The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation

Doctor of Philosophy (Law)

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Declaration

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Peter Robert Dunne

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Summary

This thesis evaluates how human rights law can impact the requirements which states impose as pre-conditions for legal gender recognition.

At the international level – within United Nations and regional human rights frameworks – there is growing consensus that transgender persons should be formally acknowledged in their preferred gender. This movement towards gender recognition rights is now reinforced by domestic legal structures, with increasing (national law) possibilities for individuals to amend their gender status.

Yet, while human rights have embraced a *general* entitlement to legal transitions, it is less clear how they can impact the processes by which transgender persons obtain formal acknowledgment. Although *de jure* progress towards gender recognition rights is welcome, that progress will not *de facto* benefit transgender individuals if states can establish insurmountable access pre-conditions.

This thesis submits four 'conditions of recognition' to human rights review: (a) physical medical intervention; (b) compulsory divorce; (c) minimum age limits; and (d) mandatory binary gender. In focusing on these four categories, the thesis does not imply that they are the only possible pre-requisites for gender recognition. There are numerous, additional conditions which can be (and have been) imposed on legal transition pathways. Rather, the thesis concentrates on the four selected requirements merely because, as a matter of both current and historical practice, they are the most common pre-conditions, which applicants for recognition confront. Around the world, formal acknowledgement has typically been reserved for adult male or female-identified persons, who are not party to an existing marriage and who desire full gender-confirming treatments, including the removal of their reproductive capacities.

Throughout the substantive assessment undertaken (Chapters II to VI), four human rights themes have particular relevance: (a) bodily integrity; (b) equality and non-discrimination; (c) marriage and family life; and (d) children's rights. As with the categories of conditions under review, focusing on these four themes does not imply that they are the only rights applicable to legal transitions. Indeed, the historical development of gender recognition illustrates that numerous rights intersect with transgender affirmation, not least the guarantee of privacy. This thesis concentrates on the four selected themes merely because, in the analysis which follows,

they are the *most* relevant rights, cutting across various access requirements for formal acknowledgement.

The thesis concludes that human rights law can significantly impact how states control acknowledgment of preferred gender. To the extent that many common conditions of recognition – imposed around the world – violate core human rights standards, they should be removed as entry requirements for legal transitions. However, the thesis also notes the context-specific relationship between human rights and gender recognition. Given the comparative dearth of research on some transgender identities (e.g. transgender minors, non-binary persons.), the thesis acknowledges that the precise impact of human rights may – at certain junctures – not yet be clear.

Involuntary medical requirements (e.g. surgery, sterilisation, etc.) are incompatible with bodily integrity guarantees. They constitute 'cruel and inhuman' and 'degrading' treatment. Depending upon the precise circumstances in which they are imposed, medical pre-conditions may even rise to the level of torture. Similarly, compulsory divorce is an unnecessary and disproportionate interference with marriage and family life. It is inconsistent with a transgender-inclusive human rights framework.

There is growing consensus that absolutely excluding transgender minors from gender recognition does not serve the 'best interests of the child'. Young people should – in accordance with their evolving capacities – be affirmed in their preferred gender. However, while human rights principles (e.g. right of children to be heard.) can help define the contours of legal recognition for minors, the specific processes adopted must also have regard for key policy considerations, such as the difficulty of identifying 'persistent' transgender identities pre-puberty. On the emerging question of non-binary recognition, the thesis observes that there is no (current) human right to be acknowledged outside 'male' and 'female' categories. The thesis does, however, engage with the lived-experience of non-man and non-woman identities, and offers important insights on the continued sufficiency and practicality of dichotomous gender rules.

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Introduction

This thesis evaluates how human rights law can impact the requirements which states impose as pre-conditions for legal gender recognition.[1] At the international level – within United Nations and regional human rights frameworks – there is growing consensus that transgender (trans)[2] persons should be formally acknowledged in their preferred gender.[3] This movement towards legal transition[4] rights is now reinforced by domestic structures, with increasing possibilities for individuals to amend their national gender status.[5] Yet, while human rights norms have embraced a *general* entitlement to legal recognition, it is less clear how they influence the processes by which trans persons obtain formal acknowledgment. Critiquing four common requirements for gender recognition[6] against a trans-inclusive human rights framework[7], this thesis asks how human rights standards affect state control over gender transition pathways.

[1] Legal gender recognition is a process (statutory, judicial or administrative) by which trans individuals – persons who identify with a gender other than that assigned at birth – can be formally acknowledged (in law) as having their preferred gender. In order to obtain recognition, applicants typically have to satisfy a number of state-imposed access conditions (the specific conditions which applicants for recognition must satisfy vary from state to state), see generally: Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report* (ILGA 2016) accessed). This thesis considers how human rights can impact the requirements which states use to control entry into legal gender recognition pathways.

[2] As noted above, 'transgender' or 'trans' (see Section II below) refers to persons who self-identify with a gender other than that assigned to them at birth.

[3] For comprehensive references to international and regional case law and jurisprudence in favour of recognising preferred gender, see: FN 56 – 73 (below).

[4] Transition refers to a process by which trans people come to live in their preferred gender. Despite popular beliefs that all trans persons desire to alter their bodies, there is no standard transition procedure. Different trans individuals prioritise different aspects (e.g. legal, social, medical, etc.) on their personal transition journey.

[5] For comprehensive references to domestic laws/administrative practices for recognising preferred gender, see: FN: 39 – 55.

[6] See Section III below and Chapter I. The four requirements are: (a) physical medical intervention; (b) divorce; (c) age limits; and (d) binary gender.

[7] Throughout this thesis, the candidate refers to the application of a 'trans-inclusive' human rights framework to the conditions for obtaining legal recognition of preferred gender. In using the language of trans-inclusivity, the candidate specifically emphasises that international human rights protections can (and do) apply to trans populations. In Chapter I, the thesis explores contemporary arguments (particularly within United Nations institutions, such as the Human Rights Council) which deny the application of international human rights law to trans and gender non-conforming persons. As Chapter I illustrates, such arguments not only contradict key principles, such as 'universality' and 'non-discrimination', they are also incompatible with the practice of international human rights law, as evidenced from international (UN Human Rights Committee, UN Committee on the Elimination of Discrimination against Women, etc.) and regional (European Court of Human Rights, Inter-American Court of Human Rights, etc.) jurisprudence. The reference to 'trans' human rights should not be understood as suggesting that trans individuals do not currently come within the scope of existing human rights protections. Nor should it be interpreted as suggesting that trans populations require special or new 'trans' guarantees. Rather, invoking the language of trans-inclusivity is merely an affirmation that: (a) international and regional human rights frameworks apply (as they would to any other population or group) to trans individuals; and (b) the thesis will – specifically in the context of Chapter I – emphasise the particular intersection of human rights and trans experiences.

In recent years, trans populations have gained increased visibility and acknowledgement around the world.[8] While trans communities still confront higher rates of poverty, discrimination and violence,[9] public understanding of trans lives is beginning (sometimes slowly and inconsistently) to develop. Growing social awareness of trans identities can have transformative consequences. From political decision-making to the provision of healthcare, engaging with trans lives facilitates greater inclusion and encourages policy choices which reflect diverse gender experiences.[10]

Enhanced trans visibility is particularly important for legal frameworks. While law has historically been used as an instrument of trans condemnation and erasure[11], trans perspectives are increasingly evident in international, regional and domestic legal protections.[12] Among global trans populations, obtaining formal acknowledgment of preferred gender holds especial significance. Legal transitions not only confer symbolic legitimacy on trans identities, they also extend access to key economic, social and political benefits.[13]

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[8] See generally: Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006); Susan Stryker and Aren Aizura (eds), *The Transgender Studies Reader 2* (2nd edn, Routledge 2013); Laura Erickson-Schroth (ed), *Trans Bodies, Trans Selves* (Oxford University Press 2014); Kate Bornstein and S Bear Bergman (eds), *Gender Outlaws: The Next Generation* (Seal Press 2010); Susan Stryker, *Transgender History* (Seal Press 2008); Joanne Meyerowitz, *How Sex Changed: A History of Trassexuality in the United States* (Harvard University Press 2004).

[9] See generally: Sandy E James and others, *The Report of the 2015 U.S. Transgender Survey* (NCTE 2016); Inter-American Commission on Human Rights, *Violence Against LGBTI Persons* (IACmHR 2015) http://www.oas.org/en/iachr/reports/pdfs/ViolenceLGBTIPersons.pdf accessed 23 August 2017; Human Rights Watch, 'Violence against the Transgender Community in 2017' (*HRW Website*, *No Date Available*) http://www.hrc.org/resources/violence-against-the-transgender-community-in-2017 accessed 23 August 2017; RECLACTRANS, 'The Night is Another Country' (REDLACTRANS 2012); European Union Agency for Fundamental Rights (EU FRA), *Being Trans in the EU: Comparative Analysis of EU LGBT Survey Data* (Publication Office of the European Union 2014); Human Rights Watch, '"All Five Fingers are not the Same" Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka' (*HRW Website,* 14 August 2016) https://www.hrw.org/report/2016/08/14/all-five-fingers-are-not-same/discrimination-grounds-gender-identity-and-sexual accessed 18 May 2017; Human Rights Watch, '"I'm Scared to be a Woman" Human Rights Abuses against Transgender People in Malaysia' (*HRW Website,* 24 September 2014) https://www.hrw.org/report/2014/09/24/im-scared-be-woman/human-rights-abuses-against-transgender-people-malaysia accessed 18 May 2017; Human Rights Watch, '"We'll Show You You're a Woman" Violence and Discrimination against Black Lesbians and Transgender Men in South Africa' (*HRW Website,* 5 December 2011) https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and accessed 18 May 2017.

[10] See generally: United Nations Development Programme, *Discussion Paper: Transgender Health and Human Rights* (UNDP 2015); Vivek Divan and others, 'Transgender social inclusion and equality: a pivotal path to development' (2016) 19(2) Journal of the International Aids Society 20803; Commissioner for Human Rights of the Council of Europe, 'Human Rights and Gender Identity' (29 July 2009) CommDH/IssuePaper(2009).

[11] United Nations High Commissioner for Human Rights (UN HCHR), 'Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity' (4 May 2015) UN Doc No. A/HRC/29/23, [44]; Graeme Reid, 'International Law and the Uncertainty of Rights for LGBT People' (*HRW Website*, 6 September 2014) ; Divan and others (n 10), 80; UNDP (n 10) 15. See generally: Southern Africa Litigation Centre, *Laws and Policies Affecting Transgender Persons in Southern Africa* (SALC 2016).

[12] For examples of trans inclusion in national and international law frameworks, see FN: 23 – 25 below.

[13] See Section I.A. below.

As noted, this thesis analyses how human rights can affect pre-conditions for accessing gender recognition. Such an inquiry has considerable value and importance. While recent *de jure* (international and domestic) progress towards gender recognition rights is welcome, that progress is unlikely to *de facto* benefit trans individuals if states are able to impose insurmountable access requirements.

In this introductory chapter, the thesis sets out the background to, justification for and contours of the inquiry that it undertakes. The chapter proceeds in six sections. In Section I, the thesis contextualises contemporary movements for trans rights. Section I acknowledges the important relationship between trans identities and law. It observes growing support for legal gender recognition worldwide. Noting that practitioners and scholars typically emphasise general affirmation guarantees, rather than precise recognition procedures, Section I warns that specific access conditions may (in practice) nullify protections. It proposes to investigate how human rights principles can impact state control of legal transition pathways.

In Section II, the thesis defines key terms, such as 'gender identity', 'cisgender' and 'queer'. While the thesis is not a trans advocacy position paper, nor is it guided by global trans politics, Section II explains that the thesis does prioritise respectful language, which acknowledges trans populations as human rights holders. Section III discusses questions of methodology, situating the thesis within the wider field of global legal studies and explaining the choice to omit empirical legal analysis. It explains that the thesis assesses four conditions of recognition ([a] physical medical intervention; [b] divorce; [c] minimum age limits; and [d] mandatory binary gender) against a trans-inclusive human rights framework. Section III identifies four rights themes ([a] bodily integrity; [b] equality and non-discrimination; [c] marriage and family life; and [d] children's rights) as having particular relevance throughout the thesis.

Section IV places the thesis within the existing legal scholarship. It highlights numerous original features of the research undertaken, including novel perspectives on trans medicalisation and the exploration of youth and non-binary[14] identities. In Section V, the thesis acknowledges two limitations of the research. First, the thesis does not address arguments to 'de-gender' the law. Abolishing gender as a legal category raises complex political and social questions, which cannot adequately be answered as only one part in this wider research project. The thesis does, however, engage with the important question of what interest states have raised

[14] 'Non-binary' gender refers to a gender which falls outside 'male' and 'female' categories. The thesis offers a comprehensive discussion of the legal status of non-binary identities in Chapter VI.

as justification for their continued (legal) regulation of gender, an issue which considerably impacts upon the proportionality of conditions for legal recognition. Second, a dearth of relevant scholarship on specific topics (e.g. trans minors, non-binary identities, etc.) restricts – at certain junctures in the thesis – opportunities for conclusive human rights recommendations.

In Section VI, the thesis acknowledges that while, under existing human rights standards, states may impose some pre-conditions for legal recognition, there is a growing movement, within academia and among trans advocates, towards the principle of 'self-determination'. While Section VI (and the wider thesis) does not engage in a comprehensive analysis of self-declaration rights, it does identify compelling arguments as to why, from both a rights and policy perspective, self-determination may be a preferable model for gender recognition reform. Finally, Section VII briefly outlines and summarises the thesis structure and chapters.

I. A Right to Legal Gender Recognition: *Whether* and *How* to Acknowledge Preferred Gender?

A. The Increasing Visibility of Trans Identities

As noted, in recent years, trans individuals have achieved increased visibility and recognition around the world. In some cases, greater awareness of trans experiences has been precipitated by high-profile individuals – young and old – revealing and speaking about their gender identities.[15] Although these comparatively privileged narratives are often criticised as unreflective of real-life trans struggles, they have encouraged important public conversations about trans marginalisation.[16]

In other situations, public knowledge has resulted from increased familiarity with the individual and collective hardships which trans persons endure.[17] As trans advocates and their allies expose systemic cultures of inequality, movements are emerging – in both Global North

[15] Ravi Somaiya, 'Caitlyn Jenner, Formely Bruce, Introduces Herself in Vanity Fair' (*New York Times*, 1 June 2015) https://www.nytimes.com/2015/06/02/business/media/jenner-reveals-new-name-in-vanity-fair-article.html?mcubz=3&mtrref=www.google.co.uk&gwh=2E4529FCCD8BFE649505359D90132993&gwt=pay accessed 23 August 2017; Janet Mock, *Redefining Realness: My Path to Womanhood, Identity, Love & So Much More* (Atria Books 2014); Jazz Jennings, *Being Jazz: My Life as a Transgender Teen* (TLC/Peggy Sirota 2016); Chaz Bono and Billie Fitzpatrick, *Transition: The Story of How I Became a Man* (Penguin 2011); Amy Ellis Nutt, *Becoming Nicole: The Transformation of an American Family* (Random House 2016); Kellie Maloney, *Frankly Kellie* (Blink Publishing 2015); Caroline Davies and Mark Sweney, 'Film director Lilly Wachowski comes out as transgender woman' (*The Guardian*, 9 March 2016) https://www.theguardian.com/film/2016/mar/09/matrix-director-lilly-wachowski-comes-out-as-a-transgender-woman accessed 23 August 2017; Aron Blake and Julie Tate, 'Bradley Manning comes out as transgender: "I am a female"' (*Washington Post*, 22 August 2013) https://www.washingtonpost.com/world/national-security/bradley-manning-comes-out-as-transgendered-i-am-a-female/2013/08/22/0ae67750-0b25-11e3-8974-f97ab3b3c677_story.html?utm_term=.026a5bcbd920 accessed 23 August 2017.

[16] S E Smith, 'Caitlyn Jenner On "Vanity Fair" Is A Victory — But We Need To Acknowledge Her Privilege' (*Bustle*, 2 June 2015) https://www.bustle.com/articles/87350-caitlyn-jenner-on-vanity-fair-is-a-victory-but-we-need-to-acknowledge-her accessed 23 August 2017; Janet Mock, 'Revealing Caitlyn Jenner: My Thoughts on Media, Privilege, Healthcare Access and Glamour' (*Janet Mock Website*, 3 June 2015) https://janetmock.com/2015/06/03/caitlyn-jenner-vanity-fair-transgender/ accessed 23 August 2017; Katy Steinmetz, 'Caitlyn Jenner' (*Time*, December 2015) https://www.google.co.uk/search?q=caitlyn+Jenner+passing+privilege&ei=9oOdWbOGAcK8aaHkt_AN&start=10&sa=N&biw=1366&bih=662 accessed 23 August 2017.

[17] Zach Stafford, 'Transgender homicide rate hits historic high in US, says new report' (*The Guardian*, 13 November 2015) https://www.theguardian.com/us-news/2015/nov/13/transgender-homicide-victims-us-has-hit-historic-high accessed 23 August 2017; Adele Horin, 'Transgender People Most Likely Abused' (*Sydney Morning Herald*, 5 May 2011) http://www.smh.com.au/nsw/transgender-people-most-likely-abused-20110504-1e8jr.html accessed 23 August 2017; Abbey Ellen, 'For Transgender Women, An Extra Dose of Fear' (*New York Times*, 9 August 2017) https://www.nytimes.com/2017/08/09/well/mind/for-transgender-women-an-extra-dose-of-fear.html?mcubz=3&mtrref=www.google.co.uk&gwh=53524B2650638F3AF88FA20D20DE7EA2&gwt=pay accessed 23 August 2017; Carl Collison, 'Torment for trans women "sent to the mountain" to learn to be men' (*Mail and Guardian*, 11 January 2017) https://mg.co.za/article/2017-01-10-transwomen-sent-to-the-mountain-to-learn-to-be-men accessed 23 August 2017).

and Global South jurisdictions – to tackle widespread transphobia and advance trans protections.[18]

Growing public awareness of trans lives shifts societal attitudes and may precipitate important social change. Trans identities have historically been presented through a lens of inevitable medicalisation.[19] While (as noted throughout this thesis) there are problems with over-generalised assumptions regarding desires for treatment[20], greater trans visibility in medical frameworks is welcome. Trans health can only be enhanced where there is safer and more patient-focused access to gender-confirming pathways.[21]

Trans populations also benefit if greater public understanding leads to more open and affirming social environments. Around the world, the most immediate risks to trans communities are often threats of public or domestic abuse.[22] To the extent that growing awareness of, and sensitivity towards, trans experiences underlines the common humanity of trans individuals, this can act as a necessary counter-weight against social norms which motivate anti-trans violence.

Increasing knowledge about trans lives may have particular significance for law. As a matter of history, the relationship between domestic legal systems and trans identities has been (at best) complex. Cross-dressing laws, vagrancy statutes and protections against public indecency have all been used to criminalise trans expression. Through national legal processes, trans persons have been denied basic civil guarantees, including employment opportunities and family rights.[23] Where trans populations have not been specifically targeted by laws, this has

[18] See generally: 'About Gender DynamiX' (*Gender DynamiX Website*, *No Date Available*) https://genderdynamix.org.za/#about accessed 23 August 2017; 'About us – Transgender Europe' (*TGEU Website*, *No Date Available*) http://tgeu.org/about/ accessed 23 August 2017; 'About us – National Centre for Transgender Equality' (*NCTE Website*, *No Date Available*) https://www.transequality.org/about accessed 23 August 2017; 'About – Asia and Pacific Transgender Network' (*APTN Website*, *No Date Available*) http://www.weareaptn.org/history/ accessed 23 August 2017.

[19] Harry Benjamin, 'The Transsexual Phenomenon; a Scientific Report on Transsexualism and Sex Conversion in the Human Male and Female' (Julian 1966); Stryker, *Transgender History* (n 8) 31 – 58; *Nick Gorton,* 'Transgender as Mental Illness: Nosology, Social Justice, and the Tarnished Golden Mean' in Stryker and Aizura (n 8) 2013) 644 – 652.

[20] Sana Loue, 'Transsexualism in medicolegal limine: an examination and a proposal for change' (1996) 24(1) Journal of Psychiatry and Law 27, 34.

[21] 'Gender-confirming' healthcare refers to the medical procedures, which trans persons *may* access as part of their own personal transition process. Many trans individuals choose, for a multitude of reasons, to undergo no gender-confirming treatment.

[22] EU FRA (n 9) 53 – 62; James and others (n 9) 197 – 211.

[23] Leigh Goodmark, 'Transgender People, Intimate Partner Abuse, and the Legal System' (2013) 48(1) Harvard Civil Rights-Civil Liberties Law Review 51, 83 – 84; Wesley Parks, 'Removal of the Impediment: The State of Transgender Marriage in Montana' (2013) 74(2) Montana Law Review 309, 323; Katie Koch and Richard Bales, 'Transgender Employment Discrimination' (2008) 17(3) UCLA Women's Law Journal 243, 250 – 258; Ashley

often reflected strategies of erasure, whereby the symbolic omission of trans references undermines the legitimacy of trans lives.

Yet, as the prominence and visibility of trans communities have increased, so too national and international actors have begun to adopt more responsive approaches. As detailed in Chapter I, trans identities are now acknowledged in domestic legal frameworks with increasing regularity. This is particularly important in the field of non-discrimination law, where a growing minority of jurisdictions protect trans populations from unequal access to services and employment.[24] At the international level, gender identity discrimination was not formally mentioned at the United Nations (UN) until 2006. [25] Yet, in the intervening years, protecting trans communities has become a key priority for United Nations human rights officials, including the UN High Commissioner for Human Rights, the UN Human Rights Treaty Bodies and the Special Procedures of the UN Human Rights Council.[26]

B. Legal Recognition of Preferred Gender

For many trans persons, their most important interaction with law is the legal recognition of preferred gender. Formally acknowledging gender identity can dramatically impact the quality – individual and collective – of trans lives. It is significant in a number of ways.

Attia, 'Explicit Equality: The Need for Statutory Protection against Anti-Transgender Employment Discrimination' (2016) 25(1) Southern California Interdisciplinary Law Journal 151, 153 – 156.

[24] See e.g. Equality Act 2010, s. 7 (UK); Canadian Human Rights Act, s. 3(1) (Canada); Ley 20.206, art. 2 (Chile); Sex Discrimination Act 1984, s. 5(B) (Australia); Ley No. 737-2010, art. 5(a) (Bolivia); Gender Equality Act BE 2558, s. 3 (Thailand).

[25] Elizabeth Baisely, 'Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38(1) Human Rights Quarterly 134, 150-151.

[26] United Nations High Commissioner for Human Rights (UN HCHR), 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (17 November 2011) UN Doc No. A/HRC/19/41; UN HCHR 2015 (n 10); United Nations Human Rights Committee, 'Concluding Observations on the Initial Report of Bangladesh' (27 April 2017) UN Doc No. CCPR/C/BGD/CO/1, [11(e) and 12(e)]; United Nations Human Rights Committee, 'Concluding observations on the third periodic report of Bosnia and Herzegovina' (13 April 2017) UN Doc No. CCPR/C/BIH/CO/3, [25] – [26]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined seventh and eighth periodic reports of the Philippines' (25 July 2016) UN Doc No. CEDAW/C/PHL/CO/7-8, [14(b)] and [45(a)]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the seventh periodic report of Turkey' (25 July 2016) UN Doc No. CEDAW/C/TUR/CO/7, [32(f)] – [33(h)]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined eighth and ninth periodic reports of Haiti' (9 March 2016) UN Doc No. CEDAW/C/HTI/CO/8-9, [47] – [48]; United Nations Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fourth periodic report of the Dominican Republic' (21 October 2016) UN Doc No. E/C.12/DOM/CO/4, [25] – [26]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the eighth periodic report of the Russian Federation' (20 November 2015) UN Doc No. CEDAW/C/RUS/CO/8, [42(a)-(c)]; UN SOGI Independent Expert (n 50); 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [34] – [36], [48] – [50]; United Nations Special Rapporteur on the Situation of Human Rights Defenders, 'Situation of human rights defenders' (30 July 2015) UN Doc No. A/70/217, [65] – [67], and [93(a)].

Gender status often determines basic entitlements and entry to services. In a context where women and men are subject to differentiated rights regimes, gender recognition ensures that trans individuals have access to benefits and accommodations (even obligations), which are consistent with their lived-experience.[27] Many high-profile trans rights cases have concerned persons who, because they could not be acknowledged in their preferred gender, were excluded from legal entitlements, most notably marriage.[28]

Legal recognition protects trans communities from identity policing and continuous accusations of fraud. Where individuals live with official documentation, which conflicts with their presented gender, they are more likely to be questioned or challenged in their identity.[29] There are documented examples where trans individuals, who had valid identity papers, have been unable to use basic services, such as public transportation, because officials refused to accept incongruence between externalised and legal genders.[30]

Without formal acknowledgement, trans populations face increased threats of violence.[31] In a world where public spaces (restrooms, locker rooms, etc.) remain heavily segregated along binary-gender lines, absence of gender recognition forces trans persons into gender-inappropriate facilities. Existing research reveals that trans populations in women-only and men-only spaces, particularly female-identified individuals in male facilities, experience higher

[27] See e.g. Retirement Age: In Austria, the normal retirement age for men is 65 years and for women is 60 years; In Chile, the normal retirement age for men is 65 years and for women is 60 years; In Israel, the normal retirement age for men is 67 years and for women is 62 years; In Switzerland, the normal retirement age for men is 65 years and for women is 64 years; In Turkey, the normal retirement age for men is 60 years and for women is 58 years, see: Organisation for Economic Co-Operation and Development, 'Current Retirement Ages' (*OECD Website*, 1 December 2015) http://www.oecd-ilibrary.org/social-issues-migration-health/pensions-at-a-glance-2015/current-retirement-ages_pension_glance-2015-11-en accessed 23 August 2017. See also: Military Service: In Finland and Singapore, only legal males are conscripted into military service, see: Embassy of Finland, 'Military Service' (*Embassy of Finland Website*, 14 December 2014) http://www.finland.org.au/public/default.aspx?nodeid=35617&contentlan=2&culture=en-US accessed 23 August 2017 (Finland); 'About National Service' (*Mindef Singapore Government Website*, 23 August 2017) https://www.mindef.gov.sg/strengthenNS/about_ns.html accessed 23 August 2017 (Singapore). See also: Political Quotas (requirement for minimum number of male and female candidates in elections): European Union Directorate General for Internal Policies, *Electoral Gender Quota Systems and their implementation in Europe* (European Parliament 2011).

[28] *Corbett v Corbett (Otherwise Ashley) (No 1)* [1971] 2 All ER 33; *W v Registrar of Marriages* [2013] HKCFA 39 (Court of Final Appeal of the Hong Kong Special Administrative Region); *Re Kevin: Validity of Marriage of Transsexual* [2001] 28 Fam LR 158.

[29] Michael Silverman, 'Issues in Access to Healthcare by Transgender Individuals' (2009) 30(2) Women's Rights Law Reporter 347, 349; Jordan Aikan, 'Promoting an Integrated Approach to Ensuring Access to Gender Incongruent Health Care' (2016) 31(1) Berkeley Journal of Gender, Law and Justice 1, 33.

[30] EU FRA (n 9) 79.

[31] ibid. See also: James and others (n 9) 89.

rates of physical abuse.[32] Indeed, even without entering gender-segregated services, non-affirmed trans persons confront tangible dangers. Simply carrying out daily tasks with inconsistent identity documents may reveal an individual's trans history, exposing that person to greater risks of transphobic harm.[33]

Finally, withholding gender recognition has a highly symbolic impact on the status of trans populations. Refusing to formally acknowledge preferred gender represents state-sponsored rejection of trans experiences. It implies that trans identities are not real and that, therefore, they should not have the imprimatur of law. Denying recognition legitimises and encourages social derision of diverse gender narratives. It carries a powerful message that trans individuals are not full and equal rights holders.

Until the late 20th century, national laws were slow to affirm the preferred gender of trans persons.[34] When initially confronted with applications for legal gender recognition, most domestic courts rejected the idea of altering assigned gender status.[35] Early case law from around the world, most prominently the English High Court judgment in *Corbett v Corbett (Otherwise Ashley) (No 1)*[36], focused on the determinative and immutable character of biological sex (chromosomes, genitals and gonads).[37] Not only did judges hold that "biological sexual constitution"[38] defines legal gender, they also considered that this constitution was fixed

[32] Masen Davis and Kristina Wertz, 'When Laws Are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice' (2010) 8(2) Seattle Journal for Social Justice 467, 477; Jody L Herman, 'Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives' (2013) 19(1) Journal of Public Management and Social Policy 65, 77.
[33] Ariel Love, 'A Room of One's Own: Safe Placement for Transgender Youth in Foster Care' (2014) 89(6) New York University Law Review 2265, 2279; James Haynes, 'Identification Problems and Voting Obstacles for Transgender Americans' (2013) 1(1) Indiana Journal of Law and Social Equality 165, 172.
[34] Jens M Scherpe and Peter Dunne, 'The Legal Recognition of Transsexual and Transgender Persons – Comparative Analysis and Recommendations' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 218 – 219.
[35] See e.g. *Foy v Registrar General of Births, Deaths and Marriages (No 1)* [2002] IEHC 116] (Ireland); Second Chamber of the Turkish Court of Cassation, Y2HD, Yargitay Kararlari Dergisi, pp. 323–326 (21 January 1982) and Second Chamber of the Turkish Court of Cassation, Y2HD, Yargitay Kararlari Dergisi, pp. 1112–1126 (27 March 1986) (Turkey); *Re T* [1975] 2 NZLR 449 (HC) (New Zealand). There were, however, notable exceptions where national courts did affirm the preferred gender of trans individuals, see: Douglas *Smith*, '*Transsexualism, Sex Reassignment Surgery, and the Law*' (*1971*) *56 Cornell* Law Review 963, 971 – 972.
[36] *Corbett* (n 28). In *Corbett*, Ormrod J refused to legally acknowledge April Ashley's preferred female gender for the purposes of marriage law in England and Wales. The judgment has had a significant impact across the common law world, see e.g. *Lim Ying v Hiok Kian Ming Eric* [1991] SGHC 135 (Singapore); *W* (n 28). See also: Kevin Tso, 'Accident of Birth or Matter of Choice: Legal Recognition of Transsexual People in the Common Law' (2015) 21(3) Cardozo Journal of Law and Gender 683.
[37] *Corbett* (n 28), 47; Tokyo High Court, Kôtô Saibansho Minji Hanreishû, 53–1, 79 (9 February 2000); French Court of Cassation, JCP 1990, II, 21588 (21 May 1990); *In Re Ladrach* [1987] 32 Ohio Misc 2d 6, 10 (Ohio); *In the Matter of the Estate of Marshall G Gardiner* [2002] 273 Kan 191, 213 (Kansas).
[38] *Corbett* (n 28), 47.

and unchangeable.[39] Irrespective of whether applicants had undertaken a medical transition, domestic law would not acknowledge their preferred gender. As Hardberger CJ of the Court of Appeals of Texas (in)famously wrote in *Littleton v Prange*, "[t]here are some things we cannot will into being. They just are."[40]

In recent years, however, domestic judges and law-makers have begun to adopt a more nuanced approach. National (and regional) courts have critiqued the "essentialist"[41] reasoning which underpinned earlier decisions, such as *Corbett*. They argue that: (a) past case law underestimated the transformative capacity of gender-confirming treatments (i.e. medical transitions *can* relevantly alter sex characteristics for the purposes of gender recognition); and (b) social and psychological factors, in addition to biology, should be considered.[42] The more recent judgments also emphasise how incongruent gender documentation practically and legally harms trans populations.[43] This harm, it is argued, reduces the legitimacy of state refusals to recognise preferred gender. Some courts have even criticised the logical inconsistency of allowing persons to medically transition (sometimes offering public funds) but withholding legal acknowledgement once that process is complete.[44]

In 1972, Sweden introduced the first "national legislative scheme for changes of registered gender and legal gender status."[45] As of 2017 – while recognition rights are not available in all parts of the world –a growing number of people live in jurisdictions which do formally acknowledge preferred gender.[46] Across the Council of Europe, 41 (of 47) State Parties have

[39] See e.g. Cámara Nacional de Apelaciones en lo Civil, sala E, RDF 1990-4-133; JA 1990-III97 (31 March 1989) (Argentina). See also: Damian A Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2013) 29(4) American University International Law Review 797, 805 – 806.
[40] [1999] 9 SW3d 223, 231.
[41] *Re Kevin* (n 27), [106] – [110].
[42] *M v M* [1991] NZFLR 337 (New Zealand); Tribunal de familia No. 1 de Quilmes, La Ley 2001-F, 217 (30 April 2001) (Argentina); Supreme Court of South Korea, En Banc Order 2004Seu42 (22 June 2006) (South Korea); *RE JG, JG v Penagarah Jabatan Pendaftaran Negara* [2006] MLJ 90 (Malaysia); *MT v JT* (355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (New Jersey); *Secretary, Department of Social Security v "SRA*" [1993] 43 FCR 299, 325 (*per Lockhart J*) (Australia).
[43] *Goodwin v United Kingdom* [2002] 35 EHRR 18, [76] – [77]; *L v Lithuania* [2008] 46 EHRR 22, [57]; *B v France* [1993] 16 EHRR 1, [59]; *Foy v Registrar General of Births, Deaths and Marriages (No 2)* [2007] IEHC 470, [64]; See generally: *National Legal Services Authority (NALSA) v Union of India and others* Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 (15 April 2014) (KS Radhakrishnan J discusses challenges confronted by trans communities without legal affirmation).
[44] *Goodwin* (n 43), [78]; Federal Constitutional Court of Germany, BVerfG, BVerfGE 60, 123 (16 March 1982).
[45] Jameson Garland, 'The Legal Status of Transsexual and Transgender Persons in Sweden' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 282.
[46] Access to legal gender recognition is difficult to quantify. A number of international and regional actors have claimed that the "vast majority" of trans people around the world cannot be recognised in their preferred gender (see e.g. UNDP (n 10) 23). This statement is simultaneously *correct* and *incorrect.* As domestic laws currently stand around the world, it would appear that a significant proportion of trans people live in countries where they *do* have a *de jure* right to be acknowledged in their preferred gender (see generally: Chiam, Duffy and González

adopted recognition laws or administrative practices.[47] Throughout Canada and the United States, all but three states and provinces (as well as both federal governments[48]) validate trans identities.[49] In Latin America, not only do an increasing number of countries affirm preferred gender[50], some Latin American jurisdictions are now global leaders in developing 'best practice' recognition models.[51]

In Oceania, Australia and New Zealand – at both the national and state-levels – legally acknowledge preferred gender.[52] Gender recognition is also available in a number of East Asian and South-East Asian jurisdictions, although Thailand and the Philippines are two notable exceptions.[53] In South Asia, recent high-profile judgments in Nepal, Pakistan and India have affirmed recognition rights.[54] Indeed, as discussed further in Chapter VI, South Asian case law is increasingly promoted as *the* optimal model for non-binary communities. It is only in the Middle East and African regions where gender recognition rights either remain prohibited or have an ambiguous status.[55] In a number of sub-Saharan jurisdictions, trans persons can nominally be acknowledged in their preferred gender. However, the processes by which formal recognition is actually obtained, are unclear.[56]

Gil (n 1)). However, in practice, ambiguity in national law or the imposition of insurmountable pre-conditions for recognition may inhibit access. One must be careful, however, to draw a distinction between domestic laws which prohibit or make no provision for recognition, and national rules where either (a) it is uncertain how to obtain recognition or (b) many trans people cannot satisfy the necessary requirements. This thesis asks how human rights can impact the requirements which states adopt as pre-conditions for legal gender recognition.

[47] Transgender Europe (TGEU), 'Trans Rights Index 2017' (*TGEU Website,* 18 May 2017) http://tgeu.org/wp-content/uploads/2017/05/Index-online.png accessed 24 May 2017.

[48] 'Gender Designation Change' (*US State Department Website, No Date Available*) https://travel.state.gov/content/passports/en/passports/information/gender.html accessed 24 August 2017; 'Change the Sex on Your Passport or Travel Document' (*Government of Canada Website,* 31 August 2017) http://www.cic.gc.ca/english/passport/apply/new/change-sex.asp accessed 9 September 2017.

[49] Three jurisdictions in the United States of America do not recognise preferred gender on birth certificates. They are Ohio, Idaho and Tennessee, see: Jameson Garland, 'The Legal Status of Transsexual and Transgender Persons in the United States' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 607.

[50] Chiam, Duffy and González Gil (n 1) 47 – 58.

[51] See e.g. Act No. 26.743 (Argentina); Civil Code of the Federal District of Mexico City, art. 135 (Mexico City). See also: 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (19 April 2017) UN Doc No. A/HRC/35/36l, [57].

[52] Chiam, Duffy and González Gil (n 1) 63.

[53] ibid, 15 – 23. See also: *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics A Manual for National Human Rights Institutions* (Asia Pacific Forum of National Human Rights Institutions and the United Nations Development Programme 2016) 55 – 58 http://www.asiapacificforum.net/media/resource_file/SOGI_and_Sex_Characteristics_Manual_86Y1pVM.pdf accessed 24 August 2017.

[54] Supreme Court of Nepal, Writ No. 917 of the year 2064 BS (2007 AD) (21 December 2007); Supreme Court of Pakistan, Constitution Petition No. 43 of 2009 (22 March 2011); *NALSA* (n 43).

[55] Chiam, Duffy and González Gil (n 1) 7 – 24.

[56] ibid, 7 – 12.

At the international level – within United Nations and regional human rights frameworks – there is growing consensus that states must legally recognise preferred gender. In their concluding observations and recommendations, numerous UN Human Rights Treaty Bodies have called upon State Parties to formally acknowledge trans identities through humane, accessible processes.[57] Denying recognition rights, it is argued, is inconsistent with the obligations which State Parties have assumed. In its landmark communication decision, *G v Australia*, the UN Human Rights Committee held that refusing to validate preferred gender interferes with privacy guarantees under art. 17 of the International Covenant on Civil and Political Rights (ICCPR).[58]

The UN High Commissioner for Human Rights (UN HCHR) has condemned the "multiple rights challenges" which lack of recognition imposes upon trans populations.[59] Various UN agencies have documented how refusing to provide accurate gender documentation precipitates transphobic[60] human rights abuses.[61] Along with the UN Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, UN

[57] See e.g. United Nations Human Rights Committee, 'Concluding observations on the third periodic report of Ireland' (30 July 2008) UN Doc No. CCPR/C/IRL/CO/3, [8]; United Nations Human Rights Committee, 'Concluding observations on the seventh periodic report of Ukraine' (22 August 2013) UN Doc No. CCPR/C/UKR/CO/7, [10]; United Nations Human Rights Committee, 'Concluding observations on the fourth periodic report of the Republic of Korea' (3 December 2015) UN Doc No. CCPR/C/KOR/CO/4, [14] – [15]; United Nations Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fifth periodic report of Costa Rica' (21 October 2016) UN Doc No. E/C.12/CRI/CO/5, [20] – [21]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the seventh periodic report of Finland' (10 March 2014) UN Doc No. CEDAW/C/FIN/CO/7, [29(b)]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the fourth periodic report of Kyrgyzstan' (11 March 2015) UN Doc No. CEDAW/C/KGZ/CO/4, [33] – [34]; United Nations Committee on the Rights of the Child, 'Concluding observations on the combined fourth and fifth periodic reports of Chile' (30 October 2015) UN Doc No. CRC/C/CHL/CO/4-5, [34] – [35]; United Nations Committee against Torture, 'Concluding observations on the fifth periodic report of Hong Kong, China' (3 February 2016) UN Doc No. CAT/C/CHN-HKG/CO/5, [28] – [29]. In some cases, the Treaty Bodies have expressly praised State Parties for introducing (or improving) domestic procedures for obtaining gender recognition, see e.g. United Nations Human Rights Committee, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc No. CCPR/C/GBR/CO/6, [5]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the seventh periodic report of Argentina' (25 November 2016) UN Doc No. CEDAW/C/ARG/CO/7, [4(g)].

[58]Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017), [7.2]. In *G*, the litigant challenged rules in New South Wales whereby applicants for gender recognition must divorce before they are formally acknowledged in their preferred gender. For a comprehensive discussion of 'divorce requirements', see Chapter IV below.

[59] UN HCHR 2011 (n 26), [69]. See also: UN HCHR 2015 (n 11 [71].

[60] Transphobia describes discrimination and prejudice (including acts of violence) which trans communities experience worldwide.

[61] UNDP (n 10) 23; The Joint-United Nations Programme on HIV and AIDS, 'HIV and Transgender People' (*UN AIDS Website*, 18 July 2016) http://www.unaids.org/en/resources/presscentre/featurestories/2016/july/20160718_jiasociety accessed 24 August 2017.

HCHR has recommended that states "[issue] legal identity documents, upon request, that reflect preferred gender."[62]

Across regional human rights systems, there are also clear movements in favour of recognition. Although the African Commission on Human and People's Rights has focused on transphobic violence and discrimination[63], other regional actors have expressly advocated legal acknowledgement for preferred gender. Through various resolutions, statements and reports, the Inter-American Commission on Human Rights (IACmHR) has "consistently called on [Organisation of American States] Member States to adopt gender identity laws, which recognise the right to identity of trans persons."[64] In its recent admissibility report for the *Tamara Mariana Adrian Hernandez* Petition – challenging the absence of gender recognition in Venezuela as a breach of the American Convention on Human Rights – IACmHR identified sufficient evidence of rights violations to proceed with a merits analysis.[65]

The Council of Europe has played a particularly important role in advancing legal transitions. Both the Commissioner for Human Rights[66] and the Parliamentary Assembly[67] have consistently promoted the affirmation of trans identities. Their recommendations have been cited in recent case law, and are often a fulcrum around which national policy debates unfold.[68]

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[62] UN HCHR 2015 (n 11), [79(i)]; UN SOGI Independent Expert (n 51), [57].

[63] African Commission on Human and People's Rights, 'Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity' (2014) Resolution 275.

[64] Inter-American Commission on Human Rights, *Violence against LGBTI Persons* (12 November 2015) OAS/Ser.L/V/II.rev.1, [419]. For recent activities and statements, see: 'IACHR Expresses Concern over Setbacks in Federal Protections for Trans and Gender-Nonconforming Students in the United States', (*OAS Website*, 15 March 2017) http://www.oas.org/en/iachr/media_center/preleases/2017/033.asp accessed 24 August 2017; 'IACHR Hails Regional Progress on Human Rights of LGBTI People in the Americas' (*OAS Website*, 10 March 2017) http://www.oas.org/en/iachr/media_center/preleases/2017/028.asp accessed 24 August 2017; 'IACHR Congratulates Mexico and Colombia for Measures Recognising Identity of Trans Persons' (*OAS Website*, 1 July 2017) http://www.oas.org/en/iachr/media_center/preleases/2015/075.asp accessed 24 August 2017.

[65] *Tamara Mariana Adrian Hernandez*, Report on Admissibility, Inter-American Commission on Human Rights, Report No. 66/16 Petition 824-12 (6 December 2016). It is important to note, however, that a positive decision on admissibility only indicates that "facts alleged represent a violation of rights as stipulated in Articles 47(b) of the American Convention" (*Tamara Mariana Adrian Hernandez*, [24]).

[66] Commissioner for Human Rights of the Council of Europe, 'Human Rights and Gender Identity (n 10) 7 – 10; Commissioner for Human Rights of the Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (2nd edn, Council of Europe 2011) 84 – 90.

[67] Parliamentary Assembly of the Council of Europe, 'Discrimination on the basis of sexual orientation and gender identity' (29 April 2010) Resolution 1728 (2010), [16.11.2]; Parliamentary Assembly of the Council of Europe, 'Discrimination against Transgender People in Europe' (22 April 2015) Resolution No. 2048(2015), [6.2].

[68] *YY v Turkey* App No. 14793/08 (ECtHR, 10 March 2015), [110]; *AP, Garcon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017), [124]; House of Commons Select Committee on Women and Equalities, *Transgender Equality* (The Stationary Office Limited 2016) 9 – 10; Natalie Videbaek Munkholm, 'The Legal Status of Transsexual and Transgender Persons in Denmark' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 157 – 160.

Prior to 2002, the European Court of Human Rights (ECtHR) – while condemning the unique consequences of non-affirmation in France[69] – accorded State Parties a general margin of appreciation to disallow gender recognition.[70] However, in *Goodwin v United Kingdom*, the ECtHR ruled that failing to acknowledge preferred gender violates private life under art. 8 of the European Convention on Human Rights (ECHR).[71] Citing "clear and uncontested evidence of a continuing international trend in favour…of legal recognition of the new sexual identity of post-operative transsexuals"[72], *Goodwin* transformed gender identity rights in Europe[73] and has influenced judicial approaches to trans identities around the world.[74]

C. Conditions of Recognition

There is, thus, a growing consensus that, as a matter of human rights, states should formally acknowledge the preferred gender of trans individuals. Although gender recognition is not available in all jurisdictions, international (and regional) human rights standards are interpreted to affirm trans identities. This affirmation is now reflected in national frameworks around the world.

Yet, while human rights actors[75] increasingly endorse a general right to recognition, it is less clear how human rights principles influence the processes by which affirmation is obtained. The UN Treaty Bodies and Special Procedures have primarily emphasised access to recognition, without focusing on the conditions for affirmation. Similarly, in *Goodwin*, although the ECtHR identified a core entitlement to formal acknowledgement, the Court

[69] *B v France* [1993] 16 EHRR 1. In *B*, the ECtHR held that the specific circumstances in which recognition was denied in France (particularly the impossibility of obtaining additional documents, outside the civil register, which indicated preferred gender) was incompatible with art. 8 of the European Convention on Human Rights. The Court did not yet, however, rule that there was a general right to gender recognition.
[70] *Rees v United Kingdom* [1987] 9 EHRR 56; *Cossey v United Kingdom* [1991] 13 EHRR 622; *X, Y and Z v United Kingdom* [1997] 24 EHRR 143; *Sheffield and Horsham v United Kingdom* [1999] 27 EHRR 163.
[71] *Goodwin* (n 43), [93].
[72] ibid, [85].
[73] In subsequent cases, the ECtHR has drawn upon *Goodwin*'s ideas of trans dignity and identity development to extend gender identity rights across Europe, see: *Schlumpf v Switzerland* App No. 29002/06 (ECtHR, 5 June 2009); *Van Kuck v Germany* [2003] 37 EHRR 51. *Goodwin* has also been determinative in domestic judgments, see e.g. *Foy (No 2)* (n 43).
[74] See e.g. *W* (n 28).
[75] Throughout this work, the thesis uses the terms 'human rights actors' and 'rights actors' to refer to a broad range of international and regional judges and soft-law officials/institutions (including UN Human Rights Treaty Bodies, the UN Human Rights Council, Special Procedures of the UN Human Rights Council, UN High Commissioner for Human Rights, Inter-American-Commission for Human Rights, European Court of Human Rights, Commissioner for Human Rights of the Council of Europe, Parliamentary Assembly of the Council of Europe, African Commission on Human and People's Rights, etc.) who, as part of their work or mandates, assess (in a binding, advisory or observational capacity) the compatibility of state action with international and regional human rights standards.

conceded that the "appropriate means of achieving recognition" remain subject to State Party discretion.[76] In recent years, international and national actors have begun to critique the legitimacy of affirmation procedures.[77] This is an area of law, however, that remains comparatively underexplored – both in practice and in scholarship.[78]

The absence of broader engagement with the requirements for gender recognition is a surprising gap in the existing jurisprudence and academic literature. It results in inadequate scrutiny of how pre-conditions for acknowledging preferred gender *de facto* restrict transition rights. *How* individuals are formally recognised directly affects *whether* they can enjoy recognition protections. The mere existence of a legal transition scheme does not determine trans status if the content of that scheme renders legal transitions inaccessible. A jurisdiction, which extends general affirmation rights to trans individuals, may create insurmountable barriers through unachievable pre-conditions. In *L v Lithuania,* the ECtHR found a violation of art. 8 ECHR where state actors conditioned legal recognition on surgical interventions, which were not available on the Lithuanian territory.[79] Similarly, requirements for recognition may necessitate the compromise of other human rights. To the extent that the practice of legally transitioning implicates bodily and family protections, it cannot suffice to simply ask whether the possibility of transitioning exists.[80]

This thesis evaluates how human rights law can impact the requirements which states impose as pre-conditions for legal gender recognition. In a context where international human rights increasingly affirm trans preferred gender, and where a growing number of jurisdictions have adopted recognition frameworks, the thesis asks how state actors can control entry into formal transition pathways. While the thesis does not offer (nor is it intended to offer) a definitive 'human rights model' for legal recognition (i.e. a binding international law framework, which all states must apply), it does identify and analyse the key human rights concerns raised by gender recognition processes.

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[76] *Goodwin* (n 43), [93].

[77] Within the United Nations Human Rights Treaty Body system, see: *G v Australia* (n 59); United Nations Human Rights Committee, 'Concluding observations on the seventh periodic report of Ukraine' (22 August 2013) UN Doc No. CCPR/C/UKR/CO/7, [10]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined fifth and sixth periodic reports of Slovakia' (25 November 2015) UN Doc No. CEDAW/C/SVK/CO/5-6, [36] – [37]; United Nations Committee against Torture, 'Concluding observations on the fifth periodic report of Hong Kong, China' (3 February 2016) UN Doc No. CAT/C/CHN-HKG/CO/5, [28] – [29]. For regional case law, see: *Hamalainen v Finland* [2015] 1 FCR 379; *AP, Garcon and Nicot* (68).

[78] See Section IV below.

[79] [2008] 46 EHRR 22, [57] – [59].

[80] See e.g. *AP, Garcon and Nicot* (n 67); Stockholm Court of Administrative Appeal, *Socialstyrelsen v NN* Mål nr 1968-12 (19 December 2012); Federal Constitutional Court of Germany, 1 BvL 10/05 (23 July 2008).

II. Terminology

Defining and explaining terminology has great importance for any thesis. It is particularly significant, however, when considering the relationship between trans identities and the law. As a population which has historically been (mis)characterised through the application of pejorative language[81], trans individuals see unique meaning in the terminology adopted to frame their lives. While a number of core terms have already been defined, it is important, at the outset, to explain and contextualise the language employed in this thesis. Given the specific complexity of non-binary vocabulary, there is also an additional terminology discussion of non-male and non-female identities in Chapter VI.

While this thesis explores conditions for gender recognition, it is not a trans position paper or an extension of trans advocacy campaigns. The thesis applies human rights principles to legal transition processes. In doing so, it may recommend reforms which align with trans political strategies. Yet, the thesis neither responds to, nor is it guided by, trans advocacy demands. It undertakes an objective and impartial human rights analysis. In some cases, the thesis reaches conclusions which differ from or conflict with preferred trans policies.

In making terminology choices, however, the thesis *does* adopt trans-respectful language. Against the background of historic discrimination and de-legitimisation, the thesis prioritises terms which affirm the dignity and humanity of trans communities. The thesis may not endorse all trans rights claims. It does, however, favour language which acknowledges trans individuals as equal and full human rights holders.

Prioritising trans-affirming vocabulary, however, is no guarantee that the thesis will employ universally agreed or desired terms. Like the multiplicity of trans identities which are explored in this thesis, so too there is an infinite spectrum of language for explaining trans narratives.[82] Some people prefer more standardised, publically-recognisable terminology (e.g. transgender, transsexual[83], etc.). Others deploy highly-personalised words which best capture their own

[81] Heklina, 'The Trouble with *Tranny*' (2015) 16(2) Studies in Gender and Sexuality 142; Heidi Levitt and Maria Ippolito, 'Being Transgender: The Experience of Transgender Identity Development' (2014) 61(12) Journal of Homosexuality 1727, 1741 – 1743. See also: Catherine White Holman and Joshua Goldberg, Social and Medical Transgender Case Advocacy' (2006) 9(3-4) International Journal of Transgenderism 197.

[82] See generally: 'Trans Terms' (*TENI Website, No Date Available*) http://teni.ie/page.aspx?contentid=139 accessed 18 March 2017; GLAAD, 'Glossary of Terms – Transgender' (*GLAAD Website*, *No Date Available*) https://www.glaad.org/reference/transgender accessed 24 August 2017.

[83] While those who identify as 'transsexual' may have their own preferred definition, the term is typically used to describe individuals who access gender-conforming surgical interventions as part of their personal transition

individualised experiences. This thesis acknowledges that the terminology used throughout may not be preferable (or even acceptable) to some trans persons. In a context where there are potentially seven billion pathways to verbalise gender identity, it is not possible to achieve full inclusivity. Rather, the thesis prioritises terminology, which is promoted by trans advocates and which embraces the widest possible range of trans lives.

As already indicated, the thesis uses the shortened term 'trans' in preference to the more commonly referenced 'transgender'. This latter word is typically invoked as an umbrella concept, encompassing all individuals who do not identify with the gender status assigned to them at birth. The thesis prefers 'trans' instead of 'trans*gender*' because some persons, who voluntarily self-identify within the trans community, have no experience of gender.[84]In recent scholarship, certain authors have used the language of 'trans*'[85]. Including an asterisk is intended to express affirmation for all diverse and non-standard gender narratives. This thesis does not use 'trans*' terminology, however, because all trans experiences can (and should) be included within 'trans' frameworks. When explaining the identity in which trans individuals wish to be formally acknowledged, the thesis speaks of 'preferred' gender (or, on rarer occasions, 'affirmed' gender).

Where the thesis discusses persons who do identify with their birth-assigned gender, it employs the word 'cisgender' (derived from the Latin term 'cis' – meaning 'on this side'). Use of 'cisgender' should not be understood as derogatory or as reverse transphobia. The term is not linked to the slur, 'sissy'. Rather, it is intended to convey the idea that there are no normative (only different) gender identities. Relying on that same reasoning, the thesis prefers 'trans man' and 'trans woman' as opposed to 'transman' or 'transwoman'. For some trans individuals, the latter terms suggest that trans experiences of masculine and feminine identities are less real than those of cisgender peers.

Apart from the term, 'transgender', 'gender identity' is perhaps the most recognisable trans-related phrase. This thesis adopts the definition of 'gender identity' set out in the landmark Yogyakarta Principles (a 2007 soft-law document, authored by 29 distinguished human rights

process.

[84] In this thesis, persons who have no experience of gender are referred to as 'agender'. While this is common terminology, which is preferred by many non-gendered individuals, it may not be used by all those who identify without a gender.

[85] See e.g. Olga Tomchin, 'Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People' (2013) 101(3) California Law Review 813.

experts, which apply international human rights to sexual orientation and gender identity).[86] The introduction to the Yogyakarta Principles describes 'gender identity' as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body…and other expressions of gender, including dress, speech and mannerisms."[87] The thesis also endorses the Principles' explanation of 'sexual orientation' as the "capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."[88] When referring to sexual orientation and gender identity together, the thesis uses the abbreviation, 'SOGI'.

Throughout the thesis, there is consistent reference to 'queer' persons and culture. Use of the terminology of 'queer' remains controversial within (particularly English-speaking) lesbian, gay, bisexual, trans and intersex[89] (LGBTI) communities. For many individuals, 'queer' is associated with past oppression, a visceral symbol of the legal and social discrimination which LGBTI persons have confronted.[90] For younger generations, however, 'queer' represents the re-appropriation of social power.[91] It is invoked as a mark of both protest and strength, affirming all diverse gender and sexual narratives. While acknowledging the legitimacy of history-focused critiques, this thesis embraces 'queer' as a transformative lens for challenging institutionalised homophobia and transphobia. The thesis understands queer in its most expansive form, encompassing all non-heterosexual and non-cisgender identities.

[86] 'About the Yogyakarta Principles' (*Yogyakarta Principles Website*, *No Date Available*) http://www.yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles/ accessed 24 August 2017.
[87] Yogyakarta Principles, Introduction, [FN 2] http://www.yogyakartaprinciples.org/introduction/ accessed 24 August 2017.
[88] ibid, [FN 1].
[89] Intersex variance refers to a "variety" of experiences where "a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male", 'What is Intersex' (*Intersex Society of North America Website, No Date Available*) http://www.isna.org/faq/what_is_intersex accessed 30 August 2017.
[90] Mark Segal, 'The Problem with the Word "Queer"' (*The Advocate*, 11 February 2016) https://www.advocate.com/commentary/2016/2/11/problem-word-queer accessed 24 August 2017; Marissa Higgins, 'Is the Word "Queer" Offensive? Here's A Look At Its History in the LGBTQA+ Community' (*Bustle*, 4 February 2016) https://www.bustle.com/articles/139727-is-the-word-queer-offensive-heres-a-look-at-its-history-in-the-lgbtqa-community accessed 24 August 2017; Paul Katz, 'Gay v Queer: Labels and Limitations' (*Huffington Post*, 2 October 2016) http://www.huffingtonpost.com/paul-katz/gay-vs-queer-labels-and-l_1_b_9195714.html accessed 24 August 2017.
[91] Diane Zosky and Robert Alberts, 'What's in a name? Exploring use of the word queer as a term of identification within the college-aged LGBT community' (2016) 26(7-8) Journal of Human Behaviour in the Social Environment 597; Judith Butler, *Excitable speech: A politics of the performative* (Routledge 1997) 158.

III. Methodology

This thesis evaluates how human rights law can impact the requirements which states impose as pre-conditions for legal gender recognition. It adopts a global studies methodology[92], situating law and preferred gender within broader political, social and historical contexts (without favouring any one national, regional or supra-national narrative).

Global legal studies differ from other methodological frameworks in key respects. A 'global' perspective challenges existing research paradigms so that, while global studies may draw from across disciplines, they are not (unlike inter-disciplinary methods) bound by specific, disciplinary conventions.[93] Similarly, a global framework understands that, at different junctures and on different questions, local and regional knowledge may have significant analytical relevance, even where the question under consideration appears international in nature.[94]

In the context of this doctoral project, use of a global studies methodology has a number of important advantages. The thesis adopts a holistic approach towards legal acknowledgement of preferred gender. Instead of anchoring its analysis in specific jurisdictions or regional frameworks, the thesis asks how – having regard to existing conditions of recognition around the world – human rights can enhance trans access to legal affirmation. With this particular research focus in mind, adopting a 'global' perspective is preferable to alternative methodological options, particularly reliance on comparative analysis (which is often applied to trans rights). For this doctoral project, a comparative approach would have significant limitations, particularly in terms of a requirement to identify 'anchor' jurisdictions. Focusing analysis on (at most) three jurisdictions would reduce the capacity of the thesis to explore all the complex political and legal concerns, which form part of modern debates on legal gender recognition. A global studies methodology, on the other hand, "seeks to recover a holistic approach to analysing societies and…peoples."[95] It is well-placed to accommodate the multi-faceted and multi-jurisdictional questions which are explored throughout the subsequent chapters.

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[92] See generally: Jan Nederveen Pieterse, 'What is Global Studies' (2014) 10(4) Globalizations 499; Giles Gunn, *Ideas to Die For: The Cosmopolitan Challenge* (Routledge 2013); Matthew Sparke, *Introducing Globalization: Ties, Tensions and Uneven Integration* (Wiley-Blackwell 2013).
[93] Eve Darian-Smith and Philip C McCarthy, *The Global Turn: Theories, Research Designs and Methods for Global Legal Studies* (University of California Press 2017) 10-12.
[94] ibid, 5.
[95] ibid, 40.

Global legal studies are particularly attuned to issues of historical and cultural context.[96] A global perspective is one which appreciates that, in order to properly understand the nature of modern legal phenomena, one must be aware of the geographic, political and temporal environment out of which those phenomena emerge.[97] In particular, a global framework not only resists the unconscious imposition of Western-centric paradigms. It also respects the individualised circumstances in which legal and social norms are developed.

For this doctoral project, the cultural sensitivities, which global-orientated analysis requires, are particularly important. While this thesis does not seek to establish a universal, human rights model for legal gender recognition, it is concerned with how individuals access recognition in all cultural environments. The thesis addresses gender and identity across geographic, cultural and political boundaries, and it seeks to understand how multiple factors, including class, race and sexual orientation, impact upon access to formal affirmation. Encouraging a broader analysis, which transcends personal, historical and geographic identities, global studies are an ideal framework in which to situate this doctoral research.

While the thesis is a global studies – rather than an inter-disciplinary – project, it does draw from materials across a broad range of academic fields, including medicine, social policy and gender studies. These non-legal resources have been utilised not only because they provide greater insights into trans lived-experiences but also because they explain and contextualise institutional (healthcare, political, etc.) responses to gender transition. As such, they are consistent with global studies' commitment to holistic analysis. Exploring topics as diverse as trans familial relationships, childhood gender cognisance and self-identification beyond the binary, use of information from across disciplines facilitates more comprehensive and inclusive research.

The doctoral project does not engage in independent empirical research. To the extent that the thesis speaks to the lived-experiences of trans populations around the world, it relies upon existing quantitative and qualitative research. In some ways, the decision not to undertake empirical work is a limitation within the wider doctoral project. If one accepts that the human rights compatibility of conditions of recognition is, to at least some extent, dependent upon how those conditions affect individual trans lives, understanding that impact, through independent

[96] ibid, 47-49.
[97] ibid.

fieldwork, would be a welcome feature. However, the candidate chose not to undertake empirical legal research for a number of reasons.

Given the availability of resources across disciplines, it was – in the overwhelming majority of instances – possible to understand trans lived-experiences of the law by referring to existing material. For those areas where there is a dearth of research (e.g. trans youth, non-binary), it would have been difficult to work with a sufficient cohort of subjects to obtain meaningful information.

Furthermore, as this thesis is situated within the broader field of global legal studies, it is not, as noted, grounded in a single jurisdiction (or comparator jurisdictions). There is a risk, therefore, that, if empirical research was only undertaken with trans populations from certain jurisdictions (such as Ireland or the United Kingdom), as would inevitably have been the case, it would have raised results which were not applicable beyond the subjects' specific cultural context. As noted in Chapter V, the fact that trans individuals in one country experience law and culture in a particular manner does not guarantee a similar experience for those whose lived-environment is substantially different. Ultimately, considering the nature of the thesis as a doctrinal evaluation of the conditions of recognition, the candidate concluded that independent empirical research would have been neither appropriate nor beneficial.

In terms of the substantive chapters (I-VI), the thesis submits four categories of pre-conditions to human rights analysis. The requirements examined are: (a) physical medical intervention; (b) compulsory divorce; (c) minimum age limits; and (d) mandatory binary gender.

In focusing on these four categories, the thesis does not imply that they are the only possible conditions of recognition. There are numerous requirements which can be imposed on legal transition processes. Rather, the thesis concentrates on the four selected categories merely because, as a matter of both current and historical practice, they are the most common pre-conditions, which applicants for recognition confront. Around the world, formal acknowledgement has typically been reserved for adult male or female-identified persons, who are not party to an existing marriage and who desire full gender-confirming treatments, including the removal of their reproductive capacities. By subjecting these four categories to human rights critique, the thesis can comprehensively analyse the potential influence of human rights principles on legal gender recognition.

In Chapter I, the thesis sets out a thorough explanation of the human rights framework against which conditions of recognition are to be evaluated. Chapter I not only identifies the relevant human rights principles, but also provides a detailed justification for the sources upon which the thesis relies.

Throughout the substantive assessment undertaken (Chapters II to VI), four human rights themes have particular relevance: (a) bodily integrity; (b) equality and non-discrimination; (c) marriage and family life; and (d) children's rights. As with the categories of conditions under review, focusing on these four themes does not imply that they are the only rights applicable to legal transitions. As the historical development of gender recognition illustrates, numerous rights intersect with trans affirmation, not least the guarantee of privacy.[98] This thesis concentrates on the four selected themes merely because, in the analysis which follows, they are the *most* relevant rights, cutting across various access requirements for formal acknowledgement.

Chapter I draws from a broad range of sources to establish a trans-inclusive human rights framework. While acknowledging the compelling status of treaty and customary law in human rights adjudication, Chapter I notes that trans identities are largely absent from existing treaty and custom guarantees. In addition, states with the most egregious anti-trans laws have often expressly refused to endorse even basic treaty obligations. While, in general terms, treaties and custom are a powerful rights framework, they are (at least on their own) weak tools for protecting trans populations.

Instead, Chapter I moves beyond a treaty-custom paradigm. It embraces additional sources of human rights which explicitly incorporate trans experiences. In particular, the thesis draws from: (a) judicial decisions; and (b) soft-law instruments. The thesis is careful, however, to avoid 'a la carte' analysis. It does not cherry-pick from favourable or trans-affirming sources. Rather, it presents all relevant case law and soft law jurisprudence. This is so even where there is express conflict with trans preferences and advocacy positions. Similarly, Chapter I concedes that drawing from a wider spectrum of sources restricts opportunities to identify binding standards of international law. While insights from national or regional standards can illuminate the relationship between human rights and trans identities, they bind only those actors who are

[98] *G v Australia* (n 57); *Goodwin* (n 43).

subject to their terms. While this is a limitation, using additional sources facilitates more meaningful and engagement with trans lives.

IV. Existing Literature and Originality

There is a growing body of scholarship which explores the status of trans identities in domestic and international legal systems. Yet, within this developing research, the thesis makes novel contributions.

Much (but not all[99]) of the available scholarship focuses on broader access and framework questions for gender recognition.[100] In a context where, until the early 21st century, trans persons in many parts of the world could not obtain formal acknowledgement, academics have unsurprisingly prioritised justifications for recognition (rather than recognition processes) under constitutional and regional rights frameworks. This thesis moves beyond baseline questions of *whether* trans populations should be affirmed and offers a comprehensive analysis of how human rights can impact conditions of recognition.

[99] See e.g. Alex Sharpe, 'Gender Recognition in the UK: A Great Leap Forward' (2009) 18(2) Social and Legal Studies 241; Ralph Sandland, 'Feminism and the Gender Recognition Act 2004' (2005) 13(1) Feminist Legal Studies 43; Rebecca Lee, 'Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States' Laws regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans People' (2015) 33(1) Berkeley Journal of International Law 114; Hollin Dickerson, 'Vindication without Substance: Gender Recognition and the Human Rights Act (2005) 40(4) Texas Law Journal 807; Divya Jalan, 'Trans Gender Justice: Critical Reflections on the Conceptual Limitations of English Law, Implementation of the Law, and the Relationship with Social Progress' (2016) 4(2) Legal Issues Journal 43; Theodore Bennett, '"No Man's Land": Non-Binary Sex Identification in Australian Law and Policy (2014) 37(3) University of New South Wales Law Journal 847.

[100] Jason Allen, 'A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States' (2008) 14(2) Michigan Journal of Law and Gender 169; Amy Ballard, 'Sex Change: Changing the Face of Transgender Policy in the United States' (2012) 18(3) Cardozo Journal of Law and Gender 775; Teresa Zakaria, 'By Any Other Name: Defining Male and Female in Marriage Statutes' (2005) 3(1) Ave Maria Law Review 349; Athena Liu, 'Gender Recognition: Two Legal Implications on Marriage' (2013) 43(2) Hong Kong Law Journal 497; Dirmann Bailey Morse, 'Comparing Civilian Treatment of Transsexual Marriage: Why Louisiana Should Implement the French Approach' (2008) 54(1) Loyola Law Review 235; Marybeth Herald, 'Transgender Theory: Reprogramming Our Automated Settings' (2005) 28(2) Thomas Jefferson Law Review 167; Sam Winter, 'Identity Recognition without the Knife: Towards a Gender Recognition Ordinance for Hong Kong's Transsexual People' (2014) 44(1) Hong Kong Law Journal 115; Jamison Green, 'If I Follow the Rules, Will You Make Me a Man: Patterns in Transsexual Validation' (2012) 34(1) University of La Verne Law Review 23; Kai Yeung Wong, 'Taking Transgender Rights Seriously: A Rights-Based Model of Gender Recognition in Hong Kong' (2015) 45(1) Hong Kong Law Journal 109; Patrick Jiang, 'Legislating for Transgender People: A Comparative Study of the Change of Legal Gender in Hong Kong, Singapore, Japan and the United Kingdom' (2013) 7 Hong Kong Journal of Legal Studies 31; Kenneth McK Norrie, '*Bellinger v Bellinger*, the House of Lords and the Gender Recognition Bill' (2004) 8(1) Edinburgh Law Review 93; Lachlan Harrison Smith, 'Changing Sex on the Birth Register – Leave Room for I – Regulation and Repression of Transsexual Identities in Theory and Law' (2007) 10(2) Flinders Journal of Law Reform 211.

Where scholars have addressed access requirements for legally transitioning, they have typically focused on compulsory medicalisation. There is a considerable body of literature which reviews the permissibility of surgery and sterilisation pre-conditions.[101] This existing research offers important insights, and has exposed the conflict between medical requirements and core protections, such as bodily integrity. In Chapter II, the thesis draws upon (and places itself within) on-going critiques of enforced medicalisation.

Yet, the thesis also departs from, and builds upon, this current research in three important ways. First, the available scholarship is heavily rooted in national and regional frameworks, such as American constitutional law. While academics have extensively considered involuntary medicalisation, they often look through a narrow and context-specific domestic lens.[102] Where surgery and sterilisation have been reviewed against international rights standards, this has frequently emphasised soft-law or advocacy perspectives.[103] Although these latter resources often represent landmark statements on trans bodily rights, they engage less with the nuance and specific requirements of human rights law. This thesis is novel in providing a detailed and thorough assessment of medicalisation under a global human rights framework. The thesis advances beyond national and regional guarantees, and assesses physical intervention through international prohibitions on torture, cruel and inhuman, or degrading treatment.

The thesis is also unique in challenging policy rationales which motivate compulsory medicalisation. While the existing case law and scholarship explores how physical requirements violate (national) bodily integrity rights, there is noticeably less research on government justifications for enforced surgery, sterilisation and hormone therapy. To the extent

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[101] Lisa Mottet, *'Modernizing State Vital Statistics Statutes and Policies* to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People' (2013) 19(2) Michigan Journal of Gender and Law 373; Harper Jean Tobin, 'Against the Surgical Requirement for Change of Legal Sex' (2006) 38(2) Case Western Reserve Journal of International Law 393; Dean Spade, 'Resisting Medicine, Re/modeling Gender' (2003) 18(1) Berkeley Women's Law Journal 15, 20; Loue (n 19); M Dru Levasseur, 'Gender Identity Defines Sex: Updating the Law to reflect modern medical science is key to Transgender Rights' (2014) 39(4) Vermont Law Review 943; Alice Newlin, 'Should a Trip from Illinois to Tennessee Change a Woman into a Man? Proposal for a Uniform Interstate Sex Reassignment Recognition Act' (2008) 17(3) Columbia Journal of Gender and Law 461; Anne E Silver, 'An Offer You Can't Refuse: Coercing Consent to Surgery through the Medicalization of Gender Identity' (2013) 26(2) Columbia Journal of Gender and Law 488; Laura H Norton, 'Neutering the Transgendered: Human Rights and Japan's Law No. 111' (2006) 7(2) Georgetown Journal of Gender and the Law 187; Lara Karaian, 'Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law' (2013) 22(2) Social and Legal Studies 211.

[102] As can be seen from the scholarship cited in FN 101, a considerable proportion of the available literature considers medicalisation requirements through the lens of American constitutional law – both state and federal.

[103] See e.g. 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [49]; World Health Organisation and others, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement* (World Health Organisation 2014) 7 http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf accessed 1 June 2017; Richard Kohler and Julia Erht, *Legal Gender Recognition in Europe* (2nd edn, TGEU 2016) 25 – 27.

that such justifications reinforce inaccurate or prejudiced assumptions (e.g. presumptions that trans persons are sub-optimal parents, etc.), they too undermine the legitimacy of medical pre-conditions. This thesis is distinct in comprehensively interrogating rationales for physical intervention. It reveals how both the practice of, *and the normative explanation for,* medicalisation conflicts with human rights. Indeed, the thesis analyses the policy aims of all four conditions of recognition under review. Acknowledging how these aims can negatively impact trans populations even outside gender recognition, the thesis challenges the biases and myths upon which they are based.

Perhaps the most important contribution that this thesis makes to the existing legal scholarship is the broad range of conditions explored. Departing from a medico-legal focus, the thesis addresses three additional categories of requirements. In all three cases – compulsory divorce, minimum age limits and mandatory binary gender – there is an absence of relevant literature, and the legitimacy of the conditions remains under-explored.[104] In the specific context of trans children and non-binary identities, despite growing media exposure, there is a particular dearth of research so that the thesis truly charts a new path. The thesis approaches all three categories in a novel and dynamic way. It confronts 'common sense' assumptions about trans intimacies and gender diversity, and it reveals the potential impact of human rights on emerging trans narratives.

[104] It is important to acknowledge, however, that, while there is a dearth of literature in this area, other scholars have – either directly or indirectly – considered these topics, see e.g. Audrey Stirnitzke, 'Transsexuality, Marriage and the Myth of True Sex' (2011) 53(1) Arizona Law Review 285; Bennett (n 99); Paul Catley, 'A long road nearing an end? Recognition for transsexual people' (2003) 25(3) Journal of Social Welfare and Family Law 277; Sharon Cowan, '"Gender is No Substitute for Sex": A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13(1) Feminist Legal Studies 67; Jack Harrison, Jaime Grant and Jody L Herman, 'A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey' (2012) 2 LGBTQ Policy Journal at the Harvard Kennedy School 13; Emily Blincoe, 'Sex markers on birth certificates: Replacing the medical model with self-identification' (2015) 46(1) Victoria University of Wellington Law Review 57; Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19(1) Social and Legal Studies 107; Sally Hines, 'A pathway to diversity? human rights, citizenship and the politics of transgender' (2009) 15(1) Contemporary Politics 87; Terry S Kogan, 'Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labelled "Other"' (1996) 48(6) Hastings Law Journal 1223; Anna James Neuman Wipfler, 'Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents' (2016) 39(2) Harvard Journal of Law and Gender 491; Myra J Hird, 'Gender's nature: Intersexuality, transsexualism and the "sex"/"gender" Binary' (2000) 1(3) Feminist Theory 34; Lauren Bishop, 'Gender and Sex Designations for Identification Purposes: A Discussion on Inclusive Documentation for a Less Assimilationist Society' (2015) 30(2) Wisconsin Journal of Law, Gender and Society 131; Jennifer Rellis, 'Please Write E in this Box toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India'(2008) 14(2) Michigan Journal of Gender and Law 223; Dylan Vade, 'Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is more Inclusive of Transgender People' (2005) 11(2) Michigan Journal of Gender and Law 253.

V. Limitations: Scope and Analysis

A. Scope: 'De-Gendering' the Law

A central premise, upon which this thesis operates, is the idea of gender as a legally regulated concept. To the extent that the thesis asks how human rights can impact conditions of legal recognition, it implicitly accepts gender as a formal category of law. Within the existing scholarship, however, there is disagreement over both the utility and desirability of legal gender.

For some observers, tying gender to law instigates, facilitates and reproduces inequality[105] (particularly when based on a binary male-female model).[106] Gilbert writes that "[b]igenderism, by codifying the distinction between male and female, man and woman, masculine and feminine, creates a virulently sexist, heterosexist, and transphobic culture."[107] Regulating society into two mandatory gender categories, law not only reinforces traditional ideas of gender difference but also legitimises troubling expectations about acceptable gender behaviour.[108] It places the official imprimatur of the State on existing socio-gender inequalities.[109]

Although legal gender is supported as a bulwark against fraud[110], opponents reject it as "fatally imprecise".[111] Where a cisgender woman, who adopts a masculine gender presentation, has 'female' gender markers, she enjoys accurate identity documents. Yet, given the incongruence between gender presentation (i.e. masculine) and legal classification (i.e. feminine), such accuracy is unlikely to facilitate identity verification. Indeed, considering that there is (perceived) incongruence between the woman's externalised and official gender, using her gender status to check identity may actually obstruct verification processes. In such

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[105] Riki Anne Wilchins, *Read My Lips: Sexual Subversion and the end of Gender* (Magnus Books 1997) 16; Martine Rothblatt, *The Apartheid of Sex: Manifesto on the Freedom of Gender* (Rivers Oram Press/Pandora 1996) 103.

[106] Elizabeth Reilly, 'Radical Tweak – Relocating the Power to Assign Sex – From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality' (2005) 12(1) Cardozo Journal of Law and Gender 297, 332; Susan Stryker, 'Undoing Sex Classification can Provide Justice' (*New York Times,* 19 October 2014) http://www.nytimes.com/roomfordebate/2014/10/19/is-checking-the-sex-box-necessary/undoing-sex-classification-can-provide-justice accessed 10 April 2017.

[107] Miqqi Alicia Gilbert, 'Defeating Bigenderism: Changing Gender Assumptions in the Twenty-first Century' (2009) 24(3) Hypatia 93, 103.

[108] Patricia Gagne, Richard Tewksbury and Deanna McGaughey, 'Coming out and Crossing over: Identity Formation and Proclamation in a Transgender Community' (1997) 11(4) Gender and Society 478, 488.

[109] Tomchin warns that "[a]s long as legal sex classification persists, it will be used to harm those who are most vulnerable", Tomchin (n 85), 861.

[110] Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records* (Human Rights and Equal Opportunity Commission 2009) 14; Bennett (n 99), 866.

[111] Bennett (n 99), 866.

circumstances, it is more reliable to use alternative indicators, like "eye colour" or "facial recognition".[112]

On the other hand, scholars have also raised numerous objections to de-gendering arguments. First, legal gender plays an important role in responding to discrimination.[113] While law may facilitate certain prejudices, it is a primary instrument for remedying gender-based inequality.[114] Second, gender unfairness is not solely a product of law. It is also a social phenomenon. De-gendering the law will not fully eradicate gender inequities. It simply reduces law's capacity to intervene.[115] Third, de-gendering diminishes the experiences of female-identified persons.[116] For many women, the legal category 'female' acknowledges the unique biases that they face "as women".[117] It is a symbolic strategizing tool around which all female-identified individuals (including trans women) can organise for collective rights.[118] Finally, many trans persons reject abolishing legal gender.[119] While scholars have described trans experiences as inherently challenging gender[120], Prosser criticises failures to acknowledge the numerous trans persons for

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[112] ibid.

[113] Government of Australia, *Australian Government Guidelines on the Recognition of Sex and Gender* (Government of Australia 2015) 6 https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF accessed 10 April 2017; Wipfler (n 1047), 539. See also: Linda C McClain, 'Categorizing by Sex is a Remedy for Discrimination' (*New York Times,* 20 October 2014) http://www.nytimes.com/roomfordebate/2014/10/19/is-checking-the-sex-box-necessary/categorizing-by-sex-is-a-remedy-for-discrimination accessed 11 April 2017.

[114] Judith Lorber, 'Using gender to undo gender: A feminist degendering movement' (2000) 1(1) Feminist Theory 79, 90. Spade suggests that "compelling reasons for the continued use of gender classification exists…with respect to affirmative action and other programs focused on remedying the long-term effects of oppression of women and transgender people", Dean Spade, 'Documenting Gender' (2009) 8(1) Dukeminier Awards Best Sexual Orientation and Gender Law Review 137, 221.

[115] Pauline Park, 'GenderPAC, the Transgender Rights Movement and the Perils of a Post-Identity Politics Paradigm' (2002) 4(2) The Georgetown Journal of Gender and the Law 747, 757-758.

[116] Marie Gustafsson Sendén, Emma Aurora Bäck and Anna Lindqvist, 'Introducing a gender-neutral pronoun in a natural gender language: the influence of time on attitudes and behavior' (2015) 6 Frontiers in Psychology http://journal.frontiersin.org/article/10.3389/fpsyg.2015.00893/full accessed 11 April 2017. According to Vade, "[i]f we act as if gender does not exist, then we act as if sexism and transphobia do not exist and so reinforce the privilege of…in particular, male genders", Vade (n 104), 277-278.

[117] Catherine MacKinnon, 'From Practice to Theory, or What is a White Woman Anyway?' (1991) 4(1) Yale Journal of Law and Feminism 13, 15; Geraldine Christmas, 'Research note: intersexuality, feminism and the case for gender binaries' (2010) 24(1) Women's Studies Journal 60, 60.

[118] Surya Munro, 'Beyond Male and Female: Poststructuralism and the Spectrum of Gender' (2005) 8(1) International Journal of Transgenderism 3, 16.

[119] Zach Strassburger, 'Disability Law and the Disability Rights Movement for Transpeople' (2012) 24(2) Yale Journal of Law and Feminism 337, 359; Julia Serano, *Whipping Girl* (Seal Press 2007) 3; *Patricia Cain, 'Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law' (1997) 75(4) Denver University Law Review 1321, 1350;* ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (Australian Capital Territory 2012) 32.

[120] Leslie Pearlman, 'Transsexualism as Metaphor: The Collision of Sex and Gender' (1995) 43(3) Buffalo Law Review 835, 845; Sally Hines, '(Trans)Forming Gender: Social Change and Transgender Citizenship' (2007) 12(1) Sociological Research Online, [5.3] http://www.socresonline.org.uk/12/1/hines.html accessed 20 March 2017; Julie L Nagoshi, Stephan/ie Brzuzy and Heather K Terrell, 'Deconstructing the complex perceptions of gender roles, gender identity, and sexual orientation among transgender individuals' (2012) 22(4) Feminism and Psychology 405, 406. McGrath writes that the mere existence of trans communities "who live, or seek to live,

whom gender, and the ability to reproduce standard gender norms, is a core desire.[121] Many trans people struggle for a significant proportion of their lives to be accepted and validated in their lived-identity.[122] Legal gender recognition is a key step towards self-actualisation.

Against the backdrop of these on-going debates, and their growing prominence in trans advocacy (particularly non-binary activism)[123], it is important to clarify, at the outset, that de-gendering the law is not addressed in this thesis. While the thesis does analyse four conditions of legal gender recognition, the prior requirement that individuals have an official gender status is not subject to review.

The decision to omit consideration of de-gendering debates has been taken for a number of reasons. From a pragmatic perspective, there is significant practical benefit in focusing on the conditions for legal gender recognition. While, on the one hand, scholars have raised coherent arguments against legal gender (and the possibility of a de-gendered legal system may, at some future point, become a mainstream political concern), the current reality is that – in the overwhelming majority of jurisdictions worldwide – gender is *de facto* and *de jure* embedded as a legal concept. All individuals, cisgender and trans, must be assigned a legal gender, and this gender subsequently determines access to core benefits, services and entitlements.

Against this background, there is – for trans persons in particular – considerable merit in investigating the processes by which individuals apply for official recognition of their preferred gender. This is a topic which, although increasingly being discussed within media and political

their lives as the opposite sex to which they were assigned at birth, directly challenge[s] the male-female gender distinction as…binary", James McGrath, 'Are You a Boy or a Girl – Show Me Your REAL ID' (2009) 9(2) Nevada Law Journal 368, 377.

[121] See generally: Jay Prosser, *Second Skins: The Body Narratives of Transsexuality* (Columbia University Press 1998). See also: Viviane Namaste, *Invisible lives: The erasure of transsexual and transgendered people* (University of Chicago Press 2000); Henry Rubin, 'Phenomenology as method in trans studies' (1998) 4(2) GLQ: A Journal of Lesbian and Gay Studies 263.

[122] Jonathan Alexander and Karen Yescavage, 'Bisexuality and Transgenderism, Journal of Bisexuality' (2003) 3(3-4) 1, 8-9; Laurel Westbrook, 'Becoming Knowably Gendered: The Production of Transgender Possibilities and Constraints in the Mass and Alternative Press from 1990-2005 in the United States' in Sally Hines and Tam Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 59; Erin R Markman, 'Gender Identity Disorder, the Gender Binary, and Transgender Oppression: Implications for Ethical Social Work' (2011) 81(4) Smith College Studies in Social Work 314, 317; Nicole L Saltzberg, *Developing a Model of Transmasculine Identity* (University of Miami 2010) 101.

[123] Wipfler (n 104), 527; Tomchin (n 85), 861; Vic Valentine, *Non-Binary People's Experiences in the UK* (Scottish Trans Alliance 2016) 79; Barb J Burdge, 'Bending Gender, Ending Gender: Theoretical Foundations for Social Work Practice with the Transgender Community' (2007) 52(3) Social Work 243, 246-247.

spheres (at least in the Global North)[124], remains under-explored, particularly by legal academics. In the short term, it is difficult to see how trans individuals will tangibly gain from abstract debates about the appropriate relationship between law and gender. On the other hand, there is significant potential for trans populations in scholarship which exposes the human rights deficiencies in gender recognition procedures and encourages law-makers to adopt appropriate, rights-conscious reforms.

Such an approach does not dismiss the importance of de-gendering debates, nor should it be interpreted as implicitly (or explicitly) endorsing the current intersections of law and gender. It is possible for an academic exercise, such as this doctoral project, to have a neutral (or even negative) stance on legal gender but to argue that, to the extent that trans individuals must have such an official gender, there is merit in seeking to identify an accessible, human rights compliant framework through which those individuals can be affirmed.

Similarly, in concentrating on conditions of recognition, this thesis does not deny that, at the level of intellectual coherence, determining whether law *should* regulate gender is a prior consideration to *how* that regulation takes place. As the opening paragraph to this section acknowledges, one need only ask how human rights can impact the conditions for legal gender recognition if one has already accepted the premise that persons – cisgender and trans – must be recognised as having a formal gender status. However, once again, within a context where a majority of countries around the world have made that acceptance, there is value in expressly moving to the subsequent enquiry and asking how human rights can influence gender recognition processes.

Where the thesis does choose to focus on conditions of recognition, there is consequently reduced space for a comprehensive, thorough discussion of de-gendering the law. As the summary of arguments (above) illustrate, the vista of a genderless legal system raises complex, interesting and hugely important issues – both ethical and political. It is an area of research which, for many years, has inspired a considerable body of scholarship. Interrogating the position of gender in law could be the subject of several (not just one) doctoral projects. It is,

[124] Ben Quinn, 'Labour Riven by Infighting over Gender Recognition' (*The Guardian*, 4 March 2018) https://www.theguardian.com/politics/2018/mar/04/labour-left-infighting-over-gender-recognition accessed 6 May 2018; Marie O'Halloran, 'Review of Gender Recognition Act will start by September, Varadkar announces' (*Irish Times*, 10 May 2017)
https://www.irishtimes.com/news/politics/oireachtas/review-of-gender-recognition-act-will-start-by-september-varadkar-announces-1.3078764 accessed 6 May 2018.

ultimately, a topic which requires greater engagement than this thesis can offer. Indeed, any attempt to do so would inevitably result in superficial, under-theorised and insufficiently reflective reasoning. Instead, this thesis focuses on trans persons who do want to affirm their preferred gender through law. It asks how human rights can impact the conditions that these individuals are required to satisfy.

(i.). State Interest in Regulating Gender

While this doctoral project does not focus on the question of abandoning gender as a legal category, there is a need – at the outset of the thesis – to explore the interests which state authorities have raised as justification for legally regulating gender. Many of these interests underline (and inspire) the four 'conditions of recognition', which are evaluated throughout this thesis. In order to properly understand these conditions, and the policy factors which motivate them, the thesis must first explore state rationales for regulating gender.

This exploration is particularly significant for determining the proportionality of conditions for legal gender recognition. As noted in Chapter I, the thesis adopts a four-step proportionality test, established by Huscroft, Miller and Webber, the first limb of which asks whether an impugned limitation on human rights has a "legitimate objective of sufficient importance."[125] To the extent that a requirement for being formally acknowledged in one's preferred gender – such as involuntary sterilisation or mandatory divorce – pursues no rational or objective goal, then imposing that requirement as a pre-condition for gender recognition cannot be a proportionate interference with human rights.

Many of the reasons why state authorities claim an interest in regulating gender have already been discussed above. In some cases, these claims have been (and continue to be) supported by both feminist scholars and women's rights advocates.

One such justification for state regulation of gender is a recognition that – socially, politically and economically – gender inequality remains the reality for many people (overwhelmingly women) around the world.[126] State regulation of gender allows domestic law to specifically

[125] Grant Huscroft, Bradley W Miller and Gregoire Webber, 'Introduction' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 2.
[126] Pauline Park, 'GenderPAC, the Transgender Rights Movement and the Perils of a Post-Identity Politics Paradigm' (2002) 4(2) The Georgetown Journal of Gender and the Law 747, 757-758.

acknowledge *de facto* discrimination of specific legal classes (e.g. legal women, etc.), and to create legal frameworks which remedy persistent inequality. As noted above, if state authorities ceased to formally acknowledge gender as a legal category, this would not result in the disappearance of social and political gender discrimination. It would merely reduce the capacity of state actors – through their laws – to combat and challenge gender-unequal practices.[127]

On the particular topic of trans rights, continued state regulation of gender has an important 'affirmative' function.[128] The capacity of the states to acknowledge trans populations through law confers an important mark of legitimacy upon trans identities. In a very real sense, this can be the difference between, on the one hand, trans individuals successfully navigating social relationships and, on the other hand, those persons experiencing social marginalization. While queer theorists have compellingly critiqued the regulating power of the state (i.e. arguing that social worth should not depend upon state approval)[129], for trans communities around the world, who cannot simply rely upon the generosity of peers to socially affirm their preferred gender, there is great benefit in state authorities legally acknowledging their preferred gender.

On the other hand, however, as the subsequent chapters in this thesis make clear, there are also numerous other interests, which state authorities have claimed in the regulation of legal gender. These claims are considerably more contentious, often being directly challenged by scholars and advocates. They are, throughout this doctoral project, subject to scrutiny and review, with an emphasis upon whether the claimed interests offer a legitimate foundation for existing conditions of recognition.

A particularly notable justification for legally regulating gender is reliance upon biological essentialism.[130] The legal system's interest in gender arises, so the argument goes, from the fact that gender – in particular, binary gender – is a biological reality, which must be reflected within the law. To the extent that all individuals are either male or female, it is appropriate that

[127] ibid.
[128] Zach Strassburger, 'Disability Law and the Disability Rights Movement for Transpeople' (2012) 24(2) Yale Journal of Law and Feminism 337, 359; Julia Serano, *Whipping Girl* (Seal Press 2007) 3; *Patricia Cain, 'Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law' (1997) 75(4) Denver University Law Review 1321, 1350;* ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (Australian Capital Territory 2012) 32.
[129] See e.g. Judith Butler, *Gender Trouble* (Routledge 1990).
[130] Julie Greenberg, 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41(2) Arizona Law Review 265, 275.

the law should follow, and make provision for, these classifications.[131] In Chapter III, this thesis will explicitly address the relationship between law, gender and biology, asking to what extent physical traits (e.g. sex characteristics) should determine official identity status.

Arguments in favour of regulating gender also rely upon the need to differentiate access to goods, services and rights. Without legal gender, state authorities would not be able to maintain gender-specific institutions, such as exclusively heterosexual marriage or unequal pension entitlements. If the law cannot distinguish between persons who are legally male and legally female, restricting marital privileges to opposite gender couples becomes practically inoperable.[132] Similarly, the legal regulation of gender is also pleaded as a necessary pre-condition for gender-segregated spaces.[133] To the extent that a majority of (if not all) jurisdictions retain – in both their public and private spheres – single-gender physical services and accommodations (e.g. separate public restrooms for women and men), it is necessary for the law to assign legal gender to determine access rights.

Throughout this thesis, there is engagement with the gendered nature of legal rights and physical space. In exploring issues, such as forced divorce and the impact of de-medicalising gender recognition on women-only services, the thesis comprehensively analyses: (a) the continued legitimacy of gender-segregated institutions (both legal and physical); and (b) the necessity of legal gender to ensure that those institutions are maintained.

Finally, at perhaps the simplest level, states' interest in regulating gender is presented as an inevitable fact. The relationship between domestic legal systems and gender categorisation is enshrined as a historic political reality; an inter-generational constant which law-makers and members of the general public have largely accepted. Within contemporary political discourse, there is little discussion about why state authorities should regulate legal gender because that regulation is – outside of feminist and queer studies – simply taken as fact. At various junctures in the subsequent chapters, the thesis will challenge aspects of the inevitable relationship between law and gender. While, as noted, this doctoral project does not substantially engage with the question of whether the law should abandon gender as a legal classification, the thesis

[131] ibid.
[132] Fergus Ryan, 'Marriage at the Boundaries of Gender: The "Transsexual Dilemma" Resolved?' (2004) 7(1) Irish Journal of Family Law 15
[133] Dean Spade, 'Documenting Gender' (2009) 8(1) Dukeminier Awards Best Sexual Orientation and Gender Law Review 137, 182-183.

does challenge the notion that the mere historical existence of a social and cultural norm (such as legal gender) is sufficient to justify that norm's continued maintenance.

B. Analysis: Dearth of Relevant Research

The decision not to address de-gendering strategies limits the *scope* of inquiry in this thesis. It reduces the number of topics which are reviewed. In addition, however, this introduction also identifies one further limitation, which restricts the extent to which certain topics can be subject to full and conclusive *analysis*.

In the age of the "Transgender Tipping Point"[134], there is often a perception that trans identities are omnipresent. From social policy to show business, and from athletes to activists, trans lives are an increasingly visible source of public conversation. As such, it is easy to assume the existence of in-depth research data, which charts the lived-reality of trans populations around the globe. For human rights scholars, all they need do, so it is presumed, is tap into this vast body of literature to understand whether domestic laws and practices align with trans experiences.

Yet, despite the growing presence of trans narratives in popular discourse, the available scholarship does not reveal wide scale and detailed understandings of trans lives. Although, on specific topics (endocrinology interventions, surgical practice, etc.) there is a considerable body of knowledge, vast areas of trans experiences and trans culture remain both under-explored and misunderstood. This lack of research obscures trans perspectives on the regulation of gender, and it may result in the omission of trans voices when law and policies are adopted.

Given the novel character of this thesis, particularly the previously-unexplored questions which it asks, there are a number of areas where a dearth of relevant information exists. In the frontier issues of trans children and non-binary identities, where both law and other disciplines have long under-engaged with trans experiences, the relatively small body of existing scholarship hinders human rights analysis. Doubts about the impact of gender affirmation for young children[135] and the possibility of reliably identifying trans identities before

[134] Eliza Gray, 'The Transgender Tipping Point' (*Time,* 29 May 2014) http://time.com/135480/transgender-tipping-point/ accessed 12 July 2015.
[135] Lisa Simons, Scott Leibowitz and Marco Hidalgo, 'Understanding Gender Variance in Children and Adolescents' (2014) 43(6) Paediatric Annals 126, 130. See also: Stephen Rosenthal, 'Transgender youth: current concepts' (2016) 21(4) Annals of Paediatric Endocrinology and Metabolism 185, 187.

adolescence[136] obstruct 'best interests' analysis.[137] Similarly, where both the contours of non-binary identities, and non-binary attitudes towards law, remain uncertain[138], one struggles to understand how human rights would (and should) challenge binary gender requirements.

This introductory chapter acknowledges that, at certain junctures in the thesis, the absence of data on trans identities impacts human rights analysis. While this is a limitation, it accurately reflects the current state of trans knowledge worldwide. Where the thesis does draw from a comparably smaller body of scholarship, it nevertheless endeavours to exploit all existing research. Recourse to material from across academic disciplines makes use of the widest possible information pool. While, on some questions, the thesis cannot make conclusive recommendations, it does offer novel insights on the relationship between human rights and diverse gender identities.

VI. Self-Determination

Before setting out the structure of the thesis and embarking upon a substantive analysis of existing conditions of recognition, it is necessary to offer one final introductory reflection; an acknowledgment of emerging movements – both within legal academia and among global trans advocacy communities – towards the principle of 'self-determination'.

As is already evident from the forgoing discussions, the present doctoral project is situated within an historical context where – in the small number of decades when trans populations have (to differing degrees) been legally recognised in their preferred gender – access to formal acknowledgement has been contingent upon satisfying state-enforced pre-conditions. Until recently, the idea of self-determined gender had been dismissed as both impractical and undesirable.[139] Yet, since 2012, certain (eight) jurisdictions have embraced a model of self-

[136] Sarah E Herbert, 'Female-to-Male Transgender Adolescents' (2011) 20(4) Child and Adolescent Psychiatric Clinics 681, 682; Thomas D Steensma and others, 'Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study' (2013) 52(6) Journal of the American Academy of Child and Adolescent Psychiatry 582, 582.

[137] Under art. 3(1) of the United Nations Convention on the Rights of the Child, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[138] Petra L Doan, 'The tyranny of gendered spaces – reflections from beyond the gender dichotomy' (2010) 17(5) Gender, Place and Culture 635, 637; Tam Sanger, 'Trans governmentality: the production and regulation of gendered subjectivities' (2008) 17(1) Journal of Gender Studies 41, 48; Hines, 'A pathway to diversity?' (n 104), 95.

[139] See e.g. *Bellinger v Bellinger* [2003] 2 AC 467, where Lord Nicholls suggested that "[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" [28].

declaration.[140] Rather than fitting their experiences within prescribed rules, trans men and women in these countries are affirmed solely on the basis of their personal gender narrative.

At the outset, one must acknowledge that – even with the most generous interpretation – international and regional human rights standards do not guarantee self-declared gender. To the extent that state actors can, as noted in Chapters V and VI, still impose age restrictions and limit recognition to male and female persons, it cannot reasonably be argued that domestic laws must affirm all personalised gender expressions. In a thesis, which emphasises the relationship between human rights and trans identities, it would be inappropriate for this introductory reflection to claim that human rights standards currently affirm trans self-determination. Yet, as an increasing number of states do embrace self-declared gender, there is value – at this early stage – in acknowledging the practical and symbolic benefits of a trans self-determination model.

Law-makers and scholars have opposed self-declared gender for a number of reasons. As will be noted in Chapter III, there are concerns that self-determination will facilitate cisgender men who falsely express a female identity to assault persons in women-only spaces.[141] Where cisgender men can be legally acknowledged as women merely through self-declaration, there are insufficient safeguards to protect against abusive applications.[142] In the United Kingdom, opposition to greater gender autonomy under the Gender Recognition Act 2004 has been framed as protecting women from assault or abuse.[143]

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[140] Argentina, Denmark, Malta, Ireland, Sweden, Colombia, Norway and Belgium.

[141] Amy Rappole, 'Trans People and Legal Recognition: What the US Federal Government Can Learn From Foreign Nations' (2015) 30 Maryland Journal of International Law 191, 214; Jessica Clarke, 'Identity and Form' (2015) 103(4) California Law Review 747, 767; Sonia Katyal, 'The Numerous Clausus of Sex' (2017) 84 University of Chicago Law Review 389, 467-471; Harper Jean Tobin and Jennifer Levi, 'Securing Equal Access to Sex-Segregated Facilities for Transgender Students' (2013) 28(3) Wisconsin Journal of Law, Gender and Society 301, 326.

[142] According to Reily-Cooper, "[w]e don't know to what extent anyone would seek to exploit legislation designed to allow people to self-identify as women. But we do know that making gender entirely a matter of self-definition effectively eradicates current legislation designed to protect women from discrimination and invasion of privacy", Rebecca Reily-Cooper, 'Why self-identification shouldn't be the only thing that defines our gender' (*The Conversation Website*, 13 May 2016) https://theconversation.com/why-self-identification-shouldnt-be-the-only-thing-that-defines-our-gender-57924 accessed 11 August 2017. See also: Tyler Brown, 'The Dangers of Overbroad Transgender Legislation, Case Law, and Policy in Education: California's AB 1266 Dismisses Concerns about Student Safety and Privacy' (2014) 2 Brigham Young University Education and Law Journal 295.

[143] Thomas Burrows, 'Choose your own gender WITHOUT seeing a doctor: Government to rip up rules on switching sex' (*Daily Mail Online*, 23 July 2017) http://www.dailymail.co.uk/news/article-4722056/Government-plans-allow-transgender-pick-gender.html accessed 11 August 2017; Helen Lewis, 'Is Jeremy Corbyn right that trans people should be allowed to self-identify their gender?' (*The New Statesman*, 19 July 2017) http://www.newstatesman.com/politics/uk/2017/07/jeremy-corbyn-right-trans-people-should-be-allowed-self-identify-their-gender accessed 11 August 2017.

Self-determination is similarly opposed as a means of fraud prevention.[144] In a global context where access to benefits under domestic laws is often gender-specific, there is a fear that individuals will legally transition to take advantage of more favourable rights and entitlements.[145] Without any check on applications for recognition, there is a risk (it is argued) that persons will make fraudulent requests to obtain an earlier state pension or avoid civic duties.[146] One of the most prevalent fears is that self-determination would be misused by gay and lesbian couples to circumvent same-gender marriage bans.[147]

There is, however, little empirical evidence to support the concerns that have been raised. Current research suggests that, despite the near-continuous proliferation of abuse-inspired objections, few (if any) cisgender persons have falsely asserted trans identities to commit assault or engage in fraud.[148] There have been well-publicised incidents where cisgender persons – typically male-identified – have, without claiming a trans identity, entered women's facilities either to highlight the purportedly 'ridiculous' character of trans protections or to incorrectly assert that trans inclusion effectively de-genders all public space.[149] However, in

[144] Mottet (n 101), 413-416; Anne E Silver, 'An Offer You Can't Refuse: Coercing Consent to Surgery through the Medicalization of Gender Identity' (2013) 26(2) Columbia Journal of Gender and Law 488, 514.
[145] Clarke (n 142), 768.
[146] ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (Australian Capital Territory 2012) 40-41; Kenji Yoshino, 'Sex and the City – A Commentary by Kenji Yoshino' (*Slate*, 11 December 2006) http://www.slate.com/articles/news_and_politics/jurisprudence/2006/12/sex_and_the_city.html accessed 9 October 2015.
[147] Tobin (n 32), 421; Julie Greenberg, 'Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience' (2002) 39(3) San Diego Law Review 917, 940.
[148] This statement is true for jurisdictions, such as Ireland and Sweden, which have introduced self-determination rights, and for jurisdictions, such as the United Kingdom and New York City, which, although imposing conditions of recognition, allow persons to enter segregated facilities (such as restrooms, locker rooms, etc.) on the basis of self-declared preferred gender. Tobias Wolf, 'Civil Rights Reform and the Body' (2012) 6(1) Harvard Law and Policy Review 201, 207-208. Sterling writes that those who oppose trans inclusion have "failed to provide statistics, studies, or facts to verify their assertions" regarding cisgender predators, meaning that such claims are "merely conjecture." On the contrary, in fact, there is "evidence to refute" such claims, see: Melissa Sterling, 'To Pee or Not to Pee - Where Is the Question: Transgender Students and the Right to Use Public School Restrooms' (2015) 3(1) Cardozo Journal of Law and Gender 757, 771. At a broader policy level, one can also question the priority, which has been placed on 'fraud' and 'predator' arguments within debates on self-determination. It is both intellectually and practically unsatisfactory to reject self-determination simply because other, non-trans individuals (over whom trans communities have no control) might engage in illegal conduct. National laws do not generally prohibit specific conduct merely because there is a threat, however remote, that somebody may ultimately engage in that conduct for an unintended purpose. If law-makers and judges do believe that self-determination may facilitate crime, they should put in place laws, which censure and punish those acts of abuse. In response to objections focused on the risk of cisgender predators misusing trans protections, West observes that "[w]e already have laws against sexual predation and harassment in public toilets – they're called laws", Lindy West, 'Public Toilets – The Key Battleground for Bigots wanting to Legislate Trans People out of Existence' (*The Guardian*, 21 February 2016) http://www.theguardian.com/commentisfree/2016/feb/21/public-toilets-battleground-for-bigots-legislate-trans-people-out-of-existence-south-dakota accessed 20 May 2016.
[149] Nutt (n 15); Alison Morrow, 'Man in Women's Locker Room cites Gender Rule' (*K5TV,* 16 February 2016) http://www.king5.com/news/local/seattle/man-in-womens-locker-room-cites-gender-rule/65533111 accessed 20 May 2016.

terms of the specific threat envisaged – persons dishonestly asserting identities to circumvent the law – there have been no reported cases.[150]

It is unsurprising that predators or fraudsters are not relying upon gender identity laws.[151] Keisling observes that, in many ways, gender recognition actually inhibits the ability to hide identity.[152] Where – in order to evade detection – a cisgender man self-identifies as a trans woman, he may find his identity subject to closer scrutiny, particularly if he does not also medically or socially transition. A cisgender man, who falsely declares a female gender, but who continues to present in his preferred male identity, is in the same position as a trans woman who, for personal or social reasons, engages in only limited processes of physical transition so that her appearance may not conform with societal understandings of typical 'femininity' or 'femaleness'. Just as that latter individual is continuously required to explain and validate her identity, so too cisgender men, who deceitfully express a female gender, are likely to draw increased attention.[153]

Eight jurisdictions[154] around the world – Argentina, Denmark, Malta, Ireland, Sweden, Colombia, Norway and Belgium – have (partially[155]) adopted a model of self-determination for

[150] Katyal (n 140), 470. See also: Carlos Maza and Luke Brinker, '15 Experts Debunk Right Wing Transgender Bathroom Myth' (*Media Matters for America Website*, 20 March 2014) http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533 accessed 11 December 2015.

[151] In fact, it is arguable that laws that make it more difficult to obtain accurate identity documents facilitate fraud. Where, because of onerous pre-conditions, a large proportion of trans persons cannot obtain formal acknowledgement, this creates a culture where incongruent identity markers are normalised. This, in turn, de-sensitises the public to inconsistent legal statuses. In such an environment, it becomes easier for individuals, who do genuinely intend to commit identity fraud or other crimes, to evade detection because members of the public are less likely to question their incongruent documentation. Blincoe writes that "[i]t is interesting that a restrictive approach to changing the sex marker on birth certificates is…characterised as certain and accurate, and contrasted with self-identification", see: Blincoe (n 104), 79. For Blincoe, "[t]he opposite is in fact true" (ibid). She writes that "laws which make it difficult to change one's birth certificate mean that there is inconsistency between a person's birth certificate, their recorded sex on other documents (for example, licences and passports), and their identity. This leads to more inaccuracy, confusion and inconsistency than a model based on self-identification would" (ibid).

[152] Mottet (n 101), 414 (the author quotes Mara Keisling, who is the Executive Director of the US-based National Centre for Transgender Equality).

[153] Rappole (n 42), 214. In many ways, the argument that individuals would use legal gender recognition to obtain a dishonest benefit is highly disingenuous. It ignores the significant isolation and marginalisation, which trans persons around the world experience when they decide to undertake a process of transition. It also reinforces historical tropes which link trans identities to fraud and deceit, see: Abigail Lloyd, 'Defining the Human: Are Transgender People Strangers to the Law?' (2005) 20(1) Berkeley Journal of Gender, Law and Justice 150, 168; Tomchin (n 85), 822.

[154] Self-determination rights have also been embraced in the Federal District of Mexico City for persons over the age of 18 years, see: Civil Code of the Federal District of Mexico City, art. 135. See also: Chiam, Duffy and González Gil (n 1) 53.

[155] In Argentina, Denmark, and Ireland, children under the age of 18 years do not share self-determination rights. In Sweden, Norway, Belgium and Malta, children under the age of 16 years do not share self-determination rights. The position of whether children in Colombia are entitled to amend their legal gender by self-determination is not clarified by national law (Decree 1227/2015).

legal gender recognition. In these countries, trans individuals typically secure affirmation by executing a statutory declaration, which requests an amendment to their legal status.[156] There are no additional pre-conditions to satisfy and, as long the procedural requirements are met, no third-party assesses the merits of the application (i.e. there is no review of whether an applicant is sufficiently feminine or masculine). While movements towards self-declared gender have raised social and legal opposition, they also open numerous advantages for applicants.

A common theme running throughout this thesis is the extent to which conditions of recognition – medicalisation, divorce, age limitations – require formal interaction with both state and non-state actors. To satisfy medicalisation demands, applicants must access the healthcare system, engage with various professionals, secure relevant treatment accounts and (often) seek reimbursement from public or private insurance schemes. Divorce requirements necessitate interaction with national registration officials. They may require organising logistics for family separations, and searches for individual or joint legal representation. Where parties decide to re-contract a formal relationship post-recognition, there will be further engagement with the State.

All these requirements not only presume sufficient resources to navigate public and private institutions.[157] They also assume that applicants have the personal capacity to interface with, and complete, (frequently complex) bureaucratic processes.[158] As the discussions throughout this thesis will reveal, however, many persons actually lack those basic abilities. For these individuals, irrespective of their willingness to satisfy conditions for recognition, the required levels of organisation and engagement stand as insurmountable barriers to gender recognition. It is in these (not untypical) situations that self-determination has transformative potential. Stripping away the bureaucratic layers of condition-orientated recognition rules, self-declared gender prioritises personal narratives.[159] It can, therefore, accommodate and embrace a larger spectrum of applicants. While there will always be people who struggle to engage with any state-regulated gender structures, self-determination is the optimal framework for trans-accessibility.[160]

[156] See e.g. Gender Recognition Act 2015, s. 10(1)(f) (Ireland); Gender Identity Act 2012 (Act Nº 26.743), art. 4(2) (Argentina); L 182, art. 1(1) (Denmark).
[157] Clarke (n 142), 812.
[158] Lewis (n 144).
[159] Blincoe (n 104), 80.
[160] Clarke (n 142), 837.

Self-determination is an implicit validation of trans lived-experiences and gender-realities. In contrast with conditions of recognition – such as medicalisation and divorce requirements – which subject trans identities to external review and establish legal recognition as a commodity for which applicants must pay a price (i.e. the compromise of their human rights), self-declaration prioritises personal narratives of gender. It suggests that, as the people who live and experience their identity on a daily basis, trans populations are best-placed to determine their proper status. For a global community whose position in society has been defined (and, in many ways, is still defined) by presumptions of deceit, incapacity and otherness, such official affirmation of their autonomy has a powerful (possibly transformative) symbolism.

As noted, under current international and regional human rights standards, there is no entitlement to self-determined legal gender. Although now adopted by eight jurisdictions, self-declaration rules do present both practical and theoretical challenges. Yet, as this thesis begins laying out a framework to evaluate conditions for obtaining gender recognition, it acknowledges that, as a vehicle for enhancing core values and confirming the status of trans individuals as human rights holders, self-determination may ultimately emerge as the preferable model for future reform.

VII. Thesis Structure

This thesis proceeds in six chapters. Chapter I presents a trans-inclusive human rights framework. It sets out and justifies the sources of law from which the thesis draws, including judicial decisions and soft law instruments. Chapter I introduces four human rights themes, which have particular relevance for conditions of gender recognition: bodily integrity; equality and non-discrimination (including intersecting inequalities); marriage and family life; and children's rights. Chapter I also offers a comprehensive overview of proportionality, and explains how proportionality review is employed throughout the thesis. In the final section (Section III), Chapter I considers objections to human rights analysis, engaging with both trans-sceptical and trans-affirming critiques. Acknowledging the existence of valid concerns, Chapter I ultimately concludes that human rights are a practical and effective lens through which to assess gender recognition.

Chapter II introduces the first (and most common) pre-condition for gender recognition: physical medical intervention. It identifies the three main treatment requirements: surgery; sterilisation and hormone therapy. Observing that compulsory medicalisation has insufficient

regard for trans consent, and that many applicants do not want physical interventions, Chapter II argues that imposing surgery, sterilisation and hormone therapy violates trans bodily integrity. Involuntary healthcare treatments reach the threshold for 'degrading' and 'cruel and inhuman' treatment. Depending upon the specific context, they may even constitute torture. On the other hand, Chapter II acknowledges the complexity of equality and non-discrimination critiques. While trans advocates and soft-law actors have condemned medical pre-conditions as discriminatory practices, they often rely upon over-general interpretations of law. Using a substantive model of equality, one can identify unequal aspects of medicalisation. Chapter II concludes, however, that bodily integrity is a more compelling lens for analysis.

Chapter III subjects medical pre-conditions to proportionality review.[161] It addresses four policy rationales which have been raised in support of compulsory healthcare treatments: (A) preserving the "binary sex paradigm"[162]; (B) maintaining 'normal' reproductive practices; (C) encouraging permanence in legal gender; and (D) ensuring the functionality of gender-segregated services. In Sections I and II – drawing from existing scientific data – Chapter III challenges 'binary sex' and 'appropriate' procreation as unpersuasive justifications for involuntary medicalisation. Both rationales rely upon questionable biological assumptions, and reinforce troubling cultural norms, including heteronormativity[163] and a vision of women defined by sexual penetration and motherhood.

Turning to 'permanence' and gender segregation arguments, Chapter III asks whether achieving permanent gender is a sufficiently important objective. It suggests that there are alternative (less invasive) methods than medicalisation to filter out flippant or thoughtless applications. Finally, in Section IV, the thesis challenges the exclusion of trans persons from their preferred gendered spaces, and it notes the possibility of exempting segregated services from standard recognition rules. It concludes that segregation-focused policy aims cannot rationalise physical intervention requirements.

Chapter IV addresses divorce requirements. It introduces the operation of, and justification for, compulsory divorce as a condition of recognition (i.e. avoiding same-gender marriage).

[161] Chapter III acknowledges that prohibitions of torture and other ill-treatment are absolute. To the extent that physical medical intervention requirements constitute torture, cruel and inhuman or degrading treatment, they cannot be justified by reference to proportionality.
[162] Julie Greenberg, 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41(2) Arizona Law Review 265, 275. The 'binary-sex paradigm' is a belief that only two, mutually exclusive, sex configurations exist (and that these sex characteristics determine legal gender).
[163] Heteronormativity refers to a belief in the normality, appropriateness and generality of heterosexuality.

Chapter IV also explores how forced dissolutions impact applicants for recognition and their spouses. In Section II, Chapter IV observes how – in many jurisdictions worldwide – the status of marriage is determined at the 'point of entry'. Legal gender recognition cannot violate 'gay' marriage prohibitions because, as a matter of law, marital gender is fixed at the moment of contract. Even if legal recognition does create same-gender unions, however, the number of trans couples, their current position in law and the negative consequences of removing marriage rights all suggest that forced divorce is disproportionate to the public benefit of protecting traditional marriage (Section III). Indeed, in Section IV, the chapter reconsiders the status of same-gender marriage under human rights law. It challenges suggestions that international law explicitly excludes lesbian, gay and bisexual couples, and argues that the existing rights instruments – international and regional – can, and should, embrace same-gender relationships.

Chapter V considers the status of trans minors. It sets out domestic recognition laws as they apply to young people, observing that most jurisdictions either prohibit or restrict legal transitions before majority. In Section II, Chapter V considers whether the interests of children are best served by affirmation or discouragement. Acknowledging an absence of consensus, Chapter V examines arguments on both sides of the debate. It notes a growing trend towards strictly-controlled, acceptance-orientated interventions. In Section III, Chapter V investigates six medical and policy factors which shape the contours of youth recognition. Exploring, *inter alia*, the stability of trans identities, children's decision-making capacities and the role of parents, Chapter V asks whether minors can legally transition without creating undue risks. Finally, in Section IV, the chapter offers concluding observations on the relationship between gender recognition and trans minors. Section IV is not a model law. Rather, it suggests workable strategies for affirming trans youth in a safe, secure and non-pressurised environment.

In Chapter VI, the thesis evaluates requirements that, in order to be affirmed in their preferred gender, applicants must embrace either a 'male' or 'female' identity. Chapter VI introduces the concept of non-man and non-woman genders. It explores binary-gender as a legal and social organising principle, and it explains the context in which non-normative genders have been legally marginalized (particularly within legal recognition processes). Chapter VI discusses reluctance to expand legal gender beyond 'man' and 'woman' categories, noting pushback from both the general public *and* binary trans communities. It considers how non-binary advocates are challenging binary gender requirements, and it analyses 'intersex' and 'existing models' reasoning. In Section V, the chapter discusses possible models for reform, particularly options for expanding gender categorisation. Finally, having acknowledged that no human right to non-

binary recognition yet exists, Section VI suggests reasonable accommodations for persons who fall outside the male-female dichotomy.

The concluding chapter offers reflections on the knowledge and insights gained throughout the substantive analysis. It directly considers whether medicalisation, compulsory divorce, age limits and binary gender are compatible with a trans-inclusive human rights framework. Noting the potentially significant influence of rights standards for physical intervention and divorce requirements, the thesis acknowledges the evolving (yet important) impact of human rights on trans minors and non-binary identities. In Section II, the thesis draws together common themes and policy considerations which have informed (and continue to inform) state responses to trans identities. It explores the myth of a common trans narrative, perceived needs to curb homosexual activities and recurring failures to interrogate 'voluntary' consent. Finally, in Section III, the thesis reflects broadly on human rights as a useful and desirable framework to enforce trans protections, observing both the advantages and weaknesses of existing international and regional mechanisms.

Chapter I

Legal Gender Recognition: A Human Rights Framework

Introduction

Chapter I introduces the framework through which this thesis examines the relationship between human rights and legal gender recognition. Where one considers whether 'conditions of recognition' comply with human rights norms, it is necessary to identify both the contours of those norms and the obligations which they impose on states.[164] Whether physical intervention, divorce, age limits or binary gender are legitimate pre-requisites depends upon the rights standards against which they are judged. While surgery and forced divorce may contradict protections for bodily integrity and family life, they are arguably more defensible if human rights emphasise community norms and traditional family values.[165]

There is also a need to explain how and why a particular human rights framework has been chosen. Lutchmie Persad writes that "[f]or as long as the concept of human rights has existed, the...controversy over which rights should be considered human rights, and to whom they should extend, has thrived."[166] The origins of human rights impact their perceived legitimacy and the extent to which they enjoy broad acceptance.[167] Before applying its preferred human rights model, the thesis must explain the sources from which that model draws, and clarify why those sources have been chosen over others.

Chapter I proceeds in three sections. Section I explores the sources of a trans-inclusive human rights model. Acknowledging the limitations of a 'treaty-custom' paradigm, Section I proposes to draw from two additional sources: judicial decisions and soft law instruments. As noted in the Introduction, Section I concedes that this broader definition of sources restricts the scope

[164] Andrew Williams, 'Human Rights and Law: Between Sufferance and Insufferability' (2007) 123 Law Quarterly Review 133, 133.
[165] United Nations Human Rights Council, '29/… Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development' (1 July 2015) UN Doc No. A/HRC/29/L.25; Graeme Reid, '"The Trouble with Tradition" When "Values" Trample over Rights' (*HRW Website, No Date Available*) https://www.hrw.org/world-report/2013/country-chapters/africa accessed 21 May 2017.
[166] Xavier B Lutchmie Persad, 'An expanding human rights corpus: Sexual Minority Rights as International Human Rights' (2014) 20(2) Cardozo Journal of Law and Gender 337, 337.
[167] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Australian Yearbook of International Law 82, 82.

and justiciability of the subsequent analysis. Yet, on balance, Section I concludes that an expanded range of sources is necessary to fully realise the impact of human rights on conditions of recognition.

In Section II, the chapter considers four broad themes which have particular relevance for legal gender recognition: (A) bodily integrity; (B) equality and non-discrimination; (C) marriage and family life; and (D) children's rights. Section II gives an overview of these areas of law, and begins to place each theme within the context of trans identities. While the four themes have been selected for their importance to gender recognition, Section II acknowledges that they are not the only rights which affect trans lives. Finally, in Section III, having explained and justified this preferred framework, the thesis considers possible objections. Engaging with both trans-sceptical and trans-affirming critiques, Section III acknowledges the existence of valid concerns but argues that human rights are a practical and effective lens through which to analyse conditions of gender recognition.

I. Sources of a Trans-Inclusive Human Rights Framework

A. Treaty and Custom

In international human rights law[168], 'sources' are often a cause of important (sometimes fundamental) disagreement.[169] Where rights come from, and who participates in their identification, impacts upon legitimacy and may either encourage or hinder compliance.[170]

[168] This thesis understands international human rights law as set of core principles, which limit and/or direct state action. They are relevant in the context of this thesis to the extent that individual human rights may restrict the conditions, which state actors impose on legal gender recognition or may require that particular rights guarantees are observed during the legal transition process. International human rights law primarily addresses the relationship between: (a) states and (b) those individuals who are subject to states' jurisdiction (i.e. vertical application of human rights). That is the central focus of this thesis (e.g. state recognition of persons' preferred gender). However, human rights can have indirect application (or 'horizontal'/'positive' application') to interaction between private persons to the extent that, by allowing private individuals to violate rights guarantees, states violate their obligations to protect, see generally: Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson 2010) 12 – 15; Michael Freeman, *Human Rights* (Polity 2011) 81 – 82; Olivier de Schutter, *International Human Rights Law: Cases, Material and Commentary* (2nd edn, Cambridge University Press 2014) 427 – 461.

[169] Simma and Alston (n 4), 82.

[170] In recent years, a significant minority of UN member states, most prominently countries from the Organisation of Islamic Co-Operation (OIC) and the Africa Group, have opposed sexual orientation and gender identity rights by challenging the source of these rights in international law, see Andrea Flynn-Schneider, 'United Nations claims Anti-Homosexuality Legislation Violates Human Rights: The cases of Uganda and India' (2014) 21(2) Human Rights Brief 70, 71; Kerstin Braun, 'Do Ask, Do Tell: Where is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?' (2014) 29(4) American University International Law Review 871, 890-891; Javaid Rehman, 'Sexual Rights in the Religious State' (2015) 11(1) Journal of Islamic State Practices in International Law 49, 55.

Among the current sources of international law, art. 38(1) of the Statutes of the International Court of Justice (ICJ Statutes) includes international conventions[171], international custom[172] and general principles.[173] In addition (and relevant for the discussion below), "judicial decisions and the teachings of the most highly qualified publicists" are also a "subsidiary means" of determining the rules of law.[174]

According to Thirlway, for international human rights law, "the two most important sources in practice are treaties and international custom."[175] Where a right emerges from an international charter or convention, it enjoys a particularly "solid and compelling legal foundation."[176] Global treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), are the end-product of "long and...complex deliberative process[es]."[177] Bantekas and Oette observe that international human rights treaties, which have been signed and ratified by a significant number of State Parties, are frequently "taken for granted" and soon develop a "self-validating quality."[178] If a right is enshrined in a UN treaty, it enjoys an explicit textual basis. It is less convincing for a State Party to dispute an obligation, such as non-discrimination (e.g. art. 26 ICCPR), when it is enshrined in an agreement which that state has voluntarily adopted.

Custom can also define human rights standards.[179] Article 38(1)(b) of the ICJ Statutes identifies international custom as "evidence of a general practice accepted by law." In order to be acknowledged as a rule of customary international law, a right must be evident from (a) "constant and uniform"[180] State practice, and (b) "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" (*opinio juris*).[181] Among the "[u]seful

[171] ICJ Statutes, art. 38(1)(a).
[172] ibid, art. 38(1)(b).
[173] ibid, art. 38(1)(c).
[174] ibid, art. 38(1)(d).
[175] Hugh Thirlway, 'The Sources of International Law' in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 116-117.
[176] Simma and Alston (n 4), 82.
[177] Illias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (Cambridge University Press 2013) 53.
[178] ibid.
[179] Jack Goldsmith and Eric Posner, 'A Theory of Customary International Law' (1999) 64(4) University of Chicago Law Review 1113, 1116.
[180] Roozbeh (Rudy) B Baker, 'Customary International Law: A Reconceptualization' (2016) 41(2) Brooklyn Journal of International Law 439, 440.
[181] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* (Merits) [1969] ICJ Reports 3, [77].

sources of ascertaining State practice"[182] are "statements and declarations made by governmental spokesmen", "governmental, and administrative actions" and "State laws and judicial decisions."[183] Rehman suggests that, "[a]lthough not as visible as treaty law, customary law [now] represents the essential basis upon which the modern human rights regime is grounded."[184] Indeed, according to de Schutter, "[t]he growing consensus is that most, if not all, of the rights enumerated in the Universal Declaration of Human Rights have acquired a customary status in international law."[185]

(i.) Critiquing the Utility of Treaty and Custom in Trans Contexts

From a strategic perspective, treaties and custom offer many benefits for undertaking human rights review, particularly in terms of legitimacy and justification. Yet, as a framework to create comprehensive and inclusive protections (specifically in the context of trans identities), they suffer from important limitations.[186]

Human rights agreements only bind State Parties. De Schutter notes that "we are far from having achieved universal ratification for all human rights treaties" and "ratifications by States may be accompanied by reservations."[187] Since the 1960s, numerous human rights charters have enjoyed high rates of ratification.[188] Yet, some countries fail to accept even foundational protections.[189] The result is an "unsatisfactory patchwork quilt of obligations" which "continues to leave many States largely untouched."[190] The on-going refusal by the United States – *the* leading international policy voice and the UN's largest funder – to ratify the United Nations Convention on the Rights of the Child (UN CRC) illustrates the limitations of a solely treaty-centric model.[191]

[182] Javaid Rehman, *International Human Rights* (n 5) 22.
[183] ibid.
[184] ibid, 23. On the other hand, Thirlway observes that, as international customary law typically "results from acts (or omissions) with an inter-state aspect" and human rights initially belong to individuals or groups, there is an arguable case that there is "no general international customary law of human rights", Hugh Thirlway, 'Human rights in customary law: an attempt to define some of the issues' (2015) 28(3) Leiden Journal of International Law 495, 497-498.
[185] de Schutter, *International Human Rights Law* (n 5) 63.
[186] Michèle Olivier, 'The relevance of "soft law" as a source of international human rights' (2002) 35(3) Comparative and International Law Journal of Southern Africa 289, 291.
[187] de Schutter, *International Human Rights Law* (n 5) 68.
[188] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29(2) Human Rights Quarterly 281, 288.
[189] Simma and Alston (n 4), 82.
[190] ibid
[191] Lainie Rutkow and Joshua T Lozman, 'Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child' (2006) 19 Harvard Human Rights Journal 161.

The majority of core international rights treaties date from a different era. ICCPR and ICESCR were both adopted by the United Nations General Assembly (UN GA) in 1966. The influential Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the United Nations Convention against Torture (UN CAT) were approved in 1979 and 1984 respectively. Even the comparatively recent UN CRC is now almost three decades old. While many of the rights that these agreements protect are ageless, the treaties are nonetheless a product of their unique social and political time: "global, political and economic environments [that were] very different from those of today."[192] In many ways, the treaties reflect a more conservative, unidimensional approach to human rights, not only in the general spirit which they convey (i.e. the broad themes that they address) but also in the specific protections which are (or are not) guaranteed.[193] In some cases, drafters may simply have been unable to foresee the multiplicity of rights which contemporary society would need to confront. In other situations, however, they would have been overtly aware of additional groups and interests. Yet, either through a lack of impetus or insufficient political leverage, the drafters were unable or unwilling to adopt more expansive texts. Although these groups and interests may, in recent years, have come to be embraced in general human rights practice[194], they remain noticeably absent from the core international treaties. To the extent that one equates human rights analysis with mere treaty compliance, it can only have a limited impact.

The residual effects of past-conservatism pose less of a problem for customary law. Considering that custom may evolve according to state practice and *opinio juris*, there is no reason why rights – which were not accepted in 1966 but now enjoy considerable support – cannot emerge as rules of customary international law. On the other hand, however, the politics of human rights (i.e. the *realpolitik* of negotiating and identifying accepted standards) *is* an additional limitation which affects customary law.

The role of political bargaining in human rights is well-documented. Prospective signatories of a human rights treaty, statement or declaration will, typically, only accept provisions which (at least nominally) they are willing to publically affirm.[195] A country which rejects all or part

[192] Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 79.
[193] Bantekas and Oette (n 14) 25.
[194] United Nations High Commissioner for Human Rights (UN HCHR), 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (17 November 2011) UN Doc No. A/HRC/19/41; United Nations High Commissioner for Human Rights (UN HCHR), 'Discrimination and violence against individuals based on their sexual orientation and gender identity' (4 May 2015) UN Doc No. A/HRC/29/23.
[195] In some circumstances, a state may ratify a human rights treaty or agree to a statement/resolution for political

of a draft treaty or declaration may either refuse to ratify or establish reservations. For drafters, who are conscious to maintain consensus and legitimacy, there may be an incentive to: (a) prioritise those rights which enjoy higher levels of agreement; and (b) compromise on controversial protections which create division.[196] The result, however, is a document which, although enjoying increased support, offers only watered-down and incomplete rights.[197] In effect, there is an appeal to the lowest common denominator of rights protection. These considerations also have an impact on customary law. While custom does not require a formal bargaining process, opposition or ambivalence by a sufficient number of states can hinder the evolution of new rules. To the extent that customary law – by its nature – develops through a slower, consensus-driven process, it is not ideally placed to fill the lacunae in human rights treaties.

These critiques of the 'treaty-custom' paradigm have particular relevance for trans individuals. Trans persons are especially impacted where states can merely 'opt out' of treaty obligations. Many of the countries which are yet to ratify agreements, such as ICCPR and CEDAW, also retain notably transphobic legal and social structures.[198] While these are the very jurisdictions where trans people have the greatest need to enforce treaty protections, they are actually the states where treaty law assists the least. Similarly, along with sexual orientation, gender identity has – whether consciously or subconsciously – been excluded from all major texts. Brown observes that "no…human rights treaty explicitly mentions discrimination on the basis of...gender identity."[199] While this is unsurprising – even when the UN CRC was adopted in

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or economic reasons, see Abdullahi A An-Na'im, 'Introduction: "Areas of Expressions" and the Universality of Human Rights: Mediating a Contingent Relationship' in David Forsythe and P C McMahon (eds), *Human Rights and Diversity: Area Studies Revisited* (University of Nebraska Press 2003) 17.

[196] Scholars and practitioners have described how, during UN drafting processes for treaties and soft law instruments, there has been compromise on issues, such as LGBTQI rights and reproductive freedoms, to encourage greater levels of state support, see: Doris Buss, 'Robes, Relics and Rights: The Vatican and the Beijing Conference on Women' (1998) 7(3) Social and Legal Studies 339, 348; Diane Otto, 'Lesbians? Not in my Country' (1995) 20(5) Alternative Law Journal 288, 288-290.

[197] ibid.

[198] See e.g. (Malaysia, Not ratified either ICCPR or ICESCR), Human Rights Watch, 'Malaysia: Court Ruling Sets Back Transgender Rights' (*HRW Website*, 8 October 2015) https://www.hrw.org/news/2015/10/08/malaysia-court-ruling-sets-back-transgender-rights accessed 14 May 2017; (Brunei, Not Ratified either ICCPR or ICESCR), International Gay and Lesbian Human Rights Commission, 'Discrimination and Violence Against Women in Brunei Darussalam on the Basis of Sexual Orientation and Gender Identity' (November 2014) https://www.outrightinternational.org/sites/default/files/Brunei1014WCover_0.pdf accessed 14 May 2017; (Saudi Arabia, Not ratified either ICCPR or ICESCR), Human Rights Watch, 'Saudi Arabia: Investigate Transgender Woman's Death' (*HRW Website*, 13 April 2017) https://www.hrw.org/news/2017/04/13/saudi-arabia-investigate-transgender-womans-death accessed 14 May 2017.

[199] David Brown, 'Making Room for Sexual Orientation and Gender Identity in Human Rights Law: An Introduction to the Yogyakarta Principles' (2009) 31(4) Michigan Journal of International Law 821, 822-823.

1989, few (if any) national jurisdictions had introduced trans-specific equality laws[200] – it does emphasise the difficulty of relying upon treaty agreements. A human rights framework, which analyses gender recognition rules using only treaties, will be unable to make meaningful recommendations.

As much as any other contemporary rights topic, gender identity is a source of particularly intense international debate. As noted in Section III below, a significant minority of jurisdictions worldwide continue to deny trans human rights and engage in state practices which marginalise trans identities.[201] In Section III, this thesis argues that trans people do fall within existing human rights standards. It rejects the notion that trans protections are special or novel, and it places trans claims within the core principle of 'universality'.[202] At the same time, however, it would be naïve to understate the opposition which trans human rights inspire. As a practical matter, there is little prospect of the UN General Assembly adopting an overtly trans-friendly human rights treaty anytime soon. Indeed, the level of resistance is such that only the most general trans human rights protections would appear to attract sufficient state practice and *opinio juris* for customary international law.[203]

[200] In the United States, Minnesota was the first state to protect trans persons (through 'sexual orientation') in 1993. Under the ECHR, trans persons were only recognised as protected through art. 14 in *PV v Spain* App No. 35159/09 (ECtHR 30 November 2010).

[201] 'States Vote to Maintain SOGI Language in Extrajudicial Executions Resolution at the United Nations' (*OutRight Action International Website*, 18 November 2016) https://www.outrightinternational.org/content/extrajudicial-executions-resolution-un-keeps-sexual-orientation-and-gender-identity-language accessed 14 May 2017; 'United Nations SOGI Mandate Safeguarded in Face of Hostility' (*OutRight Action International Website*, 21 November 2016) https://www.outrightinternational.org/content/united-nations-sogi-mandate-safeguarded-face-hostility accessed 14 May 2016.

[202] The 'universality' of human rights is the idea that "human rights are global in nature and belong to every human being" irrespective of their individual characteristics, see: Javaid Rehman, *International Human Rights* (n 5) 8.

[203] One example is perhaps the area of extrajudicial, summary or arbitrary executions where (with controversy) trans persons are now consistently included in the UN General Assembly Resolutions, see United Nations General Assembly, '67/168. Extrajudicial, summary or arbitrary executions' (15 March 2013) UN Doc No. A/RES/67/168, [6(b)]; United Nations General Assembly, '69/182. Extrajudicial, summary or arbitrary executions' (30 January 2015) UN Doc No. A/RES/69/182, [6(b)]. In terms of transphobic violence, the African Commission on Human and Peoples' Rights is not as actively trans-affirming as the Council of Europe or the Inter-American Commission on Human Rights. It has, however, adopted a "Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity" (2014) Resolution 275. In the United States, trans identities are not expressly included within federal non-discrimination laws. However, 'gender identity' has been incorporated into the federal Matthew Sheppard and James Byrd Jr Hate Crimes Prevention Act of 2009 (18 USC, s. 249(a)(2)).

B. Judicial Decisions and Soft Law

In applying an international human rights framework to trans identities, this thesis moves beyond the 'treaty-custom' model, and embraces a broader range of sources. In order to determine what impact human rights can have on conditions of recognition, the thesis engages with rights instruments and actors (international, regional and domestic) which explicitly acknowledge trans experiences. In doing so, the thesis does not radically depart from normal human rights practice. As noted, art. 38(1)(d) of the ICJ Statutes identifies "judicial decisions and the teachings of the most highly qualified publicists" as "subsidiary means" for determining international law. Those drafting the statutes understood that, while it is beneficial to resolve disputes using hard-law rules and accepted customs, there must be a (at least subsidiary) role for additional actors who can assist the decision-making process. To adopt such a stance is not to downplay the primary importance of inter-state agreements or state practices. Instead, it is merely to concede the limitations of treaty and customary law, and to recognise that alternative sources can contribute to a more complete and coherent system of legal rules. This thesis draws from two additional sources – (a) international, regional and domestic judicial decisions; and (b) international and regional soft law instruments – to develop a trans-inclusive human rights framework.

It is important, from the outset, to clarify what such an expanded human rights framework is intended to achieve. International treaties and customs have created a broad template for human rights analysis, but trans experiences are noticeably absent. This framework has, however, been reproduced in national and regional systems. Charters, such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (ACHPR) safeguard the same core principles as international treaties. Each of these agreements (and their substantive rights) has been extensively interpreted by the courts and commissions which supervise their compliance. Case law from these actors helps to undercover how broad rights protections apply to new and shifting areas of the law. In addition, numerous soft law actors, including the UN Human Rights Treaty Bodies (UN Treaty Bodies) and the Special Procedures of the UN Human Rights Council (UN Special Procedures), also interpret and apply human rights standards. Together with national and regional judges, they have, in recent years, been at the forefront of explaining and affirming the status of trans individuals in human rights law.[204] This has involved applying core

[204] UN Human Rights Committee, 'Concluding Observations on the Initial Report of Bangladesh' (27 April 2017) UN Doc No. CCPR/C/BGD/CO/1, [11(e) and 12(e)]; UN Human Rights Committee, 'Concluding

rights standards (e.g. non-discrimination, bodily integrity, etc.) to trans-specific experiences. In the absence of clearer guidance from treaty or customary law, these "subsidiary" sources offer an important insight into how trans identities intersect with human rights.[205] It is in that context – in order to better understand the relationship between trans lives and human rights – that the thesis engages with judicial decisions and soft law sources.

This thesis is, however, careful to avoid two important pitfalls. First, there will be no 'á la carte' human rights analysis. There is a reasonable fear that, where research is not rigidly grounded in one fixed source or regime, an author will 'pick and choose' only those legal instruments or judgments which conform to (or reinforce) a preferred narrative. In the precise context of this thesis, such an approach might manifest itself, for example, through concentrating on only those national cases (e.g. from Germany[206] or Italy[207]), which have rejected divorce as a pre-condition for legal gender recognition, while failing to acknowledge that, in *Hamaleinen v Finland*[208], the Grand Chamber of the European Court of Human Rights (ECtHR) held that, at least in some circumstances, divorce requirements are a proportionate interference with 'family life' under art. 8 ECHR.[209] This thesis explicitly disavows such selective analysis. Where there is recourse to sources beyond a 'treaty-custom' model, the thesis incorporates all relevant materials, including those judgments and resolutions which have been

observations on the third periodic report of Bosnia and Herzegovina' (13 April 2017) UN Doc No. CCPR/C/BIH/CO/3, [25] – [26]; UN Human Rights Committee, 'Concluding observations on the second periodic report of Thailand' (25 April 2017) UN Doc No. CCPR/C/THA/CO/2, [11] – [12]; UN Human rights Committee, 'Concluding observations on the initial report of Burkina Faso' (17 October 2016) UN Doc No. CCPR/C/BFA/CO/1, [13] – [14]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined seventh and eighth periodic reports of the Philippines' (25 July 2016) UN Doc No. CEDAW/C/PHL/CO/7-8, [14(b)] and [45(a)]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the seventh periodic report of Turkey' (25 July 2016) UN Doc No. CEDAW/C/TUR/CO/7, [32(f)] – [33(h)]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined eighth and ninth periodic reports of Haiti' (9 March 2016) UN Doc No. CEDAW/C/HTI/CO/8-9, [47] – [48]; United Nations Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fourth periodic report of the Dominican Republic' (21 October 2016) UN Doc No. E/C.12/DOM/CO/4, [25] – [26]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the eighth periodic report of the Russian Federation' (20 November 2015) UN Doc No. CEDAW/C/RUS/CO/8, [42(a)-(c)]; 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (19 April 2017) UN Doc No. A/HRC/35/36l; 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [34] – [36], [48] – [50]; United Nations Special Rapporteur on the Situation of Human Rights Defenders, 'Situation of human rights defenders' (30 July 2015) UN Doc No. A/70/217, [65] – [67], and [93(a)]; *YY v Turkey* App No. 14793/08 (ECtHR, 10 March 2015).

[205] According to de Schutter, "[i]t has become quite common for international human rights mechanisms…to rely upon comparative human rights law to develop the interpretation of the human rights provisions that they apply…", de Schutter, *International Human Rights Law* (n 5) 40.

[206] Federal Constitutional Court of Germany, 1 BvL 10/05 (23 July 2008).

[207] Constitutional Court of Italy, No. 170 [2014] (11 June 2014).

[208] [2015] 1 FCR 379.

[209] ibid, [69] – [89].

opposed by trans advocates.[210] Such sources are no less essential in explaining the current contours of international human rights than trans-affirming resources. Although, at certain junctures, the thesis does normatively critique existing interpretations of the law[211], all relevant judgments and soft law instruments (irrespective of the results that they recommend) are integrated.

Avoiding the second important pitfall requires an acknowledgment that, by drawing inspiration from subsidiary sources, such as regional case law and soft law instruments, this thesis has a reduced capacity to identify binding international rules. Although regional courts and soft law bodies can offer compelling guidance as to how international human rights ought to operate, their opinions do not – on a global level at least – have mandatory force. The recent ECtHR judgment in *AP, Garçon and Nicot v France*[212] is a persuasive explanation of how trans sterilisation requirements are incompatible with notions of bodily integrity (which are also enshrined in numerous international treaties, most notably UN CAT).[213] However, while *AP* is indicative of whether enforced infertility complies with art. 16 UN CAT[214], the ECtHR's opinion does not, on its own, establish a global norm. Moving beyond treaties and custom, and embracing a more diverse range of sources, the thesis inevitably compromises on enforceability. While this is undoubtedly a limitation, there are, on balance, a greater number of advantages.

First, this thesis is not (nor does it aspire to be) a set of court pleadings or a roadmap for litigation. While many of the arguments proposed herein could potentially be explored before national or supra-national courts, this is not the primary goal. Instead, this thesis reflects more generally upon the relationship between international human rights and trans identities, and asks how human rights can impact conditions of recognition. Within that broader perspective, questions of justiciability are clearly important but they should not be determinative. Second, drawing from a wider net of sources is as much a matter of practicality as it is a profound, methodological choice. As noted, there simply is not enough substance within a purely 'treaty-

[210] ibid; *AP, Garcon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017) (diagnosis requirements are not contrary to art. 8 ECHR); *JK, R (on the application of) v Secretary of State for the Home Department* [2015] EWHC 990 (Admin)) (trans woman does not have a right to have her gender marker changed on her child's birth certificate); French Court of Cassation, Arret 531 (4 Mai 2017) (no requirement to register a gender status beyond male or female).
[211] In Chapter IV, the thesis re-considers the status of same-gender marriage in international and regional human rights law.
[212] *AP* (n 47). The ECtHR held that imposition of a sterilisation requirement was a disproportionate failure to respect 'private life' under art. 8 ECHR, [126] – [135].
[213] ibid, [121] – [135].
[214] Article 16 UN CAT provides that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction…acts of cruel, inhuman or degrading treatment or punishment…"

custom' model to apply a proper human rights analysis to legal gender recognition. On their own, treaty and customary law offer little, explicit advice on trans rights. It is only by looking to subsidiary sources – case law and soft law instruments – that one can properly contextualise trans experiences.

More generally, in the context of academic analysis, there is benefit in breaking free from a model of rights anchored in enforceability. According to Ignatieff, human rights should be a "shared vocabulary from which our arguments can begin."[215] Instead of mere tools which *do* bind state actors, rights discourse can also define those entitlements and protections which individuals *ought* to enjoy. For Bantekas and Oette, human rights have an "important dual function."[216] In addition to norms "validated in recognised sources", they are also "claims based on particular values or principles."[217] In the specific context of trans human rights – where there is only a nascent jurisprudence – it is in this latter guise, as "values or principles", that human rights have had their greatest impact. Even where, in past decades, rights adjudicators were resolutely against trans protections, advocates were able to use the language of human rights to promote greater tolerance and respect.[218] Indeed, within western-centric lesbian, gay, bisexual and trans rights movements, there is evidence that, only where the notion of queer human rights has achieved social acceptance were courts willing to confer the imprimatur of law.[219]

(i.) Judicial Decisions

Regional and domestic judicial decisions "have been of great value in developing human rights law."[220] They help to explain the content of rights obligations, and offer a window into the practical operation of abstract principles. Article 38(1)(d) specifically identifies "judicial decisions" as a subsidiary

[215] Michael Ignatieff, *Human Rights and Idolatry* (Princeton Press 2001) 95.
[216] Bantekas and Oette (n 14) 10.
[217] ibid.
[218] In the United Kingdom, although the ECtHR refused, for almost two decades, to recognise a right to gender recognition, the language of human rights was used in making the case for legal recognition – both in terms of advocacy before the ECtHR but also within domestic politics. Even before *Goodwin v United Kingdom* ([2002] 35 EHRR 18), the UK Government had been convinced to begin laying the groundwork for a gender recognition regime; see, Ralph Sandland, 'Feminism and the Gender Recognition Act 2004' (2005) 13(1) Feminist Legal Studies 43; Alex Sharpe, 'Gender Recognition in the UK' (2009) 18(2) Social and Legal Studies 241.
[219] In the United States, the legal movement towards marriage equality, which culminated with the US Supreme Court recognising a general right to same-gender marriage in 2015 (*Obergefell v Hodges* [2015] 576 US), only began to experience success once wider social inclusion for gay, lesbian and bisexual persons had begun to be achieved, see: Molly Ball, 'What Other Activists Can Learn From the Fight for Gay Marriage' (*The Atlantic,* 14 July 2015) https://www.theatlantic.com/politics/archive/2015/07/what-other-activists-can-learn-from-the-fight-for-gay-marriage/398417/ accessed 15 May 2017. Mullally argues that, in Ireland, incremental social awareness and acceptance was a vital step towards greater legal rights, see generally: Una Mullally, *In the Name of Love: The Movement for Marriage Equality in Ireland* (The History Press Ireland 2014).
[220] Javaid Rehman, *International Human Rights* (n 5) 22.

means for determining the rule of law. While these decisions must be understood in their specific regional or national contexts, and not be presented as internationally enforceable, they are nonetheless valuable in contextualising and clarifying international norms.[221] Chinkin writes that regional and domestic litigation "fleshes out and develops international…treaties and customs."[222] Applying human rights principles to live disputes, such litigation frequently has a "greater influence than might be expected for a subsidiary [source]."[223] Where there is ambiguity over the precise contours of international norms, regional or national judgments offer guidance on the appropriate limits.

Judicial decisions have been particularly influential in defining the contours of trans protections. In the absence of treaty law and custom, regional and national courts have established a substantial jurisprudence on trans human rights.[224] Domestic adjudicators, in jurisdictions such as the United States, were among the first actors to validate preferred gender.[225] In recent years, national judges – from Australia[226] to Argentina[227] – have led the application of human rights to gender recognition. They are now joined by regional tribunals, most notably the ECtHR, which, in a series of landmark judgments, is increasingly examining conditions of recognition.[228] This thesis draws upon that wealth of regional and national case law to better understand how international human rights influence legal transitions.

(ii.) Soft Law

In addition to judicial decisions, this thesis also draws from 'soft law' sources.[229] While soft law is not specifically mentioned as a "subsidiary" source under art. 38(1), it has an "essential

[221] ibid.
[222] Chinkin (n 29) 88.
[223] ibid.
[224] *Goodwin* (n 55); *Schlumpf v Switzerland* App No. 29002/06 (ECtHR, 8 January 2009); *L v Lithuania* [2008] 46 EHRR 22; *YY* (n 41); *AP* (n 47); Stockholm Court of Administrative Appeal, *Socialstyrelsen v. NN* Mål nr 1968-12 (19 December 2012); Federal Constitutional Court of Germany, 1 BvR 3295/07 (11 January 2011); Constitutional Court of Italy, No. 170 [2014] (11 June 2014); *W v Registrar of Marriages* [2013] HKCFA 39 (Court of Final Appeal of the Special Administrative Region); *XY v R* [2012] HRTO 726 (Human Rights Tribunal of Ontario).
[225] *MT v JT* 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (New Jersey).
[226] *Re Kevin (Validity of Marriage of a Transsexual)* [2001] 28 Fam LR 158.
[227] *PRL*, Criminal and Correction Court No. 4 of Mar del Plata (10 April 2008).
[228] *Goodwin* (n 55) (the right to legal gender recognition); *L v Lithuania* (n 61) (imposition of pre-conditions for legal gender recognition which cannot be realised on the national territory); *Hamalainen v Finland* [2015] 1 F.C.R. 379 (the requirement to convert a marriage into a registered partnership); *AP* (n 47) (sterilisation and diagnosis as pre-conditions for legal gender recognition).
[229] Olivier (n 23), 299; Dinah Shelton, 'Compliance with International Human Rights Soft Law' (1997) 29 Studies in Transnational Legal Policy 119.

and growing role in international relations and in the development of international law."[230] Soft law encompasses all those "non-binding instruments that set standards and/or form part of the law-making process."[231] It is a "broad category that captures the increasing plurality and complexity of standard setting and law-processes."[232] According to Shelton, "[i]n the human rights field, there are many and varied types of normative statements that could be classified as soft law."[233] These include "UN General Assembly Resolutions", "the resolutions of specialised agencies" and the work of "regional organisations."[234] Boyle sums up the importance of soft law instruments by noting that, "in modern international relations…general norms or principles are probably more often found in the form of non-binding declarations or resolutions of international organisations than in the provisions of multilateral treaties."[235]

Like judicial decisions, soft law has played an important role in mainstreaming trans identities into international law. In recent years, key actors – including the UN Treaty Bodies, the Special Procedures, the UN Human Rights Council (HRC Council) and the UN High Commissioner for Human Rights (UN HCHR) – have repeatedly incorporated trans experiences into their work.[236] Not only have these soft law bodies offered compelling intellectual and legal arguments as to why trans persons *ought* to be protected, they have also documented how and why trans lives *already enjoy* key international guarantees. UN HCHR, in particular, monitors national requirements for gender recognition, and has recommended that certain conditions – most notably sterilisation – are incompatible with fundamental rights.[237] Regional actors – including the Council of Europe, the Organisation of American States and the African Commission on Human and People's Rights (ACmHPR) – have also taken steps (admittedly to different degrees) to enhance and promote trans human rights.[238]

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[230] Dinah Shelton, 'International Law and Relative Normativity' in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 182.
[231] Bantekas and Oette (n 14) 65.
[232] ibid.
[233] Shelton, 'Compliance' (n 66), 120.
[234] ibid, 128.
[235] Alan Boyle, 'Soft Law in International Law-Making' in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 151.
[236] For a thorough survey of the mainstreaming of trans identities into international soft law instruments, see FN 41 above. See also, United Nations Human Rights Council, '17/19 Human rights, sexual orientation and gender identity' (14 July 2011) UN Doc No. A/HRC/RES/17/19; United Nations Human Rights Council, '32/2. Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc No. A/HRC/RES/32/.
[237] UN HCHR 2015 (n 31), [17], [38], [70] and [78(g)].
[238] Parliamentary Assembly of the Council of Europe (PACE), 'Discrimination against Transgender People in Europe' (22 April 2015) Resolution No. 2048(2015); Commissioner for Human Rights of the Council of Europe, 'Human Rights and Gender Identity' (29 July 2009) CommDH/IssuePaper(2009) 2; Organisation of American States General Assembly, 'Human Rights, Sexual Orientation and Gender Identity and Expression' (5 June 2014) Resolution No. AG/RES. 2863 (XLIV-O/14); 'Mandate and Functions of the Rapporteurship on the Rights of LGBTI Persons' (*Inter-American Commission on Human Rights Website, No Date Available*)

Although, like judicial decisions, soft law sources do not create binding norms, they can have an important role in developing international human rights. Soft law is a useful vehicle to "bring an issue [onto] the international agenda."[239] In the absence of explicit treaty references, soft law, such as Resolution 17/19 of the HRC Council[240], encourages and facilitates important debates.[241] Less than five year after that first ever UN resolution on LGBTI rights, the HRC Council had already appointed an 'Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity'.[242] In addition, soft law can also "express standards and international consensus on the need for particular action, where unanimity is lacking...and the will to establish hard law is absent."[243] In some cases, soft law instruments are the only way to create global agreement on politically sensitive issues. According to Boyle, "it may be easier to reach agreement" when states understand that "their legal commitment, and the consequences of any non-compliance are more limited."[244] This is particularly true in trans contexts, where governments may be reluctant to accept binding norms which fundamentally vary from their own domestic law. Indeed, given the sensitivity and lack of protection for trans identities, it is unsurprising that soft law has been the most prominent international source of trans affirmation.[245]

http://www.oas.org/en/iachr/lgtbi/mandate/mandate.asp accessed 29 August 2017; African Commission on Human and Peoples' Rights, "Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity" (2014) Resolution No. 275.

[239] Chinkin (n 29) 93.

[240] Resolution 17/19 is a landmark resolution adopted by the UN Human Rights Council. It recognised the discrimination and violence which LGBTI persons experience worldwide. It requested the United Nations High Commissioner for Human Rights to commission a report on this issue, and established a panel discussion; United Nations Human Rights Council (n 73).

[241] Boyle, 'Soft Law' (n 72) 145. Writing in the context of disability law, Sabatello and Sculze explain that, in the years preceding adoption of the UN Convention on the Rights of Persons with Disabilities (UN CRPD), "a number of so called 'soft law' instruments covering different aspects of human rights of persons with disabilities were adopted", Maya Sabatello and Marianne Schulze, 'Introduction' in Maya Sabatello and Marianne Schulze (eds) *Human Rights and Disability Advocacy* (University of Pennsylvania Press 2013) 3.

[242] United Nations Human Rights Council, '32/2. Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc No. A/HRC/RES/32/2.

[243] Shelton, 'Compliance' (n 66), 141

[244] Boyle, 'Soft Law' (n 72) 143-144.

[245] General Assembly of the United Nations, '67/168. Extrajudicial, summary or arbitrary executions' (15 March 2013) UN Doc No. A/RES/67/168, [6(b)]; United Nations Human Rights Council, '32/2. Protection against violence and discrimination based on sexual orientation and gender identity' (15 July 2016) UN Doc No. A/HRC/RES/32/.

II. Four Key Themes

Having introduced the sources for a trans-inclusive human rights framework, Section II now identifies the central contours of that framework. It explores four key rights themes, each of which has particular relevance for this thesis. The four themes are: (A) bodily integrity; (B) equality and non-discrimination; (c) marriage and family life; and (d) children's rights.

Before embarking upon a substantive discussion of these rights categories, however, it is necessary to offer an introductory clarification. As noted, these four themes are not (nor do they pretend to achieve) an exhaustive catalogue of the human rights which intersect with condition of recognition. By focusing on these four areas of law, the thesis is suggesting neither that human rights analysis of gender recognition is limited to these four themes nor that these are the only rights that will be referenced. As the (in)ability to have one's preferred gender acknowledged, and the processes necessary to achieve recognition, impacts innumerable aspects of an individual's life, so too there are countless rights entitlements which may be affected by gender recognition processes.[246] This thesis focuses on the four above-mentioned themes simply because, in the analysis that follows, they are the most relevant categories for legal gender recognition. All four apply to at least one of the conditions of recognition under review (in some cases, such as Chapter V, more than one theme assumes importance).

Section II gives a broad overview of these areas of law, and begins to place each rights theme within the context of trans identities. It does not, however, specifically discuss the four themes in relation to legal gender recognition. That analysis is the substance of Chapters II-VI.

A. Bodily Integrity

Bodily integrity is a core tenet of human rights.[247] In international law, body integrity is typically protected through the prohibition on torture, cruel and inhuman, or degrading

[246] An example of an additional right which is affected by legal gender recognition is 'privacy'. As noted in the Introduction, in *Goodwin* (n 55), the European Court of Human Rights condemned the failure to acknowledge preferred gender as a violation of "private life" under art. 8 ECHR. In the recent communication decision, *G v Australia*, the UN Human Rights Committee affirmed that "'privacy' under article 17…includes protection of a person's identity, such as their gender identity" (Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017), [7.2]).

[247] Christoph Grabenwarter, *European Convention on Human Rights* (Verlag C.H. Beck oHG 2014) 31; Alistair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edn, Oxford University Press 2012) 145; Bantekas and Oette (n 14) 326; David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 235; Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International*

treatment. Article 5 of the Universal Declaration of Human Rights (UDHR) affirms that "[n]o-one shall be subjected to torture or to cruel, inhuman or degrading treatment." A similar provision now exist in all "general universal and regional human rights treaties."[248] Within the UN human rights system, UN CAT – and the obligations which it places upon State Parties – is the foremost statement on bodily integrity. Expressing a "[desire] to make more effective the struggle against torture and other cruel, inhuman or degrading treatment"[249], UN CAT establishes a core framework of physical rights[250], and institutes a Committee against Torture (CAT Committee) to monitor compliance.[251] Together with the other global and regional treaties, it represents (at least in theory[252]) a strong international model to uphold bodily integrity. A majority of the world's population now live in a jurisdiction which is party to at least one international or regional agreement outlawing physical mistreatment. Rodley suggests that the increasing number of treaty and positive law instruments illustrate that "the prohibition of torture and other ill-treatment is [now] a norm of customary international law."[253]

(i.) Torture, Cruel and Inhuman, or Degrading Treatment

(a.) Torture

The label 'torture' is reserved for the most "serious and cruel" inflictions of physical and mental suffering.[254] A "special stigma" applies to tortuous acts.[255] The leading modern definition of torture, "referred to by most international regional human rights treaty bodies"[256], is set out in art. 1 UN CAT. Article 1 defines torture as "any act by which severe pain or suffering...is intentionally inflicted on a person for such purposes... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official." The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or

Human Rights Law (2nd edn, Oxford University Press 2014) 174.
[248] Rodley (n 84) 176. See ICCPR, art.7; ECHR, art. 3; ACHR, art. 5; ACHPR, art. 5.
[249] UN CAT, see the Preamble.
[250] See generally, Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: a Commentary* (Oxford University Press 2008).
[251] UN CAT, arts. 17 – 24.
[252] Tate questions the extent to which UN CAT has successfully prevented states (including states which have ratified the treaty) from engaging in torture and other cruel treatment, Katharine Tate, 'Torture: Does the Convention against Torture Work to Actually Prevent Torture in Practice by States Party to the Convention' (2013) 21(2) Willamette Journal of International Law and Dispute Resolution 194, 209-221. See also, Amnesty International, *Torture in 2014 – 30 Years of Broken Promises* (Amnesty International 2014) file:///C:/Users/USER/Downloads/act400042014en.pdf accessed 17 May 2017.
[253] Rodley (n 84) 177.
[254] *Ireland v United Kingdom* [1979-80] 2 EHRR 25, [167].
[255] *Askoy v Turkey* [1997] 23 EHRR 553, [144].
[256] Bantekas and Oette (n 14) 330.

Punishment (Special Rapporteur on Torture) identifies four key elements of torture: "severe pain or suffering", "intent", "specific purpose" (e.g. "discrimination of any kind"[257]) and "the involvement of a State official."[258] Conduct which has previously been denounced as torture includes rape[259], 'Palestinian hanging'[260] and the use of electro-shocks to obtain a confession.[261]

(b.) Cruel and Inhuman or Degrading Treatment

Article 16 UN CAT requires that states "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment...committed by or at the instigation of or with the consent or acquiescence of a public official." In practice, cruel and inhuman treatment is frequently defined, not by reference to any specific characteristics, but rather through a process of contrasts and comparisons with torture.[262] While Harris, O'Boyle and Warbrick suggest that the "crucial distinction between torture and inhuman treatment lies in the degree of suffering caused"[263], the Special Rapporteur on Torture focuses on the absence of purpose or intent: "cruel and inhuman treatment...means the infliction of severe pain or suffering without purpose or intention."[264] Two persons may commit similar physical acts which inflict comparable levels of pain and suffering. Yet, only the individual who intentionally inflicts that pain in pursuit of an identifiable purpose commits torture.[265] The Special Rapporteur's reasoning is preferable in this regard. Understanding that, even to be considered 'inhuman', treatment must reach an objectively high level of severity, it is logical that any distinction from torture should arise through the intent and purposes of the actor.[266] Previous findings of inhuman treatment include child abuse[267] and female genital cutting.[268]

Treatment is 'degrading' where it is "such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them."[269] In determining whether this

[257] UN CAT, art. 1(1)
[258] 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (1 February 2013) UN Doc No. A/HRC/22/53, [17].
[259] *Mejia v Peru* Series C No. 119 (IACtHR, 1 March 1996); *Case of the Miguel Castro-Castro Prison v Peru* Series Case No. 160 (IACtHR, 25 November 2006), [311]; *Aydin v Turkey* [1998] 25 EHRR 251, [86].
[260] *Askoy* (n 97) (individuals' hands are tied behind their back and suspended).
[261] *Mikhevyev v Russia* App No. 77617/01 (ECtHR, 26 January 2006).
[262] 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 February 2010) UN Doc No. A/HRC/13/39/Add.5, [186].
[263] Harris, O'Boyle and Warbrick (n 84) 241.
[264] 'Report of the Special Rapporteur on Torture' 2010 (n 99), [186].
[265] Rodley (n 84) 180.
[266] 'Report of the Special Rapporteur on Torture' 2010 (n 99), [187].
[267] *Giusto, Bornacin and V v Italy* App No. 38972/06 (ECtHR, 15 May 2007).
[268] *Collins and Akaziebie v Sweden* App No. 23944/05 (ECtHR, 8 March 2007).
[269] *Gafgen v Germany* [2011] 52 EHRR 1, [89].

standard is met, a tribunal considers all the circumstances of the conduct.[270] While a desire to humiliate or debase can make it more likely that conduct is degrading, "the absence of any such purpose cannot definitively rule out a finding of violation."[271] In the context of art 3. ECHR, the Special Rapporteur on Torture has observed that a breach may arise "where the purpose or intention of the State's action or inaction was not to degrade, humiliate or punish the victim, but where this nevertheless was the result."[272] Examples of degrading treatment include harassment to have an abortion[273], age-inappropriate military service[274] and depriving a police witness of food and drink.[275]

(ii.) Bodily Integrity and the Provision of Medical Treatment

In recent years, human rights actors have increasingly applied bodily integrity principles to the provision of medical treatment.[276] The Special Rapporteur on Torture has written that "medical treatments of an intrusive and irreversible nature, when lacking therapeutic purpose, may constitute torture or ill-treatment when enforced without the free and informed consent of the person concerned."[277] A "fundamental principle of medical law and ethics" is that "before treating a competent patient a medical professional should get the patient's consent."[278] Exceptions to this requirement are rare, such as a medical emergency[279] or long-term absence of capacity.[280] In *Herczegfalvy v Austria,* the ECtHR held that a "measure which is a therapeutic necessity cannot be regarded as inhuman and degrading."[281] However, the instances where medical emergencies arise are tightly regulated. In general, there should not be intervention unless the circumstances "prevent the practitioner from obtaining the appropriate consent", the "necessary intervention cannot be delayed" and the treatment is carried out "for the immediate benefit of the individual concerned."[282]

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[270] *Identoba and Others v Georgia* App No. 73235/12 (ECtHR, 12 May 2015).
[271] *Peers v Greece* [2001] 33 EHRR 51, [74].
[272] 'Report of the Special Rapporteur' (n 95), [18].
[273] *P and S v Poland* App No. 57375/08 (ECtHR, 30 October 2012).
[274] *Taştan v Turkey* App No. 63748/00 (ECtHR, 4 March 2008).
[275] *Soare and Others v Romania* App No. 24329 (ECtHR, 22 February 2011).
[276] 'Report of the Special Rapporteur on Torture' (n 95), [15].
[277] ibid, [32].
[278] Johnathan Herring, *Medical Law and Ethics* (4th edn, Oxford University Press 2012) 149.
[279] Johnathan Herring, *Medical Law and Ethics* (6th edn, Oxford University Press 2016) 160.
[280] There may, for example, be situations where persons experience long-term incapacity (e.g. coma, etc.) and where, although there is no 'emergency', providing routine treatment (even in the absence of consent) is medically appropriate.
[281] [1993] 15 EHRR 437, [82].
[282] *Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine*, [56] – [59] http://conventions.coe.int/Treaty/EN/Reports/Html/164.htm accessed 11 July 2015. On this point, one must be clear that, while the Convention reflects standard medical norms, it is not a binding rule of international law.

In order to be valid, consent must be "given voluntarily, by someone who has the capacity to consent, and who understands what the treatment involves."[283] Disputes regarding consent to medical treatment most frequently arise in relation to capacity and information. An individual, or their representative, may challenge a particular intervention either on the basis that the person, at the time consent was offered, lacked full capacity or was acting with incomplete information. Challenges based on the absence of 'free' consent are significantly rarer. As Jackson notes, "[p]atients will seldom be coerced by direct threats into consenting to medical treatment."[284] Non-voluntary consent may, however, appear from time to time, often as the result of subtler, but no less important, pressures. According to Kossen, "[t]he use of coercion in matters of health is one of the most abhorrent rights violations committed by State actors."[285]

While no universally-accepted definition of coerced consent exists, Faden and Beauchamp identify three key elements.[286] First, there must be an "agent of influence who intends to influence the other party by presenting a severe threat."[287] Second, the agent must present a threat which is "credible".[288] Finally, the presented threat must be "irresistible" to the party, or parties, who receive it.[289] In *VC v Slovakia*[290], hospital staff had obtained consent for sterilisation from a young Roma woman while she was in labour. At the time of consent, the applicant had been lying supine on a bed and experienced significant pressure when staff members suggested that, without sterilisation, she or any future child might die. The ECtHR concluded that the applicant had not enjoyed the opportunity to provide "free" consent.[291] There had been a "gross disregard for [the applicant's] right to autonomy and choice as a patient."[292] In those circumstances, the conduct of the hospital staff "attained the threshold of severity required to bring it within the scope of Article 3 [ECHR]."[293]

[283] Emily Jackson, *Medical Law: Texts, Cases and Materials* (3rd edn, Oxford University Press 2013) 166.
[284] ibid, 279.
[285] Janine Kossen, 'Rights, Respect, Responsibility: Advancing the Sexual and Reproductive Health and Rights of Young People through International Human Rights Law' (2011) 15(2) University of Pennsylvania Journal of Law and Social Change 143, 157.
[286] Tom Faden and Ruth Beauchamp, *A history and theory of informed consent* (Oxford University Press 1986) 339.
[287] ibid.
[288] ibid.
[289] ibid.
[290] [2014] 59 EHRR 29.
[291] ibid, [112].
[292] ibid, [119].
[293] ibid. Article 3 ECHR provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."

(iii.) Absolute Protection

The right to bodily integrity, as enshrined in the prohibition on torture, cruel and inhuman, or degrading treatment, is "absolute and nonderogable."[294] There is no state justification for torture or cruel and inhuman acts.[295] This is so even in "ticking bomb" scenarios[296] or where there are the "highest reasons of public interest."[297]

A distinct approach, however, is evident in art. 8 ECHR. Instead of prohibiting torture or ill-treatment, art. 8 protects 'private life', which the ECtHR has interpreted to include "physical and moral integrity."[298] The Court has previously found a violation of art. 8 where an applicant was subjected to a non-consensual gynaecological examination[299] and where national criminal laws failed to protect a young victim of sexual abuse.[300] In *YY v Turkey*[301], the ECtHR confirmed that art. 8 guarantees the "right of [trans] persons to personal development and to physical and moral security."[302] Article 8 has now become a primary instrument for vindicating trans bodily integrity across the Council of Europe.[303] It has been invoked to ensure physical autonomy in both medical and legal transition pathways.[304] However, art. 8 ECHR is a qualified right and can be subject to proportionate restrictions, which must be in accordance with law and necessary in a democratic society.[305] A comprehensive discussion of proportionality is offered in the final part of Section II below.

[294] United Nations Committee against Torture, 'General Comment No 2 on the implementation of article 2 by State Parties' (24 January 2008) UN Doc No. CAT/C/GC/2, [5].
[295] 'Report of the Special Rapporteur on Torture' 2010 (n 99), [41].
[296] Rodley (n 84) 176; Robin White and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010) 176.
[297] Harris, O'Boyle and Warbrick (n 84) 236.
[298] *X and Y v Netherlands* [1986] 8 EHRR 235, [22].
[299] *YF v Turkey* App No. 24209/94 (ECtHR, 22 July 2003).
[300] *X and Y v Netherlands* [1986] 8 EHRR 235.
[301] App No. 14793/08 (ECtHR, 10 March 2015).
[302] ibid, [58].
[303] *AP* (n 47).
[304] *Schlumpf* (n 61) (medical); *YY* (n 41) (medical); *AP* (n 47) (legal).
[305] ECHR, art. 8(2).

B. Equality and Non-Discrimination[306]

Like bodily integrity, equality and non-discrimination are core human rights principles.[307] The guarantee of equality and non-discrimination is the only human right expressly mentioned in the United Nations Charter ("UNC"). Article 1(3) UNC "makes it clear that one of the basic purposes of the UN is the promotion of the equal guarantee of human rights…without distinction."[308] All major international human rights instruments incorporate at least one reference to equality and non-discrimination, including ICCPR (arts. 2, 3 and 26) and ICESCR (arts.2 and 3). Similar provisions have also been reproduced in regional agreements, such as the ECHR (art. 14), ACHR (arts. 1 and 24) and ACHPR (arts. 2, 3, 18 and 24). Clifford writes that equality and non-discrimination are so embedded within international frameworks that their "absence would make the landscape of human rights look fundamentally different."[309] According to Shelton, the "pervasiveness of the treaty obligations of non-discrimination, equal rights, and equality" mean that these principles must now be "viewed as part of the corpus of customary international law."[310]

[306] A number of courts have located the equality guarantee in a broader concept of 'dignity' (*Prinsloo v Van der Linde* [1997] (3) SA 1012 (CC); *Law v Canada* (subsequently modified in *R v Kapp*) [2008] 2 SCR 483). Dignity offers a number of advantages. 'Equality as dignity' is "incompatible with a levelling down option" (Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011), 227). In addition, a dignity-based framework emphasises the relationship between non-discrimination and self-determination (Gay Moon and Robin Allen, 'Dignity discourse in discrimination law: a better route to equality?' (2002) European Human Rights Law Review 610, 627). However, 'dignity' is also subject to critique. It is not adopted as a primary framework for analysis in this thesis. First, despite attempts among legal theorists to reveal the foundations and scope of 'dignity', there is still no "canonical definition" (Jeremy Waldron, 'Dignity, Rank and Rights' The Tanner Lectures on Human Rights, University of California, Berkeley (21-23 April 2009) 211). Second, framing non-discrimination in terms of dignity frequently privileges society's integrity at the expense of individual lived-experiences (David Feldman, 'Human dignity as a legal value: Part 1' (1999) Public Law 682, 697). Finally, as Joshi notes, while "[d]ignity as respect appeals to a person's freedom to make personal and intimate choices without interference", dignity as "respectability" prioritises the "social acceptability and worthiness of the personal choices being made" (Yuvraj Joshi, 'The Respectable Dignity of *Obergefell v Hodges*' (2015) 6 California Law Review Circuit 117, 119). Respectability allows autonomy and choice "only insofar as they have and show the qualities that are deemed dignified by a normative standard of behaviour" (Joshi, 119). To extent that a dignity analysis might only protect applicants for gender recognition who reproduce prevailing social gender norms, it is not an appealing framework to prevent discrimination.

[307] Stephanie Farrior, *Equality and non-discrimination under international law* (Ashgate 2015); Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, materials and texts on national, supranational and international non-discrimination law* (Hart 2007); David Oppenheimer, Sheila Foster and Sora Han, *Comparative Equality and Anti-Discrimination Law: Cases, Codes, Constitutions and Commentary* (Foundation Press 2015).

[308] Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 160.

[309] Jarlath Clifford, 'Equality' in Stephanie Farrior (ed) *Equality and Non-Discrimination under International Law* (Ashgate 2015) 14.

[310] Dinah Shelton, 'Prohibited Discrimination in International Human Rights Law' in Stephanie Farrior (ed) *Equality and Non-Discrimination under International Law* (Ashgate 2015) 349-350.

(i.) Scope

Equality and non-discrimination have no rigid scope. They may operate as either "subordinate" or "autonomous" norms.[311] Article 2(1) ICCPR and art. 2(2) ICESCR are examples of "parasitic"[312] or "accessory"[313] provisions. They protect the equal enjoyment of only those rights which are expressly guaranteed by their respective treaties.[314] On the other hand, art. 26 ICCPR establishes an autonomous protection, requiring equal access to rights, irrespective of whether they are recognised within the Covenant.

(ii.) Definition

There is also no "universally accepted definition of discrimination, or equality." [315] International, regional and national actors all adopt distinct approaches. While there may be commonalities and overlap, different tests typically incorporate unique values. Vandenhole cites growing international support for a non-discrimination model whereby similarly situated persons should be treated similarly unless there is a reasonable and proportionate justification.[316] This formal, 'likes alike' theory of equality has been endorsed by numerous international bodies, including the UN Committee on the Rights of the Child (CRC Committee), the Inter-American Court of Human Rights (IACtHR) and the ECtHR.[317] It is not, however, without critique. As a policy for achieving *de facto* non-discrimination, 'formal equality' is comparatively weak. Eschewing references to personal traits, 'likes alike' misunderstands how such traits critically impact access to human rights. Instead of ignoring identity, the law should explicitly acknowledge how identities have been used to withhold protection: "[t]reating status as an irrelevant ground merely ignores the ongoing disadvantage experienced by individuals

[311] Moeckli (n 145) 161.
[312] Harris, O'Boyle and Warbrick (n 84) 784.
[313] Grabenwarter (84) 343.
[314] Article 2(1) ICCPR requires State Parties to "respect and to ensure to all individuals…the rights *recognised in the present Covenant*" [emphasis added].
[315] Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005) 33.
[316] ibid 33-34.
[317] Fredman writes that the "principle that likes should be treated alike is possibly the most pervasive interpretation of the right to equality, largely in the form of prohibitions on direct discrimination or disparate treatment", Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(13) International Journal of Constitutional Law 712, 716.

who have been previously unequal."[318] While formal equality protects individuals from present discrimination, it may be unable to remedy past inequalities.[319]

To advance real equality, one must not fixate on current discrimination. There must also be structures which allow previously disadvantaged classes, despite their experience of past biases, to share fully in contemporary rights and opportunities. Sen suggests that "[e]qual consideration for all may demand very unequal treatment in favour of the disadvantaged."[320] Instead of a 'formal' analysis, this thesis adopts a 'substantive' theory of equality. Fredman writes that substantive equality is a "a multi-dimensional concept, pursuing four overlapping aims"[321]: (a) breaking "the cycle of disadvantage associated with status or out-groups"[322]; (b) promoting "respect for dignity and worth, thereby redressing stigma stereotyping, humiliation and violence because of membership of an identity group"[323]; (c) not exacting "conformity as a price of equality" but accommodating difference and aiming to achieve structural change[324]; (d) facilitating "full participation in society, both socially and politically."[325] This multi-pronged approach maps neatly onto trans lived-experiences, and speaks directly to the prejudices faced by applicants for gender recognition. It is the preferred non-discrimination framework for this thesis.

[318] Sandra Fredman, 'Facing the Future: Substantive Equality under the Spotlight' (2010) Legal Research Papers Series Paper No. 57/2010 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649991 accessed 06 August 2015.
[319] One must acknowledge, however, that this critique of 'formal' equality can itself be subject to pushback. If formal equality frameworks permit differential treatment where persons are not 'alike', there may (it can be argued) be favourable treatment for individuals (or classes of individuals) who, because of historic discrimination, are not in the same position as other members of society (e.g. children, who are part of a social class which was subject to past discrimination in education, can legitimately enjoy preferential education policies).
[320] Amartya Sen, *Inequality Re-examined* (Oxford University Press 1992) 1.
[321] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 25.
[322] ibid.
[323] ibid.
[324] ibid.
[325] ibid.

(iii.) Comparators

A common feature of non-discrimination review is emphasis on comparators. An individual who alleges unequal treatment because of a protected characteristic must prove that a comparably situated person, who does not share that characteristic, would have been treated preferentially. A significant number of human rights tribunals (international, regional, domestic) assess discrimination using a comparator-focused model.[326] UN HRC and the ECtHR have rejected claims under art. 26 ICCPR and art. 14 ECHR because petitioners failed to show inequality as against suitable comparators.[327]

As a standard element of current human rights frameworks, comparators are incorporated into this thesis. Reviewing existing trans-orientated judicial decisions and soft-law (UN, ECHR, etc.), it is clear that comparator reasoning has been consistently applied.[328] It would be intellectually dishonest for this thesis, on the one hand, to draw from national and regional case law to clarify the impact of non-discrimination on gender recognition while, on the other hand, ignoring the legal context in which those decisions are made. When applying equality analysis, the thesis does consider how the treatment of those who legally transition compares with persons who affirm their birth-assigned gender. This is particularly relevant for review of physical intervention requirements in Chapter II.

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[326] Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011) 156 – 164. For a European perspective, see: European Union Agency for Fundamental Rights (EU FRA), *Handbook on European Non-Discrimination Law* (FRA EU 2010) 23 – 25. An interesting point to consider is whether, as UN Treaty Bodies increasingly come to acknowledge intersectional discrimination (where unidimensional comparisons between men-women or persons of different races would be insufficient), the various Committees will either ease comparator requirements or apply comparator reasoning in different ways (see e.g. recent CEDAW jurisprudence: *Kell v Canada* Communication No. 19/2008 (CEDAW/C/51/D/19/2008) (UN CEDAW, 27 April 2012); *RPB v Philippines* Communication No. 34/2011 (CEDAW/C/57/D/34/2011) (UN CEDAW, 12 March 2014). See also: *Mellet v Ireland* Communication No. 2324/2013 (CCPR/C/116/D/2324/2013) (UN HRC, 12 March 2014). *In Mellet*, the UN Human Rights Committee held that Ireland's abortion prohibitions constituted sex discrimination in violation of art. 26 ICCPR ([7.11]). The concurring opinion of Committee Member Sarah Cleveland is particularly relevant for discussions of comparators. According to Committee Member Cleveland, Ireland *could* impermissibly discriminate on the basis of sex even where biological differences between men and women meant that there was no similarly-situated male against whom a comparison could be made ([6] – [8] – Concurring Opinion). State parties are required to accommodate those biological differences without direct or indirect discrimination ([7] – Concurring Opinion). This is similar to the position adopted by the European Court of Justice in *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV- Centrum)* Case C-177/88 [1990] ECR I-394. In *Dekker*, the ECJ observed that – due to the uniquely gendered nature of pregnancy (i.e. only women can become pregnant) – pregnant women should be able to claim gender-based employment discrimination without identifying a similarly-situated male comparator, ([12]).

[327] *MJG v The Netherlands* Communication No 267/1987 (CCPR/C.32/D.267/1987) (UN HRC, 24 March 1988); *Burden v United Kingdom* [2008] 47 EHRR 38.

[328] See e.g. *G v Australia* (n 83), [7.12] – [7.15]; *Hamalainen* (n 65), [112]; *P v S and Cornwall* Case C-13/94 [1996] ECR I-2143, [21]; *Doe v Yunits* [2000] WL 33162199 (Mass.Super.), 6.

In adopting a comparator model, however, the thesis does not discount critiques of this approach. Many scholars argue that imposing unattainable 'norm' comparators dilutes non-discrimination protections.[329] According to McColgan, it is "difficult to do comparison without explicitly or implicitly accepting one of the persons or things compared as the norm."[330] Rights adjudicators often select a male, cisgender, white, heterosexual and able-bodied standard against which discrimination claims are to be judged.[331] The result is claimants, who experience discrimination because they fail to reproduce desired social norms (e.g. male, white, able-bodied, etc.), being denied a remedy due to insufficient similarity with those norms.[332] In the specific context of gender recognition, it may be difficult for trans persons to prove relevant comparability with cisgender peers. Although – drawing from existing human rights frameworks – this thesis incorporates comparator reasoning, one may argue that it should suffice for applicants to experience disadvantage because they have non-normative gender identities.

(iv.) Grounds of Discrimination

In order to make a successful discrimination claim, a person must typically show a protected characteristic. A majority of international and regional instruments require an identifiable 'ground of discrimination' for which the claimant has been less favourably treated. In many cases, non-discrimination provisions enumerate certain characteristics to which their guarantees apply. There may also be a final, catch-all clause, such as "other status" or "any status". The precise contours of this more general characteristic is typically defined by the adjudicatory body or court which has jurisdiction to interpret the treaty. Article 26 ICCPR, art. 2(2) ICESCR and art. 2 UN CRC are all equality provisions with a 'non-exhaustive' list of grounds. By contrast, CEDAW refers only to discrimination "on "the basis of sex."[333]

Like the definition of discrimination, there are also no universally accepted 'grounds'. Protected characteristics are "not fixed but can change as international law on these matters develops."[334] In general, certain identity traits are normally present in equality frameworks. "Race", "colour", "sex", "language", "religion", "political or other opinion" and "national or

[329] See e.g. Sandra Fredman, *Discrimiantion Law* (Oxford University Press 2002) 98; Catherine MacKinnon, 'Reflections on Sex Equality under the Law' (1990) 100(5) Yale Law Journal 1281, 1297.
[330] Aileen McColgan, *Discrimination, Equality and the Law* (Hart 2014) 101.
[331] Sandra Fredman, *Discrimiantion Law* (Oxford University Press 2002) 98.
[332] MacKinnon (n 166), 1297.
[333] CEDAW, art 1.
[334] Moeckli (n 145) 169.

social origin" have all been included in prominent international and regional treaties.[335] A majority of UN treaty bodies have also recognised 'age' discrimination as falling within the 'other status' clauses.[336] CRC Committee, in particular, has criticised the "occurrence of discrimination…in the enjoyment of rights…against vulnerable groups of children."[337]

As noted in the Introduction, human rights actors are increasingly acknowledging the non-discrimination rights of trans persons. According to UN HCHR, "[i]n their general comments, concluding observations and views on communications, human rights treaty bodies have confirmed that States have an obligation to protect everyone from discrimination on grounds of…gender identity."[338] Since the mid-1990s, UN actors have (not without controversy) affirmed the equal status of gay, lesbian and bisexual individuals.[339] However, in recent years, there has been a concerted effort to mainstream trans equality. Among others, UN HRC and the United Nations Committee on Economic, Social and Cultural Rights (UN CESCR) have publically confirmed that a person's gender identity should not restrict enjoyment of human rights.[340] In *G v Australia,* UN HRC explicitly stated that "the prohibition against discrimination under article 26 [ICCPR] encompasses discrimination on the basis of…gender identity, including transgender status."[341] Similarly, in their Concluding Observations on state party reports, various UN Treaty Bodies have critiqued national rules and practices which discriminate against trans populations. In some cases, these committees have recommended remedial policies, such as adopting or changing laws, so as to enhance trans equality.[342] This treaty jurisprudence is reinforced by the work of the Special Procedures. In their investigations and thematic reports, the Special Procedures frequently promote trans non-discrimination and

[335] ICCPR, art. 26; ICESCR, art. 2(2); ECHR, art. 14; ACHR, art. 1; ACHPR, art. 2.
[336] Vandenhole (n 152) 185.
[337] ibid 157-158.
[338] UN HCHR (n 31), [16].
[339] *Toonen v Australia* Communication No. 488/1992 (CCPR/C/50/D/488/1992) (UN HRC, 31 March 1994); *Young v Australia* Communication No. 941/2000 (CCPR/C/78/D/941/2000) (UN HRC, 18 September 2003); *X v Colombia* Communication No. 1361/2005 (CCPR/C/89/D/1361/2005) (UN HRC, 14 May 2007); United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 14 on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights' (11 August 2000) UN Doc No. E/C.12/2000/4, [18]; United Nations Committee against Torture, 'Report of the Committee against Torture' (16 May 2001) UN Doc No. A/56/44, [119(b)]; Committee on the Rights of the Child, 'Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland - Isle of Man' (16 October 2000) UN Doc No. CRC/C/15/Add.134, [22] – [23].
[340] United Nations Human Rights Committee, 'Concluding observations on the third periodic report of Bosnia and Herzegovina' (13 April 2017) UN Doc No. CCPR/C/BIH/CO/3, [25] – [26]; United Nations Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fourth periodic report of the Dominican Republic' (21 October 2016) UN Doc No. E/C.12/DOM/CO/4, [25] – [26].
[341] *G v Australia* (n 83), [7.12].
[342] United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the eighth periodic report of the Russian Federation' (20 November 2015) UN Doc No. CEDAW/C/RUS/CO/8, [42(a)-(c)]; United Nations Human Rights Committee, 'Concluding observations on the second periodic report of Thailand' (25 April 2017) UN Doc No. CCPR/C/THA/CO/2, [11] – [12].

condemn transphobic abuse.[343] At the regional level, judges and other actors embrace trans equality.[344] In the landmark judgment, *Identoba and Others v Georgia*, the ECtHR held that "the prohibition of discrimination under Article 14 of the Convention duly covers questions related to…gender identity."[345]

It is important to acknowledge that discrimination is more than a unidimensional phenomenon. Individuals (particularly trans persons[346]) may face numerous, intersecting inequalities.[347] The result is not a "cumulative" experience of oppression where, for example, a poor, visually-impaired trans woman should be considered 'more oppressed' than a visually-impaired trans woman with material wealth.[348] Rather, intersectional discrimination gives rise to a "unique" status of vulnerability – influenced by, but separate from, the individual harassments to which a person may be subject (i.e. the distinct experience of being a visually-impaired lesbian, as opposed to being a person who is female, gay and who cannot see).[349]

Truscan and Bourke-Montignoni write that, as a matter of practice, "most…[UN human rights] treaty bodies have approached inequality as a singular or separate phenomenon."[350] Favouring a "single-axis approach"[351], the Committees employ a narrow assessment lens (e.g. sex, race, etc.) instead of considering how multifaceted discriminations shape inequality.[352] More recently, however, there has been evidence that (at least some) treaty bodies are beginning to

[343] 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (19 April 2017) UN Doc No. A/HRC/35/36l; 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [34] – [36], [48] – [50]; United Nations Special Rapporteur on the Situation of Human Rights Defenders, 'Situation of human rights defenders' (30 July 2015) UN Doc No. A/70/217, [65] – [67], and [93(a)].
[344] *P v S* (n 165); *PV v Spain* App No. 35159/09 (ECtHR, 30 November 2010); Resolution No. AG/RES. 2863 (n 75); PACE 2015 (n 75).
[345] *Identoba* (n 107), [96].
[346] Evan Vipond, 'Trans Rights will not Protect Us: The Limits of Equal Rights Discourse, Anti-Discrimination Laws, and Hate Crime Legislation' (2015) 6(1) Western Journal of Legal Studies 1, 18.
[347] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139, 140; Darren Lenard Hutchinson, 'Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination' (2001) 6(2) Michigan Journal of Race and Law 285; Tina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10(1) Berkeley Women's Law Journal 16.
[348] Ivona Truscan and Joanna Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination' (2016) 16 Equal Rights Review 103, 105. According to Davies, intersectionality "goes beyond merely merging separate identities but considers the unique identity developed from an individual belonging to multiple categories simultaneously", Aisha Nicole Davies, 'Intersectionality and International Law: Recognizing Complex Identities on the Global Stage' (2015) 28 Harvard Human Rights Journal 205, 208.
[349] Davies (n 185), 208.
[350] Truscan and Bourke-Martignoni (n 185), 109.
[351] ibid, 120.
[352] Davies (n 185), 206.

adopt intersectionality reasoning.[353] In a 2014 Joint-General Recommendation/Comment, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the CRC Committee define "harmful practices" as "persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination."[354] Similarly, UN CESCR, writing in the context of sexual and reproductive health, observes that "[i]ndividuals belonging to particular groups may be disproportionately affected by intersectional discrimination."[355] At various junctures throughout this thesis, requirements for gender recognition cut across numerous vulnerabilities. This thesis is conscious of, and responsive to, all the (possibly intersecting) ways in which pre-conditions encourage unequal treatment.[356]

(v.) Non-Absolute Guarantee

The right to equality and non-discrimination is not absolute. Where a majority of human rights regimes prohibit differential treatment *without objective and reasonable justification*, it follows that, if sufficient reasons exist, unequal treatment may be considered legitimate. In its General Comment No. 18, UN HRC notes that "[n]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[357] In determining whether discrimination is lawful, the ECtHR relies upon a two-stage analysis[358], which "has been adopted, explicitly or implicitly, by most other human rights bodies."[359]

First, one must consider if a difference of treatment pursues a legitimate aim. Human rights adjudicators have accepted a wide spectrum of legitimate goals for discriminatory behaviour,

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[353] See e.g. United Nations Committee on the Elimination of Racial Discrimination, 'General Recommendation No. 25: on gender related dimensions of racial discrimination' (2000 March 2000), [1]; United National Committee on the Rights of the Child, 'General Comment No. 11 on Indigenous children and their rights under the Convention' (12 February 2009) UN Doc No. CRC/C/GC/11, [29]. See also: *Kell* (n 163), [10.2] – [10.3].
[354] 'Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices' (14 November 2014) UN Doc No. CEDAW/C/GC/31-CRC/C/GC/18, [15]. The Committees also write that "sex- and gender-based discrimination intersects with other factors that affect women and girls, in particular those who belong to, or are perceived as belonging to, disadvantaged groups, and who are therefore at a higher risk of becoming victims of harmful practices", [6].
[355] United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 22 on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) UN Doc No. E/C.12/GC/22, [30].
[356] Vandenhole (n 152) 77; Clifford (n 146) 22.
[357] United Nations Human Rights Committee, 'General Comment No 18 on Non-Discrimination' (1989), [13].
[358] *L and V v Austria* [2003] 34 EHRR 55, [44].
[359] Moeckli (n 145) 167.

including the protection of traditional marriage and the traditional family.[360] A legitimate aim cannot, however, "be based on discriminatory reasons."[361] Choudhury writes that "discrimination is often the product of inequalities that are embedded deep within the structure of society and express themselves as social norms and common understandings"[362] According to Shelton, "[p]revailing social norms cannot always be the test of what is reasonable."[363] Human rights tribunals have refused to condone differential treatment based on "mere administrative inconvenience, existence of a longstanding tradition, prevailing views in society, stereotypes or convictions of the local population."[364] They may also reject a stated aim if, although legitimate, they are not satisfied that it is the "true" reason that a differentiation has been made.[365] The second limb in the ECtHR test asks whether there is a "reasonable relationship of proportionality between the means employed and the aim sought to be realised"[366] (see more detailed discussion of proportionality below).

C. Marriage and Family Life

Marriage and family life enjoy significant protections under human rights law.[367] All major international and regional rights treaties affirm the unique importance of families, and oblige state parties to promote and protect family security.[368] Article 23 ICCPR states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." According to the IACtHR, protecting family-based rights "entails, among other obligations, facilitating, in the broadest possible terms, the development and strength of the family unit."[369] Human rights guarantees for the family are neither unidimensional nor time-specific. The existing protections encompass all stages of family life. In recent years, international and regional actors have adapted family rights to their evolving surroundings, acknowledging the new and diverse ways in which families self-organise.[370]

[360] Christoph Grabenwarter (n 84) 350.
[361] Mark Bell, 'Direct Discrimination' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law* (Hart 2007) 272.
[362] Tufyal Choudhury, 'Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights" (2003) 8(1) European Human Rights Law Review 24, 41.
[363] Shelton (n 147) 368.
[364] Moeckli (n 145) 168.
[365] Harris, O'Boyle and Warbrick (n 84) 788.
[366] *L and V v Austria* [2003] 34 EHRR 55, [44].
[367] United Nations High Commissioner for Human Rights (UN HCHR), 'Report of the Office of United Nations High Commissioner for Human Rights on Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development' (15 January 2016) UN Doc No. A/HRC/31/37, [22].
[368] ICCPR, art. 23; ECHR, arts. 8 and 12; ACHR, art. 17; ACHPR, art. 18.
[369] *Artavia Murillo et al ("In Vitro Fertilization") v Costa Rica* Preliminary Objections, Merits, Reparations and Costs Series C No. 257 (IACtHR, 28 November 2012), [145].
[370] United Nations Human Rights Committee, 'Concluding observations on the fourth periodic report of Ireland'

(i.) The Right to Marry

Marriage has a special status in human rights law. The right to voluntarily contract an (opposite-gender) civil marriage is enshrined in international, regional and national rights frameworks.[371] Article 23 ICCPR provides for a "right of men and women of marriageable age to marry." It is reinforced by art. 16 CEDAW, which states that women have an equal right to "freely choose a spouse and enter into marriage." For the CEDAW Committee, "[a] woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity."[372] Similarly, within regional human rights frameworks, access to marriage enjoys substantial protection. The ACmHPR interprets art. 18 ACHRP – the right to found a family – as protecting "also the right to marry."[373] According to the ECtHR, "Article 12 [ECHR] secures the fundamental right of a man and a woman to marry and to found a family."[374]

Marriage is not, however, an absolute right under international law.[375] States may impose legitimate and proportionate restrictions.[376] Under art. 12 ECHR, any limitation on marriage must not "restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired."[377] Human rights law permits "far-reaching restrictions"[378], but policy-makers cannot create "an effective bar on any exercise of the right."[379] Controls which have been deemed acceptable include minimum age requirements (e.g. prohibiting child

(19 August 2014) UN Doc No. CCPR/C/IRL/CO/4, [7]; United Nations Committee on the Elimination of Discrimination against Women, 'General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)' (30 October 2013) UN Doc No. CEDAW/C/GC/29, [16] – [24]; United Nations Committee on the Rights of the Child, 'General Comment No. 7 (2005) on the implementing child rights in early childhood' (20 September 2006) UN Doc No. CRC/C/GC/7/Rev.1, [19].

[371] For international sources, see: ICESCR, art. 10(1); UN CRPD, art. 23(1). For domestic sources, see: Basic Law of Germany, art. 6; Constitution of Ireland, art. 41(1); *Loving v Virginia* [1967] 87 S Ct 1817, 1824.

[372] United Nations Committee on the Elimination of Discrimination against Women, 'General Recommendation No 21 on Equality in Marriage and Family Relations' (1994), [16].

[373] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights*, [94] http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf accessed 29 August 2017.

[374] *O'Donoghue and Others v United Kingdom* [2011] 53 EHRR 1, [82].

[375] Laura Shanner, 'The Right to Procreate: When Rights Claims Have Gone Wrong' (1994) 40(4) McGill Law Journal 823, 840-841.

[376] Article 12 ECHR is an exception to other international and regional protections. Although the ECtHR sets a high standard as to what constitutes an interference with the right to marry (the "very essence" of the right must be impaired), once such a sufficiently serious interference has been established, it cannot be justified as a "proportionate" breach.

[377] *F v Switzerland* [1988] 10 EHRR 411, [32].

[378] Bart van der Sloot, 'Between fact and fiction: an analysis of the case-law on Article 12 of the European Convention on Human Rights' (2014) 26(4) Child and Family Law Quarterly 397, 406.

[379] *Jaremowicz v Poland* App No. 24023/03 (ECtHR, 5 January 2010).

marriages)[380], mandatory secular procedures (e.g. public civil ceremonies)[381] and prohibited degrees of affinity (e.g. incestuous marriages)[382]. Although there is disagreement as to whether human rights guarantee divorce, where spouses have entered a lawful martial union, "international norms [do] proscribe the forced dissolution of the marriage bond."[383]

Since 2001, an increasing number of countries have extended marital rights to same-gender couples.[384] At present, 21 jurisdictions, and a number of regional or federal territories, permit two people with the same legal gender to marry.[385] International human rights do not, however, guarantee non-heterosexual marriages.[386] UN HCHR has conceded that "[s]tates are not required under international law to recognise same-sex marriage."[387] In drawing up the Yogyakarta Principles, the expert panel of drafters specifically did not include a standalone marital right.[388] In *Joslin v New Zealand*, the UN HRC stated that "in light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide marriage between homosexual couples, the State party has violated the rights of the authors."[389] Similarly, in *Schalk and Kopf v Austria* – affirmed in numerous subsequent cases[390] – the ECtHR held that "[art. 12] of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple…access to marriage"[391]

[380] UN HCHR, 'Protection of the Family' (n 204), [31 – 32]; United Nations Committee on the Elimination of Discrimination against Women, 'General Recommendation No 21 on Equality in Marriage and Family Relations' (1994), [36].
[381] *Frasik v Poland* App No. 22933/02 (ECtHR, 5 January 2010), [89]; van der Sloot (n 215), 406.
[382] ibid.
[383] United Nations Human Rights Council, 'Protection of the family: contribution of the family' (n 2), [29].
[384] Katharina Boele-Woelki and Angelika Fuchs (eds), *Same-Sex Marriage and Beyond* (3rd edn, Intersentia 2017); Macarena Saez, 'Transforming Family Law through Same-Sex Marriage: Lessons from (and to) the Western World' (2014) 25(1) Duke Journal of Comparative and International Law 125. For national legislation and case law, see: Marriage (Same-Sex Couples) Act 2013 (UK); *Obergefell* (n 56) (US); Marriage (Definition of Marriage) Amendment Act 2013 (New Zealand); *Fourie v Minister for Home Affairs* [2005] ZACC 19 (South Africa); LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe (France).
[385] Ireland, France, Luxembourg, New Zealand, United States, Colombia, Canada, Belgium, South Africa, Sweden, Finland, Norway, Denmark, Iceland, Netherlands, Portugal, Spain, England and Wales, Scotland, Uruguay, Brazil (parts of Mexico), Germany.
[386] Micahel O' Flaherty, 'The Yogyakarta Principles at Ten' (2015) 33(4) Nordic Journal of Human Rights 280, 295. In general, adjudicators have offered two justifications for upholding differential marriage rules: First, the language of international and regional protections emphasises "men" and "women". This suggests that men and women are only entitled to marry persons of the opposite gender (Nathan Crombie, 'A Harmonious Union? The Relationship between States and the Human Rights Committee on the Same-Sex Marriage Issue' (2012) 51(3) Columbia Journal of Transnational Law 696, 704); Second, courts often cite the prevailing societal values as evidence that marriage entitlements were always intended to be heterosexual (Crombie, 705).
[387] UN HCHR 2015 (n 31), [67].
[388] Yogyakarta Principles, Principle 24.
[389] Communication No. 902/1999 U.N. Doc. A/57/40 at 214 (2002) (UN HRC, 17 July 2002), [8.3].
[390] *Hamalainen* (n 65), [71]; *Oliari and Others v Italy* App Nos. 18766/11 and 36030/11 (ECtHR, 21 July 2015), [191 – 192].
[391] *Schalk and Kopf v Austria* [2011] 53 EHRR 20, [63].

(ii.) Founding a Family and Maintaining Family Life

In addition to marriage, human rights law protects the opportunity to found, and maintain, a family. According to current international standards, there is "no [one] definition of the family."[392] UN HRC notes that the "concept of family may differ in some respects from State to State, and even from region to region within a State."[393] As a result, national policy-makers "retain a margin of appreciation in defining the…family"[394], having regard to "religions, customs or traditions."[395]

The non-existence of any overarching 'family' definition offers both benefits and disadvantages. Deference to national interpretation may allow state actors to undermine already vulnerable populations, including families with trans members. Vague or undefined international protections offer little to family units which are systematically marginalised by domestic laws. On the other hand, avoiding an established definition prevents the institutionalisation of one, rigid family model, and allows international law to more easily adapt when family structures evolve.

While human rights adjudicators afford domestic definitions significant latitude, they do nonetheless "require respect for the principle of equality and non-discrimination"[396] (discussed above). National laws cannot draw arbitrary or unreasonable distinctions between family structures. In *Young v Australia*, UN HRC condemned different treatment for opposite-gender and same-gender cohabiting dependents.[397] Similarly, UN HCHR advocates "protection of the rights of individual family members, notably those that might find themselves in a situation of vulnerability."[398] While national jurisdictions retain a general right to define the legal family, "international mechanisms have called upon States to protect specific forms of family in view of the vulnerability of their members in relation to the enjoyment of human rights."[399]

[392] UN HCHR, 'Protection of the Family' (n 204), [24].
[393] United Nations Human Rights Committee, 'General Comment No 19 on Article 23 (The Family)' (1990), [2].
[394] UN HCHR, 'Protection of the Family' (n 204), [26].
[395] ibid.
[396] ibid.
[397] Communication No. 941/2000 (CCPR/C/78/D/941/2000) (UN HRC, 8 August 2003); see also: *Karner v Austria* [2004] 38 EHRR 24; *Duque v Colombia* Series C No. 310 (IACtHR, 26 February 2016).
[398] UN HCHR, 'Protection of the Family' (n 204), [50].
[399] ibid, [27].

International human rights structures exhibit "general preference for preserving the family unit and non-separation of its members."[400] Article 10 ICESCR requires that the "widest possible protection and assistance should be accorded to the family." According to art. 17 ICCPR, "[n]obody should be subject to arbitrary or unlawful interference with his…family."[401] Two striking features of the existing protections are: (a) the emphasis on children's rights and (b) the expanding parameters of family life.

In terms of the former, state policies, which concern the family, must clearly offer an "effective guarantee of the best interest of the child"[402] (a comprehensive discussion of the 'best interests' principle follows below). National decision-makers should not enforce measures which would adversely impact children, or work in opposition to their general welfare. Under art. 9 UN CRC, "a child shall not be separated from his or her parents…except when…necessary for the best interests of the child." In terms of the parameters of 'family life', although states retain a wide definitional power, human rights increasingly acknowledge the diverse complexion of family forms. The ECtHR has ruled that "the relationship of…a cohabiting same-sex couple living in a stable de facto partnership…falls within the notion of 'family life.'"[403] Similarly, UN CESCR has recommended that states "legally recognise same-sex couples", "regulate the financial effects of such relationships" and "guarantee the full protection of the rights of children born out of wedlock."[404]

D. Children's Rights

The final theme considered is children's rights. International law confers both rights and protections upon individuals under the age of majority.[405] Although children were specifically

[400] UN HCHR, 'Protection of the Family' (n 204), [35]. The IACtHR has stated that the "protection of the family…involves, among other obligations, promoting the strengthening and development of the family", *Forneron and Daughter v Argentina,* Merits, Reparations and Costs Series C No. 242 (IACtHR, 27 April 2012), [116].
[401] The United Nations Human Rights Committee has identified an "interference" with family life where state actions render it "uncertain for…families…whether and for how long it will be possible for them to continue their family life", *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius* Communication No. R.9/35 U.N. Doc. Supp. No. 40 (A/36/40) at 134 (1981) (UN HRC, 28 March 1988), [9.2 (b) 2 (i) 3].
[402] UN HCHR, 'Protection of the Family' (n 204), [26]. See also: ICCPR, art 23(4); UN CRC, art. 18(1).
[403] *Schalk and Kopf* (n 228), [94].
[404] United Nations Committee on Economic, Social and Cultural Rights, 'Concluding observations on the combined fourth and fifth reports of Bulgaria' (11 December 2012) UN Doc No. E/C.12/BGR/CO/4-5, [17].
[405] Aisling Parkes, *Children and International Human Rights Law* (Routledge 2013) 1 – 2. There remains some debate over whether children should be rights 'holders' (as opposed to rights 'subjects' or 'protectees'). Van Bueren notes that, for some observers, the concept of children as rights holders and participants is a "radical notion", Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998) xix.

referenced in the foundational UN human rights treaties[406], a consensus began to develop, during the latter half of the 20th century, that young people required a separate treaty.[407] As noted above, UN CRC was adopted in 1989 and "now constitutes the most authoritative and comprehensive statement of the fundamental rights of children."[408] It is the "most universally ratified human rights treaty."[409] All members of the UN (save for the United States) are parties thereto.

UN CRC revolutionises children's rights in international law.[410] It "unequivocally establishe[s the] concept of the child as an individual entitled to the full range of human rights."[411] The treaty applies to all minors under the age of 18 years, "unless under the law applicable to the child, majority is attained earlier."[412] UN CRC operates according to four "general aims"[413]: prevention, protection, provision and participation. All children, irrespective of their youth or abilities, are rights holders under the Convention.[414] The CRC Committee, the expert body which monitors state party compliance, has consistently affirmed that trans youth, and those who experience discrimination on the basis of gender identity, fall within the treaty's protection.[415]

UN CRC has been criticised as overly aspirational, western-centric and propagating an unrealistic "universal experience for children."[416] However, while the Convention is certainly not without fault, it has undoubtedly had an "educative and symbolic effect"[417], constituting an

[406] ICCPR, art. 24; ICESCR, art. 10.
[407] Olga Cvejić Jančić, 'Rights of the Child in a Changing World' in Olga Cvejić Jančić (ed), *The Rights of the Child in a Changing World: 25 Years after the UN Convention on the Rights of the Child* (Springer 2013) 3; Van Bueren (n 242) 6 – 16; Parkes (n 242) 5-6.
[408] Andrew Bainham and Stephen Gilmore, *Children: The Modern Law* (3rd edn, Jordan Publishing 2013) 96.
[409] Open Society, *Licence to Be Yourself: Trans Children and Youth* (Open Society Foundations 2015) 8.
[410] Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press 2009) 73.
[411] Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18(4) International Journal of Children's Rights 483, 483.
[412] UN CRC, art. 1.
[413] Bainham and Gilmore (n 245) 99.
[414] Lina Henzel, *'Back Me Up! Rights of Trans Children under the Convention on the Rights of the Child*' (Transgender Europe 2016) 6.
[415] United Nations Committee on the Rights of the Child, 'General Comment No 13 on the Right of the Child to Freedom from All Forms of Violence' (18 April 2011) UN Doc No. CRC/C/GC/13, [72(g)]; United Nations Committee on the Rights of the Child, 'General Comment No 15 on General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc No. CRC/C/GC/15, [II(B)]; United Nations Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic reports of Saudi Arabia' (25 October 2016) UN Doc No. CRC/C/SAU/CO/3-4, [17] – [18]; United Nations Committee on the Rights of the Child, 'Concluding observations on the second periodic report of South Africa' (27 October 2016) UN Doc No. CRC/C/ZAF/CO/2, [23] – [24].
[416] Kristina Anne Bentley, 'Can there be any universal children's rights?' (2005) 9(1) International Journal of Human Rights 107, 117; Thoko Kaime, 'The African Children's Charter: Does it represent a Relevant Vision of Childhood and Children's Rights?' (2009) 29(3) Children's Legal Rights Journal 11, 20.
[417] Bainham and Gilmore (n 245) 107.

"important milestone" in recognising the "concept of the rights of the child."[418] It is important to acknowledge, moreover, that UN CRC is not the only source of protection for children (although it has influenced the adoption and interpretation of other rights documents[419]). A number of UN treaties also guarantee human rights for minors. Article 10(3) ICESCR states that "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons." Under art. 24(1) ICCPR, "[e]very child shall have, without any discrimination…such measures of protection as are required by his status as a minor, on the part of his family, society and the State."[420]

(i.) 'Best Interests of the Child'

It is a core tenet of children's rights that, where a decision is made on behalf of or in relation to a minor, the decision-maker must pursue the best interests of the child.[421] Article 3 UN CRC states that "[i]n all actions concerning children", whether they are taken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies", "the best interests of the child shall be a primary consideration." State actors, including law-makers and judges,[422] who engage in conduct, direct or indirect[423], in relation to children, both individually and collectively[424], must prioritise the best interests of the child as a primary concern. The 'best interests' obligation has been called "the most important principle in [UN CRC]."[425] It is repeated in several provisions throughout the Convention[426] and, according to McGoldrick, is "the general standard which underpins the application of the rights guaranteed."[427] The principle is incorporated in numerous other agreements, including

[418] Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) 5 International Journal of Law and the Family 132, 158.
[419] Ursula Kilkelly, 'The CRC at 21: assessing the legal impact' (2011) 62(2) Northern Ireland Law Quarterly 143, 149; Andrea Young, 'Advances in Children's Rights over the Past Decade: The Inter-American Court of Human Right and the European Court of Human Rights' Progressive Incorporation of the Convention on the Rights of the Children' (2015) 28(1) Journal of the American Academy of Matrimonial Lawyers 285, 285; Bankole Thompson, 'Africa's charter on children's rights: a normative break with cultural traditionalism' (1992) 41(2) International and Comparative Law Quarterly 432, 433.
[420] One might argue that both provisions are vulnerable to the criticism that they reduce children to rights 'subjects' or 'protectees'.
[421] Philip Alston, 'The Best Interests Principle: Towards a reconciliation of Culture and Human Rights' (1994) 8(1) International Journal of Law and the Family 1, 1-25.
[422] Zermatten (n 248), 497.
[423] Jason Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection' 64(2) International and Comparative Law Quarterly 327, 330.
[424] United Nations Committee on the Rights of the Child, 'General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (29 May 2013) UN Doc No. CRC/C/GC/14, [23].
[425] Bainham and Gilmore (n 245) 100.
[426] See e.g. UN CRC, arts. 18, 20 and 21.
[427] McGoldrick (n 255), 135.

CEDAW[428] and the Convention on the Rights of Persons with Disabilities (UN CERD).[429] At the regional level, the ECtHR has consistently approved the 'best interests' standard in its case law.[430]

The 'best interests' principle ensures that child welfare plays a sufficient role in decision-making processes. It defends against the routine subordination of children's rights to adult preferences and other conflicting interests.[431] 'Best interests' is a rule of procedure, and requires "an evaluation of the possible impact (positive or negative) of [a] decision on the child or children concerned."[432] It is also a substantive legal guarantee, which imposes an "intrinsic" and "self-executing" obligation upon state parties.[433] Under a 'best interests' analysis, states owe a positive obligation to adopt or amend policies where the status quo, including negative public attitudes[434] or existing legislation, detrimentally impacts children's rights.[435] Here, one can draw parallels with the discussion of non-discrimination above, particularly the refusal to recognise social prejudice and bias as justifications for inequality.

Despite its ubiquity in human rights law, the 'best interests' rule is not, however, without opposition. Many of the critiques laid against the principle have direct relevance for the discussion of trans minors in Chapter V. 'Best interests' are perceived as "vague", "indeterminate" and "speculative".[436] Article 3 UN CRC offers no guidance for assessing 'best interests' and any determination, once made, is always subject to future contingencies.[437] The uncertainty inherent in 'best interests' analysis creates the potential for abuse,[438] providing a

[428] CEDAW, arts. 5 and 16.
[429] CRPD, art. 23. See also: 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 4.
[430] *Uner v Netherlands* [2006] 45 EHRR 14, [58]; *Neulinger v Switzerland* [2012] 54 EHRR 31, [134] – [135], [138].
[431] Mitchell Woolf, 'Coming of age? – the principle of "the best interests of the child"' (2003) European Human Rights Law Review 205, 207.
[432] United Nations Committee on the Rights of the Child, 'General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (29 May 2013) UN Doc CRC/C/GC/14, [6(c)].
[433] ibid, [6(a)].
[434] ibid, [15(h)].
[435] ibid, [18].
[436] Lois Weithorn, 'Involving Children in Decisions Affecting their Own Welfare: Guidelines for Professionals' in Gary B Melton, Gerald P Koocher and Michael J Saks (eds), *Children's Competence to Consent* (Plenum 1983) 240; Stephen Parker, 'The Best Interests of the Child – Principles and Problems' (1994) 8(1) International Journal of Law and the Family 26, 26.
[437] Godsglory Ifezue and Maria Rajabali, 'Protecting the interests of the child' (2013) 2(1) Cambridge Journal of International and Comparative Law 77, 82.
[438] Lynne Marie Kohm, 'Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence' (2007) 10(2) Journal of Law and Family Studies 337, 353; Sarah Valentine, 'Traditional Advocacy for Non-Traditional Youth: Rethinking Best Interest for the Queer Child' (2008) 4 Michigan State Law Review 1053, 1097.

"convenient cloak for bias, paternalism and capricious decision-making."[439] By what objective measure can one ensure that decisions regarding recognition for trans children actually pursue (or are intended to pursue) the latter's best interests? Moreover, even if an objective standard could be agreed, the reference to "*a* primary interest"[440], rather than *the* primary interest, creates the continual risk that children's welfare will be undervalued in comparison with other conflicting interests.[441]

In response, however, the "flexibility" of best interests can also be an inherent strength.[442] As with the definition of 'family', by avoiding one rigid model of child welfare[443], art. 3 UN CRC invites decision-makers to adopt a case-by-case analysis, and may ultimately offer a better response to children's individualised needs.[444] Similarly, the designation of best interests as *a* primary concern merely recognises that, while minors' rights enjoy an elevated status, they may, in appropriate cases, have to be balanced against other compelling concerns.[445]

(ii.) Right to be Heard

The 'participatory' aims of UN CRC are most obviously pursued through the 'right to be heard.'[446] Under art. 12(1) UN CRC, state parties must "assure to the child who is capable of forming his or her own views" that he or she can "express those views freely in all matters affecting the child." They must ensure that the views of the child receive "due weight in accordance with…age and maturity."[447] Like 'best interests', the 'right to be heard' is "one of the guiding principles of the UN CRC."[448] Kelly writes that "[a]rticle 12 is a strong statement in favour of a child's right to self-determination and is unlike anything that appeared in earlier

[439] Parker (n 273), 26.
[440] UN CRC, art. 3(1).
[441] John Eekelaar, 'The Importance of Thinking that Children have Rights' (1992) 6(1) International Journal of Law and the Family 221, 321; Bainham and Gilmore (n 245) 100.
[442] Caroline Simon, 'The "best interests of the child" in a multicultural context: a case study' (2015) 47(2) The Journal of Legal Pluralism and Unofficial Law 175, 180-181; United Nations Committee on the Rights of the Child, 'General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (29 May 2013) UN Doc No. CRC/C/GC/14, [34].
[443] Woolf (n 268), 208.
[444] United Nations Committee on the Rights of the Child, 'General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)' (29 May 2013) UN Doc No. CRC/C/GC/14, [1], [32] and [48].
[445] Alston (n 258), 13.
[446] Alistair MacDonald, *Child's Right to be Heard: Annotated Materials* (Jordan Publishing 2014) 31.
[447] UN CRC, art. 3(1).
[448] MacDonald (n 283) 31.

international documents."[449] The right to be heard has now been incorporated into a number of regional agreements.[450]

The right to be heard applies to all children without reference to age. Although children must be capable of forming their view on a subject, they need not "communicate through the conventions of spoken or written language."[451] According to the CRC Committee, art. 12 UN CRC embraces "recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting."[452] State parties must ensure that children can form and express their views free from influence or manipulation,[453] and that they have all necessary and relevant information.[454] In appropriate cases, children may articulate their views through a third-party representative.[455] The right to be heard is not an exercise in "window dressing".[456] Although the child's opinion is not determinative, it must "not only be listened to but…be considered seriously and accorded weight."[457] As with many of the rights and responsibilities established by the Convention, the emphasis placed on children's views should increase as the child's capacities evolve.[458]

(iii.) The Rights and Obligations of Parents

The express recognition of human rights for children has not been universally welcomed. In particular, family rights advocates warn that emphasising children's participation undermines "the legitimate role of parents"[459] and de-stabilises family-based relationships.[460] However, concerns over weakened parental authority are misplaced. It is clear that, prior to 1989, parents did not enjoy an unfettered right to abuse or neglect their children. More fundamentally, far from marginalising parents, international standards, including UN CRC[461], explicitly

[449] Fiona Kelly, 'Conceptualising the child through an "ethic of care": lessons for family law' (2005) 1(4) International Journal of Law in Context 375, 380.
[450] African Charter on the Rights and Welfare of the Child, art. 4; European Convention on the Exercise of Children's Rights, art. 3.
[451] United Nations Committee on the Rights of the Child, 'General Comment No 7 on Implementing Child Rights in Early Childhood' (20 September 2006) UN Doc No. CRC/C/GC/7/Rev.1, [14].
[452] United Nations Committee on the Rights of the Child, 'General Comment No 12 on the Right of the Child to be Heard' (20 July 2009) UN Doc No. CRC/C/GC/12, [21].
[453] MacDonald (n 283) 31.
[454] United Nations Committee on the Rights of the Child, 'General Comment No 12 on the Right of the Child to be Heard' (20 July 2009) UN Doc No. CRC/C/GC/12, [25].
[455] UN CRC, art. 12(2).
[456] Cherie Booth, 'In Search of Children's Rights' (2003) Journal of Local Government Law 19, 21.
[457] MacDonald (n 283) 33.
[458] See also UN CRC, art. 5.
[459] Sarah Elliston, *The Best Interests of the Child in Healthcare* (Routledge-Cavendish 2007) 35.
[460] Kelly (n 286), 381.
[461]The Preamble to UN CRC identifies the family as "the fundamental group of society and the natural

acknowledge parental status and authority.[462] Article 5 UN CRC refers to "the responsibilities, rights and duties of parents." In addition, the CRC Committee speaks of parents' "right and responsibility to provide direction and guidance to their adolescent children."[463] The sole limitation imposed by human rights standards is that parents must exercise their authority in a manner which promotes, rather than subordinates, the welfare and best interests of minors.

E. Proportionality

The preceding sections have mapped out the contours and contents of four human rights themes which have particular relevance for this thesis. While each of the rights discussed is unique, a key commonality is the role of "proportionality"[464]. Proportionality is a core element of modern human rights.[465] According to Huscroft, Miller and Webber, "[t]o speak of human rights is to speak of proportionality."[466] Within the UN human rights system, numerous actors and supervisory bodies have explicitly incorporated proportionality reasoning into their assessments.[467] Interpreting state party obligations "to respect and to ensure" treaty rights under art. 2(1) ICCPR, UN HRC has clarified that the imposition of any restriction must be "*proportionate* to the pursuance of legitimate aims"[468] [emphasis added]. In its' recent review of trans relationship dissolution requirements in New South Wales, UN HRC reaffirmed that "[a]ny interference with privacy and family [art. 17 ICCPR]…must be proportionate to the

environment for the growth and well-being of all its members and particularly children" and affirms that families should be "afforded the necessary protection and assistance so that [they] can fully assume…responsibilities within the community."

[462] See e.g. ICCPR, art. 18; ICESCR, art. 15; ACHPR, art. 29; ACHR, art. 12.

[463] United Nations Committee on the Rights of the Child, 'General Comment No 4 on Adolescent health and development in the context of the Convention on the Rights of the Child' (1 July 2003) UN Doc No. CRC/GC/2003/4, [7].

[464] As noted, two important exceptions are: (a) prohibitions on torture, cruel and inhuman, or degrading treatment which are absolute and non-derogable; (b) the right to marry under art. 12 ECHR.

[465] Eric Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10(1) Dartmouth Law Journal 1, 3.

[466] Grant Huscroft, Bradley W Miller and Gregoire Webber, 'Introduction' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 1.

[467] United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 20 on non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc No. E/C.12/GC/20, [9]; United Nations Committee on the Rights of Persons with Disabilities, 'Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (7th session) Concerning Communication No. 3/2011' (21 May 2012) UN Doc No. CRPD/C/7/D/3/2011, [8.4] – [8.8]; 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (1 July 2014) UN Doc No. A/HRC/26/36, [65] – [73]; 'Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies' (4 February 2016) UN Doc No. A/HRC/31/66, [22], [28(a)], [29], [30] and [36(a)].

[468] United Nations Human Rights Committee, 'General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc No. CCPR/C/21/Rev.1/Add. 13, [6].

legitimate end sought and necessary in the circumstances of any given case."[469] Proportionality is also a key doctrine within regional rights systems. It is a bedrock of analysis for arts. 8-11 and 14 ECHR.[470] It has also been adopted by the IACtHR, most notably in the context of non-discrimination.[471] Cianciardo observes that proportionality is increasingly used by national judiciaries to make domestic rights assessments.[472] Courts in countries, such as Canada, South Africa and Germany, have played a key role in refining proportionality reasoning.[473]

Proportionality offers a number of benefits. It is a rational and coherent process for deciding complicated, multi-dimensional disputes.[474] It also extends an appropriate level of respect to democratic decision-making processes, particularly where international judges are reviewing national restrictions, adopted by local actors with the benefit of local knowledge.[475] On the other hand, proportionality is also subject to (sometimes strong) critiques.[476] A number of scholars have argued that the idea of 'balancing' is incompatible with the notion of rights.[477] According to Tsakyrakis, "balancing…in the form of the principle of proportionality, appears to pervert rather than elucidate human rights adjudication."[478] In addition, there is concern that proportionality requires adjudicators to balance incommensurate variables.[479] It is the unique

[469] *G v Australia* (n 83), [7.4].
[470] Harris, O'Boyle and Warbrick (n 84) 8-11, 13-14, 503, 519-520, 794-796.
[471] *Advisory Opinion OC-18/03* (IACtHR, 17 September 2003), [119] and [168].
[472] Juan Cianciardo, 'The Principle of Proportionality: Its Dimensions and Limits' (2010) JCLS Working Papers (pp. 1 – 2)
http://www.law.lsu.edu/globals/sitelibraries/jcls/workingpapers/Cianciardo%20WP%20July%202010.pdf accessed 17 May 2017.
The doctrine of proportionality finds its origins in Prussian administrative law, see Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) American Journal of Comparative Law 463, 465.
[473] Cohen-Eliya and Porat (n 309), 465.
[474] Basak Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29(1) Human Rights Quarterly 251, 256; David Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004) 171; Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 74.
[475] Carlos Bernal Pulido, 'The Migration of Proportionality across Europe' (2013) 11(3) New Zealand Journal of Public and International Law 483, 514.
[476] See generally: Francisco Urbana, *A Critique of Proportionality and Balancing* (Cambridge University Press 2017).
[477] Gregoire Webber, 'On the Loss of Rights' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 123 – 154; Cali (n 311), 263; Guglielmo Verdirame, 'Rescuing Human Rights from Proportionality' (2014) King's College London Dickson Poon School of Law Legal Studies Research Paper Series (Paper No. 2014-14) 24-25; de Schutter, *International Human Rights Law* (n 5) 379-378.
[478] Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7(3) International Journal of Constitutional Law 468, 487.
[479] ibid, 471; Francisco Urbino, 'A Critique of Proportionality' (2012) 57 American Journal of Jurisprudence 49, 54.

status and character of rights – that which justifies their protection – which also means that they are ill-suited to balancing against the general public interest.[480]

For this thesis, an important criticism of proportionality is the striking variation in the manner, structure and intensity with which proportionality review has taken place.[481] Reflecting upon modern usages, Urbina observes that proportionality has been applied "in many judicial cases by many different courts, in sometimes very different ways."[482] There is no standard or universal test for proportionality. The various UN treaty bodies have neither adopted a common approach nor issued guidelines on compliance. The different regional systems not only apply different standards (as compared with each other) but also use different tests in their own case law.[483] National judges have offered important insights and reflections on proportionality, but they too swell the existing number of tests.[484]

With this multiplicity of proportionality standards in mind, what is the most appropriate way to proceed? Given the primacy of proportionality in modern human rights, it would be impractical to omit proportionality analysis. Yet, at the same time, this thesis cannot – for reasons of word limit if nothing else – examine conditions of recognition against every proportionality test. Instead, this thesis adopts Huscroft, Miller and Webber's "serviceable – but no means canonical" definition of proportionality.[485] While acknowledging the impossibility of identifying a universal formulation, these authors have nonetheless drawn up four proportionality questions: First, "[d]oes the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?"[486] Second, "[a]re the means in service of the objective rationally connected (suitable) to the objective?"[487] Third, "[a]re the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative

[480] In *Bendix Autolite Corp. v Midwesco Enterprises INC* [1988] 486 US 888, Scalia J, in his concurring opinion for the United States Supreme Court, described balancing as "like judging whether a particular line is longer than a particular rock is heavy."
[481] Huscroft, Miller and Webber, 'Introduction' (n 303) 2.
[482] Francisco Urbina, 'Is it Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning' (2014) 27(1) Canadian Journal of Law and Jurisprudence 167, 169.
[483] Eirik Bjorge and Jack Williams, 'The Protean Principle of Proportionality: How Different is Proportionality in EU Contexts?' (2016) 75(2) Cambridge Law Journal 186, 188; Harris, O'Boyle and Warbrick (n 84) 8-11, 13-14, 503, 519-520, 794-796.
[484] See generally: Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57(2) University of Toronto Law Journal 383; Alec Stone Sweet and Jud Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) Columbia Journal of Transnational Law 72; I M Rautenbach, 'Proportionality and the Limitation Clauses of the South African Bill of Rights' (2014) 17(2) Potchefstroom Electronic Law Journal 2229.
[485] Huscroft, Miller and Webber, 'Introduction' (n 303) 2.
[486] ibid.
[487] ibid.

means of achieving the same objective?"[488] Finally, "[d]o the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation?"[489]

As with the decision to expand beyond a 'treaty-custom' paradigm, not adopting an existing (judge-made) proportionality test does represent a limitation for the thesis. There is merit in being able to point to an established formulation and judging conditions of recognition for compliance. Yet, on balance, Huscroft, Miller and Webber's four questions are a preferable approach. If the thesis was to adopt an existing standard, it is difficult to identify objective measures by which that choice could be made. Should the thesis select an international formulation, even though the UN treaty body jurisprudence on proportionality is sparse? Should the thesis opt for a regional or domestic test, even though they are culture and context-specific (the thesis uses regional and national sources as guidance not as the primary standard of review)? The benefit of the four-stage analysis is that, while it is not grounded in one jurisdiction, it does incorporate core elements from all international, regional and national formulations.

While this thesis is reluctant to endorse any one cultural viewpoint, it acknowledges that (in practice) culture plays a role in how regional and national courts assess proportionality.[490] While the precise formulation (or individual prongs) of a proportionality test may determine the process of review (i.e. the actual questions asked), it is cultural intangibles – such as levels of deference and emphases on particular values – which can ultimately decide whether a restriction is permissible.[491] Two courts, applying similar proportionality tests to similar facts, may come to radically different conclusions if there are appreciable differences in the baseline cultural influences. For example, limiting certain lesbian and gay rights to promote the traditional heterosexual family is less likely to be proportionate where a state already grants those rights to non-married opposite-gender couples.[492] Under the ECHR, the margin of appreciation – which State Parties enjoy when implementing different convention rights – varies according to a number of culture-related value judgments. For art. 8 ECHR, state authorities enjoy a wider margin where there is no consensus over a particular right[493] or if they are interfering with private/family life in pursuit of an economic or social strategy.[494] On the

[488] ibid.
[489] ibid.
[490] de Schutter, *International Human Rights Law* (n 5) 376.
[491] Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466, 476.
[492] *X v Austria* [2013] 57 EHRR 14, [105] – [153]; *Vallianatos v Greece* [2014] 59 EHRR 12, [86] – [90].
[493] *SH and others v Austria* App No. 58813/00 (ECtHR, 2 November 2011), [94].
[494] *Gas and DuBois v France* App No. 25951/07 (ECtHR, 15 March 2012), [60].

other hand, where an interference affects a core aspect of identity, the ECtHR applies stricter scrutiny and requires weightier justifications.[495] While it is not possible to consider how all local and regional cultures impact the proportionality of conditions of recognition, this thesis does, where appropriate, consider the impact of culture on its proportionality analysis.

III. Critiques of Using a Trans-Inclusive Human Rights Framework

Having defined the contours of a trans-inclusive human rights framework, the thesis now moves to consider how those principles apply to conditions of recognition. While both international and regional rights actors have affirmed that states should acknowledge preferred gender, this thesis asks how human rights can impact recognition processes.

Before embarking upon this analysis, however, Section III offers one final 'preliminary' reflection. Although Sections I and II have placed trans identities within international human rights law, one must acknowledge that this remains a topic of substantial debate. Trans-sceptical (and anti-gay) critiques of human rights are well-documented and rehearsed.[496] Yet, there are trans individuals (and their allies) who also reject human rights as an impractical and counter-productive strategy to enhance wellbeing.[497] Section III explores opposition to human rights analyses of gender recognition. It engages both with those who oppose and support greater trans protections. While Section III acknowledges that these arguments, particularly intra-community critiques, raise important concerns, it concludes that human rights are a coherent and practical standard by which to examine legal gender recognition.

[495] *Goodwin* (n 55), [90].
[496] Stefanno Gennarini, 'UN Rights Chief Divides General Assembly on LGBT Rights' (*C-FAM Blog,* 20 October 2016) https://c-fam.org/friday_fax/un-rights-chief-divides-general-assembly-lgbt-rights/ accessed 14 May 2017; Jane Adolphe, '"Gender" Wars at the United Nations' (2012) 11(1) Ave Maria Law Review 1, 29; Jayesh Needham, 'After the Arab Spring: A New Opportunity for LGBT Human Rights Advocacy?' (2012) 20(2) Duke Journal of Gender, Law and Policy 287, 307-308.
[497] Paisley Currah, 'Gender Pluralisms under the Transgender Umbrella' in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 5-6; Jena McGill, 'SOGI....So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations' (2014) 3 Canadian Journal of Human Rights 1, 22.

A. Trans-Sceptical Critiques

Those who oppose greater trans rights – including legal affirmation of preferred gender – focus their arguments on the status of trans persons in international law. They claim that human rights are not a legitimate basis for increased trans protections because international human rights do not acknowledge trans identities[498] Relying upon the absence of trans individuals from all global and regional treaties, critics suggest that trans-affirming frameworks are, at best, "inconsistent" and "piecemeal"[499] and, at worst, a manipulation of international law-making processes.[500] In response to a landmark SOGI panel at the HRC Council in 2012 – the first ever such event at the United Nations – the Organisation of Islamic Cooperation (OIC)[501], a leading opponent of trans rights, denounced an "attemp[t] to create controversial 'new notions' or 'new standards" by misinterpreting the [UDHR] and international treaties."[502] Echoing other state and civil society actors[503], the OIC criticised trans-affirmation as advancing protections which were "never [previously] articulated or agreed to by the UN membership."[504] For trans-sceptical states, the human rights community has failed to sufficiently explain how and why trans individuals should be incorporated into human rights law. Instead, they argue that trans rights are a modern-day exercise in colonisation.[505] Through a regime of "cultural imperialism"[506], which ignores local culture and values, Global North states are engaging in rights exportation, using economic pressure to impose gender diversity on politically disenfranchised societies.

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[498] Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8(2) Human Rights Law Review 207, 228; Javaid Rehman and Eleni Polymenopoulou, 'Is Green a Part of the Rainbow: Sharia, Homosexuality, and LGBT Rights in the Muslim World' (2013) 37(1) Fordham International Law Journal 1, 41-43; Graeme Reid, '"The Trouble with Tradition" When "Values" Trample over Rights' (*HRW Website, No Date Available*) https://www.hrw.org/world-report/2013/country-chapters/africa accessed 21 May 2017.

[499] McGill (n 334), 23.

[500] Vanja Hamzic, 'The Case of "Queer Muslims": Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos' (2011) 11(2) Human Rights Law Review 237, 247; Braun (n 7), 891.

[501] According to its' website, the Organisation of Islamic Cooperation (OIC) is "the second largest inter-governmental organisation after the United Nations with a membership of 57 states spread over four continents. The Organization is the collective voice of the Muslim world. It endeavours to safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world." This information is taken from, 'History' (*OIC Website, No Date Available*) http://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en accessed 14 May 2017.

[502] 'Letter from Zamir Akram, Ambassador and Permanent Representative of Pakistan to the United Nations and the other International Organisations, to HE Ms Laura Dupuy Lassere, President of the Human Rights Council, to explain the OIC position on Resolution 17/19 and subsequent panel' (14 February 2012) UN Doc No. Pol/SO/2012, [5] https://www.unwatch.org/letter-from-uns-islamic-group-to-unhrc-president-opposing-panel-on-violence-against-gays/ accessed 20 May 2017.

[503] Piero Tozzi, 'Six Problems with the "Yogyakarta Principles"' (2007) 1 International Organisations Research Group Briefing Paper, 4-5 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551652 accessed 15 May 2017.

[504] 'Letter from Zamir Akram' (n 339).

[505] Persad (n 3), 363-364; Anthony Tirado Chase, 'Human rights contestations: sexual orientation and gender identity' (2016) 20(6) The International Journal of Human Rights 703, 704.

[506] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2003) 59.

As a first response, one should point out that, in the specific context of this thesis, which rejects a 'treaty-custom' paradigm, the absence of treaty references does not conclusively inhibit a human rights analysis. By embracing a wider range of sources, this thesis draws from additional legal materials, many of which do openly affirm trans human rights. While an explicit mention in human rights agreements might make it easier to litigate or advocate for trans protections, a comprehensive human rights assessment can still be undertaken where no such references exist.

In terms of a substantive response, it is unclear that 'gender identity' rights were actually *excluded* from the major international and regional treaties. While references to trans individuals certainly do not appear in the final texts, there is little evidence that 'gender identity' was raised and rejected during the drafting processes. Instead, like the question of same-gender marriage discussed in Chapter IV[507], it is more likely that – considering the relative invisibility of trans rights movements until the early 1990s[508] – trans lives and trans experiences were simply not a consideration. One must remember that trans populations were not officially mentioned at the UN until 2006.[509]

To acknowledge that the original drafters were not aware of a particular phenomenon is, however, significantly different to conceding that they were in opposition. Those who agreed the ICCPR in 1966 could not have foreseen the impact which modern communications technology, in particular the internet, would have on core treaty rights, such as privacy (art. 17) and freedom of expression (art. 19). However, it is not tenable to suggest that, just because the drafters were not conscious of the internet, those core rights cannot apply to new innovations, such as social media and blogs.[510] Similarly, the fact that trans persons are not specifically referenced by international treaties does not mean that they are expressly excluded from the protections therein. Indeed, considering that most treaty documents incorporate an 'other status' clause into their non-discrimination provisions, the drafters specifically provided for future (unknown) interests to be absorbed into the treaty regimes.

[507] Paul Johnson, '"The choice of wording must be regarded as deliberate": same-sex marriage and Article 12 of the European Convention on Human Rights' (2015) 40(2) *European Law Review* 207, 215.
[508] See generally: Susan Stryker, *Transgender History* (Seal Press 2008); Joanne Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* (Harvard University Press 2004).
[509] Elizabeth Baisely, 'Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38(1) Human Rights Quarterly 134, 150-151.
[510] Van der Sloot makes this argument with regard to art. 10 ECHR, see: van der Sloot (n 215), 419.

Critiques focused on 'creating rights' and 'cultural imperialism' are more complex. By seeking the protection of human rights law, trans individuals are not asking for "new" privileges.[511] A trans-inclusive framework does not confer rights over and above those already enjoyed by cisgender persons. Instead, trans communities want to benefit from the same guarantees that are extended to all other persons. In that context, trans-sceptical critiques should not be understood as resisting "new notions" or "new standards", as the OIC has suggested.[512] Rather, they are an assertion that trans identities are not covered by *existing* human rights.

This argument, however, directly contradicts a fundamental tenet of international human rights law: the principle of 'universality'.[513] 'Universality' is the concept that, irrespective of references in positive law, human rights are held "universally" by all human beings.[514] According to Tomuschat, "[i]t is the quality of being human, without any additional qualification, which provides everyone with…rights."[515] The principle of universality is a core feature of all major human rights treaties and declarations.[516] Article 1 UDHR provided that "*all* human beings are born free and equal in dignity and rights" [emphasis added]. In their preambles, the ICCPR and ICESCR similarly acknowledge the "equal and inalienable rights of *all* members of the human family" [emphasis added]. Both covenants confer individual rights upon "every human being"[517], "everyone"[518] and "all persons".[519] Against that background, it is perhaps unsurprising that scholars and advocates have expended more resources on explaining *how* (rather than *whether*) trans communities are covered by human rights. Like all others, trans persons enjoy a minimum level of protection.[520] As a significant number of trans-sceptical countries have also ratified universality-orientated treaties, it is unclear why these states do not accept the general application of human rights to trans identities.[521]

[511] Needham (n 333), 303.
[512] 'Letter from Zamir Akram' (n 339).
[513] See generally: Alston (n 258), 8; Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20(2) European Journal of International Law 265; Louis Henkin, 'The Universality of the Concept of Human Rights' (1994) 506 *The Annals of the American Academy of Political and Social Science* 10; Henrieta Anosoara Serban 'Universality of Human Rights as the Basis of the Democracy' (2014) Revisata de Drept Public 218.
[514] Donnelly (n 25), 283.
[515] Tomuschat (n 343) 58.
[516] ECHR, art. 1; ACHR, art. 1(2); ACHPR, art. 2.
[517] See e.g. ICCPR, art. 6;
[518] See e.g. ICESCR, arts. 6, 7 and 8; ICCPR arts. 12, 14 and 16.
[519] See e.g. ICCPR, arts. 10, 14 and 26; ICESCR art. 13.
[520] UN HCHR 2011 (n 31), [5].
[521] An-Na'im (n 32) 3; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013) 47.

The principle of universality has, however, been subject to critique.[522] First, applied in absolute terms, universality has "the potential to erase [that] cultural diversity" which should (and does) influence local implementation of human rights.[523] Acknowledging the universalism of rights standards does not rule out any consideration of relative cultures.[524] While international law is capable of establishing broad rights standards, the precise details of how those standards operate depends on localised context. It may vary from one culture to the next. As noted above, under the ECHR, the margin of appreciation is a useful example of how social and national differences can proportionately impact the application of generalised human rights standards.[525]

Claims to universality may overlook the extent to which – in practice – certain voices are afforded greater influence in developing human rights principles.[526] Although state parties may agree that 'legitimate' human rights should transcend cultural boundaries, there is often resentment that the process of determining legitimacy prioritises certain cultural standards.[527] For many less politically-empowered states, there may be justifiable frustration that they are expected to respect universality for civil and political rights (such as trans bodily integrity and non-discrimination based on gender identity) while Global North countries consistently deny the universal application of socio-economic rights (which may have greater relevance for Global South societies).[528] That frustration has only been heightened (and the perception of colonisation reinforced) where the unequal application of universality is imposed through "aid conditionality".[529]

One must concede, therefore, that cultural relativity critiques of trans-sceptical states are not wholly without merit. Yet, on balance, and when subject to proper scrutiny, these arguments do not de-legitimise a trans-inclusive human rights framework. First, acknowledging that culture

[522] Dianne Otto, 'Rethinking the Universality of Human Rights Law' (1997) 29(1) Columbia Human Rights Law Review 1; Lord Hoffman, 'The Universality of Human Rights' (2009) 125 Law Quarterly Review 416; Adamantia Pollis and Peter Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (Praeger 1997).
[523] Otto (n 359), 7.
[524] Donnelly (n 25), 294.
[525] Paul Mahoney, 'Universality versus subsidiarity in the Strasbourg case law on free speech: explaining some recent judgments' (1997) 4 European Human Rights Law Review 364.
[526] An-Na'im (n 32) 6.
[527] ibid, 7.
[528] Christina Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16(4) Human Rights Quarterly 740, 740-741.
[529] Aid conditionality is a mechanism whereby Global North states tie their financial support for Global South countries to conditions which the Global South countries are required to meet, such as accepting certain human rights norms, see: Antonia Kirkland, 'Female Genital Mutilation and the United States Vote at International Financial Institutions' (1998) 20(2-3) Women's Rights Law Reporter 147, 153-154; Peter Dunne, 'LGBTI Rights and the Wrong Way to Give Aid' (2012) 12 Harvard Kennedy School Review 67.

has a role to play in human rights does not justify repudiating all trans protections.[530] A culture-sensitive approach would permit the OIC to implement trans rights in a manner which, at the level of precise detail, might differ from Western European and North American jurisdictions. However, to accommodate social difference does not mean the total compromise of trans rights. Cultural relativity may influence how human rights shape conditions of recognition. It cannot absolutely pre-empt human rights analysis.

A striking feature of culture-focused objections is the extent to which they over-simplify (and even erase) diversity.[531] Donnelly writes that "the typical account of culture as coherent, homogenous, consensual, and static largely ignores cultural contingency, contestation, and change."[532] By claiming that trans human rights are a cultural imposition, state actors have explicitly denied the complex, nuanced and unique experiences of gender which exist (and are well-documented) within their jurisdictions.[533] Trans identities are a global phenomenon.[534] Some of the most creative and effective gender advocacy has originated within Global South cultures.[535] McGill writes that "advocacy on [a gender identity] agenda has, from its earliest days, been driven by a 'culturally and geographically diverse coalition of groups spanning the

[530] Donnelly writes that "[c]are and caution, however, must not be confused with inattention or inaction", Donnelly (n 25), 304.
[531] Tomuschat (n 343) 73.
[532] Donnelly (n 25), 296.
[533] Centre for the Development of People (CEDEP), Centre for Human Rights and Rehabilitation (CHRR) and the International Gay and Lesbian Human Rights Commission (IGLHRC), *Non-Governmental Organisations Shadow Report on the Implementation of the International Covenant on Civil and Political Rights in Malawi* (October 2011); Gays and Lesbians of Zimbabwe (GALZ), *Report on Discrimination against Women in Zimbabwe based on Sexual Orientation and Gender Identity* (January 2012); Human Rights Watch, "*I want to live with my Head Held High": Abuses in Bangladesh's Legal Recognition of Hijras* (Human Rights Watch 2016) https://www.hrw.org/sites/default/files/report_pdf/bangladesh1216_web.pdf accessed 14 May 2017; International Gay and Lesbian Human Rights Commission, *Discrimination and Violence Against Women in Brunei Darussalam on the Basis of Sexual Orientation and Gender Identity* (November 2014); Guyana RainBow Foundation (GuyBow), the International Gay and Lesbian Human Rights Commission (IGLHRC) and Society Against Sexual Orientation Discrimination (SASOD), *Human Rights Violations of Lesbian, Bisexual, and Transgender (LBT) People in Guyana: A Shadow Report* (July 2012); The International Gay and Lesbian Human Rights Commission (IGLHRC) and Iranian Queer Organization (IRQO*), Human Rights Violations of People in the Islamic Republic of Iran on the Basis of Their Sexual Orientation and Gender Identity* (2014).
[534] ibid.
[535] McGill (n 334), 27.

global South as well as the North.'"[536] By denying the universality of trans rights, and denouncing trans identities as colonial impositions, it is trans-sceptical state actors who are imposing the artificial culture.[537] In some cases, this process has been part of a wider geo-political strategy, either creating common cause between otherwise disparate states[538] or whipping up nationalist sentiment to distract from political or infrastructural crises.[539]

B. Intra-Community Critiques

While trans-sceptical critiques are insufficient to obstruct a human rights analysis, they are not the only source of resistance. Among trans communities, there are also those who reject human rights as an overly-exclusive and counter-productive approach.[540]

Human rights typically operate on a status-based model. Individuals are protected on the basis of specific characteristics, including race, age or disability. In order to enjoy the benefits of status-orientated rights, persons must prove membership within a recognised class. According to Irving, "vulnerable populations must render themselves intelligible through cultivating normative identities."[541] For individuals, whose identity is not subject to contestation, having to demonstrate such membership is uncontroversial. In more ambiguous cases, however, claimants who struggle to recount a clear narrative of identity may fall outside the law.[542]

[536] ibid. McGill quotes from Sonia Corrêa, Rosalind Petchesky and Richard Parker, *Sexuality, Health and Human Rights* (Routledge 2008) 171. A particularly striking example of the complexity of gender within just one jurisdiction is the status of trans communities in Iran. In this country, as a direct consequence of rigid gender roles, homosexuality is criminalised. Those who are convicted of homosexual intercourse may possibly face the death penalty. On the other hand, trans identities are not subject to legal sanction. Indeed, the Iranian state (nominally) funds gender-confirming treatment. Yet – within this seemingly contradictory reaction to differing queer identities – gender transition has become a coercive political solution to questions of homosexuality. Male-identified gay persons are pressured into undertaking medical transitions so that their sexual relationships with men (now as women) can be deemed morally acceptable. In such a context, the often commended position of trans persons in Iran reveals a more complex, nuanced picture of gender norm enforcement. See generally: OutRight Action International, *Being Transgender in Iran* (OutRight 2016); OutRight Action International, *Being Lesbian in Iran* (OutRight 2016); Human Rights Watch, 'Iran: Two More Executions for Homosexual Conduct' (*HRW Website*, 21 November 2015) https://www.hrw.org/news/2005/11/21/iran-two-more-executions-homosexual-conduct accessed 27 August 2017; Ali Hamedani, 'The Gay People Pushed to Change Their Gender' (*BBC*, 5 November 2014) http://www.bbc.co.uk/news/magazine-29832690 accessed 27 August 2017.
[537] Bantekas and Oette (n 14) 38-42.
[538] Tirado Chase writes that "[t]he OIC has little to connect its member states…it has effectively used…opposition to SOGI-related rights to give it one of its few bases of collective purpose and identity", see: Tirado Chase (n 342), 705.
[539] Marie-Bénédicte Dembour, 'Critiques' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 63; Dunne (n 389).
[540] Currah (n 334) 5-6; Tirado Chase (n 342), 704; McGill (n 334), 22.
[541] Dan Irving, 'Against the Grain: Teaching Transgender Human Rights' (2013) 16(3-4) Sexualities 319, 320.
[542] Sonia Katyal, 'Exporting Identity' (2002) 14(1) Yale Journal of Law and Feminism 97, 100.

The identity-focused character of human rights is particularly significant for gender. While, as is evident from the major UN treaties, the principle of gender equality is enshrined within international law[543], that protection is founded upon an "essentialised male/female binary."[544] Existing human rights standards guarantee gender equality to 'men' and 'women'.[545] Yet, as this thesis illustrates, many trans persons do not experience a binary gender.[546] According to Dreyfus, there is a need to "complicate conceptions of sex and gender beyond the normalised binaries of male/female."[547] What is the status of 'non-binary' persons, who may have an alternative or shifting gender narrative[548], within international frameworks? Although human rights may have the capacity to acknowledge trans persons who reproduce expected gender paradigms, they have reduced utility where complex, non-normative identities arise.[549]

With these limits in mind, human rights actors have embraced the broader, more inclusive terminology of 'gender identity'[550]. As defined in the Introduction, 'gender identity' refers to *"*each person's deeply felt internal and individual experience of gender."*[551]* Gender identity prioritises personal experiences and, therefore, is intended to embrace even those whose narrative falls outside the male-female binary.*[552]* Yet, even this more expansive definition has not escaped criticism.[553] Scholars have argued that, like sexual orientation, gender identity is a highly-western concept.[554] Although diverse experiences of gender exist worldwide, the

[543] See e.g. ICCPR, art. 3; ICESCR, art. 3; CEDAW, art. 2.
[544] Andrew Gilden, 'Toward a More Transformative Approach: The Limits of Transgender Formal Equality' (2008) 23(1) Berkeley Journal of Law and Gender 83, 103.
[545] Damian A Gonzalez-Salzberg, *'The Accepted Transsexual and the Absent. Transgender: A Queer Reading of the Regulation* of. *Sex/Gender by the European Court of Human. Rights' (2013) 29(4)* American University International Law Review 797, 799.
[546] Daphna Joel and others, 'Queering gender: studying gender identity in "normative" individuals' (2013) 5(4) Psychology and Sexuality 1, 2; Tracey Yeadon-Lee,
'What's the Story? Exploring Online Narratives of Non-binary Gender Identities' (2016) 11(2)
The International Journal of Interdisciplinary Social and Community Studies 19 (p.12)
http://eprints.hud.ac.uk/28036/8/Whats%20the%20Story%20article%20-%20first%20sub%20draft%20%20.pdf accessed 16 March 2017; Kay Siebler, 'Transgender Transitions: Sex/Gender Binaries in the Digital Age' (2012) 16(1) Journal of Gay and Lesbian Mental Health 74, 79.
[547] Tom Dreyfus, 'The Half-Invention of Gender Identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles' (2012) 37 Australian Feminist Law Journal 33, 36.
[548] Emma Dargie and others, 'Somewhere under the Rainbow: Exploring the Identities and Experiences of Trans Persons' (2014) 23(2) The Canadian Journal of Human Sexuality 60, 62; Julie L Nagoshi, Stephan/ie Brzuzy and Heather K Terrell, 'Deconstructing the complex perceptions of gender roles, gender identity, and sexual orientation among transgender individuals' (2012) 22(4) Feminism and Psychology 405, 415.
[549] Dreyfus (n 384), 37.
[550] Diane Otto, 'Queering Gender [Identity] in International Law' (2015) 33(4) Nordic Journal of Human Rights 299; O'Flaherty and Fisher (n 335).
[551] Yogyakarta Principles, Introduction, [FN 2] http://www.yogyakartaprinciples.org/introduction/ accessed 24 August 2017.
[552] O'Flaherty and Fisher (n 335), 236.
[553] Tirado Chase (n 342), 710.
[554] McGill (n 334), 25.

language and cultural associations of 'gender identity' limit its intelligibility and impact.[555] In addition, gender identity, even in its broader form, still requires a tangible, internalised sense of gender.[556] Waites writes that "'[g]ender [i]dentity' tends to privilege notions of a clear, coherent and unitary identity over conceptions of blurred identification."[557] A human rights model based on gender identity may be capable of recognising a gender spectrum. However, even without a requirement to identify at the 'male' and 'female' end-points, one may have to adopt a static (non-fluid[558]) point on that spectrum (i.e. gender identity suggests a unidimensional experience of gender, even if that experience is not male or female).[559]

Aware of these intra-community critiques, can (and should) human rights play a meaningful role in shaping legal gender recognition? While identity-focused approaches may create legitimate concerns, this thesis argues that human rights remain the most effective framework for reform.

To a large extent, the scope and inclusivity of human rights analysis depends on definition and application. Gender-orientated human rights have typically operated on the basis of a definitive, male-female dichotomy.[560] However, there is no reason why 'gender identity', as defined in the Yogyakarta Principles, cannot be interpreted to embrace non-binary (including fluid) experiences. Nothing in the current definition suggests that, while gender may fall outside 'man' and 'woman', it must land upon a fixed spot. That gender must be "deeply felt", "internal" or "individual" does not require that it also it be static. One may have deep, internal and individual experiences that are fluid and shifting. In reality, when properly understood, international human rights are capable of embracing fluid and multi-faceted gender narratives.[561] Instead of abandoning human rights, and seeking alternative strategies for reform, scholars and practitioners should exploit the full potential of the existing rights frameworks.

Concerns regarding the cultural specificity of 'gender identity' are not new. They have also been raised against 'sexual orientation'.[562] To a certain extent, they have no simple answer.

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[555] ibid, 25-26.
[556] Dreyfus (n 384), 33.
[557] Matthew Waites, 'Critique of "sexual orientation" and "gender identity" in Human Rights Discourse: Global Queer Politics beyond the Yogyakarta Principles' (2009) 15(1) Contemporary Politics 137, 147.
[558] Dreyfus (n 384), 34.
[559] Otto (n 387), 312-313.
[560] Elise Meyer, 'Designing Women: The Definition of "Woman" in the Convention on the Elimination of All Forms of Discrimination against Women' (2015) 16(2) Chicago Journal of International Law 553, 578.
[561] *An activists' guide to the Yogyakarta Principles* (2010) 23 http://www.ypinaction.org/wp/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf accessed 16 May 2017.
[562] See generally: Katyal (n 379); Waites (n 394).

These concerns speak to wider debates in international human rights about agency and voice.[563] Even among advocates that expressly support greater human rights, is there a prioritisation of Global North interests and demands? In some respects, these arguments can be seen as the trans-affirming equivalent to the claims of cultural imperialism.[564] Whereas trans-sceptical states, such as members of the OIC, accuse 'northern' actors of imposing gender diversity, trans advocates complain that those actors are imposing a mandatory narrative of what is means to experience gender diversity. Their claim is that, even if 'gender identity' was intended as a broad, catch-all class, it is steeped in a western-centric ideology which is inaccessible for Global South communities.

While recognising the validity of this critique, there are three important responses. First, one should (again) reiterate that this thesis is not a blueprint for litigation. While the thesis does aim to engage with trans lived-experiences, it is primarily a normative consideration of how international human rights principles impact gender recognition. Where, as is apparently the case, 'gender identity' can be rationally interpreted to include all – Global North and Global South – experiences of gender, it is (for the purposes of this thesis) less relevant that certain people may not subjectively locate their identity within that terminology.

Second, as a matter of pure practice, 'gender identity' has now been widely incorporated into international and regional human rights discourses. While, as noted, the term does not explicitly appear in any treaty, it has been embraced by the supervisory committees and courts which review compliance.[565] It has also been adopted by key rights actors, such as UN HCHR[566] and the Special Procedures.[567] Although one must be careful not to conflate the *adoption* and *merits* of particular language, Cabral – a prominent Global South trans advocate – notes that by using 'gender identity' (particularly within the structure of the Yogyakarta Principles), actors have

[563] Conway Blake and Philip Dayle, 'Beyond cross-cultural sensitivities: international human rights advocacy and sexuality in Jamaica' in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (Institute of Commonwealth Studies 2013) 466.
[564] Tirado Chase (n 342), 704.
[565] United Nations Human Rights Committee, 'Concluding Observations on the Initial Report of Bangladesh' (27 April 2017) UN Doc No. CCPR/C/BGD/CO/1, [11(e) and 12(e)]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined seventh and eighth periodic reports of the Philippines' (25 July 2016) UN Doc No. CEDAW/C/PHL/CO/7-8, [14(b)] and [45(a)]; United Nations Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fourth periodic report of the Dominican Republic' (21 October 2016) UN Doc No. E/C.12/DOM/CO/4, [25] – [26]; *Identoba* (n 107), [96].
[566] UN HCHR 2011 (n 31).
[567] 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [34] – [36], [48] – [50]; United Nations Special Rapporteur on the Situation of Human Rights Defenders, 'Situation of human rights defenders' (30 July 2015) UN Doc No. A/70/217, [65] – [67], and [93(a)].

made trans identities accessible to a wider audience.[568] While there must be continuing (possibly increased) efforts to educate that audience, especially on non-binary experiences, the terminology of 'gender identity' has been effective in advancing trans rights.[569]

Finally, despite strong critiques of the existing human rights frameworks, no coherent alternative has been proposed.[570] Scholars and advocates have explained why (they consider) that the existing approaches are flawed. Yet, they have not offered a workable substitute in its place. Vague references to 'gender expression' or 'sexual autonomy' (examples of suggested alternative frameworks) are insufficient responses to the complex legal and social dilemmas raised by the conditions of recognition.[571] It is also unclear how these concepts are any less exclusionary or culturally-biased than existing rights standards.[572] Human rights undoubtedly create concerns for trans advocacy. However, as both policy and legal advancements have shown, they are an effective vehicle for promoting and expanding trans equality.

Conclusion

Chapter I has established the contours of a trans-inclusive human rights model. Rejecting a 'treaty-custom' paradigm, Chapter I conceptualises human rights through a broader range of sources, emphasising the particular importance of both judicial decisions and soft law. In addition, Chapter I has introduced, and elaborated upon, four broad rights themes: (A) bodily integrity; (B) non-discrimination and equality; (C) marriage and family life; and (D) children's rights. While acknowledging that they are not the only rights categories which intersect with trans identities, Chapter I has prioritised these four themes because of their particular relevance for conditions of recognition. Finally, Chapter I has engaged with critiques – both trans-sceptical and trans-affirming – of human rights. While conceding the limitations and concerns attached to rights review, Chapter I concludes that human rights remain the most effective and coherent standard against which to examine gender recognition. Having established this trans-inclusive framework, the thesis now proceeds to analyse four major conditions of recognition: physical medical intervention (Chapters II and III); compulsory divorce (Chapter IV); age limits (Chapter V); and mandatory binary gender (Chapter VI).

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[568] Waites (n 394), 148.
[569] Currah (n 334) 13; Julie Mertus,'The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US' (2007) 29(4) Human Rights Quarterly 1036, 1037.
[570] Jennifer Levi, 'Book Review – Transgender Jurisprudence: Dysphoric Bodies of Law by Alex Sharpe' (2003) 24(1) Adelaide Law Review 99, 103.
[571] ibid.
[572] ibid.

Chapter II

Physical Medical Interventions: Interfering with Core Human Rights

Introduction

The first (and perhaps most widely known) condition of legal gender recognition is the requirement to undergo physical medical interventions. In most jurisdictions, which acknowledge preferred gender, applicants must alter their external and/or internal sex characteristics in order to legally transition.[573] Since 1972[574], medical pre-conditions have been a primary feature of gender recognition models around the world.[575] Until the United Kingdom's Gender Recognition Act 2004, the obligation to access surgery, sterilisation and hormone therapy was universal practice.[576] Even today, such interventions are anticipated by most individuals who formalise their preferred gender status.[577] In many respects, medicalisation has become a symbol for wider trans identities.[578] It is often (wrongly) considered as an inevitable part of transition pathways.[579] While public understanding about the

[573] See generally: Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report* (ILGA 2016) accessed http://ilga.org/downloads/TLMR_ENG.pdf accessed 24 May 2017.
[574] As noted in the introductory chapter, in 1972, Sweden became the first jurisdiction worldwide to enact a statutory regime for legal gender recognition (SFS 1972:119: Lag (1972:119).
[575] Liza Khan, 'Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform' (2011) 11(2) Yale Journal of Health Policy, Law, and Ethics 375, 379-381. In *Goodwin v United Kingdom* [2002] 35 EHRR 18, the ECtHR specifically envisaged gender recognition as a right of "post-operative transsexuals" (see e.g. [85]).
[576] Under the Gender Recognition Act 2004, there must be evidence that an applicant "has or has had gender dysphoria" (s. 2(1)(a)). However, there is no requirement that applicants submit to physical medical interventions. Gender Dysphoria is "a condition where a person experiences discomfort or distress because there's a mismatch between their biological sex and gender identity. It's sometimes known as gender identity disorder (GID), gender incongruence or transgenderism", see 'Gender Dysphoria' (*NHS Website*, 12 April 2016) http://www.nhs.uk/conditions/gender-dysphoria/Pages/Introduction.aspx accessed 29 August 2017.
[577] Jamie Veale and others, 'Prevalence of Pregnancy Involvement among Canadian Transgender Youth and its Relation to Mental Health, Sexual Health, and Gender Identity' (2016) 17(3-4) International Journal of Transgenderism 107; Amnesty International, *The State Decides Who I Am: Lack of Legal Gender Recognition for Transgender People in Europe* (Amnesty International 2014) 7.
[578] See generally: Laura Langley, 'Self Determination in a Gender Fundamentalist State: Towards Legal Liberation of Transgender Identities' (2006) 12(1) Texas Journal of Civil Liberties and Civil Rights 101.
[579] Dean Spade, 'Documenting Gender' (2009) 8(1) Dukeminier Awards Best Sexual Orientation and Gender Law Review 137, 212.

diversity of gender experiences is certainly growing[580], trans lives have been (and continue to be) disproportionality presented through the lens of physical interventions.[581]

The second and third chapters of this thesis consider whether physical requirements for gender recognition violate human rights law. As compared with compulsory divorce (Chapter IV), age limits (Chapter V) and binary gender (Chapter VI), medical pre-conditions are more extensively addressed in the existing literature and case law.[582] Numerous scholars, as well as soft law actors, have condemned mandatory interventions as incompatible with core rights. National and regional judicial decisions have similarly concluded that enforcing surgery, sterilisation and hormone therapy is inconsistent with constitutional and international protections.[583] Chapter II and Chapter III locate themselves within these on-going conversations and debates. They draw from a broad range of research sources to examine physical intervention requirements. The chapters do not simply synthesise the existing scholarship and soft law. Instead, they use the available materials to reconsider – within an international human rights framework – important questions, including the limits of free consent and the meaning of equal treatment.

Chapters II and III divide the discussion of medical pre-conditions into two parts. In Chapter II, the thesis introduces the main physical interventions, and considers the extent to which they interfere with core human rights. In Chapter III, the thesis moves on to explore the role of proportionality, and asks whether the aims of surgery, sterilisation and hormone therapy justify

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[580] Robin Marantz Hening, 'Rethinking Gender' (*National Geographic – The Gender Issue,* January 2017) 48 – 73.

[581] Fred McConnell, 'Channel 4's Obsession with Genitalia and Surgery Demeans Trans People' (*The Guardian,* 14 October 2015) https://www.theguardian.com/commentisfree/2015/oct/14/channel-4-genitalia-surgery-trans-people-girls-to-men accessed 31 May 2017; Samantha Allen, 'Enough with the Weird Fixation on Caitlyn Jenner's Genitalia' (*The Daily Beast*, 15 April 2017) http://www.thedailybeast.com/enough-with-the-weird-fixation-on-caitlyn-jenners-genitalia accessed 30 August 2017; Parker Marie Malloy, 'Can Media Please Stop Focusing on Trans People's Bodies?' (*The Advocate*, 9 January 2014) https://www.advocate.com/commentary/2014/01/09/op-ed-can-media-please-stop-focusing-trans-peoples-bodies accessed 30 August 2017.

[582] See e.g. Madison Kyger, 'A Global Analysis: Legal Recognition and Equal Treatment of Transgender Citizens' (2016) 5(1) University of Baltimore Journal of International Law 118; Laura Nixon, 'The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility and Family-Building Issues Facing Transgender People' (2013) 20(1) William and Mary Journal of Women and Law 73; Jenna Johnson, 'Minnesota (Trans) Gender Markers: State Statutes and Policies on Amending Identity Documents' (2015) 41(1) William Mitchell Law Review 213; Doran Shemin, 'My Body Is My Temple: Utilizing the Concept of Dignity in Supreme Court Jurisprudence to Fight Sex Reassignment Surgery Requirements for Recognition of Legal Sex' (2016) 24(4) American University Journal of Gender, Social Policy and the Law 491; Harper Jean Tobin, 'Against the Surgical Requirement for Change of Legal Sex' (2006) 38(2) Case Western Reserve Journal of International Law 393; Lisa Mottet, *'Modernizing State Vital Statistics Statutes and Policies* to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People' (2013) 19(2) Michigan Journal of Gender and Law 373.

[583] *AP, Garcon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017); Stockholm Court of Administrative Appeal*, Socialstyrelsen v. NN* Mål nr 1968-12 (19 December 2012); Federal Constitutional Court of Germany, 1 BvR 3295/07 (11 January 2011); *XY v R* [2012] HRTO 726 (Human Rights Tribunal of Ontario).

breaching human rights. While proportionality cannot validate torture and other ill-treatment, it is relevant to non-absolute guarantees of bodily integrity (e.g. art. 8 ECHR) and in analysing discriminatory practices. It also facilitates a reassessment of the public policy goals which motivate medical pre-conditions. Although these goals are grounded in important assumptions and social norms (which affect trans people far beyond gender recognition), they have been comparatively under-explored within the existing literature and case law.

Chapter II proceeds in three sections. In Section I, the thesis introduces the three main physical requirements for gender recognition – surgery, sterilisation and hormone therapy. Section I explains how these conditions are imposed on applicants, and outlines the medical procedures by which they can be satisfied. Section I also observes that, in recent years, an increasing number of jurisdictions have mandated "appropriate" healthcare, without specifying the precise treatments to be undertaken.

In Sections II and III, the thesis switches to examine whether medical pre-conditions are compatible with two core rights themes: bodily integrity and non-discrimination.[584] Observing

[584] It is important to acknowledge two rights which, although not substantively explored in this thesis, are also relevant to the question of whether physical medical intervention requirements violate human rights: (a) the right to procreate; and (b) the right to the highest attainable standard of health.

While numerous human rights actors acknowledge family life in the absence of children, international and regional law place significant importance on the right to procreate [see e.g. April Adell, 'Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees' (1996) 24(3) Hofstra Law Review 789, 794; Dan Brock, 'Shaping Future Children: Parental Rights and Societal Interests' (2005) 13(4) The Journal of Political Philosophy 377, 379]. Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination against Women protects the right of women to "decide freely and responsibly on the number and spacing of their children." The United Nations Human Rights Committee has stated that the "right to found a family implies, in principle, the possibility to procreate" [United Nations Human Rights Committee, 'General Comment No 19 on Article 23 (The Family)' (1990), [5]]. At the regional level, reproductive freedom is recognised in numerous instruments, including art. 8 ECHR [see e.g. *SH v Austria* [2011] 52 EHRR 6, [58]] and art. 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The Inter-American Court of Human Rights has ruled that protecting private life "includes respect for the decisions…to become a mother or a father" [*Artavia Murillo et al ("In Vitro Fertilization") v Costa Rica* Preliminary Objections, Merits, Reparations and Costs Series C No. 257 (IACtHR, 28 November 2012), [146]].

International law also provides significant recognition, and protection, for the right to the highest attainable standard of health [see e.g. John William Tobin, *Right to Health in International Law* (Oxford University Press 2011); Stephen P Mark (ed), *Health and Human Rights: Basic International Documents* (Harvard University 2012); Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) Health and Human Rights 109; Gian Luca Burci (ed), *Global Health Law* (Edward Elgar 2016)]. Article 12 of the International Covenant on Economic, Social and Cultural Rights requires State Parties to "recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Similarly, art. 12 of the Convention on the Elimination of All Forms of Discrimination against Women commits State Parties to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services…" In the particular sphere of minors, the Convention on the Rights of the Child (art. 24) expressly acknowledges the "the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health." In 2016, through Resolution 'A/HRC/RES/33/9', the United Nations Human Rights

Council renewed the mandate (for three years) of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Both of these rights (in addition to considerations of: (a) torture and other ill-treatment, and (b) non-discrimination), which *are* substantively addressed in Chapter II) have obvious relevance for the involuntary imposition of physical medical intervention requirements as a pre-condition for gender recognition.

While the exact contours of the right to procreate remain a source of dispute [see e.g. Alma Beltran Y Puga, 'Paradigmatic Changes in Gender Justice: The Advancement of Reproductive Rights in International Human Rights Law' (2012) 3(1) Creighton International and Comparative Law Journal 158, 171; Daniel Sperling, '"Male and female he created them": procreative liberty, its conceptual deficiencies and the legal right to access fertility care of males' (2012) 7(3) International Journal of Law in Context 375, 380], there is consensus that involuntary sterilisation violates procreative liberty [*AS v Hungary* Communication No. 4/2004 (CEDAW/C/36/D/4 (2004)) (CEDAW Committee, 29 August 2006), [11.3]; Katarina Tomamevski, 'Reproduction, Rights and Reality: How Facts and Law can work for Women: European Approaches to Enhancing Reproductive Freedom' (1995) 44(4) The American University Law Review 1037, 1050]. Forcing applicants for gender recognition, who wish to retain their reproductive capacities, to sacrifice those capacities appears (*prima facie*) to be incompatible with international protections for the right to procreate. Similarly, where state actors require applicants to submit to unnecessary and undesired medical interventions – which create serious physical risks (*Schlumpf v Switzerland* App No. 29002/06 (ECtHR, 5 June 2009) – it is clear that such requirements undermine the highest standards of health for applicants.

In choosing not to substantively explore how physical intervention requirements impact the right to procreate and the right to the highest attainable standard of health, Chapter II (and the wider thesis) does not suggest that enforced surgery, sterilisation and hormone treatments have no effect on these rights. As the preceding paragraph illustrates, there is an arguable case that such requirements undermine both procreative guarantees and health standards. Instead, Chapter II focuses on torture and other ill-treatment, as well as non-discrimination, for a number of reasons.

In practical terms, there is a limit to how extensive the thesis can be in its evaluation of physical medical intervention requirements. While, ideally, the thesis would explore all the different ways in which involuntary surgery, sterilisation and hormone therapy violate human rights standards, any such discussion must be proportionate, and must not hinder the overall ability of the thesis to adequately address the other 'conditions of recognition' within the permissible word limit. As the thesis currently stands (offering an exploration of both torture and other ill-treatment, and non-discrimination), the discussion of physical intervention requirements (across both Chapters II and III) already accounts for 25% of the allowable word-limit. The candidate considers that such an extensive exploration is both merited and necessary, given the complexity of medical intervention requirements and the extent to which they have historically dominated gender recognition processes. However, the candidate also acknowledges that any further exploration of the topic would negatively affect the balance in the thesis. There is a fear that the thesis would stray from being a discussion of four 'conditions of recognition' to becoming a more unidimensional discussion of '*medical* conditions of recognition' – with the exploration of the other three conditions (divorce, age limits and binary gender) remaining under-developed and insufficient.

Against this background, with limited room for discussion, Chapter II (and the wider thesis) elects to evaluate the legitimacy of physical intervention requirements through the lens of torture, cruel and inhuman or degrading treatment, and through a consideration of non-discrimination rights. It does so for a number of reasons.

First, torture and other ill-treatment have been afforded a central place within the existing case law and jurisprudence on bodily integrity rights in international human rights law. There is, thus, a substantial body of law (hard and soft) – international, regional and national – which the thesis can apply to the imposition of involuntary medical requirements. Second, the thesis focuses on torture and other ill-treatment in the knowledge that, while the jurisprudence (national and regional) on both protection and the highest standards of health have their own particular characteristics, any discussion on torture and other ill-treatment raises core issues (such as consent, coercion and undue influence) which also have relevance for the right to health and the right to procreate. Thus, while acknowledging that: (a) the rights to health and to procreate are unique, individual rights; and (b) that the absence of a discussion of these two rights is a weakness in the thesis, the candidate believes that focusing on torture and other ill-treatment will – within the permissible word limit – allow the thesis to explore themes which also have significance for procreation and the highest standard of health. Finally, as noted throughout this chapter, within the current soft law instruments on physical medical intervention, there is a particular concentration on torture and other ill-treatment [see e.g. 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57)]. There is, thus – having regard to the permissible word limit – merit in considering to what extent current soft law instruments reflect the actual

that medicalisation often has insufficient regard for trans consent, and that many applicants do not want physical interventions, Section II argues that imposing surgery, sterilisation and hormone therapy violates trans bodily integrity. It reaches the threshold for both 'degrading' and 'cruel and inhuman' treatment. Depending upon the specific context, it may even constitute torture.

On the other hand, Section III acknowledges the complexity of critiquing physical requirements through a non-discrimination framework. While advocates and soft-law actors have condemned medical conditions as discriminatory practices, they too often rely upon overly-general interpretations and have failed to properly engage in 'comparator' analysis. While, using a substantive model of equality, one can identify unequal aspects of medicalisation, Section III concludes that bodily integrity is the more coherent and compelling lens for analysis.

I. Surgery, Sterilisation and Hormone Therapy

Around the world, applicants for gender recognition must submit to numerous physical interventions. The three most common medical pre-conditions are: (A) surgery; (B) sterilisation; and (C) hormone therapy. In addition, a growing number of jurisdictions require trans persons to access "appropriate" treatment before having their preferred gender acknowledged.

terms and protections of international prohibitions against torture, cruel and inhuman or degrading treatment.

A. Surgery

In many countries, surgical intervention is a core requirement for legal gender recognition.[585] More than any other medical treatment, gender-confirming surgery has "fascinated"[586] the public imagination.[587] It is frequently presumed to be an inevitable step for those who do not identify with their birth-assigned gender.[588]

In the seventh edition of its 'Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People' (SOC 7), the World Professional Association for Transgender Health[589] (WPATH) identifies numerous surgical procedures which facilitate medical transitions.[590] While SOC 7 are intended to regulate *voluntary* and *necessary* interventions[591], they describe the various procedures which are now pre-conditions for legal

[585] See generally: Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015). Across the Council of Europe, 20 jurisdictions require individuals to undergo surgery before obtaining legal gender recognition (Transgender Europe (TGEU), 'Trans Rights Index 2017' (*TGEU Website,* 18 May 2017) http://tgeu.org/wp-content/uploads/2017/05/Index-online.png accessed 24 May 2017). In the United States, 34 jurisdictions require gender-confirmation surgery in order to amend a birth certificate (Jameson Garland, 'The Legal Status of Transsexual and Transgender Persons in the United States' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 595). For Asia, Africa and Central/South America, it is more difficult to obtain accurate information. In November 2016, Chiam, Duffy and Gonzalez Gil published the *Trans Legal Mapping Report* which has become the most detailed and up-to-date survey of medical requirements for gender recognition (Chiamn, Duffy and González Gil (n 1)). In Asia, countries with surgical requirements include Hong Kong, Indonesia, Japan, South Korea, Singapore, Sri Lanka and Vietnam (Chiam, Duffy and Gonzalez Gill (n 1) 13 – 23). TGEU's Trans Respect versus Transphobia Project (TRvsT) suggests that there are also surgical requirements in China, Kazakhstan and Uzbekistan ('Sterilisation/SRS/GRS Requirement' (*TRvT Website, No Date Available*) http://transrespect.org/en/map/pathologization-requirement/?submap=sterilisation-srs-grs-requirement accessed 24 May 2017). In Central and South America, there is a requirement for surgery in Cuba, parts of Mexico and Panama (Chiam, Duffy and Gonzalez Gill (n 1) 47 – 56). In addition TRvsT suggests that there are also surgical requirements in Brazil. In Africa, as noted in the introductory chapter, there is a particular dearth of information (Chiam, Duffy and Gonzalez Gill (n 1) 7). However, Chiam, Duffy and Gonzalez Gill identify surgical requirements in Namibia and (*de facto*) in South Africa (Chiam, Duffy and Gonzalez Gill (n 1) 9 – 10).

[586] Katy Steinmetz, 'Obsessing about Caitlyn Jenner's Surgery Is Part of a Larger Problem' (*Time,* 22 April 2017) http://time.com/4745641/caitlyn-jenner-surgery-memoir-2020/ accessed 24 May 2017.

[587] Julia Serano, *Whipping Girl* (Seal Press 2007) 229 – 231; Kate Bornstein and Bear S Bergman (eds), *Gender Outlaws: The Next Generation* (Seal 2010) 101-106.

[588] Anne Finn Enke, 'Introduction: Transfeminist Persectives' in Anne Finn Enke (ed), *Transfeminist Perspectives In and Beyond Transgender and Gender Studies* (Temple University 2012) 6; Michael Amico, Ann Pellegrini, and Michael Bronski, "*You Can Tell Just By Looking" and 20 Other Myths About LGBT Life and People* (Beacon Press 2013) 18-19.

[589] According to its website, the World Professional Association for Transgender Health is a "non-profit, interdisciplinary professional and educational organisation devoted to [trans] health." Its' mission is to "promote evidence based care, education, research, advocacy, public policy, and respect in [trans] health." It is widely considered the leading expert organisation working in the field of trans healthcare, see: 'Mission and Values' (*WPATH Website, No Date Available*) http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1347&pk_association_webpage=3910 accessed 24 May 2017.

[590] World Professional Association for Transgender Health, *Standards of Care for the Health of Transgender, Transsexual and Gender Nonconforming People (Version VII)* (WPATH 2012) 54 – 64 https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf accessed 24 May 2017.

[591] ibid, 3.

recognition. For persons with a female preferred gender, a variety of treatments exist, including penectomy (removal of penis), orchiectomy (removal of testes), vaginoplasty (surgical construction of vagina), clitoroplasty (surgical creation of clitoris) and chest augmentation.[592] For those with a male preferred gender, there are breast reductions, mastectomies and chest reconstruction.[593] While genital and internal-focused procedures (including hysterectomy, salpingo-oophorectomy (removal of ovaries), phalloplasty (construction of penis) and vaginectomy (removal of vagina)) are also available[594], a significant number of trans masculine persons opt-out because of expense, medical complications and the perceived absence of necessity. [595]

All or some of these surgical interventions have now been adopted as requirements for legal gender recognition.[596] In the Czech Republic, the Act on Specific Health Services, in conjunction with the Civil Code, obliges applicants to undertake a "sex change" procedure which results in the "transformation of sexual organs."[597] Individuals must alter their "sexual organs" to mirror the body aesthetic associated with their preferred gender. Under art. 40 of the Turkish Civil Code, surgery is the fulcrum around which gender recognition operates. The Turkish Court of Cassation has adopted a conservative interpretation of the necessary surgical treatments.[598] Partial genital surgeries do not suffice. Instead, trans persons must achieve the full construction of a penis or vagina.[599] Japanese law also emphasises the importance of genital reconstruction.[600] Article 3(1)(5) of Japan's Gender Identity Disorder Act 2003 (GID Act 2003) requires that individuals assume the external genital characteristics of their preferred gender. With the exception of Taiwan[601], surgery is the standard characteristic of gender recognition

[592] ibid, 57.
[593] ibid, 57, 62 – 63.
[594] ibid, 57.
[595] Stephanie Markowitz, 'Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection' (2008) 14(3) Cardozo Journal of Law and Gender 705, 707 and 710; Dan Irving, 'The Self-Made Trans Man as Risky Business: A Critical Examination of Gaining Recognition for Trans Rights through Economic Discourse' (2009) 18(2) Temple Political and Civil Rights Law Review 375, 387.
[596] Janson Wu and Kylar Broadus, 'Recognition of Name and Sex' in Jennifer Levi and Elizabeth Monnin-Browder, *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012) 18.
[597] Act No. 89/2012 Coll, Civil Code, s. 29(1).
[598] Yesim Atamer, 'The Legal Status of Transsexual and Transgender Persons in Turkey' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 324.
[599] ibid.
[600] See generally: Hiroyuki Taniguchi, 'Japan's 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan' (2013) 14(2) Asian-Pacific Law and Policy Journal 108, 110; Yuko Nishitani, 'The Legal Status of Transsexual and Transgender Persons in Japan' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 379 – 380.
[601] Chih-hsing Ho, 'The Legal Status of Transsexual and Transgender Persons in Taiwan' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 439 – 440.

processes throughout Asia.[602] In Hong Kong – in the absence of specific legislation – the Court of Final Appeal has permitted trans persons to obtain an amended identity card and marry in their preferred gender once there is evidence of gender-confirmation surgery.[603] Similarly, in Singapore, the Commissioner for National Registration will modify identity cards where there has been surgical intervention.[604] In Australia, although state law-makers and federal judges increasingly downplay the importance of gender-confirming surgery[605], a number of states and territories continue to impose surgical requirements.[606] According to art. 32B(1)(b) of the New South Wales' Births, Deaths and Marriages Registration Act 1995, legal transitions are restricted to those who have "undergone a sex affirmation procedure." This must involve the "alteration of a person's reproductive organs."[607] In South Africa, although the law formally requires only "surgical *or* medical treatment" [emphasis added][608], officials in the Department of Home Affairs have refused to process applications before an individual submits to a gender-confirmation operation.[609]

In many jurisdictions, applicants have no automatic right to access surgery.[610] Instead, they must obtain prior consent from either healthcare professionals or state-appointed officers (e.g. judges). In Turkey, art. 40 of the Civil Code requires that applicants for recognition must first apply to the courts "seeking authorisation to undergo gender reassignment surgery."[611] In Hong

[602] Chiamn, Duffy and González Gil (n 1) 13 – 23.
[603] *W v Registrar of Marriages* [2013] HKCFA 39, [124] – [125]. See generally: Athena Nga-chee Liu, 'The Legal Status of Transgender and Transsexual Persons in Hong Kong' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015).
[604] National Registration Regulations, reg. 10(2)(b). Chiam, Duffy and Gonzalez Gill write that "the Immigration and Checkpoints Authority (ICA) policy is that: the "Identity Card holder who applies to effect a change to his/her gender is required to produce a medical certificate/doctor's memo which indicates that the IC holder has completed a gender reassignment surgery from male to female or vice versa", see: Chiam, Duffy and Gonzalez Gill (n 1) 22. See also, Terry Sheung-Hung Kaan, 'The Legal Status of Transgender and Transsexual Persons in Singapore' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 410 – 413.
[605] *AB v Western Australia and another* [2011] 281 ALR 694; Births, Deaths and Marriages Registration Act 1997, s. 24 (Australian Capital Territory); Births, Deaths and Marriages Registration Act 1996, s. 29K (South Australia).
[606] Gender Reassignment Act 2000, ss. 3 and 14 (Western Australia); Births, Deaths and Marriages Registration Act 1995, s. 32B(1)(b) (New South Wales).
[607] Births, Deaths and Marriages Registration Act 1995, s. 32A.
[608] Alteration of Sex Description and Status Act 49 of 2003, s. 2(1).
[609] Ryan Thoreson, 'Beyond equality: The post-apartheid counter-narrative of Trans and Intersex Movements in South Africa' (2013) 112(449) African Affairs 646, 654; Gender Dynamix and Legal Resources Centre, *Alteration of Sex Description and Sex Status Act, No. 49 of 2003: Briefing Paper* (2015) 20 http://lrc.org.za/lrcarchive/images/pdf_downloads/publications/LRC_and_GDX_Act_49_Briefing_Paper.pdf accessed 24 May 2017.
[610] Dean Spade, 'Resisting Medicine, Re/modeling Gender' (2003) 18(1) Berkeley Women's Law Journal 15, 20; Jennifer Wong, 'Recasting Transgender-Inclusive Healthcare Coverage: A Comparative Institutional Approach to Transgender Healthcare Rights' (2013) 31(2) Law and Inequality: A Journal of Theory and Practice 471, 473 – 474.
[611] *YY v Turkey* App No. 14793/08 (ECtHR, 10 March 2015), [7].

Kong, trans persons cannot undergo surgery until they have: (a) submitted to a full psychiatric assessment; (b) obtained a diagnosis of gender dysphoria; (c) commenced hormone therapy; and (d) completed a period of "real life experience" (RLE).[612] The Hong Kong approach represents general practice in many jurisdictions which impose surgical pre-conditions.[613] In those countries, the medico-legal aspects of gender recognition are (unsurprisingly) carried out by medical professionals. As these latter work according to strict medical protocols[614], they will only provide treatment to individuals who comply with treatment guidelines. Applicants for legal gender recognition – irrespective of their desire to surgically transition – must satisfy the requirements for accessing surgery. In all of these jurisdictions, where applicants fail to obtain the necessary medical or judicial consent, there is an absolute bar on gender recognition. This means that trans persons, who have no actual need for surgery, are denied legal recognition.

B. Sterilisation

The second common physical requirement is that applicants be incapable of reproducing – either because of natural infertility or as a result of sterilisation.[615] Reproduction-focused conditions are among the most sensitive topics for legal gender recognition, and they have inspired a considerable body of case law and commentary.[616] In some jurisdictions, sterilisation is specifically incorporated into statute or administrative rules. In Finland, s. 1 of the Transsexuals (Confirmation of Gender) Act expressly requires medical evidence that an applicant "has been sterilised or is for some other reason incapable of reproducing." In other

[612] Liu (n 31) 345 – 347. 'Real Life Experience' (RLE) is a period of time (typically one or two years) before an individual can undergo gender-confirmation surgery and obtain legal gender recognition, when that individual must live 'full-time' in the preferred gender. The aim of RLE is to examine whether a person, who may have spent a significant proportion of life manifesting one gender, is capable of living a functional life in the preferred gender. RLE is controversial among trans communities. It has, in particular, been criticised as placing trans individuals in a vulnerable situation where they must outwardly manifest their preferred gender, without having either the physical or legal attributes associated with that gender. This may increase the risk that a person's trans history is revealed, and possibly expose trans individuals to violence and discrimination, see: Richard Kohler and Julia Erht, *Legal Gender Recognition in Europe* (2nd edn, TGEU 2016) 25.
[613] Garland (n 13) 595; *TGEU* (n 13).
[614] SOC 7 establish a set of strict criteria which medical professionals should enforce before providing gender-confirming surgeries, see: World Professional Association for Transgender Health, *Standards of Care* (n 18) 58 – 61.
[615] Zhiam, Duffy and Gonzalez Gill discuss the imposition of sterilisation requirements at several points in their report, see: Chiamn, Duffy and González Gil (n 1). Across the Council of Europe, 20 jurisdictions still require sterilisation as a precondition for legal gender recognition, see: TGEU (n 13).
[616] *YY* (n 39); *AP* (n 11); *Socialstyrelsen* (n 11); 1 BvR 3295/07 (n 11). For academic commentary, see e.g. Rebecca Lee, 'Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States' Laws regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans People' (2015) 33(1) Berkeley Journal of International Law 114; Kai Yeung Wong, 'Taking Transgender Rights Seriously: A Rights-Based Model of Gender Recognition in Hong Kong' (2015) 45(1) Hong Kong Law Journal 109; Nixon (n 10).

jurisdictions, such as Brazil, China and certain American states[617], sterilisation is the implied consequence of submitting to mandatory surgery. Section 29(1) of the Czech Civil Code defines "sex change" surgery to include "the disabling of reproductive function."[618]

There is evidence that, in some situations, courts have focused on present (rather than future) reproduction.[619] It suffices that applicants are able to show that they are currently incapable of procreation and do not intend to engage in future procreation.[620] However, in general, reproductive provisions require the definitive forfeiting of procreative capacities. Under s. 3(1)(5) of the GID Act 2003, individuals in Japan must either forgo their gonads or prove a total loss of gonadal function.[621] Similarly, in jurisdictions where sterilisation is achieved through removing reproductive organs, the question of permanence and reversibility does not arise.[622]

C. Hormone Therapy

For those who desire some form of medical transition, access to gender-confirming hormones is often the first (and possibly most important) intervention.[623] The SOC 7 note that, as part of trans healthcare pathways, individuals may seek "exogenous endocrine agents" in order to feminise or masculinise their physical characteristics.[624] For trans feminine persons, hormone treatment can, *inter alia*, encourage breast growth, decrease muscle mass and reduce instances of body hair.[625] For those with a trans masculine identity, hormones can, *inter alia*, deepen voice tone, increase hair loss and precipitate the "cessation of menses."[626]

Hormone therapy is also, however, a common pre-condition for legal recognition.[627] It is imposed upon applicants in one of two ways. First, as noted, hormone treatment (even if not

[617] Trans Respect versus Transphobia, 'Sterilisation/SRS/GRS Requirement' (*TRvT Website, No Date Available*) http://transrespect.org/en/map/pathologization-requirement/?submap=sterilisation-srs-grs-requirement accessed 24 May 2017.
[618] Barbara Havelková, 'The Legal Status of Transgender and Transsexual Persons in the Czech Republic' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 135.
[619] *AB* (n 33).
[620] ibid, [16] and [18].
[621] Taniguchi (n 28), 117.
[622] Liu (n 31) 349.
[623] Cary Crall and Rachel Jackson, 'Should Psychiatrists Prescribe Gender-Affirming Hormone Therapy to Transgender Adolescents?' (2016) 18(11) AMA Journal of Ethics 1086, 1091 – 1092; Madeline Deutsch, Vipra Bhakri and Katrina Kubicek, 'Effects of Cross-Sex Hormone Treatment on Transgender Women and Men' (2015) 125(3) *Obstetrics* and *Gynaecology 605; Cecile Unger, '*Hormone therapy for transgender patients' (2016) 5(6) Translational Andrology and Urology 877.
[624] World Professional Association for Transgender Health, *Standards of Care* (n 18) 33.
[625] ibid, 38.
[626] ibid, 37.
[627] TGEU, Trans Respect versus Transphobia, and Chiam, Duffy and Gonzalez Gill all identify jurisdictions

explicitly mentioned) may be a required preparation for surgeries, which *are* expressly mandated by statute or policy.[628] Second, even where there is no surgery pre-condition, hormone therapy may still be necessary if the law requires at least some form of body modification.[629] The Spanish Act 3/2007 of 15 March omits a requirement for surgical or sterilising interventions. Yet, under art. 4(1)(b), applicants must still receive medical treatment for at least two years, with the ultimate goal of transitioning their physical features to those of the preferred gender. Article 4(1)(b) is commonly understood to require hormone therapy.[630] Similarly, in South Africa, the reference to "surgical or medical treatment"[631] – irrespective of how it has been applied by the Department of Home Affairs – suggests a minimum of hormone treatment.[632]

D. Appropriate Medical Treatment

In a small (but growing) number of jurisdictions, statute or policy does not specify the exact medical procedures to which an applicant must submit. Rather, there is merely a requirement that individuals undergo 'appropriate' medical treatment.[633] In California, trans persons can access amended birth records if they have "undergone clinically appropriate treatment for the purpose of gender transition, based on contemporary medical standards."[634] Similarly, in Ontario, a practicing physician or psychologist must state that he or she "is of the opinion that the change of sex designation on the birth registration is appropriate."[635]

where, although there is no absolute requirement for surgery or sterilisation, applicants for gender recognition must still submit to hormone therapy.

[628] WPATH generally recommends "12 continuous months of hormone therapy as appropriate to the patient's gender goals" for certain genital surgeries, World Professional Association for Transgender Health, *Standards of Care* (n 18) 60 – 61.

[629] Chiam, Duffy and González Gil (n 1) 13.

[630] Maria Victoria Carrera, Renee DePalma and Maria Lameiras, 'Sex/gender identity: Moving beyond fixed and "natural" categories' (2012) 15(8) Sexualities 995, 1003.

[631] Alteration of Sex Description and Status Act 49 of 2003, s. 2(1).

[632] Gender Dynamix and Legal Resources Centre (n 37) 20.

[633] Births, Deaths and Marriages Registration Act 1997, s. 24 (Australian Capital Territory); Births, Deaths and Marriages Registration Act 1996, s. 29K (South Australia). Section 29K(a) requires a "statement by a medical practitioner or psychologist certifying that the person has undertaken a sufficient amount of *appropriate* clinical treatment in relation to the person''s sex or gender identity" [emphasis added]. In British Columbia, the law appears to adopt a more lenient approach. Under s. 27(2)(c) of the Vital Statistics Act, a practicing physician, psychologist or surgeon need only confirm that "the sex designation on the applicant's birth registration does not correspond with the applicant's gender identity." A similar provision exists in Alberta, see: Vital Statistics Information Regulation 3/2012, s. 16(3)(3)(b).

[634] California Health and Safety Code, s. 1004430.

[635] Ontario Vital Statistics Act (Application for a Change of Sex Designation on a Birth Registration of an Adult), s. 36.

Because, in most cases, evidence of appropriate treatment must be certified by medical professionals, these professionals *de facto* come to establish the required standards of treatment. Ontario's Registrar General encourages medical officers to "exercise their own judgment in accordance with their own experience, expertise and contact with the applicant" to decide whether there should be gender recognition.[636] In theory, this means that a person can access legal gender recognition without any medical treatment.[637] As discussed in Section II, many trans people neither want nor need gender-confirming care. In such circumstances, no treatment is the "appropriate" level of medical intervention. The SOC 7 specifically "[recognise] and [validate] various expressions of gender that may not necessitate psychological, hormonal, or surgical treatments."[638]

In practice, however, medical professionals may require some form of intervention.[639] Courts or administrative officials generally defer to medical decision-makers. If a medical officer determines that an applicant has not yet accessed all appropriate treatments, judges are unlikely to grant legal recognition, even where the applicant feels no need or desire for further intervention. The comparative absence of clear restrictions upon medical discretion has generated concern that conservative practitioners will enforce "cissupremacist understandings of gender identity" upon trans populations.[640] However, courts will intervene if there is a clear misreading of the medico-legal requirements. New Zealand law mandates that an applicant undergo such treatment "as is usually regarded by medical experts as desirable" to obtain the physical conformation of the nominated sex.[641] In *"Michael" v Registrar General of Births, Deaths and Marriages*,[642] the Auckland Family Court held that, having considered the wording and history of the law, an applicant for recognition could not be required to submit to full genital surgery. Rather, it sufficed that "there was some degree of permanent change as a result of the treatment."[643]

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[636] 'Application form for a Change of Sex Designation on a Birth Registration of an Adult' (*Registrar Generals Office Website, No Date Available*) http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/007-11325E~1/$File/11325E.pdf accessed 26 October 2015.
[637] Mottet (n 10), 403.
[638] World Professional Association for Transgender Health, *Standards of Care* (n 18) 2.
[639] Olga Tomchin, 'Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People' (2013) 101(3) California Law Review 813, 837; Anna James Neuman Wipfler, 'Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents' (2016) 39(2) Harvard Journal of Law and Gender 491, 507.
[640] Lauren Bishop, 'Gender and Sex Designations for Identification Purposes: A Discussion on Inclusive Documentation for a Less Assimilationist Society' (2015) 30(2) Wisconsin Journal of Law, Gender and Society 131, 141. Bishop defines 'cissupremacy' as "a discriminatory mindset that favours and values cisgender women and men over trans* people" (141, FN 4).
[641] Births, Deaths, Marriages, and Relationships Registration Act 1995, s. 28(3)(c)(b).
[642] [2008] 27 FRNZ 58.
[643] ibid, [50].

Having introduced these core physical intervention requirements, Sections II and III now consider whether such pre-conditions are compatible with a trans-inclusive human rights framework. They focus on two key themes: (A) bodily integrity and (B) non-discrimination and equality. While advocates and other actors have often framed enforced medicalisation through the lens of discrimination[644], Section III suggests that equality-focused arguments give rise to complex (and often uncertain) analyses. Although surgery, sterilisation and hormone therapy exhibit discriminatory characteristics, overly-general claims of inequality are insufficient to prove a breach of human rights. Instead, it is in the notion of bodily integrity – as protected by international and regional law – that Section II identifies the most compelling (and damning) evidence of rights non-compliance.

II. Physical Intervention Requirements: A Breach of Bodily Integrity Rights?[645]

Mandatory physical interventions violate international guarantees of bodily integrity. Where an applicant does not need or desire surgery, sterilisation or hormone therapy, conditioning gender recognition on access to these medical procedures is cruel, inhuman and degrading. It is a state-sponsored and state-enforced encroachment on trans persons' physical autonomy. Such interventions are intentionally imposed upon applicants for gender recognition, and are used to achieve (often questionable) public policy goals.[646] As such, surgery, sterilisation and hormone therapy all violate the prohibitions contained in art. 16 UN CAT. Indeed, there is an arguable case that enforced medicalisation falls within the definition of 'torture' under art. 1 UN CAT.

A. Consent

As noted in Chapter I, a "fundamental principle of medical law and ethics" is that "before treating a competent patient a medical professional should get the patient's consent."[647] Performing surgery, sterilisation or hormone treatments on applicants for gender recognition can only be legitimate if the recipients offer free and informed consent. Disputes regarding information and disclosure are less likely to arise for legal gender recognition. Individuals, who

[644] Parliamentary Assembly of the Council of Europe, 'Discrimination against Transgender People in Europe' (22 April 2015) Resolution No. 2048(2015); 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [49]; Kohler and Erht (n 39) 10; Amnesty International (n 5) 7 and 90.

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[646] For a detailed discussion of the public policy goals motivating physical intervention requirements, see Chapter III.

[647] Johnathan Herring, *Medical Law and Ethics* (4th edn, Oxford University Press 2012) 149.

accept mandatory treatment in order to have their preferred gender acknowledged, understand the impact of that physical intervention.[648] Those who submit to genital-related surgeries know that they are sacrificing their penis or vagina. Applicants who are sterilised realise that they will no longer be able to procreate. The consequences of enforced medicalisation are generally comprehended, and few persons plead ignorance. The crucial enquiry is whether an applicant's consent is voluntary.

(i.) Presumption of Consent

Gender recognition laws often operate on a presumption of consent.[649] Loue writes of a "constructed dichotomisation that assumes [trans] individuals will of course both desire and seek" physical intervention.[650] This does not mean that state actors unilaterally impose surgery, sterilisation and hormone therapy upon applicants. Trans persons must *formally* agree to gender-confirming treatments. Instead, medical pre-conditions are applied in an environment where, unlike the general provision of healthcare, there is a "popular myth that all transgender people [choose to] undergo genital surgery to confirm their gender."[651] This results in reduced attention to individualised consent and less consideration of alternative preferences. By virtue of having a non-cisgender identity, trans populations must be uncomfortable with, and want to modify, their bodies.[652] They are presumed to reject their procreative capacities, and to suffer significant distress when experiencing natural reproduction.[653] Within both medical and legal transition pathways, there have been reports that supervising officials (e.g. doctors, judges, etc.)

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[648] Laura Norton, 'Neutering the Transgendered: Human Rights and Japan's Law No. 111" (2006) 7(2) Georgetown Journal of Gender and the Law 187, 205.

[649] There are two basic elements of the presumption: (a) law-makers assume that all trans persons inevitably undergo a medical transition and, therefore, (b) all trans persons consent to medical treatments, see: Denise Diskin, 'Taking it to the Bank: Actualizing Health Care Equality for San Francisco's Transgender City and County Employees' (2008) 5(1) Hastings Race and Poverty Law Journal 129, 144 – 145; Amico, Pellegrini, and Bronski (n 16) 18-19. Katyal writes that "there are dangers in presuming that all people who identify as transgender seek the same thing, a presumption that is categorically flawed and yet often imposed by the law and the state itself", Sonia Katyal, 'The Numerous Clausus of Sex' (2017) 84 University of Chicago Law Review 389, 423.

[650] Sana Loue, 'Transsexualism in medicolegal limine: an examination and a proposal for change' (1996) 24(1) Journal of Psychiatry and Law 27, 34.

[651] Spade (n 7), 212. See also: Lori Girshick, *Transgender Voices: Beyond Women and Men* (University Press of New England 2008) 146. This presumption is not unique to law-makers. Within the news and popular media, there is an evident presumption that all trans persons desire to medically transition, 'Non Binary Trans Debate: Piers Morgan vs. Fox and Owl' (*Good Morning Britain,* 17 May 2017) https://www.youtube.com/watch?v=4cRBUHGpHpY accessed 24 May 2017.

[652] The presumption of trans consent is perhaps best captured by the institutionalisation of 'trapped in the wrong body' narratives. See: Jonathan L Koenig, 'Distributive Consequences of the Medical Model' (2011) 46(2) Harvard Civil Rights Civil Liberties Law Review 619, 625 – 628; Noa Ben-Asher, 'Paradoxes of Health and Equality: When a Boy Becomes a Girl' (2004) 16(4) Yale Journal of Law and Feminism 275, 293 – 294.

[653] According to Nixon, "transgender people's reproductive wish or potential is severely impacted by pervading myths about their desire to reproduce", Nixon (n 10), 93.

will refuse to acknowledge an individual's preferred gender unless they express a desire for full gender-confirmation treatment.[654]

(ii.) Diversity of Trans Attitudes Towards Physical Interventions

The failure to engage with the reality of trans consent is deeply problematic. Accessing healthcare is an individual and personal choice. It should not be influenced by (or reduced to) presumptions about common group preferences. Where proposed intervention has long-term and important consequences for key aspects of identity, including procreative capacity and sexual sensation[655], there is a need to verify that each recipient – irrespective of their membership within a particular class – is genuinely offering voluntary consent.

It is incorrect to assume that there is a standard transition narrative[656], and it is dangerous to believe that applicants for recognition automatically consent to physical interventions. There is no universal experience of being trans.[657] Like cisgender individuals, different trans persons live their gender in different and unique ways. For many people, there *is* both a desire and a need for gender-confirming treatment.[658] A significant proportion of trans individuals are unhappy with their natural bodies, and they do require medical intervention (including sterilisation) to live a fully self-actualised life.[659] For these individuals, access to safe,

[654] Dylan Vade, 'Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is more Inclusive of Transgender People' (2005) 11(2) Michigan Journal of Gender and Law 253, 271; Spade (n 38), 20.
[655] Cameron Bowman and Joshua Goldberg, *Care of the Patient Undergoing Sex Reassignment Surgery (SRS)* (Vancouver Coastal Health, Transcend Transgender Support and Education Society, and the Canadian Rainbow Health Coalition 2006) 11 – 14, and 23 – 26 https://www.amsa.org/wp-content/uploads/2015/04/CareOfThePatientUndergoingSRS.pdf accessed 25 May 2017.
[656] Green writes that "[g]ender identity belongs to the person who lives it", Jamison Green, *Becoming a Visible Man* (Vanderbilt University Press 2004) 121. For an insight into the broad spectrum of trans narratives, including binary, medicalised and non-binary experiences, see generally: Bornstein and Bergman (n 14); Jan Morris, *Conundrum* (Faber and Faber 2002); Leslie Feinberg, *Transgender Warriors*: *Making History from Joan of Arc to Dennis Rodman* (Beacon Press 1996); Rae Spoon and Ivan Coyote, *Gender Failure* (Arsenal Pulp Press 2014); Nick Krieger, *Nina Here Nor There: My Journey Beyond Gender* (Beacon Press 2011).
[657] According to Serano, '[t]ransness is not something that can be easily or objectively measured—it is inherently subjective and experiential. Transitioning is a matter of personal exploration, of finding what works for you on the individual level', Julia Serano, 'Detransition, Desistance, and Disinformation: A Guide for Understanding Transgender Children Debates' (*Medium*, 3 August 2016) https://medium.com/@juliaserano/detransition-desistance-and-disinformation-a-guide-for-understanding-transgender-children-993b7342946e accessed 3 July 2017.
[658] Sandy E James and others, *The Report of the 2015 U.S. Transgender Survey* (NCTE 2016) 99 -103; House of Commons Select Committee on Women and Equalities, *Transgender Equality* (The Stationary Office Limited 2016) 42 – 50; New Zealand Human Rights Commission, *To Be Who I am* (New Zealand Human Rights Commission 2008) 50 – 56 https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf accessed 17 May 2017; Jaclyn M White Hughto and Sari L Reisner, 'A Systematic Review of the Effects of Hormone Therapy on Psychological Functioning and Quality of Life in Transgender Individuals' (2016) 1(1) Transgender Health 21, 29 – 31.
[659] World Professional Association for Transgender Health, 'Position Statement on Medical Necessity of

affordable and patient-centred healthcare is a priority.[660] There are well-documented stories of trans persons engaging in informal employment, and using sub-standard medical resources, to align their sex characteristics with their internal sense of identity.[661] This thesis acknowledges the value of physical transitions in many trans lives, and respects individualised decisions to pursue a medical pathway.

Yet, for other trans persons, altering their bodies and accessing gender-confirming care, is either less important or something on which they place no importance at all.[662] Many people, particularly among younger generations, increasingly embrace their gender identity while desiring no (or partial) medical intervention. There are numerous reasons why individuals might de-prioritise medical transitions.

First, for some people, their primary interest (and that which has the greatest impact upon their lives) is social and legal affirmation. While these people may have certain preferences for their external (or internal) appearance, they are much more concerned with friends, family and colleagues respecting their preferred gender.[663] Tomchin observes that "some [trans] people elect a solely social transition in which they can live as their gender identity."[664] Where – irrespective of their physical attributes or reproductive abilities – trans individuals can navigate life without undue interference or administrative obstacles, they may experience a decreased need (even if they are not fully comfortable with their bodies) to undergo lengthy and expensive medical procedures.

Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A' (*WPATH Website,* 21 December 2016) http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947 accessed 25 May 2017.

[660] Pooja S Gehi and Gabriel Arkles, 'Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People' (2007) 4 (4) Sexuality Research and Social Policy 7, 13; Daphna Stroumsa, 'The State of Transgender Health Care: Policy, Law, and Medical Frameworks' (2014) 104(3) American Journal of Public Health 31, 33.

[661] Dean Spade, 'Trans Formation' (*Los Angeles Lawyer* 2008) 38 http://www.deanspade.net/wp-content/uploads/2010/07/transformation.pdf accessed 25 May 2017; Zowie Davy, 'Transsexual Agents: Negotiating Authenticity and Embodiment in the UK's Medical System' in Sally Hines and Tam Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 114 – 115; Richard Crosby and Nicole L Pitts, 'Caught Between Different Worlds: How Transgendered Women May Be "Forced" into Risky Sex' (2007) 44(1) Journal of Sex Research 43, 45 – 46.

[662] Alice Newlin, 'Should a Trip from Illinois to Tennessee Change a Woman into a Man? Proposal for a Uniform Interstate Sex Reassignment Recognition Act' (2008) 17(3) Columbia Journal of Gender and Law 461, 465.

[663] Parker Marie Malloy, ''Debunking the "Surgery is a Top Priority for Trans People" Myth' (*The Advocate*, 13 March 2014) http://www.advocate.com/politics/transgender/2014/03/13/watch-debunking-surgery-top-priority-trans-people-myth accessed 30 March 2016; Patricia Murphy, 'Sam Blanckensee (21): "New legislation will allow Trans people to say what gender we identify without a doctor's approval"' (*Irish Independent*, 4 June 2015).

[664] Tomchin (n 67), 843.

Surgery, sterilisation and hormone therapy all carry at least some healthcare risks.[665] Trans people are often "dissuaded from proceeding" with gender-confirming treatment because of the "complexity" and uncertainly to which it gives rise.[666] They may also worry that medical transitions will create side effects, such as physical illness, or painful after-effects, such as "disfiguring and scarring."[667]

In addition, individuals, particularly those with a trans masculine identity, frequently decide against medical treatment where the available procedures promise only limited success.[668] Although medical science has made significant advances in chest reconstruction surgeries, trans men have few genitalia-focused options.[669] Those who undergo the existing interventions often express ultimate dissatisfaction with the results.[670] Carrying out a costs-benefit analysis, trans people may be encouraged to forgo invasive treatments that ultimately will not meet their body goals.

Research indicates that more and more trans individuals (particularly those who are assigned female at birth) have not, and will not, undertake a full medical transition.[671] While these persons may desire moderate or small changes to their physical appearance (often through a low dosage of hormones)[672], they reject the idea of engaging in fundamental or invasive modifications. Similarly, there is also evidence that, while many trans persons do not want to procreate naturally and have suffered distress when using their procreative capacities, other individuals do have a strong desire to reproduce.[673] These persons resent sterilisation as a pre-

[665] Markowitz (n 23), 707 and 710; Bowman and Goldberg (n 83) 11 – 14, and 23 – 26.
[666] Loue (n 78), 30.
[667] ibid.
[668] World Professional Association for Transgender Health, *Standards of Care* (n 18) 63 – 64.
[669] ibid.
[670] Tobin (n 10), 401.
[671] Alain Giami and Emmanuelle Beaubatie, 'Gender Identification and Sex Reassignment Surgery in the Trans Population: A Survey Study in France' (2014) 43 Archives of Sexual Behaviour 1491, 1498; Maya Kailas and others, 'Prevalence and Types of Gender-Affirming Surgery Among a Sample of Transgender Endocrinology Patients Prior to State Expansion of Insurance Coverage' (2017) April Endocrine Practice; Jens U Berli and others, 'What Surgeons Need to Know About Gender Confirmation Surgery When Providing Care for Transgender Individuals A Review' (2017) 152(4) JAMA Surgery 394, 397; Titia F Beek and others, 'Partial Treatment Requests and Underlying Motives of Applicants for Gender Affirming Interventions' (2015) 12 Journal of Sexual Medicine 2201, 2203 – 2205; Jordan D Frey and others, 'An Update on Genital Reconstruction Options for the Female-to-Male Transgender Patient: A Review of the Literature' (2017) 139(3) Plastic and Reconstructive Surgery 728, 728 – 729; Christina Richards and others, 'Non-binary or genderqueer genders' (2016) 28(1) International Review of Psychiatry 95, 99.
[672] Genny Beemyn and Susan Rankin, *The Lives of Transgender People* (Columbia University Press, 2011) 147.
[673] Susan Maxwell and others, 'Pregnancy Outcomes After Fertility Preservation in Transgender Men' (2017) 129(6) 1031, 1032 – 1033; Chloe de Roo and others, 'Fertility options in transgender people' (2016) 28(1) International Review of Psychiatry 112, 112 – 113; Katrien Wierckx and others, 'Sperm Freezing in Transsexual Women' (2012) 41 Archives of Sexual Behaviour 1069, 1069 – 1070; Katrien Wierckx and others, 'Reproductive wish in transsexual men' (2012) 27(2) Human Reproduction 483, 486.

condition for obtaining legal gender recognition. As discussed in Chapter III, numerous trans individuals have procreated post-transition and have maintained stable and functional family lives.[674]

Finally, and perhaps most fundamentally, many trans individuals reject physical interventions simply because they experience no need to medically alter their bodies.[675] These individuals are confident and comfortable in their own identity, and they are not influenced by social perceptions of how gendered bodies *should* look. Trans persons may be ambivalent about their precise bodily configuration, or they may wholly embrace their physical characteristics, celebrating the masculine character of their breasts or the femininity of their penis: "I'm a woman, this is my body, therefore it's a female body and who is some doctor to tell me otherwise."[676] While trans identities have traditionally been understood through a narrative of 'trapped in the wrong body'[677], many individuals have no such feelings or experiences.[678] As Vade notes, "[s]ome transgender people feel and always felt at home in their bodies.[679]

In establishing rules for legal gender recognition, law-makers should avoid assumptions about trans consent. It is possible for applicants to desire formal acknowledgement of their preferred gender but to reject body modifications. Indeed, some people may even desire such modifications, but resist them as the required price for gender recognition. The key principle is *choice*. Persons should be entitled to legally transition without also choosing (some or all) physical interventions.[680] Not agreeing to a full medical transition does not mean that a person self-identifies any less with their identity.[681] Cases, such as *AB v Western Australia*[682] and

[674] Petra de Sutter and others, 'The Desire to have Children and the Preservation of Fertility in Transsexual Women: A Survey' (2002) 6(3) The International Journal of Transgenderism (*Online Article, No Page Number Available*) https://www.atria.nl/ezines/web/IJT/97-03/numbers/symposion/ijtvo06no03_02.htm accessed 25 May 2017; Sheelagh McGuinness and Amel Alghrani, 'Gender and Parenthood: The Case for Realignment' (2008) 16 Medical Law Review 261, 270; Henry von Doussa, Jennifer Power and Damien Riggs, 'Imagining parenthood: the possibilities and experiences of parenthood among transgender people' (2015) 17(9) Culture, Health and Sexuality 1119, 1127.
[675] Tobin (n 10), 401; Robyn Brammer and Misty M Ginicola, 'Counselling Transgender Clients' in Misty M Ginicola, Cheri Smith, Joel M Filmore (eds), *Affirmative Counselling with LGBTQI+ People* (American Counselling Association 2017) 186.
[676] Vade (n 821), 290.
[677] David Coad, 'The Politics of Home in *Becoming Julie:* Transsexual Experience in Australia' in Chantal Zabus and David Coad (eds), *Transgender Experience – Place, Ethnicity and Visibility* (Taylor and Francis 2014) 129; Laura Erickson-Schroth and Laura A Jacobs, "*You're in the Wrong Bathroom!" and 20 Other Myths and Misconceptions About Transgender and Gender Nonconforming People* (Beacon Press 2017) 25 – 27.
[678] Erickson-Schroth and Jacobs (n 104) 25; Chris Beam, *Transparent – Love, Family and Living the T with Transgender Teenagers* (Harcourt 2007) 56 – 57.
[679] Vade (n 82), 272.
[680] Gehi and Arkles (n 88), 28.
[681] Tomchin (n 67), 821.
[682] [2011] HCA 42.

'*Michael' v Registrar of Births*[683]– where trans men wished to retain some of their physical sex characteristics – illustrate that a person can desire to preserve their bodily configuration without compromising their gender identity. Legal recognition and medical transitions are distinct concepts. Offering consent to the former does not constitute agreement to undertake the latter.

(iii.) Involuntary Consent

Considering that many trans individuals do not want some (or all) of the physical requirements for gender recognition, are these pre-conditions compatible with the need for *voluntary* consent?

Silver suggests that the environment in which applicants submit to medical intervention "implicate[s] the voluntariness of a decision to undergo...treatment."[684] In *AP, Garcon and Nicot v France,* the European Court of Human Rights found that medicalisation provisions present trans people with an "insoluble dilemma".[685] They must make an impossible choice between two highly undesirable outcomes. On the one hand, applicants may agree to unwanted medical treatments, thereby exposing themselves to painful, unnecessary and possibly unhealthy interventions.[686] On the other hand, they may refuse treatment, and "live with [all] the consequences of a discordant legal identity."[687] In such circumstances, it is arguable that trans populations cannot provide voluntary consent to medical pre-conditions.[688]

Without doubt, as Steinbock notes[689], the mere existence of two objectively non-desirable choices does not automatically mean that applicants involuntarily agree to medical treatments.[690] Every day, people are faced with a range of life options, none of which may be subjectively welcomed or desired. The fact that a boring or unsatisfactory job is preferable to poverty does not mean that individuals are coerced or unduly influenced into obtaining employment. As a practical matter, people must accept a certain number of hard choices as the inevitable consequence of modern life. However, the circumstances are different where state

[683] [2008] 27 FRNZ 58.
[684] Anne E Silver, 'An Offer You Can't Refuse: Coercing Consent to Surgery through the Medicalization of Gender Identity' (2013) 26(2) Columbia Journal of Gender and Law 488, 498.
[685] *AP* (n 11), [132].
[686] ibid.
[687] Norton (n 76), 205.
[688] *AP* (n 11), [128] – [132].
[689] Bonnie Steinbock, 'The Concept of Coercion and Long-Term Contraceptives' in Ellen Moskowitz and Bruce Jennings (eds), *Coerced Contraception? Moral and Policy Challenges of Long-Acting Birth Control* (Georgetown University Press 1996) 53-78
[690] ibid.

actors establish a regime of legal benefits and entitlements, which individuals may only access by compromising their bodily integrity.

In *Socialstyrelsen v NN*, the Stockholm Administrative Court of Appeals stated that the notion of involuntary consent should not be restricted to situations where applicants for recognition are physically incapable of resisting a violation of bodily integrity.[691] Instead, if medical intervention is a "requirement to enjoy a certain benefit or right", it must "generally...be seen as forced."[692] Under Sweden's original gender recognition law, trans persons were required to submit to sterilisation.[693] The appeals court held that such a procedure cannot be consensual if it is a pre-requisite for gaining basic acknowledgement from the State. The same reasoning applies to surgery and hormone therapy.

The rationale of the *NN* judgment – largely adopted by the ECtHR in *AP*[694] – is a welcome application of the consent principle to physical pre-conditions. The decision captures the difficulty, which even the strongest opponents of surgery, sterilisation and hormones experience in resisting medical requirements. Trans persons do not 'voluntarily' consent to treatment if they only offer agreement to secure basic rights. Engaging with the realities of the gender recognition process, the Stockholm Administrative Court of Appeals offers a compelling blueprint for safeguarding trans bodily integrity.

[691] *Socialstyrelsen* (n 11).
[692] ibid.
[693] SFS 1972:119: Lag (1972:119).
[694] *AP* (n 11), [132] – [135].

(a). Coercion or Undue Influence?[695]

While there is growing consensus that medical pre-conditions undermine the agency and autonomy of trans individuals, there remains a question as to how one can (or should) conceptualise the relationship between physical intervention requirements and consent. In *NN*, the Stockholm appeal judges suggested that the threat of withholding gender recognition *coerces* trans persons into undergoing unwanted healthcare procedures. For the Appeals Court, and for a number of UN human rights actors who have subsequently endorsed the same reasoning[696], consent to surgery, sterilisation and hormone treatment is involuntary because they have been obtained through processes of 'coercion'.

Taking Faden and Beauchamp's three-step definition (discussed in Chapter I) as a starting point, there is at least an arguable case that medicalisation requirements do coerce consent from applicants.[697] Where state authorities establish medicalisation as a pre-condition, they clearly act as agents of influence seeking to encourage trans persons to physically alter their bodies. The state actors exert their influence by presenting a threat to withhold legal recognition and its accompanying benefits. The state authorities' threat is credible. Many applicants will, for numerous years before seeking recognition, have lived without an accurate legal gender.[698] They understand the willingness of state officials to render trans persons legally invisible, and they appreciate the negative consequences that invisibility creates.

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[695] In Chapter III, this thesis considers the legitimacy of rationales for surgery, sterilisation and hormone treatment. Considering arguments relating to biological essentialism, appropriate reproduction, permanence and segregated spaces, Chapter III argues that state rationales for medical pre-conditions lack a sufficient intellectual basis. As noted in the Introductory chapter (when discussing state rationales for regulating gender), many of the rationales and aims of medical requirements are based upon scientifically inaccurate and discriminatory assumptions, which, at their core, are concerned with the maintenance and reproduction of traditional social norms, and which fundamentally disadvantage key demographics, such as women and sexual minorities. In Chapter III, this thesis argues that these rationales cannot be the justification for a *proportionate* interference with trans human rights because they lack any intellectual basis. Of course, however, the legitimacy of the rationales for surgery, sterilisation and hormone treatments also impacts the extent to which trans consent to these treatments is valid and sufficient. While, in this section, the thesis focuses on the question of whether trans consent to physical interventions is coerced or unduly influenced, one must also acknowledge that such consent may not be voluntary because it has been obtained for illegitimate reasons. Where the State obtains consent for gender confirmation surgery in order to avoid homosexual sexual intercourse, the reasoning and justification for obtaining that consent cannot be – having regarding to emerging protections for LGB persons in international and regional human rights law – legitimate. As noted, the question of whether the rationales for medicalisation are legitimate will be addressed in detail in Chapter III. As such, they are not considered further in this section which, therefore, focuses solely on the issues of coercion and undue influence.

[696] United Nations Human Rights Committee, 'Concluding observations on the seventh periodic report of Ukraine' (22 August 2013) UN Doc No. CCPR/C/UKR/CO/7; World Health Organisation and others, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement* (World Health Organisation 2014).

[697] Tom R Faden and Ruth L Beauchamp, *A history and theory of informed consent* (Oxford University Press 986) 339.

[698] Many individuals begin to experience their trans identity before puberty, Marco A Hidalgo and others, 'The Gender Affirmative Model: What We Know and What We Aim to Learn' (2013) 56 Human Development 285.

For many trans persons, the state authorities' threat is 'irresistible'. However strongly trans individuals reject surgery, sterilisation or hormones, the possibility of being cast into legal limbo overpowers many people's resistance to medical intervention.[699] The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Special Rapporteur on Health) has written that "structural inequalities can result in the voluntary…nature of consent being significantly compromised."[700] The medicalisation of legal recognition is operated in an environment where state authorities have the absolute power to control and distribute legal rights. The trans community, an economically and politically disenfranchised class[701], are reliant upon state officials to recognise their preferred gender and thus allow trans persons to enjoy the benefits of full citizenship. In such circumstances, applicants are ill-placed to resist pre-conditions for gender recognition.

There are, thus, cogent reasons why one might define trans medicalisation requirements through the language of coercion. For many applicants for recognition, they do feel that the situation, in which – in order to be formally acknowledged by state officials – they must transform their bodies, is one where the requirement to undertake those transformations is foisted upon them. While state actors might not be physically subjecting these persons to surgery, sterilisation or hormone treatments, the legal and social framework is "of a kind and an amount that diminishes free choice."[702]

Yet, at the same time, it is also necessary to observe the limits (and narrow scope) of the coercion doctrine. Herring observes that "it is rare for [coercion] to arise and it is difficult to demonstrate that an apparent consent was given only under coercion."[703] Similarly, according to Jackson (writing with specific reference to the Faden and Beauchamp test), "coercion will hardly ever vitiate a patient's consent to medical treatment."[704] In reality, the law sets an extremely high bar for what constitutes coercive inducement to undergo medical treatment.

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[699] 'Debate on Resolution 20(48) in the Parliamentary Assembly of the Council of Europe' (22 April 2015) http://clients.dbee.com/coe/webcast/index.php?id=20150422-2&lang=en&ch=2 accessed 28 October 2015.
[700] 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (10 August 2009) UN Doc No. A/64/272, [23].
[701] James and others (n 86) 139 – 145. See generally: RECLACTRANS, *The Night is Another Country* (REDLACTRANS 2012) 26; European Union Agency for Fundamental Rights, *Being Trans in the European , Union* (Publications Office of the European Union 2014) http://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative_en.pdf accessed 3 March 2015.
[702] Bonnie Steinbock, 'The Concept of Coercion and Long-Term Contraceptives' in Ellen Moskowitz and Bruce Jennings (eds), *Coerced Contraception? Moral and Policy Challenges of Long-Acting Birth Control* (Georgetown University Press 1996) 53-78.
[703] Johnathan Herring, *Medical Law and Ethics* (6th edn, Oxford University Press 2016) 170.
[704] Emily Jackson, *Medical Law: Texts, Cases and Materials* (4th edn, Oxford University Press 2016) 314.

In the specific context of trans medicalisation requirements, it may be the case that applicants, who do not want to amend their physical bodies, are involuntarily agreeing to surgery, sterilisation and hormone treatments because of fear (and knowledge) about what refusing those interventions, and remaining legally invisible, would mean. However, considering that trans medicalisation involves no physical restraint and little face-to-face inducement by state actors, it is unclear whether, despite the existing hard and soft law identifying 'coercion', that label is appropriate within the legal gender recognition context.

Mills and Mulligan observe that, rather than coercion, *undue influence* "is a much more common impediment to the true voluntariness of medical decisions."[705] There may be circumstances where, although an individual does not agree to healthcare interventions because of direct threats or restraints, his consent does arise from external influences or persuasions which are "such that he can no longer think and decide for himself."[706] In *Mrs U v Centre for Reproductive Medicine*, Butler Sloss P stated that there is undue influence if an individual's will is so "overborne" that he acts "in circumstances in which [he] no longer thought and decided for himself."[707] Where a court is satisfied that a person only agrees to medical treatment because of undue pressures or persuasions, there will not be valid consent for the purposes of medical law.

In the context of trans medicalisation requirements, undue influence may be an appropriate lens through which to assess whether applicants involuntarily submit to surgery, sterilisation and hormone therapy. While, as noted, there are cogent objections to framing physical pre-conditions as 'coercion' (not least the limited circumstances in which the existing case law identifies coercive practices[708]), there are, on the other hand, compelling arguments that medical requirements give rise to undue influence. If applicants must engage with a legal process which withholds formal acknowledgement of their preferred gender (and the accompanying rights and benefits) until they access specific treatments, there is a significant risk (and evidence of that risk being realised) that the individuals submit to surgery, sterilisation and hormone therapy in circumstances where – overwhelmed by the threat of legal invisibility – they can no longer think and decide for themselves. Although the applicants may nominally offer consent, their

[705] Simon Mills and Andrea Mulligan, *Medical Law in Ireland* (3rd edn, Bloomsbury 2017) 125. See also: Michael A. Jones and Kirsty Keywood, 'Assessing the Patient's Competence to Consent to Medical Treatment' (1996) 2 Medical Law International 107, 119-121; Shaun D. Pattinson, 'Undue Influence in the Context of Medical Treatment' (2001) 5 Medical Law International 305.
[706] Re T (Adult: Refusal of Treatment) [1993] Fam 95, 113.
[707] [2002] Lloyd's Rep Med 259, 261.
[708] See e.g. *Freeman v Home Office* [1984] 1 All ER 1036.

agreement to the medical interventions is involuntary because it has been unduly influenced by state-enforced pressure and persuasion.

In *Re T (Adult: Refusal of Treatment)*[709], Lord Donaldson MR described various factors to which a court must have regard in determining whether there has been undue influence.[710] First, it is necessary to review the "strength of will" of the patient – those in positions of vulnerability or stress being more susceptible to external influences.[711] In *Re T,* the young woman, who was refusing a blood transfusion, was gravely ill. Therefore, she was more likely to be influenced by her Jehovah's Witness mother. Second, Lord Donaldson MR also referred to the "relationship of the 'persuader' to the patient…" There may be situations where particular individuals, or classes of individual, have such "added force"[712] upon others that courts should be alert to potentially involuntary consent.

In the context of medicalisation requirements, both of Lord Donaldson MR's criteria have clear relevance. As noted, trans persons, who lack formal state acknowledgement, find themselves in a position of especial vulnerability. Without official documentation and legal affirmation to support their preferred gender, non-recognised trans persons exist in a space of legal limbo. They experience higher risks of discrimination and physical violence. As such, these individuals are less likely to have the "strength of will" to resist state-imposed pressure, and are more likely to be influenced into unwanted medical treatments.

Similarly, while, in *Re T,* Lord Donaldson MR was particularly concerned with the potential impact of familial pressure, there are also significant risks where the 'persuader' is the State. For trans persons, who apply for gender recognition, the actor which is pressurising them to physically alter their bodies is the State. This is an entity which has significant control over trans rights, and which can impact trans lives in a multiplicity of ways. As such, there is a risk that, where confronted with pressure from state actors to submit to medical interventions, applicants are more likely to have their wills overborne and to be unable to think and decide for themselves about those interventions.

[709] [1993] am 95, 113.
[710] See: 'Treatment without Consent: Adult' (1993) 1 Medical Law Review 83, 83 – 87.
[711] ibid.
[712] ibid, 114.

(b). Resistance and Medical Emergencies

There are, of course, some applicants who do resist physical intervention requirements and who live with an inaccurate legal gender. This may suggest that surgery, sterilisation and hormones do not overbear applicants' will, or prevent persons from exercising free thinking and decision-making. Yet, to such arguments, two important responses can be offered.

First, the fact that some trans people resist state influence relating to medical requirements does not undermine their objectively involuntary nature. Where applicants are unduly pressured into altering their bodies to obtain gender recognition[713], it is not determinative that some trans persons can resist. For individuals who do forfeit their reproductive capacities or alter their bodies, the fact that they must do so in order to validate another human right reduces the freedom of their consent.

Second, among those who are considered 'resistors', it is important to ask whether principle or access is the primary determinant.[714] Within the existing literature, there are numerous references to trans individuals who have not submitted to physical intervention solely because they lack sufficient resources[715]. These persons do not necessarily want to medically transition. Indeed, as already noted, many trans people have no such desire. Yet, with the promise of gender recognition, they would be willing to compromise their bodily integrity if treatment was affordable or not medically contraindicated. Rather than making a choice to 'resist', these individuals have been constrained by cost, geographic unavailability and their own medical complications.[716] Silver concludes that "[i]f obtaining surgery was financially and medically possible for more trans people, it is entirely possible that the threat of non-recognition would be irresistible given the benefits associated with reclassification."[717]

In addition, the involuntary character of physical requirements cannot be justified by reference to any medical emergency. Many trans persons who access legal gender recognition have no

[713] Amnesty International (n 5) 44; *AP* (n 11).
[714] Tomchin (n 67), 845; Constantin Cojacariu, 'Moving Beyond *Goodwin*: A Fresh Assessment of the European Court of Human Right's Transgender Rights Jurisprudence' (2013) 17(3) Interights Bulletin 118, 122.
[715] James and others (n 86) 81 – 84; Vade (n 82), 260; Diskin (n 77), 144; M Dru Levasseur, 'Gender Identity Defines Sex: Updating the Law to reflect modern medical science is key to Transgender Rights' (2014) 39(4) Vermont Law Review 943, 960; Spade (n 7), 160 – 162.
[716] Girshick (n 79) 146; Kristin Wenstrom, '"What the Birth Certificate Shows": An Argument To Remove Surgical Requirements from Birth Certificate Amendment Policies' (2008) 17 Law and Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues 131, 140.
[717] Silver (n 112), 510-511.

clinical need for involuntary surgery, sterilisation or hormone treatment.[718] Such medical interventions are not a "therapeutic necessity"[719] nor are they provided for the "immediate benefit of the individual concerned."[720] The majority of applicants have healthy, properly-functioning bodies. There is no physical reason to alter their external characteristics or remove their internal sex organs. No medical purpose is served by augmenting their breasts, feminising/masculinising their faces or constructing a phallus. The International Federation of Gynaecology and Obstetrics suggests that "sterilisation for prevention of future pregnancy cannot be ethically justified on grounds of medical emergency."[721] As Chapter III discusses, physical intervention requirements pursue social and moral policy goals. They are not intended to resolve medical emergencies, and thus cannot justify an exception to the normal consent rules.

B. Torture, Cruel and Inhuman, or Degrading Treatment?

(i.) 'Degrading' and 'Cruel and Inhuman' Treatment

Compulsory physical intervention, which is neither necessary nor desired, constitutes 'degrading' treatment. Obliging applicants to physically alter their bodies, or to forfeit their reproductive capacities, extends beyond "that inevitable element of suffering that results from a given form of legitimate treatment."[722] While state authorities can establish proper systems to record and regulate gender, they must not expose individuals to unnecessary, and possible dangerous, interventions. Where applicants are required to undergo surgery, sterilisation or hormone treatment, they may experience feelings of "fear, anguish and inferiority" capable of

[718] The choice of words in this sentence has been made carefully. In general, trans individuals do not have an immediate and pressing need for medical treatment, which would justify the imposition of physical requirements without consent. In that way, surgery, sterilisation and hormone treatment cannot satisfy the 'medical emergency' exception. Yet, at a broader level, it would be incorrect to consider trans healthcare as merely experimental or cosmetic. For some trans persons, access to gender-confirming treatments is vital, life-affirming and life-saving. The trivialisation of trans medical care is often used to deny insurance coverage for transition-related services. In that context, it is important to acknowledge that, while there must be consent within the legal gender recognition framework, medically transitioning can be necessary for some trans persons.
[719] *Herczegfalvy v Austria* [1993] 15 EHRR 437, [82].
[720] Explanatory Report to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine [56] – [59] http://conventions.coe.int/Treaty/EN/Reports/Html/164.htm accessed 11 July 2015.
[721] International Federation of Gynaecology and Obstetrics, *Ethical Issues in Obstetrics and Gynaecology* (FIGO 2012) 123–124.
[722] Yankov v Bulgaria [2005] 40 EHRR 36, [107].

humiliation and debasement.[723] Many trans persons may be afraid of the negative consequences of gender-confirming treatments.[724]

In *Yankov v Bulgaria,* the applicant's head was involuntarily shaved while in prison.[725] The ECtHR held that the applicant's "forced change of...appearance" was likely to create "a feeling of inferiority", particularly as it arose "against [the applicant's] will."[726] The Court concluded that there had been a violation of art. 3 ECHR.[727] Even after the physical act of shaving had been completed, the applicant's changed appearance was, for a considerable period of time, evident to other persons. He was "very likely to feel hurt in his *dignity* by the fact that he carries a visible physical mark"[728] [emphasis added].

The reference to 'dignity' is key to understanding the inherently degrading character of physical intervention requirements. According to Rodley, "the prohibition of torture and cruel, inhuman, or degrading treatment or punishment ('torture and ill-treatment')…ha[s] an immediate link to the principle of human dignity."[729] Article 5 of the African Charter on Human and Peoples' Rights explicitly brings together guarantees of dignity and the prohibition of torture and ill-treatment. In violating the former, one necessarily compromises the latter. A similar appreciation of the relationship between bodily integrity and human dignity can also be seen in the American Convention on Human Rights and the International Covenant on Civil and Political Rights.[730]

For the European Court of Human Rights, in order to constitute 'degrading' treatment, acts or conduct must diminish the victim's human dignity.[731] Indeed, in VC v Slovakia, concerning the involuntary sterilisation of a Roma woman, the ECtHR declared that "the very essence of the Convention is respect for human dignity and human freedom."[732] VC has particular significance in the context of enforced medicalisation. In that case, the European judges observed that, as a "major interference with a person's reproductive health status", the non-consensual sterilisation

[723] *Gafgen v Germany* [2011] 52 EHRR 1, [89].
[724] Bowman and Goldberg (n 83) 11 – 14, and 23 – 26; UK National Healthcare Service, *A guide to hormone therapy for trans people* (Crown 2007) 11, 17 – 20.
[725] *Yankov* (n 150).
[726] ibid, [112].
[727] ibid, [121].
[728] ibid, [113].
[729] Nigel Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 174.
[730] ibid.
[731] *Tyrer v United Kingdom* [1979-80] 2 EHRR 1, [33]; *Valasinas v Lithuania* [2001] Prison LR 365, [117].
[732] [2014] 59 EHRR 29, [105].

bore upon "manifold aspects of the individual's personal integrity including…her physical and mental well-being and emotional, spiritual and family life."[733] Depriving the young woman of opportunities to engage in future reproduction, in circumstances of such situational pressure that she could not make a free decision, the Slovakian medical authorities had fundamentally disregarded VC's human dignity.

Similar reasoning applies in the case of forced surgery, sterilisation and hormone treatments. Applicants for recognition are likely to be distressed by the fact that they must alter their physical characteristics by way of involuntary and unnecessary medical interventions. As noted above, for individuals who do not desire to enter a medical transition pathway, such interventions are undertaken in circumstances where their consent is, at best, unduly influenced. Like in *VC,* the consequences of mandatory medical requirements bear upon many aspects of trans lives – social, professional, sexual, religious and reproductive. In some of these spheres, particularly sexual and reproductive capacities, the impact of medical pre-conditions is profound, even absolute.

As noted (and as discussed further below), for State actors, imposing treatment pre-conditions may appear as a simple, unproblematic step towards formally acknowledging preferred gender. Yet, for the trans persons who (involuntarily) experience this treatment, non-desired medical interventions have significant, sometimes devastating effects. As in *Yankov,* where the consequences of the prison authorities' actions were visible for all to see, the visibility of forced bodily amendments creates distress for applicants for recognition – preventing them from manifesting and externalising their true experience of gender. The fact that state actors may not be imposing medical requirements specifically to humiliate trans populations – a requirement which the ECtHR has consistently rejected as a pre-requisite for 'degrading' treatment[734] – does not lessen the extent to which such requirement compromises applicants' dignity.

With these considerations in mind, physical pre-conditions also reach the minimum threshold for establishing 'cruel and inhuman' treatment. As noted, surgery, sterilisation and hormone treatment are highly invasive procedures.[735] They can impose severe pain and suffering on

[733] ibid, [106].
[734] *Peers v Greece* [2001] 33 EHRR 51, [74]; *Kalashnikov v Russia* [2003] 36 EHRR 34, [101].
[735] In this context, it may be thought that one should draw a distinction between, on the one hand, surgery and sterilisation, and, on the other hand, hormone therapy. There may be an assumption that it is incorrect to conflate the impact of hormones with surgical and sterilising interventions. However, it would be inappropriate to minimise the impact which hormone treatments can have upon trans populations. Hormones can lead to significant modifications and changes in physical characteristics, including facial features, body fat distribution, muscle mass, etc. In many cases, these changes can cause significant pain. Hormones may also impact the

applicants for legal gender recognition. The German Constitutional Court has stated that compulsory "[g]ender reassignment surgery constitutes a massive impairment of physical integrity."[736] Medical requirements force trans persons to amend their bodies in the most intimate and personal of ways. Forfeiting their breasts, testes, reproductive organs and secondary sex features, applicants may justifiably feel that they are losing their core. As noted, physical interventions can have significant, permanent consequences, including deep scarring, loss of sexual sensitivity, early menopause and intense, long-lasting physical pain. In some cases, gender-confirmation treatment – particularly genital surgeries – may require numerous separate procedures.[737] This not only prolongs physical suffering, but also increases the risk of unforeseen complications. The Commissioner for Human Rights of the Council of Europe (COE Commissioner) has suggested that tying legal recognition to medicalisation runs "counter to respect for the physical integrity of the person."[738]

(iii.) 'Torture'

The final consideration is whether, in the context of legal gender recognition, surgery, sterilisation and hormone treatment constitute 'torture'. As compared with cruel, inhuman or degrading treatment, such an inquiry has no clear or straightforward conclusion. There are compelling arguments – both for and against – as to whether physical requirements come within the definition of torture. Ultimately, there may not yet be a definitive answer. This section presents the major issues to consider and suggests that the 'tortuous' character of medical pre-conditions is, perhaps more than any other aspect of gender recognition, context-specific.

The Special Rapporteur on Torture has written that "[m]edical care that causes severe suffering for no justifiable reason can be considered cruel, inhuman or degrading treatment or punishment, and if there is State involvement and specific intent, it is torture."[739]

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appearance and functioning of genitalia, and can result in significant changes to both mood and sex drive. In many cases, hormone-induced alterations, such as the deepening of trans men's voices, may be irreversible. Hormone treatment can also lead to temporary or complete loss of reproductive functions. While many of the effects of hormones are welcome for trans people who desire to alter their bodies, they can be distressing for those who have no want or need for a medical transition. See generally: *Hormones: A guide for MTFs* (Vancouver Coastal Health, Transcend Transgender Support and Education Society and Canadian Rainbow Health Coalition 2006) https://apps.carleton.edu/campus/gsc/assets/hormones_MTF.pdf accessed 25 May 2017; Fenway Health, 'The Medical Care of Transgender Persons' (Fenway Health 2015) http://www.lgbthealtheducation.org/wp-content/uploads/COM-2245-The-Medical-Care-of-Transgender-Persons.pdf accessed 25 May 2017.

[736] 1 BvR 3295/07 (n 11).

[737] World Professional Association for Transgender Health, *Standards of Care* (n 18) 63.

[738] Commissioner for Human Rights of the Council of Europe, 'Human Rights and Gender Identity' (29 July 2009) CommDH/IssuePaper(2009) 8.

[739] 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment'

Taking the UN CAT definition as a starting point, there is an arguable case that physical requirements are sufficiently "serious and cruel" to give rise to torture.[740] Surgery, sterilisation and hormone treatment can inflict severe pain and suffering. They are intentionally imposed on applicants for gender recognition through statute, administrative practice and judicial rules. Medical requirements pursue a number of social and moral 'purposes', including maintaining a binary sex paradigm and preventing trans procreation. As noted in Chapter III, many of the rationales for medicalising gender recognition are grounded in a highly discriminatory logic. They undoubtedly fall within the reference to "any reason based on discrimination of any kind" in art. 1 UN CAT. Finally, surgery, sterilisation and hormone treatment are forced upon trans individuals by the State. While medical actors – both public and private – may ultimately administer the necessary treatment, it is state authorities who specifically oblige trans persons to access medical intervention.

In such circumstances, there is a clear argument that physical requirements do satisfy the definition of torture. Invoking the language of 'torture' to describe medical intervention reflects the suffering which many trans persons endure in obtaining recognition. One should not forget, however, that the torture label is intended for only the most egregious violations of human rights. It should not be used or invoked in an "inflationary manner"[741]. The "special stigma"[742], which attaches to torture requires that courts and human rights advocates show restraint in applying the term to instances of ill-treatment. So, while enforced medicalisation is cruel and degrading, one must ask whether it rises to the level of torture.

It is possible to distinguish physical requirements from other torture scenarios. In a 'ticking bomb' situation, for instance, the torturer understands that it is *legally* wrong to torture a suspect. The torturer believes that the end – preventing the loss of human life – ultimately justifies physically mistreating the suspect. But, as a basic starting point, the torturer knows that this is conduct in which one should not engage.

In legal gender recognition, however, the existing levels of knowledge and understanding are more complicated. State authorities understand that, as a general principle, individuals should

(1 February 2013) UN Doc No. A/HRC/22/53, [39].
[740] *Ireland v United Kingdom* [1979-80] 2 EHRR 25, [167].
[741] 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 February 2010) UN Doc No. A/HRC/13/39/Add.5, [33].
[742] *Askoy v Turkey* [1997] 23 EHRR 553, [144].

not be subject to invasive and painful interferences with their physical person. They know that, all things being equal, mandatory sterilisation rules are a violation of bodily integrity. State authorities appreciate that, if applied to cisgender persons, forced surgery, sterilisation and hormone treatments would be unlawful, unethical and incompatible with human rights. Yet, for many state officials, when faced with the specific circumstances of gender recognition, their perception of the relevant factors changes. It is not simply that state authorities believe basic human rights do not apply to trans persons. Rather, as the discussion on consent illustrates, many state actors genuinely assume that medical treatment is an inevitable part of trans experiences. For these individuals, requiring medical interventions merely enshrines in law something which already (and always) takes place. This assumption is manifestly incorrect. Taking the time to speak with trans individuals, law-makers would appreciate that transitioning is a subjective process, which varies depending on personal preferences. In the absence of such engagement, however, medical requirements are often as much the product of ignorance as of an intention to harm. As such, applying the highly symbolic 'torture' label may not be fully appropriate.

The above considerations focus significantly on the notions of 'intent' and 'purpose' as they apply to the issue of torture (questioning whether the imposition of medical pre-conditions satisfies either of these requirements). As noted in Chapter I, both of these elements are – according to the definition of 'torture' as understood through the UN Convention against Torture[743] and by the Special Rapporteur on Torture[744] – crucial factors in determining whether specific conduct goes beyond the bounds of degrading, cruel and inhuman treatment. If intent and purpose are required in order to prove the existence of torture, then there is an arguable case that physical intervention requirements – while incompatible with rights to bodily integrity – do not merit the special stigma which attaches to the torture label.

Yet, one must not forget that, as discussed in Chapter I, the role and status of both 'intent' and 'purpose' remain the subject of debate within torture-focused scholarship and case law.[745] While judgments, such as the Human Rights Committee's Communication Decision in *Giri v Nepal*[746] suggest that 'purpose' is a crucial element in assessing the existence of torture, the jurisprudence of the European Court of Human Rights places greater emphasis on the severity

[743] United Nations Convention against Torture, art. 1.
[744] 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 February 2010) UN Doc No. A/HRC/13/39/Add.5, [186].
[745] David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014) 241.
[746] *Giri v Nepal*, United Nations Human Rights Committee (27 April 2011) (unreported).

of treatment[747], "with the issue of purpose playing only a subordinate, rather than determinative part."[748] Egan suggests that there may be cogent arguments to reduce the determinative nature of 'purpose' in torture analysis, not least the idea that state actors should not escape a finding of torture by intentionally obscuring the reason for their conduct.[749] Within a context where the purpose behind physical medical interventions requirements is unclear – or where state authorities appear to impose such conditions on the mistaken assumption of consent within trans communities – one can argue that courts should not shy away from the label of torture if the treatment, imposed upon applicants through the gender recognition process, is sufficiently severe.

In the same way, there is also uncertainty as to what role 'intentionality' plays within torture assessments, and whether ambiguity around 'intent' in the sphere of gender recognition militates against a finding of torture. As noted, the mind-set of many state actors, who enforce surgery, sterilisation and hormone treatments as pre-requisites for legal gender recognition, does not seem consistent with a finding of intention to torture. Yet, as Hathaway, Nowlan and Spiegel observe, judicial actors – both international and national – often adopt a holistic approach to the question of intent, frequently locating the existence of sufficient intentionality within the severity of the treatment[750] (i.e. the notion that state actors cannot have treated individuals in a particular way without an intent to cause pain and suffering). Furthermore, scholars, such as Nowak, McArthur and Boulesbaa[751], while rejecting the idea that torture can arise from merely negligent conduct, argue that there can be torture where state authorities conduct themselves in a way where a severe level of pain and suffering is reasonably foreseeable. In the context of enforced medicalisation, irrespective of assumptions regarding consent, one can argue that severe pain and suffering are a foreseeable consequence if national laws require trans individuals to physically amend and sterilise their bodies.

Furthermore, in the age of the 'Transgender Tipping Point'[752], it is possible to question whether policy-makers – developing trans-related protocols – could honestly believe that all

[747] Harris, O'Boyle and Warbrick (n 173).
[748] Suzanne Egan, 'The necessary elements of torture: a consideration of the views of the Human Rights Committee in Giri v Nepal' (2012) Dublin University Law Journal 301, 305.
[749] ibid.
[750] Oona A. Hathaway; Aileen Nowlan; Julia Spiegel, 'Tortured Reasoning: The Intent to Torture under International and Domestic Law' (2012) 52 Virginia Journal of International Law 791, 836 – 837.
[751] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford University Press 2008) 73; Ahcene Boulesbaa, 'Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the U.N. Convention on Torture' (1990) 5 Florida International Law Journal 293, 293 and 309.
[752] Eliza Gray, 'The Transgender Tipping Point' (*Time,* 29 May 2014) http://time.com/135480/transgender-

applicants for gender recognition desire to access a medical transition pathway. [753] It is now increasingly implausible that policy-makers would genuinely assume a universal (medicalised) trans narrative. The many national and supra-national challenges to unwanted gender-confirming treatment illustrates that surgery, sterilisation and hormone treatments are not universally desired.[754] Green suggests that "in many cases of official disregard, the perpetrators are well aware of their passive-aggressive behaviour, and they enjoy thwarting and chipping away at…[trans] self-esteem."[755] Where law-makers and judges intentionally medicalise legal gender recognition, knowing that medical pre-conditions will overpower trans resistance, there is arguably a breach of art. 1 UN CAT.

C. Movements for Reform

In recent years, there have been international, regional and national efforts to move away from physical requirements. In a follow-up to her landmark 2011 SOGI report to the United Nations Human Rights Council[756], the UN High Commissioner for Human Rights called upon states to issue "legal identity documents, upon request, that reflect preferred gender, *eliminating abusive preconditions, such as sterilisation, forced treatment*…"[757] [emphasis added]. The United Nations Human Rights Committee (UN HRC) has similarly recommended that states should only enforce gender-confirming healthcare treatment which is "in the best interests of the individual", receives "consent" and is "limited to those medical procedures which are strictly necessary."[758] Regional organisations, including the Council of Europe and the Organisation of American States, have consistently affirmed trans bodily integrity rights.[759] In a highly-publicised 2015 Resolution, the Parliamentary Assembly of the Council of Europe encouraged State Parties to "abolish sterilisation and other compulsory medical treatment...as a necessary legal requirement to recognise a person's gender identity."[760]

tipping-point/ accessed 12 July 2015.
[753] This is so even if, as noted in the Introduction, detailed, in-depth research on trans lives around the world is still lacking.
[754] *YY* (n 39); *AP* (n 11); *Socialstyrelsen* (n 11); 1 BvR 3295/07 (n 11).
[755] Green (n 82) 92.
[756] United Nations High Commissioner for Human Rights, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (17 November 2011) UN Doc No. A/HRC/19/41.
[757] United Nations High Commissioner for Human Rights, 'Discrimination and violence against individuals based on their sexual orientation and gender identity' (4 May 2015) UN Doc No. A/HRC/29/23, [79(i)].
[758] United Nations Human Rights Committee, 'Concluding observations on the seventh periodic report of Ukraine' (22 August 2013) UN Doc No. CCPR/C/UKR/CO/7, [10].
[759] PACE Resolution 2015 (n 71), [6.2.2]; Organisation of American States General Assembly, 'Human Rights, Sexual Orientation and Gender Identity and Expression' (5 June 2014) Resolution No. AG/RES. 2863 (XLIV-O/14).
[760] PACE Resolution 2015 (n 71), [6.2.2].

In *AP, Garcon and Nicot*, the ECtHR held that sterilisation requirements violate physical and moral integrity, as enshrined in the right to 'private life' under art. 8 ECHR.[761] To the extent that France had conditioned gender recognition on submission to "a sterilisation operation or medical treatment creating a high probability of sterilisation"[762], it was acting contrary to the Convention. As noted, in 2011, the German Constitutional Court held that limiting gender recognition to persons who have "undergone gender reassignment surgery and are permanently infertile" is "not compatible with the right to sexual self-determination and physical integrity."[763] Similar conclusions have been reached by numerous national tribunals, including those in Italy[764], Argentina[765] and Canada.[766]

Since 2004[767], a growing number of states have enacted laws or policies which omit surgery, sterilisation and hormone therapy.[768] These countries now include Uruguay, Colombia, Taiwan, Ireland, the Netherlands, Norway, Denmark, Sweden and Belgium. In 2014, Hong Kong's Legislative Council voted down a proposed gender identity statute that would have required surgery and sterilisation.[769] Prior to the vote, the Hong Kong Equal Opportunities Commission publicly stated that the bill was "not compatible with international and domestic human rights obligations."[770] Argentina's transformative Gender Identity Act 2011 – the world's first wholly non-medicalised gender recognition statute – not only excludes a requirement for physical interventions, but also expressly affirms that applicants need not prove "that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place."[771] In Malta, the Gender Identity, Gender

[761] *AP* (n 11), [135].
[762] ibid.
[763] 1 BvR 3295/07 (n 11).
[764] Supreme Court of Italy (20 July 2015).
[765] *PRL*, Criminal and Correction Court No. 4 of Mar del Plata (10 April 2008).
[766] *XY v R* (n 11).
[767] Gender Recognition Act 2004 (United Kingdom).
[768] Neela Goshal and Kyle Knight, 'Rights in Transition: Making Legal Recognition for Transgender People a Global Priority' (*HRW Website*, 2016) https://www.hrw.org/world-report/2016/rights-in-transition accessed 25 May 2017.
[769] Joy Chia and Amy Barrow, 'Inching Towards Equality: LGBT Rights and the Limitations of Law in Hong Kong' (2016) 22(2) William and Mary Journal of Women and the Law 303, 322; Winnie Chan Wing Yan, 'Transsexual Marriage in Hong Kong: Reflections on the journey from the CFA's decision in *W v The Registrar of Marriages* to the Marriage (Amendment) Bill 2014' (2015) 4 – 6 file:///C:/Users/USER/Downloads/SSRN-id2556703.pdf accessed 25 May 2017.
[770] Hong Kong Equal Opportunities Commission, 'Promoting transgender people's right to equality with a gender recognition ordinance – Submission on the Marriage (Amendment) Bill 2014' (14 April 2014) LC Paper No. CB(2)1209/12-14(05).
[771] Gender Identity Act 2012 (Act Nº 26.743), art. 4.

Expression and Sex Characteristics Act 2015 proclaims that "[a]ll persons being citizens of Malta have the right to...bodily integrity and physical autonomy."[772]

III. Physical Intervention Requirements: A Breach of Non-Discrimination Rights?

There is compelling evidence that mandatory physical interventions violate bodily integrity. The circumstances and imposition of medical pre-conditions result in degrading, cruel, and in some contexts, tortuous treatment. Enforced medicalisation is not, however, solely condemned as a breach of physical autonomy. It has also been denounced as a discriminatory and unequal interference with core human rights.[773] In recommending the repeal of "mandatory corrective surgery" requirements, UN HRC has situated its observations within the equality guarantees of arts. 2 and 26 ICCPR.[774] The Special Rapporteur on Torture writes that physical requirements, such as "forced or otherwise involuntary gender reassignment surgery, sterilisation or other coercive medical procedures" are "rooted in discrimination on the basis of…gender identity."[775] In their landmark 2014 inter-agency statement, seven UN bodies[776] warned that requiring "sterilisation surgeries that are often unwanted" may "cause and perpetuate discrimination against transgender [communities]."[777]

A. The Complexity of Non-Discrimination Critiques

Non-discrimination critiques of surgery, sterilisation and hormone therapy raise complex questions. They typically rely upon highly general interpretations of equality, and they are less obvious or straightforward than bodily integrity claims. At an intuitive level, there is undoubtedly something compelling about labelling enforced medicalisation as a discriminatory practice. Physical requirements reflect a narrow mind-set, where applicants become mere

[772] Gender Identity, Gender Expression and Sex Characteristics Act 2015 (Act No. XI of 2015), s. 3(1)(d).
[773] PACE Resolution 2015 (n 71); 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [49]; Kohler and Erht (n 39) 10; Amnesty International (n 5) 7 and 90; ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (Australian Capital Territory 2012) 38.
[774] United Nations Human Rights Committee, 'Concluding observations on the seventh periodic report of Ukraine' (22 August 2013) UN Doc No. CCPR/C/UKR/CO/7, [10].
[775] 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [49].
[776] World Health Organisation, United Nations Development Programme, UN Women, Office of the UN High Commissioner for Human Rights, UN AIDS, United Nations Population Fund and United Nations Children's Fund.
[777] World Health Organisation and others, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement* (World Health Organisation 2014) 7 http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf accessed 1 June 2017.

"objects of medicine"[778] who lack agency or choice. Imposing medical pre-conditions (consciously or subconsciously) implies that trans people enjoy less protection under human rights law. Applicants can have their preferred gender formally acknowledged, but only if they compromise other fundamental guarantees. In that context, it is perhaps unsurprising that the seven UN agencies located physical requirements within "a long history of discrimination and abuse" directed against trans individuals.[779]

Yet non-discrimination critiques sit uneasily within the international framework set out in Chapter I. While trans advocates and soft law actors have been quick to condemn medical pre-conditions as impermissibly discriminatory, they have been less able (or willing) to identify how they reach that conclusion. There has been a notable failure to explain in what ways surgery, sterilisation and hormone therapy infringe international equality guarantees.[780]

(i.) Comparator-Based Analysis

Non-discrimination critiques have, in particular, under-engaged with the question of appropriate 'comparators'. As noted, where individuals allege unequal treatment because of a protected characteristic, they must show that a comparably situated person, who does not share that characteristic, would have been treated preferentially. In the context of physical requirements, soft law actors and trans advocates typically rely upon the general idea that – as compared with the cisgender population – only trans persons are required to medicalise in order to obtain an accurate legal gender.[781] The COE Commissioner has expressed "great concern that [trans] people appear to be the only group in Europe subject to legally prescribed, state-enforced sterilisation."[782] Similarly, Vade writes that "[n]on-transgender people do not have to prove their gender; they are taken at their word."[783] These critiques are correct in identifying a difference of treatment between cisgender and trans communities. However, they do not consider (the intellectually prior question of) whether cisgender individuals, who are comfortable with their preferred gender, are sufficiently similar to be compared with applicants for gender recognition.

[778] Commissioner for Human Rights of the Council of Europe (n 144) 10.
[779] World Health Organisation and others (n 174) 2.
[780] Commissioner for Human Rights of the Council of Europe (n 144) 10; Amnesty International (n 5) 7; Kohler and Erht (n 39) 10.
[781] Norton (n 76), 209.
[782] Commissioner for Human Rights of the Council of Europe (n 144) 8.
[783] Vade (n 82), 313.

One can argue that the act of requesting an amended legal gender creates such significant differences that non-discrimination analysis becomes meaningless. Is it reasonable to compare how the law treats individuals who do, and do not, petition for an amended legal gender? The unique circumstances of gender recognition may justify the imposition of additional (more onerous) standards. Put simply, medicalisation for legal transitions is enforced *only* against trans groups because *only* trans groups are legally transitioning. Appeals to how cisgender persons are treated compares apples with oranges.

A possible response is that, while applicants for gender recognition are not similarly situated to cisgender communities, 'cisgender norms' are the standard by which trans claims for 'gender identity' discrimination are assessed. Thus, where trans individuals allege inequality on the basis of their preferred gender, they must show that there is a cisgender person: (a) with whom they are in a comparable position; and (b) who would have been preferentially treated. However, it is precisely because trans individuals are not cisgender, and because they do not identify with their preferred gender, that they are requesting gender recognition. To the extent that proving medical conditions are discriminatory depends upon identifying a similarly situated cisgender comparator, this is a standard that applicants will not be able to satisfy. Here, one is reminded of MacKinnon's observation that adopting a male-orientated comparator exponentially limits women's ability to successfully prosecute discrimination cases.[784]

As noted, this is not an insignificant complaint, and it does feed into wider criticisms of comparator-based adjudication discussed in Chapter I. Yet, within a context where comparators remain an important feature of international human rights, critiquing cisgender norms does not add to superficial and overly-generalist interpretations of non-discrimination. It may be instructive that, while trans advocates and soft law actors have prioritised non-discrimination critiques, they have (with very limited exceptions[785]) been absent from regional and national case law.[786]

[784] Catherine MacKinnon, 'Reflections on Sex Equality under the Law' (1990) 100(5) Yale Law Journal 1281, 1297.
[785] In *NN*, the Stockholm Court of Administrative Appeal grounded its analysis in arts. 8 and 14 ECHR, *Socialstyrelsen* (n 11).
[786] Instead, the focus has been on bodily integrity, see: *YY* (n 39); *AP* (n 11); 1 BvR 3295/07 (n 11).

B. Physical Intervention Requirements: Substantively Unequal?

While acknowledging the continuing centrality of comparator analysis in international law, and recognising the insufficiency of current soft law and advocacy strategies, this thesis also seeks to avoid an overly formalist approach to medicalisation. There is a need to identify precisely when trans and cisgender persons are (and are not) similarly situated. However, in those circumstances where a comparison can be made between both groups, the simple administration of the same (or similar) treatment should not automatically negate discrimination.[787]

Two possible responses to non-discrimination critiques are that: (a) all infants – whether they grow up to identify as cisgender or trans – are assigned a legal gender according to the same criteria and applying the same social norms (see Chapter III). Even though they may not ultimately identify with that birth-assigned gender, trans individuals are not comparatively discriminated against by the method of gender assignment; (b) if a cisgender person were to apply for gender recognition, they too would have to submit to (any required) physical interventions.[788] For both responses, the underlying argument is that medical pre-conditions result from gender processes rather than animus. They are applied, not against trans communities, but rather against all individuals who – whether at birth or in later life – have their gender recognised by the law.

It is questionable, however, to what extent this line of reasoning comprehends how (despite appearances) medicalisation substantively discriminates against trans identities. While it is correct that physical requirements would apply equally to cisgender applicants, they are undoubtedly designed with trans individuals in mind. Medical pre-conditions reveal the law's reaction to gender diversity, and how it perceives experiences beyond cisgender norms. In that way, even though they may be applicable to cisgender persons, such pre-conditions have a unique impact on trans identities. In Chapter I, this thesis adopts Fredman's "multi-dimensional" model of 'substantive' equality.[789] Moving beyond a 'likes alike' framework, Fredman conceptualises non-discrimination in terms of four aims: (a) ending systematic disadvantage arising from status; (b) promoting "dignity and worth"[790]; (c) not requiring

[787] Amartya Sen, *Inequality Re-examined* (Oxford University Press 1992) 1.
[788] This is the unlikely scenario of a person, who has female-associated sex characteristics, was assigned female at birth, identifies as female, but who applies for a male legal gender (and vice versa for a male individual applying for a female legal gender).
[789] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 25.
[790] ibid.

individuals to assimilate in order to enjoy equality; and (d) creating possibilities for social and political participation.[791]

Using Fredman's four-pronged analysis, one can identify substantively-unequal elements of physical intervention requirements. While, at the outset, it must be acknowledged that the identification of these aspects still relies upon generalist interpretations of inequality (and remains less compelling than bodily integrity claims), it is nevertheless important in determining the compatibility of medicalisation with contemporary human rights.

(i.) Sexism and Gender-Stereotyping

Explaining the second limb of her framework ("respect for dignity and worth"[792]), Fredman emphasises the need to redress "stigma, stereotyping, humiliation and violence."[793] A substantively equal gender recognition model is one which challenges and rejects the historical biases to which trans populations have been subject. Yet, rather than challenging stereotypes and stigma, physical requirements – both in their motivation (Chapter III) and application (below) – actually reinforce prejudice-based norms.[794]

As noted in Section I, although gender-confirming treatments are requirements around the world, applicants typically have no automatic access. Instead, they must obtain medical approval, usually through a diagnosis of gender dysphoria. In many jurisdictions, diagnosis assessments are made using gender-stereotyped criteria.[795] According to Vanderhorst, "the standards for obtaining [treatment]…are often inherently heterosexist, cissexist and classist."[796] Etta Keller notes that "medical professionals who screen [trans persons] for surgery and counsel them before and after surgery are…accused of perpetuating and reinforcing traditional gender stereotypes."[797] Deciding whether applicants can undergo legally prescribed procedures, medical professionals often rely upon their own subjective definitions of 'maleness' and 'femaleness'.[798] Trans women who 'look like' women are more likely to gain approval than

[791] ibid.
[792] ibid.
[793] ibid.
[794] Amnesty International (n 5) 90.
[795] Levasseur (n 143), 999 – 1000.
[796] Blaise Vanderhorst, 'Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex' (2015) 9(1) Harvard Law and Policy Review 241, 265.
[797] Susan Etta Keller, 'Crisis of Authority: Medical Rhetoric and Transsexual Identity' (1999) 11(1) Yale Journal of Law and Feminism 51, 54.
[798] Spade (n 38), 20.

individuals who fail to reproduce "real femininity".[799] Shapiro describes "[male] doctors using their own responses to a [female] patient – that is, whether or not the doctor is attracted to the patient – to gauge suitability."[800] Similarly, Human Rights Watch has documented refusals to authorise treatment because an applicant's clothes were "not 'male enough.'"[801]

Conditioning access to physical interventions, which are requirements for gender recognition, on traditional gender norms is problematic in a number of ways. First, reducing men and women to stereotypes reinforces sexism-based ideology. It is harmful to all individuals, but particularly impacts women[802] and non-binary persons.[803] Requiring that female-identified applicants be 'feminine' legitimises expectations of women as weak, sensitive and needing protection. It conceptualises women through a uniquely male gaze. Instead of affirming identities to promote "dignity and worth", trans women must prove that they are worthy within the context of male prejudices and sexual desires. Such gendered assessments invalidate all but a narrow category of trans feminine experience.[804] It undermines the status of women as independent rights holders.

Gender norms are also problematic because of the unequal way that they are enforced against trans communities. Trans individuals are "held to even higher sexist standards than are non-transgender people."[805] In order to access prescribed treatments, applicants must reproduce identifiably 'masculine' and 'feminine' narratives. This can involve exhibiting specific physical attributes, such as growing body hair for men or using make-up for women. It may also require 'gender-conforming' interests, such as sport for men or fashion for women. Such gendered expectations are not, however, applied equally to the cisgender population. Cisgender men can

[799] Tomchin (n 67), 851. See also: Nadzeya Husakouskaya, 'The sex change commission in Ukraine' (*Open Democracy Website*, 22 October 2014) https://opendemocracy.net/od-russia/nadzeya-husakouskaya/sex-change-commission-in-ukraine accessed 26 October 2014.
[800] Judith Shapiro, 'Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex' in Jennifer Robertson (ed), Same-Sex Cultures and Sexualities: An Anthropological Reader (Blackwell 2005) 142.
[801] Human Rights Watch, 'Allegation letter regarding the legal gender recognition procedure in Ukraine, as specified in Order No. 60 of the Ministry of Health of Ukraine' (27 April 2015) https://www.hrw.org/news/2015/04/27/allegation-letter-regarding-legal-gender-recognition-procedure-ukraine-specified accessed 1 June 2017.
[802] For a general discussion of gender-based stereotyping, and their effects on women, see Germaine Greer, *The Female Eunuch* (Paladin 1971); Betty Friedan, *The Feminine Mystique* (Victor Gollancz 1971); Naomi Wolf, *The Beauty Myth: How Images of Beauty are Used against Women* (Vintage 1991); Simone de Beuvoir, *The Second Sex* (Vintage 1997).
[803] As noted in Chapter VI, where gender recognition operates on the basis of a defined, stereotype-driven male-female binary, the law will be unable to respond to those persons who experience a gender beyond 'man' and 'woman'.
[804] Serano observes the numerous different ways in which trans women experience a feminine gender identity, see: Serano (n 15).
[805] Vade (n 82), 272.

enjoy their preferred legal gender without respecting masculine gender norms. In order to retain their birth-assigned male gender, cisgender men need not grow body hair, cultivate muscles or show a sufficient appreciation for sport.[806] Indeed, except in those jurisdictions that maintain cross-dressing laws[807], cisgender men could conceivably live all aspects of their lives as women without having to legally transition (in countries without gender recognition, such as Thailand, trans women live all aspects of their lives as women *without being able* to legally transition). Trans individuals must prove that they can live a stereotypically gendered life which ignores the multiple ways in which male and female identities actually exist.[808] There is no standard model of 'manhood' or 'womanhood'. Requiring only applicants for recognition to reproduce gender norms imposes a discriminatory burden.

(ii.) Selective Avoidance of Bodily Ambiguity

There is also inequality of application in the way that medicalisation selectively avoids bodily ambiguity. In Chapter III, this thesis explores how fears over 'unnatural' or 'abnormal' bodies motivates physical intervention requirements.[809] Adhering to a 'binary sex paradigm'[810], law-makers oblige applicants to modify their bodies so that, post-transition, their physical characteristics are consistent with 'natural' expectations for their preferred gender.[811] Chapter III challenges binary sex reasoning as scientifically and socially inaccurate.[812] It illustrates that arguments grounded in the natural or determinative character of biology cannot give rise to 'proportionate' interferences with human rights. Yet, even if this was not the case, the application of these arguments is still disproportionately (and discriminatorily) directed towards trans bodies.

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[806] One must acknowledge, however, that gender non-conformity for cisgender persons is not totally without consequence. Depending upon culture and context, cisgender persons who resist gender norms may experience social censure and isolation. In ordinary cases, this can result in men and women being mocked for individual preferences (e.g. the man who knits). However, in more extreme situations, it may manifest itself in homophobic violence and in honour crimes. Children, in particular, experience significant gender policing, see Andrea Roberts and others, 'Childhood Gender Nonconformity: A Risk Indicator for Childhood Abuse and Posttraumatic Stress in Youth' (2012) 129(3) Pediatrics 410.

[807] See e.g. Malaysia, 'Malaysia court upholds ban on cross dressing by transgender Muslims' (*Reuters,* 8 October 2015) http://www.reuters.com/article/us-malaysia-verdict-crossdressing-idUSKCN0S21CE20151008 accessed 31 May 2017.

[808] Spade (n 38), 28.

[809] Clare Ainsworth, 'Sex Redefined' (2015) Nature 518 http://www.nature.com/news/sex-redefined-1.16943 accessed 2 March 2015; Loue (n 78), 31.

[810] Julie Greenberg, 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41(2) Arizona Law Review 265, 275.

[811] ibid.

[812] ibid; Damian A Gonzalez-Salzberg, *'The Accepted Transsexual and the Absent. Transgender: A Queer Reading of the Regulation* of *Sex/Gender by the European Court of Human. Rights' (2013) 29(4)* American University International Law Review 797, 806; Tobin (n 10), 408.

As with gender stereotyping for diagnoses, the law does not hold cisgender and (adult) intersex persons to the same 'normal' body standards as applicants for gender recognition.[813] According to Tomchin, "only [trans] people are held to a definition of gender that hinges entirely on possessing certain body parts."[814] Discomfort with visible breast tissue has not resulted in cisgender men with gynecomastia[815] having to surgically alter their chests.[816] Women who experience intersex variance, who have been assigned female and who identify as female are not required to change their bodily ambiguity (e.g. genitalia, testosterone levels, etc.). It would be unthinkable that avoiding bodily ambiguity could result in a cisgender woman, who undergoes a mastectomy or hysterectomy as part of cancer treatment, being stripped of her female legal gender.[817] In all these circumstances, the law is happy to acknowledge the person's preferred legal gender, even though the person exhibits a non-normative 'male' or 'female' body.

Law-makers and courts accept a considerable amount of bodily diversity among the cisgender and adult intersex populations. Why are trans persons treated differently?[818] Cisgender individuals with gynecomastia can retain their preferred male gender but trans men must

[813] The binary sex paradigm does motivate the performance of gender 'normalizing' surgeries on intersex infants who are born with ambiguous genitalia. Like physical intervention requirements, these surgeries seek to ensure that all persons have 'gender appropriate' sex characteristics. Where intersex infants are assigned a gender, surgical intervention is intended to create a 'congruent' external (and internal) bodily configuration. Gender normalizing surgeries are performed in circumstances of (at best) questionable medical consent. See: Francesca Romana Ammaturo, 'Intersexuality and the "right to bodily integrity": critical reflections on female genital cutting, circumcision, and intersex "normalizing surgeries" in Europe' (2016) 25(5) Social and Legal Studies 591; Nancy Ehrenreich and Mark Barr, 'Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of Cultural Practices' (2005) 40(1) Harvard Civil Rights-Civil Liberties Law Review 71; Samantha Uslan, 'What Parents Don't Know: Informed Consent, Marriage, and Genital-Normalizing Survey on Intersex Children' (2010) 85(1) Indiana Law Journal 301.

[814] Tomchin (n 67), 842. It is important to draw a distinction between (a) cisgender persons who experience (as far as one can) a stereotypical 'male' or 'female' body; and (b) cisgender persons who, for whatever reason, do experience a non-normative bodily configuration. As noted above, there is significant doubt as to whether those in category (a) are in a sufficiently similar position to trans persons that a meaningful discrimination analysis can be applied. There is an arguable case that, if a person is assigned male, has a society-determined male body and identifies with a male gender, he is not in a similar position to a trans man, who has been assigned female, and whose body is considered to be female by society, but who wishes to obtain a male legal gender. On the other hand, where a cisgender male, has a non-normative male body (e.g. excessive breast tissue, absence of penis, etc.) but wishes to retain his preferred male gender, that man may be in a comparable situation to a trans man who may have very similar body traits and who may also wish to have a male legal gender. To the extent that both men have similar bodies, but only the trans man is being asked to modify his body to be recognised as a legal male, there is *prima facie* the appearance of unequal treatment.

[815] Gynaecomastia is a "common condition that causes boy's and men's breasts to swell and become larger than normal", 'What is Gynaecomastia' (*NHS Website,* 1 April 2015) http://www.nhs.uk/chq/Pages/885.aspx?CategoryID=61 accessed 30 August 2017.

[816] Tomchin (n 67), 842.

[817] ibid; Elise Meyer, 'Designing Women: The Definition of "Woman" in the Convention on the Elimination of All Forms of Discrimination against Women' (2015) 16(2) Chicago Journal of International Law 553, 574.

[818] Carrera, DePalma and Lameiras (n 58), 998 – 999.

remove their breast tissue.[819] Those who lose their penis, experience a micro penis or have no penis cannot be deprived of their birth-assigned maleness, but trans men who refuse phallus construction remain in the female legal gender.[820] Physical intervention asks trans persons to observe body norms which are not imposed on cisgender identities. For Levasseur, "[trans] bodies are somehow placed in a separate category for display and assessment in the courtroom."[821] This inconsistent reliance on the need to avoid bodily ambiguity reinforces gender identity discrimination.

(iii.) Intersecting Inequalities

As noted, discrimination is not a unidimensional phenomenon. Individuals suffer intersecting inequalities which reinforce social and legal marginalisation.[822] Human rights analysis must be capable of identifying, and responding to, the multi-faceted ways in which people experience isolation and prejudice.

Physical requirements do not simply impact applicants because they have a non-traditional gender identity. Rather, they cut across the many inequalities which trans communities experience, and weigh particularly heavily on the most vulnerable and at-risk populations.[823] First, and perhaps unsurprisingly, medical pre-conditions place especial burdens on those (many) trans persons who suffer economic deprivation.[824] Around the world, trans individuals have disproportionately low access to basic services, including healthcare.[825] For many applicants, the excessive costs of surgery, sterilisation and hormone therapy, combined with

[819] ibid.
[820] ibid. See also: Daniella Schmidt, 'Bathroom Bias: Making the Case for Trans Rights under Disability Law' (2013) 20(1) Michigan Journal of Gender and Law 155, 178.
[821] Levasseur (n 143), 1001.
[822] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139, 140.
[823] For further discussion of trans rights and intersectionality, see: Michael James Griffin, 'Intersecting Intersectionalities and the Failure of the Law to Protect Transgender Women of Color in the United States' (2016) 24 Tulane Journal of Law and Sexuality: A Review of Sexual Orientation and Gender Identity in the Law 123.
[824] European Parliament Committee on Women's Rights and Gender Equality, *Report on Poverty: A Gender Perspective* (26 April 2016) (2015/2228(INI)) 6 and 12 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2016-0153+0+DOC+PDF+V0//EN accessed 1 June 2017; James and others (n 86) 83 – 84; Centre for American Progress and Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being Transgender in America* (Movement Advancement Project 2015) 3 – 15; RECLACTRANS (n 129) 26.
[825] Tomchin (n 67), 845.

institutional prejudices among medical providers[826], create insurmountable barriers.[827] While an increasing number of jurisdictions publically provide gender-confirming interventions[828], numerous countries still demand that applicants pay for prescribed treatments (even where they are neither medically necessary nor desired).[829] The result is a two-tier system of gender recognition, where trans individuals experience unequal access to gender recognition depending upon their financial resources. As Newlin concludes, "[b]y making a legal change dependent on having reassignment surgery", courts and policy makers "limit access for people who lack financial resources, leaving the poor and those without access to health care with a much more difficult road."[830]

Medical pre-conditions also intersect with vulnerabilities relating to age and health status. As discussed in Chapter V, even in those jurisdictions which do not expressly exclude minors from legal gender recognition, the imposition of physical intervention requirements – which many healthcare professionals often will not perform until a person is 18 years old – *de facto* means that individuals cannot legally transition until they reach majority.[831] Similarly, while older persons typically do not encounter professional refusals to treat, their advancing years can create medical complications which militate against surgery, sterilisation or hormone therapy. In *Schlumpf v Switzerland*, the ECtHR held that a 67 year old trans woman was entitled to undergo gender-confirmation surgery without observing a two-year waiting period prescribed by the case law of the Swiss Federal Insurance Court.[832] The Court noted that waiting until she was 69 years would have exponentially increased the risks to the applicant's health.[833]

Finally, medicalisation particularly burdens trans individuals who are also persons of faith. As among the cisgender population, there are many trans individuals who have deep religious convictions.[834] Where non-medically necessary interventions are proscribed by scripture, religious adherents experience both practical and moral difficulty in obtaining gender

[826] See generally: Stephen Whittle and others, *Transgender Euro Study: Legal Survey and Focus on the Transgender Experience of Health Care* (ILGA-Europe 2008); James and others (n 86) 93.
[827] James and others (n 86) 83 – 84; House of Commons Select Committee (n 84) 42 – 50; New Zealand Human Rights Commission (n 85) 50 – 56.
[828] See e.g. Walter Pintens, 'The Legal Status of Transsexual and Transgender Persons in Belgium and the Netherlands' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 113; Barbara Havelkova, 'The Legal Status of Transsexual and Transgender Persons in the Czech Republic' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 130; Atamer (n 26) 317.
[829] Liu (n 31) 339 – 340; Nishitani (n 28) 371; Chih-hsing Ho (n 29) 430; Garland (n 14) 587.
[830] Newlin (n 90), 489.
[831] World Professional Association for Transgender Health, *Standards of Care* (n 18) 21.
[832] App No. 29002/06 (ECtHR, 5 June 2009), [112] and [115].
[833] ibid.
[834] See e.g. *Hamalainen v Finland* [2015] 1 FCR 379.

recognition. The Roman Catholic Pope, Francis I, has condemned gender-confirmation surgery as "a manipulation of life."[835] Jewish law prevents the surgical imposition of sterilisation except for where it is required to save a person's life.[836] In Islam, many religious leaders interpret sharia law as prohibiting gender-confirming interventions.[837] Physical requirements thus place applicants in a catch-22 scenario: either compromise their gender identity or compromise their religious convictions. For trans persons of faith, medical pre-conditions may definitively exclude them from gender recognition processes.

Conclusion

The requirement to undergo physical medical interventions is a primary feature of gender recognition laws around the world. In many jurisdictions, surgery, sterilisation and hormone therapy are the "price to pay" [838] for official state acknowledgement. As rules and practices which often contradict trans needs and desires, physical pre-conditions represent an important interference with core human rights. Mandating invasive, painful and permanent modifications, enforced medicalisation reaches the threshold for 'cruel', 'inhuman' and 'degrading' treatment. Given the intentional and purposeful manner in which physical requirements are frequently imposed, they may even constitute tortuous acts.

Surgery, sterilisation and hormone therapy are also condemned as discriminatory measures. Advocates and soft law actors complain that trans persons are the only group for whom an accurate civil status depends upon body modifications. However, while medical conditions do exhibit substantively unequal characteristics – both in terms of their application and the norms that they promote – non-discrimination arguments often fail to engage with key aspects of human rights adjudication, particularly comparator analysis. Overall, they are a less compelling critique than evaluations grounded in bodily integrity.

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[835] Heather Saul, 'Pope Francis Compares Arguments for Transgender Rights to Nuclear Arms Race' (*The Independent*, 21 February 2015) http://www.independent.co.uk/news/people/pope-francis-compares-arguments-for-transgender-rights-to-nuclear-arms-race-10061223.html accessed 1 June 2017; Human Rights Campaign, 'Seven Quotes that Make Pope Francis Complicated for LGBTQ People' (*HRC Website, No Date Available*) http://www.hrc.org/resources/seven-quotes-that-make-pope-francis-complicated-for-lgbt-people accessed 1 June 2017.

[836] Shaul Weinreb, 'Tubal Ligation and the Prohibition of *Sirus*' (2000) Journal of Halacha and Contemporary Society http://www.daat.ac.il/daat/english/journal/weinreb-1.htm accessed 25 November 2015.

[837] Human Rights Campaign, 'Stances of Faiths on LGBT Issues: Islam – Sunni and Shi'a' (*HRW Website,* 6 April 2015) http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-islam> accessed 25 November 2015.

[838] Veale and others (n 5), 107.

In Chapter III, this thesis switches from considering whether physical interventions interfere with human rights and questions whether any interference can be deemed permissible. Placing particular emphasis on the policy goals which medicalisation pursues, as well as the necessity of the required procedures, Chapter III asks whether surgery, sterilisation and hormone therapy are a 'proportionate' restriction on core protections and guarantees.

Chapter III

Physical Medical Intervention Requirements: Rationales

Introduction

Chapter II illustrates how physical intervention requirements interfere with core human rights. In order to obtain gender recognition, applicants must, *inter alia*, compromise their bodily integrity – submitting to physical amendments and and forfeiting their reproductive capacities. Involuntary surgery, sterilisation and hormone therapy are cruel, inhuman and degrading treatment.[839] Depending upon context, they may even constitute tortuous acts. In terms of non-discrimination guarantees, medicalisation raises more complex considerations. However, given the questionable body and gender norms upon which physical requirements rely, there is (at least an arguable) case that medical pre-conditions create substantive inequality.

Chapter III now moves to consider whether these interferences can be justified as proportionate limitations on human rights. In Chapter I, this thesis adopted Huscroft, Miller and Webber's multi-pronged proportionality analysis.[840] In determining whether surgery, sterilisation and hormone therapy are a permissible restriction, rights adjudicators must ask four questions: First, "[d]oes the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?"[841] Second, "[a]re the means in service of the objective rationally connected (suitable) to the objective?"[842] Third, "[a]re the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?"[843] Finally, "[d]o the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation?"[844] It is to this four-stage analysis (with a particular

[839] At the outset of Chapter III, it is important to reiterate that, for some trans individuals, access to gender-confirming healthcare is a desired and necessary step towards self-actualisation. Chapters II and III focus on the requirement that applicants for recognition – irrespective of their preferred transition pathways – must medicalise their bodies to be legally affirmed. This thesis respects and promotes the right of trans populations to access safe, affordable and consensual gender-confirming interventions.
[840] Grant Huscroft, Bradley W Miller and Gregoire Webber, 'Introduction' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 2.
[841] ibid.
[842] ibid.
[843] ibid.
[844] ibid.

emphasis on Steps 1 and 3) that Chapter III refers when considering the proportionality of physical interventions.

At the outset, it is important to re-acknowledge that prohibitions on torture and other ill-treatment are absolute.[845] They are not subject to 'balancing' analysis, and cannot be defended by reference to public policy goals.[846] To the extent that surgery, sterilisation and hormone therapy constitute torture, cruel and inhuman or degrading treatment, proportionality analysis is irrelevant. Yet, even acknowledging this caveat, proportionality remains an important consideration.

While medical pre-conditions may be incompatible with international (and regional) prohibitions on torture and other ill-treatment, they have not typically been addressed using this framework. Instead, rights adjudicators more frequently condemn physical requirements as a breach of other (non-absolute) human rights. In *YY v Turkey*[847] and *AP, Garcon and Nicot v France*[848], the ECtHR approached mandatory sterilisation through the qualified lens of art. 8 ECHR ("physical and moral integrity"[849]) rather than art. 3 ECHR ("torture or…inhuman or degrading treatment or punishment"). This has also been the strategy of numerous soft law actors and domestic courts.[850] To the extent that tribunals are relying upon qualified rights – which necessitate proportionality analysis – it is important to examine whether medical requirements are compatible therewith.

Engaging in proportionality review facilitates a re-examination of the justifications for medicalisation. In the first of their four prongs, Huscroft, Miller and Webber ask whether restricting human rights "pursue[s] a legitimate objective of sufficient importance."[851] Where state authorities cannot illustrate a rational justification, there should be no need for further assessment. A measure which does not pursue a legitimate aim cannot be a proportionate interference.

[845] United Nations Committee against Torture, 'General Comment No. 2 on the implementation of article 2 by State Parties' (24 January 2008) UN Doc No. CAT/C/GC/2, [5].
[846] 'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 February 2010) UN Doc No. A/HRC/13/39/Add.5, [41].
[847] App No. 14793/08 (ECtHR, 10 March 2015).
[848] App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017).
[849] *X and Y v Netherlands* [1986] 8 EHRR 235, [22].
[850] Stockholm Court of Administrative Appeal*, Socialstyrelsen v NN* Mål nr 1968-12 (19 December 2012); Federal Constitutional Court of Germany, 1 BvR 3295/07 (11 January 2011).
[851] Huscroft, Miller and Webber (n 2) 2.

In the context of gender recognition, the 'rationales' for physical intervention are particularly important. While, in recent years, regional and national tribunals have begun to condemn medical pre-conditions, they have largely failed to engage with the justifications offered. Judges may set aside surgery and sterilisation as disproportionate interferences, but they are slower to conclude that imposing these procedures lacks a legitimate aim. In some cases, courts have even endorsed the policy goals which motivate medicalisation.[852] Yet, given that many physical requirements are imposed – often explicitly – because of bias, prejudice and stereotyping[853], it is important to expose these discriminatory foundations. Transphobic norms, which encourage medical conditions, have an impact beyond gender recognition. Although – if left unchallenged – they may be insufficient to justify physical intervention requirements, they can limit trans rights in other legal and social contexts (e.g. access to adoption, etc.).

Chapter III subjects medical pre-conditions to proportionality review. The chapter proceeds in four sections. In Sections I and II, the thesis explores two primary (and inter-connected) justifications for surgery, sterilisation and hormone therapy. Section I focuses on what Greenberg calls the "binary sex paradigm".[854] Assuming that only two unambiguous body configurations exist, and that sex characteristics determine legal gender, state actors require physical interventions to ensure that, post-recognition, applicants exhibit 'natural' and 'normal' physical traits.[855] Drawing from existing scientific data, and observing how the law operates in practice, Section I challenges 'binary sex' as an unpersuasive justification for medicalising gender recognition.

In Section II, the thesis focuses on mandatory sterilisation. It considers how discomfort with trans procreation has encouraged limitations on applicants' reproductive rights. Citing concerns over normatively unacceptable procreation, as well as fears about legal certainty and child welfare, law-makers and judges require that applicants be incapable of bearing or begetting children. Yet, as with binary sex reasoning, justifications based on 'normal' or 'standard' body functions are scientifically, legally and intellectually problematic. Section II confronts the

[852] *YY* (n 9), [41]; *AP* (n 10), [132]; 1 BvR 3295/07 (n 12); *Socialstyrelsen* (n 12).
[853] Harper Jean Tobin, 'Against the Surgical Requirement for Change of Legal Sex' (2006) 38(2) Case Western Reserve Journal of International Law 393, 417; Abigail Lloyd, 'Defining the Human: Are Transgender People Strangers to the Law?' (2005) 20(1) Berkeley Journal of Gender, Law and Justice 150, 160; Pooja Gehi and Gabriel Arkles, 'Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People' (2007) 4(4) Sexuality Research and Social Policy 7, 15.
[854] Julie Greenberg, 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41(2) Arizona Law Review 265, 275.
[855] Sonia Katyal, 'The Numerous Clausus of Sex' (2017) 84 University of Chicago Law Review 389, 429.

argument that procreative capacities *do* and *should* determine legal gender. It illustrates that sterilisation is unnecessary to ensure certainty in family law or to protect the welfare of minors.

In Sections III and IV, the thesis addresses two further justifications which, although not as prominent as 'binary sex' and 'reproduction' rationales, have nonetheless been raised in support of surgery, sterilisation and hormone therapy.

Section III explores the idea of gender 'permanence'. It explains how a perceived need to avoid ill-considered or premature transitions inspires the imposition of medical requirements. Section III asks whether achieving gender permanence is a sufficiently important objective, and questions whether there are alternative (less invasive) methods to filter flippant or thoughtless applications. In Section IV, the thesis turns to the issue of gender-segregation. In a number of jurisdictions, law-makers and judges have argued that, without a requirement to medically transition, gender recognition would obstruct women-only and men-only spaces. Gender-specific services and accommodations cannot operate if persons, with unanticipated sexed-bodies, are free to enter. However, challenging the justifications for excluding trans persons and noting the possibility for exceptions to the standard recognition rules, Section IV argues that segregation-focused objectives cannot create a proportionate interference with trans human rights.

I. Binary Sex Paradigm

The first, and perhaps most influential, aim of surgery, sterilisation and hormone therapy is to maintain the 'natural' link between legal gender and biology.[856] As noted, in *Corbett v Corbett (otherwise Ashley) (No1)*, Ormrod J refused to acknowledge April Ashley's preferred female gender for the purposes of English marriage law.[857] Although Ashley had submitted to gender-confirming surgery, the judge concluded that men and women have different and immutable biological configurations which establish gender status.[858] As Ashley was unable to definitively modify her sex characteristics, she could not be a legal woman and, therefore, lacked the capacity to marry Arthur Corbett.

Moving away from the *Corbett* reasoning, many jurisdictions – relying upon advances in medical science – have challenged the notion of body immutability.[859] There is now a broad consensus that trans individuals can significantly align their sex characteristics with their preferred gender. Yet, law-makers and judges have been more reluctant to question *Corbett*'s other central claim: that binary sex characteristics determine legal gender.[860] Newlin observes that while "many states have… abandoned [the *Corbett*] rule", they "continue to focus on external sex characteristics, genetics, and gonads in making their determinations."[861]

The imposition of physical intervention requirements typically relies upon two assumptions: (a) human beings *all* have one of two, unambiguous and mutually-exclusive sex characteristic formations; and (b) these biological characteristics determine legal gender.[862]

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[856] Paisley Currah, 'Gender Pluralisms under the Transgender Umbrella' in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 15. See also: *MT v JT* 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (New Jersey), 209; Katyal (n 17), 403.
[857] [1971] 2 All ER 33.
[858] ibid, 48.
[859] See e.g.: *Goodwin v United Kingdom* [2002] 35 EHRR 18 (Council of Europe); *MT* (n 20) (New Jersey); *Re Kevin: Validity of Marriage of Transsexual* [2001] 28 Fam LR 158 (Australia); *W v Registrar of Marriages* [2013] HKCFA 39 (Court of Final Appeal of the Hong Kong Special Administrative Region); Supreme Court of South Korea, En Banc Order 2004Seu42 (22 June 2006); *M v M* [1991] NZFLR 337 (New Zealand).
[860] Wilchins writes that "[c]isgender society just can't get over its fixation on genitals as equal to gender", Riki Wilchins, 'The Age of Genderqueer and "They" Has Arrived' (*The Advocate,* 5 April 2017) https://www.advocate.com/commentary/2017/4/05/age-genderqueer-and-they-has-arrived accessed 31 August 2017.
[861] Alice Newlin, 'Should a Trip from Illinois to Tennessee Change a Woman into a Man? Proposal for a Uniform Interstate Sex Reassignment Recognition Act' (2008) 17(3) Columbia Journal of Gender and Law 461, 468.
[862] Clare Ainsworth, 'Sex Redefined' (2015) Nature 518 http://www.nature.com/news/sex-redefined-1.16943 accessed 2 March 2015; Sana Loue, 'Transsexualism in medicolegal limine: an examination and a proposal for change' (1996) 24(1) Journal of Psychiatry and Law 27, 31; Emma Inch, 'Changing Minds: The Psycho-Pathologization of Trans People' (2016) 45(3) International Journal of Mental Health 193, 196.

In jurisdictions which maintain medical pre-conditions, the law not only concedes that individuals *can* alter their sexed-bodies but also mandates that they *must* do so. Relying upon a "binary sex paradigm"[863], the law promotes the idea that, as a matter of nature, all 'men' and 'women' inevitably follow two uniform biological pathways.[864] Depending upon whether they are male or female, human beings will exhibit pre-determined biological features.[865]

Under the binary sex model, sex characteristics become the determinants of legal gender.[866] It is the fact that an individual has breasts, a vagina and a uterus that gives rise to her female status.[867] Similarly, officials designate a person as male because he has testes and a penis. The binary sex paradigm permits of no bodily diversity.[868] If sex characteristics establish legal gender, trans men cannot be legally recognised while they retain their breasts, a vagina or the ability to conceive children.[869] A trans woman will not be acknowledged if she has a penis or produces sperm.[870] As Currah observes, the woman "who retains her penis is not really [considered] a woman."[871]

A. Binary Sex – Natural and Normal?

Claims that there are only two rigid, naturally occurring sex configurations (which applicants for recognition must replicate) are "medically, scientifically, and factually inaccurate."[872] Greenberg writes that "a binary sex paradigm does not reflect reality. Instead, sex and gender range across a spectrum."[873] Among all populations – cisgender and trans – there is significant

[863] Greenberg (n 16), 275.
[864] Newlin (n 23), 484.
[865] Laura Langley, 'Self Determination in a Gender Fundamentalist State: Towards Legal Liberation of Transgender Identities' (2006) 12(1) Texas Journal of Civil Liberties and Civil Rights 101, 113.
[866] Hélène Frohard-Dourlent and others, '"I would have preferred more options": accounting for non-binary youth in health research' (2017) 24(1) Nursing Inquiry 1, (p. 2); Ingrid Sell, 'Not Man, Not Woman: Psycho-spiritual Characteristics of a Western Third Gender' (2001) 33(1) The Journal of Transpersonal Psychology 16, 16.
[867] Inch (n 24), 196.
[868] Paisley Currah and Lisa Jean Moore, '''We Won't Know Who You Are'': Contesting Sex Designations in New York City Birth Certificates' (2009) 24(3) Hypatia Journal of Feminist Philosophy 113, 114.
[869] Julie Nagoshi and Stephan/ie Brzuzy, 'Transgender Theory: Embodying Research and Practice' (2010) 25(4) Affilia 431. It must be acknowledged that, even within trans populations, there are some who believe that unless a person submits to full gender-confirming surgery, they should not be validated in their preferred gender, see: Tam Sanger, 'Trans governmentality: the production and regulation of gendered subjectivities' (2008) 17(1) Journal of Gender Studies 41, 47.
[870] Paisley Currah, 'Expecting Bodies: The Pregnant man and Transgender Exclusion from the Employment Non-Discrimination Act' (2008) 36(3-4) Women's Studies Quarterly 330, 333.
[871] ibid.
[872] M Dru Levasseur, 'Gender Identity Defines Sex: Updating the Law to reflect modern medical science is key to Transgender Rights' (2014) 39(4) Vermont Law Review 943, 946.
[873] Greenberg (n 16), 275.

bodily diversity.[874] While a majority of female-identified and male-identified individuals do exhibit standard body traits, even among these common features, there are important variations in size, appearance and functionality.[875] Surgery, sterilisation and hormone therapy require applicants to reproduce body standards which do not appear naturally among the general population.[876]

Intersex variance offers a compelling challenge to the binary sex paradigm.[877] Persons who experience intersex variance are born with a reproductive or sexual anatomy that do not fit typical definitions of male or female.[878] This may include "chromosomal variations", "gonadal variations" and "variations in external morphologic sex."[879] A person who experiences androgen insensitivity has XY chromosomes and may exhibit typical 'male' sex characteristics, such as "testicular atrophy".[880] However, depending on the strength of the insensitivity, the individual may also develop complete or incomplete female genitalia, including a "short vagina".[881]

Intersex is not a majority experience.[882] Blackless *et al* write that "approximately [only] 1.7% of all live births do not conform to a Platonic ideal of absolute sex chromosome, gonadal,

[874] Veronica Meade-Kelly, 'The Biological Origins of Sexual Orientation and Gender Identity' (*Medical Press*, 21 August 2015) http://medicalxpress.com/news/2015-08-biological-sexual-gender-identity.html accessed 5 October 2015.
[875] Dean Spade, 'Documenting Gender' (2009) 8(1) Dukeminier Awards Best Sexual Orientation and Gender Law Review 137, 209; Loue (n 24), 27-28. Green writes that "[w]e are not cookie-cutter men who all have penises that look exactly alike", Jamison Green, *Becoming a Visible Man* (Vanderbilt University Press 2004) 9.
[876] Peter Hyndal, 'IQ2 Debate: Society Must Recognise Trans People's Gender Identities' (3 March 2016) https://www.youtube.com/watch?v=N91s1j1YD_w accessed 27 June 2017.
[877] Darra Clark Hofman, 'Male, Female, and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law' (2012) 21 Tulane Journal of Law and Sexuality: A Review of Sexual Orientation and Gender Identity in the Law 1, 9. See generally: Greenberg (n 16), 275; Currah (n 32); P-L Chau and Jonathan Herring, 'Defining, Assigning and Designing Sex' (2002) 16(3) International Journal of Law, Policy and the Family 327, 355; Wendy O'Brien, 'Can International Human Rights Law Accommodate Bodily Diversity' (2015) 15(1) Human Rights Law Review 1, 5. One must acknowledge, however, that intersex experiences are separate from trans identities. As noted in Chapter VI, many intersex activists voice significant discomfort with trans narratives which use intersex identities as a tool to challenge gender binaries, while insufficiently acknowledging the unique restrictions and obstacles which those binaries impose on intersex lives, see: Megan Davidson, 'Seeking Refuge Under the Umbrella: Inclusion, Exclusion, and Organising within the Category Transgender' (2007) 4(4) Sexuality Research and Social Policy 60, 68-69.
[878] 'Trans Terms' (*Transgender Equality Network Ireland, No Date Available*) http://www.teni.ie/page.aspx?contentid=139 13 June 2017.
[879] Noa Ben-Asher, 'The Necessity of Sex Change: The Struggle for Intersex and Transsex Liberties' (2006) 29(1) Harvard Journal of Law and Gender 51, 81.
[880] Chau and Herring (n 41), 331.
[881] ibid.
[882] See generally: Valerine Arboleda, David Sandberg and Eric Vilain, 'DSDs: genetics, underlying pathologies and psychosexual differentiation' (2014) 10(1) Nature Reviews Endocrinology 603; Leonard Sax, 'How common is intersex? A Response to Anne Fausto-Sterling' (2002) (39(3) The Journal of Sex Research 174; Terry S Kogan, 'Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labelled "Other"' (1996) 48(6) Hastings Law Journal 1223, 1251.

genital, and hormonal dimorphism."[883] Fausto-Sterling also adopts the 1.7% calculation, but cautions that even this figure is an "order-of-magnitude estimate rather than a precise count."[884] What intersex does illustrate, however, are the scientific and medical limitations of 'binary sex' reasoning. Where almost two per cent of individuals experience non-standard sexed-traits, it is untenable to claim that *all* men and women experience unambiguous sexed-bodies. It is also difficult to argue that, if applicants for recognition do not modify their sex characteristics, the resulting medico-legal results (e.g. the legal woman with testes, etc.) would be 'unnatural'. References to a rigid binary sex paradigm are weak justifications for invasive physical requirements.

B. The Relationship between Sex and Legal Gender

It is also questionable whether, in practice, sex characteristics actually determine legal gender.[885] If sex defines gender, surely this undermines, or even negates, the right to legal gender recognition? Gonzalez-Salzberg writes that "understanding…sex as biological also means that it is immutable."[886] While the *Corbett* judgment too readily dismisses the consequences of gender-confirming healthcare, Ormrod J was correct that, according to current scientific knowledge, persons who undertake a process of medical transition will not obtain *all* the physical traits (e.g. chromosomes) typically associated with their preferred gender.[887] Sex-as-gender is a biological destination to which surgery, sterilisation and hormone therapy cannot fully transport applicants. Instead, in affirming a right to gender recognition, jurisdictions must accept that biology is only one factor which determines legal gender.[888]

Rosario speaks of gender as "a biological, psychological and cultural phenomenon."[889] Along with biology, additional considerations – including "gender attribution, gender roles, gender

[883] Melanie Blackless and others, 'How Sexually Dimorphic Are We? Review and Synthesis' (2000) 12(2) American Journal of Human Biology 151, 161.
[884] Anne Fausto-Sterling, *Sexing the Body* (Basic Books 2008) 51. Sax strongly disagrees even with this comparatively small 1.7% statistic, see: Sax (n 44), 177.
[885] Leslie Pearlman, 'Transsexualism as Metaphor: The Collision of Sex and Gender' (1995) 43(3) Buffalo Law Review 835, 839.
[886] Damian Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2013) 29(4) American University International Law Review 797, 806.
[887] The European Court of Human Rights expressly acknowledged the current limitations of medical transitions in *Goodwin* (n 21), [82]: "…it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex…"
[888] Tobin (n 15), 408.
[889] Vernon Rosario, 'Quantum sex: intersex and the molecular deconstruction of sex' (2009) 15(2) GLQ: A Journal of Lesbian and Gay Studies 267, 280.

identity, and gender expression"[890] – all influence personal and social status. These supplementary factors must be taken into account.[891] The question is what relative weight all the competing factors should be afforded in determining legal gender? Even if sex characteristics are not wholly determinative, the law may nevertheless justify extensive surgery, sterilisation and hormone therapy if biology (e.g. genitals, internal organs, reproductive capacities, etc.) remains the dominant consideration. However, are sex characteristics really *the* essential element of legal gender?[892]

It is arguable that – rather than following biology – legal gender is primarily formed through gender expression and the conscious (or subconscious) adoption of gender roles.[893] According to Vade, "[g]ender is one's own specific way of interacting with and presenting oneself to the world."[894] It is "physical, mental, spiritual, sexual [and] inter-relational."[895] Post-structuralist scholars have characterised gender as a "discursive construct, something that is produced, and not a 'natural fact.'"[896] For Butler, gender is performative, "the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being."[897] Salih notes that, within a 'performativity' framework, gender "is not something one is."[898] Instead, gender must be considered as "something one does, an act, or more precisely, a sequence of acts, a verb rather than a noun, a 'doing' rather than a 'being'."[899]

Whatever definition or conceptualisation one ultimately adopts, human beings interact with each other daily on the basis of "a small number of visual cues and a tonne of assumption.[900]" These assumptions typically arise out of mutually expressed and understood behaviours.[901] In almost no circumstances do human beings actively confirm whether their assumptions about gender actually accord with biology.[902] Gilbert observes that "it is only rarely that we are in a

[890] Genny Beemyn and Susan Rankin, *The Lives of Transgender People* (Columbia University Press 2011) 20.
[891] *PRL*, Criminal and Correction Court No. 4 of Mar del Plata (10 April 2008).
[892] *Re Kevin* (n 21), [84].
[893] Po Jen Yap, 'Transsexual marriage in Hong Kong: going beyond *Bellinger*' (2013) 129 Law Quarterly Review 503, 504. See also: 2004Seu42 (n 21).
[894] Dylan Vade, 'Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is more Inclusive of Transgender People' (2005) 11(2) Michigan Journal of Gender and Law 253, 276.
[895] ibid.
[896] Sarah Salih, *Judith Butler* (Routledge 2002) 51.
[897] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 33.
[898] Salih (n 58) 62.
[899] ibid.
[900] Julia Serano, *Whipping Girl* (Seal Press 2007) 51-52.
[901] Currah and Moore (n 28), 114.
[902] Miqqi Alicia Gilbert, 'Defeating Bigenderism: Changing Gender Assumptions in the Twenty-first Century' (2009) 24(3) Hypatia 93, 96.

position to view each other's genitals…[and] even rarer that such a viewing involves an inspection close enough to detect manufacture or artifice."[903] Indeed, as Green notes, most individuals do not even know "what [their own] sex chromosomes actually are."[904]

Medical requirements related to the 'determinative' character of sex are almost impossible to administer in a rational, principled manner.[905] As noted, where a state permits legal gender recognition, it is accepting that not all sex characteristics are essential. A trans woman will access recognition without the presence of a uterus. Trans men will be formally acknowledged without the capacity to produce sperm. What are the sex characteristics whose presence or absence *is* so vital that it justifies interfering with core human rights?

The existence of numerous, often contradictory, medical requirements makes it difficult to clearly identify any one, fundamental physical trait.[906] Hong Kong mandates the removal of reproductive organs while Czech law merely requires that they be disabled. In Japan and Turkey, applicants must submit to full genital reconstructive surgery while, in Western Australia, genitalia need only be altered to facilitate identification as the preferred gender. Although many jurisdictions enforce body modification through surgery, in Spain and South Africa, hormone treatment (nominally) suffices. Why is male-pattern baldness and fat distribution (the consequences of hormones) more important to maleness than the absence of a uterus or the presence of a penis? In the United States and Australia, neighbouring jurisdictions have adopted radically different views about the essentiality of specific characteristics.[907] Indeed, the breadth of conflicting rules about which traits determine gender undermines the idea that any characteristic is truly essential.[908]

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[903] ibid.
[904] Green (n 37) 2.
[905] Anna James Neuman Wipfler, 'Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents' (2016) 39(2) Harvard Journal of Law and Gender 491, 498.
[906] Peter Hyndal points to regulations for gender segregation in sport and notes how, in recent years, medical tests for determining gender have had to be consistently revised because healthcare experts have been unable to define what physical traits determine gender, see: Hyndal (n 40). See also: Erin Buzuvis, 'Hormone Check: Critique of Olympic Rules on Sex and Gender' (2016) 31(1) Wisconsin Journal of Law, Gender and Society 29; Langley (n 27), 113.
[907] For example, in the United States, individuals who seek an amended birth certificate in New York City are not required to submit to surgical interventions. However, applicants across the Hudson River in New Jersey must provide proof of surgical intervention. See: Jessica Clarke, 'Identity and Form' (2015) 103(4) California Law Review 747, 760.
[908] Olga Tomchin, 'Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People' (2013) 101(3) California Law Review 813, 842.

C. Cultural Sex Binary

In some cases, law-makers and judges do not impose physical requirements to reflect a 'natural' binary sex paradigm. Rather, irrespective of whether they truly believe that there are only two natural sex configurations, which inevitably determine legal gender, state authorities are also motivated by policy justifications (the notion of a 'cultural' sex binary).[909] Whether these policy-based arguments are of "sufficient importance to warrant limiting [trans human rights]"[910] is open to doubt.

(iii.) Appropriate Sexual Conduct

Physical intervention requirements are enforced to ensure that, post-recognition, trans persons engage in appropriate sexual acts. This can be seen in attempts to: *(a)* promote penis-vagina heterosexual marital intercourse and *(b)* decrease instances of 'homosexual' activity.

(a.) Marital Intercourse

Medicalisation – particularly genital surgeries – are designed to guarantee that, at least in the context of marriage, individuals only obtain gender recognition if they are able to assume "the role in heterosexual intercourse [which is] 'appropriate' to [their] reassigned sex."[911] According to Irving, fears that trans persons will take part in gender-incorrect sexual intercourse have often been invoked to refuse recognition for those who cannot "provide evidence that their genitals were capable of penal-vaginal intercourse."[912]

'Appropriate' intercourse arguments pre-suppose that the capacity to engage in heterosexual sex is an entry-condition for marriage. However, while non-consummation may, in some jurisdictions, render a marriage voidable[913], prospective spouses are not required to prove either the capacity or intention to engage in heterosexual vaginal intercourse. By requiring the

[909] Ainsworth (n 24).
[910] ibid.
[911] Tobin (n 15), 417; Newlin (n 23), 470. In *MT* (n 20) (New Jersey)), a New Jersey court stated that "[i]f…the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female….we perceive no legal barrier…to prevent that person's identification" (at 207).
[912] Dan Irving, 'Against the Grain: Teaching Transgender Human Rights' (2013) 16(3-4) Sexualities 319, 326. See also: See Chris Hutton, 'Legal sex, self-classification and gender self-determination' (2017) 11(1) Law and Humanities 64, 70.
[913] Stephen Gilmore and Lisa Glennon, *Hayes and Williams' Family Law* (5th edn, Oxford University Press 2016) 22; Jane Sendall, *Family Law Handbook 2015* (6th edn, Oxford University Press 2015) 42.

construction of a 'functional' penis or vagina, as proof of the capacity to consummate, trans persons are (once again) held to a standard which does not apply to cisgender individuals.

'Appropriate' intercourse arguments also promote an unwelcome view of legal womanhood. Chau and Herring write that the "emphasis on sexual intercourse too easily leads to unacceptable assumptions about the sexual role expected of men and women."[914] Where legal acknowledgement is contingent upon trans women receiving a male penis, "this can be seen as regarding the vagina as nothing more than a hole into which a penis can be placed."[915] Indeed, intercourse-based arguments risk viewing *women* as nothing more than holes into which a penis can be placed. If legal gender is determined by the capacity for receptive (or penetrative) intercourse, women are reduced to objects of sex who depend on a penetrating male to validate their legal identity. This form of policy argument cannot create a proportionate interference with trans human rights.

(b.) The Spectre of Homosexuality

Arguments based on marital intercourse do not simply promote 'appropriate' sexual conduct. They also discourage supposedly inappropriate forms of intimacy. In order to be recognised as a legal male, a trans man must have a sufficient phallus to penetrate his partner. This is not only because men are assumed to adopt the penetrative sexual role but also because, in the absence of a penis, the man might be perceived as engaging in non-heterosexual conduct.[916]

Sharpe observes that "the figure of the homosexual haunts [trans] jurisprudence."[917] One motivation for requiring that applicants reproduce 'binary sex' is the possible "horror" which a cisgender male may experience by "engaging unwittingly in 'unnatural' (homo)sexual intercourse."[918] Where a trans woman is formally acknowledged without modifying her genitalia, heterosexual cisgender men may be sexually attracted to her. However, as the woman

[914] Chau and Herring (n 39), 348.
[915] ibid.
[916] Alex Iantaffi and Walter O Bockting, 'Views from both sides of the bridge? Gender, sexual legitimacy and transgender people's experiences of relationships' (2011) 13(3) Culture, Health and Sexuality 355, 357.
[917] Alex Sharpe, 'Transgender Jurisprudence and the Spectre of Homosexuality' (2000) 14 Australian Feminist Law Journal 23, 37; Sharon Cowan, '"Gender is No Substitute for Sex": A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13(1) Feminist Legal Studies 67, 79 – 80.
[918] Alex Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish Publishers 2002) 107. Browne also notes fears of the "predatory lesbian who preys on 'straight' women by assuming a male appearance through dress", see: Kath Browne, '"A Right Geezer-Bird (Man-Woman)": The Sites and Sights of "Female" Embodiment' (2006) 5(2) ACME: An International E-Journal for Critical Geographies 121, 132.

retains 'male' physical traits, such attraction is deemed to call into question the heterosexuality of the individual involved: "Has he just engaged in 'gay' sexual activity? Is he now gay?"[919]

There is a perception that desiring an individual with a penis undermines the man's masculinity. As Wodda and Panfil note, "[i]n a heteronormative and patriarchal culture, men are generally expected to be in control of their interpersonal interactions."[920] There are well-documented cases where the "disgust, shame and anger"[921] which heterosexual men experience upon discovering trans women's genitalia has provoked violent, even fatal, responses.[922] In defending criminal charges for murdering or assaulting a partner, whose trans history they have just discovered, many defendants appeal to the notion of 'trans panic' whereby they reactively "punish the gender transgressor…to somehow rescue or repair [their own] masculinity."[923]

Imposing physical intervention requirements to quell homosexual desire is highly problematic. It relies upon a prior judgment that same-gender attractions are inherently wrong and should be avoided. Such reasoning is incompatible with the non-discrimination framework set out in Chapter I. It reinforces historical prejudices against gay, lesbian and bisexual persons. The fact that a heterosexual-identified man may be induced into same-gender attraction is not a sufficient policy reason to medicalise legal gender recognition.

Even if this was not the case, however, it is incorrect to categorise the sexual desire between a cisgender man and a trans woman (irrespective of her bodily characteristics) as 'homosexual'. Lee and Kwan write that a "[trans] female who dates straight men is heterosexual. She is a woman who prefers to be intimate with men, not women."[924] Where a cisgender, heterosexual man desires a trans woman, he does so because she is female and as an expression of his own heterosexuality.[925] The only way in which one could characterise the situation as an instance of same-gender desire is if the trans woman is classified as male. This would not only be contrary to how the woman experiences her gender (and, indeed, how her male partner has, for a period at least, experienced her gender), it would also, where the woman has obtained gender

[919] Aimee Wodda and Vanessa Panfil, '"Don't Talk to me about Deception": The Necessary Erosion of the Trans* Panic Defense" (2014) 78(3) Albany Law Review 927, 936.
[920] ibid, 937.
[921] ibid, 936.
[922] Morgan Tillerman, '(Trans)Forming the Provocation Defence' (2010) 100(4) The Journal of Criminal Law and Criminology 1659, 1668 – 1687.
[923] Wodda and Panfil (n 81), 956.
[924] Cynthia Lee and Peter Kwan, 'The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women' (2014) 66(1) Hastings Law Journal 77, 116.
[925] Chris Beam, *Transparent – Love, Family and Living the T with Transgender Teenagers* (Harcourt 2007) 141.

recognition, be legally incorrect. Policy arguments centred on the homosexual implications of breaking the 'binary sex paradigm' cannot result in a proportionate imposition of surgery, sterilisation or hormone therapy.

(iv.) Offensive Bodily Diversity

Medical requirements are also justified by reference to avoiding offensive bodily diversity.[926] Irrespective of whether the binary sex paradigm is natural, imposing uniform body standards protects society from the perceived 'monstrosity' of a "man with a vagina and woman with a penis."[927]

(a.) Do National Laws Seek to Avoid Bodily Diversity?

Arguments based upon the 'monstrosity'[928] of bodily diversity pre-suppose both that the law *should* and *does* discourage non-normative sex characteristics. However, as a first point, it is not clear that avoiding body differences is actually pursued by current laws. In many jurisdictions, where gender recognition is tied to surgical interventions, trans persons can access less invasive healthcare procedures.[929] Although (unless they undergo surgery) they will not be formally acknowledged in their preferred gender, these individuals can make significant alterations to their bodies. A trans woman – who retains a male legal gender – may augment her breasts and feminise her face. A trans man – who retains a female legal gender – may submit to a mastectomy and take masculising hormones. In both cases, these individuals adopt diverse bodily configurations. Although they have (respectively) male and female legal genders, they exhibit both typically 'female' and 'male'[930] sex characteristics.

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[926] Ben-Asher (n 41), 61. See e.g. 1 BvR 3295/07 (n 12), where the Court suggests that it is "constitutionally unobjectionable… to avoid a divergence of biological and legal gender affiliation."
[927] Tobin (n 15), 419.
[928] Lloyd (n 15), 160.
[929] As noted in Chapter II, in 34 American states, trans persons must access surgery before amending their birth certificate. However, in many of these states, trans persons can undertake a partial medical transition (e.g. hormone therapy, etc.) even though they do not intend to undergo, or cannot afford to undergo, gender-confirming surgeries.
[930] One must acknowledge that many trans persons object to the use of 'male' and 'female' to describe certain body characteristics. They argue that this promotes body essentialism whereby trans people can never truly be accepted in their preferred gender because biology reinforces birth-assigned identities, see: Dean Spade, 'About Purportedly Gendered Body Parts' (*Dean Spade Personal Website*, 3 February 2011) http://www.deanspade.net/wp-content/uploads/2011/02/Purportedly-Gendered-Body-Parts.pdf accessed 21 June 2017.

The fact that law-makers and judges permit such a situation weakens arguments for avoiding bodily diversity. Indeed, there is evidence that, for countries with the strictest surgical requirements, the phenomenon of trans persons – who have their birth-assigned legal gender but who exhibit at least some sex characteristics associated with their preferred gender – is the norm.[931] If bodily diversity is actually a public policy risk, these jurisdictions should limit medical transitions to those who can afford, and are willing to undergo, full re-constructive treatments. That they take no such steps undermines the necessity (and thus the proportionality) of physical intervention requirements.

(b.) Exploring the Social Costs of Bodily Diversity

Even if the law did actively discourage body difference, there would still be a broader normative question: why should it do so? Mottet observes that state actors typically fail to identify policy justifications for upholding (even artificially) the binary sex paradigm.[932] In general, the social harm caused by physical diversity is considered so "obvious" that no further explanation need be offered.[933] A review of the existing resources reveal considerable reliance upon intuitive feelings about 'normality' and 'appropriateness'.[934] Men with breasts, women with penises and the pregnant man must all be discouraged because of the discomfort to which they give rise.

Is it reasonable that bodily diversity creates unease?[935] As discussed above, the range of body traits which human beings exhibit – including intersex variance – suggests that it is not unnatural that, post-gender recognition, applicants might deviate from the body standards which are typically associated with their preferred gender. To the extent that social discomfort arises solely from biological misunderstandings, this is not sufficiently important to justify medical pre-conditions.

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[931] See e.g. Hong Kong, where, although trans individuals can access medical intervention, they will not be recognised in their preferred gender until they undergo full gender-confirming surgery, Athena Nga-chee Liu, 'The Legal Status of Transgender and Transsexual Persons in Hong Kong' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015). Similarly, in the United States, although trans individuals may have access (either formal or informal) to hormones, many low-income trans persons are unable to meet the surgical requirements necessary for amending their legal gender, see: Sandy E James and others, *The Report of the 2015 U.S. Transgender Survey* (NCTE 2016) 93.

[932] Lisa Mottet*, 'Modernizing State Vital Statistics Statutes and Policies* to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People' (2013) 19(2) Michigan Journal of Gender and Law 373, 413.

[933] ibid.

[934] Levasseur (n 34), 966.

[935] Susan Etta Keller, 'Crisis of Authority: Medical Rhetoric and Transsexual Identity" (1999) 11(1) Yale Journal of Law and Feminism 51, 72.

Garfinkel, however, writes that binary sex rules are not enforced simply because of (questionable) biological assumptions.[936] Rather, applicants for recognition must adhere to specific body standards because the idea of "dichotomous sexed persons" has become a social norm.[937] Deviation from binary sex is considered as taboo and socially harmful.

The problem with this 'social norm' reasoning is that, like Lord Devlin's (in)famous defence of English sodomy laws in the 1950s[938], it offers little normative justification for altering healthy trans bodies.[939] One cannot defend surgery, sterilisation and hormone therapy merely by reference to (the possibly improper) historical imposition of these procedures or by observing that a (possibly transphobic) majority of society continues to support medicalisation. As noted in Chapter I, human rights adjudicators have refused to condone differential treatment based on "mere administrative inconvenience, existence of a longstanding tradition, prevailing views in society, stereotypes or convictions of the local population."[940] In the landmark United States Supreme Court decision, *Brown v Board of Education of Topeka*[941], proponents of racially divided schools attempted (unsuccessfully) to bolster their position by arguing that, since the American Reconstruction, segregation had enjoyed wide public approval. In line with the first prong of Huscroft, Miller and Webber's proportionality test, national laws should only discourage bodily diversity (through the imposition of physical requirements which compromise trans human rights) where such avoidance achieves a sufficiently important social good or avoids a similarly important social evil.

(c.) The Social Objectives of Avoiding Bodily Diversity

Does enforcing the binary sex paradigm through mandatory medical treatment pursue a legitimate goal? At the outset, one must acknowledge that debates over trans bodily diversity are often more hypothetical than real. Trans bodies are rarely, if ever, visible in public. Mottet observes a general reluctance among trans individuals to expose their sex characteristics, even in designated spaces: "[trans] people who have not had genital surgery are very likely to go to

[936] Harold Garfinkel, *Studies in ethnomethodology* (Polity Press 2006) 62.
[937] ibid. According to Garcia, the history of the separation of public restrooms by sex is due to the belief that "human bodies come in only two types: male and female" so that sex-segregation of bathrooms and locker rooms constitutes a "social norm", see Emeline Garcia, 'AB 1266: The School Success and Opportunity Act or A Violation of the Constitutional Right to Privacy' (2013) 35(2) University of La Verne Law Review 243, 258.
[938] Patrick Devlin, *The Enforcement of Morals* (Oxford University Press 1965).
[939] See generally: HLA. Hart, 'Immorality and Treason' in *Listener* (1959); HLA Hart, 'Social Solidarity and the Enforcement of Morality' (1967) 35(1) University of Chicago Law Review 1.
[940] Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014) 168.
[941] [1954] 347 US 483.

great lengths to avoid having other people observe their unclothed bodies."[942] Trans populations are coerced into concealing their physical characteristics through an "inherent shame in having a body that is somehow different from the cisgender norm."[943]

Even if this were not the case, however, and trans bodies were more frequently visible, there is still no compelling argument for imposing medical pre-conditions. Levasseur writes that "[trans] people have the right to live without fear or shame. Full equality requires a level of comfort with a range of bodies that might not fit the cisgender ideal."[944] In the third prong of her 'substantive equality' analysis, Fredman warns against exacting "conformity" as the "price" for enjoying human rights.[945] Instead, substantively equal laws are those which "accommodate difference" in order to "achieve structural change."[946] The fact that a woman has a penis or a man has a vagina does not cause an impermissible detriment to society. While these physical traits may not conform to normative body ideals, neither do they negatively impact the surrounding environment. Where a person uses a private stall in a women's restroom, it is irrelevant to her fellow occupants how she urinates within those private confines.[947] For persons at the urinals in a men's restroom, it is of no consequence whether those on either side are urinating through a natural penis, a constructed penis or a Stand-to-Pee device.[948]

Since jurisdictions began to move away from surgery, sterilisation and hormone therapy in 2004[949], a growing number of applicants can obtain gender recognition without modifying their sex characteristics. This increases the likelihood that trans individuals will be acknowledged in their preferred gender without having socially-anticipated bodies. However, while an exact qualitative study might be impossible to undertake, there have been no mass claims of societal harm because Portuguese law recognises men with breasts or because Argentine law acknowledges women with penises. During the recent UK Trans Equality Inquiry, which reviewed implementation of the Gender Recognition Act 2004[950] (2004 Act), rather than recommending a return to normative-body requirements, the House of Commons Select Committee on Women and Equalities actually advocated further de-medicalisation of gender

[942] Mottet (n 94), 418.
[943] Levasseur (n 34), 1003.
[944] ibid, 1004.
[945] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011), 25.
[946] ibid.
[947] Kenneth Jost, 'Transgender Issues' (2006) 16(17) Congressional Quarterly Researcher 386, 391.
[948] A 'Stand-to-Pee' Device or 'STP' is an instrument which assists trans men to urinate while standing.
[949] As noted, in 2004, the UK Parliament recognised preferred gender without requiring surgery, sterilisation or hormone therapy.
[950] See generally: House of Commons Select Committee on Women and Equalities, *Transgender Equality* (The Stationary Office Limited 2016).

recognition.[951] Considering that bodily diversity is both natural and common, and that (as discussed in Chapter II) society tolerates significant bodily differences among cisgender and intersex populations, this absence of either public or official pushback is unsurprising.

Fausto-Sterling suggests that much social discomfort with trans bodily diversity may be linked to challenging 'gender divisions': "we must control those bodies which are so unruly as to blur the borders."[952] Historically, when presented with an intersex birth, medical officers assigned individuals to the male legal gender where there was an 'adequate' penis ("one that is [capable] of penetrating a female's vagina"[953]).[954] A person was assigned to a female legal gender if there was evidence of female "reproductive capability".[955] These practices, which are still imposed upon infant bodies around the world[956], reflect and reproduce widely entrenched notions about the proper status of men and women. Building upon the discussion of appropriate sexual conduct, Greenberg writes that "men are defined based upon their ability to penetrate females and females are defined based upon their ability to procreate."[957] Law and medicine collude to construct a dominant male identity, which exercises its power by penetrating women who are themselves only valued for their role as mother and child bearer. What shifts would occur in this gender disequilibrium, however, if legal women had the capacity to penetrate men (or other women)? In a world where both legal men and legal women give birth, it would no longer be possible to view only women through the lens of 'motherhood'. Could the idea of 'motherhood', with all its social connotations, even exist? Where trans women obtain full recognition of their female identity without discarding their natural sex characteristics, this challenges historical expectations about gendered physicalities.[958] For many people, bodily diversity creates unease because it has the potential to emancipate women from the constraints of gender stereotyping.[959]

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[951] ibid, 14.
[952] Fausto-Sterling (n 46) 8.
[953] Greenberg (n 16), 271.
[954] Myra Hird, 'Gender's Nature: Intersexuality, Transsexualism and the "Sex"/"Gender" Binary' (2000) 1(3) Feminist Theory 347, 351.
[955] Greenberg (n 16), 272.
[956] Commissioner for Human Rights of the Council of Europe, *Human Rights and Intersex People – Issue Paper* (Council of Europe 2015) https://rm.coe.int/16806da5d4 accessed 20 June 2017; Amnesty International, 'First, Do No Harm: Ensuring the Rights of Children with Variations of Sex Characteristics in Denmark and Germany' (Amnesty International 2017) file:///C:/Users/USER/Downloads/EUR0160862017ENGLISH%20(1).PDF accessed 20 June 2017.
[957] Greenberg (n 16), 272.
[958] Chau and Herring (n 39), 338.
[959] There is an irony that certain trans-exclusionary radical feminists, such as Germaine Greer, who have compellingly argued against viewing women solely through the lens of biology, are now excluding trans persons from the definition of gender because the latter apparently have insufficient insight into the biological realities of being a woman, see: Diane Otto, 'Queering Gender [Identity] in International Law' (2015) 33(4) Nordic Journal of Human Rights 299, 317. See also: 'Germaine Greer: Transgender Women are "Not Women"' (*BBC Newsnight*, 23 October 2015) https://www.youtube.com/watch?v=7B8Q6D4a6TM accessed 20 June 2017.

Boyd writes that "[o]ur narrow definitions of gender roles may be broadening, but our visceral response to the blurring of those roles is still one of shock or confusion."[960] Maintaining gender stereotypes is not, however, a legitimate policy goal. It cannot give rise to a proportionate interference with trans human rights.

II. Trans Procreation

The second justification for physical intervention – which applies specifically to sterilisation requirements (including surgeries or hormone therapies which result in infertility) – is the perceived need to avoid trans procreation.

A. Appropriate Reproduction

In many respects, this perception arises from the same concerns about 'appropriate' and 'natural' bodies discussed in Section I. Enforced infertility is imposed to protect 'normal' procreative practices.[961] Even if trans men and women *can* and *want* to conceive or beget children, there are, it is argued, reasons why this *should* not happen.[962] In an important 2011 judgment – striking down a sterilisation clause (s. 8) in the Federal Transsexual Act 1980 – Germany's Constitutional Court nevertheless warned that allowing trans individuals to procreate (using their natural reproductive organs) after gender recognition "contradict[s] the concept of the sexes and would have far-reaching consequences for the legal order."[963] The message from the German court is clear: procreation is a sexed-phenomenon in which individuals should only engage if their gender identity is congruent with the reproductive role that they adopt. In a global context, where national laws remain overwhelmingly centred around what Fineman calls "the sexual family"[964], sterilisation requirements are believed to reinforce comprehensible, normatively desirable procreative standards. Indeed, given that the "politics and practices of reproduction have historically rested on one key certainty…that only women

[960] Helen Boyd, *My Husband Betty – Love, Sex and Life with a Crossdresser* (Thunder's Mouth Press 2003) 27.
[961] Yesim Atamer, 'The Legal Status of Transsexual and Transgender Persons in Turkey' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015).
[962] In *Department of Social Security v SRA* ([1993] 118 ALR 467), Lockhart J, for the Australian Federal Court, stated that "there are…dangers in a male capable ... of procreation being classified by the law as a female" (at 495); Currah (n 32), 330; Kristin Nelson, 'The Small Person Acquisition Project' (*Third Coast Website, No Date Available*) https://www.thirdcoastfestival.org/explore/feature/small-person-acquisition-project accessed 31 August 2017.
[963] 1 BvR 3295/07 (n 12).
[964] The 'sexual family' is "a heterosexual relationship between a man and a woman…romanticised in the glorification of the nuclear family…[which] is central to traditional family law ideology", Martha Fineman, 'The Neutered Mother' (1992) 46(3) University of Miami Law Review 653, 663.

were the bearers of babies"[965], post-transition reproduction threatens to invert "traditional notions of gender."[966]

If one accepts that sex characteristics do not determine legal gender, however, it is unclear why reproductive organs (which are sexed-traits) should be an exception. In both law and practice, bearing and begetting children is not an essential consideration for gender. Without doubt, only persons who have a uterus can conceive children.[967] A trans woman, who submits to full gender-confirming surgery, will still not be able to bear children because she cannot (at present[968]) obtain a functioning uterus. However, conceding that nature limits childbirth to persons with a uterus does not also mean that all persons who can (or do) give birth are 'naturally' legal women. Instead, the link between uteri and the female legal gender is a consequence of law, not nature.[969] According to Ryan, "the concept of pregnancy as feminine is only a social mandate and not a biological reality."[970] There is no 'natural' rule that persons with a uterus must be legal women, or that legal women must have a uterus.[971] Reproductive capabilities do not determine gender. Indeed, as the facts of *Z v A Government Department and the Board of Management of a Community School*[972] illustrate, some legal women may be born without a functioning uterus or, in rare cases, with no uterus at all.

Policy-focused arguments about 'appropriate' reproduction are an equally problematic defence of sterilisation requirements. As noted, justifications based on 'normal' body traits and functions – including the idea that only legal women should conceive children and that only legal men should produce sperm – reinforce outdated gender stereotypes. They promote a narrow vision of women as mothers and child-bearers. To the extent that sterilisation requirements are intended to ensure that only legal women can give birth, and that the social

[965] Jane Maree Maher, 'A pregnant man in the movies: The visual politics of reproduction' (2008) 22(2) Continuum 279, 279.
[966] Jamie Landau, 'Reproducing and Transgressing Masculinity: A Rhetorical Analysis of Women Interacting with Digital Photographs of Thomas Beatie' (2012) 35(2) Women's Studies in Communication 178, 183.
[967] Spade (n 37), 220.
[968] See: Mats Brännström, 'Uterus transplantation and beyond' (2017) 28(5) Journal of Materials Science: Materials in Medicine 70; Chris Johnston, 'Womb transplants: first 10 British women given go-ahead' (*The Guardian*, 30 September 2015) https://www.theguardian.com/lifeandstyle/2015/sep/29/10-women-receive-go-ahead-for-first-ever-womb-transplants-in-uk accessed 16 April 2017.
[969] Spade (n 37), 220. See also: 'Comments from Elizabeth Emens' in Darren Rosenblum and others, 'Pregnant Man? A Conversation' (2010) 22(2) Yale Journal of Law and Feminism 207, 229.
[970] Maura Ryan, 'The Gender of Pregnancy: Masculine Lesbians Talk about Reproduction' (2013) 17(2) Journal of Lesbian Studies 119, 125.
[971] 'Comments from Vivian Gutierrez and Berta Hernindez-Truyol' in Darren Rosenblum and others, 'Pregnant Man? A Conversation' (2010) 22(2) Yale Journal of Law and Feminism 207, 231.
[972] C-362/12 [2014] 3 CMLR 20, [35].

expectations of motherhood fall exclusively on those with a female gender, this cannot result in a proportionate restriction on trans reproduction.

Rather than preventing trans procreation, law-makers and judges should embrace the radical impact of pregnant men (and women who produce sperm) and work to achieve the type of "structural change" in gender norms which Fredman advocates.[973] They should also welcome the wider effects of trans reproduction for all queer communities. McCandless and Sheldon argue that trans parenting directly challenges cultural assumptions (and anxieties) over queer families.[974] The emancipatory potential of trans procreation lies in its exposure of the "tensions inherent in continuing to map…legal determinations of parenthood to a family model that is unmoored from its traditional underpinnings."[975] Trans reproduction is limited not because it violates a natural or desirable link between normative reproduction and legal gender. On the contrary, applicants for recognition are sterilised precisely because trans procreation reveals that no such link exists.

B. Legal Certainty and Child Welfare

In addition to claims about 'natural' or normatively acceptable procreation, law-makers and judges also justify sterilisation requirements by reference to less abstract, more quantifiable concerns. Two such arguments have assumed particular importance: (i) the need to maintain legal certainty; and (ii) protecting child welfare.

(i.) Legal Certainty

Trans procreation is frequently opposed as undermining legal certainty.[976] The vista of a man giving birth or a woman begetting children threatens, so the argument goes, the efficient and coherent functioning of family law systems.[977] Writing in the context of Japan, Nishitani observes fears that trans procreation can "cause confusion and complications to…parentage and

[973] Fredman (n 107), 25.
[974] Julie McCandless and Sally Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) Modern Law Review 175, 200-202.
[975] ibid, 202.
[976] In 2011, the German federal government, when defending the sterilisation requirement in s. 8 of the Transsexual Act 1980, relied upon the supposed incompatibility of trans reproduction with a family law system based on child-bearing women and sperm-producing men, see: 1 BvR 3295/07 (n 12). See also, *Socialstyrelsen* (n 12); *B v France* [1993] 16 EHRR 1, [9] (per Judge Pinheiro Farinha).
[977] *Goodwin* (n 21), [91].

family order."[978] In defending the necessity of its sterilisation requirement in *AP, Garcon and Nicot*, the French Government argued that the need to guarantee a reliable and coherent civil status in France justified the alleged interference with applicants' bodily integrity rights.[979] State actors in Germany and Sweden have also made similar recent claims.[980] If *mater semper certa est*, what is the status of a legal male who conceives a child?[981]

The need for legal certainty has played, and continues to play, a primary role in shaping domestic responses to trans identities. In jurisdictions, such as Ireland, Malta and the United Kingdom, the law expressly states that gender recognition cannot alter, or erase, existing family law obligations.[982] An Irish trans woman, who has gained paternal rights through providing sperm for conception, cannot lose, or relinquish, her paternal status merely because she has been affirmed in her female identity.[983] In *JK, R (on the application of) v Secretary of State for the Home Department*, Hickinbottom J (English High Court), considering whether a trans woman could be re-registered as female, or a 'parent', on her child's birth certificate, observed that the desires of trans parents have to be balanced against "the public interest in having coherent administrative systems."[984]

Promoting certainty in family law is a legitimate goal. The proper administration of family-centred policies would be hampered if state authorities could not identify existing familial relationships. To the extent that gender recognition might obstruct or destabilise a coherent family law system, there would be a compelling justification for circumscribing, or appropriately limiting, those rules. As noted, UK and Irish law currently removes the possibility that a self-identified male, who becomes a child's legal mother at birth, can subsequently be recognised as a legal father through gender recognition – irrespective of the role that he actually plays within the family unit. However, in both jurisdictions, this limitation has been largely accepted by trans advocates as necessary to ensure that there is clarity regarding parental status and obligations.[985] In the same way, if it could be shown that pregnant men (or women begetting

[978] Yuko Nishitani, 'The Legal Status of Transgender and Transsexual Persons in Japan' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 378.
[979] *AP* (n 10), [105]-[106].
[980] 1 BvR 3295/07 (n 12). See also, *Socialstyrelsen* (n 12).
[981] Marjolein van den Brink, Phillip Reuß and Jet Tigchelaar, 'Out of the Box? Domestic and Private International Law Aspects of Gender Registration' (2015) 17(2) European Journal of Law Reform 282, 291-292.
[982] (UK) Gender Recognition Act 2004, s. 12; (Ireland) Gender Recognition Act 2015, s. 19; (Malta) Gender Identity, Gender Expression and Sex Characteristics Act 2015, s. 3(2).
[983] Section 19 of Ireland's Gender Recognition Act 2015 states that "[t]he fact that a gender recognition certificate is issued to a person shall not affect the status of the person as the father or mother of a child born prior to the date of the issue of the certificate."
[984] [2015] EWHC 990 (Admin), [101].
[985] In the United Kingdom, where trans advocates raised numerous concerns about the operation of the 2004 Act

children) impermissibly confuse or undermine national family law rules, there could be a "legitimate objective of sufficient importance" for limiting trans procreation rights (although that objective would still have to pass proportionality review and would be irrelevant if sterilisation constitutes torture or other ill-treatment).[986]

Yet, does trans procreation (post-gender recognition) create greater uncertainty than is already accepted by most domestic legal systems? If pregnant men and begetting mothers are no more confusing than heterosexual adoption or in-vitro fertilisation, there is no logic in sterilising only trans people.

(a.) Mirroring Existing Reproductive Practices?

In this section, the thesis reflects upon whether trans reproduction post-recognition mirrors (or has similarities to) existing cisgender and heteronormative reproductive practices (surrogacy, IVF, etc.). Such reflection is important because, as noted, it helps to understand whether applicants for recognition, who may wish to exercise their procreative capabilities, are subject to certainty-based constraints that are not imposed upon similarly-situated cisgender peers. In addition, understanding the dynamics (and biology) of trans reproduction also informs the significant question of how post-recognition procreation impacts child welfare (discussed in Section (ii.)).

At first glance, there is – as Wierckx *et al* suggest – key similarities between trans reproductive patterns and the ways in which heterosexual (or homosexual) cisgender populations have children.[987] For example, where a trans man gives birth ('the birth father'), the child has a direct relationship with his or her birth parent. Although the child is not raised by a birth 'mother', this is similar to cisgender adoption which is permitted around the world. Unlike in the adoption scenario, however, the child of the trans man is actually raised by his or her birth parent, who just happens to have a male legal gender. If the law really does emphasise the importance of maintaining biological familial ties (a right which has been, at least under the ECHR, reaffirmed on numerous occasions[988]), a birth father raising his child may be preferable to childrearing where neither parent has given birth.

during the recent Transgender Equality Inquiry, there were no calls to remove, or amend, the effect of legal recognition on parental rights.

[986] Huscroft, Miller and Webber (n 2) 2.

[987] Katrien Wierckx and others, 'Reproductive wish in transsexual men' (2012) 27(2) Human Reproduction 483, 486.

[988] *Kruskovic v Croatia* App No. 46185/08 (ECtHR, 21 June 2011); *Mandet v France* App No. 30955/12

Where a birth father (who subsequently raises the child) also provides the egg for conception, the child has a direct relationship with at least one genetic parent. The birth father is a 'natural parent' in all three senses of Baroness Hale's tripartite definition of that term – genetic, gestational, and social and psychological.[989] The child will have a genetic relationship with both social parents if the trans man has procreated with a cisgender male partner, who provides the sperm for conception.[990] In such a situation, there is no biological difference between trans reproduction and typical procreation between heterosexual cisgender couples. In both cases, the child knows the identity of, and is raised by, the two individuals who provided all the genetic material for his or her conception. The same is true where a trans woman naturally procreates with her cisgender female partner.

Where, on the other hand, a trans man reproduces with a cisgender female partner, the couple will have to use a sperm donor. Once again, however, this is similar to scenarios where heterosexual (or lesbian) couples use a sperm donor. Like the typical case of heterosexual sperm donation, there are two persons with opposite legal genders, one of whom intends to gestate the child and both of whom intend to play formally distinct (i.e. 'father' and 'mother') roles in the child's life. The extent to which any child knows the sperm donor's identity will depend upon what information the trans man and his female partner disclose, or the extent to which the child has a legal right to access that identity information. What is clear, however, is that a child's ability to trace the genetic origins of a sperm donor will not be hindered merely because the birth parent is trans. Where a trans man and his female partner decide not to disclose a sperm donor's identity, their child will be no less certain about his or her genetic origins than the children of heterosexual cisgender couples who make a similar choice.

There are thus (at least *prima facie*) similarities between trans reproductive practices and the various ways in which cisgender persons – heterosexual or otherwise – have children. To the extent that society, and the law, considers that these latter individuals can engage in such non-traditional reproduction, such as IVF and surrogacy, without creating impermissible

(ECtHR, 14 January 2016); *Keegan v Ireland* [1994] 18 EHRR 342.

[989] *Re R (Children) (Residence: Same-Sex Partner)* [2006] UKHL 43, [33]-[35].

[990] This may also arise where a trans man procreates with a trans female partner who has not undergone sterilisation, see: Young Ozogwu, 'Transgender Couple Expecting Their First Baby. The "Father" is Pregnant by the "Mother"'
(*The Whistler*, 13 March 2016) https://www.thewhistler.ng/story/transgender-couple-expecting-their-first-baby-the-father-is-pregnant-by-the-mother accessed 3 December 2016.

uncertainty, it is questionable why (after being formally acknowledged in their preferred gender) applicants for recognition must be prevented from carrying out similar procreative acts.

Yet, on the other hand, one must also be careful not to overstate the intersections between cisgender reproduction and the ways in which applicants for recognition have children. Socially, legally and biologically, there are core distinctions, which have important implications for both: (a) determinations as to whether applicants for gender recognition (who wish to subsequently procreate) are being treated unfairly as compared with cisgender individuals; and (b) the likely impact (positive or negative) which post-recognition trans reproduction will have on children. The remainder of this section explores the distinct legal and social uncertainties which trans reproduction creates, while the following section (Section (ii.)) considers the impact of such reproduction within a wider discussion on child welfare.

While trans procreation can be framed as mirroring typical cisgender (both heterosexual and same-gender) reproductive narratives, there are key differences.

First, within the sphere of reproduction post-gender recognition, the nexus between social identity, legal positioning and biology typically departs from the cisgender status quo (the thesis does not argue against such departure but recognises that – to extent that trans reproduction is defended on the basis of its similarities to cisgender procreation – these departures undermine that defence). For example, in the scenario described above, where the trans man conceives with his male partner, the biological dynamics of that reproduction may indeed mirror cisgender, heterosexual procreation. However, the social and legal dynamics are fundamentally different. Unlike where a female-identified individual gives birth (reinforcing expected social norms), the birth father's experience of conceiving a child will be defined through its challenge to such norms, and through the lens of social taboo. Although the *biology* of the couple's procreation may not create greater uncertainty than standard heterosexual reproduction, the *social* and *legal* reality is more precarious. Analogising the two scenarios, therefore, raises difficulties.

Second, in addition to legal and social differences, the actual biology involved in trans reproduction also deviates from cisgender heteronormative IVF and surrogacy practices (with the former aligning more closely with same-gender parenting). In the parliamentary debates on the 2004 Act, Lord Tebbit expressed concern that omitting a sterilisation clause would allow

family formations where both partners were "capable of giving birth to children."[991] For Lord Tebbit, such a scenario inevitably gave rise to same-gender relationships.[992]

Where a trans man procreates with his cisgender female partner (using sperm donation), the couple's reproductive practice mirrors, in some ways, standard IVF where a cisgender, heterosexual couple rely upon donated sperm. Yet, departing from the typical cisgender IVF scenario, in the case of the trans man and his female partner, the resulting child will be raised by two parents who, irrespective of legal gender, both have (what are popularly considered to be) 'female' sex-characteristics. If, on the other hand, the trans man procreates with a cisgender male partner (the scenario addressed above), the question of same-gender biology disappears but the child then has two parents who have the same legal gender.

Same-gender parenting is now permitted in the United Kingdom[993] and in a number of other countries.[994] In Chapter IV, this thesis offers a human rights argument in favour of greater recognition of lesbian, gay and bisexual couples. Yet, as the law stands, LGB family rights remain a minority position around the world. Concerns about legal status and genetics, reinforced by ethical and moral debates, means that only 26 countries permit same-gender joint-adoptions and only 27 jurisdictions allow same-gender second-parent adoptions.[995] In the Council of Europe, lesbian couples are excluded from IVF treatment in 33 State Parties.[996] While the ECtHR has applied strict scrutiny to parenting-restrictions based solely on sexual orientation[997], state actors retain a significant margin of appreciation. To the extent that trans procreation reproduces – explicitly or otherwise – impermissible same-gender parenting norms, many jurisdictions worldwide may argue that it transgresses the acceptable boundaries of family formation, raising uncertainties, which deviate from standard practices of cisgender IVF and surrogacy.

[991] HL Deb 11 February 2004, vol 656, cols 1093-5.
[992] ibid.
[993] Children and Adoption Act 2002; Human Fertilisation and Embryology Act 2008.
[994] Across the Council of Europe, LGB couples are allowed to jointly adopt in 15 jurisdictions; Ireland, France, United Kingdom, Netherlands, Denmark, Norway, Spain, Portugal, Luxembourg, Belgium, Sweden, Andorra, Iceland, Malta. LGB couples are allowed engage in second-parent adoption in all those fifteen countries, as well as in Slovenia and Germany.
[995] Aengus Carrol and Lucas Ramon Mendos, *State-Sponsored Homophobia* (ILGA-World 2017) 73 – 77.
[996] ILGA-Europe, 'Rainbow Index 2017' (*ILGA-Europe Website,* 17 May 2017) http://www.ilga-europe.org/sites/default/files/Attachments/rainbow_europe_index_2017.pdf accessed 20 June 2017.
[997] *Salguiero da Silva Mouta v Portugal* [2001] 31 EHRR 47; *EB v France* [2008] 47 EHRR 21; *X v Austria* [2013] 57 EHRR 14.

Indeed, even if trans procreation was fundamentally similar to cisgender, heterosexual reproductive practices, such as IVF and surrogacy, there may still be an argument as to why states can legitimately restrict its operation. Although T'Sjoen, van Caenegem and Wierckx correctly observe that trans procreation mirrors *increasingly* accepted reproductive practices, it is also true that, against the prevailing 'sexual family' framework, those practices still face strong resistance. Fear over genetic and legal certainty has encouraged state actors (in Europe and beyond) to heavily circumscribe the options available to even cisgender heterosexual couples.[998] To the extent that a state rejects, or limits, donor insemination and surrogacy for non-trans individuals because of fears over legal uncertainty (and that rejection does not itself violate human rights[999]), surely the state has a stronger justification for also restricting similar forms of trans reproduction?

(b.) Alternative Means of Achieving Legal Certainty

Even if one accepts, however, that trans reproduction is substantively different to cisgender practices of IVF, sperm donation and surrogacy, can legal certainty be achieved without sterilising applicants? In its 2011 decision, the German Constitutional Court observed that "it can be ensured by law that the children concerned will, in spite of a parent's legal gender reassignment, always be legally assigned a father and a mother."[1000] If fears over legal uncertainty are motivating sterilisation clauses, those fears can be addressed through legal, rather than physical, interventions.

In Denmark, the designation of parental status operates separately from legal gender recognition.[1001] Danish law does not require that trans persons undergo any medical treatment before they access legal recognition.[1002] A person who obtains recognition is treated, for most legal purposes, as having the preferred gender. However, where a trans man, who has accessed recognition, gives birth to a child, the Danish Children's Act requires that the individual be

[998] *Parillo v Italy* [2015] 62 EHRR 8; *SH v Austria* [2011] 52 EHRR 6; Richard Storrow, 'The Proportionality Problem in Cross-Border Reproductive Care' in I Glenn Cohen (ed), *The Globalization of Health Care: Legal and Ethical Issues* (Oxford University Press 2013) 140 – 141; Ellen Sarasohn Glazer and Evelina Weidman Stirling, *Having Your Baby Through Egg Donation* (Jessica Kingsley Publishers 2013) 279; Theresa Erickson, *Surrogacy and Embryo, Sperm and Egg Donation: What Were You Thinking? – Considering IVF and Third-Party Reproduction* (iUniverse, Inc 2010).
[999] *Mennesson and others v France* App No. 65192/11 (ECtHR, 26 June 2014); *Wagner and JMWL v Luxembourg* App No. 76240/01 (ECtHR, 28 November 2007).
[1000] 1 BvR 3295/07 (n 12).
[1001] Nathalie Munkholm, 'The Legal Status of Transsexual and Transgender Persons in Denmark' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 170-172.
[1002] Amendment Act L182 (2014).

designated as the child's 'mother'.[1003] A trans woman, who provides sperm for reproduction, will be treated as the child's father.[1004] The Danish system offers an alternative model for jurisdictions that are concerned about uncertain family structures. Similar rules apply as part of the Dutch and German Civil Codes[1005] and, collectively, these jurisdictions demonstrate that it is possible to create certainty in parent-child relationships, while avoiding the need to sterilise applicants for legal gender recognition.

One can question, however, whether designating a trans man as his child's 'legal mother', or a trans woman as her child's 'legal father', actually encourages, rather than decreases, legal confusion. Where a trans man, in a heterosexual relationship, gives birth, he will generally adopt the 'father' role. This man raises his children in his preferred male gender.[1006] He interacts with his children as a man, and is understood by wider society as being a man. The "social reality"[1007] for such families is based on the birth parent's male identity. Under the Danish model, the only institution that does not respect and acknowledge the gender of these male birth parents is the law. However, as a result, whenever birth fathers, and their children, engage with the law – applying for schools, health care etc. – they face a system which is confused, unclear and incapable of catering for their specific family needs. Registering trans men as mothers and trans women as fathers risks increasing legal uncertainty. It fails to take account of the social reality and does not promote the best interests of the child.

(ii.) Child Welfare

Sterilisation provisions are also promoted as protecting child welfare[1008] – both in terms of avoiding transphobic discrimination and safeguarding against sub-optimal parenting.

Summarising European debates on gender recognition, Kohler, Recher and Ehrt observe a common concern that, where trans persons are allowed to reproduce, their children will suffer discrimination and prejudice.[1009] In her 1974 memoir, 'Conundrum', charting her journey

[1003] Munkholm (n 163) 170-172.
[1004] ibid.
[1005] van den Brink, Reuß and Tigchelaar (n 143), 291-292; see also s. 1591 of the German Civil Code.
[1006] See generally: Peter Dunne, 'Recognising transgender parenthood on birth certificates: *R (JK) v Secretary of State for the Home Department*' (2015) 3 International Family Law 230.
[1007] *Kroon v Netherlands* [1991] 19 EHRR 263, [40].
[1008] Lara Karaian, 'Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law' (2013) 22(2) Social and Legal Studies 211, 222.
[1009] Richard Kohler, Alecs Recher and Julia Ehrt, *Legal Gender Recognition in Europe* (Transgender Europe 2013) 62.

through the transition process, the British author, Jan Morris, describes an overwhelming fear that her children "might be teased or mocked at school' because of their parent's trans status.[1010] Since the earliest legislative moves towards affirming trans identities, there has been a clear emphasis on avoiding "possible future discrimination of the child." [1011] In the recent English case of J v B and The Children[1012], Peter Jackson J refused a trans woman direct contact with her five children because, on the available evidence, contact would result in the children being marginalised by their orthodox Jewish community, a result which would not promote the welfare of the children.[1013]

Sterilisation requirements are also motivated by doubts over trans parenting capacities.[1014] As noted, in most jurisdictions, applicants must present a diagnosis in order to obtain gender recognition.[1015] Irrespective of the clinical implications, the diagnosis unequivocally signifies that applicants have a mental health concern. Dickey, Ducheny and Ehrbar write that "[t]hose opposing [trans procreation]…propose that a [trans] identity is inherently pathological…others question whether [trans] people are 'fit' to be good parents."[1016] Medics and law-makers have argued that the mental distress associated with gender identity should automatically disqualify trans persons from becoming parents. Indeed, de Sutter *el al* note that, even among trans populations, there are those who "believe the psychological trauma they had to go through because of their gender dysphoria would impair a normal parent-child relationship."[1017]

(a.) Impact of Transphobic Discrimination

One must acknowledge that concerns over discrimination are not without merit. There are instances, such as *J v B,* where the children of trans individuals have experienced prejudice.[1018]

[1010] Jan Morris, *Conundrum* (Faber and Faber 2002) 107.
[1011] Scott Dylan More, 'The Pregnant Man-An Oxymoron?' (1998) 7(3) Journal of Gender Studies 319, 323.
[1012] [2017] EWFC 4.
[1013] ibid, [177].
[1014] Di Brothers, W C L Ford and the University of Bristol Centre for Reproductive Medicine Ethics Advisory Committee, 'Gender reassignment and assisted reproduction: An ethical analysis' (2000) 15(4) Human Reproduction 737; Timothy Murphy, 'Commentary: Crossing Cultural Divides: Transgender People Who Want to Have Children' (2012) 21(2) Cambridge Quarterly of Healthcare Ethic 284.
[1015] Individuals must obtain a diagnosis either as a standalone requirement (e.g. UK, Portugal) or as necessary preparation in order to access prescribed surgeries (e.g. Czech Republic, Poland).
[1016] lore M Dickey, Kelly M Ducheny and Randall D Ehrbar, 'Family Creation Options for Transgender and Gender Nonconforming People' (2016) 3(2) Psychology of Sexual Orientation and Gender Diversity 173, 174.
[1017] Petra de Sutter and others, 'The Desire to have Children and the Preservation of Fertility in Transsexual Women: A Survey' (2002) 6(3) The International Journal of Transgenderism http://www.iiav.nl/ezines/web/ijt/97-03/numbers/symposion/ijtvo06no03_02.htm accessed 3 March 2015.
[1018] Rebecca Stotzer, Jody Herman and Amira Hasenbush, *Transgender Parenting: A Review of Existing Research* (Williams Institute 2014) 11 – 12; Amanda Veldorale-Griffin, 'Therapy with Families During and After Parental Gender Transition' in Abbie Goldberg (ed), *The SAGE Encyclopaedia of LGBTQ Studies* (SAGE 2016)

Transphobic discrimination may be committed by formal actors, such as teachers, or by peers, and it can impact all aspects of family life. Writing about parent-child relations in Ireland, Church, O'Shea and Lucey observe that, in order to avoid social stigma, the "children [of trans individuals] would not allow their parent to be seen with them in public nor have any contact with their friends."[1019] In Japan, the desire to avoid youth discrimination means that applicants cannot request gender recognition before their existing children reach the age of majority.[1020]

Potential discrimination should not, however, be sufficient to justify sterilisation requirements. Transphobia does not prove that applicants for recognition are unfit parents, nor that "reproduction in this family setting is ethically unacceptable."[1021] Discrimination on the basis of gender identity merely proves that a cross-section of society is prejudiced against trans individuals. If law-makers believe that the children of trans parents will experience discrimination, the appropriate response is to address the existence of prejudice in society. [1022] Sharpe writes that "disgust and revulsion are emotional responses conditioned by systemic transphobia…and…should not be viewed as sufficient in meeting a threshold of harm."[1023] Any other conclusion would mean that, every time law-makers (or a section of society) wish to curb minority freedoms, they could simply whip up discriminatory sentiments against that group. It certainly would not be appropriate to require that biracial couples undergo sterilisation because of lingering 'anti-miscegenation' attitudes. Similarly, it might be interesting to consider, in the context of *J v B*, whether Peter Jackson J would have felt able to refuse direct contact had 'J' been a gay man rather than a trans woman.

(b.) The Parenting Abilities of Trans Individuals

The notion that trans individuals are incapable or unstable parents is not supported by the available medical and social science evidence. According to existing data in the field, trans identities do "not have a negative influence on the psychosexual or gender identity development of…children."[1024] De Sutter *et al* write that "most [trans] individuals are very well adapting to

1184 – 1185.

[1019] Heather Church, Donal O'Shea and James Lucey, 'Parent-Child Relationships in Gender Identity Disorder' (2014) 183 Irish Journal of Medical Science 227, 280.

[1020] Partial Amendment to the GID Act, Law No.70 of 2008 (Japan).

[1021] Wierckx and others (n 149), 486.

[1022] Helen Thompson, 'A Time for Change: Removing Discrimination from Same-Sex Adoption' (*New Zealand Human Rights Blog*, 18 September 2014) http://nzhumanrightsblog.com/newzealand/a-time-for-change-recognising-the-rights-of-parents-in-same-sex-adoption/ accessed 10 October 2015.

[1023] Alex Sharpe, 'Criminalising Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (2014) 3 Criminal Law Review 207, 221.

[1024] T'Sjoen, van Caenegem and Wierckx (n 153), 576; Dickey, Ducheny and Ehrbar (n 178), 174.

their post-transition life and are capable of establishing a normal relationship with children."[1025] Reviewing the existing data, McGuinness and Alghrani observe that "[t]here is no evidence to indicate a child's welfare would be adversely affected by being raised by a parent" who has transitioned.[1026] There is no reason to believe that, as a general class, trans persons are any less capable of raising children than cisgender populations.

For those children who do encounter difficulties with a parent's transition, the research identifies "two primary factors"[1027]: the "age of the child" and the "absence of a positive relationship between the two parents."[1028] An adolescent whose parent transitions in an environment of domestic conflict, including separation and divorce, may be more adversely affected than a young child whose parent transitions with spousal support.[1029] Both of these primary factors are less likely to negatively impact children after legal gender recognition. A trans man, who has obtained recognition, reproduces in circumstances where he has already undertaken his transition and where his partner knows his gender identity. There is a reduced possibility, therefore, of gender-related strife which would harm a child's welfare. Where the couple decide to procreate, one can assume that the man's trans status is not an issue for his partner (and vice versa for trans women). Similarly, if children benefit from earlier transitions, surely there is more likely to be a positive outcome where the parent has already transitioned before birth? As Wierckx *et al* note, in such a situation, "the child will not experience the moment of transition and the accompanied emotional and social difficulties."[1030]

In relation to concerns regarding mental illness, it is important to note that some trans persons only ever approach healthcare services as a box-ticking exercise.[1031] They obtain a diagnosis because it is a requirement for legal recognition. In reality, many trans individuals may not experience a level of mental distress which should disqualify them from becoming parents.[1032]

[1025] Petra de Sutter and others (n 179).
[1026] Sheelagh McGuinness and Amel Alghrani, 'Gender and Parenthood: The Case for Realignment' (2008) 16(2) Medical Law Review 261, 270.
[1027] Tonya White and Randi Ettner, 'Adaptation and adjustment in children of transsexual parents' (2007) 16(4) European Child and Adolescent Psychiatry 215, 219.
[1028] ibid.
[1029] This research appears to directly contradict the desirability of divorce as a pre-condition for gender recognition (see Chapter IV). If children experience better mental health where their parents remain committed throughout the transition process, it is contrary to the best interests of the child to require that their parents involuntarily dissolve a marital relationship.
[1030] Katrien Wierckx and others, 'Sperm Freezing in Transsexual Women' (2012) 41(5) Archives of Sexual Behaviour 1069, 1070.
[1031] European Union Agency for Fundamental Rights, *Being Trans in the European Union* (Publications Office of the European Union 2014) 41; Walter Bockting, 'Are Gender Identity Disorders Mental Disorders? Recommendations for Revision of the World Professional Association for Transgender Health's Standards of Care' (2009) 11(1) International Journal of Transgenderism 53, 58.
[1032] Tobin (n 15), 398. There is a suggestion that much of the distress which trans communities do experience has

Even if this were not the case, however, there is little justification for absolutely prohibiting trans reproduction. As a general rule, psychological or psychiatric difficulties do not entitle state officials to sterilise individuals. Where trans persons with mental health concerns do have children, social services may subject that family structure to increased surveillance. However, just as in the cisgender population, an applicant for recognition's mental health can only justify sterilisation in the rarest of cases.

There are, thus, important reasons to question whether trans reproduction (after an applicant has obtained gender recognition) poses such significant threats to the welfare of any resultant children that procreation should be prohibited or restricted. The existing medical and social science research suggests that, outside situations of familial strife (which negatively impact upon all children irrespective of whether their parents are trans), trans families are capable of providing a safe, secure environment where young people develop the same levels of mental health as those experienced by peers who do not have trans parents.

However, the above observations are subject to three important caveats which, within the sphere of trans reproduction and child welfare, should encourage policy-makers to (at least) exercise due caution in developing this sensitive area of the law.

The first caveat relates to the absence of any broad body of established research (and thus the difficulty of discerning a clearly-formed scholarly consensus) in this area. While, as noted above, the majority of literature written on the experiences of children with trans parents (since the 1970s) has not identified any reduction in mental health levels, it is important to acknowledge that – despite the growing visibility of trans families and the fact that trans persons have been openly parenting for many decades – there is a relative paucity of academic research.[1033] In reality, trans parenthood, and its effects on children, remains an emerging topic for medicine and social science. Von Doussa, Power and Rigg can identify only "a handful of studies' existing on the issue.[1034]

no inherent link with gender identity. Rather, it is a product of a culture which stigmatises and shames gender diversity, see: Bockting (n 193), 57 – 58.

[1033] Jean Malpas, 'Can Couples Change Gender? Couple Therapy with Transgender People and their Partners' in Jerry Bigner and Joseph Wetchler, *Handbook of LGBT-Affirmative Couple and Family Therapy* (Routledge 2012) 72.

[1034] Henry von Doussa, Jennifer Power and Damien Riggs, 'Imagining parenthood: the possibilities and experiences of parenthood among transgender people' (2015) 17(9) Culture, Health and Sexuality 1119, 1127.

As such, there is a need to proceed with an especial level of caution. In Chapter V, this thesis notes that – on the question of legal transition rights for trans minors – the primary consideration must be (irrespective of the stated wishes of children, although children's voices have obvious relevance[1035]) the objective 'best interests' of child applicants[1036], and the extent to which legal recognition can (or cannot) promote their well-being. Although the existing data might create, as James-Abra *et al* suggest[1037], a presumption in favour of trans reproductive rights, policy-makers must be alert to how much remains unknown about the wider consequences which such reproduction entails.

The second caveat relates to an inevitable shortcoming which the existing research (and any future research) is likely to exhibit: the fact that it is difficult for medical and social science investigators to prove that a particular phenomenon *does not* exist.[1038] For policy-makers to be truly comfortable that trans reproduction will not negatively impact the welfare of any resulting children, the optimal data tools would be research which clarifies that trans parents do not reduce mental health among offspring. However, while researchers might be able to show (as, indeed, the small body of existing scholarship does appear to show) that certain children in certain families experience standard levels of mental health, they cannot prove (more generally) that parental trans status has no detrimental impact on children (and that future children will not be negatively affected by having a trans parent). While, intuitively, it seems unfair that trans reproductive rights could be limited because investigators have not disproved (and, perhaps, will never disprove) an 'unprovable' connection between parental identities and child welfare, there is at least an arguable case that – where the ultimate impact of such a connection remains unknown – policy-makers must, as noted above, proceed with caution.

The final caveat relates to the earlier discussion in Section I, which observed possible differences between trans procreation and other forms of cisgender reproduction. In Section I, the thesis considered how trans procreation deviates from (and, thus, may create greater uncertainty) than cisgender practices of IVF and surrogacy. However, the differences between trans and cisgender reproduction are not only relevant to the question of 'legal uncertainty'; they also have an impact upon child welfare.

[1035] UN CRC, art. 12.
[1036] ibid, art. 3.
[1037] S James-Abra and others, 'Trans peoples experiences with assisted reproduction services: a qualitative study' (2015) 30(6) Human Reproduction 1365, 1366.
[1038] Myrte Dierckx and others, 'Families in Transition: A Literature Review' (2016) 28(1) International Review of Psychiatry 36, 37-38.

A striking feature of the research addressed in this section (which indicates the positive or neutral mental health outcomes for children with trans parents) is the extent to which that research focuses upon children whose parents transition *after* the child is born (and thus whose role in reproduction was consistent with the role expected of the parent's assigned gender). The available scholarship explores the lives and health of young people who were conceived by their legal mother and whose legal father provided the relevant sperm. Although, at some stage, one of the children's parents undertook a process of gender transition, the children were overwhelmingly born into a heteronormative reproductive framework. As such, while the children did, at a certain points in their life, have to confront (possibly socially taboo) gender diversity, their origins did not challenge the standard reproductive narrative.

However, against that background, it is questionable to what extent the existing research (even looking beyond the relative paucity thereof) can adequately predict the mental health outcomes for children who are conceived post-legal recognition. At this juncture, it is important to distinguish the experiences of: (a) children who are born through surrogacy and children whose parents transition post-birth; and (b) children who are born after gender recognition so that their trans parent, although using their natural reproductive capacities, is doing so in a social and legal identity which deviates from the reproductive conduct in which the parent is engaging.

For the child born through surrogacy or whose parent subsequently transitions, there is no doubt that they may struggle with the fact that their birth mother is not their genetic mother or that their legal mother now expresses a preferred male gender. Yet, in both cases, the child's reproductive origins conform to a standard 'woman gives birth/man provides sperm' narrative. As such, while the child's history and lived-reality may not be typical, it does not fundamentally challenge established reproductive norms. On the other hand, however, this is not true for the child who is born after a parent obtains gender recognition (so that the child has a 'pregnant father' or a 'mother who produces sperm'). For that young person, their conception narrative does directly challenge established procreative norms, and their reproductive origins may create substantial personal uncertainty, as well as social taboo.

For policy-makers, who are reflecting upon the likely welfare impact of trans reproduction post-transition, there must be an awareness of the potential (and novel) difficulties which children may experience if they are born into a reproductive scenario, which deviates from everything that the children witness around themselves. While, ultimately, such experiences may not negatively influence children (particularly as long as they are raised in a secure, loving

environment), policy-makers should not assume that, because children whose parents transition after birth have stable mental health outcomes, the same will be true for young people, whose unique and non-traditional conception narrative (i.e. the 'pregnant man') expose them to additional personal and social pressures.

C. Impact of Pregnant Men on Gender-Based Pregnancy Discrimination Laws

A possible area of concern for legal gender recognition – yet one which has not been raised in national debates – is the impact of recognising legal males, who have the capacity to give birth, on gender-based pregnancy non-discrimination laws. In *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV- Centrum) Plus,* the European Court of Justice held that a woman who experiences unfavourable employment treatment because of pregnancy can claim 'sex' discrimination.[1039] The woman is entitled to bring her action irrespective of whether she can prove that a comparably placed male individual was treated better. The rationale for adopting this *sui generis* non-comparator model is clear: pregnancy is exclusively experienced by women; pregnancy discrimination arises against women because of a gendered characteristic which men do not share; it is therefore inappropriate to compare the situation of a pregnant woman with a non-pregnant man. A similar conclusion was reached by the Supreme Court of Canada in *Brooks v Safeway Canada Ltd*[1040] and by the United States Congress as part of the Pregnancy Discrimination Act 1978.

Where both legal women and legal men can become pregnant, is it tenable to maintain a discrimination test which focuses solely on womanhood? Given the ubiquity of sterilisation requirements, it is unsurprising that national courts have yet to specifically rule on the position of pregnant men in employment discrimination cases. Within wider social commentary, however, there are undoubtedly strong feminist objections to "decentering 'women'"[1041] in political and legal debates over reproductive justice.[1042] As reproductive service providers increasingly neutralise their gendered-language to accommodate non-female pregnant individuals, there is a fear that – both symbolically and substantively – women's identities are

[1039] Case C-177/88 [1990] ECR I-394, [12].
[1040] [1989] 1 SCR 1219.
[1041] Chase Strangio, 'Can Reproductive Trans Bodies Exist?' (2015) 19(2) City University of New York Law Review 223, 233.
[1042] Elinor Burkett, 'What Make's A Woman' (*The New York Times,* 6 June 2015) https://www.nytimes.com/2015/06/07/opinion/sunday/what-makes-a-woman.html accessed 16 April 2017; Sarah Ditum and Jennie Kermode, 'Should Feminists talk about "Pregnant People"?' (*The New Statesman,* 30 September 2016) http://www.newstatesman.com/politics/feminism/2016/09/should-feminists-talk-about-pregnant-people accessed 16 April 2017.

being erased.[1043] Scholars and commentators point to the fact that, whether or not legal men can conceive children, pregnancy is a biological (and social) phenomenon which overwhelmingly affects female-identified lives, and which remains a primary obstacle to women's professional advancement.[1044] Strangio writes that the "idea of shifting from talking about 'pregnant women' to 'pregnant people' can evoke traumatic memories of the [American] Supreme Court's refusal to protect pregnant people from discrimination under a sex discrimination theory."[1045] In *Geduldig v Aiello,* the all-male Court, framing pregnancy in gender-neutral terms, denied the plaintiff relief under Title VII of the federal Civil Rights Act 1964 on the basis that she had been discriminated against as a pregnant person (which was not a protected characteristic) rather than as a woman.[1046] If persons, who are acknowledged to be men, can conceive children, it may be more difficult for the law to emphasise the gendered dynamics of pregnancy.

For some scholars, however, the requirement to redefine pregnancy in non-gendered terms represents an opportunity rather than a detriment. Authors, such as Rosenblum, have longed advocated a process of 'unsexing' reproduction,[1047] which would more accurately reflect the multiple roles which individuals play in procreation and child-rearing. Within this context, a protected characteristic of 'pregnant person' may well be preferable.[1048] For Karaian, to the extent that current pregnancy protections are incapable of embracing trans masculine and non-binary identities, there is a justification for "reconceiving of pregnancy as a ground of discrimination divorced from sex."[1049] Indeed, for Williams, de-gendering pregnancy may enhance, rather than marginalise, the position of women.[1050] She questions how women benefit from rules which reinforce and mandate their "special place in the scheme of human existence when it comes to maternity."[1051] How these arguments would play out in practice, however, remains open to doubt. While a utopian image of unsexed-reproduction may have intuitive appeal, it is unclear how a gender-neutral law would have appeared to Mrs Dekker when she was being refused employment because of a physical trait which no male applicant faced.

[1043] Carole Hanisch, 'How to Defang a Movement: Replacing the Political with the Personal Panel' (Boston University, 28 March 2014) http://www.bu.edu/wgs/2014/05/29/how-to-defang-a-movement-replacing-the-political-with-the-personal/ accessed 27 June 2017.
[1044] ibid.
[1045] Strangio (n 203), 230-231.
[1046] [1974] 417 US 484, 494.
[1047] Darren Rosenblum, 'Unsex Mothering: Toward a New Culture of Parenting' (2012) 35(1) Harvard Journal of Law and Gender 57; Karaian (n 170).
[1048] I am grateful for a discussion with Dr Catherine Donnelly and Dr Andrea Mulligan (Trinity College Dublin) as to how to address the issue of pregnant men and discrimination law.
[1049] Karaian (n 170), 222.
[1050] Wendy Williams, 'The Equality Crisis: Some Reflections On Culture, Courts, and Feminism' (1982) 7(3) Women's Rights Law Reporter 175, 195
[1051] ibid.

At a practical level, one can argue that, considering the small number (if any) of legal males who will ever claim pregnancy discrimination, national laws can still enforce a gender-equality model, while also providing exceptional relief to male petitioners. The fact that trans men can become pregnant does not lessen the gendered ways in which many women experience pregnancy discrimination. Indeed, where pregnant men are themselves treated inferior, their experience, even as men, will be informed by the same patriarchal norms which devalue pregnancy because of its association with women. Recognising that a small number of trans men become pregnant does not detract from the gendered context in which pregnancy discrimination arises.

III. Permanence

The third justification for physical intervention requirements is promoting 'permanent' transitions.[1052] Proponents of surgery, sterilisation and hormone therapy argue that medicalisation encourages greater reflection and reduces the incidence of "ill-considered" applications.[1053] Where gender recognition is not simply an abstract legal process, but involves extensive body modifications, individuals are *more* likely to undertake substantial deliberations and *less* likely to experience subsequent regret.[1054] According to Wenstrom, law-makers and judges are strongly influenced by the "fear that without some form of permanent physical change, the individual may 'change back' to the gender they were assigned at birth."[1055]

Analysing permanence-based rationales, this section addresses two primary questions: First, is gender permanence a policy goal "of sufficient importance" to justify physical requirements? Second, are medical pre-conditions necessary to achieve that goal? As persistence of gender identity among minors raises unique considerations (explored in Chapter V), this section focuses solely on 'permanence' as it relates to adult applicants.

[1052] Currah and Moore (n 30), 123; Anonymous, 'Experience: I Regret Transitioning' (*The Guardian*, 3 February 2017) https://www.theguardian.com/lifeandstyle/2017/feb/03/experience-i-regret-transitioning accessed 21 June 2017; Katyal (n 19), 410.

[1053] Tobin (n 15), 420; Dean Spade, 'Resisting Medicine, Re/modeling Gender' (2003) 18(1) Berkeley Women's Law Journal 15, 31. Serano writes of fears that "people who are not 'really trans'…[will be] inappropriately swayed or recruited into trans identities and gender transition", Julia Serano, 'Detransition, Desistance, and Disinformation: A Guide for Understanding Transgender Children Debates' (*Medium*, 3 August 2016) https://medium.com/@juliaserano/detransition-desistance-and-disinformation-a-guide-for-understanding-transgender-children-993b7342946e accessed 3 July 2017.

[1054] Mottet (n 94), 416-417.

[1055] Kristin Wenstrom, '"What the Birth Certificate Shows": An Argument To Remove Surgical Requirements from Birth Certificate Amendment Policies' (2008) 17 Law and Sexuality Review Lesbian Gay Bisexual and Legal Issues 131, 156.

A. Permanence-Based Objectives of Medicalisation

Permanence-focused arguments rely on an assumption that multiple amendments to legal gender create social harm. However, although frequently invoked to defend surgery, sterilisation and hormone requirements, the nature and character of this harm has rarely been explained. Like the supposed dangers of bodily diversity, the risk inherent in changeable genders is considered so obvious that it need not be elaborated upon. In practice, law-makers and judges often engage in circular logic: non-permanent gender transitions are sub-optimal because they are not permanent. Existing policy debates do not shed light on the detriment caused by applying for gender recognition more than once.

Mottet writes that, instead of focusing on permanence, laws should prioritise accuracy.[1056] It is more important that a person have the correct legal status than an identity which remains permanent. In most cases, where trans individuals are acknowledged in their preferred gender, that new status will suffice for life. Accuracy and permanence typically coincide. Yet, as Vade notes (and as discussed extensively in Chapter VI), "some [trans] people identify as male for part of their life, as female for another part of their life, and later again as male."[1057] A (growing) minority of trans individuals experience a continuous evolution in gender identities. These people do not have a permanent identity, but self-perceive and self-express in different ways at different times.[1058] Requiring that transitions be permanent, even though this may contradict one's lived-experience, obstructs rather than facilitates accurate identities.[1059] Where self-identification and expression do change over time, there is an argument that legal status should reflect that evolution.[1060]

In response, one can argue that: (a) requiring permanent transitions reduces potential fraud; and (b) continuous changes would render the institution of legal gender unworkable. With regard to the first argument, there is a fear that, if states acknowledge individuals as a matter of

[1056] Mottet (n 94), 416.
[1057] Vade (n 56), 267.
[1058] Emma Dargie and others, 'Somewhere under the Rainbow: Exploring the Identities and Experiences of Trans Persons' (2014) 23(2) The Canadian Journal of Human Sexuality 60, 62; Sarah Marsh, 'The gender-fluid generation: young people on being male, female or non-binary' (*The Guardian*, 23 March 2016) https://www.theguardian.com/commentisfree/2016/mar/23/gender-fluid-generation-young-people-male-female-trans (accessed 16 March 2017); Julie Nagoshi, Stephan/ie Brzuzy and Heather Terrell, 'Deconstructing the complex perceptions of gender roles, gender identity, and sexual orientation among transgender individuals' (2012) 22(4) Feminism and Psychology 405, 415.
[1059] Mottet (n 94), 416.
[1060] ibid.

routine and without limitation, cisgender (and trans) persons will switch between legal identities to take advantage of gender-specific benefits.[1061] The result will be dishonest applications which do not reflect internal experiences of gender. To the extent that this argument touches upon the relationship between gender recognition and fraud, it has already been addressed in the introductory chapter. It suffices to note that, as noted in that introductory discussion, while misuse of gender recognition is certainly possible, it is (at most) extremely rare in practice.

With regard to the second argument, one can ask whether legal gender would still make sense if applicants engaged in continuous changes. In Chapter VI, this thesis explores non-binary experiences, including fluid and changing identities.[1062] Many people, who experience gender flux, self-identify beyond the concepts of male and female. Even if the law permitted non-permanent male and female identifications, these persons could not take advantage of gender recognition because they would never have a fully-male or fully-female experience.

For other non-binary individuals, however, they understand their fluidity as a continuous oscillation between rigid male and female identities.[1063] Such persons may experience changing identities every week or every day, and these changes always involve feeling wholly man or woman. For these individuals, removing permanence from gender recognition would radically alter their relationship with the law. Where there is no limitation on applying for recognition, such applicants could conceivable amend their status daily. However, from a practical perspective, what are the consequences of continuous changes? There is real risk that, subject to daily or weekly amendments, gender would become both ungovernable and meaningless as a legal concept.[1064]

B. Permanence and Necessity

Even if one concedes that permanent transitions are a sufficiently important policy goal, it is doubtful that achieving permanence requires surgery, sterilisation and hormone therapy. There is little evidence to suggest that, in the context of gender recognition, premature applications

[1061] Tey Meadow, '"A Rose is a Rose" On Producing Legal Gender Classifications' (2010) 24(6) Gender and Society 814, 927 – 828.
[1062] Maria Pahl, *'Immutability of Identity, Title VII, and the ADA Amendment Act: How Being "Regarded As" Transgender Could Affect Employment Discrimination'* (2014) 3(1) De Paul Journal of Women, Gender and the Law 63, 68; Marsh (n 220).
[1063] Lore Graham, 'How to be a Good Ally to Non-Binary People' (*xojane Website*, 11 January 2016) http://www.xojane.com/issues/how-to-be-a-good-ally-to-nonbinary-people (accessed 18 March 2017).
[1064] Rebecca Reilly-Cooper, 'Gender is Not a Spectrum' (*Aeon,* 28 June 2016) https://aeon.co/essays/the-idea-that-gender-is-a-spectrum-is-a-new-gender-prison (accessed 10 April 2017).

are a frequent (or even infrequent) occurrence. Thus, while the law can (and should) encourage proper reflection, there is not a culture of ill-considered transitions in need of rectification. Similarly, surgery, sterilisation and hormone therapy are only proportionate if they actually prevent premature applications for gender recognition. However, no aspect of medical intervention prohibits trans individuals – either internally or externally – from subsequently re-identifying with their birth-assigned gender.

(i.) Are Non-Permanent Transitions a Problem Necessitating Medical Interventions?

Medical pre-conditions are the solution to a non-permanence problem which, at least according to the available research, does not exist. The current statistics on 'regret' illustrate that only a small (in most cases negligible) number of individuals ever desist from their trans identity.[1065] People who do re-transition often cite the absence of social support, rather than self-identification, as their primary motivation.[1066] These individuals continue to experience a trans identity but return to their birth-assigned gender because of unbearable social pressures.[1067]

Arguments about capricious or flippant applications significantly underestimate the process of personal reflection in which individuals engage pre-transition.[1068] They reflect biased assumptions about trans persons, and a failure to meaningfully engage with trans lives. As Crowley notes, decisions to seek legal gender recognition are "often twinned with social and familial rejection, loss of employment and resultant high degrees of social and economic hardship."[1069] They are "not made lightly, arbitrarily or without considerable sacrifice."[1070] During a ceremony to mark Argentina's transformational Gender Identity Act 2012, the

[1065] Cecelia Dhejne and others, 'An Analysis of All Applications for Sex Reassignment Surgery in Sweden, 1960–2010: Prevalence, Incidence, and Regrets' (2014) 43(8) Archives of Sexual Behaviour 1535, 1540 – 1544; Annika Johansson and others, 'A Five Year Follow-Up Study of Swedish Adults with Gender Identity Disorder' (2010) 39(6) Archives of Sexual Behaviour 1429, 1435 – 1436; AJ Kuiper and Peggy Cohen-Kettenis, 'Gender Role Reversal among Postoperative Transsexuals' 1998 2(3) The International Journal of Transgenderism http://www.iiav.nl/ezines/web/ijt/97-03/numbers/symposion/ijtc0502.htm accessed 4 March 2015; Cordula Weitze and Susanne Osburg, 'Transsexualism in Germany: Empirical Data on Epidemiology and Application of the German Transsexuals' Act during tts First Ten Years' (1996) 25(4) Archives of Sexual Behaviour 409, 418.

[1066] Mikael Landen and others, 'Factors predictive of regret in sex reassignment' (1998) 97(4) Acta Psychiatrica Scandinavica 284, 288; Mottet (n 96), 416.

[1067] Amber Roberts, 'Dispelling the Myths Around Trans People De-Transitioning' (*Vice Website,* November 17 2015) http://www.vice.com/en_uk/read/dispelling-the-myths-around-detransitioning accessed 23 November 2015.

[1068] Hyndal (n 38).

[1069] 'Opening Statement to the JCHC by Dr Philip Crowley, National Director' (*Health Service Executive Website*, 4 July 2013) http://www.hse.ie/eng/services/news/media/pressrel/newsarchive/2013archive/july2013/philipcrowleyopening.html accessed 20 October, 2015.

[1070] ibid

Argentine President acknowledged that receipt of congruent identity documents is frequently the culmination of a life-long struggle.[1071] Against that background, there is not a clear need for measures which will increase deliberations and reflection.

There is, however, one important note of caution. The existing research relates, with some exceptions[1072], to medical transitions. Persons, who undertake a voluntary process of physical interventions, overwhelmingly maintain their trans identity. Yet, there are important reflective processes built into trans medical pathways. As noted, candidates for surgery and sterilisation typically have to obtain a diagnosis, receive hormone treatments and complete a period of real life experience. All of these pre-conditions encourage individuals to fully consider their transition options. It may not be surprising, therefore, that those persons, who do ultimately submit to treatment, generally maintain their trans identification. However, can highly-supervised medical pathways predict permanence rates for legal recognition? Where an applicant can be acknowledged, without physical pre-conditions which promote deliberation, research on medical transitions appear to have less relevance. There is at least an arguable case that, in the absence of those pre-conditions, more people are at risk of making premature applications.

(ii.) Medicalisation as a Strategy for Encouraging Permanence

The second consideration is whether medical requirements actually avoid non-permanence. Huscroft, Miller and Weber write that, in order to be proportionate, an interference with human rights must be "rationally connected" to achieving a legitimate goal.[1073] Even if jurisdictions impose the strictest medical intervention requirements, however, there is no guarantee that persons will always identify with their affirmed gender.[1074]

Legal status is merely one (albeit important) element of gender experiences. Where a trans woman obtains recognition, there is nothing to stop her subsequently re-transitioning to her birth-assigned male gender.[1075] The individual may even be able to access, or stop, medical interventions to reverse previous gender-confirming treatments.[1076] The result would be that the person, while retaining a female legal gender, would live in 'his' (now) preferred male gender.

[1071] 'In emotional ceremony, Argentinian President Hands out new ID Cards to Transgender Individuals' (*Blabbeando*, 3 July 2012) http://blabbeando.blogspot.ie/2012/07/in-emotional-ceremony-argentinean.html#.VPRc__msVyU accessed 4 March 2014.
[1072] Weitze and Osburg (n 227), 418.
[1073] Huscroft, Miller and Webber (n 2) 2.
[1074] Currah and Moore (n 30), 126
[1075] ibid
[1076] ibid

The individual would be in the same position as a trans man who cannot obtain legal gender recognition. Indeed, depending upon the initial gender-confirming treatments and subsequent procedures to reverse their effects, the person may be fully accepted as male for all social and professional purposes. Surgery, sterilisation and hormone therapy do not *de facto* mean that all individuals will permanently live in their recognised gender.[1077]

There are numerous alternative (less invasive) methods which more effectively encourage permanent gender. If the law is concerned that individuals should not re-transition after accessing legal recognition, policy makers could simply establish a cap on the number of applications a person can make. While, like medical pre-conditions, this would not ensure that applicants permanently self-identify with their recognised gender, it would result in trans persons having a consistent legal gender (while respecting core human rights). Medicalisation is not necessary to ensure that applicants maintain a permanent legal gender post-transition.

IV. Segregated Spaces

The final justification for physical intervention is maintaining gender-segregated services and accommodations.[1078] It would not be possible to operate women-only and men-only facilities, it is claimed, if individuals did not have standard, consistent and unambiguous sexed-bodies. In refusing to amend New York City's former surgery requirements in 2006, the city's Department of Health noted "concerns about housing in sex-segregated hospitals and prisons."[1079]

Segregation-based rationales assume that gender-specific services are *de facto* operated according to body characteristics. As the law has historically recognised only two body configurations, which legal men and women are presumed to always exhibit, it was acceptable to use legal status as a proxy for sex divisions. If legal women always have breasts, uteri and vaginas, it is easier to create services for 'women' rather than for persons with those characteristics. Similarly, if legal men always have a penis and testes, 'men'-only facilities are more convenient. Yet, while the language may speak in terms of gender, uniformity of sexed-bodies is the true motivating factor.

[1077] ibid
[1078] Spade (n 37), 182-183.
[1079] Anne E Silver, 'An Offer You Can't Refuse: Coercing Consent to Surgery through the Medicalization of Gender Identity' (2013) 26(2) Columbia Journal of Gender and Law 488, 514.

A non-medicalised model of legal recognition, particularly one which does not require surgery or hormone therapy, compromises the goal of appropriate sexed-divisions. If trans individuals are acknowledged in their preferred gender without modifying their bodies, they will be able to enter women-only or male-only facilities with 'incongruent' sex characteristics. Such a situation places administrators in a supposedly untenable position.[1080] They must permit access although this creates an undesirable mix of body traits. It also exposes other users to sex-gender dynamics which are not only novel but possibly even incomprehensible.

In reviewing the proportionality of medical requirements through a segregation-focused lens, one must (as in Section III) make two core enquiries. First, what is the purpose of omitting trans persons, who have not medically transitioned, from gendered spaces and is that purpose sufficiently important to interfere with human rights? Secondly, are physical intervention requirements 'necessary' to achieve that purpose?

A. Justifying Uniform Body Standards in Segregated Spaces

A number of policy arguments – directly linked to concerns regarding gender-segregated facilities – have been raised in support of medicalisation. First, the existence of surgical and hormone requirements obstructs, so it is claimed, cisgender men who attack women in gender-segregated spaces.[1081] If entry into women-only facilities does not pre-suppose particular body traits, cisgender men could easily enter women's toilets or locker rooms, and threaten the safety of occupants.[1082] Second, surgery, sterilisation and hormone therapy ensure that the cisgender population are not discomforted by diverse sex characteristics.[1083] Cisgender men and women may believe that it is inappropriate and unnatural to share facilities and services with persons who have unexpected body traits.

[1080] Wenstrom (n 217), 144; Kenji Yoshino, 'Sex and the City – A Commentary by Kenji Yoshino' (*Slate*, 11 December 2006) http://www.slate.com/articles/news_and_politics/jurisprudence/2006/12/sex_and_the_city.html accessed 9 October 2015.

[1081] Harper Jean Tobin and Jennifer Levi, 'Securing Equal Access to Sex-Segregated Facilities for Transgender Students' (2013) 28(3) Wisconsin Journal of Law, Gender and Society 301, 326; Tyler Brown, 'The Dangers of Overbroad Transgender Legislation, Case Law, and Policy in Education: California's AB 1266 Dismisses Concerns about Student Safety and Privacy' (2014) 2 Brigham Young University Education and Law Journal 287, 295; Carlos Maza and Luke Brinker, '15 Experts Debunk Right Wing Transgender Bathroom Myth' (*Media Matters for America Website*, 20 March 2014) http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533 accessed 11 December 2015.

[1082] Spade (n 37), 182-183; Amy Rappole, 'Trans People and Legal Recognition: What the U.S. Federal Government Can Learn From Foreign Nations' (2015) 30(1) Maryland Journal of International Law 191, 215.

[1083] Keller (n 97), 72; Yoshino (n 242).

In relation to cisgender abuse, this has been (like the relationship between permanence and fraud) addressed in the discussion on potential misuses of gender recognition in the introductory chapter. It will not, therefore, be considered further in Section IV. Similarly, in terms of cisgender discomfort, this justification raises identical concerns to those already addressed in Sections I and II. Discomfort-based claims ignore both the natural diversity of human bodies and the broad acceptance of non-normative cisgender and (adult) intersex sex characteristics (i.e. the man with gynecomastia is not excluded from the locker room). They are a weak rationale for surgery, sterilisation and hormone therapy. Cisgender persons may subjectively reject unmodified trans bodies as wrong or abnormal. However, that should not, without further explanation (and without equal application to all a-typical bodies), suffice to exclude trans individuals who have not medically transitioned. Tobin and Levi write that "the desire to avoid sharing a facility with a [trans] person represents precisely the sort of entrenched cultural bias that our non-discrimination laws are designed to address."[1084] As objections to 'unnatural' sex characteristics have already been extensively considered, they too are not explored further in Section IV.

Instead, the remainder of this section engages with justifications grounded in fear of (voluntary and involuntary) sexual misconduct. There is a perception that, if trans women are able to enter gender-segregated services and accommodations without modifying their genitalia, they will pose a threat to cisgender female occupants. Wenstrom writes of a "common fear" that "women who have a penis will sexually or physically attack non-trans women if they are placed in a women's facility."[1085] A requirement to modify body characteristics is justified as reducing sexual violence in women-only spaces.[1086] Similarly, surgery, sterilisation and hormone therapy also ensure the "prevention of [consensual] sexual activity."[1087] Some commentators argue that women with a penis are more likely to voluntarily engage in sexual intercourse with other female service users. To the extent that one accepts that service users or inhabitants, such as prison detainees, should not be sexually active, physical requirements reduce the potential for such undesirable conduct.[1088]

[1084] Tobin and Levi (n 243), 318.
[1085] Wenstrom (n 217), 148; Maza and Brinker (n 243).
[1086] Martine Rothblatt, *The Apartheid of Sex: Manifesto on the Freedom of Gender* (Rivers Oram Press/Pandora 1996) 92.
[1087] Spade (n 37), 214.
[1088] This argument adopts a highly phallic-centric conception of sexual intercourse (If a trans woman no longer has a penis, there could be no other conceivable way in which she might engage in consensual sexual intercourse with another female service user).

(i.) Voluntary and Involuntary Sexual Misconduct

The myth of the trans predator operates on the idea that trans persons, particularly trans women, pose a threat of sexual violence to women.[1089] Both feminist and conservative scholars have long argued that trans persons should be excluded from their preferred single-gender spaces as a means of protecting bodily integrity rights.[1090] According to Brydum, there is a "'provably false' fear that trans people inherently threaten the safety of cisgender women and children."[1091]

Supporting medicalisation by reference to sexual misconduct is problematic. It suggests that trans persons are sexual deviants, who target the cisgender population and who are incapable of complying with rules on proper sexual behaviour.[1092] Characterising trans individuals as predators reflects a deeply engrained social prejudice. It is supported by neither legal nor medical evidence.[1093] In response to the UK Transgender Equality Inquiry's recommendations (which advocated greater trans access to gendered spaces[1094]), Long complained that Members of Parliament had ignored research undertaken in Sweden which, she claimed, found that trans women commit violent crime, including sex offending, at the same rates as cisgender men.[1095] However, the research that Long references – a 2011 article by Dhejne *et al* – makes no suggestion that trans women are a rape risk. Indeed, as the first author notes, "claims about trans criminality, specifically rape likelihood, is misrepresenting the study findings."[1096] In reality, there is no peer-reviewed scholarship which proves, or even suggests, that trans individuals, as a class, pose a threat of sexual violence to cisgender populations.[1097]

Concerns relating to misconduct also assume that trans women, irrespective of self-identification and gender expression, are men.[1098] Observers argue that allowing women, who have not medically transitioned, to enter female-only facilities is equivalent to welcoming

[1089] Julia Long, 'Interview with Jack Monroe and Mark Frei' (*Channel 4 News,* January 14 2016) https://www.youtube.com/watch?v=5eIQXJi8-Do accessed 19 May 2016.
[1090] Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (Routledge 2014) 160.
[1091] Sunnivie Brydum, 'Texas Doubles Down on Transphobic Legislation, Adding $2,000 Fine for Wrong Bathroom Use' (*The Advocate,* 10 March 2015) http://www.advocate.com/politics/transgender/2015/03/10/texas-doubles-down-transphobic-legislation-adding-2000-fine-wrong-ba accessed 9 October 2015.
[1092] Evan Vipond, 'Trans Rights Will Not Protect Us: the Limits of Equal Rights Discourse, Antidiscrimination Laws, and Hate Crime Legislation' (2015) 6(1) Western Journal of Legal Studies 1, 9 – 10.
[1093] Maza and Brinker (n 243).
[1094] House of Commons Select Committee on Women and Equalities (n 112) 32.
[1095] Long (n 251).
[1096] Cristan Williams, 'Fact Check: Study Shows Transition makes Trans People Suicidal' (*The Trans Advocate,* 2 November 2015) http://www.transadvocate.com/fact-check-study-shows-transition-makes-trans-people-suicidal_n_15483.htm accessed 20 May 2016.
[1097] Yoshino (n 242); Sam Winter, 'Transgender Science: How might it shape the way we think about Transgender Rights' (2011) 41(1) Hong Kong Law Journal 139, 147-148.
[1098] Levasseur (n 34), 1000.

cisgender males.[1099] If there are policy reasons for excluding men from gender-segregated spaces, so too trans women, who have not modified their bodies, should be barred.[1100]

From a human rights perspective, denying the true identity of trans women disregards their lived identities and personal experience of gender. Wodda and Panfil write, unequivocally, that trans women "are women".[1101] They self-identify with and, where they are not restricted by violence or discrimination, live in their preferred female gender. Trans women communicate and engage with other persons as women. They may even undertake difficult, often painful, transitions to be fully recognised in their preferred gender. As a group, trans women are as diverse in their make-up and characteristics as any other female population. Different trans women respond differently to similar situations, including their proximity to female-only services and communal accommodations. However, if national laws operate upon a general presumption that cisgender women can share segregated spaces without inappropriate sexual activity, the courtesy of that presumption should also be extended to trans persons.

As in the general female population, many trans women have no interest whatsoever in a voluntary sexual relationship with a person of the same gender. A large number of trans persons, just like those in the cisgender community, experience only opposite-gender attraction. On the other hand, some trans women are indeed lesbian-identified.[1102] Yet, unless service providers are excluding all women with same-gender attractions – cisgender and trans – there is no justification for excluding only trans women. Considering that most jurisdictions do not permit LGB persons to be excluded from women-only and men-only services and accommodations, there is no logical reason for a specific trans exception.

Excluding trans women, who retain their natural genitalia, promotes the "sexist and heterosexist assumption that a [person] with a penis will inevitably attack and rape a female."[1103] Irrespective of whether trans women are actually deviant or really men, it is argued that segregated spaces should bar trans females on the sole basis that individuals with 'male' genitalia are dangerous.[1104] Cavanagh observes an "antiquated and heterosexist construction of masculinity…[whereby] 'if a man sees a woman, just a glimpse, he cannot be controlled.'"[1105]

[1099] '*Newsnight* interview with Sarah Ditum and CN Lester' (*BBC 2*, 5 January 2016) https://www.youtube.com/watch?v=Mnui7OqawSM accessed 20 May 2016.
[1100] ibid.
[1101] Wodda and Panfil (n 81), 952.
[1102] Petra de Sutter and others (n 179).
[1103] Wenstrom (n 217), 151.
[1104] ibid, 148.
[1105] Sheila Cavanagh, *Queering Bathrooms: Gender, Sexuality and the Hygienic Imagination* (University of

Like concerns relating to sexual deviancy, 'penis as predator' reasoning is both offensive and troublingly overbroad. It implicates trans women, who retain their penis, and all cisgender men. It not only encourages a damaging vision of male identities, but also reduces women to passive, unwilling prey: women are constructed, inherently, as "potential victims".[1106] The notion of the 'unequivocally violent penis' is unsubstantiated in wider criminology research, and has little impact on how gendered-spaces actually operate. If the presence of any male genitalia automatically compromises the sexual safety of cisgender women, why are male staff permitted to work in prisons or women-only education institutions? Medicalising gender recognition on the basis that trans women with a penis are inherently dangerous is not a valid justification for interfering with trans human rights.

B. The Necessity of Uniform Body Standards in Segregated Spaces

There are, thus, key difficulties with the justifications for excluding trans persons – who have not submitted to medical interventions – from gender-segregated spaces. These rationales are based upon problematic assumptions and transphobic prejudices. Yet, even if this was not the case, and medicalisation pursued a valid aim, there are still doubts about the 'necessity' of physical intervention requirements.

(i.) The Role of Sex Characteristics in Determining Access to Gendered Spaces

Medical pre-conditions could only be proportionate if sex characteristics determine access to gender-segregated spaces. Where national laws mandate body modifications to maintain sex-based divisions, 'necessity' requires evidence that entry into those spaces actually depends on sexed-traits. Irrespective of the legitimacy of maintaining sex-based divisions, if gendered spaces are, in practice, divided using alternative criteria, there is no need for applicants to modify their bodies.

In Section I, this thesis explored how justifying medicalisation by reference to the 'determinative' character of sex is highly contested. Self-identification, self-expression and public perception all have an important influence. Similar considerations apply in the context of gender-segregation. Where a man wishes to enter the men-only restroom in a small local

Toronto Press 2010) 78.
[1106] ibid.

restaurant, is permission determined by proof of a penis or testes? Restaurant proprietors rarely, if ever, subject their clients to strip search exams. As MacKinnon observes, "[m]ost people don't flash their genitals to gain access to places."[1107] Individuals are allowed to use male restrooms if they clearly express a male gender and are perceived by others as male. The reality is that, in the normal course of events, access to the most common forms of gender-segregated facilities – such as public restrooms or department store fitting rooms – is not actually policed according to sex characteristics. The vital determinant is whether trans persons can 'pass' in their preferred gender.[1108] A 42 year-old trans woman, who, in her early twenties, submitted to full gender-confirming surgery, may well experience greater difficulty accessing segregated spaces than an 19 year old trans man who, although taking a low dosage of hormones, retains his breasts, genitalia and internal organs.

The fact that, in informal settings, sex configuration has little bearing on access to gender-segregated facilities undermines the determinative role of sex. If trans men and women routinely enter public restrooms without anyone viewing or confirming their sex characteristics, requiring amendments to those characteristics (in order to maintain sex-divided facilities) is insufficiently important to justify interfering with trans human rights.

On the other hand, however, there is evidence that, in more formal settings, such as prisons or educational establishments, access to gender-segregated spaces is more strictly determined by reference to sexed-bodies. In these formal environments, trans individuals cannot enter male-only or women-only facilities unless they exhibit expected bodily traits. In the United States, the National Centre for Lesbian Rights has observed that trans people "who have not had genital surgery are generally classified according to their birth sex for purposes of prison housing, regardless of how long they may have lived as a member of the other gender."[1109] A trans woman, who has achieved social and professional recognition of her preferred gender (and who may even have certain documents with a female marker), will be excluded from women's

[1107] Cristian Williams, 'Sex, Gender and Sexuality: The TransAdvocate interviews Catherine A MacKinnon' (*The TransAdvocate*, 7 April 2015) http://www.transadvocate.com/sex-gender-and-sexuality-the-transadvocate-interviews-catharine-a-mackinnon_n_15037.htm accessed 21 October 2015.
[1108] Spade (n 37), 181. It is important to note that the concept of 'passing' is highly contested within the trans community. The general understanding of 'passing' is that a trans person 'passes' when living in the preferred gender without raising suspicion or questions about gender. This is the context in which the notion of 'passing' is here used. However, an alternative, perhaps preferable, understanding of passing arises where a trans person can 'pass' in the 'assigned' gender. This definition of 'passing' affirms the truth of trans persons' preferred gender. A person who lives in the preferred gender without raising questions does not pass. That person merely lives their true identity. The person passes when successfully inhabiting the gender which society and the law has assigned.
[1109] National Centre for Lesbian Rights, 'Transsexual Prisoners' (*Transgender Law and Policy Institute Resource*, 9 April 2010) http://www.transgenderlaw.org/resources/prisoners.htm accessed 3 March 2015.

prisons until she has surgically altered her body. If the law recognised preferred gender without surgery, sterilisation and hormone therapy, such exclusions, it is argued, would not be permissible.

(iii.) Alternative Methods of Creating Uniform Body Standards in Gendered Spaces

Even if these more formal (often state-run) services and accommodations *do* use gender as a proxy for sexed-divisions, and *do* promote uniform body standards, these goals can be achieved without medicalising the entire gender recognition process. Where applicants are formally acknowledged in their preferred gender, access to their preferred segregated spaces is only one ancillary benefit. While entry into women-only or men-only accommodations may be an important validation for trans individuals, it is not the only consequence of the legal recognition process. It is unclear, therefore, why policy arguments, which are only relevant in the context of gender-segregation, should influence the general conditions for recognition.

If law-makers and judges believe that there are compelling reasons why, irrespective of individuals' legal identity, only persons with particular sex characteristics should enter women-only and men-only spaces, they can simply make segregated services and accommodations an exception to the gender recognition rules.

In the United Kingdom and Ireland, 'gender-specific' offences are explicit exceptions under both the 2004 Act and the Gender Recognition Act 2015 (2015 Act).[1110] UK and Irish trans persons, who commit offences, which can only be performed by male or female individuals, will not escape prosecution merely because they have been acknowledged in their preferred gender.[1111]

This exception is particularly relevant for gendered sexual crimes (e.g. rape offences). Although a trans woman has a female legal gender, she may retain her penis and commit vaginal, anal or mouth rape[1112], which typically requires: (a) a male perpetrator who (b) has male-typical genitalia. Where a trans woman has engaged in all of the constituent elements of the rape offence, she cannot avoid liability merely because she does not have a male legal gender. The only way that trans women would be able to definitively avoid prosecution is by

[1110] Gender Recognition Act 2004, s. 20 (United Kingdom); Gender Recognition Act 2015, s. 23 (Ireland).
[1111] Gender Recognition Act 2004, s. 20.
[1112] Sexual Offences Act 2003, s. 1(1) (United Kingdom).

submitting to gender-confirmation surgery and proving that they did not have the necessity physical attributes to commit the crime. This would require applicants to go beyond the general conditions for gender recognition in both the United Kingdom and Ireland.

The UK and Irish experience illustrates that – in specific circumstances, for specific policy reasons – the law can require trans persons to satisfy stricter medical conditions as an exception to the normal recognition rules. This does not mean that, in order to be generally acknowledged, all applicants must satisfy those stricter requirements. In the UK and Ireland, the fact that trans women must remove their penis to definitively fall outside certain rape offences has not resulted in a general requirement for penectomies under the 2004 Act and 2015 Act. Instead, only those trans persons, who do wish to avail of additional benefits associated with their male or female status, should have to meet the more stringent requirements.

In the context of segregated spaces, it would be possible to ensure that, while applicants can generally be recognised without medical intervention, access to certain facilities or services (e.g. intimate partner violence centres where women may have a heightened sensitivity to the presence of penises or testes[1113]) could be conditional on certain medical treatments. In a growing number of jurisdictions, trans persons increasingly enjoy a general right to non-discrimination based upon their gender identity and gender expression. Yet, in many cases, as an exception to the general rule, service providers can continue to adopt stricter policies for entry into women-only and men-only spaces.[1114] This illustrates how, in appropriate circumstances, gender-segregation can operate as a limited exception to the law. Concerns about appropriate sexed-divisions, however, should not unilaterally shape that law.

[1113] In the United Kingdom, where there have been parliamentary calls to extend trans access to segregated spaces, there remains concern that, if women with male-associated sex characteristics can use services for female victims of sexual violence, other cisgender women may not use the services, see: House of Commons Select Committee on Women and Equalities (n 114) 27 – 30. These cisgender users are not inherently prejudiced against trans persons, and they do not necessarily deny trans identities in a more general sense. Rather, the experience of male-perpetrated violence may create a heightened sense of discomfort in the presence of persons who are perceived – particularly because of physical characteristics – as sharing the male gender. It is important to note, however, that there are compelling reasons why trans individuals should have access to their preferred shelters and refuges. Trans individuals suffer disproportionately high rates of physical and sexual violence (see e.g. James and others (n 93)). Like their cisgender counterparts (perhaps even more so), trans communities have a need for safe, secure and affirming survival services.

[1114] See e.g. UK Equality Act 2010, Schedule 3, Part 7(23) and Schedule 23(3). In the United States, Minnesota was the first state to provide protection to trans individuals under state non-discrimination laws. However, under Chapter 363A.24 of the Minnesota Human Rights Act, that protection does not apply to "public accommodations". As noted in the preceding footnote, there may be compelling reasons why public and private actors should not be able to exclude trans persons from their preferred spaces and accommodations, particularly if exclusion places trans populations in situations of danger or if it withholds important services.

Conclusion

Chapter III critiques the rationales for physical medical intervention. It analyses scientific and public policy arguments which motivate enforced surgery, sterilisation and hormone therapy. Chapter III reviews these 'aims of medicalisation' through a proportionality lens, and it asks whether those aims justify restricting trans human rights.

At the outset, Chapter III acknowledges that prohibitions on torture, cruel and inhuman, or degrading treatment are absolute. To the extent that physical intervention conditions constitute torture or other ill-treatment, they cannot be proportionate (irrespective of their rationales). However, in a context where physical requirements are typically reviewed against qualified rights-frameworks (e.g. art. 8 ECHR), and where the goals of medical requirements have impacts beyond legal recognition, Chapter III reviews the norms and assumptions upon which those goals are founded.

In undertaking proportionality analysis, this thesis has adopted Huscroft, Miller and Webber's multi-pronged test. Step I asks whether limiting rights guarantees "pursue[s] a legitimate objective of sufficient importance"? To the extent that medicalisation is not based on legitimate policy aims, it cannot be a proportionate interference with trans human rights. Yet, a common feature of the rationales identified throughout Chapter III is that they are grounded in inaccurate and legally-questionable beliefs.

References to both the binary, and the (legally) determinative, nature of sex characteristics misrepresent biology and are inconsistent with how gender currently operates as a legal category. This is also true of policy aims which focus on bodily normality, and the avoidance of inappropriate sex configurations and reproductive practices. All such arguments ignore the vast biological diversity which exists around the world. They hold applicants for recognition to rigid body standards, which are not imposed upon cisgender populations. They are an objectively weak justification for limiting trans rights.

Rationales for physical intervention also reinforce problematic gender norms, and are inconsistent with modern affirmation for queer identities. To the extent that medicalisation is intended to avoid non-heterosexual intimacy or to protect cisgender males from homosexual desires, this is an insufficient defence of involuntary surgery, sterilisation and hormone therapy. Similarly, reliance upon historical tropes and stereotypes – such as women as mothers, women

as penetratees, and trans women as sexual deviants – reproduces gender discrimination, and is incompatible with the right to equality. It is not a valid reason to require that applicants alter their physical bodies.

In some circumstances, however, law-makers and judges have raised legitimate concerns about non-medicalised recognition processes. They express unease that, without physical interventions, there will be uncertainty in family law (e.g. the legal position of pregnant men?) and possibly infinite amendments to gender status (rendering legal gender meaningless). These are significant policy arguments, and they provoke legitimate questions for advocates of reform.

Yet, while these arguments set out important aims, it is not clear that achieving those aims requires surgery, sterilisation or hormone therapy. There is compelling evidence that appropriately-directed legal rules (e.g. capping applications, assigning parenthood through biological criteria, etc.), rather than involuntary medicalisation, suffices to ward off unwanted consequences. Thus, even where – in limited scenarios – physical requirements pursue objective goals, involuntary interventions are not a proportionate response.

Chapter IV

Divorce Requirements

Introduction

Chapter IV analyses compulsory divorce as a pre-condition for legal gender recognition (divorce requirement).[1115] Drawing upon international protections for marriage and family life (as well as non-discrimination and children's rights), Chapter IV asks whether requiring the dissolution of an existing marital union is compatible with human rights guarantees.

As a matter of history, marriage has played a central role in movements for gender recognition. As noted in the Introduction, many of the most prominent judicial opinions on trans rights have concerned applications to enter (or to be confirmed as having validly entered) heterosexual civil marriages.[1116] Although *Corbett v Corbett (otherwise Ashley) (No 1)*[1117] has influenced *general* recognition entitlements throughout the common law world[1118], the case itself concerned only

[1115] In jurisdictions, where civil partnership is only open to same-gender couples (e.g. United Kingdom, Ireland), there is a question whether applicants, who are in existing same-gender civil unions, may be required to dissolve that legal partnership before obtaining gender recognition. Applicants, and their (now) opposite-gender partners, will be entitled to contract a marriage post-recognition. For many individuals, particularly those with strong feminist or queer critiques of marriage, a requirement to dissolve a civil partnership would create significant frustration. Just as entering a civil union may be an inadequate alternative for former spouses, who have had to divorce pre-transition, so too many former civil partners would not want to marry, even though the couple now have opposite legal genders. In countries where civil unions are limited to same-gender couples, gender transition requires law-makers and judges to consider, not only whether two people with the same legal gender can remain in a marriage, but also whether two people who (now) have opposite legal genders can remain in a civil partnership. Many of the issues considered in Chapter IV, such as 'point of entry' reasoning and the 'proportionality' of requiring dissolution, apply equally to civil partnerships. There is an arguable case that requiring trans couples to dissolve their civil union, as a pre-condition for gender recognition, would be incompatible with human rights. However, the focus of Chapter IV is 'divorce requirements'. There is a dearth of information on the impact of gender transition on civil partnerships. It would be logically consistent that states, which: (a) impose divorce requirements; and (b) limit civil partnerships to same-gender spouses, would also require dissolution of civil unions. Yet, there is little information on how states treat applicants and their same-gender civil partners. To the extent that there is insufficient evidence that states are requiring dissolution of civil unions, this issue is not substantively explored in Chapter IV. In practice, dissolution requirements have focused (almost exclusively) on marriage and divorce. While some states always intended that civil unions would only be open to same-gender couples, dissolution requirements have a primary objective of preventing marriages with two persons with different legal genders.

[1116] *Corbett v Corbett (otherwise Ashley) (No 1)* [1971] 2 All ER 33 (UK); *Bellinger v Bellinger* [2003] 2 AC 467 (England and Wales); *W v Registrar of Marriages* [2013] HKCFA 39 (Court of Final Appeal of the Hong Kong Special Administrative Region) (Hong Kong); *Re Kevin (Validity of Marriage of a Transsexual)* [2001] 28 Fam LR 158 (Australia); *Kantaras v Kantaras 884 So.2d 155* (*Fla*. Dist. *Ct. App. 2004*) (Florida); *MT v JT* 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (New Jersey); *Lim Ying v Hiok Kian Ming Eric* [1991] SGHC 135 (Singapore); *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 (New Zealand).

[1117] *Corbett* (n 2).

[1118] See e.g. *Bellinger* (n 4); *Lim Ying* (n 2); Kevin Tso, 'Accident of Birth or Matter of Choice: Legal Recognition of Transsexual People in the Common Law' (2015) 21(3) Cardozo Journal of Law and Gender 683.

the narrower question of April Ashley's status under the Matrimonial Causes Act 1965.[1119] Similarly, in *Goodwin v United Kingdom,* Christine Goodwin was requesting an amended birth certificate in order, *inter alia,* to validly marry her male partner.[1120]

The question of marriage, however, is not only relevant to trans persons who wish to contract a lawful marital union. It also has importance for trans individuals, who are already married and who wish to maintain their existing legal relationship post-gender transition.

Around the globe, divorce is commonly imposed as a pre-condition for legal gender recognition. Chiam writes that "[m]ost states…[continue to] ask for [applicants] to be unmarried or, if married, to divorce their spouse."[1121] In 2017, trans persons in 22 State Parties across the Council of Europe must be single or divorced before they can be legally acknowledged.[1122] In Australia, the Births, Deaths and Marriages Registration Acts 1995, 1999 and 2003 in New South Wales[1123], Tasmania[1124] and Queensland[1125] all limit recognition to those who are "not married". In Japan, art. 3(1)(2) of the GID Act 2003 provides that trans persons "may not be married, insofar as [they intend] to obtain legal recognition."[1126] The Japanese approach is replicated throughout Asia, with similar rules in, among other countries, Hong Kong[1127], Singapore[1128] and China[1129]. In some jurisdictions, national laws do not specifically prescribe divorce. However, in order to be acknowledged, applicants must access healthcare treatments which medical officers will not perform while the person remains married [1130]

[1119] In his published opinion, Ormrod J expressly sought to limit the scope of his ruling, and declined to "determine the 'legal sex' of the respondent *at large*" [emphasis added], [1971] P 83, 106. See also: Chris Hutton, 'Legal sex, self-classification and gender self-determination' (2017) 11(1) Law and Humanities 64, 68.
[1120] [2002] 35 EHRR 18, [94] – [95].
[1121] Zhan Chiam, 'Author's Preface' in Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report* (ILGA 2016) 3 accessed http://ilga.org/downloads/TLMR_ENG.pdf accessed 24 May 2017.
[1122] Transgender Europe (TGEU), 'Trans Rights Index 2017' (*TGEU Website,* 18 May 2017) http://tgeu.org/wp-content/uploads/2017/05/Index-online.png accessed 24 May 2017.
[1123] Births, Deaths and Marriages Registration Act 1995, s. 32B(1)(c).
[1124] Births, Deaths and Marriages Registration Act 1999, s. 28A(1)(c).
[1125] Births, Deaths and Marriages Registration Act 2003, s. 22.
[1126] Yuko Nishitani, 'The Legal Status of Transgender and Transsexual Persons in Japan' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 374.
[1127] Athena Nga-chee Liu, 'The Legal Status of Transgender and Transsexual Persons in Hong Kong' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 347.
[1128] Terry Sheung-Hung Kaan, 'The Legal Status of Transgender and Transsexual Persons in Singapore' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 405.
[1129] Trans Respect versus Transphobia, 'Marriage/Divorce' (*TRvT Website, No Date Available*) http://transrespect.org/en/map/pathologization-requirement/?submap=marriage-divorce accessed 30 June 2017.
[1130] Jean Malpas, 'From Otherness to Alliance: Transgender Couples in Therapy' (2006) 2(3-4) Journal of GLBT Family Studies 183, 185.

The primary justification for compulsory divorce is avoiding same-gender marriages.[1131] There is an assumption that, by "[r]ecognising the [preferred] gender of a married person", the law "would convert that person's marriage into a same-sex marriage."[1132] Although states increasingly embrace gender recognition rights, they are also reluctant for trans affirmation to become a Trojan horse for lesbian, gay and bisexual (LGB) marital unions. In *Hamalainen v Finland* – an unsuccessful challenge to Finland's divorce requirements – the ECtHR observed that, although the applicant was "not advocating same-sex marriage in general", granting her request "would in practice lead to a situation in which two persons of the same [legal gender] could be married to each other."[1133]

As outlined in Chapter I, international human rights do not currently protect non-heterosexual marriages.[1134] States are not obliged to acknowledge marital unions where there are two, same-gender spouses. As such, jurisdictions (which maintain divorce requirements) have argued that mandating trans divorce – as a means of preventing LGB marriages – does not violate human rights standards.[1135] Applicants have a right to be affirmed in their preferred gender, but they cannot circumvent (permissible) domestic marriage restrictions. The ECtHR has accepted that the "protection of the family in the traditional sense" – the purported aim of divorce requirements – "is, in principle, a weighty and legitimate reason which might justify a difference in treatment."[1136]

Chapter IV critiques divorce requirements against the trans-inclusive framework set out in Chapter I. International human rights recognise families as "the natural and fundamental group unit of society…entitled to protection"[1137] and manifest a "general preference for preserving the family unit and non-separation of its members."[1138] Against a background of robust

[1131] 'Transsexuals - gender recognition: gender reassignment surgery - recognition of gender (Case Comment)' (2014) 6 European Human Rights Law Review 659, 663; Alex Sharpe, 'The Transsexual and Marriage: Law's Contradictory Desires' (1997) 7 Australasian Gay and Lesbian Law Journal 1, 13 (quoting the Honourable Mr Merton of the New South Wales Legislative Assembly, *Debates of the Legislative Assembly (NSW)* (22 May 1996) 1350). See also: *G v Australia* Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017), [4.12]. There is also a presumption that trans marriages do not survive post-transition, so that there is no detriment in requiring applicants to divorce.
[1132] The Equality Authority of Ireland, *Observations on the Revised General Scheme of the Gender Recognition Bill 2014* (Walsh Printers 2014) 25.
[1133] [2015] 1 FCR 379, [70].
[1134] United Nations High Commissioner for Human Rights, 'Discrimination and violence against individuals based on their sexual orientation and gender identity' (4 May 2015) UN Doc No. A/HRC/29/23, [67].
[1135] *G* (n 17), [4.12] – [4.13].
[1136] *Karner v Austria* [2004] 38 EHRR 24, [40].
[1137] ICCPR, art. 23.
[1138] 'Report of the Office of United Nations High Commissioner for Human Rights on Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development' (15 January 2016)

protections for existing marital unions (including familial privacy)[1139] and the rights of children in families[1140], Chapter IV argues that compulsory divorce is a disproportionate and unlawful interference with trans human rights.

The chapter proceeds in four sections. Section I explores the effects of involuntary divorce on applicants, highlighting negative consequences for trans family life. While law-makers and judges frequently assume that couples will not survive gender transition, "relationships can and do endure."[1141] Mandatory terminations often contradict trans lived-experiences, and may be inconsistent with both the desires and emotional well-being of married couples.

Section II considers the legal impact of gender recognition on marital status. Although compulsory divorce is justified as avoiding LGB unions, legal transitions do not actually challenge heterosexual norms. In a large number of jurisdictions, the validity and status of marriage is determined at the 'point of entry'. While legal transitions may alter gender for non-marriage purposes, *marital gender* remains fixed as the status in which the individual contracted the union (i.e. a trans woman retains a male marital gender). As such, legal gender recognition does not create same-gender marriages. Divorce requirements are not, therefore, necessary to avoid LGB marital unions.

Section III investigates the proportionality of divorce requirements. It argues that, even if legal recognition for married applicants does create same-gender unions, the benefits of avoiding LGB marriage are disproportionate to the ways in which compulsory divorce interferes with the (family-focused) human rights identified in Chapter I. Considering the small number of married trans applicants, their current position as *de facto* spouses and the negative consequences of involuntary marriage dissolution, Section III concludes that forced divorce is an unnecessary and improperly-balanced disruption to family life.

Finally, Section IV reconsiders the status of same-gender marriage under human rights law. As the absence of LGB marital rights are raised to support divorce requirements, Section IV asks whether this absence is a coherent and justifiable interpretation of international marriage guarantees. In doing so, Section IV strays from the core methodological focus of this thesis –

UN Doc No. A/HRC/31/37, [35].
[1139] See generally: *G* (n 17).
[1140] A/HRC/31/37 (n 24), [26]. See also: ICCPR, art 23(4); UN CRC, art. 18(1).
[1141] S Colton Meier and others, 'Romantic Relationships of Female-to-Male Trans Men: A Descriptive Study' (2013) 14(2) International Journal of Transgenderism 75, 82.

applying existing human rights standards to conditions of recognition. Yet, considering the centrality of same-gender marriage to divorce requirements, and critiques of the current case law, Section IV argues that: (a) international law can and should incorporate LGB marriage protections; and (b) avoiding same-gender marriages is not a legitimate justification for compulsory divorce.

I. Relationships, Transition and the Impact of Divorce Requirements

Divorce requirements have a significant impact on many trans individuals and their spouses. Law-makers and judges frequently assume that, where one party to a heterosexual marriage transitions, the couple's shared-life inevitably terminates.[1142] Giammattei notes a common belief that "a partner's gender role transition would always lead to the end of a couple's relationship."[1143] Gender recognition rules have typically been constructed on the understanding that "the romantic relationships of [trans] people were neither healthy nor resilient."[1144] Just as it is presumed that trans individuals always enter a medical transition pathway, so too it is presumed that divorce requirements confirm a marriage's inescapable demise.

While it is unclear from where this scepticism over the stability and long-term viability of trans relationships arises, there are (at least) two possible sources. First, state authorities act on the assumed prevalence of heterosexual identity. Bischof *et al* observe the "subtle homophobia that underlies [the] assumption that families or marriages cannot survive gender transition."[1145] There is a common myth (typically reinforced by medical models of trans identities) that all trans individuals express a heterosexual orientation.[1146] Married trans persons – in a legally opposite-gender union – are presumed to have no sexual or emotional desire for their spouses. This presumption of heterosexuality, however, discounts individuals who, post-transition,

[1142] Myrte Dierckx and others, 'Families in transition: A literature review' (2016) 28(1) International Review of Psychiatry 36, 39; Alex Morris, 'My Husband is now my Wife' (*New York Magazine*, 22 September 2015) http://nymag.com/thecut/2015/09/trans-wives-transitioning.html accessed 24 March 2016.
[1143] Shawn Giamattei, 'Beyond the Binary: Trans-Negotiations in Couple and Family Therapy' (2015) 54(3) Family Process 418, 428.
[1144] Meier and others (n 27), 76.
[1145] Gary Bischof and others, 'Thematic Analysis of the Experiences of Wives Who Stay with Husbands who Transition Male-to-Female' (2011) 15(1) Michigan Family Review 16, 17.
[1146] Dylan Vade, 'Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is more Inclusive of Transgender People' (2005) 11(2) Michigan Journal of Gender and Law 253, 256.

experience a homosexual, lesbian or bisexual identity.[1147] It is not inevitable that trans men cannot be intimate with their male spouses or that trans women will reject their female partners.

Second, irrespective of spouses' sexual orientation, there is a more general presumption that cisgender persons will reject their partners' trans identity. Boyd observes a "commonality…that transgenderedness is upsetting to all of us."[1148] Law-makers and judges often expect that non-trans spouses will experience discomfort, distress or even disgust where their husband or wife transitions. The trauma they (inevitably) experience will compel them to terminate the marriage relationship.

Existing research on trans relationships is comparatively "sparse".[1149] Whitley speaks of a "dearth of empirical and theoretical research addressing how family members…are impacted by the [trans] status of a loved one."[1150] Many couples do disconnect as a result of transition. Married individuals may confront at least three common obstacles where one spouse seeks gender recognition.

There can be a perceived loss of identity, both individually and as a couple. Some cisgender spouses experience a loss of self when their partner transitions. Spouses may need "social recognition of [their own] identity and not just the recognition of [their] partner's [trans] status."[1151] In addition, for spouses collectively, there can be uncertainty around their status as a couple. The author, Jennifer Finney Boylan, describes the significant difficulties which she and her wife encountered in defining their partnership post-transition: "We knew what we were *not* – we were not husband and wife; we were not lesbians; we were not merely friends. We knew that we were not all these things. But what were we?"[1152]

A second obstacle is that, while trans couples express no universal sexual orientation, questions of sexuality can encourage "intense internal and external struggles."[1153] For cisgender, heterosexual-identified spouses, continuing a marriage may require – either

[1147] Judith Butler, 'Un-Diagnosing Gender' in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 279.
[1148] Helen Boyd, *My Husband Betty: Love, Sex and Life with a Crossdresser* (Thunder Mouth Press 2003) 226.
[1149] Nicola Brown, '"I'm in Transition Too": Sexual Identity Renegotiation in Sexual-Minority Women's Relationships with Transsexual Men' (2009) 21(1) International Journal of Sexual Health 61, 61.
[1150] Cameron Whitley, 'Trans-Kin Undoing and Redoing Gender: Negotiating Relational Identity among Friends and Family of Transgender Persons' (2013) 56(4) Psychological Perspectives 597, 598.
[1151] ibid, 606.
[1152] Jennifer Finney Boylan, *She's Not There: A Life in Two Genders* (Broadway 2013) 241.
[1153] Whitley (n 36), 606.

voluntarily or involuntarily – embracing the perception of homosexuality and "giving up the identity and privileges associated with a heterosexual relationship."[1154] Some cisgender individuals maintain a heterosexual self-identity, even though they inhabit a same-gender marriage.[1155] Giammattei notes that "[f]or a couple from a traditional heterosexual marriage, it is not uncommon to still identify as heterosexual rather than lesbian after the [spouse] transitions."[1156]

Finally, cisgender persons frequently express a sense of "betrayal" upon discovering their spouses' preferred gender, particularly where the identity has been concealed for a lengthy period.[1157] Malpas suggests that "a history of secrecy and betrayal…makes the journey extremely challenging."[1158] While reluctance to disclose a trans identity is understandable in a culture of immense transphobia, perceptions that a trans partner has hidden their true identity may reduce the potential for future relationship stability.

Despite these significant challenges, however, the existing data contradicts the inevitability of relationship demise. According to Meier *et al*, "many relationships may be able to be maintained through a gender transition of one of the partners."[1159] Levi writes that "marital relationships involving a [trans] spouse [do] remain intact and even thrive after a time of initial adjustment."[1160] In the United States, according to the 2015 US Transgender Survey, only 27% of individuals "out to a spouse or partner" lost their relationship "solely or partly because they were [trans]."[1161] Similarly, Kirk-Robinson reports that, "given time", approximately half of trans individuals "who come out to their partner or spouse can expect a positive reaction in the long term."[1162]

[1154] Brian Zamboni, 'Therapeutic Considerations in Working with the Family, Friends, and Partners of Transgendered Individuals' (2006) 14(2) The Family Journal: Counselling and Therapy for Couples and Families 174, 176. See also: Liesl Theron and Kate Collier, 'Experiences of female partners of masculine-identifying trans persons' (2013) 15(1) Culture, Health and Sexuality 62. Giamattei writes that "[a]fter the initial shock and anger following disclosure subsides, the cisgender partner may struggle to make sense of what staying in the relationship may mean with regard to their own gender or sexual identity", Giamattei (n 29), 426.
[1155] Asher Fogle, 'My Husband became a Woman – And it Saved our Marriage' (*Marie Claire Online*, 18 June 2015) http://www.marieclaire.com/sex-love/a14767/jonni-and-angela-pettit-transgender-marriage/?src=spr_TWITTER&spr_id=1449_198911149 accessed 28 June 2017.
[1156] Giamattei (n 29), 426.
[1157] Zamboni (n 40), 175.
[1158] Malpas (n 16), 196.
[1159] Meier and others (n 27), 82.
[1160] Jennifer Levi, 'Divorce and Relationship Dissolution' in Jennifer Levi and Elizabeth Monnin-Browder (eds), *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012) 87.
[1161] Sandy E James and others, *The Report of the 2015 U.S. Transgender Survey* (NCTE 2016) 67 http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf accessed 19 March 2017.
[1162] Zoe Kirk-Robinson, *Spouse Reactions to Transsexuality* (T-Vox, *No Date Available*) 6 http://t-vox.org/information/spouse-reactions-to-transsexuality-report accessed 28 June 2017.

There are numerous factors which maintain and reinforce trans marriages. For many couples, remaining together post-transition is simply an expression of their deep love. While gender recognition, and its consequences, may not be the optimal vehicle through which to conduct their married life, individuals may be convinced that the significant benefits of continuing their marriage outweigh the positives of divorce. In other circumstances, a couple may initially intend to disconnect, or make no definitive choice about their future. Yet, the shared emotional experience of transitioning may create "greater knowledge and acceptance" and encourage a couple to renew their commitment.[1163] Bischoff *et al* write that "[a]fter the initial emotional reactions…those who [stay are] often…able to move from acquiescence to a place of tolerance, and ultimately many fully accept their…partner."[1164]

In some trans marriages, the couple, while preserving the legal relationship, engage in a substantial "negotiation and renegotiation"[1165], fundamentally redefining the terms of their intimacy. This process may invert the couple's gendered roles, expand the boundaries of their sexual lives and recalibrate individual expectations for a shared future.[1166] Renegotiation can facilitate "profound personal growth" and inspire couples to "lead richer lives."[1167] Finally, some people may remain together to prioritise the well-being of their children. While, as noted, existing research does not question the parenting capabilities of trans individuals, it does suggest that children suffer where trans couples engage in domestic strife.[1168] Parents – who, although no longer romantically connected, maintain a respectful relationship – may avoid dissolving their marriage to promote stability in their family life.[1169]

Whatever their reasons, it is clear that many trans couples desire to maintain their legal relationships post-transition. These couples do not voluntarily terminate their commitment and it is not inevitable that their relationships will collapse. The Commissioner for Human Rights of the Council of Europe writes that "[i]n numerous cases, forced divorce is against the explicit will of the married couple, who wish to remain a legally recognised family unit."[1170] Divorce

[1163] Kelly Ellis and Karen Eriksen, 'Transsexual and Transgenderist Experiences and Treatment Options' (2002) 10(3) The Family Journal: Counselling and Therapy for Couples and Families 289, 297.
[1164] Bischof and others (n 31), 21.
[1165] Brown (n 35), 71.
[1166] Malpas (n 16), 196. See also: Roni Jacobson, 'What's it like when Your Wife Becomes Your Husband' (*New York Magazine*, 6 January 2016) http://nymag.com/scienceofus/2016/01/what-its-like-when-your-wife-becomes-your-husband.html# accessed 28 June 2017.
[1167] Bischof and others (n 31), 22.
[1168] Roni Jacobson, 'Adaptation and adjustment in children of transsexual parents' (2007) 16(4) European Child and Adolescent Psychiatry 215, 219.
[1169] Commissioner for Human Rights of the Council of Europe, 'Human Rights and Gender Identity' (29 July 2009) CommDH/IssuePaper(2009) 9. See also: Morris (n 28).
[1170] Commissioner for Human Rights of the Council of Europe (n 55) 9.

requirements do not unduly burden all applicants for legal gender recognition. However, for those who remain in a loving relationship, they compound what is already an "emotional, intense, and often lonely experience."[1171]

II. The 'Point of Entry' Rule

A. 'Point of Entry' Rule: Determining the Legal Status of Marriage at the Moment of Contract

If divorce requirements reflect opposition to same-gender marriage, one must question whether, as a matter of law, legal gender recognition converts heterosexual relationships into same-gender unions. To the extent that, post gender-recognition, trans marriages do not include two men or two women, trans divorce requirements are not necessary to avoid LGB marital unions.

Around the world, there is no uniform procedure for contracting a valid civil marriage. The multiple national approaches – influenced by local culture, religion and tradition – mean that comparing domestic marriage laws is typically an imprecise exercise. However, at least on the question of nullity, there is evidence of commonality. At common law, and in a large number of civil law jurisdictions, the validity and status of marriage is determined at the 'point of entry'. Where prospective marriage contractors do not, at the moment of contract, satisfy the relevant criteria, their marriage is void *ab initio* and no legal relationship comes into effect. It is irrelevant for the initial validity of the union that, at some point subsequent to entry, the parties do meet the necessary conditions. For example, in a jurisdiction where marriage is proscribed for minors under the age of 18 years, it does not assist a man who attempts to marry on Monday that he will obtain the age of majority on Wednesday.

In *Napier v Napier*, the English Court of Appeal observed that "where a decree of nullity or divorce *a vinculo* was granted it was in consequence of an impediment existing *at the time of the marriage* which made it no marriage"[1172] [emphasis added]. The *Napier* rule is standard practice within many common law jurisdictions. In *OB v R and OB*, the Irish High Court advised that "one must look at the condition of the parties at the time they entered into the contract and not what may have emerged later."[1173] Similarly, the Family Court of Australia will issue a nullity decree if "one or both of the parties" was "already married", "under-age" or "forced" to

[1171] Dierckx and others (n 28), 40.
[1172] [1915] P 184, 189.
[1173] [2001] 1 ILRM 306, 314.

marry "at the time" of the official ceremony.[1174] Domestic statutes also provide that marital validity and status is determined at entry.[1175] Article 45 of the Family Code of the Philippines permits annulment for a number of "causes, existing at the time of the marriage." In Switzerland, art. 105 of the Federal Civil Code requires that "[t]he marriage must be annulled" if certain conditions have not been fulfilled "at the moment of celebration." Under arts. 27 and 28 of the Family Code of the Russian Federation, a court may annul a marriage based on the state of affairs, including the intentions of the parties, judged at the "moment of registration of the marriage."

The corollary of the 'point of entry' rule is that, where prospective spouses do satisfy the necessary conditions at the moment of contract, they form a lawful marital union and (with limited exceptions[1176]) subsequent conduct does not affect either the status or validity of their marriage. Robson observes that the "facts giving rise to the voided marriage occur at the time the marriage is entered into by the parties…[subsequent] facts cannot retroactively void the marriage."[1177] A couple's actions, once they are married, such as committing adultery, may allow one or both individuals to terminate the marriage. However, while creating a right to divorce, adultery does not alter the initial validity and status of the union.

Applying 'point of entry' reasoning to trans marriages, obtaining legal gender recognition does not, as a matter of law, convert a heterosexual union into a same-gender marriage. According to Ryan, "[i]f the parties were, at the time of the marriage, respectively male and female, any subsequent [recognition] would be irrelevant."[1178] Where two individuals have opposing legal genders when contracting a marriage, they create an opposite-gender union. Legal transitions may result in two spouses having identity documentation with the same gender markers. It does not, however, alter the legal position that, for the purposes of the marriage, the couple are deemed to have opposite genders. As Levi concludes, "[a]s long as two people of different sexes otherwise satisfy all of the qualifications for marrying, there are no grounds to challenge the

[1174] 'What is a Declaration of Nullity' (*Family Court of Australia Website*, 3 May 2016) http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/separation-and-divorce/nullity/ accessed 27 June 2017.
[1175] See e.g. Civil Code of Hungary, s. 4:16(2); Civil Code of France, art. 183 (see also, Chapter 4 of the Civil Code of Luxembourg); Family Law Act 2009 of Estonia, s. 9(1)(1).
[1176] Under art. 183 of the French Civil Code, for example, spouses are not able to bring an action for nullity if they subsequently approve the marriage or if, having discovered the void-character of a marriage, they do not seek a declaration of annulment within five years.
[1177] Ruthann Robson, 'Re-inscribing Normality? The Law and Politics of Transgender Marriage' in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006) 304.
[1178] Fergus Ryan, 'Marriage at the Boundaries of Gender: The "Transsexual Dilemma" Resolved?' (2004) 7(1) Irish Journal of Family Law 15.

validity of that marriage…simply because one of the spouses initiates and undergoes gender transition."[1179]

In the Australian judgment, *Re Kevin (Validity of Marriage of a Transsexual)*, Chisolm J considered the hypothetical case of "John", a married trans man, who transitions at the age of fifty. Asking "[w]hat would be the position if the marriage law were to recognise" John's transition, Chisolm J responded that "[t]he marriage would…still be valid: its validity would be determined as at the date of the marriage, and I would not think it would become invalid by reason of the [transition]."[1180] A similar approach has been adopted by courts in a number of civil law jurisdictions. In France, the Court of Appeals in Rennes held that, where two spouses have opposite legal genders at "the date the marriage is celebrated", the couple are not required to divorce before one partner transitions.[1181] Although gender recognition does amend the spouse's birth certificate, such amendment need not be noted in the marriage documents which continue to depict an opposite-gender union.[1182] A similar position has been adopted by the Court of First Instance of Luxembourg City which, in 2009, permitted a trans individual to remain married following the rectification of the birth certificate.[1183]

'Point of entry' arguments, which emphasise the continuing validity of birth-assigned gender, may be unpalatable to some applicants. Individuals may be unwilling, even for the limited purposes of marriage, to retain a gender which they consider to be neither real nor authentic. Stirnitzke writes that confining trans individuals to heterosexual unions "[denies trans] identity" and "nullifies all the effort put into transition."[1184] Trans persons may prefer to dissolve their marriage, and cohabit outside a formal relationship structure, rather than disavow their preferred gender.

For other couples, however, maintaining a lawful heterosexual marriage may be a worthwhile, even welcome, compromise. As noted, a number of trans spouses – despite their identical gender expressions – continue to identify as heterosexual.[1185] These couples may appreciate the possibility of confirming the opposite-gender status of their marriage, particularly if it helps

[1179] Levi (n 46) 88-89.
[1180] *Re Kevin* (n 2), [302] – [303].
[1181] Court of Appeal, Rennes, Chamber 6 A, N°11/08743, 1453,12/00535 (16 October 2012).
[1182] ibid.
[1183] First Chamber of the arrondissement of Luxembourg, Civil Judgment No. 184/2009 (30 September 2009).
[1184] Audrey Stirnitzke, 'Transsexuality, Marriage and the Myth of True Sex' (2011) 53(1) Arizona Law Review 285, 292.
[1185] Giamattei (n 29), 426.

cisgender spouses to feel that a new sexual orientation is not being imposed upon them.[1186] Similarly, for persons of faith, such as the applicant and her wife in *Hamalainen*, who may have a religious objection to same-gender marriage[1187], 'point of entry' rules allow couples to honour their beliefs, without sacrificing the right to transition.[1188] Some trans individuals, where given a free choice, would not characterise their union as heterosexual post-transition. However, if embracing a birth-assigned gender, solely for the purposes of marriage, both extends recognition, and secures existing legal ties, those individuals may consider that the family benefits gained outweigh the detriment of any personal loss.

Commenting on 'point of entry' arguments, Sloan suggests that there is a "certain irony" that, in seeking to define the appropriate contours of gender recognition, trans advocates would argue that "marriages…founded on incorrect genders should nevertheless remain valid once gender recognition occurs."[1189] For many observers, lessening the burdens of obtaining gender recognition in this way may require too great a logical inconsistency. It effectively ignores the fact that, whatever the specific technicalities of marriage law, there are now two spouses who, for most purposes, have the same legal gender. Domestic courts may reject 'point of entry' arguments as an impermissible attempt to circumvent heterosexual marriage rules, allowing technical reasoning to defeat the clear spirit of the law. It is perhaps instructive that, despite the ubiquity of both divorce requirements and 'point of entry' clauses, comparatively few judges have held that trans couples remain in heterosexual unions post-transition.

Yet, there is still considerable force in the argument that, on a proper interpretation, 'point of entry' rules preserve the opposite-gender status of marriage. While it is possible to analogise trans couples and homosexual marriage, the mere fact that one spouse obtains legal gender recognition does not retroactively alter the fact that two, opposite-gender individuals had contracted the marriage. A person who marries as a legal woman on Monday does not have a male legal gender on Monday because he will subsequently obtain recognition of his preferred male gender on Wednesday. Where a trans individual contracts a heterosexual marriage in their birth-assigned gender, the spouses' union is opposite-gender. It does not threaten 'traditional' marriage and, as long as the trans individual does not object to being classified (for the purposes of marriage) in their birth-assigned gender, state authorities should not require dissolution as a pre-condition for recognition.

[1186] Zamboni (n 40), 176.
[1187] *Hamalainen* (n 19), [15].
[1188] As with surgical requirements, one can observe that divorce requirements fall particularly harshly upon individuals who find their identities at the intersection of religious and trans experiences.
[1189] Brian Sloan, 'The Legal Status of Transsexual and Transgender Persons in Ireland' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 243.

B. Consequences of the 'Point of Entry' Rule: Marriage and Non-Discrimination Protections

If the status of marriage is determined at the 'point of entry', this has significant consequences for the rights upon which applicants for recognition can rely. To the extent that trans marriages were (and are) always same-gender unions, trans couples enjoy: (a) extensive marital protections, as well as (b) the right to be treated equally with all other validly married (opposite-gender) spouses.

(iii.) Marital Rights

As noted, international law establishes robust marriage rights.[1190] Although state actors may appropriately restrict access to marital unions[1191] (e.g. minimum age, etc.), they may not impair the "very essence" of the marriage guarantee.[1192] Law-makers and judges violate the right to marry not only where they impose illegitimate restrictions, but also when they fail to acknowledge that a person satisfies requirements that have been legitimately imposed. Domestic laws can, for example, properly restrict marriage to those who have reached the age of majority.[1193] They cannot, however, prohibit an adult person from contracting a valid marriage by pretending that the individual has not yet achieved majority. Similarly, there is a breach of the right to marry if, having reached the age of majority and contracted a lawful marriage, state authorities subsequently annul the union on the pretence that the party was not old enough.

In the context of opposite-gender marriages, where one partner later transitions, state authorities claim that granting gender recognition would convert the relationship into a same-gender union. Yet, this claim is contradicted by 'point of entry' reasoning. Like the age scenarios described above, it requires the pretence that, at the time of contract, when the status of the marriage was determined, the spouses did not have opposite legal genders. It may be legitimate for jurisdictions to require that those who enter a marriage prove that they are respectively male and female.[1194] There is a breach of the right to marry, however, where – that

[1190] ICESCR, art. 10(1); UN CRPD, art. 23(1); ECHR, art. 12; ACHR, art. 17(2).
[1191] Laura Shanner, 'The Right to Procreate: When Rights Claims Have Gone Wrong' (1994) 40(4) McGill Law Journal 823, 840-841.
[1192] *Schalk and Kopf v Austria* [2011] 53 EHRR 20, [49].
[1193] A/HRC/31/37 (n 24), [31 – 32]; United Nations Committee on the Elimination of Discrimination against Women, 'General Recommendation No. 21 on Equality in Marriage and Family Relations' (1994), [36].
[1194] *Joslin v New Zealand* Communication No. 902/1999 U.N. Doc. A/57/40 at 214 (2002) (UN HRC, 17 July 2002); *Schalk* (n 78). However, in Section IV (below), this thesis argues that international and regional human rights law should recognise a right to same-gender marriage.

proof having been received – law-makers and judges nevertheless impute a historically inaccurate legal gender to the transitioning spouse.[1195]

Human rights not only prohibit unreasonable entry requirements for marriage. They also proscribe national rules which deprive marriage of its substantive effect. The right to marry is meaningless if, having allowed parties to contract a valid union, state actors arbitrarily or capriciously withhold marital benefits. In *Hamalainen*, the dissenters – Judges Sajó, Keller and Lemmens – observed that human rights "guaran[tee] not only a right to marry but also a right to remain married unless compelling reasons justify an interference with the civil status of the spouses."[1196] While there is disagreement as to whether international law requires access to divorce, where spouses have entered a lawful martial union, "international norms [do] proscribe the forced dissolution of the marriage bond."[1197]

If one understands trans marriages through the lens of 'point of entry' reasoning, divorce requirements are incompatible with human rights. They oblige trans individuals, who have contracted a valid heterosexual union, to forfeit their marriage. 'Divorce requirements' are properly understood as "the forced dissolution of the marriage bond."[1198] In Chapter II, this thesis explained how medical requirements cannot be voluntary interferences with bodily integrity. Where surgery, sterilisation and hormone therapy are pre-conditions for basic state recognition, they overwhelm even the strongest dissent and deprive applicants of objective choice. In the same way, if divorce is a requirement for acknowledging preferred gender, trans people are compelled to involuntarily dissolve their marriage. The fact that applicants do not *have* to divorce is immaterial when the only alternative is life with an incorrect legal gender. Divorce requirements are *de facto* 'forced' divorce. They are inconsistent with international marriage and family life guarantees.

[1195] This is both incorrect and deeply insensitive to trans persons. Many trans people live significant portions of their life with an inaccurate, birth-assigned legal gender. While these individuals do not self-identify with that assigned status, it is the legal identity through which they must interact with state actors. For trans individuals, who have had to live with that assigned gender, it is deeply unsympathetic for judges and law-makers to subsequently pretend that, at the time of their marriage (which is the point at which the validity and status of marriage is determined), the trans individuals actually already had their preferred gender. The stigma, discrimination and distress – which trans people often experience before recognition – stands as proof that applicants did not have their preferred legal gender at the time that they entered the marriage.
[1196] *Hamalainen* (n 19), [16] (per Judges Sajó, Keller and Lemmens).
[1197] A/HRC/31/37 (n 24), [30].
[1198] ibid.

(iv.) Non-Discrimination

Point of entry reasoning, and the recognition that trans marriages remain opposite-gender, also reveals the discriminatory character of divorce requirements. If trans marital unions, formed before transition, are always male-female contracts, applicants and their spouses should be treated equally with other individuals who have entered a valid, heterosexual union.

In many jurisdictions, law-makers and judges have rejected equality-focused critiques of divorce requirements on the basis that trans couples (at least after gender recognition) are same-gender spouses.[1199] They should, thus, be compared with LGB couples. Where state parties prohibit 'gay marriage', and where there is no right for same-gender couples to marry under international law, applicants for recognition experience no discrimination when they are required to divorce.

Yet, applying the point of entry rule, trans and cisgender couples *are* analogously situated. If applicants and their spouses remain (at law) an opposite-gender union, rather than looking to LGB relationships, one must compare how law-makers and judges have treated other opposite-gender couples.

Applicants for recognition are the only married individuals who are required to forfeit their legal relationship before they can exercise a core human right. In the recent communication decision, *G v Australia*, the United Nations Human Rights Committee (UN HRC) concluded that "by denying [trans] persons who are married a birth certificate that correctly identifies their sex, in contrast to…non-[trans] persons", Australia had "fail[ed] to afford the author and similarly situated individuals equal protection under the law"[1200] (the Committee also concluded that there was discrimination on the basis of marital status as between married and non-married applicants[1201]). In *Hamalainen*, the dissenting judges could identify no other situation where "a legally married cisgender heterosexual couple [were] required to choose between maintaining their civil status and obtaining identity cards."[1202]

[1199] *G* (n 17); Irish Gender Recognition Advisory Group, *Report to Joan Burton, TD, Minister for Social Protection* (15 June 2011) 16 http://www.welfare.ie/en/downloads/Report-of-the-Gender-Recognition-Advisory-Group.pdf accessed 28 June 2017; Hong Kong Inter-Departmental Working Group on Gender Recognition, *Consultation Paper: Part 1 Gender Recognition* (June 2017) 201 – 202 http://www.iwggr.gov.hk/eng/pdf/consultation01.pdf accessed 28 June 2017.
[1200] *G* (n 17), [7.14].
[1201] ibid, [7.13] – [7.14].
[1202] *Hamalainen* (n 19), [19] (per Judges Sajó, Keller and Lemmens).

A possible answer to these non-discrimination critiques is that applying for gender recognition sufficiently separates trans and cisgender couples so that, even if trans marriages remain (at law) opposite-gender unions, different treatment (i.e. divorce requirements for trans spouses) is not impermissibly discriminatory. Here, one can recall 'comparator' problems with non-discrimination critiques of surgery, sterilisation and hormone therapy (Chapter II). To the extent that requesting an amended legal gender distinguishes applicants from the cisgender population, it is more difficult to claim that medicalisation creates inequality. State actors are entitled to differentiate between persons in relevantly different situations.[1203] So, where trans spouses apply for gender recognition, surely there is a sufficient distinction with cisgender couples? In *Hamalainen,* the majority concluded that Ms Hamalainen's "situation and the situation of [cisgender couples were] not sufficiently similar to be compared with each other."[1204]

There are, however, important difficulties with this comparator-based defence. In particular, different legal considerations apply in the contexts of medical and divorce requirements. To the extent that requesting an amended legal gender creates sufficient differentiation for the purposes of medicalisation, it is not clear that the same is true for divorce. In the former scenario, the law must consider the legal status of comparable *individuals*. In the latter, it is the status of comparable *marital unions* which is relevant.

Where trans individuals apply for gender recognition, they undertake a process which results in a new (personal) legal status. That change in official identity is a relevant consequence, which separates individual trans persons from individual cisgender persons. To the extent that an applicant, 'A', requests gender recognition, A will experience a sufficient change in position (or proposes to experience a sufficient change in position) that A can be subject to different treatment to 'B' and 'C', who are cisgender individuals who retain their birth-assigned gender. It is the unique situation, which A inhabits that creates obstacles for non-discrimination analysis.

Where a married spouse legally transitions, however, although that individual's *personal* legal identity changes for most purposes, the legal status of the *marriage*, and the spouse's legal gender *for the purposes of the marriage*, remain constant ('point of entry' rule). Where 'A', a legal man, and 'B', a legal woman, enter an opposite-gender marriage, the fact that A

[1203] See e.g. *MJG v The Netherlands* Communication No. 267/1987 (CCPR/C.32/D.267/1987) (UN HRC, 24 March 1988); *Burden v United Kingdom* [2008] 47 EHRR 38.
[1204] *Hamalainen* (n 19), [112].

subsequently requests gender recognition does not alter the legal position of the marital union. Both before and after gender recognition. A and B have a valid, heterosexual marriage. At law, A remains the male party to the marriage, even if she is now recognised as female in other contexts. A and B are in the same position as all other couples (e.g. C and D, E and F, etc.) where there is one legal male and one legal female. A and B have not sufficiently differentiated their union from other opposite-gender couples so as to justify forced divorce.

The only way that law-makers and judges could decide that trans and cisgender couples are relevantly dissimilar is if, irrespective of legal status, the internal dynamics of trans marriages are sufficient to justify unequal treatment. This would mean that, even if two people remain in a valid, two-person and (legally) opposite-gender union, their conduct as a married couple (e.g. one spouse obtaining gender recognition) legitimises different treatment. In many jurisdictions, however, internal marital conduct, which does not change the *legal status* of the union, does not justify different treatment.

All married couples operate, to a certain extent, in unique ways. In some cases, spouses' internal marital conduct – such as weekly sky-diving trips – may be extreme but compatible with the (supposed) core pillars of marriage. In other circumstances, couples may engage in conduct which directly undermines the marriage ideal. Spouses may invite third (or fourth) partners to share their emotional intimacy. They may consensually and knowingly engage in individual (or joint) extra-marital sexual encounters. In doing so, couples contradict social (and legal) expectations of marriage.[1205]

Yet, in many jurisdictions, open relationships and private polyamory[1206], to the extent that they leave the legal status of a marriage intact, do not create a requirement to divorce. Spouses need not dissolve their marriage before bringing – either emotionally or sexually – additional persons into the union. Indeed, spouses may even enter *de facto* three-person marriages with another party, formalising their relationship through property and power-of-attorney agreements. In the latter scenario, the couple actually uses the law, a state institution, to legitimise their deviation from marital norms.[1207] The spouses' actions invert what it means to

[1205] *Hyde v Hyde* [1866] LR 1P&D 130, 133 (per Lord Penzance).
[1206] In certain jurisdictions (e.g. Saudi Arabia, Philippines, etc.), extra-marital sexual intercourse remains a criminal offence.
[1207] One question is whether such contractual agreements, if subject to litigation, would be invalidated on grounds of 'public policy' (i.e. circumventing laws prohibiting same-gender legal relationships or multi-party legal relationships). See generally: Ewan McKendrick, *Contract Law* (Palgrave 2015), [15.6]; Ben Templin, *Contracts – A Modern Coursebook* (Wolters Kluwer 2017) 375 – 377.

maintain a two-person, heterosexual union "to the exclusion of all others."[1208] Yet, in the eyes of the law, they are a validly married couple.

In those circumstances, it is unclear why an application for gender recognition – another form of internal marital conduct, which inverts marriage norms but does not alter legal status – necessitates divorce.[1209] Irrespective of their gender, applicants for recognition and their spouses are in the same legal situation as other opposite-gender couples. They should not be treated less favourably by state actors.

C. Lesbian, Gay and Bisexual Critiques of the 'Point of Entry' Rule

'Point of entry' reasoning has been criticised by LGB-focused scholars. Commentators have argued that, in seeking to preserve their existing marital rights by disavowing the same-gender character of their relationships, trans couples reinforce heterosexual privilege and legitimise the exclusionary, heteronormative boundaries of existing marital laws. Writing about *Hamalainen,* Johnson expresses "[pleasure] that the Court did not grant exceptional status to some same-sex couples" merely because they identified, "by virtue of a previous or existing sexual orientation…not to be 'homosexual'."[1210] Trans couples who are in "the same situation that millions of same-sex couples find themselves in", should not be permitted to "hold onto the privilege of opposite-sex couples, by invoking an identity as 'heterosexual'."[1211] In general,

[1208] *Hyde (n 91),* 133 (per Lord Penzance).
[1209] One might differentiate between, on the one hand, open marriages and, on the other hand, legal gender recognition by pointing out that, only in the latter case, is the State required to affirm the offensive (internal) marital conduct. Without doubt, couples who engage in threesomes or open relationships are inverting the nature of marriage. They are engaging in that conduct, however, without the imprimatur of the State (indeed, they may possibly be acting in direct conflict with guidance from the State). On the other hand, gender recognition specifically requires state actors to support internal marital conduct which inverts the opposite-gender marital ideal. There may be greater justification for refusing to allow conduct which requires the State to condone parties acting contrary to 'acceptable' marital standards (presuming that one believes that opposite-gender marriage is a legitimate public policy standard). While this is a valid critique, there are two responses: First, although open marriages do not require state-sponsorship, where the parties attempt to formalise their multi-person relationships (i.e. joint property ownership, etc.), the State would play a role in upholding the legal validity of those formal, contractual arrangements. One would expect, therefore (in order to be consistent), that if spouses are going to create legal, multi-person relationships, they should have to divorce before formalising those relationships (trans persons have to divorce before creating a legal relationship with two persons with the same legal gender). However, there are no recorded instances where a married couple, which sought to create legal (marriage-like) ties with other individuals, were required to divorce before those ties could be formalised. Indeed, within the common law, there are few (if any) reported cases where courts have refused to uphold contracts which created marriage-like relationships between spouses and third parties. Why are trans spouses held to a higher standard? Second, and reiterating an earlier point, recognising trans identities without divorce does not involve public affirmation of 'gay marriage'. As a matter of law ('point of entry' rule), trans marriages remain heterosexual, even after legal transitions.
[1210] Paul Johnson, '*Hämäläinen v Finland* - the question of sexual orientation and religion' (*ECHR Sexual Orientation Blog*, 17 July 2014) http://echrso.blogspot.com/2014/07/hamalainen-v-finland-question-of-sexual.html accessed 24 March 2016.
[1211] ibid.

LGB objections to 'point of entry' reasoning encourage a broader 'all-in-this-together' strategy which advocates the widest possible marriage entitlements for every queer-identified person.

Privilege-focused critiques of 'point of entry' arguments are perhaps unsurprising. It is undoubtedly preferable that, where progress is achieved within the lesbian, gay, bisexual, trans and intersex (LGBTI) community, it is experienced equally by all individuals, irrespective of sexual orientation, gender identity or sex characteristics. Within the specific context of divorce requirements, however, privilege-focused objections are problematic in three respects.

The idea that trans couples exploit their former heterosexual privilege unilaterally imposes gay and lesbian identities upon trans spouses. It explicitly places trans couples in the same position as cisgender LGB persons who seek to contract a marriage. However, as noted, numerous trans spouses, particularly the cisgender partner, *do not* express, or identify with, homosexuality.[1212] They acknowledge that there are now two individuals with the same legal gender in their marriage. Yet, they continue – perhaps as a method of self-preservation – to maintain their existing relationship dynamics, including the public expression of intimate and emotional heterosexuality.[1213] In *Hamalainen*, the dissenters observed that, "[e]ven after the applicant's gender [recognition], it [was] an oversimplification of the situation to treat her relationship as a homosexual one."[1214] In pleading the opposite-gender status of their existing marriages, trans couples do not rely upon a *former* heterosexual privilege. They ask the law to authenticate the *current* lived-reality of their relationship. Within an LGBTI movement, which prioritises personal experiences of gender, sexuality and body, one should respect individual narratives and avoid imposing identities with which trans couples may have no connection.

There is also no obligation on trans couples to act as standard-bearers for greater marital freedoms. By seeking to vindicate individual rights, advocates for change can establish wider protections for general society. In challenging divorce requirements, and normalising marriage between spouses who self-define with the same gender, trans couples question common assumptions about appropriate marital unions. This, in turn, may promote the cause of LGB couples who wish to enter a marriage. In such circumstances, it is perhaps natural that LGB-focused scholars will take an interest, both in the outcome of such challenges and the arguments upon which they are constructed. Yet, just because LGB couples are indirectly affected does not place an obligation upon trans spouses to divert from their preferred advocacy strategies. If

[1212] Fogle (n 41).
[1213] Giamattei (n 29), 426.
[1214] *Hamalainen* (n 19), [20] (per Judges Sajó, Keller and Lemmens).

existing trans marriages can be preserved through 'point of entry' reasoning, trans couples should not be required to adopt an alternative, (perhaps) less effective, marriage equality strategy.

Finally, scholars must be careful when criticising trans advocates for insufficient solidarity with gay men and lesbians. Such arguments risk not only whitewashing the troubled history of intra-LGBTI community relationships[1215] but also tend to reinforce the privileged position of gay men within wider movements for sexuality and gender equality.[1216] References to trans couples' "privilege" overlooks the significant legacy of oppression and discrimination which has affected trans populations worldwide. Even today, trans persons around the globe are more likely to face physical (sometimes fatal) violence and systemic discrimination than their LGB peers.[1217] What scholars criticise as trans 'privilege' is simply trans people attempting to secure their families. 'Point of entry' arguments are not an endorsement of same-gender marriage bans. Indeed, there are well-documented examples of trans advocates taking leading roles in campaigns for 'gay marriage'.[1218] 'Point of entry' reasoning merely illustrates that divorce requirements are legally distinct from marriage equality debates, and should be assessed as such.

[1215] See generally: Julia Serano, *Whipping Girl* (Seal Press 2007). See also: Marc Stein, *Rethinking the Gay and Lesbian Movement* (Routledge 2012) 8; Benjamin Sheppard, 'Sylvia and Sylvia's Children: A Battle for a Queer Public Space' in Mattilda Bernstein Syncamore (ed), *That's Revolting! Queer Strategies for Resisting Assimilation* (Soft Skull Press 2004) 97-112; Mickael Chacha Enriquez, 'The T in LGBTQ: How do Trans Activists Perceive Alliances within LGBT and Queer Movements in Quebec (Canada)?' in Yolanda Martinez-San Miguel and Sarah Tobias (eds), *Trans Studies: The Challenge to Hetero/Homo Normativities* (Rutgers 2016) 141 – 153.

[1216] Chris Cormier, 'Dear Gay White Brothers' (*Huffington Post,* 28 March 2016) http://www.huffingtonpost.com/chris-cormier/dear-gay-white-brothers_b_9508194.html accessed 18 August 2016); Tyler Oakley, 'Examining My Own Privilege as a Gay-White-Cis-Male' (*Huffington Post,* 2 February 2016) http://www.huffingtonpost.com/tyler-oakley/examining-my-own-privileg_b_4557037.html accessed 18 August 2016; Richard Lyon, 'Gay White Male Angst: Clutching the Pearls of Privilege' (*Huffington Post,* 14 June 2012) http://www.huffingtonpost.com/richard-lyon/gay-white-male-privilege_b_1596915.html accessed 18 August 2016.

[1217] See generally: European Union Agency for Fundamental Rights (EU FRA), *Being Trans in the EU: Comparative Analysis of EU LGBT Survey Data* (Publication Office of the European Union 2014); James and others (n 47); Inter-American Commission on Human Rights, 'IACHR expresses concern about violence and discrimination against LGTBI persons, particularly youth, in the Americas' (*Inter-American Commission on Human Rights Website,* 15 August 2013) http://www.oas.org/en/iachr/media_center/PReleases/2013/060.asp accessed 28 July 2017.

[1218] See e.g. Transgender Equality Network Ireland, 'TENI VOTE YES to Marriage Equality' (*TENI Website, No Date Available*) http://www.teni.ie/page.aspx?contentid=1352 accessed 18 August 2016; National Centre for Transgender Equality, 'Marriage Equality and Transgender People' (*NCTE Website,* 23 June 2015) http://www.transequality.org/sites/default/files/docs/resources/NCTEMarriageFAQ_Z-Fold_0.pdf accessed 28 June 2017; Transgender Law Centre, 'Freedom to Marry Hub' (*Transgender Law Centre Website,* 25 March 2013) https://transgenderlawcenter.org/archives/3715 accessed 28 June 2017.

While high profile LGB and trans coalitions have existed for many decades – indeed, trans activists frequently inspired queer history's most iconic moments[1219] – the relationship has never been one of parity or true equality (bisexual advocates also claim that their identities are erased[1220]).[1221] Successive generations of LGB advocates, frequently led by "cisgender gay men with class/caste power"[1222], have promoted unidimensional political agendas which, at best, have marginalised trans voices and, at worst, have systematically disenfranchised trans experiences. At its extreme, the chasm between the LGB and trans communities has encouraged either the express omission of trans identities or the exploitation of trans exclusion to increase LGB political capital.[1223] In the UK, the high-profile lobby group, Stonewall, refused to work on trans policies until 2015.[1224] In the US, the largest LGBTI rights organisation, the Human Rights Campaign, famously supported trans-exclusionary employment non-discrimination legislation in 2007 in the belief that removing gender identity protections would improve the bargaining position of gay and lesbian persons.[1225] In recent years, these organisations have apologised for their past failure to adequately acknowledge, and protect, trans individuals.[1226] Against that backdrop, one should be slow to criticise trans advocates who adopt explicitly trans-focused litigation strategies.

[1219] See generally: Victor Silverman and Susan Stryker, 'Screaming Queens: The Riot at Compton's Cafeteria' (Documentary) (Frame Line Studios 2005); Martin Duberman, *Stonewall* (Plume 1994).
[1220] See e.g. Kenji Yoshino, 'The Epistemic Contract of Bisexual Erasure' (2000) 52(2) Stanford Law Review 353.
[1221] Jonathan Alexander and Karen Yescavage, 'Bisexuality and Transgenderism: InterSEXions of the Other' in Jonathan Alexander and Karen Yescavage (eds), *Bisexuality and Transgenderism: InterSEXions of the Other* (Routledge 2012) 12.
[1222] Gee Imaan Semmalar, 'Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India' (2014) 42(3-4) WSQ: Women's Studies Quarterly 286, 288.
[1223] Maria Pahl, '*Immutability of Identity, Title VII, and the ADA Amendment Act: How Being "Regarded As" Transgender Could Affect Employment Discrimination' (2014) 3(1) DePaul Journal of Women, Gender and the Law 63, 63.*
[1224] Aisha Gani, 'Stonewall to start campaigning for trans equality' (*The Guardian*, 16 February 2015) http://www.theguardian.com/uk-news/2015/feb/16/stonewall-start-campaigning-trans-equality accessed 24 March 2016.
[1225] Rebecca Juro, 'Transcript: HRC President Chad Griffin Apologises to Trans People at Southern Comfort' (*The Advocate*, 5 September 2014) http://www.advocate.com/politics/transgender/2014/09/05/transcript-hrc-president-chad-griffin-apologizes-trans-people-speech accessed 24 March 2016.
[1226] Gani (n 110); Juro (n 111).

III. Proportionality of Divorce Requirements

'Point of entry' reasoning challenges the idea that – where a couple have contracted an opposite-gender marriage, and one spouse transitions – the union becomes a (legally) same-gender marriage. If marital unions are assessed at the moment of formation, it is irrelevant that, having entered a heterosexual marriage, one party obtains gender recognition.

Despite its intellectual appeal, however, there remains, as noted, doubt whether state actors (particularly domestic courts) would accept the 'point of entry' rule. For many law-makers and judges, the simple fact that there are two spouses who, post-recognition, have the same legal gender, is sufficient to conclude that, irrespective of the strict legalities, the marriage is also same-gender. In such circumstances, trans persons can no longer rely upon their status as part of a married, opposite-gender couple. Rather, they must oppose divorce requirements through alternative means.

One strategy is 'proportionality' analysis. In reviewing the compatibility of divorce requirements with the ICCPR and the ECHR, both UN HRC and the ECtHR have used proportionality.[1227] In many respects, proportionality is an ideal lens through which to judge forced divorce. Cases, such as *G v Australia*[1228] and *Hamalainen v Finland*[1229], involve complex arguments, which are more effectively resolved through balancing rather than by applying absolute standards. Compulsory divorce, so its proponents argue, pursues an important public policy objective: the protection and promotion of traditional, heterosexual marriage. Without divorce requirements, gender recognition will become a backdoor for non-heterosexual marital unions. On the other hand, however, forced divorce interferes with core human rights. It disrupts family life, curtails marital freedoms and creates unfavourable treatment as compared with cisgender couples and non-married applicants.

Section III explores the proportionality of divorce as a pre-condition for gender recognition. Drawing once again from Huscroft, Miller and Webber's four-pronged test[1230], Section III asks whether divorce requirements are a legitimate, rational, necessary and balanced restriction on trans rights protections. In carrying out this analysis, Section III particularly focuses on three

[1227] *G* (n 17), [7.14]; *Hamalainen* (n 19), [81].
[1228] *G* (n 17).
[1229] *Hamalainen* (n 19).
[1230] Grant Huscroft, Bradley W Miller and Gregoire Webber, 'Introduction' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 2.

aspects of compulsory divorce: (A) the small number of same-gender marriages which are avoided; (B) the existence of *de facto* same-gender marriages even where forced divorce is applied; and (C) the significant legal and social impact which divorce has upon trans family life. Section III ultimately concludes that, irrespective of whether divorce requirements pursue a sufficiently important aim, they are not a proportionate interference with human rights.

A. Small Number of Trans Marriages

The number of married individuals who apply for legal gender recognition is relatively small.[1231] While Section I described how many relationships survive transition, there are comparatively few applications from married persons. This perhaps reflects both the small trans population worldwide and the fact that trans couples (particularly those that endure) may pursue their relationships outside marriage. In its 2008 decision striking down Germany's divorce requirement as a disproportionate breach of the Basic Law protection for marriage, the Federal Constitutional Court emphasised that there was only a "small number of [trans persons] who did not discover or reveal their [trans identity] until during the marriage, and whose marriages did not break up as a result."[1232]

The low incidence of trans couples who seek to retain a marriage post-recognition undermines the importance and necessity of divorce. Allowing a handful of marriages – with parties who previously contracted a heterosexual union but who now have identical genders – does not require state authorities to accept marriage equality more generally. A state can strongly oppose non-heterosexual marriage as a general rule but still accommodate the exceptional position of trans couples. Indeed, numerous jurisdictions, such as Georgia, Croatia and South Australia,[1233] already allow applicants to remain married without extending marriage rights to same-gender couples.[1234] In *Hamalainen,* the dissenting judges argued that "the institution of marriage would not be endangered by a small number of couples who may wish to remain married in a situation such as that of the applicant."[1235]

[1231] *Hamalainen* (n 19), [12] (per Judges Sajó, Keller and Lemmens).
[1232] Federal Constitutional Court of Germany, 1 BvL 10/05 (23 July 2008).
[1233] For Georgia and Croatia, see: TGEU (n 8). For South Australia, see: Births, Deaths and Marriages Registration Act 1996, s. 29I(3).
[1234] Richard Koehler, Alecs Recher and Julia Erht, *Legal Gender Recognition in Europe* (Transgender Europe 2013) 22.
[1235] *Hamalainen* (n 19), [12] (per Judges Sajó, Keller and Lemmens).

The small number of married applicants seeking gender recognition influences the proportionality of divorce requirements. There are, however, two important limitations. First, reliance on the rarity of married applicants would have decreasing relevance if applications were subsequently to rise. In recent years, there has been a steady increase in the percentage of individuals publicly expressing a trans identity. In 2016, the Williams Institute[1236] doubled its estimation of America's trans population.[1237] Considering the growing prevalence of non-cisgender identities, it is conceivable that the number of applicants seeking to create a marriage with same-gender spouses may eventually become so high that it would (if one accepts the legitimacy of preferring opposite-gender marriages) be necessary to enforce divorce requirements.

Second, creating a specific exception for trans couples may give rise to impermissible discrimination between different classes of same-gender couples.[1238] While trans individuals and their spouses would enjoy (now) same-gender marriages, cisgender gay, lesbian and bisexual couples would remain excluded from the marital institution. This inequality of treatment might encourage litigation grounded in non-discrimination guarantees and require that domestic marriage laws embrace all LGB relationships. To the extent that a limited exception for trans spouses would inevitably precipitate full marriage equality, this may justify divorce requirements.

One can question, however, whether accommodating trans spouses really does constitute impermissible discrimination. There is a compelling argument that cisgender LGB couples, who wish to enter a marriage, are not comparably placed with trans couples, who have already contracted a valid heterosexual union and who seek to preserve their existing marriage. Unlike cisgender LGB partners, trans spouses initially entered an opposite-gender legal relationship. They now hope to preserve their legal union with two legal males or two legal females but they never required the State to authorise an explicitly same-gender marriage. Similarly, unlike cisgender LGB couples, it is possible to classify trans spouses as a heterosexual couple. The couple may now share a common gender identity but they entered their legal relationship with

[1236] According to its' website, "[t]he Williams Institute is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy. A think tank at UCLA Law, the Williams Institute produces high-quality research with real-world relevance and disseminates it to judges, legislators, policymakers, media and the public", 'Mission' (*The Williams Institute Website, No Date Available*) https://williamsinstitute.law.ucla.edu/mission/ accessed 30 June 2017.
[1237] Andrew Flores and others, *How Many Adults Identify as Transgender in the United States* (The Williams Institute 2016) 2.
[1238] Hong Kong Inter-Departmental Working Group on Gender Recognition (n 85) 45.

different legal genders. Thus, while creating a trans exception certainly raises equality concerns, trans and cisgender couples are insufficiently analogous to sustain a discrimination claim.

B. *De-Facto* Same-Gender Marriages

In addition to the comparatively low number of married applicants for gender recognition, the existence of "de facto"[1239] same-gender couples also undermines the necessity of dissolution requirements. A majority of jurisdictions worldwide[1240], irrespective of whether they offer legal gender recognition, permit individuals to socially and medically transition. Although they retain their legal gender, trans persons can openly express, and live in, their preferred gender.

Many trans couples, who have contracted a valid heterosexual marriage, begin – even before the trans spouse has been formally acknowledged in law – to identify and interact as *de facto* same-gender spouses.[1241] Catley notes national laws that permit trans women to remain married to cisgender women, and trans men to remain married to cisgender men, "despite the fact that to the outside world these relationships would appear to be same-sex marriages."[1242] In numerous marital unions (pre-gender recognition), the spouses already live and present with identical genders.[1243] The couples structure their marriage as a same-gender partnership, and they engage with family, friends and strangers on those terms.[1244]

In Australia, while many individual states mandate divorce to amend a birth certificate[1245], the federal government issues passports without any such requirement.[1246] As a result, under

[1239] Stirnitzke (n 70), 292.
[1240] Malaysia is a high-profile example of a jurisdiction where trans persons are not entitled to socially express their preferred gender. See: Human Rights Watch, 'Malaysia: Court Ruling Sets Back Transgender Rights' (*HRW Website,* 8 October 2015) https://www.hrw.org/news/2015/10/08/malaysia-court-ruling-sets-back-transgender-rights accessed 14 May 2017. See also: 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (19 April 2017) UN Doc No. A/HRC/35/36l, [52].
[1241] Anatol Dutta, 'The Legal Status of Transgender and Transsexual Persons in Germany' in Jens M Scherpe, *The Legal Status of Transgender and Transsexual Persons* (Intersentia 2015) 213.
[1242] Paul Catley, 'A long road nearing an end? Recognition for transsexual people' (2003) 25(3) Journal of Social Welfare and Family Law 277, 285.
[1243] *G* (n 17), [7.9].
[1244] Sarah Leinicke, 'Post-Operative Transsexuals' Right to Marriage' (2005) 1(1) The Modern American 18, 20.
[1245] Births, Deaths and Marriages Registration Act 1995, s. 32B(1)(c) (New South Wales); Births, Deaths and Marriages Registration Act 1999, s. 28A(1)(c) (Tasmania); Births, Deaths and Marriages Registration Act 2003, s. 22 (Queensland).
[1246] 'Sex and Gender Diverse Passport Applicants' (*Department of Foreign Affairs and Trade Website, No Date Available*) https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpob.aspx accessed 25 March 2016. See also: Miki Perkins, 'When Albert met Ann: "Ridiculous" marriage laws force transgender divorce' (*The Age Online,* 28 December 2014) http://www.theage.com.au/victoria/when-

Australian law, a validly married couple, who both express and live in the same gender, can engage in international travel with federal documents which acknowledge their shared genders.[1247] In *G v Australia,* UN HRC observed that state officials had failed to explain why "a change in [legal gender] on a *birth certificate* would result in irreconcilable and unacceptable conflict with the Marriage Act" when "a change in [legal gender] on [the author's] *passport* in identical circumstances is allowed" [emphases added].[1248]

The existence of *de facto* same-gender marriages contradicts the necessity of dissolution requirements. If trans spouses can live in the same gender, identify publicly in the same gender, and even engage professionally in the same gender, it is unclear what public goal is achieved by requiring that they have opposite legal genders for the purposes of marriage. Living fulltime as a same-gender couple, and being recognised as such in public, surely any negative social consequences would already have become apparent?[1249]

Of course, *de facto* gay marriages are legally distinct from relationships which have been formally acknowledged by the State. As a matter of law, there is a difference between Argentina or Ontario allowing trans couples to create legal same-gender unions and Japan or Poland permitting only the appearance of a 'gay' marriage. In the latter case, one might argue that maintaining different legal genders safeguards Japanese and Polish society against the perceived detriments of marriage equality. Yet, converting a trans couple's legal relationship into an explicitly same-gender marriage does not significantly alter their lifestyle or, perhaps more importantly, the way that they are perceived by society. If law-makers and judges really are concerned about the impact of same-gender marriage, they should prevent opposite-gender spouses from transitioning pre-marriage dissolution. The fact that most jurisdictions take no such steps, and actually permit *de facto* 'gay' marriages, suggests that compulsory divorce is not a necessary interference with trans human rights.[1250]

albert-met-ann-ridiculous-marriage-laws-force-transgender-divorce-20141210-124b8q.html#ixzz43tBUtqyW accessed 25 March 2016.

[1247] *G* (n 17), [7.7].

[1248] ibid.

[1249] *Hamalainen* (n 19), [13] (per Judges Sajó, Keller and Lemmens).

[1250] In *G v Australia,* the United Nations Human Rights Committee drew a comparison with the earlier communication decision of *Toonen v Australia* (Communication No. 488/1992 (CCPR/C/50/D/488/1992) (UN HRC, 31 March 1994)). Just as in *Toonen,* where Tasmania's lack of enforcement of sodomy laws undermined the necessity of criminalisation, so too the fact that Australia allowed trans couples – both socially and under *federal* law – to live with the same gender undermined the necessity of divorce requirements in New South Wales, see: *G* (n 17), [7.10].

C. Impact of Divorce Requirements on Family Life

The final proportionality consideration is the impact of forced divorce on applicants and their families. Requiring that applicants for recognition dissolve an existing marriage influences family life in three important ways. First, compulsory divorce reduces legal rights and obligations. Second, it creates a symbolic loss of status. Finally, there is a disruption of normal family life. Each of these 'impacts' are now addressed in turn.

(i.) Reduction in Legal Rights

In many jurisdictions, married couples receive legal benefits which do not apply to non-marital relationships. In Ireland and Germany, marital unions enjoy special status and are guaranteed legal protection under the Constitution and Basic Law.[1251] Countries, such as France and the Netherlands, have unique property guarantees which protect spouses on the breakdown of marital relationships.[1252] State authorities may incentivise entry into marriage through more favourable financial benefits.[1253] In *United States v Windsor*– a successful challenge to America's Defence of Marriage Act (DOMA) – the plaintiff sought access to marriage precisely because only spouses were exempt from federal inheritance tax.[1254] Married couples enjoy next-of-kin entitlements, creating hospital visitation rights and priority in making spousal healthcare decisions. There are well-documented cases where partners who were unable to formalise their relationship through marriage have been denied access to dying loved-ones because family members disapproved of the relationship.[1255]

[1251] For Ireland, see art. 41 of the Constitution. For Germany, see art. 6 of the Basic Law.
[1252] Dutch Law establishes a 'Community of Property' regime for married couples. Under French law, spouses adhere to a 'Community of Acquisitions' system, see Katharina Boele-Woelki and others (eds), *Principles of European Family Law regarding Property Relations between Spouses* (Intersentia 2013) 139 – 345. See also: Katharina Boele-Woelki, Joanna K Miles, Jens M Scherpe (ed), *The Future of Family Property in Europe* (Intersentia 2011) 1 – 62.
[1253] Emma Simon and Nicole Blackmore, 'Why Getting Married leaves you Better Off' (*The Telegraph*, 20 February 2015) http://www.telegraph.co.uk/finance/personalfinance/money-saving-tips/10162608/Why-getting-married-leaves-you-better-off.html accessed 18 August 2016.
[1254] [2013] 570 US, 3.
[1255] In her recent history of the movement for marriage equality in Ireland, Mullally writes, at many points, of the family-based discrimination which LGB couples faced because they did not have next-of-kin rights. See generally: Una Mullally, *In the Name of Love: The Movement for Marriage Equality in Ireland* (The History Press Ireland 2014).

Requiring individuals to dissolve their marriage prior to gender recognition deprives spouses of marital protections.[1256] Across the Council of Europe, 15 of the 22[1257] State Parties that require divorce pre- recognition offer no alternative relationship structure.[1258] This is also standard practice in all Asian jurisdictions, which impose divorce, including Singapore, Japan and Hong Kong.[1259] Trans individuals and their partners, are cast into the position of legal strangers. They must rely upon civil law remedies, such as contract, to create relationship security.

The German and Italian Constitutional Courts have both suggested that the loss of legal protections associated with marriage impacts the proportionality of divorce requirements: "the existing marriage of the person concerned is considerably impaired…[divorce] denies to existing marriages the protection granted to them by art. 6.1 [of the German Basic Law]."[1260] Requiring a couple, which enjoys special marital benefits, to forfeit those rights is a significant interference with family life, particularly when compared with the less defined, more intangible policy objectives of exclusively opposite-gender marriage.

A reduction in legal rights may have a profound impact on child welfare. Young people, who are born to trans spouses pre-recognition (and pre-divorce), enjoy numerous marriage-based rights, including automatic filiation. In *Goodridge v Department of Public Health*[1261], Marshall CJ observed how "marital children reap a measure of family stability and economic security…that is largely inaccessible, or not readily accessible to non-marital children."[1262] Where trans parents are required to divorce, however, children may experience loss of entitlement or reduced priority for legal protection.[1263] Sharp contrasts in between pre and post-

[1256] Michael Dorf, 'Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings' (2011) 97(6) Virginia Law Review 1267, 1308.
[1257] This statistic rises to 23 State Parties if one considers Northern Ireland where, in contrast with the rest of the United Kingdom, individuals are still required to divorce before obtaining gender recognition. See: Stephen Gilmore, 'The Legal Status of Transsexual and Transgender Persons in England and Wales' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 196.
[1258] Poland, Belarus, Moldova, Macedonia, Latvia, Lithuania, Bulgaria, Azerbaijan, Bosnia and Herzegovina, Russia, Slovakia, Ukraine, Romania, Turkey, Serbia.
[1259] Aengus Carroll and Lucas Ramon Mendos, *State Sponsored Homophobia* (ILGA 2017) 71.
[1260] 1 BvL 10/05 (n 118).
[1261] *Goodridge v Department of Public Health* (798 N.E.2d 941 (Mass. 2003)) is a 2003 judgment from the Massachusetts Supreme Judicial Court which found that, under the Massachusetts State Constitution, same-gender couples could not be denied the right to marry. The Court's decision resulted in Massachusetts becoming the first American state to introduce marriage equality in 2004.
[1262] ibid, 956-957.
[1263] In Italy, art. 29 of the Constitution confers special recognition on the family "founded upon marriage". Under arts. 21 of the Greek Constitution and 41(1) of the Slovak Constitution, 'marriage' is the only form of legal relationship status which expressly enjoys the 'protection' of 'the state' or of 'the law'. Article 18 of the Constitution of Poland states that "[m]arriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."

transition rights illustrates how divorce requirements injure young people and are inconsistent with their best interests. There is no benefit for children where their parents become legal strangers, are denied financial benefits and cannot make basic healthcare decisions.[1264]

(a.) Alternative Relationship Structures

One option for reducing the legal impact of divorce requirements is to provide additional relationship frameworks. In *Hamalainen*, the majority concluded that there was not a disproportionate interference with 'family life' under art. 8 ECHR because the applicant and her wife could, as part of the recognition process, automatically convert to a registered partnership: "it is not disproportionate to require…that the applicant's marriage be converted into a registered partnership…a genuine option which provides legal protection for same-sex couples."[1265]

The ECtHR's reasoning is *prima facie* compelling. If one accepts that prioritising opposite-gender marriage is a sufficiently important policy objective, against which the rights of trans spouses must be balanced, it is reasonable that, where trans couples are required to divorce but are immediately accommodated through alternative marriage-like structures, courts and policy makers might conclude that any loss of rights is proportionate.

There are, however, a number of important caveats. First, the availability of same-gender partnership schemes, in jurisdictions which enforce divorce requirements, is largely restricted to Europe and Australia. Most countries, which mandate divorce, do not offer alternative relationship structures. Indeed, across the Council of Europe, only 30% (7 out of 22) of State Parties, which require divorce, provide other legal options.[1266] Thus, while 'conversion' solutions have intellectual appeal, their broader applicability is questionable.

Second, the proportionality of 'conversion rules' is highly context-specific. It varies significantly depending upon the existing facts. In a number of jurisdictions, married spouses and civil partners do enjoy similar protections.[1267] In *Hamalainen*, converting to a registered partnership would not have cost Finnish applicants parental, tax or pension benefits.[1268] In such

[1264] Paula Gerber and Adiva Sifris, *Submission to the House Standing Committee on Social Policy and Legal Affairs* (Castan Centre for Human Rights Law Monash University 2012) 17.
[1265] *Hamalainen* (n 19), [40].
[1266] TGEU (n 8).
[1267] Carroll and Ramon Mendos (n 145) 72.
[1268] *Hamalainen* (n 19), [83] – [85].

circumstances, where alternative relationship regimes mitigate the tangible legal disadvantages of dissolution, requiring divorce is more acceptable.

However, in other countries, registered partnership is not the legal equivalent of marriage. Civil partners enjoy only limited, often insufficient protection, and their rights are less secure than those of married peers. In Italy, the new Civil Unions Act[1269] "falls well short of giving gay couples the same rights as heterosexual [married] ones."[1270] As civil partners, applicants and their former spouses would be unable to adopt jointly, while if one partner conceives using alternative reproductive technologies, the other individual cannot effect a second-parent adoption.[1271] Similar restrictions apply to civil partners in Greece, where registered partnerships, open to heterosexual couples since 2009, were extended to same-gender partners in 2015.[1272] In the Czech Republic, registered partners experience numerous disadvantages compared with their married peers, such as unequal pension rights and obligations.[1273] Thus, while conversion-based solutions certainly reduce interference with human rights, the more civil unions diverge from standard marriage rights, the less likely they are to withstand proportionality review.

Proportionality also depends on the ease with which couples can convert to a partnership structure. A conversion process which is streamlined and accessible has an increased capacity to satisfy human rights requirements. In *Hamalainen*, Finnish law permitted couples to automatically convert their marriages. Ms Hamalainen, and her wife, could immediately enter a registered partnership, and the length of their relationship (for accrued pension rights, etc.) was determined from the point of marriage.[1274] In such circumstances, it was more reasonable for the majority to conclude that there was only a limited interference with the applicant's family life.

[1269] ILGA Europe, 'Important Day as Italy becomes the 27th European Country to Legally Recognise Same-Sex Couples' (*ILGA Europe Website,* 11 May 2016) http://www.ilga-europe.org/resources/news/latest-news/italy-recognises-same-sex-couples accessed 18 August 2016.
[1270] 'Italy Approves Same-Sex Civil Unions' (*The Economist*, 12 May 2016) https://www.economist.com/news/europe/21698736-critics-say-bill-which-leaves-out-adoption-does-not-go-far-enough-italy-approves 2 September 2017.
[1271] ILGA Europe (n 155).
[1272] ILGA Europe, 'Greece becomes 26th European country to recognise same-sex partnerships' (*ILGA-Europe Website*, 22 December 2015) http://www.ilga-europe.org/resources/news/latest-news/greece-becomes-26th-european-country-recognise-same-sex-partnerships accessed 18 August 2016.
[1273] Jones Day, 'Legal Recognition of Same-Sex Couples: Czech Republic' (*Jones Day Website, No Date Available*) http://www.samesexrelationshipguide.com/~/media/files/ssrguide/europe/legal-recognition-of-samesex-relationships--czech-republic.pdf accessed 28 June 2017.
[1274] *Hamalainen* (n 19), [84].

However, most jurisdictions do not offer a streamlined process for conversion. Depending on the exact national rules, it may be both time consuming and administratively complex to lawfully terminate a marriage and enter a registered partnership. Divorce requirements typically involve, first, dissolving an existing marriage and then, separately, contracting a civil union.[1275] Even on its own, this two-stage process begins to recalibrate the proportionality analysis. It suggests that the "beneficial effects of the limitation on" trans human rights may not "outweigh the deleterious effects."[1276]

Applicants may also face additional, more complex difficulties in accessing a legal divorce. Where trans spouses, who remain committed, only seek dissolution to obtain gender recognition, has there been an "irretrievable" or "unendurable" breakdown in their relationship, as is usually required under Italian, Slovenian and Czech law?[1277] Should domestic courts terminate a marriage, which the parties will subsequently re-contract as a domestic partnership? The impossibility for loving couples to achieve a legal divorce was one of the strongest arguments against a proposed divorce requirement for Ireland's Gender Recognition Act 2015.[1278] Concerns over the process for, and accessibility of, converting trans marriages undermines the extent to which conversion strategies can save the proportionality of forced divorce.

(ii.) Symbolic Loss of Status

Marriage does not simply create legal rights for spouses. It also denotes a distinct social status. By requiring trans couples to dissolve their marriages, law-makers and judges deny trans couples the symbolism of marital unions. Even where an alternative relationship structure, such as registered partnership, exists, forfeiting marital status imposes a symbolic injury on spouses.

Marriage has a unique public stature and is often inter-connected with national culture, tradition and identity.[1279] While scholars such as Franke, Polikoff and Ettelbrick have

[1275] See e.g. Barbara Havelková, 'The Legal Status of Transgender and Transsexual Persons in the Czech Republic' in Jens M Scherpe, *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 137.
[1276] Huscroft, Miller and Webber (n 116) 2. The fourth prong of Huscroft, Miller and Webber's proportionality test is: "Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation?"
[1277] See: (Slovenia) Marriage and Family Relations Act, art. 65; (Czech Republic) Family Code, s. 24(1); (Italy) Divorce Law, ss. 1 and 2.
[1278] In Ireland, under art. 41(3)(2)(ii) of the Constitution, spouses cannot divorce unless there is "no reasonable prospect of a reconciliation."
[1279] Marc Poirier, 'Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction' (2009) 41(5) Connecticut Law Review 1425, 1490.

convincingly argued against the historic prioritisation of marital unions,[1280] marriage remains a primary vehicle for public expressions of commitment. Recent campaigns to introduce marriage equality have emphasised the social significance of the marriage institution.[1281]

Depriving trans spouses of the symbolic status of marital unions is an important interference with marriage, family life and non-discrimination rights. In *Halpern v Canada (Attorney General)*, the Court of Appeal of Ontario stated that "[t]he societal significance of marriage, and the corresponding benefits…cannot be overlooked….exclusion perpetuates the view that [couples] are less worthy of recognition."[1282] Requiring spouses to divorce encourages the "perception…that others '[place] less value on their relationship'."[1283] It suggests that, post-transition, a trans couple is lesser and should be disqualified from optimal social recognition.

Concerns about symbolic status may have a particular impact on the spouse who is applying for gender recognition. It is only when trans individuals give full legal expression to their preferred gender that courts and law-makers remove the marriage label. In such circumstances, applicants are likely to ask what it is about their true self that the law finds so objectionable. What aspect of a trans individual's authentic gender merits the deprivation of marriage rights? These questions cut across fundamental values and essential aspects of an applicant's life. They should influence the extent to which divorce can be a proportionate interference with human rights. The emotional burdens occasioned through forced divorce appear greater than the less-defined benefits of heterosexual marriage.

While the availability of alternative relationship structures can mitigate the loss of *legal* protections, it does not remedy losing the *symbolic status* attached to marriage. As Cott notes, "[t]here is nothing that is like marriage except marriage."[1284] Accommodating trans couples

[1280] Katherine Franke, *Wedlocked: The Perils of Marriage Equality* (NYU Press 2015); Nancy Polikof, 'Why Lesbians and Gay Men Should Read Martha Fineman' (2000) 8 American University Journal of Social Policy and Law 167; Paula Ettelbrick, 'Since When is Marriage a Path to Liberation?' (1989) OUT/LOOK 9. In arguing that trans spouses lose the social symbolism of marriage when required to divorce, this thesis does not support a normative claim that marriage should be prioritised over other family formations. Instead, the thesis merely engages in a descriptive argument which acknowledges (without supporting) the social symbolism of marriage in many cultures.

[1281] See generally: Yes Equality, 'The Case for Marriage Equality' (*Yes Equality Website, No Date Available*) https://www.yesequality.ie/why-marriage-equality/ accessed 18 August 2016; 'The Gardner Family – Why Marriage Matters Maine' (*Why Marriage Matters Maine*, 25 July 2012) https://www.youtube.com/watch?v=gvJrmMK8Hl0 accessed 28 June 2017.

[1282] [2003] OJ No. 2268, [107].

[1283] Paula Gerber, Kristine Tay and Adiva Sifris, 'Marriage: A Human Right for All?' (2014) 36(4) Sydney Law Review 643, 661.

[1284] Nancy Cott, Johnathan Turnbull Professor of History, Harvard University, testifying during *Perry v Schwarzenegger*, United States District Court for the Northern District of California (4 August 2010), 81. The

through a "separate but equal"[1285] partnership structure does not lessen the social impact of involuntary dissolutions. Conversion options may actually reinforce, rather than ameliorate, the symbolism of removing marital rights. In many jurisdictions, law-makers have adopted registered partnerships to formalise same-gender relationships without having to grant marriage privileges.[1286] Thus, although civil unions practically enhance the rights of LGB persons, they symbolically enshrine, and reproduce, a history of "second-class status" for same-gender relationships.[1287] Crompton writes that creating a parallel regime "sends out a clear signal that these relationships are valued less highly."[1288] Harding similarly identifies concerns that "[t]he term 'civil union' perpetuates the stigma of being different."[1289] By requiring that applicants convert to a civil partnership, state actors force trans couples into a relationship structure which was adopted as a second-class option.

(iii.) Involuntary Disruption of Family Life

Divorce requirements disrupt families in a number of key respects. They remove trans spouses from the general security of marital relationships. Existing research illustrates that married individuals enjoy firmer and steadier unions than non-married partners.[1290] In *Fourie v Minister for Home Affairs,* Sachs J, for the South African Constitutional Court, observed that "[m]arriage stabilises relationships by protecting the vulnerable partners and introducing equity and security into the relationship."[1291] Dissolution requirements are likely to have a particular impact in jurisdictions where policy makers mandate divorce but offer no alternative relationship structure. In such circumstances, trans couples are deprived of the most stable foundation on which to pursue their shared lives.[1292]

Perry litigation was a federal challenge to *Proposition 8* – a referendum initiative which constitutionally prohibited same-gender marriage in California.

[1285] Gerber, Tay and Sifris (n 169), 657.

[1286] In the United Kingdom and Ireland, the Civil Partnership Act 2004 and *Civil Partnership* and Certain Rights and Obligations of Cohabitants *Act 2010* allowed the UK and Irish parliaments to recognise same-gender relationships, without having to acknowledge that LGB couples are entitled to full marriage equality.

[1287] Rosie Harding, '"Dogs Are 'Registered', People Shouldn't Be": Legal Consciousness and Lesbian and Gay Rights' (2006) 15(4) Social and Legal Studies 511, 525.

[1288] Lucy Crompton, 'Civil Partnerships Bill 2004: The Illusion of Equality' (2004) Family Law 888, 891.

[1289] Harding (n 173), 525.

[1290] Ben Wilson and Rachel Stuchbury, 'Do partnerships last? Comparing marriage and cohabitation using longitudinal census data' (2010) 139 Population Trends 37, 47; Michael Rosenfeld, 'Couple Longevity in the Era of Same-Sex Marriage in the United States' (2014) 76(5) Journal of Marriage and Family 905.

[1291] [2005] ZACC 19, [69].

[1292] One may question whether marriage stabilises couples or whether the benefits associated with marriage attract stable couples who, in turn, stabilise marriage. It is not inconceivable that, if stable trans couples, who entered opposite-gender marriages pre-recognition, are required to divorce, they would show greater levels of stability than either a trans or cisgender couple who have always chosen to remain outside the boundaries of marriage; Peter Charleton and Sinead Kelly, 'Marriage and the Family: A Changing Institution? Part II (2011) 16(5) Bar Review 127, 105.

Forced divorce also has the potential to create discord in trans marriages. If individuals are required to terminate their legal relationship formally, there may be an obligation to engage in financial or property negotiations. Catley observes that "[b]ringing a relationship to an end has costs, arrangements for financial provision will have to be made…and the impact on potential pension entitlement may be great."[1293] While, in many jurisdictions, spouses enjoy financial autonomy during marriage, dissolution laws often establish (as noted) a general framework for asset distribution upon divorce.[1294] Couples who have never (and would never have) contemplated finance and property ownership may suddenly become embroiled in tense, adversarial disputes. There may be a sense that, while finances are not a major consideration in their marital life, each party, when expressly asked to address the issue, will want a fair deal. Even spouses who retain a strong commitment may find it difficult to avoid the adversarial posture of divorce negotiations. In opposing forced divorce in Ireland, many trans individuals predicted that there would be increased disharmony within families if spouses were subjected to a dissolution process.[1295]

Ultimately, the most pertinent question – when considering the proportionality of any interference with family life – is how compulsory divorce is an objectively balanced restriction. Even if one concedes that there is a public benefit in heterosexual marriage, it is still possible to achieve that goal in a less intrusive manner. Proponents of heterosexual marriage frequently emphasise the longevity and fidelity-focused character of marital unions. It is, therefore, unclear why, if two spouses have maintained a long-lasting and faithful commitment through the often traumatic process of transition, their relationship threatens, rather than enhances marriage security.[1296] Reflecting upon divorce requirements worldwide, Byrne writes that "[i]t is inappropriate and highly insensitive for the law to dissolve a marriage that has remained strong after one partner transitions."[1297] Post-transition, spouses do have identical legal genders and their marriage does conflict with one aspect of the traditional marital definition. Yet, considering that many trans couples personify the other core attributes of marriage – longevity,

[1293] Catley (n 128), 284.
[1294] In the Netherlands, there is a 'community of property' regime (Civil Code, arts. 1:93 – 1:113). In France, there is a 'community of acquisitions' (i.e. property acquired during the marriage) (Civil Code, arts. 1441 – 1496). In Ireland, the courts must ensure that the couple make 'proper provision' for each spouse's financial needs (*YG v NY* [2011] IESC 40).
[1295] Stephanie Grogan, 'New Transgender Laws could be in Place by July' (*UTV Ireland*, 3 June 2015) http://utv.ie/News/2015/06/03/New-transgender-laws-could-be-in-place-by-July-38389 accessed 25 March 2016.
[1296] *Hamalainen* (n 19).
[1297] Jack Byrne, *Licence to Be Yourself: Marriage and Forced Divorce* (Open Society Foundations 2004) 11.

fidelity and commitment – it is questionable whether dissolution requirements can be a proportionate interference with family life.

Having regard to the foregoing considerations – the reduction in legal rights, the loss of symbolic status and the disruption to family life – there is a strong argument that, even if divorce requirements "pursue a legitimate objective of sufficient importance", the "beneficial effects" do not "outweigh the deleterious effects" on applicants and their families.[1298]

IV. The Status of Same-Gender Marriage in Human Rights Law

Chapter IV has thus far proceeded on the basis that: (a) international human rights do not guarantee same-gender marriage; and that (b) state actors can (proportionately) interfere with trans spouses in order to promote two-person, opposite-gender unions. In numerous international and regional decisions, most prominently *Joslin v New Zealand*[1299] and *Schalk and Kopf v Austria*[1300], human rights adjudicators have confirmed that, while international law does not prohibit marriage equality, neither does it compel countries to expand their marital definitions.

Section IV reconsiders the existing relationship between same-gender marriage and human rights. While an in-depth exploration of marriage equality is beyond the scope of this thesis, to the extent that current international rules legitimise divorce requirements, one must address whether those rules are rational and defensible. As noted in the introduction to Chapter IV, reconsidering existing international standards is not strictly within the methodological focus of this thesis (i.e. applying current human rights to conditions of recognition). Yet, given the centrality of same-gender marriage arguments in rationalising divorce requirements, there is merit in reviewing the *Joslin* and *Schalk* jurisprudence.

A number of points in support of marriage equality have already been identified in Section III. Concerns about reduced legal rights and the symbolic loss of status, which trans couples experience post-divorce, also impact LGB couples who cannot contract a marital union. To the extent that these points have already been addressed, they are not considered further below.

[1298] Huscroft, Miller and Webber (n 116) 2.
[1299] *Joslin* (n 80), [8.3].
[1300] *Schalk* (n 78), [63].

Nor does Section IV explore claims focused on religious liberty, procreation, 'slippery slope' consequences or queer critiques. While important for understanding historic opposition to LGB marital rights, these arguments are not an objectively coherent defence of heterosexual exclusivity. First, law-makers and judges increasingly understand that, in extending civil marital rights to same-gender couples, state actors cannot compel religious institutions and officials to solemnise 'gay marriage'[1301]. Second, opening up marital unions to LGB persons does not inevitably require the decriminalisation of bigamy, incest or bestiality.[1302] Third, while many individuals who enter marriage do ultimately have children, procreation has never defined the marriage right.[1303] Finally, although feminist and queer scholars critique the marriage institution[1304], their arguments are a call to de-prioritise marriage[1305] rather than a claim that human rights ignore same-gender relationships.

Section IV *does* focus on three additional aspects of the same-gender marriage debate: (A) the supposed intention that international marriage rights be limited to opposite-gender couples; (B) arguments that same-gender unions are historically and definitionally inaccurate; and (C) the supposed disruptive, destabilising and devaluing impact of marriage equality. Section IV concludes that the *Joslin* and *Schalk* position, while politically comprehensible, is weak in many other respects.[1306] It argues in favour of broader marriage rights, and the consequent de-legitimisation of divorce requirements.

[1301] Devon Lerner, 'Why We Support Same-Sex Marriage: A Response from Over 450 Clergy' (2003) 38(3) New England Law Review 527, 531.
[1302] William Eskeridge Jr, 'Three Cultural Anxieties undermining the Case for Same-Sex Marriage' (1998) 7(2) Temple Political and Civil Rights Law Review 307, 314.
[1303] *Halpern* (n 168), [122]. See also: Angelo Pantazis, 'An Argument for the Legal Recognition of Gay and Lesbian Marriage' (1997) 114(3) South African Law Journal 556, 565; Mary Coombs, 'Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage' (1997) 8(2) UCLA Women's Law Journal 219, 246.
[1304] Ettelbrick (n 166); Nancy Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage will not "Dismantle the Legal Structure of Gender in Every Marriage"' (1993) 79(7) Virginia Law Review 1535.
[1305]Nan Hunter, 'Marriage, Law, and Gender: A Feminist Inquiry' (1991) 1 Law and Sexuality Review Lesbian and Gay Legal Issues 9, 11; Chai Feldblum, 'A Progressive Moral Case for Same-Sex Marriage' (1998) 7(2) Temple Policy and Civil Rights Law Review 485, 486.
[1306] Malcolm Langford, 'Revisiting *Joslin v New Zealand*: Same-Sex Marriage in Polarised Times' (2017) University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2017-12, 20.

A. Intended Exclusion of Same-Gender Marriage Rights?

In rejecting a human right to marriage equality, UN HRC and the ECtHR have relied upon two propositions. First, the wording of international and regional protections ("[t]he right of men and women of marriageable age to marry and to found a family shall be recognised"[1307]) is evidence that "the right of a man to marry must be exercised in concert with a woman, and vice versa."[1308] Secondly, the prevailing societal values, which formed the historical backdrop against which the major rights treaties were drafted, indicate that marriage entitlements were always intended to be heterosexual.[1309] At the same time, however, UN HRC and the ECtHR have conceded that, while current human rights standards do not protect same-gender marriage, as moral and social norms evolve, so too international and regional protections may expand.[1310]

One can immediately identify a tension in the *Joslin* and *Schalk* reasoning. If the modern contours of marriage are defined by historical intent, it is immaterial that contemporary attitudes towards same-gender couples may evolve. The justification for referencing historical context depends upon drafters' original motivation being determinant. Where that is the case, evolving moral and social norms are irrelevant. If, on the other hand, marriage rights are shaped by contemporary trends, it is unclear what useful role past intentions play. For example, if it could conclusively be shown that a majority of people support marriage equality (e.g. plebiscite, etc.), a modern-focused analysis would take no account of previous trends. It is logically inconsistent to limit marital rights according to history while, at the same time, acknowledging the possibility of a wider protection based on contemporary moral standards.

Even if one concedes the relevance of original purpose (a point discussed below), it is unclear that there was an intention to exclude same-gender couples from international marriage protections. No international or regional treaty expressly rejects marriage equality.[1311] Looking to the *travaux preparatoire* for art. 16 UDHR – which serves as the blueprint for marital rights under art. 23 ICCPR and art. 12 ECHR[1312] – one observes two primary motivations for marriage guarantees, neither of which are inconsistent with same-gender unions.

[1307] ICCPR, art. 23(2).
[1308] Nathan Crombie, 'A Harmonious Union? The Relationship between States and the Human Rights Committee on the Same-Sex Marriage Issue' (2012) 51(3) Columbia Journal of Transnational Law 696, 704.
[1309] *Schalk* (n 78), [55]; *Joslin* (n 80), [8.2].
[1310] *Joslin* (n 80), [8.2]; *Schalk* (n 78), [61].
[1311] Langford (n 192), 9.
[1312] Bart van der Sloot, 'Between fact and fiction: an analysis of the case-law on Article 12 of the European Convention on Human Rights' (2014) 26(4) Child and Family Law Quarterly 397, 400. Johnson writes that those who drafted the ECHR "intended the right to marry to harmonise with the UDHR", Paul Johnson, '"The choice

First, having regard to the discriminatory marriage laws of Nazi Germany, drafters intended that marital entitlements should never again be withheld because of race or religion. Cook writes that the "recognition of a right to marry….is a reaction against Nazi racial and reproductive polices."[1313] Similarly, Van der Sloot observes that "the rationale behind the right to marry….was one of freedom and protection against discrimination."[1314] Second, the reference to "men and women", rather than being directed against same-gender couples, was actually intended to address gender inequality. According to Gerber, Tay and Sifris, "gendered language was adopted in order to emphasise the principle of equality between men and women."[1315] Johnson suggests that "the qualification that men and women were entitled to equal rights as to marriage…can be understood as the outcome of the decision to give literal expression to the commitment to ensure gender equality in marriage."[1316]

The UDHR's preparatory documents reveal a desire for inclusive marriage rights. They are not evidence of a conscious decision to exclude marriage equality.[1317] The drafters may not have positively considered same-gender couples, but they made no statement against LGB relationships. Without historical evidence to the contrary, there is a compelling argument that

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of wording must be regarded as deliberate": same-sex marriage and Article 12 of the European Convention on Human Rights' (2015) 40(2) *European Law Review* 207, 218.

[1313] Rebecca Cook, 'International Protection of Women's Reproductive Rights' (1992) 24(2) New York University Journal of International Law and Policy 644, 700.

[1314] van der Sloot (n 198), 404.

[1315] Gerber, Tay and Sifris (n 169), 647.

[1316] Johnson (n 198), 215.

[1317] One can argue that an implicit intent to exclude same-gender marriage is evident from the widespread state practices of rejecting gay marriage which were common at the time when the UDHR (and the ICCPR) were drafted. These practices continued until the emergence of marriage equality movements in the 1990s, and the introduction of marital rights in the 21st century (in 2001, the Netherlands became the first jurisdiction worldwide to permit same-gender marriage). Those who drafted and affirmed (ratified) the major international rights treaties may not have explicitly excluded same-gender couples. However, their practices, and the context of the time, mean that an intention to exclude was clear. Yet, in response, one can make a number of observations. First, and perhaps most importantly, in the absence of an express intention to exclude, it is questionable whether LGB persons should be deprived of the human right to marry. This is particular so where that deprivation constitutes unfavourable treatment on the basis of sexual orientation. Surely, where a policy (i.e. exclusively heterosexual marriage rights) withholds core protections from a historically vulnerable minority, the policy must (at the very least) be expressly stated in law? LGB exclusions from marriage should require more than the simple interpretation of context. Second, the mere fact that, reflecting upon history, one can find an implied intent to exclude has not prevented domestic courts from engaging in LGB-inclusive interpretations. In the United States, Taiwan and Columbia, constitutional and basic law guarantees were certainly enacted in a context where, at best, the drafters were unaware of same-gender relationships, and, at worst, the drafters implicitly intended to exclude (indeed, the absence of an express inclusion may reflect beliefs that the exclusion was obvious). However, where there is no express prohibition of gay marriage (although domestic statutes may create such a prohibition), national courts have been willing to interpret that silence in a manner which is consistent with sexual orientation protections. Thus, implicit intent (derived from social context) is not enough to defeat equality guarantees. Against that background, even if those who drafted the UDHR and the ICCPR (as well as the state parties which affirmed those instruments) implicitly intended to exclude same-gender marriage, the absence of an express exclusion empowers human rights actors to interpret marriage rights in a non-discriminatory manner.

international and regional marriage protections should embrace same-gender couples. If "men and women" enjoy a right to marry, that privilege should cover both men who marry women and men who marry men (and vice versa).

Marriage exists within a wider human rights framework which, as noted in Chapter I, prohibits sexual orientation discrimination.[1318] Denying same-gender marriage rights, where there is no express exclusion of LGB couples, violates this equality guarantee. Same-gender marriage bans directly discriminate on the basis of sexual orientation. They single out LGB relationships, and subject LGB partners to inferior treatment.[1319] It is irrelevant that such bans apply equally to both heterosexual and homosexual individuals (i.e. both gay men and straight men cannot marry other men). Heterosexual individuals have no desire to engage in a same-gender relationship, and they experience no dignitary or substantive injury where the law ignores LGB intimacy. Same-gender marriage bans specifically tell non-heterosexual couples that it is *their* sexual orientation which is less worthy of recognition.

B. Definition and History

If those who drafted the major international and regional treaties did not reject same-gender marriage, can human rights still exclude LGB relationships on the basis that, as a matter of both definition and history, marriage is an opposite-gender institution? According to Pantazis, "a common argument against gay and lesbian marriage…is *definition*: that marriage is necessarily a different sex institution"[1320] [emphasis added]. Under 'definition' and 'history' based reasoning, claims for marriage equality are "a contradiction in terms."[1321] In order for the concept of marriage to make sense, there must be one legal male and one legal female. Just as it is not discriminatory to exclude men from the Women's Institute[1322], so too there is no inequality where LGB couples cannot access marriage.

[1318] Edward Sadtler, 'A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?' (1999) 40(1) Virginia Journal of International Law 405, 424.
[1319] See e.g. *Fourie* (n 177); *Obergefell v Hodges* [2015] 576 US; *Halpern* (n 168).
[1320] Pantazis (n 189), 557.
[1321] Coombs (n 189), 228.
[1322] According to its' website, "[t]he Women's Institute (WI) was formed in 1915 to revitalise rural communities and encourage women to become more involved in producing food during the First World War. Since then the organisation's aims have broadened and the WI is now the largest voluntary women's organisation in the UK", 'About the WI' (*The Women's Institute Website, No Date Available*) https://www.thewi.org.uk/about-the-wi accessed 28 June 2017.

One can question why history should control the current definition of marriage. Ramsden and Marsh write that "by failing to objectively examine the logical validity of the conventional definition of marriage in a present-day…context", law-makers and judges assume that "marriage continues to serve identical public and private purposes as it did when the…right was first recognised."[1323] Where contemporary society chooses to retain marriage as a public vehicle for expressing private intimacy, marriage laws must reflect modern norms and attitudes. There is extensive evidence that, over the past two centuries, the marital institution has adapted – including by increasing the persons who can contract a marriage – to meet contemporary needs.[1324] Hunter observes that "although marriage may have ancient roots, its form has not been unchanging."[1325] Marriage is a "historically contingent institution, having existed with widely differing indicia and serving shifting social functions in various cultures."[1326] The fact that marital rights have, until recently, prioritised opposite-gender relationships does not mean that modern human rights cannot embrace LGB couples.

Definitional critiques of same-gender marriage are "circular"[1327] and "tautological"[1328] ("same-sex couples can be denied the fundamental right to marry because same-sex couples have no fundamental right to marry"[1329]). They do no more than express the current contours of a particular law. Definition-based arguments are not a normative justification for why human rights law should abandon same-gender couples. Allen writes that "the fact that marriage has not included same-sex couples in the past does not explain why that cannot be so now."[1330] Where the legitimacy of law is proven by its' mere existence, it would be impossible to achieve any meaningful social change.[1331] Drawing upon an earlier example from Chapter III, in *Brown v Board of Education of Topeka*[1332], should the existence of Jim Crow laws since the American Reconstruction have justified continuing segregation in Topeka, Kansas?

[1323] Michael Ramsdem and Luke Marsh, 'Same-sex marriage in Hong Kong: the case for a constitutional right' (2015) 19(1) The International Journal of Human Rights 90, 93.
[1324] Dís Sigurgeirsdóttir, *The Right to Marry. A Right or Privilege? – Same-sex Couples in Europe* (University of Lund 2007) 19; Gerber and Sifris (n 150) 11.
[1325] Hunter (n 191), 11.
[1326] ibid.
[1327] John Murphy, 'Same-sex marriage in England: a role for human rights?' (2004) 16(3) Child and Family Law Quarterly 245, 248.
[1328] Beth Allen, 'Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon' (1996) 32(3) Willamette Law Review 619, 635-636.
[1329] Eskeridge Jr (n 188), 312.
[1330] Allen (n 214), 635-636.
[1331] *Obergefell* (n 205), 18.
[1332] [1954] 347 US 483.

Maintaining the historic definition of marriage is not a neutral act. Lesbian, gay and bisexual individuals have traditionally been excluded from marriage because of a deeply engrained, widespread culture of homophobia.[1333] In *Fourie*, Sachs J observed that "same-sex couples are not afforded equal protection not because of oversight, but because of the legacy of severe historic prejudice against them."[1334] Modern laws which exclude LGB unions are not an impartial restatement of the accepted contours of marriage. They are the direct product of a social animus which has consistently undermined same-gender relationships. Emphasising the traditional definition of marriage reinforces that animus, and normalises the lesser status of non-heterosexual couples.[1335] As Pantazis concludes, "surely historical ill-treatment is a reason for protecting gay and lesbian rights, not against protecting these rights."[1336]

C. Disruptive, Destabilising and Devaluing Impact of Same-Gender Marriage

The final issue to consider is the alleged negative impact of same-gender unions. Within the existing literature, there are references to the disruptive, destabilising and devaluing effects of LGB relationships. Same-gender marriage, it is argued, hurts children, reduces stability and cheapens the experiences of opposite-gender spouses.[1337]

Marriage equality is often opposed to 'protect' children.[1338] As adoption and procreation rights are typically connected to marriage, law-makers and judges prohibit same-gender unions to preserve heterosexual parenting. There is a widely-held belief – manifested both in court judgments and legislative debates – that LGB relationships are an "inferior loci for child rearing"[1339], and that same-gender parents inflict tangible harms. Wardle writes that "[e]very child deserves to be raised by his or her mother and father….same-sex marriage guarantees that

[1333] *Kerrigan v Commissioner of Public Health* 957 A.2d 407, 478 (Conn. 2008); Paul Johnson, 'Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority' (2011) 20(3) Social and Legal Studies 349, 356.
[1334] *Fourie* (n 177), [76].
[1335] *Kerrigan* (n 219).
[1336] Pantazis (n 189), 562.
[1337] See generally: John Finnis, 'The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations' (1997) 42 The American Journal of Jurisprudence 97; Lynn Wardle, 'A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "the Tragedy of the Commons"' (2008) 22(2) Brigham Young University Journal of Public Law 441; Sherif Girgis, Robert George and Ryan Anderson, 'What is Marriage?' (2010) 34(1) Harvard Journal of Law and Public Policy 245.
[1338] John Tobin and Ruth McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23(1) International Journal of Law, Policy and the Family 110, 123.
[1339] Coombs (n 189), 229.

all children who are born during or raised in such unions will be deprived totally of this fundamental moral right."[1340]

The proposition that children are harmed through same-gender parenting is contradicted by extensive social science research.[1341] Adams and Light observe that "[t]he scientific community examining outcomes for children of same-sex parents has achieved consensus, and the consensus is that children of same-sex parents do not experience comparative disadvantage."[1342] In 2015, researchers from Columbia Law School's 'What We Know' Project undertook an exhaustive review of 77 scholarly articles which "[add] to knowledge about the wellbeing of children with gay or lesbian parents."[1343] Save for four studies which were "so misleading as to be inaccurate", the reviewed literature "[formed] an overwhelming scholarly consensus, based on over three decades of peer-reviewed research, that having a gay or lesbian parent does not harm children."[1344] Prohibiting same-gender marriage, as a means of preventing LGB parenting, is not necessary to 'protect' children.

Similarly, in countries, which have already embraced 'gay marriage', there is no evidence that same-gender unions undermine the marital institution. While, in some jurisdictions, the number of couples marrying continues to fall, this drop-off phenomenon pre-dates marriage equality and the rate of decrease is consistent with previous statistics.[1345] It is unsurprising that same-gender couples have no empirically negative impact on marriage. LGB advocates promote marriage equality in a manner which would not repeal, amend or add to its' basic characteristics.[1346] Saez notes that "[s]ame-sex marriage does not challenge marriage as an

[1340] Lynn Wardle, 'The Attack on Marriage as the Union of a Man and a Woman' (2007) 83(4) North Dakota Law Review 1365, 1377.
[1341] See e.g. Rachel Farr, Stephen Forssell and Charlotte Patterson, 'Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?' (2010) 14(3) Applied Developmental Science 164; Timothy Biblarz and Judith Stacey, 'How Does the Gender of Parents Matter?' (2010) 72(1) Journal of Marriage and Family 3; Roberta Baiocco and others, 'Lesbian Mother Families and Gay Father Families in Italy: Family Functioning, Dyadic Satisfaction, and Child Well-Being' (2015) 12(3) Sexuality Research and Social Policy 202.
[1342] Jimi Adams and Ryan Light, 'Scientific Consensus, the Law and Same Sex Parenting Outcomes' (2015) 53 Social Science Research 300, 308.
[1343] 'What does the scholarly research say about the wellbeing of children with gay or lesbian parents?' (*What We Know Website,* February 2016) http://whatweknow.law.columbia.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/ accessed 25 March 2016.
[1344] ibid.
[1345]This point is discussed at length at various points in Judge Walker's opinion in *Perry v Schwarzenegger*, United States District Court for the Northern District of California (4 August 2010).
[1346] In *Obergefell* (n 205), Kennedy J specifically notes that "[i]t would misunderstand [LGB] men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfilment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law" at [28].

institution and it does not challenge state intervention in intimacy."[1347] Rather than inverting the core of marriage, same-gender unions are presented as an affirmation of marriage.

Finally, concerns about destabilisation or devaluation often reveal prejudicial attitudes towards non-heterosexual relationships. Some of the most cited scholars, who oppose marriage equality, present LGB identities as sexually promiscuous and serially unfaithful. They caution that "the introduction of gay and lesbian relationships into the institution of marriage entails a serious risk of lowering the standards, understanding, expectations and behaviours of marriage for all members of society."[1348] According to Wardle, "[t]he morality and behavioural expectations of gays and lesbians differ markedly from married [spouses]."[1349] For gay couples, "promiscuity, infidelity, multiple sexual partners, and dangerous sexual practices are [apparently] the behavioural norms."[1350] Finnis similarly suggests that "[o]nly a small proportion of men who live as 'gays' seriously attempt anything even resembling marriage as a permanent commitment."[1351]

Such arguments demean the important commitments which LGB couples have historically shared, often in the face of significant social condemnation. Accusations of serial promiscuity are inconsistent with the lived-experience of many same-gender relationships. They cannot justify excluding non-heterosexual persons from marital protections. This is also the case for 'devaluation' arguments. Embracing same-gender couples only creates devaluation if one accepts the inferiority of non-heterosexual relationships. As Ramsden and Marsh conclude, 'devaluation' objections "[betray] unjustifiable and legally indefensible prejudices regarding the nature of homosexuality and homosexual relationships."[1352]

As the foregoing considerations in Section IV illustrate, excluding same-gender couples from international marriage guarantees is subject to substantial critique. Relying upon questionable interpretations of law and reinforcing discriminatory ideologies, such exclusions do not reflect a coherent and rational rights framework. International marriage protections can and should embrace same-gender couples. Prohibiting LGB marital unions is not a legitimate justification for imposing divorce requirements.

[1347] Macarena Saez, 'Transforming Family Law through Same-Sex Marriage: Lessons from (and to) the Western World' (2014) 25(1) Duke Journal of Comparative and International Law 125, 192.
[1348] Wardle 2008 (n 223), 467.
[1349] Wardle 2007 (n 226), 1374.
[1350] ibid.
[1351] Finnis (n 223), 130.
[1352] Ramsdem and Marsh (n 209), 97.

Conclusion

Chapter IV has analysed whether divorce requirements are compatible with human rights. It asks whether forced divorce pursues legitimate policy objectives and explores how involuntary relationship dissolutions violate marital and family life guarantees set out in Chapter I.

When first encountering divorce requirements, many individuals – who have no connection to trans communities or gender identity activism – express two common reactions. There is genuine surprise that, having been required to navigate the emotionally taxing path of gender transition, applicants and their spouses maintain a committed relationship. Individuals often suggest that, faced with a similar experience, their own marriage would not be able to endure. At the same time, observers also question why, if a trans relationship is surviving, law-makers and courts would mandate involuntary divorce.

In many respects, these diverging responses capture the main fault lines in divorce requirement debates. Forced dissolution relies upon two (incorrect) assumptions: (a) that gender recognition creates same-gender marriages; and (b) that cisgender persons always reject trans spouses.

With regards to the latter presumption, existing evidence shows that many (but not all) trans persons *do* maintain loving relationships through gender recognition processes. While spousal transition creates challenges, marital unions – for numerous reasons – often survive. Retaining marital status is frequently *the* primary concern where married individuals apply for gender recognition.

As concerns the former assumption, the reason that trans persons are required to divorce is the belief that legal transitions give rise to LGB marriages. Where domestic laws prohibit non-heterosexual marital unions, and where international law does not protect same-gender spouses (a position challenged in Section IV of this chapter), law-makers and judges claim to impose involuntary divorce without breaching human rights.

Under the 'point of entry' rule, however, a valid heterosexual marriage, which is contracted before recognition, remains (legally) opposite-gender even if one spouse transitions. Respecting the preferred gender of married applicants does not create same-gender unions, and compulsory divorce is not necessary to conserve traditional marital norms.

Even in the absence of ‘point of entry’ reasoning, forced divorce is not a proportionate interference with trans marital and family protections. Reducing legal benefits, denying symbolic status and involuntarily disrupting family relations, divorce requirements cannot be justified through abstract references to heterosexual marriage. Such requirements breach core rights guarantees, and they should not form part of gender recognition processes.

Chapter V

Minimum Age Requirements

Introduction

Chapter V explores minimum age requirements as a pre-condition for legal gender recognition. Around the world, a majority of jurisdictions either limit or fully restrict minors' access to legal transitions.[1353] Within an international framework where, as noted in Chapter I, children are now rights *participants*, as opposed to mere rights *protectees*[1354], Chapter V asks whether excluding young people – partially or absolutely – from formal acknowledgement is compatible with existing human rights standards.

In the past 10 years, one sub-set of the wider trans community – trans children – has gained particular visibility.[1355] While public perceptions of trans identities have historically focused on older (often female-identified) individuals[1356], there is now growing awareness of the vibrant trans movement among child and adolescent populations worldwide.[1357]

Trans children are routinely referenced in both fictional and non-fictional media.[1358] They appear in popular television programmes[1359], are the subject of on-air debate[1360] and have had

[1353] See generally: Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015); Open Society, *Licence to Be Yourself: Trans Children and Youth* (Open Society Foundations 2015); Transgender Europe, 'Trans Rights Index 2017' (*TGEU Website,* 18 May 2017) http://tgeu.org/wp-content/uploads/2017/05/Index-online.png accessed 24 May 2017.
[1354] Aisling Parkes, *Children and International Human Rights Law* (Routledge 2013) 1 – 2.
[1355] Sacha M Coupet, 'Policing Gender on the Playground' in Sacha M Coupet and Ellen Marrus (eds), *Children, Sexuality and the Law* (NYU Press 2015) 193.
[1356] See e.g. Jan Morris, *Conundrum* (Faber and Faber 2002); Renee Richards, *Second Serve: The Renee Richards Story* (Stein and Day 1992); Deirdre McCloskey, *Crossing: A Memoir* (University of Chicago Press 1999).
[1357] Kimberley Ens Manning, Elizabeth J Meyer and Annie Pullen Sansfa*çon, 'Introduction'* in Elizabeth J Meyer and Annie Pullen Sansfa*çon (eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014) 1. See generally: Zack M Paakonen, 'Legal Protections for Transgender Youth' in Jennifer Levi and Elizabeth Monnin-Browder (eds), *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012) 146 – 178; Amy Ellis Nutt, *Becoming Nicole: The Transformation of an American Family* (Random House 2016); Elijah C Nealy, *Transgender Children and Youth: Cultivating Pride and Joy with Families in Transition* (WW Norton and Company Press 2017).
[1358] Christine Aramburu Alegria, 'Gender nonconforming and transgender children/youth: Family, community, and implications for practice' (2016) 28(10) Journal of the American Association of Nurse Practitioners 521, 521.
[1359] Tom Sandercock, 'Transing the small screen: loving and hating transgender youth in *Glee* and *Degrassi*' (2015) 24(4) Journal of Gender Studies 436.
[1360] 'Transgender Teens – Born in the Wrong Body' (*BBC Radio Ulster*, 9 October 2016) http://www.bbc.co.uk/news/uk-northern-ireland-37588612 accessed 5 September 2017; 'Two Transgender Kids: Who Knows Best?' (*BBC 2*, 12 January 2017) http://www.bbc.co.uk/programmes/b088kxbw accessed 5

their lives chronicled in high-profile documentaries.[1361] In schools, recreational services and hospitals, staff report an exponential rise in young people expressing a preferred identity which differs from their gender assigned at birth.[1362] Olson and Garofalo write that the "past decade has shown increasing numbers of [trans] youth presenting for care at gender centres throughout the world, with the average age of referral getting younger each year."[1363] It is not clear whether the increased number of trans-identified youth are a cause or product of wider visibility. However, there is evidence that, when young people have improved information about diverse gender identities[1364], they feel more comfortable pushing back against cisgender norms.[1365] As Pollock and Eyre observe, "exposure transform[s] vague feelings about gender into a nameable identity."[1366]

In many respects, protecting young people has become the "cause du jour"[1367] for modern trans activism. This is unsurprising considering that children live a particularly gendered existence.[1368] According to Burke, from segregated facilities to the toys that society mandates for children, young people are indoctrinated in the "power of gender role expectation."[1369] Within a regime where gender assumes such a dominant status, ensuring that children can live an authentic gendered-existence assumes particular importance. The emphasis placed on trans minors also reflects the capacity for gender diversity among young people to terrify, confuse and enrage. Stieglitz notes that "[trans] youth constantly confront socially expected gender

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September 2017; 'Transgender: Should we be talking to our kids about it?' (*BBC Newsnight*, 1 November 2016) https://www.youtube.com/watch?v=LQJrUTRxFAM accessed 5 July 2017; 'Do We Need More Education on Transgender Issues' (*BBC Sunday Morning Live*, 6 November 2016) https://www.youtube.com/watch?v=gh7ZZlr9o50 accessed 5 July 2017.

[1361] 'Growing up Trans' (*Frontline Public Service Broadcasting*, 30 June 2015) http://www.pbs.org/wgbh/frontline/film/growing-up-trans/ accessed 24 October 2016; Eric Juhola, 'Growing up Coy' (Documentary) (Still Point Pictures 2016).

[1362] Jack Turban and others, 'Ten Things Transgender and Gender Non-Conforming Youth Want Their Doctors to Know' (2017) 56(4) Journal of the American Academy of Child and Adolescent Psychiatry 275, 275; Aramburu Alegria (n 6), 521; Declan Harvey and Liam Smedley, 'Referrals for Young Transgender People Increase' (*BBC Website*, 5 February 2015) http://www.bbc.co.uk/newsbeat/article/31120152/referrals-for-young-transgender-people-increase accessed 24 October 2016.

[1363] Johanna Olson and Robert Garofalo, 'The Peripubertal Gender-Dysphoric Child: Puberty Suppression and Treatment Paradigms' (2014) 43(6) Paediatric Annals 132, 133.

[1364] Shannon Price Minter, 'Foreword' in Genny Beemyn and Susan Rankin, *The Lives of Transgender People* (Columbia University Press 2011) xi.

[1365] Shannon Price Minter, 'Supporting Transgender Children: New Legal, Social, and Medical Approaches' (2012) 15(3) Journal of Homosexuality 422, 425; Herbert J Bonifacio and Stephen M Rosenthal, 'Gender Variance and Dysphoria in Children and Adolescents' (2015) 62(4) Paediatric Clinics of North America 1001, 1001.

[1366] Lealah Pollock and Stephen Eyre, 'Growth into manhood: identity development among female-to-male transgender youth' (2012) 14(2) Health and Sexuality 209, 215.

[1367] Tey Meadow, *Bringing Up the Transgender Child: Parents, Activism and the New Gender Stories* (NYU 2011) 11.

[1368] Elizabeth Anne Riley, 'The Needs of Gender-Variant Children and Their Parents: A Parent Survey' (2011) 23(3) International Journal of Sexual Health 181, 181.

[1369] Phyllis Burke, *Gender Shock: Exploding the Myths of Male and Female* (Double Day 1997) 3.

norms" and that the "[e]xhibition of gender-atypical behaviours makes [trans] youth vulnerable to victimization."[1370] There is evidence that trans children elicit considerable social unease[1371] – both among adults and peers – and that public expressions of gender non-conformity expose young individuals to particularly extreme forms of gender-policing.[1372]

In recent times, many of the most prominent debates over trans rights have had especial relevance for youth identities. In the United States, high-profile litigation on trans access to segregated spaces has frequently originated in school locker rooms and single-gender bathrooms.[1373] While the voluntary medicalisation of trans bodies, and the possibility for public funding, has long been a source of political controversy, it is the question of childhood interventions that now energises both conservative and progressive advocacy.[1374] Even in the sphere of discrimination, and access to public resources, trans children inhabit the most extreme, and precarious, margins of society, experiencing higher rates of homelessness, substance abuse and suicidal ideation.[1375]

As noted, a majority of jurisdictions worldwide either limit or absolutely prohibit gender recognition for minors.[1376] They do this by imposing both minimum age conditions and consent requirements.[1377] Prior to achieving majority, trans children generally cannot be acknowledged in their preferred gender. Where possibilities for formal affirmation do exist, they are strictly

[1370] Kimberly Stieglitz, 'Development, Risk and Resilience of Transgender Youth' (2010) 21(3) Journal of the Association of Nurses in Aids Care 192, 198.
[1371] Francoise Susset, 'Between a Rock and a Hard Place: The Experience of Parents of Gender-Nonconforming Boys' in Elizabeth J Meyer and Annie Pullen Sansfaçon *(eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014) 113; Ken Corbett, *A Murder over a Girl* (Henry Hold 2016) 175.
[1372] Coupet (n 3) 189; Lina Henzel, *Back Me Up! Rights of Trans Children under the Convention on the Rights of the Child* (Transgender Europe 2016) 5.
[1373] See e.g. *GG v Gloucester County School Board* Case No. 15-2056 (19 April 2016). See also: Harper Jean Tobin and Jennifer Levi, 'Securing Equal Access to Sex-Segregated Facilities for Transgender Students' (2013) 28(3) Wisconsin Journal of Law, Gender and Society 30; Katherine Szczerbinski, 'Education Connection: The Importance of Allowing Students to Use Bathrooms and Locker Rooms Reflecting Their Gender Identity' (2016) 36(2) Children's Legal Rights Journal 153*;* Julie Bosmon and Motoko Rich, 'As Transgender Students Make Gains, Schools Hesitate at Bathrooms' (*New York Times,* 3 November 2015) http://www.nytimes.com/2015/11/04/us/as-transgender-students-make-gains-schools-hesitate-at-bathrooms.html?_r=0 accessed 25 October 2016.
[1374] Sanchez Manning and Stephen Adams, 'NHS to give sex change drugs to nine-year-olds: Clinic accused of "playing God" with treatment that stops puberty' (*Daily Mail,* 17 May 2014) http://www.dailymail.co.uk/news/article-2631472/NHS-sex-change-drugs-nine-year-olds-Clinic-accused-playing-God-treatment-stops-puberty.html accessed 16 October 2016; Jesse Singal, 'How the Fight over Transgender Kids got a Leading Sex Researcher Fired' (*NY Mag Science of Us,* 7 February 2016) http://nymag.com/scienceofus/2016/02/fight-over-trans-kids-got-a-researcher-fired.html accessed 17 October 2016.
[1375] Stieglitz (n 18), 199; Jama Shelton, 'Transgender youth homelessness: Understanding programmatic barriers through the lens of cisgenderism' (2015) 59 Children and Youth Services Review 10.
[1376] See: Section I (below).
[1377] ibid.

conditional on parental or medical agreement.[1378] Drawing from core child rights protections identified earlier in this thesis, Chapter V subjects the legal invisibility of trans minors to human rights review. The chapter asks whether legal recognition pursues the best interests of trans youth.[1379] It also considers how key international norms, including hearing the 'voice' of children[1380], taking account of evolving capacities[1381] and respecting parental responsibility[1382], can shape child recognition processes.

At the outset, it is important to acknowledge that, as noted in the introductory chapter, trans childhood is a topic that remains – across academic disciplines – comparatively underexplored. Rosenthal observes that there is "currently only limited outcomes data" for law-makers and judges working with trans children.[1383] In its 2015 'Guidelines for Psychological Practice with Transgender and Gender Nonconforming People', the American Psychological Association laments the "limited available research regarding the potential benefits and risks of different treatment approaches for [trans] children and for adolescents."[1384] Chapter V analyses age requirements against a background of emerging (and sometimes incomplete) information. Unlike for involuntary medicalisation and forced divorce – where there is now considerable social science data, judicial opinions and soft-law jurisprudence – trans childhood is an evolving area of inquiry.

At certain junctures throughout this chapter, the absence of relevant information restricts opportunities for conclusive recommendations. To the extent that the contours of young trans identities are not fully-understood, so too there cannot be *complete* understanding of how human rights affect child affirmation. Although this is a limitation, it does not defeat the primary goals and methodological focus of Chapter V. As scholarship on this topic rapidly develops and youth experiences are increasingly visible, Chapter V can evaluate how international norms should impact intersections of law, gender and childhood. The status of trans minors is a growing social, medical and political concern. As jurisdictions attempt to define secure and workable frameworks for trans children, Chapter V identifies the core human

[1378] ibid.
[1379] UN CRC, art. 3. See also: Philip Alston, 'The Best Interests Principle: Towards a reconciliation of Culture and Human Rights' (1994) 8(1) International Journal of Law and the Family 1, 1-25.
[1380] UN CRC, art. 12(1). See also: Alistair MacDonald, *Child's Right to be Heard: Annotated Materials* (Jordan Publishing 2014) 31.
[1381] UN CRC, art. 5; UN CRC, art. 14(2).
[1382] UN CRC, art. 5.
[1383] Stephen Rosenthal, 'Transgender Youth: Current Concepts' (2016) 21(4) Annals of Paediatric Endocrinology and Metabolism 185, 187.
[1384] American Psychological Association (APA), 'Guidelines for Psychological Practice with Transgender and Gender Nonconforming People' (2015) 70(9) American Psychologist 832, 843.

rights pillars upon which those frameworks must be founded. The chapter concludes that absolutely prohibiting minors' recognition is not compatible with international child rights standards.

Chapter V proceeds in four sections. Section I sets out the current law as it applies to recognising trans minors. It explains how a majority of jurisdictions either prohibit, or restrict, legal transitions for young people, and explores what factors have shaped the existing rules. In Section II, the chapter moves to consider whether the 'best interests' of trans children are served by affirming or discouraging preferred gender. While acknowledging an absence of full consensus, Section II observes a growing trend toward strictly-controlled, acceptance-orientated interventions.

In Section III, the thesis investigates six medical and policy factors which shape the contours of youth recognition. It considers how these factors intersect with, and are influenced by, key child rights guarantees (e.g. right to be heard). Exploring, *inter alia*, the stability of trans identities, children's decision-making capacities and parental responsibility, Section III asks whether minors can legally transition without creating undue risks. Finally, in Section IV, the thesis offers concluding observations on the relationship between gender recognition and trans minors. Section IV does not identify a model, universally-applicable standard for youth affirmation. Rather, taking account of current human rights standards and existing knowledge on trans children, Section IV suggests workable strategies for acknowledging minors in a safe, non-pressurised environment.

I. Current Law

A. The Legal Status of Trans Minors: Existing Law and Practice

A majority of jurisdictions worldwide either exclude, or significantly limit, the right of minors to access legal gender recognition. While a growing number of states acknowledge 'adult' trans identities, there is a clear preference for restricting or dissuading child applicants.

In the Council of Europe, only six countries – Ireland, the Netherlands, Norway, Sweden, Malta and Belgium – specifically allow minors to legally transition.[1385] In Ireland, a minimum

[1385] TGEU (n 1). According to Henzel, five additional countries (Austria, Germany, Croatia, Switzerland and Moldova) do not impose age restrictions (although trans minors might not necessarily be specifically mentioned

age of 16 years is imposed, and adolescents aged 16 and 17 years are subject to onerous pre-conditions, including joint-parental consent, medical supervision and judicial assent.[1386] In the Netherlands, Belgium, Sweden and Norway, minors above 15 years access recognition on the same terms as adults. All Dutch children below 16 years cannot have their preferred gender acknowledged.[1387] In Sweden[1388], Belgium[1389] and Norway[1390], if young applicants have guardians' support, they can obtain recognition from 12 years, 12 years and 7 years respectively (although applicants in Belgium must have consulted a psychiatrist if they are under 16 years[1391]). Malta is the only European jurisdiction which does not enforce a minimum age for gender recognition, but Maltese children must have parental consent until they reach the age of 16 years.[1392] In most other European states, children are either *de jure* or *de facto* excluded from the legal transition process. Although Danish law permits adults to self-determine their preferred gender, minors are omitted under the current regime.[1393] Indeed, express prohibitions are enforced in numerous European jurisdictions, including Spain, the United Kingdom, Poland, Czech Republic and Ukraine.[1394]

The European experience is standard practice in most parts of the world. In Latin America, where (despite widespread acts of transphobic violence) trans communities have gained increasing legal rights[1395], Argentina remains the only jurisdiction to offer state acknowledgement for trans youth.[1396] While the legislatures in Bolivia[1397], Ecuador[1398] and

in the relevant law or administrative rules), see: Henzel (n 20) 13.
[1386] Gender Recognition Act 2015, s. 12.
[1387] Dutch Civil Code, art. 28.
[1388] Act for Change of Juridical Gender, s. 2.
[1389] 'Projet de loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets' (24 May 2017) Parliamentary Doc No. 54K2403 http://www.dekamer.be/kvvcr/showpage.cfm?section=|flwb&language=fr&cfm=flwbn.cfm?lang=N&dossierID=2403&legislat=54 accessed 7 July 2017. See also: ILGA-Europe, 'New legal gender recognition legislation approved by Belgium!' (*ILGA-Europe Website*, 24 May 2017) https://www.ilga-europe.org/resources/news/latest-news/new-legal-gender-recognition-belgium accessed 7 July 2017.
[1390] Law Decisions 71, Law 46 (2015–2016), s. 4.
[1391] ILGA-Europe (n 37).
[1392] Gender Identity, Gender Expression and Sex Characteristics Act 2015, s. 7.
[1393] L 182, art. 1(1).
[1394] TGEU (n 1).
[1395] Jonathan Blitzer, 'Latin America's Transgender-Rights Leaders' (*New Yorker*, 10 August 2015) http://www.newyorker.com/news/news-desk/latin-americas-transgender-rights-leadership accessed 7 July 2017; Alexander Sanger, 'One Step Forward, One Step Back: The Fight for Transgender Rights in Latin America' (*Huffington Post, No Date Available*) http://www.huffingtonpost.com/alexander-sanger/one-step-forward-one-step_b_5553414.html accessed 5 September 2017; Whitney Eulich, 'In Latin America, LGBT Rights Change More Quickly than Attitudes' (*Christian Science Monitor*, 20 May 2016) https://www.csmonitor.com/World/Americas/2016/0520/In-Latin-America-LGBT-legal-rights-change-more-quickly-than-attitudes accessed 5 September 2017.
[1396] Act No. 26.743, art. 5.
[1397] Ley No. 187 of 21 May 2016, art 4(1).
[1398] Ley No. 684 of 4 February 2016.

Uruguay[1399] have recently enacted gender identity protections, all three countries continue to exclude persons under 18 years. A number of Canadian provinces, such as Ontario[1400] and British Columbia[1401], have opened gender recognition to trans youth. However, in all cases, parents and doctors retain a veto control. That is also the case in many Australian states, including New South Wales[1402], Queensland[1403] and Western Australia[1404], where trans minors must prove both parental consent and medical interventions.[1405] Finally, in Asia, the law in Japan[1406], China[1407], Taiwan[1408] and South Korea[1409] requires that applicants be at least 20 years old. Similarly, in Hong Kong, trans individuals must show evidence of gender-confirming surgery, which cannot be undertaken before the age of majority.[1410]

In addition to *de jure* exclusions or limitations on recognising trans youth, the *de facto* practice and application of national laws, even where they affirm or are neutral on, minors' rights, may result in the omission of trans youth from recognition regimes.[1411] In the United States, statutory and administrative practice frequently does not impose explicit age limitations for gender recognition. However, considering that 34 states require surgery as a pre-condition for altering birth certificates[1412], and that many American health providers will not surgically intervene on minors[1413], there is an implicit prohibition against acknowledging young applicants.[1414] Similarly, in New Zealand, although the *Births, Deaths, Marriages, and Relationships Registration* Act 1995 embraces child applicants[1415], there are few reported instances of children amending their birth certificates.[1416] Problems may arise where national rules incorporate a requirement for judicial approval. In such circumstances, individual judges can

[1399] Ley No. 18.620.
[1400] Ontario Vital Statistics Act, s. 36.
[1401] British Columbia Vital Statistics Act, s. 27.
[1402] Births, Deaths and Marriages Registration Act 1995, ss. 32B and 32C.
[1403] Births, Deaths and Marriages Registration Act 2003, ss. 22 and 23.
[1404] Gender Reassignment Act 2000, ss. 14 and 15.
[1405] Births, Deaths and Marriages Registration Act 1995, ss. 32C; Births, Deaths and Marriages Registration Act 2003, s. 22; Gender Reassignment Act 2000, s. 15.
[1406] Law Concerning Special Rules Regarding Sex Status of a Person with Gender Identity Disorder (GID Act) of 16 July 2003, art. 3(1).
[1407] National Health and Family Planning Commission, *Specifications for the Management of Sex-Change Technology* (NHFPC 2009).
[1408] Chih hsing-ho, 'The Legal Status of Transsexual and Transgender Persons in Taiwan' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 431-432.
[1409] Supreme Court of South Korea, En Banc Order 2004Seu42 (22 June 2006).
[1410] *W v Registrar of Marriages* [2013] 3 HKLRD 90, [15].
[1411] Henzel (n 20) 14.
[1412] Jameson Garland, 'The Legal Status of Transsexual and Transgender Persons in the United States' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 595.
[1413] World Professional Association for Transgender Health (WPATH), *Standards of Care for the Health of Transgender, Transsexual and Gender Nonconforming People (Version VII)* (WPATH 2012) 21.
[1414] Garland (n 60) 593-596.
[1415] *Births, Deaths, Marriages, and Relationships Registration* Act 1995, s. 29.
[1416] New Zealand Human Rights Commission, *To Be Who I Am* (Human Rights Commission 2008) 68 – 69.

frustrate minors' access to gender recognition. There are many documented instances of courts refusing to affirm a child's preferred gender.[1417]

B. Rationales for Excluding Trans Minors from Legal Gender Recognition

A number of rationales have been offered as justification for excluding, or limiting, minors' access to legal gender recognition. Perhaps the most prominent concern is that children and adolescents might lack the capacity to understand[1418] and properly express a stable trans identity.[1419] There is a fear that, if gender recognition is available to minors, there will be premature applications (made before the child fully appreciates their true identity[1420]) and children will subsequently come to regret gender recognition.[1421] According to Vrouenraets *et al*, "[c]oncerns have been raised about the risk of making the wrong…decisions and the potential adverse effects on health and on psychological and psychosexual functioning."[1422] Law-makers exclude (or limit) young trans applicants so as to protect children from ill-advised requests and to avoid widespread de-transitioning at a later date.

Opposition to recognising minors also arises from "alarm about medical intervention."[1423] In a context where most national laws continue to impose medical requirements as a pre-condition for recognition (Chapters II and III), many observers worry that acknowledging minors would encourage the improper medicalisation of young bodies.[1424] In recent years, media commentary on trans youth has been dominated by sensationalised headlines[1425], warning of surgical

[1417] Emily Ikuta, 'Overcoming the Parental Veto: How Transgender Adolescents can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent under the Mature Minor Doctrine' (2016) 25(1) Southern California Interdisciplinary Law Journal 179, 192-193.
[1418] Kristina Olson, 'Prepubescent Transgender Children: What We Do and Do Not Know' (2016) 55(3) Journal of the American Academy of Child and Adolescent Psychiatry 155, 155. For a recent media example of the debate on this issue, see: 'Do We Need More Education on Transgender Issues?' (n 8).
[1419] Illana Sherer, 'Social Transition: Supporting Our Youngest Transgender Children' (2016) 137(3) Paediatrics 1, 1-2.
[1420] Some commentators even question whether trans identities can exist in minors, see e.g. Bronwyn Winter, 'IQ2 Debate: Society Must Recognise Trans People's Gender Identities' (3 March 2016) https://www.youtube.com/watch?v=N91s1j1YD_w accessed 27 June 2017.
[1421] Jake Pyne, 'Health and Well-Being among Gender-Independent Children' in Elizabeth J Meyer and Annie Pullen Sansfaçon *(eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014) 37.
[1422] Lieke Josephina Jeanne Joahanna Vrouenraets and others, 'Early Medical Treatment of Children and Adolescents with Gender Dysphoria: An Empirical Ethical Study' (2015) 57(4) Journal of Adolescent Health 367, 368.
[1423] Kristina Olson and Lilly Durwood, 'Are Parents Rushing to Turn their Boys into Girls?' (*Slate,* 14 January 2016) http://www.slate.com/blogs/outward/2016/01/14/what_alarmist_articles_about_transgender_children_get_wrong.html accessed 16 October 2016.
[1424] Sheila Jeffreys, *Gender Hurts* (Routledge 2014) 125.
[1425] Matt Hunter, 'Children as young as THREE convinced they are born in the wrong body: Toddlers are among 1,500 under-16s sent to a "transgender identity clinic"' (*Daily Mail,* 14 May 2016)

intervention for infants and sex change drugs for nine year olds.[1426] Gender recognition, and social affirmation for minors' preferred gender, is criticised as an assault on children's physical integrity, affecting irreversible physical changes before young people fully understand their gendered-self.

There are concerns that minors will request legal gender recognition for inappropriate reasons. Within a social environment where homophobic bullying is common place, scholars have suggested that gay, lesbian and bisexual children may obtain gender recognition to re-frame their same-gender attractions.[1427] Ignoring the extensive evidence that trans youth experience greater discrimination than LGB peers[1428], these commentators argue that legal recognition may be viewed as a gateway towards heterosexual privilege.

Practitioners also warn that young people may legally transition as "a symptom of another underlying disorder or conflict, such as trauma, anxiety, social communication disorder, or psychosis, or a more global disorder of the self."[1429] Where legal recognition is available to minors, state authorities must ensure that only those children, who genuinely experience a trans identity, are acknowledged by the law.[1430] Drawing parallels with historic anxiety over a 'homosexual agenda', there is a fear that minors will be manipulated into gender recognition

http://www.dailymail.co.uk/news/article-3590175/Children-young-THREE-convinced-born-wrong-body-Toddlers-1-500-16s-sent-transgender-identity-clinic.html accessed 16 October 2016; Carol Malone, 'Why is NHS money wasted on treating transgender kids who aren't old enough to understand?' (*Mirror Newspaper*, 8 April 2014) http://www.mirror.co.uk/news/uk-news/nhs- money-wasted- treating-transgender- 5478956 accessed 16 October 2016.

[1426] Sanchez Manning and Stephen Adams, 'NHS to give sex change drugs to nine-year-olds: Clinic accused of "playing God" with treatment that stops puberty' (*Daily Mail*, 17 May 2014) http://www.dailymail.co.uk/news/article-2631472/NHS-sex-change-drugs-nine-year-olds-Clinic-accused-playing-God-treatment-stops-puberty.html accessed 16 October 2016.

[1427] Claudia Lament, 'Transgender Children Conundrums and Controversies— An Introduction to the Section' (2014) 68 The Psychoanalytic Study of the Child 13, 21; Hazel Beh and Milton Diamond, 'Ethical Concerns Related to Treating Gender Nonconformity in Childhood and Adolescence: Lessons from the Family Court of Australia' (2005) 15(2) Health Matrix: The Journal of Law-Medicine 239, 250.

[1428] Cather Taylor and Tracy Peter, *Every Class in Every School: Final Report on the First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools* (Egale Canada Human Rights Trust 2011) 13-26; Lisa Simons, Scott Leibowitz and Marco Hidalgo, 'Understanding Gender Variance in Children and Adolescents' (2014) 43(6) Paediatric Annals 126, 130.

[1429] Diane Ehrensaft, 'From Gender Identity Disorder to Gender Identity Creativity: True Gender Self Child Therapy' (2012) 59(3) Journal of Homosexuality 337, 345.

[1430] ibid, 339.

by activist parents and trans advocates.[1431] Legal recognition should be restricted, it is argued, so that children cannot be exploited in the promotion of a wider trans philosophy.

Some observers have opposed recognising trans youth in order to protect cisgender peers.[1432] Relying upon perceptions of trans identities as deviant or harmful, there is a fear that trans minors pose "serious dangers not just for them[selves], but for the larger social order that relies on their adherence to gender norms."[1433] Brill and Pepper describe how "parents can be very afraid of [trans] children if they haven't had any education in gender variance."[1434] There is a general sense that trans identities should not be affirmed so that cisgender youth can be spared confusion and distress.

II. Affirmation or Discouragement? Pursuing the Best Interests of the Child

In Chapter I, this thesis observes the centrality of 'best interests' reasoning in international human rights law.[1435] Article 3 UN CRC provides that, "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The 'best interests' obligation has been called "the most important principle in [UN CRC]."[1436] Although it is not the only (or *the* primary) consideration for child-focused decision-making[1437], it is repeated in several provisions throughout the Convention[1438] and has become a "general standard which underpins the application of the rights guaranteed."[1439] In Section II – applying

[1431] Julia Serano, 'Placing Ken Zucker's Clinic in Historical Context' (*Whipping Girl Blog*, 9 February 2016) http://juliaserano.blogspot.ie/2016/02/placing-ken-zuckers-clinic-in.html accessed 17 October 2016. In England and Wales, the issue of parental pressure to transition has gained increased public attention with the recent judgment in *Re J (a minor)* ([2016] EWHC 2430 (Fam)). In this case, the facts of which remain a source of dispute, the English High Court found that a mother had caused her child (who had a male legal gender) emotional harm by making him live as a girl. See generally: Kate Lyons, 'Parents fear transgender children will be taken away after court ruling' (*The Guardian*, 22 November 2016) https://www.theguardian.com/society/2016/nov/22/parents-fear-transgender-children-will-be-taken-away-after-court-ruling accessed 3 July 2017; Helen Lewis, 'The Boy Made to Live as a Girl – or the girl made to live as boy?' (*Medium*, 22 October 2016) https://medium.com/@helenlewis/the-boy-made-to-live-as-a-girl-or-the-girl-made-to-live-as-a-boy-e76221bb50c accessed 6 September 2017.

[1432] Arnold Grossman and others, 'Parents' Reactions to Transgender Youths' Gender Nonconforming Expression and Identity (2005) 18(1) Journal of Gay and Lesbian Social Services 3, 5; Corbett (n 19) 193.

[1433] Meadow (n 15) 3.

[1434] Stephanie Brill and Rachel Pepper, *The Transgender Child: A Handbook for Families and Professionals* (Cleis Press 2008) 181.

[1435] Alston (n 27), 1-25; Andrew Bainham and Stephen Gilmore, *Children: The Modern Law* (3rd edn, Jordan Publishing 2013) 100.

[1436] Bainham and Gilmore (n 83) 100.

[1437] John Eekelaar, 'The Importance of Thinking that Children have Rights' (1992) 6(1) International Journal of Law and the Family 221, 321; Bainham and Gilmore (n 83) 100.

[1438] See e.g. UN CRC, arts. 18, 20 and 21.

[1439] Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child' (1991) 5 International Journal of Law and the Family 132, 135.

'best interests' analysis – the thesis explores existing medical and social science research on trans affirmation in childhood. Critically evaluating arguments for and against youth transitions, Section II asks whether gender recognition enhances or reduces minors' welfare.

Within the existing literature, there are "two broad models" of opinion.[1440] On the one hand, a number of commentators advocate a policy of disaffirmation.[1441] Proposing either simple inaction (ignoring the child's identity) or proactive steps to 'correct' a non-cisgender orientation, these observers urge parents and authorities to discourage gender non-conformity and to emphasise a child's assigned gender role. On the other hand, an increasing number of researchers support affirmative interventions.[1442] Highlighting the importance of positive reinforcement, many scholars argue that, by validating and co-operating with lived-experiences, parents and others most effectively pursue the best interests of the child.[1443]

A. Disaffirmation

The justifications offered by 'dis-affirmers' mirror the fears and concerns generally raised in opposition to gender recognition. Medical researchers, such as Bradley and Zucker[1444], maintain that gender identity is not stable among minors, and that children can be assisted to embrace their assigned gender with appropriate guidance and supervision. According to Zucker *et al*, "[f]or children who present clinically with the diagnosis of [gender identity disorder], long term follow-up studies suggest that their gender identity is not necessarily fixed…one could argue that their childhood gender identity [is] alterable."[1445] There is a fear that, if parents and state authorities affirm a child's preferred gender, that child may be more likely to persist with

[1440] Jake Pyne, '"Parenting Is Not a Job … It's a Relationship": Recognition and Relational Knowledge Among Parents of Gender Non-conforming Children' (2016) 27(1) Journal of Progressive Human Services 21, 22. See also: Holly Franson, 'The Rise of the Transgender Child: Overcoming Societal Stigma, institutional Discrimination, and Individual Bias to Enact and Enforce Non-Discriminatory Dress Code Policies' (2013) 84(2) University of Colorado Law Review 497, 506.
[1441] See e.g. Kenneth J Zucker and others, 'A Developmental, Biopsychosocial Model for the Treatment of Children with Gender Identity Disorder' (2012) 59(3) Journal of Homosexuality 369. Singal provides an overview of the reasons while some healthcare professionals advocate disaffirmation, Singal (n 22).
[1442] Diane Ehrensaft, 'Found in Transition: Our Littlest Transgender People' (2014) 50(4) Contemporary Psychoanalysis 571; Edgardo Menvielle, 'A Comprehensive Program for Children with Gender Variant Behaviours and Gender Identity Disorders' (2012) 59(3) Journal of Homosexuality 357; Laura Edwards-Leeper and Norman Spack, 'Psychological Evaluation and Medical Treatment of Transgender Youth in an Interdisciplinary "Gender Management Service" (GeMS) in a Major Paediatric Centre (2012) 59(3) Journal of Homosexuality 321.
[1443] Aramburu Alegria (n 6), 522. See also: Bonifacio and Rosenthal (n 13).
[1444] Kenneth J Zucker and Susan J Bradley, *Gender Identity Disorder and Psychosexual Problems in Children and Adolescents* (Guilford Press 1995).
[1445] Zucker and others (n 89), 375.

a trans identification than if adults had adopted a 'neutral' or discouraging approach.[1446] There is also a perception that disaffirmation has a protective function, shielding young children from transphobic teasing and abuse.[1447]

Policies of disaffirmation are subject to considerable critique. In general terms, researchers have expressed scepticism that measures of discouragement can alter or convert a child's preferred gender.[1448] There is currently "no empirical evidence…demonstrating that discouraging childhood cross-gender interests reduces the frequency of persistence into adolescence and adulthood."[1449] Mallon and Decrescenzo write that "no treatment program, no residential program, no group therapy, no aversion treatment plan could change who [trans children] are."[1450] Trans youth exist "whether or not they are legally recognised."[1451] Disaffirmation does not erase their identities, but it does reduce the ease with which young people can live and function in their preferred identity role.[1452] As noted in the introductory chapter, trans youth who socially and medically transition, but who lack proper legal recognition, face increased risks that their gender history will be involuntarily revealed in public.[1453] This in turn exposes trans minors to greater threats of physical and emotional

[1446] Jiska Ristori and Thomas D Steensma, 'Gender dysphoria in childhood' (2016) 28(1) International Review of Psychiatry 13, 17; Jack Drescher, 'Controversies in Gender Diagnosis' (2014) 1(1) LGBT Health 10, 13.
[1447] Meadow (n 15) 283. See also: Alix Spiegel, 'Two Families Grapple with Son's Gender Identity' (*National Public Radio Website*, 7 May 2008) http://www.npr.org/2008/05/07/90247842/two-families-grapple-with-sons-gender-preferences accessed 19 October 2016.
[1448] The Paediatric Endocrine Society Special Interest Group on Transgender Health writes that there is "no data to support the use of 'reparative or conversion' therapy with the intention of changing one's gender identity", 'Statement on Gender Affirmative Approach to Care from the Paediatric Endocrine Society Special Interest Group on Transgender Health' https://www.pedsendo.org/members/members_only/PDF/TG_SIG_Position%20Statement_10_20_16.pdf accessed 3 July 2017. See also: Jack Drescher and Jack Pula, 'Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children' (2014) 44(5) Hastings Centre Report (LGBT Bioethics: Visibility, Disparities and Dialogue) 19; Price Minter (n 13), 427; 'Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights International Day against Homophobia, Biphobia and Transphobia - Sunday 17 May 2015' (*UN OHCHR Website*, 13 May 2015) http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15941&LangID accessed 20 October 2015.
[1449]Drescher (n 94), 13.
[1450] Gerard Mallon and Teresa Decrescenzo, 'Social Work Practice with Transgender and Gender Variant Children and Youth' in Gerard Mallon (ed), *Social Work Practice with Transgender and Gender Variant Youth* (2nd edn, Routledge 1999) 73.
[1451] Open Society (n 1) 17.
[1452] Annelou de Vries, Peggy Cohen-Kettenis and Henriette Delemarre-van de Waal, 'Clinical Management of Gender Dysphoria in Adolescents' (2006) 9(3-4) International Journal of Transgenderism 83, 88.
[1453] Anniken Sørlie, 'Legal Gender Meets Reality: A Socio-Legal Children's Perspective' (2015) 33(4) Nordic Journal of Human Rights 353, 369. See also: Peggy Cohen-Kettenis, Henriette Delemarre-van de Waal and Louis Gooren, 'The Treatment of Adolescent Transsexuals: Changing Insights' (2008) 5(8) Journal of Sexual Medicine 1892, 1894.

violence.[1454] Indeed, there is documented evidence that trans children confront exponentially higher levels of abuse because of their gender identity and expression.[1455]

Justifying disaffirmation by reference to social prejudice is both misguided and discriminatory. Just as bias against trans parenting should not limit trans reproductive rights, so too trans children should not be prevented from engaging in morally unobjectionable conduct because third parties may be abusive. A central criticism of reparative therapies is that they "explicitly or implicitly accept the notion that gender-variance…[is an] undesirable outcom[e]"[1456] but offer little in the way of support for that argument.[1457] Dis-affirmers have been unable to illustrate any negative consequences of trans identities beyond their own subjective preference for cisgender lived-experiences.[1458] Indeed, as explained in Chapter III, much of the gender-related distress which trans persons experience appears to result, not from any inherent default in their gender preferences, but rather from social conventions which

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[1454] Annie Pullen Sansfaçon, Audrey-Anne Dumais-Michaud, and Marie-Joelle Robichaud, 'Transforming Challenges into Action' in Elizabeth J Meyer and Annie Pullen Sansfaçon *(eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014) 172; Stieglitz (n 18), 198.

[1455] Emily Greytak, Joseph Kosciw and Elizabeth Diaz, *Harsh Realities: The Experiences of Transgender Youth in our Nation's Schools* (Gay, Lesbian and Straight Education Network 2009) 14; Bonifacio and Rosenthal (n 13), 1004; Simons, Leibowitz and Hidalgo (n 76), 130; Maureen Carroll, 'Transgender Youth, Adolescent Decision-making, and *Roper v Simmons*' (2009) 56(3) UCLA Law Review 725, 733.

[1456] Darryl Hill and Edgardo Menvielle, '"You Have to Give Them a Place Where They Feel Protected and Safe and Loved": The Views of Parents Who Have Gender-Variant Children and Adolescents' (2009) 6(2-3) Journal of LGBT Youth 243, 247. Serano writes that "[t]rans-antagonistic and trans-suspicious people…seem to think that a good outcome is a *cisgender child*, and they seem to be willing to make transphobic arguments…in order to achieve that end goal", Julia Serano, 'Detransition, Desistance, and Disinformation: A Guide for Understanding Transgender Children Debates' (*Medium*, 3 August 2016) https://medium.com/@juliaserano/detransition-desistance-and-disinformation-a-guide-for-understanding-transgender-children-993b7342946e accessed 7 July 2017.

[1457] Jeffreys (n 72) 123; David Alan Perkiss, 'Boy or Girl: Who Gets To Decide? Gender Nonconforming Children in Child Custody Cases' (2014) 25(1) Hastings Women's Law Journal 57, 66.

[1458] Scholars, who are more reluctant to embrace affirmative policies, such as Dreger and Zucker, often refer to the idea that, if a child ultimately maintains a trans identity, that child is tied to a lifetime of surgeries and medical interventions (see generally: Alice Dreger, 'The Big Problem with Outlawing Gender Conversion Therapies' (*Wired*, 4 June 2015) https://www.wired.com/2015/06/big-problem-outlawing-gender-conversion-therapies/ accessed 4 July 2017; Zucker and others (n 89)). For Dreger and Zucker, this is a sufficiently negative consequence to justify steering young people away from trans identities (APA (n 32), 842). There are, however, two problems with this approach. First, it subjectively decides that all gender-confirming healthcare is negative. There is a presumption that trans persons are inevitably burdened by medicalising their bodies. However, many trans people do not experience their medical transition (and the continuing follow-up care) as a burden. For many individuals, the medical aspect of their transition can be life-affirming and self-actualizing. Therefore, it is problematic to steer children away from trans identities to avoid life consequences that Dreger and Zucker may not desire but which are not harmful for many trans persons. Second, Dreger and Zucker situate their claims within an absolutist medical model. They presume that transition inevitably involves medical interventions. This is perhaps unsurprising considering that both are healthcare experts. Yet, their arguments are unidimensional, and fail to appreciate the myriad ways in which trans persons give expression to their identities. In Chapters II and III, this thesis has argued that applicants should be recognised without any requirement for physical medical interventions. It is not inevitable that, if a child is *legally* affirmed in a trans identity, which the child maintains into adulthood, that child will inevitably experience a lifetime of medical interventions. Many young people, who live and express their preferred gender, do not undertake (and have no intention of undertaking) a medical transition.

explicitly censure those preferences.[1459] If observers are concerned that gender recognition will result in social prejudice, they should refrain from "blaming the victim"[1460] or undermining children's experiences of gender. Instead, it is incumbent upon state authorities to counteract transphobic bias.[1461] As Gale and Syrja-McNally comment, "the 'problem' is not the gender-independent child, but a social environment that fails to accept or value diverse ways of being."[1462]

Policies of disaffirmation must be placed in their wider context. Where the law refuses to acknowledge a child's preferred gender, there is reduced incentive for public and private actors to respect trans lived-experiences. Where the State does not accept a trans boy's male identity, why should his school, healthcare centre or sports team? Without the imprimatur of legal recognition, trans children confront social and cultural barriers which significantly restrict their life choices, particularly the ability to access basic rights and services.[1463] Even where trans minors can avail of public institutions, such as schools and hospitals, official policies of disrespect impact communication and interaction with other service users.[1464] Where teachers and school administrators are not required to affirm a student's preferred gender, it is more likely that trans children will experience peer resistance and bullying: "[t]eachers don't realise…that when they call me by my 'government name' everyone is going to call me that."[1465]

In addition to the opposition levelled against disaffirmation in general, there are also individual critiques of attempts to 'ignore' and 'correct' children's preferred gender. A chief objection to 'ignoring' strategies is that they are presented through a framework of 'neutrality'[1466]. While

[1459] Walter Bockting, 'Are Gender Identity Disorders Mental Disorders? Recommendations for Revision of the World Professional Association for Transgender Health's Standards of Care' (2009) 11(1) International Journal of Transgenderism 53, 58.
[1460] Lorraine Gale and Haley Syrja-McNally, 'Expanding the Circle' in Elizabeth J Meyer and Annie Pullen Sansfaçon *(eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014) 192.
[1461] According to Markman, "[w]hat is needed is not an individual intervention, but a social one", Erin R Markman, 'Gender Identity Disorder, the Gender Binary, and Transgender Oppression: Implications for Ethical Social Work' (2011) 81(4) Smith College Studies in Social Work 314, 321. See also: Susan Langer and James I Martin, 'How Dresses Can Make You Mentally Ill: Examining Gender Identity Disorder in Children' (2004) 21(1) Child and Adolescent Social Work Journal 5, 14.
[1462] Gale and Syrja-McNally (n 108), 202.
[1463] Henzel writes that "[l]egal gender recognition is much more than an administrative act. It is the recognition and respect of a child [despite] its differences…essential for succeeding in school, participating in the everyday-life and in society and for growing up and living a life of dignity and respect", see: Henzel (n 20) 13.
[1464] Greytak, Kosciw and Diaz (n 103) 11.
[1465] Arnold H Grossman and Anthony R D'augelli, 'Transgender Youth' (2006) 51(1) Journal of Homosexuality 111, 122.
[1466] Beh and Diamond (n 75), 242.

affirmative policies are condemned as guiding youth into the unknown, 'wait-and-see' tactics are promoted as maintaining the status quo. However, ignoring a minor's lived-identity is "not a neutral option."[1467] Solomon criticises the "underlying modernist fallacy…that doing nothing is not doing something – that slowing transition is cautious, and accelerating it is rash."[1468] Just as recognising young people's preferred gender alters their experience of identity, so too enforcing assigned gender has tangible and quantifiable consequences. Trans children, who are required to live in their assigned gender, experience reduced physical and mental health.[1469] For individuals in their childhood and adolescence, where gender affirmation may be time-sensitive, non-engagement does not simply retain the status quo. It creates a new reality with long-term importance.[1470]

As for attempts to 'correct' trans identities, scholars criticise numerous "disturbing elements" which form part of such therapies.[1471] Burke has chronicled confusing, frequently distressing, gender 'normalising' strategies which steer children away from "morally wrong" gender identities.[1472] In many cases, correction techniques rely upon questionable interpretations of gender roles, "limiting a child's play activities, toys, dress, and playmates to those conforming closely to traditional gender stereotypes."[1473] Skougard recalls how the parents of a female-identified trans youth were "instructed to take away…dolls and collection of makeshift dress-up clothes, and provide [the child]…only with 'boy things' like trucks or action figures."[1474] One may question how a minor's best interests are enhanced through the reification of gendered rules, which cisgender children are no longer expected to observe and which have long been rejected as unrealistic and retrograde.

Correction strategies negatively affect children's emotional health.[1475] Where parents and authorities positively reject their preferred gender, young people learn (and internalise) a culture

[1467] Cohen-Kettenis, Delemarre-van de Waal and Gooren (n 101), 1896.
[1468] Andrew Solomon, *Far from the Tree: Parents, Children and the Search for Identity* (Scribner 2012) 622.
[1469] Drescher and Pula (n 96), 20; Lily Durwood, Katie McLaughlin and Kristina Olson, 'Mental Health and Self-Worth in Socially Transitioned Transgender Youth' (2017) 56(2) Journal of the American Academy of Child and Adolescent Psychiatry 116, 120.
[1470] This point has particular relevance in the context of medical transition pathways. If a trans girl experiences puberty, she will develop irreversible sex characteristics (e.g. deep voice, masculinised facial features, etc.), which the girl may consider as inconsistent with her preferred gender.
[1471] Hanna Rosin, 'A Boy's Life' (*The Atlantic*, November 2008) http://www.theatlantic.com/magazine/archive/2008/11/a-boys-life/307059/ accessed 20 October 2016.
[1472] Perkiss (n 105), 66.
[1473] Erika Skougard, 'The Best Interests of Transgender Children' (2011) Utah Law Review 1161, 1177.
[1474] ibid.
[1475] Michelle M Forcier and Emily Haddad, 'Health Care for Gender Variant or Gender Non-Conforming Children' (2013) 96(4) April Rhode Island Medical Journal 17, 19; Ristori and Steensma (n 94), 17.

of shame and phobia.[1476] Perkiss warns that "[c]onversion therapy causes significant internal harms in otherwise healthy gender-nonconforming children, including suicide, self-mutilation, nervous breakdowns, paranoia, feelings of guilt, and post-traumatic stress disorder."[1477] Rather than positively improving the life quality of minors, corrective therapies reduce children's self-esteem and emotional stability.[1478] In its Standards of Care (Seventh Edition), WPATH warns that "[t]reatment aimed at trying to change a person's gender identity and expression to become more congruent with sex assigned at birth has been attempted in the past without success…Such treatment is no longer considered ethical."[1479]

B. Affirmation

There is a growing body of medical and social science research which indicates that intervening earlier to affirm preferred gender increases the emotional and physical well-being of minors.[1480] Recent studies from Europe and the United States suggest that, where trans youth are facilitated – medically and socially – in affirming their preferred gender, they experience better mental health outcomes.[1481]

In the United States, Olson *et al* report that "[trans] children supported in their identities had internalising symptoms that were well below even the preclinical range."[1482] According to the authors, "familial support in general, or specifically via the decision to allow their children to socially transition, may be associated with better mental health outcomes."[1483] While trans children in the United States have typically exhibited reduced mental and physical health[1484],

[1476] Brill and Pepper (n 82) 84; Mallon and Decrescenzo (n 98) 68.
[1477] Perkiss (n 105), 67.
[1478] Richard Pleak, 'Formation of Transgender Identities in Adolescence' (2009) 13(4) Journal of Gay and Lesbian Mental Health 282, 288.
[1479] WPATH (n 61) 16. There may be exceptional circumstances where, while not disaffirming a child's identity, parents or guardians, for reasons of safety, may encourage a child to conceal the preferred gender. While trans children should not have to change merely because of social pressure, there may be situations where openly expressing a trans identity places young people in immediate danger (Ehrensaft (n 77), 23).
[1480] Susset (n 19) 117; Sarah Gray, Alice Carter and Heidi Levitt, 'A Critical Review of Assumptions about Gender Variant Children in Psychological Research' (2012) 16(1) Journal of Gay and Lesbian Mental Health 4, 21-22; Stanley Vance Jr, Diane Ehrensaft and Stephen Rosenthal, 'Psychological and Medical Care of Gender Nonconforming Youth' (2014) 134(6) Paediatrics 1184, 1187; Aramburu Alegria (n 6), 524.
[1481] Bonifacio and Rosenthal (n 13), 1005; Annelou de Vries and others, 'Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment' (2014) 134(4) Paediatrics 696; Kristina R Olson and others, 'Mental Health of Transgender Children Who Are Supported in Their Identities' (2016) 137(3) Paediatrics. According to the Paediatric Endocrine Society Special Interest Group on Transgender Health, "the best predictor of positive psychological outcomes is parental support", see: 'Statement on Gender Affirmative Approach to Care from the Paediatric Endocrine Society Special Interest Group on Transgender Health' (n 96).
[1482] Olson and others (n 129) p.5.
[1483] ibid.
[1484] Maureen Connelly and others, 'The Mental Health of Transgender Youth: Advances in Understanding' (2016) 59(5) Journal of Adolescent Health 489, 494; Durwood, McLaughlin and Olson (n 117), 120.

Olson *et al* encountered young persons who, having undertaken a process of social transition, had similar healthcare levels to their siblings and cisgender peers.[1485] In subsequent research – focusing specifically on the "self-reported depression, anxiety, and self-worth in socially transitioned [trans youth]" (Olson *et al* had used parental reporting[1486]) – Durwood, McLaughlin and Olson discovered "remarkably good mental health outcomes."[1487] Post-transition, trans young persons had "normative rates of depression and slightly increased rates of anxiety."[1488] In fact, "rates of depression in [socially transitioned] children did not differ significantly from those in siblings…or from those in age- and gender-matched controls."[1489] Commenting on their own and previous results, the authors conclude that "[t]hese and other recent findings are certainly suggestive that…transitions during childhood can be associated with positive outcomes."[1490]

The recent American data supports similar research conducted in Europe, particularly at the pioneering Gender Clinic of the Free University Amsterdam. Reporting on their extended work with numerous medically and socially transitioned youth, de Vries *et al* observe that earlier affirmations not only improve "psychological functioning" but also "contrib[ute] to a satisfactory objective and subjective well-being in young adulthood."[1491] While – as in the United States – Dutch trans youth have historically registered higher levels of depression and suicidality, those who benefit from early affirmation have "well-being [that is] in many respects comparable to peers."[1492]

Taken together with the American scholarship, these results are evidence in favour of earlier interventions. According to Sherer, they confirm what experts working with trans youth have "suspected all along: that socially transitioned children are doing fine, or at least as well as their age-matched peers and siblings."[1493] The results have now been endorsed by a number of professional healthcare organisations[1494], including WPATH[1495], which recommend strictly-controlled gender-affirmative policies for minors. Indeed, Aramburu Alegria writes that, "[a]t this juncture, the standard of care is that the child is supported and not shamed, and that gender

[1485] Olson and others (n 129) p.5.
[1486] ibid, (p. 2).
[1487] Durwood, McLaughlin and Olson (n 117), 120.
[1488] ibid.
[1489] ibid.
[1490] ibid, 121.
[1491] de Vries and others (n 129), 703.
[1492] ibid, 701.
[1493] Sherer (n 67), 2.
[1494] Rosenthal (n 31), 187.
[1495] WPATH (n 61) 18 – 21.

variant behaviour be allowed."[1496] It may be instructive that, while international human rights actors have historically been reluctant to address trans youth, the United Nations Committee on the Rights of the Child increasingly recommends that State Parties respect preferred gender.[1497]

There is growing evidence that the best interests of trans minors are served through policies of affirmation. There are, however, three important limits to consider. First, as noted, the available data is comparatively sparse. Although recent studies do point towards early intervention, there is a need for more extensive, longer-term research.[1498] Second, the existing data is Europe and North America-centric.[1499] It reflects western academic practices and methodologies. It is also grounded in western interpretations of gender identity. Reflecting upon recent scholarship, Olson-Kennedy *et al* observe how "ethnic and cultural diversity" may reduce the intelligibility of research in non-European and American contexts.[1500] Finally, mirroring the limits of 'trans regret' research in Chapter III, the existing data considers the impact of 'medical' and 'social' (rather than 'legal') transitions on children. While general indicators about the benefits of affirmation can be identified, the research does not speak directly to legal gender recognition.

[1496] Aramburu Alegria (n 6), 522.
[1497] See e.g. United Nations Committee on the Rights of the Child, 'Concluding observations on the combined fourth and fifth periodic reports of Chile' (30 October 2015) UN Doc No. CRC/C/CHL/CO/4-5, [34] – [35]; United Nations Committee on the Rights of the Child, 'Concluding observations on the combined third to fifth periodic reports of Cameroon' (6 July 2017) UN Doc No. CRC/C/CMR/CO/3-5, [14] – [15].
[1498] Johanna Olson-Kennedy and others, 'Research Priorities for Gender Nonconforming/Transgender Youth: Gender Identity Development and Biopsychosocial Outcomes' (2016) 23(2) Current Opinion in Endocrinology, Diabetes and Obesity 172 (p. 3) (retrieved from *Pub Med* database, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4807860/pdf/nihms767274.pdf accessed 4 July 2017).
[1499] ibid, p. 8.
[1500] ibid.

III. Affirming the Preferred Gender of Trans Youth: Medical and Policy Considerations

Having identified a growing trend towards affirmation (while acknowledging the absence of full consensus), one must consider the practicalities of children undertaking legal transitions. Respecting trans identities may – in general terms – be preferable to policies of 'ignoring' or 'correcting' gender. However, international human rights would not embrace youth recognition processes which compromise health and well-being.

Section III considers six medical and policy factors which impact the capacity of state authorities to safely acknowledge young trans identities. These factors are: (A) the extent to which gender recognition medicalises children's bodies; (B) the ability to identify trans youth whose gender preferences persist into adulthood; (C) minors' decision-making capabilities as regards gender-affirmation; (D) the role of parents and guardians; (E) the possibility of de-transitioning; and (F) social transition strategies. Section III evaluates these six factors against the children's rights framework set out in Chapter I – including the right of young people to be heard and the consideration of evolving capacities. Section III identifies both possibilities for, and important obstacles against, youth gender recognition.

A. Involuntary Medicalisation

As noted, a central criticism of affirming children's preferred gender is the fear of involuntary medicalisation. There are concerns that, if legal recognition is contingent upon medical intervention, minors will be required to undergo treatments which are unnecessary, improper and irreversible.[1501]

To a certain extent, these medicine-focused arguments are neither unreasonable nor without precedent. While children may have limited access to gender recognition in jurisdictions such as Australia and Canada, legal affirmation is conditional upon proof that gender-confirming healthcare has been received.[1502] If the Canadian or Australian models became standard practice

[1501] Olson and Durwood (n 71); Jeffreys (n 72) 125.
[1502] Canada: (British Columbia) Vital Statistics Act, s. 27; (Ontario) Vital Statistics Act, s. 36. Australia: (New South Wales) Births, Deaths and Marriages Registration Act 1995, ss. 32B and 32C; (Queensland) Births, Deaths and Marriages Registration Act 2003, ss. 22 and 23; (Western Australia) Gender Reassignment Act 2000, ss. 14 and 15.

worldwide, it is conceivable that many young people would be forced into treatments that they might not otherwise desire.

This doctoral project, however, critiques conditions of recognition through the lens of human rights. In Chapters II and III, the thesis explains how surgery, sterilisation and hormone therapy violate core international norms, particularly bodily integrity. Healthcare interventions should not be requirements for acknowledging preferred gender. This is so irrespective of whether an applicant is above or below the age of majority. To the extent that involuntary medicalisation has already been discussed, it is not considered further in Chapter V. Suffice it to say that, where minors access gender recognition under a human rights framework, they should have no obligation to alter their bodies.[1503]

B. Identifying Trans Children

For many observers, their primary opposition to affirming trans minors stems from two general presumptions: that (i.) children do not experience a stable trans identity (in effect, that trans persons under the age of majority do not exist)[1504]; and (ii.) even if this is not the case, it is impossible to identify trans youth with sufficient clarity.[1505] In determining whether to affirm

[1503] It is important to acknowledge that, while trans minors should not be involuntarily medicalised, prescribed gender-confirming procedures can greatly improve children's well-being. The irony of critiques focused on involuntary medicalisation is that, far from being over-medicalised, trans youth typically struggle to obtain the healthcare interventions that they need: "far more children who need puberty suppressants are not being prescribed them than are" ('Transgender Children Know Their Identity. Bigots in the Media Don't' *(The Guardian*, 25 May 2014) https://www.theguardian.com/society/2014/may/25/transgender-children-gender-identity-bigots-media accessed 7 July 2017). In recent years, there has been significant progress in developing medical pathways for trans children and adolescents. Key healthcare actors, such as WPATH and the Endocrine Society now endorse a three-stage intervention strategy for young people. In Phase One, as children enter puberty, they are offered puberty blocking interventions (puberty blockers). Puberty blockers, initially developed for children who experience 'precious puberty' (i.e. early puberty), suspend a child's natural development cycle, and prevent young people from experiencing the possibly harmful growth of secondary sex characteristics (menstrual cycle, testicle growth, voice deepening, etc.). At Phase Two, approximately as the minor reaches 16 years, officers administer partially reversible cross-sex hormones, which allow children to develop sex characteristics associated with their preferred gender. Finally, during Phase Three, when the child reaches the age of majority, there is the opportunity to access gender-confirming surgeries for persons who wish to alter their primary sex features, including internal organs and genitalia. For puberty blockers, the physical effects are "fully reversible" (Vance Jr, Ehrensaft and Rosenthal (n 128), 1188) and there is no evidence of long-term negative consequences, such as reduced bone mineral density (Henriette Delemarre-van de Waal and Peggy Cohen-Kettenis, 'Clinical management of gender identity disorder in adolescents: a protocol on psychological and paediatric endocrinology aspects' (2006) 155 European Journal of Endocrinology 131, 136-137). Research suggests that, by shielding children from a traumatic natural puberty and restricting the development of unwanted, possibly irremovable physical attributes, medical pathways increase trans choices and positively affect quality of life (Delemarre-van de Waal and Cohen-Kettenis (n 151), 131 – 132).

[1504] Olson (n 66), 155; Sherer (n 67), 1-2.

[1505] Paul McHugh, Professor of Psychiatry at Johns Hopkins University, has been a prominent sceptic of the capacity of parents, medics and state officials to reliably identify trans youth, see e.g. Paul McHugh, 'Transgender Surgery Isn't the Solution' (*The Wall Street Journal*, 13 May 2016) https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120 accessed 4 July

minors, law-makers and judges must consider whether these presumptions are borne out in the existing research. Irrespective of the merits of affirmation, it would be inappropriate to grant formal acknowledgment if the result will be misidentifications and widespread de-transitions.

(i.) Minors' Experience of A Stable Trans Identity

There is evidence that minors not only experience, but can also externally express, a stable trans identity well before the age of majority.[1506] Hidalgo *et al* write that "[r]esearch and…clinical experience suggest that many children develop a strong sense of gender identity at a young age."[1507] The existing medical data suggests that children form a gender identity during their second and third years, and that they are able to communicate a firm trans identity by age four or five years.[1508]

Young people are clear and intelligible in expressing their preferred gender.[1509] They can be as consistent and persistent in their self-identification as cisgender peers. Reporting the results of a 2014 controlled study with both trans and cisgender pre-puberty youth, Olson, Key and Eaton note that trans participants had a "clear preference for peers and objects endorsed by peers who shared their expressed gender, an explicit and implicit identity that aligned with their expressed gender, and a strong implicit preference for Gender Cognition in [trans] Children."[1510] In subsequent research, Fast and Olson observed that "[a]cross all measures of preference, behaviour, stereotyping, and identity, if coded according to children's expressed gender, preschool-age socially transitioned [trans] children never significantly differed from their gender-matched peers."[1511] In particular, trans youth were "just as likely" as cisgender

2017. In the United Kingdom, the debate over identifying trans children recently gained significant publicity through a high-profile BBC 2 documentary, 'Two Transgender Kids: Who Knows Best?', in which Kenneth Zucker, a leading healthcare expert on trans identity in youth, offered similar critiques, see: 'Two Transgender Kids' (n 8).

[1506] Tobin and Levi (n 21), 302; Stieglitz (n 18), 194; WPATH (n 61) 12.

[1507] Marco Hidalgo and others, 'The Gender Affirmative Model: What We Know and What We Aim to Learn' (2013) 56(5) Human Development 285, 286.

[1508] Chance Nicholson and Teena M McGuinness, 'Gender Dysphoria and Children' (2014) 52(8) Journal of Psychosocial Nursing 27, 28; Faith Lynn, 'To be a Trans* Parent: How Emotional Abuse Statutes Facilitate Parent's Acceptance of their Children's Gender Identity' (2013) 7(1) John Marshall Law Journal 89, 112; Elizabeth R Boskey, 'Understanding Transgender Identity Development in Childhood and Adolescence' (2014) 9(4) American Journal of Sexuality Education 445, 450. According to the American Psychological Association, "[m]any children develop stability…in their gender identity between ages 3 to 4…although gender consistency (recognition that gender remains the same across situations) often does not occur until ages 4 to 7", APA (n 32), 841.

[1509] Hidalgo and others (n 155), 286.

[1510] Kristina R Olson, Aidan C Key and Nicholas R Eaton, 'Gender Cognition in Transgender Children' (2015) 26(4) Psychological Science 467, 472-473.

[1511] Anne Fast and Kristina Olson, 'Gender Development in Transgender Preschool Children' (2017) Child Development (p.12).

children to prefer "peers, toys, and clothing…associated with their expressed gender", to "dress in a stereotypically gendered outfit", to "endorse flexibility in gender stereotypes" and to "say [that] they are more similar to children of their gender than…the other gender."[1512] While, as noted, there is a need for further research, the existing evidence undermines "the assumption that [trans] children are simply confused by the questions at hand, delayed, pretending, or being oppositional."[1513] There are strong indications that trans children "do indeed exist and that their identity is a deeply held one."[1514]

(ii.) Criteria for Reliably Identifying Trans Minors

Gender recognition cannot, however, operate on the simple proposition that trans children exist. There must be available methodologies to reliably identify trans youth and filter out those minors who, while manifesting gender non-conformity, self-align with their assigned gender. Within the current scholarship, there is no consensus on a test for identifying persistent trans identities.[1515] According to Forcier, "[i]t is important to make clear to parents and families that there are…no accurate ways to 'diagnose' which gender non-conforming pre-pubertal children will consider themselves [trans] in adolescence."[1516]

Much of the academic literature since the 1980s has suggested that a significant majority (70%-80%[1517]) of children marked as having a trans identity do not persist into adulthood.[1518] Rosenthal writes that "[l]ongitudinal studies have demonstrated that most gender dysphoric pre-pubertal youth will no longer meet the mental health criteria for gender dysphoria once puberty

[1512] ibid, p.13.
[1513] Olson, Key and Eaton (n 158), 473.
[1514] ibid. In Fast and Olson's research, one metric where trans and cisgender children differed was (past) gender constancy. Whereas cisgender children had a rigid understanding of their gender identity, trans children often spoke of having had a different gender as an infant (Fast and Olson (n 159) p.13). The authors suggest that this difference may be contextual. Trans children often live in environments where, even if they experience familial support, others speak about the child having previously had an alternative gender (p.13). In many ways, children's understanding of (past) gender constancy may reflect (and reproduce) the gender narratives that they hear from family members or other adults (p.13). It is instructive that, where children have transitioned and are experiencing family support for their preferred gender, they are just as likely as cisgender peers to say that their current gender will be constant into adulthood (p.13).
[1515] Sarah E Herbert, 'Female-to-Male Transgender Adolescents' (2011) 20(4) Child and Adolescent Psychiatric Clinics 681, 682; Thomas D Steensma and others, 'Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study' (2013) 52(6) Journal of the American Academy of Child and Adolescent Psychiatry 582, 582.
[1516] Forcier and Haddad (n 123), 19.
[1517] Bonifacio and Rosenthal (n 13), 1004.
[1518] Cohen-Kettenis, Delemarre-van de Waal and Gooren (n 101), 1893; Kristina Olson, 'Prepubescent Transgender Children: What We Know and What we Do Not Know' (2016) 55(3) Journal of the American Academy of Child and Adolescent Psychiatry 155, 155; Ristori and Steensma (n 94), 15.

has begun."[1519] While many supposedly trans youth do grow up to have non-heterosexual orientations, they nevertheless self-identify with their assigned-gender.[1520]

This data should give law-makers and health professionals pause for thought, especially in terms of affirming *pre-pubertal* youth. If the current evidence suggests that most gender non-conforming children do not maintain a trans identity into adulthood, there is a risk that a non-negligible number of young people will be incorrectly affirmed.[1521] To the extent that one considers false positives, and subsequent de-transitions, as harmful to trans youth (discussed below), there may be compelling reasons to withhold legal recognition from minors.[1522]

There are, however, a number of important defects in the current research.[1523] First, the criteria used for identifying trans children are overly inclusive.[1524] The available evidence relies upon diagnostic guidelines established under the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). Under DSM-IV, young people could be marked as experiencing "gender identity disorder" without ever having expressed a trans identity.[1525] A child who merely engaged in gender non-conforming or non-stereotypical behaviour could be identified as trans, and included within the larger set of children whose persistence rates were to be measured.[1526] Tannehill criticises the existing data for failing to "differentiate between children with consistent, persistent and insistent gender dysphoria, kids who socially transitioned, and kids who just acted more masculine or feminine than their birth sex and culture

[1519] Stephen Rosenthal, 'Approach to the Patient: Transgender Youth: Endocrine Considerations' (2014) 99(12) The Journal of Clinical Endocrinology and Metabolism 4379, 4384.
[1520] Alexander Korte and others, 'Gender Identity Disorders in Childhood and Adolescence' (2008) 105(48) Deutsches Ärzteblatt International 834, 838; Drescher and Pula (n 96), 18; Madeleine Wallien and Peggy Cohen-Kettenis, 'Psychosexual Outcome of Gender Dysphoric Children' (2008) 47(12) Journal of the *American Academy* of *Child and Adolescent Psychiatry 1413, 1420 – 1422.* See generally: Zucker and Bradley (n 92).
[1521] McHugh (n 153).
[1522] Mary Huft, 'Statistically Speaking: The High Rate of Suicidality among Transgender Youth and Access Barriers to Medical Treatment in a Society of Gender Dichotomy' (2008) 28(1) Children's Legal Rights Journal 53, 55.
[1523] Olson (n 166), 155.
[1524] 'Statement on Gender Affirmative Approach to Care from the Paediatric Endocrine Society Special Interest Group on Transgender Health' (n 96).
[1525] Under DSM-IV, in order to diagnose children with Gender Identity Disorder [Code. 302.6], healthcare officers had to identify the existence of certain criteria. While one of the criteria was a "repeatedly stated desire to be, or insistence that he or she is, the other sex", officers were entitled to make a diagnosis even where this behaviour was absent (this criterion was one of five elements, four of which had to be present). Furthermore, even if this factor was in existence, it still only required that a child "desire" to be another gender. There was no requirement that, at any point, children actually state that they are their preferred gender. According to Ehrbar *et al*, "it is possible that in children, the criteria for GID…[could] be met through gender role nonconforming behaviour, without any indication of gender dysphoria" (Randall D Ehrbar and others, 'Clinician Judgment in the Diagnosis of Gender Identity Disorder in Children' (2008) 34(5) Journal of Sex and Marital Therapy 385, 388). See also: Kelly Winters, 'The New York Magazine lies to parents about trans children' (*The Trans Advocate*, 9 August 2016) http://transadvocate.com/the-new-york-magazine-lies-to-parents-about-trans-children_n_18875.htm 22 October 2016.
[1526] Olson-Kennedy and others (n 146) p. 5.

allowed for."[1527] It is perhaps unsurprising that, where children, who "were not [trans] to begin with", were arbitrarily included within a trans subset, the desistence rates within that subset became inflated. However, such research does not prove high levels of desistence among trans youth. It merely confirms that minors, who do not identify as trans in childhood, are unlikely to express a trans identity in adulthood.[1528] Law-makers should not absolutely withhold legal gender recognition on the basis of such evidence.

Second, the existing research also exhibits methodological flaws in relation to children who were lost to follow-up.[1529] Desistence and persistence rates are often calculated using data from gender identity clinics. In theory, one should calculate the total number of children initially identified as trans within these clinical settings, and then observe the percentage of those young people who have positively (and verifiably) rejected that trans identification by adolescence or adulthood. However, in a number of key studies[1530], the researchers included (as desisters) "30% to 62% of youth who [simply] did not return to the clinic" and "whose gender identity may be unknown."[1531] Without taking further steps to verify these individuals' identity – cisgender or trans – in adulthood, the researchers "assumed that for…[the] adolescents…who did not return to the clinic...their [gender dysphoria] had desisted, and that they no longer had a desire" to transition.[1532] While it is possible that such children stopped engaging with gender-confirming healthcare because they no longer had a trans identity, the researchers presume, rather than confirm, that outcome. Their results must be viewed, therefore, in a context of unanswered questions.[1533]

The researchers implicitly (or explicitly) dismiss the numerous other factors which may influence transition pathways, including preference for social transitions, geographic relocation and the impact of social pressure on public expressions of gender. Indeed, a more general criticism of the existing data is that it fails to appreciate how, particularly during their adolescent years, trans youth may be forced to internalise preferred gender as a consequence of rigid gender

[1527] Brynn Tannehill, 'The End of the Desistence Myth' (*Huffington Post,* 1 January 2016) http://www.huffingtonpost.com/brynn-tannehill/the-end-of-the-desistance_b_8903690.html accessed 22 October 2016.
[1528] Winters (n 173).
[1529] 'Statement on Gender Affirmative Approach to Care from the Paediatric Endocrine Society Special Interest Group on Transgender Health' (n 96). In its 'Guidelines for Psychological Practice with Transgender and Gender Nonconforming People', the American Psychological Association (APA) lays this charge at a number of high-profile studies (APA (n 32), 842).
[1530] APA (n 32), 842.
[1531] ibid, 842.
[1532] Steensma and others (n 163), 583.
[1533] Tannehill (n 175).

conventions.[1534] In a world where transphobia remains commonplace[1535], terminating one's externalisation of a trans identity cannot be conclusive evidence of actual desistence. As Bonifacio and Rosenthal observe, the external disappearance of a minor's preferred gender may simply illustrate "an internalising pressure to conform rather than a natural progression to non–gender variance."[1536]

(a.) Consistent and Persistent

While there remains no consensus on the methods for identifying trans youth, researchers have begun to suggest criteria which, when present, may indicate a greater likelihood of persistence.[1537] These factors have most frequently been employed for medical transitions, where there is a heightened need to ensure that young people accessing treatments actually have a stable and enduring trans identity.

The first indicator is the intensity of a child's gender identification.[1538] The more extreme an association with preferred gender, the more likely that association is to persist.[1539] Menvielle writes of "more intense dysphoria predicting a higher likelihood of persistence."[1540] The second criterion is the belief that one 'is' the preferred gender.[1541] Research suggests that minors who self-identify as 'being' their preferred gender, rather than merely desiring to be the gender, are more likely to persist into adulthood.[1542] Third, maintaining a trans identity through puberty and adolescence – in particular, the "period between the ages of 10 and 13 [years]"[1543] – appears to increase the likelihood of persistence.[1544] A considerable proportion of children who desist in a trans identification begin to embrace their assigned gender at the onset of puberty.[1545]

[1534] Serano (n 104).
[1535] Josh Bradlow and others, 'School Report: The experiences of lesbian, gay, bi and trans young people in Britain's schools in 2017' (Stonewall UK 2017) 9 – 12 http://www.stonewall.org.uk/sites/default/files/the_school_report_2017.pdf accessed 7 July 2017.
[1536] Bonifacio and Rosenthal (n 13), 1004.
[1537] Ristori and Steensma (n 94), 16.
[1538] Ristori and Steensma (n 94), 16.
[1539] Wallien and Cohen-Kettenis (n 168), *1420.*
[1540] Menvielle (n 90), 362.
[1541] Ehrensaft (n 90), 578.
[1542] Steensma and others (n 163), 588.
[1543] Thomas D Steensma, 'Desisting and persisting gender dysphoria after childhood: A qualitative follow-up study' (2010) 16(4) Clinical Child Psychology and Psychiatry 499, 512.
[1544] Sonja Shield, 'The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment' (2007) 31(2) New York University Review of Law and Social Change 361, 389; Huft (n 170), 55.
[1545] Vrouenraets and others (n 70), 368.

In the context of adult recognition, the requirement to observe a period of 'real life experience' is often opposed as both condescending and superfluous. There is a belief that, for persons above the age of majority, who may have already experienced their trans identity for over a decade, they are best-placed to affirm their gender status.[1546] However, for trans youth, where doubts about the durability of trans experiences remain, allowing a period of reflection has been discovered to increase persistence rates. The existing research suggests that, the longer a minor has expressed a clear and stable trans identity, the more likely the child is to continue into adulthood.[1547] In that regard, parents and public authorities should perhaps feel more confident affirming a 17 year old, who has identified as trans for 12 years, than a five year old whose trans expressions are comparatively recent.

Overall, the presence of a "consistent" and "persistent" trans identity increases the chances that a young person will continue to hold their preferred gender into adulthood.[1548] In the medical transition sphere, the application of these stricter diagnostic criteria has resulted in significantly lower levels of desistence. In fact, within a tightly controlled three-stage medical model[1549], there is little evidence that appropriately identified children subsequently re-embrace their assigned gender.[1550] If more onerous assessment methods were incorporated into legal gender recognition, law-makers could have faith in the integrity of recognising even those persons who are still in their pubertal years.

However, as with the research on the effects of affirmative policies, there are two notes of caution. First, while stricter controls reduce the possibility of false positives, they may also exclude young people who would genuinely benefit from legal recognition. As noted, there is no single trans narrative. Different people experience their preferred gender in different ways. Tightening the criteria to affirm a 'true' trans identity inevitably will reduce the number of young people who can find validation within the law. On the other hand, the best interests of trans children are not served by laissez-faire, overly inclusive gender recognition rules. Stricter controls may increase the bar for obtaining recognition, but it also protects vulnerable children who may simply be exploring gender. A recognition model that results in widespread de-transitions is not fit-for-purpose, and would be unlikely to achieve political and public support.

[1546] Richard Kohler and Julia Erht, *Legal Gender Recognition in Europe* (2nd edn, TGEU 2016) 25.
[1547] Aiden Key, 'Children' in Laura Erickson-Schroth (ed), *Trans Bodies, Trans Selves* (Oxford University Press 2014) 411; Delemarre-van de Waal and Cohen-Kettenis (n 151), 133; Olson (n 166), 156.
[1548] Olson and others (n 129) p. 2; Joel Baum, 'Gender, Safety and Schools: Taking the Road Less Travelled' (2011) 15(1) University of California Davis Journal of Law and Policy 167, 167; Cecile Unger, 'Gynaecologic Care for Transgender Youth' (2014) 26(5) Current Opinion in Obstetrics and Gynaecology 347, 348.
[1549] See FN 151.
[1550] Delemarre-van de Waal and Cohen-Kettenis (n 151), 132; Edwards-Leeper and Spack (n 90), 334.

Therefore, while, from a certain perspective, stricter assessment criteria may not be optimal, they may also be a necessary trade-off in achieving youth recognition.

A second concern is that, as in all other areas, research on identifying trans youth remains in its infancy, relying upon small scale studies and anecdotal reports. As evidence of trans characteristics continue to emerge, and as the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) adopts stricter controls for childhood gender dysphoria, there must be further studies to consider the impact for desistence rates. Researchers are certainly more confident in distinguishing those children who will hold their preferred gender into adulthood. Yet, as the current state of knowledge stands, there is still a need for caution.

C. Minors' Decision-Making Abilities

For older trans minors, debates on gender recognition are not simply about being reliably identified. Unlike younger children – where the law may reasonably confer the recognition decision upon parents, guardians or other third-party authorities – there is an increasing movement towards trans adolescents playing a role in their own gender affirmation. In jurisdictions, such as Norway, Sweden, Malta, Belgium and the Netherlands, persons above 16 years now have the right to apply for recognition without parental consent. Such a development maps neatly onto the requirements of art. 5 UN CRC, whereby parents exercise "responsibilities, rights and duties" in a manner which is "consistent with the evolving capacities of the child."[1551] As young people evolve and mature into gender-autonomous actors, they can increasingly play a (primary) role in defining their legal status.

Yet, what are the capacities of trans adolescents to decide their own legal gender? The decision to amend gender status has complex long-term consequences. It affects a person's core relationship with the State and may determine access to basic rights and obligations. Where law-makers confer greater autonomy, there must be certainty that minors can undertake a reflective and thoughtful decision-making process. Trans adolescents need not show *comparable* competency as adults, but they must have *sufficient* capacity to make rational and responsible choices.[1552] In many jurisdictions, the law has operated a general presumption that children are not capable decision-makers.[1553] Albert and Steinberg cite "popular conceptions of

[1551] UN CRC, art. 5. See also: UN CRC, art. 12.
[1552] Larry Cunningham, 'A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law' (2006) 10(2) University of California Davis Journal of Juvenile Law and Policy 275, 307.
[1553] Lois Weithorn, 'Involving Children in Decisions Affecting their Own Welfare: Guidelines for Professionals' in Gary B Melton, Gerald P Koocher and Michael J Saks (eds), *Children's Competence to Consent* (Plenum

the typical adolescent as beset by an 'invulnerability complex.'"[1554] Due to a perceived lack of maturity and sufficient development, minors are often excluded from decision-making and must submit to adult choices.

It is within this context of presumed incapacity that children's voices are largely excluded from legal gender recognition. As noted in Section I, a majority of jurisdictions wholly omit recognition for minors. Where young people can amend their legal gender, the affirmation process typically (acknowledging the above exceptions) confers determinative powers on parents, legal guardians and medical officers.

(i.) Factors Influencing Decision-Making Capacity

It is at least questionable whether the law should adopt such a pessimistic view of minors' decision-making.[1555] The notion that, as a class, minors lack reasoned and reflective competence is not supported by "empirical research".[1556] Indeed, the very idea of speaking of 'minors' as a collective decision-making group may lead to distorted and superficial results. Children are a broad constituency. They range from the five-year-old, exploring the world through infant eyes, to the 17-year-old adolescent, approaching the cusp of majority. It is both misleading and inappropriate to assess these categories under the same terms. As Flekkoy observes, "[c]ompetence is not an 'all or nothing' quality; it develops gradually…A child may be competent in one area, but not in another, and may be competent to take on part of a given task, but not the whole."[1557] Minors' decision-making is situational and depends on numerous factors, including experience, knowledge, supervision and surroundings.[1558]

There is evidence that minors make better-reasoned decisions where they are familiar with a subject matter.[1559] According to de Lourdes Levy, Larcher and Kurz, "[c]ompetence…must be

1983) 245; Kimberly M Mutcherson, 'Whose Body is it Anyway? An Updated Model of Healthcare Decision-making Rights for Adolescents' (2005) 14(2) Cornell Journal of Law and Public Policy 251, 287.
[1554] Dustin Albert and Laurence Steinberg, 'Judgment and Decision Making in Adolescence' (2011) 21(1) Journal of Research on Adolescence 211, 213.
[1555] Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press 2009) 84.
[1556] Sally D Hawkins, 'Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes' (1996) 64(6) Fordham Law Review 2075, 2118. See also: Gary B Melton, 'Children's Competence to Consent: A Problem in Law and Social Science' in Gary B Melton, Gerald P Koocher and Michael J Saks (eds), *Children's Competence to Consent* (Plenum 1983) 15; Bainham and Gilmore (n 83) 359.
[1557] Milfrid Grude Flekkoy, 'Psychology and the Rights of the Child' in Kathleen Alaimo and Brian Klug (eds), *Children as Equals: Exploring the Rights of the Child* (University Press of America 2002) 79.
[1558] Ikuta (n 65), 222; Hope Davidson and Jennifer Schweppe, 'Time for legislative clarity on consent to medical treatment: children, young people and the "mature minor"' (2015) 21(2) Medico-Legal Journal of Ireland 65, 65.
[1559] Hawkins (n 204), 2118.

seen within the child's experience."[1560] A young person who deals consistently with an illness over an extended period often has increased capacity to make rational choices regarding long-term healthcare.[1561] In the context of legal recognition, it might be thought that children, who have lived a trans identity for an appreciable period of time, are better placed to choose affirmative policies than young people beginning to explore their gender identity.

Research also shows that, in addition to experiencing a subject, minors have improved capacities where they obtain greater information about the subject.[1562] Larcher and Hutchinson observe that "[c]ompetence may be enhanced by sharing information that increases understanding…and the potential consequences of all options."[1563] In Chapter I, this thesis observes that a key element of children's right to be heard is an accompanying entitlement to information.[1564] Minors applying for gender recognition should receive comprehensive and complete information so that they are better-placed to make rational and reflective choices about their gender status.[1565]

Where minors have the benefit of adult supervision and guidance, they engage in more reflective decision-making.[1566] Steinberg *et al* contrast two opposing choice-scenarios.[1567] In the first setting, which mirrors standard situations of criminality[1568], a young person makes a choice under stress and without adult guidance. On the other hand, in the second scenario, circumstances such as accessing abortion or other medical procedures, the minor generally consults an adult advisor (doctor, social worker, etc.) and makes a choice in a strictly-controlled environment.[1569] Existing data illustrates that, while youth in the first scenario have reduced capacity compared with peer adults, young people, who benefit from supervision and advice, more frequently gravitate towards better, more rational choices. For Steinberg *et al*, the results explain why the law might simultaneously limit minors' culpability for criminal offences while

[1560] Maria De Lourdes Levy, Victor Larcher and Ronald Kurz, 'Informed consent/assent in children. Statement of the Ethics Working Group of the Confederation of European Specialists in Paediatrics (CESP)' (2003) 162(9) European Journal of Paediatrics 629, 631.
[1561] ibid, 631.
[1562] Vic Larcher and Anna Hutchinson, 'How should paediatricians assess *Gillick* competence?' (2010) 95(4) Archives of Disease in Childhood 307, 310.
[1563] ibid, 309.
[1564] United Nations Committee on the Rights of the Child, 'General Comment No. 12 on the Right of the Child to be Heard' (20 July 2009) UN Doc No. CRC/C/GC/12, [25].
[1565] Cohen-Kettenis, Delemarre-van de Waal and Gooren (n 101), 1896.
[1566] Mutcherson (n 201), 281-282.
[1567] Laurence Steinberg and others, 'Are Adolescents Less Mature Than Adults: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"' (2009) 64(7) American Psychologist 583, 592.
[1568] ibid, 585-586.
[1569] ibid, 592.

still extending reproductive choices to pregnant teenagers.[1570] In the context of gender recognition, where trans youth overwhelmingly make affirmation decisions under the guidance of professional adults, one might conclude that, where recognition rules incorporate the provision of appropriate guidance, adolescents can be trusted to adopt reflective and thoughtful choices.

Much opposition to minors' decision-making autonomy centres on the fear that young people are susceptible to third-party influence, and are more easily persuaded to adopt non-optimal choices than similarly-placed adults. Within the existing literature, there is considerable reference to the impact of "peer pressure" and increased deference to "authority".[1571] While there is undoubtedly evidence that "the simple presence of peers differentially biases adolescents toward increased risk-taking behaviour"[1572], it is not clear how this research would affect legal transitions. Within the gender recognition context, concerns over third-party influence are only relevant to the extent that one believes that peers or authority figures will pressure minors into obtaining an unwanted or improper change of legal gender. However, there is considerable evidence to suggest that, far from promoting transitioning, peers and adults actively discourage trans identities, often through abusive, even violent means.[1573] Milrod writes that, "[f]or [trans] individuals no matter what their age, coercion is largely a nonissue as there are no reports in the literature of children being induced or forced to transition."[1574] It is unlikely that, if adolescents are offered greater autonomy in choosing gender recognition, they will be inappropriately persuaded to make an injurious application.

The above reasoning is, however, subject to one caveat. In recent years, as minors have increasingly expressed a trans identity, so too there has been a rise in the expression of non-binary identities (see Chapter VI). While many children do not identify with their assigned gender, they may also not fully embrace a dichotomously opposite gender role. Even for parents who support their child's preferred gender, the failure to manifest a clear, understandable gender identity may create considerable unease and distress.[1575] Parents can be "uncomfortable with the ambiguity of the situation and the possibility of continued gender fluidity in their

[1570] ibid, 593.
[1571] Catherine C Lewis, 'A Comparison of Minors' and Adults' Pregnancy Decisions' (1980) 50(3) *American Journal* of *Orthopsychiatry* 446, 447; Open Society (n 1) 13; Steinberg and others (n 215), 586.
[1572] Albert and Steinberg (n 202), 218-219.
[1573] Carroll (n 103), 733; Ristori and Steensma (n 94), 14. However, for a recent English case where a local authority accused a mother of forcing her son to transition, see: *Re J* (n 79).
[1574] Christine Milrod, 'How Young Is Too Young: Ethical Concerns in Genital Surgery of the Transgender MTF Adolescent' (2014) 11(2) Journal of Sexual Medicine 338, 342.
[1575] Edwards-Leeper and Spack (n 90), 331.

child."[1576] There may be a sense that, while parents are able to endure their offspring rejecting an assigned gender, they still have a residual need for gender clarity. According to Ehrensaft, "[m]any parents want to be able to look into a crystal ball and be assured of an accurate and permanent gender future for their child."[1577] In such circumstances, there is a fear that distressed parents will pressure young people into obtaining recognition, which does not accurately reflect the child's lived-experience.[1578] It is welcome, and unfortunately too rare, that parents affirm their trans children. However, they must do so in manner that validates and respects their child's true gender.

Where minors are allowed greater time for consideration and reflection, they engage in more rational decision-making.[1579] While research suggests that children make comparably poorer decisions in situations of impulsiveness[1580], youth do exhibit higher decision-making capacities when offered sufficient time to think through an issue.[1581] For legal gender recognition, the apparent impact of time should encourage greater autonomy for adolescents. As noted, youth gender transitions, where properly supervised, typically unfold over a period of years, where children have the opportunity to fully explore and manifest a stable gender experience.[1582] In all transition contexts – medical, social and legal – young people are only affirmed where there is sufficient certainty as to the child's trans identity. Where a gender recognition model builds in an appropriate period of reflection, policy makers should have reduced concerns for rash, or impulsive, applications.

Assessing children's decision-making capacities may depend on the complexity of the issue involved.[1583] According to Griffith and Tengnah, "[t]he degree of maturity and intelligence needed depends on the gravity of the decision."[1584] Whereas it may be safe to assume that 10-year-olds can consent to the application of a plaster, it is more questionable whether they will sufficiently understand open-heart surgery.[1585] The more intricate a decision, the greater the level of competency needed. In terms of gender recognition, altering one's legal status has

[1576] ibid.
[1577] Diane Ehrensaft, 'Young Is Too Young: Ethical Concerns in Genital Children' (2014) 68 Psychoanalytic Study of the Child 28, 53.
[1578] Brill and Pepper (n 82) 24-25.
[1579] Carroll (n 103), 743.
[1580] Steinberg and others (n 215), 592.
[1581] Ikuta (n 65), 223-224.
[1582] Carroll (n 103), 743.
[1583] Cunningham (n 200), 367; Larcher and Hutchinson (n 201), 308.
[1584] Richard Griffith and Cassam Tengnah, 'Assessing children's competence to consent to treatment' (2012) 17(2) British Journal of Community Nursing 87, 89.
[1585] ibid, 89.

complex and important consequences. While the practical effect of gender recognition may simply be the alteration of a letter or number, there is a fundamental change in legal status, with knock-on effects for all related rights and responsibilities. There is a need to ensure that decision-making for gender recognition is only exercised by those persons who can sufficiently understand the gravity of the consequences involved.

Finally, there is evidence that age, while not a complete proxy for competence, does offer general indications about decision-making capacities. The existing research suggests that younger children, particularly pre-puberty minors, have considerably lower capacities compared with peer adults and adolescents.[1586] Fortin writes that "[b]efore early adolescence, the majority of children do lack the cognitive abilities and judgmental skills to make major decisions that might seriously affect their lives."[1587] Adolescents, on the other hand, have "far greater capacity to make decisions than our legal system's presumptions of incapacity currently recognise."[1588] Thus, the older a minor is, particularly where they have experienced their puberty years, the more likely they will be able to engage in rational decision-making. For legal transitions, one can expect that the 17-year-old, on the cusp of majority, will be better-placed to decide on gender recognition than the five-year-old still exploring infancy. On this point, one can draw a link with persistence rates, where, as noted, it is easier to reliably identify trans adolescents than trans children.

The foregoing considerations demonstrate that, rather than following any clear, delineated pattern, children's decision-making is context-specific and varies according to numerous factors. These factors should play an important role in determining the relationship between gender recognition and trans minors. The changeable nature of minors' decision-making is evident in the fact that, despite a general presumption of incompetence, national laws accept that children should sometimes be able to participate in (what might otherwise be considered) adult conduct.

Around the world, the age at which children can consent to sexual activities varies widely, with certain jurisdictions permitting sexual conduct for those as young as 14 years.[1589] In the

[1586] Lois A Weithorn and Susan B Campbell, 'The Competency of Children and Adolescents to Make Informed Treatment Decisions' (1982) 53(6) Child Development 1589, 1595-1596; Thomas Grisso and Linda Vierling, 'Minors' Consent to Treatment: A Developmental Perspective' (1979) 9(3) Professional Psychology 412, 420; Joshua A Weller and others, 'Assessment of Decision-making Competence in Preadolescence' (2012) 25 Journal of Behavioural Decision Making 414, 415.
[1587] Fortin (n 203) 84.
[1588] Shield (n 192), 406. See also Cunningham (n 200), 316; Weithorn and Campbell (n 234), 1596; Melton (n 204) 15.
[1589] Comparative Ages of Consent: United Kingdom (16 years); France (15 years); Portugal (14 years); New

United States, children cannot purchase alcohol below 21 years, but may use a firearm as early as 12 years.[1590] Across the common law world, many countries have adopted the '*Gillick*' competence standard, whereby sufficiently mature minors may agree to medical intervention even before the statutory age of consent.[1591] In parts of Latin America and Europe, voting rights have been extended to persons under 18 years.[1592] These exceptions show the complexity of bright line rules where children's decision-making capacities are concerned. While law-makers should be cautious to increase adolescent autonomy for gender recognition, there is growing evidence that older minors are competent to determine their gendered future.

D. The Role of Parents and Legal Guardians

In shaping the contours of recognition for children, one must clearly identify the role which parents and legal guardians play in the decision-making process. While an increasing number of jurisdictions permit children to amend their legal gender, parents retain a determining role.[1593] Parents invariably initiate the recognition process, and it is they who complete the necessary requirements in the name of their child. Apart from self-determination rights for 16 and 17-year-olds in Sweden, Belgium, Malta and Norway, children's voices are largely subsumed by parents' where there is a legal transition.[1594] Parents should listen to children, act consistently with children's evolving capacities, and (as a primary consideration) should pursue children's best interests.[1595] However, gender recognition laws, whether they include or exclude minors, typically prioritise the concerns and views of parents.

South Wales (16 years); Tasmania (17 years); In Argentina, individuals aged 13 years are entitled to engage in certain sexual activities; Brazil (14 years); Colombia (14 years); South Africa (16 years); Algeria (16 years); Ghana (16 years); Bangladesh (14 years); China (14 years); Malaysia (16 years).

[1590] 'Hunting Licences and Permits' (*Connecticut Department of Energy and Environmental Protection Website*, 27 September 2016) http://www.ct.gov/deep/cwp/view.asp?a=2700&q=323418&depNav_GID=1633 accessed 25 October 2016.

[1591] *Gillick v West Norfolk & Wisbeck Area Health Authority* [1986] AC 112; (Australia) *Marion's Case* [1992] 175 CLR 189. See: Tim Grimwood, '*Gillick* and the Consent of Minors: Contraceptive Advice and Treatment in New Zealand' (2009) 40(4) Victoria University of Wellington Law Review 743; Larcher and Hutchinson (n 201), 71.

[1592] Comparative Voting Rights: 16-year-olds have voting rights in Austria, Argentina, Bosnia and Herzegovina, Brazil, Cuba, Ecuador, and Nicaragua.

[1593] See e.g. Ontario Vital Statistics Act, s. 36; British Columbia Vital Statistics Act, s. 27; (New South Wales) Births, Deaths and Marriages Registration Act 1995, ss. 32B and 32C; (Queensland) Births, Deaths and Marriages Registration Act 2003, ss. 22 and 23; (Western Australia) Gender Reassignment Act 2000, ss. 14 and 15.

[1594] In the Netherlands, children (aged 16 and 17 years) can access gender recognition without parental consent. The Dutch application procedure, however, is not based on self-determination. Rather, medical officers, at specialised gender clinics, retain a supervisory role, see: Walter Pintens, 'The Legal Status of Transsexual and Transgender Persons in Belgium and the Netherlands' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 118 – 119.

[1595] Gender Identity, Gender Expression and Sex Characteristics Act 2015, s. 7 (Malta); Act Nº 26.743, art. 5 (Argentina).

The primary role of parents in gender recognition is not (necessarily) inconsistent with existing human rights standards. As noted in Chapter I, international norms, particularly UN CRC, embrace children as rights participants. However, they equally acknowledge the core "responsibilities, rights and duties"[1596] of parents and guardians (to be exercised in a "manner consistent with the evolving capacities of the child"[1597]). Human rights require that parents pursue their child's welfare, but parents are still invested with significant protective powers. These powers arise from two key presumptions: (a) parents are best placed to assess 'best interests'[1598] and (b) parents invariably act in the 'best interests' of their child.[1599] The law confers significant entitlements upon parents as a means of achieving the optimal well-being of children and adolescents. In the Australian case, *Re Jaime*, Bryant CJ suggested that "is unlikely that the parental interests in a case of a child living with gender dysphoria would be anything other than the welfare of the child."[1600]

The dominant position of parents in gender recognition appears to have raised little controversy. Trans advocates certainly desire that the law grant wider recognition to persons under the age of majority. Yet, as a general rule, there is an implicit assumption that parents do have a role in the legal transition process, and few organisations advocate widespread self-determination for younger children.[1601]

(i.) Do Parents always Act in the 'Best Interests' of their Children?

It is important to note that the presumption that parents act in their children's best interest is not without critique. Koocher writes that the "values, needs, desires, and so-called best interests of parents and their children are not necessarily congruent. In fact…the best interests of parents and their children will often be different and even contradictory."[1602] The "natural bonds of

[1596] UN CRC, art. 5.
[1597] UN CRC, art. 5. See also: United Nations Committee on the Rights of the Child, 'General Comment No. 4 on Adolescent health and development in the context of the Convention on the Rights of the Child' (1 July 2003) UN Doc No. CRC/GC/2003/4, [7].
[1598] Gale and Syrja-McNally (n 108), 202; Sarah E Valentine, 'Traditional Advocacy for Non-traditional Youth: Rethinking Best Interest for the Queer Child' (2008) 4 Michigan State Law Review 1053, 1083.
[1599] Shield (n 192), 363. See also: Federal Constitutional Court of Germany, 1BvR 3247/09 (19 February 2013), [50].
[1600] [2013] FamCAFC 110, [107].
[1601] See e.g. Transgender Equality Network Ireland, *Gender Recognition and Transgender Young People* (TENI 2015) http://www.teni.ie/attachments/8156eb45-14af-4804-aac4-412a3f6cdec1.PDF accessed 25 October 2016.
[1602] Gerald P Koocher, 'Competence to Consent: Psychotherapy' in Gary B Melton, Gerald P Koocher and Michael J Saks (eds), *Children's Competence to Consent* (Plenum 1983) 112.

affection"[1603] between parent and child hopefully motivate the former into benevolent acts towards the latter. There remains a need for vigilance, however, and this is particularly the case where a child exhibits gender non-conformity.

A parent's capacity to act in the best interests of a trans child may be restricted. Individual prejudice or bias against gender diversity may prevent a parent from respecting a trans identity even where affirmation would increase the young person's well-being.[1604] Carroll observes that the "prevalence of parental abuse and abandonment of [trans] youth shows that parenthood does not adequately counteract transphobia."[1605] In particular, there is evidence that social and religious conventions restrain parents in promoting their trans children's interests.[1606]

When confronted with a non-cisgender identity, some individuals are heavily influenced by community reactions. Parents may be reluctant to affirm a trans child if they believe that it will encourage social condemnation.[1607] There is evidence that medical practitioners have historically blamed parents for minors' gender non-conformity.[1608] Social concerns may persuade individuals to reject a trans identity even where it negatively impacts their child.[1609]

In some families, deciding whether to affirm a child's preferred gender may create a "conflict of interests" which restricts parents' ability to satisfy the 'best interests' principle.[1610] In the family context, there are typically numerous competing priorities. There is a fear that, faced with the wider picture of family life, parents may reject trans identities to the detriment of young people.

According to Key, "[s]iblings of gender nonconforming children often experience greater teasing."[1611] Where affirming a trans child exposes other offspring to discrimination and abuse, parents are less likely to permit gender recognition, even where affirmation would increase mental and physical health.[1612] The same is true where respecting children's preferred gender

[1603] *Parham v JR* [1979] 442 US 584, 602.
[1604] Christian Burgess, 'Internal and External Stress Factors Associated with the Identity Development of Transgendered Youth' (2000) 10(3-4) Journal of Gay and Lesbian Social Services 35, 43; Susset (n 19) 117.
[1605] Carroll (n 103), 751.
[1606] Herbert (n 163), 683; Diane Ehrensaft, '"I'm a Prius": A Child Case of a Gender/Ethnic Hybrid' (2010) 15(1) Journal of Gay and Lesbian Mental Health 46, 48.
[1607] Susan Johnson and Kristen Benson, '"It's Always the Mother's Fault": Secondary Stigma of Mothering a Transgender Child' (2014) 10(1-2) Journal of GLBT Family Studies 124, 138.
[1608] Skougard (n 121), 1177-1178; Susset (n 19) 117.
[1609] Stieglitz (n 18), 194-195.
[1610] Weithorn (n 201) 240.
[1611] Key (n 195) 424.
[1612] Katherine Kuvalanka, Judith Weiner and Derek Mahan, 'Child, Family, and Community Transformations: Findings from Interviews with Mothers of Transgender Girls' (2014) 10(4) Journal of GLBT Family Studies 354, 369.

gives rise to internal family strife.[1613] There is evidence that the presence of trans identities creates intra-family conflict. If refusing to affirm a trans young person encourages wider familial harmony, parents may be willing to overlook the emotional injury that such rejection inflicts on youth. Finally, linked to social condemnation of parents, individuals may positively disaffirm a trans child in order to maintain their family's standing in the community.[1614] In an environment where families have been shunned, and even attacked, for supporting non-cisgender youth[1615], parents may restrict trans expressions in order to protect status.

In medical law, courts are less willing to presume benign parental intent where there is consent for treatment which would benefit only a third-party.[1616] If a parent proposes that one of their offspring submit to a procedure for the sole benefit of another child, courts may more strictly supervise the motivations and appropriateness of any interventions.[1617] The same reasoning can apply to conflicts of interest in legal gender recognition. If parents refuse to affirm a trans child because of concerns for other family members, state authorities should meaningfully consider whether their decision can properly pursue the best interests of the child as a primary concern.[1618] In Colombia, the Constitutional Court has suggested that, where a parent consents to surgeries which 'normalise' the ambiguous genitalia of an intersex infant, an elevated standard of informed consent should apply.[1619] Parents should not have the right to surgically intervene on a new born simply because social concerns, particularly third-party prejudice, would impact upon young people and their families.[1620]

[1613] Karen Saeger, 'Finding our Way' (2006) 2(3-4) Journal of GLBT Family Studies 207, 209; Brill and Pepper (n 82) 40.
[1614] Brill and Pepper (n 82); Juhola (n 9).
[1615] Solomon (n 116) 599 – 676.
[1616] Anne Tamar-Mattis, 'Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants' (2006) 21 Berkeley Journal of Law, Gender and Justice 59, 94.
[1617] Skylar Curtis, 'Reproductive Organs and Differences of Sex Development: The Constitutional Issues Created by the Surgical Treatment of Intersex Children' (2011) 42(4) McGeorge Law Review 841, 851; Felicity Bell, 'Children with Gender Dysphoria and the Jurisdiction of the Family Court' (2015) 38(2) University of New South Wales Law Journal 426, 447.
[1618] From conversations with Dr Brian Sloan, it is important to acknowledge that, within a human rights framework, one must consider the extent to which family strife will affect the best interests of the child. Put simply, if gender recognition ostracises a child within a family or a community, that too is a consideration as to whether affirmation best serves the child. This is an important point to note. However, on balance, reflecting upon how recognition confers access to fundamental rights and benefits (as well as allowing greater self-actualisation), one can argue that – even in the presence of family strife – gender recognition pursues the best interests of the child.
[1619] Constitutional Court of Colombia, SU-337/99 (12 May 1999); Constitutional Court of Colombia, T-551/99 (2 August 1999).
[1620] ibid.

(ii.) Practical Obstacles to Obtaining Parental Consent

There are, thus, reasons to doubt whether, against the specific background of gender non-conformity, parents should be presumed to act in the best interests of their trans child. If the law confers a determinative power upon parents because it is assumed that they will promote a child's welfare, there may be grounds for rethinking, or at least easing, the control which parents exercise over the gender recognition process. However, in addition to concerns regarding improper motivations, there are also practical concerns which militate against an absolute role for the parents of trans youth.

A model of gender recognition which vests consent rights exclusively in parents ignores the well-documented precariousness in which many trans youth live. Existing research illustrates that trans minors are disproportionately represented among both homeless youth[1621] and children who are in state care.[1622] For many reasons, including rejection and abuse, trans young persons are often estranged from their birth families[1623] and may live on the streets, in informal accommodation or social services placements.[1624] These children frequently have no contact with their parents, and an absolute requirement for parental consent would create an insurmountable bar to recognition.

Where minors are in state care, and particularly where state actors have been granted decision-making authority, trans children will have greater access to those whose consent the law requires. Yet, institutional caution, bureaucratic delays and transphobic prejudice mean that even state officials may "not always [be] knowledgeable enough or sufficiently free of bias to be able to adequately act in the best interests of [trans] youth in [their] care."[1625] A human rights model for legal gender recognition should respond to the reality of trans lives.

For children, who do live with their families, parental consent requirements still create important hurdles. In order to obtain a parent's agreement, young people must expose their trans identity. Around the world, there are many trans youth who live 'stealth' lives. While they may

[1621] Pollock and Eyre (n 14), 217.
[1622] Amanda Kennedy, 'Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition' (2008) 19(2) Hastings Women's Law Journal 281, 288.
[1623] Hannah Hussey, *Beyond 4 Walls and a Roof Addressing Homelessness Among Transgender Youth* (Centre for American Progress 2015) 1. See e.g. *Re Isaac* [2014] FamCA 1134.
[1624] Calla Wahlquist, 'Transgender and Homeless: The Young People who can't Get the Support they Need' (*The Guardian*, 6 April 2017) https://www.theguardian.com/society/2017/apr/06/transgender-and-homeless-the-young-people-who-cant-get-the-support-they-need accessed 2 March 2017.
[1625] Shield (n 192), 363.

express their preferred gender within safe spaces, among trusted friends, these young people understand that, for reasons of personal safety, it is advisable to conceal their trans status from parents and family members. An absolute requirement for parental consent may force trans minors into situations which compromise both their physical and mental health.[1626] Shield writes that "[u]nfortunately, home is often not a safe haven for [trans] youth."[1627] Trans children who reveal their preferred gender may suffer violence and harassment.[1628] In many cases, they are ejected from the family home[1629] and may be denied the basic financial support that they need to survive.[1630]

Apprehending the likely consequences of disclosure, parental consent requirements may discourage children from seeking a beneficial change in their legal status.[1631] Instead, these young people internalise their true gender and suffer the emotional hardship to which that decision gives rise. Kennedy observes that "[m]any youth feel that they must keep their identities a secret from their families for fear of disappointing them and may also fear being mistreated or disowned."[1632] On a pure costs-benefit analysis, financially dependent trans minors may conclude that they have no other option but to conceal their identity and forgo the benefits of legal recognition.

In the public health sphere, practitioners increasingly understand that, for sensitive interventions, such as treatment for sexually transmitted infections, young people may resist proper care, and thus increase the risk of re-transmission, if they believe that any procedure, and their previous sexual activities, would be revealed to parents or legal guardians.[1633] While generally respecting the rights of parents to make medical decisions, policy-makers, when faced with such a scenario, typically create exceptions to the general rule so that more young people will access necessary interventions[1634]. For gender recognition, if one accepts that children benefit from affirmation and that disclosing identities may sometimes precipitate negative

[1626] Burgess (n 252), 42-43. One might legitimately respond that, if a child is reliant upon parents, from whom they are hiding a trans identity, it is unlikely that the child (even without a consent requirement) will take formal steps to legally change their gender. Living and relying upon a parent, it would be difficult for a trans child to conceal an amendment to legal gender, even if there is no *ex ante* obligation to obtain permission.
[1627] Shield (n 192), 373.
[1628] Arnold H Grossman, Anthony R D'augelli and Nickolas Salter, 'Male-to-Female Transgender Youth' (2006) 2(1) Journal of GLBT Family Studies 71, 85; Herbert (n 163), 684.
[1629] Stephanie Ignatavicius, 'Stress in Female-Identified Transgender Youth: A Review of the Literature on Effects and Interventions' (2013) 10(4) Journal of LGBT Youth 267, 270.
[1630] Pollock and Eyre (n 14), 217.
[1631] Grossman, D'augelli and Salter (n 267), 125.
[1632] Kennedy (n 270), 285.
[1633] Mutcherson (n 201), 237.
[1634] ibid, 269 – 271.

outcomes, there is a compelling argument that parents should not have an irrefutable, absolute role in legal transitions.

The foregoing considerations illustrate the significant practical difficulties which arise where gender recognition rules impose an absolute requirement for parental consent. Indeed, even where children are supported by one parent, they are unlikely to be affirmed by both.[1635] Existing data reveals not only that parents frequently disagree on trans affirmative policies but also that children's trans identity can be a source of marital strife.[1636] Mandating parental support as an absolute pre-condition for legal transition places gender recognition out of reach for many young people.[1637] As with medicalisation requirements, it is likely to create a two-tier affirmation system[1638], disfavouring minors at the intersection of numerous vulnerabilities. On the one hand, supported children will achieve their preferred gender status with (comparative) ease. On the other, youth who are already isolated and estranged from family units will experience further marginalisation – now with the sanction of the law.[1639]

E. De-Transitioning

Any debate on legally affirming trans youth must expressly acknowledge the possibility of de-transitions. While, in drawing an outline for gender recognition, law-makers will automatically seek to enforce strict controls and reduce the potential for 'false positives', one must accept (at least the possibility) that some children may reject their recognised gender.

In Chapter III, this thesis argued that, for adult applicants, concern about 'non-permanent' gender does not necessitate medical pre-conditions. It did so for a number of reasons, including low regret rates among older persons, possibilities to achieve permanence without physical intervention (e.g. limiting the number of permissible applications, etc.) and the greater benefit of having accurate, rather than historically continuous, identity documents.

In the context of child applicants, advocates have also claimed that possible de-transitions should not absolutely bar gender-affirming policies.[1640] Multiple amendments to a child's

[1635] Henzel (n 20) 14.
[1636] Key (n 195) 422; Brill and Pepper (n 82) 87.
[1637] Huft (n 170), 55.
[1638] Lee Teitelbaum, 'Children's Rights and the Problem of Equal Respect' (1999) 27(4) Hofstra Law Review 799, 809.
[1639] Kennedy (n 270), 297.
[1640] Singal (n 22); Simons, Leibowitz and Hidalgo (n 76), 129.

gender are not ideal, it is argued, but unlike cross-sex hormones and confirmation surgery (which form part of medical transitions), legal and social gender do not leave irreversible marks. Re-amending legal gender, particularly where there are no medical requirements, is not such a traumatic process that it would have a lasting, negative impact. The reality is that gender non-conforming youth are, irrespective of legal recognition, going to explore their inner-identity. Just as adults benefit from having an accurate legal gender, so too it is better that minors can experience their childhood years in a gender role which, irrespective of future preferences, currently feels authentic and comfortable.[1641] Preventing future de-transitions is less important than ensuring that, where children do re-embrace their birth-assigned gender, they encounter only love and support.[1642]

There may, however, be reasons why de-transitioning is not as straightforward for children as some advocates claim.[1643] Transition regret (or 'desistence') rates are higher among minors than adults. While non-permanence might not be sufficiently important to impact adult recognition processes, it is a legitimate consideration for trans children. Although the existing research potentially inflates desistence rates, it does indicate that a greater number of trans-identified young people (as opposed to adults) will not maintain their preferred gender. If child applicants (particularly before puberty) are more likely to reject their affirmed gender, this is something to which law-makers should have regard.

One can also question how de-transitioning would affect child welfare. For adults, there is an assumption that, even if individuals are negatively impacted by gender non-permanence, there is greater advantage in having an accurate (if changeable) identity. Any distress or mental burdens arising from re-amending gender are preferable to living with an incorrect legal status. In the context of child applicants, however, there is no consensus on the consequences of re-embracing a birth-assigned gender. While some advocates claim that minors would easily return to their previous gendered-lives, Drescher warns that there is "no empirical evidence demonstrating that a prepubescent child who is permitted to transition gender role but then desists can simply and harmlessly transition back to the natal gender."[1644] There are a number of factors which potentially complicate de-transition for young people.[1645]

[1641] Serano (n 79).
[1642] Ehrensaft (n 77), 354; Francine Russo, 'Debate is growing about how to meet the urgent needs of Transgender Kids' (2016) January/February Scientific American Mind 26, 32.
[1643] Annelou de Vries and Peggy Cohen-Kettenis, 'Clinical Management of Gender Dysphoria in Children and Adolescents: The Dutch Approach' (2012) 59(3) Journal of Homosexuality 301, 308; Drescher and Pula (n 96), 20.
[1644] Jack Drescher, 'Controversies in Gender Diagnoses' (2014) 1(1) LGBT Health 10, 13.
[1645] Ristori and Steensma (n 94), 17.

Legal gender impacts core rights and entitlements. If legal gender was irrelevant or inconsequential, there would not be such urgent calls to affirm children's preferred identities. To the extent that de-transitioning (once again) alters legal status and obligations, it does significantly affect life situations and its consequences should not be downplayed.[1646]

Second, obtaining recognition (even by way of de-transition) is a time-consuming and emotionally draining process. Even under the most liberal recognition model, revoking an affirmed gender, or seeking recognition of a former gender, requires that parents and children submit to application procedures. One of the arguments in support of affirming minors is that, where young people are acknowledged in their preferred gender, the practical disturbance is minimal because, in many cases and irrespective of their legal gender, the individuals will have mostly lived in that preferred identity. However, this reasoning does not apply to de-transitions. While it is possible that a trans girl, who requests a female legal gender, may always have identified (and lived) as a woman, where that girl subsequently de-transitions, it is clear that, at least at some point in his life, the now male-identified youth did not experience a male gender identity.[1647] There will, therefore, have to be at least some form of social adaptation process.

Finally, where trans children obtain legal recognition, they create a set of cultural expectations which they may find hard to subsequently push against.[1648] Minors who are supported by family and friends – either initially or after a period of adjustment – may feel boxed-in or artificially tethered to a gender with which they no longer have an authentic connection. Particularly if young people have previously struggled to validate a preferred gender, they may be unwilling to express subsequent doubts for fear that any future gender identity would be automatically de-legitimised. Trans children, whose parents have been particularly vociferous in their support and advocacy, may even feel that re-amending legal gender would require parents to engage in a process of quasi-de-transition.[1649] There is evidence that supportive parents are often highly involved in a child's journey towards transition. According to Lament, trans minors may "struggle with their change of heart when family, peers, and the community have embraced, if not inspirited, their former desires."[1650]

[1646] This negative consequence also applies to adults and is, perhaps, an argument in favour of establishing safeguards to prevent non-permanent adult transitions.
[1647] Lisa Weinstein and Hannah Wallerstein, 'If We Listen: Discussion of Diane Ehrensaft's "Listening and Learning from Gender-Nonconforming Children"' (2014) 68 Psychoanalytic Study of the Child 79, 86.
[1648] Brill and Pepper (n 82) 114.
[1649] Singal (n 22).
[1650] Lament (n 75), 18.

Legal gender recognition does not have the same physical consequences as accessing a medical transition pathway. Trans children can disentangle themselves from legal affirmation with greater ease than physical intervention treatments. Yet, it would be wrong to discount the potential impact which de-transitioning has upon young lives. While the possibility of non-permanent genders is insufficient to prevent all acknowledgment for minors, so too one should not assume that trans youth can, as a matter of routine, simply cast-off genders into which they, and their intimates, have made significant investments.

F. Social Transitions

The final consideration is the role of social transitions. If law-makers do wish to affirm trans youth, but are concerned about taking definitive action too early, one compromise is to offer a social transition model without extending full legal acknowledgement.[1651] Under a social transition approach, younger trans minors would live all aspects of their lives – both public and private – in their preferred gender but they would not yet obtain gender recognition.[1652] Instead, families, peer groups and state actors would respect a child's gender identity through a series of reasonable accommodations, using preferred names and pronouns, opening access to gender-appropriate facilities and minimising public revelations of birth-assigned gender.

While, using a social model, there is increased risk that a child will still have to engage others through their non-preferred gender, social transitions also offer significant benefits. They allow trans minors to explore their gender identity in circumstances which are both comfortable and flexible.[1653] Young persons who socially transition experience childhood through the lens of their preferred identity but they also enjoy the advantage of a simpler de-transition if their feelings should alter or desist. Social transitions increase a child's opportunity for reflection before choosing a definitive preferred gender. As noted, existing evidence suggests that: (a) children make better decisions with increased deliberation; and (b) trans youth are more likely to persist in their preferred gender where they maintain that identity over a longer period of time. Social transitions thus increase the prospects of optimal decision-making, while still respecting children's immediate need for gender authenticity.

[1651] Durwood, McLaughlin and Olson (n 117), 116.
[1652] Olson and others (n 129) p. 2.
[1653] Boskey (n 156), 448; Key (n 195) 432.

Social transitions assist parents, acclimatising them to a new gender reality and assuaging fears that trans identity may be fleeting or mistaken.[1654] It also has the potential to improve communal attitudes towards gender diversity. Recalling the wider social impact of disaffirmation (e.g. encouraging bullying and disrespect in schools, etc.), social transitions may institutionalise increased trans-positivity and encourage actors, particularly state officials, to respect and celebrate young people's experience of gender.[1655] As Greytak, Kosciw and Diaz conclude, "[w]hen a school has and enforces a comprehensive policy, one that also includes procedures for reporting incidents to school authorities, it can send a message that harassment and assault are unacceptable and will not be tolerated."[1656]

One weakness of a social transition model, however, is that it depends upon public and private buy-in. A reticent school or sports club may defeat the goals of socially transitioning if they refuse to acknowledge preferred gender without formal recognition. Within a context where public and private actors often fail to voluntarily respect gender identity, a social model may only succeed if it is backed-up by measures of legal enforcement.

IV. Legal Gender Recognition, Minors and Human Rights: Observations

There is growing scholarly consensus that – in contrast to the majority legal position worldwide – trans children should be affirmed in their preferred gender. Absolutely excluding young people from transition pathways does not promote their best interests, and it is not consistent with the child-sensitive human rights framework set out in Chapter I.

In this final section, drawing from discussions throughout Chapter V, the thesis explores the intersections of gender recognition, minors and human rights. As *unqualified* minimum age requirements become increasingly untenable, Section IV asks how human rights can shape processes for acknowledging (at least some) trans minors. In doing so, Section IV addresses three (inter-connected) issues: (A) the use of bright-line rules; (B) the status of minors aged 16 and 17 years; and (C) legal recognition for children under 16 years.

Consistent with the overall methodology of this thesis, Section IV is not a 'human rights model' for young persons. It is not a mandatory, 'trans children's charter' which all states must

[1654] Brill and Pepper (n 82) 221.
[1655] ibid, 163.
[1656] Greytak, Kosciw and Diaz (n 103) 41.

impose. Given the absence of youth recognition processes[1657] from judicial decisions and soft-law instruments, it would be premature to interpret human rights as requiring specific procedures for affirming minors. Instead, Section IV concentrates on available social science and medical research. Evaluating this knowledge against key child rights standards (e.g. right to be heard, etc.), Section IV suggests options for safe, secure and non-pressurised recognition outcomes. Although – at certain junctures – Section IV does offer more concrete proposals, these merely identify and facilitate important discussions, which law-makers and judges increasingly have to undertake.

A. Bright-Line Rules

Considering how age and physical development can impact self-awareness and the externalisation of trans identities, one must reflect upon the desirability of bright line rules. In jurisdictions, such as Ireland and the Netherlands, law-makers have extended legal recognition below 18 years but the law still draws contrasts based on age. In Sweden[1658], a minor, who is 16 years or over, can request legal recognition through a process of self-determination. A young person aged between 12 and 15 years can be recognised with parental or guardian consent. However, for all children aged 11 years or under, there is an absolute exclusion.

The question of bright-line limits has no easy answer. On the one hand, definitive age-based rules offer significant advantages in terms of both clarity and efficiency.[1659] Where gender recognition requires a minimum age, parents and children have certainty regarding their legal rights. In Sweden, it is clear that only children who have reached 12 years will be acknowledged, and that younger individuals are absolutely excluded.[1660] Bright-line rules also create a more efficient recognition system, where state actors are not required to make case-by-case assessments of young people's competence.[1661]

[1657] By contrast, as noted, the United Nations Committee on the Rights of the Child has increasingly affirmed general rights to gender recognition, see: United Nations Committee on the Rights of the Child, 'Concluding observations on the combined fourth and fifth periodic reports of Chile' (30 October 2015) UN Doc No. CRC/C/CHL/CO/4-5, [34] – [35]; United Nations Committee on the Rights of the Child, 'Concluding observations on the combined third to fifth periodic reports of Cameroon' (6 July 2017) UN Doc No. CRC/C/CMR/CO/3-5, [14] – [15].
[1658] Act for Change of Juridical Gender 2015. See also: Jameson Garland, 'The Legal Status of Transsexual and Transgender Persons in Sweden' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015) 300 – 301.
[1659] Sarah Elliston, *The best interests of the child in healthcare* (Routledge-Cavendish 2007) 207.
[1660] David Archard, *Children: Rights and Childhood* (Routledge 1993) 64.
[1661] Michelle Oberman, 'Minors' Rights and Wrongs' (2996) 24(2) The Journal of Law, Medicine and Ethics 127 134.

On the other hand, existing evidence illustrates that young people's identities, as well as their decision-making capacities, are not easily categorised.[1662] Instead of evolving in identifiable linear segments, trans identities, and the ability to comprehend the recognition process, develop across a fluid spectrum. While individuals' capacity to express gender identity increases with age, it is less clear that all minors' development tracks a standard age-based path. Current research suggests that, while many youth discover their preferred gender in infancy, others may only recognise that identity after puberty.[1663] Similarly, although adolescents typically make better-reasoned decisions than younger children, there are 15 and 16-year-old teenagers with under-matured faculties.[1664] For legal gender recognition, there is a fear that any bright-line limit might be both over-inclusive, embracing children whose best interests are not served by amending their gender status, and under-inclusive, excluding vulnerable young people who do experience a stable trans identity.[1665] Concerns regarding efficiency are also less relevant because of the comparatively small trans population size.[1666]

Ultimately, while human rights do not prescribe any one model, there may, in practice, be a need for compromise. Although some bright-line limits appear inevitable, affirming laws should also respond to the lived-realities of trans children and adolescents.

B. The Status of Minors Aged Between 16 and 17 Years

Among persons under the age of majority, trans adolescents, aged 16 and 17 years, occupy a unique position. Having (in most cases) navigated puberty, these individuals are more likely to express a stable trans identity into adulthood.[1667] On the cusp of majority, they have often experienced their preferred gender for an extended period and have reflected upon the consequences of legal recognition. Existing data suggests that, by 16 and 17 years, young people engage in enhanced decision-making procedures, and can arrive at well-reasoned, rational solutions.[1668] In many jurisdictions, 16 and 17-year-olds enjoy numerous adult-type entitlements, including voting privileges, the right to buy alcohol and the capacity to consent to

[1662] Ikuta (n 65), 222; Davidson and Schweppe (n 206), 65.
[1663] Pollock and Eyre (n 14), 212.
[1664]Albert and Steinberg (n 202), 216.
[1665] Valentine (n 246), 1108-1109; David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17(1) International Journal of Children's Rights 1, 14.
[1666] As noted in Chapter IV, this statement is contingent upon trans population sizes remaining comparatively small.
[1667] Shield (n 192), 389; Huft (n 170), 55.
[1668] Shield (n 192), 406. See also: Cunningham (n 200), 316; Weithorn and Campbell (n 234), 1596; Melton (n 204) 15.

both medical treatment and sexual intercourse. Within that context, there is a compelling argument that, although minors between 16 and 17 years remain children under UN CRC[1669], they have sufficiently evolved capacities for gender recognition on the same terms as adults.

C. Recognition for Children Under 16 Years

The position of minors under the age of 16 years is more complex. While there is evidence that such children can both externalise a clear gender identity and understand the consequences of legal recognition[1670], young people, as a class, exhibit more changeable and less stable characteristics. Below the age of 16 years, minors are likely to still experience (or are yet to experience) puberty. There is, thus, an increased risk that any expressed trans identity will not persist. Younger children have also had less time to live their preferred gender, and to consider what it would mean to change their legal status. Indeed, according to current research, before their teenage years, young people might not even have sufficient capacities to engage in those types of considerations.[1671] In such circumstances, as a matter of policy, it would not serve children's interest to rely upon the same rules as applied to adults. Instead, children under 16 years require a recognition system which accommodates their particular needs.

(iii.) 12 – 15 Years

Minors aged between 12 and 15 years are likely to be either experiencing or exiting puberty. Depending upon their precise age, they may have already lived or identified with their preferred gender for a number of years. While younger teenagers have reduced decision-making capacities compared with 16 and 17-year-olds, they typically engage in better decision-making processes than has generally been presumed. At least for older individuals within this group, there is evidence that they would understand the consequences of legal gender recognition.

Existing data supports legal affirmation for minors aged between 12 and 16 years. As in jurisdictions, such as Belgium and Norway, these individuals could apply for recognition through their parent or guardian.[1672] When making an application, parents or guardians should

[1669] UN CRC, art. 1. In jurisdictions where individuals achieve the age of majority before 18 years, persons aged 16 or 17 years may not come within the Convention definition of a 'child'.
[1670] Tobin and Levi (n 21), 302; Stieglitz (n 18), 194.
[1671] Weithorn and Campbell (n 234), 1595-1596; Grisso and Vierling (n 234), 420; Weller (n 234), 415.
[1672] Having regard to the fact that trans children rarely have the support of both parents or guardians, it would be preferable that consent from one parent or guardian should suffice. However, where only one parent or guardian agrees to recognition, there may be justification for greater (court or administrative) supervision of the affirmation process. As noted, in Argentina, art. 5 of Act Nº 26.743 provides for court oversight where there is a

prioritise the best interests of children, listen to their voices and afford sufficient weight having regard to the evolving capacities of the child. Two possible measures of support are: (a) access to an independent advisor who provides the child with impartial information on legal recognition (such as exists in Argentina)[1673]; and (b) consulting a child gender expert who can monitor the identification and expression of gender identity.

(iv.) Under 12 Years

The most difficult category of trans minors to recognise are those under 12 years. While there are many young people who, even before puberty, discover a persistent trans identity[1674], the precariousness and fluidity of youth means that reliably identifying these children, and affirming their preferred gender in a safe manner, presents unique and complex challenges.

A majority of children under 12 years are entering, or have yet to enter, puberty. There is thus an increased risk that, where children within this group express a trans identity, their sense of gender may alter or desist during the pubertal years. Young children (particularly infants) are often just beginning to explore their gender, and are less likely to have engaged in an extended period of personal reflection. They also have reduced decision-making capacities, and may not fully comprehend the consequences of amending their legal gender. Overall, there is a strong argument that law-makers should not legally recognise younger children as a matter of routine.

Instead, it may be preferable to engage in an alternative, two-pronged strategy. As with all observations in Section IV, this strategy largely reflects policy considerations. Although it is explained through concrete proposals, these are suggestions rather than mandatory standards. The strategy is merely one (of possibly numerous) approaches, and would have to be adapted to account for national norms.

Under the first prong, the law could operate a presumption of social transitions. Where young children express a consistent trans identity, they should be empowered to explore their preferred gender by socially transitioning. Supported by legal protections, trans minors would access public and private institutions in their preferred gender, and would be respected with regard to pronouns, names and use of facilities. Institutions, such as schools and public recreational

contentious application (e.g. where it is not possible to obtain parental consent, etc.).
[1673] Act Nº 26.743, art. 5 (Argentina).
[1674] Olson, Key and Eaton (n 158), 473.

services, would be required to make reasonable accommodations to affirm a child's social transition. Any institution, which wished to be exempt, would have to prove that: (a) acknowledging the child's social transition is superseded by another legitimate concern; and (b) that the child's preferred gender has been respected to the greatest extent possible. Social discrimination – either the fear that the child would be subject to abuse or that the child's identity would harm others – cannot justify an exemption to the general rule.

Social transitions allow children to explore their preferred gender in an affirming environment without the legal complications of amending gender markers. It means that, where parents or guardians subsequently decide to seek gender recognition, there is greater certainty that the child has experienced, and can anticipate, the consequences of living in another legal gender.

There may, however, be extraordinary circumstances where a child's interests are not best served by a social transition (the second prong). If a young person, under 12 years, has expressed an "intense", "persistent" and "consistent" trans identity[1675], there may be little justification for withholding legal recognition. This would particularly be the case where social transitions cannot cover all public or private interactions and where children, who only live in their preferred gender, are continuously required to "out" their trans identity. In such exceptional situations, and although the law operates a presumption for social transitions, there may be policy reasons to legally acknowledge the child.

As with minors aged between 12 and 16 years, gender recognition for children under 12 years would be requested by a parent or legal guardian. Once again, there would be a requirement to prioritise the best interests and voice of the child (although the evolving capacities standard may have a different impact for pre-pubescent children). As noted, young people may benefit from meeting with a state-appointed third-party, who provides age-appropriate information and ensures that, as far as practicable, children understand the recognition process. Under art. 5 of Argentina's Gender Identity Law 2012, a minor is always "assisted by a children's lawyer" where a parent or guardian applies for gender recognition on their behalf.[1676] Under the two-pronged strategy, young people under 12 years would only be formally acknowledged if there is sufficient evidence that the goals of gender recognition cannot be adequately achieved through a social transition.

[1675] Olson and others (n 129) p. 2; Joel Baum (n 196), 167; Cecile Unger (n 196), 348; Steensma and others (n 163), 587.
[1676] Act Nº 26.743, art. 5.

Conclusion

Chapter V evaluates minimum age requirements as a pre-condition for gender recognition. Around the world, a majority of jurisdictions either prohibit or restrict minors' access to legal transitions. While the status of trans young people remains comparatively under-explored in both human rights practice and scholarship, Chapter V illustrates that international children's rights can help shape national responses to gender diversity.

Chapter V reviews age limits against the child-sensitive, trans-inclusive human rights framework adopted in Chapter I. Identifying 'best interests' analysis as a primary consideration, Section II observes growing scholarly consensus that trans minors are best served by policies of early affirmation – rather than efforts to 'ignore' or 'correct' their gender. While certain researchers remain unconvinced about trans identities in youth, medical and legal institutions (including the United Nations Committee on the Rights of the Child) increasingly favour acknowledgment and support.

In Section III – remaining conscious of key child rights norms – Chapter V considers six medical and policy factors which explain whether trans children can be safely and securely affirmed. Exploring issues, such as persistence of trans identities in youth, minors' decision-making capacities and social transitions, Section III acknowledges both the possibilities for, and dangers of, extending legal recognition. While, as in preceding chapters, Section III exposes trans myths and assumptions, it also concedes important limitations – many of which conflict with contemporary trans advocacy positions.

Finally, in Section IV, the thesis offers observations on current intersections of gender recognition, minors and human rights. Section IV does not establish a 'human rights model' for trans minors, nor does it identify binding international norms. Rather, drawing from existing research data and considering child rights standards (e.g. right to be heard), Section IV pinpoints the key contours of youth recognition debates in which law-makers and judges must increasingly engage.

Chapter VI

Gender beyond the Binary:
The Requirement to Identify as Male or Female

Introduction

Chapter VI explores the requirement that, in order to obtain legal gender recognition, applicants must identify as either 'male' or 'female'. Around the world – save for rare, often culturally-specific exceptions[1677] – trans individuals, who want to be formally acknowledged in a preferred gender, are required to embrace (at least for official purposes) a legal 'man' or 'woman' identity.[1678] Acknowledging individuals who fall outside traditional gender categories[1679], Chapter VI considers the legitimacy of male-female pre-conditions.

In the preceding chapters, the thesis has evaluated conditions of recognition which do not (for the most part at least) challenge binary gender narratives. Although removing requirements for physical intervention, divorce or reaching the point of adulthood undermines heteronormative and cisnormative[1680] conventions, it respects the inevitability of 'man' and 'woman' classifications. A trans man, who remains married to his male spouse raises the spectre of homosexuality and 'gay' marital unions. He does not, however, challenge the principle that all persons who access marriage – whether heterosexual, homosexual or bisexual – must have "M" or "F" gender markers. Similarly, minors, who request legal recognition before the age of majority, create unease over capacity and the unintended consequences of early transitions. Yet, requiring that children can only be affirmed as male or female means that they do not fall outside the bounds of gendered intelligibility.

For many individuals, however, their internal understanding of gender is not captured by existing binary norms. While these persons do not identify with their birth-assigned gender, neither do they desire affirmation of a male or female identity. Instead, such individuals self-

[1677] See Section IV below.
[1678] Dorian Needham, 'A Categorical Imperative? Questioning the Need for Sexual Classification in Québec' (2011) 52(1) Les Cahiers de droit 71, 73; Sonia Katyal, 'The Numerous Clausus of Sex' (2017) 84 University of Chicago Law Review 389, 405.
[1679] See Section I below.
[1680] 'Cisnormativity' refers to a belief in the normality, appropriateness and generality of identifying with the gender that one is assigned at birth.

identify beyond or outside the traditional binary.[1681] They may experience a static 'in-between' gender, a fluid and changing gender or, in some cases, no gender at all. For these persons, their identity not only destabilises gender immutability and legitimises non-normative gender expression (characteristics that they may share with binary-trans individuals), they also defy the dichotomous, bi-gendered framework, which law mandates. Against a background of rigid political and legal structures, non-male and non-female identities are not merely beyond the binary. For many observers – both state actors and the general public – they are also beyond comprehension.

If trans minors constitute the current "cause du jour"[1682] for gender identity advocacy, non-binary experiences are the new frontier. While the concept of legally acknowledging individuals as non-male or non-female is foreign to all but a small minority of legal regimes, non-binary discourse is increasingly evident both within intra-trans debates and wider public conversations on gender diversity.[1683]

Chapter VI evaluates mandatory male-female classification as a pre-condition for gender recognition. It explores the legitimacy of requiring applicants to identify as 'men' or 'women', and it considers the practicality of acknowledging persons across a broader spectrum of gender

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[1681] See generally: Christina Richards and others, 'Non-binary or genderqueer genders' (2016) 28(1) International Review of Psychiatry 95; Jack Harrison, Jaime Grant and Jody L Herman, 'A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey' (2012) 2 LGBTQ Policy Journal at the Harvard Kennedy School 13; Surya Monro, 'Beyond Male and Female: Poststructuralism and the Spectrum of Gender' (2005) 8(1) International Journal of Transgenderism 3; Doan (n 5), Petra L Doan, 'The tyranny of gendered spaces – reflections from beyond the gender dichotomy' (2010) 17(5) Gender, Place and Culture 635; Anna James Neuman Wipfler, 'Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents' (2016) 39(2) Harvard Journal of Law and Gender 491; Maureen D Connelly and others, 'The Mental Health of Transgender Youth: Advances in Understanding' (2016) 59(5) Journal of Adolescent Health 489, 489.

[1682] Tey Meadow, *Bringing Up the Transgender Child: Parents, Activism and the New Gender Stories* (NYU 2011) 11.

[1683] Jessica Murphy, 'Toronto professor Jordan Peterson takes on gender-neutral pronouns' (*BBC Website,* 4 November 2016) http://www.bbc.com/news/world-us-canada-37875695 accessed 21 March 2017; 'I'm a Non-Binary 10-Year-Old' (*BBC Website*, 18 September 2016) http://www.bbc.com/news/magazine-37383914 accessed 10 July 2017; Julie Scelfo, 'A University Recognises a Third Gender: Neutral' (*New York Times,* 3 February 2015) https://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?_r=3 accessed 18 March 2017; Raillan Brooks, '"He", "She", "They" and "Us"' (*New York Times*, 5 April 2017) https://www.nytimes.com/2017/04/05/insider/reporting-limits-of-language-transgender-genderneutral-pronouns.html accessed 10 July 2017; Polly Carmichael, 'A Child without A Gender Challenges our Preconceptions about Sex' (*The Guardian*, 6 July 2017) https://www.theguardian.com/commentisfree/2017/jul/06/child-without-gender-sex-canadian-health-card-u accessed 10 July 2017; Naaman Zhou, 'Gender Diverse Students "Could Face Delays to Centrelink Payment"' (*The Guardian*, 6 April 2017) https://www.google.ie/search?q=wimbledon&oq=wim&aqs=chrome.0.69i59j0j69i59j69i60j69i57j69i61.1738j0j7&sourceid=chrome&ie=UTF-8 accessed 10 July 2017; Sarah Marsh, 'The gender-fluid generation: young people on being male, female or non-binary' (*The Guardian*, 23 March 2016) https://www.theguardian.com/commentisfree/2016/mar/23/gender-fluid-generation-young-people-male-female-trans accessed 16 March 2017.

identities. At the outset, it is important to recognise that assessing 'binary gender' pre-conditions involves unique considerations as compared with other requirements for legal gender recognition. The human rights methodology and analysis thus far applied throughout this thesis (i.e. scrutinising medicalisation, divorce and age limits against a trans-inclusive framework) may have less practical impact where non-binary debates are only beginning to emerge, and thus where human rights actors have reflected significantly less upon the legitimacy of binary gender requirements.

A common feature of Chapters II – V is the extent to which human rights principles mapped neatly onto the conditions of recognition under consideration. Involuntary medicalisation is incompatible with bodily integrity. Forced divorce compromises marital and family life. Trans minors are less frequently addressed by human rights jurisprudence but existing child rights guarantees (e.g. 'best interests' reasoning, etc.) are a blueprint for critiquing minimum age limits. Human rights are, therefore, a practical and coherent standard for review.

In terms of the requirement that applicants for recognition identify as a 'man' or a 'woman', however, there is less certainty about the utility of human rights analysis. On the one hand, non-male and non-female persons do enjoy all the same protections as their binary peers. They benefit from a general right to be acknowledged in their preferred gender, and they should be formally recognised without unwanted physical interventions, relationship dissolutions or the absolute exclusion of minors. As noted in Chapter I, non-binary experiences can be incorporated into 'gender identity' protections so that non-man and non-woman applicants should not experience discrimination in gender recognition processes.

Yet, on the other hand, one cannot ignore the almost complete invisibility of non-binary identities in existing human rights law – both hard and soft. While human rights actors increasingly embrace trans identities, they have focused (almost) exclusively[1684] on binary gender narratives. Scrutinising the legitimacy of male-female pre-conditions, one can reasonable ask: (a) whether human rights have any practical impact; and if yes, (b) what specific protections or guarantees against mandatory binary classification are relevant? While, as noted, the trans-inclusive framework set out in Chapter I does apply equally to non-binary populations, it is unclear how that framework could condemn male-female preconditions for gender recognition. The concept of 'gender identity' in non-discrimination law can protect a broad

[1684] See Section IV below.

spectrum of non-traditional identities. Yet, the exceptional position of non-binary applicants – seeking recognition beyond standard classification – makes it difficult to identify a *similarly-situated* (binary) applicant who receives favourable treatment.

With these limitations in mind, Chapter VI adopts a more general methodology. The focus of the discussion remains on evaluating whether it is legitimate to require that, in order to obtain legal recognition, applicants must bring their identities within the binary. However, as understanding of this topic begins to develop, Chapter VI seeks to identify the main contours of non-binary debates and the context in which non-binary populations are currently denied legal affirmation. The chapter is guided by core human rights considerations, not least the overarching principle that (as explained in the introductory chapter) trans individuals should be acknowledged in their preferred gender. Yet, conceding the dearth of available human rights jurisprudence, Chapter VI explores relevant policy factors (e.g. social justifications for requiring 'male' and 'female' identification; non-binary advocacy arguments which challenge dichotomous legal gender, etc.) which highlight both the potential within, and arguments against, opening gender recognition to non-man and non-woman identities. While, similar to the review of minimum age limits, Chapter VI may not offer conclusive recommendations, it does provide important insights on the continued legitimacy and practicality of a rigid, bi-gender framework.

Chapter VI proceeds in six sections. Section I introduces the concept of non-male and non-female identities. Drawing heavily upon non-binary narratives, Section I explains the multi-faceted ways in which individuals can experience and express a non-orthodox gender. It also speaks to the comparative invisibility of non-binary rights in historic (and contemporary) trans advocacy. In Section II, the thesis explores binary gender as a foundational legal principle, noting how, in order to be formally acknowledged in law, trans persons must embrace either a 'male' or 'female' status. Observing the centrality of man-woman classifications in law (as well as society), Section II sets out the context in which, around the world, non-binary genders fall outside the contours of legal intelligibility.

In Section III, having identified the legal limbo in which non-male and non-female identities exist, the chapter moves to discuss justifications which have been raised in favour of excluding non-binary genders from legal recognition processes. Noting resistance from both the general public and binary-trans peers, Section III investigates whether this pushback – which supports the maintenance of only two gender categories – offers a reasonable critique of non-binary

affirmation. In Section IV, despite the existence of these objections, the chapter observes how non-binary activists are challenging mandatory 'male' or 'female' categorisation. Section IV evaluates the coherence and practicality of their arguments, identifying (and warning against) certain pitfalls in intersex and 'existing regimes' strategies.

Section V addresses possible models for non-binary recognition, exploring the options which can be introduced if state authorities remove male-female requirements. The section acknowledges the 'inclusivity' benefits of 'third' or additional classifications but also notes their practical and symbolic limitations. Finally, in Section VI, the thesis offers concluding remarks. Although there is no current human right which would require the abolition of dichotomous legal gender, Section VI suggests reasonable accommodations for persons who fall outside the male-female binary.

I. Non-Binary Gender: Invisible Identities

The standard trans narrative presents: (a) male or female-identified adult individuals[1685] who; (b) feel trapped in the wrong body[1686]; (c) wish to alter their physical characteristics[1687] and; (d) desire heterosexual relationships.[1688] While providing legal recognition relaxes rigid conventions on gender immutability, it continues to foreground adult, heterosexual and binary identities as the only authentic trans experience. As the preceding chapters have illustrated, however, the existence of a unitary trans narrative is a fallacy, ignoring the diverse ways in which individuals live and understand their gender identity.[1689] Among the people, who seek to legally transition from their birth-assigned gender, there are those who do not identify as either male or female.[1690] Experiencing a gender beyond the binary (often referred to as a 'non-binary'

[1685] Jake Pyne, 'Health and Well-Being among Gender-Independent Children' in Elizabeth J Meyer and Annie Pullen Sansfaçon *(eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014) 37.
[1686] Julia Serano, *Whipping Girl* (Seal Press 2007) 1.
[1687] Sana Loue, 'Transsexualism in medicolegal limine: an examination and a proposal for change' (1996) 24(1) Journal of Psychiatry and Law 27, 34.
[1688] S Colton Meier and others, 'Romantic Relationships of Female-to-Male Trans Men: A Descriptive Study' (2013) 14(2) International Journal of Transgenderism 75, 76; Myrte Dierckx and others, 'Families in transition: A literature review' (2016) 28(1) International Review of Psychiatry 36, 39.
[1689] Jamieson Green, *Becoming a Visible Man* (Vanderbilt University Press 2004) 121.
[1690] Daphna Joel and others, 'Queering gender: studying gender identity in 'normative' individuals' (2013) 5(4) Psychology and Sexuality 1, 2; Tracey Yeadon-Lee,
'What's the Story? Exploring Online Narratives of Non-binary Gender Identities' (2016) 11(2)
The International Journal of Interdisciplinary Social and Community Studies 19 (p.12)
http://eprints.hud.ac.uk/28036/8/Whats%20the%20Story%20article%20-%20first%20sub%20draft%20%20.pdf accessed 16 March 2017; Kay Siebler, 'Transgender Transitions: Sex/Gender Binaries in the Digital Age' (2012) 16(1) Journal of Gay and Lesbian Mental Health 74, 79.

identity[1691]), these persons have numerous self-identifications, and manifest their gender in highly subjective and deeply personal ways.[1692]

Perhaps the most publicised and recognisable expression of non-binary identity is the language of a 'third' gender[1693]. According to Roughgarden, "[s]ome people feel they inhabit a space between man and woman – a third gender."[1694] Within a social and legal context dominated by only two gender classes, individuals find utility in describing their identity as a 'third' or 'other' option. While third gender usually means that a person has a stable or fixed self-identification (outside male or female), the precise contours of that experience can vary significantly.

For certain people, third gender does indeed mean falling "somewhere in the middle" – a static point on the continuum between man and woman.[1695] In individual cases, that point may gravitate more towards either masculinity or femininity so that, while the person does not experience a male or female gender, they may nonetheless be appropriately placed on a masculine or feminine spectrum.[1696] Other persons express their identity as a combination of genders – male, female and beyond.[1697] While these individuals define their gender as one single identity, it is often the product of numerous, possibly even oppositional, factors.

Non-binary identities are not confined to those who have a fixed gender outside man and woman. Whereas some individuals inhabit a static point on the spectrum between male and female, others float along that spectrum, experiencing different gender identities at different times and in different situations.[1698] As part of their recent exploration of modern trans identities in the United States, Beemyn and Rankin observe individuals pursuing a "multi-gendered life."[1699]

[1691] Elise R Carrotte and others, '"I am yet to encounter any survey that actually reflects my life": a qualitative study of inclusivity in sexual health research' (2016) 16 BMC Medical Research Methodology 86.
[1692] Harrison, Grant and Herman (n 5), 20.
[1693] Monro (n 5), 18. See also: 'Should we Use Gender Neutral Language' (*BBC Big Questions*, 9 April 2017) https://www.youtube.com/watch?v=dRBNbWeEI4w accessed 12 July 2017.
[1694] Joan Roughgarden, *Evolution's Rainbow: Diversity, Gender and Sexuality in Nature and in People* (2nd edn, University of California Press 2009) 393.
[1695] Genny Beemyn and Susan Rankin, *The Lives of Transgender People* (Columbia University Press 2011) 26.
[1696] Nicole L Saltzberg, *Developing a Model of Transmasculine Identity* (University of Miami 2010) 2, 45-46.
[1697] Lauren Bishop, 'Gender and Sex Designations for Identification Purposes: A Discussion on Inclusive Documentation for a Less Assimilationist Society' (2015) 30(2) Wisconsin Journal of Law, Gender and Society 131, 135.
[1698] Emma Dargie and others, 'Somewhere under the Rainbow: Exploring the Identities and Experiences of Trans Persons' (2014) 23(2) The Canadian Journal of Human Sexuality 60, 62; Marsh (n 7); Julie L Nagoshi, Stephan/ie Brzuzy and Heather K Terrell, 'Deconstructing the complex perceptions of gender roles, gender identity, and sexual orientation among transgender individuals' (2012) 22(4) Feminism and Psychology 405, 415.
[1699] Beemyn and Rankin (n 19) 27.

For some, "multi-dimensional"[1700] gender is a fast-moving, evolving process, where one's sense of self constantly changes and regenerates.[1701] In many cases, such individuals will conceptualise their identities through the language of flux or fluidity.[1702] While they may feel more masculine or feminine depending upon the prevailing circumstances, they will never fully self-identify as either male or female. Bornstein explains gender fluidity as "the ability to freely and knowingly become…many of a limitless number of genders, for any length of time, at any rate of change."[1703]

On the other hand, there are also non-binary persons who describe a more nuanced, less frenetic experience of gender flux.[1704] While these individuals do not embrace a static gender identity over the course of their lifetime, they may "feel entirely masculine or entirely feminine on a given day."[1705] Fluctuations in their self-identification arise less frequently, over a period of weeks or even months.[1706] There are, in addition to static and fluid positioning outside the binary, those who claim no gender whatsoever, and who are commonly referred to as 'agender' or non-gendered.[1707]

The ways in which non-binary persons express their preferred gender – both physically and linguistically – reflect the complex, multiplicity of identities embraced beyond the binary. For

[1700] Doan (n 5), 637.
[1701] Dylan Vade, 'Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is more Inclusive of Transgender People' (2005) 11(2) Michigan Journal of Gender and Law 253, 267; Vic Valentine, *Non-Binary People's Experiences in the UK* (Scottish Trans Alliance 2016) 14; Katie Byrne, 'Gender fluidity needs to be clearly defined and vigorously discussed' (*The Irish Independent,* 13 December 2015) http://www.independent.ie/life/katie-byrne-gender-fluidity-needs-to-be-clearly-defined-and-vigorously-discussed-34270932.html accessed 17 March 2017.
[1702] Maria Pahl, *'Immutability of Identity, Title VII, and the ADA Amendment Act: How Being "Regarded As" Transgender Could Affect Employment Discrimination'* (2014) 3(1) De Paul Journal of Women, Gender and the Law 63, 68; Marsh (n 7).
[1703] Kate Bornstein, *Gender Outlaw* (Routledge 1994) 52.
[1704] Bishop (n 21), 135.
[1705] Christina Capatides, 'The type of Transgender You Haven't Heard of' (*CBS News*, 10 July 2017) http://www.cbsnews.com/news/non-binary-transgender-you-havent-heard-of/ accessed 10 July 2017. See also: Lore Graham, 'How to be a Good Ally to Non-Binary People' (*xojane website*, 11 January 2016) http://www.xojane.com/issues/how-to-be-a-good-ally-to-nonbinary-people accessed 18 March 2017.
[1706] Nagoshi, Brzuzy and Terrell (n 22), 415; Beemyn and Rankin (n 19) 27. Strudwick speaks of a young non-binary individual who expresses a "98.7%" male identity, Patrick Strudwick, 'This Is The Moment A 15-Year-Old Told Their Parents: "I'm 98% Male"' (*Buzzfeed,* 16 June 2016) https://www.buzzfeed.com/patrickstrudwick/watch-the-moment-a-15-year-old-came-out-to-their-parents-as?utm_term=.noMPL16MJ#.biQOxz0pl accessed 18 March 2017.
[1707] Brian Kritz, 'The Global Transgender Population and the International Criminal Court' (2014) 17 Yale Human Rights and Development Law Journal 1, 5; Ian Farrell and Nancy Leong, 'Gender Diversity and Same-Sex Marriage' (2014) 114 Columbia Law Review Sidebar 97, 99; Valentine (n 25) 12; Tyler Ford, 'My life without gender: "Strangers are desperate to know what genitalia I have"' (*The Guardian,* 7 August 2015) https://www.theguardian.com/world/2015/aug/07/my-life-without-gender-strangers-are-desperate-to-know-what-genitalia-i-have accessed 18 March 2017.

many people, language plays a particularly important role in that process of expression.[1708] Although 'non-binary' is the best known and most widely used term to describe individuals who are neither female nor male (and the standard term employed throughout this chapter)[1709], it is only one of the possibly infinite labels that have been adopted to define personal gender identity.[1710] Frohard-Dourlent *et al* write that the "language people use is shifting as awareness of the complexity of sex and gender rapidly increases."[1711] Examples of modern non-binary terminology now include, *inter alia*, genderqueer[1712], two-spirit[1713], demigender[1714], androgyne[1715] and neutrois[1716]. In some instances, individuals may use more than one description to accurately convey their self-identification.[1717] They may also embrace an increasingly broad (and sometimes controversial[1718]) set of personal pronouns[1719], eschewing the traditional 'he/she/his/her' in favour of terms, such as 'xe/xyr/xem/xyrself'[1720] and 'zie/hir'.[1721] In 2015, the American Dialect Society chose the singular, gender-neutral 'they' as its 'Word of the

[1708] Leslie Feinberg, *Transgender Warriors*: *Making History from Joan of Arc to Dennis Rodman* (Beacon Press 1996) 156.
[1709] Hélène Frohard-Dourlent and others, '"I would have preferred more options": accounting for non-binary youth in health research' (2017) 24(1) Nursing Inquiry (p. 2).
[1710] For a sample of the possible identities with which non-binary persons can, and do, identify, see the helpful list provided on the genderqueer blog, Gender Queeries, see: 'Some GenderQueer Identities' (*Gender Queeries Website*, *No Date Available*) http://genderqueeries.tumblr.com/identities accessed 18 March 2017.
[1711] Frohard-Dourlent and others (n 33), p. 2.
[1712] According to the US National Centre for Transgender Equality (NCTE), "genderqueer" is a "term used by some individuals who identify as neither entirely male nor entirely female", 'Transgender Terminology' (*NCTE Website*, 15 January 2014) http://www.transequality.org/issues/resources/transgender-terminology accessed 18 March 2017.
[1713] NCTE defines "Two-Spirit" as a "contemporary term that refers to the historical and current First Nations people whose individual spirits were a blend of male and female spirits. This term has been reclaimed by some in Native American LGBT communities in order to honour their heritage and provide an alternative to the Western labels of gay, lesbian, bisexual, or transgender", 'Transgender Terminology' (*NCTE Website*, 15 January 2014) http://www.transequality.org/issues/resources/transgender-terminology accessed 18 March 2017.
[1714] According to Transgender Equality Network Ireland (TENI), "demigender" is a "gender identity that involves feeling a partial, but not a full, connection to a particular gender identity. Demigender people often identify as non-binary. Examples of demigender identities include demigirl, demiboy, and demiandrogyne", 'Trans Terms' (*TENI Website, No Date Available*) http://teni.ie/page.aspx?contentid=139 accessed 18 March 2017.
[1715] TENI states that "androgyne" refers to "a person whose gender identity is both male and female, or neither male nor female. They might present as a combination of male and female or as sometimes male and sometimes female", 'Trans Terms' (*TENI Website, No Date Available*) http://teni.ie/page.aspx?contentid=139 accessed 18 March 2017.
[1716] TENI defines "neutrois" as "a non-binary gender identity which is considered to be a neutral or null gender. It may also be used to mean genderless, and has considerable overlap with agender – some people who consider themselves neutrally gendered or genderless may identify as both, while others prefer one term or the other", 'Trans Terms' (*TENI Website, No Date Available*) http://teni.ie/page.aspx?contentid=139 accessed 18 March 2017.
[1717] Dargie and others (n 22), 62.
[1718] In particular, the use of "they" in order to refer to individual persons has encouraged significant grammatical backlash, see: Scelfo (n 7).
[1719] Bradon Darr and Tyler Kibbey, 'Pronouns and Thoughts on Neutrality: Gender Concerns in Modern Grammar' (2016) 7(1) Pursuit: The Journal of Undergraduate Research at the University of Tennessee 71, 75.
[1720] Richards and others (n 5), 96.
[1721] Yeadon-Lee (n 14) p. 3.

Year'.[1722] The society's choice was an acknowledgment that the novel use of new and existing terminology has encouraged greater public discourse on gender diversity.[1723]

Non-binary identities have been largely absent from contemporary debates and movements for trans rights.[1724] Although, within the past five years, there has been a general improvement in public awareness of trans lives, media and political coverage has privileged those who express uncomplicated, familiar trans narratives.[1725] For Nicolazzo, the growing visibility of trans public figures, such as Laverne Cox and Janet Mock, has the potential to be both culturally transformative and socially "liberating".[1726] Yet, by focusing on trans women, who reflect and reinforce societal expectations about binary femininity, such depictions ultimately exclude and erase "the existence of non-binary [trans] people."[1727] While, on popular YouTube and Tumblr platforms, non-binary individuals share stories of living outside male and female categorisation[1728], there remains "few representations in mainstream media of a [trans] person who defies these categories."[1729] Just as the growing visibility of trans minors has helped a new generation of trans youth to comprehend their gendered experiences[1730], so too the implicit suppression of non-binary experiences means that a "majority of individuals…do not even consider that there is an alternative to the gender binary."[1731]

[1722] Jessica Bennett, 'She? Ze? They? What's in a Pronoun?' (*New York Times,* 30 January 2016) https://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html?mtrref=query.nytimes.com&_r=0 accessed 18 March 2017.
[1723] ibid.
[1724] Siebler (n 14), 80; Lisa M Diamond and Molly Butterworth, 'Questioning Gender and Sexual Identity: Dynamic Links Over Time' (2008) 59(5-6) Sex Roles 365, 366.
[1725] Capatides (n 29); Philip R Corbett, "Mx.'? Did The Times Adopt a New, Gender-Neutral Courtesy Title?' (*The New York Times,* 3 December 2015) https://www.nytimes.com/2015/12/03/insider/mx-did-the-times-adopt-a-new-transgender-courtesy-title.html accessed 19 March 2017; Kay Cairns, '"As non-binary, someone not strictly a man or a woman, I'm seen as too confusing to discuss"' (*The Irish Times,* 30 August 2016) http://www.irishtimes.com/life-and-style/people/as-non-binary-someone-not-strictly-a-man-or-a-woman-i-m-seen-as-too-confusing-to-discuss-1.2772871 accessed 19 March 2017.
[1726] Z Nicolazzo, '"It's a hard line to walk": black non-binary trans* collegians' perspectives on passing, realness, and trans*-normativity' (2016) 29(9) International Journal of Qualitative Studies in Education 1173, 1184.
[1727] ibid.
[1728] Richard Ekins and Dave King, 'The Emergence of New Transgender Identities in the Age of the Internet' in Sally Hines and Tam Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010) 28; Sarah Hampston, 'Their story: "I want to be somewhere between two fixed points of gender"' (*The Globe and Mail*, 5 January 2017) http://www.theglobeandmail.com/news/national/their-story-i-want-to-be-somewhere-between-two-fixed-points-ofgender/article28456135/ accessed 19 March 2017.
[1729] Siebler (n 14), 75.
[1730] Shannon Price Minter, 'Supporting Transgender Children: New Legal, Social, and Medical Approaches' (2012) 15(3) Journal of Homosexuality 422, 425; Herbert J Bonifacio and Stephen M Rosenthal, 'Gender Variance and Dysphoria in Children and Adolescents' (2015) 62(4) Paediatric Clinics of North America 1001, 1001.
[1731] Tam Sanger, 'Trans governmentality: the production and regulation of gendered subjectivities' (2008) 17(1) Journal of Gender Studies 41, 47.

Academia too has failed to meaningfully engage with trans persons who experience neither male nor female identities.[1732] Although queer and feminist scholars have long theorised a utopian existence free from binary gender, few researchers are documenting or foregrounding those individuals – both young and old – whose existence actually applies the theory. Even among trans and queer rights advocates, there has often been a failure to properly incorporate less stable gender identities into their work.[1733] According to Neuman Wipfler, "the rhetoric of legal advocacy on behalf of trans clients for the most part has hewed to a binary conception of gender identity, accepting it as a natural."[1734] In seeking legal gender recognition or protection from discrimination, advocates have argued that the law should respect trans individuals – as *women* or *men*.[1735]

One might respond that, as some members of the non-binary community specifically self-identify outside the wider trans umbrella, it is neither surprising nor unreasonable that non-binary concerns are not a primary focus for expressly *trans* activism. Indeed, it would be troubling if trans advocates unilaterally acted in the name of non-binary communities, without proper consent and consultation. Yet, the reality is that many non-binary individuals do identify within the trans continuum and seek to play an active, constructive role within trans advocacy.[1736] Excluded from legal and political strategizing, there is a fear that non-binary concerns will remain (as discussed below) largely unintelligible and that non-binary persons may be relegated to the status of second class trans citizens.

[1732] Shannon Price Minter, 'Foreword' in Genny Beemyn and Susan Rankin, *The Lives of Transgender People* (Columbia University Press 2011) viii; Frohard-Dourlent and others (n 33), p. 3.
[1733] Stevie V Tran and Elizabeth M Glazer, 'Transgenderless' (2012) 35(2) Harvard Journal of Law and Gender 399, 402; Meredith Talusan, 'Telling Trans Stories Beyond "Born in the Wrong Body"' (*Buzzfeed,* 14 May 2016) https://www.buzzfeed.com/meredithtalusan/telling-trans-stories-beyond-born-in-the-wrong-body?utm_term=.kr8Repoal#.itRyeZq3B accessed 19 March 2017; Ashe McGovern, 'Bathroom Bills, Selfies, and the Erasure of Non-binary Trans People' (*The Advocate,* 1 April 2016) http://www.advocate.com/commentary/2016/4/01/bathroom-bills-selfies-and-erasure-nonbinary-trans-people accessed 19 March 2017.
[1734] Wipfler (n 5), 498.
[1735] Train and Glazer (n 57), 419; Anna Kłonkowska, 'Dual-unity or dichotomy? Androgyny and social construction of gender bipartition' (2014) 7(2) Creativity Studies 118, 127.
[1736] Sandy E James and others, *The Report of the 2015 U.S. Transgender Survey* (NCTE 2016) 44.

II. Binary Gender:
The Legal Requirement to Self-Identify as 'Male' or 'Female'

Around the world, the experiences of individuals who live beyond the binary are not reflected in the national rules and frameworks which organise modern societies.[1737] While non-binary lives may question the inevitability of bi-genderism, they have so far not replaced the (seemingly irrefutable) legal presumption that all persons inhabit either a male or female identity.[1738] Gilbert writes that "'basic bigenderism' is [still] found throughout the bureaucratic devices and institutions that govern our daily lives."[1739]

Binary gender is a core pillar for the majority of contemporary legal, social and cultural structures. Whether engaging with public institutions (e.g. birth registration, social security, etc.) or private actors (familial and friend relationships), there is, in all but the rarest of circumstances, an assumption that persons identify comfortably with one of two dichotomous genders.[1740] Needham suggests that binary gender is now so ingrained within wider public consciousness that most people have never considered alternative gender possibilities.[1741] Indeed, according to Butler, in order to even qualify for basic recognition as a human being, one must adopt the prevailing gender orthodoxy: "persons only become intelligible through becoming gendered in conformity with recognisable standards of gender intelligibility."[1742]

Non-binary individuals experience significant pressure to bring their identities within the acceptable limits of gendered self-identification.[1743] Through a mixture of regulatory coercion and social marginalisation, persons quickly discover that maintaining a non-male or non-female identity precludes possibilities for a liveable life.[1744] Doan warns that "gender variant identities

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[1737] Needham (n 2), 73; Katyal (n 2), 405.
[1738] Wipfler (n 5), 496; Laurie Penny, 'Laurie Penny on gender: Society needs to get over its harmful obsession with labelling us all girls or boys' (*The New Statesman*, 30 August 2013) http://www.newstatesman.com/politics/2013/08/society-needs-get-over-its-harmful-obsession-labelling-us-all-girls-or-boys accessed 19 March 2017.
[1739] Miqqi Alicia Gilbert, 'Defeating Bigenderism: Changing Gender Assumptions in the Twenty-first Century' (2009) 24(3) Hypatia 93, 95.
[1740] Sara R Benson, 'Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed' (2005) 12(1) Cardozo Journal of Law and Gender 31, 58; Julie A Greenberg, 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41(2) Arizona Law Review 265, 275.
[1741] Needham (n 2), 73.
[1742] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 122.
[1743] Mel Wiseman and Sarah Davidson, 'Problems with binary gender discourse: Using context to promote flexibility and connection in gender identity' (2011) 17(4) Clinical Child Psychology and Psychiatry 528, 530; Bishop (n 21), 141; Aaron Devor, 'Gender Blending Females: Women and Sometimes Men' (1987) 31(1) American Behavioural Scientist 12, 22.
[1744] Erin Calhoun Davis, 'Situating "Fluidity" (trans) gender identification and the Regulation of gender diversity' (2009) 15(1) GLQ: A Journal of Lesbian and Gay Studies 97, 113.

challenge gender norms at a significant social cost, namely the 'trade-offs in terms of such things as social power, social approval and material benefits.'"[1745]

Non-binary individuals not only struggle to navigate official institutions, such as the law and social services, but also experience increased rates of "abuse" and "social isolation".[1746] For many non-binary persons, the negative consequences of living beyond male and female categories result in higher rates of self-censorship and the suppression of one's true experience of gender.[1747] This in turn may have a "serious and significant impact" on both collective and individual "emotional wellbeing".[1748] Recent evidence suggests that – even compared with the generally elevated rates of physical and emotional distress among trans populations – non-binary individuals are a particularly at-risk group.[1749]

Law is a primary instrument used to control non-binary identities. As noted in the introductory section, the vast majority of legal systems – national and international – do not acknowledge third, fluid or situational genders. In order to obtain formal affirmation of their preferred gender, applicants for legal recognition must bring their identities within a rigid male-female dichotomy. As a mechanism of validating identity, the law obliges individuals to identify as either 'men' or 'woman'.[1750] While a small number of (usually culturally specific) exceptions do exist and are discussed below, they have not meaningfully impacted the availability of only 'M' or 'F' gender markers. Individuals who experience their gender outside those categories, and who apply for accurate legal recognition, inevitably discover that their identities are unintelligible to the law and its administrators.[1751] An individual who insists upon non-binary status, and refuses to meet the existing male or female requirements, suffers reduced access to

[1745] Doan (n 5), 639.
[1746] Wiseman and Davidson (n 67), 530.
[1747] Dana M Stachowiak, 'Queering it up, strutting our threads, and baring our souls: genderqueer individuals negotiating social and felt sense of gender' (2017) 26(5) Journal of Gender Studies 1, 7; Patricia Gagne, Richard Tewksbury and Deanna McGaughey, 'Coming out and Crossing over: Identity Formation and Proclamation in a Transgender Community' (1997) 11(4) Gender and Society 478, 504.
[1748] Valentine (n 25) 47.
[1749] Kłonkowska (n 59), 127.
[1749] James and others (n 60) 105; Carrotte and others (n 15), p. 5.
[1750] Benson (n 64), 292; Elizabeth Reilly, 'Radical Tweak - Relocating the Power to Assign Sex - From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality' (2005) 12(1) Cardozo Journal of Law and Gender 297, 297.
[1751] *In Re Anonymous* 293 N.Y.S.2d 834, 837 (Civ. Ct. 1968); Damian A Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2013) 29(4) American University International Law Review 797, 802; Theodore Bennett, '"No Man's Land": Non-Binary Sex Identification in Australian Law and Policy (2014) 37(3) University of New South Wales Law Journal 847, 850-851.

both identification documents (e.g. drivers licence, passport, etc.) and legal rights, such as relationship recognition.[1752]

III. Justifications for Enforcing Binary Gender Requirements

Considering both the existence of non-binary persons, and the legal and social hardships that they suffer, one might ask why there have not been greater attempts to remove rigid bi-gender requirements from legal recognition frameworks. One obvious response might be the lack of social and political visibility discussed earlier. If neither lawmakers, nor the general public, understand lives outside the binary, and if trans peers fail to prioritise or adequately promote non-binary rights, it is unsurprising that no significant measures have been adopted to remedy the status quo.

Yet the current requirements for 'male' or 'female' identification cannot be explained merely as the logical consequence of political and societal indifference. While unfamiliarity can certainly delay social progress, it is not the only hurdle to recognition beyond 'man' and 'woman'. Rather, across broad sections of society, there remains both suspicion and discomfort with lives outside the binary. Objections are raised both to the frameworks through which non-binary identities have been presented and the possible consequences of removing existing 'male' and 'female' pre-conditions.

The requirement that applicants come within the gender binary is perhaps unique among the various conditions for legal recognition considered throughout this thesis. Although – just like rejecting physical interventions, maintaining a trans marriage and affirming trans minors – expanding towards non-binary recognition incites opposition from sections of the general public, it is also the subject of severe critique within the wider trans community.[1753] This section investigates both general societal, as well as trans-specific, justifications for binary gender requirements. It explores the various criticisms which are levelled against non-male and non-female lives and assesses whether such critiques merely recycle historic objections to non-cisgender identities.

[1752] See e.g. testimony of Christie Elan-Cain to the UK Transgender Equality Inquiry, see: 'Oral Evidence 13 October 2015' (*Women and Equalities Committee Website*, 22 October 2015) (p. 32) http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/oral/23159.pdf accessed 11 July 2017.

[1753] According to Capatides, "non-binary people don't just struggle to explain themselves to non-trans people…they have to fight for acceptance within the trans community as well", Capatides (n 29).

A. General Societal Resistance to Legal Affirmation of Non-Binary Identities

A primary justification for legally acknowledging only binary genders arises from claims that non-binary experiences (and identities) are "not real".[1754] While the general public (at least in certain parts of the world) is increasingly comfortable with individuals transitioning from male to female (and vice versa), there remains deep scepticism as to whether a person can inhabit a space in-between or outside the gender binary.[1755] James *et al* report that "non-binary identity is often dismissed as not being a real identity or just a phase."[1756] Individuals who self-identify outside male or female must not be legally acknowledged, either because they are "confused"[1757] or because they are experiencing a period of transition.[1758] Numerous non-male and non-female persons recall accusations that they do not properly understand their gender and that they should be disqualified from legal affirmation.[1759] There is also the assumption that non-binary identities are a stepping phase, and that the law must wait until an individual has settled upon their definitive (binary) gender.[1760]

A particularly influential justification for maintaining binary gender requirements is the assertion that non-binary identities are a political strategizing tool rather than an honest expression of lived gender.[1761] Identifying outside male and female is written-off as a crude

[1754] James and others (n 60) 49; Aidan Quigley, 'Being Non-Binary – What does it mean to young LGBT People?' (*The Outmost*, 15 November 2016) http://theoutmost.com/interviews/being-non-binary-what-does-it-mean-young-lgbt/4/ accessed 20 March 2017.
[1755] Penny (n 62); Adrian Ballou, '10 Myths About Non-Binary People It's Time to Unlearn' (*Everyday Feminism,* 6 December 2014) http://everydayfeminism.com/2014/12/myths-non-binary-people accessed 20 March 2017.
[1756] James and others (n 60) 49.
[1757] Jack Monroe, 'I'm a little bit female and a little bit male. Finally, I fit in my skin' (*The Guardian*, 19 May 2016) https://www.theguardian.com/commentisfree/2016/may/19/jack-monroe-little-bit-male-little-bit-female accessed 12 July 2017; Siobhan Fenton, '"A hole in your chest where gender used to be": Being non-binary in the UK' (*The Independent*, 21 September 2016) http://www.independent.co.uk/news/uk/home-news/what-does-non-binary-mean-what-its-like-to-not-have-a-male-female-gender-a7317086.html accessed 20 March 2017.
[1758] Saltzberg (n 20) 57.
[1759] Ballou (n 79); National Centre for Transgender Equality, 'Understanding Non-Binary People: How to Be Respectful and Supportive' (*NCTE Website*, 9 July 2016) http://www.transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive accessed 20 March 2017.
[1760] Saltzberg (n 20) 57. It is interesting to note similar claims that bisexual persons are also experiencing a transition period before they discover their settled heterosexual or homosexual orientation.
[1761] Terry S Kogan, 'Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labelled "Other"' (1996) 48(6) Hastings Law Journal 1223, 1224; Murray Couch and others, *Tranznation: A Report on the Health and Wellbeing of Trans People in Australia and New Zealand* (Australian Research Centre in Sex, Health and Society 2007) 69; Saltzberg (n 20) 44-45; Murphy (n 7); Susan Cox, 'Coming out as "non-binary" throws other women under the bus' (*Feminist Current,* 10 August 2016) http://www.feministcurrent.com/2016/08/10/coming-non-binary-throws-women-bus/ accessed 21 March 2017; Sarah Ditum, 'Why gender became the ultimate forum for self-expression' (*The New Statesman,* 19 February 2017) http://www.newstatesman.com/politics/feminism/2017/02/why-gender-became-ultimate-forum-self-expression accessed 21 March 2017.

attempt to "challenge…socially constructed gender norms"[1762] and should not be legitimised with the official imprimatur of law. Opponents of non-binary affirmation point to advocates who self-define as gender "radicals"[1763], "terrorists"[1764] and "anarchists".[1765] They suggest that such statements illustrate why non-binary claims are more appropriately considered as a partisan policy debate rather than a matter of fundamental rights.

In particular, defiance of the gender binary is dismissed as merely the latest extension of long-running feminist attempts to destabilise gender categories.[1766] Trans identification, and especially those who experience a fluid or ambiguous gender, is frequently employed by queer and feminist scholars to question both the utility and sustainability of binary gender models.[1767] References to queer theory are also the source of a related critique: that persons who express a gender beyond man and woman are simply reproducing intellectual arguments, which reflect an abstract gender fantasy and are wholly removed from individual gendered realities.[1768]

For some observers, non-binary identities are merely a childish fad[1769], overwhelmingly adopted by a privileged youth which, at best, is seeking to assert a questionable individuality and, at worst, is misappropriating an undeserved and unwarranted status of victimhood.[1770] With

[1762] Saltzberg (n 20) 44.
[1763] Gagne, Tewksbury and McGaughey (n 71), 482.
[1764] Sally Hines, 'A pathway to diversity? Human rights, citizenship and the politics of transgender' (2009) 15(1) Contemporary Politics 87, 95-96.
[1765] Griffin Hansbury, 'The Middle Men An Introduction to the Transmasculine Identities' (2005) 6(3) Studies in Gender and Sexuality 241, 256-257.
[1766] As discussed below, there is evidence that some (particularly female-assigned) individuals specifically choose a non-binary identity as a means of manifesting their masculine identity without having to adopt the cultural baggage of being identified as 'male' within an overwhelmingly patriarchal world. Diamond and Butterworth speak of an individual, 'Lori' who "is acutely aware— and wary—of the socio-political ramifications of taking on a conventional 'male' identity in light of the other identity statuses that she would simultaneously occupy", Diamond and Butterworth (n 48), 369. See also: Brent Bilodeau, 'Beyond the Gender Binary: A Case Study of Two Transgender Students at a Midwestern Research University' (2005) 3(1) Journal of Gay and Lesbian Issues in Education 29, 33-34.
[1767] Leslie Pearlman, 'Transsexualism as Metaphor: The Collision of Sex and Gender' (1995) 43(3) Buffalo Law Review 835, 845; Jennifer Rellis, 'Please Write E in this Box toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India' (2008) 14(2) Michigan Journal of Gender and Law 223, 241.
[1768] Beemyn and Rankin (n 19) 152; Marie Gustafsson Sendén, Emma A Bäck and Anna Lindqvist, 'Introducing a gender-neutral pronoun in a natural gender language: the influence of time on attitudes and behaviour' (2015) 6 Frontiers in Psychology 893, (p. 2).
[1769] Valentine (n 25) 53; Fenton (n 81); Scelfo (n 7).
[1770] Megan Davidson, 'Seeking Refuge under the Umbrella: Inclusion, Exclusion, and Organising within the Category Transgender' (2007) 4(4) Sexuality Research and Social Policy 60, 69; Sam Escobar, 'I'm Not Male. I'm Not Female. Please Don't Ask Me about My Junk' (*Esquire Online,* 31 March 2016) http://www.esquire.com/lifestyle/sex/news/a43461/what-is-non-binary-gender/ accessed 3 April 2017; Jan Moir, 'Sexuality has been in a state of flux since Marlene Dietrich put on a smoking jacket. But gender fluidity? Do grow up, girls' (*Daily Mail,* 4 December 2015) http://www.dailymail.co.uk/femail/article-3345389/JAN-MOIR-Gender-fluidity-grow-girls.html accessed 3 March 2017; Mark Gevisser, 'Engendered: Beyond the Binary' (*The Nation,* 23 March 2015) https://www.thenation.com/article/engendered/ accessed 3 March 2017.

particularly high rates of non-male and non-female identification among white, Global North, university students, Yeadon-Lee observes that "mainstream and popular media" often dismisses non-binary claims as an academic exercise, undertaken only by "younger generation[s]."[1771] Irrespective of the diversity of identities beyond man and woman, "the dominant image of a non-binary person is that they are young, white..[and] assigned female at birth."[1772] If non-binary identities merely reflect a youthful, middle-class desire to feel "special and unique"[1773], it would be inappropriate for the law to change the current, permissible gender categories.

Age-based critiques also draw upon the recent emergence of non-binary celebrities within the fashion, music and entertainment industries.[1774] As high-profile designers increasingly embrace sartorial gender fluidity, and public figures, such as Miley Cyrus, reject "the very notion of being male or female as too constrictive"[1775], there is a growing belief that "gender fluidity is [simply] the new black."[1776] For those who oppose state acquiescence beyond the binary, it would be inappropriate to re-cast the current limitations of legal gender recognition to accommodate a momentary or fleeting social craze.[1777]

The final generalist justification for binary gender requirements is also perhaps the most simple: an existence beyond male and female is too radical, too extreme and too uncertain to be acknowledged. According to Davidson, "[b]ecause the norm in…society is to view gender as a binary biological construct", non-binary persons challenge those "categorical norms" and undermine important social foundations.[1778] For many people, gender identities outside man and

[1771] Yeadon-Lee (n 14) p. 3.
[1772] ibid.
[1773] German Lopez, 'Gender is not just male or female. 12 people across the gender spectrum explain why' (*Vox,* 11 October 2016) http://www.vox.com/identities/2016/9/28/12660752/gender-binary-spectrum-queer accessed 3 March 2017.
[1774] Alex MacPherson, 'Gender fluidity went pop in 2015 – and it's not just a phase' (*The Guardian,* 28 December 2015) https://www.theguardian.com/music/musicblog/2015/dec/28/gender-fluidity-went-pop-in-2015-miley-cyrus-angel-haze-young-thug accessed 3 March 2017; Marsh (n 7); Moir (n 94); Susan Chira, 'Gender Fluidity on the Runways' (*New York Times,* 15 February 2017) https://www.nytimes.com/2017/02/15/fashion/gender-fluidity-new-york-fashion-week.html accessed 3 March 2017; Maya Singer, 'Gigi Hadid and Zayn Malik Are Part of a New Generation Who Don't See Fashion as Gendered' (*Vogue Online,* 13 July 2017) http://www.vogue.com/article/gigi-hadid-zayn-malik-august-2017-vogue-cover-breaking-gender-codes accessed 21 July 2017.
[1775] Moir (n 94).
[1776] Viva Bianca, 'Gender Fluid is the New Black: 5 Icons Redefining Gender Today' (*SheRa,* 1 September 2015) http://www.sheramag.com/gender-without-limitations-5-gender-fluid-icons-of-today/ accessed 3 March 2017. See also: Kay Dibben, 'Minority of Children with Gender Issues Diagnosed with Gender Dysphoria, Psychiatrist Says' (*The Courier Mail,* 8 April 2017) http://www.couriermail.com.au/news/queensland/minority-of-children-with-gender-issues-diagnosed-with-gender-dysphoria-psychiatrist-says/news-story/2d8a6725d98e5f5bf3f7e5e9eb99d065 accessed 10 July 2017.
[1777] Micah, 'Don't Dismiss Me For Being Genderqueer' (*Huffington Post,* 18 September 2015) http://www.huffingtonpost.com/micah/dont-dismiss-me-for-being_1_b_8155518.html accessed 3 March 2017.
[1778] Skylar Davidson, 'Gender inequality: Non-binary transgender people in the workplace' (2016) 2(1) Cogent Social Sciences 2. See also: Bornstein (n 27) 97; Rellis (n 91), 227.

woman are so complicated or unfamiliar that they inevitably become incomprehensible.[1779] Those who have only ever encountered binary gender are typically at a loss when confronted with genderqueer, demigender or androgynous identities. These individuals may experience feelings of embarrassment, anxiety or even resentment where they require education about lives beyond male and female[1780]: "[a] lot of discomfort arises when people's organising schemas (in this case, the idea that there are two and only two genders) are being challenged."[1781]

Chapter V explored the reaction of parents who, while willing to support their child's transition, experienced significant unease with the uncertainty of a child living in-between genders.[1782] Even for cisgender persons, non-binary identities may create doubt about their own positioning as man or woman.[1783] Ford writes that lives outside male and female "[cause] people to question everything they have been taught about gender, which in turn inspires them to question what they know about themselves, and that scares them."[1784]

What is the response to these various justifications which have been offered in defence of binary gender requirements? At first glance, much of the criticism does resemble the more general tropes which have historically been aimed at trans communities. Broad assumptions – about non-binary experiences and the unquestioned legitimacy of social norms – are not compelling arguments against opening up legal gender recognition beyond 'male' and 'female' categories. Yet other claims, particularly about demographics and the politicisation of lives beyond the binary, do find support in the existing data, and are even acknowledged by non-binary communities. If claims to live outside man and woman do not actually reflect one's lived-reality of gender, there may be legitimate arguments against broadening legal recognition.

A first answer to those who support binary gender requirements is the acknowledgement that, consistent with earlier passages in this thesis, a social norm's historic or majoritarian pedigree

[1779] Cairns (n 49); Valentine (n 25) 53; Mel Zulch, 'I Switched to Gender Neutral Pronouns and this is What I Learned' (*Bustle,* 18 January 2016) https://www.bustle.com/articles/121131-i-switched-to-gender-neutral-pronouns-and-this-is-what-i-learned accessed 3 March 2017.
[1780] Calhoun Davis (n 68), 108; Humaira Jami and Anila Kamal, 'Measuring Attitudes toward Hijras in Pakistan: Gender and Religiosity in Perspective' (2015) 30(1) Pakistan Journal of Psychological Research 151, 153; Kath Browne, '"A Right Geezer-Bird (Man-Woman)": The Sites and Sights of "Female" Embodiment' (2006) 5(2) ACME: An International E-Journal for Critical Geographies 121, 128.
[1781] Saltzberg (n 20) 14.
[1782] Laura Edwards-Leeper and Norman Spack, 'Psychological Evaluation and Medical Treatment of Transgender Youth in an Interdisciplinary "Gender Management Service" (GeMS) in a Major Paediatric Centre (2012) 59(3) Journal of Homosexuality 321, 331; Diane Ehrensaft, 'Listening and Learning from Gender-Nonconforming Children' (2014) 68 Psychoanalytic Study of the Child 28, 53; Stephanie Brill and Rachel Pepper, *The Transgender Child: A Handbook for Families and Professionals* (Cleis Press 2008) 24-25.
[1783] Kogan (n 85), 1253.
[1784] Ford (n 31).

does not *per se* justify its retention or respect.[1785] In Chapter III, this thesis argues that, if requiring trans persons to undergo invasive surgeries offers no societal benefits and avoids no societal detriments, the mere existence of a 'normative' genital standard is insufficient to justify breaching trans bodily integrity. Similarly, the fact that opposite-gender marriage has enjoyed, and continues to enjoy, wide support as an established social convention does not (on its own) legitimise the otherwise discriminatory logic for excluding same-gender couples (see Chapter IV).

As a challenge to the acknowledged binary orthodoxy – a social norm regulating nearly all modern societies – living outside male and female categories creates unease and anxiety.[1786] It is understandable that, faced with a spectrum of identities which stretches human imagination, many people may be confused, embarrassed and possibly even angry.[1787] Yet, the fact that non-binary persons are different or unfamiliar does not, without more, justify their complete exclusion from legal gender recognition. As Fredman notes, substantive equality is about "accommodating difference" rather than exacting "conformity".[1788] Normative gender arguments are only relevant where they illustrate the necessary advantages of 'male-female' requirements or expose the dangers of removing rigid gender dichotomies. Any contrary conclusion is impermissibly circular and tautological (i.e. society *should* not recognise non-binary identities because society *does* not recognise such identities).

There are also problems with critiques which pre-empt, presume or even deny individual experiences of gender. Arguments, which absolutely dismiss identities as non-existent or childish, inappropriately censure self-identification and suggest that, unlike the cisgender and binary-trans populations, all non-binary persons are incapable of exercising gendered agency.

[1785] *Markin v Russia* [2013] 56 EHRR 8, [127]. See also: United Nations Human Rights Committee, 'General Comment No. 34 on Article 19: Freedom of Opinions and Expression' (12 September 2011) UN Doc No. CCPR/C/GC/34, [32]; *Müller and Engelhard v Namibia* Communication No. 919/2000 (CCPR/C/74/D/919/2000) (UN HRC, 29 March 2002), [6.8]; Alistair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edn, Oxford University Press 2012) 145 and 825.

[1786] Erin R Markman, 'Gender Identity Disorder, the Gender Binary, and Transgender Oppression: Implications for Ethical Social Work' (2011) 81(4) Smith College Studies in Social Work 314, 317-318; Davidson (n 102); Stachowiak (n 71), 3.

[1787] Valentine notes claims that non-binary identities are "too complicated", Valentine (n 25) 14. According to Jami and Kamal, gender non-conforming identities "make others apprehensive and annoyed", see: Jami and Kamal (n 104), 153. In addition, Browne writes that "[t]hreatening the dichotomous separation of man and woman can result in physical violence, verbal abuse along with more subtle cultural process that cause individuals to feel different and 'abnormal'", Browne (n 105), 128.

[1788] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 25.

Allegations about realness and temporariness have long been used to undermine and de-legitimise queer identities. Marcus and Emens describe the disaffirming interrogations to which bisexual and asexual individuals are subject when giving expression to their sexual orientation.[1789] Dismissiveness is an effective strategy for those who support binary gender requirements. It absolves them from having to engage with the emerging testimonies of those who claim a space outside male and female. Indeed, it is the individual accounts of non-binary lives which are the best retort to 'realness'-based opposition.[1790] According to Micah, "genderqueer people are not doing it because it's cool…They are simply genderqueer because they feel that the two options offered – male and female – are not enough for them to truly *live*."[1791] In her research on the discursive tensions in trans politics, Roen recalls non-male and non-female individuals who articulate a gender "in the context of an explicit refusal of the 'political'."[1792] In the face of absolutist critics, which reject non-binary identities as unreal or political, it is important to remember that, for some people, standing outside male or female categories is the only way to live their "underlying truth".[1793]

There is, however, evidence that, while overly-generalist critiques trivialise and depreciate non-binary experiences, some oppositional claims do find support in the existing research. Although individuals may identify as non-male and non-female at all stages of life, the vast majority of openly non-binary persons are under the age of 35 years.[1794] Similarly, while some individuals conceptualise life outside the binary in explicitly anti-political terms, many others do incorporate both overtly political[1795] and highly-intellectualised[1796] arguments into their process of self-identification.

Kuper, Nussbaum and Mustanski observe that a greater proportion of individuals who claim non-orthodox identities, such as genderqueer, fall within younger age demographics.[1797] While

[1789] Elizabeth F Emens, 'Compulsory Sexuality' (2014) 66(2) Stanford Law Review 303, 326; Nancy C Marcus, 'Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation' (2015) 22(2) Michigan Journal of Gender and Law 291, 330.
[1790] See generally: Kate Bornstein and S Bear Bergman (eds), *Gender Outlaws: The Next Generation* (Seal Press 2010); Chris Ricketts, *Food Needs Labelling, People Don't: A journey from gender confusion to self-acceptance* (Little Singing Bear Publishing 2016); Rae Spoon and Ivan Coyote, *Gender Failure* (Arsenal Pulp Press 2014); Nick Krieger, *Nina Here Nor There: My Journey Beyond Gender* (Beacon Press 2011).
[1791] Micah (n 101).
[1792] Katrina Roen, '"Either/Or" and "Both/Neither": Discursive Tensions in Transgender Politics' (2002) 27(2) Signs 501, 515.
[1793] ibid. See also: Saltzberg (n 20) 2 and 44; Fenton (n 81).
[1794] Yeadon-Lee (n 14) p. 11; Harrison, Grant and Herman (n 5), 18; Valentine (n 25) 20; Beemyn and Rankin (n 19) 25.
[1795] Roughgarden writes of "glaring and provocative declarations of resistance", Roughgarden (n 18). See also: Saltzberg (n 20) 2 and 44; Hines (n 88), 95-96.
[1796] Beemyn and Rankin (n 19) 148; Yeadon-Lee (n 14) pp. 13 and 16.
[1797] Laura E Kuper, Robin Nussbaum and Brian Mustanski, 'Exploring the Diversity of Gender and Sexual

older trans persons are more likely to identify as either binary man-woman or as part of cross-dressing communities[1798], younger people increasingly adopt an identity (or identities) which rejects the gender status quo. According to Price Minter, "those who describe[e] their gender in non-binary terms [are] substantially younger."[1799] The existing data does not prove that being non-binary is merely a youth fad. It does indicate, however, that living outside the binary is overwhelmingly a youth phenomenon. If there *is* evidence that non-binary identities reflect youthful rebellion, rather than lived-experiences, that does affect the legitimacy and rationality of existing 'male' and 'female' requirements within legal gender recognition laws.

There is also evidence to suggest that, while lives outside male and female are not inevitably political, many non-binary individuals do construct and express their gender in political terms.[1800] By rejecting the established male-female identities, these persons are challenging gender divisions and rethinking both the role and utility of legal gender. According to Kogan, "[i]dentifying oneself as 'Other' is a conscious choice by an individual to oppose the male/female, masculine/feminine dichotomies, and the oppressions that result."[1801] Couch *et al* observe individuals who are "working politically and socially for acceptance and celebration of diversity in society."[1802] Some female-assigned non-binary individuals adopt a life beyond man and woman categories for specifically feminist reasons.[1803] Persons with a female legal gender may have a strongly male self-identification but make a political choice to express a trans masculine, rather than fully male, identity because they fear encouraging "male privilege and reinforcing rape culture."[1804]

While all these political motivations may have laudable aims, they do pose difficulties for legal gender recognition. A core justification for legally acknowledging preferred gender is that, by forcing persons to live and experience an identity with which they have no self-connection, the law imposes a disproportionate burden which is incompatible with basic human rights standards.[1805] A key (prior) assumption in that analysis is that individuals genuinely do

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Orientation Identities in an Online Sample of Transgender Individuals' (2012) 49(2-3) The Journal of Sex Research 244, 249.
[1798] ibid, 251. James and others (n 60).
[1799] Price Minter (n 56) ix-x.
[1800] Gagne, Tewksbury and McGaughey (n 71), 501; Roen (n 116), 512.
[1801] Kogan (n 85), 1224.
[1802] Couch and others (n 85) 69.
[1803] Diamond and Butterworth (n 48), 368; Bilodeau (n 90), 33-34. Capatides writes of "Grace Gittelman and Ela Hosp — friends at the Kansas City Art Institute — who both identify as non-binary because they feel it frees them of the limitations society places on women", Capatides (n 29).
[1804] Bilodeau (n 90), 34.
[1805] See e.g. *Goodwin v United Kingdom* [2002] 35 EHRR 18.

experience the preferred gender, which they are claiming. Where, on the other hand, gender identity merely collapses into a political strategy, which may not necessarily have any relationship to one's actual lived-experiences, the case that human rights require expanded gender categories is less compelling. Put simply: everybody has unique political opinions, and there is currently no human right to have those opinions written into law. As Serrano concedes, "there's a big difference between calling yourself…genderqueer because you feel that word best captures your gendered experience and using that identity to make claims or presumptions."[1806]

There are, however, two important caveats to the age and politics-based limitations discussed immediately above. While these caveats may not be sufficient to remove all lingering doubt over the authenticity and sincerity of non-binary expression, they do at least place those doubts in a more appropriate perspective.

First, while increased rates of young people have been documented as expressing a non-male or non-female identity, it remains unclear what role cultural context plays in creating the disparity between young and old. The higher number of youth identifications may suggest that non-binary is merely a modern-day youth fad, in which the law should be slow to acquiesce. On the other hand, however, the greater prevalence among teenagers and adolescents may simply reflect the growing freedom that contemporary youth have to fully and openly express themselves.[1807] Many older trans persons grew up in an environment where even to identify as binary-trans stretched the limits of social acceptance.[1808] It is possible that, instead of drawing upon the language of non-binary, older trans individuals, who experienced a multiplicity of genders, located their identities within more standardised and publicly-accessible ideas, particularly the language of cross-dressing.[1809] If that is actually the case, non-binary lives should not be dismissed as a modern-day youth craze. Instead, it is the particular terminology of 'non-binary' which is unique to younger generations.

It is also unclear why the mere existence of a political element supports the maintenance of rigid binary gender requirements. There does not appear to be any reason why politics and non-

[1806] Serano (n 10) 360.
[1807] Johanna Olson and Robert Garofalo, 'The Peripubertal Gender-Dysphoric Child: Puberty Suppression and Treatment Paradigms' (2014) 43(6) Paediatric Annals 132, 133.
[1808] For personal narratives of growing up as trans in the early and mid-twentieth century, see generally: Jan Morris, *Conundrum* (Faber and Faber 2002); Jennifer Finney Boylan, *She's Not There: A Life in Two Genders* (Broadway 2013).
[1809] Kuper, Nussbaum and Mustanski (n 121), 249; James and others (n 60) 46.

binary expression *must* be mutually exclusive.[1810] While it is incorrect to define all trans experiences as politically transgressive[1811], it is reasonable to conclude that those trans identities, which expressly exist outside male and female, are more likely to have political ramifications. Even among non-binary persons who expressly disclaim a political motivation for their gender, there is an acknowledgement that, whether intentional or not, "[b]eing non binary and being true to yourself is often a political act."[1812] The fact that non-male and non-female identities are politically-charged does not mean that they are inevitably inauthentic or disingenuous. A person can sincerely experience a particular gender while also understanding, and possibly even acting upon, the political dimensions of that identity. The existence of feminist legal scholarship proves that gender identity can simultaneously be real *and* political. While it is reasonable that the law should not allow binary-identified persons to misuse gender recognition for political purposes, so too the law should not ignore individuals simply because their experience of gender has political aspects.

B. Trans Resistance to Legal Affirmation of Non-Binary Identities

In addition to general justifications for binary gender requirements, expanding available classes within a legal recognition framework has also been criticised by certain binary trans persons and groups. Doan writes that "individuals who persist in violating gender norms are marginalised in both queer and other public spaces."[1813] For some trans persons, who do self-identify as either male or female, non-binary identities inspire three core frustrations and concerns.

A recurring trans objection to legally acknowledging non-male and non-female expression (at least, in the context where those expressions are framed through the language of 'trans') is that living outside gender dichotomies is insufficient for inclusion under the wider trans umbrella.[1814] Non-binary individuals are frequently told that they are not "transgender enough" for incorporation into political strategies or to access peer support groups.[1815] Adhering to an ideology of "trans-normativity" – "the belief that there is only one [binary] way for [trans] people to practice their gender"[1816] – some trans men and women construct a gendered

[1810] Fenton (n 81); Ballou (n 79).
[1811] Roughgarden (n 18), 393; Roen (n 116), 506; Gagne, Tewksbury and McGaughey (n 71), 501.
[1812] Fenton (n 81).
[1813] Doan (n 5), 639.
[1814] National LGBT Health Education Centre, *Providing Affirmative Care for Patients with Non-binary Gender Identities* (Fenway Institute) 8.
[1815] Beemyn and Rankin (n 19) 153.
[1816] Nicolazzo (n 50), 1175.

hierarchy, where individuals who can "pass" in a stable, socially-recognisable gender take precedence over those with more complex experiences.[1817]

Passing is also the source of a second trans critique of formal recognition for lives beyond the binary. As noted, non-binary individuals express their gender in numerous physical and linguistic ways. It is not uncommon for individuals to self-identify as neither man nor woman, but to retain their physical characteristics, name and even their personal pronouns.[1818] For such individuals, what is important is their internalised sense of gender, not the assumptions and judgements of others. For binary trans persons, however, this means that non-binary individuals can claim a share in the victimhood of trans oppression, without ever having to actually confront the virulent transphobia which arises when there are incongruent identities and presentations.[1819]

Finally, non-binary lives are considered as political "liabilities" for a modern trans movement that is increasingly gaining public support and social legitimacy.[1820] Dismissed as both incomprehensible[1821] and hopelessly impractical[1822], non-binary experiences complicate the acceptable trans narrative[1823], and require a level of engagement which both politicians and the general population may be unwilling to make.

Overall, trans-specific justifications for binary gender requirements are less compelling than 'age' and 'politics' focused critiques. There is little difference between dismissing non-male and non-female identities as 'insufficient' or 'not trans enough', and the general claim that those identities are 'not real'. In both cases, a self-appointed third-party arbiter stands in judgement of non-binary persons and determines whether their gender experiences satisfy an undefined

[1817] Roen (n 116), 504; Ingrid Sell, 'Not Man, Not Woman: Psycho-spiritual Characteristics of a Western Third Gender' (2001) 33(1) The Journal of Transpersonal Psychology 16, 26; Gagne, Tewksbury and McGaughey (n 71), 500.
[1818] Capatides (n 29).
[1819] Within the trans community, there has been significant (often heated) debate – both online and in group discussions – of the extent to which non-binary persons are alleged to benefit from the capacity to pass in their assigned gender, see e.g. 'Non-binary People, the Trans Narrative and "Passing Privilege"' (*Captainglittertoes Blog*, 16 July 2014) https://captainglittertoes.wordpress.com/2014/07/16/non-binary-people-the-trans-narrative-and-passing-privilege/ accessed 9 April 2017; Don Crothers, 'What Unique Problems do Non-Binary People Face?' (*Medium Blog*, 1 April 2016) https://medium.com/gender-2-0/what-unique-problems-do-non-binary-people-face-7bdbd1dbb395 accessed 9 April 2017; Hari Ziyad, '3 Reasons Why Folks Who Don't "Look" Non-Binary Can Still Be Non-Binary' (*Everyday Feminism Blog*, 18 Mary 2016) http://everydayfeminism.com/2016/05/still-non-binary/ accessed 9 April 2017.
[1820] Gagne, Tewksbury and McGaughey (n 71), 501. See also, Helen Lewis, 'Is Jeremy Corbyn Right that Trans People Should be Allowed to Self-Identify Their Gender' (*New Statesman*, 19 July 2017) http://www.newstatesman.com/politics/uk/2017/07/jeremy-corbyn-right-trans-people-should-be-allowed-self-identify-their-gender accessed 24 July 2017.
[1821] Davidson (n 94), 66.
[1822] Amy McCrea, 'Under the Transgender Umbrella: Improving ENDA's Protections' (2014) 15(2) Georgetown Journal of Gender and the Law 543, 556.
[1823] Capatides (n 29); Hampson (n 52).

standard of adequacy. What are the characteristics of trans identities which are required for non-binary persons to be "transgender enough"? If it is inappropriate for the wider cisgender public to question the realness of non-binary lives, trans peers should have no greater privilege. Critiques based on standards of sufficiency mirror intra-trans debates about what surgeries or behaviour are necessary for individuals to claim an authentic male or female identity.[1824] Just as such conversations are slowly disappearing[1825], and both trans and cisgender communities acknowledge that identity cannot be reduced to physical bodies, so too some binary-trans persons must accept that an individual's 'sufficiency', and their place on the trans continuum, does not depend on passing and the subjective judgement of others.

There are also problems with justifying binary requirements for purely strategic reasons. Achieving greater trans rights by disowning complicated or less popular trans identities is unlikely to result in substantive equality.[1826] If trans communities are only empowered to the extent that they conform to a recognisable, heteronormative ideal, this leaves in place historic, rigid gender norms, which harm all trans-identified persons.

It is unclear why, having themselves experienced oppression from non-queer and queer populations, binary-trans individuals would wish to deny recognition to vulnerable elements within their own community.[1827] In Chapter IV, this thesis recalls the troubling history of sexual orientation and gender identity activism, whereby advocates systematically silenced or undermined trans voices in order to promote greater lesbian and gay equality. In recent years, this strategy has been condemned as not only unprincipled but also as ultimately counter-productive. While a new 'epistemic contract of non-binary erasure'[1828] may have short-term

[1824] See generally: DCJ Catalano, '"Trans Enough?" The Pressures Trans Men Negotiate in Higher Education' (2015) 2(3) Transgender Studies Quarterly 411; Margaret Talbot, 'About a Boy' (*New Yorker,* 18 March 2013) http://www.newyorker.com/magazine/2013/03/18/about-a-boy-2 accessed 9 April 2017; Mia Violet, 'Yes, You're "Trans Enough" to Be Transgender' (*Huffington Post*, 29 February 2016) http://www.huffingtonpost.com/mia-violet/yes-youre-trans-enough-to_b_9318754.html accessed 9 April 2017.

[1825] In February 2016, the organisers of an annual competition, Miss Transgender UK, attempted to 'de-throne' the competition's winner after she was judged to be insufficiently trans because she was spotted exercising in stereotypically 'male' sports clothing, see: 'Winner of national transgender beauty pageant stripped of her title because she was "not transgender enough"' (*The Telegraph,* 19 February 2016) http://www.telegraph.co.uk/news/uknews/12165845/Winner-of-national-transgender-beauty-pageant-stripped-of-her-title-because-she-was-not-transgender-enough.html accessed 9 April 2017.

[1826] Fredman (n 112) 25.

[1827] Capatides (n 29).

[1828] Yoshino famously identified an 'epistemic contract of bisexual erasure', see: Kenji Yoshino, 'The Epistemic Contract of Bisexual Erasure' (2000) 52(2) Stanford Law Review 353. Because of their "distinct but overlapping interests in the promulgation or repression of certain kinds of knowledge" (at 392), Yoshino argues that gay and heterosexual individuals unconsciously enter into a mutually beneficial social contract ("a social norm that arises unconsciously" at 391-392) to undermine and invisibilise bisexuality, with the effect that homosexual and heterosexual orientations are stabilised and normalised (at 401-402). One can see a similar form of reasoning in binary-trans objections to non-male and non-female identities. By prioritising (and reinforcing the exclusivity of)

benefits for trans advocacy, it is unlikely to have long-term benefits for either intra-trans relations or the general lived-experiences of gender non-conforming individuals.

A preferable approach is to cultivate a relationship of mutual respect and recognition among all persons who claim a trans identity. Indeed, mutual respect is also the appropriate response to the final, perhaps more complicated, reason for binary-trans resistance to legal recognition beyond 'male' and 'female': the idea that non-binary expression shields individuals from the harshest consequences of transphobia and permits them to claim a space of victimhood without experiencing victimisation. Binary-trans individuals, whose physical expression renders more obvious their trans history, are likely to face greater levels of discrimination than non-binary persons, who retain their physical characteristics and are comfortable using their assigned name and gender markers.[1829] The more obvious physical manifestation of one's trans identity means that, in such circumstances, binary-trans individuals will typically be more obvious targets for abuse. Yet, does the fact that binary-trans persons experience a higher threat of discrimination justify absolutely excluding non-male and non-female persons from legal gender recognition?

Many non-binary persons do also suffer both explicit and implicit discrimination. In particular, the systematic erasure of their identities – and the wider social refusal to engage with, or even believe in, lives outside the binary – can place unique pressures on non-binary mental health.[1830] While some binary-trans individuals may consider non-binary passing as a social privilege, the persons themselves may experience this as a harmful denial of identity.[1831]

Appeals to a hierarchy of victimhood risk defining trans identities through a lens of necessary oppression, where positive experiences of preferred gender actually delegitimise self-identification. The logical endpoint of such reasoning is that only persons who experience the most brutal, repressive forms of transphobia can validly have their preferred gender acknowledged. For many binary-identified individuals, this reasoning might have unintended

identities within the binary, trans men and trans women create common cause with the cisgender community, and emphasise the stability of both cisgender and binary-trans lives.

[1829] Valentine (n 25) 16. James and others (n 60) 48.

[1830] Valentine (n 25) 9; James and others (n 60) 104. Jay McNeil and others, *Speaking from the Margins Trans Mental Health and Wellbeing in Ireland* (Transgender Equality Network Ireland 2013) 32.

[1831] See e.g. LJ Ferris, 'The Reality of Non-Existence' (*Huffington Post,* 27 January 2017) http://www.huffingtonpost.co.uk/lj-ferris/the-reality-of-non-existe_b_14400674.html accessed 9 April 2017; Alok Vaid-Menon, 'Greater Transgender Visibility Hasn't Helped Non-Binary People – Like Me' (*The Guardian,* 13 October 2015) https://www.theguardian.com/commentisfree/2015/oct/13/greater-transgender-visibility-hasnt-helped-nonbinary-people-like-me accessed 9 April 2017. In addition, Meyer writes that "[p]assing, even unintentionally, is dangerous, and living with the fear of being outed produces anxiety", see: Elise Meyer, 'Designing Women: The Definition of "Woman" in the Convention on the Elimination of All Forms of Discrimination against Women' (2015) 16(2) Chicago Journal of International Law 553, 576.

consequences whereby their own relatively settled identities might precipitate exclusion from the trans umbrella.[1832] Rather than reject non-binary persons because they have insufficient exposure to discrimination, a better approach is to candidly and respectfully discuss the multiple aggressions – micro and macro – which all trans individuals face, and which often intersect with other characteristics, such as class, race and sexual orientation. While it is reasonable for all trans persons, whether binary or non-binary, to expect their peers to acknowledge various forms of privilege, the fact that non-binary persons may experience comparative privilege should not exclude them from legal recognition.

IV. Non-Binary Advocacy: Challenging the Legitimacy of Binary Gender Requirements

The justifications for binary gender requirements – both general and trans-specific – have hindered movements for legal reform. In a context where non-male and non-female identities are framed as illegitimate, advocates have struggled to attract support for a broader, more inclusive gender recognition model. They have also struggled to show how the existing framework – which embraces only legal 'men' and 'women' – undermines and violates core human rights standards. However, despite the lack of public and institutional buy-in, evidenced by the limited up-take of non-binary options, activists and academics continue to develop strategies which challenge the legitimacy of binary gender requirements.

A. Intersex Experiences

Non-binary advocates draw upon the substantial body of activism and scholarship concerning intersex variance to challenge the legitimacy of binary gender requirements. For many non-male and non-female individuals, intersex and non-binary experiences not only share a direct connection, but they also complement and reinforce each other.[1833]

[1832] Sharpe has made a similar point in relation to recent debates over whether trans women can ever be considered 'real' women, see: Alex Sharpe, 'Let's Get "Real" on International Women's Day' (*Inherently Human Blog,* 10 March 2017) https://inherentlyhuman.wordpress.com/2017/03/10/lets-get-real-on-international-womens-day/#more-2032 accessed 9 April 2017. In response to the argument that trans women have never experienced the specifically gendered oppression, which is directed towards cisgender women, Sharpe notes that "if suffering and/or lack of privilege are the determinants of what it means to be a woman, then surely we must acknowledge the varying degrees of suffering and lack of privilege that cut across the class of cisgender women. Indeed, if suffering and lack of privilege are its benchmarks, we might perhaps wonder about the gender status of many women, and especially white middle-class women." If suffering and oppression are intrinsic elements of a trans identity, this would exclude many binary-trans individuals, who experience comparative privileges of class, race and material wealth.

[1833] Benson (n 64), 58; Greenberg (n 64), 292; Reilly (n 74), 297.

In Chapter III, this thesis explored the phenomenon of intersex variance in the context of requirements for physical interventions. While intersex is a minority experience (approximately 1.7% of persons[1834]), the existence of intersex communities contradicts established paradigms of rigid, binary biological sex.[1835] To the extent that nature accommodates individuals whose sex characteristics defy the classic sex-type model (i.e. men with penises, testes and an Adams Apple; women with breasts, a vagina and uterus) it is unclear why the law cannot also allow such biological diversity.

For some advocates and scholars, however, the relevance of intersex goes beyond challenging normative gendered bodies. Intersex also calls into question, so the argument goes, the inevitability of binary gender as a social and legal reality. Experiencing physical characteristics, which are neither unambiguously male nor female, intersex persons expose the insufficiency of 'man-woman' gender options, and require a rethinking of gender, which accommodates non-binary individuals.[1836]

There are key problems with using intersex experiences as a strategy for challenging 'male' and 'female' pre-conditions. First, and perhaps most obviously, intersex and non-binary genders are distinct and separate.[1837] While intersex concerns ambiguous sex characteristics, non-binary identities speak to an internal sense that one is neither male nor female. Although both concepts are concerned with ideas of gender and sexual diversity, the mere fact that one group exists does not, at least without further elaboration, fundamentally alter the status and rights of the other. In recent years, intersex communities have voiced opposition and resentment towards "trans people using the term intersex to validate their identities" without ever having to confront the "shame", "secrecy" and "stigma" which accompany non-normative sex characteristics.[1838]

[1834] Melanie Blackless and others, 'How Sexually Dimorphic Are We? Review and Synthesis' (2000) 12(2) American Journal of Human Biology 151, 161.
[1835] M Dru Levasseur, 'Gender Identity Defines Sex: Updating the Law to reflect modern medical science is key to Transgender Rights' (2014) 39(4) Vermont Law Review 943, 946. See also: Wendy O'Brien, 'Can International Human Rights Law Accommodate Bodily Diversity' (2015) 15(1) Human Rights Law Review 1, 15.
[1836] Hazel Glenn Beh and Milton Diamond, 'Individuals with Difference in Sex Development: Consult to Colombia Constitutional Court Regarding Sex and Gender' (2014) 29(3) Wisconsin Journal of Law, Gender and Society 421, 423; Michaela Balocchi, 'The Medicalization of Intersexuality and the Sex/Gender Binary System: A Look on the Italian Case' (2014) 6(1) LES Online 65, 70-71; Pearlman (n 100), 843-844.
[1837] 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (19 April 2017) UN Doc No. A/HRC/35/36l, [6]; ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (Australian Capital Territory 2012) 30; Yeadon-Lee (n 14) p.3.
[1838] Davidson (n 94), 68. Baird notes that, in the *Norrie* judgment, "[m]embers of the intersex community had

Misrepresentation and misappropriation of identities also motivates the second objection to intersex-focused non-binary advocacy. To the extent that such advocacy assumes that intersex individuals will, by virtue of their body configuration, experience a gender outside the male-female dichotomy, that assumption is inconsistent with many intersex narratives.[1839] Although some intersex individuals may have a non-binary preferred gender (and thus may support expanded gender options), many persons do self-identify as either male or female and they want to have that status acknowledged in law.[1840] Numerous intersex rights groups, including the Third International Intersex Forum, specifically recommend that, while intersex children should not be subject to genital surgery, they should be raised with a binary gender (with the option of identifying with another gender identity always remaining open).[1841] Any argument in favour of non-binary rights should respect the lived-experience of intersex communities, and not limit the ability of intersex persons to exercise their own gendered agency.

The final disadvantage of intersex-focused arguments is their biologically essentialist and determinative undertones. To suggest that intersex persons are entitled to a non-normative legal gender because they have non-normative sex characteristics implies that such sex characteristics are the ultimate determinant of legal status.[1842] As discussed in Chapter III, this not only contradicts how gender actually operates in most societies. It also creates significant difficulties for the large number of persons – both trans and intersex – who identify with a binary gender, but who were not born with sex characteristics which match the accepted body configuration for that gender. Equating ambiguous genitalia with a right to an ambiguous legal gender may assist intersex persons who also self-identify as non-binary. However, what about intersex or trans individuals who identify as binary male or female? Focusing on sex characteristics means that, in order to be affirmed in their preferred legal gender, such persons must exhibit all those features, which society typically associates with men and women.[1843] As

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argued that Norrie should not be able to call herself 'intersex' because she had not technically been born so", Julia Baird, 'Neither Female nor Male' (*New York Times,* 6 April 2014) https://www.nytimes.com/2014/04/07/opinion/neither-female-nor-male.html?mtrref=query.nytimes.com&assetType=opinion&_r=0 accessed 9 April 2017.

[1839] Intersex Society of North America, 'Why Doesn't ISNA want to Eradicate Gender' (*ISNA Website,* 17 February 2006) http://www.isna.org/faq/not_eradicating_gender accessed 9 April 2017; Hilda Viloria and Dana Zzyym, 'How Intersex People Identify' (*Organization Intersex International – USA Affiliate*, 10 July 2015) http://oii-usa.org/2719/how-intersex-people-identify accessed 9 April 2017.

[1840] Zowie Davy, 'The DSM-5 and the Politics of Diagnosing Transpeople' (2015) 44(5) Archives of Sexual Behaviour 1165, 1171.

[1841] 'Public Statement by the Third International Intersex Forum' (*ILGA-Europe Website,* 1 December 2013). The Statement recommends registering "intersex children as females or males, with the awareness that, like all people, they may grow up to identify with a different sex or gender." See also the advice of the Intersex Society of North America ('Does ISNA think children with intersex should be raised without a gender, or in a third gender?' (*ISNA Website, No Date Available*) http://www.isna.org/faq/third-gender accessed 9 April 2017).

[1842] Monro (n 5), 10; Wipfler (n 5), 513.

[1843] Wipfler (n 5), 513-514; Myra J Hird, 'Gender's nature: Intersexuality, transsexualism and the

noted in Chapter II, not only does such a requirement violate rights to bodily integrity, it may also be a condition which – for economic, social, familial, religious or health reasons – applicants for recognition are unable to satisfy.[1844] Thus, in determining whether to rely upon intersex experiences to challenge the requirement that applicants (for gender recognition) must express a binary gender, one should consider that strategy in the round and be careful to avoid any unintended consequences.

B. 'Existing Models' Reasoning

In recent years, arguments against the legitimacy of binary gender requirements have increasingly focused on existing and historical models – legal, social and cultural – of non-male and non-female identities (hereinafter referred to as 'existing models' reasoning).[1845] According to Feinberg, "the very concept that our current narrow sex and gender system is eternal needs to be challenged by exploring the diversity that has existed throughout human history."[1846] While binary gender remains an almost universal status quo, a "fresh re-examination of history, anthropology, and medical science" may encourage society to "weed out any concepts that sex and gender variation are 'abnormal'."[1847] The basic premise of 'existing models' reasoning is that the presence of alternative gender schemas "casts doubt on a binary, anatomical **gender** model" and supports claims to more diverse gender rights.[1848]

Sub-Section B, which is further sub-divided into two parts, explores existing non-binary models as evidence against the legitimacy and rationality of binary gender requirements in the context of legal gender recognition. The section first introduces the various legal, social and cultural structures, which acknowledge (or at least tolerate) lives outside the male-female binary. In the second, more substantive, part of the section, there is a critical discussion of these structures, both in terms of their cultural transferability and the extent to which they have

"sex"/"gender"' Binary (2000) 1(3) Feminist Theory 347, 353.

[1844] Alice Newlin, 'Should a Trip from Illinois to Tennessee Change a Woman into a Man? Proposal for a Uniform Interstate Sex Reassignment Recognition Act' (2008) 17(3) Columbia Journal of Gender and Law 461, 489; Dean Spade, 'Documenting Gender' (2009) 8(1) Dukeminier Awards Best Sexual Orientation and Gender Law Review 137, 162.

[1845] Sell (n 141), 17; Evan B Towle and Lynn Marie Morgan, 'Romancing the Transgender Native: Rethinking the Use of the 'Third Gender' Concept" (2002) 8(4) GLQ: A Journal of Lesbian and Gay Studies 469, 469; Emma Inch, 'Changing Minds: The Psycho-Pathologization of Trans People' (2016) 45(3) International Journal of Mental Health 193, 196.

[1846] Feinberg (n 32) 125.

[1847] ibid.

[1848] Barb J Burdge, 'Bending Gender, Ending Gender: Theoretical Foundations for Social Work Practice with the Transgender Community' (2007) 52(3) Social Work 243, 245. See also: Holning Lau, 'Law, Sexuality and Transnational Perspectives' (2013) 5(2) Drexel Law Review 479, 485 – 486.

actually challenged prevailing gender orthodoxies. Sub-Section B does not argue that 'existing models' reasoning has no relevance for the question of whether binary gender requirements are legitimate. Rather, the section urges caution that, in using existing models to condemn the availability of only two gender options, one must understand the cultural context in which those models exist and interrogate whether – both legally and culturally – they have managed to displace or destabilise existing bi-gender norms.

(i.) Legal and Cultural Models of Non-Binary Affirmation

While binary gender remains the fundamental organising principle for both national and international law[1849], there are a small number of (often context-specific) legal exceptions. Perhaps the best-known examples of non-binary recognition are the court-enforced 'third gender' options decided in South Asia (a non-male and non-female gender has also been introduced by the government in Bangladesh[1850]). In the landmark 2007 decision, *Pant and others v Nepal*, the Nepalese Supreme Court ruled that 'third gender' persons were entitled to equal protection under the national constitution.[1851] According to the judgment, "[a]s people with a third type of gender identity other than male and female…are also Nepali citizens…they should be allowed to enjoy rights with their own identity."[1852] The Supreme Court held that "[it was] the responsibility of the State to create an appropriate environment and make legal provisions accordingly for the enjoyment of such rights."[1853] In particular, government officials were required to "make necessary arrangements towards creating appropriate laws or amending existing laws to ensure that there are legal provisions which allow people of a different gender identity…[to enjoy] their rights."[1854] The *Pant* decision inspired a number of proposed government initiatives, including third gender census options, public accommodations and identity documents, although the extent to which these policies (like other third gender models worldwide) have been implemented remains uncertain.[1855]

[1849] Andrew Gilden, 'Toward a More Transformative Approach: The Limits of Transgender Formal Equality' (2008) 23(1) Berkeley Journal of Law and Gender 83, 103.
[1850] Syeda Samara Mortada, 'The Third Gender' (*Dhaka Tribune,* 17 November 2013) http://archive.dhakatribune.com/op-ed/2013/nov/17/third-gender accessed 9 April 2017.
[1851] Supreme Court of Nepal, Writ No. 917 of the year 2064 BS (2007 AD) (21 December 2007).
[1852] ibid.
[1853] ibid.
[1854] ibid.
[1855] Kyle Knight, *Bridges to Justice: Case Study of LGBTI Rights in Nepal* (Astraea Lesbian Foundation for Justice 2015) 25; Human Rights Watch, *Controlling Bodies, Denying Identities Human Rights Violations against Trans People in the Netherlands* (Human Rights Watch 2011) 79; Barbara Berardi Tadié, 'Engendering Minorities in Nepal: The Authority of Legal Discourse and the Production of Truth' (2016) 30(2) Oral Tradition 361, 383.

Following the Nepalese precedent, the Supreme Courts of Pakistan and India have also embraced third gender or equivalent legal categories. In *Khaki v Rawalpindi*, Pakistan's highest court directed state officials to administer national identity cards to "eunuchs" with an acknowledgement of their special (non-male and non-female) status.[1856] Similarly, in *National Legal Services Authority (NALSA) v Union of India and others*[1857], India's Supreme Court, recognising that "[s]elf-identified gender can be either male or female or a third gender"[1858], ruled that "Hijras/Eunuchs…have to be considered as Third Gender, over and above binary genders."[1859] Since 2005 and 2009 respectively, India's Hijra and Eunuch communities had already been able to obtain an "E" gender marker on their passports and voter registration documents.[1860]

In *New South Wales Registrar of Births, Deaths and Marriages v Norrie*[1861], the High Court of Australia held that a non-binary trans individual, 'Norrie', had satisfied the specific requirements for having an "indeterminate" registered "sex" under the New South Wales' Births, Deaths and Marriages Registration Act 1995 ("the NSW 1995 Act").[1862] Australia also: (a) permits persons with an indeterminate sex to obtain an 'X' marker on their national passports[1863]; and (b) provides an 'X' designation on government records for "all adults who so choose."[1864] In New Zealand[1865] and Canada[1866], non-binary persons may apply for an 'X' passport. This option has also recently been introduced for passports and ID cards in Malta.[1867] In the United States, following a landmark judgment of the Multnomah County Circuit Court

[1856] Supreme Court of Pakistan, Constitution Petition No. 43 of 2009 (22 March 2011).
[1857] Supreme Court of India, Writ Petition (Civil) No. 400 of 2012 (15 April 2014).
[1858] ibid, at [70] (per KS Radhakrishnan J).
[1859] ibid, at [74] (per KS Radhakrishnan J).
[1860] Rellis (n 91), 233; Michael Bochenek and Kyle Knight, 'Establishing a Third Gender Category in Nepal: Process and Prognosis' (2012) 26(1) Emory International Law Review 11, 29-30.
[1861] [2014] HCA 11.
[1862] ibid, at [46] – [47].
[1863] Australian Department of Foreign Affairs and Trade, 'Sex and Gender Diverse Passport Applicants' (*Passport Office Website, No Available Date*) https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changeofsexdoborpob.aspx accessed 10 April 2017.
[1864] Bishop (n 21), 143; Government of Australia, *Australian Government Guidelines on the Recognition of Sex and Gender* (Government of Australian 2015) https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF accessed 10 April 2017.
[1865] 'Information about Changing Sex/Gender Identity' (*New Zealand Identity and Passports Website,* 29 September 2016) https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/ accessed 10 April 2017.
[1866] 'Change the Sex on Your Passport or Travel Document' (*Government of Canada Website,* 31 August 2017) http://www.cic.gc.ca/english/passport/apply/new/change-sex.asp accessed 9 September 2017.
[1867] '"X" gender option to be added to passports and ID cards' (*Times of Malta,* 24 February 2017) http://www.timesofmalta.com/articles/view/20170224/local/x-gender-option-to-be-added-to-passports-and-id-cards.6405441 accessed 10 April 2017.

(Oregon) in 2016[1868], a small number of state-court judges, particularly in California, have offered legal recognition to non-binary gender identities.[1869]

Outside the law, there are numerous social and cultural examples of living beyond male and female.[1870] Irrespective of whether non-binary persons are (or have been) *legally* acknowledged, they may achieve *community* and *cultural* affirmation.[1871] The Hijra populations of South Asia are a high-profile group transgressing (socially and culturally) the gender binary.[1872] Although there is no universal definition or understanding, the term "Hijra" typically refers to male-assigned persons who frequently (but not always) undergo castration, express a feminine identity and self-align (or are aligned by society) with a "third gender".[1873] Nanda writes that, "[t]he Hijras, as human beings who are neither man nor woman, call into question the basic social categories of gender on which…society is built."[1874]

In North America, more than 150 native tribes have been documented as acknowledging (or having acknowledged in the past) individuals outside the male-female dichotomy[1875] – including persons identified as two-spirit, Alyha, Hwame and berdaches.[1876] Around the world, numerous local cultures recognise individuals beyond man and woman, including the "bissu" in

[1868] Multnomah County Circuit Court, Oregon (10 June 2016) (per Judge Amy Holmes Hehn).
[1869] Mary Emily O'Hara, 'Court Rulings Raise Number of Legally Non-Binary Californians to Seven' (*National Broadcasting Company,* 16 February 2017) http://www.nbcnews.com/feature/nbc-out/court-ruling-raises-number-legally-nonbinary-californians-seven-n721676 accessed 10 April 2017; 'CA Court Issues Non-Binary Gender Change to Transgender Law Centre Client' (*Transgender Law Centre,* 10 April 2017) https://transgenderlawcenter.org/archives/13570 accessed 10 April 2017.
[1870] Gilbert Herdt, 'Introduction: Third Sexes and Third Genders' in Gilbert Herdt (ed), *Third sex*, *third gender*: *beyond sexual dimorphism in culture and history (Zone Books 1993) 11; S Elizabeth Malloy, 'What best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting A New Judicial Framework' (2010) 32(4) Women's Rights Law Reporter 283, 288.*
[1871] Loue (n 11), 31-32; Sell (n 141), 18-19.
[1872] Serena Nanda, *Neither Man nor Woman: The Hijra of India* (Wadsworth Publishing Company 1990); Rellis (n 91); Pooja S Jagadish, 'Mainstreaming Third-Gender Healers: The Changing Perceptions of South Asian Hijras' (2013) 9 Vanderbilt Undergraduate Research Journal 1; Aurangzaib Alizai, Philippe Doneys and Donna L Doane, 'Impact of Gender Binarism on Hijras' Life Course and Their Access to Fundamental Human Rights in Pakistan' (2016) 64(9) Journal of Homosexuality 1214.
[1873] Greenberg (n 64), 276; Rellis (n 91), 225.
[1874] Nanda (n 196) 23.
[1875] Kogan (n 85), 1242.
[1876] ibid. See also: Bret Boyce, 'Sexuality and Gender Identity under the Constitution of India' (2015) 18(1) Journal of Gender, Race and Justice 1, 21; Loue (n 11), 32-33.

Indonesia[1877], "sworn virgins" in the Balkans[1878], "fa'afafine" in Samoa[1879], "acault" in Myammar[1880], "muxes" in Mexico[1881] and "guevodoche" in the Dominican Republic[1882].

(ii.) Limitations of 'Existing Models' Reasoning in Challenging the Legitimacy of Binary Gender Requirements

What relevance do these legal and cultural examples have for the more general question of whether binary gender requirements – in the context of legal gender recognition – are legitimate? Proponents of expanding legal gender argue that the above examples highlight the insufficiency of male-female dichotomies, and prove that permitting only two rigid gender categories is neither rational nor necessary.[1883]

At first glance, it is not clear that the existence of limited legal and cultural exceptions undermines the legitimacy of binary gender requirements.[1884] Such reasoning, if taken to its logical conclusion, would mean that the mere presence of exceptions to any general rule – irrespective of the normative validity and desirability of those exceptions – justifies displacing or modifying the general rule in favour of a more obscure, less appropriate principle. The fact that certain local communities in India, Indonesia or the Dominican Republic provide cultural space for identities outside male and female cannot, without further explanation and support, create a wider requirement for non-binary recognition around the globe. As Towle and Morgan write, "an argument that relies on cross-cultural evidence of gender variation elsewhere to support the possibility of radical change at home is illogical: if gender is determined by culture elsewhere, then it must be determined by culture at home."[1885] Simply put: while there may be compelling arguments against the legitimacy of only two – male and female – gender categories, the rare existence of local recognition is not, on its own, sufficient.

[1877] Sharyn Graham, 'It's Like One of Those Puzzles: Conceptualising Gender Among Bugis' (2004) 13(2) Journal of Gender Studies 107.
[1878] Antonia Young, *Women who become Men: Albanian Sworn Virgins* (Bloomsbury Publishing 2001).
[1879] Johanna Schmidt, 'Being "Like a Woman": Fa'afāfine and Samoan Masculinity' (2016) 17(3-4) The Asia Pacific Journal of Anthropology 287.
[1880] Eli Coleman, Philip Colgan and Louis Gooren, 'Male cross-gender behaviour in Myanmar (Burma): a description of the acault' (1992) 21(3) Archives of Sexual Behaviour 313.
[1881] Alfredo Mirande, 'Hombres Mujeres: An Indigenous Third Gender' (2016) 19(4) Men and Masculinities 384.
[1882] Greenberg (n 64), 276.
[1883] Sell (n 141), 17.
[1884] Towle and Morgan (n 169), 487.
[1885] ibid.

Appeals to 'existing models' reasoning often underestimate the unique and highly-contextual environments in which the (small number of) existing non-male and non-female models arise.[1886] One must not assume that "the enactment and interpretation of identities formulated in one cultural context will remain stable when transferred to another context."[1887] Identities, such as Hijra and berdaches, are not general cultural phenomena. They cannot be easily transferred from one society to the next. Rather, these existing examples of non-binary identities are the product of a specific cultural context.[1888] They may be intelligible only to the extent that they are viewed through the lens of a particular social framework. Attempts to apply more generalist or universal meanings may be futile or may distort the actual meaning and lived-dynamics of those identities.[1889] In citing localised examples of gender diversity as a justification to condemn binary gender requirements, non-binary advocates are possibly engaging in a cultural manipulation, which re-constructs identities according to a western gaze.[1890] Dynes warns that "[i]n seeking to peer into the exotic mirror of the 'Other' we may see only the altered image of ourselves at an earlier stage."[1891] While presumably not the intention, advocates may – by drawing improper analogies between culturally-dependent identities and western non-binary movements – perpetrate an "unwitting kind of neo-colonial (or at least ethnocentric) appropriation that distorts the complexity and reality of other peoples' lives."[1892]

Localised examples of non-binary identities are typically the product of specific social and environmental factors. They depend upon a unique cultural understanding about gender which, when no longer present, render those identities meaningless or incomprehensible.[1893] Describing Hijra communities in South Asia, numerous scholars identify sexual "impotence" as a key element.[1894] A hijra individual's 'third' gender reflects the reality that, while the person may

[1886] ibid, 481. See also: Rachel Hope Cleves, 'Beyond the Binaries in Early America: Special Edition Introduction' (2014) 12(3) Early American Studies: An Interdisciplinary Journal 459, 460-461; Elizabeth C Lyons, 'Normal for Whom? Gender Acculturation in Native American Communities' (2010) 2(1) DePaul Journal of Women, Gender and the Law 87, 95; Mobeen Azhar, 'Pakistan's traditional third gender isn't happy with the trans movement' (*PRI Website*, 29 July 2017) https://www.pri.org/stories/2017-07-29/pakistans-traditional-third-gender-isnt-happy-trans-movement accessed 1 August 2017.
[1887] Towle and Morgan (n 169), 481.
[1888] Amisha R Patel, 'India's Hijras: The Case for Transgender Rights' (2010) 42(4) George Washington International Law Review 835, 840; Wipfler (n 5), 516.
[1889] Jagadish (n 196), 2; Mirande (n 205), 385. Inch writes that "one has to be wary of interpreting data from one culture through the prism of another…" see: Inch (n 169), 196.
[1890] Enrique Moral, 'Qu(e)erying Sex and Gender in Archaeology: a Critique of the "Third" and Other Sexual Categories' (2016) 23(3) Journal of *Archaeological Method* and *Theory 788, 791;* Towle and Morgan (n 169), 474.
[1891] Wayne R Dynes, 'The Return of the Third Sex' (1995) 32(4) The Journal of Sex Research 335, 337.
[1892] Towle and Morgan (n 169), 490.
[1893] Nanda (n 196) 143.
[1894] Serena Nanda, 'The Hijras of India: Cultural and Individual Dimensions of an Institutionalised Third Gender Role' (1986) 11(3-4) Journal of Homosexuality 35; Jessica Hinchy, 'Troubling bodies: "eunuchs," masculinity and impotence in colonial North India' (2013) 4(2) Gender and Masculinities: New Perspectives 196.

have forfeited their 'male' capacities to procreate, so too they are unable to conceive and give birth to a child. For many North American native peoples, inclusion among non-male or non-female populations, such as two-spirit, is connected to the work in which a person engages and the form of clothing that they prefer to wear.[1895] Sell recalls "men or women who…early in life assumed cross-gendered occupations and wore either opposite-sex clothing or a modified third alternative."[1896] Indeed, within certain North American tribes, an individual may even be "summoned" towards a non-binary identity "through…vocational dreams or visions by spirit."[1897] For the muxes in Mexico, self-identification outside the male-female dichotomy does not simply reflect individualised experiences of gender. Rather, as Mirandé suggests, muxes identity seems to be influenced as much by "language, cultural categories, practices and worldviews" as it is by "sexuality, sexual identity, or doing transgender."[1898]

It is precisely these unique factors, constructing localised examples of non-binary identities, which limit their relevance as a critique of binary gender requirements for legal recognition. Where sterility is an intrinsic feature of the 'hijra' status, it is unclear how that status can support rights for non-male and non-female persons who choose to retain their reproductive capacities. Similarly, if the law was to adopt or re-create native American identities which are linked to clothing or occupation, would that mean that all persons – trans and cisgender – who wear 'cross-gendered' clothes or undertake 'cross-gendered' work must inhabit a non-binary identity? When seeking to draw useful analogies to challenge binary gender requirements, one cannot reference cultural examples without acknowledging all the elements and factors which constitute those examples. Hijra, muxes and berdaches are real identities. To the extent that one may wish to reproduce those identities in national or international law, there is a need to respect their existing contours and inescapable limitations.

It is not simply the factors (which constitute localised non-binary examples) that limit their relevance. There is also evidence that: (a) given the broad scope of these examples, they cannot be analogised to narrower non-binary movements[1899]; and (b) if the law was to construct a gender recognition model by reference to localised examples, the results would be overly inclusive and negatively impact other queer communities, particularly gay men.[1900]

[1895] Loue (n 11), 32; Sell (n 141), 20; Lyons (n 210), 98.
[1896] Sell (n 141), 20.
[1897] ibid.
[1898] Mirande (n 214), 386.
[1899] Bochenek and Knight (n 193), 20.
[1900] Kyle Knight, 'What We Can Learn from Nepal's Inclusion of "Third Gender" on its 2011 Census' (*New Republic,* 18 July 2011) https://newrepublic.com/article/92076/nepal-census-third-gender-lgbt-sunil-pant accessed 10 April 2017. See also: Schmidt (n 212), 287.

In at least some cultural contexts, what have been identified as non-male and non-female gender categories include – either voluntarily or involuntarily – binary gender identities.[1901] In Nepal, the highly-publicised concept of 'third gender', given official status in the *Pant* judgment, stretches beyond lives outside the man-woman binary, and embraces "[trans] people and also all sexual and gender minorities."[1902] Blue Diamond Society, a Nepalese gender and sexuality health organisation, of which Sunil Pant himself is a former Executive Director, includes a wide spectrum of terms under the 'third gender' umbrella: "intersexed, transgendered people, homosexuality, metis and kothis, tas, other terms for homosexuals, bisexuals, hijras, transsexuals, and transvestites."[1903]

A recurring feature of localised third gender models worldwide is the incorporation of cisgender gay male identities.[1904] In some cases, this may simply reflect a more fluid understanding of gender so that one's sexuality intersects with, and cannot be separated from, gendered experiences. Yet, in many other cases, 'third' status becomes an instrument of gender policing whereby all men who fail to reproduce acceptable standards of masculinity, particularly gay men, are relegated to an 'in-between' space where they no longer trouble gender norms (Monro notes references to third gender as a "dustbin" into which troubling genders are placed[1905]).[1906]

Recalling the experiences of fa'afāfine persons in Samoa, Schmidt writes that "unlike the fairly broad range of gendered performances encompassed by Western understandings of 'man', the gendered behaviours enacted by male Samoans need only wander a little way from the hegemonic norms of masculinity for their bodies to be understood as not being those of 'men'."[1907] Irrespective of whether individuals, who are placed within the fa'afāfine category, actually identify as (effeminate) cisgender males, their failure to respect the "inflexible"[1908]

[1901] Lau (n 181), 485 – 486.
[1902] Knight (n 188) 5.
[1903] Bochenek and Knight (n 193), 20.
[1904] Knight (n 233).
[1905] Monro (n 5), 18.
[1906] Moral (n 223), *799;* Bochenek and Knight (n 193), 23. According to Serano, "[s]o long as "third genders" are composed only of male-bodied people with feminine qualities and female-bodied people with masculine qualities, it is hard…to see such designations as anything other than oppositional sexist attempts by society to marginalise gender-variant people", see: Serano (n 10) 149. Serano argues that, in the context of certain native American tribes, scholars have insisted on applying the label, 'third gender', to gender non-conforming identities, despite evidence that many individuals who inhabited those identities self-defined within a binary (often female) gender (at p. 147).
[1907] Schmidt (n 212), 290.
[1908] ibid, 293.

cultural boundaries of masculinity – perhaps by engaging in sexual relationships with other male-identified persons – means that these individuals are refused access to the status of 'man'.[1909]

The broad range of identities which are incorporated (or possibly even coerced) into localised third gender categories casts doubt upon the utility of these categories for challenging binary gender recognition in the context of legal gender recognition. Without doubt, there may be individuals who voluntarily identify with localised, culturally-specific third gender models and who experience their gender as outside the male-female dichotomy. Yet, to the extent that localised models undermine, or require the law to deny, the cisgender identity of gay men, it is doubtful whether they offer a desirable justification for permitting legal recognition beyond the binary.

In addition to the difficulty of using *cultural* examples (e.g. hijra, muxes, two-spirit, etc.) to challenge binary gender requirements, it is also doubtful that *legal* interventions (e.g. *Pant, Norrie* and *NALSA* judgments) have created meaningful reform. Despite judicial and legislative support in jurisdictions, such as Nepal, India and Pakistan, it is unclear whether these legal systems – and others which have nominally looked beyond man and woman – actually embrace a less binary framework.

Some of the legal innovations, which have been specifically highlighted as undermining the rationality and necessity of binary gender requirements, may in fact be completely inaccessible to most non-binary individuals. While the high-profile *Norrie* judgment was widely reported as creating a 'third gender' right in Australia[1910], the decision actually provides that, for the limited purposes of the NSW 1995 Act (as opposed to Australian law generally), a person who "has undergone a sex affirmation procedure"[1911] (i.e. gender-confirming surgery) in order to "be considered to be a member of the opposite sex"[1912] and who still self-identifies outside the male-

[1909] ibid, 293.
[1910] 'Gender Ruling: High Court Recognises Third Category of Sex' (*Australian Broadcasting Company*, 2 April 2014) http://www.abc.net.au/news/2014-04-02/high-court-recognises-gender-neutral/5361362 accessed 10 April 2017; Neil Sands, 'Australia's top court recognises "neutral" third gender' (*Irish Examiner*, 3 April 2014) http://www.irishexaminer.com/world/australias-top-court-recognises-neutral-third-gender-264158.html accessed 10 April 2017; Lydia Smith, 'Who is Norrie? Australia High Court Recognises Third "Gender Neutral" Sex Category' (*International Business Times*, 2 April 2014) http://www.ibtimes.co.uk/australia-high-court-recognises-third-gender-neutral-sex-category-1443047 accessed 10 April 2017; 'Australia's top court recognises "gender neutral" sex category' (*The Telegraph*, 2 April 2014) http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/10738405/Australias-top-court-recognises-gender-neutral-sex-category.html accessed 10 April 2017.
[1911] *Norrie* (n 185), [8].
[1912] ibid, at [10].

female binary, may be registered as having a "non-specific" legal gender.[1913] So, in New South Wales, a non-binary person, who has submitted to gender-confirmation surgery in order to be considered as male or female, can be registered as having no specific gender. This is clearly distinct from a broader, non-medicalised right to non-binary recognition. Indeed, given that: (a) *Norrie* reinforces a surgery-dependent framework; where (b) an individual will initially have to convince healthcare professionals that they identify as either male or female[1914]; and that (c) the most that the individual can achieve is a residual "non-specific" gender (as opposed to a positive gender status), it appears that *Norrie* establishes a recognition model that non-binary persons may neither be able nor want to satisfy. Therefore, it is inappropriate to cite the High Court's judgment as undermining the legitimacy of binary gender requirements.

Australia's current passport rules, which provide for the possibility of an 'X' gender marker, appear intended to cater for the specific case of intersex individuals, rather than non-binary persons who are neither male nor female.[1915] While, using the *Norrie* judgment, a person, who does not experience intersex, might nonetheless satisfy the criteria for "indeterminate" or "unspecified" sex, that person would have to undergo a sex affirmation procedure which, as noted, would not be acceptable to many non-binary persons.

Although explicit medical requirements are less visible in the existing South Asian court judgments and legislation, the continued emphasis upon 'eunuch' status[1916], as well as the popular association of hijra communities with castration[1917], suggests that, even if fully implemented, the recent movements towards non-male and non-female legal categories would be contingent upon healthcare treatments.

At a more general level, the existence of legal recognition for non-binary identities (through judicial, legislative or executive act) has not meaningfully impacted upon current national law

[1913] ibid, at [46].
[1914] Section 32A of the NSW Act 1995 specifically requires that an individual undergo surgical intervention in order "to be considered to be a member of the opposite sex." Therefore, for the purposes of the medical process at least, the individual will have to convince healthcare officers that they desire to live in the opposite, binary gender and that surgical intervention is necessary to achieve that goal.
[1915] Bennett (n 75), 855; 'Australian passports to have third gender option' (*The Guardian,* 15 September 2011) https://www.theguardian.com/world/2011/sep/15/australian-passports-third-gender-option accessed 10 April 2017; Jane Fae, 'Why the Australian Passport Category "X" May not Mark the Spot' (*The Guardian,* 16 September 2011) https://www.theguardian.com/commentisfree/2011/sep/16/australian-passport-x-intersex accessed 10 April 2017.
[1916] Petition No. 43 of 2009 (n 189); Rellis (n 91), 233; Bochenek and Knight (n 193), 29-30.
[1917] Benjamin Dykes, 'Hijras' in Timothy Murphy (ed), *Readers Guide to Lesbian and Gay Studies* (Fitzroy Dearborn Publishers 2000) 280; Lawrence Cohen, 'The Pleasures of Castration: The Postoperative Status of Hijras, Jankhas and Academics' in Paul R Abramson and Steven D Pinkerton, *Sexual Nature, Sexual Culture* (University of Chicago Press 1995) 285.

structures. Can existing models of non-binary recognition justify the removal of 'male' and 'female' gender requirements when they have not challenged those requirements within their own jurisdictions? In Nepal, India and Pakistan – despite differing levels of government engagement – society continues to operate a highly-binary framework.[1918] In many cases, non-male or non-female persons have struggled to obtain the basic non-binary identity documents to which they are nominally entitled.[1919] Although numerous superior courts have acknowledged lives outside man and woman, the steps taken to translate that acknowledgement into practice remain "unclear".[1920]

To some extent, this lack of implementation is not surprising. While judgments, such as *Pant* and *NALSA*, offer an admirable defence of trans-inclusive human rights, they provide little guidance for law-makers who seek to adopt concrete measures.[1921] When a US state court made Sara Kelly Keenan the second individual to achieve non-binary recognition in America, Kelly Keenan acknowledged the practical hurdles to enforcing the order: "It won't happen for some time….I must force them to create a mechanism to make it possible."[1922] Keenan's case highlights both the short-term administrative difficulties with removing binary gender requirements, as well as longer-term (and arguably more immovable) societal impediments. Within established national frameworks, which have always been administered on the basis that there are only two, opposite-gendered possibilities, providing individuals with a third or alternative gender marker will take time to coordinate. The fact that, a decade after the seminal *Pant* judgment, third gender persons in Nepal may still not have access to their preferred identity documents[1923], speaks to the practical difficulty of moving beyond the gender binary in law.

[1918] Bochenek and Knight (n 193), 29; Human Rights Watch, 'Bangladesh: Gender Recognition Process Spurs Abuse' (*HRW Website,* 23 December 2016) https://www.hrw.org/news/2016/12/23/bangladesh-gender-recognition-process-spurs-abuse accessed 10 April 2017; Human Rights Watch, 'India: Enforce Ruling Protecting Transgender People' (*HRW Website,* 5 February 2015) https://www.hrw.org/news/2015/02/05/india-enforce-ruling-protecting-transgender-people accessed 10 April 2017.

[1919] HRW, 'Bangladesh: Gender Recognition Process Spurs Abuse' (n 251); International Commission of Jurists (ICJ), *"Unnatural Offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity* (International Commission of Jurists 2017) 28-29; HRW (n 188) 79. See also: Devershi Mishra and Komal Khare, 'Deciphering the Reality of The Transgender Persons (Protection of Rights) Bill 2016' (*Oxford Human Rights Hub Blog*, 14 April 2017) http://ohrh.law.ox.ac.uk/deciphering-the-reality-of-the-transgender-persons-protection-of-rights-bill-2016/ accessed 10 July 2017.

[1920] HRW (n 188) 79.

[1921] Kristian Foden-Vencil, 'Neither Male Nor Female: Oregon Resident Legally Recognized As Third Gender' (*National Public Radio Website*, 17 June 2016) http://www.npr.org/2016/06/17/482480188/neither-male-nor-female-oregon-resident-legally-recognized-as-third-gender accessed 10 April 2017; Transgender Law Centre (n 202).

[1922] Erin Rook, 'Californian Second in US to Have Non-Binary Gender Approved by Court' (*LGBTQ Nation,* 30 September 2016) https://www.lgbtqnation.com/2016/09/californian-second-u-s-non-binary-gender-approved-court/ accessed 12 July 2017.

[1923] See generally: Bochenek and Knight (n 193).

Even where state authorities can create frameworks to recognise gender markers outside 'M' and 'F', there are broader doubts as to what use an 'X' or 'Other' gender marker can serve within a legal system that is overwhelmingly binary.[1924] On a personal level, third gender or non-gender individuals may benefit emotionally and psychologically from recognition as neither man nor woman[1925]. However, in reality, it is unclear what practical value non-binary recognition can offer if all the surrounding legal and social structures continue to adhere to binary norms. A person who today has a legal female identity, but identifies as genderqueer, will no less struggle to enter binary-regulated services merely because that genderqueer identity has legal status tomorrow.

In some circumstances, non-binary legal recognition may actually hinder a person's access to services.[1926] At least where an individual has a binary legal status, they may present an identity, which service providers deem to be intelligible (although that is not an identity with which the individual feels personally connected). On the other hand, where society continues to operate an absolute male-female dichotomy, persons with a non-binary gender are likely to experience decreased social and legal functionality[1927]. As Hupf writes, "[i]n creating a 'third gender', but one lacking any other relevancy in terms of basic services (health insurance, marriage rights, etc.), the law intentionally leaves those who choose that option even more 'outside the law' than usual."[1928]

In some cases, despite *legal* progress towards non-binary rights, non-male or non-female persons still feel unable to apply for gender recognition.[1929] Where there is no accompanying *cultural* and *social* progress, and stigma over gender diversity remains common, *de jure* reforms can provide only limited benefits.[1930] It is instructive that, despite the broad cultural recognition of local non-binary identities considered above, communities, such as hijra, two-spirt and

[1924] This is a question which currently confronts the legislature in California, which is attempting to enact a non-binary recognition model, see: 'SB-179 – Gender identity: female, male, or non-binary (2017-2018)' (*California Legislative Information Website, No Date Available*) https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180SB179 accessed 9 September 2017.
[1925] Christie Elan-Cain (n 76) pp. 22 – 33.
[1926] ICJ (n 252) 31-32.
[1927] One must acknowledge, however, that, contrary to Fredman's recommendation to work toward "structural change" (Fredman (n 112) 25), this is an argument which encourages conformity. The idea is that state actors make challenging discrimination so difficult that individuals cease morally unobjectionable conduct and conform to unequal social conventions. A model of substantive equality should not defend discrimination by reference to the hardships of challenging that discrimination.
[1928] Robert Hupf, 'Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital "Normalising Surgery"' (2015) 22(1) William and Mary Journal of Women and the Law 73, 97.
[1929] Bochenek and Knight (n 193), 33.
[1930] Berardi Tadié (n 188), 383.

fa'afafine persons, continue to lack cultural affirmation and are often forced into the margins of society.[1931]

V. Potential Models of Non-Binary Gender Recognition

The previous section illustrates that, while actual recognition of non-male and non-female genders remains scarce, activists and academics are increasingly strategizing to challenge the requirement that applicants may only be acknowledged in a 'male' or 'female' gender. Whether campaigners can successfully achieve the removal of mandatory binary gender will likely depend on the model by which such removal is proposed. A campaign to acknowledge identities outside 'man' and 'woman' is more convincing where there is a coherent legal status that non-binary persons wish to obtain.

A. 'Third' or 'Other' Gender Category

For many non-male and non-female individuals, abolishing binary gender requirements means access to an alternative, 'third' or 'other' gender category.[1932] Third gender provides a space for persons, who cannot bring their experiences within binary reasoning, to obtain legal status in a form which is more accurate and comfortable. To the very limited extent that non-binary identities have pierced the public consciousness, it has typically been through the lens of a 'third' status.[1933]

Yet, both practically and conceptually, recourse to 'third' or 'other' classification appears somewhat limited and possibly ineffective. If a key objection to existing binary gender options is their rigid inability to acknowledge diverse experiences, surely that criticism is not addressed merely by introducing a third rigid category?[1934] Chau and Herring write that where current gender standards "unreasonably restric[t] people's identity into one of two sexes, it becomes hard to deny that restricting people to three identities is open to identical objections."[1935] While

[1931] Tove Stenqvist, *The social struggle of being HIJRA in Bangladesh – cultural aspiration between inclusion and illegitimacy* (Malmo University 2015) 12; Towle and Morgan (n 169), 479; Lyons (n 210), 101.
[1932] Malloy (n 194), *318;* Kogan (n 85), 1224; Davy (n 173), 1172.
[1933] Holly Young, 'Trans Rights: Meet the Face of Nepal's Progressive "Third Gender" Movement' (*The Guardian,* 12 February 2016) https://www.theguardian.com/global-development-professionals-network/2016/feb/12/trans-rights-meet-the-face-of-nepals-progressive-third-gender-movement accessed 12 July 2017; Tim Elliot, 'X marks the gender: what to call someone who isn't a he or she' (*Sydney Morning Herald,* 2 April 2014) http://www.smh.com.au/nsw/x-marks-the-gender-what-to-call-someone-who-isnt-a-he-or-she-20140402-35xwp.html accessed 10 April 2017; Scelfo (n 7).
[1934]Beh and Diamond (n 169), 438; Needham (n 2), 101; Chris Hutton, 'Legal sex, self-classification and gender self-determination' (2017) 11(1) Law and Humanities 64, 80.
[1935] P-L Chau and Jonathan Herring, 'Defining, Assigning and Designing Sex' (2002) 16(3) International Journal of Law, Policy and the Family 327, 356.

a ‘third’ or ‘other’ classification may begin to trouble established gender orthodoxies, one must avoid “the tendency to believe that adherence to a three-gender system would necessarily be less oppressive.”[1936]

A third gender category runs the risk of being both overly *inclusive* and overly *exclusive*. Where an alternative option, labelled ‘third’ or ‘other’, must accommodate all non-male and non-female identities, the inevitable result will be an inappropriate mix of highly different experiences and the conflation of diverse genders, which have nothing in common other than existing outside binary norms.[1937] According to Halberstam, “‘thirdness’ merely balances the binary system and . . . tends to homogenise many different gender variations under the banner of ‘other’.”[1938] An overly inclusive alternative classification, which is simply a repository for every complicated gender experience, loses all meaning and is unlikely to satisfy non-binary demands. It cannot truly be said to accurately acknowledge lived-gender.

At the same time, there is also the fear that, far from being inclusive, a third or other gender option would actually be defined by the ways in which it *excludes* non-male and non-female individuals. Coffey suggests that the “amorphous, dehumanised association of the term ‘other’” may only serve to underline non-binary difference, and to further entrench the social marginalisation to which non-male and non-female identities are often subject.[1939] Emphasising the ‘third’ or ‘other’ status of non-binary genders reinforces the optimal positioning of man and woman, and defines all other gendered experiences by reference to their deviation from the norm.[1940] According to Beh and Diamond, “if ‘other’ is used to socially sort individuals, it may have the unintended consequence of heightening an awareness of sex differences, and the ‘other’ classification becom[ing] a source of discrimination and rejection.”[1941] Indeed, there is evidence that – both legally and socially – ‘third’ gender status has historically been used to ‘other’ trans individuals and to restrict their access to non-discrimination protections.[1942]

[1936] Towle and Morgan (n 169), 485.
[1937] Monro (n 5), 18; Bennett (n 75), 858.
[1938] Jack Halberstam, *Female masculinity* (Duke University Press 1998) 28.
[1939] Carolyn E Coffey, ‘Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures’ (2004) 7(1) New York City Law Review 161, 171.
[1940] Needham (n 2), 102; Valentine (n 25) 42-43; Bennett (n 75), 859.
[1941] Beh and Diamond (n 169), 438.
[1942] Malloy (n 194), *303; Patricia A Cain, ‘Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law’ (1997) 75(4) Denver University Law Review 1321, 1324 and 1355;* Serano (n 10) 174-176.

B. Multiple Gender Alternatives

One solution may be to increase the number of possible 'alternative' gender categories. By expanding the options for self-definition, the law can provide greater accommodation for nuanced genders and avoid either: (a) conflating wholly dissimilar experiences; or (b) ghettoising non-binary identities into a status of otherness. Where there are increased opportunities for gendered existence, and non-binary can no longer be defined as a deviant third in opposition to standard male and female norms, gender recognition is less likely to reinforce traditional dichotomies and non-binary individuals may find greater respect for their lived-realities.

Even with an expanded list of options, however, non-binary categorisation continues to raise important difficulties. If the goal of increased gender possibilities is to accommodate the diversity of lived-experiences, how many non-binary alternatives would the law have to offer? Feinberg writes that "the gradations of sex and gender self-definition are limitless."[1943] All persons – cisgender, binary trans, non-binary – experience gender in different, often complex forms.[1944] As Reilly-Cooper notes, if the law did aim to accurately capture the infinite variety of personal identities, the only way to proceed would be recognising "7 billion" gendered options.[1945] Such a solution would render categorisation meaningless. While this may be supported by those who advocate removing gender from the law (see introductory chapter), it would not be compatible with a strategy that genuinely seeks to create workable classifications.

Similarly, in addition to the impractical diversity of identities, there is also the problem of experiences, which defy definition or enumeration. How does the law create categories for genders which are situational[1946], fluid[1947] or comprising numerous sub-experiences?[1948] Where a person has a male identity on Monday, a female identity on Tuesday and no gender on Wednesday, attempts to provide meaningful status options – through expanded categories – may ultimately prove no less futile than the existing male-female classes. Indeed, in some

[1943] Feinberg (n 32) 102.
[1944] Davidson (n 94), 70.
[1945] Rebecca Reilly-Cooper, 'Gender is Not a Spectrum' (*Aeon,* 28 June 2016) https://aeon.co/essays/the-idea-that-gender-is-a-spectrum-is-a-new-gender-prison accessed 10 April 2017.
[1946] Nagoshi, Brzuzy and Terrell (n 22), 415; Vade (n 25), 267.
[1947] Pahl (n 26), 66-67; Beemyn and Rankin (n 19) 65-66.
[1948] Harrison, Grant and Herman (n 5), 20; Dargie and others (n 22), 62; United Nations Development Programme and the Williams Institute*, Surveying Nepal's Sexual and Gender Minorities: An Inclusive Approach – Executive Summary* (United Nations Development Programme 2014) 5.

circumstances, individuals confess an inability to define their non-binary identity.[1949] It seems reasonable to assume that, even if the law did adopt "7 billion" gender possibilities, it would still not be able to embrace identities which are unknown or undefined.

VI. Concluding Remarks: Reasonable Accommodation of Non-Binary Genders

A. Are Binary Gender Requirements Incompatible with Human Rights?

Chapter VI addresses binary gender as a pre-condition for legal recognition. Exploring identities outside 'male' and 'female', Chapter VI considers arguments which challenge the legitimacy of man-woman gender dichotomies.

The requirement that applicants identify as either 'men' or 'women' is simultaneously among the least and most controversial aspects of gender recognition. For many trans persons and the wider public, the existence of only two gender options – male and female – is unproblematic. While there is increasing rejection of biological essentialism, and an acceptance that one can legally transition, there is nevertheless a (possibly unconscious) assumption that only two gender categories exist.

For non-binary individuals, however, conditioning recognition on male or female identification not only reproduces a sense of gendered oppression. It also means that recent movements toward trans equality have had little impact. Where a person self-identifies as neither man nor woman, the possibility of transitioning between only those two genders has no practical merit.

As noted in the introduction to this chapter, the relationship between non-binary identities and human rights remains in a nascent phase. Although the concept of 'gender identity' – particularly when applied in non-discrimination contexts – can embrace diverse (i.e. fluid, situational, etc.) genders, international rights standards prioritise binary experiences. Key actors, such as the United Nations Treaty Bodies and Special Procedures of the Human Rights Council, now acknowledge trans men and trans women as a matter of routine. However – surveying existing hard and soft law jurisprudence – non-male and non-female lives remain largely invisible.[1950] Non-binary applicants enjoy the same core guarantees (e.g. bodily

[1949] Sanger (n 55), 48; Hines (n 88), 95.
[1950] United Nations Human Rights Committee, 'Concluding Observations on the Initial Report of Bangladesh'

integrity, marriage and family life, etc.) as their binary peers. They should have access to formal acknowledgement without involuntary medicalisation, forced divorce or the absolute exclusion of minors. Yet, as things currently stand, there is no norm of human rights law (international or regional) which would require states to remove binary gender as a pre-condition for legal recognition.

In recent years, when reviewing cases in the sphere of trans rights, both the United Nations Human Rights Committee (UN HRC) and the ECtHR have emphasised "personal" identity as a core aspect of privacy and private life.[1951] Both institutions have relied upon the free expression and development of personal identity as a key justification for legal gender recognition.[1952] Within this emerging case law – where personal identity (including gender identity) becomes a central pillar of privacy guarantees – there is perhaps potential for future recognition of "personal" genders, which fall outside binary norms. Yet, considering that UN HRC and the ECtHR have only ever opined in the context of developing *male* and *female* personal identities[1953], their case law cannot (yet) be interpreted as requiring recognition of non-binary genders.

(27 April 2017) UN Doc No. CCPR/C/BGD/CO/1, [11(e) and 12(e)]; United Nations Human Rights Committee, 'Concluding observations on the third periodic report of Bosnia and Herzegovina' (13 April 2017) UN Doc No. CCPR/C/BIH/CO/3, [25] – [26]; United Nations Human Rights Committee, 'Concluding observations on the second periodic report of Thailand' (25 April 2017) UN Doc No. CCPR/C/THA/CO/2, [11] – [12]; United Nations Human Rights Committee, 'Concluding observations on the initial report of Burkina Faso' (17 October 2016) UN Doc No. CCPR/C/BFA/CO/1, [13] – [14]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined seventh and eighth periodic reports of the Philippines' (25 July 2016) UN Doc No. CEDAW/C/PHL/CO/7-8, [14(b)] and [45(a)]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the seventh periodic report of Turkey' (25 July 2016) UN Doc No. CEDAW/C/TUR/CO/7, [32(f)] – [33(h)]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined eighth and ninth periodic reports of Haiti' (9 March 2016) UN Doc No. CEDAW/C/HTI/CO/8-9, [47] – [48]; United Nations Committee on Economic, Social and Cultural Rights, 'Concluding observations on the fourth periodic report of the Dominican Republic' (21 October 2016) UN Doc No. E/C.12/DOM/CO/4, [25] – [26]; United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the eighth periodic report of the Russian Federation' (20 November 2015) UN Doc No. CEDAW/C/RUS/CO/8, [42(a)-(c)]; 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' (19 April 2017) UN Doc No. A/HRC/35/36l; 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) UN Doc No. A/HRC/31/57, [34] – [36], [48] – [50]; United Nations Special Rapporteur on the Situation of Human Rights Defenders, 'Situation of human rights defenders' (30 July 2015) UN Doc No. A/70/217, [65] – [67], and [93(a)]. In *Goodwin*, the European Court of Human Rights permitted Christine Goodwin to legally transition from a male assigned gender to an uncomplicated female gender, in which she hoped to access a heterosexual marriage with her male partner, *Goodwin* (n 129).

[1951] *G v Australia* Communication No. 2172/2012 (CCPR/C/119/D/2172/2012) (UN HRC, 15 June 2017), [7.2]; *Goodwin* (n 129), [90]; *YY v Turkey* App No. 14793/08 (ECtHR, 10 March 2015), [58].

[1952] ibid.

[1953] ibid. See also: *Schlumpf v Switzerland* App No. 29002/06 (ECtHR, 8 January 2009); *L v Lithuania* [2008] 46 EHRR 22; *AP, Garcon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017).

B. Reasonably Accommodating Genders outside 'Man' and 'Woman'

The absence of non-binary rights in international law does not, however, mean that states cannot (and should not) reasonably accommodate individuals whose identities stretch beyond man and woman. Chapter VI has highlighted the very real ways in which many people around the world experience genders outside male and female categorisation. Although these persons may not have a formal right to recognition, there are numerous ways (short of legally acknowledging additional genders) that their identities can be respected.

A first option, which might possibly benefit all persons – cisgender, binary-trans and non-binary – is to reduce reliance on gender classifications where they serve no logical purpose.[1954] According to Neuman Wipfler, if there is a fear that de-gendering the law "would leave the most vulnerable trans people without proof of the legitimacy of their gender identity" (or fail to acknowledge the specific gender oppression experienced by women), "advocates should promote a gradual approach to abolition" which focuses only on those areas where legal gender has no practical function, or where it creates tangible discriminatory effects.[1955]

In its *Norrie* judgment, the High Court of Australia observed that, despite widespread assumptions about the centrality of gender in the law, "[f]or the most part, the sex of the individuals concerned is irrelevant to legal relations."[1956] While, there may be compelling reasons to retain legal gender categories in areas, such as non-discrimination and health care law, other examples of legal gender are less justifiable or socially beneficial (e.g. maternity/paternity laws which, by drawing a distinction between women and men, imply that women must be children's primary caretakers[1957]).

In Chapter IV, this thesis explored human rights arguments for gender-neutral marriage. While many individuals who support de-gendering marriage would also accept that gender can play an important role in the law, they would nevertheless argue that marriage is a specific example where there is no benefit of using legal gender as a relevant entry criteria. Reducing unnecessary

[1954] Government of Australia (n 188) 5; Ayden I Scheim and Greta R Bauer, 'Sex and Gender Diversity Among Transgender Persons in Ontario, Canada: Results From a Respondent-Driven Sampling Survey' (2015) 52(1) Journal of Sex Research 1, 12-13; Carrotte and others (n 15), p. 2; Reilly (n 74), 324.
[1955] Wipfler (n 5), 503.
[1956] *Norrie* (n 185), [42].
[1957] See e.g. Paternity Leave and Benefits Act 2016 (Ireland); Family and Medical Leave Act (United States of America); Basic Conditions of Employment Act 1997 (South Africa).

reliance on legal male or female gender categories eases pressure on non-binary individuals and can also work to reduce the wider impact of arbitrary and capricious gender distinctions.

A second accommodation is to expand existing gender options on identity documents where it would not require a redefinition of legal gender categories. As noted, countries, such as New Zealand, Canada and Malta, now permit individuals to obtain an 'X' gender marker on their passports. In all three jurisdictions, the provision of that alternative identity category has not created a 'third' gender option. Legal gender does not derive from an individual's passport, but rather from another source, such as the birth certificate or civil status register. Issuing 'X' gender passports does not require New Zealand, Canada and Malta to reorganise their legal and administrative institutions (e.g. social security, etc.), which continue to operate according to binary-gender. However, the alternative gender markers do mean that non-binary persons can access at least one form of official identification which, however imperfectly, acknowledges that their experience of gender is more complicated than simply man or woman. In Europe, there are growing movements which – although accepting that 'X' passports are not a comprehensive solution to non-binary demands – advocate this alternative passport option as a first, achievable step to breaking the legal orthodoxy.[1958]

A final option is for states to issue non-binary persons with a de-gendered passport document, where the gender marker has been omitted or left blank.[1959] Although not substantively different from the 'X' gender option, selectively de-gendering passports may: (a) more accurately capture 'agender' experiences; and (b) be more palatable to persons who believe that a rigid 'X', available to all non-binary persons, is unsuitable for their uniquely fluid, situational or multifaceted identity. While a previous regime of genderless identification documents in New York City was the subject of significant academic and activist protest[1960], those critiques arose from the fact that genderless documents were issued to *all* trans persons who sought legal recognition, even those who identified as male or female. The amended documents had the effect of involuntarily 'outing' binary trans individuals. However, where a person has no gender, or is asking to be publicly acknowledged as neither man nor woman, there would not appear to be a problem where their identification documents reveal that fact.

[1958] Jamie Grierson, 'Stonewall calls for gender-neutral X option for UK passports' (*The Guardian*, 5 April 2017) https://www.theguardian.com/society/2017/apr/05/uk-passports-should-include-transgender-title-says-stonewall accessed 13 April 2017; Transgender Europe, 'Denmark: X in Passports and New Trans Law Works' (*TGEU Website,* 12 September 2014) http://tgeu.org/denmark-x-in-passports-and-new-trans-law-work/ accessed 13 April 2017.
[1959] HRW (n 188) 72-74; Wipfler (n 5), 526.
[1960] Paisley Currah and Lisa Jean Moore, '"We Won't Know Who You Are": Contesting Sex Designations in New York City Birth Certificates' (2009) 24(3) Hypatia Journal of Feminist Philosophy 113, 120-121.

Conclusion

This thesis has evaluated how human rights law can impact the requirements which states impose as pre-conditions for legal gender recognition. Identifying a growing consensus towards acknowledging preferred gender, the thesis asks how human rights can influence how judges and law-makers control access to recognition.

The relationship between human rights and trans identities has significant legal and political importance. While state actors have debated gender recognition rights since the mid-20th century, their frame of reference (and the content of their deliberations) has often been narrowly focused. Until the early 2000s, and the emergence of legislative reforms, judges and law-makers tended to concentrate on *whether* trans persons should be legally acknowledged.[1961] There was little consideration of *how* gender recognition would operate once introduced. Most actors (e.g. state officials, scholars, etc.) assumed that, if national laws were to provide for legal transitions, there would be a standard pathway, which all applicants should (and would want to) follow.

In recent years, however, the conditions of recognition have attracted increased judicial, political and academic scrutiny. Having achieved acknowledgement for preferred gender in a growing number of jurisdictions, advocates have begun to question why that right is subject to onerous requirements. Their concern is not without merit. Although legal recognition has expanded around the world since 1972, it has been tightly controlled through regulations affecting body, civil status and age.[1962] When describing the modern intersection of human rights and trans identities, it would be misleading to speak only of a general right to recognition. Rather, one must also concede that, even where state actors acknowledge preferred gender, the conditions of recognition can render that right inoperable or unobtainable. These conditions must be subject to human rights evaluation.

This thesis has analysed four requirements for gender recognition: (a) physical medical intervention; (b) divorce; (c) age limits; and (d) binary gender identification. In focusing on these four topics, the thesis has not suggested that they are the only pre-conditions which applicants do (or could) have to satisfy. There are numerous additional hurdles built in to

[1961] See e.g. *MT v JT* 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (New Jersey); *Corbett v Corbett (Otherwise Ashley) (No 1)* [1971] 2 All ER 33 (England and Wales); *Lim Ying v Hiok Kian Ming Eric* [1991] SGHC 135 (Singapore); *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 (New Zealand).

[1962] See generally: Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report* (ILGA 2016) accessed http://ilga.org/downloads/TLMR_ENG.pdf accessed 24 May 2017; Transgender Europe (TGEU), 'Trans Rights Index 2017' (*TGEU Website,* 18 May 2017) http://tgeu.org/wp-content/uploads/2017/05/Index-online.png accessed 24 May 2017.

domestic recognition regimes around the world. Rather, the thesis focuses on these four requirements because they are the most common conditions which state actors impose. The typical gender identity rule foresees a male or female adult, who is not party to an existing marriage, who desires to forfeit his or her reproductive capacities and who will alter both internal and external sex characteristics.

The thesis has reviewed these requirements through the lens of a trans-inclusive human rights framework. It has asked whether existing national laws and practices comply with international rights standards, and whether human rights principles can offer guidance for reform. The thesis focuses on four rights themes: (a) bodily integrity; (b) equality and non-discrimination; (c) marriage and family life; and (d) children's rights. As it was for the four pre-conditions, concentrating on these rights themes does not imply that they are the only protections with significance for legal recognition. As the introductory chapter illustrates, debates on gender recognition implicate many additional rights, particularly privacy. The thesis has concentrated on these four themes simply because they are most relevant for the conditions of recognition under review.

The thesis has adopted an expansive interpretation of human rights. Moving beyond a treaty-custom model, which could have only limited impact for trans lives, the thesis embraces a broader range of sources, including judicial decisions and soft law instruments. While this restricts capacity to identify binding international rules, it facilitates a more meaningful engagement with trans lives.

In this final chapter, the thesis offers a concluding assessment of how human rights can impact legal gender recognition. Drawing upon the preceding analyses and critiques, the thesis evaluates the relationship between existing pre-conditions for acknowledgment and human rights standards. It also identifies core themes and narratives, which are often present in gender identity debates and serve as motivation for limiting trans recognition rights.

The concluding chapter proceeds in four sections. Section I directly considers whether medicalisation, divorce, age limits and binary gender are compatible with a trans-inclusive human rights framework. Noting the potentially significant influence of international and regional protections in areas, such as compulsory sterilisation and forced relationship dissolution, Section I also acknowledges the evolving impact of human rights on trans minors and non-binary populations.

In Section II, the thesis draws together common themes and policy considerations which have informed (and continue to inform) state responses to trans identities. Exploring, *inter alia*, the myth of a common trans narrative, perceived needs to curb homosexual activities and recurring failures to interrogate 'voluntary' consent, Section II exposes numerous false (often discriminatory) narratives, which have shaped legislative and judicial attitudes towards recognition. Finally, in Section III, the thesis reflects broadly on human rights as a useful and desirable framework to enforce trans protections, observing both the advantages and weaknesses of existing international and regional mechanisms.

I. Impact of Human Rights on Conditions of Recognition

Section I considers how the four human rights themes considered in this thesis – bodily integrity, equality and non-discrimination, marriage and family life, and children's rights – can impact the requirements, which states impose as pre-conditions for legal gender recognition. It draws together the central themes and observations set out in Chapters II to VI.

A. Bodily Integrity

Considerations of bodily integrity are (unsurprisingly) most relevant in the context of physical medical intervention. To the extent that recognition rules require unwanted surgery, sterilisation or hormone treatment, they violate international and regional protections for physical autonomy.

As a first point, it is important to acknowledge (as noted in Chapter II) that medical transitions are not automatically illegitimate. Many trans persons do want to align their physical bodies with their internalised experience of gender.[1963] For these individuals, access to appropriate healthcare resources is not only desirable, it may also be life-saving.[1964] Since the 1950s, in

[1963] Sandy E James and others, *The Report of the 2015 U.S. Transgender Survey* (NCTE 2016) 99 -103 http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf accessed 19 March 2017; House of Commons Select Committee on Women and Equalities, *Transgender Equality* (The Stationary Office Limited 2016) 42 – 50; New Zealand Human Rights Commission, *To Be Who I am* (New Zealand Human Rights Commission 2008) 50 – 56 https://www.hrc.co.nz/files/5714/2378/7661/15-Jan-2008_14-56-48_HRC_Transgender_FINAL.pdf accessed 17 May 2017; Jaclyn White Hughto and Sari Reisner, 'A Systematic Review of the Effects of Hormone Therapy on Psychological Functioning and Quality of Life in Transgender Individuals' (2016) 1(1) Transgender Health 21, 29 – 31.

[1964] World Professional Association for Transgender Health (WPATH), 'Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA' (*WPATH Website,* 21 December 2016) http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1352&pk_association_webpage=3947

parallel with advocacy for gender recognition, trans activists have campaigned for safe and affordable medical transition pathways.[1965] In recent years, professional health organisations have increasingly rejected arguments that gender-confirming treatment is cosmetic or experimental, affirming the beneficial role which surgery, hormones and even sterilisation can play in some trans lives.[1966] This thesis does not underestimate the significance of medical interventions, nor does it suggest that physical transitions are always undesirable. Rather, the thesis argues that, where medicalisation is an absolute pre-condition for gender recognition, requiring even unwanted treatments, there is incompatibility with bodily integrity rights.

Medical intervention conditions infringe international protections against 'cruel and inhuman' and 'degrading' treatment. Surgery, sterilisation and hormone treatment are highly invasive requirements, and may impose severe pain and suffering on applicants. Compulsory medicalisation obliges trans persons to amend their bodies in the most intimate ways. There are few (if any) other circumstances where individuals must sacrifice their bodily characteristics to vindicate basic human rights. Surgery, sterilisation and hormone therapy can have significant, permanent consequences, including deep scarring, loss of sexual sensitivity, early menopause and intense, long-lasting physical pain. They are not justifiable by reference to medical emergencies, nor is their objectively coercive nature lessened by the fact that some trans individuals refuse to submit.

A more uncertain question is whether physical intervention requirements constitute 'torture'. Chapter II acknowledges the complexity of this inquiry. It suggests that the response is context specific, and depends upon both the knowledge and mind-frame of state actors. On one hand, there is an arguable case that involuntary surgery, sterilisation and hormone treatment do satisfy the elements of art. 1 UN CAT.[1967] Such pre-conditions create severe pain and suffering, are intentionally applied, frequently pursue discriminatory social and moral 'purposes', and are enforced by the State. Yet, on the other hand, many law-makers and judges genuinely (but incorrectly) believe that body alterations are a natural part of *all* transition pathways. They

accessed 25 May 2017.

[1965] See generally: Stephen Whittle and others, *Transgender Euro Study: Legal Survey and Focus on the Transgender Experience of Health Care* (ILGA-Europe 2008); National Centre for Transgender Equality, 'Health and HIV' (*NCTE Website*, *No Date Available*) http://www.transequality.org/issues/health-hiv accessed 11 August 2017.

[1966] WPATH (n 6); UK National Health Service, 'Gender Dysphoria' (*NHS Website*, 14 April 2016) http://www.nhs.uk/conditions/gender-dysphoria/Pages/Introduction.aspx accessed 11 April 2017.

[1967] As noted, art. 1 UN CAT provides that: "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes…[as] any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

impose physical intervention as a reflection of (what they perceive to be) standard trans practice. While such attitudes expose a troubling detachment from trans realities, they may fall outside the narrower contours of the torture offence.

Concerns about bodily integrity are also raised in opposition to acknowledging the preferred gender of minors. Many observers support age limits as a basis for protecting trans youth from inappropriate and premature medical interventions.[1968] This argument presupposes that physical requirements are an inevitable and necessary feature of legal recognition regimes. To the extent that children will be acknowledged in their preferred gender, they will also be obliged to undertake a prior medical transition. As Chapters II and III illustrate, however, such a position is inconsistent with human rights law. Trans individuals, both old and young, should obtain recognition without having to submit to medical treatments. Where trans minors are recognised without involuntarily altering their bodies, there is no risk to their bodily integrity.

B. Equality and Non-Discrimination

Equality and non-discrimination are relevant across the spectrum of conditions of recognition. This is true both at the macro level – where applicants experience a generalised sense of inequality – and the micro level – where the precise operation of specific pre-conditions has substantively discriminatory effects.

The imposition of medical requirements is problematic both in terms of validating gender stereotypes and creating arbitrary distinctions. In order to access surgery, sterilisation and hormone therapy, applicants must first obtain a medical diagnosis ('gender dysphoria'). Trans-related diagnoses reinforce traditional (highly questionable) ideas of what it means to be a 'man' or 'woman'.[1969] They are, in practice, often dependent upon individual perceptions of acceptable or proper 'maleness' and 'femaleness'.[1970] There are documented cases where applicants for recognition were denied legally prescribed medical treatment until they externalised sufficiently masculine or feminine characteristics.[1971] Not only does this situation

[1968] Sheila Jeffreys, *Gender Hurts* (Routledge 2014) 125; Kristina Olson and Lilly Durwood, 'Are Parents Rushing to Turn their Boys into Girls?' (*Slate,* 14 January 2016) http://www.slate.com/blogs/outward/2016/01/14/what_alarmist_articles_about_transgender_children_get_wrong.html accessed 16 October 2016.
[1969] Amnesty International, *The State Decides who I Am: Lack of Legal Gender Recognition for Transgender People in Europe* (Amnesty International 2014) 90.
[1970] Blaise Vanderhorst, 'Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex' (2015) 9(1) Harvard Law and Policy Review 241, 265.
[1971] Susan Etta Keller, 'Crisis of Authority: Medical Rhetoric and Transsexual Identity' (1999) 11(1) Yale Journal

legitimise outdated myths about male and female behaviour – norms which have historically curtailed and policed women's social participation – they also hold applicants to gendered-expectations which are not imposed upon cisgender populations.[1972] Indeed, establishing unequal standards for trans persons is a common feature of medicalisation. While domestic laws routinely acknowledge cisgender and intersex preferred genders, even where there are non-normative body characteristics, applicants for recognition must undergo surgery, sterilisation and hormone interventions.[1973]

Conditions of recognition create intersecting inequalities. They often fall hardest on trans individuals who have multiple vulnerabilities or marginalisations. Forced divorce and medicalisation have a particular impact on persons who lack financial resources. Applicants who experience poverty have reduced ability to afford either the financial detriments of divorce or the cost of gender-confirming treatment. Both requirements also negatively affect persons of faith who, in order to comply with religious doctrine, may be unwilling to dissolve their marriage or alter their healthy body.

Age limitations, particularly parental consent provisions, and forced divorce place greater burdens on applicants who experience familial rejection. Where an individual is estranged from family members, they are ill-placed to obtain the necessary parental affirmation. Similarly, dissolving a marital union may be a drawn-out, costly and possibly even unobtainable process if the relevant parties are no longer communicating. Across the four conditions for recognition analysed, there is the persistent creation of *de facto* two-tier systems, where applicants with financial, age, secular and age privilege enjoy enhanced status.

This thesis carries out non-discrimination review through the lens of Fredman's four-pronged substantive equality model. A central pillar of this approach is the idea that substantively equal laws and policies do not require "conformity as a price of equality."[1974] Individuals must enjoy non-discriminatory treatment without an obligation to assimilate. Yet, a striking feature of domestic recognition rules around the world is their contingency upon adherence to societal norms. In many states, binary gender, opposite-gender sexuality and childhood incapacity

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of Law and Feminism 51, 54; Dean Spade, 'Resisting Medicine, Re/modeling Gender' (2003) 18(1) Berkeley Women's Law Journal 15, 20.

[1972] Dylan Vade, 'Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is more Inclusive of Transgender People' (2005) 11(2) Michigan Journal of Gender and Law 253, 272.

[1973] Olga Tomchin, 'Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People' (2013) 101(3) California Law Review 813, 842.

[1974] Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 25.

(among other requirements) are the standard price of equality. Trans persons can be recognised in their preferred gender, but only where they uphold adult, binary and heterosexual conventions. Those who fail to assimilate remain strangers to the law.

There are, however, limitations to non-discrimination analysis. While the language of equality is a useful advocacy tool, one must not overstate it substantive reach.

Those who oppose physical intervention requirements often fail to engage in sufficient comparator reasoning. While it is true that only trans individuals need medically transition to have an accurate gender status, there is a compelling argument that legally amending gender differentiates applicants from cisgender peers. Requiring surgery, sterilisation and hormone therapy does not come within the contours of impermissible discrimination because trans and cisgender persons – who do experience objectively different treatment – cannot be meaningfully compared. This is also true in the context of binary gender and age restrictions. Applying for fluid, intermediate or undefined legal statuses, non-male and non-female persons are sufficiently distinct from binary applicants that recognising only the latter is not substantively unequal. Similarly, in the sphere of trans minors, although age-based conditions disfavour young people, their objective differences with trans adults provides a basis for different rules.

C. Marriage and Family Life

Gender transitions often have a significant impact on family life. The decision to live in one's preferred gender can profoundly influence intra-family relationships, and create changed dynamics for spouses, parents, children and wider relations.[1975] Throughout this thesis, there have been numerous references to the ways in which revealing one's trans identity may affect family life. From marital strife (because of a spouse or child's gender)[1976] to sibling discontent (because non-trans siblings are bullied or feel neglected)[1977], transitions are a challenging, sometimes traumatic, pathway for families to navigate.

[1975] Brian D Zamboni, 'Therapeutic Considerations in Working with the Family, Friends, and Partners of Transgendered Individuals' (2006) 14(2) The Family Journal: Counselling and Therapy for Couples and Families 174, 175; Jean Malpas, 'From Otherness to Alliance: Transgender Couples in Therapy' (2006) 2(3-4) Journal of GLBT Family Studies 183, 196; Hannah Hussey, *Beyond 4 Walls and a Roof Addressing Homelessness Among Transgender Youth* (Centre for American Progress 2015) 1; *Re Isaac* [2014] FamCA 1134.
[1976] Aiden Key, 'Children' in Laura Erickson-Schroth (ed), *Trans Bodies, Trans Selves* (Oxford University Press 2014) 422; Stephanie Brill and Rachel Pepper, *The Transgender Child: A Handbook for Families and Professionals* (Cleis Press 2008) 87.
[1977] Key (n 16) 424.

Obtaining legal recognition may curtail existing marriage and family life protections. In this context, divorce requirements are particularly relevant. Obliging individuals, who have contracted a valid heterosexual marriage, to involuntarily dissolve that union constitutes 'forced' divorce. It is inconsistent with both international and regional human rights frameworks.[1978] In most jurisdictions, divorce requirements are not a necessary response to legal transitions – even if there is a prohibition on same-gender marriage. Where the status of a union is determined at the 'point of entry', legal recognition cannot give rise to 'gay' marriages and, so, there is no risk of circumventing that prohibition.[1979]

Divorce requirements are a disproportionate interference with family life guarantees. The loss of legal rights, symbolic status and the disruption to internal family dynamics outweigh the (somewhat abstract) benefit of maintaining uniquely opposite-gender marriages. Indeed, as noted in Chapter IV, it is even questionable whether reinforcing traditional marital norms is a "legitimate objective of sufficient importance to warrant"[1980] forced divorce. While neither international nor regional human rights currently protect marriage equality, there are compelling arguments that gay marriage prohibitions reproduce (and validate) historical anti-gay prejudice[1981], and that such laws are impermissible discrimination on the basis of sexual orientation.

It may be possible for state actors to mitigate the consequences of divorce requirements by offering an alternative relationship structure into which former spouses can contract (e.g. civil partnership, etc.).[1982] However, the proportionality of 'conversion' options depends both on the rights guaranteed and the ease with which applicants and their spouses can transfer into the additional regime. Where civil partnerships significantly deviate from marital protections, they are less likely to be a proportionate counter-balance to the interference with family life.

[1978] United Nations Human Rights Council, '29/… Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development' (1 July 2015) UN Doc No. A/HRC/29/L.25, [29].
[1979] Fergus Ryan, 'Marriage at the Boundaries of Gender: The "Transsexual Dilemma" Resolved?' (2004) 7(1) Irish Journal of Family Law 15; Jennifer Levi, 'Divorce and Relationship Dissolution' in Jennifer Levi and Elizabeth Monnin-Browder (eds), *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012) 88-89.
[1980] Grant Huscroft, Bradley W Miller and Gregoire Webber, 'Introduction' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 2.
[1981] *Fourie v Minister for Home Affairs* [2005] ZACC 19, [76] (per Sachs J); *Kerrigan v Commissioner of Public Health* 957 A.2d 407, 478 (Conn. 2008); Angelo Pantazis, 'An Argument for the Legal Recognition of Gay and Lesbian Marriage' (1997) 114(3) South African Law Journal 556, 562.
[1982] See e.g. *Hamalainen v Finland* [2015] 1 FCR 379.

Similarly, to the extent that dissolving a marriage may be inaccessible to some applicants, or may require lengthy legal or physical separations, they may be insufficient.

D. Children's Rights

The final human rights theme considered in this thesis is children's rights. In recent years, the lives of trans minors have gained increasing visibility. The right of children to be affirmed – both socially and medically – in their preferred gender is a source of intense debate and, in some circumstances, has given rise to notable public controversy.[1983]

As noted in Chapter V, human rights law can influence the broad contours of youth recognition guarantees. Consistent with art. 3 UN CRC, the decision whether to legally acknowledge trans children should be guided, as a primary consideration, by the 'best interests of the child'. To the extent that affirming trans children increases physical and emotional well-being[1984], state actors should make provision – legal or social – to respect minors' preferred gender.

In terms of implementing a youth recognition model, however, it is less clear to what extent human rights prescribe (or proscribe) particular conditions. In a global context, where the voices of trans children often remain supressed, domestic recognition laws should ensure that young applicants are heard. Similarly, to the extent that trans minors are entitled to offer their opinion about recognition, they should also have sufficient information to make an informed choice. While art. 5 UN CRC would support a role for parents in the recognition process, that role must be exercised "in a manner consistent with the evolving capacities of the child."[1985] A small (but growing) number of jurisdictions, including Malta, Sweden, Norway, Belgium and the

[1983] Kimberley Ens Manning, Elizabeth J Meyer and Annie Pullen Sansfaçon, *'Introduction'* in Elizabeth J Meyer and Annie Pullen Sansfaçon *(eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014) 1. See generally: Zack M Paakonen, 'Legal Protections for Transgender Youth' in Jennifer Levi and Elizabeth Monnin-Browder (eds), *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012) 146 – 178; Amy Ellis Nutt, *Becoming Nicole: The Transformation of an American Family* (Random House 2016); Elijah C Nealy, *Transgender Children and Youth: Cultivating Pride and Joy with Families in Transition* (WW Norton and Company Press 2017); 'Growing up Trans' (*Frontline Public Service Broadcasting*, 30 June 2015) http://www.pbs.org/wgbh/frontline/film/growing-up-trans/ accessed 24 October 2016; Eric Juhola, 'Growing up Coy' (Documentary) (Still Point Pictures 2016); Jesse Singal, 'How the Fight over Transgender Kids got a Leading Sex Researcher Fired' (*NY Mag Science of Us,* 7 February 2016) http://nymag.com/scienceofus/2016/02/fight-over-trans-kids-got-a-researcher-fired.html accessed 17 October 2016.

[1984] Herbert Bonifacio and Stephen Rosenthal, 'Gender Variance and Dysphoria in Children and Adolescents' (2015) 62(4) Paediatric Clinics of North America 1001, 1005; Annelou LC de Vries and others, 'Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment' (2014) 134(4) Paediatrics 696; Kristina R Olson and others, 'Mental Health of Transgender Children Who Are Supported in Their Identities' (2016) 137(3) Paediatrics.

[1985] UN CRC, art. 5.

Netherlands, acknowledge the autonomy of 16 and 17-year-old applicants in the gender recognition process.

Children's rights have an impact outside the recognition of trans minors. Where domestic laws require applicants to divorce, this may have significant knock-on effects for young people. Divorce requirements precipitate the involuntary break-up of family relationships, possibly resulting in children living either temporarily or permanently away from a parent. Forced divorce may legally disadvantage children. If marriage confers enhanced rights, children lose these benefits where their parent terminates a marital union to access gender recognition. Overall, it is doubtful that children's best interests are served where their family has a reduced legal status, and where their parents must become strangers in law.

Concern about children's rights has motivated opposition to gender recognition. Sterilisation and divorce requirements aim, *inter alia*, to protect children from the supposed detriment of having either trans parents or parents with the same legal gender. Although (the admittedly limited) existing research suggests that children in trans[1986] and LGB families experience comparable mental health outcomes to peers with cisgender and heterosexual parents[1987], child protection is still consistently invoked in contemporary policy debates. Indeed, as noted in Chapter V, prominent arguments against affirming youth are: (a) that legal recognition will encourage bullying[1988]; and (b) that cisgender minors should not be exposed to trans identities.[1989] To the extent that these arguments either blame trans children for the abuse that they suffer, or legitimise social prejudice against trans experiences, they manipulate and distort the intended aims of child protective frameworks.

[1986] One must acknowledge (as noted in Chapter III and in Section II below) that there is only limited data on mental health outcomes for children with trans parents.
[1987] Guy T'Sjoen, Eva Van Caenegem and Katrien Wierckx, 'Transgenderism and Reproduction' (2013) 20(6) Reproductive Endocrinology 575, 576; lore M Dickey, Kelly M Ducheny and Randall D Ehrbar, 'Family Creation Options for Transgender and Gender Nonconforming People' (2016) 3(2) Psychology of Sexual Orientation and Gender Diversity 173, 174; 'What does the scholarly research say about the wellbeing of children with gay or lesbian parents?' (*What We Know Website,* February 2016) http://whatweknow.law.columbia.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/ accessed 25 March 2016.
[1988] Tey Meadow, *Bringing Up the Transgender Child: Parents, Activism and the New Gender Stories* (NYU 2011) 283. See also: Alix Spiegel, 'Two Families Grapple with Son's Gender Identity' (*National Public Radio Website*, 7 May 2008) http://www.npr.org/2008/05/07/90247842/two-families-grapple-with-sons-gender-preferences accessed 19 October 2016.
[1989] Brill and Pepper (n 16) 181.

II. Themes and Goals Motivating Conditions of Recognition

Throughout this thesis, one can observe a number of recurring themes which, while not directly revealing the relationship between legal gender recognition and human rights, have been instrumental in determining that interaction. Section II explores three common considerations, which cut across various conditions of recognition and inform national responses to trans identities. These themes are: (A) assuming a common trans narrative; (B) failure to properly assess trans consent; and (C) avoiding homosexual activity.

A. Assuming a Common Trans Narrative

A significant theme running through domestic recognition rules is the belief in a common trans narrative. National policy debates and case law expose consistent assumptions that applicants adhere to standard transition pathways and that, therefore, recognition rules need not account for individualised preferences. In consequence, lawmakers and judges frequently offer unidimensional recognition frameworks, ignoring trans realities and undermining human rights protections.

Physical intervention requirements typically arise from presumptions regarding medicalised trans bodies. While existing scholarship illustrates that trans persons pursue numerous (often non-medicalised) transition pathways[1990], law-makers and judges operate from a belief in universal recourse to gender-confirming treatments. There are also presumptions regarding the non-workability of marriages post-recognition. While divorce requirements primarily reflect perceived needs to prevent same-gender marital unions, there is also a common belief that relationships inevitably terminate following gender transitions – either because the trans individual, their spouse or both parties no longer desire to maintain their connection.[1991] Although many marriages do breakdown through the transition process, such an assumption ignores the numerous unions that endure.

[1990] Alice Newlin, 'Should a Trip from Illinois to Tennessee Change a Woman into a Man? Proposal for a Uniform Interstate Sex Reassignment Recognition Act' (2008) 17(3) Columbia Journal of Gender and Law 461, 465; Harper Jean Tobin, 'Against the Surgical Requirement for Change of Legal Sex' (2006) 38(2) Case Western Reserve Journal of International Law 393, 401; Robyn Brammer and Misty Ginicola, 'Counselling Transgender Clients' in Misty Ginicola, Cheri Smith, Joel M Filmore (eds), *Affirmative Counselling with LGBTQI+ People* (American Counselling Association 2017) 186.

[1991] Myrte Dierckx and others, 'Families in transition: A literature review' (2016) 28(1) International Review of Psychiatry 36, 39; Shawn Giamattei, 'Beyond the Binary: Trans-Negotiations in Couple and Family Therapy' (2015) 54(3) Family Process 418, 428; S Colton Meier and others, 'Romantic Relationships of Female-to-Male Trans Men: A Descriptive Study' (2013) 14(2) International Journal of Transgenderism 75, 76.

Presuming a standard trans narrative particularly impacts child and non-binary rights. To the extent that trans experiences are presented through *adult* (typically female) identities, there is an implicit erasure of youth transitions. Some commentators give voice to assumptions that any trans identification before majority is imagined, transient or at least alterable.[1992] Where law-makers and judges legitimise beliefs that trans minors do not exist, they have limited capacity to pursue the best interests of this population. The same is true for non-binary communities. Against a background where all trans individuals are presumed to have male or female preferred genders, there is little scope to accommodate experiences outside the binary norm. Indeed, non-male and non-female persons are especially vulnerable to the impact of assumptions, particularly the continuous insinuation that their identities are political or childish fads.

B. Failure to Properly Assess Trans Consent

Relying upon overbroad assumptions about trans preferences, without properly considering unique trans experiences, reduces the extent to which national laws can (and do) respect individualised consent. A common defence to critiques of gender recognition rules is that applicants voluntarily satisfy the necessary pre-conditions. Yet, throughout this thesis, a troubling theme has been the absence of proper engagement with applicants' actual or potential capacity to consent.

Where law-makers and judges presume trans desires for medicalisation and divorce, there is insufficient reflection upon whether individual persons freely comply with those requirements. In Chapters II and IV, this thesis explained how, if physical intervention and marriage dissolution are absolutely necessary to exercise gender recognition rights, there cannot be voluntary consent. An increasing number of international and domestic human rights actors are condemning conditions of recognition, which deprive applicants of free choice.[1993]

[1992] Kenneth J Zucker and others, 'A Developmental, Biopsychosocial Model for the Treatment of Children with Gender Identity Disorder' (2012) 59(3) Journal of Homosexuality 369, 375; Kristina Olson, 'Prepubescent Transgender Children: What We Do and Do Not Know' (2016) 55(3) Journal of the American Academy of Child and Adolescent Psychiatry 155, 155. For an example of the debate on this issue, see: 'Do We Need More Education on Transgender Issues?' (*BBC Sunday Morning Live*, 6 November 2016) https://www.youtube.com/watch?v=gh7ZZlr9o50 accessed 7 July 2017; Illana Sherer, 'Social Transition: Supporting Our Youngest Transgender Children' (2016) 137(3) Paediatrics 1, 1-2.

[1993] See e.g. *AP, Garcon and Nicot v France* App Nos. 79885/12, 52471/13 and 52596/13 (ECtHR, 6 April 2017); *Socialstyrelsen v NN* Stockholm Court of Administrative Appeal*, Socialstyrelsen v. NN* Mål nr 1968-12 (19 December 2012).

While medical and divorce requirements *overestimate* trans consent, the existing rules for trans minors actually *underestimate* capacity. Apart from Malta, Netherlands, Sweden, Norway and Belgium, all jurisdictions deny the ability of trans children to independently consent to gender recognition.[1994] A majority of countries worldwide exclude minors from existing gender recognition structures. Where law-makers and judges have made provision for children, it is parents and medical officers who provide the necessary consent[1995]. A regrettable scenario has arisen, therefore, whereby, ignoring social science research, state actors impute a false consent to adult applicants, while also failing to realise that some minor applicants (particularly adolescents) can exercise free and informed consent.[1996]

C. Avoiding Homosexual Activity

One of the great successes for trans advocacy in recent years has been raising public understanding that, while sexual orientation and gender identity discrimination share many commonalities, trans experiences are distinct from gay, lesbian and bisexual narratives. To the extent that policy-makers wish to adopt trans-inclusive protections, they cannot rely upon a solely LGB-focused framework.

Yet, across the spectrum of existing conditions of recognition, one observes a clear desire to avoid (or minimise) homosexual activities. Married applicants must divorce in order to avoid 'gay' unions. Individuals must alter their genitalia to prevent 'biologically homosexual' intercourse. Applicants must be sterilised so that there will not be homosexual reproductive practices. There is a consistent need to avoid recognition outcomes with children having two same-gender parents. As noted above, to the extent that these motivations reinforce anti-gay prejudice, they violate international sexual orientation protections and are not a "legitimate objective of sufficient importance to warrant" interfering with human rights.[1997]

[1994] In these five jurisdictions, minors can independently consent to recognition once they reach the age of 16 years.
[1995] See e.g. Gender Identity Act 2012 (Act Nº 26.743), art. 5 (Argentina); Gender Recognition Act 2015, s. 12 (Ireland); Ontario Vital Statistics Act, s. 36 (Ontario, Canada). Indeed, in Malta, Sweden, Belgium and Norway, it is parents who consent to recognition for minors under 16 years (over the age of 16 years, minors in these jurisdictions may self-determine their legal gender).
[1996] Sally D Hawkins, 'Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes' (1996) 64(6) Fordham Law Review 2075, 2118. See also: Gary B Melton, 'Children's Competence to Consent: A Problem in Law and Social Science' in Gary B Melton, Gerald P Koocher and Michael J Saks (eds), *Children's Competence to Consent* (Plenum 1983) 15; Andrew Bainham and Stephen Gilmore, *Children: The Modern Law* (3rd edn, Jordan Publishing Ltd 2013) 359.
[1997] Huscroft, Miller and Weber (n 20) 2.

Concerns regarding homosexuality also impact recognition for children and non-binary persons. A common argument in opposition to affirming minors and non-male/non-female persons is that such identities merely represent an attempt to supress internalised gay or lesbian identities.[1998] Despite growing research on how young people and non-binary individuals experience their gender, both groups are still regularly dismissed as confused homosexuals in whose protestations the law should not acquiesce. In Chapters V and (particularly) VI, the thesis argues that refusing formal acknowledgement on the basis that identities are insufficiently real is incompatible with a rights-orientated recognition approach.

III. Utility of Human Rights as a Framework for Evaluating Conditions of Recognition

In the introductory chapter, this thesis explores various criticisms of human rights as a framework for analysing trans identities. In addition to trans-sceptical claims that international law is indifferent to non-cisgender experiences, there are also trans-affirmers who critique the supposed exclusion of diverse and non-standard gender narratives. Through evaluation of the conditions which persons must satisfy to be acknowledged in their preferred legal gender, this thesis illustrates how human rights can positively affect the status of trans populations under national and international law.

As the preceding analyses in Chapters II to VI reveal, human rights can impact conditions of recognition in a number of key ways. Human rights principles establish core guarantees which state actors – developing national rules to acknowledge preferred gender – must respect. There is growing consensus, for example, that, in determining the status of trans individuals under domestic law, state officials must prioritise protections for physical integrity, particularly prohibitions on involuntary sterilisation. Similarly, while human rights do not yet guarantee same-gender marriage entitlements, it is clear that states cannot disproportionately interfere with existing marriages to which applicants are already party.

Human rights also provide a valuable roadmap for novel and complex areas of law, where the precise obligations falling upon state actors are not yet fully defined. In the context of recognition for trans minors, there is increasing evidence that policies of affirmation (rather than 'ignoring' or 'correcting' non-gender identities) best serve the interests of children.

[1998] Claudia Lament, 'Transgender Children Conundrums and Controversies— An Introduction to the Section' (2014) 68 The Psychoanalytic Study of the Child 13, 21; Hazel Beh and Milton Diamond, 'Ethical Concerns Related to Treating Gender Nonconformity in Childhood and Adolescence: Lessons from the Family Court of Australia' (2005) 15(2) Health Matrix: The Journal of Law-Medicine 239, 250.

However, as noted, there is considerable uncertainty as to the processes by which youth acknowledgment should be achieved. Although human rights law does not prescribe a specific model of affirmation, which all states must adopt and enforce, key human rights principles, (e.g. the right to be heard, respect for 'evolving capacities', etc.) can guide domestic law-makers and judges as they approach the intersection of gender recognition and childhood.

Human rights are an effective tool for educating cisgender populations about both the humanity of trans individuals, as well as the (in)humanity of gender recognition processes. As noted, a consistent theme throughout this thesis has been the extent to which – despite growing visibility – trans lives and experiences remain unknown to many cisgender persons. The imposition of inappropriate conditions of recognition is as much the product of misunderstandings about trans realities as it is a reflection of indifference to trans rights entitlements. Human rights law frames processes for acknowledging preferred gender through commonly-understood, intelligible language. It allows cisgender observers – particularly domestic law-makers and judges – to look beyond personal presumptions, and to assess conditions of recognition by reference to universally-knowable ideas, such as non-discrimination and family life.

On the other hand, however, one must acknowledge certain limitations of human rights. In Chapter II, the thesis warns against over-generalist or incomplete human rights claims. This is particularly relevant in the context of physical medical interventions, where there is evidence that both advocates and soft-law actors frequently fail to engage in sufficient comparator reasoning. While surgery, sterilisation and hormone requirements may intuitively appear (or feel) unequal and discriminatory, there is a need to consider whether they actually violate international and regional non-discrimination guarantees.

In addition, as Chapter VI illustrates, human rights principles may have reduced utility where they are applied to novel or less-defined aspects of trans identities. To the extent that one encounters obstacles not just in defining the contours of non-binary experiences and narratives, but also in understanding how non-binary populations wish to be placed within legal frameworks, it is difficult to determine the status of non-binary lives in national and international law. Although general concepts, such as a reasonable accommodation, and emerging ideas, such as development of personal identity, provide a starting-point for review, the thesis has not offered definitive human rights recommendations on acknowledging identities beyond the binary.

Bibliography

I. Books

Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002)

Michael Amico, Ann Pellegrini, and Michael Bronski, *"You Can Tell Just By Looking" and 20 Other Myths About LGBT Life and People* (Beacon Press 2013)

David Archard, *Children: Rights and Childhood* (Routledge 1993)

Andrew Bainham and Stephen Gilmore, *Children: The Modern Law* (3rd edn, Jordan Publishing 2013)

Illias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (Cambridge University Press 2013)

Chris Beam, *Transparent – Love, Family and Living the T with Transgender Teenagers* (Harcourt 2007)

David Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004)

Genny Beemyn and Susan Rankin, *The Lives of Transgender People* (Columbia University Press 2011)

Katharina Boele-Woelki, Joanna K Miles, Jens M Scherpe (eds), *The Future of Family Property in Europe* (Intersentia 2011)

Katharina Boele-Woelki and others (eds), *Principles of European Family Law regarding Property Relations between Spouses* (Intersentia 2013)

Katharina Boele-Woelki and Angelika Fuchs (eds), *Same-Sex Marriage and Beyond* (3rd edn, Intersentia 2017)

Chaz Bono and Billie Fitzpatrick, *Transition: The Story of How I Became a Man* (Penguin 2011)
Kate Bornstein, *Gender Outlaw* (Routledge 1994)
Kate Bornstein and S Bear Bergman (eds), *Gender Outlaws: The Next Generation* (Seal Press 2010)

Helen Boyd, *My Husband Betty – Love, Sex and Life with a Crossdresser* (Thunder's Mouth Press 2003)

Stephanie Brill and Rachel Pepper, *The Transgender Child: A Handbook for Families and Professionals* (Cleis Press 2008)

Phyllis Burke, *Gender Shock: Exploding the Myths of Male and Female* (Double Day 1997)

Judith Butler, *Excitable speech: A politics of the performative* (Routledge 1997)

Judith Butler, *Undoing Gender* (Routledge 2004)

Sheila Cavanagh, *Queering Bathrooms: Gender, Sexuality and the Hygienic Imagination* (University of Toronto Press 2010)

Ken Corbett, *A Murder over a Girl* (Henry Hold 2016)

Sonia Corrêa, Rosalind Petchesky and Richard Parker, *Sexuality, Health and Human Rights* (Routledge 2008)

Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006)

Simone de Beuvoir, *The Second Sex* (Vintage 1997)

Olivier de Schutter, *International Human Rights Law: Cases, Material and Commentary* (2nd edn, Cambridge University Press 2014)

Patrick Devlin, *The Enforcement of Morals* (Oxford University Press 1965)

Martin Duberman, *Stonewall* (Plume 1994)

Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011)

Amy Ellis Nutt, *Becoming Nicole: The Transformation of an American Family* (Random House 2016)

Sarah Elliston, *The Best Interests of the Child in Healthcare* (Routledge-Cavendish 2007)

Theresa Erickson, *Surrogacy and Embryo, Sperm and Egg Donation: What Were You Thinking? – Considering IVF and Third-Party Reproduction* (iUniverse Inc 2010)

Laura Erickson-Schroth (ed), *Trans Bodies, Trans Selves* (Oxford University Press 2014)

Laura Erickson-Schroth and Laura A Jacobs, *"You're in the Wrong Bathroom!" and 20 Other Myths and Misconceptions About Transgender and Gender Nonconforming People* (Beacon Press 2017)

Tom R Faden and Ruth L Beauchamp, *A history and theory of informed consent* (Oxford University Press 986)

Stephanie Farrior, *Equality and non-discrimination under international law* (Ashgate 2015)

Anne Fausto-Sterling, *Sexing the Body* (Basic Books 2008)

Leslie Feinberg, *Transgender Warriors*: *Making History from Joan of Arc to Dennis Rodman* (Beacon Press 1996)

Jennifer Finney Boylan, *She's Not There: A Life in Two Genders* (Broadway 2013)

Naomi Wolf, *The Beauty Myth: How Images of Beauty are used against Women* (Vintage 1991)

Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, Cambridge University Press 2009)

Katherine Franke, *Wedlocked: The Perils of Marriage Equality* (NYU Press 2015)

Sandra Fredman, *Discrimination Law* (Oxford University Press 2002)

Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011)

Michael Freeman, *Human Rights* (Polity 2011)

Betty Friedan, *The Feminine Mystique* (Victor Gollancz 1971)
Harold Garfinkel, *Studies in ethnomethodology* (Polity Press 2006)

Stephen Gilmore and Lisa Glennon, *Hayes and Williams' Family Law* (5th edn, Oxford University Press 2016)

Lori Girshick, *Transgender Voices: Beyond Women and Men* (University Press of New England 2008)

Christoph Grabenwarter, *European Convention on Human Rights* (Verlag C.H. Beck oHG 2014)

Jamison Green, *Becoming a Visible Man* (Vanderbilt University Press 2004)

Germaine Greer, *The Female Eunuch* (Paladin 1971)

Giles Gunn, *Ideas to Die For: The Cosmopolitan Challenge* (Routledge 2013)

Jack Halberstam, *Female masculinity* (Duke University Press 1998)

David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014)

Lina Henzel, *Back Me Up! Rights of Trans Children under the Convention on the Rights of the Child* (Transgender Europe 2016)

Johnathan Herring, *Medical Law and Ethics* (4th edn, Oxford University Press 2012)

Johnathan Herring, *Medical Law and Ethics* (6th edn, Oxford University Press 2016)

Michael Ignatieff, *Human Rights and Idolatry* (Princeton Press 2001)

Emily Jackson, *Medical Law: Texts, Cases and Materials* (3rd edn, Oxford University Press 2013)

Emily Jackson, *Medical Law: Texts, Cases and Materials* (4th edn, Oxford University Press 2016)

Sheila Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (Routledge 2014)

Jazz Jennings, *Being Jazz: My Life as a Transgender Teen* (TLC/Peggy Sirota 2016)

Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013)

Nick Krieger, *Nina Here nor There: My Journey Beyond Gender* (Beacon Press 2011)

Alistair MacDonald, *Child's Right to be Heard: Annotated Materials* (Jordan Publishing 2014)

Kellie Maloney, *Frankly Kellie* (Blink Publishing 2015)

Deirdre McCloskey, *Crossing: A Memoir* (University of Chicago Press 1999)

Aileen McColgan, *Discrimination, Equality and the Law* (Hart 2014)

Ewan McKendrick, *Contract Law* (Palgrave 2015)

Tey Meadow, *Bringing Up the Transgender Child: Parents, Activism and the New Gender Stories* (NYU 2011)

Joanne Meyerowitz, *How Sex Changed: A History of Trassexuality in the United States* (Harvard University Press 2004)

Simon Mills and Andrea Mulligan, *Medical Law in Ireland* (3rd edn, Bloomsbury 2017)

Janet Mock, *Redefining Realness: My Path to Womanhood, Identity, Love & So Much More* (Atria Books 2014)

Jan Morris, *Conundrum* (Faber and Faber 2002)

Alistair Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd edn, Oxford University Press 2012)

Una Mullally, *In the Name of Love: The Movement for Marriage Equality in Ireland* (The History Press Ireland 2014)

Viviane Namaste, *Invisible lives: The erasure of transsexual and transgendered people* (University of Chicago Press 2000)

Serena Nanda, *Neither Man nor Woman: The Hijra of India* (Wadsworth Publishing Company 1990)

Elijah C Nealy, *Transgender Children and Youth: Cultivating Pride and Joy with Families in Transition* (WW Norton and Company Press 2017)

Lucy Nicholas, *Queer Post-Gender Ethics: The Shape of Selves to Come* (Palgrave MacMillan 2014)

Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: a Commentary* (Oxford University Press 2008)

David Oppenheimer, Sheila Foster and Sora Han, *Comparative Equality and Anti-Discrimination Law: Cases, Codes, Constitutions and Commentary* (Foundation Press 2015)

Aisling Parkes, *Children and International Human Rights Law* (Routledge 2013)

Adamantia Pollis and Peter Schwab (eds), *Human Rights: Cultural and Ideological Perspectives* (Praeger 1997)

Jay Prosser, *Second Skins: The Body Narratives of Transsexuality* (Columbia University Press 1998)

Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson 2010)

Renee Richards, *Second Serve: The Renee Richards Story* (Stein and Day 1992)

Chris Ricketts, *Food Needs Labelling, People Don't: A journey from gender confusion to self-acceptance* (Little Singing Bear Publishing 2016)

Martine Rothblatt, *The Apartheid of Sex: Manifesto on the Freedom of Gender* (Rivers Oram Press/Pandora 1996)

Joan Roughgarden, *Evolution's Rainbow: Diversity, Gender and Sexuality in Nature and in People* (2nd edn, University of California Press 2009)

Sarah Salih, *Judith Butler* (Routledge 2002)

Nicole L Saltzberg, *Developing a Model of Transmasculine Identity* (University of Miami 2010)

Ellen Sarasohn Glazer and Evelina Weidman Stirling, *Having Your Baby Through Egg Donation* (Jessica Kingsley Publishers 2013)

Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, materials and texts on national, supranational and international non-discrimination law* (Hart 2007)

Amartya Sen, *Inequality Re-examined* (Oxford University Press 1992)

Jane Sendall, *Family Law Handbook 2015* (6th edn, Oxford University Press 2015)

Julia Serano, *Whipping Girl* (Seal Press 2007)

Alex Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (Cavendish Publishers 2002)

Dís Sigurgeirsdóttir*, The Right to Marry. A Right or Privilege? Same-sex Couples in Europe* (University of Lund 2007)

Andrew Solomon, *Far from the Tree: Parents, Children and the Search for Identity* (Scribner 2012)

Matthew Sparke, *Introducing Globalization: Ties, Tensions and Uneven Integration* (Wiley-Blackwell 2013)

Rae Spoon and Ivan Coyote, *Gender Failure* (Arsenal Pulp Press 2014)

Marc Stein, *Rethinking the Gay and Lesbian Movement* (Routledge 2012)

Tove Stenqvist, *The social struggle of being HIJRA in Bangladesh – cultural aspiration between inclusion and illegitimacy* (Malmo University 2015)

Susan Stryker, *Transgender History* (Seal Press 2008)

Susan Stryker and Aren Aizura (eds), *The Transgender Studies Reader 2* (2nd edn, Routledge 2013)

Ben Templin, *Contracts – A Modern Coursebook* (Wolters Kluwer 2017)

John Tobin, *The Right to Health in International Law* (Oxford University Press 2012)

Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2003)

Francisco Urbana, *A Critique of Proportionality and Balancing* (Cambridge University Press 2017)

Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998)

Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005)

Robin White and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (5th edn, Oxford University Press 2010)

Elizabeth Wicks, *Human Rights and Health Care* (Hart Publishing 2007)

Riki Anne Wilchins, *Read My Lips: Sexual Subversion and the end of Gender* (Magnus Books 1997)

Antonia Young, *Women who become Men: Albanian Sworn Virgins* (Bloomsbury Publishing 2001)

Kenneth J Zucker and Susan J Bradley, *Gender Identity Disorder and Psychosexual Problems in Children and Adolescents* (Guilford Press 1995)

II. Book Chapters

Jonathan Alexander and Karen Yescavage, 'Bisexuality and Transgenderism: InterSEXions of the Other' in Jonathan Alexander and Karen Yescavage (eds), *Bisexuality and Transgenderism: InterSEXions of the Other* (Routledge 2012)

Abdullahi A An-Na'im, 'Introduction: "Areas of Expressions" and the Universality of Human Rights: Mediating a Contingent Relationship' in David Forsythe and P C McMahon (eds), *Human Rights and Diversity: Area Studies Revisited* (University of Nebraska Press 2003)

Yesim Atamer, 'The Legal Status of Transsexual and Transgender Persons in Turkey' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Mark Bell, 'Direct Discrimination' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Texts on National, Supranational and International Non-Discrimination Law* (Hart 2007)

Conway Blake and Philip Dayle, 'Beyond cross-cultural sensitivities: international human rights advocacy and sexuality in Jamaica' in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (Institute of Commonwealth Studies 2013)

Alan Boyle, ‘Soft Law in International Law-Making’ in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006)

Robyn Brammer and Misty M Ginicola, ‘Counselling Transgender Clients’ in Misty M Ginicola, Cheri Smith and Joel M Filmore (eds), *Affirmative Counselling with LGBTQI+ People* (American Counselling Association 2017)

Judith Butler, ‘Un-Diagnosing Gender’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006)

Mickael Chacha Enriquez, ‘The T in LGBTQ: How do Trans Activists Perceive Alliances within LGBT and Queer Movements in Quebec (Canada)?’ in Yolanda Martinez-San Miguel and Sarah Tobias (eds), *Trans Studies: The Challenge to Hetero/Homo Normativities* (Rutgers 2016)

Christine Chinkin, ‘Sources’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014)

Jarlath Clifford, ‘Equality’ in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law* (Ashgate 2015)

David Coad, ‘The Politics of Home in *Becoming Julie:* Transsexual Experience in Australia’ in Chantal Zabus and David Coad (eds), *Transgender Experience – Place, Ethnicity and Visibility* (Taylor and Francis 2014)

Lawrence Cohen, ‘The Pleasures of Castration: The Postoperative Status of Hijras, Jankhas and Academics’ in Paul R Abramson and Steven D Pinkerton (eds), *Sexual Nature, Sexual Culture* (University of Chicago Press 1995)

Sacha M Coupet, ‘Policing Gender on the Playground’ in Sacha M Coupet and Ellen Marrus (eds), *Children, Sexuality and the Law* (NYU Press 2015)

Paisley Currah, ‘Gender Pluralisms under the Transgender Umbrella’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006)

Olga Cvejić Jančić, ‘Rights of the Child in a Changing World’ in Olga Cvejić Jančić (ed), *The Rights of the Child in a Changing World: 25 Years after the UN Convention on the Rights of the Child* (Springer 2013)

Eve Darian-Smith and Philip C McCarthy, *The Global Turn: Theories, Research Designs and Methods for Global Legal Studies* (University of California Press 2017)

Zowie Davy, 'Transsexual Agents: Negotiating Authenticity and Embodiment in the UK's Medical System' in Sally Hines and Tam Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010)

Marie-Bénédicte Dembour, 'Critiques' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014)

Anatol Dutta, 'The Legal Status of Transgender and Transsexual Persons in Germany' in Jens M Scherpe, *The Legal Status of Transgender and Transsexual Persons* (Intersentia 2015)

Benjamin Dykes, 'Hijras' in Timothy Murphy (ed), *Readers Guide to Lesbian and Gay Studies* (Fitzroy Dearborn Publishers 2000)

Diane Ehrensaft, 'From Gender Identity Disorder to Gender identity Creativity' in Elizabeth J Meyer and Annie Pullen Sansfaç*on (eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014)

Richard Ekins and Dave King, 'The Emergence of New Transgender Identities in the Age of the Internet' in Sally Hines and Tam Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010)

Kimberley Ens Manning, Elizabeth J Meyer and Annie Pullen Sansfa*çon, 'Introduction'* in Elizabeth J Meyer and Annie Pullen Sansfaç*on (eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014)

Anne Finn Enke, 'Introduction: Transfeminist Persectives' in Anne Finn Enke (ed), *Transfeminist Perspectives In and Beyond Transgender and Gender Studies* (Temple University 2012)

Milfrid Grude Flekkoy, 'Psychology and the Rights of the Child' in Kathleen Alaimo and Brian Klug (eds), *Children as Equals: Exploring the Rights of the Child* (University Press of America 2002)

Lorraine Gale and Haley Syrja-McNally, 'Expanding the Circle' in Elizabeth J Meyer and Annie Pullen Sansfaç*on (eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014)

Jameson Garland, 'The Legal Status of Transsexual and Transgender Persons in Sweden' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Jameson Garland, 'The Legal Status of Transsexual and Transgender Persons in the United States' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Stephen Gilmore, 'The Legal Status of Transsexual and Transgender Persons in England and Wales' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Nick Gorton, 'Transgender as Mental Illness: Nosology, Social Justice, and the Tarnished Golden Mean' in Susan Stryker and Aren Aizura (eds), *The Transgender Studies Reader 2* (2nd edn, Routledge 2013)
HLA Hart, 'Immorality and Treason' in *Listener* (1959)

Barbara Havelková, 'The Legal Status of Transgender and Transsexual Persons in the Czech Republic' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Gilbert Herdt, 'Introduction: Third Sexes and Third Genders' in Gilbert Herdt (ed), *Third sex, third gender*: *beyond sexual dimorphism in culture and history (Zone Books 1993)*

Chih-hsing Ho, 'The Legal Status of Transsexual and Transgender Persons in Taiwan' in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Grant Huscroft, Bradley W Miller and Gregoire Webber, 'Introduction' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014)

Jennifer Levi and Bennett Klein, 'Pursuing Protection for Transgender People Through Disability Laws' in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006)

Jennifer Levi, 'Divorce and Relationship Dissolution' in Jennifer Levi and Elizabeth Monnin-Browder (eds), *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012)

Aiden Key, 'Children' in Laura Erickson-Schroth (ed), *Trans Bodies, Trans Selves* (Oxford University Press 2014)

Gerard Mallon and Teresa Decrescenzo, ‘Social Work Practice with Transgender and Gender Variant Children and Youth’ in Gerard Mallon (ed), *Social Work Practice with Transgender and Gender Variant Youth* (2nd edn, Routledge 1999)

Jean Malpas, ‘Can Couples Change Gender? Couple Therapy with Transgender People and their Partners’ in Jerry Bigner and Joseph Wetchler, *Handbook of LGBT-Affirmative Couple and Family Therapy* (Routledge 2012)

Gary B Melton, ‘Children’s Competence to Consent: A Problem in Law and Social Science’ in Gary B Melton, Gerald P Koocher and Michael J Saks (eds), *Children’s Competence to Consent* (Plenum 1983)

Daniel Moeckli, ‘Equality and Non-Discrimination’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014)

Athena Nga-chee Liu, ‘The Legal Status of Transgender and Transsexual Persons in Hong Kong’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Yuko Nishitani, ‘The Legal Status of Transsexual and Transgender Persons in Japan’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Zack M Paakonen, ‘Legal Protections for Transgender Youth’ in Jennifer Levi and Elizabeth Monnin-Browder (eds), *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012)

Walter Pintens, ‘The Legal Status of Transsexual and Transgender Persons in Belgium and the Netherlands’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Shannon Price Minter, ‘Foreword’ in Genny Beemyn and Susan Rankin, *The Lives of Transgender People* (Columbia University Press 2011) xi

Annie Pullen Sansfaçon, Audrey-Anne Dumais-Michaud, and Marie-Joelle Robichaud, ‘Transforming Challenges into Action’ in Elizabeth J Meyer and Annie Pullen Sansfaçon *(eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014)

Jake Pyne, ‘Health and Well-Being among Gender-Independent Children’ in Elizabeth J Meyer and Annie Pullen Sansfaçon *(eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014)

Ruthann Robson, ‘Re-inscribing Normality? The Law and Politics of Transgender Marriage’ in Paisley Currah, Richard M Juang and Shannon Price Minter (eds), *Transgender Rights* (University of Minnesota Press 2006)

Nigel Rodley, ‘Integrity of the Person’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakuraman (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014)

Maya Sabatello and Marianne Schulze, ‘Introduction’ in Maya Sabatello and Marianne Schulze (eds), *Human Rights and Disability Advocacy* (University of Pennsylvania Press 2013)

Jens M Scherpe and Peter Dunne, ‘The Legal Recognition of Transsexual and Transgender Persons – Comparative Analysis and Recommendations’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Judith Shapiro, ‘Transsexualism: Reflections on the Persistence of Gender and the Mutability of Sex’ in Jennifer Robertson (ed), *Same-Sex Cultures and Sexualities: An Anthropological Reader* (Blackwell 2005)

Dinah Shelton, ‘International Law and Relative Normativity’ in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006)

Dinah Shelton, ‘Prohibited Discrimination in International Human Rights Law’ in Stephanie Farrior (ed), *Equality and Non-Discrimination under International Law* (Ashgate 2015)

Benjamin Sheppard, ‘Sylvia and Sylvia’s Children: A Battle for a Queer Public Space’ in Matilda Bernstein Syncamore (ed), *That’s Revolting! Queer Strategies for Resisting Assimilation* (Soft Skull Press 2004)

Terry Sheung-Hung Kaan, ‘The Legal Status of Transgender and Transsexual Persons in Singapore’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Brian Sloan, ‘The Legal Status of Transsexual and Transgender Persons in Ireland’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Bonnie Steinbock, ‘The Concept of Coercion and Long-Term Contraceptives’ in Ellen Moskowitz and Bruce Jennings (eds), *Coerced Contraception? Moral and Policy Challenges of Long-Acting Birth Control* (Georgetown University Press 1996)

Richard Storrow, ‘The Proportionality Problem in Cross-Border Reproductive Care’ in I Glenn Cohen (ed), *The Globalization of Health Care: Legal and Ethical Issues* (Oxford University Press 2013)

Francoise Susset, ‘Between a Rock and a Hard Place: The Experience of Parents of Gender-Nonconforming Boys’ in Elizabeth J Meyer and Annie Pullen Sansfaçon *(eds), Supporting Transgender and Gender Creative Youth: Schools, Families and Communities in Action* (Peter Lang 2014)

Hugh Thirlway, ‘The Sources of International Law’ in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006)

Amanda Veldorale-Griffin, ‘Therapy with Families During and After Parental Gender Transition’ in Abbie Goldberg (ed), *The SAGE Encyclopaedia of LGBTQ Studies* (SAGE 2016)

Natalie Videbaek Munkholm, ‘The Legal Status of Transsexual and Transgender Persons in Denmark’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

Lois Weithorn, ‘Involving Children in Decisions Affecting their Own Welfare: Guidelines for Professionals’ in Gary B Melton, Gerald P Koocher and Michael J Saks (eds), *Children’s Competence to Consent* (Plenum 1983)

Laurel Westbrook, ‘Becoming Knowably Gendered: The Production of Transgender Possibilities and Constraints in the Mass and Alternative Press from 1990-2005 in the United States’ in Sally Hines and Tam Sanger (eds), *Transgender Identities: Towards a Social Analysis of Gender Diversity* (Routledge 2010)

Gregoire Webber, ‘On the Loss of Rights’ in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014)

Janson Wu and Kylar Broadus, ‘Recognition of Name and Sex’ in Jennifer Levi and Elizabeth Monnin-Browder, *Transgender Family Law: A Guide to Effective Advocacy* (Author House 2012)

III. Journal Articles

Jimi Adams and Ryan Light, 'Scientific Consensus, the Law and Same Sex Parenting Outcomes' (2015) 53 Social Science Research 300

April Adell, 'Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees' (1996) 24(3) Hofstra Law Review 789

Jane Adolphe, '"Gender" Wars at the United Nations' (2012) 11(1) Ave Maria Law Review 1

Jordan Aikan, 'Promoting an Integrated Approach to Ensuring Access to Gender Incongruent Health Care' (2016) 31(1) Berkeley Journal of Gender, Law and Justice 1

Clare Ainsworth, 'Sex Redefined' (2015) Nature 518 http://www.nature.com/news/sex-redefined-1.16943 accessed 2 March 2015

Dustin Albert and Laurence Steinberg, 'Judgment and Decision Making in Adolescence' (2011) 21(1) Journal of Research on Adolescence 211

Jonathan Alexander and Karen Yescavage, 'Bisexuality and Transgenderism' (2003) 3(3-4) Journal of Bisexuality 1

Aurangzaib Alizai, Philippe Doneys and Donna L Doane, 'Impact of Gender Binarism on Hijras' Life Course and Their Access to Fundamental Human Rights in Pakistan' (2016) 64(9) Journal of Homosexuality 1214

Beth Allen, 'Same-Sex Marriage: A Conflict-of-Laws Analysis for Oregon' (1996) 32(3) Willamette Law Review 619

Jason Allen, 'A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States' (2008) 14(2) Michigan Journal of Law and Gender 169

Philip Alston, 'The Best Interests Principle: Towards a reconciliation of Culture and Human Rights' (1994) 8(1) International Journal of Law and the Family 1

American Psychological Association, 'Guidelines for Psychological Practice with Transgender and Gender Nonconforming People' (2015) 70(9) American Psychologist 832

Yarrow Andrew, ‘The unavoidable salience of gender: notes from Australian childcare work’ (2016) 23(12) Gender, Place and Culture 1738

Henrieta Anosoara Serban ‘Universality of Human Rights as the Basis of the Democracy’ (2014) Revisata de Drept Public 218

Christine Aramburu Alegria, ‘Gender nonconforming and transgender children/youth: Family, community, and implications for practice’ (2016) 28(10) Journal of the American Association of Nurse Practitioners 521

Valerine Arboleda, David Sandberg and Eric Vilain, ‘DSDs: genetics, underlying pathologies and psychosexual differentiation’ (2014) 10(1) Nature Reviews Endocrinology 603

David Archard and Marit Skivenes, ‘Balancing a Child’s Best Interests and a Child’s Views’ (2009) 17(1) International Journal of Children’s Rights 1

Patricia Baetens, ‘Should requests for donor insemination on social grounds be expanded to transsexuals?’ (2003) 6(3) Reproductive BioMedicine Online 281

Dirmann Bailey Morse, ‘Comparing Civilian Treatment of Transsexual Marriage: Why Louisiana Should Implement the French Approach’ (2008) 54(1) Loyola Law Review 235

Roberta Baiocco and others, ‘Lesbian Mother Families and Gay Father Families in Italy: Family Functioning, Dyadic Satisfaction, and Child Well-Being’ (2015) 12(3) Sexuality Research and Social Policy 202

Elizabeth Baisely, ‘Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ (2016) 38(1) Human Rights Quarterly 134

Roozbeh (Rudy) B Baker, ‘Customary International Law: A Reconceptualization’ (2016) 41(2) Brooklyn Journal of International Law 439

Amy Ballard, ‘Sex Change: Changing the Face of Transgender Policy in the United States’ (2012) 18(3) Cardozo Journal of Law and Gender 775

Michaela Balocchi, ‘The Medicalization of Intersexuality and the Sex/Gender Binary System: A Look on the Italian Case’ (2014) 6(1) LES Online 65

Helen Barker and Kevan Wylie, ‘Are the Criteria for the ‘Real-Life Experience’ (RLE) Stage of Assessment for GID Useful to Patients and Clinicians?’ (2008) 10(3-4) International Journal of Transgenderism 121

Karin Barron, ‘The importance of a gender perspective in educational research’ (1997) 12(2) European Journal of Special Needs Education 107

Kevin Barry, ‘Disabilityqueer: Federal Disability Rights Protection for Transgender People’ (2013) 16(1) Yale Human Rights and Development Law Journal 1

Joel Baum, ‘Gender, Safety and Schools: Taking the Road Less Travelled’ (2011) 15(1) University of California Davis Journal of Law and Policy 167

Titia F Beek and others, ‘Partial Treatment Requests and Underlying Motives of Applicants for Gender Affirming Interventions’ (2015) 12(11) Journal of Sexual Medicine 2201

Hazel Beh and Milton Diamond, ‘Ethical Concerns Related to Treating Gender Nonconformity in Childhood and Adolescence: Lessons from the Family Court of Australia’ (2005) 15(2) Health Matrix: The Journal of Law-Medicine 239

Felicity Bell, ‘Children with Gender Dysphoria and the Jurisdiction of the Family Court’ (2015) 38(2) University of New South Wales Law Journal 426

Alma Beltran Y Puga, ‘Paradigmatic Changes in Gender Justice: The Advancement of Reproductive Rights in International Human Rights Law’ (2012) 3(1) Creighton International and Comparative Law Journal 158

Noa Ben-Asher, ‘Paradoxes of Health and Equality: When a Boy Becomes a Girl’ (2004) 16(4) Yale Journal of Law and Feminism 275

Harry Benjamin, ‘Transsexualism and transvestism as psychosomatic and somatopsychic syndromes’ (1954) 8(2) American Journal of Psychotherapy 219

Theodore Bennett, ‘“No Man’s Land”: Non-Binary Sex Identification in Australian Law and Policy (2014) 37(3) University of New South Wales Law Journal 847

Sara R Benson, ‘Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed’ (2005) 12(1) Cardozo Journal of Law and Gender 31

Kristina Anne Bentley, ‘Can there be any universal children’s rights?’ (2005) 9(1) International Journal of Human Rights 107

Jens U Berli and others, ‘What Surgeons Need to Know About Gender Confirmation Surgery When Providing Care for Transgender Individuals: A Review’ (2017) 152(4) JAMA Surgery 394

Timothy Biblarz and Judith Stacey, ‘How Does the Gender of Parents Matter?’ (2010) 72(1) Journal of Marriage and Family 3

Brent Bilodeau, ‘Beyond the Gender Binary: A Case Study of Two Transgender Students at a Midwestern Research University’ (2005) 3(1) Journal of Gay and Lesbian Issues in Education 29

Gary Bischof and others, ‘Thematic Analysis of the Experiences of Wives Who Stay with Husbands who Transition Male-to-Female’ (2011) 15(1) Michigan Family Review 16

Lauren Bishop, ‘Gender and Sex Designations for Identification Purposes: A Discussion on Inclusive Documentation for a Less Assimilationist Society’ (2015) 30(2) Wisconsin Journal of Law, Gender and Society 131

Eirik Bjorge and Jack Williams, ‘The Protean Principle of Proportionality: How Different is Proportionality in EU Contexts?’ (2016) 75(2) Cambridge Law Journal 186

Melanie Blackless and others, ‘How Sexually Dimorphic Are We? Review and Synthesis’ (2000) 12(2) American Journal of Human Biology 151

Emily Blincoe, ‘Sex markers on birth certificates: Replacing the medical model with self-identification’ (2015) 46(1) Victoria University of Wellington Law Review 57

Michael Bochenek and Kyle Knight, ‘Establishing a Third Gender Category in Nepal: Process and Prognosis’ (2012) 26(1) Emory International Law Review 11

Walter Bockting, ‘Are Gender Identity Disorders Mental Disorders? Recommendations for Revision of the World Professional Association for Transgender Health’s Standards of Care’ (2009) 11(1) International Journal of Transgenderism 53

Herbert J Bonifacio and Stephen M Rosenthal, 'Gender Variance and Dysphoria in Children and Adolescents' (2015) 62(4) Paediatric Clinics of North America 1001

Carlos Bernal Pulido, 'The Migration of Proportionality across Europe' (2013) 11(3) New Zealand Journal of Public and International Law 483

Cherie Booth, 'In Search of Children's Rights' (2003) Journal of Local Government Law 19

Elizabeth R Boskey, 'Understanding Transgender Identity Development in Childhood and Adolescence' (2014) 9(4) American Journal of Sexuality Education 445

Ahcene Boulesbaa, 'Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the U.N. Convention on Torture' (1990) 5 Florida International Law Journal 293

Bret Boyce, 'Sexuality and Gender Identity under the Constitution of India' (2015) 18(1) Journal of Gender, Race and Justice 1

Mats Brännström, 'Uterus transplantation and beyond' (2017) 28(5) Journal of Materials Science: Materials in Medicine 70

Kerstin Braun, 'Do Ask, Do Tell: Where is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?' (2014) 29(4) American University International Law Review 871

Dan Brock, 'Shaping Future Children: Parental Rights and Societal Interests' (2005) 13(4) The Journal of Political Philosophy 377

Di Brothers, W C L Ford and the University of Bristol Centre for Reproductive Medicine Ethics Advisory Committee, 'Gender reassignment and assisted reproduction: An ethical analysis' (2000) 15(4) Human Reproduction 737

David Brown, 'Making Room for Sexual Orientation and Gender Identity in Human Rights Law: An Introduction to the Yogyakarta Principles' (2009) 31(4) Michigan Journal of International Law 821

Nicola Brown, '"I'm in Transition Too": Sexual Identity Renegotiation in Sexual-Minority Women's Relationships with Transsexual Men' (2009) 21(1) International Journal of Sexual Health 61

Tyler Brown, ‘The Dangers of Overbroad Transgender Legislation, Case Law, and Policy in Education: California’s AB 1266 Dismisses Concerns about Student Safety and Privacy’ (2014) 2 Brigham Young University Education and Law Journal 287

Kath Browne, ‘“A Right Geezer-Bird (Man-Woman)”: The Sites and Sights of “Female” Embodiment’ (2006) 5(2) ACME: An International E-Journal for Critical Geographies 121

Regina Burch, ‘Worldview Diversity in the Boardroom: A Law and Social Equity Rationale’ (2011) 42(4) Loyola University Chicago Law Journal 585

Barb J Burdge, ‘Bending Gender, Ending Gender: Theoretical Foundations for Social Work Practice with the Transgender Community’ (2007) 52(3) Social Work 243

Christian Burgess, ‘Internal and External Stress Factors Associated with the Identity Development of Transgendered Youth’ (2000) 10(3-4) Journal of Gay and Lesbian Social Services 35

Doris Buss, ‘Robes, Relics and Rights: The Vatican and the Beijing Conference on Women’ (1998) 7(3) Social and Legal Studies 339

Erin Buzuvis, ‘Hormone Check: Critique of Olympic Rules on Sex and Gender’ (2016) 31(1) Wisconsin Journal of Law, Gender and Society 29

Patricia Cain, ‘Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law’ (1997) 75(4) Denver University Law Review 1321

Erin Calhoun Davis, ‘Situating “Fluidity” (trans) gender identification and the Regulation of gender diversity’ (2009) 15(1) GLQ: A Journal of Lesbian and Gay Studies 97

Basak Cali, ‘Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions’ (2007) 29(1) Human Rights Quarterly 251

Marıa Victoria Carrera, Renee DePalma and Maria Lameiras, ‘Sex/gender identity: Moving beyond fixed and “natural” categories’ (2012) 15(8) Sexualities 995

Maureen Carroll, ‘Transgender Youth, Adolescent Decision-making, and *Roper v Simmons*’ (2009) 56(3) UCLA Law Review 725

Elise R Carrotte and others, '"I am yet to encounter any survey that actually reflects my life": a qualitative study of inclusivity in sexual health research' (2016) 16 BMC Medical Research Methodology 86

DCJ Catalano, '"Trans Enough?" The Pressures Trans Men Negotiate in Higher Education' (2015) 2(3) Transgender Studies Quarterly 411

Paul Catley, 'A long road nearing an end? Recognition for transsexual people' (2003) 25(3) Journal of Social Welfare and Family Law 277

Timothy Cavanaugh, Ruben Hopwood and Cei Lambert, 'Informed Consent in the Medical Care of Transgender and Gender Nonconforming Patients' (2016) 18(11) AMA Journal of Ethics 1147

Christina Cerna, 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts' (1994) 16(4) Human Rights Quarterly 740

Winnie Chan Wing Yan, 'Transsexual Marriage in Hong Kong: Reflections on the journey from the CFA's decision in *W v The Registrar of Marriages* to the Marriage (Amendment) Bill 2014' (2015) 4 – 6 file:///C:/Users/USER/Downloads/SSRN-id2556703.pdf accessed 25 May 2017

P-L Chau and Jonathan Herring, 'Defining, Assigning and Designing Sex' (2002) 16(3) International Journal of Law, Policy and the Family 327

Peter Charleton and Sinead Kelly, 'Marriage and the Family: A Changing Institution? Part II (2011) 16(5) Bar Review 127

Joy Chia and Amy Barrow, 'Inching Towards Equality: LGBT Rights and the Limitations of Law in Hong Kong' (2016) 22(2) William and Mary Journal of Women and the Law 303

Tufyal Choudhury, 'Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights" (2003) 8(1) European Human Rights Law Review 24

Geraldine Christmas, 'Research note: intersexuality, feminism and the case for gender binaries' (2010) 24(1) Women's Studies Journal 60

Heather Church, Donal O'Shea and James Lucey, 'Parent-Child Relationships in Gender Identity Disorder' (2014) 183 Irish Journal of Medical Science 227

Juan Cianciardo, 'The Principle of Proportionality: Its Dimensions and Limits' (2010) JCLS Working

Papers (pp. 1 – 2)
http://www.law.lsu.edu/globals/sitelibraries/jcls/workingpapers/Cianciardo%20WP%20July%202010.pdf accessed 17 May 2017

Darra Clark Hofman, 'Male, Female, and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law' (2012) 21 Tulane Journal of Law and Sexuality: A Review of Sexual Orientation and Gender Identity in the Law 1

Jessica Clarke, 'Identity and Form' (2015) 103(4) California Law Review 747

Rachel Hope Cleves, 'Beyond the Binaries in Early America: Special Edition Introduction' (2014) 12(3) Early American Studies: An Interdisciplinary Journal 459

Carolyn E Coffey, 'Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures' (2004) 7(1) New York City Law Review 161

Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) American Journal of Comparative Law 463

Peggy Cohen-Kettenis, Henriette Delemarre-van de Waal and Louis Gooren, 'The Treatment of Adolescent Transsexuals: Changing Insights' (2008) 5(8) Journal of Sexual Medicine 1892

Constantin Cojacariu, 'Moving Beyond *Goodwin*: A Fresh Assessment of the European Court of Human Right's Transgender Rights Jurisprudence' (2013) 17(3) Interights Bulletin 118

Eli Coleman, Philip Colgan and Louis Gooren, 'Male cross-gender behaviour in Myanmar (Burma): a description of the acault' (1992) 21(3) Archives of Sexual Behaviour 313

Maureen Connelly and others, 'The Mental Health of Transgender Youth: Advances in Understanding' (2016) 59(5) Journal of Adolescent Health 489

Rebecca Cook, 'International Protection of Women's Reproductive Rights' (1992) 24(2) New York University Journal of International Law and Policy 644

Mary Coombs, 'Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage' (1997) 8(2) UCLA Women's Law Journal 219

Sharon Cowan, '"Gender is No Substitute for Sex": A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13(1) Feminist Legal Studies 67

Cary Crall and Rachel Jackson, 'Should Psychiatrists Prescribe Gender-Affirming Hormone Therapy to Transgender Adolescents?' (2016) 18(11) AMA Journal of Ethics 1086

Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Legal Forum 139

Nathan Crombie, 'A Harmonious Union? The Relationship between States and the Human Rights Committee on the Same-Sex Marriage Issue' (2012) 51(3) Columbia Journal of Transnational Law 696

Lucy Crompton, 'Civil Partnerships Bill 2004: The Illusion of Equality' (2004) Family Law 888
Richard Crosby and Nicole L Pitts, 'Caught Between Different Worlds: How Transgendered Women May Be "Forced" into Risky Sex' (2007) 44(1) Journal of Sex Research 43

Larry Cunningham, 'A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law' (2006) 10(2) University of California Davis Journal of Juvenile Law and Policy 275

Paisley Currah, 'Expecting Bodies: The Pregnant man and Transgender Exclusion from the Employment Non-Discrimination Act' (2008) 36(3-4) Women's Studies Quarterly 330

Paisley Currah and Lisa Jean Moore, '''We Won't Know Who You Are'': Contesting Sex Designations in New York City Birth Certificates' (2009) 24(3) Hypatia Journal of Feminist Philosophy 113

Skylar Curtis, 'Reproductive Organs and Differences of Sex Development: The Constitutional Issues Created by the Surgical Treatment of Intersex Children' (2011) 42(4) McGeorge Law Review 841
Emma Dargie and others, 'Somewhere under the Rainbow: Exploring the Identities and Experiences of Trans Persons' (2014) 23(2) The Canadian Journal of Human Sexuality 60

Bradon Darr and Tyler Kibbey, 'Pronouns and Thoughts on Neutrality: Gender Concerns in Modern Grammar' (2016) 7(1) Pursuit: The Journal of Undergraduate Research at the University of Tennessee 71

Hope Davidson and Jennifer Schweppe, ‘Time for legislative clarity on consent to medical treatment: children, young people and the “mature minor”’ (2015) 21(2) Medico-Legal Journal of Ireland 65

Megan Davidson, ‘Seeking Refuge under the Umbrella: Inclusion, Exclusion, and Organising within the Category Transgender’ (2007) 4(4) Sexuality Research and Social Policy 60

Aisha Nicole Davies, ‘Intersectionality and International Law: Recognizing Complex Identities on the Global Stage’ (2015) 28 Harvard Human Rights Journal 205

Masen Davis and Kristina Wertz, ‘When Laws Are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice’ (2010) 8(2) Seattle Journal for Social Justice 467

Maria De Lourdes Levy, Victor Larcher and Ronald Kurz, ‘Informed consent/assent in children. Statement of the Ethics Working Group of the Confederation of European Specialists in Paediatrics (CESP)’ (2003) 162(9) European Journal of Paediatrics 629

Chloe de Roo and others, ‘Fertility options in transgender people’ (2016) 28(1) International Review of Psychiatry 112

Petra de Sutter and others, ‘The Desire to have Children and the Preservation of Fertility in Transsexual Women: A Survey’ (2002) 6(3) The International Journal of Transgenderism https://www.atria.nl/ezines/web/IJT/97-03/numbers/symposion/ijtvo06no03_02.htm accessed 25 May 2017

Annelou de Vries, Peggy Cohen-Kettenis and Henriette Delemarre-van de Waal, ‘Clinical Management of Gender Dysphoria in Adolescents’ (2006) 9(3-4) International Journal of Transgenderism 83

Annelou de Vries and others, ‘Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment’ (2014) 134(4) Paediatrics 696

Henriette Delemarre-van de Waal and Peggy Cohen-Kettenis, ‘Clinical management of gender identity disorder in adolescents: a protocol on psychological and paediatric endocrinology aspects’ (2006) 155 European Journal of Endocrinology 131

Madeline Deutsch, Vipra Bhakri and Katrina Kubicek, ‘Effects of Cross-Sex Hormone Treatment on Transgender Women and Men’ (2015) 125(3) *Obstetrics* and *Gynecology 605*

Aaron Devor, ‘Gender Blending Females: Women and Sometimes Men’ (1987) 31(1) American Behavioural Scientist 12

Cecelia Dhejne and others, ‘An Analysis of All Applications for Sex Reassignment Surgery in Sweden, 1960–2010: Prevalence, Incidence, and Regrets’ (2014) 43(8) Archives of Sexual Behaviour 1535

Lisa M Diamond and Molly Butterworth, ‘Questioning Gender and Sexual Identity: Dynamic Links Over Time’ (2008) 59(5-6) Sex Roles 365

lore M Dickey, Kelly M Ducheny and Randall D Ehrbar, ‘Family Creation Options for Transgender and Gender Nonconforming People’ (2016) 3(2) Psychology of Sexual Orientation and Gender Diversity 173

Hollin Dickerson, ‘Vindication without Substance: Gender Recognition and the Human Rights Act (2005) 40(4) Texas Law Journal 807

Myrte Dierckx and others, ‘Families in Transition: A Literature Review’ (2016) 28(1) International Review of Psychiatry 36

Carter Dillard, ‘Rethinking the Procreative Right’ (2007) 10 Yale Human Rights and Development Law Journal 1

Denise Diskin, ‘Taking it to the Bank: Actualizing Health Care Equality for San Francisco’s Transgender City and County Employees’ (2008) 5(1) Hastings Race and Poverty Law Journal 129

Vivek Divan and others, ‘Transgender social inclusion and equality: a pivotal path to development’ (2016) 19(2) Journal of the International Aids Society 20803
Petra L Doan, ‘The tyranny of gendered spaces – reflections from beyond the gender dichotomy’ (2010) 17(5) Gender, Place and Culture 635

Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29(2) Human Rights Quarterly 281

Michael Dorf, ‘Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings’ (2011) 97(6) Virginia Law Review 1267

Jack Drescher, ‘Controversies in Gender Diagnosis’ (2014) 1(1) LGBT Health 10

Jack Drescher and Jack Pula, ‘Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children’ (2014) 44(5) Hastings Centre Report (LGBT Bioethics: Visibility, Disparities and Dialogue)

Tom Dreyfus, ‘The Half-Invention of Gender Identity in International Human Rights Law: From CEDAW to the Yogyakarta Principles’ (2012) 37 Australian Feminist Law Journal 3

Peter Dunne, ‘LGBTI Rights and the Wrong Way to Give Aid’ (2012) 12 Harvard Kennedy School Review 67

Peter Dunne, ‘Recognising transgender parenthood on birth certificates: *R (JK) v Secretary of State for the Home Department*’ (2015) 3 International Family Law 230

Lily Durwood, Katie McLaughlin and Kristina Olson, ‘Mental Health and Self-Worth in Socially Transitioned Transgender Youth’ (2017) 56(2) Journal of the American Academy of Child and Adolescent Psychiatry 116

Wayne R Dynes, ‘The Return of the Third Sex’ (1995) 32(4) The Journal of Sex Research 335

Laura Edwards-Leeper and Norman Spack, ‘Psychological Evaluation and Medical Treatment of Transgender Youth in an Interdisciplinary “Gender Management Service” (GeMS) in a Major Paediatric Centre (2012) 59(3) Journal of Homosexuality 321

John Eekelaar, ‘The Importance of Thinking that Children have Rights’ (1992) 6(1) International Journal of Law and the Family 221

Suzanne Egan, ‘The necessary elements of torture: a consideration of the views of the Human Rights Committee in Giri v Nepal’ (2012) Dublin University Law Journal 301

Randall D Ehrbar and others, ‘Clinician Judgment in the Diagnosis of Gender Identity Disorder in Children’ (2008) 34(5) Journal of Sex and Marital Therapy 385

Nancy Ehrenreich and Mark Barr, ‘Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of Cultural Practices’ (2005) 40(1) Harvard Civil Rights-Civil Liberties Law Review 71

Diane Ehrensaft, '"I'm a Prius": A Child Case of a Gender/Ethnic Hybrid' (2010) 15(1) Journal of Gay and Lesbian Mental Health 46

Diane Ehrensaft, 'From Gender Identity Disorder to Gender Identity Creativity: True Gender Self Child Therapy' (2012) 59(3) Journal of Homosexuality 337

Diane Ehrensaft, 'Found in Transition: Our Littlest Transgender People' (2014) 50(4) Contemporary Psychoanalysis 571

Diane Ehrensaft, 'Listening and Learning from Gender-Nonconforming Children' (2014) 68 Psychoanalytic Study of the Child 28

Marleen Eijkholt, 'The Right to Found a Family as a Stillborn Right to Procreate?' (2010) 18(2) Medical Law Review 127

Kelly Ellis and Karen Eriksen, 'Transsexual and Transgenderist Experiences and Treatment Options' (2002) 10(3) The Family Journal: Counselling and Therapy for Couples and Families 289

Alicia Ely Yamin and Angela Duger, 'Adjudicating Health-Related Rights: Proposed Considerations for the United Nations Committee on Economic, Social and Cultural Rights, and Other Supra-National Tribunals' (2016) 17(1) Chicago Journal of International Law 80

Comments from Elizabeth Emens' in Darren Rosenblum and others, 'Pregnant Man? A Conversation' (2010) 22(2) Yale Journal of Law and Feminism 207

Elizabeth Emens, 'Compulsory Sexuality' (2014) 66(2) Stanford Law Review 303

Eric Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10(1) Dartmouth Law Journal 1

William Eskeridge Jr, 'Three Cultural Anxieties undermining the Case for Same-Sex Marriage' (1998) 7(2) Temple Political and Civil Rights Law Review 307

Paula Ettelbrick, 'Since When is Marriage a Path to Liberation?' (1989) OUT/LOOK 9

Chinyere Ezie, 'Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination – The Need for Strict Scrutiny' (2011) 2(1) Columbia Journal of Gender and Law 141

Rachel Farr, Stephen Forssell and Charlotte Patterson, ‘Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?’ (2010) 14(3) Applied Developmental Science 164

Ian Farrell and Nancy Leong, ‘Gender Diversity and Same-Sex Marriage’ (2014) 114 Columbia Law Review Sidebar 97

Anne Fast and Kristina Olson, ‘Gender Development in Transgender Preschool Children’ (2017) Child Development

Chai Feldblum, ‘A Progressive Moral Case for Same-Sex Marriage’ (1998) 7(2) Temple Policy and Civil Rights Law Review 485

David Feldman, ‘Human dignity as a legal value: Part 1’ (1999) Public Law 682

Martha Fineman, ‘The Neutered Mother’ (1992) 46(3) University of Miami Law Review 653

John Finnis, ‘The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations’ (1997) 42 The American Journal of Jurisprudence 97

Andrea Flynn-Schneider, ‘United Nations claims Anti-Homosexuality Legislation Violates Human Rights: The cases of Uganda and India’ (2014) 21(2) Human Rights Brief 70

Michelle M Forcier and Emily Haddad, ‘Health Care for Gender Variant or Gender Non-Conforming Children’ (2013) 96(4) April Rhode Island Medical Journal 17

Holly Franson, ‘The Rise of the Transgender Child: Overcoming Societal Stigma, institutional Discrimination, and Individual Bias to Enact and Enforce Non-Discriminatory Dress Code Policies’ (2013) 84(2) University of Colorado Law Review 497

Sandra Fredman, ‘Facing the Future: Substantive Equality under the Spotlight’ (2010) Legal Research Papers Series Paper No. 57/2010

Sandra Fredman, ‘Substantive Equality Revisited’ (2016) 14(13) International Journal of Constitutional Law 712

Jordan D Frey and others, ‘An Update on Genital Reconstruction Options for the Female-to-Male Transgender Patient: A Review of the Literature’ (2017) 139(3) Plastic and Reconstructive Surgery 728

Hélène Frohard-Dourlent and others, ‘“I would have preferred more options”: accounting for non-binary youth in health research’ (2017) 24(1) Nursing Inquiry 1

Patricia Gagne, Richard Tewksbury and Deanna McGaughey, ‘Coming out and Crossing over: Identity Formation and Proclamation in a Transgender Community’ (1997) 11(4) Gender and Society 478

Emeline Garcia, ‘AB 1266: The School Success and Opportunity Act or A Violation of the Constitutional Right to Privacy’ (2013) 35(2) University of La Verne Law Review 243

Pooja S Gehi and Gabriel Arkles, ‘Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People’ (2007) 4 (4) Sexuality Research and Social Policy 7

Janneke Gerards, ‘How to improve the necessity test of the European Court of Human Rights’ (2013) 11(2) International Journal of Constitutional Law 466

Paula Gerber, Kristine Tay and Adiva Sifris, ‘Marriage: A Human Right for All?’ (2014) 36(4) Sydney Law Review 643

Shawn Giamattei, ‘Beyond the Binary: Trans-Negotiations in Couple and Family Therapy’ (2015) 54(3) Family Process 418

Alain Giami and Emmanuelle Beaubatie, ‘Gender Identification and Sex Reassignment Surgery in the Trans Population: A Survey Study in France’ (2014) 43 Archives of Sexual Behaviour 1491

Miqqi Alicia Gilbert, ‘Defeating Bigenderism: Changing Gender Assumptions in the Twenty-first Century’ (2009) 24(3) Hypatia 93

Andrew Gilden, ‘Toward a More Transformative Approach: The Limits of Transgender Formal Equality’ (2008) 23(1) Berkeley Journal of Law and Gender 83

Sherif Girgis, Robert George and Ryan Anderson, ‘What is Marriage?’ (2010) 34(1) Harvard Journal of Law and Public Policy 245

Jack Goldsmith and Eric Posner, 'A Theory of Customary International Law' (1999) 64(4) University of Chicago Law Review 1113

Damian A Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2013) 29(4) American University International Law Review 797

Leigh Goodmark, 'Transgender People, Intimate Partner Abuse, and the Legal System' (2013) 48(1) Harvard Civil Rights-Civil Liberties Law Review 51

Emily Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19(1) Social and Legal Studies 107

Sharyn Graham, 'It's Like One of Those Puzzles: Conceptualising Gender Among Bugis' (2004) 13(2) Journal of Gender Studies 107

Sarah Gray, Alice Carter and Heidi Levitt, 'A Critical Review of Assumptions about Gender Variant Children in Psychological Research' (2012) 16(1) Journal of Gay and Lesbian Mental Health 4

Jamison Green and others, 'Recommendations from the WPATH Consensus Process for Revision of the DSM Diagnosis of Gender Identity Disorders: Implications for Human Rights' (2011) 13(1) International Journal of Transgenderism 1

Jamison Green, 'If I Follow the Rules, Will You Make Me a Man: Patterns in Transsexual Validation' (2012) 34(1) University of La Verne Law Review 23

Julie Greenberg, 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41(2) Arizona Law Review 265

Julie Greenberg, 'Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience' (2002) 39(3) San Diego Law Review 917

Michael James Griffin, 'Intersecting Intersectionalities and the Failure of the Law to Protect Transgender Women of Color in the United States' (2016) 24 Tulane Journal of Law and Sexuality: A Review of Sexual Orientation and Gender Identity in the Law 123

Richard Griffith and Cassam Tengnah, 'Assessing children's competence to consent to treatment' (2012) 17(2) British Journal of Community Nursing 87

Tina Grillo, ‘Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House’ (1995) 10(1) Berkeley Women’s Law Journal 16

Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57(2) University of Toronto Law Journal 383

Tim Grimwood, ‘*Gillick* and the Consent of Minors: Contraceptive Advice and Treatment in New Zealand’ (2009) 40(4) Victoria University of Wellington Law Review 743

Thomas Grisso and Linda Vierling, ‘Minors’ Consent to Treatment: A Developmental Perspective’ (1979) 9(3) Professional Psychology 412

Arnold Grossman and others, ‘Parents’ Reactions to Transgender Youths’ Gender Nonconforming Expression and Identity (2005) 18(1) Journal of Gay and Lesbian Social Services 3

Arnold Grossman and Anthony R D’augelli, ‘Transgender Youth’ (2006) 51(1) Journal of Homosexuality 111

Arnold Grossman, Anthony R D’augelli and Nickolas Salter, ‘Male-to-Female Transgender Youth’ (2006) 2(1) Journal of GLBT Family Studies 71

Marie Gustafsson Sendén, Emma Aurora Bäck and Anna Lindqvist, ‘Introducing a gender-neutral pronoun in a natural gender language: the influence of time on attitudes and behavior’ (2015) 6 Frontiers in Psychology

Comments from Vivian Gutierrez and Berta Hernindez-Truyol’ in Darren Rosenblum and others, ‘Pregnant Man? A Conversation’ (2010) 22(2) Yale Journal of Law and Feminism 207

Vanja Hamzic, ‘The Case of “Queer Muslims”: Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos’ (2011) 11(2) Human Rights Law Review 237

Griffin Hansbury, ‘The Middle Men: An Introduction to the Transmasculine Identities’ (2005) 6(3) Studies in Gender and Sexuality 241

Rosie Harding, ‘“Dogs Are ‘Registered’, People Shouldn’t Be”: Legal Consciousness and Lesbian and Gay Rights’ (2006) 15(4) Social and Legal Studies 511

Jack Harrison, Jaime Grant and Jody L Herman, 'A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey' (2012) 2 LGBTQ Policy Journal at the Harvard Kennedy School 13

Lachlan Harrison Smith, 'Changing Sex on the Birth Register – Leave Room for I – Regulation and Repression of Transsexual Identities in Theory and Law' (2007) 10(2) Flinders Journal of Law Reform 211

HLA Hart, 'Social Solidarity and the Enforcement of Morality' (1967) 35(1) University of Chicago Law Review 1

Oona A. Hathaway; Aileen Nowlan; Julia Spiegel, 'Tortured Reasoning: The Intent to Torture under International and Domestic Law' (2012) 52 Virginia Journal of International Law 791

Sally D Hawkins, 'Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes' (1996) 64(6) Fordham Law Review 2075

James Haynes, 'Identification Problems and Voting Obstacles for Transgender Americans' (2013) 1(1) Indiana Journal of Law and Social Equality 165

Dawn Heinecken, 'Gender and jockography: post-feminism and resistance in female sports autobiographies' (2016) 16(2) Feminist Media Studies 325

Heklina, 'The Trouble with *Tranny*' (2015) 16(2) Studies in Gender and Sexuality 142
Louis Henkin, 'The Universality of the Concept of Human Rights' (1994) 506 The Annals of the American Academy of Political and Social Science *10*

Marybeth Herald, 'Transgender Theory: Reprogramming Our Automated Settings' (2005) 28(2) Thomas Jefferson Law Review 167

Sarah E Herbert, 'Female-to-Male Transgender Adolescents' (2011) 20(4) Child and Adolescent Psychiatric Clinics 681

Jody L Herman, 'Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives' (2013) 19(1) Journal of Public Management and Social Policy 65

Marco A Hidalgo and others, 'The Gender Affirmative Model: What We Know and What We Aim to Learn' (2013) 56 Human Development 285

Darryl Hill and Edgardo Menvielle, '"You Have to Give Them a Place Where They Feel Protected and Safe and Loved": The Views of Parents Who Have Gender-Variant Children and Adolescents' (2009) 6(2-3) Journal of LGBT Youth 243

Jessica Hinchy, 'Troubling bodies: "eunuchs," masculinity and impotence in colonial North India' (2013) 4(2) Gender and Masculinities: New Perspectives 196

Sally Hines, 'A pathway to diversity? human rights, citizenship and the politics of transgender' (2009) 15(1) Contemporary Politics 87

Sally Hines, '(Trans)Forming Gender: Social Change and Transgender Citizenship' (2007) 12(1) Sociological Research Online http://www.socresonline.org.uk/12/1/hines.html accessed 20 March 2017

Myra J Hird, 'Gender's nature: Intersexuality, transsexualism and the "sex"/"gender" Binary' (2000) 1(3) Feminist Theory 34

Lord Hoffman, 'The Universality of Human Rights' (2009) 125 Law Quarterly Review 416

Mary Huft, 'Statistically Speaking: The High Rate of Suicidality among Transgender Youth and Access Barriers to Medical Treatment in a Society of Gender Dichotomy' (2008) 28(1) Children's Legal Rights Journal 53

Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) Health and Human Rights Journal 109

Nan Hunter, 'Marriage, Law, and Gender: A Feminist Inquiry' (1991) 1 Law and Sexuality Review Lesbian and Gay Legal Issues 9

Robert Hupf, 'Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital "Normalising Surgery"' (2015) 22(1) William and Mary Journal of Women and the Law 73

Darren Lenard Hutchinson, 'Identity Crisis: Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination' (2001) 6(2) Michigan Journal of Race and Law 285

Chris Hutton, ‘Legal sex, self-classification and gender self-determination’ (2017) 11(1) Law and Humanities 64

Alex Iantaffi and Walter O Bockting, ‘Views from both sides of the bridge? Gender, sexual legitimacy and transgender people’s experiences of relationships’ (2011) 13(3) Culture, Health and Sexuality 355

Stephanie Ignatavicius, ‘Stress in Female-Identified Transgender Youth: A Review of the Literature on Effects and Interventions’ (2013) 10(4) Journal of LGBT Youth 267

Emily Ikuta, ‘Overcoming the Parental Veto: How Transgender Adolescents can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent under the Mature Minor Doctrine’ (2016) 25(1) Southern California Interdisciplinary Law Journal 179

Gee Imaan Semmalar, ‘Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India’ (2014) 42(3-4) WSQ: Women’s Studies Quarterly 286

Emma Inch, ‘Changing Minds: The Psycho-Pathologization of Trans People’ (2016) 45(3) International Journal of Mental Health 193

Dan Irving, ‘The Self-Made Trans Man as Risky Business: A Critical Examination of Gaining Recognition for Trans Rights through Economic Discourse’ (2009) 18(2) Temple Political and Civil Rights Law Review 375

Dan Irving, ‘Against the Grain: Teaching Transgender Human Rights’ (2013) 16(3-4) Sexualities 319

Pooja S Jagadish, ‘Mainstreaming Third-Gender Healers: The Changing Perceptions of South Asian Hijras’ (2013) 9 Vanderbilt Undergraduate Research Journal 1;

Divya Jalan, ‘Trans Gender Justice: Critical Reflections on the Conceptual Limitations of English Law, Implementation of the Law, and the Relationship with Social Progress’ (2016) 4(2) Legal Issues Journal 43

S James-Abra and others, ‘Trans peoples experiences with assisted reproduction services: a qualitative study’ (2015) 30(6) Human Reproduction 1365

Humaira Jami and Anila Kamal, ‘Measuring Attitudes toward Hijras in Pakistan: Gender and Religiosity in Perspective’ (2015) 30(1) Pakistan Journal of Psychological Research 151

Po Jen Yap, ‘Transsexual marriage in Hong Kong: going beyond *Bellinger*’ (2013) 129 Law Quarterly Review 503

Patrick Jiang, ‘Legislating for Transgender People: A Comparative Study of the Change of Legal Gender in Hong Kong, Singapore, Japan and the United Kingdom’ (2013) 7 Hong Kong Journal of Legal Studies 31

Daphna Joel and others, ‘Queering gender: studying gender identity in “normative” individuals’ (2013) 5(4) Psychology and Sexuality 1

Annika Johansson and others, ‘A Five Year Follow-Up Study of Swedish Adults with Gender Identity Disorder’ (2010) 39(6) Archives of Sexual Behaviour 1429

Jenna Johnson, ‘Minnesota (Trans) Gender Markers: State Statutes and Policies on Amending Identity Documents’ (2015) 41(1) William Mitchell Law Review 213

Paul Johnson, ‘Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority’ (2011) 20(3) Social and Legal Studies 349
Paul Johnson, ‘“The choice of wording must be regarded as deliberate”: same-sex marriage and Article 12 of the European Convention on Human Rights’ (2015) 40(2) *European Law Review* 207

Susan Johnson and Kristen Benson, ‘“It’s Always the Mother’s Fault”: Secondary Stigma of Mothering a Transgender Child’ (2014) 10(1-2) Journal of GLBT Family Studies 124

Yuvraj Joshi, ‘The Respectable Dignity of *Obergefell v Hodges*’ (2015) 6 California Law Review Circuit 117

Kenneth Jost, ‘Transgender Issues’ (2006) 16(17) Congressional Quarterly Researcher 386

Maya Kailas and others, ‘Prevalence and Types of Gender-Affirming Surgery Among a Sample of Transgender Endocrinology Patients Prior to State Expansion of Insurance Coverage’ (2017) April Endocrine Practice

Thoko Kaime, ‘The African Children's Charter: Does it represent a Relevant Vision of Childhood and Children's Rights?’ (2009) 29(3) Children’s Legal Rights Journal 11

Lara Karaian, ‘Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law’ (2013) 22(2) Social and Legal Studies 211

Sonia Katyal, ‘Exporting Identity’ (2002) 14(1) Yale Journal of Law and Feminism 97

Sonia Katyal, ‘The Numerous Clausus of Sex’ (2017) 84 University of Chicago Law Review 389

Susan Etta Keller, ‘Crisis of Authority: Medical Rhetoric and Transsexual Identity’ (1999) 11(1) Yale Journal of Law and Feminism 51

Fiona Kelly, ‘Conceptualising the child through an “ethic of care”: lessons for family law’ (2005) 1(4) International Journal of Law in Context 375

Amanda Kennedy, ‘Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition’ (2008) 19(2) Hastings Women’s Law Journal 281

Liza Khan, ‘Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform’ (2011) 11(2) Yale Journal of Health Policy, Law, and Ethics 375

Ursula Kilkelly, ‘The CRC at 21: assessing the legal impact’ (2011) 62(2) Northern Ireland Law Quarterly 143

Antonia Kirkland, ‘Female Genital Mutilation and the United States Vote at International Financial Institutions’ (1998) 20(2-3) Women’s Rights Law Reporter 147

Anna Kłonkowska, ‘Dual-unity or dichotomy? Androgyny and social construction of gender bipartition’ (2014) 7(2) Creativity Studies 118

Katie Koch and Richard Bales, ‘Transgender Employment Discrimination’ (2008) 17(3) UCLA Women’s Law Journal 243

Jonathan L Koenig, ‘Distributive Consequences of the Medical Model’ (2011) 46(2) Harvard Civil Rights Civil Liberties Law Review 619

Terry S Kogan, ‘Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labelled “Other”’ (1996) 48(6) Hastings Law Journal 1223

Lynne Marie Kohm, ‘Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence’ (2007) 10(2) Journal of Law and Family Studies 337

Alexander Korte and others, ‘Gender Identity Disorders in Childhood and Adolescence’ (2008) 105(48) Deutsches Ärzteblatt International 834

Janine Kossen, ‘Rights, Respect, Responsibility: Advancing the Sexual and Reproductive Health and Rights of Young People through International Human Rights Law’ (2011) 15(2) University of Pennsylvania Journal of Law and Social Change 143

Brian Kritz, ‘The Global Transgender Population and the International Criminal Court’ (2014) 17 Yale Human Rights and Development Law Journal 1

AJ Kuiper and Peggy Cohen-Kettenis, ‘Gender Role Reversal among Postoperative Transsexuals’ 1998 2(3) The International Journal of Transgenderism http://www.iiav.nl/ezines/web/ijt/97-03/numbers/symposion/ijtc0502.htm accessed 4 March 2015

Laura E Kuper, Robin Nussbaum and Brian Mustanski, ‘Exploring the Diversity of Gender and Sexual Orientation Identities in an Online Sample of Transgender Individuals’ (2012) 49(2-3) The Journal of Sex Research 244

Katherine Kuvalanka, Judith Weiner and Derek Mahan, ‘Child, Family, and Community Transformations: Findings from Interviews with Mothers of Transgender Girls’ (2014) 10(4) Journal of GLBT Family Studies 354

Madison Kyger, ‘A Global Analysis: Legal Recognition and Equal Treatment of Transgender Citizens’ (2016) 5(1) University of Baltimore Journal of International Law 118
Elina Lahelma, ‘Female paths to adulthood in a country of “genderless gender”’ (2012) 24(1) Gender and Education 1

Claudia Lament, ‘Transgender Children Conundrums and Controversies— An Introduction to the Section’ (2014) 68 The Psychoanalytic Study of the Child 13

Mikael Landen and others, ‘Factors predictive of regret in sex reassignment’ (1998) 97(4) Acta Psychiatrica Scandinavica 284

Jamie Landau, ‘Reproducing and Transgressing Masculinity: A Rhetorical Analysis of Women Interacting with Digital Photographs of Thomas Beatie’ (2012) 35(2) Women’s Studies in Communication 178

Susan Langer and James I Martin, ‘How Dresses Can Make You Mentally Ill: Examining Gender Identity Disorder in Children’ (2004) 21(1) Child and Adolescent Social Work Journal 5

Malcolm Langford, ‘Revisiting *Joslin v New Zealand*: Same-Sex Marriage in Polarised Times’ (2017) University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2017-12

Laura Langley, ‘Self Determination in a Gender Fundamentalist State: Towards Legal Liberation of Transgender Identities’ (2006) 12(1) Texas Journal of Civil Liberties and Civil Rights 101

Vic Larcher and Anna Hutchinson, ‘How should paediatricians assess *Gillick* competence?’ (2010) 95(4) Archives of Disease in Childhood 307

Holning Lau, ‘Law, Sexuality and Transnational Perspectives’ (2013) 5(2) Drexel Law Review 479

Cynthia Lee and Peter Kwan, ‘The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women’ (2014) 66(1) Hastings Law Journal 77

Rebecca Lee, ‘Forced Sterilization and Mandatory Divorce: How a Majority of Council of Europe Member States’ Laws regarding Gender Identity Violate the Internationally and Regionally Established Human Rights of Trans People’ (2015) 33(1) Berkeley Journal of International Law 114
Sarah Leinicke, ‘Post-Operative Transsexuals’ Right to Marriage’ (2005) 1(1) The Modern American 18

Devon Lerner, ‘Why We Support Same-Sex Marriage: A Response from Over 450 Clergy’ (2003) 38(3) New England Law Review 527

M Dru Levasseur, ‘Gender Identity Defines Sex: Updating the Law to reflect modern medical science is key to Transgender Rights’ (2014) 39(4) Vermont Law Review 943

Jennifer Levi, ‘Book Review – Transgender Jurisprudence: Dysphoric Bodies of Law by Alex Sharpe’ (2003) 24(1) Adelaide Law Review 99

Heidi Levitt and Maria Ippolito, ‘Being Transgender: The Experience of Transgender Identity Development’ (2014) 61(12) Journal of Homosexuality 1727

Catherine C Lewis, ‘A Comparison of Minors’ and Adults’ Pregnancy Decisions’ (1980) 50(3) American Journal of Orthopsychiatry 446

Athena Liu, ‘Gender Recognition: Two Legal Implications on Marriage’ (2013) 43(2) Hong Kong Law Journal 497

Abigail Lloyd, ‘Defining the Human: Are Transgender People Strangers to the Law?’ (2005) 20(1) Berkeley Journal of Gender, Law and Justice 150

Judith Lorber, ‘Using gender to undo gender A feminist degendering movement’ (2000) 1(1) Feminist Theory 79

Sana Loue, ‘Transsexualism in medicolegal limine: an examination and a proposal for change’ (1996) 24(1) Journal of Psychiatry and Law 27

Ariel Love, ‘A Room of One’s Own: Safe Placement for Transgender Youth in Foster Care’ (2014) 89(6) New York University Law Review 2265

Xavier B Lutchmie Persad, ‘An expanding human rights corpus: Sexual Minority Rights as International Human Rights’ (2014) 20(2) Cardozo Journal of Law and Gender 337

Faith Lynn, ‘To be a Trans* Parent: How Emotional Abuse Statutes Facilitate Parent’s Acceptance of their Children’s Gender Identity’ (2013) 7(1) John Marshall Law Journal 89

Elizabeth C Lyons, ‘Normal for Whom? Gender Acculturation in Native American Communities’ (2010) 2(1) DePaul Journal of Women, Gender and the Law 87

Catherine MacKinnon, ‘Reflections on Sex Equality under the Law’ (1990) 100(5) Yale Law Journal 1281

Catherine MacKinnon, ‘From Practice to Theory, or What is a White Woman Anyway?’ (1991) 4(1) Yale Journal of Law and Feminism 13

Jane Maree Maher, ‘A pregnant man in the movies: The visual politics of reproduction’ (2008) 22(2) Continuum 279

Paul Mahoney, ‘Universality versus subsidiarity in the Strasbourg case law on free speech: explaining some recent judgments’ (1997) 4 European Human Rights Law Review 364

S Elizabeth Malloy, ‘What best to Protect Transsexuals from Discrimination: Using Current Legislation or Adopting A New Judicial Framework’ (2010) 32(4) Women’s Rights Law Reporter 283

Jean Malpas, ‘From Otherness to Alliance: Transgender Couples in Therapy’ (2006) 2(3-4) Journal of GLBT Family Studies 183

Nancy C Marcus, ‘Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation’ (2015) 22(2) Michigan Journal of Gender and Law 291

Erin R Markman, ‘Gender Identity Disorder, the Gender Binary, and Transgender Oppression: Implications for Ethical Social Work’ (2011) 81(4) Smith College Studies in Social Work 314

Stephanie Markowitz, ‘Change of Sex Designation on Transsexuals’ Birth Certificates: Public Policy and Equal Protection’ (2008) 14(3) Cardozo Journal of Law and Gender 705

Susan Maxwell and others, ‘Pregnancy Outcomes After Fertility Preservation in Transgender Men’ (2017) 129(6) 1031

Julie McCandless and Sally Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73(2) Modern Law Review 175

Amy McCrea, ‘Under the Transgender Umbrella: Improving ENDA’s Protections’ (2014) 15(2) Georgetown Journal of Gender and the Law 543

Jena McGill, ‘SOGI....So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations’ (2014) 3 Canadian Journal of Human Rights 1

Dominic McGoldrick, ‘The United Nations Convention on the Rights of the Child’ (1991) 5 International Journal of Law and the Family 132

James McGrath, ‘Are You a Boy or a Girl – Show Me Your REAL ID’ (2009) 9(2) Nevada Law Journal 368

Sheelagh McGuinness and Amel Alghrani, ‘Gender and Parenthood: The Case for Realignment’ (2008) 16(2) Medical Law Review 261

Tey Meadow, '"A Rose is a Rose" On Producing Legal Gender Classifications' (2010) 24(6) Gender and Society 814

S Colton Meier and others, 'Romantic Relationships of Female-to-Male Trans Men: A Descriptive Study' (2013) 14(2) International Journal of Transgenderism 75

Edgardo Menvielle, 'A Comprehensive Program for Children with Gender Variant Behaviours and Gender Identity Disorders' (2012) 59(3) Journal of Homosexuality 357

Julie Mertus,'The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US' (2007) 29(4) Human Rights Quarterly 1036

Elise Meyer, 'Designing Women: The Definition of "Woman" in the Convention on the Elimination of All Forms of Discrimination against Women' (2015) 16(2) Chicago Journal of International Law 553

Christine Milrod, 'How Young Is Too Young: Ethical Concerns in Genital Surgery of the Transgender MTF Adolescent' (2014) 11(2) Journal of Sexual Medicine 338

Alfredo Mirande, 'Hombres Mujeres: An Indigenous Third Gender' (2016) 19(4) Men and Masculinities 384

Surya Monro, 'Beyond Male and Female: Poststructuralism and the Spectrum of Gender' (2005) 8(1) International Journal of Transgenderism 3

Gay Moon and Robin Allen, 'Dignity discourse in discrimination law: a better route to equality?' (2002) European Human Rights Law Review 610

Enrique Moral, 'Qu(e)erying Sex and Gender in Archaeology: a Critique of the "Third" and Other Sexual Categories' (2016) 23(3) Journal of Archaeological Method *and* Theory 788

Scott Dylan More, 'The Pregnant Man-An Oxymoron?' (1998) 7(3) Journal of Gender Studies 319

Lisa Mottet, 'Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People' (2013) 19(2) Michigan Journal of Gender and Law 373

Kimberly M Mutcherson, ‘Whose Body is it Anyway? An Updated Model of Healthcare Decision-making Rights for Adolescents’ (2005) 14(2) Cornell Journal of Law and Public Policy 251

John Murphy, ‘Same-sex marriage in England: a role for human rights?’ (2004) 16(3) Child and Family Law Quarterly 245

Timothy F Murphy, ‘Commentary: Crossing Cultural Divides: Transgender People Who Want to Have Children’ (2012) 21 Cambridge Quarterly of Healthcare Ethics 284

Julie Nagoshi and Stephan/ie Brzuzy, ‘Transgender Theory: Embodying Research and Practice’ (2010) 25(4) Affilia 431

Julie Nagoshi, Stephan/ie Brzuzy and Heather K Terrell, ‘Deconstructing the complex perceptions of gender roles, gender identity, and sexual orientation among transgender individuals’ (2012) 22(4) Feminism and Psychology 405

Serena Nanda, ‘The Hijras of India: Cultural and Individual Dimensions of an Institutionalised Third Gender Role’ (1986) 11(3-4) Journal of Homosexuality 35

Jan Nederveen Pieterse, ‘What is Global Studies’ (2014) 10(4) Globalizations 499

Dorian Needham, ‘A Categorical Imperative? Questioning the Need for Sexual Classification in Québec’ (2011) 52(1) Les Cahiers de droit 71

Jayesh Needham, ‘After the Arab Spring: A New Opportunity for LGBT Human Rights Advocacy?’ (2012) 20(2) Duke Journal of Gender, Law and Policy 287

Anna James Neuman Wipfler, ‘Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents’ (2016) 39(2) Harvard Journal of Law and Gender 491

Alice Newlin, ‘Should a Trip from Illinois to Tennessee Change a Woman into a Man? Proposal for a Uniform Interstate Sex Reassignment Recognition Act’ (2008) 17(3) Columbia Journal of Gender and Law 461

Chance Nicholson and Teena M McGuinness, ‘Gender Dysphoria and Children’ (2014) 52(8) Journal of Psychosocial Nursing 27

Z Nicolazzo, '"It's a hard line to walk": black non-binary trans* collegians' perspectives on passing, realness, and trans*-normativity' (2016) 29(9) International Journal of Qualitative Studies in Education 1173

Laura Nixon, 'The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility and Family-Building Issues Facing Transgender People' (2013) 20(1) William and Mary Journal of Women and Law 73

Kenneth McK Norrie, '*Bellinger v Bellinger*, the House of Lords and the Gender Recognition Bill' (2004) 8(1) Edinburgh Law Review 93

Laura H Norton, 'Neutering the Transgendered: Human Rights and Japan's Law No. 111' (2006) 7(2) Georgetown Journal of Gender and the Law 187

Michelle Oberman, 'Minors' Rights and Wrongs' (1996) 24(2) The Journal of Law, Medicine and Ethics 127

Wendy O'Brien, 'Can International Human Rights Law Accommodate Bodily Diversity' (2015) 15(1) Human Rights Law Review 1

Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8(2) Human Rights Law Review 207

Micahel O'Flaherty, 'The Yogyakarta Principles at Ten' (2015) 33(4) Nordic Journal of Human Rights 280

Michèle Olivier, 'The relevance of "soft law" as a source of international human rights' (2002) 35(3) Comparative and International Law Journal of Southern Africa 289

Johanna Olson and Robert Garofalo, 'The Peripubertal Gender-Dysphoric Child: Puberty Suppression and Treatment Paradigms' (2014) 43(6) Paediatric Annals 132

Johanna Olson-Kennedy and others, 'Research Priorities for Gender Nonconforming/Transgender Youth: Gender Identity Development and Biopsychosocial Outcomes' (2016) 23(2) Current Opinion in Endocrinology, Diabetes and Obesity 172 (retrieved from *Pub Med* database, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4807860/pdf/nihms767274.pdf accessed 4 July 2017)

Kristina Olson, Aidan C Key and Nicholas R Eaton, ‘Gender Cognition in Transgender Children’ (2015) 26(4) Psychological Science 467

Kristina Olson, ‘Prepubescent Transgender Children: What We Do and Do Not Know’ (2016) 55(3) Journal of the American Academy of Child and Adolescent Psychiatry 155

Kristina Olson and others, ‘Mental Health of Transgender Children Who Are Supported in Their Identities’ (2016) 137(3) Paediatrics

Diane Otto, ‘Lesbians? Not in my Country’ (1995) 20(5) Alternative Law Journal 288

Dianne Otto, ‘Rethinking the Universality of Human Rights Law’ (1997) 29(1) Columbia Human Rights Law Review 1

Maria Pahl, *‘Immutability of Identity, Title VII, and the ADA Amendment Act: How Being “Regarded As” Transgender Could Affect Employment Discrimination’* (2014) 3(1) De Paul Journal of Women, Gender and the Law 63

Angelo Pantazis, ‘An Argument for the Legal Recognition of Gay and Lesbian Marriage’ (1997) 114(3) South African Law Journal 556

Pauline Park, ‘GenderPAC, the Transgender Rights Movement and the Perils of a Post-Identity Politics Paradigm’ (2002) 4(2) The Georgetown Journal of Gender and the Law 747

Stephen Parker, ‘The Best Interests of the Child – Principles and Problems’ (1994) 8(1) International Journal of Law and the Family 26

Wesley Parks, ‘Removal of the Impediment: The State of Transgender Marriage in Montana’ (2013) 74(2) Montana Law Review 309

Amisha R Patel, ‘India’s Hijras: The Case for Transgender Rights’ (2010) 42(4) George Washington International Law Review 835

Leslie Pearlman, ‘Transsexualism as Metaphor: The Collision of Sex and Gender’ (1995) 43(3) Buffalo Law Review 835

David Alan Perkiss, ‘Boy or Girl: Who Gets To Decide? Gender Nonconforming Children in Child Custody Cases’ (2014) 25(1) Hastings Women’s Law Journal 57

Richard Pleak, ‘Formation of Transgender Identities in Adolescence’ (2009) 13(4) Journal of Gay and Lesbian Mental Health 282

Jason Pobjoy, ‘The Best Interests of the Child Principle as an Independent Source of International Protection’ 64(2) International and Comparative Law Quarterly 327

Marc Poirier, ‘Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction’ (2009) 41(5) Connecticut Law Review 1425

Nancy Polikoff, ‘We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage will not “Dismantle the Legal Structure of Gender in Every Marriage”’ (1993) 79(7) Virginia Law Review 1535

Nancy Polikof, ‘Why Lesbians and Gay Men Should Read Martha Fineman’ (2000) 8 American University Journal of Social Policy and Law 167

Lealah Pollock and Stephen Eyre, ‘Growth into manhood: identity development among female-to-male transgender youth’ (2012) 14(2) Health and Sexuality 209

Shannon Price Minter, ‘Supporting Transgender Children: New Legal, Social, and Medical Approaches’ (2012) 15(3) Journal of Homosexuality 422

Jake Pyne, ‘“Parenting Is Not a Job … It’s a Relationship”: Recognition and Relational Knowledge Among Parents of Gender Non-conforming Children’ (2016) 27(1) Journal of Progressive Human Services 21

Michael Ramsdem and Luke Marsh, ‘Same-sex marriage in Hong Kong: the case for a constitutional right’ (2015) 19(1) The International Journal of Human Rights 90

Amy Rappole, ‘Trans People and Legal Recognition: What the U.S. Federal Government Can Learn From Foreign Nations’ (2015) 30(1) Maryland Journal of International Law 191

I M Rautenbach, ‘Proportionality and the Limitation Clauses of the South African Bill of Rights’ (2014) 17(2) Potchefstroom Electronic Law Journal 2229

Javaid Rehman and Eleni Polymenopoulou, ‘Is Green a Part of the Rainbow: Sharia, Homosexuality, and LGBT Rights in the Muslim World’ (2013) 37(1) Fordham International Law Journal 1

Javaid Rehman, ‘Sexual Rights in the Religious State’ (2015) 11(1) Journal of Islamic State Practices in International Law 49

Elizabeth Reilly, ‘Radical Tweak – Relocating the Power to Assign Sex – From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality’ (2005) 12(1) Cardozo Journal of Law and Gender 297

Jennifer Rellis, ‘Please Write E in this Box toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India’ (2008) 14(2) Michigan Journal of Gender and Law 223

Meredith Render, ‘Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World’ (2006) 29(1) Harvard Journal of Law and Gender 99

Christina Richards and others, ‘Non-binary or genderqueer genders’ (2016) 28(1) International Review of Psychiatry 95

Elizabeth Anne Riley, ‘The Needs of Gender-Variant Children and Their Parents: A Parent Survey’ (2011) 23(3) International Journal of Sexual Health 181

Jiska Ristori and Thomas D Steensma, ‘Gender dysphoria in childhood’ (2016) 28(1) International Review of Psychiatry 13

Andrea Roberts and others, ‘Childhood Gender Nonconformity: A Risk Indicator for Childhood Abuse and Posttraumatic Stress in Youth’ (2012) 129(3) Pediatrics 410

Katrina Roen, ‘“Either/Or” and “Both/Neither”: Discursive Tensions in Transgender Politics’ (2002) 27(2) Signs 501

Francesca Romana Ammaturo, ‘Intersexuality and the “right to bodily integrity”: critical reflections on female genital cutting, circumcision, and intersex “normalizing surgeries” in Europe’ (2016) 25(5) Social and Legal Studies 591

Vernon Rosario, ‘Quantum sex: intersex and the molecular deconstruction of sex’ (2009) 15(2) GLQ: A Journal of Lesbian and Gay Studies 267

Darren Rosenblum, ‘Unsex Mothering: Toward a New Culture of Parenting’ (2012) 35(1) Harvard Journal of Law and Gender 57

Michael Rosenfeld, ‘Couple Longevity in the Era of Same-Sex Marriage in the United States’ (2014) 76(5) Journal of Marriage and Family 905

Stephen Rosenthal, ‘Approach to the Patient: Transgender Youth: Endocrine Considerations’ (2014) 99(12) The Journal of Clinical Endocrinology and Metabolism 4379
Stephen Rosenthal, ‘Transgender youth: current concepts’ (2016) 21(4) Annals of Paediatric Endocrinology and Metabolism 185

Henry Rubin, ‘Phenomenology as method in trans studies’ (1998) 4(2) GLQ: A Journal of Lesbian and Gay Studies 263

Francine Russo, ‘Debate is growing about how to meet the urgent needs of Transgender Kids’ (2016) January/February Scientific American Mind 26

Lainie Rutkow and Joshua T Lozman, ‘Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child’ (2006) 19 Harvard Human Rights Journal 161

Fergus Ryan, ‘Marriage at the Boundaries of Gender: The “Transsexual Dilemma” Resolved?’ (2004) 7(1) Irish Journal of Family Law 15

Maura Ryan, ‘The Gender of Pregnancy: Masculine Lesbians Talk about Reproduction’ (2013) 17(2) Journal of Lesbian Studies 119

Maya Sabaletto, ‘Advancing Transgender Family Rights through Science: A Proposal for an Alternative Framework’ (2011) 33(1) Human Rights Quarterly 43

Edward Sadtler, ‘A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?’ (1999) 40(1) Virginia Journal of International Law 405

Karen Saeger, ‘Finding our Way’ (2006) 2(3-4) Journal of GLBT Family Studies 207

Macarena Saez, ‘Transforming Family Law through Same-Sex Marriage: Lessons from (and to) the Western World’ (2014) 25(1) Duke Journal of Comparative and International Law 125

Tom Sandercock, ‘Transing the small screen: loving and hating transgender youth in *Glee* and *Degrassi*’ (2015) 24(4) Journal of Gender Studies 436

Ralph Sandland, ‘Feminism and the Gender Recognition Act 2004’ (2005) 13(1) Feminist Legal Studies 43

Tam Sanger, ‘Trans governmentality: the production and regulation of gendered subjectivities’ (2008) 17(1) Journal of Gender Studies 41

Leonard Sax, ‘How common is intersex? A Response to Anne Fausto-Sterling’ (2002) (39(3) The Journal of Sex Research 174

Ayden I Scheim and Greta R Bauer, ‘Sex and Gender Diversity Among Transgender Persons in Ontario, Canada: Results From a Respondent-Driven Sampling Survey’ (2015) 52(1) Journal of Sex Research 1

Daniella Schmidt, ‘Bathroom Bias: Making the Case for Trans Rights under Disability Law’ (2013) 20(1) Michigan Journal of Gender and Law 155

Johanna Schmidt, ‘Being “Like a Woman”: Fa’afāfine and Samoan Masculinity’ (2016) 17(3-4) The Asia Pacific Journal of Anthropology 287

Ingrid Sell, ‘Not Man, Not Woman: Psycho-spiritual Characteristics of a Western Third Gender’ (2001) 33(1) The Journal of Transpersonal Psychology 16

Laura Shanner, ‘The Right to Procreate: When Rights Claims Have Gone Wrong’ (1994) 40(4) McGill Law Journal 823

Alex Sharpe, ‘The Transsexual and Marriage: Law’s Contradictory Desires’ (1997) 7 Australasian Gay and Lesbian Law Journal 1

Alex Sharpe, ‘Transgender Jurisprudence and the Spectre of Homosexuality’ (2000) 14 Australian Feminist Law Journal 23

Alex Sharpe, ‘Gender Recognition in the UK: A Great Leap Forward’ (2009) 18(2) Social and Legal Studies 241

Alex Sharpe, ‘Criminalising Intimacy: Transgender Defendants and the Legal Construction of Non-Consent’ (2014) 3 Criminal Law Review 207

Dinah Shelton, ‘Compliance with International Human Rights Soft Law’ (1997) 29 Studies in Transnational Legal Policy 119

Jama Shelton, ‘Transgender youth homelessness: Understanding programmatic barriers through the lens of cisgenderism’ (2015) 59 Children and Youth Services Review 10

Doran Shemin, ‘My Body Is My Temple: Utilizing the Concept of Dignity in Supreme Court Jurisprudence to Fight Sex Reassignment Surgery Requirements for Recognition of Legal Sex’ (2016) 24(4) American University Journal of Gender, Social Policy and the Law 491

llana Sherer, ‘Social Transition: Supporting Our Youngest Transgender Children’ (2016) 137(3) Paediatrics 1

Sonja Shield, ‘The Doctor Won’t See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment’ (2007) 31(2) New York University Review of Law and Social Change 361

Kay Siebler, ‘Transgender Transitions: Sex/Gender Binaries in the Digital Age’ (2012) 16(1) Journal of Gay and Lesbian Mental Health 74

Anne E Silver, ‘An Offer You Can’t Refuse: Coercing Consent to Surgery through the Medicalization of Gender Identity’ (2013) 26(2) Columbia Journal of Gender and Law 488

Michael Silverman, ‘Issues in Access to Healthcare by Transgender Individuals’ (2009) 30(2) Women’s Rights Law Reporter 347

Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1988) 12 Australian Yearbook of International Law 82

Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20(2) European Journal of International Law 265

Caroline Simon, ‘The “best interests of the child” in a multicultural context: a case study’ (2015) 47(2) The Journal of Legal Pluralism and Unofficial Law 175

Lisa Simons, Scott Leibowitz and Marco Hidalgo, ‘Understanding Gender Variance in Children and Adolescents’ (2014) 43(6) Paediatric Annals 126

Erika Skougard, ‘The Best Interests of Transgender Children’ (2011) Utah Law Review 1161

Douglas *Smith, ‘Transsexualism, Sex Reassignment Surgery, and the Law’ (1971) 56 Cornell* Law Review 963

Anniken Sørlie, ‘Legal Gender Meets Reality: A Socio-Legal Children’s Perspective’ (2015) 33(4) Nordic Journal of Human Rights 353

Dean Spade, ‘Resisting Medicine, Re/modeling Gender’ (2003) 18(1) Berkeley Women’s Law Journal 15

Dean Spade, ‘Documenting Gender’ (2009) 8(1) Dukeminier Awards Best Sexual Orientation and Gender Law Review 137

Daniel Sperling, ‘“Male and female he created them”: procreative liberty, its conceptual deficiencies and the legal right to access fertility care of males’ (2012) 7(3) International Journal of Law in Context 375

Dana M Stachowiak, ‘Queering it up, strutting our threads, and baring our souls: genderqueer individuals negotiating social and felt sense of gender’ (2017) 26(5) Journal of Gender Studies 1

Thomas D Steensma, ‘Desisting and persisting gender dysphoria after childhood: A qualitative follow-up study’ (2010) 16(4) Clinical Child Psychology and Psychiatry 499

Thomas D Steensma and others, ‘Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study’ (2013) 52(6) Journal of the American Academy of Child and Adolescent Psychiatry 582

Laurence Steinberg and others, ‘Are Adolescents Less Mature Than Adults: Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”’ (2009) 64(7) American Psychologist 583

Melissa Sterling, ‘To Pee or Not to Pee - Where Is the Question: Transgender Students and the Right to Use Public School Restrooms’ (2015) 3(1) Cardozo Journal of Law and Gender 757

Kimberly Stieglitz, ‘Development, Risk and Resilience of Transgender Youth’ (2010) 21(3) Journal of the Association of Nurses in Aids Care 192

Audrey Stirnitzke, ‘Transsexuality, Marriage and the Myth of True Sex’ (2011) 53(1) Arizona Law Review 285

Alec Stone Sweet and Jud Matthews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47(1) Columbia Journal of Transnational Law 72

Chase Strangio, ‘Can Reproductive Trans Bodies Exist?’ (2015) 19(2) City University of New York Law Review 223

Zach Strassburger, ‘Disability Law and the Disability Rights Movement for Transpeople’ (2012) 24(2) Yale Journal of Law and Feminism 337

Daphna Stroumsa, ‘The State of Transgender Health Care: Policy, Law, and Medical Frameworks’ (2014) 104(3) American Journal of Public Health 31

Katherine Szczerbinski, ‘Education Connection: The Importance of Allowing Students to Use Bathrooms and Locker Rooms Reflecting Their Gender Identity’ (2016) 36(2) Children's Legal Rights Journal 153

Anne Tamar-Mattis, ‘Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants’ (2006) 21 Berkeley Journal of Law, Gender and Justice 59

Hiroyuki Taniguchi, ‘Japan’s 2003 Gender Identity Disorder Act: The Sex Reassignment Surgery, No Marriage, and No Child Requirements as Perpetuations of Gender Norms in Japan’ (2013) 14(2) Asian-Pacific Law and Policy Journal 108

Katharine Tate, ‘Torture: Does the Convention against Torture Work to Actually Prevent Torture in Practice by States Party to the Convention’ (2013) 21(2) Willamette Journal of International Law and Dispute Resolution 194

Lee Teitelbaum, ‘Children’s Rights and the Problem of Equal Respect’ (1999) 27(4) Hofstra Law Review 799

Liesl Theron and Kate Collier, ‘Experiences of female partners of masculine-identifying trans persons’ (2013) 15(1) Culture, Health and Sexuality 62

Hugh Thirlway, ‘Human rights in customary law: an attempt to define some of the issues’ (2015) 28(3) Leiden Journal of International Law 495

Bankole Thompson, ‘Africa’s charter on children's rights: a normative break with cultural traditionalism’ (1992) 41(2) International and Comparative Law Quarterly 432

Ryan Thoreson, ‘Beyond equality: The post-apartheid counter-narrative of Trans and Intersex Movements in South Africa’ (2013) 112(449) African Affairs 646

Morgan Tillerman, ‘(Trans)Forming the Provocation Defence’ (2010) 100(4) The Journal of Criminal Law and Criminology 1659

Anthony Tirado Chase, ‘Human rights contestations: sexual orientation and gender identity’ (2016) 20(6) The International Journal of Human Rights 703

Harper Jean Tobin, ‘Against the Surgical Requirement for Change of Legal Sex’ (2006) 38(2) Case Western Reserve Journal of International Law 393

Harper Jean Tobin and Jennifer Levi, ‘Securing Equal Access to Sex-Segregated Facilities for Transgender Students’ (2013) 28(3) Wisconsin Journal of Law, Gender and Society 301

John Tobin and Ruth McNair, ‘Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?’ (2009) 23(1) International Journal of Law, Policy and the Family 110

Katarina Tomamevski, ‘Reproduction, Rights and Reality: How Facts and Law can work for Women: European Approaches to Enhancing Reproductive Freedom’ (1995) 44(4) The American University Law Review 1037

Olga Tomchin, ‘Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People’ (2013) 101(3) California Law Review 813

Evan B Towle and Lynn Marie Morgan, ‘Romancing the Transgender Native: Rethinking the Use of the ‘Third Gender’ Concept” (2002) 8(4) GLQ: A Journal of Lesbian and Gay Studies 469

Piero Tozzi, ‘Six Problems with the “Yogyakarta Principles”’ (2007) 1 International Organisations Research Group Briefing Paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551652 accessed 15 May 2017

Stevie V Tran and Elizabeth M Glazer, ‘Transgenderless’ (2012) 35(2) Harvard Journal of Law and Gender 399

Ivona Truscan and Joanna Bourke-Martignoni, ‘International Human Rights Law and Intersectional Discrimination’ (2016) 16 Equal Rights Review 103

Stavros Tsakyrakis, ‘Proportionality: An assault on human rights?’ (2009) 7(3) International Journal of Constitutional Law 468

Guy T’Sjoen, Eva Van Caenegem and Katrien Wierckx, ‘Transgenderism and Reproduction’ (2013) 20(6) Reproductive Endocrinology 575

Kevin Tso, ‘Accident of Birth or Matter of Choice: Legal Recognition of Transsexual People in the Common Law’ (2015) 21(3) Cardozo Journal of Law and Gender 683

Jack Turban and others, ‘Ten Things Transgender and Gender Non-Conforming Youth Want Their Doctors to Know’ (2017) 56(4) Journal of the American Academy of Child and Adolescent Psychiatry 275

Cecile Unger, ‘Gynaecologic Care for Transgender Youth’ (2014) 26(5) Current Opinion in Obstetrics and Gynaecology 347

Cecile Unger, ‘Hormone therapy for transgender patients’ (2016) 5(6) Translational Andrology and Urology 877

Francisco Urbina, ‘A Critique of Proportionality’ (2012) 57 American Journal of Jurisprudence 49

Francisco Urbina, ‘Is it Really That Easy? A Critique of Proportionality and “Balancing as Reasoning”’ (2014) 27(1) Canadian Journal of Law and Jurisprudence 167

Samantha Uslan, ‘What Parents Don't Know: Informed Consent, Marriage, and Genital-Normalizing Survey on Intersex Children’ (2010) 85(1) Indiana Law Journal 301

Dylan Vade, ‘Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is more Inclusive of Transgender People’ (2005) 11(2) Michigan Journal of Gender and Law 253

Sarah Valentine, ‘Traditional Advocacy for Non-Traditional Youth: Rethinking Best Interest for the Queer Child’ (2008) 4 Michigan State Law Review 1053

Stanley Vance Jr, Diane Ehrensaft and Stephen Rosenthal, ‘Psychological and Medical Care of Gender Nonconforming Youth’ (2014) 134(6) Paediatrics 1184

Marjolein van den Brink, Phillip Reuß and Jet Tigchelaar, ‘Out of the Box? Domestic and Private International Law Aspects of Gender Registration’ (2015) 17(2) European Journal of Law Reform 282

Blaise Vanderhorst, ‘Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex’ (2015) 9(1) Harvard Law and Policy Review 241

Bart van der Sloot, ‘Between fact and fiction: an analysis of the case-law on Article 12 of the European Convention on Human Rights’ (2014) 26(4) Child and Family Law Quarterly 397

Jamie Veale and others, ‘Prevalence of Pregnancy Involvement among Canadian Transgender Youth and its Relation to Mental Health, Sexual Health, and Gender Identity’ (2016) 17(3-4) International Journal of Transgenderism 107

Guglielmo Verdirame, ‘Rescuing Human Rights from Proportionality’ (2014) King’s College London Dickson Poon School of Law Legal Studies Research Paper Series (Paper No. 2014-14)

Evan Vipond, ‘Trans Rights will not Protect Us: The Limits of Equal Rights Discourse, Anti-Discrimination Laws, and Hate Crime Legislation’ (2015) 6(1) Western Journal of Legal Studies 1

Henry von Doussa, Jennifer Power and Damien Riggs, ‘Imagining parenthood: the possibilities and experiences of parenthood among transgender people’ (2015) 17(9) Culture, Health and Sexuality 1119

Lieke Josephina Jeanne Joahanna Vrouenraets and others, ‘Early Medical Treatment of Children and Adolescents with Gender Dysphoria: An Empirical Ethical Study’ (2015) 57(4) Journal of Adolescent Health 36

Matthew Waites, ‘Critique of “sexual orientation” and “gender identity” in human rights discourse: global queer politics beyond the Yogyakarta Principles’ (2009) 15(1) Contemporary Politics 137

Jeremy Waldron, ‘Dignity, Rank and Rights’ The Tanner Lectures on Human Rights, University of California, Berkeley (21-23 April 2009)

Madeleine Wallien and Peggy Cohen-Kettenis, 'Psychosexual Outcome of Gender Dysphoric Children' (2008) 47(12) Journal of the *American Academy* of *Child and Adolescent Psychiatry 1413*

Lynn Wardle, 'The Attack on Marriage as the Union of a Man and a Woman' (2007) 83(4) North Dakota Law Review 1365

Lynn Wardle, 'A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "the Tragedy of the Commons"' (2008) 22(2) Brigham Young University Journal of Public Law 441

Shaul Weinreb, 'Tubal Ligation and the Prohibition of *Sirus*' (2000) Journal of Halacha and Contemporary Society http://www.daat.ac.il/daat/english/journal/weinreb-1.htm accessed 25 November 2015

Lisa Weinstein and Hannah Wallerstein, 'If We Listen: Discussion of Diane Ehrensaft's "Listening and Learning from Gender-Nonconforming Children"' (2014) 68 Psychoanalytic Study of the Child 79

Lois A Weithorn and Susan B Campbell, 'The Competency of Children and Adolescents to Make Informed Treatment Decisions' (1982) 53(6) Child Development 1589

Cordula Weitze and Susanne Osburg, 'Transsexualism in Germany: Empirical Data on Epidemiology and Application of the German Transsexuals' Act during its First Ten Years' (1996) 25(4) Archives of Sexual Behaviour 409

Joshua A Weller and others, 'Assessment of Decision-making Competence in Preadolescence' (2012) 25 Journal of Behavioural Decision Making 414

Kristin Wenstrom, '"What the Birth Certificate Shows": An Argument To Remove Surgical Requirements from Birth Certificate Amendment Policies' (2008) 17 Law and Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues 131
Catherine White Holman and Joshua Goldberg, 'Social and Medical Transgender Case Advocacy' (2006) 9(3-4) International Journal of Transgenderism 197

Jaclyn M White Hughto and Sari L Reisner, 'A Systematic Review of the Effects of Hormone Therapy on Psychological Functioning and Quality of Life in Transgender Individuals' (2016) 1(1) Transgender Health 21

Tonya White and Randi Ettner, 'Adaptation and adjustment in children of transsexual parents' (2007)

16(4) European Child and Adolescent Psychiatry 215

Cameron Whitley, ‘Trans-Kin Undoing and Redoing Gender: Negotiating Relational Identity among Friends and Family of Transgender Persons’ (2013) 56(4) Psychological Perspectives 597

Andrew Williams, ‘Human Rights and Law: Between Sufferance and Insufferability’ (2007) 123 Law Quarterly Review 133

Wendy Williams, ‘The Equality Crisis: Some Reflections On Culture, Courts, and Feminism’ (1982) 7(3) Women’s Rights Law Reporter 175

Katrien Wierckx and others, ‘Sperm Freezing in Transsexual Women’ (2012) 41(5) Archives of Sexual Behaviour 1069, 1069 – 1070

Katrien Wierckx and others, ‘Reproductive wish in transsexual men’ (2012) 27(2) Human Reproduction 483

Ben Wilson and Rachel Stuchbury, ‘Do partnerships last? Comparing marriage and cohabitation using longitudinal census data’ (2010) 139 Population Trends 37

Sam Winter, ‘Transgender Science: How might it shape the way we think about Transgender Rights’ (2011) 41(1) Hong Kong Law Journal 139

Sam Winter, ‘Identity Recognition without the Knife: Towards a Gender Recognition Ordinance for Hong Kong’s Transsexual People’ (2014) 44(1) Hong Kong Law Journal 115

Mel Wiseman and Sarah Davidson, ‘Problems with binary gender discourse: Using context to promote flexibility and connection in gender identity’ (2011) 17(4) Clinical Child Psychology and Psychiatry 528

Aimee Wodda and Vanessa Panfil, ‘“Don’t Talk to me about Deception”: The Necessary Erosion of the Trans* Panic Defense’ (2014) 78(3) Albany Law Review 927

Tobias Wolf, ‘Civil Rights Reform and the Body’ (2012) 6(1) Harvard Law and Policy Review 201

Jennifer Wong, ‘Recasting Transgender-Inclusive Healthcare Coverage: A Comparative Institutional Approach to Transgender Healthcare Rights’ (2013) 31(2) Law and Inequality: A Journal of Theory and Practice 471

Mitchell Woolf, ‘Coming of age? – the principle of “the best interests of the child”’ (2003) European Human Rights Law Review 205

Tracey Yeadon-Lee, ‘What’s the Story? Exploring Online Narratives of Non-binary Gender Identities’ (2016) 11(2) The International Journal of Interdisciplinary Social and Community Studies 19 http://eprints.hud.ac.uk/28036/8/Whats%20the%20Story%20article%20-%20first%20sub%20draft%20%20.pdf accessed 16 March 2017

Kai Yeung Wong, ‘Taking Transgender Rights Seriously: A Rights-Based Model of Gender Recognition in Hong Kong’ (2015) 45(1) Hong Kong Law Journal 109

Kenji Yoshino, ‘The Epistemic Contract of Bisexual Erasure’ (2000) 52(2) Stanford Law Review 353

Andrea Young, ‘Advances in Children’s Rights over the Past Decade: The Inter-American Court of Human Right and the European Court of Human Rights’ Progressive Incorporation of the Convention on the Rights of the Children’ (2015) 28(1) Journal of the American Academy of Matrimonial Lawyers 285

Teresa Zakaria, ‘By Any Other Name: Defining Male and Female in Marriage Statutes’ (2005) 3(1) Ave Maria Law Review 349

Brian Zamboni, ‘Therapeutic Considerations in Working with the Family, Friends, and Partners of Transgendered Individuals’ (2006) 14(2) The Family Journal: Counselling and Therapy for Couples and Families 174

Jean Zermatten, ‘The Best Interests of the Child Principle: Literal Analysis and Function’ (2010) 18(4) International Journal of Children’s Rights 483

Diane Zosky and Robert Alberts, ‘What’s in a name? Exploring use of the word queer as a term of identification within the college-aged LGBT community’ (2016) 26(7-8) Journal of Human Behaviour in the Social Environment 597

Kenneth J Zucker and others, ‘A Developmental, Biopsychosocial Model for the Treatment of Children with Gender Identity Disorder’ (2012) 59(3) Journal of Homosexuality 369

IV. United Nations Treaty Bodies: General Comments/Recommendations and Concluding Observations

A. General Comments/Recommendations

Human Rights Committee

United Nations Human Rights Committee, 'General Comment No 18 on Non-Discrimination' (1989)

United Nations Human Rights Committee, 'General Comment No 19 on Article 23 (The Family)' (1990)

United Nations Human Rights Committee, 'General Comment No 28 on Article 3 (The equality of rights between men and women)' (29 March 2000) UN Doc No. HRI/GEN/1/Rev.9 (Vol. I)

United Nations Human Rights Committee, 'General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc No. CCPR/C/21/Rev.1/Add. 13

United Nations Human Rights Committee, 'General Comment No 34 on Article 19: Freedom of Opinions and Expression' (12 September 2011) UN Doc No. CCPR/C/GC/34

Committee on Economic, Social and Cultural Rights

United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No 14 on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights' (11 August 2000) UN Doc No. E/C.12/2000/4

United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No 20 on non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc No. E/C.12/GC/20

United Nations Committee on Economic, Social and Cultural Rights, ‘General Comment No 22 on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2 May 2016) UN Doc No. E/C.12/GC/22

Committee on the Elimination of Discrimination against Women

United Nations Committee on the Elimination of Discrimination against Women, ‘General Recommendation No 21 on Equality in Marriage and Family Relations’ (1994)

United Nations Committee on the Elimination of Discrimination against Women, ‘General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)’ (30 October 2013) UN Doc No. CEDAW/C/GC/29

‘Joint general recommendation No 31 of the Committee on the Elimination of Discrimination against Women/general comment No 18 of the Committee on the Rights of the Child on harmful practices’ (14 November 2014) UN Doc No. CEDAW/C/GC/31-CRC/C/GC/18

Committee against Torture

United Nations Committee against Torture, ‘General Comment No 2 on the implementation of article 2 by State Parties’ (24 January 2008) UN Doc No. CAT/C/GC/2

Committee on the Rights of the Child

United Nations Committee on the Rights of the Child, ‘General Comment No 4 on Adolescent health and development in the context of the Convention on the Rights of the Child’ (1 July 2003) UN Doc No. CRC/GC/2003/4

United Nations Committee on the Rights of the Child, ‘General Comment No 7 (2005) on the implementing child rights in early childhood’ (20 September 2006) UN Doc No. CRC/C/GC/7/Rev.1

United National Committee on the Rights of the Child, ‘General Comment No 11 on Indigenous children and their rights under the Convention’ (12 February 2009) UN Doc No. CRC/C/GC/11

United Nations Committee on the Rights of the Child, ‘General Comment No 12 on the Right of the Child to be Heard’ (20 July 2009) UN Doc No. CRC/C/GC/12

United Nations Committee on the Rights of the Child, ‘General Comment No 13 on the Right of the Child to Freedom from All Forms of Violence’ (18 April 2011) UN Doc No. CRC/C/GC/13

United Nations Committee on the Rights of the Child, ‘General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ (29 May 2013) UN Doc No. CRC/C/GC/14

United Nations Committee on the Rights of the Child, ‘General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)’ (17 April 2013) UN Doc No. CRC/C/GC/15

Committee on the Elimination of Racial Discrimination

United Nations Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 25: on gender related dimensions of racial discrimination’ (20 March 2000)

B. Concluding Observations

Human Rights Committee

United Nations Human Rights Committee, ‘Concluding observations on the third periodic report of Ireland’ (30 July 2008) UN Doc No. CCPR/C/IRL/CO/3

United Nations Human Rights Committee, ‘Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’ (30 July 2008) UN Doc No. CCPR/C/GBR/CO/6

United Nations Human Rights Committee, ‘Concluding observations on the seventh periodic report of Ukraine’ (22 August 2013) UN Doc No. CCPR/C/UKR/CO/7

United Nations Human Rights Committee, ‘Concluding observations on the fourth periodic report of Ireland’ (19 August 2014) UN Doc No. CCPR/C/IRL/CO/4

United Nations Human Rights Committee, ‘Concluding observations on the fourth periodic report of the Republic of Korea’ (3 December 2015) UN Doc No. CCPR/C/KOR/CO/4

United Nations Human Rights Committee, ‘Concluding observations on the initial report of Burkina Faso’ (17 October 2016) UN Doc No. CCPR/C/BFA/CO/1

United Nations Human Rights Committee, ‘Concluding observations on the third periodic report of Bosnia and Herzegovina’ (13 April 2017) UN Doc No. CCPR/C/BIH/CO/3

United Nations Human Rights Committee, ‘Concluding observations on the second periodic report of Thailand’ (25 April 2017) UN Doc No. CCPR/C/THA/CO/2

United Nations Human Rights Committee, ‘Concluding Observations on the Initial Report of Bangladesh’ (27 April 2017) UN Doc No. CCPR/C/BGD/CO/1

Committee on Economic Social and Cultural Rights

United Nations Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the combined fourth and fifth reports of Bulgaria’ (11 December 2012) UN Doc No. E/C.12/BGR/CO/4-5

United Nations Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the fifth periodic report of Costa Rica’ (21 October 2016) UN Doc No. E/C.12/CRI/CO/5

United Nations Committee on Economic, Social and Cultural Rights, ‘Concluding observations on the fourth periodic report of the Dominican Republic’ (21 October 2016) UN Doc No. E/C.12/DOM/CO/4

Committee on the Elimination of Discrimination against Women

United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the seventh periodic report of Finland’ (10 March 2014) UN Doc No. CEDAW/C/FIN/CO/7

United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the fourth periodic report of Kyrgyzstan’ (11 March 2015) UN Doc No. CEDAW/C/KGZ/CO/4

United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the eighth periodic report of the Russian Federation’ (20 November 2015) UN Doc No. CEDAW/C/RUS/CO/8

United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the combined eighth and ninth periodic reports of Haiti’ (9 March 2016) UN Doc No. CEDAW/C/HTI/CO/8-9

United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the combined seventh and eighth periodic reports of the Philippines’ (25 July 2016) UN Doc No. CEDAW/C/PHL/CO/7-8

United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the seventh periodic report of Turkey’ (25 July 2016) UN Doc No. CEDAW/C/TUR/CO/7

United Nations Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the seventh periodic report of Argentina’ (25 November 2016) UN Doc No. CEDAW/C/ARG/CO/7

Committee against Torture

United Nations Committee against Torture, ‘Concluding observations on the fifth periodic report of Hong Kong, China’ (3 February 2016) UN Doc No. CAT/C/CHN-HKG/CO/5

Committee on the Rights of the Child

United Nations Committee on the Rights of the Child, ‘Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland - Isle of Man’ (16 October 2000) UN Doc No. CRC/C/15/Add.134

United Nations Committee on the Rights of the Child, ‘Concluding observations on the combined fourth and fifth periodic reports of Chile’ (30 October 2015) UN Doc No. CRC/C/CHL/CO/4-5

United Nations Committee on the Rights of the Child, ‘Concluding observations on the combined third and fourth periodic reports of Saudi Arabia’ (25 October 2016) UN Doc No. CRC/C/SAU/CO/3-4

United Nations Committee on the Rights of the Child, 'Concluding observations on the second periodic report of South Africa' (27 October 2016) UN Doc No. CRC/C/ZAF/CO/2

United Nations Committee on the Rights of the Child, 'Concluding observations on the combined third to fifth periodic reports of Cameroon' (6 July 2017) UN Doc No. CRC/C/CMR/CO/3-5

V. Reports

United Nations

'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (10 August 2009) UN Doc No. A/64/272

'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (5 February 2010) UN Doc No. A/HRC/13/39/Add.5

'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (17 November 2011) UN Doc No. A/HRC/19/41

'Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment' (1 February 2013) UN Doc No. A/HRC/22/53

World Health Organisation and others, *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement* (World Health Organisation 2014) http://www.unaids.org/sites/default/files/media_asset/201405_sterilization_en.pdf accessed 1 June 2017

'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (1 July 2014) UN Doc No. A/HRC/26/36

United Nations Development Programme, *Discussion Paper: Transgender Health and Human Rights* (UNDP 2015)

‘Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity’ (4 May 2015) UN Doc No. A/HRC/29/23

United Nations Special Rapporteur on the Situation of Human Rights Defenders, ‘Situation of human rights defenders’ (30 July 2015) UN Doc No. A/70/217

‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (5 January 2016) UN Doc No. A/HRC/31/57

‘Report of the Office of United Nations High Commissioner for Human Rights on Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development’ (15 January 2016) UN Doc No. A/HRC/31/37

‘Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies’ (4 February 2016) UN Doc No. A/HRC/31/66

‘Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity’ (19 April 2017) UN Doc No. A/HRC/35/36

Council of Europe

Commissioner for Human Rights of the Council of Europe, *Human Rights and Gender Identity* (29 July 2009) CommDH/IssuePaper(2009)

Commissioner for Human Rights of the Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe* (2nd edn, Council of Europe 2011)

Commissioner for Human Rights of the Council of Europe, *Human Rights and Intersex People – Issue Paper* (Council of Europe 2015) https://rm.coe.int/16806da5d4 accessed 20 June 2017

European Union

European Union Directorate General for Internal Policies, *Electoral Gender Quota Systems and their implementation in Europe* (European Parliament 2011)
European Union Agency for Fundamental Rights, *Being Trans in the EU: Comparative Analysis of EU LGBT Survey Data* (Publication Office of the European Union 2014)

European Parliament Committee on Women's Rights and Gender Equality, *Report on Poverty: A Gender Perspective* (26 April 2016) (2015/2228(INI))
Organisation of American States

Inter-American Commission on Human Rights, *Violence against LGBTI Persons* (IACmHR 2015)

National Reports

A. Australia

Australian Human Rights Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records* (Human Rights and Equal Opportunity Commission 2009)

ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (Australian Capital Territory 2012)

B. Hong Kong

Hong Kong Inter-Departmental Working Group on Gender Recognition, *Consultation Paper: Part 1 Gender Recognition* (June 2017)

C. Ireland

Irish Gender Recognition Advisory Group, *Report to Joan Burton, TD, Minister for Social Protection* (15 June 2011)
Equality Authority of Ireland, *Observations on the Revised General Scheme of the Gender Recognition Bill 2014* (Walsh Printers 2014)

D. New Zealand

New Zealand Human Rights Commission, *To Be Who I am* (New Zealand Human Rights Commission 2008)

E. United Kingdom

House of Commons Select Committee on Women and Equalities, *Transgender Equality* (The Stationary Office Limited 2016)

Non-Governmental Organisations

Amnesty International, *The State Decides Who I Am: Lack of Legal Gender Recognition for Transgender People in Europe* (Amnesty International 2014)

Amnesty International, *Torture in 2014 – 30 Years of Broken Promises* (Amnesty International 2014)

Amnesty International, *First, Do No Harm: Ensuring the Rights of Children with Variations of Sex Characteristics in Denmark and Germany* (Amnesty International 2017)

Jack Byrne, *Licence to Be Yourself: Marriage and Forced Divorce* (Open Society Foundations 2004)

Josh Bradlow and others, *School Report: The experiences of lesbian, gay, bi and trans young people in Britain's schools in 2017* (Stonewall UK 2017)

Aengus Carrol and Lucas Ramon Mendos, *State-Sponsored Homophobia* (ILGA-World 2017)

Centre for American Progress and Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for Being Transgender in America* (Movement Advancement Project 2015)
Centre for the Development of People (CEDEP), Centre for Human Rights and Rehabilitation (CHRR) and the International Gay and Lesbian Human Rights Commission (IGLHRC), *Non-Governmental Organisations Shadow Report on the Implementation of the International Covenant on Civil and Political Rights in Malawi* (October 2011)

Zhan Chiam, Sandra Duffy and Matilda González Gil, *Trans Legal Mapping Report* (ILGA 2016)

Murray Couch and others, *Tranznation: A Report on the Health and Wellbeing of Trans People in Australia and New Zealand* (Australian Research Centre in Sex, Health and Society 2007)

Andrew Flores and others, *How Many Adults Identify as Transgender in the United States* (The Williams Institute 2016)

Gays and Lesbians of Zimbabwe (GALZ), *Report on Discrimination against Women in Zimbabwe based on Sexual Orientation and Gender Identity* (January 2012)

Gender Dynamix and Legal Resources Centre, *Alteration of Sex Description and Sex Status Act, No. 49 of 2003: Briefing Paper* (2015)

Paula Gerber and Adiva Sifris, *Submission to the House Standing Committee on Social Policy and Legal Affairs* (Castan Centre for Human Rights Law Monash University 2012)

Emily Greytak, Joseph Kosciw and Elizabeth Diaz, *Harsh Realities: The Experiences of Transgender Youth in our Nation's Schools* (Gay, Lesbian and Straight Education Network 2009)

Guyana RainBow Foundation (GuyBow), the International Gay and Lesbian Human Rights Commission (IGLHRC) and Society Against Sexual Orientation Discrimination (SASOD), *Human Rights Violations of Lesbian, Bisexual, and Transgender (LBT) People in Guyana: A Shadow Report* (July 2012)

Human Rights Watch, *Controlling Bodies, Denying Identities Human Rights Violations against Trans People in the Netherlands* (Human Rights Watch 2011)

Hannah Hussey, *Beyond 4 Walls and a Roof Addressing Homelessness among Transgender Youth* (Centre for American Progress 2015)
Sandy E James and others, *The Report of the 2015 U.S. Transgender Survey* (NCTE 2016)

Kyle Knight, *Bridges to Justice: Case Study of LGBTI Rights in Nepal* (Astraea Lesbian Foundation for Justice 2015)

Richard Kohler, Alecs Recher and Julia Ehrt, *Legal Gender Recognition in Europe* (Transgender Europe 2013)

Richard Kohler and Julia Erht, *Legal Gender Recognition in Europe* (2nd edn, TGEU 2016)

International Commission of Jurists, *"Unnatural Offences" Obstacles to Justice in India Based on Sexual Orientation and Gender Identity* (International Commission of Jurists 2017)

International Gay and Lesbian Human Rights Commission, *Discrimination and Violence Against Women in Brunei Darussalam on the Basis of Sexual Orientation and Gender Identity* (November 2014)

International Gay and Lesbian Human Rights Commission and Iranian Queer Organization (IRQO*), Human Rights Violations of People in the Islamic Republic of Iran on the Basis of Their Sexual Orientation and Gender Identity* (2014)

Jay McNeil and others, *Speaking from the Margins Trans Mental Health and Wellbeing in Ireland* (Transgender Equality Network Ireland 2013)

National LGBT Health Education Centre, *Providing Affirmative Care for Patients with Non-binary Gender Identities* (Fenway Institute)

Open Society, *Licence to Be Yourself: Trans Children and Youth* (Open Society Foundations 2015)

OutRight Action International, *Being Lesbian in Iran* (OutRight 2016)

OutRight Action International, *Being Transgender in Iran* (OutRight 2016)

RECLACTRANS, 'The Night is Another Country' (REDLACTRANS 2012)

Southern Africa Litigation Centre, *Laws and Policies Affecting Transgender Persons in Southern Africa* (SALC 2016)

Stonewall, *A Vision for Change: Acceptance without Exception for Trans People* (Stonewall 2017)

Rebecca Stotzer, Jody Herman and Amira Hasenbush, *Transgender Parenting: A Review of Existing Research* (Williams Institute 2014)

Cather Taylor and Tracy Peter, *Every Class in Every School: Final Report on the First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools* (Egale Canada Human Rights Trust 2011)

Vic Valentine, *Non-Binary People's Experiences in the UK* (Scottish Trans Alliance 2016)

Vic Valentine, *Non-Binary People's Experience of Using UK Gender Identity Clinics* (Scottish Trans Alliance 2016)

Stephen Whittle and others, *Transgender Euro Study: Legal Survey and Focus on the Transgender Experience of Health Care* (ILGA-Europe 2008)

VI. Online Newspaper/Magazine Articles

Atlantic

Molly Ball, 'What Other Activists Can Learn from the Fight for Gay Marriage' (*The Atlantic*, 14 July 2015) https://www.theatlantic.com/politics/archive/2015/07/what-other-activists-can-learn-from-the-fight-for-gay-marriage/398417/ accessed 15 May 2017

Hanna Rosin, 'A Boy's Life' (*The Atlantic*, November 2008) http://www.theatlantic.com/magazine/archive/2008/11/a-boys-life/307059/ accessed 20 October 2016

Courier Mail

Kay Dibben, 'Minority of Children with Gender Issues Diagnosed with Gender Dysphoria, Psychiatrist Says' (*The Courier Mail*, 8 April 2017) http://www.couriermail.com.au/news/queensland/minority-of-children-with-gender-issues-diagnosed-with-gender-dysphoria-psychiatrist-says/news-story/2d8a6725d98e5f5bf3f7e5e9eb99d065 accessed 10 July 2017

Daily Mail

Thomas Burrows, 'Choose your own gender WITHOUT seeing a doctor: Government to rip up rules on switching sex' (*Daily Mail Online*, 23 July 2017) http://www.dailymail.co.uk/news/article-4722056/Government-plans-allow-transgender-pick-gender.html accessed 11 August 2017

Matt Hunter, 'Children as young as THREE convinced they are born in the wrong body: Toddlers are among 1,500 under-16s sent to a "transgender identity clinic"' (*Daily Mail*, 14 May 2016) http://www.dailymail.co.uk/news/article-3590175/Children-young-THREE-convinced-born-wrong-body-Toddlers-1-500-16s-sent-transgender-identity-clinic.html accessed 16 October 2016

Sanchez Manning and Stephen Adams, ‘NHS to give sex change drugs to nine-year-olds: Clinic accused of “playing God” with treatment that stops puberty’ (*Daily Mail,* 17 May 2014) http://www.dailymail.co.uk/news/article-2631472/NHS-sex-change-drugs-nine-year-olds-Clinic-accused-playing-God-treatment-stops-puberty.html accessed 16 October 2016

Jan Moir, ‘Sexuality has been in a state of flux since Marlene Dietrich put on a smoking jacket. But gender fluidity? Do grow up, girls’ (*Daily Mail,* 4 December 2015) http://www.dailymail.co.uk/femail/article-3345389/JAN-MOIR-Gender-fluidity-grow-girls.html accessed 3 March 2017

Dhaka Tribune

Syeda Samara Mortada, ‘The Third Gender’ (*Dhaka Tribune,* 17 November 2013) http://archive.dhakatribune.com/op-ed/2013/nov/17/third-gender accessed 9 April 2017

Economist

‘Italy Approves Same-Sex Civil Unions’ (*The Economist*, 12 May 2016) https://www.economist.com/news/europe/21698736-critics-say-bill-which-leaves-out-adoption-does-not-go-far-enough-italy-approves 2 September 2017

Esquire

Sam Escobar, ‘I’m Not Male. I’m Not Female. Please Don't Ask Me about My Junk’ (*Esquire Online,* 31 March 2016) http://www.esquire.com/lifestyle/sex/news/a43461/what-is-non-binary-gender/ accessed 3 April 2017

Globe and Mail

Sarah Hampston, ‘Their story: “I want to be somewhere between two fixed points of gender”’ (*The Globe and Mail,* 5 January 2017) http://www.theglobeandmail.com/news/national/their-story-i-want-to-be-somewhere-between-two-fixed-points-ofgender/article28456135/ accessed 19 March 2017

Guardian

Anonymous, ‘Experience: I Regret Transitioning’ (*The Guardian*, 3 February 2017) https://www.theguardian.com/lifeandstyle/2017/feb/03/experience-i-regret-transitioning accessed 21 June 2017

‘Australian passports to have third gender option’ (*The Guardian,* 15 September 2011) https://www.theguardian.com/world/2011/sep/15/australian-passports-third-gender-option accessed 10 April 2017

Polly Carmichael, ‘A Child without A Gender Challenges our Preconceptions about Sex’ (*The Guardian,* 6 July 2017) https://www.theguardian.com/commentisfree/2017/jul/06/child-without-gender-sex-canadian-health-card-u accessed 10 July 2017

Caroline Davies and Mark Sweney, ‘Film director Lilly Wachowski comes out as transgender woman’ (*The Guardian,* 9 March 2016) https://www.theguardian.com/film/2016/mar/09/matrix-director-lilly-wachowski-comes-out-as-a-transgender-woman accessed 23 August 2017

Jane Fae, ‘Why the Australian Passport Category “X” May not Mark the Spot’ (*The Guardian,* 16 September 2011) https://www.theguardian.com/commentisfree/2011/sep/16/australian-passport-x-intersex accessed 10 April 2017

Tyler Ford, ‘My life without gender: “Strangers are desperate to know what genitalia I have”’ (*The Guardian,* 7 August 2015) https://www.theguardian.com/world/2015/aug/07/my-life-without-gender-strangers-are-desperate-to-know-what-genitalia-i-have accessed 18 March 2017

Kate Lyons, ‘Parents fear transgender children will be taken away after court ruling’ (*The Guardian,* 22 November 2016) https://www.theguardian.com/society/2016/nov/22/parents-fear-transgender-children-will-be-taken-away-after-court-ruling accessed 3 July 2017

Aisha Gani, ‘Stonewall to start campaigning for trans equality’ (*The Guardian,* 16 February 2015) http://www.theguardian.com/uk-news/2015/feb/16/stonewall-start-campaigning-trans-equality accessed 24 March 2016

Jamie Grierson, ‘Stonewall calls for gender-neutral X option for UK passports’ (*The Guardian,* 5 April 2017) https://www.theguardian.com/society/2017/apr/05/uk-passports-should-include-transgender-title-says-stonewall accessed 13 April 2017

Ashifa Kassam, ‘Canada order barring child from wearing girls’ clothes prompts call for change’ (*The Guardian,* 19 November 2016) https://www.theguardian.com/world/2016/nov/19/canada-gender-identity-training-lawsuit-clothing-public-alberta accessed 2 July 2017

Fred McConnell, ‘Channel 4’s Obsession with Genitalia and Surgery Demeans Trans People’ (*The Guardian,* 14 October 2015) https://www.theguardian.com/commentisfree/2015/oct/14/channel-4-genitalia-surgery-trans-people-girls-to-men accessed 31 May 2017

Alex MacPherson, ‘Gender fluidity went pop in 2015 – and it’s not just a phase’ (*The Guardian,* 28 December 2015) https://www.theguardian.com/music/musicblog/2015/dec/28/gender-fluidity-went-pop-in-2015-miley-cyrus-angel-haze-young-thug accessed 3 March 2017

Sarah Marsh, ‘The gender-fluid generation: young people on being male, female or non-binary’ (*The Guardian,* 23 March 2016) https://www.theguardian.com/commentisfree/2016/mar/23/gender-fluid-generation-young-people-male-female-trans accessed 16 March 2017

Jack Monroe, ‘I’m a little bit female and a little bit male. Finally, I fit in my skin’ (*The Guardian,* 19 May 2016) https://www.theguardian.com/commentisfree/2016/may/19/jack-monroe-little-bit-male-little-bit-female accessed 12 July 2017

Marie O’Halloran, ‘Review of Gender Recognition Act will start by September, Varadkar announces’ (*Irish Times,* 10 May 2017) https://www.irishtimes.com/news/politics/oireachtas/review-of-gender-recognition-act-will-start-by-september-varadkar-announces-1.3078764 accessed 6 May 2018

Ben Quinn, ‘Labour Riven by Infighting over Gender Recognition’ (*The Guardian,* 4 March 2018) https://www.theguardian.com/politics/2018/mar/04/labour-left-infighting-over-gender-recognition accessed 6 May 2018

‘Transgender Children Know Their Identity. Bigots in the Media Don’t’ *(The Guardian,* 25 May 2014) https://www.theguardian.com/society/2014/may/25/transgender-children-gender-identity-bigots-media accessed 7 July 2017

Zach Stafford, ‘Transgender homicide rate hits historic high in US, says new report’ (*The Guardian,* 13 November 2015) https://www.theguardian.com/us-news/2015/nov/13/transgender-homicide-victims-us-has-hit-historic-high accessed 23 August 2017

Alok Vaid-Menon, ‘Greater Transgender Visibility Hasn’t Helped Non-Binary People – Like Me’ (*The Guardian,* 13 October 2015) https://www.theguardian.com/commentisfree/2015/oct/13/greater-transgender-visibility-hasnt-helped-nonbinary-people-like-me accessed 9 April 2017

Lindy West, ‘Public Toilets – The Key Battleground for Bigots wanting to Legislate Trans People out of Existence’ (*The Guardian,* 21 February 2016) http://www.theguardian.com/commentisfree/2016/feb/21/public-toilets-battleground-for-bigots-legislate-trans-people-out-of-existence-south-dakota accessed 20 May 2016
Calla Wahlquist, ‘Transgender and Homeless: The Young People who can’t Get the Support they Need’ (*The Guardian,* 6 April 2017) https://www.theguardian.com/society/2017/apr/06/transgender-and-homeless-the-young-people-who-cant-get-the-support-they-need accessed 2 March 2017

Holly Young, ‘Trans Rights: Meet the Face of Nepal’s Progressive “Third Gender” Movement’ (*The Guardian,* 12 February 2016) https://www.theguardian.com/global-development-professionals-network/2016/feb/12/trans-rights-meet-the-face-of-nepals-progressive-third-gender-movement accessed 12 July 2017

Naaman Zhou, ‘Gender Diverse Students “Could Face Delays to Centrelink Payment”’ (*The Guardian*, 6 April 2017) https://www.google.ie/search?q=wimbledon&oq=wim&aqs=chrome.0.69i59j0j69i59j69i60j69i57j69i61.1738j0j7&sourceid=chrome&ie=UTF-8 accessed 10 July 2017

The Independent

Siobhan Fenton, ‘“A hole in your chest where gender used to be”: Being non-binary in the UK’ (*The Independent,* 21 September 2016) http://www.independent.co.uk/news/uk/home-news/what-does-non-binary-mean-what-its-like-to-not-have-a-male-female-gender-a7317086.html accessed 20 March 2017

Heather Saul, ‘Pope Francis Compares Arguments for Transgender Rights to Nuclear Arms Race’ (*The Independent*, 21 February 2015) http://www.independent.co.uk/news/people/pope-francis-compares-arguments-for-transgender-rights-to-nuclear-arms-race-10061223.html accessed 1 June 2017

International Business Times

Lydia Smith, ‘Who is Norrie? Australia High Court Recognises Third “Gender Neutral” Sex Category’ (*International Business Times,* 2 April 2014) http://www.ibtimes.co.uk/australia-high-court-recognises-third-gender-neutral-sex-category-1443047 accessed 10 April 2017

Irish Examiner

Neil Sands, ‘Australia's top court recognises “neutral” third gender’ (*Irish Examiner,* 3 April 2014) http://www.irishexaminer.com/world/australias-top-court-recognises-neutral-third-gender-264158.html accessed 10 April 2017

Irish Independent

‘Sam Blanckensee (21): “New legislation will allow Trans people to say what gender we identify without a doctor’s approval”’ (*Irish Independent,* 4 June 2015) http://www.independent.ie/life/sam-blanckensee-21-new-legislation-will-allow-trans-people-to-say-what-gender-we-identify-without-a-doctors-approval-31277924.html accessed 23 September 2017

Katie Byrne, ‘Gender fluidity needs to be clearly defined and vigorously discussed’ (*Irish Independent,* 13 December 2015) http://www.independent.ie/life/katie-byrne-gender-fluidity-needs-to-be-clearly-defined-and-vigorously-discussed-34270932.html accessed 17 March 2017

Irish Times

Kay Cairns, ‘“As non-binary, someone not strictly a man or a woman, I’m seen as too confusing to discuss”’ (*Irish Times,* 30 August 2016) http://www.irishtimes.com/life-and-style/people/as-non-binary-someone-not-strictly-a-man-or-a-woman-i-m-seen-as-too-confusing-to-discuss-1.2772871 accessed 19 March 2017

Mail and Guardian

Carl Collison, 'Torment for trans women "sent to the mountain" to learn to be men' (*Mail and Guardian*, 11 January 2017) https://mg.co.za/article/2017-01-10-transwomen-sent-to-the-mountain-to-learn-to-be-men accessed 23 August 2017

Mirror

Carol Malone, 'Why is NHS money wasted on treating transgender kids who aren't old enough to understand?' (*Mirror Newspaper*, 8 April 2014) http://www.mirror.co.uk/news/uk-news/nhs- money-wasted- treating-transgender- 5478956 accessed 16 October 2016

New Republic

Kyle Knight, 'What We Can Learn from Nepal's Inclusion of "Third Gender" on its 2011 Census' (*New Republic*, 18 July 2011) https://newrepublic.com/article/92076/nepal-census-third-gender-lgbt-sunil-pant accessed 10 April 2017

New Statesman

Sarah Ditum and Jennie Kermode, 'Should Feminists talk about "Pregnant People"?' (*The New Statesman*, 30 September 2016) http://www.newstatesman.com/politics/feminism/2016/09/should-feminists-talk-about-pregnant-people accessed 16 April 2017

Sarah Ditum, 'Why gender became the ultimate forum for self-expression' (*The New Statesman*, 19 February 2017) http://www.newstatesman.com/politics/feminism/2017/02/why-gender-became-ultimate-forum-self-expression accessed 21 March 2017

Laurie Penny, 'Laurie Penny on gender: Society needs to get over its harmful obsession with labelling us all girls or boys' (*The New Statesman*, 30 August 2013) http://www.newstatesman.com/politics/2013/08/society-needs-get-over-its-harmful-obsession-labelling-us-all-girls-or-boys accessed 19 March 2017

Helen Lewis, ‘Is Jeremy Corbyn Right that Trans People Should be Allowed to Self-Identify Their Gender’ (*New Statesman,* 19 July 2017) http://www.newstatesman.com/politics/uk/2017/07/jeremy-corbyn-right-trans-people-should-be-allowed-self-identify-their-gender accessed 24 July 2017

New Yorker

Jonathan Blitzer, ‘Latin America’s Transgender-Rights Leaders’ (*New Yorker,* 10 August 2015) http://www.newyorker.com/news/news-desk/latin-americas-transgender-rights-leadership accessed 7 July 2017

Margaret Talbot, ‘About a Boy’ (*New Yorker,* 18 March 2013) http://www.newyorker.com/magazine/2013/03/18/about-a-boy-2 accessed 9 April 2017

New York Magazine

Jesse Singal, ‘How the Fight over Transgender Kids got a Leading Sex Researcher Fired’ (*NY Mag Science of Us,* 7 February 2016) http://nymag.com/scienceofus/2016/02/fight-over-trans-kids-got-a-researcher-fired.html accessed 17 October 2016

New York Times

Julia Baird, ‘Neither Female nor Male’ (*New York Times,* 6 April 2014) https://www.nytimes.com/2014/04/07/opinion/neither-female-nor-male.html?mtrref=query.nytimes.com&assetType=opinion&_r=0 accessed 9 April 2017

Jessica Bennett, ‘She? Ze? They? What’s in a Pronoun?’ (*New York Times,* 30 January 2016) https://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html?mtrref=query.nytimes.com&_r=0 accessed 18 March 2017

Julie Bosmon and Motoko Rich, ‘As Transgender Students Make Gains, Schools Hesitate at Bathrooms’ (*New York Times,* 3 November 2015) http://www.nytimes.com/2015/11/04/us/as-transgender-students-make-gains-schools-hesitate-at-bathrooms.html?_r=0 accessed 25 October 2016

Raillan Brooks, '"He", "She", "They" and "Us"' (*New York Times*, 5 April 2017) https://www.nytimes.com/2017/04/05/insider/reporting-limits-of-language-transgender-genderneutral-pronouns.html accessed 10 July 2017

Elinor Burkett, 'What Make's A Woman' (*The New York Times,* 6 June 2015) https://www.nytimes.com/2015/06/07/opinion/sunday/what-makes-a-woman.html accessed 16 April 2017

Susan Chira, 'Gender Fluidity on the Runways' (*New York Times,* 15 February 2017) https://www.nytimes.com/2017/02/15/fashion/gender-fluidity-new-york-fashion-week.html accessed 3 March 2017

Philip R Corbett, ''Mx.'? Did The Times Adopt a New, Gender-Neutral Courtesy Title?' (*The New York Times,* 3 December 2015) https://www.nytimes.com/2015/12/03/insider/mx-did-the-times-adopt-a-new-transgender-courtesy-title.html accessed 19 March 2017

Abbey Ellen, 'For Transgender Women, An Extra Dose of Fear' (*New York Times*, 9 August 2017) https://www.nytimes.com/2017/08/09/well/mind/for-transgender-women-an-extra-dose-of-fear.html?mcubz=3&mtrref=www.google.co.uk&gwh=53524B2650638F3AF88FA20D20DE7EA2&gwt=pay accessed 23 August 2017

Linda C McClain, 'Categorizing by Sex is a Remedy for Discrimination' (*New York Times*, 20 October 2014) http://www.nytimes.com/roomfordebate/2014/10/19/is-checking-the-sex-box-necessary/categorizing-by-sex-is-a-remedy-for-discrimination accessed 11 April 2017

Julie Scelfo, 'A University Recognises a Third Gender: Neutral' (*New York Times,* 3 February 2015) https://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?_r=3 accessed 18 March 2017

Ravi Somaiya, 'Caitlyn Jenner, Formely Bruce, Introduces Herself in Vanity Fair' (*New York Times*, 1 June 2015) https://www.nytimes.com/2015/06/02/business/media/jenner-reveals-new-name-in-vanity-fair-article.html?mcubz=3&mtrref=www.google.co.uk&gwh=2E4529FCCD8BFE649505359D90132993&gwt=pay accessed 23 August 2017

Susan Stryker, 'Undoing Sex Classification can Provide Justice' (*New York Times*, 19 October 2014) http://www.nytimes.com/roomfordebate/2014/10/19/is-checking-the-sex-box-necessary/undoing-sex-classification-can-provide-justice accessed 10 April 2017

Slate

Kristina Olson and Lilly Durwood, ‘Are Parents Rushing to Turn their Boys into Girls?’ (*Slate,* 14 January 2016) http://www.slate.com/blogs/outward/2016/01/14/what_alarmist_articles_about_transgender_children_get_wrong.html accessed 16 October 2016

Kenji Yoshino, ‘Sex and the City – A Commentary by Kenji Yoshino’ (*Slate*, 11 December 2006) http://www.slate.com/articles/news_and_politics/jurisprudence/2006/12/sex_and_the_city.html accessed 9 October 2015

Sydney Morning Herald

Tim Elliot, ‘X marks the gender: what to call someone who isn't a he or she’ (*Sydney Morning Herald,* 2 April 2014) http://www.smh.com.au/nsw/x-marks-the-gender-what-to-call-someone-who-isnt-a-he-or-she-20140402-35xwp.html accessed 10 April 2017

Adele Horin, ‘Transgender People Most Likely Abused’ (*Sydney Morning Herald,* 5 May 2011) http://www.smh.com.au/nsw/transgender-people-most-likely-abused-20110504-1e8jr.html accessed 23 August 2017

The Telegraph

‘Australia’s top court recognises “gender neutral” sex category’ (*The Telegraph,* 2 April 2014) http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/10738405/Australias-top-court-recognises-gender-neutral-sex-category.html accessed 10 April 2017

Radhika Sanghani, ‘Why the UK should ditch male and female toilets for “gender-neutral” loos’ (*The Telegraph,* 14 December 2015) http://www.telegraph.co.uk/women/life/why-the-uk-should-ditch-male-and-female-toilets-for-gender-neutr/ accessed 20 March 2017

Emma Simon and Nicole Blackmore, ‘Why Getting Married leaves you Better Off’ (*The Telegraph,* 20 February 2015) http://www.telegraph.co.uk/finance/personalfinance/money-saving-tips/10162608/Why-getting-married-leaves-you-better-off.html accessed 18 August 2016

‘Winner of national transgender beauty pageant stripped of her title because she was “not transgender enough”’ (*The Telegraph*, 19 February 2016) http://www.telegraph.co.uk/news/uknews/12165845/Winner-of-national-transgender-beauty-pageant-stripped-of-her-title-because-she-was-not-transgender-enough.html accessed 9 April 2017

Time Magazine

Eliza Gray, ‘The Transgender Tipping Point’ (*Time*, 29 May 2014) http://time.com/135480/transgender-tipping-point/ accessed 12 July 2015

Katy Steinmetz, ‘Caitlyn Jenner’ (*Time*, December 2015) https://www.google.co.uk/search?q=caitlyn+Jenner+passing+privilege&ei=9oOdWbOGAcK8aaHkt_AN&start=10&sa=N&biw=1366&bih=662 accessed 23 August 2017

Times of Malta

‘“X” gender option to be added to passports and ID cards’ (*Times of Malta*, 24 February 2017) http://www.timesofmalta.com/articles/view/20170224/local/x-gender-option-to-be-added-to-passports-and-id-cards.6405441 accessed 10 April 2017

Wall Street Journal

Paul McHugh, ‘Transgender Surgery Isn’t the Solution’ (*The Wall Street Journal*, 13 May 2016) https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120 accessed 4 July 2017

The Washington Post

Aron Blake and Julie Tate, ‘Bradley Manning comes out as transgender: “I am a female”’ (*Washington Post*, 22 August 2013) https://www.washingtonpost.com/world/national-

security/bradley-manning-comes-out-as-transgendered-i-am-a-female/2013/08/22/0ae67750-0b25-11e3-8974-f97ab3b3c677_story.html?utm_term=.026a5bcbd920 accessed 23 August 2017

Vogue

Maya Singer, ‘Gigi Hadid and Zayn Malik Are Part of a New Generation Who Don’t See Fashion as Gendered’ (*Vogue Online*, 13 July 2017) http://www.vogue.com/article/gigi-hadid-zayn-malik-august-2017-vogue-cover-breaking-gender-codes accessed 21 July 2017