Sex-Classification Policies as Transgender Discrimination: An Intersectional Critique

Heath Fogg Davis

Sex-classification policies are unjust because they prompt and authorize administrative agents to use their own subjective gender judgments to target, inspect, and exclude transgender-appearing people from the public accommodations under their watch. The vast majority of sex-classification policies are not rationally related to legitimate policy goals because there is no objective, socially agreed upon test for determining who is male and who is female, and legitimate policy goals such as fraud prevention, safety, security, and privacy can almost always be met more effectively by alternative means that do not subject people to gender inspection. I make a legal-normative argument for using gender-identity antidiscrimination laws to abolish sex-classification policies. I ground this radical proposal in a modified liberalism that treats sexual self-definition as an integral feature of liberal self-definition. Gender and intersectionality theorists rightly point out the deep structure of race-sex-class perception and oppression, but many of these theorists are too quick to dismiss the radical potential of gender-identity discrimination laws to eliminate, rather than modify, longstanding sex-classification policies. Racial, class and gender perception intersect to generate the possibility, rather than the inevitability, of invidious sex administration. And that is more than enough reason to abandon sex-classification policies.

In feminist and gender studies one often hears the claim that the restrictive sex binary harms everyone by reducing complex experiences and identities to simple stereotypes of "male" and "female." Generally speaking, that may be true. But some people, namely people who are perceived to have changed or be in the process of changing their birth sex designation, bear the brunt of this harm. In 2006, Charlene Arcila, an African American transgender woman who was in the early stages of her gender transition from male to female, attempted to board a Philadelphia city bus, and was denied entrance because the bus operator told her that she was not female and therefore could not use a monthly public transit pass marked with an F to signify a female gender sticker. Subsequently, she tried to use an M for male transit pass, and was also turned away, this time on the bus driver's pronouncement that she was not male. From 1981 to July of 2013, the Southeastern Pennsylvania Transportation Authority (SEPTA), which owns and operates mass transit public vehicles in Philadelphia and its surrounding region, mandated that all of its monthly transit passes bear a male or female gender sticker that matched the gender of its purchaser and user. SEPTA's employee handbook instructed bus operators to verify each monthly pass for the correct date and the correct sex marker, but the handbook gave no guidance concerning the criteria that bus drivers should use to verify the sex of riders as they carried out their many other stressful duties.[1] Consequently, individual bus operators were free to use their own subjective gender judgments to determine which pass holders could access the buses under their control.

After having both her female and male gender-marked passes rejected, Arcila filed a formal legal complaint with the city of Philadelphia alleging that SEPTA's gender sticker policy violated her civil right to be free of gender-identity discrimination, which the city added to its lengthy list of legally protected identity categories in 2002.[2] SEPTA instituted the gender stickers in 1981 as a fraud prevention measure aimed to deter the swapping of passes between husbands and wives sharing a household.[3] But

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the gender stickers were not rationally related to the legitimate business goal of fraud prevention because females could share their monthly passes with other females, and males could share their passes with other males, both within and without heterosexual households. Other bus riders whose appearances also challenged prevailing gender norms reported having been harassed or ejected by bus operators, too. Some of these incidents were reported to SEPTA, and to Philadelphia's Commission on Human Relations, the official body charged with enforcing the city's Fair Practices Ordinance. Additionally, R.A.G.E. (Riders Against Gender Exclusion), a local grassroots organization which sprouted in 2009 to bring public attention to the invidious impact of SEPTA's gender sticker policy, solicited and compiled its own catalogue of gender-identity discrimination stories from SEPTA bus riders. R.A.G.E. used a mix of traditional and innovative protest strategies that included meeting with the director of SEPTA, staging a drag show at SEPTA's busy city hall subway station, penning a Riders' Bill of Rights and disrupting public hearings to read it out loud, as well as gathering thousands of signatures on a petition that its members presented to SEPTA's general manager, Joe Casey. Initially, Casey agreed to discontinue the gender sticker policy, but then prevaricated and failed to do so for over three years.[4] Finally, in the eighth paragraph of an eleven-paragraph May 23, 2013 media release about fare increases, SEPTA quietly announced that it would end its gender sticker policy effective July 1, 2013.[5]

The gender stickers are gone, but a slew of other sex-classification policies persist that generate the same sex-related harm as the gender sticker policy: discretionary gender judgment that can be used to deprive individuals of their civil right to access public accommodations.[6] Personal identification documents such as driver's licenses, passports, and birth certificates bear mandatory binary sex markers. We are asked to tick binary sex boxes on many bureaucratic forms ranging from school, job, mortgage and apartment rental applications, to government census forms, and dental and medical in-take questionnaires. And we live in a society in which most public restrooms, change room facilities, and all prisons are designed, constructed, and designated as sex-segregated. The invidious nature of these sex-classificatory schemes may be hard for many people to fathom because they are so customary, and because most people experience them as mere moments of cursory verification of who they are and where they ought to be. Moreover, these policies do not fit the model of traditional sex discrimination, which has focused on policies that disadvantage women in relationship to men, and vice versa. However, for those of us who appear to some to be stretching conventional binary sex categories "too far," sex-classification policies cause significant vulnerability to invasive questioning, verbal ridicule, exclusion, and even physical violence by administrative agents, and the public at large.

I take the radical position that we should do away with the vast majority of sex-classification policies. I base this legal-normative argument on a modified liberalism that takes into account critical insights from contemporary gender theory and intersectional identity analysis concerning structural oppression. According to the liberal logic of anti-discrimination law, sex-classification policies must be at least rationally related to legitimate employment, business, or educational goals. When government or state actors use sex classifications in their laws and policies, they must meet an even higher standard of judicial scrutiny, and demonstrate that the sex-classification schemes they employ are not just rationally, but also "substantially" related to legitimate and "important" governmental goals.[7] Most sex-classification policies, whether state-sponsored or not, fail even the lowest level of judicial scrutiny because they are not rationally related to legitimate policy goals. Not only can legitimate goals such as fraud prevention, safety, security, and privacy be met by alternative means, but also, and even more damning, there is no objective, socially agreed upon test for determining who is male and who is female. Hence, there is no way of ever enforcing sex-classification policies in a "rational," i.e., consistent way. And because gender perception is never race or class neutral, the subjective administration of sex-classification policies always raises the specter of intersectional gender judgments that are also irrelevant to legitimate policy goals, no matter their content or moral valence. I do not presume that every, or even most administrative agents wield their power to inspect and evaluate gender in discriminatory ways. The problem is that sex-classification policies prompt and permit such invidious treatment. If we cannot come up with good reasons for subjecting people to such caprice where something as personal as their sex identity and as crucial as their civil rights are concerned, then we have no business inspecting anyone's gender in the first place.

My argument proceeds in four sections. I first offer a working definition of the term "transgender," and stress that the perception of transgender experience does not always map onto the fact of transgender experience. Transgender discrimination is based upon the subjective perception that a person has stretched the elastic bands of binary sex categories "too far." Next I elucidate the political principle of sexual self-definition as contiguous with the more general liberal precept of personal autonomy and self-determination. I acknowledge the structural constraints that are placed upon our personal projects of sexual self-definition, and on our ability to see others apart from the intersectional gender stereotypes that permeate our culture. I then address antidiscrimination law specifically, and argue that gender identity antidiscrimination

laws can and should be used to abolish sex-classification policies. Doing so requires that we expand the normative goals of anti-sexism to explicitly recognize and remediate transgender discrimination. Gender-identity antidiscrimination laws may not change individual hearts and minds, but such laws can and should be used to strongly indicate when and where our feelings of animosity and aversion concerning gender identity and expression may and may not be expressed. I will then discuss some common examples of sex-classification policies that we have been socialized to think of as normal, benign, and necessary. I use the rational relationship test that governs gender-identity antidiscrimination law to show why longstanding and "normal" policies such as sex-marked bureaucratic medical forms, sex-segregated public restrooms, and even sex-segregated prisons are neither benign nor necessary. I show, too, how dismantling these and other sex-classification policies can benefit people whose appearances fall within the "normal" range of male and female intersectional gender appearances. I conclude by acknowledging antidiscrimination law's "remainder," the extra-legal transgender discrimination that will persist in the wake of withered sex-classification policies. I suggest that we use the role-goal-context logic of the rational relationship test to check our personal behavior when we feel curious, bewildered, or threatened by another person's "strange" intersectional gender appearance. My argument is intended as a contribution to broad normative discussions among scholars and citizens about public law, constitutional principles, and justice. At the same time, I draw from a range of empirical approaches to the study of gender, intersectionality, and discrimination, and my arguments speak to a broad range of scholars interested in liberal democratic citizenship and the conflicts of interest and value that continually redefine it.

Transgender Discrimination

Transgender discrimination punishes people who appear, in certain places, to be stretching the categories of male and female "too far." It is not necessarily the fact of transgender experience that makes a person vulnerable to transgender animus. Rather, it is the visual evidence, or what is assumed to be evidence, of transgender experience that makes someone vulnerable to transgender discrimination. I use the term "transgender" in this article to signify the experience of having changed one's birth sex designation from male to female or from female to male, the experience of rejecting binary gender classification and self-identifying as neither male nor female, as well as the experience of self-identifying as both male and female.[8] Intersex experience is sometimes yoked beneath the transgender umbrella, but it refers specifically to people who are born with hormonal, physiological, or chromosome characteristics that do not correspond to Western medical definitions of binary sex.[9] Later in life, an intersex person may or may not decide to change the sex they were assigned to as infants. Whether a person's birth sex designation is intersex or dyadic, "transitions" from male to female, or female to male later in life may or may not involve the use of surgical procedures and hormonal therapies that are used to produce the secondary sex characteristics of the person's felt gender.[10] Although we enact our sexualities via our gendered self-understandings and our gendered perceptions of others, the term transgender does not describe a person's sexual orientation.[11] Like people whose felt gender identities align with their birth sex designation, transgender people can be homosexual, heterosexual, bisexual, or asexual, a crucial descriptive point that is often obscured by the emphasis placed on "gayness," and more pointedly gay maleness, in the political and cultural deployment of the LGBT (Lesbian, Gay, Bisexual, and Transgender) awning.[12] Transgender and intersex individuals are not the only people harmed by transgender discrimination. But they are often singled out and policed in especially harsh ways because their existence reveals not just the social construction of sex-role stereotypes, but also the mutability of maleness and femaleness that predicate and anchor sex-role stereotypes.[13]

The rates of discrimination and violence against transgender people, especially transgender women, are alarmingly high. Two-thirds (63 percent) of transgender people report having experienced at least one episode of anti-transgender discrimination that "majorly impacted their ability to sustain themselves," such as losing their job, being physically or sexually assaulted, and being denied medical service. The unemployment rate for transgender people is double the rate of unemployment for non-transgender people. When the intersecting factors of race, class, and the direction of gender transition are taken into account, the statistical picture of transgender discrimination and violence becomes even grimmer. The unemployment rate for black transgender people is twice the rate of unemployment for white transgender people.[14] A 2011 study showed that 40 percent of anti-LGBT murder victims were transgender women. Black and Latina transgender women are murdered at higher rates than white transgender women, and their murders are especially brutal and typified by overkill.[15] Police departments often fail to adequately investigate such murders, in large part because the murders of transgender people fail to garner the mainstream media attention that would pressure law enforcement officials to be more accountable to the public they serve. And when such murders are reported, many journalists describe transgender women as men, use their given male names instead of their chosen female names, and print pre-gender transition photos of them. These actions not only fail to accord slain transgender women dignity, they also impede police investigations of their crimes by making them unrecognizable to anyone who may have witnessed their murders.[16] Poor black and

Latina transgender women are often targeted, harassed, and arrested by police officers under the stereotypical assumption that they are prostitutes. New York City's "stop and frisk" policy facilitated this kind of intersectional racial profiling, but black and Latina transgender women were never featured alongside the black and Latino non-transgender men that mainstream media focused on to highlight the policy's disparate race-sex impact.[17]

Sex-classification policies do not, of course, require or explicitly sanction transgender violence or discrimination, or its intersectional manifestations. Many of the bus operators that Arcila encountered chose not to enforce SEPTA's gender-sticker policy in a discriminatory way, even though they had the discretionary power to do so. The problem is that on at least two documented and reported occasions, bus operators did choose to invidiously enforce the policy, and their refusals meant dire consequences for Arcila. They used their own opinions about how black women and black men should appear and behave, and concluded that Arcila did not measure up to those standards in a momentary glance that quickly morphed into verbal harassment and then expulsion. SEPTA's gender-sticker policy transfigured Arcila into a criminal suspect, someone who was summarily suspected, tried, and punished for trying to filch a bus trip. But that is subterfuge for what really happened in those moments, which is that bus operators used the gender-sticker policy as a pretext for conveying their personal disdain for Arcila's gender expression. Her "wrong" gender expression could not be corrected by using a male transit pass, as that, too, was rejected. To use Dean Spade's apt wording, Arcila became "administratively impossible," which made it administratively possible to take away her civil right to use the public transportation that she had paid for.[18]

The contradictory claim that we both cannot and should not alter our birth sex designation is made possible by the widespread misconception that verifying who is male and who is female is simple and objective, so simple and objective that the criteria for doing so need not be written down or verbally explained to an employee charged with such a task. But what do we mean by sex verification? It cannot mean checking to see if a person has a vagina or penis, since we are required by law and social custom to cover our genitalia with clothing when we are in public. Absent this requirement we would see that there is much more size and shape variation among "male" and "female" genitalia, and bodies more generally, than popular culture would lead us to believe. The institution of advanced imaging body scanners at US airports in 2010 places a burden on some transgender and intersex people whose bodies do not correspond to the expectations of the TSA officials watching them enter the scanner. But the security measure also places a burden on many non-transgender people who feel embarrassed that their genitals, breasts, and other body parts are the wrong size or shape. Sex verification cannot mean the capacity to become pregnant given that some transgender men who have ovaries and uteruses can become pregnant, and some non-transgender women cannot become pregnant. It cannot mean the presence or lack of secondary sex characteristics such as breasts, facial and body hair, so-called male patterned baldness, muscularity, voice tone, skin texture, body fat distribution, or body odor since all of these physiological features vary according to endocrinology, and therefore can be altered via hormone therapy.

Try as we might, there are no objective or socially agreed upon criteria for assessing whether a person is male or female. Historically, the International Olympic Committee (IOC) has used a variety of techniques to gender-test athletes wishing to compete as female. Prior to the 1968 Mexico City Games, IOC officials visually inspected the genitalia of athletes who were accused by other athletes or coaches of being too masculine. After numerous complaints about this invasive and humiliating practice, the IOC switched to chromosomal testing. For the 2012 summer games, the IOC adopted its current protocol of measuring the level of testosterone in female athletes. If an athlete's testosterone levels fall within the "normal" range of male testosterone levels, the athlete may not compete as female, but may compete as male. The concern is about "men" infiltrating female sports, but not about "women" infiltrating men's athletics.[19] This reasoning is based on the statistical stereotype that most men are bigger and physically stronger than most women, and that size and strength necessarily produce competitive advantage in every Olympic sport. I address why this sort of statistical sex stereotyping should not be used to justify sex-classification policies in part three. For now, suffice it to say that such biological testing is imperfect, controversial, and completely impractical for the vast majority of administrative settings, including fare collection on a city bus not so very long ago in Philadelphia.

The fact that there are no objective, socially agreed upon criteria for verifying binary sex should be reason enough to abolish sex-classification policies. However, highlighting the irrationality of sex-classification policies, alone, is not likely to persuade all or even many people whose appearances fit well enough within existing gender norms that we should eliminate this longstanding social custom. I will need to show that sex-classification policies generate real harm that can only be alleviated by getting rid of these policies, root and branch. The political harm of sex-classification policies is that they transfer the crucial and deeply personal matter of sexual identity to administrative agents who then have the power to use their normative ideas about gender to deprive people of their civil right to use the public accommodations under their watch. The administrative charge to "simply" verify sex markers seems benign and inconsequential, but

it is not. Arcila and other transgender-appearing bus riders never knew how their gender appearances would be evaluated by the individual bus drivers they encountered, but they were always painfully aware that invidious discrimination was possible and likely, and that such discrimination could take the form of "mere" public inquisition and embarrassment, or escalate to formal ejection from a bus that was needed to get somewhere. The chance of meeting with these possibilities produces a chilling effect, too. Who knows how many people never even bothered to purchase a transit pass, or stopped taking buses altogether after one or more run-ins with a gender-assessing bus driver?[20]

Sexual Self-Definition

A major purpose of antidiscrimination law is to protect people who make unpopular self-regarding decisions from the tyrannical judgments and coercion of the majority who may not personally relate to, understand, or approve of their decisions. Transgender discrimination, as described above, infringes upon our authority to make decisions about our sexual affinity, about where and with whom we socially belong. In this sense, transgender bias differs from other identity-based bias. The crux of racism, sexism, ableism, ageism, and homophobia is not typically the allegation of not belonging to the group in question, but rather the low expectations and pernicious stereotypes about what a person can and cannot do precisely because she or he *is* Asian, a woman, old, in a wheelchair, or gay. Having our self-authority concerning sexual affinity be recognized by others goes to the core of our self-concepts, even when that decision is to confirm that one feels aligned, more or less, with one's birth sex designation.[21] Claire Snyder-Hall draws a useful conceptual distinction between choices and decisions, cautioning that the rhetoric of choice in third-wave "choice feminism" trivializes the hard decisions that individual women must often make in the face of formidable constraints.[22] Some of what John Stuart Mill generally referred to as socially-useful individual "experiments in living" are trivial, while other decisions are urgent and necessary for making one's life livable.[23]

By livability I mean something more than bare existence. For as Judith Butler notes, it is practically possible for social norms to tolerate a person's life without tolerating the conditions that make that person's life livable. Livability, for Butler, means something more than the conference of civil rights. It means according someone the full range of human feelings, so that one sees oneself and others as subjects of love, desire, pain, and ultimately grief.[24] Wendy Brown finds legally-mandated liberal toleration wanting because it leaves intact our feelings of aversion. She writes that "we cannot properly speak of tolerating what threatens or repels us; rather we are subjected, oppressed, or undone by their presence."[25] Anthony Appiah finds a certain kind of liberal tolerance to be fertile ground for the liberal project of self-definition that he endorses. He invokes the concept of dignity to do the normative work prompted by Butler's attention to livability and Brown's caution concerning aversion, arguing that we should use antidiscrimination law to reshape gender norms so that they "serve as potential instruments in the construction of a dignified individuality." The normative goal of sex discrimination law, according to Appiah, should be "to make it less true that our society constructs women as inferior to men."[26] Nancy Hirschmann theorizes feminism "very basically as a political and philosophical devotion to ending the oppression of people on the basis of gender and sex."[27] Making the lives of transgender people more livable requires these kinds of anti-sexist projects, but it also requires a deeper critique of the flawed assumption that anchors many feminist arguments: that binary sex is immutable and visually knowable. It will require treating the personal decision to change one's birth sex designation as a dignified decision pertaining to sexual affinity and the expression of love and desire, even if one cannot imagine making such a decision for oneself. Indeed, because the life-affirming decision to alter one's birth sex designation clashes with social norms and majority sentiment, the need for protecting the right to make and sustain such a decision against the tyranny of the majority becomes all the more crucial.[28]

To imagine being transgender when one has no personal experience with the feelings of being misaligned with one's birth sex designation is a form of empathy that many people have never been asked to contemplate. Transgender experience, in all of its variation, does not defeat the idea that sex is an "accident" of birth, to invoke John Rawls's famous wording.[29] It does, however, challenge the inference that our birth sex designations are consequently immutable, which is precisely the incorrect sweeping conclusion that Rawls and other political theorists have drawn from the fact that *most* people do not alter their birth sex designation. Courts have held administrative racial classifications to the strictest standard of judicial scrutiny not just because such classifications were historically used by whites to exclude and mistreat non-whites, but also because race has been deemed a "badge" that a person is born with and cannot change.[30] Analogizing from this legal logic, many liberal political and legal theorists have reasoned that it is unjust to disadvantage someone based upon a socially salient characteristic such as race or sex that she or he did not choose and cannot alter.[31] But as David A.J. Richards points out in his first-amendment argument for gay rights, identity immutability is a peculiar and ultimately unsound foundation for building an argument for equal treatment under the law. Whether or not sex is personally changeable tells us nothing about the meaning and importance of sexual identity for a particular person.

It may be even more difficult to further imagine the subjective forms that transgender experience and self-understanding can take. Some transgender individuals self-identify as queer, while others seek to assimilate into existing gender norms.[32] As Jay Prosser observes, "What gets dropped from transgender in its queer deployment to signify subversive gender performativity is the value of the matter that often most concerns the transsexual: the *narrative* of becoming a biological man or a biological woman (as opposed to the performative of effecting one) —in brief and simple the materiality of the sexed body." In other words, "there are transsexuals who seek very pointedly to be nonperformative, to be constative, quite simply to *be*."[33] Transgender identity, queer or constative, may or may not be visually transparent to others. Thus, our understanding of transgenderism must also allow "for the possibility of [gender] transition, which does not occur on the surgeon's table [or] at the clinic but instead in the spaces where people come together or in the quiet moments of reflection in one's room."[34] The social goal should not be to figure out what a transgender person looks, sounds, or acts like. While we may be curious about and want to "know" whether someone is male or female, curiosity does not grant us moral permission to question, inspect or pass judgment on another person's gender identity. The possibility of constative sex-identity transition also means that we do not always know what we think we know when it comes to reading the sex identity of other people. Instead of trying to detect binary sex, we should be aware and tolerant of the fact that some of the people we encounter in the public sphere will be in various stages of gender transition or prefer a gender pronoun that differs from the one listed on their personal identification documents or that our own reading of normative intersectional "scripts for identity" would suggest.

I do not want to overstate the freedom involved in sexual self-definition. Our decisions about sexual identity are constrained by entrenched binary sexual thinking, as well as by the many ways in which race, class, and the direction of one's binary gender transition intersect in processes of gender perception and evaluation. As Lori Marso theorizes, the "demands of femininity" cannot be experientially detached from becoming or being a woman.[35] In Butler's formulation, binary sexual thinking is so ingrained that it is presuppositional to human recognition. We cannot make sense of ourselves, or one another without the binary apparatus of male and female. It might seem that the bus operators' collective judgments that Arcila was neither a real woman nor a real man banish her from binary sex altogether. But such exile is not possible given the sexual regulatory regime through and against which we emerge as human to ourselves and to one another.[36] Jack Halberstam magnifies this point by noting that "the very flexibility and elasticity of the terms 'man' and 'woman' ensures their longevity. To test this proposition, look around any public space and notice how few present formulaic versions of gender and yet how few are unreadable or totally ambiguous."[37] Gender "realness" and "the real" are therefore conceptually distinct. "Realness—the appropriation of the attributes of the real, one could say—is precisely the transsexual condition. The real, on the other hand, is that which always exists elsewhere, and as a fantasy of belonging and being" that the extreme elasticity of binary gender makes possible.[38] I find this distinction instructive because it defers to Arcila's self-knowledge regarding her gender realness. It accords her the presupposition of being a black woman on her say-so without prejudging or prescribing what being a "real" black woman entails.

Intersectionality scholars remind us that our other socially salient identities interact with gender to further constrain the liberal concept of self-definition. Laws, policies, and everyday speech tease apart the identity vectors of race, gender, class, sexual orientation, and disability, but we experience these identities together in "simultaneous and interactive ways."[39] Rita Dhamoon describes "intersectionality type" scholarship as a heterogeneous body of work pertaining to identities, categories, processes, and systems.[40] Her own intersectional work focuses on the "interactive processes and structures in which meanings of privilege and penalty are produced, reproduced, and resisted in contingent and relational ways."[41] Our plural identities and their interactions factor into the crafting, interpretation, and enforcement of laws and policies even when such identity intersections are not explicitly indicated or acknowledged.[42] SEPTA's gender sticker policy made no explicit reference to race, class, or transgender identity, and neither do most other sex-classification policies. Nevertheless, normative stereotypes of black femaleness and maleness were "in the air" and, thus, culturally available for individual bus drivers to draw upon or reject in their misbegotten role as sex verifiers. Linda Alcoff underscores the visual dimension of such intersectional verification. "What I can see for myself is what is real; all else that vies for the status of the real must be inferred from that which can be seen [and] race and gender operate as our penultimate visible identities."[43] Class complicates intersectional gender surveillance because our race-sex assumptions concerning what men and women should look like are class-specific. In her legal account of appearance discrimination Deborah Rhode notes that "bias based on attractiveness is largely unregulated and compounds other inequalities based on class, race, ethnicity, and gender. Prevailing beauty standards privilege those with white-European features and the time and money to invest in their appearance."[44] Anna Kirkland argues that the real animus driving transgender discrimination is that, "nontrans people find them threatening, horrifying, aesthetically shocking, and deviant."[45] But she does not offer an intersectional race-sex-class account of this aesthetic shock, or what Iris Young

generally referred to as having an ugly body and being "feared, avoided, or hated on that account."[46]

Class status also affects where we are vulnerable to race-sex gender surveillance — for instance, whether we *must* take public transportation or can afford the option of a private vehicle. But the ability to dodge intersectional transgender discrimination in a poor or working-class venue does not mean that one will not encounter intersectional transgender discrimination in a middle or high-class venue. Transgender-appearing people with the financial means to afford private transportation could avoid being cross-examined by a SEPTA bus operator about their sex identity, and face the risk of expulsion. But middle-class and affluent transgender-appearing people are vulnerable to transgender discrimination in different places. Staying with the transportation example, such people are vulnerable to being denied a car rental or a new car test-drive if the rental or sales agent decides that their race-sex appearance does not match the sex marker on their driver's license.[47] Indeed, transgender people must "often cope with identification documents and public records that 'out' them as transgender," which renders them vulnerable to public harassment, humiliation, and physical violence.[48] Gender surveillance takes place in particular material environments, under certain lighting. Whose makeup seems especially heavy as compared to other women boarding the bus? Is a five o'clock shadow materializing under the fluorescent lights of a bus or car dealership office, or in a parking lot under the midday sun? Is the outline of breasts visible through clothing? Who is to say whether one kind of intersectional transgender discrimination is worse than the other? The upshot of both scenarios is that a person's access to a public accommodation has been curtailed, and consequently the person cannot get to where she or he wants or needs to go.

My claim is not that identity intersectionality necessarily makes transgender discrimination worse. Noting identity intersectionality does not tell us *how* individuals will use such information to make decisions. Indeed, as Keisha Lindsay and Nancy Wadsworth point out in their separate works on the use of intersectionality by conservative groups, the conceptual framework of intersectionality can be harnessed to serve diverse normative ends.[49] I argue that the normative open-endedness of intersectional gender perception intensifies the harm of sex-classification policies because it ushers in racial and class judgments that are also irrelevant to legitimate institutional goals, no matter their normative content. It was, after all, the arbitrary enforcement of the gender-sticker policy that made it terroristic for Arcila and others similarly situated. Paisley Currah and Dean Spade correctly conclude that the "the real impact of discrimination against transgender individuals is to be found in the cracks and crevices of the modern regulatory state, in the agency rules administered by particular state actors that exclude trans people" under the pretense of gender fraud.[50] However, neither Spade nor Currah sees anti-discrimination law as a way to rescind this misplaced decision-making authority. I make the case for doing so in the next section.

The Radical Potential of Gender Identity Anti-Discrimination Law

Gender-identity anti-discrimination laws such as the ordinance used by Arcila can and should be used to radically unsettle our customary assumptions about the social value we attach to sex classification in public life. But doing so requires that we imagine the normative goals of anti-sexism in more expansive terms than the correction of gender "mistakes," and the important but narrow feminist goal of making "it less true that our society constructs women as inferior to men."[51] Many critics of liberalism see antidiscrimination law as structurally limited to these restrictive normative goals. When Spade cites Alan Freeman's critique of antidiscrimination law's focus on the "perpetrator's perspective" as a reason for abandoning antidiscrimination law, he gives up on the prospect of using antidiscrimination law to prevent administrative agents from becoming perpetrators of intersectional gender-identity discrimination in the first place.[52] Those who seek to modify sex-classification policies to include transgender people wrongly presume that the discriminatory impact of sex-classification policies on transgender-appearing people is exclusion from sex-classificatory schemes, when in fact the sex-classification schemes are the harm. The gender-sticker policy was unjust because it wrongly structured the relationship between bus operators and bus riders. Gender identity (and its intersectional manifestations) was wholly irrelevant to the business of fare payment.

I use gender-identity antidiscrimination law to draw out and make explicit what traditional sex-discrimination law often overlooks—discrimination based on the presupposition of sex role stereotypes: sex itself. At the time of this writing, 17 states and the District of Columbia, as well as 143 US cities and counties have laws explicitly banning discrimination on the basis of gender identity or gender expression.[53] All of these states and municipalities already had sex discrimination laws, and still do. Neither the federal government nor the state of Pennsylvania currently bans gender-identity discrimination.[54] The push for gender-identity discrimination laws gained momentum in the 1990s because other efforts, such as adding a separate transgender category to discrimination statutes or framing transgender rights using the existing discrimination categories of sex or disability, were largely unsuccessful.[55] These newfangled antidiscrimination laws grew out of a pragmatic need to find a way to extend civil rights to transgender people, rather than out of any ontological or political claim that transgender discrimination is not a form of sexism. Philadelphia's ordinance effectively defines gender-identity discrimination as a kind of sex

discrimination that wrongly, and illegally, calls into question people's authority over their own sexual sense of self. The ordinance defines gender identity as "self-perception, or perception by others, as male or female," which includes "an individual's appearance, behavior, or physical characteristics, that may be in accord with, or opposed to one's physical anatomy, chromosomal sex, or sex assigned at birth; and shall include, but not be limited to, individuals who are undergoing or have completed sex reassignment."[56]

The idea that gender-identity discrimination is a kind of sexism that should be included in the legal definition of sex discrimination is gaining traction in employment discrimination jurisprudence, and federal administrative law. But these rulings and statements have not legally scrutinized the intrinsic harm of sex-classification policies, themselves. In 2011, courts decided that Title VII of the 1964 federal Civil Rights Act, which bars employers from discriminating against employees and prospective employees "because of sex," should be interpreted to protect transgender people.[57] In 2012, the Equal Employment Opportunity Commission (EEOC) ruled that "when an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment *related to the sex of the victim*".[58] More recently, the US Departments of Justice and Education issued separate statements that gender-identity discrimination should be treated as sex discrimination under Title IX of the 1972 Education Amendments to the 1964 Civil Rights Act. Title IX prohibits discrimination "on the basis of sex" in any federally-funded educational program. In 2011, a ninth-grade female-to-male (FTM) transgender student brought a Title IX lawsuit against the Arcadia Unified School District in Arcadia, California, alleging that school district officials had engaged in illegal sex discrimination when they denied his request to use male restroom and locker room facilities at his school, as well his request to bunk in the boys' cabin on an overnight school camping trip. The case was settled out of court in the student's favor. As part of the legal settlement, the Departments of Justice and Education each wrote letters stating that discrimination on the basis of gender identity constitutes sex discrimination in violation of Title IX, although officials from both departments were quick to caution that the content of the letters should not be construed as either agency's official policy.[59]

No one asked whether the existence of sex-segregated facilities within the school violated Title IX's prohibition of discrimination "on the basis of sex." Instead, the harm at issue was narrowly framed as a matter of individual misrecognition—a gender mistake. The departments of Justice and Education missed an opportunity to locate and excavate the source of gender-identity discrimination at the deeper and more profound level of discretionary gender judgment. Instead of asking whether the school officials made the right gender judgment, the discretion to make gender judgments in the first place should have been called into question. What seems to have made the case for allowing the student access to male facilities so compelling was that he had self-identified as male from a very early age, and with his parents' support had adopted a traditionally male name and "presented outwardly as male" as early as the fifth grade. Although he faced some initial harassment, after his teacher notified his classmates that he had transitioned to male, the peer harassment ceased and he was socially accepted.[60] But relying on social acceptance sets a precarious precedent for extending civil rights to transgender people. How will the school district handle a case in which a student self-identifies as neither male nor female, or as both male and female? Or, to follow the logic of the case, would the case have been as compelling if the transgender student had not been socially accepted as male by his parents, peers, and fifth-grade teacher? As my discussion of the SEPTA transit pass case shows, the people who are the most vulnerable to transgender discrimination are the people whose gender identities are not socially affirmed in particular places. Arcila self-identified as a woman, but her gender decision was socially rejected in the moment of fare-card inspection.

Sex-discrimination jurisprudence has neglected this kind of sexism because the harm of sexism has been narrowly construed as female disadvantage in relation to men and vice versa. In the 1996 landmark Supreme Court ruling that made it possible for women to attend the previously all-male Virginia Military Institute (VMI), the Court stressed that only sex-segregated public accommodations that place "artificial constraints on an individual's opportunity" are unconstitutional. The statistical stereotype that most women are physically weaker than most men and do not seek out predominately male, hyper-masculine educational settings such as VMI, where they will be physically and psychologically hazed, could not be used to justify the school's male-only admissions policy. Some women do seek out such an experience, and can meet its rigors. The IOC has adopted this logic, but has added a testosterone-level measurement to "scientifically" determine which women should compete against men in Olympic sport. In *VMI* Ginsburg reached all the way back to *Ballard v. United States*, the 1946 case that held that women could no longer be categorically excluded from juries, to make this point. She zoomed in on the *Ballard* Court's *ober dicta*, the passing comments made by judges that explain the holding but are not officially part of it, surmising that "the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both [sexes]."[61] Whether or not the *Ballard* and *VMI* Courts are right about binary sex differences, establishing equal opportunity for women and men does not require us to think of sex categories as "not fungible." State court rulings on sex discrimination have absorbed this flawed logic, too. Many have ruled, for instance, that

sex-differentiated business promotional pricing schemes such as "ladies' night" discounts are not forms of sex discrimination because they are intended to increase business revenue rather than to convey sex-specific animus.[62] Courts have also ruled inconsistently on the question of the extent an employer can require its male and female employees to adhere to stereotypically masculine and feminine dress and grooming standards. In the 1988 case, *Price Waterhouse v. Hopkins*, the Supreme Court upheld a woman's civil right not to dress and act femininely in an accounting firm. But eighteen years later, a US Court of Appeals upheld a casino's right to *require* that female employees wear makeup and pantyhose, and *ban* male employees from donning the very same feminine accoutrements in *Jespersen v. Harrah's*.

What all of these cases miss is the harm of administrative sex classification itself. When sex-discrimination law is merely used to correct gender mistakes, as in the school district case, it does nothing to help people in Arcila's shoes—people who have become "administratively impossible" because their sex self-identification statements are not taken at face value. But hitched to a more expansive notion of gender justice, sex-discrimination law can be used to disrupt transgender discrimination by banning the administration of gender.[63] Instead of asking whether a specific sex-classification policy harms women or men, or whether an administrative agent has misrecognized someone as male or female, we should ask the more profound question that antidiscrimination law demands: Is sex verification rationally related to a legitimate institutional goal?

Wither Sex-Classification Policies

A comprehensive analysis of the many sex-classification policies that structure our lives is beyond the scope of this article. However, in this section I briefly consider some common examples of sex classification and segregation policies that many of us think of as normal, necessary, and non-discriminatory. Think of all the times and places when and where your sex identity is verified as you go about your business in the public sphere. When and where are you asked to present your driver's license, passport, or birth certificate, all of which bear mandatory binary sex markers? When and where are you prompted to indicate your sex identity on a bureaucratic form, and do you know if you are required to do so? When and where might your sex identity be subject to the informal scrutiny of fellow citizens as you move through and attempt to access sex-segregated public accommodations such as restrooms, locker rooms, and fitting rooms? In each of these settings, what goals are binary sex markers meant to serve? And are there ways of achieving those goals without using sex markers or sex segregation?

Birth certificates, passports, and driver's licenses are used to guard against personal identity fraud. But, given the fact that sex identity is personally changeable, and not always visually transparent, are sex markers the best proxies for personal identity verification? Paisley Currah and Tara Mulqueen's analysis of gender verification in the ramping up of airport security since 9/11 reveals that gender-marked identity documents can be unreliable signposts to the very personal identity that homeland security agents are trying to decipher and "securitize."[64] It may seem obvious that binary sex identification is necessary for the provision of medical and dental care. But this is only true to the extent that the words male and female are proxies for a person's endocrinology and physiology. Transgender and intersex people disrupt this assumption. If a dentist wants to know whether a person is pregnant or may become pregnant because of the damaging effects of x-rays on a developing fetus, then that particular question should be asked of patients instead of using binary sex identity as a proxy for those possibilities. Some men can become pregnant and some women cannot.

We think it normal and necessary that males and females should be physically separated in different rooms, not just partitioned stalls, when it comes to urinating, defecating, applying make-up, and changing clothing.[65] But this longstanding social custom invidiously impacts transgender-appearing people. In Jody Herman's study of transgender and gender non-conforming people in Washington, DC, many respondents reported being subjected to verbal harassment, physical assault, and exclusion when attempting to use restrooms in their workplace, school, and public accommodations. Non-white respondents faired worse than white respondents. Being denied access to a bathroom causes serious health consequences ranging from dehydration and kidney infections to urinary tract infections.[66] If privacy and safety are the main reasons for sex-segregated restrooms, then might alternative physical designs such as floor-to-ceiling stall partitions do an even better job of meeting that goal than the current design of most American public restrooms? Indeed, some newer restaurants in cities such as New York and Philadelphia have opted for this design and maintain a common area for hand washing. Such re-design would increase the safety of everyone. Men seeking to physically harm women would be discouraged by the knowledge that both men and women would be present in the open area of sinks and mirrors. Transgender and non-transgender parents, teachers, babysitters, and other caretakers would also benefit from gender-neutral public restrooms, as they would not have to worry about entering the "wrong" bathroom to visually keep track of those under their care. And the gendered appearances of people using such facilities would not be policed in the way it is now in our current state of what Lacan wryly termed "urinary segregation."[67]

When it comes to criminal detention and incarceration we think it normal and necessary that males and females be held in separate facilities. But what goals are sex-segregated

correctional institutions meant to serve? It cannot be privacy, since a major part of criminal punishment entails the loss of most privacy rights. Is it safety? We assume that women would be extremely vulnerable to rape and other forms of physical assault by men in the absence of sex segregation. The majority of prisoners in US correctional facilities are non-violent drug offenders. So, the assumption that all male prisoners are inherently violent and prone to rape female prisoners may be unfounded. Separating men from women seems to be part of punishment itself. The denial of heterosexual access is founded on the misconception that same-sex prisoners will not have sex with one another. Gabriel Arkles argues that transgender prisoners should be given the option of separate housing while in prison, but that they should not be forced into solitary confinement. At the systemic level, Arkles advocates abolishing prisons altogether.[68] But he does not consider the radical reform of using gender-identity antidiscrimination law to abolish sex-segregated imprisonment. Prisons serve a different social function than public restrooms, to be sure. We can and should design and construct both kinds of facilities differently to better meet those particular functions.

Most transgender civil rights activism has focused on making it easier for transgender people to assimilate into existing sex-classification policies by, for example, being able to change the sex markers on their drivers' licenses, passports, and birth certificates to reflect their lived or felt sex identity. Some activists have pushed for adding alternative sex categories to binary sex categories. Australia offers its citizens the choice of three sex markers on their national passports: M, F, or an X. Some contend that the way to make public restrooms compliant with gender-identity antidiscrimination laws is to add a separate single-user restroom to the traditional men and women's restrooms, or to place transgender prisoners in protective custody or solitary confinement.[69] These reforms run the risk of stigmatizing those who opt for the X category or feel that they must use a separate bathroom apart from everyone else, or be denied social contact with other inmates within a prison. I argue that sex markers should be eliminated from birth certificates, passports, and driver's licenses, and that public restrooms should be imagined and constructed for use by everyone, regardless of gender identity. A better means to personal identity verification would be to rely upon biometric identification techniques that are not sex-specific. When it comes to applying for jobs or school admission, the only justifiable reason that I can imagine for an employer or school to ask for the sex identity of applicants is to collect data for meeting gender diversity goals. In those cases, it may make sense to provide applicants with the option of checking a binary sex or a transgender or gender variant box, and to make the voluntary nature of providing such information administratively clear.

To be clear, I am not arguing for the social abolition of binary sex identity. I do not think that such a radical prescriptive project is possible. And even if it were, I do not find such a goal normatively desirable. For it is precisely because gender identity is such an important part of our lives that we must take care not to institutionalize situations that deprive individuals of the authority to embody and enact the gender identity that feels most right for them. Whether the fight against transgender discrimination takes the legal form of sex- or gender-identity antidiscrimination law, we need to expand the normative goal of feminist politics to include the right of individuals to make unpopular gender identity decisions that may seem and even appear to others as strange.

Conclusion: Legal Remainder

A world without sex-classification policies would not be a world without strong binary sexual social norms and intersectional prejudice against those whose appearances stretch gender norms to their breaking points. The critics of liberalism rightly draw our attention to the fact that governmentality exceeds formal politics and is embedded in the social and cultural structures that become our collective and individual everyday habits.[70] The termination of SEPTA's gender-sticker policy will not mean the end of stares, snickers, and other forms of informal intersectional judgment and harassment by riders, and even drivers, when a transgender-appearing person enters a bus. In the wake of the gender-sticker policy's demise, grassroots activists in Philadelphia have galvanized to tackle residual gender-identity harassment on board public vehicles. This "legal remainder" does not mean that the fight to dismantle the three-decade old gender sticker policy was unimportant. The reason why administrative agents should not have been given the discretion to verify sex classification is not because they were not entitled to their own gender judgments. Many people will continue to find transgender-appearing people aesthetically shocking, and may feel "undone by their presence."[71] But no one should be given the discretionary power to use their personal discomfort to impede someone from boarding a bus, or accessing some other public accommodation.

Sex-classification policies are also harmful because they send a strong message to the public at large that we are not only justified in policing the gender expressions of others, but that doing so may in fact be our civic duty. But if the words "men" and "women" no longer appear on the doors of public restrooms or locker rooms, then the formal mechanism for making a "citizen's arrest" of someone who appears too masculine or too feminine to be sharing a bathroom or locker room with us evaporates into thin air. We make numerous decisions in the course of our daily lives in our various social roles about whether and

how we will use race-sex-class normative stereotypes in the "interactive processes" we find ourselves in. The purpose or function of our relationships and interactions should dictate whether and how our intersectional gender opinions are in or out of place. The reasons why Arcila wears dresses, or why someone classified as female at birth might opt for the sartorial trappings associated with normative masculinity, are really none of our business. Nor should these backstories be the business of a bus operator verifying fare payment, a police officer verifying someone's driver's license and auto insurance coverage, or a court adjudicating a Title IX discrimination dispute. Gender-identity laws can help spark self-reflection and guide our actions by reminding us to consider the potential impact of our words and actions on those whose race-sex appearances challenge our imagined ideals of what "real" men and women should look, sound, and behave like. Such laws can also prompt non-transgender people to notice that their sex identities are in fact changeable, even if they have never considered and cannot imagine ever wanting to make such a change.

How might Arcila's bus riding experience have been different had she been taken at her word, and acknowledged, even tolerated, as a black woman? Arcila was both in and out of place in the city buses she depends upon for changing location beyond walking distance of her home. As a black woman she was "in place" as a bus rider, given that the majority of bus riders in Philadelphia are black women.[72] But as a black transgender woman, she was frequently, and unpredictably, deemed "out of place" in this moving public place. Liberal legalism can be used to correct "gender mistakes," but it can also be deployed to challenge the validity of longstanding and deeply embedded sex-classification policies that by their very nature will always produce such mistakes. There is something remarkable and potentially radical about Arcila's story of transgender discrimination being representational of transgender discrimination writ large. It is radical for Arcila, as a black transgender woman, to be legally positioned as a rights-bearing citizen. Her racial appearance and class position were edited out of her formal legal complaint, but they cannot be redacted from the story of how she came to be at the center of a gender identity discrimination case in the city of Philadelphia at the dawn of the twenty-first century. Nor can we afford to ignore these fundamental if complicated features of individual and political identity if we wish to develop better and fairer understandings of contemporary liberal democratic citizenship.

Notes

1 Denvir 2009.

2 The ordinance covers "race, ethnicity, color, sex, sexual orientation, religion, national origin, ancestry, age, disability, marital status, source of income, familial status, genetic information or domestic or sexual violence victim status, or other act or practice made unlawful under this Charter or under the non-discrimination laws of the United States or the Commonwealth of Pennsylvania"; Philadelphia Commission on Human Relations, 2011.

3 Denvir 2009.

4 See R.A.G.E. 2012. The legal challenge is still pending because SEPTA contends that it is not subject to Philadelphia's gender-identity antidiscrimination law because it operates public vehicles outside of the city. Neither the state of Pennsylvania nor the federal government ban gender-identity discrimination in public accommodations. The Pennsylvania Supreme Court has agreed to hear the case to settle the dispute over jurisdiction. See Taylor 2013.

5 SEPTA 2013.

6 Public accommodations are entities that provide goods or services to the public. They may be publicly or privately owned. Public transportation is a public accommodation. Other examples include hotels, restaurants, government agencies, hair salons, schools, taxis, theatres, and medical and dental offices. Courts have ruled that public accommodations may not exclude people on the basis of protected social categories such as race and sex, but have held that private clubs may exclude members based on such identities. See *Moose Lodge No. 107 v. Irvis*.

7 This is the intermediate level of judicial scrutiny established in *Craig v. Boren* that falls somewhere between the "strict scrutiny" given to racial classifications and the lowest level of scrutiny (the rational relationship test) given to all other classifications. Because it receives funding from the state of Pennsylvania and also generates revenue from fare collection, SEPTA could be considered a quasi-state actor, and Arcila might have brought a federal sex-discrimination lawsuit against SEPTA based on that contention.

8 See for example, Bernstein Sycamore 2004; Diamond 2004.

9 Many doctors continue to use "corrective" surgeries to assign intersex infants to a binary sex classification in spite of compelling evidence that what medical experts have termed intersex "medical conditions" are in fact natural variations in human sexual development. See Fausto-Sterling 2000; Preves 2003. Surgical sexual assignment at birth robs intersex individuals of the right to decide, as they mature, which if either sex classification feels right to them. For personal memoirs that highlight this denial of self-determination, see Colapinto 2000 and Hillman 2008.

10 Perhaps a better word than "transition" is "alignment" which evokes coalescence or cohesion, which is very different from the imagery evoked by the euphemistic language of movement across implied by the prefix

"trans." This leads to the misunderstanding that the transsexual leaves his or her body and purchases a new one. As Aaron Raz writes in his memoir, "This body has changed since I was born. It will change more before I leave it, in ways I can't anticipate. How do any of us recognize ourselves, given the changes we go through between birth and death? Depending on your point of view, trapped within this question are answers about autoimmune disease, calls from God, cancer, pregnancy, schizophrenia, samsara, transsexualism. Like everyone else, I have had the same body since the day I was born. Approximately every seven years, most of my cells, like yours, have been replaced by new cells. I am trapped within my body only as little and as much as every other human being. To believe otherwise is to deny a miracle; I have changed and there is only one of me"; Raz 2007, 12-13.

11 Although as Valentine 2007 points out, the clear separation between gender and sexuality is not always reflected in people's self-understandings. He found that many "transgender" people, especially poor black and Latina transgender women use the term "gay" to describe themselves.

12 Gender-identity discrimination fuels the animus directed towards non-transgender lesbian, gay and bisexual people. Individuals who are perceived by others as masculine women or feminine men are vulnerable to homophobic stereotypes that equate all expressions of female masculinity with lesbianism, and all expressions of male femininity with gay maleness, regardless of the person's sexual orientation. In *Oncale v. Sundowner Offshore Services* (1998), the Supreme Court case ruling that Title VII protects employees against same-sex sexual harassment, Joesph Oncale was routinely subjected to homophobic epithets and threatened with rape by bigger and physically stronger male co-workers in the absence of any sincere allegation that he was gay.

13 In describing her theory of performativity, Judith Butler (1997, 532) argues for conceptualizing "the construal of 'sex' no longer as a bodily given on which the construct of gender is artificially imposed, but as a cultural norm which governs the materialization of bodies."

14 A 2011 study conducted by the National Center For Transgender Equality reported that the unemployment rate for transgender people was 14 percent overall, and 28 percent for black transgender people; Ellis 2013.

15 GLAAD 2013.

16 Brydum 2013; Haywood 2013.

17 See Brownstone 2013

18 Spade 2009, 369.

19 Vilain 2012.

20 Monthly transit passes are the most cost-effective way to purchase public transportation because they provide a discount over single-ride fares. Frequent bus riders therefore incurred an economic penalty if they chose not to buy a monthly transit pass.

21 Beth Kiyoko Jamieson 2011 (32) grounds her argument for trans civil rights in self-determination, too. Citing the Supreme Court's strong endorsement of a broadly defined notion of self-determination in the 2003 Supreme Court case, *Lawrence v. Texas*, Jamieson analogizes, "If, as in *Lawrence*, the choice of a sexual partner is among the 'most intimate and personal' decisions, then surely the determination of gender identity and expression, would be even more fundamental to freedom."

22 Snyder-Hall 2010, 256.

23 Mill 1997, 104.

24 Butler 2004, 8.

25 Brown 2006, 29.

26 Appiah 2011, 69.

27 Hirschmann 2003, 30.

28 John Stuart Mill (1997, 106) cautions against cleaving to majority opinion in either law or social practice for "on questions of self-regarding conduct [the opinion of the majority] is quite as likely to be wrong as right; for in these cases public opinion means, at the best, some people's opinion of what is good or bad for other people; while very often it does not even mean that; the public, with the most perfect indifference, passing over the pleasure or convenience of those whose conduct they censure, and considering only their own preference."

29 In devising his theory of justice, Rawls 1971, 102, writes, "In designing institutions [men] undertake to avail themselves of the accidents of nature and social circumstance only when doing so is for the common benefit."

30 In his famous dissenting opinion in the 1896 Supreme Court case, *Plessey v. Ferguson*, Justice Harlan opined, "[The thirteenth amendment] not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute *badges* of slavery or servitude"; emphasis added.

31 Rawls 1971.

32 Personal memoirs highlight some of the diversity of transgender life, although the vast majority of these accounts have been written by white transgender men and women. See for example, Bornstein 1995; Green 2004; Raz 2007; Serano 2007; Valerio 2006. For some personal reflections on being a black transman, see Kortney Ryan Ziegler's 2008 documentary film, *Still Black: A Portrait of Black Transmen*.

33 Prosser 1998, 32.

34 Snorton 2009, 90.

35 Marso 2010, 267.

36 Butler 2004, 8.

37 Halberstam 1998, 27.

38 Halberstam 2005, 52.
39 Simien and Hancock 2011, 185.
40 Dhamoon 2011, 232.
41 Ibid., 238.
42 Intersectionality has been adopted and amended by scholars and activists in a wide range of humanistic and social scientific fields, including political science in both its theoretic and empirical formats. See Garcia-Bedolla 2007; Jordan-Zachery 2007; Hankivsky and Cormier 2011; Hawkesworth 2006; Lindsay 2013; Wadsworth 2011.
43 Alcoff 2006, 6.
44 Rhode 2010, 7.
45 Kirkland 2006, 108.
46 Young 1993, 123.
47 "Lauren Grey didn't think much about the gender recorded on her Illinois driver's license until she went to test-drive a new car. Although she had been living as a woman for months and easily obtained a license with her new name and picture reflecting her feminine appearance, Grey's ID still identified her as male, puzzling the salesman and prompting uncomfortable questions. 'They are like, 'This doesn't match' Then you have to go into the story: 'I was born male, but now I'm not,' said Grey, 38, a graphic designer living in suburban Chicago. And they are like, 'What does this mean?' It was super embarassing. Similarly awkward conversations ensued when she tried to rent an apartment, went to bars, or was taken out of airport security lines for inspection"; Leff 2013.
48 Taylor 2007, 837.
49 Lindsay 2013; Wadsworth 2011.
50 Currah and Spade 2007, 3.
51 Appiah 2001, 69.
52 Spade 2011, 84.
53 Some people draw a distinction between "gender identity" and "gender expression," but I do not. Most of these laws were passed in the last two decades, with Minneapolis, MN, Champaign, IL, Urbana, IL, and Los Angeles, CA being forerunners in the late 1970s. See Transgender Law and Policy Institute.
54 In 2009 the House State Government Committee voted 12–11 in support of Pennsylvania HB 300, which is currently pending before the House. The bill would prohibit discrimination based on sexual orientation and gender identity in employment, housing, public accommodations, and other areas. See Transgender Law and Policy Institute.
55 In 1984 the American Psychiatric Association (APA) replaced the term "transsexualism" with "gender identity disorder" in its Diagnostic and Statistical Manual of Mental Disorders (DSM-V). The new designation prompted some attorneys to frame instances of transgender discrimination as disability rights cases. However, most of those efforts failed. In 2012, the APA replaced the term "gender identity disorder" with "gender dysphoria," which it defines as emotional distress pertaining to "a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children, the desire to be of the other gender must be present and verbalized."
56 See the Philadelphia Commission on Human Relations, Philadelphia Code, Chapter 9-1100. "Fair Practices Ordinance: Protections Against Unlawful Discrimination," Para 9-1102. Definitions (k).
57 In *Mia Macy v. Eric Holder*, the court found that the Bureau of Alchohol, Tobacco, Firearms and Explosives had illegally discriminated against its employee, Mia Macy, because of sex, after Macy was turned down for an already approved transfer to a crime laboratory immediately after notifying the Bureau of her transition from female to male. In *Glenn v. Brumby et. Al.*, the court found that the Georgia's General Assembly Legislative Counsel, Sewell Brumby, had illegally discriminated against its employee, Vandy Beth Glenn, an editor and proofreader in the Georgia General Assembly's Office of Legislative Counsel, when he fired her upon being notified of her intention to transition from male to female.
58 Geidner 2012, emphasis added.
59 Geidner 2013.
60 Ibid.
61 *United States v. Virginia* F. Supp. (1996).
62 Rank 2006.
63 Dhamoon 2011.
64 Currah and Mulqueen 2011, 557.
65 For a series of essays on the politics, including gender politics, of public toilets, see Molotch and Noren, 2010.
66 Herman 2013.
67 Case 2010.
68 Arkles 2009.
69 According to Delaware's recently passed public accommodation nondiscrimination law, "Such accommodations may include a separate or private place for the use of persons whose gender-related identity, appearance or expression is different from their assigned sex at birth."
70 Young 2006.
71 Kirkland 2006; Brown 2006.
72 SEPTA ridership is 64.2 percent female and 35.8 percent male, 50.6 percent African American, 1.8 percent Asian, 41.4 percent Caucasian, 3.1 percent Hispanic, and 3.1 percent Other; 43.9 percent of riders have a yearly household income of less than $35,000. These data lump dependent riders and non-dependent riders (i.e, work commuters and students) together. See SEPTA Fiscal Years 2010-2014.

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