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The Intellectual Commons of Gender

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“You may not believe in gender, but gender believes in you,”

-Jennifer, quoted in *Cyborgs, Gender, Performance*

Precis

Last fall, in a flurry of media attention, New York City’s Board of Health took the unprecedented and frankly courageous step of validating what the transgender community had argued for years: that individuals can and should have the right to change the sex on their birth certificates without explicitly requiring them to undergo a particular type of sex reassignment surgery. Under the rule change initially explored by the Board, individuals would have been able to change the sex on their birth certificates, so long as they provided affidavits from a doctor and a mental health professional outlining the reasons for the change and their intention to live permanently as members of the opposite sex.

At the time of their announcement, the decision was met with enormous praise from transgender rights advocates, who felt that the proposed rule confirmed the possibility of correcting a perceived disjunction between one’s anatomical sex and one’s gender identity without the need for prohibitively expensive (and often medically unsafe) sex reassignment surgery. Instead, the proposed rule recognized the panoply of other ways in which individuals both transform and cross the boundaries of anatomical sex, through hormone treatments, cosmetic surgery, and other forms of medical intervention. For individuals like Mariah Lopez, a transgendered woman who was born as a biological male, the change would have offered her the ability to confirm her choice to live as a female, as well as the opportunity to legally validate what she feels, thinks, and represents about herself. For Lopez, and others who face similar struggles, this right—

essentially a right to represent oneself by choice, rather than by legal prescription or extensive biomedical revision—is a right that is at the heart of notions of gender equality. Yet, just as public health advocates were nearing victory, the Board abruptly backpedaled on its decision, citing “broader societal implications,” and decided to quickly abandon consideration of the proposed rule, much to the consternation of advocates who had worked on behalf of the transgender community for years.

As this example illustrates, America is steeped in a pervasive anxiety about the relationship between sex, gender, and social identity. For years, the law has largely maintained a steadfast commitment to the idea that anatomical sex—the physical polarities of male and female—operates as a relatively stable fixture that is capable of being mapped onto one’s identity and self-perception. This expectation of stability, in many ways, has informed an additional expectation within case law that often presumes that gender identity and anatomical sex are almost always perfectly aligned with one another—that anatomical sex operates as a crucible that formalizes and reifies gender expression, sexuality, and so forth. In most cases, our anti-discrimination jurisprudence reflects these presumptions, and, with the exception of a few, isolated cases, has largely labored under the perception that gender identity and sex rarely conflict with one another.

Today, these perceptions are becoming increasingly confronted with the uncomfortable reality that the relationship between gender and sex is far more complicated than the law currently suggests. Taking this observation as an invitation, this paper attempts to provide both a theoretical starting point to reanalyze the relationship between sex and gender, and, to develop a normative theory that offers a new way to conceive of their relationship that might provide another vantage point in demonstrating the limits of its own jurisprudence. Interrogating these categories is no simple task. In this paper, building on my prior work on international human rights and performance theory,¹ I attempt to introduce a necessary conversation between the arenas of gender and sex through a sustained analysis of property theory as it relates to the categorization of gender through the prisms of real space and cyberspace. In this way, the paper draws on

¹ See, for example, Sonia K. Katyal, *Exporting Identity*, 14 *Yale Journal of Law and Feminism* 97 (2002); *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 *Wm & Mary Bill of Rights L.J.* 1435 (2006); and *Performance, Property and the Slashing of Gender in Fan Fiction*, 14 *American Journal of Gender, Social Policy and the Law* 426 (2006).

Cheryl Harris' important work on race and property, as well as other scholarship on anti-essentialism and anti-discrimination.

Consider, for example, the impact of the transgender rights movement. In the introduction to their path-breaking volume, *Transgender Rights*, the authors observe that over two hundred employers, and more than sixty colleges and universities now include gender identity as part of their nondiscrimination policies.² Every major lesbian, gay, and bisexual rights organization now includes transgender individuals in their mission statements.³ At the same time, however, despite these strides, courts continue to display a pervasive confusion regarding transgender equality, continually using the language and history of Title VII and other areas of law to unwittingly craft one of the most protracted—and ironic--exclusions of transgender individuals from the protections for discrimination on the basis of sex. In part because of these exclusions, which add to the difficulty many transgender individuals face in the workplace and beyond, transgender individuals are particularly vulnerable to violence and discrimination as a result.

Yet, at the same time that the case law demonstrates a serious problem within social, political and legal treatments of gender difference, the humanities literature has never before reflected such a momentous degree of fascination with unpacking the codes of both sex and gender within literature and science. Beginning perhaps with Judith Butler's seminal work, *Gender Trouble*, dominant academic thought in the humanities posits both sex and gender as necessary fictions—social constructs that operate to divide, classify, and polarize society into useful, but not always universal, categories. Its rich body of insight, often drawing on performance theory, has helped explore how social norms and codes operate to govern outward expression—indeed, everything within human behavior to dress, speech, articulation, and other mannerisms. In turn, by exploring the *external* markers of identity, performance theory has also helped to deconstruct the *internal* aspects of identity. It has helped us to think of identity as something created and constructed by human behavior and expression, rather than something that exists as internally separate and apart from expression altogether.

² Currah, Juang, and Minter, at xiii.

³ Currah, Juang, and Minter, at xiii.

Yet there are limits to this new mode of thought. While scholarship on the topic has virtually exploded; the transgender studies movement has had only a limited effect in changing both the descriptive and normative approaches to gender jurisprudence in legal scholarship. Yet as the transgender rights movement takes firm hold, it exposes a series of preexisting qualifications and limitations to anti-discrimination jurisprudence, and forces us to contemplate the limits of the legal categories that animate sex and gender as a result. For this reason, any account of gender—or transgender—identity must necessarily embrace the importance of *not* situating transgender individuals as merely a “means to an end or an intellectual curiosity,” as legal scholar Paisley Currah has written, but one that focuses on the importance of ensuring gender self-determination as a matter of well-being, rather than intellectual exercise.⁴

The result of this confluence of moments—one legal, one academic—inscribes the transgender studies movement with an almost overwhelming degree of irony: at the very moment at which the transgender studies movement has revolutionized academic thought on gender and sexuality, it has never before faced such yawning obstacles within the law’s superlative commitment to categorization. The end result is the development of two, relatively vast stand-alone regimes in silent conflict with one another, one that suggests the fictive dimensions of identity, and another which largely requires the existence of these identities—both virtual and real—for its regulatory functions to function successfully, consequently resulting in two coexisting regimes which are silenced by the failures of each to acknowledge and explore the limits and possibilities of the other.

This paper argues that in order to understand the relationship between sex and gender, it might be helpful to explore a parallel type of affiliation between property and intellectual property. *My thesis is that sex is to gender as property is to intellectual property.* Unpacking this further, instead of thinking of sex as a construct of biology alone, this paper argues that it might be helpful for us to reconceptualize anatomical sex along the lines of *tangible property*—bordered, seemingly fixed, rivalrous, and premised on a juridical presumption of scarcity in terms of its rigid polarities of male and female. In contrast, regarding *gender*, I argue that thinking through gender as a performance (as

⁴ Currah, Juang, and Minter, a xxii.

Judith Butler has suggested), if taken seriously, also suggests that gender is more akin to *intellectual property*—permeable, malleable, unfixed, nonrivalrous, and ultimately—deeply nonexclusive. An account of gender performance suggests that gender is not something natural, tangible, or fixed; but constitutes a sort of expression that is intangible, borderless, and suffused through cultural regulation and social norms rather than biological imperative. As I will argue, this account moves gender from a set of cultural expectations—and instead offers it as a series of intangible forms of expression, an essence that is not natural or fixed, but instead resembles the mutable, highly expressive and transitory qualities of intellectual property.

If we reconceptualize the intellectual properties of gender, we decouple them from a set of expectations mapped onto the vagaries of biological identity, and map an entirely new host of possibilities for gender relations to operate outside of the boundaries of law's fixedness on identity. But this project is not only a descriptive one. It also provides us an important set of normative possibilities stemming from property law, intellectual property theory, and the management of resources. Here, I argue that the metaphor of the *commons* provides us with an important framework with which to examine the importance of gender diversity and fluidity. Instead of looking at the relationship between male and female as: (1) a series of polarities, or (2) a continuum, I propose looking at gender through the lens of (3) a commons, which implies a nonexclusive, unlimited access to both polarities, and to the myriad host of possibilities that lie within human expression.

My argument in this paper will proceed in three main parts. Part I begins by focusing on the theoretical relationship between biological sex and tangible property, and posits that the law's treatment of biological sex within Title VII jurisprudence posits a sort of polarity of male and female, which tends to disadvantage transgender individuals through an implicit imposition of scarcity. In Part II, I turn to the relationship between gender and sex, and argues that gender is more like intellectual property, in contrast to biological sex. Relying on Judith Butler's treatment of gender performativity, I argue that the law should also demonstrate the intangible essences of gender as a fluid and expressive set of possibilities, rather than a fixed set of presumptions linked to biology. In Part III, I turn to the normative prescriptions present in the relationship between

property and intellectual property, and suggest that we think about the relationship between gender and sex as a sort of intellectual commons. Drawing on Donna Haraway's work on cyborgs and cyberfeminism, this section offers a metaphorical reconceptualization of gender as a commons, as a set of nonexclusive, open access regimes that enables individuals to appropriate objects—to play with gender—in order to freely shift and rebuild multiple aspects of their persona.