a heterosexual man, married since 1977, who identified as a male cross-dresser, and who had no intention to take feminizing hormones or to transition, but who instead demonstrated a motivation to cross-dress in order to express "a feminine side" and for other, erotically motivated reasons.[341] Oiler wore female clothing, wore makeup, and adopted a female persona in public one to three times per month, but never at work.[342] However, after he told a supervisor that he cross-dressed, his supervisor and the president of the company decided to terminate him after consulting the company's lawyer and asking Oiler to resign.[343]

In the case, the court granted summary judgment to Winn-Dixie, rejecting Oiler's claims.[344] It noted, after a thorough review of the prior case law, including *Ulane*, that Title VII was not "meant to embrace 'transsexual' discrimination, or any permutation or combination thereof."[345] The court stated that it did not believe that the plaintiff was discharged "because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee."[346] Rather, the court explained that he was terminated due to his "disguise" as a woman:

> The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and

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339 2002 WL 31098541 (ED La).

340 Id at *1.

341 See id at *1 & nn 11–12.

342 Id at *1.

343 2002 WL 31098541 at *2. They explained that they were concerned that, if their clients recognized Oiler in his female attire as a Winn-Dixie employee, "they would shop elsewhere and Winn–Dixie would lose business." Id.

344 Id at *5–6, 8.

345 Id at *4 n 51, quoting *Voyles v Ralph K. Davis Medical Center*, 402 F Supp 456, 457 (ND Cal 1975). The court further bolstered its conclusions based on the fact that, despite many attempts to amend, Congress had failed to include protections for gender or sexual identity in Title VII. *Oiler*, 2002 WL 31098541 at *4–5.

346 *Oiler*, 2002 WL 31098541 at *5.

> nail polish, pretends to be a woman, and publicly identifies himself as a woman named "Donna."[347]

The court underscored that, in its view, the plaintiff was not discriminated against because he was perceived as being insufficiently masculine or because he appeared to be effeminate. "The plaintiff in [*Price Waterhouse*] may not have behaved as the partners thought a woman should have, but she never pretended to be a man or adopted a masculine persona," the court observed, thus distinguishing the two cases.[348]

Cases like *Oiler* suggest that, when an employer can offer a seemingly nondiscriminatory reason for its decision (even one that draws a facile distinction between "disguising" oneself as the opposite sex and resisting gender stereotyping), courts will defer to the employer's determination. The effect simply rescripts the plaintiff into a binary system of sex identification, the *numerus clausus* principle. Such deference to the employer is particularly striking in cases that involve grooming and dress codes, which have been used to uphold terminations of female employees, transgender employees, and employees of color.[349] Such cases, in many ways, personify the darker side of gender performance regulation, because they overwhelmingly tend to defend an employer's right to control the expression and performance of employees, even when the guidelines are sex and gender specific.[350]

In one example, a transgender female plaintiff with gender dysphoria began to change her appearance at work to appear more feminine by wearing clear nail polish and mascara, growing out her hair, and trimming her eyebrows.[351] She also began to use the name Amber Creed.[352] The defendant maintained that it had received over fifty complaints about Creed's appearance,

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347 Id.

348 Id at *6.

349 See, for example, *Jespersen v Harrah's Operating Co*, 392 F3d 1076, 1077–78, 1083 (9th Cir 2004). See also Rich, 79 NYU L Rev at 1140–41 (cited in note 53) (arguing that employers are able "to discriminate against workers by proxy [by] disproportionately screening out or penalizing workers from disfavored racial/ethnic groups based on aesthetics").

350 See Brian P. McCarthy, Note, *Trans Employees and Personal Appearance Standards under Title VII*, 50 Ariz L Rev 939, 956–59 (2008).

351 *Creed v Family Express Corp*, 2009 WL 35237, *1 (ND Ind).

352 Id.

and eventually told her that she was not in compliance with the dress code and grooming policy of Family Express.[353] When Creed explained that she was transgender and was going through her transition, the employer allegedly replied by asking "whether it would kill her" to appear masculine for eight hours a day; she was eventually told that she had twenty-four hours to decide whether she would report to work in a more masculine manner.[354] When she allegedly replied that she could not, she was terminated.[355]

Interestingly, the employer argued that it did not demand that Creed present herself in a less feminine manner; it reported that the only demands that it made of Creed were that she cut her hair and stop wearing makeup and nail polish.[356] The court, in turn, granted summary judgment to the employer, finding that the employer did not discriminate against Creed based on her sex, but instead fired her because she had failed to comply with its sex-specific grooming and dress codes.[357] "While [the human resources director's] comments, in particular, were insensitive of Ms. Creed being in the process of coming to terms with her gender identity, these comments in and of themselves don't establish that Family Express fired Ms. Creed because she wasn't 'male' enough."[358] By drawing a line between prohibited gender stereotyping and permitted dress and grooming code regulation, the court enabled the protection of the codes to take precedence over prohibiting gender discrimination under Title VII.

Similar reasoning has been adopted in other cases, as well. In 2005, a case emerged involving a transgender bus operator, Krystal Etsitty, who was diagnosed with what was then known as GID and was transitioning from male to female through the use of hormones.[359] The employer subsequently asked her about

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353 Id at *2–3. The codes were sex specific, requiring males to maintain neat and conservative hair and not to wear any jewelry. Id at *2.

354 Id at *4.

355 *Creed*, 2009 WL 35237 at *3.

356 Id at *4.

357 Id at *9. Other cases have reached similar determinations in nontransgender contexts. See, for example, *Jespersen*, 392 F3d at 1082–83; *Harper v Blockbuster Entertainment Corp*, 139 F3d 1385, 1387 (11th Cir 1998); *Tavora v New York Mercantile Exchange*, 101 F3d 907, 908–09 (2d Cir 1996) (per curiam).

358 *Creed*, 2009 WL 35237 at *9.

359 *Etsitty v Utah Transit Authority*, 2005 WL 1505610, *1 (D Utah).

her transition process and expressed concern about potential liability resulting from her using a female restroom facility.[360]

The court granted summary judgment to the defendants on the ground that "transsexuals" are not a protected class under Title VII, and explicitly disagreed with the reasoning offered by the Sixth Circuit in *Smith*:[361]

> There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.[362]

It rejected a gender stereotyping theory, noting that the only concern involved one of restroom use, which it distinguished from requiring the plaintiff's appearance to conform to a particular gender stereotype.[363] Still other cases have come out in the same manner.[364]

3. Transgender equality and sex-segregated spaces.

As Professor Tobias Wolff persuasively argues, and as the case law demonstrates, opponents of transgender equality have also focused their resistance to antidiscrimination efforts around

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[360] Id at *1–2.

[361] Id at *4–6.

[362] Id at *5. The court then went on to cite "[a]n authoritative treatise" on GID that asserted the following:

> Gender Identity Disorder can be distinguished from simple nonconformity to stereotypical sex role behavior by the extent and pervasiveness of the cross-gender wishes, interests and activities. This disorder is not meant to describe a child's nonconformity to stereotypic sex-role behavior. . . . Rather, it represents a profound disturbance of the individual's sense of identity with regard to maleness or femaleness.

Id (reflecting the APA diagnostic criteria from DSM-IV).

[363] *Etsitty*, 2005 WL 1505610 at *6. On appeal, the Tenth Circuit affirmed the lower court, holding that *Ulane* was still good law and finding that the employer had provided a nondiscriminatory reason for its actions: that it feared liability from allowing someone with anatomically male genitalia to use a female restroom. *Etsitty v Utah Transit Authority*, 502 F3d 1215, 1221–27 (10th Cir 2007).

[364] See *Kastl v Maricopa County Community College District*, 325 Fed Appx 492, 494 (9th Cir 2009) (finding, like the *Etsitty* court, that banning the plaintiff from the women's restroom was motivated by safety reasons and not by her gender).

a single issue: the bathroom.[365] When the Employment Non-discrimination Act (ENDA) (a bill that would have prohibited employment discrimination on the basis of both sexual orientation and gender identity) failed in Congress a few years ago, proponents of the bill explained that the protections for gender identity, and in particular the anxiety over bathroom use by transgender persons, were the reason for its failure.[366] As Wolff explains, the image of bathroom use illustrates an underlying anxiety over the body that has played a powerful role in forming opposition to civil rights reforms. Within this bathroom-obsessed strategy, Wolff writes, "this aggressive form of erasure takes shape around anxiety over the body, for it is the transgender body itself that the antagonist wishes to erase."[367] Wolff points out that, like the anxieties expressed by white individuals about including persons of color in swimming pools, or the fears expressed by heterosexuals about showering with gay people when the Don't Ask Don't Tell Act[368] faced repeal, anxieties about the body have remained a central theme in opposition to civil rights reforms.[369]

Again, the materiality of the body remains a central concern. Even the proposed ENDA bill contains an exception for grooming standards despite its transgender-inclusive language.[370]

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365 Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv L & Pol Rev 201, 201–02 (2012). There are a number of excellent articles on restroom access, noting, of course, that bathroom issues also disproportionately affect particular groups based on class, age, and race, among other characteristics. See generally, for example, Jennifer Levi and Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 Seattle U L Rev 133 (2010); *Transgender Youth and Access to Gendered Spaces in Education*, 127 Harv L Rev 1722 (2014).

366 Wolff, 6 Harv L & Pol Rev at 202 (cited in note 365).

367 Id.

368 National Defense Authorization Act for Fiscal Year 1994, Pub L No 103-160, 107 Stat 1671, repealed by Don't Ask Don't Tell Repeal Act of 2010, Pub L No 111-321, 124 Stat 3515, codified at 10 USC § 654.

369 Wolff, 6 Harv L & Pol Rev at 203 (cited in note 365).

370 Employment Non-discrimination Act of 2013 § 8(a), S 815, 113th Cong, 1st Sess (Apr 25, 2013), in 159 Cong Rec S7907, S7908 (daily ed Nov 7, 2013):

> Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition . . . to

The bill essentially requires that the individual has already undergone gender transition or plans to transition, and then enables employers to impose rigorous grooming standards on those individuals. Those standards, again, would likely have the perverse effect of reimposing the very same standards of masculinity and femininity that *Price Waterhouse* dictated against.

As Wolff eloquently recounts, protections on the basis of gender identity have been labeled as "bathroom bills" by astute opponents who have realized that honing in on gender panic can breed powerful opposition.[371] In Connecticut, opponents of a bill protecting gender identity claimed that the bill "would permit ANY man who claims female 'gender identity' even if he just wears a dress cannot [sic] be excluded from any job statewide, and MUST be given access to women's facilities, including public and private women's restrooms, locker rooms and showers."[372] As Wolff explains, these campaigns play into the fear that women and children are at risk for rape or sexual assault; others suggest

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> adhere to the same dress or grooming standards as apply for the gender to which the employee has transitioned or is transitioning.

See also Gilden, 23 Berkeley J Gender, L & Just at 108 (cited in note 66) (discussing comments made by Representative Barney Frank, one of ENDA's sponsors, who noted that employers would not be forced to hire a person "with a beard wearing a dress").

[371] Wolff, 6 Harv L & Pol Rev at 201–02 (cited in note 365). See also the commentary of Andrew Beckwith, president of the Massachusetts Family Institute, who observed, in reference to proposed legislation protecting transgender access to restrooms:

> [T]hat's why you see individuals who claim to be transfemale–if that's the proper terminology–but they're biological men going into women's dressing rooms and exploiting these laws whether they're just doing it as folks with gender identity issues or abusing them. It's unclear because it's hard to nail down what exactly someone's gender identity is because it all boils doing to what their internal feelings are. But what's black and white is if you take a guy like Bruce Jenner–I know he calls himself Caitlyn now but as far as I understand he is still an intact male. If he walks into a locker room at the local Y where my wife and her daughter are changing, they're going to be exposed to his male genitalia. Regardless of what he looks like on the cover of Vanity Fair or what he calls himself on his TV show, he is still an intact biological male with an XY chromosome.

North Carolina's HB2 Controversy, Transgender Legislation, and Litigation (Legal Talk Network, Apr 25, 2016), archived at http://perma.cc/RT75-NLE9.

[372] Wolff, 6 Harv L & Pol Rev at 205–06 (cited in note 365) (alteration in original), quoting *STOP the CT "Bathroom Bill" (Gives Cross-Dressing Men Access to Women's Restrooms, Locker Rooms)* (Free Republic, May 10, 2011), archived at http://perma.cc/PT9M-4BV3.

a risk of "peeping Tom" behavior.[373] Yet both fears are unsubstantiated; there is absolutely no evidence to suggest that gender identity protections have led to any predatory behavior.[374]

Nevertheless, these unsubstantiated fears informed the passage of HB2 in North Carolina and the lawsuit filed by eleven states against the Obama administration's interpretation of Title IX to require access to restrooms that were consistent with a person's gender identity, alleging that the guidelines "conspired to turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting the democratic process, and running roughshod over common-sense policies protecting children and basic privacy rights."[375] HB2 essentially requires individuals to use restrooms that are consistent with their "biological sex," defined as "[t]he physical condition of being male or female, which is stated on a person's birth certificate."[376] The bill has the effect of treating transgender employees whose gender identities do not match their assigned sexes differently than cisgender employees, who are able to access restrooms that are consistent with their gender identities.[377] It also has the effect of putting transgender individuals in an "impossible" catch-22: a separate state law requires individuals to undergo gender confirmation surgery in order to change their birth certificates; but they are required by medical recommendations to live for at least twelve months in the gender roles that conform with their identities, including using the restrooms consistent with those identities, prior to receiving such surgery.[378]

Yet despite recent jurisprudence that has found gender identity protections not to be foreclosed by a previous focus on

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373 Wolff, 6 Harv L & Pol Rev at 207 (cited in note 365).

374 Id at 207–08.

375 Steve Harrison, *On HB2, Attention Shifts from Bathrooms to Showers. How Would Charlotte Ordinance Have Handled That?* (Charlotte Observer, May 26, 2016), archived at http://perma.cc/Z5BB-CMAQ, quoting Complaint for Declaratory and Injunctive Relief, *Texas v United States*, Case No 7:16-cv-00054-O, *3 (ND Tex filed May 25, 2016).

376 HB2 § 1.2, codified at NC Gen Stat § 115C-521.2.

377 See Vanita Gupta, Principal Deputy Assistant Attorney General, Letter to Pat McCrory, Governor of the State of North Carolina *1 (May 4, 2016), archived at http://perma.cc/RNB8-3V97.

378 Scott Skinner-Thompson, *North Carolina's Catch-22* (Slate, May 16, 2016), archived at http://perma.cc/M6ET-T92F.

the original definition of assigned sex,[379] some courts have come out differently. Most recently, a district court in Texas that addressed the DOJ guidelines interpreting Title IX drew a clear line between gender identity and state-assigned sex, finding that "the plain meaning of the term sex . . . meant the biological and anatomical differences between male and female students as determined at their birth," emphasizing the historical focus on the physiological and reproductive differences between males and females.[380] It noted, for example, that the text and regulations surrounding the construction of restroom and locker facilities focused on recognizing the need for "separation from members of the opposite sex, those whose bodies possessed a different anatomical structure," due to concerns about personal privacy.[381] In reaching these conclusions, it seemed that the court drew a clear line between gender identity and assigned sex, finding a more inclusive interpretation to be wholly outside "traditional biological considerations,"[382] as well as "illogical and unworkable."[383]

Finally, the need to protect the self-determination of transgender employees is particularly acute beyond the workplace, particularly in cases involving institutionalized settings (prisons, youth facilities, and the like), for a host of distributive reasons.[384] Many sex-segregated facilities (shelters, foster care, group homes, psychiatric facilities, prisons, etc.) have particular racial dimensions due to the comparably higher concentration of persons of color.[385] In such facilities, individuals are subjected to an astonishing array of surveillance and regulations on dress, behavior, and access to entitlements.[386] As Professor Russell

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379 See, for example, *Schroer*, 577 F Supp 2d at 306–08.

380 *Texas v United States*, 2016 WL 4426495, *14 (ND Tex).

381 Id at *15.

382 Id at *6.

383 Id at *15, quoting *G.G. v Gloucester County School Board*, 822 F3d 709, 736–37 (4th Cir 2016) (Niemeyer concurring in part and dissenting in part), vacd and remd, 2017 WL 855755 (US).

384 See David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20.1 Colum J Gender & L 51, 60–101 (2011) (discussing many forms of institutional sex segregation).

385 See Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison"*, 3 Cal L Rev Cir 184, 186–90 (2012). See also Pooja Gehi, *Gendered (In)Security: Migration and Criminalization in the Security State*, 35 Harv J L & Gender 357, 374–76, 385–87 (2012).

386 See Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy through Dress*, 87 NYU L Rev 859, 896–905 (2012).

Robinson has pointed out, sex segregation in such facilities also raises intrinsic questions of paternalism and misidentification.[387]

Prisons, perhaps more than any other sex-segregated facility, routinely struggle with the management of gender identity and expression. Court cases have long tended to diverge on the question whether these facilities are required to provide forms of accommodation for individuals diagnosed with gender dysphoria. In one recent case, the Fourth Circuit reversed a district court's dismissal of an Eighth Amendment claim brought by a transgender woman.[388] In that case, the plaintiff had a GID diagnosis and overwhelming urges of "self-castration," even though she had been allowed to dress in feminine attire and was

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[387] Robinson, 99 Cal L Rev at 1356–61 (cited in note 210). Robinson has explored the significance of the K6G unit of the Los Angeles County Jail, which is ostensibly designed to protect individuals who might face abuse or harassment based on their self-identified gay sexual orientation or gender nonconforming appearance. Id at 1311. Yet as Robinson points out, the standards for determining who belongs in K6G are not only stereotypically constructed, but are also significantly underinclusive of other individuals who may be just as deserving of protection (as they exclude, for example, some men who have had sex with men, or gay-identified men who lead private lives), and also overlook the racialized dimensions of identity. Id at 1345–49. See also Rosenblum, 6 Mich J Gender & L at 522–36 (cited in note 66) (describing the problems faced by transgender prisoners, who are often placed in facilities according to the sex assigned to them at birth); Oparah, 18 UCLA Women's L J at 242 (cited in note 78) ("By assuming, erroneously, that *all people incarcerated in women's prisons are women*, and that *all imprisoned women are in women's prisons*, we have overlooked and misrepresented the gender fluidity and multiplicity that exists in men's and women's prisons, jails and detention centers."); Elizabeth F. Emens, *Inside Out*, 2 Cal L Rev Cir 95, 96–99 (2011) (commenting on Robinson's discussion of K6G); Gabriel Arkles, *Safety and Solidarity across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 Temple Polit & CR L Rev 515, 537–60 (2009) (questioning the utility of segregated facilities for transgender inmates and making alternative suggestions for preventing violence). For a different, more positive view of K6G, see generally Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J Crim L & Crimin 965 (2012). It bears noting, however, that many of these policies have now changed. In both 2012 and 2016, the Department of Justice issued guidelines stating that policies that segregate "based solely on [the inmates'] external genital anatomy" violate a federal standard that "mandates that prisons consider both inmates' gender identity and personal concerns about safety." Brandon Ellington Patterson, *Justice Department Takes Steps to Protect Transgender Prisoners* (Mother Jones, Mar 25, 2016), archived at http://perma.cc/MZM4-DNBB. See also generally Thomas R. Kane, *Transgender Offender Manual* (Department of Justice, Federal Bureau of Prisons, Jan 18, 2017), archived at http://perma.cc/6C2J-6YTY; *Know Your Rights: Laws, Court Decisions, and Advocacy Tips to Protect Transgender Prisoners* (ACLU and National Center for Lesbian Rights, Dec 1, 2014), archived at http://perma.cc/V5YV-YUNW.

[388] See *De'Lonta v Johnson*, 708 F3d 520, 526–27 (4th Cir 2013).

provided with psychological counseling and hormone therapy.[389] Yet her request for gender confirmation surgery was characterized by the district court as a "choice of treatment," rather than as a necessary part of her treatment protocol.[390] The Fourth Circuit reversed, noting that the plaintiff had stated a claim under the Eighth Amendment based on the prison officials' "deliberate indifference" to her serious medical needs.[391]

Today, more courts have adopted this view.[392] Seven US Courts of Appeals and the Supreme Court recognize that gender dysphoria is a serious medical need.[393] However, while Federal Bureau of Prisons policy now authorizes the use of hormones, officials may fail to consider other modes of treatment.[394] In addition, inmates who are not diagnosed with gender dysphoria may not receive the benefit of an Eighth Amendment imperative to receive medical care.[395] Gender confirmation surgery is not required, and hormone treatments are available only to those who receive a diagnosis.[396]

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389 Id at 522.

390 Id at 523–24. At the time of litigation, the standards of care adopted by the World Professional Association for Transgender Health advised a "triadic treatment sequence compris[ing] [ ] (1) hormone therapy; (2) a real-life experience of living as a member of the opposite sex; and (3) sex reassignment surgery." Id at 522–23 (quotation marks omitted). According to these recommendations, "after at least one year of hormone therapy and living in the patient's identified gender role, sex reassignment surgery may be necessary" for those who have persistent symptoms of GID. Id at 523.

391 Id at 525–26.

392 In 2010, for example, the US Tax Court decided that expenses related to medical treatments for transgender individuals were tax deductible. See *O'Donnabhain v Commissioner of Internal Revenue*, 134 Tax Ct 34, 74–77 (2010). See also Travis Wright Colopy, Note, *Setting Gender Identity Free: Expanding Treatment for Transsexual Inmates*, 22 Health Matrix 227, 239–44 (2012).

393 Colopy, Note, 22 Health Matrix at 250 & n 170 (cited in note 392) (listing cases).

394 Id at 251. Note that in 2014, the Federal Bureau of Prisons provided that "inmates in the custody of the Bureau with a possible diagnosis of GID will receive a current individualized assessment and evaluation" and that "[t]reatment options will not be precluded solely due to level of services received, or lack of services, prior to incarceration." See Charles E. Samuels Jr, *Patient Care* *42 (Department of Justice, Federal Bureau of Prisons, June 3, 2014), archived at http://perma.cc/WN77-E938.

395 Colopy, Note, 22 Health Matrix at 255 (cited in note 392).

396 Id at 255, 264–65. At least one state, California, now funds gender confirmation surgery for prisoners. See *California Is First to Pay for Prisoner's Sex-Reassignment Surgery* (NY Times, Jan 7, 2017), online at http://www.nytimes.com/2017/01/07/us/california-is-first-to-pay-for-prisoners-sex-reassignment-surgery.html (visited Mar 5, 2017) (Perma archive unavailable).

The only recourse, then, for inmates in such situations is to depict their condition as an extreme condition. Yet even when inmates are able to do so, and to attain hormone treatments, legislatures have presented obstacles. In Wisconsin, for example, even though the Department of Corrections had a previous practice of providing hormone treatment to inmates diagnosed with GID, the practice was abruptly terminated after the legislature passed the Inmate Sex Change Prevention Act,[397] which forced the department to cease providing such treatment.[398] The Act was later found to be unconstitutional under the Eighth and Fourteenth Amendments after a series of transgender plaintiffs decided to file a legal challenge.[399] However, the evidence submitted, like much of the evidence surrounding gender dysphoria, further underscored a rigid gender binary that depicted the plaintiffs, rather than the system of classification itself, as impaired.[400]

B. Toward a Model of Gender Pluralism

Both the performative and morphological approaches, taken together, underscore the need for a more capacious approach to gender regulation. At best, the law treats state-assigned sex as a spectrum, a crossing from male to female or the reverse, placing transgender individuals somewhere along the transition in between.[401] Yet, as I and others have suggested, the pluralism represented by the transgender community—some who see themselves as entirely male or female, others who see themselves as

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[397] 2005 Wis Laws 105.

[398] Wis Stat § 302.386(5m), held unconstitutional by *Fields v Smith*, 653 F3d 550, 559 (7th Cir 2011). The legislation was designed to prevent

> [t]he department [from] authoriz[ing] the payment of any funds or the use of any resources of this state or the payment of any federal funds passing through the state treasury to provide or to facilitate the provision of hormonal therapy . . . for a resident or patient . . . [who would use the] hormones to stimulate the development or alteration of [his or her] sexual characteristics in order to alter [his or her] physical appearance so that [he or she] appears more like the opposite gender.

Ryan, Note, 34 U La Verne L Rev at 125–26 (cited in note 312) (brackets and ellipses in original).

[399] *Fields v Smith*, 712 F Supp 2d 830, 855–69 (ED Wis 2010), affd, 653 F3d 550 (7th Cir 2011).

[400] Ryan, Note, 34 U La Verne L Rev at 127–29 (cited in note 312), quoting *Fields*, 712 F Supp 2d at 841–43.

[401] See Ryan, Note, 34 U La Verne L Rev at 120–25 (cited in note 312).

combining aspects of both, some who see themselves as falling completely outside the gender binary, others who identify as genderqueer, and still others who reject these terms entirely—is at times left unrecognized by the *numerus clausus* of sex.[402]

Years ago, Professor Mary Dunlap noted, "If the individual's authority to define sex identity were to replace the authority of law to impose sex identity, many of the most difficult problems currently associated with the power of government to probe, penalize, and restrict basic freedoms of sexual minorities would be resolved."[403] As Currah has brilliantly noted, Dunlap's transformative project has become obscured, largely due to the deployment of legal arguments that serve to reify, rather than challenge, the dominance of gender norms.[404] The result of this approach risks what Currah describes as a "pyrrhic" victory, one that disadvantages not just gender nonconforming and transgender individuals, but many others who fall outside those categories as well.[405]

Throughout this Article, I have argued that the *numerus clausus* of assigned sex leads to a polarity between male and female classification, one that forecloses alternative identity formations under the law. Is it possible, however, to reform the *numerus clausus* principle so that it can take into account the potential for alternatives?[406] The answer, I would argue, is that this is definitively possible by adopting a model of gender pluralism.[407]

In the property context, a pluralist framework, as described by Professor Nestor Davidson, recognizes the varied, sometimes conflicting crosscurrents that animate the potential dynamism in property law, recognizing a diverse array of interests, com-

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402 Vade, 11 Mich J Gender & L at 265–66 (cited in note 78).

403 Dunlap, 30 Hastings L J at 1147–48 (cited in note 62).

404 Paisley Currah, *Defending Genders: Sex and Gender Non-conformity in the Civil Rights Strategies of Sexual Minorities*, 48 Hastings L J 1363, 1364 (1997).

405 Id.

406 See Gayle Rubin, *Of Catamites and Kings: Reflections on Butch, Gender, and Boundaries*, in Stryker and Whittle, eds, *Transgender Studies Reader* 471, 479 (cited in note 4) ("Instead of fighting for immaculate classifications and impenetrable boundaries, let us strive to maintain a community that understands diversity as a gift [and] sees anomalies as precious.").

407 See Davidson, 61 Vand L Rev at 1610–16 (cited in note 36) (noting the dynamism present in the *numerus clausus* system of property).

munities, and institutions.[408] Others, too, take the view that, while the *numerus clausus* principle represents a set of shared understandings of the basic forms of property, those forms can expand and change through legislative intervention[409] or common-law reformation.[410] Consider, for example, a critique of the *numerus clausus* principle put forth by Professors Henry Hansmann and Reinier Kraakman, who suggested that a lower level of verification, rather than standardization, should be the goal of property regulation.[411] Here, at least in the realm of gender and sexuality, there are strong possibilities for reform through legislation or private contractual solutions that dilute the overwhelming monopoly power of the state in defending the gender binary. As Professors Davina Cooper and Flora Renz note, "civil society organizations may not only recognize genders unrecognized by state law; they may also recognize, and so give, gender a classed, racialized, sexual, and religious specificity in contexts where state law *claims* only to notice broad abstract categories."[412]

As scholars have noted in the *numerus clausus* system, the state frequently invokes and relies upon preexisting categories; as Davidson writes, "The state limits the forms of property self-consciously at times by explicitly pruning the extant forms . . . [and at other times] refuses to recognize new forms passively."[413] Here, the immutability of standardization can be inappropriate for the formation of identity, expression and community.[414] Yet others, like Professor Hanoch Dagan, argue that contract law, rather than property, should enable citizens to opt out of the rules of property.[415] Whereas property principles relate to a wide variety of social and nonmarket interactions, thus necessitating a set of shared understandings and standard formations, contract law is built upon principles of freedom in crafting "one-shot"

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408 Id at 1637–44.

409 See Avihay Dorfman, *Property and Collective Undertaking: The Principle of* Numerus Clausus, 61 U Toronto L J 467, 510–14 (2011).

410 See Hanoch Dagan, *Property: Values and Institutions* 33–35 (Oxford 2011) (defending the virtue of common-law alternatives).

411 Hansmann and Kraakman, 31 J Legal Stud at S395–S402 (cited in note 36).

412 Cooper and Renz, 43 J L & Society at 493 (cited in note 38).

413 Davidson, 61 Vand L Rev at 1648 (cited in note 36).

414 See Dagan, *Property* at 34 (cited in note 410).

415 Id.

market transactions "in an ad hoc fashion."[416] Private law, here, can be pluralist in nature, Dagan explains, participating "in the state's obligation to empower people to make real choices among viable alternatives, and thus be the authors of their own lives."[417]

The preceding principles, while admittedly abstract, also have legal purchase, because they provide us with a solid foundation from which to explore the potential of gender pluralism as a replacement for the binary system that we have grown accustomed to. More recently, scholars have embraced the possibility of offering menus of options for antidiscrimination in the workplace, while "setting altering rules that make it easier for private parties to contract toward more preferred alternatives."[418] Consider, for example, the possibility of contractual alternatives for self-identification, like the Facebook example in the Introduction, which offer some divergent possibilities to the *numerus clausus* of the gender binary system. A notion of gender pluralism would normatively embrace gender nonconforming behavior, not just individuals who wanted to transition from one sex to another.[419] It would also demonopolize the classificatory power of the state in determining sex or gender identity. Taking this concept seriously also requires broad and creative thinking about how other jurisdictions have dealt with similar issues and about how to dilute the state's power in determining sex classifications altogether.

As I have noted, data suggest that the gender binary might be wholly inapposite to large numbers of individuals who face discrimination.[420] The concept of gender pluralism, I would argue,

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416 Id.

417 Hanoch Dagan, *Private Law Pluralism and the Rule of Law*, in Lisa M. Austin and Dennis Klimchuk, eds, *Private Law and the Rule of Law* 158, 158–59 (Oxford 2014). See also generally Jedediah Purdy, *Some Pluralism about Pluralism: A Comment on Hanoch Dagan's "Pluralism and Perfectionism in Private Law"*, 113 Colum L Rev Sidebar 9 (2013).

418 Ian Ayres, *Menus Matter*, 73 U Chi L Rev 3, 9 (2006) (noting the value in having "menus" when default rules are nonmajoritarian or impose penalties).

419 See Currah, *Gender Pluralisms* at 18 (cited in note 74) (proposing a similar conclusion based on the language of the International Bill of Gender Rights, which declares that "all human beings have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role").

420 See text accompanying notes 324–26. Note, of course, that there are also broader issues with empirical data collection as well. See Spade, 59 Hastings L J at 749–50 (cited in note 88).

embodies a conceptual model that echoes the basic presumptions present in intellectual property law: the nonrivalry and nonexclusivity between male and female. Here, I do not want to suggest a perfect complementarity between the notion of property and intellectual property and the regulation of sex and gender. Instead, I want to suggest that there are key areas of resonance between the regulation of resources and the regulation of identity, and that some of the insights offered by the former can influence the way that we think about the latter. The language of property embraces tangibility and the material body, leaving room for a strict set of norms regarding gender transition. However, the language of intellectual property embraces the expressive potential of human behavior and identity formation, leaving room for other forms of gender nonconforming behavior to be protected by the laws that govern gender discrimination.

1. Sex without scarcity.

The idea of a more plural approach to gender regulation has long been a part of the transgender advocacy community—the law has simply failed to recognize its potential. More than thirty years ago, for example, a variety of groups—including cross-dressers and other transgender individuals—had begun to question the appropriateness of the diagnostic categories under which they were described.[421] In the transgender world, the "medical" model of transgender identity persisted as the dominant model until Professor Sandy Stone published an essay titled *The* Empire *Strikes Back: A Posttranssexual Manifesto*.[422] The piece was an eloquent and expansive essay that largely argued that the narrow, medicalized requirements for gender reassignment actually forced individuals to essentially lie to their doctors in order to satisfy these requirements and to fit the common medical constructions associated with gender dysphoria and the binary model.[423] In part due to Stone's prominent critique, the model shifted from a medicalized view of transgenderism to a

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[421] See Denny, *Transgender Communities of the United States* at 180 (cited in note 120).

[422] See generally Sandy Stone, *The* Empire *Strikes Back: A Posttranssexual Manifesto* (1987), archived at http://perma.cc/89TC-BEPD.

[423] Id at *12–13. See also Denny, *Transgender Communities of the United States* at 178–79 (cited in note 120).

gradual trend toward building a greater community for transgender individuals (who had been previously pressured to assimilate).[424]

With this paradigm shift, a new model, a transgender model, was born, one that embraced the need for gender differentiation and pluralism and that also empowered trans individuals to view themselves as healthy, whole individuals. As Dallas Denny observes:

> Gender-variant people were no longer forced to choose restrictive transsexual or cross-dresser or drag queen/king roles, each with its own behavioral script. Suddenly it was possible to transition gender roles without a goal of genital surgery, to acknowledge one's gender dysphoria and yet remain in one's original gender role, to take hormones for a while and then stop, to be a woman with breasts and a penis or a man with a vagina, to blend genders as if from a palette.[425]

In line with these observations, empirical research has shown an accompanying diversity of body modification choices within the transgender community—some individuals desire surgery, others take hormones, and others choose to alter their hairstyle or makeup choices, bind their chests, or do nothing at all.[426] Just as there is not a single age for coming out, transgender people discover their self-identity at different points along their lives—some know very early in age, while others know their gender only years later.[427]

Perhaps looking to recent scholarly work on pluralist rulemaking might lead to some insights into what a better model might look like. In one example, Professor William Eskridge describes how family law has increasingly moved from a set of mandatory rules governing marriage to a system that includes a broader focus on "guided choice," leaning more heavily toward default rules with override options instead.[428] While I am clearly

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[424] Denny, *Transgender Communities of the United States* at 178–81 (cited in note 120).

[425] Id at 182.

[426] Vade, 11 Mich J Gender & L at 268–70 (cited in note 78).

[427] Id at 267–68.

[428] William N. Eskridge Jr, *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 Georgetown L J 1881, 1892–1901 (2012).

oversimplifying for the purposes of this Article, my primary normative suggestion, here, would be to adopt a similar framework for the state's gender assignment system: Why not also allow for default rules that can be overridden or altered in cases that are necessary or justified? In other words, just like the concept of increased pluralism in family law, which now provides individuals with a menu of options to define a family,[429] the law should act to embrace the same concept here.[430]

Legally, the first place to start in building a gender pluralism model is to explore deregulation.[431] Here, much of my normative analysis echoes part of Professor Cruz's groundbreaking article, *Disestablishing Sex and Gender*.[432] As Cruz writes elsewhere, "The Constitution could be understood to protect individuals' free exercise of gender, as well as to require the disestablishment of sex and gender."[433] Cruz's proposition, which parallels the constitutional treatment of religion, has both affirmative and negative aspects to the approach of regulating gender. On the one hand, he proposes not only "disestablishing" gender, but also enabling an affirmative right to the free exercise of gender at the same time.[434] Cruz advocates, for example, precluding the government from forcing a transgender person to identify with an assigned sex that does not represent how they

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Note Eskridge's definition: "[m]andatory rules" are "rules or directives that parties . . . must accept as binding"; "[d]efault rules" are directives that can be changed "by contracting around the default"; and "[o]verride rules" are "the legal steps or requirements that . . . must [be] follow[ed] . . . to contract around" the default rule regime. Id at 1902. Note that override rules are also called "altering rules" by Professor Ian Ayres. See Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 Yale L J 2032, 2036 (2012); Ayres, 73 U Chi L Rev at 6 (cited in note 418).

429 See Eskridge, 100 Georgetown L J at 1889–91 (cited in note 428).

430 See Cooper and Renz, 43 J L & Society at 503 (cited in note 38) (reaching similar observations).

431 See id at 496 (noting the utility of an "official" gender status, but observing that "just because states withdraw from determining and assigning gender does not mean they cannot recognize gender determinations by others") (emphasis omitted).

432 See generally David B. Cruz, *Disestablishing Sex and Gender*, 90 Cal L Rev 997 (2002). See also Laura K. Langley, Note, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex J CL & CR 101, 117 (2006) ("Asserting a right to gender self-determination disestablishes the state's power to define the categories of male and female."). Others have adopted a similar disestablishment approach in family law. See generally, for example, Alice Ristroph and Melissa Murray, *Disestablishing the Family*, 119 Yale L J 1236 (2010).

433 Cruz, 18 Duke J Gender L & Pol at 215 (cited in note 165).

434 Cruz, 90 Cal L Rev at 1054–84 (cited in note 432).

see themselves.[435] Here, Cruz advocates for a principle of "inclusive neutrality," which would create, essentially, a public realm in which gender divisions are not reinforced (or enforced), enabling all individuals, including intersex and transgender persons, to self-identify and reducing the power of the state to use its own criteria to determine sex.[436] Cruz also argues for an approach he calls "separationism," which aims to restrain government regulation in a certain area.[437] Here, Cruz argues that questions of how many sexes there are, or how to distinguish between the sexes, would be matters left to the private realm instead of state regulation.[438] A final area of Cruz's approach is "accommodation"; here, Cruz advocates enabling government to protect the flourishing of gender in the private sphere.[439] One application of this principle involves supporting employers who create inclusive restrooms, for example.[440]

Cruz's disestablishment model does a brilliant job of clarifying how the state can refrain from overregulating sex and gender classifications. Admittedly, there are legitimate reasons for the state to record one's assigned sex at birth,[441] but there are equally legitimate reasons for enabling the state to broadly deregulate the way in which individuals can identify themselves. Moreover, in a gender pluralism model, the state essentially refrains from heavily regulating gender classifications unless there is a sound justification for doing so. But there are also affirmative actions that the government may take in order to avoid imposing gender scripting or sex classifications. Here, under the overarching aegis of individual autonomy, the law may take certain actions and interpretations that actualize the principle of gender self-determination.[442]

Aside from the realm of government regulation, there are three other avenues of change that also are worthy of analysis: common law, legislative intervention, and private contractual

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435 Id at 1056.

436 Id at 1042.

437 Id at 1048–50.

438 Cruz, 90 Cal L Rev at 1050 (cited in note 432).

439 Id at 1050–54.

440 Id at 1052.

441 See Spade, 59 Hastings L J at 806 (cited in note 88).

442 For more on the concept of gender autonomy, see generally Weiss, 5 J Race, Gender & Ethnicity 2 (cited in note 33).

alternatives. Consider, for example, the common-law solutions offered by the case law discussed in this Article. *Price Waterhouse* and its progeny protected gender nonconforming behavior in the workplace, and *Macy v Holder*[443] and other cases recognized discrimination against transgender individuals as intrinsically violative of Title VII.[444] Both lines of cases clearly suggest that gender nonconforming individuals—not just individuals who are transitioning to members of the opposite sex—are automatically protected from workplace discrimination under Title VII.

Just as these cases can offer ways to move beyond the binary formations of the *numerus clausus* of sex, they also present new ways to reimagine gender pluralism through enabling individuals to create their own complex formation of identities.[445] One option, therefore, could be to simply liberalize the existing standards for gender reassignment, thereby moving toward a default model with override potential. Significantly, in 2010, the State Department issued guidelines that permit trans citizens to obtain passports in their lived gender without having to submit a revised birth certificate, and without having to prove that genital confirmation surgery had been performed.[446] This change enables applicants to bypass onerous state procedures or state laws that forbid gender reassignment.[447] But the law can even go further than that, perhaps by allowing people to opt out of gender recognition altogether in specific instances, under the rubric of privacy protection, thus dismantling the binary system of classification.[448]

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443 EEOC Doc No 0120120821, 2012 WL 1435995.

444 See Part II.C.

445 See Langley, Note, 12 Tex J CL & CR at 103–05 (cited in note 432) (commenting on the complexity of individual self-identification in the areas of race, nationality, class, sexual orientation, and religion, among other categories). See also text accompanying notes 324–26.

446 See note 91 and accompanying text. The Veterans Health Administration has also implemented a similar policy, as did the Social Security Administration. See *Veterans Administration Makes Important Clarification on Records Policy* (National Center for Transgender Equality), archived at http://perma.cc/Z6CX-X49X; *Transgender People and the Social Security Administration* (National Center for Transgender Equality, June 2013), archived at http://perma.cc/3PGC-6BEZ.

447 See notes 94–99 and accompanying text.

448 See Meerkamper, Note, 12 Dukeminier Awards J at *9 (cited in note 6). For an excellent treatment of the privacy arguments, see Mottet, 19 Mich J Gender & L at 437–47

A related concept is the idea of a third classification for transgender individuals.[449] The International Civil Aviation Organization (ICAO), which adopts international standards for customs and immigration, has established a separate category beyond male or female, called "unspecified."[450] In Australia, for example, gender confirmation surgery is not necessary in order to obtain a passport in the preferred gender: the individual must procure a letter from a medical practitioner that confirms either intersex status or some form of clinical treatment.[451] Or, if they cannot acquire a letter from a doctor, they can apply for a Document of Identity with the gender left blank—one can get a passport with either M, F, or X (unspecified).[452] Similarly, in New Zealand, gender confirmation surgery is not necessary—the applicant must provide documentation to the New Zealand Family Court demonstrating that the gender change "will be maintained."[453] In order to receive an "X" designation, citizens must declare how long they have been living in their current gender status and promise that, if the gender identity changes in the future, they will file for a new application.[454]

In many writings about transgender individuals, the notion of a "third gender" was traditionally employed as a sort of "exotica,

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(cited in note 94). Some argue that the state should cease collecting birth marker information entirely. See Elizabeth Reilly, *Radical Tweak—Relocating the Power to Assign Sex: From Enforcer of Differentiation to Facilitator of Inclusiveness; Revising the Response to Intersexuality*, 12 Cardozo J L & Gender 297, 318–28 (2005).

449 See Michael Bochenek and Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis*, 26 Emory Intl L Rev 11, 12–13 (2012), citing *Controlling Bodies, Denying Identities: Human Rights Violations against Trans People in the Netherlands* *80 (Human Rights Watch 2011), archived at http://perma.cc/2ZDL-43SU (emphasizing the importance, for human rights, of establishing a recognized third gender category).

450 See Bochenek and Knight, 26 Emory Intl L Rev at 26–27 (cited in note 449), quoting *Doc 9303: Machine Readable Travel Documents; Part 4: Specifications for Machine Readable Passports (MRPs) and Other TD3 Size MRTDs* *14 (International Civil Aviation Organization 7th ed 2015), archived at http://perma.cc/QFC9-XU6P. Similar options are available in Nepal, India, and Pakistan. Bochenek and Knight, 26 Emory Intl L Rev at 29–30 (cited in note 449).

451 Bochenek and Knight, 26 Emory Intl L Rev at 28 (cited in note 449).

452 Id.

453 Id at 28–29. See also *Information about Changing Sex/Gender Identity* (New Zealand Department of Internal Affairs), archived at http://perma.cc/HG67-QLQC.

454 Bochenek and Knight, 26 Emory Intl L Rev at 28–29 (cited in note 449). See also *Information about Changing Sex/Gender Identity* (cited in note 453).

with little relevance to our 'modern' societies."[455] Today, however, more and more transgender writers are employing the term to denote those who live outside the gender binary; ironically, the term has become more popular at the same time as anthropologists have found great fault with its use, because of the historical and cultural specificity associated with the term and because it tends to depict an overly rigid dichotomy between the West and the "primordial" East.[456]

Yet at its most useful, it illuminates what Professor Marjorie Garber calls a "space of possibility," highlighting the point that some phenomena, like cross-dressing, should be understood on their own terms rather than through the lens of a binary system.[457] As others argue, a third category can be empowering in its diversity:

> Third sex/gender does not imply a single expression or an androgynous mixing. . . . The third gender category is a space for society to articulate and make sense of all its various gendered identities, as more people refuse to continue to hide them or remain silent on the margins. . . . If more transsexual people were able to identify as transgendered and express their third gender category status, instead of feeling forced to slot into the binary because of the threats of punishment and loss of social legitimacy, that third category would be far more peopled than one might imagine. People could be given legitimacy by this third category, if society recognized gender diversity alongside ethnic or religious diversity.[458]

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[455] See Evan B. Towle and Lynn M. Morgan, *Romancing the Transgender Native: Rethinking the Use of the "Third Gender" Concept*, in Stryker and Whittle, eds, *Transgender Studies Reader* 666, 666–67, 676 (cited in note 4) (noting that the concept of a third gender is itself "flawed because it subsumes all non-Western, nonbinary identities, practices, terminologies, and histories" into a single term, a "junk drawer into which a great non-Western gender miscellany is carelessly dumped").

[456] Id at 667, 674–76 (noting Kate Bornstein and Leslie Feinberg as examples of popular writers who have referred to third genders in their work).

[457] Id at 671, citing Marjorie Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* 11 (HarperPerennial 1993).

[458] Katrina Roen, *"Either/or" and "Both/Neither": Discursive Tensions in Transgender Politics*, 27 Signs: J Women Culture & Society 501, 510 (2002) (ellipses in original), quoting Zachary I. Nataf, *Lesbians Talk Transgender* 57–58 (Scarlet 1996).

Others, like Professor Terry Kogan, argue that the classification of a category like "other" should be dependent on personal choice, rather than biology, desire, or gender presentation.[459] "Identifying oneself as 'Other' is a conscious choice by an individual to oppose the male/female, masculine/feminine dichotomies, and the oppressions that result from those dichotomies."[460]

A third category, however, has costs. One of them is that it may be situated hierarchically underneath the categories of male and female; in other words, the "other" category could be treated just as such, as "other," and given less weight and meaning.[461] Even the use of a third gender, Evan Towle and Professor Lynn Morgan write, can be problematic because it suggests the relative inviolability of the first and second categories.[462] As they argue, "The term *third gender* does not disrupt gender binarism; it simply adds another category (albeit a segregated, ghettoized category) to the existing two."[463] There is also the danger that even three forms will require an increasing level of standardization, just as the *numerus clausus* dictates. "The greater the number of genders," cautions one scholar, "the greater their oppressive potential as each may demand the conformity of the individual within increasingly narrower confines."[464]

One scholar has also advocated for the use of the term "trans*" with an asterisk to demonstrate an intrinsic critique of the notion of gender and sex categorization and emphasize those categories' open-endedness.[465] As explained, "The asterisk allows for the inclusion of many identities. Rather than enumerating a single subset of identities, the term trans* recognizes our incredibly diverse community and widely varying self-

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459 Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other"*, 48 Hastings L J 1223, 1245–47 (1997).

460 Id at 1247.

461 Some intersex activists question whether a third gender would be helpful. See, for example, Alice D. Dreger and April M. Herndon, *Progress and Politics in the Intersex Rights Movement*, 15 GLQ: J Lesbian & Gay Stud 199, 217 (2009) (noting that some intersex activists argue that, because intersex is not a discrete category, "someone would always be deciding who to raise as male, female, or intersex: three categories don't solve the problem any more than two or five or ten do").

462 Towle and Morgan, *Romancing the Transgender Native* at 677 (cited in note 455).

463 Id.

464 Id, quoting Anuja Agrawal, *Gendered Bodies: The Case of the "Third Gender" in India*, 31 Contributions Indian Sociology 273, 294 (1997).

465 See Clarke, 103 Cal L Rev at 764 (cited in note 58).

identification."[466] As one scholar has argued, if the law were more understanding that there are more than two possibilities beyond male and female, then the law might be more accommodating of that third choice.[467]

For these reasons, a pragmatic first step would be to liberalize rules regarding gender reassignment. Argentina has one of the most liberal rules, enabling people to change their gender on official documentation without first having to receive a psychiatric diagnosis of gender dysphoria, hormone therapy, surgery, or any other psychological or medical treatment or diagnosis.[468] It also requires public and private practitioners to provide free hormone therapy or gender confirmation surgery for those who desire it, even if they have not reached the age of eighteen.[469] Similarly, Mexico City's civil code was amended in 2004 to enable transgender individuals to change the sex on their birth certificates upon request and without requirement of gender confirmation surgery.[470] In Austria, a court invalidated the requirement of gender confirmation surgery for legal recognition, and in Sweden, a recent law allows individuals who have felt "for some time" that they were a different gender to change their birth marker.[471] These changes are not limited to just a few countries; indeed, they provide the backdrop for many of the changes that are taking place in agencies and localities throughout the United States.[472]

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466 Id (brackets and ellipsis omitted).

467 S. Elizabeth Malloy, *What Best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, 32 Women's Rts L Rptr 283, 318 (2011).

468 See *Argentina Gender Identity Law* (Transgender Europe, Sept 12, 2013), archived at http://perma.cc/LN9G-FWPG.

469 Id at Art 11. See also Emily Schmall, *Transgender Advocates Hail Law Easing Rules in Argentina* (NY Times, May 24, 2012), online at http://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html (visited Nov 10, 2016) (Perma archive unavailable).

470 *Mexico: Mexico City Amends Civil Code to Include Transgender Rights* (OutRight Action International, June 15, 2004), archived at http://perma.cc/4A3A-PVWK.

471 Rappole, Comment, 30 Md J Intl L at 206–10 (cited in note 8).

472 For example, California is considering a law that would allow individuals to change their designation to "nonbinary" on official documentation. See California Senate SB-179 (cited in note 3). In addition, Uruguay, Spain, South Africa, and the United Kingdom all have relaxed their standards for transition. See *Uruguay Approves Historic Transgender Law* (On Top Magazine, Oct 14, 2009), archived at http://perma.cc/6VKD-NQ3K; Thamar Klein, *Querying Medical and Legal Discourses of Queer Sexes and*

A final example of constructive gender pluralist modeling comes from private industry: as mentioned earlier, Facebook added a customizable option with over fifty different terms that people can use to identify their gender (such as androgynous, trans woman, bigender, intersex, gender fluid, transsexual, and others), including three different choices of pronouns: him, her, or them.[473] "There's going to be a lot of people for whom this is going to mean nothing, but for the few it does impact, it means the world," stated a transgender software engineer at Facebook who worked on the program and who changed her gender from female to trans woman the day it launched.[474] Indeed, a central factor in motivating the change was the recognition that a binary system of gender failed to represent many individuals, including many who worked at Facebook.[475]

2. Protecting gender expression.

The previous Section outlined ways in which the law could liberalize the "transition" part of gender transition and thus deemphasize the importance of gender confirmation surgery and other tangible markers of transition. Yet, as this Article has suggested, simply lowering the requirements for state-recognized transition is not enough. The law needs to actively embrace those who are gender nonconforming—in short, it has to embrace the concept of gender as a nonrivalrous form of expression, rather than a static formation. What this means, more literally, is that the law must begin to embrace the concept of

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Genders in South Africa, 10 Anthro Matters J 1, 8–10 (2008); Harper Jean Tobin, Note, *Against the Surgical Requirement for Change of Legal Sex*, 38 Case W Res J Intl L 393, 429–34 (2006–2007).

[473] See *Facebook Expands Gender Options: Transgender Activists Hail "Big Advance"* (The Guardian, Feb 14, 2014), archived at http://perma.cc/9MGJ-87R9.

[474] Id.

[475] Id. At the same time that the decision was hailed by the trans community and its allies, however, it was disparaged by others. Consider this statement from an analyst for Focus on the Family, a religious organization:

> Of course Facebook is entitled to manage its wildly popular site as it sees fit, but . . . it's impossible to deny the biological reality that humanity is divided into two halves–male and female. . . .
>
> Those petitioning for the change insist that there are an infinite number of genders, but just saying it doesn't make it so.

Id.

protection beyond the binary of male and female—and begin protecting those who transgress these boundaries. One simple, doctrinal tool to accomplish this goal is for legislatures to choose to enact protections on the basis of gender *expression*, rather than focusing on gender identity alone, in order to enable and protect a broader variety of gender nonconforming behavior.

Consider the difference between the two. Scholars describe "gender identity" as referring to "an individual's emotional and psychological sense of being male or female," noting that this is not always "the same as an individual's biological identity," whereas they define "gender expression" as "how a person represents or expresses one's gender identity to others, often through behavior, clothing, hairstyles, voice or body characteristics," something that can more easily change over time.[476] Gender identity might be more internal, whereas gender expression is typically considered to be more external[477] and, as I have suggested, does not always follow a binary formation.

The difference between the two terms can often result in significant differences in legal treatment, because existing law tends to emphasize protection on the basis of gender identity, instead of the comparably broader category of gender expression. As Dr. Matthew Waites has observed, "'Gender identity' tends to privilege notions of a clear, coherent and unitary identity over conceptions of blurred identifications."[478] Again, the focus on a stable, fixed binary can act to exclude those whose self-presentation is less fixed toward the polarities of male and female. Accordingly, because gender expression tends to be a more capacious category than identity, it can offer a more capacious form of protection for gender pluralism. The Yogyakarta Principles on Sexual Orientation and Gender Identity, for example, recognize that "the right to freedom of opinion and expression . . . includes the expression of identity or personhood through

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[476] Palmer, Note, 37 Hofstra L Rev at 898–99 (cited in note 239) (brackets omitted) (providing definitions of the terms as used by other scholars). See also *Diagram of Sex and Gender* (Center for Gender Sanity), archived at http://perma.cc/59UW-TH4R (using similar definitions of gender expression and gender identity).

[477] See Stryker, *(De)Subjugated Knowledges* at 9 (cited in note 4) (making this distinction).

[478] Matthew Waites, *Critique of "Sexual Orientation" and "Gender Identity" in Human Rights Discourse: Global Queer Politics beyond the Yogyakarta Principles*, 15 Contemp Polit 137, 147 (2009).

speech, deportment, dress, bodily characteristics, choice of name, or any other means."[479]

Notably, these values—supporting a diversity of expression, avoiding enforced conformity—are very much at work in the regulation of intellectual property, particularly copyright law, which has long protected fair use rights of commentary, critique, and scholarship with the goal of protecting expressive diversity. Copyright law also places a great deal of emphasis on protecting the sanctity of authorship as an equally expressive part of the author's personality.[480] The law carves out a protective space to ensure that intellectual property retains a nonexclusive, non-sovereign character that comports with basic First Amendment values by enabling the flourishing of many different kinds of expressive freedom.[481]

By focusing on expression, as opposed to a traditional anti-discrimination model, we can begin to reform—and reimagine—our approach to gender regulation.[482] Antidiscrimination models are caught within a tension between equality doctrine, which presupposes sameness, and the law's treatment of sex, which is premised on differentiating between men and women.[483] In traditional gender discrimination cases, the law is well established that government classifications based on sex are held to a standard of intermediate scrutiny, that is, that they must be substantially related to an important government purpose.[484] As a result of this standard, which tends to implicitly presuppose

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[479] See *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* *24 (Mar 2007), archived at http://perma.cc/2QEG-N7MK.

[480] See generally Mark A. Lemley, Book Review, *Romantic Authorship and the Rhetoric of Property*, 75 Tex L Rev 873 (1997), reviewing James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Harvard 1996) (discussing the notion of the romantic author).

[481] See *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 580–81 (1994).

[482] Others have made similar arguments. See, for example, Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 Wm & Mary J Women & L 187, 203–21 (2013).

[483] See Cohen, 20.1 Colum J Gender & L at 106 & n 238 (cited in note 384). See also id at 123 n 323, quoting Catharine A. MacKinnon, *Sex Equality* 5 (Foundation Press 2d ed 2007) ("[I]f one is the same, one is to be treated the same; if one is different, one is to be treated differently.").

[484] Cohen, 20.1 Colum J Gender & L at 102 (cited in note 384), citing *Craig v Boren*, 429 US 190, 197 (1976).

the benign necessity for sex discrimination in certain circumstances, challenges to sex segregation have led to mixed results, sometimes upheld, and sometimes not.[485]

Although the Court has struck down sex segregation in state-run educational institutions because it was based on overbroad stereotypes about men and women, it has also, at other times, permitted segregation when it is tied to physical differences between men and women.[486] In either case, however, the law starts from a presumption that sex classifications are sometimes necessary, particularly when the Court perceives an "actual" difference to exist between men and women, whether legislatively, biologically, or socially.[487] Even in the absence of facially sex-based classifications, the law requires clear evidence of conscious discriminatory intent when there is some evidence of discriminatory impact, suggesting that gender discrimination is an anomaly.[488]

As others have observed, transgender activists are caught almost perfectly at the cross section between wanting to protect volitional choices regarding gender and being imprisoned by the unsatisfactory choices that law offers in protecting against discrimination.[489] The dominant strategy, thus far, has been to add another category onto the variety of types of gender discrimination: "[T]o ask legislatures to define sex, gender, or even sexual orientation within nondiscrimination laws so as to explicitly include trans people, or to add a new category, usually gender identity."[490] Even in the most inclusive formulation of Title IX, in a case recently pending before the Supreme Court, earlier regulations promulgated by the previous Department of Education initially specified that an individual's sex should be determined by reference to gender identity.[491] Here, gender identity becomes the focus of interpretation, even though gender expression would

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485 Cohen, 20.1 Colum J Gender & L at 103 (cited in note 384).

486 See id at 103–04, citing generally *Mississippi University for Women v Hogan*, 458 US 718 (1982), *United States v Virginia*, 518 US 515 (1996), and *Rostker v Goldberg*, 453 US 57 (1981).

487 See Cohen, 20.1 Colum J Gender & L at 106 (cited in note 384).

488 Flynn, 18 Temple Polit & CR L Rev at 474–75 (cited in note 66) (criticizing this approach as ignoring the ongoing threat of gender discrimination).

489 Currah, Juang, and Minter, *Introduction* at xvii–xix (cited in note 1).

490 Id at xvii.

491 See *G.G.*, 822 F3d at 720, vacd and remd, 2017 WL 855755 (US).

be a much more inclusive category precisely for its ability to transgress simple categories of identity classification.

As I have argued in this Article, some courts might interpret gender identity narrowly, keeping a rigid binary system in place. This categorization may risk excluding those who demonstrate gender nonconforming behavior or expression, but who do not fall within a binary, identity-based structure. Put more directly, a focus on identity, while understandable, comes at the expense of honoring volitional choices regarding expression and also risks overemphasizing the binary nature of the sexes without paying due regard to those who fail to meet the heightened standards for gender reassignment.

Moreover, taken to its logical conclusion, one could plausibly argue that the standards of what qualifies as a gender identity are set so fundamentally high that they may unwittingly construct a picture of gender that overemphasizes, rather than diminishes, the importance of a binary system—thereby reinscribing the codes of gender, rather than challenging them altogether. The result, again, is an assimilationist bias that almost completely transforms the goals of the antidiscrimination movement altogether, reifying and replicating gender classification with every decision that works in its favor. As Jeffrey Kosbie has pointed out, an antidiscrimination model can (does not always, but can) run the risk of reinforcing the cultural binary.[492] But it also, more importantly, overlooks the reality of gender expression altogether: that it can be fundamentally different, and broader, than gender identity alone, and that it encompasses a panoply of behaviors that are—in fact—far more pluralistic regarding expression than identity itself.

Here, a focus on expression starts from a wholly different vantage point. Rather than addressing the state as a benign protector, the state might be viewed through a comparably more suspicious lens.[493] The concern about state regulation stems from a desire to protect expression and avoid the coercion of conformity, which is closely linked to traditional First Amendment jurisprudence.[494] A more pluralist model would include the term "gender

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[492] See Kosbie, 19 Wm & Mary J Women & L at 218 (cited in note 482).

[493] Flynn, 18 Temple Polit & CR L Rev at 475 (cited in note 66).

[494] Id.

identity *and expression*," which broadens its protections beyond gender dysphoric individuals alone.[495] For example, "gender identity or expression" has been defined by one municipality as the following:

> [A] person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression whether or not that gender identity, gender-related self-image, gender-related appearance, or gender-related expression is different from that traditionally associated with a person's sex at birth.[496]

Such statutes are drafted so broadly that they effectively eliminate any required relationship between assigned sex, gender identity, and gender expression.[497] The result is a conscious delinking of sex from gender, and a conscious effort to integrate autonomy, self-determination, and authorship within both constructs by situating the protection of transgender individuals "as part of a strategy of gradually expanding the courts' interpretation of gender as a legal category."[498]

Of course, a related possibility is to simply interpret gender identity to *include* gender expression, instead of describing it as a separate category. For example, gender identity, at least in an earlier version of the ENDA federal bill, is defined as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[499] Unfortunately, the provisions regarding gender identity garnered the most opposition regarding ENDA's passage; supporters were told to either drop the transgender-inclusive language or risk losing the passage of the legislation altogether. They opted for the latter, but the law has still not been passed.[500]

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495 Currah, *Gender Pluralisms* at 22 (cited in note 74).

496 Id at 23 (quoting a 2003 Boston nondiscrimination law).

497 Id.

498 Id.

499 Palmer, Note, 37 Hofstra L Rev at 889 (cited in note 239) (quoting from a 2007 version of ENDA). Although the bill would have required employers to provide adequate shower or dressing facilities to transitioning employees, it did not prohibit them from enacting reasonable dress or grooming standards. Id.

500 Id at 890–91.

Despite the outcome of ENDA, this language appears extremely significant, because it extends a much fuller set of protections to transgender individuals, as well as everyone else, suggesting a kind of embrace of the pluralities of gender expression and identity.[501] At the same time, however, as Professor Mary Anne Case has insightfully noted, ENDA's inclusion of allowances for dress and grooming codes serves to reify the existing binary at the cost of those who may have the greatest need for inclusive protection.[502]

Again, the conflict between gender inclusivity and grooming codes may seem insurmountable. Yet Case, drawing on California state law, offers a solution by creating an allowance that enables "an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, *provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity or gender expression*."[503] By reaching a compromise that enables an employer to regulate dress, but only insofar as it is consistent with gender identity and expression, it becomes possible to reach a fruitful, inclusive conclusion. "If the gender identity being accommodated is indeed, as suggested by the text of the California statute, nonbinary," she writes, then it becomes "subject to an almost infinite range of possibly required accommodations."[504]

CONCLUSION

The goal of this Article is to offer a theory of the relationship between sex and gender, not as a social construct, biological reality, or expression alone, but as a theory that focuses on its descriptive similarities to property and intellectual property. As I have suggested, just as the *numerus clausus* principle has operated to foreclose productive alternative interpretations in property, the same theory holds true in the law's steadfast commitment to a

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501 Currah, *Gender Pluralisms* at 6 (cited in note 74) (observing that legislation tends "to place gender nonconforming identities and practices on a continuum of gender, rather than create a new category of a protected class").

502 See Case, 66 Stan L Rev at 1368 (cited in note 234) (noting that ENDA carries these risks).

503 Id (emphasis added), quoting Cal Gov Code § 12949.

504 Case, 66 Stan L Rev at 1368 (cited in note 234).

static, binary system premised on male and female categories. Accordingly, an account of gender as a set of intangible properties can further suggest the need to rethink categories of discrimination and the law as tools for governing and protecting the plurality of gender expression, rather than gender identity. In making these comparisons among property, intellectual property, and gender, I do not expect them to be perfectly seamless or complete, but I do hope that the examination reveals important sets of similarities between the two theoretical constructs and sheds light on the relationship between gender and sex—where it has been and where it can go in the future.