‘The effect of ‘*becoming*’ on trans* legal recognition’

Amy Rodgers
L.L.B

Submitted in fulfilment of the requirements of the degree of MRes. Law

School of Law, College of Social Sciences

University of Glasgow

November 2018

ABSTRACT

This thesis focuses on law's conception of trans* embodiment and explores how the treatment of trans* lives by law exposes the existentially limiting understandings of 'sex' and 'gender' that underpin legal thinking. The thesis considers these limits on understanding to be problematic and limiting for the trans* community and uses theory to explore and advance a more appropriate and fluid scheme for legal recognition. Chapter one pays particular attention to the Gender Recognition Act 2004. It will be argued that it is based on the idea of the 'authentic transsexual' which, in the case of the Act, is founded on the separation of 'sex' and 'gender' and the construction of sex as dimorphic biological fact. Chapter two introduces and explores the idea of '*becoming*' which can be used to re-figure what it means to be trans*. '*Becoming'* can de-essentialise trans* lives in law and path the way for a more transformatory and fluid politics of recognition. Chapter three introduces a model of recognition that could be introduced in Scotland that is responsive to the self understood in terms of '*becoming*'. It will be argued that the model of self-identification and multiple gender scheme proposed balances trans* need for rights and protection with the demand that their sense of being and right to self-determination be protected. Finally, it is argued that this model is a necessary intermediate step in the move toward a post-gender world.

TABLE OF CONTENTS

CHAPTER TWO: *'becoming'*

CHAPTER THREE: Recognition - Potential Ways Forward

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: AMY RODGERS

Signature:

Table of Cases

Table of Statutes and Conventions

Equality Act 2010

Gender Recognition Act 2004

Sex Discrimination Act 1975

Sex Discrimination (Amendment of Legislation) Regulations 2008

Sex Discrimination (Gender Reassignment) Regulations 1999

Acknowledgements

Firstly, I would like to express my gratitude to Dr. Lilian Moncreiff for her encouragement and support throughout the completion of this thesis. I have gotten a lot out of writing this and part of the reason for this, I'm sure, is due to the conversations we have had and the guidance and freedom she has given to allow me to write what I wanted to write.

I would like to say thank you to my Mum, Dad and Lucy for their continued support.

Finally, I would like to thank Marina, for her love and support and to whom this is dedicated.

INTRODUCTION

Introduction

Gender variance is still widely misunderstood in society today. This misunderstanding manifests in a myriad of ways: trans* folk are often subjected to violence, hostility and confusion in their everyday lives. This can come in the obvious forms of physical violence or threats. For example, leading LGBTQ charity stonewall has found that almost 1 in 10 young trans* people have received death threats at school.[1] Less obvious forms of violence such as misgendering are also damaging and should not be underestimated.[2] Moreover, not only do trans* folk face threats and violence from others, a lack of understanding and acceptance in society often leads to internalized transphobia in trans* individuals, leaving many feeling depressed, anxious and suicidal. In 2013, trans* people under 26 were found to be nearly twice as likely (48%) to have attempted suicide in their life compared to non-transgender people of the same age group (26%).[3] Moreover, trans* young people were nearly three times more likely

---

[1] Stonewall UK, '*Stonewall School Report 2017: Anti-LGBT bullying down but LGBT young people still at risk',* 2017 <http://www.stonewall.org.uk/news/stonewall-school-report-2017-anti-lgbt-bullying-down-lgbt-young-people-still-risk> [accessed 9 January 2018].

[2] S.D Finch, *10 things you're actually saying when you ignore someone's pronouns, (*2014) < https://everydayfeminism.com/2014/10/ignore-gender-pronouns/ > [accessed 9 January 2018].

[3] C. Dinenage, *Gender Recognition Act review announced in plan for transgender equality*, 2016 < https://www.gov.uk/government/news/gender-recognition-act-review-announced-in-plan-for-transgender-equality > [accessed 9 January

to have self-harmed in the 12 months prior to the study (59%) than non-transgender people of the same age (22%).[4]

A small improvement in recent years is that trans* deaths and suicides appear to be more reported in the news, as are more general trans* issues. There is, generally, more visibility of trans* lives in mainstream society. Publicity in the media of trans* identities is on the rise which brings with it greater attention from the general public. There has been a proliferation of documentaries, newspaper articles and online blogs around trans* identities and issues and in 2014 *Time* magazine announced that we have now reached a 'Transgender Tipping Point.'[5]

However, despite trans* identities becoming generally more visible, this visibility has not always created acceptance and understanding. What often happens is that in mainstream society trans* lives are depicted in a simplified and monolithic way. Trans* identities are often portrayed through reiteration of phrases such as 'born in the wrong body'[6] and 'always felt this way'.[7] This language often goes alongside depictions of trans* lives as ones filled with struggle, anxiety, self-hate, discomfort and dysfunctional mental health. While these narratives can certainly resonate within the community, they are by no means the only narrative. Yet, this is all we seem to

---

[4] ibid

[5] K. Steinmetz, *The Transgender Tipping Point, Times Magazine (1 September* 2014) <http://time.com/135480/transgender-tipping-point/> [accessed 9 January 2018]

[6] BBC News, *Transgender Teens Born in the Wrong Body, BBC NEWS (8 October* 2016) < <http://www.bbc.co.uk/news/uk-northern-ireland-37588612> [accessed 9 January 2018]

[7] K. Lyons, 'Transgender stories: "People think we wake up and decide to be trans"' (10 July 2016) *The Guardian.* www.theguardian.com/society/2016/jul/10/transgender-stories-people-think-we-wake-up-and-decide-to-be-trans [accessed 16 September 2018]

hear about trans* lives. The effect of these accounts is that they reduce the variation and richness of trans* lives, pathologies them, and hinder those individuals who are questioning or curious towards their gender to approach and seek out support from the trans* community.

Trans* Lives and Law

It is apparent then that there is much to be done to make trans* lives more liveable. This thesis takes the position that law is an important resource in achieving this change. The thesis connects with the long history of efforts within critical legal studies to challenge and reform the law as a way of challenging power structures and overcoming societies biases and prejudices against marginalized groups. Critical theory can and has been used to address and reverses conditions of domination and exploitation.[8] The power of law in realising emancipatory goals for minorities has also been questioned and challenged by Carol Smart in her ground-breaking book *Feminism and the Power of Law*.[9] Smart warns against the 'malevolence' of law when using it, she also points out that legal norms nevertheless play a powerful part in asserting how things are by 'imposing their definition of events on everyday life'.[10] The reason law is able to do this is, in part, because law represents 'a claim to a superior and official field of knowledge.'[11] With law claiming this spot, alternative and competing versions of life are deemed insignificant or, as Smart puts it, 'suspect

[8] Christodoulidis et al, *Jurisprudence: themes and concepts* (Routledge 2018) p.193 – p.203.
[9] C. Smart, *Feminism and the Power of Law.* (Routledge, London 1989) Dean Spade has also questioned the usefulness of law in D. Spade., *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press 2015).
[10] C. Smart, *Feminism and the Power of Law*, 1989 at 4.
[11] ibid

and/or secondary'.[12] In relation to gender recognition, law uses its power and influence to regulate and constitute certain gendered lives and ignore those alternative versions of what it means to be trans* that live outside its strict and uncompromising definitions.[13] It will be shown that the Gender Recognition Act, legislation that allows for trans* people to be recognised in their acquired gender, classifies and regulates trans* lives. Through its mechanisms, procedures and requirements, the GRA determines who is a valid an authentic trans* person and therefore worthy of recognition.

The GRA performs three broad functions: it offers material legal benefits to trans* people; it carries out a symbolic and expressive role and it builds identity and increases self-esteem within trans* individuals. It is helpful to say a few words about each of these functions. Firstly, there are important material effects of the granting of legal recognition: successful applicants may register a change of gender which can then be used for all purposes including ID documentation, sex-segregation, and

---

[12] ibid at 11

[13] The national LGBT Survey, published in 2018, had over 108,000 respondents. Of the total sample, 7% identified as non-binary. Amongst trans* respondents, over half (52%) identified as non-binary. Government Equalities Office, *National LGBT Survey: Research Report* , (July 2018), 16 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf> [accessed 12 September 2018].
A 2016 survey asking for people's experiences of being non-binary attracted 895 responses from self-identified non-binary people. In this survey, over half (54%) described their gender as fluid. V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 13 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018]. In a recent survey by Stonewall UK, just under half (48%) of respondents describe their gender in a different way from male or female. See C.L Bachmann & B. Gooch. *LGBT in Britain: Trans Report* (2018), 23 < https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf> [accessed 12 September 2018]

marriage.[14] This not only upholds trans* people's privacy and dignity but also functions to ensure that their insurance policies, marriages and civil partnerships pensions are all administered correctly.

Whilst the material advantages of gaining access to the GRA are important, trans people can also do a number of things without gaining access to the legislation. In the UK one can already change one's name, access the appropriate NHS services, and receive a passport with the appropriate gender/sex marker without having gained access to the Act. Yet, although access to the GRA may appear to have little substantive effect on what a trans* person can and cannot do in their lives, this should not blind us to the crucial expressive role that recognition law plays:

'There can be no doubt that law, like action in general, has an expressive function. Some people do what they do mostly because of the statement the act makes; the same is true for those who seek changes in law. Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences.'[15]

What this means is that while it may well be true that attainment of a GRC will not create much substantive legal effect beyond that already achieved without one, the real importance of the recognition law lies in its symbolic effect. The GRA gives out a signal to society that trans* people's identities are to be respected and validated. A

[14] The Gender Recognition Act 2004, section 9 (1)

[15] C.R. Sunstein, 'On the Expressive Function of Law' (1996) *144 U.Penn. L.R*. 2021, 2026

similar point was made in the Scottish Parliamentary debates over the introduction of same-sex marriage when opponents argued that same-sex couples already receive the same materials benefits as heterosexual couples under the Civil Partnership Act. [16]

Finally, the effect of legal recognition is not only material and expressive, but also psychological. Having an authoritative institution such as law deem an identity valid goes some way towards enhancing self-esteem and solidifying the new gender identification. For example, a recent report on transgender people has shown that lack of recognition adversely affects mental health:

'Being forced to live as someone you're not, in a society that doesn't accept you, can cause mental health issues…'[17]

Moreover, a recent report on non-binary identities has suggested that trans* people believe that because their non-binary identity has no legal recognition, they are

[16] See Stage One debate, 'Official Report' (20 November 2013) speeches by Jackie Baillie MSP, at col. 24640, Ruth Davidson MSP, at col. 24646, Jim Hume MSP, at col. 24658, and Alex Neil, MSP, at col.24694. accessed online < http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9521&mode=pdf> [accessed 18 September 2018]. See also Alex Neil, MSP at Stage Three Debate: 'This legislation sends a powerful message to the world about the kind of society that we in Scotland are trying to create' in 'Official Report' (4 February 2014) at col.27343. accessed online at < http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9329&mode=pdf> .Cited in K. Norrie, 'Now the dust has settled: The Marriage and Civil Partnership (Scotland) Act 2014' (2014) *Juridical Review* 2014 (2) pp.135-163 at note 38.

[17] C.L Bachmann & B. Gooch. *LGBT in Britain: Trans Report* (2018), 20 < https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf> [accessed 12 September 2018]

refused services. In addition, they also believe that lack of visibility and inclusion in those services has adverse impacts on their mental health and self-esteem.[18]

The power and influence of law over gendered bodies therefore cannot be overstated. Law plays both a regulatory and constitutive role in gendered lives. In other words, law creates and limits the type and amount of liveable lives possible through regulations, requirements and mechanisms. Of course, other structures and institutions play a large part in dictating gender norms. Yet there is no doubt that law compels trans* citizens - viz. its power to form and impose its conceptions of things - to cisheteronormative ideals of gender in a massive way. Therefore, whilst I agree with the contention that non-legal routes must also be explored in political projects, this thesis takes the view that if we are to change the difficulties that trans* people face in their day to day life for the better, law is a crucial resource.

Jurisdiction

Law asserts its power over gendered lives in a way to ensure that trans* lives are regulated and produced in a narrow and uncompromising manner. Currently, there are two main sources of legislation that concern trans* people in Scotland; the Equality Act 2010 and the Gender Recognition Act 2004. Whilst it is the GRA that will form the focus of this thesis, discussion will also be given to the Equality Act and its predecessors. There are two reasons for this. Firstly, the development of discrimination law plays a crucial role in understanding how trans* people have been understood in law. Secondly, consideration must be given to whether the changes to

[18] V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 9 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018].

the GRA proposed in this thesis will affect the rights and protections trans* people gain in other areas of law. The GRA is UK wide legislation but gender recognition policy is a devolved matter. This means that the changes to the GRA proposed here can be made without Westminster's consent but the Scottish Government will need to discuss with Westminster if a Scottish GRC will be recognised in England and Wales. Additionally, the proposed changes made to the GRA do not necessarily require any amendments to the Equality Act. However, possible amendments to the Equality Act, for reasons of clarity, will also be discussed.[19] The Equality Act is largely reserved so these changes will need to be discussed with Westminster.

Current role of the Gender Recognition Act

Legal regimes for gender recognition are underpinned by a range of different objectives. It is submitted that in Scotland, the current legal regime is seeking to regulate and produce trans* lives in a narrow and uncompromising way. The rationale for this, it will be discussed, is law's historical need to uphold the gender binary as natural and necessary. This is clear from early recognition and discrimination cases and continues despite the introduction of the GRA. It will be shown that the GRA - which obliges subjects to repeatedly perform either male or female gender across various procedures and activities - constitutes a significant role in sustaining and entrenching gender as a binary, dimorphic and biological fact. It is submitted that and in light of the struggles of trans* people trying to navigate a world in which their gender is constantly put in doubt or challenged and in light of queer developments in the concept of what gender is - discussed in chapter two - the rationale behind gender recognition law must change. Currently, too much respect is given to upholding the

[19] See Chapter three

gender binary in law. More respect must be given to the freedom and autonomy of trans* people. This – it will be shown - can be achieved by amending the current regime so that law allows people to identify in the way that they wish. Finally, law is currently used by trans* people to gain protection from discrimination through the Equality Act and also to gain access to trans* specific healthcare. It will be argued that the reform proposals to the GRA in this thesis ought not to affect these two important functions of law.

Overview of Chapters

Chapter one explains and analyses how the law functions to regulate and produce trans* lives. I will focus on the norms and discourse in relation to the concepts of sex and gender that work to constitute the identities that are recognizable. Accordingly, an analysis of cases involving trans* individuals is necessary in order to reveal the assumptions about identity that are embedded within their rulings. What is clear from the cases prior to the introduction of the GRA is that legal judgements have been underpinned by the separation of sex and gender and the construction of biological sex. After discussing the preceding case law prior to its introduction, the focus will then be the Gender Recognition Act 2004. I will demonstrate that whilst the GRA is an improvement to the law in some respects, it is not without its problems. On the one hand, the GRA is to be welcomed for its apparent lack of surgery requirement as a precondition to legal recognition, signaling a shift from the concept of sex to the concept of gender in law's understanding of the distinction between male and

female.[20] The result of this is that trans* persons who cannot or choose not to alter their body now have access to recognition. However, there are problems in the Act. The act is based on a notion of identity that makes the trans community pathological, it excludes trans* lives and ensures they are kept at the margins. It achieves this through: requiring a diagnosis of gender dysphoria, demanding the applicant live in their acquired gender for at least two years, enforcing a gender permanence mechanism and by denying recognition to trans* lives that live outside the binary. Trans* lives who are unable or do not wish to identify in a way that is congruent with the restrictive and uncompromising narrative that the act requires are excluded. Meanwhile, those that are able to satisfy the requirements of the Act are included, but in a way that figures them as mentally ill. Trans* lives are, therefore, not given freedom and autonomy over their gendered lives. For many, the limited choice is to live without recognition and the difficulties that come with this, or to otherwise force oneself into a category and a process that one does not align with. Moreover, this form of recognition does little to change the marginal status of trans* individuals as it posits them as the unnatural exceptions to the natural male/female binary. As Sandland argues, 'there is (intentionally) little that is new about the GRA' in regards to the theoretical underpinnings of it.[21] The conceptual assumptions behind the Act ensure that trans* lives are kept at the margins. The expressive power of law is (yet again)

[20] S. Cowan, '"Gender is no substitute for sex": A comparative human rights analysis of the
legal regulation of sexual identity." (2005); *Feminist Legal Studies* 13:67-96; R Sandland, 'Feminism and the Gender Recognition Act 2004' (2005) *Feminist Legal Studies*
13(1):43-66

[21] R. Sandland, Running to Stand Still' (2009) *Social & Legal Studies* 18:2, pp. 253 – 257, p.253.

being used to send the message to society that trans* people are less than those who identify as cis.

It will be argued that these problems stem from a particular construction of trans* lives that underpins legal thinking. This particular construction of transsexuality is one which is based on the idea of an authentic trans* identity; an identity which acts to uphold both the sex/gender binary and a temporal framework of 'straight' time. Chapter two sets out to refigure trans* embodiment with the view that it can make way for a new fluid and nuanced model of recognition. Chapter two looks closely at the idea of '*becoming*', which complicates both the sex/gender binary and our common understanding of how time operates. '*Becoming'* provides fertile ground to re-imagine trans* identity. It allows us to reimagine trans* bodies as open-ended systems and existences that are subject to the active forces of culture, nature and time. Trans* embodiments are unpredictable and fluid and do not develop in a linear and stable manner. These insights, when incorporated into trans* recognition law, allow us to drop the two ideas that there is a specific thing that is knowable to experts or to ourselves in which being a woman, or a man, or trans* exists, and that there must be some concrete shared content to that assertion. It therefore allows us to critique and discard a recognition model that is still routed through the question of what constitutes an authentic trans* identity.

Chapter two refigures trans* subjectivity with the view that it will allow for a nuanced and fluid model of recognition that could deal with the problems inherent in the GRA. The exact contours of this new model will be explored in Chapter three. The value of this model is that it will 'disconnect the claim to 'authenticity' of identity from the

demand for recognition'[22] and will therefore go some way towards remedying the feelings of 'not being trans* enough' that are experienced by many individuals.[23] Moreover, this model will better balance trans* folks demand for recognition with the need to retain their specificity and respect their freedom and autonomy. The model will involve both a self-identification and a multiple gender schema. Crucially, it is submitted that a model such as this – in which law steps back from assigning gender - need not affect the rights and protection that come with gendered laws. Gender, as a category, is currently relied upon for protection against discrimination and to allow access to healthcare. A particular concern that has been raised around changing the GRA is that de-regulating gender would mean that these rights and protections disappear. However, de-centring the law does not necessarily mean that the law cannot continue to regulate gendereddecisions, nor does it mean that trans* healthcare

[22] D. Cornell & S. Murphy, 'Anti-racism, multiculturalism and the ethics of identification' *Philosophy and Social Criticism*, 4 (2002*)* pp.419-449, p.420

[23] Gendered Intelligence, an online resource for trans* discuss how expectations from within and out with the trans* community can make trans people feel like they are 'not trans enough'. See *Trans Identities.* (2018) http://genderedintelligence.co.uk/projects/kip/transidentities [accessed 12 September 2018]; See also D. Chase & J. Catalano, '"Trans Enough?": The Pressures Trans Men Negotiate in Higher Education' (2015) *Transgender Studies Quarterly* (2015) 2:3 pp.411-430; In the survey on non-binary people in the UK, 20% answered 'unsure' and 15% answered 'no' to the question "do you consider yourself to be trans*?" 9% of this group said they answered this way because they felt that they weren't "trans enough". V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 17 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018]. A number of trans* writers also described feelings of 'not being trans* enough' in their writing. See, for example, D. Spade, 'Resisting medicine, re/modeling gender.'(2003) *Berkley Women's LJ 18: pp. 15 – 37 at 22.* and SD. Finch, *5 Affirmations for Trans* folks who don't feel Trans* Enough.* (2017) < https://everydayfeminism.com/2017/03/trans*-folk-dont-feel-trans*-enough/ > [accessed 10 January 2018]

practices will no longer be covered.[24] This will be dealt with in Chapter three. The model proposed can better balance the need to grant crucial rights and protection to trans* people whilst at the same time giving people space to live the gendered life of their own choosing. In addition, it is believed that this scheme will make crucial steps towards situating trans* lives alongside cis lives and expressing to the world that both are equal.

Methods, sources and positionality

This thesis employs a theoretical approach to the study of gender recognition law and legal sources. It draws on existing empirical academic and activist research on gender recognition and identity and on the experiences of the same within the trans community.

[24] For a discussion on how the law can continue to regulate gendered decisions, see D Cooper and F Renz, 'If the State Decertified Gender, What Might Happen to its Meaning and Value? ' [2016] 43(4*) Journal of Law and Society*, 484. For a discussion on how trans* specific health care need to be tied to a medical diagnosis, see J. Butler, 'Undiagnosing Gender' in *Undoing Gender* (New York: Routledge, 2004)

CHAPTER ONE
Trans Recognition Law*

Introduction

There are two main sources of law that offer rights and protection to trans* people: The Equality Act 2010 and Gender Recognition Act 2004. Under the former, gender reassignment is a protected characteristic, meaning that those who possess it are protected from discrimination by the legislation. The Act covers people who are proposing to undergo, currently undergoing or have undergone a process (or part of a process) of gender reassignment.[25] This piece of legislation will be discussed further below but it is the latter, the GRA, which forms the main focus of this thesis. The GRA offers full legal recognition to trans* people in their acquired gender. Whilst the Act is to be welcomed in some respects, it has its problems. The way in which law recognises transgender lives has been, and still is, problematic. From the induction of the biology based *Corbett* test in 1970 that was used to determine subjects legal sex, law has continued to use biological essentialism to conceptualise trans* lives for many years.[26] Using the biology is destiny logic, law has been able to control and regulate trans* subjectivity so that pre-operative transgender people were unable to be recognised in their chosen gender. Law was operating on the premise that there was an authentic way to be trans* and if one did not satisfy the criteria – which was in the earlier cases surgery - no recognition was granted. The introduction of The GRA in

[25] Section 7 (1)
[26] (Otherwise Ashley) [1970] 2 All E.R. 33

2004 moved away from biology and pays particular attention to gender, which has had positive legal affects for trans* folk. Surgery is no longer a prerequisite to legal recognition and thus pre-operative trans* people now have access to legal recognition. This improvement is evidence of the GRA incorporating queer developments in the understanding of sex and gender and signals a move away from some of the troubling aspects of the *Corbett* judgment. However, it also demonstrates the continuing power of the sex/gender binary and the construction of sex – and the law's need to uphold it - that was evident in the *Corbett* case. While legal sexual identity may no longer be determined purely by biology, sex still lingers as a 'truth' – unchangeable and waiting to be discovered by scientific fact. In other words, the constructed nature of sex, as separate from gender, remains. This is apparent in the provisions of the act: a gender dysphoria diagnosis is required, as well as production of gender stability for two years prior to recognition and the promise of gender permanence post-recognition. Moreover, the Act only allows for the recognition of male and female genders. With provisions determining whether a trans* person does in fact, truthfully, have the identity they claim, the Act therefore operates through an 'authentic/inauthentic' trans* framework. The three features of the Act will each be explored below. First, the troubling effects of each will be discussed and the real-life effects they have on trans* individuals will be explored before going onto show how they are indicative of the construction of sex and gender underpinning the law. My analysis will begin by tracing how legal recognition of transgender individuals emerged and the legal thinking around concepts of sex and gender that emerged alongside it. This will begin with a discussion of the state of the law prior to the GRA, beginning with *Corbett,* before moving onto a discussion of the GRA. The chapter will end with the suggestion that a reconceptualization of sex and gender, concepts which underpin the way in

which trans* subjectivity is understood in law, is needed in order to remedy the problematic elements of the current law highlighted.

Terminology

I will be using the term 'trans*' throughout this thesis. To explain this choice, it is important to illustrate what is meant by the words transsexual, transgender and trans*. The literature uses them interchangeably and in many (and frequently) contested ways. Transsexual is often used to refer to individuals who use hormonal and/or surgery technologies to alter their body in ways that may be considered to be at odds with their sex assignment of birth or which may not be readily intelligible in terms of traditional conceptions of sexed bodies. Transsexuals often self-identify within the binary i.e. as either an unambiguous man or as an unambiguous woman. Transgender, on the other hand, is a more ambiguous self-identification. It will be used here to refer to people who do not appear to conform to traditional gender norms by presenting and living genders that were not assigned to them at birth or by presenting and living genders in ways that may not be readily intelligible in terms of more traditional conceptions. By which I mean that the gender presentation may be read as misaligned with the sexed body, either successfully or not. Transgender folk may not seek surgery and/or hormones and may also cross gender in ways which may be less permanent. However, transgender is not simply the 'non-surgical' option. In fact, transgender is both resistance and an alternative to medicine and/or scientific authority over the gender identity. Transgender is not simply deciding not to have surgery but can also mean deciding not to comply with systemic norms and the procedures around sex and gender that they have spurned. As will be explored fully in Chapter three, the contours of each category are increasingly acknowledged as blurred. This is why the term

trans* is useful. It encapsulates both categories and also acts as a nod to the fact that the categories can and do overlap. It is also useful when considering the fact that gender terminology is not one word fits all. The label that works for one person may not work for another. Finally, trans* with an asterisk is useful for the reason that it also signifies the continued push of boundaries regarding the conceptualisation of trans* embodiment. This will become clearer in Chapter two, which introduces the concept of '*becoming',* and an expansive approach to embodiment that includes the complex intertwinement of biology, culture and also time.

The Development of Trans* Law Prior to the GRA

The concepts of sex and gender and how they relate to each other have an impact on the legal regulation of trans* lives.[27] The regulation of trans* lives by law not only controls and manages trans* people, it also produces trans* people. In other words, regulation 'determines, more or less, what we are, what we can be.'[28] The types of subjectivity that law deems legible and recognisable are the types of lives that are liveable. Therefore, how we conceptualise sex and gender has a massive effect on liveable lives. The legal recognition of trans* folk have emerged alongside the medical recognition of trans* persons. Not surprising then, legal thinking around the concepts of sex and gender have very much been influenced by medical discourse. Historically, medical science has taken the view that sexual identity is based on sex which is biological and is fixed at birth. Features that are associated with gender, such

[27] S. Cowan, '"Gender is no substitute for sex": A comparative human rights analysis of the
legal regulation of sexual identity." (2005) *Feminist Legal Studies* 13 pp. 67-96 (p.69)
[28] J. Butler, *Undoing Gender* (Routledge 2004) p.57

as behaviours, attitudes, lifestyle and felt sense of gender are given little to no weight. This medicalised understanding of sexual identity, the construction of sex as biological and as distinct from gender, has been applied to conceptualising trans* identity. As a result of this, prior to the introduction of the GRA, law has been reluctant to provide any means to legally recognise gender identity, insisting instead that one remained the sex they were assigned at birth, notwithstanding and steps taken to physically or socially change sex. Time and time again, the courts upheld the heavily medically influenced test for legal sex as laid down in *Corbett.*

Corbett

The first common law decision to consider the sexual identity claims of a trans* persons for purposes of marriage was the landmark English decision of *Corbett v Corbett*.[29] The influence of the *Corbett* case on legal thinking concerning legal sex cannot be overstated. Despite being a case about marriage, the test for legal sex established in it has been subsequently applied broadly and its influence is still evident in trans* law today. The case concerned the validity of a marriage between a biological man and a post-operative male to female transgender woman. In this decision Ormrod J held that sex is determined at birth and by a congruence of chromosomal, gonadal and genital factors.[30] Since marriage at that time could only be between a man and woman, and because under this test April Ashley was a woman, the marriage was held to be invalid. In addition to saying that sex is biological and fixed at birth, the *Corbett* case also shows that law considered sex and gender to be

[29] *Corbett v Corbett* (Otherwise Ashley) [1970] 2 All E.R. 33
[30] ibid 106[D].

distinct, and that gender is to be ignored in determining legal sex. These three elements of the case will now be considered in more detail below.

The law in *Corbett* quite clearly puts sex at the focus of sexual identity, which is to be determined by biological factors. In determining how the law should deal with the criteria used by medicine when determining sex i.e. chromosomes, gonads, genitals, psychology and secondary sex characteristics Ormond J stated that:

'the law should adopt […] the first three of the doctor's criteria, i.e., the chromosal, gonadal, and genital tests, and if all three are congruent, determine sex for the purpose of marriage accordingly, and ignore any operative interventions.'[31]

Sex is determined by biology and cannot be changed, notwithstanding any gender reassignment surgery that has been carried out. Lord Nicholls describes the gender reassignment as medical operations that merely create fake genitals:

'For men surgery may mean castration or inversion of the penis to create false vagina. For women it may mean a mastectomy, hysterectomy or creation of a false penis by phalloplasty.'[32]

The use of the word false indicate that the courts view the surgery as merely superficial changes to one's body and do not in fact signal a 'true' change of sex. The

[31] ibid
[32] ibid, 98

function of the operations, is to help the patient psychologically, not to alter their sex. As Ormrod states, surgery:

'is, of course, to help to relieve the patient's symptoms and to assist in the management of their disorder; it is not to change their sex.'[33]

It is clear that surgery, in the law's eyes, is carried out not to indicate a real sex change, but to fabricate the trans* subjects body as a way of alleviating the suffering that is taking place inside the mind. [34] The *Corbett* case therefore makes it clear that legal sex is determined at birth, which is decided by biology, notwithstanding any surgical alterations to one's body. In addition, the *Corbett c*ase also indicates that a separation of sex from gender existed in legal thinking. The fact that the court decided that legal sex was fixed at birth and that surgery is unable to alter one's 'true sex' is indicative of the distinction made between 'natural' biological sex and social gender.[35] Law not only ignores any reassignment surgery in its determination of legal sex, it also ignores the individuals social and self-identified gender. With sex at the focus, gender is given little to no consideration. The fact that *Corbett* self-identified as a woman and lived socially as a woman is deemed irrelevant for the purpose of deciding what legal sex she is. Gender is treated as a social factor that is to be trumped by biological sex. As Cowan observes, *Corbett* confirmed that law believes that 'sex is not a matter of choice in law; rather it is an essential biological characteristic.'[36]

---

[33] ibid

[34] K. Norrie, 'Is the gender recognition act 2004 as important as it seems?'. In S. A. M. McLean (Ed.), *First do no harm: law, ethics and health care. (*Applied Legal Philosophy, 2006) pp. 561-572 (p.564)

[35] *Corbett v Corbett* [1971] at p.107

[36] S. Cowan, 'Gender is no substitute for sex', 2005, p.74

Corbett shows then that one's legal sex is that sex which was assigned at birth, based on the congruence of biological factors and that both self-identified gender and attempts to alter ones primary or secondary sex characteristics has no legal impact. The effect of this test on transsexuals is that someone who has undergone surgery to modify his or her body to make it congruent with his or her gender identity has not changed sex and that the gender someone identifies as or lives as socially will be trumped by the biological make-up of their body. Under this test many trans* folk were left in somewhat of a legal limbo; they were living a life different from the one that was being legally recognised. For example, a socially transitioned MtF trans* woman could be living a life as a female for all social purpose but is deemed as a male in law. This lack of recognition clearly affected all areas of life, evidenced in the *Corbett* case by the fact that April Ashely could not marry the woman she loved in her gender. Not only does lack of recognition affect legal areas of folk's lives, it also has the effect of requiring trans* folk to 'come out' repeatedly in day to day life. Moreover, without the authoritative legal recognition behind the 'coming out', it can attract responses of doubt, violence, discrimination and also cause feelings of anxiety, distress and embarrassment.

Bellinger

Corbett was upheld for a number of years following the ruling and the criteria within it was used as the test for determining a person's legal sex. In terms of UK domestic law, perhaps the most significant recent case after *Corbett* and prior to the GRA was *Bellinger v. Bellinger*.[37] The case involved a post-operative male to female

[37] *Bellinger v Bellinger* [2001] EWCA Civ 1140; [2002] Fam 150

transsexual who sought a declaration that her marriage to her husband was valid under the Family Law Act. The case went to court of appeal and then, later, also the House of Lords. In the Court of Appeal judgement, the judges, following *Corbett*, held that the marriage was invalid.[38] Yet, although *Corbett* was upheld, the case features hints that change to the way in which legal sex is to be determined in law was to come. Firstly, the reason for following *Corbett* was not due to the soundness of the reasoning in it but rather due to the reasoning that to depart from *Corbett* would involve a significant change to the law which, it was held, is not for the courts to make but for parliament.[39] Secondly, there was a strong dissent from Thorpe LJ. Thorpe LJ stated that the aetiology of transsexualism is not known but the test established in *Corbett* which stated that three biological features should trump the psychological component may no longer be relevant in current times.[40] Accordingly, the cause of transsexuality may now include biological, physiological and psychological factors:

'in my opinion the test that is confined to physiological factors, whilst attractive for its simplicity and apparent certainty of outcome, is manifestly incomplete. There is no logic or principle in excluding one vital component of personality, the psyche. That its admission imports the difficulties of application that may lead to less certainty of outcome is an inevitable consequence. But we should prefer complexity to superficiality in that the psychological self is the product of an extremely complex process, although not fully understood.'[41]

[38] Bellinger v. Bellinger [2002] Fam. 150, 160
[39] ibid, 177
[40] ibid, 113
[41] ibid at 132

Although he was not in the majority, Thorpe LJ's dissent is significant for the reason that one of his main points - the importance of psychological factors in determining legal status - was subsequently crucial in the ECHR case of *Goodwin v UK* one year later.

Goodwin

Prior to the case of Goodwin, the ECHR granted member states a reasonably wide margin of appreciation in refusing trans* person's claims to recognition. [42] *Goodwin* however, changed this. In *Goodwin*, the applicant, an MtF postoperative trans* woman, submitted that the failure of the UK to recognise her as a female for the purposes of social security, pensions and retirement age was a breach of Art 8, Art 12, Art 13 and Art 14 of the ECHR.[43] The ECHR held that there was a violation of Art 8 and 12. For our purposes, two important developments happened *in Goodwin* which signal a change in legal thinking around the concept of sex and gender that were evident in *Corbett*. Firstly, the judges rejected a biological essentialist test that was established in *Corbett*:

'[t]he Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.'[44]

[42] see *Rees v UK* [1986] 9 EHRR 56; *Cossey v UK* [1991] 13 EHRR 622; *X, Y and Z v UK* [1997] EHRR 143; *Sheffield and Horsham v UK* [1998] 2 FLR 928)

[43] Respectively, these articles covered the right to respect for private and family life; the right to marry; the right to an effective remedy and prohibition of discrimination.

[44] *Goodwin v United Kingdom* (2002) 35 EHRR 18, 83

The judges acknowledged that the *Corbett* test for sex (congruence of genetic and physiological traits) is no longer appropriate. In addition to this, gender and social/psychological traits must also be considered in determining sexual identity. The court's reasoning in *Goodwin* indicated a move away from the test established by Ormrod J in *Corbett* which relied solely on physiological criteria over psychological identity. In other words, gender was no longer being ignored. It must be noted at this point that non-surgery recognition remained to be unrecognised, as *Goodwin* was a post-operative trans* person. However, the readiness of the ECHR to move away from medical and scientific findings as determinative of the legal sex of trans* persons in law hinted that it pre-operative recognition could, in future, become a legal reality. As Rudolf put it, the case 'abandoned the view that medical knowledge about the causes of transsexualism was a determining factor.'[45] In other words, although *Goodwin* was a limited judgement in that it only referred to postoperative transsexuals, it was transformative in that it suggested that recognition law need not be reliant on the authenticity of sex, based on biological factors with little to no consideration of gender:

'[w]hile it [...] remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex, the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. [...] It is not apparent

[45] B. Rudolf, 'European Court of Human Rights: Legal Status of Postoperative Transsexuals' (2003) International Journal of Constitutional Law 1(4): pp.716-756 (721).

to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals.'[46]

The approach taken by the ECHR in *Goodwin* indicated a fundamental shift in the thinking around gender and sex. Significantly, *Goodwin* did not directly change domestic gender recognition law. What it did do, however, is lead the House of Lords in *Bellinger* to declare that domestic marriage law in the UK is incompatible with the ECHR.

Bellinger in the House Of Lords

The *Bellinger* case came before the House of Lords nine months after *Goodwin*.[47] The HOL in this case were faced with the decision of either departing from *Corbett* and applying *Goodwin* or applying *Goodwin* narrowly and upholding *Corbett.* The judges chose to uphold *Corbett* as accurately representing the law of England but declared that the law was incompatible with European Human Right law. The reason for choosing to apply Corbett was not due to the soundness of the biological test established in it, but for the reason that to do so would require a major change to the law.[48] Like the judgement of the Court of Appeal case, the court again stated that this was a job for the legislature, not the court to make.[49] This decision has been criticized by Norrie for its failure to follow a modern approach that was being applied in other

[46] ibid at 82.
[47] *Bellinger v Bellinger* [2003] 2 AC at 467, 467
[48] ibid
[49] ibid

jurisdictions in favour of applying *Corbett*.[50] Despite the questioning of the suitability of the *Corbett* test, the judges in the HOL nevertheless 'deliberately chose to reject the modern approach of the Australian High Court and to follow the earlier English case.'[51] As recently as *Bellinger,* then, law has demonstrated that is believes legal sex is based on essential and fixed categories and can to be determined by recourse to scientific truth:

'[i]ndividuals 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.'[52]

The long-lasting influence of *Corbett* therefore cannot be overstated. Following *Bellinger, Corbett* still ruled. The courts have applied *Corbett* time and time again despite many opportunities to depart. The effect of this is that pre-operative trans* people, following *Bellinger*, were unable to gain legal recognition in their chosen gender.

Discrimination Law Protections

The position of pre-op trans* people was similarly precarious at this time in regard to gaining protection from discrimination. Prior to the introduction of the Equality Act 2010 (the legislation that now governs discrimination is Scotland and the rest of the UK) the Sex Discrimination Act 1975 covered this area of law. However, the

[50] K. Norrie, '*Bellinger v Bellinger: The House of Lords and the Gender Recognition bill.' (2004) Edinburgh Law Review*, pp. 93-99
[51] ibid at p.94
[52] *Bellinger v Bellinger* [2003] UKHL 21 at 477

introduction of this Act in 1975 did not mean that trans people were protected from discrimination; it did not contain any provision for the protection of those who were in the process of gender reassignment. The protection under the SDA was only available to heterosexuals who were able to compare their treatment to someone of the opposite sex. [53] Protection for trans* people against discrimination came only in 1996 with the landmark ECJ ruling of *P v S*, which held that gender discrimination on grounds of gender reassignment is unlawful.[54] Following this case, in 1999 secondary legislation was introduced to the SDA which made it unlawful to discriminate on grounds of gender reassignment in employment.[55] Things moved further still in 2008 when secondary legislation was again introduced which extended this protection to goods and services.[56] The legal meaning of 'gender reassignment' under these provisions included explicit reference to being under 'medical supervision' as part of transition.[57] This meant it was not clear that a trans* person who was pre-operative would gain protection under the legislation. The case of *Croft* illuminated this. In *Croft,* it was initially held by the EAT that an employee who was assigned male at birth but had begun to transition socially was a man. Therefore, the court held, there was no discrimination in his employers preventing use of a female toilet. [58] *Bellinger* was relied upon to determine that *Croft* was legally male despite feminization steps

[53] Sex Discrimination Act 1975, section 1
[54] *P v. S and Cornwall County Council*, Case C-13/94, [1996] IRLR 347
[55] The Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102) amending the SDA 1975 to specifically include discrimination on the grounds of gender reassignment. , in so far as the applicant "intends to undergo, is undergoing or has undergone gender reassignment" (s.2A(1) of the SDA 1975).
[56] Sex Discrimination Act 1975 (Amendment) Regulations 2008, SI 2008/656, regs .2(2) and 2(3).
[57] See Sex Discrimination (Gender Reassignment) Regulations 1999, SI 1999/1102 and Sex Discrimination Act 1975 (Amendment) Regulations 2008, SI 2008/656, regs .2(2) and 2(3).
[58] *Croft v Royal Mail* [2002] I.R.L.R. 851

and social changes she had taken as part of her transition.[59] *Goodwin* was considered but the court ultimately ruled that it was of no use in the present case as *Goodwin* was a post-operative trans* case whereas *Croft* was pre-operative.[60] The Court of Appeal took a more subtle approach and held that gender reassignment protection covered all stages of the reassignment under medical supervision but that it was correct to prohibit use of the female toilet for a period of time during which Ms Croft could use the unisex (disabled) toilet.[61] In other words, trans* people who were under transition were not immediately entitled to be treated as members of the sex to which they aspired. *A* pre-operative trans* woman could be considered a woman for legal purposes, but it is very much dependent on the circumstances to determine the point at which a male to female transsexual becomes a woman, and is therefore entitled to use the same facilities as other women. *Croft* therefore showed a significant limitation of both discrimination law and *Goodwin*: pre-operative trans* people do not automatically get the rights and protections of the gender they self-identify as. Although the case of *Goodwin* was progressive, the cases of *Croft* and *Bellinger* refused to apply it broadly. The positon of pre-operative trans* people remained to be precarious under both areas of gender recognition law and discrimination law at this time.

The GRA however, with its elimination of the surgery requirement, changes this.[62] Pre-operative trans* people can now be recognised in law. However, as will be

[59] *Croft* at para.66.
[60] *Croft* at para.72.
[61] *Croft v Royal Mail* [2003] IRLR 592.
[62] The 2010 also improved the situation of pre-op trans* people. Equality Act 2010 mainly consolidated the previous provisions under the Sex Discrimination Act 1975, but it amended the definition of gender reassignment by removing the need for medical

explored below, the staying power of the construction of sex as distinct from gender and the law's concern in upholding the gender binary is also evident in the introduction of the Gender Recognition Act.

The Gender Recognition Act

Three months after the House of Lords decision in *Bellinger* and on the one-year anniversary of the European Court's decision in *Goodwin*, a draft bill intended to overwrite the rule in *Corbett* and *Bellinger* was published. In April 2005 the GRA 2004 came into force. The GRA introduces a regulatory scheme which allows for the recognition by law of a trans* person in an acquired gender identity. The Act can be seen as a response to the requirements of *Goodwin* and is also the result of a long campaign by the trans* community, in particular the trans* pressure group Press for Change, for legal recognition. Section 9 (1) provides that, on recognition,

'the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).'[63]

The requirements for a successful standard track application under section 2 of the GRA are that the applicant: (1) is over 18 years of age and has, or has had, a diagnosis

---

supervision. The Equality Act could be clearer: although it does not refer to medically supervised, it does refer to 'gender reassignment' and 'transsexual'. These are outdated and confusing terms and work to suggest that only post-op trans* people will be covered. The explanatory notes to the Act, however, confirm that pre-op are covered. See Equality Act 2010*: Explanatory Notes*, August 2010, para 41-43. Accessed at http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/4 [accessed 16 September 2018].

[63] Gender Recognition Act 2004, s.9(1).

of gender dysphoria;[64] (2) has lived in their acquired gender for two years;[65] and (3) intends to continue to live in their acquired gender 'until death'.[66] It is these three requirements in the GRA, that of gender dysphoria, the two year provision and the gender permanence provision that are the focus of the second part of my analysis of the GRA, as well as the fact that only men and women are recognized. All four of these features of the Act will be explored. This exploration will involve both an analysis of the real life effects of the requirements and also how these requirements are indicative of the conceptions of sex and gender that underpin the Act. It will become clear that whilst the Act demonstrates significant changes in legal thinking in relation to sex and gender, the legacy of *Corbett* – that is, the distinction of sex and gender that underpinned the case and the biological understanding of legal sex – remains.

No Surgery Requirement

As noted above, the Act is a response to the requirements laid down by *Goodwin*. Importantly, however, this response is not merely an implementation of *Goodwin* but in fact goes beyond. Recall that *Goodwin* did not require that the UK government change legal recognition law so that surgery was no longer required. Rather, *Goodwin* left the option open. As discussed, the case of *Croft* chose to interpret *Goodwin* narrowly and this could have well been the route that the UK took by choosing to only provide for post-operative recognition. The GRA did not follow this path however and instead goes further than what was strictly required by the European Court. The GRA does not require individuals to undergo any form of body modification prior to

[64] ibid s.2(1)(a)
[65] ibid s.2(1)(b)
[66] ibid s.2(1)(c)

being able to access the protections in the legislation. This feature of the Act is to be applauded on a number of grounds. Firstly, the lack of surgery requirement better captures the reality of trans* lives. Equating trans* with genital reassignment does not in fact reflect the reality of many trans* lives. As noted above, law should make space for trans* person's autonomy and freedom over their gendered lives and reflect the most possible lives. It will do so by representing the lived experience people actually inhabit. The issue with surgery is that firstly, and most simply, many people are medical-phobes and do not want intrusive operations carried out on their body. Halberstam, for example (talking about hormones):

'I watch friends, one after the other, transition, mostly from butch to TG male and I wonder whether I am just sitting on a fence and not wanting to jump. But actually, as a real medi-phobe, I don't see taking hormones, even in small doses as right for me for any extended amount of time.'[67]

Medical procedures are serious and often frightening life events. Like many other medical procedures, the patient will weigh up the pros and cons before they make a decision to receive it or not. Trans* folk's aversion or willingness to such procedures will play a part. Secondly, a surgical requirement is ignorant to intersectionality concerns. Trans* people of colour and trans* folk who are poor experience the world differently to that of white middle class trans* people. It is therefore not enough to focus on trans* recognition across gender differences: race and class must likewise be

[67] J. Halberstam, *On Pronouns,* 2012 http://www.jackhalberstam.com/on-pronouns/ [accessed 9 January 2018]

considered.[68] Poor and coloured trans* people often cannot or do not wish to have surgery, largely due to financial reasons. Many trans* individuals simply cannot afford the surgery. Many of the technologies of bodily reconstruction are expensive and, when not covered by a health care system, are not financially viable options for most trans* people. The NHS in the UK provides surgery for no cost but there are reports that its availability is not consistent across the country. According to Cowan, for example:

'Although surgery is available on the NHS in the UK, it seems that its availability is not consistent across the country; according to Press for Change, many transsexual people are denied surgery because their Primary Healthcare Trust has insufficient funds to support surgical reassignment as a priority treatment.'[69]

Also consider, for example, the fact that in many trans* subcultures sex work is a dominant practice and source of income for poor trans* women, particularly trans* women of colour. For these women, as Bettcher points out, genital reconstruction surgery 'will not necessarily be a desired goal, since this may well cause the loss of a crucial source of income.'[70] The practical focus on surgery obscures the ways in which poor and racialized trans* people view surgery, as compared to white middle class

[68] V.K. Namaste, *Sex Change, Social Change: Reflections on Identity, Institutions and Imperialism* (Toronto: Women's Press 2005);
T. Bettcher, 'Understanding transphobia: Authenticity and sexual abuse', in *Trans*/Forming feminisms: Transfeminist voices speak out*, (ed.) K. Scott-Dixon (Toronto: Sumach Press, 2006) pp.203–210.
[69] S. Cowan, 'We Walk Among You: Trans* Identity Politics Goes to the Movies' (2009) *Canadian Journal of Women and the Law* 21[1] pp. 91-118 (p.113) at fn. 73.
[70] Bettcher, T. "Trapped in the Wrong Theory: Rethinking Trans* Oppression and Resistance," Signs: Journal of Women in Culture and Society 39, no. 2 (Winter 2014): pp. 383-406 (p.401)

people. Finally, financially viable or not, the 'search for harmony does not require surgical intervention' for many trans* individuals.[71] Stonewall UK recently reported that one in ten trans* people do not want any form of medical intervention.[72] Recall from the terminology section that the term trans* is now understood to encompass both those who wish to have surgical intervention and those who do not. A surgical requirement only reflects the reality of *transsexual* individuals, those who do want surgery, and ignores *transgender* individuals, those who may not seek it. Many trans* individuals experience of being trans* does not include a transformative process with regard to their physical body. Not all trans* people feel the need to resort to surgery in order to feel that they inhabit the correctly gendered body. Many are quite happy with their bodies. A positive effect of the GRA then is that recognition is now given to persons with functioning male sexual organs as female and persons with functioning female sexual organs as male. Law is now giving recognition to the reality that individuals are actually inhabiting. Having a surgery requirement would ignore the lives of trans* individuals, broadly defined. The lack of it is a welcomed feature of the GRA and goes some way in achieving what should be the function of law when it comes to gender recognition; that is, to give people freedom and autonomy to live full and developed identities. Legal recognition schemes should not force people to make decisions they otherwise would not have made, nor should it make them doubt the authenticity of their self for choosing not to alter their bodies. [73]

---

[71] A. Sharpe, 'A critique of the Gender Recognition Act 2004' (2007) *Journal of Bioethical Enquiry* 4 pp.33-42 (p.33)

[72] C.L Bachmann & B. Gooch. *LGBT in Britain: Trans Report* (2018), 16 < https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf> [accessed 12 September 2018]

[73] A recent report on the experiences of non-binary people in the UK reported that respondents 'felt their lack of medical interventions, or their lack of desire for medical interventions, meant that they didn't identify as trans.' See V. Valentine.

Not only is the lack of surgery requirement indicative of law better reflecting the lived reality of trans* lives and granting them more freedom and autonomy, it also exposes a shift in legal thinking around the concepts of sex and gender. It has been argued by Cowan that this is due to feminist and queer advancements in theorizing sex and gender.[74] Feminist legal theory succeeded in separating sex from gender.[75] This distinction allowed legal feminists to 'argue for legal or political accommodation, for example, in the context of pregnancy and childbirth, on the grounds that in some ways women are biologically different from men' whilst also arguing 'that many of the perceived differences between men and women, often enshrined in legal texts and discourses, are socially constructed and, therefore, neither the proper basis for legal distinctions nor indeed immune to challenge or alteration.[76] In other words, feminists used the distinction between sex and gender to show that the apparent differences between men and women (that were assumed to be natural and therefore a sound basis for providing differential treatment) were in fact part of gender roles. And because gender roles (ie femininity) were cultural and escapable, as opposed to natural and inevitable, they could therefore be altered in law and practice.

Queer theory has also advanced thinking around sex and gender. Queer theorist Butler, for example, has argued that the gender side of this separation is per formative. [77],i.e., the identity that gender expresses is fabricated. It is a process; a process that

---

Non-Binary People's Experiences in the UK. (2016), 18 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf

[74] S. Cowan, 'Gender is no substitute for sex', 2005

[75] J. Conaghan, *Law and Gender* (Oxford: Clarendon Law Series, 2013) p.19.

[76] Ibid.

[77] J. Butler, *Gender trouble: Feminism and the subversion of identity*, (New York: Routledge, 1990) pp.24-25.

involves 'repeated, iterative performances, ritualized citations which produce and stabilize gender norms and effects.'[78]. Therefore, the general idea is that how we act determines who we are, rather than who we are determining how we act. This conception of gender instils a degree of autonomy into sexual identity and can make way for the creation and identification of genders beyond the binary. As Butler puts it, the conception of gender as performative can open the door for 'cultural configurations of sex and gender [to] proliferate.' [79]

Trans* legal recognition is quite clearly affected by these developments. Sandland, for example, points out, 'it is a distinctly Butlerian approach which has been generalised in U.K. law by the s.9(1) of the 2004 Act.'[80] The separation of sex and gender, and the performative nature of gender, has allowed legal sexual identity to not be solely dictated by sex (the body), but instead by other factors that are associated with the performative nature of gender. The law is no longer equating legal sex with biological characteristics. The biological 'sex' you were born with is no longer dictating the legal subjects' identity. Legal subjects are now given more autonomy and freedom to author their own identity, rather than the body being destiny, as it was under *Corbett.*

With the introduction of the GRA then, the focus of the law in determining legal sex has shifted from sex to gender. Rather than biological 'sex' being the fixed marker of identity, 'gender', the psychological and social, is now recognised. As stated, this is a

[78] J. Conaghan, *Law and Gender,* 2013 at p.105
[79] J. Butler, *Gender Trouble*, 1990, at p.149
[80] R. Sandland, 'Feminism and the Gender Recognition Act 2004' (2005) *Feminist Legal Studies* 13:1 pp.43-66 (p.47)

welcomed change as it now offers the opportunity for trans* people who cannot or chose not to physically alter their body to legally recognise their chosen gender. This is an illuminating example of how important, and useful, theory is in affecting legal developments. Nussbaum has criticized Butler for both her 'exasperating' prose and, most significantly, Butler's version of feminism.[81] In her view, Butler ignores the 'material suffering of women who are hungry, illiterate, violated, beaten' in favor of focusing 'narcissistically on personal self-presentation.' [82]

Butler's work, Nussbaum argues, is nothing more than a passive 'hip quietism'[83]. Taking issue with Butler's theorizing, Nussbaum states that 'gays and lesbians do not achieve legal protection' through intellectual endeavors like Butler.[84] I suggest that Nussbaum undervalues the power of theory to reshape the world. Through a re-conceptualization of the concepts of sex and gender, feminist and queer theorists like Butler have provided the theoretical foundation on which the GRA has based its reform.[85] The substantive and real-life effects of this, for trans* people, have been documented above.

However, although the separation of sex and gender has led to positive legal progress, this very distinction – and the law's need to uphold it - unfortunately also underpins a number of problematic elements of the GRA. Although a biologically focussed

[81] M. Nussbaum, 'The Professor of Parody: The Hip Defeatism of Judith Butler' (1999) *The New Republic* 22:37-45
[82] ibid at p.39
[83] ibid at p.41
[84] ibid at p.45
[85] At the same time, I do not wish to downplay the many other forces that led to the introduction of the Gender Recognition Act, most notably the activism of pressure group Press for Change.

definition of sexual identity is no longer being enforced by law, a stable and – as will be argued, restrictive and uncompromising - definition is nevertheless being enforced. This hinders trans* autonomy and their freedom to identify the way they choose. The GRA and the provisions in section 9 demonstrate that law is still functioning to uphold a 'truth' of sex/gender and that it can be uncovered objectively. The GRA is based on one making that claim that one is in fact a true and authentic transsexual. The provisions contained in section 9 regulate and construct what an authentic trans* person is. Unfortunately, we will see, the particular definition of what it means to be trans* proscribed in the GRA has the effect of failing to recognise all self-identified trans* people while also continuing to pathologize them. Law enforces this definition through requiring that the applicant has or has had gender dysphoria, identifies unambiguously as a man or a woman, intends to identify that way for the rest of their life and has lived the life of that identification, socially, for at least a period of two years. Trans* people, if they want to seek recognition – and the material and psychological benefits that come with this – have no freedom or autonomy to depart from these terms. If an applicant fails to satisfy any of these criteria they are not considered to be 'trans* enough' and therefore will not be granted recognition.

Taking these features of the Act together, it will be argued that despite the move toward queer incorporations (evidenced in the shift in focus from sex to gender by the lack of surgery requirement) the Act remains tied to the troubling theoretical aspects of *Corbett* around sex and gender and their relation to each other. The sex/gender distinction is still in place, leaving sex constructed as stable and immutable. The GRA,

'falls into the same trap of *Corbett*, since it treats transsexuals as subjects to be identified according to a supposedly objective bio political criteria, regulated and treated as mentally disordered and then reassigned into a binary order which itself remains undisrupted.'[86]

The GRA shifts the focus of sexual identity from sex to gender, accompanied by the welcomed effect that trans* individuals who cannot or do not have genital surgery are now recognised. However, although the focus has changed from sex to gender, the binary of sex and gender has remained in place.[87] Whilst a system of recognition that has gender (over sex) as its priority benefits those who wish to change their legal gender without changing their body, it does not help dismantle the idea that there are only two, naturally and exclusively, sexes. In other words, it 'does not in itself aid the long term aim of undermining the dichotomous and binary nature of sex and gender categories.'[88] The problematic effect of this is that while gender is now being interrogated and deconstructed, the perception that sex is a scientific truth and is immutable remains. The 'scientific truth' of sex is that it is stable and binary. The result: any identity outside or beyond the binary is considered to be an anomaly or exception to the binary rule, as Sharpe has similarly argued:

[86] A. Harris, 'Non-binary Gender Concepts and the Evolving Legal Treatment of UK Transsexed Individuals: A Practical Consideration of the Possibilities of Butler' p.68
[87] S. Cowan, 'Gender is no substitute for sex', 2005 at p.79
[88] ibid at p.79

'reform that is channelled through categories other than sex enables law to distribute marginal groups around sex while maintaining intact a traditional and (bio)logical understanding of sex.'[89]

Solely focussing on gender leaves the construction of 'sex' hidden, but there as dimorphic fact nonetheless. To put it another way, we are still relying on a 'particular set of assumptions about the materiality of bodies and the relation this materiality has to gender.' [90] Features of the Act are indicative of this: the requirement of a gender dysphoria diagnosis prior to recognition and the binary, the fact that only men and women can be recognised and the requirement that the applicant remain in their acquired gender 'for life'. The gender dysphoria requirement will be explored first.

Gender Dysphoria Requirement

Section 2 (1) (a) of the Act provides that the GRP must grant the application if they are satisfied that the applicant has had gender dysphoria. Sections 3 (1) and 3 (2) provide that the application must include medical reports which include details of the applicant's diagnosis of gender dysphoria. Gender dysphoria is a mental health diagnosis which is associated with experiencing feelings discomfort or distress because there is a mismatch between one's biological sex and gender identity. There are two problematic effects of the diagnosis that will now be dealt with. Firstly, it pathologizes trans* people and secondly, it misses folk out. Both of these will be

[89] A. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law*. (Great Britain, Cavendish Publishing Ltd., 2002) at p.38.
[90] Hird, M 'Gender's Nature: Intersexuals, Transsexuals, and the ''Sex''/''Gender'' Binary'. (2000) *Feminist Theory*, 1(3): pp.347–364 (p.358)

explored before going onto explore the ways in which this requirement is indicative of legal thinking around sex and gender.

Gender Dysphoria Pathologizes

The GRA is progressive in that it does not defer to medical surgery prior to giving recognition. However, it nevertheless defers to medical criteria, broadly defined. It defers to psychology and psychoanalysis. Transsexualism is therefore medicalised by the gender dysphoria requirement. Transsexualism is not only medicalised, it is also pathologized. Gray has pointed out the link between medicalisation and pathologization:

'Medicalization brings it within the realm of medicine and pathologization renders it abnormal.'[91]

A number of commentators have noted that a gender dysphoria diagnosis perpetuates the idea that transgender desires makes them mentally ill and establishes trans* wishes as pathological.[92] Sandland for example, has stated that

'The GRA … figures the human rights of trans* person as flowing from the medical construction of transsexualism as mental illness.'[93]

---

[91] C. Gray, *A critique of the legal recognition of transsexuals in UK law.* (2016*)* PhD thesis. University of Glasgow < http://theses.gla.ac.uk/7100/ > [accessed 10 January 2018]

[92] See, for example, J Theilan, 'Depathologisation of Transgenderism and International Human Rights Law ' .(2014) *Human Rights Law Review* 14 pp.327–342; A Sharpe , 'A critique of the Gender Recognition Act 2004', 2007 at p.43; R. Sandland, 'Feminism and the Gender Recognition Act, 2004 at p.49; J. Butler, *Undoing Gender,* 2004 at p.76.

[93] R. Sandland, 'Feminism and the Gender Recognition Act, 2004 at p.49

To understand the way in which the diagnosis does this we must look closer at what it actually requires. The definition is not contained in the Act itself but guidance to its definition is found on the NHS website. The medical practitioner who is responsible for diagnosing a trans* individual will use either the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM 5) or the World Health Organization's International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10). All three of these sources will be explored as all three are likely to have an influence on what is considered to constitute gender dysphoria. From the NHS website on gender dysphoria:

'Gender dysphoria is a condition where a person experiences discomfort or distress
because there's a mismatch between their biological sex and gender identity … Some people with gender dysphoria have a strong and persistent desire to live according to their gender identity, rather than their biological sex … In most cases, this type of behavior is just part of growing up and will pass in time, but for those with gender dysphoria it continues
through childhood and into adulthood … Adults with gender dysphoria can feel trapped inside a body that doesn't match their gender identity.'[94]

[94] NHS, *Gender Dysphoria,* 2016 < https://www.nhs.uk/conditions/gender-dysphoria/ > [accessed 10 January 2018]

In DSM 5 the diagnostic criteria for GD in adolescents and adults provides that in order to diagnose there must be:

'[a] marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration.'

In addition, there must be two of the following present:

1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics [...].
2. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender [...].
3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

In addition to the above it is noted that '[t]he condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.' Elsewhere, in the IC-10 transsexualism is described as:

'[d]esire to live and be accepted as a member of the opposite sex, usually accompanied by the wish to make one's body as congruent as possible with one's preferred sex through surgery and hormonal treatment.'[95]

The desire, under this definition, must be present persistently for a period of at least two years. [96] Suffering is clearly a core aspect of GD; the words 'distress' and 'discomfort' are used in both the DSM manual and the NHS definition of the condition. This is an oblique but harsh statement that strips trans* people of autonomy over their identification and makes the identification itself something that is undesirable and in need of authentication. As Nirta observes, the gender dysphoria requirement is 'an insidious way of allowing a subtext which undermines the validity of trans* identity and makes it something objectionable and in need of constant validation.'[97] It is clear from the definition of gender dysphoria that if you have it, there is something wrong with you. Gender dysphoria is 'something one bears rather than something one is.'[98] The message is clear: being trans* is not desirable. It turns desire into disorder and in need of medical attention. It is the negative connotations of the diagnosis that send this message. As Butler observes:

---

[95] ibid

[96] World Health Organization *International Statistical Classification of Diseases and Related Health Problems* 10th Revision (2010) [online version] <http://apps.who.int/classifications/icd10/browse/2010/en> [accessed 10 January 2018]

[97] C. Nirta, *Marginal bodies: Actualising trans* Utopias.* PhD thesis, University of Westminster (2014), p.101 Accessed at <https://westminsterresearch.westminster.ac.uk/item/972vq/marginal-bodies-actualising-trans-utopias>

[98] ibid

'[t]o be diagnosed with [GD] is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis being given at all.'[99]

It should be noted that the act uses the phrase gender dysphoria, as opposed to gender identity disorder and so in some respect the change in language (removal of the word disorder) is an improvement. Despite this name change though, the act of recognition is still posited as curative. Posited as curative, the connotations of correction, adaption and normalization are still there. It assumes that the body and innate sense of gender ought to be aligned and if they are not, there is something wrong with the person. The effect of the gender dysphoria requirement in the GRA is that those who identify as a member of the sex opposite to the sex they were assigned at birth are not thought of as merely exhibiting natural gender variance but rather abnormal gender variance, something that is in need of treatment to alleviate their psychological suffering. The result is that many trans* individuals are subject to stigmatization and shame as a consequence of the diagnosis and it's pathologizing connotations. The stigmatization of trans* people that the diagnosis achieves has been well documented.[100] What is clear from this research is that the stigma that is attached to trans* gender identification being considered a mental health disorder has a detrimental effect, psychologically, on trans* people. Theilan, for example, has documented how the positing of gender variance as a mental illness is the route of many of the problems trans* people face in their day to day lives:

[99] Butler J, *Undoing Gender,* 2004 at p.76

[100] J Theilan, 'Depathologisation of Transgenderism and International Human Rights Law ' .(2014) *Human Rights Law Review* 14 pp.327–342

'the stigma attached to mental illness does have an impact on the health of trans* persons… They face a myriad of problems in everyday life which stem precisely form the fact that transsexuality is not accepted as normal but rather regarded as something unusual, a deviation, a cause for concern – in short, an illness.'[101]

This section has shown how the GRA retains a medicalised and pathologized approach to gender variance that existed back in the 1970s with *Corbett*. Law continues to situate the problem of gender in the minds of the trans* person, rather than in the construction of sex/gender. In other words, the gender problem is 'in the minds of the ill' not in the construction of what is normal and healthy. The construction of normative sex ensures that the gender dysphoria requirement is needed. For trans* people to be recognized in way that does not upset the current gender order, the law positions them as pathological exceptions to the binary.

Before moving on, it must be noted that the diagnosis of gender dysphoria has support among some trans* people. Whilst many share the view above that the diagnosis acts to pathologize and fails to reflect the reality of trans* experience, some trans* folk have nevertheless developed 'what one might call a stance of grudging acceptance towards the status quo: they dislike it, but they do not dispute it.'[102] The gender dysphoria diagnosis currently facilitates access to a variety of medical procedures that, if carried out through a private route would become unaffordable to many. Without the diagnosis trans* people fear that access to trans* specific health care may be adversely affected. Surgery, for example, if viewed as elective rather than necessary

[101] ibid at p.331
[102] ibid at p.328

may not be covered by the NHS. However, the position taken here is that this 'access to healthcare' argument is not convincing. Firstly, the trade-off – that is, gaining access to free healthcare at the expense of submitting oneself to pathologizing language – is not worth it. Many trans* are of the view that pathologization is a small price to pay if it leads to the surgery that they desire.[103] However, this argument assumes (again) the narrow definition of what it means to be trans*. Not all trans* people want surgery.[104] The gender dysphoria requirement affects all trans* people. The above argument does not consider the fact that a significant number of trans* people do not wish, or cannot have, surgery. Recall that transsexuality tends to refer to someone who has a desire to change sex through genital surgery, transgender to someone who may not desire surgery and trans*to both groups. This is important, because pathologization is not restricted to transsexuality, but extends to all trans* persons. A lot of transgender people have no interest in hormone treatment or operations. For example, Stonewall UK recently reported that one in ten trans people don't want any form of medical intervention.[105] The point is that the alleged positive effects of gender dysphoria do not extend to all those persons affected by its negative effects.[106] The group of people affected by trans* specific health care is smaller than the group affected by trans* pathologization by way of gender dysphoria diagnosis. Elliot has critiqued the stance this thesis takes on the matter, arguing that it 'negates' transsexual's desires.[107] I do not wish to do this. Transsexuals (those who do want

[103] J. Butler, *Undoing Gender,* 2004 at pp.75-78
[104] see p.39 above
[105] C.L Bachmann & B. Gooch. *LGBT in Britain: Trans Report* (2018), 16 < https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf> [accessed 12 September 2018]
[106] J. Butler, *Undoing Gender*, 2004 at p.267
[107] P. Elliot, *Debates in Transgender, Queer, and Feminist Theory: Contested Sites* (London: Routledge, 2010) at p.198

surgery) desires are real and their interests are important. However, because being trans* and the desire for an operation are not as closely linked as commonly believed, the health care argument should not be enough to justify acceptance of gender dysphoria requirement. Of course, if the GD requirement is to go, we should first put in place another mechanism that allows trans* folk to access to health care:

'it would be wrong to call for its eradication without first putting into place a set of structures through which transitioning can be paid for and legal status attained.'[108]

I agree. However, as Butler points out, there is no reason that trans*-specific health care should require a diagnosis. The elimination of gender dysphoria should not have to interfere with trans* specific health care. Having a disease is not a necessary condition of being afforded health care. Chapter three will argue in more detail that the best model of legal recognition is one that best gives trans* folk autonomy and freedom to author their own lives whilst at the same time providing them with the protection and rights that are important to them.

The Diagnosis Excludes

As demonstrated, Gender dysphoria implies some level of personal distress and/or discomfort. However, the reality is that many trans* individuals do not feel the appropriate amount of discomfort or distress that is required by the diagnosis. It has been suggested by Whittle that a 'well-adjusted' trans* person would be outside the

[108] J. Butler, 'Undoing Gender, 2004 at p.267

clinical definition.[109] GD ignores the fact that many trans* people do not feel gender dysphoria. Trans* narratives are full of a myriad of other feelings towards gender that are experienced beside just dysphoria. One of which, for example, is:

'gender euphoria, which is a feeling of rightness, completeness, and well-being trans* people sometimes feel when their body or how their perceived reflects what they consider to be their true self.'[110]

Focussing on the distress of trans* people ignores the many other feelings that can often come with being trans*. Being trans* does not always mean experiencing a persistent and vivid revulsion towards aspects of your body and gender, it can also materialise, for example, as having more positive feelings towards the idea of living in another gender. Trans* people today become aware of trans* literature and narratives before they come to perceive or accept themselves as trans*. They, accordingly, do not view dysphoria as being a necessary requirement to being trans*:

'Legal recognition of gender identity – trans, non-binary, or otherwise – should never be dependent upon the experience of dysphoria. It is very possible to have a different gender identity without dysphoria…'[111]

---

[109] S. Whittle, *Respect and Equality: Transsexual and Transgender Rights* (London: Cavendish, 2002). p.20

[110] S.D. Finch, 'These 5 Myths About Body Dysphoria in Trans* Folks Are Super Common – But Also Super Wrong', *EVERYDAY FEMINISM* 2015 < https://everydayfeminism.com/2015/06/these-5-myths-about-body-dysphoria-in-trans*-folks-are-super-common-but-also-super-wrong/ > [accessed 10 January 2018]

[111] V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 77 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018].

As a result of this, feelings of distress around their identity are minimal. Weisse', for example, narrative is as follows:

'I never experience the distress of feeling like I had the wrong body. I just wholly disagreed with the idea of labelling people men and women based on the bodies they have.'[112]

Due to the increasing awareness of trans* issues and ease of access to trans* narratives and literature, more and more trans* folk are aware that it is not their body or minds that are wrong but the sex/gender system that they were born into. Gender dysphoria is therefore no longer an acceptable test for deciding whether someone is trans* or not.

The conception of sex and gender under Gender Dysphoria

The requirement that the applicant must have or has had gender dysphoria diagnosis prior to gaining gender recognition in law is indicative of law's thinking around sex and gender. It will be demonstrated that law is still thinking bodies in terms of the sex/gender distinction and truth of sex, much like it did in *Corbett.* The central tenet of the concept of gender dysphoria is a 'dissonance between sex (the body) and gender

[112] S. Weiss, *3 Reasons It's Totally Valid to Have More Than One Gender Identity*, (2016) < https://everydayfeminism.com/2016/12/valid-more-than-one-gender/> [accessed January 10 2018]

identity (the mind).'[113] The NHS website, for example, describes gender dysphoria as follows: 'there's a mismatch between their biological sex and gender identity.'[114]

In addition, both the DSM and the IC-10 make reference to an incongruence within the patient as an indicator of gender dysphoria. This feeling of dissonance/incongruence assumes that sex and gender are separate entities. It is an incongruence between the body (sex) and the mind (gender). As explored above, there are many trans* narratives that do not feel incongruence or do not believe in distinction between body and mind or physical sex and gender. As Hine points out, many participants in her research felt deeply unsatisfied by the wrong body account.[115] Participants in Hines research state that their gender transition is a much more complex and nuanced process than the wrong body account assumes:

'It's [transition] been a progression. It's never been fixed from the outset and I've never had those overwhelming feelings of being in the wrong body. There's always been fluidity in my feelings.'[116]

The gender dysphoria diagnosis demands a coherent narrative from the trans* applicant. It does not favor ambiguousness, fluidity or uncertainty in relation to gender

[113] S. Hines, *TransForming Gender: Transgender Practices of Identity, Intimacy and Care (*Bristol: Policy Press, 2007*)* p.60
[114] NHS, *Gender Dysphoria,* 2016 < https://www.nhs.uk/conditions/gender-dysphoria/ > [accessed 10 January 2018]
[115] S. Hines, *TransForming Gender: Transgender Practices of Identity,* 2007
[116] ibid at p.65

identity, something that is experienced by many.[117] Moreover, the definitions of the diagnosis all require a degree of gender solidity from the applicant, either of a period of 6 months, two years or from childhood into adulthood. The diagnosis wants to establish that an applicant's sense of gender is relatively permanent and stable.

The requirement of gender dysphoria makes sense when we consider the normative underpinnings of the GRA. Insofar as law functions to uphold the idea that sex and gender are distinct and that there is a stable and unquestionable 'truth' of sex that is to be determined, some sort of method is necessary for determining whether a trans* person really does have the identity they claim to have. The gender dysphoria requirement is the chosen method used by law in the GRA. The gender dysphoria requirement exposes that the GRA is based on the assumption that there is a 'true' sex of the applicant: it is feelings of dysphoria that is the manifestation of that 'true sex' that law demands. As long as sex is assumed to be a stable and objectionable fact, the need for a definition of what it means to be trans* will remain.

The account of what it feels like to be trans* as contained in the gender dysphoria diagnosis is in conflict with queer developments on of sex and gender. Queer

[117] A 2016 survey asking for people's experiences of being non-binary attracted 895 responses from self-identified non-binary people. In this survey, over half (54%) described their gender as fluid. V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 13 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018]. In a recent survey by Stonewall UK, just under half (48%) of respondents describe their gender in a different way from male or female. See C.L Bachmann & B. Gooch. *LGBT in Britain: Trans Report* (2018), 23 < https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf> [accessed 12 September 2018]

developments on sex and gender question the distinction the between sex and gender that posits gender as the performative and sex as the stable and natural given.[118] Queer advancements in how we understand gender and sexual identities can provide the underpinnings of a new recognition model.[119] Once it is acknowledged that there is no truth of sex, law will no longer require such a rigid and prescriptive definition of what constitutes being trans*. The analysis that there is no truth of sex or gender need not contradict or invalidate those narratives of transsexuals who view their feelings of gender as innate, fixed and real. [120]As Serano clarifies, to say that something is constructed is not to say that it is 'not real' or not genuinely felt.[121] What it does mean however is that what it means to be trans* can be refigured so that it does not route through an authentic/inauthentic framework.

Two year requirement

Section (2) (1) (b) contains yet another provision that demonstrates that law is regulating trans* subjectivity through an authentic transsexual narrative, a narrative which is underpinned by problematic conceptions of sex and gender. This section requires that for recognition to be granted, the applicant must have:

---

[118] See, for example, J. Butler, *Gender Trouble,* 1990: Here, Butler undermines the distinction between sex as a natural given category and gender as an acquired socio-cultural category. Butler argues that sex, like gender, is also a socially constructed category which is produced social and cultural practices.

[119] These developments on how we understand sex and gender, and how they have provided fertile ground for the concept of '*becoming*' are explored further in Chapter two.

[120] See, for example, J. Prosser, *Second Skins: The Body narratives of Transsexuality. (*USA; Columbia University Press, 1998)

[121] J. Serano, *Transgender People and "Biological Sex" Myths,* 2017 < https://medium.com/@juliaserano/transgender-people-and-biological-sex-myths-c2a9bcdb4f4a > [accessed 10 January 20180]

'lived in the acquired gender throughout the period of two years ending with the date on which the application is made.'[122]

This provision has the effect of requiring trans* persons to perform gender stability and permanence. If they are unable to do so, recognition is denied. During these two years, applicants must perform their gender in a certain way; in a stable manner that is either unambiguously female or unambiguously male. This pressure can cause fear and anxiety with applicants often worrying that they are not producing gender in a way that is 'trans* enough.' Feelings of not being trans* enough is prevalent within the trans* community. Gendered Intelligence, an online resource for trans* discuss how expectations from within and out with the trans* community can make trans people feel like they are 'not trans enough.'[123] Thus, any shifts or changes felt in their gender identity during this time must be rejected in order to achieve the required stability for recognition. This acts to ensure that it is only the binary male and female genders that exist as they approach recognition. Any ambiguousness in relation to sexual identity is coalesced into a binary framework in this two year period. It is clear that this provision is underpinned by the construction of sex. This requirement

[122] GRA 2004, s.2(1)(b)

[123] See *Trans Identities.* (2018) http://genderedintelligence.co.uk/projects/kip/transidentities [accessed 12 September 2018]. In the survey on non-binary people in the UK, 20% answered 'unsure' and 15% answered 'no' to the question "do you consider yourself to be trans*?" 9% of this group said they answered this way because they felt that they weren't "trans enough". V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 17 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018]. See also D. Chase & J. Catalano, '"Trans Enough?": The Pressures Trans Men Negotiate in Higher Education' (2015) *Transgender Studies Quarterly* (2015) 2:3 pp.411-430.

compels subjects to live in one of two genders only, eliding the complexity and ambiguity of people's gendered selves. This upholds the construction of the binary. The law's desire to preserve and perpetuate this construction - at the expense of allowing more space for people to explore themselves - is again evidence that too little respect is being given to trans* freedom and autonomy in the current regime.

Gender Permanence Requirement

The GRA, through the gender dysphoria requirement and the two-year requirement, constructs a trans* identity which trans* people must align themselves with if they are to gain recognition. In addition to constructing a trans* identity that is pathological, stable and that is within the binary, the GRA also designates an identity which is to be permanent post recognition. Section 2 (1) (c) of the GRA requires that the individual must intend to live in the acquired gender until death. This gender permanence provision of the GRA functions to regulate trans* lives by requiring that their first gender transition remains their only transition. Again, this is a regulation that is underpinned by law's need to uphold particular conceptions of sex and gender, again at the expense of trans* persons' freedom and autonomy. Law is attempting to reproduce a binary gender order despite the fact that the existence of fluid, non-binary trans* lives illuminate how this no longer holds. The fact that law requires permanent - even if apparently non-surgical - gender crossings, shows this. If individuals are to 'change gender', then this transition should be final and irreversible. The Act serves to reproduce a more general legal reluctance to contemplate gender in non-binary ways. In addition, the requirement is not practical, as there is no actual restriction on whether one could apply again for a different gender. Finally, the symbolic power of 'until death' creates a narrative of mistakes. The Act is requiring trans* citizens to

perform (and produce) gender permanence that is at odds with the idea that sex/gender is fluid and unstable, which will be explored further in Chapter two.

Only men and woman recognized

As stated, the gender permanence signifies the general legal reluctance to consider the possibility of beyond the binary gender. This reluctance is most obvious when you consider the fact that the act only recognises male and female genders. The Act allows for a change of gender *within* the binary: any gender that is out with the binary is not recognised. Although the act is evidence of gender being increasingly accepted as having a psychological component, it nevertheless masks sex behind the 'veneer of scientific and, therefore, unquestionable objectivity'[124]. This has the result of forcing people into one of two essentialist binary identities of either 'male' or 'female' and ignores those who consider themselves to be beyond the binary. For instance, one trans* research participant in Hines research describes themselves as follows:

'I am very gendered. I have a lot of gender and that expresses itself in a lot of different ways, whereas other people don't. They stay at one point but with me I'm kind of moving around [...] There's lots of different levels so there's not just one way in which I describe my identity. I've called myself a gender terrorist; I've called myself intersex by design, an intentional mutation, FtM, but not transsexual, and FtM is more about how people perceive me. I call myself a hermaphrodite sometimes. I've been a lesbian or a dyke, I've been a queer dyke. Queer is probably the term I feel

[124] A. Harris, 'Non-binary gender concepts and the evolving legal treatment of UK transsexed individuals: a practical consideration of the possibilities of Butler' (2013) Journal of International Women's Studies. 13(6), pp.57-71. (p.61).

best describes me. I could call myself a queer trannie boy. Everything is qualified in one way or another [laugh].'[125]

The binary underpinnings of the act offer no space to these rich, complex and nuanced narratives. The refusal to recognize them undermines the validity of the identities and helps perpetuate violence, hostility and doubt towards them. Although the law now allows for movement across the binary of male/female, the identities in-between and beyond male and female, such as transgendered, intersexed, gender fluid, bigendered, non-binary and androgynous, remain outside the current framework of recognition under the GRA. The option for those that identify in terms like these are as follows: either jettison recognition completely - and face the risks that come with this - or apply for recognition and give up your specificity, autonomy and subject yourself to pathologizing language in the process. Recognition law should not require subjects to choose between these two unacceptable options. The binary logic of the GRA cannot recognize the diversity of trans* identities as they are variously experienced and expressed. Therefore, rather than widening recognition in relation to gender diversity, the Act instead is ultimately 'a conservative move'[126] which assimilates trans* experience to reinforce the normative gender binary system. Finally, the binary underpinnings of act also have the effect of creating a 'discourse of mistakes' in relation to individuals wanting to change gender more than once.[127] Only men and woman are recognised by the GRA. This, coupled with the reality that transition is thought under the Act as a shift from one gender to the other, with no acknowledgment of the space in between, ensures that gender fluidity, uncertainty or ambiguousness is

[125] S. Hines, *TransForming Gender*, 2007 at p.80
[126] R. Sandland, 'Feminism and the Gender Recognition Act 2004', 2005 at p.43
[127] S. Cowan, 'Gender is no substitute for sex', 2005 at p.93

impossible. Shifts or changes in gender post recognition are therefore considered to be a mistake. As will be shown in the following chapters however, the sex/gender system can be reconceptualised so that a desire for multiple genders, fluid genders, ambiguous genders or beyond the binary gender is accepted as simply another human variance as opposed to pathological exceptions or mistake. Reconceptualised this way, this new sex/gender system can ensure that law functions to give more respect to trans* freedom and autonomy.

Conclusion

The positive and negative implications of the GRA have been explored along with the construction of gender and sex that underpin it, which has been exposed by its terms. What constitutes a 'true sex change' and therefore who is deemed an 'authentic transsexual' has changed in law as the discourse around sex and gender has developed. While the GRA allows for the socially constructed nature of gender to be put at the focus in the determination of legal sex, the construction of sex as dimorphic fact remains. The set of criteria that is laid down in the provisions of the Act are evidence of the law's need to uphold the sex/gender binary. Currently, the terms of the GRA stipulate that the authentic transsexual: is dysphoric and that this has been felt persistently, has a stable gender identity that is within in the binary and intends to remain stable for the rest of their life. It is suggested that this criterion is problematic. It is problematic because firstly, it pathologizes and excludes trans* people from legal recognition. Secondly, it is grounded in conceptions of sex and gender that are no longer justified in light of queer developments on sex/gender and in light of the difficulties and struggles trans* people face in everyday life. A reconfiguration of these concepts is needed to better understand and reflect trans* subjectivity in law and

to allow them to live the life they want to live. The construction of sex and the separation of sex and gender that underpins the Act is in contradiction with queer developments on sexed embodiment. An incorporation of these developments can enable law to disconnect recognition from the claim to authenticity and toward a more transformative and fluid recognition law that can better respect trans* freedom and autonomy over their gender journey. Chapter two introduces the concept of *'becoming'* which will de-essentialize the body and enable a move in this direction.

CHAPTER 2

'becoming'

Introduction

Chapter one tracked the development of trans* gender recognition law in the UK from *Corbett* up until the GRA. The problematic features of the GRA (the requirement of gender dysphoria; the two year provision; the for life requirement and the fact that only men and women are recognised) were explored. It has been suggested that it is a particular conceptualisation of sex and gender and their relation to each other that underpins these features of the act. It is clear that the law, through the regulation and constitutional mechanisms of the GRA is seeking to uphold the gender binary with not enough respect given to trans* freedom and autonomy. Chapter one ended with the view that it is a re-conceptualisation of sex and gender that is needed in order to justify the removal of the problematic elements of the GRA and to move towards allowing people more space to author their own gendered lives. Chapter two introduces the concept of '*becoming*' and explores in detail the ways in which it can re-think the concepts of sex, gender and time. These new concepts can refigure what it means to be trans* in law. '*Becoming'*, by refiguring trans* subjectivity, can ultimately make space for a more nuanced model of recognition and allow for a wider range of gender subjects to be recognised in law. I will use Gatens' critique of the sex/gender binary and show how this provides fertile ground to re-imagine sexed

bodies in law.[128] This re-imagining, it will be shown, calls for the removal of the problematic features of the act discussed in Chapter one and can also offer suggestions of alternative ways of providing recognition to trans* folk in law. Essentially, trans* identities can be awarded recognition notwithstanding any claim to 'authenticity.' In addition to the deconstruction of sex/gender binary, I will also explore how *'becoming'* challenges the construction of the concept of 'time' that is contained in the act, which will also necessitate the refiguring of our conception of trans* subjectivities. A reconceptualization of time, that is; away from 'straight' conceptions of it towards incorporations of queer temporal frameworks, recognises the temporal complexity of trans* subjectivity and can ground a recognition model that better contends with this.

Sex/Gender binary critique

Gatens' critique of the sex/gender binary can be used as providing grounds for the re-imagining of sexed bodies and therefore what it means to be trans*. Gatens' critique is two pronged; she deconstructs sex and also questions the relationship between sex and gender.[129] As explored in Chapter one, feminism succeeded in separating sex from gender which has allowed for important progress in law to be made, to the benefit of both women and trans* folk. Most notably for the trans* community, the separation allowed gender to be put at the focus in the GRA which meant that legal sexual identity no longer need be solely dictated by biological sex. This is evidenced

[128] M Gatens, 'A Critique of the Sex/Gender Distinction' in *Imaginary Bodies: Ethics, Power and Corporeality* (London: Routledge, 1996)
[129] ibid at p.16

in the act by the fact that recognition of acquired gender is granted to applicants without any surgical procedures having been carried out on them. However, despite this undoubtedly welcomed feature of the Act, the separation of sex and gender also underpins a number of problematic elements of the act. The requirement of gender dysphoria, the requirement of gender permanence and the fact that only men and women are recognised are all dependant on the separation of sex and gender. A critique of the sex/gender binary however can provide fertile ground to re-imagine sexed embodiment, what it means to be trans* and therefore challenge the current gender recognition law provisions.

What is sexed embodiment? According to Gatens' theory, as long as we have the sex/gender binary as the starting point in our theorising, the answer to this question is limited to either gender (culture) *or* sex (biology).[130] The latter answer pervaded much of legal thinking from the *Corbett* judgement up until the introduction of the GRA, with the courts holding that legal sex is determined at birth through a congruence of biological features. The former view, that a person's gender identity can be determined without recourse to their body, is now at the focus in the GRA. Historically, sexed embodiment has therefore been deemed to be caused by either primarily biological sex or primarily cultural gender. Both, we have seen, do not adequately represent trans* lives in all their complexity and consequentially do not provide a sound underpinning for trans* recognition law. Neither a purely biological or purely cultural analysis can be a sufficient means of establishing the gender identity of someone. Theorising gender identity in terms of purely biology suffers from biological determinism. Whereas putting gender at the focus of sexed identity leaves

[130] ibid

sex concealed, but accepted as a dimorphic biological fact nevertheless. In other words, 'gender produces the misnomer of a prediscursive "sex"'[131] It 'assumes the existence of sex as some pure thing in itself.' [132] Whilst a system of recognition that has gender (over sex) as its priority benefits those who wish to change their legal gender without changing their body, it 'does not in itself aid the longterm aim of undermining the dichotomous and binary nature of sex and gender categories.'[133] To put it another way, it leaves sex unconstructed. As Sharpe has argued,

'reform that is channelled through categories other than sex enables law to distribute marginal groups around sex while maintaining intact a traditional and (bio)logical understanding of sex.'[134]

These detrimental effects of having sexed embodiment as either sex or as gender were explored in more detail in Chapter one.

Fortunately, sexed embodiment can be alternatively understood in a way that does not require a choice between either sex or gender at the exclusion of the other. The cause of sexed embodiment is much more complex than the binary presumes and therefore can be thought in a way that is not reduced to the simplistic choice between nature or nurture. A number of theorists have convincingly argued that the line between nature and nurture, between biology and culture, between sex and gender cannot be easily

---

[131] J. Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'*. (New York: Routledge, 1993) at p.6

[132] C. Colebrook, 'From Radical Representations to Corporeal Becomings: The Feminist Philosophy of Lloyd, Grosz, and Gatens.' (2000) *Hypatia* 15(2) pp. 76-93 (p.83)

[133] S. Cowan, 'Gender is no substitute for sex', 2005 at p.79

[134] A. Sharpe, 'A critique of the Gender Recognition Act 2004', 2007 at p.38

drawn.[135] These theorists have challenged the oppositions of nature and culture, of sex and gender. Neither solely biology, nor solely culture, it is argued, can provide a definitive truth on what constitutes sexed embodiment. A framework where one supplants or overrules the truth of the other is therefore limited. Rather, sexed embodiment can be explored more productively if we consider it to be both biology and culture acting as figural resources together. Together, because both domains are in fact complexly intertwined and emerge together interactively; the separation of biology and culture is impossible as they interpenetrate. We should not have a definitional separation between 'sex' and 'gender'. Rather, what is needed is an account of them that emphasize instead 'their exceedingly complex interdependent definitional status.' [136] Sex and gender are so interwoven that it is more accurate to talk of them as one thing. [137] Acknowledgment of this entanglement has the result that gender is no longer the focus when seeking to understand trans* lives, as is currently the case in the GRA. As explored in Chapter one, directing attention to the construction of gender has the effect of leaving the assumed naturalness of biological sex undisturbed. It is clear that an investigation of sex and biology, as well as gender, must be brought back into our theorising to fully recognise the complexity of trans* sexed embodiment. Understandably, however, a return to biology – a field which has so often been utilised by law to the detriment of both women and trans* people, including in the case of *Corbett* – has been met with fear and uncertainty. Yet, biology

[135] See e.g. M Gatens, 'A Critique of the Sex/Gender; Hird, M 'Gender's Nature', 2000 Distinction', 1996; G. Lloyd, 'Woman as other: *Sex,* gender and subjectivity' in *Australian Feminist Studies* (1982) 10:4, pp.13-22; E. Grosz, 'Notes towards a corporeal feminism' (1987) in *Australian Feminist Studies* 5:4 pp.1-15.

[136] M. Hird, 'Gender's nature: Intersexuality, transsexualism and the 'sex'/'gender' binary' (2000) *Feminist Theory* 1: 3, pp. 347 – 364 at p.359

[137] L. Bibbings, 'Heterosexuality as harm: fitting in.' in P. Hillyard, C. Pantazis, S Tombs & D Gordon (eds), *Beyond Criminology: Taking Harm Seriously.* (London: Pluto Press,2004) pp. 217 - 235. (p.223)

can be brought back to the focus in our investigations in a way that avoids the biological determinism of the past.

Re-addressing Biology

Feminist writer Frost has explored why feminists may be 'ambivalent and uncertain' towards incorporating biological research into feminism. [138] The same anxiety, it can be said, is felt within the trans* community. This is understandable. Both women and trans* people have worked hard to dispel the 'biology is destiny' logic that has underpinned much of the discrimination and invalidation against both groups. For example, biological determinism has allowed in the case of Corbett, discussed above, for the argument that your gender identity is based on biology and is fixed at birth, with no consideration given to one's self-identified gender or the alteration of one's primary or secondary sex characteristics. [139] It has been used, more recently, to support the argument that post-operative transgender women are actually men.[140] When it comes to re-addressing biology in our theorising, the concern is that the incorporation of scientific findings would result in the reaffirmation of science as 'proper' knowledge. In other words, there is the fear that this move would perpetuate the cultural authority that has so often been given to scientific knowledge in comparison to other kinds of discourse. Many feminists, such as Cornell 'carefully avoid discussion of the biological the natural, and the real as if they in some way

[138] S. Frost, 'Re-considering the turn to biology in feminist theory', *Feminist Theory, 15:3* (2014) pp.307-326 (p.309).
[139] See, for example, Corbett v Corbett [1971]
[140] BBC NEWS, *Germaine Greer: Transgender women are 'not women',* 2015 <http://www.bbc.co.uk/news/av/uk-34625512/germaine-greer-transgender-women-are-not-women > [accessed 10 January 2018]

detract from or mitigate the cultural and political issues at hand.' [141] The success of the GRA for gender recognition, too, is also reasons for ambivalence. Recall that it was cultural deconstructionist arguments that helped carve out recognition for gender in law. The worry is that these developments - and the critical cultural analysis arguments that achieved them - would be overwritten by a turn to biology. To put it another way, the fear is that biological findings could be used to 'deprioritize or give a counterbalance to the dominant forms of cultural deconstruction'[142] that has led to positive legal development for trans* lives.

However, whilst gender being put at the focus certainty had positive legal effects, the negative effect was that an investigation of the body was neglected. The result is a stable, immutable and essentialized body lurking below the surface of the GRA. The critical facilities that have been so useful in our analysis of gender to understand embodiment must now be extended to our turn to science and the body. The body needs to be refigured. Frost points out that in,

'our analyses of how culture shapes bodies, contemporary feminists have developed wonderfully complex figures and tropes for talking about social, political, symbolic, and linguistic forms of inter-relatedness, influence, and association.'[143]

Yet, this critical eye must also be directed to the body in theorizing trans* embodiment in law. We need to develop 'an equivalent set of languages, models, logics, and

[141] Grosz E, *Time Travels: Feminism, Nature, Power* (Durham: Duke University Press, 2005*)* p.77
[142] Frost, S, 'Reconsidering the Turn to Biology', 2014 at p.321
[143] ibid

concepts'[144] to that of culture in order to 'think expansively or incisively across the porous boundaries of cells, organisms, and their environments.'[145] By doing this, we can begin to move away from the body as a constructed spatial and inert figure and towards a figuration of it as an open-ended system; 'as process-oriented figure in which the permeable body continually absorbs and responds to an environment as it engages and changes it.'[146] A number of theorists are taking this nuanced approach to sexed embodiment.[147]

A nuanced approach

There are ways in which we can incorporate biological findings into the theorising of trans* bodies without fear that it will result in a return to biological determinism. Gatens' critique not only involves the deconstruction of sex – i.e. to bring the focus and investigation back onto biology. Rather, it is two pronged; Gatens' also dismantles the sex/gender binary. This dismantling questions 'the distinction between the real body (sex) and its meaningful sexuality.'[148] Taking both parts of Gatens' critique together it is clear that by bringing biological findings back into our focus, we are not simply carrying out a *reversal* of the way we have been theorising sexed

[144] ibid
[145] ibid
[146] ibid
[147] Corporeal and material feminists are moving beyond the matter/representation binary and attempting to think corporeality. See, for example: C. Colebrook, "From Radical Representations to Corporeal Becoming', 2000; Grosz, E *Volatile Bodies: Toward a Corporeal Feminism,* 1994; M Gatens, 'A Critique of the Sex/Gender; M Hird, 'Gender's Nature, 2000 Distinction', 1996; Lloyd; E. Grosz, 'Notes towards a corporeal feminism' (1987) in *Australian Feminist Studies* 5:4 pp.1-15; G. Lloyd, 'Woman as other: *Sex,* gender and subjectivity' in *Australian Feminist Studies* (1982) 10:4, pp.13-22.
[148] C. Colebrook, 'From Radical Representations to Corporeal Becoming', 2000 at p.85

embodiment ("naturally" as opposed to culturally caused). Rather, we are challenging the 'implicit sense of their distinction.'[149] In other words, rather than shifting the balance or dynamic between sex and gender, the separation of them is dismantled. With the distinction eliminated, biology can no longer conceivably be used as a factual resource. Instead, it is used as a figural one. Serrano for example, a trans* woman and biologist, uses biology as a figural resource to allow her to investigate the effect of brain cells and processes on gender development whilst at the same time refusing to accord these scientific findings the status of determinative fact.[150] Citing a number of scientific references to argue that biology does in fact have an impact on gender development, she notes that there is 'some evidence to suggest that our gender identities are influenced by biology.'[151] Yet, although she acknowledges the necessity of investigating the processes of how our brain cells - and the hormone receptors they have - affect sexual development, Serano stops short of concluding that this is the whole story: 'none of us can say precisely what effects these hormones elicit in our brain.'[152] Serano therefore turns to biology as a resource but refuses to conclude that it 'wholly determines our gender, just that it seems to have an influence on it.'[153] Moreover, involved in her research is also an analysis of how 'social gender' has an effect on our biology. Cultural influences impact biology in her research: 'our brains physically change in response to our experiences.'[154] One of the virtues of Serano's research then, is her account of how the biological and the social interact.

---

[149] S. Frost, 'Reconsidering the turn to biology', 2014 at p.313
[150] J. Serano, *Transgender People and "Biological Sex" Myths,* 2017 < https://medium.com/@juliaserano/transgender-people-and-biological-sex-myths-c2a9bcdb4f4a > [accessed 10 January 2018]
[151] ibid
[152] ibid
[153] ibid
[154] ibid

Through displacing the ever-present fiction that biological and social, nature and culture, sex and gender are distinct, we can re-imagine what it means to be alive in this world. As Roberts observes, by tracking 'the complex inter- relations of the biological and the social' we can create new forms of refiguration of what we are as living creatures**.** [155] Through the re-coordinating of our conception of the relationship between concepts, by recognising the developmental interaction between biology and culture, we can radically transform how we view sexed bodies.

Binary Gender

An understanding of sex and gender in terms of *'becoming'* contrasts to how these phenomena are understood in the GRA. The GRA is underpinned by the essentialist construction of sex and the strict demarcation of sex and gender. Whilst the act is evidence of gender being increasingly accepted as having a psychological component, the separation of sex and gender nevertheless masks sex behind the 'veneer of scientific and, therefore, unquestionable objectivity'[156]. These underpinnings of the GRA are exposed by the fact that it is only male and female that are recognised. That is, the Act allows for a change of gender *within* the binary and any gender that is out with or beyond the binary is unrecognisable. The GRA is based on the presumption that bodies can be divided into only two sexes. Any bodies that do not fall easily within this binary are positioned as exceptions and anomalies that are in need of regulation and management. The act lets people change genders but in a regulated and

[155] Roberts, C. 'A Matter of Embodied Fact: Sex Hormones and the History of Bodies'. (2002) Feminist Theory, 3(1): pp.7–26. (p.26).
[156] A. Harris, 'Non-binary gender concepts and the evolving legal treatment of UK transsexed individuals', 2013 at p.61

controlled way that leaves the binary of sex intact and curtails trans* person's freedom and autonomy by limiting who and what gender can be or become. Yet, the insights from Gatens' critique above allow us to contend with the argument that bodies cannot neatly be divided into two distinct sexes. The re-configuration of sex and gender explored above unsettles the biologically based male/female binary that has been used by both medicine and law to distinguish and organise bodies. The body thought as an open-ended organism that continually absorbs and responds to its surroundings is uncontained by the male/female binary which depended on the biological construction of sex as separated from cultural gender. In its current form, the GRA thinks sexual difference though a binary framework. Sex difference, under this binary rule is understood is a *difference of kind.* What I mean by this is that gender identity is,

'constructed by a comparative activity in which male and female are perceived and positioned as alternative categories, so that belonging to one necessarily entails a discourse that highlights non- belonging to the other.'[157]

Under the binary rule of sex difference each category relies on the other to define itself. For example, man is defined as not woman and woman is defined as not man. These guarded binary categories also have the effect of ensuring that trans* identities are placed in opposition to them. That is, the naturalized gender binary also has the effect of defining transgender as not cisgender and cisgender is defined against what is not trans*. Not only does this position trans* and women as subordinate, it also has the effect of eliding everyone's specificity.

[157] S. Linstead, S. & A. Pullen, 'Gender as multiplicity: Desire, displacement, difference and dispersion.'(2007) *Human Relations* 59(9), 1287–310 (p.1288)

However, refiguring the body offers a new way to think about sexual difference. Rather than thinking difference through binaries and hierarchies, a process orientated figure thinks gender as a *multiplicity of difference.* Gender as having a multiplicitous nature breaks free of the constrain of binary sex difference which recognized only male and female and instead considers gender to be a proliferation of processes. Thought this way, gender is opened up so that multiple and variable genders beyond male and female are recognized. Sexual difference need not be constrained to the binary forms in which we currently know them.

Fausto-Sterling recognizes that the body can be divided up into more than two sexes. Her research on variations in sexual morphology shows that the seeming naturalness of the binary sex classification system is untrue.[158] Her research demonstrates that at both the level of the molecular and at the social, the division of bodies into two makes little sense. Biological findings are important in her analysis – she uses them to demonstrate the body can be divided up in five ways – but, crucially, they are utilised on the understanding that they are inescapably intertwined with the cultural. Sterling doesn't just deconstruct sex, i.e. swap the truth of two sexes with truth of five sexes, in her analysis, there are multiple and varied active forces - biological and cultural processes together - that contribute to the development of sex and gender identity.[159] Her research therefore also involves an investigation of the relationship between the 'biological' and 'cultural' phenomena to allow her to use biology as a figural resource.

[158] A. Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality.* (New York: Basic Books, 2000)
[159] ibid

Butler has also argued for the division of bodies beyond the binary. In her book chapter '*What about Hormones*?'[160] Butler explores the widely held view that the existence of hormones supports the division of sexed bodies into exclusively male and female. Proponents of this view argue:

'that there are, minimally, sexually differentiated parts, activities, capacities, hormonal and chromosomal differences that can be conceded without reference to ''construction'''[161]

The immutability of someone's chromosomes has been reiterated in several cases concerning the determination of someone's legal sex.[162] However, the insight that nature and culture are not distinct highlights how this argument is misguided. To say that hormones are unaffected by construction suggests that there is a sense that 'deep within the body there is an untouchable core of biological-ness.[163] In other words, it assumes that there is a natural core that is unreachable and completely distinct from culture. The suggestion that hormones are purely biological assumes a strict demarcation of biology from culture. As we have explored, a re-figuration of the body as constituted by the active force of nature and culture together collapses the distinction between biology and culture and therefore breaks down the male/female binary which depends on the distinction. Butler in her argument against the sex/gender binary has demonstrated that we can never access the 'thing in itself' – in this case

[160] J. Butler, *Bodies that Matter,* 1993 at p.10
[161] ibid
[162] Bellinger v. Bellinger [2002] Fam. 150 (C.A.), at p. 160; Goodwin v United Kingdom (2002) 35 EHRR 18; R v Harris and McGuiness (1988) 17 NSWLR 158.
[163] Esposito, R *Bìos: Biopolitics and Philosophy*, Trans*. Timothy Campbell (Minnesota :University Press, 2008).p.23

hormones - of objective reality. Hormones are not just there, waiting to be objectively discovered. For example, a scientist, with political inclinations, biases and presumptions (ie "cultural" influences) discovered these hormones. After this, they were given a certain meaning, organised in a certain way and then used as criteria to divide the body into two sexes. Hormones, as we know them, are unavoidably a construct. These features have been inscribed with meaning that goes far beyond anything warranted by biology. The particularly sexual meaning that they have been naturally inscribed with has been questioned. Sterling for example, asks:

'Why, then, have hormones always been strongly associated with the idea of sex, when, in fact, "sex hormones" apparently affect organs throughout the entire body and are not specific to either gender?'[164]

Hormones are not naturally sexed. Rather, what happens is that we mark certain chemicals as 'female' and 'male' as:

'a convenient way to describe their involvement in certain sexual reproductive processes, and then we overlook the non-reproductive, and thus, nonsexual functions they direct.'[165]

Shrage adds to this by describing the way in which we ignore evidence and research that suggests that 'sex hormones' are a misnomer in that they also play a role in non-sexual aspects of the body. Consequentially, bodies

[164] A. Fausto-Sterling, *Sexing the Body*, 2000. at p.147
[165] L. Shrage, 'Sex and Miscibility' in *You've Changed: Sex Reassignment and Personal Identity* (USA: Oxford University Press, 2009) at p.181

'become female and male by virtue of the presence of their respective female and male chemicals, and chemicals take on female and male properties by virtue of their presence in bodies we read as female and male.' [166]

In other words, as Shrage observes, 'our sex concepts are logically circular.'[167] What body features and functions we choose to categories as male or female come already intertwined in our ideas around gender. What we anticipate to see is affected by our cultural notions about gender and therefore affects what we end up classifying as characteristics that are sexual.

It is for this reason above – the logical circularity of our sex concepts - that we then find it difficult to explain the presence of 'male' hormones in female bodies and 'female' hormones in male bodies. This finding of circularity is crucial for understanding the earlier critique of law. When faced with the reality that trans* lives may disrupt the sex/gender system, law's response is to explain these bodies away as pathological exceptions and assimilate them into the current gender order. Not only does the naturalised binary have the effect of subordinating women and eliding everyone's gender specificity then, it also positions all genders that are out with the binary as abnormal deviations. Rather than the existence of these bodies making us question the binary rule and consider alternatives to it, law has treated these cases as anomalies that prove the rule. Those who do not fall neatly into either category fail to count as 'bodies' and are deemed less than human. This plays out in the regulation,

[166] ibid at p.182
[167] ibid

control and pathologisation of trans* bodies through mechanisms within the GRA which ignores the need to respect trans* autonomy and freedom in favour of retaining the binary order.

It is clear then, from the problems explored above, that biology must be brought back into our theorising. As explained, the recognition of biology as a useful resource need not require the repudiation of all other forces involved in sexed embodiment. Instead of avoiding biology as a resource in helping to explain trans* lives, we can embrace it. There is no need to be apprehensive of this move as long as the findings are used as figural, not as determinative fact. Using biology as a figural resource acknowledges that it is an active agent in constituting sexed embodiment *whilst also refusing* to accord it some sort of priori status, or a clear-cut determining role. Bringing biology back in does not necessitate us saying that sexed embodiment is biology alone but rather it is both biology and culture, that constitute us as living creatures. In other words, as Sterling puts it, we are '100% nature and 100% nurture.'[168] Once this is acknowledged we can explore the way in which the natural or the biological interacts, transforms and becomes in continuation with the cultural.

'Becoming'

The insight that we are 100% nature and 100% culture refigures ourselves as bio-cultural creatures, immersed in and interactive with both biological and cultural forces acting together. Sexed embodiment rethought this way - rather than through a binary framework - challenges the view that there is a natural and precultural essence of the

[168] A. Fausto-Sterling, 'The Bare Bones of Sex: Part 1 – Sex and Gender' (2005) *SIGNS:*
Journal of Women in Culture and Society, 30(2): 1491–1527 (p.1510)

body that can be uncovered by science. Contrary to scientific understandings of sex, there is no such thing as pure biology. Sex, like gender, is constructed. Butler has shown, for example, how the concept of gender produces sex.[169] That is, the act of seeing only two ways of performing gender produces two biological sexes. The binary sexes are not static and essential entities but rather bodies transform and become *in continuation* with the cultural. Bodies are an open-ended and complex system, they are:

> 'discontinuous, nontotalized series of processes, organs, flows, energies, corporeal substances and incorporeal events, intensities, and durations.'[170]

Bodies thought this way mean that we are now dealing with a subject that is never mired in being but is always in the process of becoming something else. A determinative truth to sexed embodiment, therefore, cannot be uncovered. This is impossible given that the body is constantly changing by virtue of the forces and processes taking place in and around it. The body, then, can better be thought of as a multitude of processes and forces that change over time. It is not a closed and contained organism; it exists as an open-ended system that is affected and produced by many different contingencies in unpredictable ways. It follows that under this conceptualisation of embodiment, gendered '*becomings*' cannot be foreseen nor contained, but should instead be understood as an open and abundant terrain constituted by a multiplicity of active forces. An understanding of sex and gender that underpin the features of the GRA contrasts to how these phenomena are understood

---

[169] J. Butler, *Bodies that Matter, 1993*

[170] E. Grosz, *Volatile Bodies: Toward a Corporeal Feminism (*Bloomington: Indiana University Press, 1994) pp.193–4.

in terms of '*becoming*'. The GRA depends on the essentialist construction of sex and the strict demarcation of sex and gender to recognise only two binary genders. The essentialist construction of sex has allowed the GRA to set the limits on what will qualify as a body by regulating the terms by which bodies are and are not recognizable. Certain factors have been foreclosed or banished from the proper domain of sex - and some have been included to create the binary rule of sex difference. However, gender thought in terms of '*becoming*', gender as a multiplicity creates a new rule for sex difference. Under this rule, gender categories are not strictly demarcated but are instead thought of as open and permeable, the boundaries fluid and shifting. The difference amongst these multiple categories will be thought of as 'shades of difference'[171] rather than as clear opposites as they are under the current binary rule. Moreover, gender transitions will no longer be thought of as merely a movement across the binary or movement across numerous boundaries between multiple identity categories. Rather, gender transitions will be fluid and imperceptible, not clear cut:

'identity is motion, fluidity dissolves boundaries and carries them off in its flood.'[172]

Thinking gender as '*becoming*', as dynamic movement, undermines both the normative construction of bounded categories and the identities that emerge from this construction. '*Becoming*' moves our thinking beyond the binary sexes. It dismantles the sex/gender system in law that is currently constrained by the binary and offers a

[171] Linstead, S 'Gender as multiplicity: Desire, displacement, difference and dispersion', 2007 at p.1305
[172] ibid

radical re-figuration of the body which is in the constant and unpredictable process of change. As we will now see, this does not merely push the body beyond the two sexes, '*becoming'* refigures the body so that a closed conception of identity is impossible.

'*Becoming*' refigures the body as a multitude of processes and forces that change over time. Not only does '*becoming*' re-organise the concepts of sex and gender and how they affect the body, it also recognises the body as being affected by the force of time. Against the notion that the body is spatially indifferent and temporally static, '*becoming*' situates the body in temporal frames, insisting that we conceive of the body as a collection of processes of elaboration and change, both within individual organisms and across generations. No longer inert and ahistorical, the body refigured in terms of '*becoming*' allows for the incorporation of temporal dimensions into trans* embodiment. The temporal complexity of trans* embodiment must now be investigated. Whilst all bodies become in temporally complex ways, we will see that trans* temporalities are particularly salient because they undermine the universality of 'chrononormativity'. Drawing critical attention to the temporal underpinnings of law, and how they contrast with trans* temporalities, might open toward a more transformative model of recognition.

Time

The new conception of the body as an open-ended system not only challenges the sex/gender system but it also disrupts the fallacy that the body is ahistorical, unaffected by time. Subjects do not act on empty time. In other words, not only are natural and cultural forces acting within and around the body but time is also an active

ingredient in its constitution.[173]. '*Becoming*' challenges us to recognise the body as a system that is radically open to nonlinear temporal forces of sensation. Recognising the complexity of time as an active force in *'becoming'* is important. The relationship between law and time should be considered if we are to understand the way in which we are alive.

Law produces and regulates gender identities not only through particular constructions of sex and gender, but also through temporal mechanisms. The construct of time produces particular types of embodied trans* legal subject with 'particular histories, trajectories and futures.' [174] Time is not objective, nor is it an extraneous entity. The widely held assumption that subjects take part in, and act upon, 'empty time' is false. Time is not a neutral or transparent medium from which subjects emerge. Rather, human practice makes time.[175] The reality that time is a construct is a disorientating concept. Much like sex difference, time has been considered to be one of the few seemingly reliable and objective things in life. One explanation given to this is that because we 'experience time as some form of natural progression', we 'fail to realize or notice its construction.'[176] Significantly, not only is time constructed, the way in which it is constructed in law privileges certain ways of life and prohibits others. Forms of temporal experience only seem natural, liveable and doable to those they privilege. Trans* lives are not simply at odds with the normative gender binary

[173] E. Grosz, *Time Travels,* 2005
[174] E. Grabham, 'Governing permanence: trans* subjects, time, and the Gender Recognition Act' (2010) *Social & Legal Studies* 19 (pp.107-126) p.108
[175] E. Grabham, *Brewing Legal Times: Things, Forms, and the Enactment of Law* (Toronto: University of Toronto, 2016) at p.9
[176] J. Halberstam, *In a Queer time and Place (*New York: New York University Press, 2005) at p.5

but are also at odds with normative conceptions of time. [177] For trans* people - who resist normative temporalities - their lives appear to be completely 'out of time'. Law tries to contain and regulate the queer temporalities of trans* lives through temporal mechanisms that are underpinned by normative constructions of time.

I will demonstrate that the GRA operates from particular constructions of time. As will be explored further below, the current conceptions of time embedded in the law fails to reflect the lives of many trans* people. The reason for this is that trans* lives fall completely outside the acceptable temporal schemes that law proscribes. Within the GRA there are temporal mechanisms which are based on particular linear, coherent and predictable temporalities whereas trans* lives spans often follow nonlinear, unclear and unforeseeable life trajectories. The term 'chrononormativity' has been used to describe the way in which bodies are shaped and organized by time.[178] Bodies are linked, or bound, to normative temporal frames or 'narratives of movement and change.'[179] Chrononormativity thus assumes that there is a pre-determined way to live your life, with particular normative schedules shaping and limiting what ways are possible. There are many common temporal frames, including: the path to marriage, the accumulation of health and wealth for the future, reproduction, and childrearing. Notably, these narratives all follow '*straight*' conceptions of time. Straight is used here in two senses of the word: it refers to the reproductive and heteronormative familial and also to the linear and unidirectional.

[177] ibid at p.7
[178] E. Freeman, *Time Binds: Queer Temporalities, Queer Histories*. Halberstam, J and Lisa, Lowe (eds) (USA: Duke University Press, 2010)
[179] ibid at p.4

Trans* subjectivities occur outside the parameters of straight time. Halberstam, for example, observes that trans* people problematize the

> 'the conventional forward moving narratives of birth, marriage, reproduction and death.' [180]

Rather than giving space to these aberrations, law's response is to attempt to bind these queer deviations to normative temporal schedules. The GRA uses three temporal mechanisms to bind bodies to straight temporal frames: the gender dysphoria requirement, the two-year requirement and the gender permanence provision. Through these, it will be shown, law is able to 'shape and determine the possibilities, hopes, and future-scapes of transgendered people.'[181] Again, the rationale here is clear: law is functioning to restrict and produce permissible narratives to ones that follow straight conceptions of time and that are within the gender binary.

Gender Dysphoria

The gender dysphoria requirement is one of three provisions in the GRA that illustrates that access to recognition, and therefore what trans* lives are possible, is controlled through temporal regulations. While the gender dysphoria provision is found in section 2 (1) (a) of the Act, the provision itself contains no definition of the condition. However, the NHS website describes gender dysphoria as follows:

[180] J. Halberstam, *In a Queer time and Place, 2005* at p.314
[181] E. Grabham, 'Governing Permanence', 2010 at p.108

'In most cases, this type of behavior is just part of growing up and will pass in time, but for those with gender dysphoria it continues through childhood and into adulthood.'[182]

The definition of gender dysphoria on the NHS website prescribes a specific temporality for trans* folk to follow and comes in the form of narrative. For trans* people to be recognised as having or having had gender dysphoria, their experience of it must follow the narrative laid out above. The phrase 'Childhood into adulthood' describes the 'maturity narrative' which has been discussed and critiqued by Halberstam.[183] This maturity narrative follows the linear 'emergence of the adult from the dangerous and unruly period of adolescence as a desired process of maturation.'[184] Implicit in this narrative is the understanding that anything experienced prior to the emergence of 'adulthood' is immature, 'a phase' or inauthentic; it is only anything experienced after this transitional period that is considered to be genuine and final. The similarities with how same-sex desire has been perceived at different life stages are obvious. Homosexuality, too, has been theorized 'as a stage in development, a phase, that the adolescent will hopefully pass through quickly and painlessly.'[185] In the same way that same-sex desire is presumed to be a stage or a phase, cross gender identification or ambiguousness is also expected (and hoped) to be a temporary life stage rather than a lifelong commitment. Moreover, the definition also suggests that there are limitations on what feelings will be taken seriously even if felt in adulthood. 'Continues through' suggests that only feelings of dysphoria that have persisted for a

[182] NHS, *Gender Dysphoria,* 2016 < https://www.nhs.uk/conditions/gender-dysphoria/ > [accessed 10 January 2018]
[183] J. Halberstam, *In a Queer time and Place , 2005* at p.4
[184] ibid
[185] ibid at p.174

long time i.e. since childhood and through the transition into adulthood are to be validated. It is suggested that folk that begin to feel gender dysphoria at later stages in life may find it more difficult to convince others of the authenticity of their desires. This illuminates what Borneman has shown in his exploration of how personal histories are not legible unless they exist within a 'state-sponsored time-line.'[186] This provision of the GRA works to ensure that a legible life is only that which adheres to straight time. That is, life trajectories that follow the stable and linear transition of adulthood into childhood, that is underpinned by a heteronormative/reproductive temporal logic, will be privileged. The difficulty, however, is that many trans* narratives involve different temporal experiences of gender:

'As we listen to trans* stories, autobiographies, poems, prose and narratives outside the clinic we notice that they are irreducible to the presupposed chronological progression from a 'terrible-present-in-the-wrong-body' to a 'better-future-in-the-right-body.' Trans* lives are more complicated and nuanced than this temporal sequence indicates.'[187]

If one wants to gain recognition one must mould and alter the accounts of their desires so that they are coherent to law. This requires the trans* subject to flatten out their past experiences into one, true authentic and persistent desire, and a future removed of any regrets. Inconsistencies with an unfaltering and stable desire to be the opposite sex will likely result in a diagnosis not being given. James Morton from the Scottish Transgender Alliance, for example, has reported that:

---

[186] cited in E. Freeman, *Time Binds*, 2010 at p.4

[187] S. Fisher, R. Phillips, and IH. Katri, 'Introduction: Trans* Temporalities' (2017) *Somatechnics*. 7:1, pp1-15 (p.2)

'Panels have been incredibly pedantic about any perceived inconsistencies in the medical reports, which means that people end up extremely upset and feel really invalidated.' [188]

A concern with inconsistency ignores the reality of the instability and unpredictably of gender '*becomings*'. The focus of the law on a coherent narrative precludes the idiosyncratic nature of transition journeys. Dean Spade's narrative, which intertwines his gender desires with his political and intellectual inclinations, for example, would surely not grant him access to the GRA:

'My project would be to promote sex reassignment, gender alteration, temporary gender adventure, and mutilation of gender categories, via surgery, hormones, clothing, political lobbying, civil disobedience, or any other means available. But that political commitment itself, if revealed to the gatekeepers of my surgery disqualifies me. One therapist said to me, "you're really intellectualizing this, we need to get to the root of why you feel you should get your breasts removed, how long have you felt this way?"[189]

Spade's description of his therapist's reaction to his narrative shows that gatekeepers often look for one story and consistency in the gender narrative. Anything else is disregarded or met with suspicion. The power of law acts to ensure that the GRP

[188] Women and Equalities Committee, *Transgender Equality* (2015-2016) (London: The Stationery Office Limited) at para.37 accessed at https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf [accessed 12 September 2018]

[189] D. Spade, 'Resisting Medicine, Re/modeling Gender.' *Berkeley Women's LJ* (2003) 18: pp15-37 (p.22)

favours those accounts that are in line with law's narratives of what it means to be trans* and any accounts that diverge are treated as 'suspect or secondary.'[190] The gender dysphoria requirement, like the gatekeeper in Spade's account, focuses on the length and durability of the desire and ignores the multitude of other factors involved in someone's sense of self. Spade rightfully critiques this focus, challenging: 'Does realness reside in the length of time a desire exists?' [191]

There are many different temporal trajectories of trans* experiences of gender dysphoria and of gender itself. For some, the feeling of distress in the gender they were assigned to at birth is not as persistent or as intense as the diagnosis postulates. And for many, the extreme discomfort did not begin in early childhood. Many trans* folk experience their gender in a non-linear and incoherent time frame that is out of alignment with what the diagnosis is asking for. The diagnosis and therefore the GRA, ignores these alternative narratives with the hope that it will function to force trans* people to alter their experiences so that they coalesce into one easily manageable identity group. This illustrates that temporal governance play a part in the regulation and production of trans* lives.

Two year requirement

Section (2) (1) (b) of the GRA contains yet another provision that forces trans* folk into regulated durations of gender performance and stability. This section requires that for recognition to be granted, that the applicant:

[190] C. Smart, *Feminism and the Power of Law.* (Routledge, London, 1989) p.11
[191] ibid at p.21

'has lived in the acquired gender throughout the period of two years ending with the date on which the application is made.'

It is clear that this requirement is regulating the public life of trans* lives. This provision is often referred to as the 'real life test': during this time the applicant must live their life in a way that is associated with the gender they feel themselves to be. The success of the achievement of this requirement by the applicant will be determined by the GRP who will examine evidence showing that the applicant has presented themselves in a way that correlates with their chosen gender. This provision has been critiqued due to its subjective nature. Jeffreys, for example, has noted that the members of the GRP are people who undoubtedly and inescapably possess their own biases and perceptions of what is the correct aesthetic and behavior associated with male and female genders.[192] The requirement therefore clearly regulates trans* subjectivity through aesthetic judgements, or what Sandland calls the 'public politics of the presentational.'[193] In addition to this, and most important for our purposes, the requirement also signals a regulation of the subject through time. Contained in section (c) is a time period in which the applicant must 'live' as the gender they wish to acquire before their application is considered. Grabham has demonstrated that law, through this temporal mechanism, is attempting to shape trans* agents' 'experiences of their own bodies, and their experience of the "forthcoming"'[194] During this time trans* folk must perform gender stability. Any shifts or changes felt in their gender identity during this time must be ignored, doused or blocked if they want to achieve

[192] S. Jeffreys, 'They know it when they see it: the UK Gender Recognition Act 2004' (2008) *British Journal of Politics & International Relations* 10(2):328-345 at p.333
[193] R. Sandland, *'Feminism and the GRA',* 2005 p.52
[194] E. Grabham, 'Governing Permanence', 2010 at p.113

the required stability for recognition. For example, Sandland has argued that an FtM transsexual who engages in sexual activity as a female during this time may be denied recognition.[195] While this period is a time which is potentially full of hope and anticipation, for many it also brings with it the fear of not being 'trans* enough'. During this time there is the ongoing fear that one is not living one's gendered life in a way that is associated with a man or associated with a woman to such an extent that it is deserving of recognition. This temporal framework compels subjects to live in one of two genders, and acts to freeze their gender '*becomings'*, eliding the complexity and ambiguity of people's gendered selves and curtailing their freedom and autonomy.

Gender Permanence

The gender dysphoria and two year provisions of the Act regulate trans* subjectivities by requiring gender stability. Both provisions require the trans* subject to perform gender in a particular way: they must experience a gender that is different from that assigned to them at birth persistently and that lasts from childhood through to adulthood and they must have lived as that acquired gender for at least a period of two years. If the applicant's current and previous gendered self does not align with these temporal frames proscribed by law, recognition is denied. The gender permanence provision in section 2 (1) (c) of the GRA also functions to regulate trans* lives through temporal mechanism. Whilst the temporal regulation of gender dysphoria and the two year requirement provisions look to the past and current gender embodiments of the applicant, the temporal regulation of the gender permanence requirement comes in the form of a declaration of future intention. This provision requires trans* folk to declare

[195] R. Sandland, 'Feminism and the GRA', at p.54

that they intend to maintain their gender identification 'until death'[196]. It is through this promise, undertaken in the present, that the trans* legal subject's whole future becomes decided and contained. Grabham has argued that this requirement is not simply there to ensure certainty given that it 'goes well beyond any administrative rationale of assisting in the identification of post-recognition trans* citizens.'[197] Rather, it is argued, it is there to secure gender permanence. The for life requirement acts as guarantee to law, from the trans* applicant, that throughout the rest of their lives they will adhere to gender normativity and the gender binary that underpins it. Those that are willing and able to make this undertaking gain access to recognition and those who do not consider legal recognition as marking the end of one's gender journey are denied it. The GRA is demonstrating that law will permit gender transitions from female to male or male to female provided that they are 'final' and 'irreversible.'[198] The new is only allowed if it is recognizable and tied to the known. Faced with the gender flexibility of trans* people, law's response is to allow gender crossings, but in a regulated way that reinforces the binary divide by 'simply effecting a changing of places which leaves the lines of demarcation relatively uncontested.'[199] In other words, law will allow change, or 'the new', but only if it is able to be predicted, anticipated and incorporated within the already existing frameworks. As Grabham correctly points out, this is 'evidence of how critical concepts of gender can be refracted into more normative outcomes through engagement with law reform.' [200]

[196] Gender Recognition Act 2004, section 2 (1) (c)
[197] Grabham, 'Governing Permanence', at p.119
[198] Grabham, Governing Permanence', at p.109
[199] Linstead, S, 'Gender as multiplicity: Desire, displacement, difference and dispersion', 2007 at p.1297
[200] Grabham, 'Governing Permanence', at p.110

In addition, the permanence requirement acts to ensure that the gender transition process takes place at a clearly definable time and has a clear and specific end-point. The current model of recognition for trans* people is imagined as a 'specific moment fixed in space and time when acknowledgement is bestowed upon the individual.'[201] This 'poses the act of claiming recognition as a monumental, one-off event.'[202] Transitions are much more complex than how this provision poses it. Transition is not a one-off event. In addition to genital surgery or attainment of a GRC, transition is also, as Simpkins points out, a bundle of different type of changes:

'everyday concatenations (tuckings, pullings, bindings, wrappings, prickings, gesturings, speakings, clothings, paddings, strappings, comportings, bearings, lookings, posturings, assertings, spacings, affectings, insertings, thrustings, givings, moldings, shapings, framings).'[203]

This series of changes can begin long before approaching the law and often continue long after recognition. This highlights the complexity of trans* embodiment which is in contrast to the way the GRA imagines it. Trans* lives are more complicated and nuanced than what the temporal schedules of law suggest. A recognition model like the GRA freezes and blocks any future gender '*becomings*' and ignores the plethora of ways and stages of transition. Grabham observes that 'it is a gender fixing'; it requires trans* citizens to perform and produce gender permanence in a certain way.

[201] Nirta, C 'Marginal bodies, 2014. at p.130
[202] Grabham, Governing Permanence', at p.110
[203] R. Simpkins, 'Temporal Flesh: Material Becomings' (2017) *Somatechnics*. 7:1, pp124-141 (p.127)

This requirement is at odds with the view taken by many trans* individuals who view their gender as a process of '*becoming*'; as fluid, irredeemably incomplete and beyond the binary. Impermanence, fluidity and future unpredictability is unrecognisable under the current provisions of the GRA. While some trans* folk undoubtedly live with a sense of certainty and permanence and are therefore well served by the GRA, many do not. [204]

While the it is true that recognition provides rights and a significant degree of protection, this comes at the cost of requiring many trans* folk to give up their specificity and any possibility of gender change, evolution or *'becoming'* post recognition.

Grabham has demonstrated that individuals orient themselves in relation to what the law lays out, rather than authoring their experience for themselves. Much 'like that of

---

[204] A number of recent surveys have found that the non-binary trans* population is significant. The national LGBT Survey, published in 2018, had over 108,000 respondents. Of the total sample, 7% identified as non-binary. Amongst trans* respondents, over half (52%) identified as non-binary. Government Equalities Office, *National LGBT Survey: Research Report* , (July 2018), 16 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf> [accessed 12 September 2018];
A 2015 survey asking for people's experiences of being non-binary attracted 895 responses from self-identified non-binary people. In this survey, narratives describe their gender in fluid, incomplete and unstable terms. See V Valentine, 'Non-binary people's experiences in the UK', pp13 -15. See also F Glen and K Hurrell, 'The Equality and Human Rights Commission Note on Measuring Gender Identity' (June 2012) : reported that 0.4% of people who answered a question about their gender identity reported that they identified in another way from a man or woman. (Accessed at https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf .); See also recent survey by Stonewall UK: just under half (48%) of respondents describe their gender in a different way from male or female. See C.L Bachmann & B. Gooch. *LGBT in Britain: Trans Report* (2018), 23 < https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf> [accessed 12 September 2018].

a jumper preparing to jump,'[205] trans* people's actions and desires are molded and altered in anticipation of the forthcoming. This 'orientation to future action'[206] changes trans* folk's experience of becoming trans*. Trans* people gendered '*becomings*' are compelled towards identities that are in alignment with the regulations of the GRA. Lives that experience gender non-conformity coalesce and follow a single predetermined path rather than experiencing their own unique and unpredictable journey. In this sense, the GRA acts to contain folk's future gender '*becomings*' and diminishes the potential variability and richness of trans* subjectivity.[207] Along with the gender dysphoria diagnosis and the two year requirement, the gender permanence provision is further indication that law believes that gendered lives should follow a clear, coherent and pre-determined path. Trans* subjects must orient themselves in relation to the regulations of the GRA if they are to have access to recognition. This orientation can often begin long before direct interaction with the law. The provisions 'require the modification of one's relation to all future gendered action within the life- span'[208]. It therefore affects trans* people long before they interact with the law. The permanence provision, 'obfuscates the lived futurity, and/or becoming, of post-recognition trans* subjects.'[209]

The effect of 'becoming' on the GRA

The effects of the above temporal mechanisms within the act highlight the normative underpinnings of the GRA, this time from a temporal perspective. It is clear that the

[205] E. Grabham, 'Governing Permanence', at p.111
[206] ibid
[207] E. Grabham, 'Transgender Temporalities and the United Kingdom Gender Recognition Act' . in: Davies, B. and Funke, J.(eds). *Sex, Gender and Time in Fiction & Culture,* (London: Palgrave Macmillian, 2011) pp.154-169 (p.158)
[208] Grabham, 'Governing Permanence', at p.123
[209] ibid

Act privileges gender that is stable, develops in a coherent and linear fashion and is binary. '*Becoming*', however, allows us to reimagine the normative underpinnings of the GRA so that a closed conception of gendered identity is impossible. A '*becoming*' conception of gender elides any notion of required permanency and stability and better reflects the reality that people's gendered lives continue to change and develop over time, even after events such as surgery, HRT or attainment of a GRC. '*Becoming*' offers a conception of time, as well as a conception of sex and gender, that is compatible with the variability, fluidity and unpredictability of trans* lives. This new conception of time does not follow any logic but is instead open to the unpredictability of the future. I will use the phrase '*becoming*' temporalities to denote this new conception. '*Becoming*' temporalities 'challenge conventional logics of development, maturity, adulthood and responsibility.'[210] In contrast to the dominant temporal frames under chrononormativity, '*becoming*' time is not concerned with reproduction, family, longevity or the childhood into adulthood narrative in traditional and normative ways. '*Becoming*' temporalities are temporalities that resist, instead of follow, the chronology of progress. In fact, '*becoming'* time rejects any form of pre-set narrative. It recognises that people's lives are not a matter of 'unfolding an already worked out blueprint.'[211] A determinative narrative is declined in favour of a time that is 'outside the causal control that the past exerts over the present and the future.'[212] Queer time is elaboration. It is 'indeterminate, the unfolding and the emergence of the new.'[213] The future is not contained by present but is considered to be full of unpredictable potentiality.

[210] Halberstam, *Queer Time and Place,* 2005 at p.13
[211] Grosz, E *Time Travels,* 2005 at pp.110-111
[212] ibid at p.178
[213] ibid at p.110

A recognition model that incorporates these complex and nuanced temporal frames into its framework must leave behind any mechanisms that seek to control or force people into normative sex/gender classification and life schedules. The gender binary logic, the gender dysphoria requirement, the two-year requirement provisions and the gender permanence provisions must be eliminated so that a more fluid and spacious path for recognition in law can be offered. Recognition law thought this way will not figure trans* lives as something that are in need of management, constrain and regulation. Difference will not be assimilated into prevailing norms but instead recognised and celebrated in all its specificity as a normal variation of human becoming.

Conclusion

Chapter two has explored the concept of '*becoming*' and demonstrated how it challenges the provisions which maintain and regulate the idea of authentic trans* identity which the GRA is currently based on. Whilst the GRA allows trans* people to be recognised formally, it does so in a way that elides much of the richness and ambiguity of their lives. '*Becoming'*, with its focus in imperceptibility and unpredictability, allows for the claim of authenticity to be disconnected from recognition so that fluid, ambiguous and beyond the binary subject positions may be taken up and recognised in law. *'Becoming'* changes how we think of sexual difference. Difference is now thought of as pure difference, as that which constitutes all living matter and therefore is uncontained by the male/female binary. Moreover, '*becoming'* involves the refiguration of the body that is imbued with a temporal complexity. The normative sex/gender framework of the GRA and its normative

temporal underpinnings must be dismantled so that recognition is compatible with the '*becoming*' temporalities of trans* lives. A recognition model based on this refiguration will now be explored in more detail. Instead of attempting to bind queer temporal deviations to normative temporal schedules, and queer sexual identity to normative sex/gender classifications, a fluid and transformative recognition model is offered. Recognition need not be tied to any given authentic identity and it need not be given solely to those with a clear cut and recognizable gender history – but also to those whose gender identifications are in the process of being formed or changing.

Chapter Three

Trans Recognition: Potential Ways Forward*

Introduction

The GRA, it has been argued, gives far too much respect to upholding the gender binary at the expense of granting trans* people the freedom to determine the course of their gendered lives. The rationale behind the GRA – respect for the gender binary- is unprincipled for two main reasons. Firstly, there is evidence that trans* people suffer greatly as a direct result of the terms of the GRA. This was explored in Chapter one. Secondly, both the queer advancements in the theorizing of sex and the concept of '*becoming*' illuminate that the gender binary is not an objective fact. This was explored in Chapter two. Organizing bodies according to the binary logic is therefore unprincipled. Chapter three introduces a new model of recognition that is firstly, responsive to the new ways of understanding embodiment in terms of '*becoming*' and secondly, goes some way towards remedying the problems with the current model. The new model, it will be argued, better respects trans* person's freedom and autonomy which ought to be the objective of gender recognition law. In addition to this principle, other objectives should include the promotion of true equality between cis and trans* people and the ability of law to protect of trans* people from discrimination. Finally, reserved too must be the ability of law to allow trans* people to access trans* specific healthcare. This chapter will show that the new model proposed can achieve all these aims.

Not trans* enough

Chapter one showed that the current legal regime for gender recognition gives too much concern toward protecting the gender binary, at the expense of trans* person's freedom and autonomy. The result is that trans* people are depicted in the Act as a monolithic, homogenous and pathological group, positioned as anomalies or exceptions to the gender binary. Moreover, the ideal of authenticity required by the Act- and the difficulties and pressure to accomplish it – causes significant distress for trans* people. Not only must those that do not or cannot live up to the standard go without the material benefits of a GRC, they also suffer psychologically. The psychological suffering that comes with grounding recognition law in a restrictive definition of what it means to be trans* is illuminated by the myriad of trans* narratives and stories that speak of feelings or accusations of 'not being trans enough.'[214] For example, Sam Dylan Finch who is a writer in the trans* community, has stated that many within the trans* community do not believe that he is trans*:

'by far, the biggest pushback I receive is the accusation that I'm not trans* enough.'[215]

[214] Gendered Intelligence, an online resource for trans* discuss how expectations from within and out with the trans* community can make trans people feel like they are 'not trans enough'. See *Trans Identities.* (2018) http://genderedintelligence.co.uk/projects/kip/transidentities [accessed 12 September 2018]. See also D. Chase & J. Catalano, '"Trans Enough?": The Pressures Trans Men Negotiate in Higher Education' (2015) *Transgender Studies Quarterly* (2015) 2:3 pp.411-430.

[215] Finch, S.D. *5 Affirmations for Trans* folks who don't feel trans* Enough.* (2017) < https://everydayfeminism.com/2017/03/trans*-folk-don't-feel-trans*-enough/> [accessed 10 January 2018]

Finch has explained that their feelings of inauthenticity come from the restrictive and uncompromising account of what it means to be trans* that exists both within and outside of trans* circles:

'if my narrative fails to be typical in any way – I didn't always know, I'm not dysphoric enough, I haven't had enough medical interventions, I'm too feminine, I'm not happy enough with my transition (yes, seriously) – I'm ostracized by folks both within and outside of the community.'[216]

Lack of gender stability (a stability that the GRA requires across its provisions) is used as ammunition by others in refusing to affirm trans* people's self-identified gender and acts to foster feelings of insecurity within trans* people themselves. A recent study on the experiences of non-binary people in the UK found that a number of respondents experienced feelings of not being trans* enough.[217] A lack of persistent dysphoria, gender stability and the fact they still live publicly in their assigned gender were cited as reasons for these feelings. [218] It is fair to say that the legal recognition of trans* people – which requires persistent dysphoria, a two year life test and stable binary gender - influences these feelings of not being trans* enough in the community. A respondent in recent research by the LGBT charity Stonewall, for example, described how interaction with the GRA made them feel inauthentic:

---

[216] ibid

[217] In the survey on non-binary people in the UK, 20% answered 'unsure' and 15% answered 'no' to the question "do you consider yourself to be trans*?" 9% of this group said they answered this way because they felt that they weren't "trans enough". V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 17 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018]

[218] Ibid.

'The Gender Recognition Act allowed me to change my birth certificate, however, the process to do so felt invasive and judged me for not being "trans enough."'[219]

Recognition law is central in the construction and regulation of trans* identity. Trans* folk do not act independently from law. Rather, what law considers possible as recognizable influences trans* subjects to a large extent. The GRA, backed by the power of law, plays a crucial role in asserting how things are by imposing its meaning of events on everyday life. Chapter one showed how the official field of knowledge of law, and the superiority it claims to have, ensures that any alternative or competing narratives of what it means to be trans* are dismissed, doubted or, as Smart puts it, considered 'suspect and/or secondary.'[220] In other words, law uses its power and influence to delimit the kinds of gendered lives possible by ignoring and invalidating the alternative versions that live outside its strict and uncompromising definitions. Law seeps into trans* existence and the development of trans* identities. As such the law not only ensures that those whose gender identities differ from the norm are protected through legislation such as the GRA and the Equality Act, the law also constructs the boundaries of those identities.

From binary bodies to '*becoming*' bodies.

[219] Isaac, 24 (West Midlands) in C.L Bachmann & B. Gooch. *LGBT in Britain: Trans Report* (2018), 21 < https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf> [accessed 12 September 2018]
[220] C. Smart, *Feminism and the Power of Law.* (Routledge, London, 1989) p.11

It has already been discussed that those who choose to engage with the GRA must align themselves with its terms and are therefore regulated and controlled by law. Significantly however, the legal category of trans* regulates not only those whose choose to approach the law. Whilst direct interaction with the GRA can certainly change the experience of being trans*, the influence of law can also manipulate those who keep their distance. Chapter two introduced the concept of '*becoming*' and also demonstrated that individuals begin to orient themselves towards what the law lays out, rather than defining the experience for themselves. The GRA, in this sense, acts to contain folk's future gender becomings. In other words, trans* subject's sense of the forthcoming shapes and regulates who and what they allow themselves to become. Gender expressions that have not yet been realized might never come to fruition. The Act ignores the plethora of ways to be trans*, current and potential, and chooses instead to map-out a template of trans* identity which is stable and authentic. The terms of the GRA, so narrow and uncompromising, leave no room for the fluid, unstable, non-binary and incomplete identities that '*becoming*' opens our eyes to and that an increasing number of people are now identifying with. [221] Chapter two ended

[221] A number of recent surveys have found that the non-binary trans* population is significant. The national LGBT Survey, published in 2018, had over 108,000 respondents. Of the total sample, 7% identified as non-binary. Amongst trans* respondents, over half (52%) identified as non-binary. Government Equalities Office, *National LGBT Survey: Research Report* , (July 2018), 16 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf> [accessed 12 September 2018];
A 2016 survey asking for people's experiences of being non-binary attracted 895 responses from self-identified non-binary people. In this survey, over half (54%) described their gender as fluid. V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 13 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018]. In a recent survey by Stonewall UK, just under half (48%) of respondents describe their gender in a different way from male or female. See C.L Bachmann & B. Gooch. *LGBT in Britain: Trans Report* (2018), 23 <

with the suggestion that the concept of '*becoming*' can help us move away from thinking identity in terms of the gender binary and authenticity/non-authenticity and therefore alter recognition law, that has up until now been based on this framework. A '*becoming*' self is fluid, contingent and has a future uncontained by the present. Legal suggestions will now be offered that are compatible with this '*becoming*' self and that better perform the desirable functions of law stated throughout this thesis.

New Functions of Law

It has been submitted that the legal regime for gender recognition currently concerns itself too much with protecting the gender binary, at the expense of respecting trans* person's freedom and autonomy. The result is that trans* people are depicted as a monolithic, homologous and pathological group. The effects of grounding recognition law in this definition, as well as material legal and administrative effects, are that it contributes to the lack of acceptance and understanding that trans* people face in their day to day lives, as well as feelings of low self-esteem. A less restrictive and burdensome legal recognition model can improve this situation. Evidence shows that trans* people consider legal recognition to be crucial in improving the quality of their lives. In a survey on non-binary identities, a number of respondents spoke about how much they value legal recognition:

https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf> [accessed 12 September 2018]

'Legal Recognition at least makes it possible for people like me to be part of society, to not be on the outside. It is also the best step forwards towards more social acceptance and integration of non-binary identities.'[222]

Legal recognition for trans* people, particularly when it has been denied to them for so long, is a high priority on the list of things that could improve their lives. This chapter will now explore a model of recognition that responds to identity thought of in terms of '*becoming*' and that better respects trans* person's freedom and autonomy, allows them continued access to rights and protections and situates them alongside cisgender identities. It is submitted that a legal regime of gender recognition that allows for self-declaration and that recognizes multiple genders achieves these aims. A self-declaration model will de-territorialize trans* identity: it will acknowledge the body's ability to shift and transition among genders 'without external prompts and approval.'[223] This means that trans* people will no longer face interference by the state in how they choose to live their gendered life. Moreover, the availability of a large number of multiple gender categories allows for more types of trans* lives to be acknowledged in their specificity and ambiguity, particularly fluid identities and those identities that are beyond the binary. This means that trans* people will no longer have to force themselves into categories in order to gain rights. These two components of the new model, taken together, will function to give trans* people more respect and autonomy, situate them alongside cis identities while keeping the rights and protections they currently have access to.

---

[222] V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 79 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018].

[223] J. Veccaro. 'Felt Matters' in *Transgender Studies Reader 2* S Stryker, and A Aizura (eds) (Routledge 2013) p.96

Self-Identification

It is proposed that law should permit individuals to self-identify their own gender for legal purposes without requiring medical certification or a guarantee that their gender identity will remain stable throughout their life. Self-declaration is widely recognized as being international best practice. It has now been adopted in a number of countries, including: Norway, Denmark, Malta, Columbia, Argentina, and the Republic of Ireland.[224] Certain Canadian and America states, like Quebec and Oregon, have also moved this way.[225] Reforming Scotland's gender recognition law to incorporate a self-identification model would therefore bring Scotland in line with international best practice. This would also be in line with Transgender Europe's call for the development of 'quick' and 'transparent' gender recognition procedures.[226] A self-declaration model is supported by international human rights framework: both the European Convention on Human Rights (ECHR)[227] and the Yogyakarta Principles

[224] Scottish Government, *Review of the gender recognition Act 2004: A Consultation,* (2017), 3.21 https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/user_uploads/sct1017251758-1_gender_p4--3-.pdf [accessed 12 September 2018].

[225] Minister for Women and Equalities, *Reform of the Recognition Act – Government Consultation.* (2018), para.42. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf [accessed 12 September 2018].

[226] Resolution 2048 of the Parliamentary Assembly of the Council of Europe resolution calls on all Member States to "develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards…and other similar documents. Parliamentary Assembly of the Council of Europe, Resolution 2048 (2015) 'Discrimination against Transgender People in Europe', 2015. accessible at: http://tinyurl.com/hx9nzzz [accessed 12 September 2018]

[227] In 2015, Resolution 2048 of the Parliamentary Assembly of the Council of Europe (Resolution 2048) expressed concerns that requiring someone seeking legal recognition of their acquired gender to have been medically treated or diagnosed is

advocate it.[228] Finally, a recent consultation on the current GRA in Scotland proposed that recognition law be amended to include a self-identification system. [229]

Although specifics of the model vary from country to country,[230] generally speaking, this type of model focusses exclusively on trans* person's felt sense of gender. In contrast to the medicalized, quasi-judicial process of the GRA, it is more akin to an administrative process. The focus is on the wishes of the applicant, as opposed to relying on intensive analysis by doctors and lawyers. This type of model would therefore decrease the 'intrusive and humiliating' aspects of the GRA in its current

---

a breach of their right to respect for their private life under Article 8 of the ECHR. The resolution calls on all Member States to:
"develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards … and other similar documents". Accessed at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21736&lang=en.> [accessed 12 September 2018].

[228] In 2006, a group of human rights law experts, representatives of nongovernmental organisations and others agreed the non-binding Yogyakarta Principles. Principle 31 asks countries to: "take all necessary … measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex including birth certificates … reflect the person's profound self-defined gender identity" and to "ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned". Principle 31 of Yogyakarta Principles, 2017 accessible at http://www.yogyakartaprinciples.org [accessed 12 September 2018]

[229] Scottish Government, *Review of the gender recognition Act 2004: A Consultation,* (2017), 3.26 https://consult.gov.scot/family-law/review-of-the-gender-recognition-act-2004/user_uploads/sct1017251758-1_gender_p4--3-.pdf [accessed 12 September 2018].

[230] For an overview of how the model works in each country, see Scottish Government, *Review of the gender recognition Act 2004: A Consultation,* 2017 at 2.1 - 5.4.

form as well as being less time consuming and costly, issues that were recently highlighted by the Scottish Government[231] and the Women Equalities Committee.[232]

Although this proposal is similar in many ways to that suggested by the Scottish Government's recent review of the GRA, it diverges in one important way. The recent Scottish Government consultation was in favor of retaining the declaration of intent to stay in acquired gender for life, for reasons that it reflects the seriousness of the event:

'Choosing to apply for legal recognition of your acquired gender is an important life decision. This needs to be reflected in any new self-declaration system for obtaining legal gender recognition.'[233]

This proposal is in agreement that a declaration of seriousness of intent is desirable as it shows that that applicant fully understands the legal consequences of the change in legal gender and acts as a safeguard with legal sanctions if the system is abused. However, there is no need for a statutory declaration to include a for life requirement. [234] The for life requirement has little substantial effect as it does not stop people from

[231] Scottish Government, *Review of the gender recognition Act 2004: A Consultation,* (2017), 3.26
[232] Minister for Women and Equalities, Reform of the *Recognition Act – Government Consultation.* (2018), p.2.
[233] Scottish Government, *Review of the gender recognition Act 2004: A Consultation,* (2017), 3.30.
[234] The response by Stonewall Scotland to the Scottish Government's consultation on the GRA discusses this. See Stonewall Scotland, *Gender Recognition Act: Stonewall Scotland Consultation Response, (*2018), 10. <https://www.stonewallscotland.org.uk/sites/default/files/gra_consultation_response_scotland_final.pdf> [accessed 12 September 2018].

changing gender again given that there are no restrictions on the amount of times someone can apply for legal recognition. As argued in Chapters one and two, the for life requirement and the idea of permanence that it is based on is a mechanism by law to preserve and reassert the gender binary. As the aim of this proposal is to dismantle the binary logic of gender recognition law and to give trans* people more freedom and autonomy, then this requirement must go.

Self-Identification and '*becoming*'

Chapter two demonstrated that the sex/gender binary is not a principled basis for recognition law and argued that the concept of '*becoming*' was useful in re-conceptualizing embodiment. Insights of becoming have illuminated us to the fact that the self is never knowable or settled, but rather it is constantly involved in processes of *'becoming'*. Our identities are not static; they are open-ended, variable and unpredictable. This alternative conception does not square with the conception of gender in law that is routed through a stable sex/gender binary framework. A *'becoming'*-self forces us to think gender differently. '*Becoming*' highlights how there is no truth of the self and, following this, there is no truth of gender. Therefore, there can be no metaphysical account of gender. In other words, the indeterminacy and contingency of the self means that the meaning of gender cannot be regarded as fixed or static but is instead constantly changing and evolving.

Law's rationale for deciding gender has up until now, relied on the presumed objectivity of the gender binary. That objectivity has been proven false.[235] As such,

[235] See, for example, A Fausto-Sterling. 'The Five Sexes', 1993 at p.23 and J. Butler, 'What about Hormones' in *Bodies that Matter,* 1993 at p.10 discussed in detail in Chapter two.

gender recognition routed through the gender binary is deeply unprincipled. Trans* theorists have pointed this out:

'in absence of an agreement on a definitive metaphysical account of sex, states have an ethical responsibility to give trans* people self-identification.'[236]

This proposal is in agreement with the above statement. Self-identification is the only principled way in which the state can assign gender; to do otherwise would be an unjustified restriction on people's freedom and autonomy over their lives.

Self - Identification and Freedom and Autonomy

Given the lack of agreement on exactly what gender is, the current legal system that places 'experts' to decide the gender of someone is unprincipled and unduly restricts people's autonomy and freedom. As Meyeda points out, for someone to force their own interpretive assessment of someone else's gender upon them is 'an infringement on the person's autonomy.'[237] Principle 3 of the Yogyakarta Principles similarly highlights the link between having one's gender identity recognized and respecting their freedom and autonomy:

'Each person's self-identified … gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.'[238]

[236] G, Mayeda. 'Who do you think you are' in *You've Changed: Sex Reassignment and Personal Identity (*USA: Oxford University Press, 2009) at p.201.
[237] ibid
[238] Principle 3, The Yogyakarta Principles (2007). https://yogyakartaprinciples.org/principle-3/ [accessed 12 September 2018]

It is clear that self-identification is wound up tightly with someone's sense of liberty and agency. The ability to describe one's own identity and have that validated by law is greatly desired and highly valued by trans* people. In a recent survey exploring non-binary trans* experiences in the UK, a respondent described the privileges (that are so often taken for granted by identities that are not marginal) that could come with legal recognition:

'if we had legal recognition –oh my, the thought is so exciting – I wouldn't have to constantly justify the nature of my existence to almost every single person I meet. I could be free to be who I am with public bodies, my doctor, everyone.'[239]

Narratives like this illuminate the emotional burden that trans* people suffer daily in hiding or altering who they are out of fear. They also highlight the potential that a self-identification model has for improving the current reality of trans* lives.

Place Alongside Cis Identities

In current law trans* people are recognized in their chosen gender only if they apply to the GRA and satisfy certain requirements. Trans* people must commit time and effort if they want to be recognized for who they are. They have to allow themselves to be analyzed, scrutinized and often humiliated before they are awarded legal recognition. Cis people, on the other hand, are granted recognition automatically and

[239] V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 79 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf

without qualification.[240] This contributes to the idea that perpetuates much of society: that trans* people are less than that of cisgender people.

A self-identification model like the one proposed here, however, recognizes all genders, both cis and trans*, in the same way. Neither, under this model, are required to subject themselves to analysis by law or medicine. A self-identification model which refuses to offer differential treatment in recognition between cis and trans* people can recognize that all identities are to be taken to be natural and paradigmatic genders. It recognized that differential treatment is no longer justified.[241]

The trans* activists campaign in Ecuador, which sought to connect trans* self-identification with cis gender self-identification, appeared to move in a similar direction. Ecuador trans* activists, instead of asking for rights from the state, proposed a system where the state would ask *everyone,* once they get to a certain age, what gender they would like to be registered as on the system. This type of system, as Halberstam explains, refuses to demand justification from trans* people:

'[it] takes the onus off the trans* person and puts it back onto the system, and shows us the way in which the system has presumed things that it should never have presumed.'[242]

---

[240] T. Bettcher., 'Trans* Woman and meaning of Women' in *The Philosophy of Sex: Contemporary Readings, 6th Ed , Halwani, R et al. (eds). (*London: Rowland and Littlefield, 2015*)* at p.245

[241] ibid

[242] J Halberstam, 'Jack Halberstam - Trans**: A Quick and Quirky Guide to Gender Variance' NYU Florence Youtube Channel, 2017. At 1h 22mins. < https://www.youtube.com/watch?v=quvWUlus6ao > [accessed 10 September 2018]

The aim in this campaign was to create a recognition system where everyone is subject to the same treatment.[243] Ecuador activist's proposal is therefore an example of a system that is changing the terms by which gender is registered. Both cis and trans* identities are subject to the same gaze from the law in the activist's proposal. It therefore made steps toward situating trans* and cis identities alongside each other, as opposed to in opposition.

Challenges to Self-Identification

While there are numerous advantages to the adoption of a self-identification model, there are also a number of challenges. When moving away from expert designations of identity, there are two main issues. Firstly, the effect this may have on discrimination law and healthcare must be considered. Secondly, there is also the concern that conflicts around who has the right to call themselves a particular gender could arise, particularly in the context of access to certain services such as access to safe spaces. I will show, however, that these issues can be dealt with.

1. Discrimination Protections

Gender reassignment is currently used as grounds for discrimination under the Equality Act 2010.[244] If gender becomes self-identified, this may affect the protections afforded under this Act. There is no doubt that this would be undesirable:

[243] J. Halberstam, 'Jack Halberstam - Trans**: A Quick and Quirky Guide to Gender Variance' NYU Florence Youtube Channel, 2017. At 1h 22mins. https://www.youtube.com/watch?v=quvWUlus6ao > [accessed 10 September 2018]

[244] Section 7.

gender, after all, will continue to be a relation of inequality notwithstanding any moves toward self-identification.[245] It is submitted however, that discrimination protections can be retained. Cooper has convincingly argued that amending the GRA so that the state no longer assigns people's gender will not necessarily mean that trans* people can no longer use gender or gender reassignment as a ground of discrimination.[246] Cooper cites religion and sexuality as examples of areas in which law becomes involved when needed even though it does not assign religious or sexual identities to people.[247] Cooper suggests that the regulation of gender can become similar to these domains of law and therefore de-certifying gender need not necessarily mean de-regulating gender. Law can continue to recognize and regulate gender decisions. Changes to the GRA do not mean that trans* people can no longer be protected from discrimination; legal tools such as the Equality Act can continue to be used to ground people's claim for discrimination.[248]

It is suggested, however, that Equality Act be amended to improve clarity. While changes to the GRA need not hinder trans* people's ability to access discrimination protection, the increased recognition of non-binary identities proposed in this thesis may require the Scottish Government to discuss with the UK Government whether any amendments are required to the 2010 Act. [249] Although the introduction of the

---

[245] J. Conaghan, *Law and Gender* (2013) pp. 77-80; V. Munro, *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart Publishing, 2007) pp.132-43.

[246] D Cooper and F Renz, 'If the State Decertified Gender, What Might Happen to its Meaning and Value? ' [2016] 43(4*) Journal of Law and Society*, 484.

[247] Ibid at p.488

[248] ibid

[249] Whilst the GRA is largely devolved, the 2010 Act is largely reserved and therefore any proposed changes to it will need to be discussed with Westminster. An Order can be made under section 104 of the Scotland Act, which allows UK

Equality Act removed the need to have medical supervision to gain protection, the exact scope of the Act on first reading is far from clear. It refers to 'transsexual' and 'gender reassignment' which are outdated terms that work together to suggest that only post-operative trans* people are covered.[250] The explanatory notes make it clear that this is not in fact the case.[251] However, it has nevertheless created the mistaken belief that the Act only provides protection to post-operative trans people. [252] A broader definition of who is protected from discrimination would therefore make the responsibilities and rights under the Act clearer and more certain.

2. Access to Healthcare

Chapter one explored how the diagnosis of gender dysphoria has support among some trans* people. The reason being that it facilitates access to a variety of medical procedures that if carried out through a private route would be unaffordable to many. Without a medical model of transgender legal recognition, trans* people fear that access to health care may be adversely affected.[253] In other words, if trans* specific treatment is founded on a psychological disorder as opposed to a desire or personal preference, then it is more likely to receive public funding. Surgery, for example, may come to be viewed as elective rather than necessary and therefore cease to be covered by the NHS. However, as Butler points out, there is no reason that trans*-specific

---

ministers to make consequential provision following an Act of the Scottish Parliament.

[250] Minister for Women and Equalities, Reform of the *Recognition Act – Government Consultation.* (2018), p.24.

[251] Equality Act 2010*: Explanatory Notes*, August 2010, para 41-43. Accessed at http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/1/4 [accessed 16 September 2018]

[252] Minister for Women and Equalities, *Reform of the Recognition Act – Government Consultation.* (2018), p.24.

[253] J. Butler, *Undoing Gender,* 2004 at p.265.

health care should require a diagnosis.[254] The elimination of gender dysphoria should not have to interfere with trans* specific health care. Having a disease is not a necessary condition of being afforded health care.[255] Of course, if the GD requirement is to go and steps are to be made toward a self-identification model, we should first put in place another mechanism that allows trans* folk access to health care:

'it would be wrong to call for its eradication without first putting into place a set of structures through which transitioning can be paid for and legal status attained.'[256]

What is argued then is that legal recognition need not be tied to trans-specific health care. Moreover, the NHS must move towards incorporating a richer and more nuanced understanding of trans* identities, particularly fluid identities. This approach of changing the medical professionals approach to providing access to trans* healthcare will also require that doctors begin to read wider than medical accounts of trans* lives. [257] Medical professionals must be more informed of trans* experiences. Medical accounts of trans* embodiment must be displaced with open trans* life stories and by diverse embodiments of gender. For example, if someone changes their mind halfway through hormones this will no longer be scrutinized and considered to be an inconsistency or a mistake[258] in their identity but rather as a part of their complex gender becoming. Medicine needs to shed it pathologizing tendencies towards trans*

[254] ibid at p.267
[255] ibid
[256] ibid
[257] J. Halberstam, 'Jack Halberstam - Trans**: A Quick and Quirky Guide to Gender Variance' NYU Florence Youtube Channel, 2017.. < https://www.youtube.com/watch?v=quvWUlus6ao > [accessed 10 January 2018].
[258] S. Cowan, 'Gender is no substitute for sex', 2005 at p.93

people. The success of this, I think, depends on the effort that goes into bridging the gulf between how the trans* community understand their own narratives, their own experiences, their own bodies, and the way the other communities understands them.[259] Increasing medical knowledge of trans* lives aside, what is clear is that trans* legal recognition need not be routed through a medical route.

3. Access to Safe Spaces

There is a particular and specific concern around proposed changes to the GRA that has been taking up much of the mainstreams media's time. The concern is that changes to the GRA that allow trans people to self-identify will have an adverse impact on women-only safe spaces (such as refuges, rape crisis centers, prisons and hospitals).[260] This view is based on some damaging misconceptions. Firstly, the process of obtaining a GRC is purely for the sake of updating one's birth certificate to reflect one's true gender. This process already exists and so there will be no impact on the access trans* women have to these spaces. Trans* people are not required to show a GRC on entering these spaces. Secondly, access to spaces and services is dealt with

[259] Attempts are being made to do this. See for example B. Vincent, *Transgender Health – a practitioners guide to trans healthcare* (Jessica Kingsley Publishers 2018)

[260] See for example S. Craven, 'Women must not be silenced in the debate on gender identity' *The National* (19 January 2018) http://www.thenational.scot/news/15865387.Women_must_not_be_silenced_in_the_debate_on_gender_identity/; E. Harding 'Women WILL be allowed to bar transgender people from female-only changing rooms in toilets and swimming pools' *The Daily Mail* (24 June 2018). https://www.dailymail.co.uk/news/article-5880533/Women-allowed-bar-transgender-people-female-changing-rooms-toilets-ministers.html [accessed 12 September 2018]. J. Turner, 'Trans Rapists are a Danger in Women's Jails' *The Times* (8 September 2018) https://www.thetimes.co.uk/article/trans-rapists-are-a-danger-in-women-s-jails-5vhgh57pt; See also J. Kirkup, , 'Why was a Transgender Rapist put in a Women's Prison?' *The Spectator*'(7 September 2018) https://blogs.spectator.co.uk/2018/09/why-was-a-transgender-rapist-put-in-a-womens-prison/

under the Equality Act, not the Gender Recognition Act. Trans* persons, already have a legal right, protected under the Equality Act, to access these spaces and be respected in their gender identity. Any changes to the GRA would not create a new right for trans* women, who reject medical transitions, to enter women-only spaces.

Self-declaration has in fact been the basis for access to many of these spaces – rape crisis centers and women's refuges - for years.[261] Contrary to public and mainstream media fears, this has not undermined the safety of these spaces for other women. Rather, as LGBT charity Stonewall points out, it has enabled these services to support the diverse range of vulnerable women who need their services and support.[262] Indeed, many 'women's only spaces' organizations, including Scottish Women's Aid, Rape Crisis Scotland and Zero Tolerance, have publicly voiced their support to the proposal by the Scottish government to introduced self-identification:

'All violence against women organizations that receive Scottish Government funding provide trans-inclusive services. The requirement for trans inclusion plans has been in place for six years, and has not given rise to any concerns or challenges of which we are currently aware. Rather, trans women have added to our movements through their support, through volunteering, and as staff members of our organizations.'[263]

---

[261] Stonewall Scotland, *Gender Recognition Act: Stonewall Scotland Consultation Response, (*2018), 38. <https://www.stonewallscotland.org.uk/sites/default/files/gra_consultation_response_scotland_final.pdf> [accessed 12 September 2018].

[262] ibid

[263] Engender, 'Frequently asked questions: Women's equality and the Gender Recognition Act' (2018). Accessed at https://www.engender.org.uk/news/blog/frequently-asked-questions-womens-equality-and-the-genderrecognition-act/ [accessed 12 September 2018].

The proposed changes to the GRA in this thesis, which will allow trans* people to have their self-identified gender legally recognized, will not have an adverse impact on women-only safe spaces. The very organizations being painted as 'at risk' by potential changes to the law already operate on a self-identification policy. The government needs to catch up with them.

Cooper has pointed out that changes to gender recognition law will pose challenges for organizations: 'changing the law so people might legally hold multiple, non-binary, evolving gender identities creates complex and striking challenges for a range of bodies and activities.' [264] While a discussion of all of these issues[265] is out with the scope of this thesis, what is clear is that different types of organizations and bodies will require different and nuanced responses. Sharpe, for example, has written about the risk of putting trans women sexual offenders in female prisons. Her analysis shows that focusing on biological gender obscures the real issue and the best possible responses. Women prisoners are subject to violence from both cis women and trans* women fellow inmates and also by prisons guards. Therefore, removing trans* women from female prisons will not stop female prisoners being assaulted, which is surely the main issue. In other words, the suggestion that we ought to exclude all trans* women sexual offenders from female prisons masks other important issues such as the fact that fellow cis prisoners and prison guards also commit these offences. Removing trans* women from female prisons will not stop female prisoners being assaulted. The solution to problems like this lies not in state assigned gender status

[264] D. Cooper and F Renz, 'If the state decertified gender', 2012 at 489.
[265] See D. Cooper, 'De-certifying Gender', 2012. note 22 and notes 50-52 for detailed discussion of these issues.

which puts a blanket ban on all trans* people from certain spaces, but in proper and robust risk assessment of all female prisoner's/rape crisis center attendees etc. There will be different responses to this issue for different institutions and organizations. What is clear is though is that the blunt tool of biological gender is inadequate to deal with these issues. Freeing access decisions from a concern over biological sex can allow for more principled decision making which can be informed by a clear and robust assessment of the present danger trans and cis women pose to others. In case of gender identity, organizations can recognize gender identity in ways that are more responsive to why it is important in that situation. While it is clear that different spaces and organizations will require unique responses, due to the protections of Equality Act, however, the number of areas where the rules of an organization or body trump trans* people's gender identification will likely be very few. Currently, under the Act, trans* identities are protected unless covered by one of the exceptions.[266]

Power and Privilege

The access to spaces debates highlight that for the individual freedom of self-identification to work, it must come together with communities that are built around open-reflexive-identities for recognition to be realized. In other words, for self-identification to function properly, all identities must begin to embrace their own self as '*becoming'*; that is, contingent and unstable:

'An ability to affirm what is contingent and incoherent in oneself may allow one to affirm others that may or may not 'mirror' one's own constitution.'[267]

[266] The Equality Act 2010, section 7

[267] J. Butler, *Giving an Account of Oneself* (USA: Fordham University Press, 2009), 41.

Of course, asking cis men and cis women to embrace their own self as '*becoming*' - as something that is contingent and unstable - may be difficult given the investment and apparent privilege that many men and women receive from their stable gender identifications. Many cis men and women are heavily invested in, and receive privilege from, their gender identification and so demanding them to give it up may be met with opposition. Yet, it will be argued that a strict gender binary is not only detrimental to gender non-conforming individuals, but also to cis women and cis men. Both cis men and cis women have an interest in ensuring that the gender binary is dismantled. It does not serve either of them. Firstly, it is the gender binary and the idea that men and women are meaningful categories of difference which legitimizes women being regarded as inferior to men and therefore being treated as less than them (for example being subject to sexual violence and being paid less). Feminism has pointed out that gender is an oppressive system that produces unequal norms, ways of being and statuses. A social regime that has a strict binary of man and woman allows men to exploit the social hierarchy that exists between them to dominate and control women. It is the strict gender binary that ensures the continued marginalization of women. If women want to challenge the inequality between men and women then dismantling the gender binary that constitutes and sustains it should be a goal.

Moreover, the power that the patriarchy promises men is false. While men as a social group have power, many individual men feel powerless.[268] Masculinities scholarship has shown that the privilege that comes with being a man, by virtue of the gender

[268] N.E. Dowd 'Masculinities and Feminist Legal Theory', *in 23 Wis. J.L. Gender & Society* (2008) p.209

hierarchy - also comes with harms.[269] It can therefore reinforce and strengthen the commitment of this proposal to deconstructing the binary.

The reason for this is that masculinities, like the gender binary, is constructed. Masculinity is not universally felt amongst men. Privilege is not monolithic; it is unevenly distributed and it exists differently in varying forms and contexts. Most men, a lot of the time, fail to live up to the high standard of what constitutes being a man. Pursuing masculinity is an ongoing process that men experience and construct daily in establishing their place. And they will always fall short. The construction of men, like the construction of what it means to be trans*, is so strict and uncompromising that few, if any feel that they live up to it. Attributes frequently associated with being a man (leadership, strength, self-reliance, dominance, heroism, attraction to women) also come with expectations and limits that greatly affect their identities and lives. The self-esteem of men is firmly tied to their ability to perform masculine traits. While gender roles have fortunately been challenged and opposed throughout the world by feminist movements, patriarchal values still remain deeply embedded in our society. Men have internalized these gender norms that are predicated upon self-reliance and dominance and failure to uphold these traits fuels mental health issues. The result is that many men suffer fear, isolation, anxiety and anger – manifesting in, for example, the high suicides rate of males.[270] We can convince those that currently receive some benefits from the gender binary that it is also causing great harms. It is in men and women's best interest to support trans* efforts to dismantle the gender binary and to

[269] ibid

[270] Samaritans, 'Suicide Statistics Report 2017' (Report, 2017), p.6. accessed at < https://www.samaritans.org/sites/default/files/kcfinder/files/Suicide_statistics_report_2017_Final.pdf> [accessed 16 September 2018]

rearrange power relationships along more equitable lines. Men and women can and should seek relief from the gender struggle.

Multiple Gender Schema

In addition to allowing people to self-identify in their chosen gender, this thesis proposes a system that recognizes multiple gender identifications. An increasing number of trans* people in Scotland gender identify beyond female or male classifications. [271] The current recognition model provides no recognition to these individuals. Amending recognition law to include non-binary identities is necessary to safeguard the mental, physical and emotional wellbeing of those people, to give them freedom and autonomy to live the gendered life of their choosing and to move towards social and legal equality in society between trans* and cis people.

---

[271] A number of recent surveys suggest that the non-binary trans* population is significant. The national LGBT Survey, published in 2018, had over 108,000 respondents. Of the total sample, 7% identified as non-binary. This was over half of those that identified as trans*. Government Equalities Office, *National LGBT Survey: Research Report* , (July 2018), 16 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf> [accessed 12 September 2018];
A 2015 survey asking for people's experiences of being non-binary attracted 895 responses from self-identified non-binary people. In this survey, narratives describe their gender in fluid, incomplete and unstable terms. See V Valentine, 'Non-binary people's experiences in the UK', pp13 -15. See also F Glen and K Hurrell, 'The Equality and Human Rights Commission Note on Measuring Gender Identity' (June 2012) : reported that 0.4% of people who answered a question about their gender identity reported that they identified in another way from a man or woman. (Accessed at https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf .); See also recent survey by Stonewall UK: just under half (48%) of respondents describe their gender in a different way from male or female. See C.L Bachmann & B. Gooch. *LGBT in Britain: Trans Report* (2018), 23 < https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf> [accessed 12 September 2018]

Along with self-identification, the recognition of non-binary identity is becoming international best practice. The third gender marker of "X" has already been introduced in Canada[272] and in New Zealand[273] on official identification documents, including passports. California has also recently introduced non-binary recognition policies[274] and the German Constitutional Court recently acknowledged legal categorization outside 'male' and 'female'.[275]

Addition of 'X' Identity marker

Exactly how to include non-binary identities is challenging. One possibility is to enact a third or 'X' gender marker which can accommodate persons who do not or cannot self-identify as a man or woman. This is the route taken by the jurisdictions cited above and is the path being taken by a number of non-binary persons in Scotland who are currently litigating for it. [276]

---

[272] W Strong, 'Transgender N.W.T., residents can now change birth certificates to reflect gender", *CBC News* (15 July 2017). https://www.cbc.ca/news/canada/north/nwt-transgender-legislation-changes-1.4206782 [accessed 16 September 2019]

[273] New Zealand Government, 'What you need to renew or apply for a passport – Information about Changing Sex/Gender Identity' (21 February 2017). < https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/> [accessed 16 September 2018]

[274] Transgender Law Centre, 'TLC Backs CA Bill to Create New Gender Marker and Ease Process for Gender Change in Court Orders and on State Documents' (26 January 2017) https://transgenderlawcenter.org/archives/13524 [accessed 16 September 2018].

[275] BVerfG, Order of the First Senate of 10 October 2017 - 1 BvR 2019/16 - paras.1-69. Accessed at http://www.bverfg.de/e/rs20171010_1bvr201916en.html [accessed 16 September 2019]. <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/10/rs20171010_1bvr201916en.html>

[276] L. Brooks, 'Legal recognition for non-binary people planned in Scotland', *The Guardian (9* November 2017)

There are few issues with this route, however. Firstly, the single addition of an 'X' gender marker would be under inclusive. It would be under inclusive in the sense that it would be consolidating all identities outside or beyond male and female together. This is inappropriate as this is in fact a diverse, varied and sometimes conflicting group of people. One category representing all these people does not recognize the specificity of all the gender identities that would be subsumed under it. A respondent to a survey on non-binary identities summed this point up well:

'Only having 'non-binary' might not be helpful either for some people who may want more specific words used for their gender.'[277]

Secondly, it would be over inclusive for the reason that many beyond the binary experiences, such as those that consider themselves to be fluid, explicitly reject any notion of fixed or stable categories. Respondents that took part in a recent study on the experience of non-binary people in the UK stated that they thought that having only three categories would not be enough.[278] A marker of 'X' will therefore not represent these people in an appropriate way.

Finally, while this option would achieve the aim of formally recognizing, in law, someone's chosen gender, employing a third or 'X' category leaves the gender binary firmly in place at the normative centre.[279] The simple addition of one additional

https://www.theguardian.com/society/2017/nov/09/legal-recognition-for-non-binary-people-planned-in-scotland, [accessed 10 January 2018]

[277] V. Valentine, 'Non-binary people's experiences in the UK', 74

[278] ibid.

[279] M. Hird (2000) 'Gender's Nature: Intersexuals, Transsexuals, and the ''Sex''/''Gender'' Binary'. Feminist Theory, 1(3): pp.347–364 (p.359)

gender marker will not displace male and female as the sole paradigmatic genders. Individuals who are marked as 'X' will continue to be considered as exceptions to the binary rule. This is the view of Barrs who has stated that it is unlikely that the hierarchy of gender will be dismantled by the simple addition of a third gender. What is instead likely to happen is that X will continue to be considered apart and subordinate to male and female.[280] To be awarded gender recognition and thus be legitimized as a member of one's self-identified gender does not necessarily mean that trans* people will become accepted in society. For real transformation, legally and socially, a new gender recognition model must disrupt the binary and gender hierarchy. This will not be done if the experiences of trans* people are continued to be thought of as atypical and the naturalized binary is left unquestioned. A new recognition system must recognize all multiple trans* identities as the norm rather than as exception. While a self-identification model described above will go some way towards remedying the pathological tendencies of the current system, this will not itself eliminate the image of trans* identities as exceptions to the natural binary rule in the public imaginary. The simple addition of an 'X' marker will similarly not do this.

The third gender, or 'X', option highlights the difficulty of including new identities into the current recognition system. The radical transformation of trans* lives, legally and socially, will not happen unless beyond the binary identities are recognized in their specificity and in a way that recognizes them as full members of society, to the

[280] G. Baars, 'The Politics of Recognition and the Limits of Emancipation through Law', *Critical Legal Thinking,* 2017 < http://criticallegalthinking.com/2017/11/30/politics-recognition-limits-emancipation-law/ > [accessed 10 January 2018]

same extent as cis identities. Cis identities, it is useful to remind ourselves, are recognized automatically and without qualification as *the* paradigmatic genders. They are exclusively the ideal, typical and natural examples of gender identities. This needs to change. A new recognition model, to be truly transformatory, must problematize the status of the normal; it must displace cis gender subject positions as the sole occupants of the natural and paradigmatic centre. The current normative assumptions of the current legal recognition model will only be disturbed by the reality of trans* lives if it is amended so that they too are considered to by typical, natural examples of gender variance. Scheman has pointed this out in her essay 'Queering the Center by centering the Queer':

'Whether or not, or to what extent, the sex/gender system is disrupted by the gender experiences of transsexuals depends on the extent to which those experiences are thought of as paradigmatic.'[281]

The stability of cis gender identities at the centre explains why the existence and reality of trans* lives have continued to be explained away as exceptions or anomalies to the binary rule:

'In our current system, cases that do not meet the criteria of the two-sex system tend to remain exceptions to the rule, mere anomalies that may give us pause about

[281] M. Scheman, 'Queering the Center by Centering the Queer: Reflections on Transsexuals and Secular Jews' in *Shifting Ground: Knowledge & Reality, Transgression & Trustworthiness* (London:Oxford University Press, 2011), 137

the accuracy of our criteria but in no way destroy the very concept for which those criteria are to serve as the test.'[282]

A system that recognizes trans* lives but does so *in this way* will do little to improve their lives socially. I will show, however, that we can include trans* identities in a way that situates them alongside cis identities at the normative centre. I propose a model that rejects the binary, hierarchies, strict divisions and borders and instead embraces the fluidity, ambiguousness and becoming of all identities.

Multiple Gender Schema

It is proposed that law should permit individuals to self-declare their own gender for legal purposes and for self-identification to not be limited to 'male', 'female' or 'X'. This thesis proposes a system that acknowledges a much larger variety of identity categories. Principles 3 and 31 of the Yogyakarta Principles maintain that states should 'take all necessary legislative, administrative and other measures to fully respect and legally recognize each person's self-defined gender identity' [283] and that 'everyone, regardless of their sex, gender, sexual orientation, gender identity or sex characteristics, has the right to legal recognition and access to identity documents that

[282] Zirilli, L. *Feminism and the Abyss of Freedom. (*USA: University of Chicago Press, 2005)
), 42.

[283] International Commission of Jurists. 'Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.' (2007) http://www.yogyakartaprinciples.org/principles_en.htm [accessed 16 September 2018]

are true to their self.'[284] Whilst international framework like this does not explicitly call for the inclusion of a specific number of gender identities, it is submitted that a large number and wide variety is necessary to ensure that people's self-identified gender identity are fully 'respected', 'recognized' and 'true to self". Elsewhere, other international bodies mention the importance of including more than three options for people to identify with. The World Professional Association for Transgender Health (WPATH) released a statement in 2017 supporting the inclusion of multiple gender identities for legal gender recognition:

'WPATH recognizes that there is a spectrum of gender identities, and that choices of identity limited to Male or Female may be inadequate to reflect all gender identities. An option of X, NB (non-binary), or Other (as examples) should be available for individuals who so choose.'[285]

Whilst there is yet to be a jurisdiction that has adopted this type of gender system, a multiple gender scheme was put in place by Facebook in 2014 where the company introduced more than 70 new gender options in the UL.[286] The new gender options include androgynous, trans*, trans* woman, trans* man, transsexual, pangender, bi-gender, agender, polygender, and cisgender. Significantly, Facebook has left the list

[284] International Commission of Jurists. 'The Yogyakarta Principles plus 10 (YP+10)' (2017) http://yogyakartaprinciples.org/principles-en/yp10/ [accessed 16 September 2018].
[285] K Gnudson, 'WPATH Identity Recognition Statement' (2017) https://www.wpath.org/newsroom/global-impact [accessed 16 September 2018]
[286] R William. 'Facebook's 71 gender options come to UK users', *The Telegraph* (27 June 2014) http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html [accessed 10 January 2018]

open to change, with the option for people to add genders that are not yet on the list.[287] Facebook - by creating a more descriptive, explanatory and affirming concept of trans* gender identities - is therefore an example of a recognition system that is responsive to the deconstruction of gender by feminism, queer theory and '*becoming*'. An open-ended list of multiple identities can be responsive to the idea of sex as being open-ended process, elaboration and unpredictable.[288] Facebook, by allowing people to identify as ways beyond the binary has opened up possibilities for gendered life.

Multiple Gender Scheme and '*becoming*'

A multiple gender is consistent with the '*becoming*' self. In contrast to organizing bodies according to the sex/gender binary rule, the concept of '*becoming*' introduced in Chapter two offers an alternative way to understand bodies and therefore change how they are categorized in law. Under the binary rule, bodies are conceptualized as inert, stable and passive. Under this conception, non-binary and fluid genders are either inconceivable or treated as exceptions to the binary rule. In contrast to this conception of bodies, '*becoming*' understands all bodies as fluid, malleable and constantly open to change, with the boundaries and hierarchies between different bodies unclear and ambiguous. This can open up for the possibility of categorizing bodies in an alternative way.

[287] ibid

[288] Steven Whittle when asked to comment on the Facebook gender list in a recent interview suggested that more could be added and more still in future. See Durham University 'Gender, What Future Does it Have? Professor Steven Whittle', *YOUTUBE* at (1h 18m), 2015 < https://www.youtube.com/watch?v=lap2DLdI8Vs > [accessed 10 January 2018]

Bodies can be organized into more than one, two or even three categories. The research of Fausto-Sterling for example, has showed that we can 'revamp our sex and gender system' by dividing bodies into five sexed categories as opposed to two.[289] Her research shows that absolute binarism breaks down at the social and biological level. At the level of the former, she produces evidence of the existence of third, fourth and even fifth genders in social and cultural groups.[290] In terms of the biological, she shows that sex is a continuum: 'there are many graduations running from female to male.' [291]

This continuum of gender, Sterling asserts, can be sorted into more than two categories. [292] Her research has shown that between and beyond the categories of male and female there is a significant amount of people that have mixed and matched primary and secondary sex characteristics.[293] For example, there are people that have ovaries and some male genitalia.[294] And there people that have testis and some female genitalia.[295] There are actually many other ways in which typically male and female characteristics can be mixed and matched.[296] Contrary to what the law currently

[289] A Fausto-Sterling. *Sexing the Body: Gender Politics and the Construction of Sexuality.* (New York: Basic Books, 2000), 79.
[290] A Fausto-Sterling. 'The Five Sexes: Why Male and Female are not enough.' *The Sciences* (New York Academy of Sciences 1993), 23.
[291] Ibid, 20.
[292] Ibid.
[293] ibid, 21.
[294] Ibid.
[295] ibid, 21.
[296] Other examples include people with, what is known as, Androgen insensitivity syndrome. This is where a person who is genetically male (has one X and one Y chromosome) is resistant to male hormones (androgens). As a result, the person has some or all of the physical traits of a woman, but the genetic makeup of a man. See C.F. Sullivan 'Gender Verification and Gender Policies in Elite Sport: Eligibility and "Fair Play"' (2011) *Journal of Sport and Social Issues* Vol 35 (4), pp. 400 – 419.

suggests then, there are many more graduations of sex than two. Sterling talks of five sexes but she also says that we could have many more.[297] It just depends on what criteria we use to distinguish and categorize.[298] The reason we categorize bodies into two distinct sexes is not because of some biological imperative or fact but because of societies need to keep the order of binary gender necessary and natural:

'But why should we care if a 'woman,' defined as one who has breasts, a vagina, a uterus and ovaries and who menstruates, also has a clitoris larger enough to penetrate the vagina of another woman? Why should we care if there are people whose biological equipment enables them to have sex "naturally" with both men and woman? The answers seem to lie in a cultural need to maintain clear distinctions between the sexes.'[299]

This instability of sex categories shown by researchers such as Sterling, and the fluidity and open-endedness of all bodies that '*becoming*' suggests, allows us to explode and proliferate the categories of male and female into many more. This, Sterling points out, requires that ambiguity be permitted.[300] An ambiguous system is similar to the type of system that Scheman also imagines. Drawing inspiration from the way in which Jewish identity is understood, Scheman imagines a sex/gender system that is less restrictive and less clear than the one we currently have:

[297] A Fausto Sterling, 'The Five Sexes' (2000), 24
[298] ibid
[299] ibid
[300] ibid

'A sex/gender system in which, by contrast, not only natal members are paradigmatic, in which paradigm status can be shared with transsexuals, would be much more like the system that underwrites Jewish identity: full of ambiguity, unclarity, and vagueness.'[301]

An undefined system elides the core definition of sex/gender categories and the boundaries that contain them. A multiple gender scheme – with its inclusion of a vast amount of (often overlapping) identities and which lacks any definitive criteria to identify as them - is muddy and deliberately ambiguous. This ambiguous and fluid recognition system reflects the fact that our bodies are constantly in a process of '*becoming*'. There are advantages to having an ambiguous multiple gender scheme. Firstly, this type of system attends to what is being asked for by the trans community:

'There should just be a box saying 'gender' to which you can add non-binary, male, female, none etc. which means people can specify and can put how they identify. This would also mean that male/female won't be considered the norm.'[302]

This quote also highlights two further important benefits of a multiple gender scheme, benefits that should be the objectives of recognition law. Firstly, it demonstrates how the more categories we have, the more likely people will have the freedom and autonomy to be able to find an accurate representation of who they feel themselves to

[301] N. Scheman, 'Queering the Center by Centering the Queer', 2011 at p.137 Scheman points out that what constitutes Jewish identity is undefined: it is impossible to point to one determinative factor that makes up Jewish identity. Rather, but it made up of a cluster of traits.

[302] V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 74 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018]

be. Additionally, the above quote also suggests how a system like this can displace cis identities as the sole occupants of the normative centre.

Multiple Gender Scheme and Freedom and Autonomy

Recognizing non-binary identities in their varied multitude in law is directly linked to trans* person's wellbeing, freedom and autonomy and is also linked to increasing social acceptance and understanding towards trans* identities. With the adoption of a multiple gender scheme, trans* people will no longer feel the pressure to force themselves into categories they do not fully align with. Unlike current law or the mere addition of an X or third gender option, a multiple gender schema awards legal recognition without requiring trans* people to give up their specificity and richness. For example, those who identify as fluid can choose the option of identifying as 'fluid', signaling to the world that they reject any notion of fixed or stable identities and have the legal backing to affirm this. Moreover, this system also recognizes, for example, non-binary, fluid gender and pangender as different (even if, overlapping) identities. This is in contrast to third gender option, which would assimilate all these three into one. Moreover, a recognition system that does this is better equipped to contend with what the future may bring in terms of the increasing diversity and complexity of how people are understanding and choosing to identify as their gender. This system allows us 'to think the future, live the future, produce a future that is different from the present and that can be welcomed instead of feared'.[303] Finally, a multiple gender system that is underpinned by a conception of bodies as a multitude of difference as opposed to a gender binary framework, moves towards situating trans and cis people alongside each other.

[303] E. Grosz, 'Time Travels', 2005 p.155

Situate trans* Identities Alongside cis identities

A gender scheme that is routed through binary sexual difference situates all gender identifications that are not male or female as exceptions to the binary rule. In contrast to this, multiplicities of sexual difference do not position genders that are not male or female as non-normative. Rather, beyond the binary identities can be thought of as natural instances of human variation; as paradigmatic genders alongside cis people.

Refiguring the body in terms of '*becoming*', explored in Chapter two, offered a new way to think about sexual difference. A continually changing and open-ended '*becoming*' figure understands bodies as a proliferation of differences - as a fluid and constant process of differentiation and movement - rather than thinking difference through binaries and hierarchies. Thought this way, sex/gender is opened up beyond the constraints of the contained, binary, and hierarchal sex difference. Gender bodies thought in terms of '*becoming*', and gender categories thought in terms of multiplicities of difference – are not strictly demarcated. The borders between them are open-ended and permeable; the boundaries are fluid and shifting. The difference amongst the multiple categories under a system like this are therefore thought of as constantly changing shades of difference, as opposed to clear differences of kind. Considering trans* people and cis people to be differences of kind was necessary to situate cis people at the natural and paradigmatic centre (with trans* people on the outside). '*Becoming*' allows us to make the conceptual move away from viewing these two groups in opposition to each other to situate trans* people alongside cis people. All '*becoming'* identities can now be thought of as natural variation of human difference. In other words, instead of differences of kind (as they are under the binary),

they are considered as natural variations of each other. A model that allows people to self-identify in one of multiple options can recognize people in all their complexity and without qualification or justification. Law is sending the message to the world that trans* and cis people are no better, or worse, than each other and are therefore deserving of equal treatment in the way that their gender is recognized. This will go some way toward mitigating the prejudice against trans* people that currently exists in the social imaginary.

No gender

The scheme proposed in Ecuador, which subjected both trans and cis people to the same gaze, is an example of a way to eliminate the asymmetrical treatment of cis and trans* people by law. The self-identification and multiple gender scheme proposed in this thesis moves in a similar direction: it awards both cis and trans* identities legal recognition without qualification or justification. An alternative option to achieve the same aim is to remove the law's gaze from all subjects altogether.[304] This path will be considered but ultimately rejected.

No gender would mean that gender is no longer recorded on any official ID documents like passports, driver's license and birth certificates. It would also mean that gender specific areas of law such as parentage law, marriage law, registration law, criminal

[304] A complete de-certification of gender has been proposed by some academics. See, for example, D. Spade, Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law (2015, rev. and exp. edn.); S. Cowan, `Gender is no Substitute for Sex: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 Feminist Legal Studies, p. 90 and G. Baars 'The Politics of Recognition and the Limits of Emancipation through Law', *Critical Legal Thinking,* 2017 < http://criticallegalthinking.com/2017/11/30/politics-recognition-limits-emancipation-law/ > [accessed 10 January 2018].

law and the rights of victims of crime would need to be revised.[305] Given the practical difficulties that are to be expected in introducing a new multiple gender schema such as cost of new ID documents and paying fees, it could be argued the Government should cease to use gender to classify at all. This option would also have the additional bonus in that it would allow maximum fluidity and flexibility as people could live their gendered lives without the watchful eye of the law on them. Whilst these are good points, a no gender option is undesirable at the moment.

Undesirable

Gender is a source of pleasure for people. Many people are heavily invested in their gender and draw a lot of identification from it. Although gender causes a lot of problems, it is also socially important to people. What I mean by this is that our gender and sexual identities are important for expressing our social solidarities, sexual orientations, personalities, tastes, reproductive roles, and community memberships. [306] Butler has spoken about this:

'gender can be very important to us, and some people really love the gender that they have claimed for themselves. If gender is eradicated, so too is an important domain of pleasure for many people. And others have a strong sense of self bound up with their genders, so to get rid of gender would be to shatter their self-hood. I think we have to accept a wide variety of positions on gender. Some want to be gender-free, but others want to be free really to be a gender that is crucial to who they are.'[307]

[305] Scottish Government, *Review of the gender recognition Act 2004: A Consultation,* (2017), Annex J.
[306] L. Shrage, *You've Changed,* 2009 at p.184
[307] J. Butler 'Gender Performance: The TransAdvocate interviews Judith Butler' *Transadvocate (*1 May 2014)

Gender is an intimate and valuable thing that people are not quite ready to give up. For trans* people, these sexual identities are particularly important given the fact they have been denied them for so long. Whilst it is true that not everything that matters socially needs to be registered in law,[308] registering gender in law for trans* people, who have historically been refused it, is highly important to them.[309] The GRA, in its current form, is a statutory declaration of trans* gender inferiority. It postulates that trans* people as less deserving of respect, autonomy and understanding than cis people. We should not forget or deny that the GRA is the remnant of a long history of discrimination, persecution and state disapproval of trans* people.[310] It is, therefore, not enough to remove law's say in all things gendered. There is long line of prejudice and invalidation that needs to be reversed and law suddenly going silent on the matter of gender recognition will not do this. Gender recognition law must change to instead explicitly express the fact that trans people are no worse, or better, than cis people. It is time for law to make a powerful and clear declaration that trans* people are nothing more, or less, than a natural variant of human diversity. It is time for Scotland to give

<https://www.transadvocate.com/gender-performance-the-transadvocate-interviews-judith-butler_n_13652.htm>

[308] For example, religion and sexuality are significant social markers but are not registered in law.

[309] During the debates prior to the introduction of same-sex marriage, opponents sought to rely on the fact that same-sex couples already had civil partnership which, in effect, granted them the same legal rights as marriage would. Kenneth Norrie has convincingly argued, however, that the introduction of same-sex marriage was needed not to grant the material effects of marriage to gay people, but for the symbolic effect. The introduction of same-sex marriage sent the message to the world that gay people were on the same moral standing as heterosexual couples. See K Norrie, 'Now the dust has settled: the Marriage and Civil Partnership (Scotland) Act 2014' (2014) Juridical Review 135.

[310] See Chapter one for an overview off the legal recognition of trans* people prior to the Gender Recognition Act.

trans* people what they have been asking for and to show to the world that it is a forward thinking and dynamic country when it comes to trans* rights.

Although many do see the complete deconstruction of gender as utopian, many others, including even non-binary identities, do not prefer to see gender becoming a meaningless concept. Trans* people have fought long and hard for increased political power and visibility. They do not want to be denied the identifications that they have battled for. Many trans* narratives accord high importance to having their gender recognized:

'Legal gender recognition is important as it is a validation of who I am. When you are born you get your birth certificate and when you die you get your death certificate. People take that for granted. It follows you all through life… Legal gender recognition also validates you within the rest of the population. If you are seen to be legally recognized, then you have more legitimacy within the wider community.'[311]

This narrative describes how recognition can often be underestimated by those who automatically get it. Cis people often do not see the importance of recognition as they have never had to do without it from law or wider society. Trans* people may no longer need or desire the recognition of their gender in the future once society catches up. But until then it is clear that trans* people want and need to be able to express and identify their gender and to use law to affirm this expression and identification. In a

[311] Louise (second name unknown), 'The State Decides Who I Am: Lack of Recognition for transgender people.' Amnesty International, 2014, p.6. <https://www.es.amnesty.org/uploads/media/The_state_decide_who_I_am._Febrero_2014.pdf > ,See also p.18, p.30 and p.40 for other testimonies by trans* people on the importance of legal gender recognition. [accessed 12 September 2018].

recent study on the experiences of non-binary people in the UK, 64% of respondents said that they would like to have their non-binary gender recognized in law.[312] Reasons cited include the effect that trans* people believe it will have on their own wellbeing and also on the way other people treat them. For example:

'I would feel far more comfortable if my passport, driver's license, etc., said my actual gender rather than the one I was assigned at birth. The gender on them currently feels wrong, and I feel like having my real gender on those items would be a big step in making myself and others feel more comfortable with our identities, and in making sure people in general know about and acknowledge non-binary people.'[313]

Since the provisions of the GRA came into force, 4,910 GRCs have been issued, at an average of around 300 a year.[314] This number is significantly lower than all the known estimates of the trans population.[315] Of the trans* respondents to the LGBT survey who were aware of the GRA process, but did not have a GRC and had never applied for one, only 7% said they would not be interested in getting one.[316] This suggests that

---

[312] V. Valentine. *Non-Binary People's Experiences in the UK.* (2016), 68 < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf> [accessed 12 September 2018]

[313] ibid

[314] Minister for Women and Equalities. *Reform of the Recognition Act – Government Consultation.* (2018), p.10. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721725/GRA-Consultation-document.pdf [accessed 12 September 2018].

[315] See Ibid, Annex E. There is, at the moment, no definitive measure of the size of the trans population in the UK. Applying estimates of population prevalence from studies in other countries suggests that between 0.35% and 1% of the UK population might be trans (not including non-binary people). This works out to be between 200,000 and 500,000 people.

[316] ibid, p.11.

it is not that legal recognition of gender needs to go completely, but the way in which trans* people are legally recognized that needs to change. Whilst I agree philosophically that a post-gender world could be ideal, it is undesirable at this moment in history. Trans* people have been clear that they want legal recognition of their gender identifications. To ignore the high percentage of trans* people who want legal recognition also ignores the value and power of law in realizing progressive change. Law can change how people view trans* people. Freedom does not come with complete decertification. Law can remain involved in recognizing gender identifications whilst at the same time allowing freedom and autonomy.

Necessary intermediate steps must be taken before the law completely withdrawls from certifying gender. The explosion and proliferation of gender by a multiple gender scheme, along with a self-identification model makes the right steps towards post gender whilst also tending to what trans* people are asking for. As Hird points out, 'appealing to a multiple gender schema may be an attempt to … tread softly towards, such an eventuality [of post gender].'[317]

Conclusion

Whilst this proposal seeks to move towards decertification by the state of gender, it stops short of complete de-gendering. The importance of gender in legal and social areas of law, particularly to trans* people, suggests that legal recognition must be retained. Options have therefore been discussed that show that legal recognition of gender must change, rather than be abolished completely. Chapter three has proposed changes to our current model of recognition that is compatible with the new

[317] H. Myra, 'Gender's nature', 2000 at p.359

understanding of identity that '*becoming*' brings to light. These changes include the introduction of both a self-identification and a multiple gender schema. The proposals underpinning assumptions are more in line with the reality of the way trans* people live their lives today, and want to live their lives. The proposal will, in effect, give trans* people more freedom and autonomy over how they want to live their gendered life and reduces the unjustified asymmetrical treatment that trans* people receive as compared to cis people.

Concluding Remarks

It is the ideal of authenticity, and with it the difficulty to accomplish it, the anxiety, the pressure, the medical and legal hegemony, that have inspired this thesis. Chapter one explored the legal constructs through which trans* lives are understood and regulated. These legal constructs contrast starkly, in many ways, with an alternative understanding of trans* embodiment, illuminated by the concept of '*becoming'*, introduced and discussed in Chapter two. The GRA, in its current form, is not able to account for the ever-changing subjectivities which many trans*-identified individuals embody every day, nor deal with the new and unpredictable subjectivities that the future will bring. Chapter three has proposed changes to our current model of recognition that are compatible with this new understanding of identity. A model that includes both self-identification and a multiple gender schema is suggested. It is believed that this type of model can better balance the need to grant crucial rights and protection to trans* people whilst at the same time allowing opportunity for people to author their own experiences. This scheme will make crucial steps towards situating trans* lives alongside cis lives as an instance of natural human variance and send the message to society that trans* people are valid and are to be respected.

Bibliography

Bettcher, T., 'Trans* Woman and meaning of Women' in *The Philosophy of Sex: Contemporary Readings, 6th Ed , Halwani, R et al. (eds). (*Rowland and Littlefield 2015).

——— 'Trapped in the Wrong Theory: Rethinking Trans* Oppression and Resistance,' (2014) *Signs: Journal of Women in Culture and Society* 39(2) pp. 383-406.

——— 'Understanding transphobia: Authenticity and sexual abuse', in *Trans*/Forming feminisms: Transfeminist voices speak out*, (ed.) K. Scott-Dixon (Toronto: Sumach Press, 2006) pp.203–210.

Bibbings, L., 'Heterosexuality as harm: fitting in.' in P Hillyard, C Pantazis, S Tombs & D Gordon (eds), *Beyond Criminology: Taking Harm Seriously.* (Pluto Press 2004) pp. 217-235

Butler J., *Gender* Trouble: Feminism and the Subversion of Identity (Routledge 1990)

Butler, J., *Bodies that Matter: On the Discursive Limits of 'Sex'*. (Routledge 1993)

Butler, J., *Undoing Gender* (Routledge 2004)

Butler, J., *Giving an Account of Oneself* (Fordham University Press 2009)

Chase, D., & Catalano, J., '"Trans Enough?": The Pressures Trans Men Negotiate in Higher Education' (2015) *Transgender Studies Quarterly* (2015) 2:3 pp.411-430.

Christodoulidis, E. et al, *Jurisprudence: themes and concepts* (Routledge 2018)

Conaghan, J., *Law and Gender* (Clarendon Law Series 2013)

Colebrook, C., 'From Radical Representations to Corporeal Becomings: The Feminist Philosophy of Lloyd, Grosz, and Gatens.' (2000) *Hypatia* 15(2) pp. 76-93

Cooper, D. & Renz, F., 'If the State Decertified Gender, What Might Happen to its Meaning and Value? ' [2016] 43(4) *Journal of Law and Society.*

Cornell, P. & Murphy., 'Anti-racism, multiculturalism and the ethics of identification' (2002*) Philosophy and Social Criticism*, 4 *pp.419-449*

Cowan, S., `Gender is no Substitute for Sex: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 Feminist Legal Studies

——— 'We Walk Among You: Trans* Identity Politics Goes to the Movies' (2009) *Canadian Journal of Women and the Law*, vol 21, no. 1, pp. 91-118 (p.113) at fn. 73.

Dowd, N.E., 'Masculinities and Feminist Legal Theory', *23 Wis. J.L. Gender & Society* (2008)

Dunne, P., Gender Recognition in Europe: Steralisation, Diagnosis and Medical Examination Requirements (2017) *Journal of Social Welfare and Family Law*

Elliot P., *Debates in Transgender, Queer, and Feminist Theory: Contested Sites* (Routledge 2010)

Esposito, R., *Bìos: Biopolitics and Philosophy*, Trans*. Timothy Campbell (University Press 2008)

Fausto-Sterling, A., 'The Five Sexes: Why Male and Female are not enough.' *The Sciences* (New York Academy of Sciences 1993)

——— *Sexing the Body: Gender Politics and the Construction of Sexuality.* (Basic Books 2000)

——— 'The Bare Bones of Sex: Part 1 – Sex and Gender'.(2005) *SIGNS: Journal of Women in Culture and Society*, 30(2): 1491–1527

Fisher, S., Phillips, R., & Katri, IH., 'Introduction: Trans* Temporalities' (2017) *Somatechnics*. 7(1), pp.1-15

Freeman, E., *Time Binds: Queer Temporalities, Queer Histories*. Halberstram, J and Lisa, Lowe (eds) (Duke University Press 2010)

Frost, S., 'Reconsidering the turn to biology in feminist theory', (2014) *Feminist Theory,* 15(3) pp.307-326

Gatens, M., 'A Critique of the Sex/Gender Distinction' in Imaginary Bodies: Ethics, Power and Corporeality (Routledge 1996)

Grabham, E., 'Governing permanence: trans* subjects, time, and the Gender Recognition Act' (2010) *Social & Legal Studies* 19: pp.107-126

——— 'Transgender Temporalities and the United Kingdom Gender Recognition Act' . in: Davies, B. and Funke, J.(eds). *Sex, Gender and Time in Fiction & Culture,* (Palgrave Macmillian 2011) pp.154-169

——— *Brewing Legal Times: Things, Forms, and the Enactment of Law* (University of Toronto, 2016)

Gray, C., *A critique of the legal recognition of transsexuals in UK law (2016)* PhD thesis. University of Glasgow http://theses.gla.ac.uk/7100/

Grosz, E., *Volatile Bodies: Toward a Corporeal Feminism (*Indiana University Press, 1994)

——— *Time Travels: Feminism, Nature, Power* (Duke University Press, 2005*)*

Halberstam, J. *In a Queer time and Place (*New York University Press, 2005)

Harris, A., 'Non-binary gender concepts and the evolving legal treatment of UK transsexed individuals: a practical consideration of the possibilities of Butler'(2013) *Journal of International Women's Studies* 13(6), pp.57-71.

Hird, M., (2000) 'Gender's Nature: Intersexuals, Transsexuals, and the ''Sex''/''Gender'' Binary'. *Feminist Theory*, 1(3): pp.347–364.

S. Hines, *TransForming Gender: Transgender Practices of Identity, Intimacy and Care (*Bristol: Policy Press, 2007*)*

Jeffreys, S., 'They know it when they see it: the UK Gender Recognition Act 2004' (2008) *British Journal of Politics & International Relations* 10(2) pp.328-345

Lee, M., 'Being Wary of Categories: Is It Possible to Move Away from Categorisations in Anti-Discrimination Law?' (2017) *University of Vienna Law Review*

Linstead, S. & Pullen., A. 'Gender as multiplicity: Desire, displacement, difference and
dispersion.'(2007) *Human Relations* 59(9), 1287–310

Mayeda, G., 'Who do you think you are' in *You've Changed: Sex Reassignment and Personal Identity (*USA: Oxford University Press, 2009).

Myra, H., 'Gender's nature: Intersexuality, transsexualism and the 'sex'/'gender' binary' (2000) *Feminist Theory* 1: 3, pp. 347 - 364

Norrie, K., '*Bellinger v Bellinger : The House of Lords and the Gender Recognition bill.' (2004) Edinburgh Law Review*, pp. 93-99.

——— ‘Is the gender recognition act 2004 as important as it seems?’. In S. A. M. McLean (Ed.), *First do no harm: law, ethics and health care. (*Applied Legal Philosophy, 2006) pp. 561-572.

——— ‘Now the dust has settled: the Marriage and Civil Partnership (Scotland) Act 2014’ (2014) *Juridical Review* 135

Namaste, V., *Sex Change, Social Change: Reflections on Identity, Institutions and Imperialism* (Toronto: Women’s Press 2005)

Nirta, C., *Marginal bodies: Actualising trans* Utopias.* PhD thesis, University of Westminster (2014)

Nussbaum, M., ‘The Professor of Parody: The Hip Defeatism of Judith Butler’ (1999) *The New Republic* 22 pp.37-45

Prosser, J., *Second Skins: The Body narratives of Transsexuality. (*Columbia University Press 1998)

Roberts, C., ‘A Matter of Embodied Fact: Sex Hormones and the History of Bodies’. (2002) Feminist Theory, 3(1): pp.7–26.

Rudolf, B., ‘European Court of Human Rights: Legal Status of Postoperative Transsexuals’ (2003) International Journal of Constitutional Law 1(4): pp.716-756

Sandland, R., ‘Feminism and the Gender Recognition Act 2004’ (2005) *Feminist Legal Studies*
13(1) pp.43-66

——— ‘Running to Stand Still’ (2009) *Social & Legal Studies* 18:2, pp. 253 – 257

Scheman, N., ‘Queering the Center by Centering the Queer:
Reflections on Transsexuals and Secular Jews’ in *Shifting Ground: Knowledge & Reality, Transgression & Trustworthiness* (London:Oxford University Press, 2011)

Sharpe, A., *Transgender Jurisprudence: Dysphoric Bodies of Law*. (Cavendish Publishing Ltd. 2002)

——— ‘A critique of the Gender Recognition Act 2004’ (2007) *Journal of Bioethical Enquiry* 4. pp.33-42.

Shrage, L., ‘Sex and Miscibility’ in *You’ve Changed: Sex Reassignment and Personal Identity* (Oxford University Press 2009)

Simpkins, R., ‘Temporal Flesh: Material Becomings’ (2017) *Somatechnics*. 7(1), pp.124-141

Smart, C., *Feminism and the Power of Law.* (Routledge 1989)

Spade, D., *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Duke University Press 2015)

Spade, D., 'Resisting medicine, re/modelling gender.' *Berkeley Women's LJ* (2003) 18:1 pp15-37

Sullivan, C.F., 'Gender Verification and Gender Policies in Elite Sport: Eligibility and "Fair Play**"** *Journal of Sport and Social Issues* (2011) 35:4, pp. 400-419

Sunstein, C.R., 'On the Expressive Function of Law" (1996) *144 U.Penn. L.R*. 2021

Theilan, J., (2014) 'Depathologisation of Transgenderism and International Human Rights Law ' .(2014) *Human Rights Law Review* 14

Veccaro, J., 'Felt Matters' in *Transgender Studies Reader 2* S Stryker & A Aizura (eds) (London Routledge 2013)

Vincent, B., *Transgender Health – a practitioners guide to trans healthcare* (Jessica Kingsley Publishers 2018)

Whittle, S., *Respect and Equality: Transsexual and Transgender Rights* (Cavendish 2002)

Zirilli, L., *Feminism and the Abyss of Freedom. (*University of Chicago Press 2005)

Government Reports

Minister for Women and Equalities, *Reform of the Recognition Act – Government Consultation.* (2018)

Scottish Government, *Review of the gender recognition Act 2004: A Consultation* (2017)

International

International Commission of Jurists. 'Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.' (2007)

International Commission of Jurists. 'The Yogyakarta Principles plus 10 (YP+10)' (2017)

Online Sources

Amnesty International 'The State Decides Who I Am: Lack of Recognition for transgender people.' Amnesty International (2014) <https://www.es.amnesty.org/uploads/media/The_state_decide_who_I_am._Febrero_2014.pdf>

Bachmann, C.L., & Gooch. B., *LGBT in Britain: Trans Report*, Stonewall UK. (2018) < https://www.stonewall.org.uk/sites/default/files/lgbt-in-britain-trans.pdf

Baars, G., 'The Politics of Recognition and the Limits of Emancipation through Law', *Critical Legal Thinking,* 2017 < http://criticallegalthinking.com/2017/11/30/politics-recognition-limits-emancipation-law/

BBC NEWS., *Germaine Greer: Transgender women are 'not women', BBC NEWS (*2015) <http://www.bbc.co.uk/news/av/uk-34625512/germaine-greer-transgender-women-are-not-women >

BBC News., *Transgender Teens Born in the Wrong Body, BBC NEWS (8 October* 2016) < <http://www.bbc.co.uk/news/uk-northern-ireland-37588612>

Brooks, L., 'Legal recognition for non-binary people planned in Scotland', *The Guardian (9* November 2017) https://www.theguardian.com/society/2017/nov/09/legal-recognition-for-non-binary-people-planned-in-scotland

Butler, J., 'Gender Performance: The TransAdvocate interviews Judith Butler' *Transadvocate (*1 May 2014) <https://www.transadvocate.com/gender-performance-the-transadvocate-interviews-judith-butler_n_13652.htm>

Craven, S., 'Women must not be silenced in the debate on gender identity' *The National* (19 January 2018) http://www.thenational.scot/news/15865387.Women_must_not_be_silenced_in_the_debate_on_gender_identity/

Engender., 'Frequently asked questions: Women's equality and the Gender Recognition Act' (2018). https://www.engender.org.uk/news/blog/frequently-asked-questions-womens-equality-and-the-genderrecognition-act/

Dinenage, C., *Gender Recognition Act review announced in plan for transgender equality*, 2016 < https://www.gov.uk/government/news/gender-recognition-act-review-announced-in-plan-for-transgender-equality >

Finch, S.D., *5 Affirmations for Trans* folks who don't feel trans* Enough.* Everyday Feminism. (2017) < https://everydayfeminism.com/2017/03/trans*-folk-don't-feel-trans*-enough/>

———*10 things you're actually saying when you ignore someone's pronouns, (*2014) < https://everydayfeminism.com/2014/10/ignore-gender-pronouns/ >

———*These 5 Myths About Body Dysphoria in Trans* Folks Are Super Common – But Also Super Wrong (*2015) < https://everydayfeminism.com/2015/06/these-5-myths-about-body-dysphoria-in-trans*-folks-are-super-common-but-also-super-wrong/ >

Gendered Intelligence., *Trans* Identities (2018). http://genderedintelligence.co.uk/projects/kip/transidentities

Glen, F. & Hurrell, K., 'The Equality and Human Rights Commission Note on Measuring Gender Identity' (June 2012) <https://www.equalityhumanrights.com/sites/default/files/technical_note_final.pdf.>

Gnudson, K., 'WPATH Identity Recognition Statement' *WPATH* (2017) https://www.wpath.org/newsroom/global-impact

Halberstam, J., 'Jack Halberstam - Trans**: A Quick and Quirky Guide to Gender Variance' NYU Florence Youtube Channel (2017). https://www.youtube.com/watch?v=quvWUlus6ao

Halberstam J., *On Pronouns.* 2012 http://www.jackhalberstam.com/on-pronouns/

Harding, E., 'Women WILL be allowed to bar transgender people from female-only changing rooms in toilets and swimming pools' *The Daily Mail* (24 June 2018). https://www.dailymail.co.uk/news/article-5880533/Women-allowed-bar-transgender-people-female-changing-rooms-toilets-ministers.html

Kirkup, J., 'Why was a Transgender Rapist put in a Women's Prison?' *The Spectator*' (7 September 2018) https://blogs.spectator.co.uk/2018/09/why-was-a-transgender-rapist-put-in-a-womens-prison/

New Zealand Government, 'What you need to renew or apply for a passport – Information about Changing Sex/Gender Identity' (21 February 2017). < https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/>

NHS, *Gender Dysphoria,* 2016 < https://www.nhs.uk/conditions/gender-dysphoria/ >

Samaritans, 'Suicide Statistics Report 2017' (Report, 2017) < https://www.samaritans.org/sites/default/files/kcfinder/files/Suicide_statistics_report_2017_Final.pdf>

Serano, J., *Transgender People and "Biological Sex" Myths,* 2017 < https://medium.com/@juliaserano/transgender-people-and-biological-sex-myths-c2a9bcdb4f4a >

Stonewall Scotland, *Gender Recognition Act: Stonewall Scotland Consultation Response, (*2018).

<https://www.stonewallscotland.org.uk/sites/default/files/gra_consultation_response_scotland_final.pdf>

Stonewall UK, *Stonewall School Report 2017: Anti-LGBT bullying down but LGBT young people still at risk, (*2017) <http://www.stonewall.org.uk/news/stonewall-school-report-2017-anti-lgbt-bullying-down-lgbt-young-people-still-risk>

Strong, W., 'Transgender N.W.T., residents can now change birth certificates to reflect gender", *CBC News* (15 July 2017). https://www.cbc.ca/news/canada/north/nwt-transgender-legislation-changes-1.4206782

Transgender Law Centre, 'TLC Backs CA Bill to Create New Gender Marker and Ease Process for Gender Change in Court Orders and on State Documents' (26 January 2017) https://transgenderlawcenter.org/archives/13524

Turner, J., 'Trans Rapists are a Danger in Women's Jails' *The Times* (8 September 2018) https://www.thetimes.co.uk/article/trans-rapists-are-a-danger-in-women-s-jails-5vhgh57pt

Valentine, V., *Non-Binary People's Experiences in the UK.* Scottish Transgender Alliance (2016) < https://www.scottishtrans.org/wp-content/uploads/2016/08/Report-final.pdf>

Weiss, S., *3 Reasons It's Totally Valid to Have More Than One Gender Identity*, (2016) < https://everydayfeminism.com/2016/12/valid-more-than-one-gender/>

William, R., 'Facebook's 71 gender options come to UK users', *The Telegraph* (27 June 2014) http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html

Women and Equalities Committee, *Transgender Equality (2015-2016)* (14 January 2016) https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf

World Health Organisation. *International Statistical Classification of Diseases and Related Health Problems* 10th Revision (2010) [online version] <http://apps.who.int/classifications/icd10/browse/2010/en>

Whittle, S., 'Gender, What Future Does it Have? Professor Steven Whittle', Durgham University (2015) https://www.youtube.com/watch?v=lap2DLdI8Vs