

TRANSGENDER INTRASECTIONALITY:
RETHINKING ANTI-DISCRIMINATION LAW AND LITIGATION

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INTRODUCTION

As the media frenzy over the transition of Ms. Caitlyn Jenner has shown, transgender awareness is ever evolving and accompanied by major legal transformations worldwide. Away from the spotlights directed at Ms. Jenner, gender variant individuals are still struggling daily with discrimination once others become aware of their transgender status. Like many other gender variant people worldwide, Ms. Jessi Dye, a young transwoman from Alabama, was fired from her job for her gender performance.¹ On her first day of work at a nursing home, after completing the new hire paperwork and employee training, Jessi was called in to see her supervisor, who bluntly

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¹ *Alabama Nursing Home Settles Discrimination Case After Firing Transgender Woman*, SOUTHERN POVERTY LAW CENTER (Sept. 10, 2015), <https://www.splcenter.org/news/2015/09/10/alabama-nursing-home-settles-discrimination-case-after-firing-transgender-woman> [<https://perma.cc/7TZF-Q2CQ>]. Jessi’s case is not exceptional or local. It manifests one aspect of the daily struggle for access to resources and opportunities of gender variant individuals.

asked Jessi “what are you?”² Jessi replied that she was a transwoman in transition,³ commenting, “That’s not a question you ask me as a person, it’s a question you ask some little knickknack.”⁴ The supervisor asked her what was he “supposed to do with [her]? And how she expected to be employed when she “looked one way” but was actually “another way.”⁵ Ms. Dye was terminated, effective immediately, and instructed to gather her belongings and leave the facility.⁶

What does it mean to “look one way” but be “another way?” It is not hard to imagine what Jessi’s supervisor meant; he expected her to dress in masculine attire, to talk “like a man,” to use male pronouns, and to have other masculine traits, such as in the way she walks, speaks, and styles her hair, to name a few. What Jessi’s supervisor was expecting of her, based on the fact that she was assigned ‘male’ at birth, was that Jessi signify herself as “a man,” using external markers attributed to masculinity to perform her gender identity (or rather, the gender identity that she was assigned at birth). When she failed to perform the masculinity that was expected from her, she was no longer a subject, but had transformed into a “knickknack” deserving of the question “what are you?”

The demand for gender conformity was made even clearer in another recent case of a young transman from Louisiana who was fired from his job after he refused to sign a written agreement forcing him to dress according to the company’s “female dress code.”⁷ Mr. Tristan Broussard was hired by First Tower Loan in 2013 for a manager trainee position.⁸ Tristan, who had been living full time as a man since 2011, reported to work dressed, groomed and conducting himself according to the professional standards suitable for his gender.⁹ He was asked to provide a valid ID in order to complete the paperwork for new employees.¹⁰ Tristan provided his driver’s license, which listed his sex as “F.” The supervisor asked Tristan about it and he replied that he is a transgender man.¹¹ A week later, the vice president of the company traveled to the branch, took Tristan and his supervisor aside, and informed Tristan that the company does not want him to dress “like a man.”¹² The VP told Tristan that it would be confusing to the customers, and stated that if

² *Id.*

³ The process of changing one’s sexual characteristics with the goal of gender/sex affirmation, confirmation, or realignment. I am purposely noting all these linguistic options because different people describe their transitioning differently, and even the term transition itself is contested because it implies one is now something they were not before. I am using this term to refer to people accessing medical technologies of hormone replacement therapy and different surgical procedures that change one’s secondary and primary sex characteristics.

⁴ Bryce Covert, *Woman Fired for Being Transgender Scores a Victory*, THINKPROGRESS (Sept. 11, 2015), <http://thinkprogress.org/economy/2015/09/11/3700662/transgender-employment-settlement> [https://perma.cc/8RSJ-3A8X].

⁵ SOUTHERN POVERTY LAW CENTER, *supra* note 1.

⁶ Bil Browning, *Fired Trans Employee Asked “What Are You?” Settles Discrimination Case*, THE ADVOCATE (Sept. 15, 2015), <http://www.advocate.com/transgender/2015/9/15/fired-trans-employee-asked-what-are-you-wins-discrimination-case> [https://perma.cc/R2M5-SCE3].

⁷ Complaint & Jury Demand, *Broussard v. First Tower Loan, LLC*, No. 2:15-cv-01161-CJB-KWR at ¶ 36 (E.D. La. Apr. 13, 2015).

⁸ *Id.* at ¶ 2.

⁹ *Id.* at ¶ 22.

¹⁰ *Id.* at ¶ 23.

¹¹ *Id.* at ¶ 25.

¹² *Id.* at ¶ 12.

Tristan wants to be employed as a man he needs first to undergo surgery.¹³

It should be noted that Tristan's gender performance is not ambiguous,¹⁴ as the company did not suspect him of being transgender prior to seeing his ID. Moreover, the Equal Employment Opportunity Commission found no evidence that "any customer complained about Mr. Broussard because of his manner of dress or grooming, or otherwise expressed any confusion or concern as a result of Mr. Broussard's presenting as a man."¹⁵ One could argue that if Tristan, a bearded masculine man, would have been forced to wear women attire, that would be far more "confusing" for the customers. The VP presented Tristan with the following written statement he was required to sign as a condition of continued employment: "I understand that my preference to act and dress as a male, despite having been born a female, is not something that will be in compliance with Tower Loan's personnel policies. I have been advised as to the proper dress for females and also have been provided a copy of the female dress code."¹⁶

Why did the company insist that Tristan commit in writing to dress "as a woman?" Was it because they truly believed that a masculine, bearded man wearing a dress would be less "confusing" for their customers? Or was it because they imagined how Tristan should dress, walk, and talk based on an external sign, such as the sex designation on his ID? Why did they demand that Tristan undergo surgery? Was it because they thought that customers would or should be able to "look inside his pants?" Or was it because they were concerned about the lack of cohesion between the sex he was assigned at birth, his gender, and his gender presentation? When Tristan refused to perform femininity, as when Jessi failed to perform masculinity, he was no longer a subject deserving equal treatment. In the eyes of their employers, Tristan and Jessi were not a "legal man" or a "legal woman."

What does it mean to legally perform one's gender identity? As I will suggest, in law, as in other social constructs, performance refers to the process by which certain configurations of external markers (such as those listed above) come to signify an "inner truth" about who you are, your characteristics, and your abilities.¹⁷ The signifiers can include all sorts of information that can be marked on the public body, ranging from bodily gestures such as attire to, for example, the sex marked on a government-issued ID.¹⁸ Every piece of external information (which can be read by an outside gaze) that signifies one as having a coherent identity stemming from some stable inner core can be understood as part of one's performance. What rendered Jessi's femininity and Tristan's masculinity "fake" in the view of their employers was the fact that it did not correlate to what was believed to be Jessi's and Tristan's inner truth. Why was Jessi's supervisor concerned about her ability to work with the residents of the nursing home? Why was Tristan's boss claiming that he would confuse the customers? Because Jessi's and Tristan's attributes did not cohere to socially

¹³ *Id.* at ¶ 35.

¹⁴ Tristan's gender performance can be seen in his YouTube interview regarding the case. Southern Poverty Law Center, "*I was fired solely because of my gender*," YOUTUBE (Apr. 13, 2015), <https://www.youtube.com/watch?v=L-eKZA6og3o> [<https://perma.cc/UM4C-D7GR>].

¹⁵ EEOC's Complaint & Jury Demand, *Broussard v. First Tower Loan, LLC*, No. 2:15-cv-02500-CJB-SS (E.D. La. Sept. 8, 2015).

¹⁶ *Broussard*, No. 2:15-cv-01161-CJB-KWR at ¶ 32.

¹⁷ See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (Routledge Classics ed. 2006) (discussing how is a reiterated social performance rather than the expression of a prior reality).

¹⁸ It seems that Mr. Summerford confirmed Jessi's transgender status by looking at her driver's license, which listed her sex designation as "male." Browning, *supra* note 6.

accepted norms of gender, they were not able to both “look” and “be” the same thing.¹⁹

As I will further show, the framing of anti-discrimination law through protected classes and the law’s use of the outside gaze to conclude whether or not an act is discriminatory, show that the law utilizes performance in deciding cases and allocating rights. The better you can cohere to an identity included in a protected class, the better your chances of gaining legal recognition; if you can prove you are a legal “woman,” you can be protected as one. In order to decide whether you are a “legal woman” or a “legal man,” the court will often de facto evaluate your performance.

I opened with the stories of Jessi and Tristan, whose experiences are by no means unique but rather common encounters by gender variant people in the neo-liberal market. I ask the reader to bear this in mind while reading, as it will help us be attuned to the vivid connection between legal ideals and actual lived experiences of gender variant people. I will explore the ways performance is intertwined with the ways the law²⁰ thinks about equality within the anti-discrimination framework. I will question the legal impact of those “inner truths” of one’s identity, suggesting that this concept serves to police the legal subject and is used in the (mal) distribution of resources and opportunities. I will not argue that identity is something one takes on and off at will, but rather that the social meaning attached to one’s performance is perpetually being generated and charged with value in our societies, and that these mechanisms are reflected in the law, if not upheld by it.

I aim to put forth a gender variant point of view on rights-based advocacy. In Part A, I will review the current discussions in trans studies’ scholarship and trans political communities regarding the use of legal rights as an instrument for change. On one side of the debate, following civil rights tactics, there are those who want to use the law to promote inclusion. On the other side, respecting critical theories of social change, there are those who consider the law to be a major player in constituting the social systems that exclude gender variant people. I will read current debates within their historical relation to the gay and lesbian rights movements as well as to feminism and critical race theory. I will maintain that although focusing on legal inclusion has significant drawbacks, it is still an area of change that cannot be disregarded altogether by critical theories.

In Part B, I will claim that exclusion from resources and opportunities of gender variant people is inextricably linked, legally as well as affectively, to gender performance. I will suggest that we can bring the performativity aspects of the law forward by applying an “intrasexual” analysis of the protected classes relating to gender variant people within employment anti-discrimination law and litigation (ADL). Showing how it is not clear whether one is exposed to harm due to their “sex,” “gender,” or “sexuality” in the case of gender variance, I will suggest that a critical reader should not only be attentive to the intersections of different categories, such as race and sex, but to the merging of experience and practice within a given category, which I refer to as “intrasexuality.” The intrasexual analysis, continuing the well-known intersectional legal analysis, will allow me to explore the role of performance in the legally protected categories of ADL. Intrasexuality will allow me to think about why one is or is not considered a woman in

¹⁹ As Jessi’s complaint reveals, she was questioned about her sex, gender identity, and physical anatomy. SOUTHERN POVERTY LAW CENTER, *supra* note 1. Tristan, on the other hand, was asked to undergo surgery.

²⁰ It is important to note that when I refer to “the law,” I am looking at the law broadly as a site of social power, yet I do so by looking at the sphere of rights-based litigation and specifically through the lens of anti-discrimination law. I will analyze the structure of common law ADL statutes and court proceedings. It should be noted that the Civil Rights Act of 1964 is oriented around the notion of “legal categories” or “protected classes,” which describe the characteristics that should not be taken into account when making a decision regarding an individual. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

relation to how sex, gender, and sexuality are constituted legally through performance. My inquiries into the intrasectionality of the sex category with respect to equality will set the stage for the claim that ADL is intertwined with performativity.

In Part C, I will look not at what “the law says about itself”²¹ but at what the law actually does. I will analyze the transgender legal claim for equality by using the Butlerian drag queen show metaphor, in which what is supposedly “fake” is revealed for all to see. I will focus on the implications of protecting gender variant individuals from discrimination without accounting for the social mechanisms that make it possible. I will suggest that the law’s continued investment in legal gender stability is upholding the system that excludes gender variants and others. I will point out the limitation of current inclusionary paradigms and suggest the possibilities of an intrasectional performative analysis of existing law. I will try and formulate the basis for a legal analysis that addresses the actual lived experience of gender variance and gendered (mal) distribution of life chances. I will then offer a reformulation of anti-discrimination claims by shifting the basis of comparison. Instead of considering how “legal men” are treated differently than “legal women,” I will ask whether one was treated differently than someone whose gender performance coheres to socially accepted norms. My conclusion will show how using the performative analysis offered here would enable ADL to better serve the people it aims to protect.

I. TRANS LIBERALS VERSUS TRANS RADICALS – OR, WHAT IS GENDER VARIANCE?

As I set out to locate the intersections of ADL and performativity by looking at gender variant exclusion, I find myself limited by the tool I am using – language. It is hard to decide how to describe the people I wish to discuss. Many writers have chosen the word “transgender” as an umbrella term referring to all individuals “whose gender identity or expression does not conform to the social expectations for their assigned sex at birth,”²² in that it refers to a range of identities and behaviors that challenge the accepted social norm of genders. It is a political term that arose outside the scope of medical discourse and was adopted by activists and academics alike. The term offered the community possibilities to articulate itself without referring to the medical pathology of the term “transsexual,” allowing new ways to describe oneself outside of the narrow and normalizing enforced medical narrative.²³

In recent years, the term “transgender” has been criticized for erasing the differences in experiences and struggles of different groups (mainly the needs and desires of self-identified transsexuals). Others have criticized the term’s connection with post-structuralist theory that implies the nonexistence of any gender and thereby delegitimizes the desire to belong to one of the two socially accepted genders.²⁴ Other people who transgress gender do not identify with this term at all and use a variety of other words to describe themselves and their experiences.²⁵ Some have challenged the way in which the term “transgender” internalizes the dichotomies between gender and sexuality, due to which the term fails to capture the real life experiences and identities of many and replicates the apparatus of narrowing the human experience (a criticism the term itself makes

²¹ Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 442, 471 (2011).

²² TRANSGENDER RIGHTS xiv (Paisley Currah et al. eds., 2006).

²³ *Id.* at 152.

²⁴ VIVIANE NAMASTE, *INVISIBLE LIVES: THE ERASURE OF TRANSSEXUAL AND TRANSGENDERED PEOPLE* (1st ed. 2000).

²⁵ David Valentine, “*I went to bed with my own kind once*”: *the erasure of desire in the name of identity*, 23 LANG. COMMUN. 123, 135 (2003).

toward the medical term “transsexual”).²⁶ Respecting the critiques, I will use the terms “trans” and “gender variant” to talk about people whose gender presentation does not conform to the social expectations attached to the sex category they were assigned at birth. I will use the term “transgender” to refer to the political movement. When I refer to people who identify themselves like Jessi and Tristan, I will use the term they have picked.

Trans scholars and legal advocates are divided on the question of the use of ADL as a tool for promoting the interests of the trans communities. The main controversy is whether ADL serves underprivileged gender variant individuals or merely redefines the borders of gender to include very specific configurations of gender variant identities and practices. Agreeing with the position that abandoning rights-based litigation altogether is a privileged position,²⁷ I will argue for the possibility of incorporating substantial aspects of the critiques against ADL into a viable legal strategy for rights-based litigation. Acknowledging that the law is a tactic of social power,²⁸ I will try to produce an outline for a tactical use of the law. I will argue that by deconstructing the legal phenomena of discrimination, we might be able to promote a discussion about the law’s significant part in creating and upholding social mechanisms and (mal) distributing resources and opportunities²⁹ that exclude, among others, gender variant identities and practices.

Before I delve into those critiques and suggest a nuanced perspective on the controversy centered on the relation between the subject and society, it is important to understand how the social system of gender works in respect to trans identities and practices. The socially accepted norms of gender, sex, and sexuality, i.e. heterosexual norms, distinguish between two diametrically opposed sexes from which are derived two diametrically opposed genders: the masculine man who was assigned male at birth, and the feminine woman who was assigned female at birth.³⁰ Under these norms, any sexual or gendered identity or practice is set in relation to a normative ideal of heterosexuality, i.e. a sexual relation between male-assigned men and female-assigned women.³¹ There is an alleged essential and inherent difference between men/males and women/females that is reflected in their characteristics and abilities.³² Those differences are perceived to be natural, and this justifies the well-known social hierarchy of gender headed by non-trans men. This is a complex system of values which we are all forced to live by from the moment we are categorized at birth as either “boys” or “girls,” usually based only on visible genitals.³³ This value system teaches us the

²⁶ Spade, *supra* note 21.

²⁷ Kylar Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, TRANSGENDER RIGHTS 93, 99 (Paisley Currah et al. eds., 2006).

²⁸ Michel Foucault, *Governmentality*, THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 95 (Graham Burchell et al. eds., 1991).

²⁹ DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* 29–30 (2011).

³⁰ Stevi Jackson, *Gender, sexuality and heterosexuality: The complexity (and limits) of heteronormativity*, 7 FEM. THEORY 105, 106 (2006).

³¹ *Id.* at 107.

³² Catharine A. MacKinnon, *Reflections on sex equality under law*, 100 YALE L.J. 1281, 1290 (1991).

³³ It is interesting to note that this very early sex classification is allegedly based in actual biology and not on mere social ideology. However, it is in this very moment that one can view how a social value is attached to a non-significant biological trait, such as visible genitals. This one biological trait that is recoded about the newborn, among many others that are actually used to determine scientific sex (which is considered a spectrum), affects how they will be treated by everybody with whom they encounter – what baby clothes they will be dressed in, what toys they will get, and even what kinds of compliments their parents will receive regarding them from strangers in the street. Obviously this has no real

social role we must portray as either “masculine” or “feminine.” As I will illustrate, society demands that all of us be heterosexual feminine female/women or heterosexual masculine men/male and punishes anybody who dares to cross these borders.³⁴ Being inside the border is part of what constitutes our subjectivity, and our citizenship.

Trans identities are also created within this dichotomous set of norms. From the perspective that accepts the mutual exclusivity of sex and gender, trans people are those who lack a correlation between their subjective experience of gender and their birth-assigned sex. Because trans intelligibility is formed in a society that sanctifies this perspective, trans people often feel that something is “wrong” with them.³⁵ This feeling is what medical discourse refers to as gender dysphoria,³⁶ a feeling sometimes described as being born in the “wrong body,”³⁷ which is understood as arising from an inherent discrepancy between birth-assigned sex, gender identity, and gender expression.

However, the experience of discrepancy itself exposes the traditional tie between sex, gender, and sexuality as non-universal. It also reveals the dichotomous existence of two genders to be socially inflicted. The fact that our society produces individuals who do not easily fit into the existing gender/sex order challenges the naturalization of this order and unearths its socio-political dimension.³⁸ Hence, the experience of dysphoria and distress is not the mere result of a subjective individual’s discrepancy of sex and gender; rather, it is the effect of insubordination, deliberate or not, to the social prohibition on crossing the borders of sex, gender, and sexuality. This is the trans paradox: on the one hand, what constitutes trans identity is the discovery of discrepancy in the correlation between gender and sex, and a realization that the system of two all-inclusive mutually exclusive categories is too narrow to reflect one’s experience. On the other hand, the trans person can only be a part of society if he or she aspires to adopt a normalized behavior. In other words, in order to be legitimized in their gender non-conformity, the trans person must aspire to take part in the same gendered social structure that caused their non-conformity in the first place.³⁹

My analysis of ADL from a gender variant perspective will follow Judith Butler’s analysis of gender performativity.⁴⁰ The Butlerian analysis points out the falseness of the social deductive process; that when you see someone’s presentation (their clothes, hair style, diction, presence, etc), you assume that presentation is an indication of a specific “sex,” and that “sex” correlates to “gender,”⁴¹ which in turn indicates “sexuality.” Following Derrida, Butler argues that there is no true “origin” that is represented, but that the presentation is what constitutes “sex” as an origin from

biological significance to the newborn and says nothing about their characteristics and abilities.

³⁴ BUTLER, *supra* note 17, at 190.

³⁵ Sandy Stone, *The “Empire” Strikes Back: A Posttranssexual Manifesto* (1993), http://w2.eff.org/Net_culture/Gender_issues/empire_strikes_back.html [<https://perma.cc/3RL6-W9WG>].

³⁶ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-5* (5th ed. 2013).

³⁷ JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES* 136 (1st ed. 2004).

³⁸ *See generally* Dean Spade, *Resisting medicine, re/modeling gender*, 18 *BERKELEY WOMEN’S L.J.* 15 (2003) (discussing the concerns with relying on medical evaluation of gender identity in legal work towards trans equality).

³⁹ *See generally* Ido Katri, *You Scare the Customers: Mechanism of Gender Policing in Anti-Discrimination Law in AN OTHER SEX- ISRAELI QUEER THEORY* (Aeyal Gross, Amalia Ziv and Raz Yosef eds. Resling Publishing House, 2016).

⁴⁰ BUTLER, *supra* note 17.

⁴¹ Understood here as “gender roles.”

which gendered sexual acts flow out to the public body. In this sense, gender attributes and acts are “the various ways in which a body shows or produces its cultural signification.”⁴² These acts are public, meaning that what constitutes them is their ability to be read from the outside, as “they are instituted in an exterior space through the stylization of the body.”⁴³ Although Butler talks directly about “bodily gestures, movements, and styles of various kinds,”⁴⁴ based on her own description of the repetitive gender act, it is clear that all actions that signify one as having a coherent identity constitute performance. I will return to discuss Butler’s main theoretical standpoint on this issue when I present the case of discrimination of a trans claimant.

Moreover, as I will further elaborate, only people who follow hegemonic lines in everything *but* their gender identity can ever fully adopt a normalized behavior that would render their transgression coherent. At this point it is enough to bear in mind the role coherence plays in both ADL and trans social integration, where being read from the outside as a “normative” citizen is key for making intelligible claims.

A. *The First Gay Divorce: The Separation of Sexuality and Gender*

Transgender as a category of identity and community organizing emerged in the 1990s, in the background of the development of the gay rights movement and lesbian feminism in regard to social regimes of sexuality and gender.⁴⁵ In order to understand how transgender came to be, we need to understand how the gay and lesbian struggles helped to unlink sexuality and gender. Transgender as a concept emerged as the shelter for those neglected by the new gender normative model of homosexuality. This process shaped the transgender political movement in different ways, forcing it to aspire to be more inclusive while at the same time replicating the exclusionary mechanisms that constitute the current homosexual heyday.⁴⁶

Modern western norms regarding gender and sexuality have developed in a process that has stretched over centuries.⁴⁷ Up until the middle of the twentieth century, what we would consider under present discourse to be sexuality and gender were bundled up in the category of deviant behavior.⁴⁸ When Foucault describes the “invention” of homosexuality as a disorder – a kind of “androgyny” – in one of the most famous passages from *The History of Sexuality*,⁴⁹ he sheds light on how homosexuality was linked as a category of being and practice with what would later be called “gender performance.”⁵⁰ Homosexuality was seen as a gender behavior; homosexual men

⁴² BUTLER, *supra* note 17, at 192.

⁴³ *Id.* at 191.

⁴⁴ *Id.*

⁴⁵ See generally DAVID VALENTINE, *IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY* (2007) (discussing the emergence of trans issues and community organizing and their connections to the gay and lesbian rights movements).

⁴⁶ See BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 3 (2007) (discussing the exclusionary aspects of the new gay inclusive citizenship with respect to neoliberal forms of self-governance of heterogeneity of identity and practices).

⁴⁷ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. 1: AN INTRODUCTION* 62 (Reissue ed. 1990).

⁴⁸ See generally SUSAN STRYKER, *TRANSGENDER HISTORY* (1st ed. 2008) (discussing transgender history and developments in the post-World War II transsexual and transvestite communities).

⁴⁹ FOUCAULT, *supra* note 47, at 43.

⁵⁰ See generally Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 *THEATRE J.* 519 (1988) (arguing that gender is not a stable identity but is rather “an identity tenuously

were associated with feminine behavior and desires,⁵¹ and lesbian women, if considered at all,⁵² were only recognized when they displayed typical masculine behaviors.⁵³ As Foucault argues, the social division between deviant and normal, as well as public policing, was less directed at deviants and more towards the “normative.” By focusing on the deviant and the process of deviation, the “normative” becomes transparent, gaining an ontological status as the “neutral” and “normal.” Foucault explains how this external process of framing the borders of “normative” behavior has been internalized to self-discipline.⁵⁴ By framing what is improper, the “normative” defined the borders of the proper, as well as the borders between subject and object, and citizen and non-citizen. Whoever is able to self-govern their subjectivity so that it remains within the lines of “normal” becomes a bearer of rights.⁵⁵ Citizenship is thus a strategy of governance.⁵⁶

The framing of the deviant as opposed to the normal encompasses what it means to be a “good citizen.” By looking at the process of becoming a citizen with respect to its normalizing power,⁵⁷ we can understand how it relies on mutually exclusive categories of belonging and otherness (*inter alia* sex/gender),⁵⁸ while at the same time affixing the rights-bearing status of the categories.⁵⁹ As part of the ongoing process of constantly constituting citizenship through mutually exclusive categories of belonging and otherness, the gendered/sexed deviant started to break from within, giving birth to a new gender normative homosexual subject. From the early to mid-twentieth century, sex and gender deviance began to be understood as separate and mutually exclusive in both medical discourse and political movements for recognition.⁶⁰

constituted in time... through a stylized repetition of acts”).

⁵¹ VALENTINE, *supra* note 45, at 41.

⁵² MAD FOR FOUCAULT: RETHINKING THE FOUNDATIONS OF QUEER THEORY, 43–83 (2009).

⁵³ VALENTINE, *supra* note 45, at 46.

⁵⁴ MICHEL FOUCAULT, TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT (Luther H. Martin, Huck Gutman, & Patrick H. Hutton eds., 1988).

⁵⁵ COSSMAN, *supra* note 46, at 14.

⁵⁶ *Id.* at 5. (viewing citizenship as “invoking the ways that different subjects are constituted as members of a polity, the ways they are or are not granted rights, responsibilities, and representations within that polity, as well as acknowledgement and inclusion through a multiplicity of legal, political, cultural and social discourse. It is about the way subjects are constituted as citizens and the way citizenship itself is constituted.”). Having practiced law within the Israeli legal system, where the political status of individuals is heavily stratified and the government effectively controls populations through different legal norms, I am aware of the universalism of the term “citizenship.” However, Cossman’s articulation of the subject’s constitution through citizenship allows me to go beyond the classical understanding of citizenship as a mere bundle of political rights.

⁵⁷ *Id.* at 8.

⁵⁸ *Id.* at 2–3, 5.

⁵⁹ We should also consider how this understanding of citizenship as an all-inclusive regime that distributes all kinds of privileges affectively impacts those it excludes in a way that shapes their demands for inclusion. While it is beyond the scope of this work, I suggest that this affective impact is significantly noticeable in the formulation of the transgender community in the following pages.

⁶⁰ It should be noted that the modern genealogy of gender as a separate concept comes from the work of the sexologist John Money. Harry Benjamin later adopted this distinction. *See generally* HARRY BENJAMIN, THE TRANSEXUAL PHENOMENON: A SCIENTIFIC REPORT ON TRANSEXUALISM AND SEX CONVERSION IN THE HUMAN MALE AND FEMALE (1966) (presenting the first diagnostic criteria for transsexualism). When feminism later adopted the concept of “gender,” it did so in a different way. Sexologists like Money and Benjamin considered gender an inherent stable truth, whereas sex was an unstable factor open to manipulation through modern science. In contrast, feminism saw sex as inherent and gender as unstable and social. *See generally* JENNIFER GERMON, GENDER: A GENEALOGY OF AN IDEA, 23–62 (2009) (analyzing the

Gay and lesbian liberation movements framed their identities and practices through the new concept of sexual orientation, an ontological characteristic that is both internal and invisible.⁶¹ In other words, they claimed that one's sexual identity, i.e. sexual orientation, is inherently different from gender.⁶² One of the main tactics of the homophile movement⁶³ was to adopt a gender normative model of homosexuality, shedding away the image (and reality) of "fairies."⁶⁴ This allowed gay liberation to promote that idea that "we are just like you" but for one invisible (and hence private) aspect of our inner world that has no effect on the public sphere.⁶⁵ A similar course, but from a very different political angle, was taken by the 1970s lesbian-feminists when they rejected the butch-femme model and transwomen participation to give preference to the "Womyn-born-Womyn" gender normative model of lesbianism.⁶⁶ This gender normative model helped lesbian-feminism to claim unity of all women based on biological "truth" of birth-assigned sex.⁶⁷ Even though the homophile movement and lesbian-feminism employed different tactics, they both made use of the idea that sex and gender exist in two separate spheres to promote their goals.⁶⁸ Both of these movements rejected gender variant identities and practices, i.e. "visible" deviants, no matter what those deviants called themselves.⁶⁹

contemporary ideologies of gender with a particular focus on John Money's work to demonstrate the influence of his ideas on what it means to be a sexed subject). Valentine can help us understand the link between these two seemingly contradictory approaches through his description of the gay movement's efforts to de-pathologize homosexuality through gender normativity. VALENTINE, *supra* note 45, at 54–55. Notably, when 'homosexuality' was removed from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, 'Gender Identity Disorder' was added. *Id.* This category encapsulated transsexuals and others who engaged in visibly gender variant behaviors and who had not been explicitly recognized in the DSM. *Id.*

⁶¹ TRANSGENDER RIGHTS, *supra* note 22, at 149–150.

⁶² VALENTINE, *supra* note 45, at 53–59.

⁶³ Defined as a North American advocacy group of gay men "advocating or supportive of the interests, civil rights, and welfare of homosexuals." DICTIONARY.COM, <http://www.dictionary.com/browse/homophile> [https://perma.cc/2KKB-3F9P] (last visited Oct. 30, 2016). Interestingly, they choose the word "homophile" to distinguish themselves from the pathologies' term "homosexual," a move that the trans movement later adopted with the term "transgender."

⁶⁴ VALENTINE, *supra* note 45, at 42.

⁶⁵ DAVID L. ENG, *THE FEELING OF KINSHIP: QUEER LIBERALISM AND THE RACIALIZATION OF INTIMACY* 30 (2010).

⁶⁶ Emi Koyama, *Whose Feminism Is It Anyway?*, TRANSGENDER STUDIES READER 698, 700–701 (Susan Stryker & Stephan Whittle eds., 2006).

⁶⁷ VALENTINE, *supra* note 45, at 45–48.

⁶⁸ *Id.* at 55–59.

⁶⁹ *Id.* at 56. Also, Valentine argues that the distinction between biological sex, social gender, and sexual desire was a move that enabled a distinction between those who "visibly transgressed the conventional expectations of masculinity and femininity in clothing, occupation, or manner (the contemporary realm of 'gender,') and those who, despite being content to be socially men and women in concordance with their birth ascription, were erotically drawn to people of the same general embodiment ('sexuality')." *Id.* at 57. It should be noted that these histories are much richer and more complex, involving different historical events that occurred, such as the AIDS epidemic and the lesbian "sex wars," but I cannot discuss them in depth as part of this article.

B. *Single Axis Analysis and the Outsourcing of the Deviance*

The gender normative model was tailored with respect to mainstream norms of gender which were, and still are, white, able, and middle class.⁷⁰ These norms fail to make broader claims against the social systems in which sexed/gendered subjects/activities are given different social value. Such a critique would have to address the ways that the social exclusionary framework of class and race, among other factors,⁷¹ nourish and are nourished by the sex/gender paradigm. Women of color feminism has a long tradition of analyzing the binding power of universalized critique centered on a single axis of gender binary.⁷² The act of overlooking the ways in which gender domination is shaped by race, class, and culture⁷³ is the act of erasure of non-white, non-middle class, non-western, and differently-abled subjects.⁷⁴

While it is true that single axis analysis erases other differences, I argue that even within the category of sex/gender, the single axis focus creates erasure. I argue that this analysis is also relevant to the separation of sex, gender, and sexuality. By focusing on a single axis of critique, one ignores the impact of the other vectors of the experience of “gendered control.” By focusing on sexual orientation without accounting for gender policing, the critiques⁷⁵ effectively and affectively erase multilayered experience of gender variant identities and practices.⁷⁶ These critiques thus overlook socially exclusionary mechanisms created by elaborate systems of gendered/sexually stratified citizenship that are pivotal in linking different social values to identities and practices based on sex, gender, and sexuality.⁷⁷

It has been argued that white women integrated into the job market by hiring black women to do their housework.⁷⁸ Thus, white feminism did not change the gendered distribution of labor, it merely outsourced it to black women.⁷⁹ Paraphrasing this claim, I argue that when gays and lesbians adopted a gender normative model of homosexuality, they outsourced the deviance status to gender variant individuals. The rise of a political gay movement and lesbian-feminism in the mid to late twentieth century, which adopted a gender normative model, had in many ways “outsourced” the image of “perverseness” to gender variant individuals. The gender normative model of homosexuality, though useful in promoting certain issues such as gay marriage, did not have a significant disruptive impact on the social mechanisms that normalize society, the mechanisms Foucault claimed were served by the “invention” of homosexuality.⁸⁰ The later emergence of the category of transgender is rooted in this racialized and class inflicted history of ontological

⁷⁰ *Id.* at 199–201.

⁷¹ Such as culture, ableism, xenophobia, and other forces of exclusion, some we have not even named yet.

⁷² CHELA SANDOVAL, *METHODOLOGY OF THE OPPRESSED* 45–47 (2000).

⁷³ Among other factors. *Id.*

⁷⁴ *Id.* at 46.

⁷⁵ As well as transgender critique, as I will argue later.

⁷⁶ VALENTINE, *supra* note 45, at 201.

⁷⁷ Gayle Rubin, *Thinking Sex: Noted for a Radical Theory of the Politics of Sexuality*, in *CULTURE, SOCIETY AND SEXUALITY: A READER* 143, 149–153 (Richard Parker & Peter Aggleton eds., 1999).

⁷⁸ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 143–145.

⁷⁹ *Id.*

⁸⁰ Huffer points out in *MAD FOR FOUCAULT* that the processes stretched over centuries, and I will add that the process of “outsourcing” the invert to gender variant is a continuous part of this process and that even the rise of transgender identities, as I will further elaborate, is part of this continuum, *MAD FOR FOUCAULT*, *supra* note 52, at 62.

separation between “sex” and “gender.” The development of separate legal categories of sex, sexual orientation, gender identity, and expression continues the systemic oversight.

C. *From the Emergence of a Transgender Movement to Current Debates*

To reiterate the argument so far, as part of the claim of separation between the spheres of sexuality and gender put forward by the gender normative model of homosexuality, the role of “social deviance” was “outsourced” to gender variant people. With this context in mind, we turn now to explore the emergence of trans political identities. Trans identity emerged from the erasure created by the gender normative models of gay and lesbian political identities, with their specific underlying biases and their practices of gaining access to citizenship through essentialized identity claims. This will help us understand the current debates of trans advocacy for and against the use of rights-based claims.

As stated above, the emergence of “transgender” as a political identity and community dates back to the early 1990s when North American activist groups, as well as prominent academics and theorists, coined the term “transgender” as a political opposition to the medical term “transsexual.”⁸¹ The new term aspired to create collective demands for diverse groups, such as transsexuals, cross-dressers, transvestites, androgens, gender non-conforming individuals, and even butch women or sissy men, as well as drag performers.⁸²

Transgender was not only a response to the separation of sexuality and gender, but a continuance of this separation. Transgender refers to individuals whose “gender identity” or “gender expression” does not conform to the “social expectations for their assigned sex at birth.”⁸³ Hence, gender is separated from sex. This is noticeable by the move from “trans-sexual” to “trans-gender.” One can be both transgender and gay not because gender and sexuality are intertwined, but because transgender refers to their “gender” which is separate from their “sex” and “sexuality.”

The transgender claim is that all the different identities and practices that are grouped together under the “transgender umbrella” share a “common political investment in a right to gender self-determination.”⁸⁴ As in many other social movements, the liberal and the radical transgender advocates disagree on the tactics that should be taken to secure a right to gender self-determination that would ensure access to resources and opportunities. While the liberals advocate for inclusion, for the recognition of trans identities, the radicals argue that it is the social structure of gender that creates the exclusion of gender variant persons in the first place. That is, one side asks to allow trans persons to participate in the given social order and thereby create change, and the other side asks to change the social order and thereby create redistribution of resources and opportunities. It is a debate about the meaning of belonging, which questions who exactly are the beneficiaries of the demands made in the name of the collective. These tensions over whom the transgender movement represents and how it does so have been at the heart of the transgender debate over the use of ADL since the emergence of the movement. While the liberal side strikes for inclusion in ADL in hopes that changing the law would change lives,⁸⁵ others are skeptical about the law’s ability to create

⁸¹ Much like the attempt to steer away from the term “homosexual” with “homophile.”

⁸² As Susan Stryker notes in *TRANSGENDER HISTORY*, this category is still “under construction” where new identities such as “genderqueer” or “bigender” are added and others such as “drag” are removed. STRYKER, *supra* note 48.

⁸³ *TRANSGENDER RIGHTS*, *supra* note 22, at 5.

⁸⁴ *THE TRANSGENDER STUDIES READER* xi (Susan Stryker & Stephen Whittle eds., 1st ed. 2006).

⁸⁵ *BROADUS*, *supra* note 27.

social change, or to give up its role in upholding the system of exclusionary categories.⁸⁶

D. Liberal Trans Legal Strategies

The liberal legal-academic movement aspires to advance social acceptance of trans people by developing a progressive discourse of fundamental preconditions of the phenomena in order to justify inclusion.⁸⁷ Within this movement, there are those who take different stands on the essentializing of trans identities. Some stress the ability of the law to adapt to less essentialist categories, such as gender expression and identity. Others argue that there is no problem with using the current legal framework, insofar as it applies to trans persons who are fine with identifying as male/men or female/women or that can articulate their demand within this framework.⁸⁸ Then there are those who argue that we need to expand the categories to include gender identity and gender expression precisely so that trans persons need not fit within the categories of male/female as such. The liberal attempts are trying to complicate the legal categories, but they are still working within the law. The liberal trans tactics follow similar tactics as the gay movement, aspiring to secure inclusion in anti-discrimination and hate-crime legalization for “gender identity” or “gender expression” and to promote the visibility of “positive” transgender images in the public sphere by educating the general public as well as specialized professionals such as medical staff, social workers and educators.

The inclusive approach has had some important success worldwide in recent years. The need to protect trans people from discrimination echoes globally and has reached the highest international institutions.⁸⁹ Federal, state, and local authorities have enacted various laws and policies aimed at protecting trans individuals. For instance, state legislation forbidding discrimination of transgender persons in employment now exists in Washington, Oregon, California, Nevada, Utah, Colorado, New Mexico, Minnesota, Iowa, Illinois, Vermont, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, and the District of Columbia.⁹⁰ Under the Obama administration, the federal government has seen a tremendous shift in providing access to health care and identification documents for transgender people through administrative

⁸⁶ Dean Spade, *For Those Considering Law School* (2010), <http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School-Nov-2010.pdf> [https://perma.cc/9SPT-KNLP].

⁸⁷ THE TRANSGENDER STUDIES READER, *supra* note 84, at 3–4; THE TRANSGENDER STUDIES READER 2, 3–5 (Susan Stryker & Aren Aizura eds., 1st ed. 2013).

⁸⁸ BROADUS, *supra* note 27.

⁸⁹ For example, in June 2011 the United Nation Human Rights Council upheld that the protection against discrimination and violence on the basis of gender identity is part of the Universal Declaration of Human Rights and called for the use of human rights law to address the problems faced by transgendered people. Human Rights Council Res. 17/19, U.N. Doc. A/HRC/17/L.9/Rev.1 (2011). In September 2014, the United Nations Human Rights Council adopted a second decision that reflected grave concerns with acts of violence and discrimination in all regions of the world and called for sharing of good practices and ways to overcome violence and discrimination. Human Rights Council Res. 27/32, U.N. Doc A/HRC/27/L.27/Rev.1 (2014).

⁹⁰ See *Equality Maps*, MOVEMENT ADVANCEMENT PROJECT, <http://www.lgbtmap.org/equality-maps> (last visited Jan. 4, 2016) [https://perma.cc/U67Z-G543] (detailing transgender equality legislation across the U.S.). See Cal. Penal Code § 422.56; Colo. Rev. Stat. Ann. §§ 24-34-401(7.5); Haw. Rev. Stat. § 489-3; 775 Ill. Comp. Stat. 5/1-103(O-1); Iowa Code Ann. § 216.6; Me. Rev. Stat. Ann. tit. 5, § 4553(9-C); Minn. Stat. Ann. § 363A.03, subd. 44; N.J. Stat. Ann. § 10:5-5(rr); N.M. Stat. Ann. § 28-1-2(Q); Or. Rev. Stat. § 174.100(6); R.I. Gen. Laws § 11-24-2.1; Vt. Stat. Ann. tit. 1, § 144; Wash. Rev. Code § 49.60.040(26); D.C. Code § 2-1401.02(12A).

prerogatives.⁹¹ However, with the dawn of the Trump administration, much of this progress might be undone. Also notable is the Employment Anti-Discrimination Act that passed in the Senate in 2013 but died in the House of Representatives. This bill, introduced in every congress since 1994 (except for the 109th), was changed in 2007, after long deliberation, to include a protection on the basis of gender identity.⁹²

There is no denying that recent years have seen tremendous developments in public intelligibility related to the transgender community and its rights, leading to the rise of the transgender movement dubbed as the “next civil rights frontier.”⁹³ However, these achievements have been denounced by more radical transgender advocates for failing to promote significant change in the lives of the community members they aim to serve,⁹⁴ especially those in the margins of the community who struggle with multiple grounds for exclusion, and whose identities and practices exceed the single axis of gender identity by way of non-hegemonic sexualities, race, class, and ability.⁹⁵ Countering these criticisms, radical trans advocates have shifted away from identity-based claims and ADL to focus on the regulatory scheme where gender currently upholds the system of mutually exclusive identity categories.

E. Radical Trans Legal Analysis

The radical trans claim is a distributive one, trying to locate the role of gender identity within the stratification of social goods. It stems from the tension between the heterogeneity of gender variant identities and practice and the collective term transgender. Following queer theory, feminist theory, and critical race theory, the radical analysis tries to reflect the ways in which gender variant exclusion is part of a greater social scheme where merely “changing the law” is not enough but rather the law is a vital part of the scheme itself.⁹⁶ Scholars, such as David Valentine, have noted that the life and experiences of gender variant individuals and their communities, especially those at the margins, do not conform to current terminology or understand their identity and practices as a sole matter of “gender expression.”⁹⁷ Valentine warns us of the dangers of marginalization of more heterogeneous trans identities and experiences. The focus on inclusion and unification of all gender variant practices into one category of identity masks racial, class, geographical, and other biases.⁹⁸ The byproduct of reframing the borders of (legal or other) inclusion is the creation of new borders.

The use of identity categories in the context of gender variance forces one to define those

⁹¹ Juliet Eilperin, *Obama's quiet transgender revolution*, THE WASHINGTON POST (Nov. 30, 2015), https://www.washingtonpost.com/politics/obamas-quiet-transgender-revolution/2015/11/30/6879527e-95e4-11e5-b5e4-279b4501e8a6_story.html [https://perma.cc/HRB7-WL5X].

⁹² *House panel rejects last ditch effort to pass ENDA*, WASHINGTON BLADE: GAY NEWS, POLITICS, LGBT RIGHTS (Dec. 3, 2014), <http://www.washingtonblade.com/2014/12/03/house-panel-rejects-last-ditch-panel-pass-enda/> [https://perma.cc/GDT6-JQJZ].

⁹³ Katy Steinmetz, *The Transgender Tipping Point*, TIME (May 29, 2014), <http://time.com/135480/transgender-tipping-point/> [https://perma.cc/U3T3-UXBH].

⁹⁴ SPADE, *supra* note 29, at 60.

⁹⁵ *See id.* (explaining that given the disproportionate rates of poverty in the transgender community, especially for people of color, these people might be at the margins but are not necessarily the minority).

⁹⁶ Dean Spade, *Intersectional resistance and law reform*, 38 SIGNS 4, 1031–1034 (2013).

⁹⁷ Valentine, *supra* note 25.

⁹⁸ *See* THE TRANSGENDER STUDIES READER 2, *supra* note 87, at 8.

identities and narrow the variety of possible ones, despite the fact that trans people identify themselves in many different ways, sometimes using more than one category. The law forces trans rights claimants to accept one category or the other to be recognized. There is an underlying belief about the inherent nature of trans identities as moving from one gender to the other. It is possible that the law could recognize certain trans individuals, to the extent that they identify with the categories available in law. In other words, by assigning trans people rights based on a closed system of exclusive categories, the law ensures that these rights constitute an effort to take part in the socially accepted order of sex/gender.

As a result, the ability and desire of trans individuals to be “like everyone else” have a significant role in determining their access to rights and legal procedures.⁹⁹ However, discrimination against trans people happens precisely when they are revealed to be “not like everyone else,” i.e. they do not follow the socially accepted norms of sex/gender. If no one knows you are trans, they cannot discriminate against you on that basis. Thus, protection based on the condition of being “like everyone else” leaves out those most exposed to discrimination. It is for this reason that the radical trans legal-academic movement would argue that these borders are the means by which trans exclusion is created, justified and upheld.

The radical part of the transgender movement points to the gender binary itself as an oppressive power. It is one of many governance strategies that constitute trans exclusion from resources and opportunities.¹⁰⁰ Furthermore, the radical stand would argue that the focus on the individual hinders the critique of external structural social systems of gender and sexuality that create the exclusion of gender. Following Foucault, radical trans advocates ask to look at gender as a regulatory power that has attached different value to different gendered identities and practices as “a core element of participation in our capitalist economy.”¹⁰¹ This regulatory power explains the “disproportionate poverty and incarceration [of] poor, gender transgressive people.”¹⁰² Hence, from this radical point of view, in order to secure access to resources and opportunities, trans people need to fight the social system of gender itself. For these reasons, Dean Spade and other radical advocates reject rights-based advocacy, claiming it empowers the regulatory scheme of gender by upholding the system of mutually exclusive identity categories.

II. TRANS INTRASECTIONALITY – THE THING WE CANNOT NOT WANT

Supposedly one must choose between the total liberal recognition strategy and the radical redistributive strategy, presuming that the two, like heteronormative sex/gender, are mutually exclusive. I will argue, however, that there is a possibility to integrate a significant part of the critique put forward by the radical analysis back into rights-based litigation. Following Spade’s call “to stop believing what the law says about itself is true and what the law says about us is what matters,”¹⁰³ I will go beyond current critiques to further examine the function of the legal categories that are used to protect against discrimination on the basis of gender variance, in order to pin point their “intra-sectional” relation to one another. Instead of abandoning rights-based litigation completely, I will argue that this existing and relatively accessible legal mechanism should be tactically used to demand more accountability from the law for the role it plays in creating and

⁹⁹ Spade, *supra* note 38.

¹⁰⁰ See SPADE, *supra* note 29, at xiv.

¹⁰¹ See Spade, *supra* note 21, at 232.

¹⁰² *Id.*

¹⁰³ SPADE, *supra* note 29, at 128.

upholding the gender binary. The demand that marginalized communities let go of their desire to be seen as equal is not politically viable and even runs the risk of imperialist tendencies.¹⁰⁴ Answering the criticisms against the use of the existing legal categories by trans claimants, Paisley Currah reminds us that non-trans people enjoy enormous privileges by having their gender recognized.¹⁰⁵ Currah continues to explain how the anti-discrimination framework is one of the only ways available for minorities to demand resources and opportunities.¹⁰⁶

One can see that the liberal advocates look for recognition while the radical advocates seek to dismantle the social system that distribute life chances in accordance with gender compliance. The liberals ask to entrench “transgender” and by doing so, aim to create a new self-made self-representation of the group that would publicly assert respect and esteem from society at large.¹⁰⁷ The radicals stress that misrecognition of trans identities is not a “free-standing” harm, but a distributive injustice caused by a social-political matrix of sex/gender.¹⁰⁸ They further claim that the entrenchment of transgender narrows the scope of protection because it only recognizes those individuals who can “prove” their authentic belonging to the community by virtue of a coherent identity.¹⁰⁹ Yet, the process of constituting coherent gender identity is a process of framing and reframing the accepted borders of sex/gender. Moreover, this process excludes the complex and heterogeneous gender variant identities and practice, rendering visible for inclusion those who “neatly fit” within the other characteristics of the hegemon’s identity, such as class, race and ability. Indeed, as Dean Spade points out, “in the face of large scale social movements demanding change, governments have often created laws that declare equality or neutrality in order to quell dissent and maintain the status quo to the greatest extent possible,”¹¹⁰ thereby maintaining hegemony itself.

I borrow David Eng’s reference to Spivak in the context of queer liberalism in *Lawrence vs. Texas*,¹¹¹ claiming that rights-based litigation is something that we “cannot not want.”¹¹² I will therefore try to identify the ways the law is already used to promote trans interests, aspiring to move away from looking at who the rights claimants are to what they want and need. I will suggest that this move can open a space for discussion about the accountability of the law, the institutions it regulates, and the structural insecurities faced by marginalized groups. However, the fact that I am using the very categories that I critique in order to better account for the structural aspect of the inequalities is a challenge I can only partially address. In what follows, I will apply the concept of intersectionality to the category of sex itself to expose its “intra-sectionality.” Using the intra-sectional perspective will help me to deconstruct discrimination on the basis of gender variance in a way that will bring forward some of the structural aspects that are otherwise excluded.

¹⁰⁴ PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 158–165 (1991).

¹⁰⁵ Paisley Currah, *Gender pluralisms under the transgender umbrella*, *TRANSGENDER RIGHTS* 3–31.

¹⁰⁶ Stanford Law School, *Marriage Equality Symposium | Perspectives in Gender and Geography in the Marriage Debate*, YOUTUBE (Oct. 17, 2013), <https://www.youtube.com/watch?v=TpKa2opkWUc> [https://perma.cc/SLW4-UJJ8].

¹⁰⁷ Nancy Fraser, *Rethinking Recognition*, 3 *NEW LEFT REV.* 109–112 (2000).

¹⁰⁸ *Id.* at 110–112.

¹⁰⁹ Spade, *supra* note 38, at 19–23.

¹¹⁰ Spade, *supra* note 86.

¹¹¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹² ENG, *supra* note 65, at 25.

A. *ADL and Marginalized Communities – The Broken Promise for Equality*

Anti-discrimination laws have long been criticized for failing to deliver their egalitarian promise and create real change in the social status of those they protect. They have been criticized for creating an image of equality that hides the realities of disparities and their individual scope.¹¹³ Moreover, it is argued that rights-based litigation hinders the structural distribution of life chances.¹¹⁴ Because it relies on coherent identity claims that exclude heterogeneous or multilayered experiences, rights-based litigation often fails to serve the needs of individuals and groups whose identities and experiences reflect more than one category.¹¹⁵

As I will go on to elaborate in the analysis of the trans rights claimant, this coherence of identity is only achievable by the process of repetition of behaviors attributed to a certain identity. As such, it is not an indication of some “inner truth” about ones belonging to a certain protected class but rather a presentation of an “inner truth” that constitutes belonging. The legal discourse in this framing is narrowed to developing compatibility with a specific category, much like the way trans health protocols forces trans people to articulate a specific story in order to get access to health care. This process contravenes the stated purposes of the legal and medical procedures because it forces patients/rights claimants to tell the institution what it wants to hear and not what is actually going on, thus making it impossible for that institution to be able to offer a remedy. Moreover, the requisite of coherence reveals how ADL interlocks with self-discipline, further elaborating the connections between these allegedly independent forms of governance and the law.¹¹⁶

The problem of coherence connects to the next argument, that ADL is most effective for otherwise privileged rights claimants (in other words, those who if not for one specific trait would likely not face discrimination). A decision not to hire a non-passing uneducated former sex-worker transwoman of color for a low wage job would probably be more difficult to frame as nothing more than a transphobic decision than a decision to dismiss a white transman software engineer who has undergone an extensive surgical transition.¹¹⁷ It would undoubtedly be easier to make a claim for the software engineer without referring to the broader social system of exclusion than to articulate within ADL the strategies a poor gender variant woman of color had to take in order to survive.¹¹⁸ This is because that system of legal categories included in ADL is focused on the individual who was harmed and who must belong to a protected category, and the perpetrator who must identify that category. Accordingly, the tribunal’s task is to decide whether such relational identification

¹¹³ Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1092 (1977).

¹¹⁴ Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 3, 3–14 (1995).

¹¹⁵ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

¹¹⁶ COSSMAN, *supra* note 46, at 16.

¹¹⁷ Also known as sex reassignment surgery, gender reassignment surgery, sex affirmation surgery, gender confirmation surgery, sex realignment surgery, a sex change, and other terms. It refers to medical technologies sought by trans people with respect to their gender identity and performance such as hormonal replacement therapy, genital reconstruction surgery, chest/breast surgeries, and so on. Many of these surgeries are also performed on non-trans individuals for different reasons, but they are only called GSRP when performed on trans persons. Classifying these surgeries in this way is another manifestation of the ideological undertone of trans medical discourse.

¹¹⁸ This is the case for many other rights claims where lawyers are looking for “good cases,” which are actually cases that can be told in court without discussing the complex web of social policing that creates the different challenges people encounter when trying to access resources and opportunities.

occurred. Intrinsically, this is easier to conclude when all other factors that are not sex/gender, such as race, class, and ability, do not come into play. ADL mainly serves those who would be otherwise considered “good” citizens,¹¹⁹ reflecting the characteristics the nation-state imagines its self-disciplined citizen to portray.¹²⁰

ADL problems seem to be particularly acute with respect to gender variant rights claimants because of their multi-layered identities and practices¹²¹ leading them to face multiple intertwined grounds for exclusion.¹²² As noted, if your identity and experience relate to more than one protected class, they are less coherent and less likely to be read by a tribunal. When an individual is understood as signifying more than one kind of subordination, being excluded on both racialized and gendered grounds, category-based claims are less adequate. The gender variant perspective implies a need to re-conceptualize ADL in ways that go beyond protected classes. In the following section, in order to reflect the gender variant perspective, I will offer the hypothesis that gender variance is a form of “intra-sectionality,” following Kimberlé Crenshaw’s work on intersectionality.¹²³

B. Intersectionality/Intra-sectionality

The intersectional analysis put forward by Crenshaw is by now a cornerstone of the feminist, queer, and critical race critique. Crenshaw has illuminated the law’s inability to reflect multilayered identities and experiences due to the exclusive nature of the protected classes.¹²⁴ In “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” Crenshaw coined the term “intersectionality,” describing the reality faced by people whose identities and experiences reflect more than one category.¹²⁵ She points out that analyzing harm as only racist, gendered, or economic creates an inadequate understating of causes and solutions.¹²⁶ Crenshaw looks at discrimination on the job market from the perspective of a non-trans black woman.¹²⁷ When that woman is discriminated against, the harm occurs at the intersection of her perceived identities, as both a woman and a black person.¹²⁸ The intersection analogy allows Crenshaw to point out the false neutrality of ADL protected classes and to demonstrate how they reflect only privileged members of such categories. While the protected classes are presented as objective, they actually reflect the experiences of those that are only one degree of separation from total inclusion because they only possess one characteristic that could be the cause for exclusion. Crenshaw refers to members of

¹¹⁹ Freeman, *supra* note 113, at 1050–1056.

¹²⁰ COSSMAN, *supra* note 46, at 124, 175.

¹²¹ VALENTINE, *supra* note 45

¹²² SPADE, *supra* note 29.

¹²³ Crenshaw, *supra* note 79; Crenshaw, *supra* note 115, at 1242.

¹²⁴ *Id.*

¹²⁵ Crenshaw, *supra* note 79.

¹²⁶ TRANSGENDER RIGHTS, *supra* note 22, at 245.

¹²⁷ *Id.*

¹²⁸ As I will further elaborate in due course, analyzing instances of discrimination demands adopting the perpetrator point of view. The perpetrator has no “objective” knowledge of the victim’s racial or gendered “biology.” Moreover, this information is also irrelevant because the reasoning of the harm is driven from the social meaning of a specific performance, i.e. what it means to be black has nothing to do with genetics, but with public racial perception.

such protected classes as “those who are privileged but for their racial or sexual characteristics.”¹²⁹ The discrimination suffered by black women is broader than the legal categories discourse can express, which is why their needs are seldom addressed.¹³⁰

ADL does not only see the categories as constructed from mutually exclusive coherent classes; as I previously argued, ADL also understands the categories to be mutually exclusive in nature. When one is discriminated against for being black, one cannot also be discriminated against for being a woman, because the law requires a fixed coherent identity that can relate to a protected class. If an individual is both black and a woman, it becomes unclear what stands at the root of the discrimination.¹³¹ Furthermore, the proclamation of abstract equality¹³² premised by the ADL scheme of mutual exclusivity forces the claimants to pick a side.¹³³ Crenshaw’s analysis urges us to broaden our critique of ADL and consider how the function of the categories in relation to one another further hinders the actual realities of marginalized communities within a hierarchal society. The intersectional analysis is a critique of ADL single axis analysis and a call for a more complex reading of identities and practices subject to discrimination. The intersectional analysis empowers us to better account for experiences of multilayered identities and practices, and enables us to bring to the fore elements of exclusion that ADL struggles to express.¹³⁴

Nonetheless, intersectionality has been criticized for its heavy reliance on assumed inherent distinctions between the categories themselves,¹³⁵ specifically sex and gender.¹³⁶ From a deconstructionist point of view, the reliance on categories is flawed because categories cannot produce anything, but instead simplify “social fictions that produce inequalities in the process of producing differences.”¹³⁷ This position would claim that categories are the product of discourse that creates categorical truth, and not the other way around.¹³⁸ A more pragmatic strain of critique argues that Crenshaw’s intersectionality focuses on the complexity of relations among different groups and not the complexities within a single group, single category, or both.¹³⁹ This critique goes on to claim that the “inter” focus of intersectionality does not allow representation of diversity and heterogeneity of experience to be represented fully.¹⁴⁰ Specifically looking at sex, gender, and sexuality, Valentine suggests the intriguing idea that “age, race, class, and so on don’t merely inflect or intersect with those experiences we call gender and sexuality but rather *shift the very boundaries of what ‘gender’ and ‘sexuality’ can mean* in particular contexts.”¹⁴¹

Following Valentine, I will suggest that a gender variant perspective on law demands an “intrasexual” analysis of the relevant protected classes. That is, I will apply the intersectional analysis to the protected classes themselves. I suggest that in ADL gender variance is a form of

¹²⁹ Crenshaw, *supra* note 79, at 151.

¹³⁰ *Id.* at 149–150.

¹³¹ *Id.*

¹³² ENG, *supra* note 65, at 49.

¹³³ Crenshaw, *supra* note 115.

¹³⁴ Leslie McCall, *The complexity of intersectionality*, 30 SIGNS 1771, 1771–1800 (2005).

¹³⁵ *Id.*

¹³⁶ VALENTINE, *supra* note 45.

¹³⁷ McCall, *supra* note 134, at 1773.

¹³⁸ *Id.* at 1777.

¹³⁹ *Id.* at 1786.

¹⁴⁰ *Id.* at 1783.

¹⁴¹ VALENTINE, *supra* note 45, at 100 (emphasis in original).

“intra-sectionality,” because theoretically and practically it is almost impossible to distinguish whether discrimination is a result of one’s perceived sex, sexual orientation, gender expression, or perhaps a combination. Moreover, I argue that what constitutes the modes by which one is prescribed to belong to a specific sex, gender, or sexual orientation cannot be read separately from one’s race, class, ability, or any other social force that shapes one’s life chances.¹⁴²

I will also argue that having to “pick sides” – whether inside the category between “woman” and “man,” or outside between “gay” and “trans” – presumes a correlation of identification that is not neutral but reflects social borders of right and wrong practices and modes of being. In order to understand the intra-sectionality of gender, I will use the facts from Jessi’s and Tristan’s cases. Following this analysis, I argue that the gender variant experiences of marginalization stem from existing outside of the structure of coherent identities. By occupying “in-between” spaces, they challenge the organizing principle of social and legal order based on mutually exclusive categories.¹⁴³ Thus, in order to accommodate their interests, we need to look for the “in-between” spaces of the relevant protected classes and their connection to one another. In order to do so, I will look at the protected classes that might be used in reference to gender variant people’s “sex,” “sexual orientation,” “gender identity,” and “gender expression” to find that they are each heavily shaped by gender performance. I will then discuss the effects of presentation on ADL to suggest that by understanding it, we might be able to articulate an ADL claim that opens space for discussion of systematic exclusion.

C. *The Case of the “Real” Woman*

In March 2015, through the Southern Poverty Law Center, Jessi filed a complaint with the EEOC.¹⁴⁴ Jessi claimed that she was discriminated against because of her gender identity and that this constituted discrimination on the basis of sex. Jessi also put forward demands regarding sexual orientation.¹⁴⁵ Remembering that her supervisor was troubled by the alleged discrepancies between how she looked and who she “really was,” we should ask which factors (be they thoughts, beliefs, feelings or actual events) constituted what Jessi later termed as discrimination. How do they connect to her gender identity, to her sex, and to her sexual orientation? To answer these questions, I will first look at how ADL works in regard to a “simple,” classic case of discrimination on the basis of sex. Next, I will examine the extent to which Jessi’s and Tristan’s claims differ from this classic case. I conclude that the claims do not substantially differ, but concede that opinions may differ.

Let us consider a case in which a non-trans heterosexual woman is fired for being a woman, and the court rules this to be unlawful discrimination. The court’s recognition of discrimination against the woman is premised on the recognition that gender-based dismissal is a violation of the prohibition against discrimination on the basis of sex. In other words, because of the prohibition on sex-based discrimination, a claimant’s gender is an irrelevant characteristic that was unlawfully utilized by the employer in the decision to fire the claimant. But what actually happened in this

¹⁴² Race, class, ability, and other categories of subordination also necessarily have intra-sectional dimensions.

¹⁴³ I am not implying that trans people are more “in-between” gender than anybody else or that their identities are more or less stable than non-trans people. I am certainly not suggesting that trans people are less of men or women than non-trans people. What I am stating is that in the close system of protected classes that reflect a narrow understanding of sexed and gendered identities and practices, trans people fall “in-between” because they do not follow the “holy trinity” of related birth-assigned sex, gender, and sexuality.

¹⁴⁴ SOUTHERN POVERTY LAW CENTER, *supra* note 1.

¹⁴⁵ Browning, *supra* note 6.

scenario? How did the perpetrator, from their point of view, identify the claimant as a woman? I will argue that, from the perpetrator's point of view, all that can be recognized is the claimant's performance of gender. Based on gender signifiers, the perpetrator deduces that the subject is a woman and that her gender performance reflects a "biological" sex. Hence, the woman was not discriminated against because of "sex," but because of her gender performance.

The subject perpetually generates her identity by marking herself as a woman in speech, dress, style of hair, and other signifiers, including administrative ones.¹⁴⁶ These external markings are the only signifiers available to the perpetrator. In practice, the perpetrator only observes the performance of femininity, which is in effect, to paraphrase Judith Butler, a performance of a performance, since the perpetrator cannot detect the biology or ontology of the subject's sex separately from the markings offered by the performance itself. Under these conditions, sex is denied an existence independent from the signifiers of gender performance. The perpetrator (hopefully) does not 'look inside the woman's pants' to decide that she is a woman, but sees her performance and makes an assumption about her gender. The woman who is the subject of discrimination does not inhabit her femininity as a role, but continuously constitutes "femininity" by repeatedly imitating it as a gender identity. The court, however, is limited in its ability to bring this dynamic to bear on its legal considerations. The inability of the juridical system to recognize discrimination on grounds of sex as amounting to discrimination on grounds of gender performance is evidence of its disregard for gender performances as the epistemological basis for the category of sex itself. In other words, an intrasectional look inside the sex category finds gender performance at its core, inhabiting the space between the legally recognizable man and the legally recognizable woman.

Using the lens of drag, Butler's own paragon of gender performativity, to return to Jessi's case enables us to go on and make the claim that sex discrimination is about gender performance.¹⁴⁷ Exposing the fallacy of the social deduction of an ontological body onto which we project the performative meanings of gender, Butler looks at the drag queen's show as a scene where the imitation of gender is openly revealed.¹⁴⁸ When one looks at the drag queen's show, one looks at a biological male performing as a woman. The difference between the drag show and everyday gender performances (for example, seeing a woman walking down the street) lies in this extra knowledge one has: that the drag queen's birth-assigned sex and gender performance do not correspond.¹⁴⁹ Yet, in everyday life we do not know whether the woman in the street was assigned female at birth, but deduce this from external signifiers of femininity. Butler argues the drag queen does not imitate femininity, but she imitates an imitation of femininity performed by women in everyday life. Drag is not a gender performance of biological sex; rather, it is a performance of the socially accepted feminine performance.¹⁵⁰ However, there is no other authentic performance,

¹⁴⁶ Judith Butler, *Imitation and Gender Insubordination* 1, 1 CULT. THEORY POP. CULT. READ. 255 (2006).

¹⁴⁷ Judith Butler, *Critically queer*, 1 GLQ-N. Y. 17, 17–32 (1993).

¹⁴⁸ Butler has been heavily criticized for viewing drag dressers and trans people in a broad, metaphorical sense and not accounting for the actual materiality of their bodies and lives. NAMASTE, *supra* note 24. Butler herself has integrated these critiques in later works. One example is in *Doing justice to someone: Sex reassignment and allegories of transsexuality*, 7 GLQ J. LESBIAN GAY STUD. 621–636 (2001). More importantly, Butler's work has enabled numerous articulations of trans subjectivity. While I am inspired by Butler's work, I build on the critiques and take Butler's drag analogy back from the realm of abstract theory to use it to describe legal proceedings regarding a transwoman's story of exclusion.

¹⁴⁹ BUTLER, *supra* note 17, at 180.

¹⁵⁰ *Id.* at 179.

whether in drag or in everyday life. When we walk down the street, we do not stop and check the chromosomes of people we see; we note their gender signifiers, their speech, dress, style of hair, and other characteristics, and deduce that they are women or men who were assigned female or male at birth. However, these signifiers are all we can note. We have no proof of the existence of such a thing as “biological sex” outside of gender performance. Hence, there is no independent meaning to “sex” outside of gender performance.¹⁵¹ We are always looking at an imitation of an imitation, and this constant imitation is what constitutes “sex” as ontological.¹⁵²

III. PERFORMATIVE DISCRIMINATION – THE DRAG SHOW AS LITIGATION STRATEGY

Jessi’s case reveals to the court the “truth” that drag shows expose, by forcing the court to analyze a case where the imitation is apparent. This case came to court after the claimant had already been “outed” as lacking a correlation between her sex, gender, and gender identity. Due to the framework of ADL, when the court faces charges of discrimination, it must first shift its perspective outside to locate the subjective point of view of the perpetrator. From there, the court must judge whether or not a distinction was made and, if so, whether this distinction was made on the basis of a relevant difference. When Jessi brought her case before the EEOC, she claimed to be a victim of discrimination on the basis of sex. The tribunal ostensibly needs to decide whether Jessi is a woman who has been treated differently than a man, but in actuality it is her womanhood that is contested by the perpetrator. Her “in-betweenness” is what stands before the tribunal.¹⁵³

In order to rule on her claim, the tribunal needed to differentiate between dismissal because one is a transwoman and dismissal because one is a non-transwoman. The difference is that in the case of the transwoman, the perpetrator knows that her gender performance is an imitation without a “biological truth” behind it.¹⁵⁴ The transwoman is discriminated against exactly when the perpetrator encounters her “fakeness,” i.e. that there is no correlation between her birth-assigned sex and gender presentation. In Jessi’s case, it is possible to “pinpoint” the negative animus that grew out of Jessi’s presentation because Jessi’s supervisor undoubtedly knew that she was a transwoman (she told him so), but felt her femininity was “fake.”¹⁵⁵ Thus, the discriminated against

¹⁵¹ Butler clarifies that even though gender is performativity, gender is not necessarily a role that one can take on at any point. Behind the imitation there is no free willed subject; what makes one a subject is their ability to have coherent performance, accessible only through the imitation process.

¹⁵² BUTLER, *supra* note 17, at 183.

¹⁵³ In April 2015, Tristan filed a complaint of Sex Discrimination in Violation of Title VII of the Civil Rights Act of 1964 with the United States District Court for the Eastern District of Louisiana. He claimed that he was the victim of sex-based discrimination. Considering that the Vice President was concerned that he would “confuse” the customers as a man and demanded that he commit in writing to come to work “as a woman,” what does sex discrimination mean in this context? Was he discriminated against because he was a female who was treated differently from other females who are allowed to express their gender as they see fit? Was he discriminated against as a man treated differently than other men? Was he discriminated against because he was neither of these in their socially accepted meaning? What actually constituted his belief that Tristan is not a barrier to right for equal treatment? *Broussard, supra* note 7.

¹⁵⁴ In Jessi’s case, Jessi’s birth gender became known because of her driver’s license; in other cases, knowledge of an individual’s birth gender can come from failing to pass properly, from coming out as trans, from the reveal of that information by a third party who has it, or from other sources. In any case, gender variant individuals are discriminated against when perpetrators realize that they are gender variant. Otherwise, they will not be discriminated against on these grounds. SOUTHERN POVERTY LAW CENTER, *supra* note 1.

¹⁵⁵ Yet, although clear negative animus is often present in gender variance discrimination, proving said animus is not necessary in order to claim mistreatment based on gender insubordination.

transwoman, like the drag queen, reveals the falseness of the sex category because she fits the same prerequisite – her birth-assigned sex not correlating to her gender presentation. The transwoman’s failure of coherence in performance is at the basis of her discrimination, proving that there is no “authentic” core to the legally protected class besides the repetitive imitation of gender signifiers. Yet, this is not only true to the transwoman. She is not more “fake,” nor does she engage in imitation, any more than the non-transwoman. Thus, her claim exposes the significant role that gender performance plays in the ADL-protected category of “sex.” Jessi’s claim exists in between the legally protected classes and facilitates an intrasectional look inside the protected class itself, not only exposing the false premise of the dichotomy, but also revealing the space between the mutually exclusive categories underpinning gender performativity.

In summary, from the perpetrator’s point of view, one can only comprehend gender performance, and it is in fact the performance that motivates the perpetrator’s decision-making process.¹⁵⁶ However, this performance is not evident to any pre-legal, pre-social inner truth about one’s “sex.” Rather, it is the performance that constitutes the ontological status of the protected class of sex. When the law prohibits discrimination on the basis of sex, it prohibits discrimination on the basis of performance. In practice, a non-trans heterosexual feminine woman can be discriminated against because her womanhood is understood as signifying and reaffirming the hierarchy that produces her subordination. Likewise, gender variant people might be discriminated against because they fail to signify their participation in this social system, intentionally or not.

Therefore, I argue that discrimination on the basis of sex, specifically when directed at gender variants as well as non-trans individuals, is discrimination on the basis of gender performance. The basis for comparison in sex discrimination should shift. In addition to considering whether a woman is treated differently than a man, we should also consider whether an individual was treated differently than someone whose gender performance is coherent. Let us keep in mind that coherent gender performance connects to proper citizenship; hence coherent gender performance is not only about being perceived as masculine, heterosexual, and male, but also white, middle class, and able-bodied. It should also be noted that the non-trans heterosexual feminine woman might be considered as not having coherent gender when her acts or omissions deviate from her social role as subordinated to men (for example, when she tries to cross the occupational segregation walls).¹⁵⁷

Yet, I will argue that performance is not only at the core of discrimination on the basis of sex. Trans and gender variant individuals use a variety of protected classes beyond sex to make their claims. Jessi herself argued that her discrimination was also based on sexual orientation. Moreover, as a result of two decades of trans liberal advocacy in different jurisdictions across the United States and the world, we now have protected classes designed for trans people specifically, such as gender expression and identity.¹⁵⁸ I argue that all these different protected classes can also

¹⁵⁶ In a classic sex discrimination event, the perpetrator sees a woman and discriminates against her. However, the perpetrator never sees her “sex,” whether it is assigned at birth or her social gender; what they can spot is her presentation, or the way she dresses, acts, and behaves. The perpetrator concludes from her presentation of gender that she is a “biological” woman and they never check her chromosomes or other scientific sex signifiers before making this judgment.

¹⁵⁷ Men are of course also subjected to their own forms of gender policing, as we have seen in the case of Tristan.

¹⁵⁸ *Equality Maps*, *supra* note 90.

be understood through the lens of performance. I also argue that using performance could have an impact on the coercive power of protected classes over heterogeneous experiences of identity and practices.

A. Other Dissenters of the Holy Trinity

Looking at the list of protected classes in local state legalizations¹⁵⁹ or the ENDA,¹⁶⁰ one can easily see how they reflect categories of identity. “Sexual orientation” is designated for gays and lesbians, and “gender identity” for transgender people. These categories represent deviations from the “holy trinity” of normative sex, gender, and sexuality. An intrasectional look inside these protected classes would reveal that in the spaces between the mutually exclusive categories, gender performance is abundant. This is why it is almost impossible to know whether one’s motives for discrimination are homophobic, transphobic, or sexist. Any deviation from the “holy trinity” makes one less of a subject, and this process is the privatized embodiment of the social mechanism of exclusion that fuels discrimination. Moreover, these deviations are often not straightforward, but rather combine different aspects of sex and gender practices and identities shaped by other dimensions of subordination such as race, class, and ability. This leads me to question the very need for these different protected classes, and to ask how we can make better use of community resources to advance marginalized individuals.

Closed identity categories are a threat to heterogeneous experiences of identity and practices, as they exercise coercive power over the imagined community they represent. Functioning as a “straightening device,”¹⁶¹ identity categories conceal intragroup power relations and social stratification.¹⁶² Their universalizing trait renders invisible the needs and struggles of those at the margins of the intragroup mainstream, which are usually parallel to general social mainstream.¹⁶³ That is, the interests of those in the group who are in line with social hegemony (in everything but the characteristic that makes them part of the group) take up a disproportionate part of the agenda.¹⁶⁴ These concerns grow when we consider that other members of the group face far more complicated mechanisms of exclusion because of their intersectionality. Furthermore, the ones who are the hegemonic members of the protected classes of sexual orientation and gender identity and expression are precisely those who can follow, or can articulate their demands in accordance with, the normative model of genders. Their claims for inclusion do not question the social system of stratification that facilitates the exclusion – typically, they ask for inclusion within that system based on their sameness. Yet they are the ones best fit to bring forward a sameness

¹⁵⁹ Such as Cal. Penal Code § 422.56 (2012); Colo. Rev. Stat. Ann. §§ 24-34-401(7.5) (2015); Haw. Rev. Stat. § 489-3; 775 Ill. Comp. Stat. 5/1-103(O-1)(2015); Iowa Code Ann. § 216.6 (2009); Me. Rev. Stat. Ann. tit. 5, § 4553(9-C) (2016); Minn. Stat. Ann. § 363A.03, 44 (2016); N.J. Stat. Ann. § 10:5-5(rr); N.M. Stat. Ann. § 28-1-2(Q)(2011); Or. Rev. Stat. § 174.100(6) (2015); R.I. Gen. Laws § 11-24-2.1 (2012); Vt. Stat. Ann. tit. 1, § 144 (2012); Wash. Rev. Code § 49.60.040(26); D.C. Code § 2-1401.02(12A) (2007).

¹⁶⁰ All refer to “sex,” “sexual orientation,” “gender identity,” and “gender expression.”

¹⁶¹ SARAH AHMED, QUEER PHENOMENOLOGY: ORIENTATIONS, OBJECTS, OTHERS 23 (1st ed. 2006).

¹⁶² Fraser, *supra* note 107, at 112–113.

¹⁶³ *Id.*

¹⁶⁴ Spade, *supra* note 29, at 61–62. For example, while trans advocates in Israel joined the global movement and worked to remove trans identities and practices from psychiatric diagnostic manuals, little attention was given to the fact that those diagnoses allow trans people with no access to the job market due to transphobia to claim social security money for mental disability.

claim because their identities and practices coincide with hegemonic experiences.

However, even though they are highly problematic, I am not arguing that one should not use the sex, gender, and sexuality protected classes. Rather, I argue that one should understand them as reflecting performance and should bring forward demands that recognize this function of ADL. An intrasectional look inside these sub categories would reveal that performance plays a major role in how they are translated into ADL. In the following section, I will argue that all these different protected classes can be understood as demanding the court to compare the treatment the victim received to the treatment of someone whose performance is coherent with the socially accepted norms of good sexual and gendered citizenship.

B. Gender Identity and Gender Expression: Thank You for Admitting We Exist

There is no need to discuss at length how “gender identity,” and even more so “gender expression,” relates directly to gender performance. The above analysis of “sex” as a protected class applies to these protected classes as well. From the perpetrator’s point of view, one’s gender identity can only be read through one’s gender performance. Therefore, the proposed shift in the basis of comparison is relevant to these protected classes, because when determining whether the perpetrator discriminated against an individual for their gender identity or expression, we consider whether an individual was treated differently than someone whose performance is coherent.

Moreover, considering that everybody has a gender identity and everybody expresses their gender, it seems that these categories should not apply just to trans people. Their existence indicates that the law previously refused to recognize gender variance discrimination, claiming that it could not be articulated within existing protected classes. That is, the existence of gender identity as distinct protected classes reflects an assumption that “sex” only refers to “real” men and women; otherwise, trans people would already be included. This category teaches us that in the current legal regime sex discrimination only applies to the allegedly ontological differences between feminine women who were assigned female at birth and masculine men who were assigned male at birth. Lacking the ability to read gender variance into the protected class of “sex” testifies to the ideological framework concealed in the legal “sex” category and to the law’s role in upholding the borders of gender. From this perspective, the enactment of the protected classes of “gender identity” and “gender expression” does not address the hierarchal social system of gender, but rather collaborates with it, upholding an ontological difference between gender variant people and everybody else.

However, gender expression and identity as protected classes can be used to promote a more structural discussion when they are understood in relation to gender performativity. Claimants, trans or non-trans, can use these categories to claim they were discriminated against based on their gender performance. That is, claimants can argue that they were treated differently than a person whose gender is coherent with the social norms. In this way, claimants would need less to “prove” that they belong into a certain category. Instead, the claimant would focus on exposing the privileges granted to those whose gender performance coheres to the social norms, promoting a legal debate on how those social norms structure hierarchies of normativity and how this normativity is reflected in the labor force.

C. Sexual Orientation: Are You a Boy, a Girl, or a Faggot?

Jessi did not claim she was discriminated against based on her sexual orientation by mistake; she claimed it because the lines between sexual and gender deviation and between sex and

gender are blurry. Practices that constitute both deviations are connected to performativity in a broader sense – one that accounts for how normative heterosexual identities are constituted as coherent. These categories are intertwined in reality.¹⁶⁵ I argue that sexual orientation is a form of gender variance and vice versa precisely because gender variance is inextricably connected to sexuality. Intra-sectional analysis of sexual orientation as a protected category can suggest an inner connection between the protected classes that make up the “holy trinity” and the “in-between” spaces of presentation they share. This allows us to conceptualize the uses of a discrimination claim on the basis of presentation, and to imagine who we might find in the “in-betweens.”

Prohibition of discrimination on the basis of sexual orientation is supposed to protect gay, lesbians and bisexuals from discrimination on the basis of their different sexuality – in other words, they should not be discriminated against based on who they choose for sexual partners. Much like the perpetrator in the case of the transwoman, the perpetrator here never sees the victim have sex in order to identify that the victim is non-heterosexual. The perpetrator sees “something” that is a proxy for the victim’s sexuality, but what is that something? Much like in the previous discussion, a significant part of the knowledge the perpetrator has over the victim is deduced from the victim’s performance.

Here, as in regards to trans people, performativity is a broad term. It can consist of feminine or masculine behaviors that indicate non-heterosexuality. Yet, this is not all that constitutes performativity. When Butler talks about gender performativity, she is not yet considering trans identities and practices but actually talking about gay identities.¹⁶⁶ Butler’s claim is that heterosexuality is compulsory in that it forces the subject to participate in an endless cycle of repetition of the heterosexual norms as a precondition for coherence that constitutes the subject, and that gay identities are also formed in relation to that imitation mechanism that creates gender presentation.¹⁶⁷ Although Butler talks directly about “bodily gestures, movements, and styles of various kinds,” from her own description of the repetitive gender act it is clear that all actions that signify one as having a coherent identity constitute presentation. For example, these actions include a man acting out his heterosexuality by making sexist jokes at lunchtime. Alternatively, a gay person “coming out” to colleagues or having their gayness revealed by rumors or social media can be considered acts that constitute their gender as incoherent.

Returning to ADL, when the perpetrator makes unlawful decisions based on someone’s sexual orientation, it is likely that they discriminate against them based on their performance. The perpetrator can “use” the information transmitted through the gender signifiers to deduce that the victim is gay, and based on this assumption, the perpetrator discriminates on the basis of sexual orientation. Moreover, lesbian, gay, and bisexual subjects are discriminated against because their sexuality deviates from the socially accepted norms of sex, gender, and sexuality, meaning that they do not conform to one (or more) pieces of the heteronormative puzzle of masculine/male/men sexually attracted to feminine/female/women. For example, calling someone a “faggot” or asking someone if they are “a boy or a girl” both aim to signify that one has trespassed the borders of sex,

¹⁶⁵ I cannot think of any trans person who was not a part of the LGB community or who had not engaged in what would seem, from a heteronormative point of view, as non-heterosexual sexuality in their lifetimes. The new generation of gender independent children who get early access to medical technologies which enable them to go through one puberty (as opposed to other trans people who transition post-puberty) might prove me wrong. In fact, these children, if they wish for it, could easily be post-trans from a conservative point of view or post-gender from a radical one, because they would not transition.

¹⁶⁶ Butler, *supra* note 146.

¹⁶⁷ *Id.*

gender, and sexuality.

The LGB individual's insubordination is revealed by their "failed"¹⁶⁸ imitation – for example, when the lesbian wears "masculine" attire or when the gay man brings his partner instead of a wife to the office party. Hence, when LGB subjects are discriminated against for their sexual orientation, their exclusion can be understood as related to their gender performativity in its broader sense. That is not to say that discrimination could not be based on actual aversion to the idea of gay sex, but that the fantasy of gay sex and the reality of performativity might not always be so easily separable. Therefore, when considering discrimination on the basis of sexual orientation, like sex, we do not simply try to decide whether a gay man was treated differently than a straight man, but also whether an individual was treated differently than someone whose gender presentation is coherent.

IV. CONCLUSION: SHIFTING THE BASIS OF COMPARISON

I have argued that anti-discrimination law's protection of sex, sexual orientation, gender identity, and expression can all be better understood through the idea of performativity. I argued that the residue of gender performativity is present in the in-between spaces of the mutually exclusive categories that comprise the protected classes. Now I will address the possibilities this analysis opens up. These possibilities cannot answer all the concerns around the use of ADL that the transgender movement is debating, but they might open up a small "in-between" space that can harness the ever-growing use of ADL by trans people (as well as other LGB people and organizations) to serve the interests of marginalized individuals.

The division into the sub categories of gender, sex, and sexuality itself enforces the claim that the characteristics represented in the protected class are exclusive and that they are not inextricably connected, creating and promoting the illusion that sex, gender, and sexuality have nothing to do with each other. The normative model this axiom sets forth allows access to legal protection only to those who can articulate their identities and experiences within these normalizing models. Protection based on gender identity is easily available to a person who has received recognition of their gender non-conformity by a medical institution – for example, a person who is diagnosed with gender dysphoria, a recognition that is granted by expressing a "fierce and demanding"¹⁶⁹ drive for gender normativity.¹⁷⁰ A white educated transman working as a software engineer at IBM, who is immersed in "proper" discourses of transitioning as a way of reintegrating into society with his "true" self and supported by his longtime female-identified partner, will most likely find a sympathetic ear in court in a case of unlawful dismissal. That is because his identity can be perceived as coherent, in line with the law's conception of sex and gender, and appearing as a neutral characteristic and not as signifiers of the mechanism of social stratification.

On the other hand, the chances are lower for getting legal protection against an unlawful dismissal of a non-passing, black, gender variant woman who identifies occasionally as trans and occasionally as gay, has no education or capital, and who engages in sex work. In fact, her chances of accessing the law to begin with are almost non-existent, not to mention securing legal representation or having the time and money to pursue legal action. Yet, even if her case would end up in a courtroom, it would be challenged by her apparent lack of coherence. For example, her

¹⁶⁸ Butler would note that since the imitation has no origin, the concept of failing to imitate is contested by itself.

¹⁶⁹ Joanne Meyerowitz, *How Sex Changed*, THE TRANSGENDER STUDIES READER 362.

¹⁷⁰ Spade, *supra* note 38, at 15–18.

employer might find a sympathetic ear for an argument that she might “confuse the customers,” as was claimed about Tristan, making the decision to terminate one’s employment appear reasonable. Moreover, this woman would have to frame her claim as either arising from her “sex,” “gender identity,” “gender expression” or “sexual orientation,” when in fact all these categories collapse into each other in her lived experience and are shaped by her affective history of race and class more than they are informed by academic or medical discourse.

In both cases, when we take a deeper look, questioning the artificial boundaries between sex, gender, and sexuality and considering them as complementary components of the socially accepted norms, one cannot be sure what went on inside the perpetrator’s mind, or what sort of information propelled their decision. How can we know what kind of trespassing of the borders of gender, sex, and sexuality is visible to the perpetrator, which they then unlawfully considered in their decision? Do they consider the transwoman to be a non-masculine man? A homosexual? A non-feminine woman? A transsexual? Is she discriminated against because of her sex? Her gender? Her gender presentation? Her sexual orientation? How does her class, ability, and race positionality impact how the perpetrator perceives her performance? There is actually no way to answer these questions, precisely because coherent gender performance must always reflect a heterosexual correlation between sex, gender, and gender presentation of a hegemonic member of society,¹⁷¹ thus deviation from coherence can reflect any deviation from any of these categories.

As I have suggested earlier in the context of gender identity, shifting the basis of comparison by understanding the role performativity plays in discrimination could facilitate an expansion of the legal discussion. Instead of comparing man/woman, straight/gay, and trans/non-trans, the tribunal would compare the victim with someone whose gender performance is coherent. Remember, the non-trans heterosexual feminine woman might also be considered as not having coherent gender when her acts or omissions deviate from her social role as subordinated to men. Likewise, gender variant people, trans, gays, lesbians, and bisexuals might be considered as not having coherent gender when they fail to signify their participation in this social system of normative sex, gender, and sexuality. Hence, by allowing the shift in articulating legal claims, referring to the presentational dimensions of the discrimination, the tribunal would not be troubled by the coherence of the victim, but would have to evaluate the privileges that come from having coherent gender presentation.

There is evidence that the federal arbitrator that ruled that Tristan was discriminated against “because of his sex” in violation of Title VII of the Civil Rights Act of 1964 recognized that Tristan experienced this discrimination because of his performance.¹⁷² The arbitrator found that Tristan “involuntarily resigned in order to escape an intolerable and illegal employment requirement imposed by the corporate office – that he act and dress only as a female[.]”¹⁷³ The arbitrator also found that “after learning that Broussard’s driver’s license stated female, [the employer] began to act in a manner showing that it perceived Broussard did not comply with the

¹⁷¹ We can consider how different cultural presentations might also be read by the white western subject as more or less feminine or masculine, when they consider them through their single culture imagination of the world. However, this is beyond the scope of this paper.

¹⁷² Kenny Lopez, *Transgender Louisiana employee wins sex discrimination case*, WGNO (Dec. 7, 2016), <http://wgno.com/2016/12/07/transgender-louisiana-employee-wins-sex-discrimination-case/> [https://perma.cc/FK4N-SLQN].

¹⁷³ Award and Opinion of Arbitrator, *Broussard v. First Tower Loan* (Dec 2016) at 3 (J. William Manuel, Arb).

traditional gender stereotypes of a female.”¹⁷⁴ Similarly, in Jessi’s case, the EEOC stated that “sex discrimination under Title VII includes not just discrimination because of biological sex, but also gender stereotypes, i.e., when an employer treats an employee differently for failing to conform to gender-based expectations or norms. Discrimination against transgender individuals because of his/her gender non-conforming is sex discrimination.”¹⁷⁵ The federal arbitrator’s direct reference to how one ‘acts and dresses,’ as well as to ‘gender stereotypes,’ and the EEOC’s findings about gender norms and expectations support the claim that the basis of comparison must shift. Both reasonings are in line with the idea that performance motivates the discrimination. While the federal arbitrator and the EEOC only take this stand with respect to gender variance claims, my analysis suggests that this reformulation of ADL has far-reaching implications that go beyond the imaginary borders of the category of “transgender.”

The current inability of the law and juridical system to recognize discrimination on grounds of sex, sexual orientation, gender identity, and gender expression as amounting to discrimination on grounds of gender performance is evidence of the disregard of gender performance as the epistemological basis of the categories themselves. In the current legal situation, courts are searching to uncover whether or not the victim was read by the perpetrator as belonging to a protected class by virtue of the victim’s coherent identity. Instead I suggest that it is the lack of coherence that should be the starting point, leaving the tribunal free to search for and discover the social norms the perpetrator had in mind.

This formulation too has its limitations because it is still set inside an individualist framework, which does not allow direct discourse about systematic disparities. However, it does allow us to use the available tools of ADL to have a legal discussion that does not revolve solely around the identity and practices of the victim but focuses on the social ideologies of hierarchical distribution of resources and opportunities that created their exclusion in the first place. This rephrasing of the legal analytical tools of ADL seems to be particularly acute with respect to gender variant rights claimants because they have multi-layered identities and practices¹⁷⁶ and thus face multiple intertwined grounds for exclusion.¹⁷⁷

By placing the socially predominant standards of good citizenship at the center of the legal debate, the law might move away from its fixation on coherence as the only available framework for making claims. This would not only allow more claims to be made, but it would facilitate a broader systematic discussion within the framework of ADL. I am not suggesting that shifting the basis of comparison would alleviate the economic and other obstructions that negatively impact the ability of marginalized individuals to make legal claims. Instead, I suggest that rephrasing legal demands is a way to promote a legal discussion about the systemic aspects of exclusion, in hopes of better utilizing individual claims to offer protection and promote the interests of a more diverse range of identities, practices, and experiences. In conclusion, rather than heavily investing in putting the word “transgender” into the law, transgender advocates can potentially lead a legal movement that could reshape how we use readily available anti-discrimination law, focusing on what people need and want instead of who they are or are not.

¹⁷⁴ *Id.* at 4.

¹⁷⁵ Frontiers, *EEOC Issues Historic Decision Protecting Transgender Employees*, FRONTIERS MEDIA (Apr. 24, 2012), <https://www.frontiersmedia.com/channel-special-reports/2012/04/24/eec-issues-historic-decision-protecting-transgender-employees/> [https://perma.cc/6FE9-6VZH].

¹⁷⁶ VALENTINE, *supra* note 45.

¹⁷⁷ SPADE, *supra* note 29.