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If the state decertified gender, what might happen to its meaning and value?

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Abstract

As jurisdictions reform gender identity laws to accommodate transgender and intersex people, this article speculatively explores a more fundamental shift: eliminating state law's role in determining and assigning gender status altogether. Adopting a feminist perspective, we explore what the meaning and effects of comprehensively reforming legal gender might be in terms of gender's constitution as a socio-legal property, differentially recognised and protected by diverse but unequal bodies. Our discussion proceeds along two intersecting paths. The first concerns the different classificatory methods which could enable state law, without assigning gender, to continue to regulate gender identity decisions, thereby allowing state law to remain involved in tackling gender discrimination. The second concerns the changing form gender might take in conditions where state law withdraws its allocative function. These paths converge in a final discussion which considers what legal and political effects might follow from gender becoming a property that is individually and collectively cultivated.

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If the state decertified gender, what might happen to its meaning and value?

Over the past decade, transgender activists and scholars have been at the forefront of moves to modify national systems of sex/ gender[1] certification, working to make them more responsive to those whose gender identities change or appear to have been misrecognised.[2] Across different jurisdictions, these moves have taken varying forms: from adding additional gender categories to birth certificates,[3] to reforming gender transitioning procedures so they are based on self-identification rather than medical judgment,[4] to reducing the number of official contexts in which gender identification is required. Yet, despite variations in approach, what these contemporary moves to modify gender certification systems share is a policy lens trained on transgender (and to a lesser degree intersex) people as a disadvantaged minority deserving better accommodation.

This article takes a different approach. Instead of approaching gender assignment from the perspective of minority need, which risks perpetuating the notion that those being accommodated are a socially differentiated, pathologised group, it explores options for legal reform that would impact on how gender is determined for *all* members of a polity.. In particular, we are interested in reforms that would mean gender was no longer legally assigned at birth. But while straightforward to phrase, what declassifying or "decertifying"[5] gender identity might bring into being, in

[1] The relationship between sex and gender is complex and contested; for useful recent accounts of their interrelationship see J. Conaghan, *Law and Gender* (2013) 17-23; S. Cowan, 'Gender is no Substitute for Sex: A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 *Feminist Legal Studies* 67-96. To avoid repeatedly referring to sex/ gender, we use "gender" to cover both the state's legal assignment of sex or gender status, and the expression of sex and gender identities.

[2] See, for instance P. Currah and L.J. Moore, '"We Won't Know Who You Are": Contesting Sex Designations in New York City Birth Certificates' (2009) 24 *Hypatia* 113-35. For a useful international report, see M. van den Brink and J. Tigchelaar, *M/V en verder Sekseregistratie door de overheid en de juridische positie van transgenders,* (2014) WODC, Ministerie van Veiligheid & Justitie. Auteursrechten voorbehouden.

[3] See, e.g. *NSW Registrar of Births, Deaths and Marriages* v. *Norrie* [2014] HCA 11.

[4] See for instance the analysis of Argentina's gender identity law by L. 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 *Michigan Journal of Gender and Law* 376-470.

[5] We use this phrase for reforms that would abolish the present system of gender certification, which assigns, confirms and authorises people as male or female.

conditions where deregulation invariably involves new forms of regulation, is far more open and uncertain. In complex regulatory conditions, such as those governing contemporary Britain, decertification could mean the state's withdrawal from assigning gender while still *recognising* self-determined gender identities, for instance, in anti-discrimination law, equality monitoring or census surveys. But who gets to determine what gender *means*? Would state law defer to individual understandings; would it continue to establish criteria for gender and the spectrum of recognisable genders despite no longer classifying individuals; or, in ways more akin to the regulation of religious plurality in Britain, would state law defer to gender-identity criteria and categories established by collective bodies? This article explores these different possibilities. Approaching gender as a socio-legal property, it considers what could happen to this property, in terms of how it is regulated and what it might mean, if the state's relation to gender identification radically changed.

In so doing, we want to contribute to three debates. The first concerns current law reform discussion on how states should relate to gender status. Decertification is not currently a major political demand in Britain,[6] although it has been proposed by a number of activists and academics internationally.[7] In Britain, the merits of self-determination (if not quite full informalisation) have generated proposals to reduce the range of official contexts in which a person's gender identity is considered relevant information.[8] In our view, political interest in gender's decertification or, at least, in legally recognising greater gender flexibility is likely to intensify as transgender and intersex demands are attended to, and as other reforms which attenuate gender-based forms of differentiation, such as same-sex marriage and shared parental leave, bed in. This article teases out some of the implications of reform, posing questions about the form it might take, and what the implications of decertification might be. Without posing a model law, we want to trouble the oft-made assumption that decertification would necessarily remove the state from regulating gender statuses and identities altogether. There are many ways state law

[6] House of Commons Women and Equalities Committee, 'Transgender Equality', (2015) at 61
[7] E.g., D. Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law Revised and Expanded Edition* (2015); Cowan, op. cit., n. 1, p.90.
[8] See Press Association, 'Call to Remove Gender from UK Passports and Driving Licences', *The Guardian*, 2 January 2016 and Press Association, 'Government to Review 2004 Gender Recognition Act', *The Guardian*, 7 July 2016. The British Minister for Women and Equalities' proposed that it might be possible to abandon recording individual gender on driving licenses and passports (Press Association, 2 January 2016; 7 July 2016).

can continue to regulate gender. Exploring what some of these are, in the light of wider regulatory discussions,[9] contributes also to more general debates about the relationship between identity categories and social reform, particularly conversations about the ongoing salience (or otherwise) of categories constituted in conditions of inequality for social justice projects.[10]

Our second aim is to contribute to methodological developments within feminist legal studies. Recent interest in bill-drafting as a way of exploring what the law *could be like*[11] and the transnational Feminist Judgments Project are two examples of a methodological turn that combines social justice commitments with a renewed interest in the flexibility and progressive potential of legal form.[12] This is not, it should be stressed, an uncritical attention; it does not treat legal form as politically neutral. At the same time, there is a creative and political interest in the capacity of statute-writing and legal judgments to take more feminist directions. In this article, we take up this reworking of legal form to explore what classificatory principles might be available, and what choices they pose, in conditions of gender's decertification. As with feminist statute and judgment writing, this is a "thought experiment" intended to open up and stimulate more practical discussion, to provide a ground from which to critique what is and to explore some paths for what could be. At the same time, while we cannot know what decertification would do, or how it might be legally embedded, we also cannot assume gender's ontological character would remain unaffected. Thus, in exploring the possible consequences of legal reform, we also seek to contribute to a third set of debates; concerned with what it is we are talking about when we talk about gender.

At the heart of debates between pro and anti-transgender feminists lies disagreement about what gender *is*, whether it is an oppressive, exploitative regime or system that necessarily produces unequal statuses, norms, and ways of being; or is first and foremost an intimate, natural attachment. Approaching gender as a *propertied* attachment, as we do here, does not mean rejection of more systemic

[9] See for instance, J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103-146.
[10] For a scathing analysis of the usefulness of racial categories constructed during apartheid for a post-apartheid South Africa, see G. Maré, *Declassified: Moving Beyond the Dead End of Race in South Africa* (2014).
[11] See for instance the Irish Access to Abortion Bill, M. Enright et al, 'General Scheme of Access to Abortion Bill 2015' (2015) 5 *feminists@law* 1-32.
[12] See R. Hunter et al, *Feminist Judgments: From Theory to Practice* (2010).

approaches. At the same time, it foregrounds (as analytical object) the gender identity paradigm that has come to dominate liberal political and legal discourse, in which gender is understood and treated as something authentic, and of value, which people hold, and which, like other kinds of personal attachment, they have a *right* to hold and have protected. This way of approaching gender has become increasingly pervasive, even as its propertied terms are often implicit rather than explicitly identified. But it is also an approach more radical feminists reject on the grounds that protecting gender as an intimate attachment romanticises and so misreads gender's pernicious and oppressive character.[13] This article explores these disagreements in the context of imagining fundamental reforms to the current system of gender certification. Such reforms, as we discuss, do not necessarily mean the end of gender as social property; nor would gender (or particular genders) necessarily diminish in value. At the same time, we are interested in considering the relationship between reform and gender's ontology: could decertification change what gender *is* and if so, in what ways?

But before going any further, we need to ask: Why should nation-states, such as Britain, stop determining and assigning legal gender; why should they dismantle a framework of direct control, albeit one that works largely through a relay of health practitioners, parents and local registration offices, for a framework based on structuring or steering the self-regulating acts of others? Arguments for reform have largely been framed in terms of the experiences of transgender and intersex people, navigating a world in which their gender is constantly challenged or in doubt.[14] Dean Spade illuminates the troubling complexities and inconsistencies of the administrative web that snares transgender people in the US, a web that renders self-determined gender status legally and socially precarious.[15] Other research identifies the difficulties those seeking to transition, as in Britain, face due to normalising, expensive, slow, medicalised and disciplining procedures.[16] While governments, in

[13] S. Jeffreys, 'Transgender Activism: A Lesbian Feminist Perspective' (1997) 1 *Journal of Lesbian Studies* 55–74; S. Jeffreys, *Gender Hurts: A Feminist Analysis of the Politics of Transgenderism* (2014); J. Raymond, *The Transsexual Empire: The Making of the She-Male* (1979).
[14] J. A. Greenberg, *Intersexuality and the Law: Why Sex Matters* (2012); S. Monro, 'Transmuting Gender Binaries: The Theoretical Challenge' (2007) 17 *Sociological Research Online;* A. Sharpe, *Foucault's Monsters and the Challenge of Law* (2010).
[15] D. Spade, 'Documenting Gender' (2008) 59 *Hastings Law Journal* 731-842; Spade, op. cit., n.7, pp.92-93; see also Currah and Moore, op. cit., n.2.
[16] E. Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107-126; S. Hines, *Transforming Gender: Transgender Practices of Identity,*

Britain and elsewhere, debate the minutiae of reforming their transitioning processes, the psychological pain, stress, time, expense and inadequacy of reclassification procedures for those whose gender identity diverges from the binary sex they have been assigned at birth begs the question: would it not be preferable to eliminate these problems in one sharp move by eradicating the requirement for a state-assigned legal gender altogether?

There are other reasons also for proposing such a change. If states play an important role in the interpellation of people as gendered subjects, processes of certification in which individuals are assigned a gender, and then obliged to repeat that gender across various procedures and activities, constitute a significant aspect of how gender, as a binary set of differentiated categories, is sustained and entrenched.[17] As Carol Smart (1989) argues in her ground-breaking book, *Feminism and the Power of Law*, legal norms and assumptions play a powerful role in asserting how things are, "impos[ing their] definition of events on everyday life", in part because law represents itself as embodying "a claim to a superior and official field of knowledge".[18] Not only does a system in which everyone is officially gendered from birth reinforce the notion that gender is a vitally important marker or characteristic of what (or who) one is, it also confirms the presumption that people are exclusively, and naturally, either male or female. But what can eliminating state assigned gender status achieve, in terms of "undoing" gender inequalities or moving towards a less gender-differentiated society – feminist political aspirations which underpin the analysis offered here? Critics of gender-neutral law, for instance, argue that in a gendered society removing law's ability to differentiate diminishes its capacity to ameliorate or compensate for gender inequalities in work, home-life, media and other spheres. This is an argument against formal equality (or sameness) as *the* remedy for gender disadvantage.[19] Child care and sexual violence are two core areas where critics argue gender neutral laws do little to combat existing inequalities, and may, by *masking* socially inscribed gender distinctions, have iniquitous effects instead,

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Intimacy and Care (2007); House of Commons Women and Equalities Committee, op. cit., n.6; Monro, op. cit., n.14.

[17] Conaghan, op. cit., n. 1.

[18] C. Smart, *Feminism and the Power of Law* (1989) at 4.

[19] Conaghan, op. cit., n. 1., pp. 77-80; V. Munro, *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (2007) 132-143.

whether in relation to the unequal distribution of domestic responsibilities,[20] or in relation to men's use of sexual violence to control women.[21]

Yet, applying the critique of gender neutral law to the declassification (or more flexible, self-determined classification) of gender identity begs an important question: is decertification a form of gender neutral law? At one level, it seems this *par excellence*, with its implication that people become gender neutral subjects from a state perspective. At the same time, as we explore, reforming the current system so gender is no longer assigned does not mean the state necessarily withdraws from recognising gender identities or from recognising gender as a *relation of inequality*. Without certifying individual gender at birth, state law can continue to recognise gender, and regulate the gendered decisions, practices and resource allocations of other organisational bodies in various ways. This becomes apparent when we consider other areas of inequality and identity, such as religion and sexuality. Both are areas where, at least in Britain, the general lack of an assigned legal identity does not equate to the absence of legal recognition or lack of state engagement. Indeed, the equality law framework established in Britain's Equality Act 2010 not only protects people from discrimination on grounds that include legally *un*certified identities, such as religious beliefs, race and sexuality, but also protects people who have been "mistakenly" identified in relation to a prohibited ground and discriminated against as a result.

State withdrawal from recognising only its own officially determined gender statuses does not necessarily leave people without legal tools to challenge discrimination (leaving to one side the testing question of how effective such tools might be). It also doesn't necessarily mean that organisations and other public bodies cannot base allocation and membership decisions on gender grounds (unless this is also explicitly prohibited). At the same time, changing the law so people might legally hold multiple, non-binary, evolving gender identities creates complex and interesting

[20] N. Iyer, 'Some Mothers Are Better Than Others: A Re-Examination of Maternity Benefits' in *Challenging the Public/Private Divide: Feminism, Law, and Public Policy,* ed. S. Boyd (1997) 168-194; B. J. Risman, 'Gender as a Social Structure: Theory Wrestling with Activism' (2004) 18 *Gender & Society* 429-450.

[21] Conaghan, op. cit., n. 1.; C. A. MacKinnon, 'Reflections on Sex Equality under Law' (1991) 100 *Yale Law Journal* 1281-1328; S. Walklate, 'What Is to Be Done About Violence against Women? Gender, Violence, Cosmopolitanism and the Law' (2008) 48 *British Journal of Criminology* 39-54.

challenges for a range of bodies and activities.[22] In the discussion that follows, we focus on one aspect of this challenge: the relationship between regulatory law and gender-based organisational decision-making. What happens to property in gender when the state no longer assigns it?

GENDER AS PROPERTY

Feminists have long used property tropes to encapsulate women's relationship to men; Margaret Davies provides an excellent critical account of the material and symbolic dimensions of this subject-object relationship.[23] Treating women as men's possession is not, however, the property framework drawn on here. Rather than detailing how male/ female relations are property-*like*, we are interested in how people's relationship to their own gender identity itself becomes depicted and treated as property. Our discussion of this relationship combines three qualities or dimensions that liberals and their critics associate with property in the person: social power; autonomy; and protection. The first builds on Cheryl Harris's ground-breaking writing on whiteness as property, which addresses the privileges and advantages people gain from being coded as white.[24] Harris's account inspired a cluster of subsequent research exploring the unequal capital associated with different social

[22] Issues have been raised in relation to medical practice, see L. Khan, 'Transgender Health at the Crossroads: Legal Norms, Insurance Markets, and the Threat of Healthcare Reform' (2011) 11 *Yale Journal of Health Policy Law & Ethics* 375-418; gender monitoring, see A. S. Chaudhry, 'Lessons from Jim Crow: What Those Seeking Self-Determination for Transgender Individuals Can Learn from American's History with Racial Classification Categories' (2009) 18 *Temple Political & Civil Rights Law Review* 505-15 and Mottet, op. cit., n.4; single-sex institutions such as prisons, see S. Bendlin, 'Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy?' (2013) 61 *Cleveland State Law Review* 61 957-82; schools and community organisations, L. M. Brymer, 'Better Dead Than Co-Ed-Transgender Students at an All-Women's College' (2011) 18 *William & Mary Journal of Women and the Law*135-59; shelters, L. Mottet and J. M. Ohle, 'Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People' (2003) *The National Coalition for the Homeless and the National Gay and Lesbian Task Force Policy Institute* <www.thetaskforce.org/transitioning-shelters/>; sports activities, see C. F. Sullivan, 'Gender Verification and Gender Policies in Elite Sport Eligibility and "Fair Play"' (2011) 35 *Journal of Sport & Social Issues* 400-419; as well as in relation to psycho-social attachments, see L. D. Wayne, 'Neutral Pronouns: A Modest Proposal Whose Time Has Come' (2005) 24 *Canadian Woman Studies* 85-91. The focus, however has been on genders deemed ambiguous or in transition with a spotlight on pre- or postoperative "transsexuals", intersex people and on those whose queer, transgender, or subversive presentations unsettle conventional gender categories. See, for instance House of Commons Women and Equalities Committee, op. cit., n.6, p.9; L. E. Kuper, R. Nussbaum, and B. Mustanski, 'Exploring the Diversity of Gender and Sexual Orientation Identities in an Online Sample of Transgender Individuals"' (2012) 49 *Journal of Sex Research* 244-254.

[23] M. Davies, 'Queer Property, Queer Persons: Self-Ownership and Beyond' (1999) 8 *Social & Legal Studies* 327-352.

[24] C. I. Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review* 1707-91.

identifications.[25] Drawing from this work, one line of argument might suggest that cis[26]-masculinity is the only gender to historically function as valuable property – bestowing resources and opportunities on those who can claim it, causing harm to those subject to its power. From this perspective, female and transgender status function only as negative property, generating not strength but privation and want as Sheila Jeffreys remarks, "'Woman' is the result of the experience of living as a woman under male supremacy."[27] While we do not fully sign up to Jeffreys's categorical framing, her formulation acts as a reminder that property is not just about the unequal capital which people "hold"; fundamentally property is a *relation* between subjects that, in Margaret Davies' words, "has things as its focus".[28] In other words, the property rights, including gender property rights, of one subject not only impact on the property rights of another, but are constituted through and in relation to others' powers and deprivations, particularly when it comes to what that property means, does and enables.[29]

Property's second dimension is less concerned with the social power that different gender statuses make available and more with people's *presumed* capacity and entitlement, within contemporary liberal regimes, to define and govern their inner gender. Treating ownership as the link between personhood and self-determination,[30] it is a property dimension anchored in a set of liberal ideas that associate autonomy with the right to own one's labour, powers and capabilities. From this perspective, gender as a property of the self is an effect, expression of, and contribution to, individual autonomy. Paradigms of self-ownership have been subject to considerable criticism, including for their capacity to legitimate exploitative relations and workplace domination thanks to the notion of the contracting or "voluntarily"

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[25] See for instance E. Grabham, '"Flagging" the Skin: Corporeal Nationalism and the Politics of Belonging ' (2009) 15 *Body and Society* 63-82; S. Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 *Social and Legal Studies* 423-39.

[26] "Cis" is the current term to describe people whose gender identity matches that assigned at birth.

[27] Jeffreys, op. cit. (1997), n.13, p.66.

[28] M. Davies, 'Queer Property, Queer Persons: Self-Ownership and Beyond' (1999) 8 *Social & Legal Studies* 327-352 at 328.

[29] Gender's property power might also be coded as one of guardianship or stewardship, involving a responsibility to care, support and protect – a responsibility historically been framed in patriarchal terms.

[30] Self-ownership is also supplemented by a different approach to property and personhood in which development and freedom of the self depends on our relationship to intimate and meaningful things. E.g., see M. J. Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957-1015.

alienated self.[31] They have also been supplemented by accounts of the entrepreneurial self in contemporary neoliberalism[32]as risk-managing individuals invest in developing skills and capabilities, forging as we discuss below the "right" gender repertoire, in order to engage in economically maximising behaviour. Lisa Adkins argues that there has been a historical movement from the possessive self to the entrepreneurial self, whose value depends on the contribution others make also (as consumers, clients, and audience).[33] The role of others is important in thinking about gender identity. There is a tendency on the part of some advocates of gender self-determination to treat gender as something determined *only* by its "owner". But if gender is (or has) property, this is a form of property that is *socially* created and *socially* priced.

The third dimension of property concerns the legal rights different social identities acquire. Approaching human rights and anti-discrimination law as orders that bestow property[34] sheds light on their political claims to *redistribute* the capital and power that different identities hold.[35] But while one aspect of identity property is tuned to what it can do, another is tuned to its own protection and safeguarding. Jennifer Nedelsky suggests a propertied conception of the self gives rise to a subject "in need of boundaries to secure it from invasion by others".[36] Treating gender identity as a protectable part of the subject also contributes to a territorial imagination as gendered "vulnerabilities" but also gender-based rights and privileges become subject to safeguards as law contributes to protecting, but also to regulating, the scope and limits of one's identity estate. For instance, does gender identity include specific practices, beliefs or modes of appearance; and does protecting gender identity mean

[31] For critical engagement, see C.B. Macpherson, *The Political Philosophy of Possessive Individualism. Hobbes to Locke.* (1962); also J. H. Carens, 'Possessive Individualism and Democratic Theory: Macpherson's Legacy' in *Democracy and Possessive Individualism: The Intellectual Legacy of CB Macpherson*, ed. J. H. Carens (1993) 1-18; C. Pateman, Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts', (2002) 10 *Journal of Political Philosophy* 20-53; J. Richardson, 'Feminism, Property in the Person and Concepts of Self' (2010) 12 *British Journal of Politics and International Relations* 56-71.
[32] See, for example L. McNay, 'Self as Enterprise: Dilemmas of Control and Resistance in Foucault's the Birth of Biopolitics' (2009) 26 *Theory, Culture and Society* 55-77.
[33] L. Adkins, 'The New Economy, Property and Personhood' (2005) 22 *Theory, Culture and Society* 111–130.
[34] Writing on human rights as property, Macpherson argues that treating the right to a decent quality of life as a property right resonates with older conceptions of property, which encompassed a person's rights, liberties, and capacities; it also, he suggests, strategically recuperates property's moral and discursive force. C. B. Macpherson, 'Human-Rights as Property-Rights' (1977) 24 *Dissent* 72-77.
[35] D. Cooper and D. Herman, 'Up against the Property Logic of Equality Law: Conservative Christian Accommodation Claims and Gay Rights' (2013) 21 *Feminist Legal Studies* 61-80.
[36] J. Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations* 162-189 at 168.

protecting the performance and expression of these also?[37] So far, we have suggested a socio-legal account of gender as property engages elements of social power, autonomy and protection. But what else is required for gender to function in this way; does gender as property need to be severable, recognised and, if recognised, by whom or what?

In their interesting account of identity performances at work, Lisa Adkins and Celia Lury explore how employees exercise property in gender when they can choose which gender to perform from a repertoire of workplace options.[38] While the ability to assume a different gender enactment seems to imply gender's ability to be separated from the one performing it, in this analysis we do not treat severability as an essential aspect of property. Instead, we build on a "property as belonging" framework in which the conventional subject/object relationship (of control, exclusion and severability) is supplemented and tangled up with a second property relationship, concerned with the relationship between part and whole.[39] The complex relationship between these two property frames comes into relief in political and theoretical conflicts between transgender women and anti-trans feminists. For instance, we witness it in the way anti-trans feminists criticise transgender women for "appropriating" an identity that does not belong to them – an arrogation, it is claimed, that repeats longer histories of men's appropriation of women's resources and value.[40] For anti-trans feminists, such appropriations invoke a subject-object relationship of belonging in which gender is treated as an attachment that can be selected, put on, and removed.[41] Certainly, some transgender and queer activists draw deliberately on more

[37] For related discussion regarding the legal protection accorded religious identity, see Cooper and Herman, op. cit., n. 35.
[38] L. Adkins and C. Lury, 'The Labour of Identity: Performing Identities, Performing Economies' (1999) 28 *Economy and Society* 598-614.
[39] D. Cooper, 'Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32 *Law & Social Inquiry* 625-664; Keenan, op. cit. n.25; on the impossibility of severing labour from the worker and its implications for property in the self, see Pateman, op. cit., n. 31.
[40] J. Raymond, *The Transsexual Empire: The Making of the She-Male* (1979), see also K. Browne, 'Womyn's Separatist Spaces: Rethinking Spaces of Difference and Exclusion' (2009) 34 *Transactions of the Institute of British Geographer* 541-56. Discussing the Michigan Womyn's Music Camp, Browne quotes cis-women who claim trans-women's presence appropriates a scarce resource, namely community space, which should belong exclusively to them.
[41] For a nuanced account of this see C. J. Heyes, 'Feminist Solidarity after Queer Theory: The Case of Transgender' (2003) 28 *Signs* 1093-1120.

flexible *and severable* conceptions of gender.[42] However, others take up a part-whole conception of belonging to argue their gender "belongs" in ways that cannot be differentiated from the experience of belonging which cis-women describe.[43] A part-whole approach depicts gender as a constitutive dimension of human life that contributes to its lived experience and formation. But gender is not just a "part" that belongs; to the extent that relations of propertied belonging are also concerned with "proper place" in terms of what belongs together and what does not,[44] gender's organising principles contribute to determining where we belong[45] and who we belong with. This last has proven a source of major disagreement as we discuss.

Property involves relations of belonging, but not all relations of belonging count as property. To function as property, they need to be supplemented by particular forms of power-bestowing recognition[46] since it is through recognition that relations acquire their propertied force (although relations of belonging also exercise force outside of their propertied status). But if property relations depend on being recognised, whose recognition counts? Paralleling work on self-regulation,[47] scholarship in legal pluralism has problematized the notion that the only authoritative provider of recognition is state law, exploring the legal (or law-like) character of other normative regimes, from customary and religious law to convention and rule-based orders within educational institutions, work sectors and social communities.[48] In the case of gender identity, civil society organisations may not only recognise genders unrecognised by state law; they may also recognise, and so give, gender a classed,

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[42] See, for instance P. Preciado, *Testo Junkie: Sex, Drugs, and Biopolitics in the Pharmacopornographic Era* (2013); A. L. Stone, 'Flexible Queers, Serious Bodies: Transgender Inclusion in Queer Spaces' (2013) 60 *Journal of Homosexuality* 1647-65.

[43] See, for instance J. Serano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (2007) 11-20. Thus, the claim that transwomen are stealing cis-women's gender misreads what it means to be transfemale, as well as female more generally. See, for instance M. J. Hird, 'Out/Performing Our Selves: Invitation for Dialogue' (2002) 5 *Sexualities* 337-56.

[44] D. Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (2014) 94-95.

[45] This resonates with references in some transsexual and transgender communities on the importance of coming home to the gender they belong to. See, for instance P. Elliot, 'Engaging Trans Debates on Gender Variance: A Feminist Analysis' (2009) 12 *Sexualities* 5-32; J. Prosser, *Second Skins: The Body Narratives of Transsexuality* (1998).

[46] Recognition here means an authority, such as state law or a community organisation; it identifies the relation or attachment as not only existing but with a legitimate claim to be supported (or protected). For more discussion on the point, see Cooper, op. cit., n. 44, ch. 7.

[47] See Black, op. cit., n. 9.

[48] J. Griffiths, 'What Is Legal Pluralism?' (1986) 24 *The Journal of Legal Pluralism and Unofficial Law* 1-55; S. E. Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869-96.

racialized, sexual and religious specificity in contexts where state law *claims* to only notice broad abstract categories.[49]

For people with unconventional or disputed gender identities, recognition according to community rules or organisational norms has proven crucial. Yet, for members' self-identified genders to also have wider force, community or organisational recognition needs to have some degree of power and authority. Informal peer-based recognition for transgender people, for instance, may enhance self-esteem and solidify new gender identifications, but may not provide access to desired goods in terms of work, recreation, education, volunteering and healthcare. Accessing these resources and opportunities has become a major area of contention between transgender women and anti-trans feminists in relation to a range of gender-specific organisations, from women's colleges[50] to rape counselling lines[51] and sports teams.[52] To the extent one of the "goods" these women's organisations provide is *recognition*, experience has been mixed.[53] While trans-positive women's organisations deliberately seek to mirror people's self-identified gender,[54] other organisations have taken a very different approach – one high-profile example being the annual Michigan Womyn's Music festival.[55]In line with many other women's

[49] This does not mean state law renders gender unmarked; however, it is more likely to draw from hegemonic notions of gender in ways that mask both the specificity being presumed and imposed (for instance where its conception of womanhood is based on white, middle-class women) as well as the specificity of the gendered subjects being addressed.

[50] C. Perifmos, 'The Changing Faces of Women's Colleges: Striking a Balance between Transgender Rights and Women's Colleges' Right to Exclude' (2008) 15 *Cardozo Journal of Law & Gender* 141-68.

[51] L. Chambers, 'Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence, and Kimberly Nixon' (2007) 19 *Canadian Journal of Women and the Law* 305-334.

[52] E. Buzuvis, 'Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics' (2011) 21 *Seton Hall Journal of Sports & Entertainment Law* 1-59; A. Travers, 'Queering Sport Lesbian Softball Leagues and the Transgender Challenge' (2006) 41 *International Review for the Sociology of Sport* 431-446.

[53] For instance, see debates and struggles within American lesbian softball leagues on transgender people's inclusion, e.g., A. Travers, and J. Deri, 'Transgender Inclusion and the Changing Face of Lesbian Softball Leagues' (2011) 46 *International Review for the Sociology of Sport* 488-507. For a very different approach in terms of authorial perspective and findings, see L. H. Gottschalk, 'Transgendering Women's Space: A Feminist Analysis of Perspectives from Australian Women's Services' (2009) 32 *Women's Studies International Forum* 167-178 on attitudes among employees and clients of Australian women's organisations.

[54] The Toronto women and trans bathhouse, for instance, moved from being a women's sex club to one that publicly welcomed transwomen and transmen also. The bathhouse adopted a strict policy against discrimination; however, it recognised the limits of its legal powers since it could not *instruct* people to have sex with those they did not desire, even if volunteers had to provide sexual services without distinction. See Cooper, op. cit., n.44, ch. 5.

[55]N. A. Boyd, 'The Materiality of Gender: Looking for Lesbian Bodies in Transgender History' (1999) 3 *Journal of Lesbian Studies* 73-81; K. Browne, 'Womyn's Separatist Spaces: Rethinking Spaces of Difference and Exclusion' (2009) 34 *Transactions of the Institute of British Geographer* 541-56; L. Vogel, 'Letter from Lisa Vogel' (2015)

organisations internationally, the music festival rejected the notion that all *self-defined* women belonged together. Extensive protest and criticism led the festival to officially recognise transwomen as women; however, organisers argued festival participation was restricted to a subgroup of women, namely "womyn born womyn".[56] Thus, from a property perspective, the femaleness that transwomen possessed was not so much denied as devalued through the requirement for additional identity property in order to participate.

Adopting a legal pluralist approach multiplies the bodies acknowledged as capable of bestowing recognition to include community organisations as well as states. In so doing, the competing, often antagonistic, character of norms and rules exercised by different bodies comes to the fore. Legal pluralism, importantly, directs attention to *how* diverse regulatory and normative orders *interact*. In our context, such interactions include the battles between feminist organisations and transgender activists over definitions of gender, as well as the relationship between organisational norms and rules about participation and state law. A legal pluralist account might ask: When do organisational rules and norms that deny or devalue transgendered people's gender property get recognised and respected by state law? What difference might the state's withdrawal from assigning gender identity make to how it responds to organisational and individual forms of self-determination? In the next section of the article, we address these issues, teasing out some of their complexity. States can structure and guide organisational and individual gender identity decisions in many ways; our focus is on how state law structures and penetrates gender identity classifications. To tease out some forms this can take, we consider two legal decisions. These decisions operate in very different contexts; however in both, the question of identity-property comes to the fore in conditions where individual, organisation, and state law disagree about how a person's identity should be recognised; the force it should have; and the rights it should be entitled to.

<https://genderidentitywatch.files.wordpress.com/2015/04/letter-from-lisa-vogel.pdf>. The festival officially ended in 2015. Although Lisa Vogel, as festival producer, did not directly refer to debates about transwomen's inclusion in her statement, she referred to on-going "struggles" throughout the run of the festival (Vogel, 2015). This, combined with falling attendance, is likely to have played some role in the decision to end the festival after forty years, see G. Beemyn, and M. Eliason, '"The Intersections of Trans Women and Lesbian Identities, Communities, and Movements": An Introduction' (2016) 20 *Journal of Lesbian Studies* 1-7.

[56] K. Browne, 'Womyn's Separatist Spaces: Rethinking Spaces of Difference and Exclusion' (2009) 34 *Transactions of the Institute of British Geographer* 541-56.

RECOGNISING AND REGULATING IDENTITY PROPERTY

To the extent that the state protects its own identity allocations more sturdily than those of other bodies, its proposed withdrawal from *assigning* gender may seem to imply some diminution in gender's propertied power and in the capacity of particular gender identities to be protected. This might generate reasonable fears among those reliant on their official legal status to protect them from civil society attempts to deny their gender – whether the denial is from a medical professional, health insurer (in countries, such as the USA, which rely on private insurance), employer, homeless or domestic violence shelter, sports organisation or fellow user of a public lavatory (a site of considerable contemporary legal and political controversy in the USA).[57] Having an *official* gender status can provide an authoritative resource in situations of perceived gender misrecognition. But just because states withdraw from determining and assigning gender does not mean they cannot recognise gender determinations by others.

Assuming it remains legal for organisations to allocate membership or resources by gender, and of course that may not be the case, one pressing question becomes whether or not state law should recognise or "certify" organisational criteria for ascertaining gender when this clashes with the self-designation of potential participants.[58] The *Nixon* case in British Columbia, Canada demonstrates some of the tensions and dilemmas this question raises.[59] The case concerned a transwoman denied membership of a rape counselling service on the grounds she had been raised male, and therefore from the organisation's perspective was not a woman;[60] or, if she was a woman, not part of the subset of women - those with experience of gender

[57] See, for instance T. Kopan and E. Scott, 'North Carolina Governor Signs Controversial Transgender Bill' CNN, 24 March 2016; L.Westbrook and K. Schilt, 'Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System' (2014) 28 *Gender & Society* 32-57.
[58] See Black, op. cit., n. 9 for discussion of self-regulation, here taking shape as a clash between individual (unilateral) and organisational (multilateral) forms.
[59] *Vancouver Rape Relief Society* v. *Nixon et al*. [2003] BCSC 1936; [2005] BCCA 601.
[60] C.Boyle, 'The Anti-Discrimination Norm in Human Rights and Charter Law: Nixon V. Vancouver Rape Relief' (2004) 37 *University of British Columbia Law Review* 31-72; b. findlay, 'Real Women: Kimberly Nixon V. Vancouver Rape Relief' (2003) 36 *University of British Columbia Law Review* 57-76.

oppression "from birth" – that the organisation's membership criteria required.[61] Nixon filed a human rights complaint and won at the British Columbia Human Rights Tribunal, before losing her case in judicial review and, again, on appeal on the grounds that, as a non-profit organization under s. 41 BC Human Rights Code 1996, the rape counselling organisation had the legal right to determine who counted as a woman for their own membership purposes. Interestingly, this case occurred in a context where state law *did* certify gender identity rather than one where the state had withdrawn from the task. At the same time, it reveals how precarious property in gender identity can be. Although Nixon was recognised as a transsexual woman with a female birth certificate, the force of this status was substantially undermined [62] by the court's refusal to require that civil society organisations, such as the rape counselling organisation, recognise it.

The *Nixon* case is helpful for our purposes in two respects. First, it shows how multiple, diverging gender definitions can be overlaid onto a particular encounter, such that someone recognised as female by one legal/ normative order may not be recognised as female by another. Second, it demonstrates the *indirect* power of state regulatory frameworks, as statute and judicial interpretation combine to structure property in gender.[63] State law can regulate gender identity in several ways beyond the mere certification of someone's sex. One, as we have noted, is by recognising organisations' definitional autonomy when it comes to the meaning of, say, womanhood (although once an organisation has set their criteria, however informally, they may be legally compelled to treat individual applicants fairly according to its terms). A contrasting approach *requires* organisations to recognise and accept those who self-identify with the relevant gender regardless of whether the organisation wishes to recognise them in those terms. Despite their differences, what these two

[61] Supreme Court quoting the Tribunal: 'in the training session Ms. Cormier advised Ms. Nixon that "a woman had to be oppressed since birth to be a volunteer at Rape Relief and that because she had lived as a man she could not participate" and that "men were not allowed in the training group".' *Vancouver Rape Relief Society v. Nixon et al.* [2003] BCSC 1936, para 10.

[62] See *Vancouver Rape Relief Society* v. *Nixon* 2005 BCCA 601, para 2. The lower BC Supreme Court, interestingly, disagreed on how significant the impact was; declaring the loss Nixon suffered in being denied membership minimal. "Rape Relief provides access to only a tiny part of the economic, social and cultural life of the province. By reason of Rape Relief's self-definition, perhaps reflected in its small number of members, exclusion from its programs is quite evidently exclusion from a backwater, not from the mainstream of the economic, social and cultural life of the province" *Vancouver Rape Relief Society v. Nixon et al.* [2003] BCSC 1936, para 154.

[63] In an earlier case, by contrast, a BC lesbian organisation was found to have discriminated against a transwoman in suspending her membership due to her sex as a transsexual female, see *Mamela* v. *Vancouver Lesbian Connection* [1999] B.C.H.R.T.D. No. 51.

approaches accomplish is to reframe what counts as the paramount property. Instead, of focusing on the property attached to gender, it is property in the classifying decision which is key (trumping other property claims) - a property that state law may bestow upon either organisations or individuals.[64] But property in the decision can also be limited by regulatory frameworks which structure and limit permissible choices, for instance by determining that certain kinds of identity criteria are legally unacceptable. A good entrée to thinking about this issue is the British *Jewish Free School* (*JFS*) case.[65]

The *JFS* case concerned a dispute over the legal parameters of the criteria used to determine whether a child was Jewish for the purpose of admission to a Jewish school. With its legal focus on race and religion rather than gender, this case may seem a tangential example; however, its relevance for our discussion is that being Jewish in Britain is *not* an identity or status set by the state. The *JFS* case therefore illustrates how state law can regulate community determinations of identity or membership even when it does not actually *determine* someone's identity status. Conventionally, in Judaism, someone is Jewish if their mother is Jewish – an identity that can be achieved through matrilineal descent or by conversion.[66] In this legal dispute, the Jewish Free School turned down an application for admission from a boy whose mother had converted to Judaism through a non-orthodox conversion process, a conversion not recognised by the school, which only recognised orthodox procedures. Since being Jewish in British law is treated as an ethnicity as well as a religion, the case fell within the regulatory purview of the Race Relations Act 1976. The question for the court was whether the criteria the school applied for determining Jewishness (either matrilineal descent or recognised conversion) constituted racial discrimination under the RRA s.1.[67] In other words, was JFS's refusal to recognise the boy's property in Jewishness for the purposes of admission unlawful?

The dissent argued that it was lawful; they held the policy did not breach the RRA as it involved the application of religious rather than racial criteria. The school

[64] This resonates with transgender advocacy for gender *freedom*, rather than gender itself, being held as property. See L. Feinberg, *Trans Liberation: Beyond Pink or Blue* (1998); C. J. Heyes, 'Feminist Solidarity after Queer Theory: The Case of Transgender' (2003) 28 *Signs* 1093-1120.
[65] *R (E)* v *Governing Body of JFS* [2009] UKSC 15. See also *Chandhok* v *Tirkey* (19 December 2014) EAT; *Hall* v *Bull* [2013] UKSC 73.
[66] Other more progressive wings of religious Judaism now allow patrilineal as well as matrilineal descent.
[67] This is now updated by the Equality Act 2010.

did not deny the boy was *ethnically* Jewish; it was simply that he did not meet the school's criteria for being *religiously* Jewish based on orthodox Jewish law. In this sense, the school recognised the boy's Jewishness as something he possessed and was entitled to; however, it could not give rise to the effects – namely admission - which he sought. Like Nixon or the transwomen seeking admission to the Michigan Womyn's Music Festival, what he possessed was the wrong kind of property for this particular purpose. The majority, however, disagreed; they declared the school's policy of determining Jewishness according to a matrilineal line of descent to be directly discriminatory on racial grounds.[68] As a result of the decision, the school changed its admissions policy to emphasise religious observance and participation rather than halachic Jewish status. According to critics, this legally mandated policy change, based on a refusal to recognise that a religion could be lawfully based on descent, imposed on the school a *Christian* conception of religion in ways that not only interfered with, but made it illegal to apply, Jewish notions of religious affiliation.[69] In his dissenting judgment, Lord Brown remarked, "Jewish schools in future, if oversubscribed, must decide on preference by reference only to outward manifestations of religious practice. The Court [] judgment insists on a non-Jewish definition of who is Jewish."[70] Danchin and Blond develop this point, "In JFS, a majority of the judges appear to understand religion as an epistemologically distinct form of non-ethnic belief that parallels both Christian commitment and an Enlightenment view of religious identity as a matter of internal private conscience."[71] In other words, the *JFS* case not only challenged the lawful contours of Jewishness as a religious category but also tacitly reworked the meta-category of religion itself.

So, how does the JFS case help us to think about gender and, specifically, the capacity of the state to regulate property in gender without determining people's actual gender? Since this article is a speculative one, our interest is not in closely parsing current law but to identify and explore some approaches to identity categorisation available to be taken up. Religion, in many ways, is a good analogy to gender because, when it comes to a religion such as Judaism, the British state plays no

[68] See also P. Danchin and L Blond, 'Unlawful Religion: Modern Secular Power and the Legal Reasoning in the JFS Case' (2014) 29, *Maryland Journal of International Law* 419-480; D. Herman, *An Unfortunate Coincidence: Jews, Jewishness and English Law* (2011).
[69] D. Herman, op. cit., n. 68; A. R. Petty, "Faith, However Defined': Reassessing JfS and the Judicial Conception of 'Religion" (2014) 6 *Elon Law Review* 117-50.
[70] *R (E)* v *Governing Body of JFS* [2009] UKSC 15, para 248.
[71] P. Danchin and L Blond, op. cit., n. 68 pp.443-444.

role in directly assigning status. At the same time, as Didi Herman has discussed, modern British law's treatment of Jewish identity demonstrates the power state law can exert over an identity category – shaping how it can be deployed and what its members can do.[72] Thus, state law can regulate how civil society bodies determine category membership by making certain criteria-decisions impermissible, by defining the category (for instance, gender or religion) in particular ways, or by switching categories so organisational decisions, which seem to be made in relation to one category, are re-recognised as being in fact an (unlawful) other.

While they come from different jurisdictions, relate to different legal frameworks, and address different kinds of identity-property, the *JFS* case is an interesting counterpoint to *Nixon*. In *Nixon*, the court refused (or deemed themselves unable) to stop the rape counselling organisation from excluding the claimant, despite the fact she was *legally* defined as a woman, because the organisation had the right, according to the court, to not recognise her as a woman (or, in their terms, as the "right" kind of woman). In the *JFS* case, by contrast, although the claimant did *not* possess a legal status as Jewish, the court nevertheless stepped in to prohibit the school policy on the grounds it breached the RRA by unlawfully applying a race-based test. In thinking about gender as property, then, what these two cases illustrate are the complex and uncertain effects that legalising self-determination may have. While it can give individuals a heightened sense of self-ownership as felt gender remains un-trumped by a countervailing legally imposed classification, what self-defined gender actually *makes possible* remains an open question.[73] Individual self-definition may be protected and empowered through regulatory strategies that require others to recognise it. But it is also possible that while people are recognised as self-possessed gendered individuals, law limits the protection, entitlements and capital that their gender can bear.

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[72] D. Herman, op. cit., n. 68.

[73] Complex evidentiary issues also arise from decertification depending on which bodies are recognised as having the contextual right to define gender, particularly when specific gender identity claims allow people to access desired goods, opportunities, services or forms of protection; in relation to transwomen see Westbrook and Schilt, op. cit, n.57. An emphasis on autonomous individual self-determination may here clash with the need to demonstrate continuity or recognition by others in order to establish or confirm a gender identity. Pressing in relation to gender-specific benefits, these issues are far less prominent in relation to protection from discrimination which may not depend on proving possession of a particular identity. For legal discussion of some of these issues in the context of Métis identity, see the Canadian case, *R.* v. *Powley* (also cited in *Nixon*) [2003] SCC 207 (223).

GENDER AS CULTIVATED PROPERTY

If gender is no longer a birth "right", labour, care, and encounters with others may provide the means through which gender identities develop and acquire life. In the previous section we considered the effects of decertification on state law's capacity to continue to regulate gender as socio-legal property. In the discussion that follows, we explore what it could mean for gender to move from being a property assigned by the state to one grown and cultivated by individuals within particular social contexts. What might it mean to treat gender in this way, with its implication that gender is not an identity or status such that one either *is* male or female (or some other gender designation) but instead a quality that can be grown or developed? Does gender then become a matter of *degree*, and what might this mean legally? Would it give employers a license to advertise not for men or women but for particular intensities of gender performance, such as high femme or ultra-butch? Could organisations select members and users also with regard to the care and effort with which a particular gender identity is held; where single-gender provision, for instance, reflects not simply an allocated status as male or female, but an assessment of how comprehensively and fully a particular identity is cultivated, recognising that some forms of cultivation, as with religion and ethnicity, may generate vulnerability. And what about those who do not cultivate *any* gender identity? If gender identifies a set of categories demanding effort and commitment, a refusal, unwillingness or inability to exert effort in this direction might mean no gender is selected or developed, paralleling the case of non-religious identity in a society where religion continues to have an institutional and cultural role.[74] What material and cultural implications might come from rejecting gender identities as some people are already attempting, or from performing gender abysmally, in conditions where gender is not legally required but continues to have property? These questions and concerns may sound far-fetched; yet, they reflect the current experience of many "non-passing" transgender and intersex people for whom a legal gender identity is not sufficient status or protection, and

[74] People who identify as atheist are still affected by the religious history, heritage and ongoing presence of religion in society, including in their very choice to define themselves as non-believers; as such, they might be more aptly characterised as "post" rather than "non" religious.

where discrimination arises because people are deemed not female or male enough.[75] Decertification, then, would seem to cast the net of cultivation and effort far more broadly, but what does "cultivation", in this context, mean? What is this gender that is being worked upon?

We can understand cultivation here in several different, if interconnected, ways. One line of thinking, based on developing property in the self, identifies cultivation with a subject who puts time and effort into developing their "inner" qualities, furthering their personal attributes and skills. Here, cultivating one's gender may be part of personal self-development and the search for authenticity, but it may also involve augmenting one's personal economic and social value in conditions where market rationalities of competition and social investment extend into ever increasing areas of life.[76] This more instrumental approach to cultivation seems to foreground appearance and performance and, understood in this way, the need to cultivate one's gender is far from new. Feminist scholarship has long addressed such processes,[77] exploring the care people expend in disciplining their bodily movements, voice, and expressions so they are gender appropriate. Writers on gender transitioning also describe the acute pressures; the feelings of embarrassment for self and others that arise on occasions when people slip up or fail to pass, revealing in the process a prior (and feared as always still there) corporeal gender.[78] But cultivation can also suggest a seemingly more detached or expressive register in which gender functions as a kind of cultural project; gender here shapes subjects and may be internalised but it is not defined as, or reduced to, an inner truth. In her discussion of the "new economy", Lisa Adkins argues that gender "is characterized by principles of performance… and gender hybrids may be performed, mobilized, and contested by workers in a variety of ways in order to innovate and succeed."[79] This kind of performance, she suggests, differs from older ways of doing gender, not simply because its creative, alienable aspects are emphasised but also because of the new

[75] See Cowan op. cit., n. 1, pp. 86-87.
[76] W. Brown, *Edgeworks: Critical Essays on Knowledge and Politics* (2005) 26.
[77] S. L. Bartky, 'Foucault, Femininity, and the Modernization of Power' in *Feminism & Foucault. Reflections on Resistance*, ed. I. Diamond and L. Quinbym (1988); C. West and D. H. Zimmerman, 'Doing Gender' (1987) 1 *Gender & Society* 125-151.
[78] K. Johnson, 'Changing Sex, Changing Self - Theorizing Transitions in Embodied Subjectivity' (2007) 10 *Men and Masculinities* 54-70; D. P. Schrock et al, 'Emotion Work in the Public Performances of Male-to-Female Transsexuals' (2009) 38 *Archives of Sexual Behavior* 702-712; R. A. Wilchins, *Read My Lips: Sexual Subversion and the End of Gender* (1997).
[79] Adkins, op. cit., n. 33 p.121.

importance of "customer" or "audience effect".[80] Adkins, importantly, emphasises the unequal relationship of men and women to workplace gender performances in conditions where women may struggle to claim "ownership of their cultural work".[81] However, the point we want to take up relates to the co-produced or collaborative character of gender as an "external" cultural project.

Approaching gender as collectively cultivated, particularly when it is cultivated as a shared cultural project, foregrounds ways of thinking about gender more familiar to ethnicity or religion. Collectively developed genders can take a conventional form but what we want to consider here are those networks and communities in which dissident or non-normative genders are cultivated. These community networks and attachments exist despite the fact people's legal gender status does not meaningfully reflect them, and despite the fact that people can sometimes contribute to building gender-specific communities (as with transmen in lesbian communities) even when their own identity no longer aligns with the gendered community of affiliation either.[82] The presence of dissident gender identities spurs us to ask: what might happen to such *deliberately cultivated* non-hegemonic gender identities if they were no longer undermined or trumped by state legal categories? Whether state law's withdrawal would empower or safeguard the collective self-possession they instantiate remains an open question. The evolution of gender identity is not dependent on legal structures alone, and reform may produce far from progressive effects[83]given its capacity to also trigger counter-measures intent on sustaining more rigid gender binary frameworks. At the same time, a key motivation for exploring decertification has been to consider its capacity to support gender

[80] Id. p.123.
[81] Id. p.124.
[82] The specific history of female-to-male transitioning is such that many transmen were once active participants in women's organisations and communities, see L. B. Girshick, *Transgender Voices: Beyond Women and Men* (2008) and Travers and Deri, op. cit., n.53. While some face ambivalence or exclusion from women-only organisations after transitioning, Travers and Deri explore how transmen can sustain an ongoing affinity and attachment to lesbian or women's communities even though they no longer identify as women. Sally Hines also notes that many of the participants in her research recounted both previous and on-going involvement within feminist and lesbian communities, despite identifying as male, see S. Hines, *Transforming Gender: Transgender Practices of Identity, Intimacy and Care* (2007) 86-87.
[83] For discussion of negative unintended effects of regulation, see P. Grabosky, 'Counterproductive Regulation', (1995) 23 *International Journal of the Sociology of Law* 347-365.

identity change that would allow gendered identities to evolve, fluctuate, be held in plural ways,[84] and also to be dropped.[85]

CONCLUSION

This article has woven together three lines of discussion: the regulatory options available for state law to supervise and structure gender-based decisions in conditions where gender identity is no longer state certified; the implications of decertification for gender's ontology; and the effects changes might have on the capital, protections and self-determination that property in gender make available. As stated at the outset, such a discussion can only be speculative; however, in our view exploring the potential shape and implications of reform is worth pursuing – in part because it sheds light on the property character of gender and other identities within a human rights and equality law context, but also because it highlights some of the policy choices to be made if the legal assignment of gender was to be reformed. Like other forms of property, gender can have property status without being allocated by the state; in other words, gender's property status can outlive the current certification structure. However, to count as property and to have property force, gender needs institutional or community recognition. From a legal pluralist perspective, recognition of gender in ways that are property bestowing is broader than state law. At the same time, official legal regimes are important (if not monopolistic) determinants of what community and organisational recognition (and non-recognition) can do. As we have discussed, the regulatory role of state law is apparent in several disputes between feminist/ lesbian organisations and (potential) transgender participants as state institutions and courts determine whose gender and decision-making property rights they will

[84] K. Browne 'Womyn's Separatist Spaces: Rethinking Spaces of Difference and Exclusion' (2009) 34 *Transactions of the Institute of British Geographers* 541-556, at 550. Kath Browne describes how, at Michigan Womyn's Music Festival, people who inhabit other spaces as transmen can reconnect with their female identity. "Thus, festival spaces could temporally recreate 'women', that are also men⁄ male."

[85] This is something states are already addressing; see legal recognition as "non-binary" in the US, C. Parks, 'Oregon Court Allows Person to Change Sex from 'Female' to 'Non-Binary'' *The Oregonian*, 10 June 2016. Similarly, Australia (Australian Government, 'Australian Government Guidelines on the Recognition of Sex and Gender' (2013)), India (M. Van den Brink et al, 'Out of the Box-Domestic and Private International Law Aspects of Gender Registration' (2015) 17 *European Journal of Law Reform* 282-93), Pakistan (V. Divan et al, 'Transgender Social Inclusion and Equality: A Pivotal Path to Development' (2016) 19 *Journal of the International AIDS Society* 1-6) and Germany (§ 22 (3) Personenstandsgesetz) recognise some version of a "third" gender.

recognise and protect: those of the single-sex organisation wishing to define and determine what and who is female, or the rights of transgender participants claiming their entitlement to belong. Identity disputes like these, as we have addressed, are not exclusive to gender (although the struggle over transwomen's membership in feminist organisations has a distinctive current political flavour). Similar disputes over definition and decision-making authority arise in relation to other identities, particularly in contexts when having the "right" identity opens up desired opportunities, membership and other resources, as witnessed in the *JFS* case.

Yet, if states withdraw from legally determining gender, it is plausible to suggest that gender's form may change. Instead of everyone having a gender assignment as male or female, options open up for people's identities to be gendered in non-binary ways, and for people to be more or less gendered. As we have noted, these options already informally exist. Thus, one key question is what might happen to these presently evolving social forms if they no longer have to compete for ground with state law's gender assignment; if the take-up of informal gender identities does not have to confront and work on a terrain of incompatible, already legally gendered subjecthood. One possibility here is that, like religious faith, gender might become increasingly something to cultivate (or to choose not to cultivate) in conditions where its property value depend (at least in part) on the work and effort invested in its accomplishment. In a still gendered society this might work to disempower those who feel unable or chose not to develop a gendered identity; making gender property dependent on labour and effort is not necessarily a progressive development even if it seems to favour flexibility and diversity. But what other ways forward are there? Are we limited to thinking about gender identity in propertied terms; and, if so, is "choice" the most progressive formulation available, with its recognition that gender can be flexible, plural and created (or rejected)? Certainly, many feminists would argue that understanding gender in this fashion spectacularly misses the point – that gender is a relational system of domination and structural asymmetry. From this perspective, gender is not something to recuperate, and to approach it as a selected identity, particularly an individually selected identity that generates claims for protection and entitlement, does little more than echo those many other contexts where social inequalities have become rendered intelligible through neoliberal discourses of choice.

Yet, while this critique has merit, we also think gender politics and the gendered identities that have been spawned are more than the sum of domination plus neoliberal choice. Socio-political opposition to gender as a form of domination, discipline, control, and wider social organisation has not simply evacuated gender but generated in turn other kinds of gender practices. Although these largely reject gender's formal propertied status, they have more complex relationships to the social power, self-definition and protection that gender as informally recognised property can provide. Some dissident gender politics, such as radical feminism, may aim for gender's abandonment (even as they perform their own, particular, resistant form of gender identity). Other dissident politics treat gender's potential more equivocally, recognising gender's conceptual elasticity and capacity to give (and take) shape from oppositional, progressive and transformative politics as well as conservative ones. These include what we might call prefigurative gender projects, which seek to actualise in the present the future gender forms (for instance, no genders, fluid genders, or new genders) that are sought. They also include stylised gender enactments performed to protect and sustain flourishing dissident communities; and they include the strategic take-up of gender meanings, codes and legacies to advance other political goals - witnessed in the women's peace movement of the 1980s, which married conventional gender norms of domesticity, peace, care and women's responsibility for rearing future generations with radical norms of female self-sufficiency, physical competence, political activism and lesbian desire. It is impossible to know what contribution decertification might make to the future of these kinds of gender politics and the gendered identities they generate. However, removing the state from the task of assigning gender might free gender from certain forms of direct state control. Clearly, indirect forms of control or regulation will continue to have consequences, but the naturalised, taken-for-granted notion of gender as a common-sense binary structure would be, at the very least, shaken.