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Legal sex, self-classification and gender self-determination

Christopher Hutton *

University of Hong Kong

ABSTRACT

This paper discusses legal sex in the context of transgender jurisprudence, reviewing arguments for individual agency, elective categories and ideas concerning or 'self-sovereignty'. It is argued that legal sex has no explicit foundation in case law or statute, and that it was effectively brought into being by the decision in *Corbett v Corbett (otherwise Ashley)* [1971] P 83. In *Corbett* the judge could simply have ruled that the birth certificate was determinative unless refuted by medical testimony (ie a clear mistake on its face) – instead he embarked on ontological investigation of sexual identity. That decision, paradoxically, denied that there was a category of legal sex 'at large', and argued that it was primarily the law of marriage that reflected sex. In other legal domains, gender identity or psychological sex could be recognized. However *Corbett* was treated as setting out criteria for legal sex, this understood as grounded in bodily ontology or 'sexed being'. Reviewing arguments for self-determination, self-classification or self-ownership in relation to sexual identity, the paper concludes that there is no way for law to capture the lived ontology of sexual identity or gender. It was *Corbett* that gave the impetus for this approach, and even now that Corbett has been rejected, various attempts were being made to create a fit between the ontological or experiential category and legal sex. This is in principle impossible, given the diversity of identity narratives that exists in society. Legal sex, if it is required at all, needs to be understood in non-essentialist terms.

KEYWORDS legal sex; transgender jurisprudence; sex/gender distinction; *Corbett v Corbett*; gender self-determination; self-ownership; self-classification

Introduction

The impetus for this paper comes from judicial statements rejecting the possibility of self-determination or self-classification in relation to legal sex:

> The law could never countenance a definition of male or female which depends on how a particular person views his or her own gender. The consequence of such an approach would be that a person could change sex from year to year despite the fact that the person's chromosomes are immutable.[1]

CONTACT Christopher Hutton chutton@hku.hk
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[1] *R v Harris and McGuinness* 1988 WL 859962 (NSWCCA) 11 (Carruthers J).

This quotation comes from a dissenting judgment in an appeal relating to sex-specific prostitution offences. The majority distinguished between a post-operative transsexual identity (Harris) and the identity of an individual who had not undergone any surgical procedures (McGuinness). For the purposes of the offence, Harris, registered as male at birth, could be classified as a woman (and was therefore acquitted), whereas McGuiness could not. Harris's appeal was successful, whereas McGuiness had her conviction upheld. By contrast, Carruthers J in dissent stressed that 'surgery combined with "her" hormone therapy and "her" psychological attitude to her gender cannot possibly, to my mind, override the congruence of the chromosomal, gonadal and genital factors which are all male'.[2] While differing on this point, there was agreement that there could be no self-determination in relation to legal sex.

Discussing marriage and sexual identity in *Bellinger v Bellinger*,[3] Lord Nicholls of Birkenhead asserted that the 'distinction between male and female exists throughout the animal world', and that classification as male or female 'has long conferred a legal status':

> Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction.

These judgments affirm that sexual identity is a fundamental form of legal status, and that its determination falls within the domain of law and outside the zone of self-determination. They differ on whether the distinction is biological, in the sense that bodily ontology at birth provides the only criterion for classification, or whether a surgically attained alignment of a body with its psychological gender can also be recognized in determining legal sex. Given this, it is evident that individuals for whom the traditional binary represented by legal sex is problematic can be understood as marginal. However, this paper argues that this marginality cannot be rectified by reforming the traditional binary that constitutes legal sex.

Legal sex

Legal sex involves the classification of an individual as either male or female for the purposes of the administrative state and in criminal and civil law. Classification by sex as a legal status sits at the intersection of classic jurisprudential questions of personal autonomy, self-ownership, personhood and the public–private distinction, and is relevant to a significant number of legal domains. Common law jurisdictions rely in general on the birth certificate as the ultimate guarantor of an individual's identity and historically the

[2] *Corbett v Corbett (otherwise Ashley)* [1971] P 83.
[3] *Bellinger v Bellinger* 2003 WL 1610368, 5.

birth certificate allows only for a binary choice in sexual identity.[4] Legal sex as classically understood is not directly analogous to a status such as citizenship, even though in many cases citizenship is a status established at birth; nor is it like marital status, which is an elective identity defined within an explicit institutional and legal framework (though an adult cannot choose to be neither single, married nor divorced). Legal sex might at first sight have more in common with ethnic, racial or 'mother tongue' identity, in states that classify their populations in this way. But common law states in general do not have a legal status associated with group identities, though such categories, and the individual's relationship to them, may become relevant in some legal contexts, eg race discrimination law. An important exception to this is in indigenous law, where the descendants of inhabitants prior to the founding of the jurisdiction have a specific status which marks them off from the 'ordinary' citizens, as in the United States, Canada, Australia, New Zealand, and other jurisdictions. Legal sex, however, reflects an assumed universal binary that exists irrespective of jurisdiction. The analogous idea that each person's racial identity is determinable objectively has been intellectually discredited.[5]

Common law jurisdictions have a context-dependent notion of personal identity: one is, in part, the person who one shows up to be. Such jurisdictions tend to be permissive about changes to, and forms of, personal names, so that in many common law jurisdictions, personal names lie, to a degree, outside law's domain: 'The law of surnames may be concisely stated: there is none at all.'[6] One need not use the same name for distinct purposes, provided that no fraud is committed. The case of *Phillips v Brooks Ltd*[7] decided that a face-to-face contract was merely voidable and not void where one party gave a false name, since there was a course of dealing with a specific person identified by sight and hearing. One can track the historical processes whereby names came to be recorded: 'The legal seizure of the personal name in Europe is a recent and highly uneven development that followed centuries of stabilization.'[8] There is no analogy here with legal sex, which lacks a history in this explicit sense.

For the common law, the legal person is in effect a set of distinct though intimately related 'multiple personas' or masks. The aim of national identity cards is to join up all the administrative and legal domains, and resistance to the introduction of such cards is in effect resistance to the synthesis of the various, domain-specific personas. Modern states seek to integrate multiple administrative domains. However, the barriers to achieving this are

[4]A Appell, 'Certifying Identity' (2014) 42 *Capital University Law Review* 361.
[5]*Mandla v Dowell-Lee* [1983] UKHL 7.
[6]J Amphett, 'The Law of Surnames' (1878) 243 *The Gentleman's Magazine* 499.
[7]*Phillips v Brooks Ltd* [1919] 2 KB 243.
[8]J Caplan, 'Protocols of Identification in 19th Century Europe' in J Caplan and J Topley (eds), *Documenting Individual Identity: The Development of State Practices in the Modern* World (Princeton University Press, 2001) 49, 54.

formidable, not least because of constant changes in modes of record-keeping, but also due to questions of privacy. To what extent is a criminal record a facet of legal personhood? The common law approach to personal identity might suggest a liberal or laissez-faire approach to legal sex. Yet it was European civil law jurisdictions, where the state's 'ownership' of its citizens' identity is in theory much stronger, that led the way in recognizing a degree of self-determination in relation to legal sex.[9] It was the European Court of Human Rights in *Christine Goodwin v United Kingdom*[10] and not the House of Lords or Parliament that triggered the passing of the UK Gender Recognition Act (2004). This is due no doubt to sociocultural differences, but may in part reflect the distinction between an identity card-based system (where the card can be changed to reflect synchronic identity concerns) and one which makes ultimate reference to the birth certificate, understood as a historical, unchangeable document.

Legal sex has no explicit foundation in statute or case law. The registration regimes that arose in the nineteenth century for births, marriages and deaths, the introduction of the passport and other forms of state-sponsored identity, erected a scaffold for the creation of legal sex, without explicitly setting out its biomedical, sociopolitical and legal basis. Criteria for assigning legal sex arguably emerged only once so-called 'sexual reassignment surgery' was popularized, and a debate began about the nature of sexual identity.[11] The decision in *Corbett v Corbett (otherwise Ashley)*[12] had the effect of formalizing criteria for legal sex as an explicit category of law across the common law world. The judge, Ormrod J, declared the marriage between the Hon Arthur Corbett and April Ashley to be void, on the grounds that Ms Ashley's identity was fixed at birth as male. This was 'the first occasion on which a court in England has been called upon to decide the sex of an individual'. However the decision was relevant to marriage only: 'I am not concerned to determine the "legal sex" of the respondent at large.' The judge ruled that the law should adopt 'the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention'. [13] Ormrod J was well attuned to the common law idea of domain-specific status, and saw no problem in someone with a birth certificate identifying them as male having a female identity for the purpose of National Insurance. As he wrote later: '[T]he law is largely indifferent to sex.'[14] However the lengthy analysis of the nature of sexual identity by a

[9][Council of Europe], *Transsexualism, Medicine and Law: Proceedings, 23rd Colloquy on European Law* (Council of Europe Publishing, 1993).
[10]*Christine Goodwin v United Kingdom* App no 25680/93, ECtHR (2002).
[11]D Mundy, 'Hitting below the Belt: Sex-ploitative Ideology and the Disaggregation of Sex and Gender' (2001) 14 *Regent University Law Review* 215, 226.
[12]*Corbett v Corbett (otherwise Ashley)* [1971] P 83.
[13]*Ibid*, 106.
[14]R Ormrod, 'The Medico-Legal Aspects of Sex Determination' (1972) 40 *Medico-Legal Journal* 78, 78.

judge who was also a medical practitioner gave the case great persuasive power in legal domains beyond marriage and in jurisdictions where normally an English High Court decision would carry little weight. Even as the case has been gradually overruled in the various jurisdictions in which it was applied, its legacy remains a powerful one, most importantly in the 'ontological' understanding of the category of legal sex itself.

Judgments concerning legal sex frequently reflect the unexamined social or religious intuition of the judge, invoked as a kind of raw, unanalysed social fact. Judgments have, for example, invoked theological anthropology: '[C]an 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?'[15] More commonly, as seen above, the appeal is to the immutability of a person's chromosomal make-up.[16] Alternatively, or in conjunction, the content of the legal category is provided by the ordinary meanings of the words *man* and *woman*. In *Corbett*, the medical reasoning obscured a more basic, unarticulated intuition about linguistic meaning. In a letter to the Australian academic Dr Henry Finlay, sent in the late 1980s, Ormrod wrote:

> The real issue in Corbett was the meaning of the word 'marriage'. It is agreed that it means the formal union of a man and a woman. The only question, therefore, was of construction! Giving the word 'woman' its natural and ordinary meaning, could April Ashley be described as a woman? The answer must be No![17]

This meaning is often supplied by standard dictionaries or fixed at a historical moment: '[S]ince the statutory language in question was enacted in the early 1900s, without change, it cannot be argued that the term "male," as used at that time, included a female-to-male post-operative transsexual.'[18] In this way the legal determination follows the linguistic facts:

> We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth.[19]

In *Vancouver Rape Relief Society v Nixon*, the court asserted that linguistic categories constituted an autonomous factual reality in which the sexual binary was realized, even if sexual identity might not be best conceptualized in this way: 'Language makes a binary distinction between male and female, although there was reference in the hearing to sexual identity existing as a continuum.'[20]

[15] *Littleton v Prange* 9 SW3d 223, 224 (Hardenberger CJ).
[16] *Bellinger v Bellinger* 2003 WL 1610368, 5.
[17] Cited in S Gilmore, 'Corbett v Corbett: Once a Man, Always a Man?' in S Gilmore, J Herring and R Probert (eds), *Landmark Cases in Family Law* (Hart Publishing, 2011) 47, 58.
[18] *In re A Marriage License for Nash* 2003 WL 23097095 [32] (Grendell, J).
[19] *Kantaris v Kantaris* 884 So2d 155 (2004) 161 (Fulmer J).
[20] *Vancouver Rape Relief Society v Nixon* 2005 BCCA 601 [6].

Caught somewhere between administrative practice, legal status, ordinary language categories, and perceived biological, theological or biomedical fact, classification by sexual identity permeates the modern bureaucratic state. Flynn argues that while feminist and gay rights activism has challenged the gender roles assigned to men and women, 'only trans litigation challenges the sex system', that is 'the law's categorization and regulation of persons as male or female based primarily on their genitalia at birth', and ignores gender identification. [21]

Marginality and recognition

The social marginality of transgender and other gender non-conforming people has been reflected in a lack of recognition in law. Lack of recognition, for the purposes of this discussion, takes two forms. The first is an absence of awareness, where the category is largely invisible to law. In *Corbett*, it emerged that April Ashley had obtained a National Insurance card and a passport with her identity registered as female, even though her birth certificate identified her as male. The absence of an explicit, overarching legal framework provided scope for limited administrative discretion. But the flip-side of this invisibility to law could be incomprehension, official harassment, loss of civic rights, and sporadic malice or violence. For example, laws in the United States banning cross-dressing or gender-in appropriate clothing ('dress not belonging to his/her sex'[22]) were used to target gender non-conformity.[23] Similar issues arise in relation to access to public toilets and other sex-segregated spaces.[24] The second form of lack of recognition arises where law takes note of or 'sees' a particular identity but does not accord recognition to it. Here lack of recognition takes on a reflexive form. The identity is accepted as existing, perhaps as a social fact, or at the level of individual pathology, or as identified by medical or other non-legal experts, but it is deemed non-authentic in relation to legal norms or a particular legal category. The transition from the first to the second type of non-recognition is neatly recorded in the judgment in *Littleton v Prange*: 'Christie is medically termed a transsexual, a term not often heard on the streets of Texas, nor in its courtrooms.'[25]

[21]T Flynn, '"Transforming" the Debate: Why we Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality' (2001) 101 *California Law Review* 392.
[22]Section 210.455 Indecent Behavior and Exposure, City of Kearney, Missouri, ecode360.com/KE3330.
[23]J Levi and D Redman, 'The Cross-Dressing Case for Bathroom Equality' (2010) 34 *Seattle University Law Review* 133.
[24]T Kogan, 'Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled 'Other' (1996) 48 *Hastings Law Journal* 1223; T Kogan, 'Transsexuals in Public Restrooms: Law, Cultural Geography and *Etsitty v Utah Transit Authority*' (2009) 18 *Temple Political and Civil Rights Law Review* 673; H Molotch and L Norén (eds), *Toilets: Public Restrooms and the Politics of Shaming* (NYU Press, 2010).
[25]*Littleton v Prange* 9 SW3d 223, 225 (Hardenberger CJ).

Non-recognition in the second sense takes the form of explicit non-legitimation. In *Corbett*, April Ashley was categorized not only as *not a woman* for the purposes of marriage, but also as *transsexual* rather than *intersex*. Her ascribed 'transsexuality' became visible to law as a category. Marriage was a matter of (objective) sex; other domains could follow (subjective) gender.[26] The judgment also invoked the notion of 'true sex' (neither a legal nor a biological concept) as that which determined legal sex for the purpose of marriage.[27] This in spite of the judge's recognition that there was no binary in biology: '[L]iving organisms refuse to fall into clearly defined groups.'[28] The judge later expressed his relief that *Corbett* had concerned a case of transsexualism rather than intersexuality.[29]

Over time, judicial non-legitimation had nonetheless to confront the radical steps taken by many transgender parties to litigation:

> The applicant testified that although he was born a male and was married twice, each time to a female, that he considered himself a female and had demonstrated that fact by the change of name, cross-dressing and the submission to the recent medical surgical procedure that resulted in the removal of the penis and testicles and the creation of a vagina.[30]

Eventually, this surgically achieved alignment of physical body and psychological gender identity received legal recognition in many jurisdictions. The medical procedures were understood to legitimate the affirmed identity:

> [G]iven the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment.[31]

This approach, whilst reformist in spirit, has been strongly criticized for its normative construction of surgically achieved 'ideal' alignment of mind and body, which involves sterilization, as well privileging heterosexuality in the context of marriage. [32]

The situation today in common law jurisdictions is radically different from that when *Corbett* was the leading case worldwide.[33] Many jurisdictions have in place statutes or administrative practices that recognize certain transgender identities and allow changes to personal names and recorded sex on

[26]*Corbett v Corbett (otherwise Ashley* [1971] P 83, 104.
[27]*Ibid*, 89, 106.
[28]Ormrod (n 14) 78.
[29]*Ibid*, 86.
[30]*Re Ladrach* 32 Ohio Misc2d 6 (1987) 830 (Clunk J).
[31]*Van Kück v Germany* ECtHR, App no 35968/97, 2003 [59].
[32]A Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish, 2002).
[33]T Bennett, 'Transsexualism and the Consideration of Social Factors within Sex Identification Law' (2014) 34 *Adelaide Law Review* 379, 380–81.

birth certificates, passports, driving licences, etc. These changes may be within the male–female binary or offer the possibility of a third category; they may be largely formal, in that a declaration is primarily what is required, or they may be mediated by medical or other professionals. This reflects an important shift in international human rights law, the understanding of the legal protection of privacy, as well as innovations within the specific domain of 'transgender jurisprudence'. However, each progressive step forward in recognition, though welcome, picks out and legally reifies one set of identities and in this way makes explicit the marginalization of others.

Gender self-determination

Self-determination is at the heart of Principle Three of the Yogyakarta Principles, 'The Right to Recognition before the Law'. This reads in part as follows:

> Everyone has the right to recognition everywhere as a person before the law. … Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. … No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity.[34]

This stops just sort of an affirmation of self-definition in terms of legal sex, though the principle is arguably implicit. The idea that self-classification should be fully determinative for all legal purposes has been termed an 'elective' model; this is contrasted with 'ascriptive' identities that are imposed administratively or by process of law.[35] This is not an either/or distinction. In *Van Kück v Germany*, the court endorsed the applicant's freedom 'to define herself as a female person, one of the most basic essentials of self-determination'. This arose out of 'her right to respect for private life, namely her right to gender identity and personal development'. [36] The court determined that 'gender identification, name and sexual orientation and sexual life' all fell within the personal sphere protected by Article 8 of the European Convention.[37] But as noted above, the court also saw the identity as validated by the medical and surgical procedures the applicant had undergone.

Franke argues that sexual identity should not be defined in deterministic or biological terms, but 'according to a set of behavioral, performative norms that at once enable and constrain a degree of human agency and create the background conditions for a person to assert, *I am a woman*'. This non-biological approach 'demands a complex description of the history and experience of persons so labeled' and 'ultimately provides the basis for a

[34]Available at: www.yogyakartaprinciples.org/principles_en.pdf.
[35]J Clarke, 'Identity and Form' (2015) 103 *California Law Review* 747.
[36]ECtHR, App no 35968/97, 2003 [73, 78].
[37]*Ibid*, [69].

fundamental right to determine gendered identity independent of biological sex'.[38] This reflects Franke's view that: '[W]e all possess a degree of sexual agency beyond the rigid determinism of biology, or the bleak overdeterminism of strong constructionism.'[39] Grounding sexual discrimination law in biology implies a denial of 'the possibility of sexual agency'.[40] This partial agency implies a high degree of gender autonomy or self-determination, but the reference to norms of behavior implies that some agency or party must ascriptively assess conformity. This reflects a shift from biological essentialism to a holistic or multifactorial approach. While this shift enables transgender identities which reflect the sexual binary (as in *Re Kevin*[41]), one problem with the multifactorial approach is that it tends to substitute normative social scrutiny for biological criteria.[42]

Chambers argues that 'self-identification must be sufficient for inclusion' in a gender category.[43] For Langley, the realization of 'the Fourteenth Amendment's promise of liberty' means that 'people must be able to determine gender for themselves' through 'a right to gender self-determination'.[44] Following the logic of Supreme Court decisions such as *Planned Parenthood v Casey*[45] (upholding the constitutional right to an abortion) and *Lawrence v Texas*[46] (striking down sodomy laws), state interference in one's sense of gender is likewise an intrusion into a private sphere of personal liberty. In this sense, 'given its importance to both self-identity and social legibility', there was a need for 'protection from direct state coercion of gender's definition and its ascription'.[47] Once the theological or biological paradigm is rejected, 'the individual may be understood to possess agency in determining how to identify, present and negotiate the social production of his or her gender'.[48] One consequence of ending 'gender coercion' might be an explosion of categories; alternatively, official documents might not need to show a gender at all. This would not require that the state be totally 'gender blind', and the state could nonetheless continue to act on gender discrimination: 'The State can see gender without producing and coercing its own view.'[49] For Levasseur, if the legal binary gender system continues to

[38]K Franke, 'The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender' (1995) 144 *University of Pennsylvania Law Review* 1, 3–4.
[39]*Ibid*, 8.
[40]*Ibid*, 98.
[41]*Re Kevin* 165 FLR 404 (2001).
[42]Sharpe (n 32); Bennett (n 33) 379–402.
[43]L Chambers, 'Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon' (2007) 19 *Canadian Journal of Women and the Law* 305, 307.
[44]L Langley, 'Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities' (2006) 12 *Texas Journal on Civil Liberties and Civil Rights* 101, 101.
[45]*Planned Parenthood v Casey* 505 US 833 (1992).
[46]*Lawrence v Texas* 539 US 558 (2003).
[47]Langley (n 44) 124–25.
[48]*Ibid*, 125.
[49]*Ibid*, 130.

exist, then 'gender identity must be given primary weight, as the single most important *biological* determinant of sex'.[50]

Clarke argues that the elective model or gender self-determination 'responds to the definitional problems, stereotyping, and determinism of the ascriptive model' (definitional disagreements, essentialism, determinism) 'by deferring to an individual's own decision as to his or her identity and what that entails'.[51] However there are problems with 'inauthenticity', for example in cases of possible fraud or self-misrepresentation: 'A purely elective regime has no principled basis for policing entrance into and exit out of identity categories, or ensuring that individuals must take on both the benefits and burdens of particular legal identities.'[52] The nature of Native American tribal identities raises complex questions of this kind, as do bad faith attempts to exploit affirmative action regimes. The legal category is also threatened with 'disuniformity'. [53] If a given category is an elective one, then there will be no overall standard: 'Often, these categories must be binary and exclusive – for example, with respect to a child, a person is either a parent or a legal stranger.' Individuals 'may self-identify in an unlimited variety of manners, combinations, and shades of gray, or not at all. Such wildcard identifications may not be intelligible to legal rules.'[54]

Clarke suggests that, as a compromise between, or supplement to, ascriptive and elective views of identity, at least some of these issues can be dealt with by using a 'formal' approach. A formal identity 'comes into being through the execution of a formality by the parties laying claim to a particular identity'.[55] It is recognized as a legally significant step for individuals to order their lives. The sex designation on a birth certificate is not a formal identity in this sense, since it is ascribed to the baby. Formal identity as a legal mode 'facilitates private autonomy with respect to identity choices, while also allowing the law to place some ascriptive limits on identity claims, which fosters stability, reliance, and efficient regulation'.[56] One traditional 'formal' identity is where the husband of a woman who gives birth is deemed the father by default.[57] Such formal identities have some of the features of contracts, and there might be forms of estoppel-like relations among various formal identities, preventing someone from claiming the privileges of an identity in one domain while avoiding its responsibilities in another.

[50]M Dru Levasseur, 'Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights' (2015) 39 *Vermont Law Review* 943, 1004.
[51]Clarke (n 35) 771, 766.
[52]*Ibid*, 747.
[53]*Ibid*, 767, 802–06.
[54]*Ibid*, 769.
[55]*Ibid*, 770.
[56]*Ibid*, 747.
[57]*Ibid*, 789.

A formal procedure at its purest is simply a declaration, but a medical or psychiatric process in relation to self-determination may be primarily formal or ascriptive, depending on its underlying assumptions and procedures. Clarke sees one benefit of the formal approach in enabling intersex and transgender individuals to operate within a binary gender system:

> When recognized by the law, formal sex may allow intersex and transgender individuals to achieve recognition and challenge the equation of certain biological traits with gender identities, norms, and stereotypes. Administrative and even medical treatment requirements for changes to sex designations might be understood as formalities, intended to ensure that individuals consider their decisions with caution, and to channel them into one of two binary identities, male or female, enabling sex-segregated institutions to readily categorize them without having to engage in debates about ascriptive versus elective meanings.[58]

In limiting the number of categories to two, the procedure is not of course purely formal but also in part inherently ascriptive, as is any formal procedure relating to identity that constrains the number or nature of categories in this way, or which requires licensing or certification by a medical, psychiatric or other authority designated by law. Many systems now offer a third undetermined designation in addition to 'male' and 'female', but differ as to how that category is managed subsequently and whether the designation can be changed, and if so, whether medical certification is necessary.[59]

Formal identities have their own drawbacks. They are 'confounded by dynamic identities: identities that change over time or depend on context'.[60] In the case of allocation to prison, access to public toilets, etc, a formal identity may be beneficial, but it raises the wider question of the purpose and domain relevance of legal sex. Formal identities may have the disadvantages of commodification, bureaucratization, discrimination, pigeonholing and selective legitimation.[61] Yet, these domains aside, it is hard to think of a regulatory reason for an insistence that each individual have a coherent, domain-neutral legal sex.[62] Nonetheless, 'sex-designation changes, which would seem to affect few public interests outside the prison and restroom contexts, are considered irrevocable'.[63]

[58] *Ibid*, 799.
[59] J Rellis, 'Please Write "E" in this Box': Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India' (2007) 14 *Michigan Journal of Gender and Law* 223; M Moscati and H Phuyal, "The Third Gender Case": Decision of the Supreme Court of Nepal on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex People' (2009) 4 *Journal of Comparative Law* 291; A Dutta, 'Contradictory Tendencies: the Supreme Court's NALSL Judgment on Transgender Recognition and Rights' (2014) 5 *Indian Law and Society* 225.
[60] J Clarke (n 35) 822.
[61] *Ibid*, 808ff.
[62] One further, highly complex, domain is that of competitive sport.
[63] *Ibid*, 822.

Frameworks and analogies

Self-ownership and property in oneself

Self-determination suggests the primacy of the individual and individualistic rather than systemic, dialogic or relational understandings of identity: 'Communitarians, Marxists and other critical theorists including many feminists, have highlighted in particular the individualistic representation of the legal subject, and this correspondingly carries through to human rights law.'[64] A model of identity that privileges individual choice is redolent for some of neoliberalism, since the ability to assert successfully a particular identity would depend on that individual's social position and resources. It is 'based on an individualistic, atomistic and self-possessed version of the human being'. [65] In any clash of individual rights, structural inequalities will dictate who wins out: 'Notions of individualistic, rational choosers, and our core essence fail to capture how law creates, develops and recognizes who *is* a person and what type of personal identity they are permitted.'[66] For its critics, this suggests 'the ideal of the authentic self', and 'a project of discovering one's true, authentic, already there, identity'.[67] By contrast, if identities are dialogical, contextual, relational and co-created by social and ideological forces, then 'personal identity is composed of fragments, a web, or perhaps, a patchwork'.[68] There may be agency in this continual process of self-creation but the grounds of action and the categories available are not freely chosen: '[T]his process takes place not in condition of its own choosing.'[69] Individuals, whether seen by themselves or others as transgender or not, can take radically different views of their identity development and their relation to the gender binary.[70]

The defence of self-determination draws on traditional concepts of human rights and the protection of personal autonomy and privacy. But it is also implicated in more complex jurisprudential concepts such as legal personhood, self-sovereignty, self-ownership, self-possession, property-in-self, etc. One way to understand this property regime is that self-ownership or self-possession sits at the centre of radiating property rights. These rights are implicated in private spaces, particularly one's home, objects (particularly private possessions, many of which are suffused with intimate meanings and memories), interpersonal relationships that create and reflect property rights (family), contractual relationships (employment, pension rights) and civic

[64] J Marshall, *Human Rights Law and Personal Identity* (Routledge, 2014) 71.
[65] *Ibid*, 11.
[66] *Ibid*, 72.
[67] *Ibid*, 85.
[68] *Ibid*, 85.
[69] *Ibid*, 85–86.
[70] L Diamond, S Pardo, and M Butterworth, 'Transgender Experience and Identity' in S Schwartz, K Luyckx and V Vignoles (eds), *Handbook of Identity Theory and Research* (Springer, 2011) 629.

identities (the right to enter public spaces, voting rights, citizenship). The autonomy of the self is therefore extended and protected in virtue of being vested in various forms of property, 'property-for-personhood' in Radin's formulation,[71] which are increasingly contingent, dissoluable and nebulous as they radiate outward into society. At the centre sits the inviolable or inalienable ownership right to self, the 'self-proprietor'.[72] The autonomy of the self is protected from the state by virtue of being vested in property rights, including the ultimate, quasi-absolute form of self-sovereignty. While all other property rights are relational or subject to overriding exceptions, ownership of self is absolute. The self sits as reigning monarch as absolute ruler of its private domain, and is protected in its bodily integrity from 'trespass', ie assault, rape, false imprisonment and other crimes against the person. In the famous Lockean formulation: '[E]very man has a *Property* in his own *Person*. This no Body has any Right to but himself.'[73]

This notion of self as sustained by private property rights can be framed as a conservative idea, which relies on 'an absolute conception of property rights as sacred to personal autonomy'; by contrast, communitarians would argue that 'changing conceptions of property reflect and shape the changing nature of persons and communities'.[74] As Naffine argues,[75] the notion of the self-proprietor in the age of contract can be criticized for reducing the person to an owned thing and in this sense opening up the self to commodification and objectification by others.[76] Naffine argues that the Lockean concept of self-ownership was in its ideological deep structure primarily concerned with the securing sexual rights over women, as represented by the suspension or incorporation of the women's personhood within marriage, and hence the securing and transmission of property rights.[77] Nonetheless, this would not preclude self-ownership being deployed in defence of gender self-determination, depending on the jurisprudential context.

A purely libertarian view of self-ownership would seek to maximize self-autonomy in relation to all domains of personal identity, including the right to self-designate in terms of race, ethnicity, sex/gender (or to avoid any such self-designations), to use a variety of names without restriction, to apply such medical and surgical interventions to one's body as one sees fit, to take into one's body such substances as one wishes, to make contracts for prostitution, to customize forms of marriage through any consensual contractual arrangement, and to elect freely one's place of residence and citizenship(s), given

[71]M Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957.
[72]N Naffine, 'The Legal Structure of Self-Ownership; or the Self-Possessed Man and Woman Possessed' (1998) 25 *Journal of Law and Society* 193.
[73]J Locke, *Second Treatise on Government* (Awnsham and Churchil, 1690) s 27.
[74]Radin (n 71) 957–58.
[75]Naffine (n 72) 198–200.
[76]M Davis, 'Feminist Appropriations: Law, Property and Personality' (1994) 3 *Social and Legal Studies* 365.
[77]Naffine (n 72).

libertarianism's commitment to open borders. In libertarian discourse, individual self-ownership is contrasted with state-ownership, with self-ownership implying also maximal freedom to alienate aspects of one's personhood. One could then, paradoxically, contract oneself into slavery[78] or into fatal multiple organ donation. Classic human rights law, drawing on the notion of inalienable rights under natural law, would reject the property metaphor as a dangerous analogy, and would ground the notion of autonomy in ideas of dignity, equal worth, freedom and rights to self-expression.

Analogies from disability, race and religion

The stigmatized yet powerful category of disability offers a challenging framework for considering the benefits and drawbacks of a particular legal status.[79] Disability advocacy locates disability primarily within social processes and (physical and ideological) structures rather than in individual selves. Like legal sex, disability can be understood as constructed out of specific social domains and interrelationships, rather than being intrinsic to the person. The history of transgender people's interactions with the medical system has involved ambivalence, at best, concerning labels such as *gender dysphoria*.[80] Labels facilitate access to social systems such as medicine, yet also mark identities as pathological. Another possible analogy for legal sex is race, since racial identity, like sexual identity, is perceived in dominant social ideologies as intrinsic to the person by birth. Racial discrimination exists as a category within anti-discrimination law, in spite of the intellectual recognition that race is a fiction, and under governance regimes that do not classify citizens by race or ethnicity. On this analogy, there is no need to essentialize legal sex for law to be applied against discrimination on grounds of sex, including gender roles. The question of racial self-determination or 'transracial' identities, as well as the parallel if any with transgender identities, has been raised by the Rachel Dolezal case.[81]

Cruz argues in the US context that 'the constitutional treatment of gender is better analogized to religion than to race'[82] and that sex/gender should be 'de-institutionalized': 'As with religious beliefs under the disestablishment of religion, under the disestablishment of sex and gender government would neither endorse nor disapprove gender beliefs.'[83] Both God and Nature

[78]R Nozick, *Anarchy, State and Utopia* (Basic Books, 1974).
[79]J Puar, 'Keywords: Disability' (2014) 1 *Transgender Studies Quarterly* 77; A Shotwell, 'Open Normativities: Gender, Disability and Collective Political Change' (2012) 37 *Signs* 989.
[80]A Dreger, 'Why Gender Dysphoria Should No Longer Be Considered a Medical Disorder' *Pacific Standard* (2009) available at https://psmag.com.
[81]R Brubaker, 'The Dolezal Affair: Race, Gender, and the Micropolitics of Identity' (2015) *Ethnic and Racial Studies* doi:10.1080/01419870.2015.1084430.
[82]D Cruz, 'Disestablishing Sex and Gender' (2002) 90 *California Law Review* 997, 1072.
[83]*Ibid*, 1009.

'have been taken to provide non-rational and non-falsifiable explanations for and justifications of a host of religious and gender beliefs' and displaced human responsibility and agency for social divisions.[84] The US Constitution 'supports the premise that the citizenry ought presumptively to be regarded as comprising but one class of persons, rather than fundamentally differing sex/gender subclasses'. The Equal Protection Clause (Fourteenth Amendment) has been interpreted by the Supreme Court to mean 'that government may not rely on stereotypes or "overbroad generalizations" about the proper roles of men or women when it allocates rights and responsibilities'.[85] More fundamentally, the argument can be made that the Constitution protects 'a right for the free exercise of gender', understood as a right to freedom of self-expression, freedom of association, self-realization or simply as 'a fundamental human right'. The government could adopt a neutral, non-preferential, non-coercion, non-endorsement approach, applying principles such as 'separation' and 'privatization'. [86] For example, in *M T v J T*, [87] the court recognized the plaintiff's post-operative transgender identity as female for the purposes of marriage, in part because this would 'promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality'.

The end of legal sex?

If legal sex follows self-definition in terms of gender identity and is fully decoupled from marital or parental status, medical intervention and social pressure to conform, then it is on the verge of disappearing as a legal status. A personal narrative or individually customized status cannot function as a legal status as traditionally understood. A fully elective notion of legal sex implies a right to recognition without being limited by preselected category, in other words a purely formal identity. If the self-designated categories of legal sex were truly open ended, then this would lead to complex disputes about where the outer boundaries of legal sex lie, ie about what makes an identity a *sex* or a *gender* rather than some other form of identity. Is the assertion of a negative identity[88] in relation to sex/gender categories, ie a denial that one has a gender, nonetheless a form of gender identity?

Self-determination can therefore mean a number of things. It can imply the right to self-determination in relation to officially recognized gender categories, such as the traditional male/female binary or a three (or more) gender system. It may require a purely formal procedure, approval by a

[84] *Ibid*, 1011.
[85] *Ibid*, 1022.
[86] *Ibid*, 1028ff.
[87] *M T v J T* 140 NJ Super 77 (1976) 89–90 (Handler, J.A.D).
[88] N Leong, 'Negative Identity' (2015) 88 *Southern California Law Review* 1357.

board, or the meeting of a threshold of medical invention. A more radical way to understand self-determination is in terms of the right to nominate and define a category and one's relationship to it, including as an intermittent or inconsistent identity. In a purely formal system with no preassigned categories, there would be no ascriptive element such as certification or approval from a board or panel of medical, psychiatric experts, such as the procedures under the UK Gender Recognition Act.[89] The formality, with its transaction costs, is itself the only barrier. This more radical approach, however, implies in effect the end of legal sex, since it is difficult to imagine how a purely elective, individually customized legal status might function. This would render self-determination in legal terms a private act which is officially recorded. It might even be argued that the official recording and registering of individual identity narratives might be undesirable in terms of privacy. One side-effect of the official legal binary system is that the system has no grasp of the actual lived complexity of individuals, families and communities. The 'gaze' of the system sees only two categories. If the concern is with policies that deal with social issues, then this is clearly a serious problem; if the concern is with appropriation and control of identities, then this 'stupidity of law' may be seen as in part positive.

Full self-determination is equivalent to rendering individuals in effect legally 'sexless', just as the French constitution in theory understands its citizens as 'raceless' under the 'abstract equal citizenship model'.[90] One argument against this 'sexless citizenship' is that this would hamper modern law's commitment to anti-discrimination. It would make invisible contemporary patterns of discrimination, particularly in employment. Further, for some transgender identities, law has served, belatedly, as a form of recognition in the face of societal hostility. Law's categories from this angle can be understood as potentially a refuge, in that legal recognition of an identity protects it from the contingencies of discretionary acts and offers a platform for advocacy in employment, health, education and other domains. The problem is that legal recognition implies law's control over definition and criteria, and legal regimes may set up ascriptive barriers for the achievement of an identity which may exclude, deter or marginalize.

Conclusion: de-ontologizing legal sex

Questions of gender self-determination and self-classification are generally understood as undermining the binary of legal sex. Full gender self-determination is seen as a case where marginal identities overturn the underlying logic of a mainstream norm, ie legal sex. But this is to read legal sex as if it

[89] 2004 c 7.

[90] M Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2009).

were law's definitive statement about the bodily ontology or sexed nature of its subjects and to judge legal sex in relation to the imagined 'real reference' of its categories. Law in this sense is understood as codifying 'true sex', whether defined according to biomedical criteria, or as determined by a mix of medical, social and psychological factors. *Corbett*, even in its discredited form, has framed and limited the challenge to what has been termed the 'sex/gender system'.[91] Its legacy is an ontological understanding of legal sex, whereby legal sex is held to reflect the true nature of the sexed human person, thereby symbolically fusing the legal person and the actual person.

An ontological understanding of legal sex is always self-deconstructing, given the complexity of gender labelling and self-labelling, as well its intensely local and personal character. If there are a limited number of categories, then legal sex will be seen as narrowly ascriptive and coercive; a large number undermines the possibility of group solidarity and law-based activism. On the multiple personas or 'one is who one shows up to be' view, legal sex exists merely at those points where an individual's identity intersects with law's requirement for a classification by sex. In other words, legal sex is created out of and maintained by the individual's interaction with the legal-administrative state. This legally created status should make no further claims about an individual's 'true' sexual identity. Law should not be understood as constituting its subjects as sexed in particular ways; nor should it appeal to language, theology, science, psychology or medicine for some underlying, legally operationalizable truth about sexual identity.

It is misleading to frame gender non-conformity as somehow marginal in relation to legal sex. This is to render unto law power over a domain where it has no jurisdiction, and implies that it would possible to create a better, improved set of legal categories to reflect more accurately the actual diversity of sexual identities. In this sense, a system with a male–female binary is not necessary more repressive than a system with a third gender. Where the binary is read as radically non-ontological and understood as primarily formal or elective, it need not carry any ontological claims about 'true sex'. A three-gender system, where a strong ascriptive element is in play, has by contrast greater potential for marginalizing particular sexual identities. Philosophically, we should adopt a 'multiple persona' view of legal sex. This means assessing arguments for legal sex from a position of domain-specific pragmatism, maintaining at the same time a secular scepticism in relation to law's power to define and constitute identity.

ORCID

Christopher Hutton http://orcid.org/0000-0002-0861-4168

[91]Cruz (n 82) 1006.

Notes on contributor

Christopher Hutton is chair professor in the School of English at the University of Hong Kong. He holds a BA in Modern Languages (1980) and a DPhil in General Linguistics from the University of Oxford (1988), an MA in Linguistics and Yiddish Studies from Columbia University (1985), and an LLB from Manchester Metropolitan University (2008). His research concerns the history of linguistics, in particular the relationship between linguistics and race theory, linguistics and colonialism, and linguistics and fascism. More recently he has been working on the politics of language and interpretation in the context of the law. His publications include *Linguistics and the Third Reich* (Routledge, 1999), *Race and the Third Reich* (Polity Press, 2005), *Word Meaning and Legal Interpretation* (2014), and the *Signs, Meaning and Experience* (with Adrian Pablé, 2015).