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## Gender. Identity. Property?

Eliot T. Tracz

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# Gender. Identity. Property?

*Eliot T. Tracz\**

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## I. INTRODUCTION

Just over forty years ago, Professor Margaret Jane Radin published the massively influential article “Property and Personhood.”<sup>1</sup> Radin premised her article on the idea that in order “to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment.”<sup>2</sup> Going farther, Radin suggests that there are certain objects within a person’s possession—a ring, a house, an heirloom—which are so important that they become part of a that individuals personhood.<sup>3</sup>

Radin and her ideological successors—a “Who’s Who” of property experts<sup>4</sup>—have explored in detail the idea of property and personhood. Such treatment includes subjects such as constitutional takings,<sup>5</sup> land use,<sup>6</sup> and body parts.<sup>7</sup> These examples only scratch the surface on the property and personhood connection, and Radin’s work continues to be widely cited.<sup>8</sup>

Here, I extend Radin’s argument by suggesting there is something else which is central to personhood and worthy of property protections: a person’s gender identity. In making this argument, I draw on the fact that “property” need not be tangible, indeed the very existence of intellectual property—upon which I lean heavily—proves that an object need not be something you can hold in your hand in order to merit protection.

Much litigation has ensued testing the limits of gender identity and rights, but advocates often turn their focus to constitutional protections for a person’s gender identity and expression.<sup>9</sup> Similarly, other cases invoke civil rights protections.<sup>10</sup> This article looks to push consideration of gender identity and its legal protections beyond those traditional aspects. The goal is not to enact major change, but rather to expand the discussion of what

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1. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

2. *Id.*

3. *Id.* at 959.

4. See Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL’Y 93, 94-98 (2011) (listing over fifty scholars who have adopted Radin’s theory of Property and Personhood).

5. See, e.g., Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517 (2009); Nestor Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1 (2008).

6. See, e.g., Craig Anthony Arnold, *Clean Water Land Use: Connecting Scale and Function*, 23 PACE ENV’T L. REV. 291 (2006).

7. See, e.g., Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113 (2003).

8. A recent check of Westlaw found that *Property and Personhood* had received over 1,000 citations.

9. See e.g., Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 551-65 (2016) (arguing that transgender people should be considered a quasi-suspect class).

10. The best known example may be *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020) which involved a challenge under Title VII of the Civil Rights Act.

rights attach to gender identity and the extent to which the government may abridge those rights.

Part II provides insight into gender identity as a concept, using definitions and statistical information to provide understanding of the demographics of transgender and non-binary individuals.<sup>11</sup> Part III begins by questioning what it is that makes a person a person. In particular it looks at philosophical conceptions of personhood found in the works of George Hegel and John Locke.<sup>12</sup> Part IV argues the law already offers property protections for identities, especially in the area of intellectual property.<sup>13</sup> Part V argues individuals have a property interest in their gender identity. It begins by exploring the relationship between gender identity and personhood, before arguing that gender identity is a form of personal property.<sup>14</sup> Finally it discusses the legal implications of acknowledging gender identity as a form of property.<sup>15</sup>

## II. GENDER DIVERSITY

### A. GENDER OUTSIDE OF THE BINARY

Gender can be deceptively complex. It consists of a panoply of identities<sup>16</sup> which extend beyond a male/female binary. A person's gender identity, on the other hand, is that person's concept of themselves as male, female, both, or neither.<sup>17</sup> This identity may be identical to, or different from, the sex that the person was assigned at birth.<sup>18</sup> A person's "gender expression" on the other hand is the "[o]utward characteristics—such as appearance, behaviors, and attitudes—that communicate a person's identity to society."<sup>19</sup> A person's gender expression may be consistent with their gender assigned at birth, or it may differ to varying degrees based on the individual.

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11. *See infra* Part II.

12. *See infra* Sections III.A, III.B.

13. *See infra* Part IV.

14. *See infra* Sections V.A, V.B.

15. *See infra* Section V.C.

16. A recent textbook discussed 12 distinct identities: cisgender, trans boy, trans girl, genderqueer, non-binary, gender fluid, gender flux, agender, demigender, questioning gender, androgynous, and bigender. *See* CARLOS A. BALL ET AL., *CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY AND THE LAW* 7 (7th ed. 2022).

17. *See Glossary of Terms: Gender Identity*, HUM. RTS. CAMPAIGN (May 31, 2023), [https://www.hrc.org/resources/glossary-of-terms?utm\\_medium=ads&utm\\_source=bing&utm\\_content=Glossary-LGBTQ&utm\\_campaign=GoogleGrant&utm\\_source=GS&utm\\_medium=AD&utm\\_campaign=BPI-HRC-Grant&utm\\_content=&utm\\_term=lgbt%20terminology%20glossary](https://www.hrc.org/resources/glossary-of-terms?utm_medium=ads&utm_source=bing&utm_content=Glossary-LGBTQ&utm_campaign=GoogleGrant&utm_source=GS&utm_medium=AD&utm_campaign=BPI-HRC-Grant&utm_content=&utm_term=lgbt%20terminology%20glossary) [https://perma.cc/4J33-PHGA].

18. *See id.*

19. CHLOE O. DAVIS, *THE QUEEN'S ENGLISH: THE LGBTQIA+ DICTIONARY OF LINGO AND COLLOQUIAL PHRASES* 142 (2021).

Some individuals experience discomfort with the gender assigned at their birth.<sup>20</sup> This may be due to gender dysphoria, a medical condition characterized by:

[a] marked incongruence between one's experienced/expressed gender and natal gender of at least 6 months in duration, as manifested by at least two of the following:

A. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics)

B. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)

C. A strong desire for the primary and/or secondary sex characteristics of the other gender

D. A strong desire to be of the other gender (or some alternative gender different from one's designated gender)

E. A strong desire to be treated as the other gender (or some alternative gender different from one's designated gender)

F. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's designated gender).<sup>21</sup>

A number of people experiencing gender dysphoria may be transgender.

"Transgender" refers to a person who identifies with a gender identity or gender expression that differs from the sex assigned at the time of their birth.<sup>22</sup> It is an umbrella term<sup>23</sup> which includes a number of other identities such as trans man, trans woman, gender non-conforming,<sup>24</sup> or agender.<sup>25</sup>

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20. AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA I (2013), [https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA\\_DSM-5-Gender-Dysphoria.pdf](https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf) [<https://perma.cc/N3N6-3C4B>].

21. Natalie J. Nokoff, M.D., *Medical Interventions for Transgender Youth*, in ENDOTEXT at tbl. 2 (Bradley Anawalt et al. eds., updated Jan. 19, 2022), <https://www.ncbi.nlm.nih.gov/books/NBK577212/> [<https://perma.cc/N4NC-TJZF>].

22. DAVIS, *supra* note 19, at 299.

23. *Id.*

24. *Id.* at 144 (defining non-conforming as "[e]xpressing one's gender in a way that does not fit neatly into the gender binary").

25. *Id.* at 20 (defining agender as "[n]ot identifying with any gender").

All terms share the common thread of having a gender identity which does not align with their sex assigned at birth.

Some individuals identify as non-binary. Non-binary means that a person's gender identity is open to "a full spectrum of gender expressions, not limited by masculinity and femininity."<sup>26</sup> Professor Jessica Clarke has observed that "[t]here is no single model or even archetype of non-binary gender identity."<sup>27</sup> The numbers support this statement.

The 2015 U.S. Trans Survey (USTS)<sup>28</sup> provided an unprecedented look at the demographics of the transgender community in the United States. Out of all of the respondents, 62% identified as transgender men or women, while 35% identified as non-binary or genderqueer.<sup>29</sup> Among those who identified, 80% were assigned female at birth, and 20% were assigned male at birth.<sup>30</sup> Non-binary respondents also tended to be young, with approximately two thirds falling within the 18-24 age range.<sup>31</sup> Finally, evidence suggests that non-binary are more likely to be multiracial than transgender people.<sup>32</sup>

Third genders exist as well. Some First Nations members identify as Two-Spirit, while some Hawaiians may identify as "Mahuwahine."<sup>33</sup> Other cultures also have third—or more—genders.<sup>34</sup> As a result, gender constitutes a diverse mosaic of identities.

#### B. INTERSEX CONSIDERATIONS

In some cases, gender may be a challenging issue for biological reasons. Some people are born with the external sexual organ of one sex, and the internal sex organ of another sex.<sup>35</sup> Anecdotal evidence demonstrates that intersex individuals have many experiences which are likely foreign to those who are not intersex.

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26. DAVIS, *supra* note 19, at 223.

27. Jessica Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 905 (2019).

28. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE U.S. TRANSGENDER SURVEY (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/3YY6-RYVH>].

29. *Id.* at 45.

30. *Id.*

31. *Id.* at 46.

32. Jack Harrison et al., *A Gender Not Listed Here: Gender Queers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ POL'Y J. HARV. KENNEDY SCH. 13, 186 (2012).

33. *Id.* at 14.

34. While most of us are familiar with a traditional Western gender binary—male and female—this is by no means the full extent of gender identity. Some have found that, beyond male and female, there may be as many as 72 other genders. See Shaziya Allarakha, *What are the 72 Other Genders?*, MEDICINET (Feb. 9, 2024), [https://www.medicinenet.com/what\\_are\\_the\\_72\\_other\\_genders/article.htm](https://www.medicinenet.com/what_are_the_72_other_genders/article.htm) [<https://perma.cc/VAB9-46UA>].

35. For a deep exploration of this topic, see KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* 97 (Duke Univ. Press 2009).

Some intersex people have expressed difficulty with finding their identity in a binary system. Professor Hil Malatino writes that:

I wasn't buying the narrative that was offered me, the notion that nature had an intention that my body was somehow disobeying or belying, that I was a failed but remediable woman. It didn't resonate with me; it seemed that I failed to meet the constitutive criteria for womanhood at what I had been taught was the most basic level—the biological—and that no amount of gender-appropriate dressage would change that.

That was when I began to ask myself [if] I could inhabit a specifically intersex identity. I was preoccupied, above all, with the question of what I was, now that I considered myself neither male nor female. Some big questions concerning me, in no particular order: what was wrong with conventional understandings of biological sex, if being like me could be produced? What did being intersex mean in terms of my sexuality? Could I still be heterosexual? Homosexual? Bisexual? Did any of these sexual identities pertain?<sup>36</sup>

Professor Malatino eloquently describes the uncertainty and deeply personal experiences of a person struggling to understand how their gender informs their identity. This can include something as basic as trying to understand what their sexual orientation is.<sup>37</sup>

*Zzymm v. Pompeo*<sup>38</sup> provides a clear example of the legal challenges intersex individuals may face while trying to accomplish tasks that others take for granted. Dana Zzymm was born with both male and female genitalia.<sup>39</sup> Initially their birth certificate was left blank, but eventually Zzymm's parents chose to raise them as male and the original birth certificate's space for indicating sex was filled in as "male."<sup>40</sup> After reaching adulthood, Zzymm felt uncomfortable living as a man, and tried living as a woman.<sup>41</sup> They obtained a driver's license identifying them as a woman, but eventually even this felt uncomfortable.<sup>42</sup> Eventually, Zzymm embraced a non-binary identity and obtained a birth certificate identifying their sex as "unknown."<sup>43</sup>

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36. HIL MALATINO, *QUEER EMBODIMENT: MONSTROSITY, MEDICAL VIOLENCE, AND INTERSEX EXPERIENCE* 19 (Univ. of Nebraska Press 2019).

37. *Id.*

38. *Zzymm v. Pompeo*, 958 F.3d 1014 (10th Cir. 2020).

39. *Id.* at 1018.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

Upon applying for a passport, Zzyimm requested to designate their sex as “X.”<sup>44</sup> The United States State Department denied the request, instead offering Zzyimm the options to (1) obtain a passport identifying sex as female, consistent with Zzyimm’s passport; (2) obtain a passport identifying as male, if a physician would confirm that Zzyimm had transitioned to male; or (3) withdraw the application.<sup>45</sup> Zzyimm provided two letters from physicians attesting that Zzyimm was, in fact, intersex, but the State Department denied the application.<sup>46</sup> Following the denial, Zzyimm sued.<sup>47</sup>

A panel for the Tenth Circuit found that although the State Department had statutory authority to deny the passport based on the binary sex policy,<sup>48</sup> the court ultimately found that the Passport Act<sup>49</sup> has permissive language which allows the State Department to deny passports for reasons not contained within the statute’s text.<sup>50</sup> Arguing the United States Supreme Court had upheld the revocation of passports for other reasons not enumerated in the Passport Act, the Tenth Circuit found that, even though the State Department had never denied a passport based on an applicant’s refusal to identify as male or female, the State Department had acted in accordance with its longstanding gender binary policy.<sup>51</sup>

Ultimately, however, the Tenth Circuit found the State Department’s reliance upon the binary rule was arbitrary and capricious.<sup>52</sup> The Tenth Circuit vacated a district court ruling in favor of Zzyimm, including an injunction against the State Department enforcing its binary sex policy against Zzyimm.<sup>53</sup> At the same time, the court remanded the case with instructions to vacate the State Department’s decision and reconsider Zzyimm’s application for an intersex passport.<sup>54</sup>

It would be difficult to characterize *Zzyimm* as a win for intersex individuals. It is, however, a fair representation as the kind of struggles that intersex people may experience when simply trying to live authentically.

### III. PROPERTY AND PERSONHOOD

Before discussing the relationship between property and personhood, the question of what constitutes a “person” should be answered. Miriam Webster provides a number of definitions, the most useful of which are (1)

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44. *Zzyimm*, 958 F.3d at 1018.

45. *Id.* at 1019.

46. *Id.* at 1018-19.

47. *Id.* at 1019.

48. *Id.* at 1020.

49. 22 U.S.C. § 211(a).

50. *Zzyimm*, 958 F.3d at 1020 (citing *Haig v. Agee*, 453 U.S. 280, 290 (1981)).

51. *Id.* at 1022.

52. *Id.*

53. *Id.* at 1034.

54. *Id.* at 1034-35.

human, individual; and (2) the personality of a human being.<sup>55</sup> Yet, these definitions seem insufficient, and indeed, philosophers have long argued over what it means to be a “person.”

For John Locke a person is a “thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places.”<sup>56</sup> Self-consciousness is a key aspect of Lockean personhood. Similarly, the ability to reflect and therefore memory, are essential.

Philosopher Immanuel Kant provides a broader definition of what it means to be a person. For Kant, a person is both a free and rational agent whose existence is an end in and of itself.<sup>57</sup> From this perspective, personhood does not take into account any individual human differences such as tastes or personal histories. All of these definitions coalesce into a workable concept of personhood, though “personhood” itself remains objectively undefinable.

#### A. HEGELIAN PERSONHOOD

George Hegel’s “person” is similar to Kant’s definition,<sup>58</sup> essentially nothing more than an autonomous (though abstract) entity capable of possessing rights, lacking any individual characteristics. In positing this view of a person as a holder of rights, Hegel manages to eliminate all of those things—tastes, memories, plans, hopes and dreams, personal traits—which make human beings unique. Instead, the Hegelian person becomes concrete only through its interaction with the external world.

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55. *Person*, MERRIAM-WEBSTER (last updated Mar. 29, 2024), <https://www.merriam-webster.com/dictionary/person> [<https://perma.cc/2CU9-AXT4>].

56. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING IN FOUR BOOKS 286 (7th ed. 1715-16).

57. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS 25 (Thomas Kingsmill Abbott trans., 1949).

58. GEORGE HEGEL, PHILOSOPHY OF RIGHT §§ 35-36, at 37 (Thomas Malcolm Knox trans., 1942).

As Hegel puts it:

35. The universality of this consciously free will is abstract universality, the self-conscious but otherwise contentless and simple relation of itself to itself in its individuality, and from this point of view the subject is a person . . . .

35R. Personality begins not with the subject’s mere general consciousness of himself as an ego concretely determined in some way or other, but rather with his consciousness of himself as a completely abstract ego in which every concrete restriction and value is negated and without validity . . . .

36. (1) Personality essentially involves the capacity for rights and constitutes the concept and the basis (itself abstract) of the system of abstract and formal right. Hence the imperative of right is: “Be a person and respect others as persons.”

Hegel argued that a person “must translate his freedom into an external sphere in order to exist as Idea.”<sup>59</sup> This led Hegel to conclude that: “I as free will am an object to myself in what I possess and thereby also for the first time am an actual will, and this is the aspect which constitutes the category of *property*, the true and right factor in possession.”<sup>60</sup> By imposing one’s will on an item, that item then becomes the property of the person whose will is being imposed.<sup>61</sup> Thus, Hegel’s view of the relationship between personhood and property rests on the occupancy of one’s will within an object.

#### B. LOCKEAN PERSONHOOD

Another important thinker who tied property to personhood is John Locke. In the second of his *Two Treatises on Government*, Locke famously wrote that, “[t]hough the earth, and all inferior creatures be common to all men, yet every man has a property in his own person, this nobody has any right to but himself.”<sup>62</sup> Locke, of course, went further than simply attributing property interests to a “person.”

For Locke, a person’s property is “[t]he labour of his body and the work of his hands.”<sup>63</sup> By taking a thing from its natural state, and through labor transforming it into something else, a person could make a thing his own property.<sup>64</sup> Because of this labor, which is “the unquestionable property of the labourer,” no person but the laborer themselves can have any right to that property.<sup>65</sup>

The law has embraced Locke’s view, providing certain individuals with property interests in the work of their hands. A common example are mechanics liens which are creatures of statute. Minnesota law, for example, provides that

[w]hoever . . . contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery for any of the purposes hereinafter stated, whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor or subcontractor of such owner, shall have a lien upon

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59. HEGEL, *supra* note 58, § 41, at 40.

60. *Id.* § 45, at 42.

61. In Hegel’s words: “A person has for as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all ‘things’.” *Id.* § 44, at 41.

62. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* § 27 at 111 (Ian Shapiro ed., 2003).

63. *Id.*

64. *Id.* at 111-12.

65. *Id.* at 112.

the improvement, and upon the land on which it is situated or to which it may be removed . . . .<sup>66</sup>

Other states have similar statutes protecting the work of a laborer's body.<sup>67</sup>

Despite Locke's reasoning, property interests in bodies presents unique legal challenges. The Constitution rightly forbids the sale of live bodies,<sup>68</sup> but pieces of bodies—organs, plasma, and the like—or the bodies of a deceased prove somewhat more complicated to regulate. In *Moore v. Regents of University of California*,<sup>69</sup> the plaintiff, who suffered from hairy cell Leukemia, was treated by a physician who dishonestly used the plaintiff's cells to create a new line of cells, which were then patented.<sup>70</sup> The California Supreme Court found the plaintiff had no ownership interest in his cells, writing:

Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.<sup>71</sup>

*Moore* continues to be representative of rules regarding tissue excised from a human body.

At the same time, bodies—either whole or in part—may be donated, evidencing some rights to alienation in a person's body.<sup>72</sup> Our society has determined that it is beneficial to allow people to choose whether to donate their organs either after their death or, in certain circumstances such as with kidneys, during their lifetime. Similarly, the law allows people to donate their bodies as cadavers for the purposes of research or education.<sup>73</sup>

How does this relate to Locke? Professor Margaret Jane Radin has argued “[i]f it makes sense to say that one owns one's body, then, on the embodiment theory of personhood, the body is quintessentially personal property because it is literally constitutive of one's personhood.”<sup>74</sup>

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66. MINN. STAT. § 514.01 (2023).

67. N.Y. LIEN LAW § 3 (McKinney 2023); TEX. PROP. CODE ANN. § 53.021 (West 2022).

68. U.S. CONST. amend. XIII, § 1.

69. *Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120 (1990).

70. *Id.* at 125-128.

71. *Id.* at 137.

72. CAL. HEALTH & SAFETY CODE § 7150.15.

73. *Id.*

74. Radin, *supra* note 1, at 966.

### C. CONTEMPORARY PROPERTY AND PERSONHOOD

In the early 1980's, the Kantian and Lockean views—with a little George Hegel thrown in—came together through the groundbreaking work of Professor Radin, beginning with her article “Property and Personhood.”<sup>75</sup> In her work, Radin offered three propositions about the relationship between personhood and property:

(1) At least some conventional property interests in society ought to be recognized and preserved as personal.

(2) Where we can ascertain that a given property right is personal, there is a *prima facie* case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people. This case is strongest where without the claimed protection of property as personal, the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.

(3) Where we can ascertain that a property right is fungible, there is a *prima facie* case that that right should yield to some extent in the face of conflicting recognized personhood interests, not embodied in property. This case is strongest where without the claimed personhood interest, the claimants' opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened.<sup>76</sup>

It is the first of these propositions—some property interests ought to be recognized and preserved as personal—which is the focus of the remainder of this section.

This principle has already been enshrined in law, most notably in the Fourth Amendment, which states in its entirety:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>77</sup>

Even more so, the view that these categories of property are of significant personal value predates the Constitution. For example, in the

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75. Radin, *supra* note 1, at 957.

76. *Id.* at 1014-15.

77. U.S. CONST. amend. IV.

case of *Entick v. Carrington*, decided in 1765, an opinion by Lord Camden states:

Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection . . . yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass . . . .<sup>78</sup>

This language would later be adopted in 1886, by the United States Supreme Court in *Boyd v. United States*, when the Court affirmed the Framers' of the Constitution considered the *Entick* decision when drafting the Fourth Amendment.<sup>79</sup> It bears noting, however, the Supreme Court, eschewing the plain language of the Fourth Amendment's text, has since pivoted to the understanding that "the Fourth Amendment protects people, not places."<sup>80</sup>

The Supreme Court notwithstanding, Radin writes that there are certain items of property which ascend to such a level of importance that they become entwined with our personhood.<sup>81</sup> Drawing on Hegel and Locke, Radin argues that these objects—wedding rings, portraits, heirlooms, houses—become part of our personhood because "they are part of the way we constitute ourselves as continuing personal entities in the world."<sup>82</sup> Although different types of items may vary from person to person, it is the person's relationship to the item that matters.

Under Radin's view, the strength of a person's relationship to an item of property can be determined by the amount of pain a person would feel if the item were lost.<sup>83</sup> In other words, "an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement."<sup>84</sup> In order to be tied to personhood, an object must not be fungible.

Radin's theory of property and personhood, nicely ties together the property and personhood theories of both Locke and Hegel. In doing so, it transcends the mere theoretical and draws attention to real world relationships that people have with their property. Later, this article will consider how a person's gender identity would fit within this framework.<sup>85</sup> First, however, it is necessary to establish that a person's identity can be considered property in the first place.

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78. *Entick v. Carrington*, 95 Eng. Rep. 807, 810 (1765).

79. *Boyd v. United States*, 116 U.S. 616, 626-28 (1886).

80. *Katz v. United States*, 389 U.S. 347, 351 (1967).

81. Radin, *supra* note 1, at 959.

82. *Id.*

83. *Id.*

84. *Id.*

85. See *infra* Part V.

#### IV. EXISTING PROPERTY RIGHTS IN PERSONAL IDENTITY

This section argues the law already protects a person's interest in aspects of their identity, in both civil and criminal law. Each area will be examined in detail below.

##### A. CIVIL PROTECTIONS

Civil rules and statutes present a number of ways in which a person's property interest in their identity can be protected. Rights of Publicity and Likeness Rights protect an individual's identity from unfair commercial use, and these trademarks can be used to protect a persona, which may be synonymous with a person's identity.<sup>86</sup> -

The right of publicity is one such protection example. In 1953, the Second Circuit Court of Appeals issued a decision in the case *Haelan Laboratories v. Topps Chewing Gum*.<sup>87</sup> The Plaintiff, Topps Chewing Gum, had contracted with popular baseball players for an exclusive right to use photographs of the players in connection with the share of chewing gum.<sup>88</sup> Haelan Laboratories, a competitor of Topps, "deliberately induced" a player to allow Haelan to use the player's photograph in connection with the sales of Haelan's gum "either during the original or extended term of plaintiff's contract" with Topps.<sup>89</sup> Topps filed suit to enjoin Haelan from infringing on its allegedly exclusive rights to the players' images.<sup>90</sup> Haelan, on the other hand, argued that the players' only legal interest in their photographs was an unassignable right of privacy.<sup>91</sup> As a result, Haelan argued, Topps had acquired nothing more than a release of liability.<sup>92</sup> A judge for the Eastern District of New York found in favor of Haelan, but on appeal the Second Circuit reversed, finding that "a man has a right in the publicity value of his photograph" in addition to the right to privacy.<sup>93</sup>

Although *Haelan* broke new ground in creating a right to publicity, decades passed before the right became more fully developed.<sup>94</sup> As time progressed, proponents of the right to publicity argued that famous people should be entitled to an unrestricted property interest in the use of their name or likeness for commercial purposes.<sup>95</sup> Eventually, the United States Supreme Court addressed the right to publicity in the case *Zacchini v.*

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86. See cases cited *infra* notes 90, 99, and 104.

87. *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953).

88. *Id.* at 867.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 868.

94. Emily Hoenig, *Why Can't We All Just Cher?: Drag Celebrity Impersonators Versus an Ever-Expanding Right of Publicity*, 38 CARDOZO ARTS & ENT. L.J. 537, 542 (2020).

95. See Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 215-16 (1954).

*Scripps-Howard Broad. Co.*<sup>96</sup> That case involved a performer—Hugo Zacchini—who was well-known for a human cannonball act which involved Zacchini being fired out of a cannon into a net 200 feet away.<sup>97</sup> A reporter of Scripps-Howard Broadcasting recorded the performance, despite having been asked not to, and the clip aired on the news that night.<sup>98</sup> Zacchini sued, alleging “unlawful appropriation” of his “professional property.”<sup>99</sup> The Supreme Court acknowledged that the right to publicity exists under state law.<sup>100</sup>

Subsequently, celebrities took great advantage of the right to publicity in order to restrain commercial uses of their identities.<sup>101</sup> Courts protected numerous aspects of celebrities’ identities including voices,<sup>102</sup> likenesses,<sup>103</sup> catchphrases,<sup>104</sup> and even a baseball pitcher’s windup.<sup>105</sup> Eventually, a number of states amended what was, in effect, a common law right by adopting statutes codifying the right to publicity.<sup>106</sup> In every case, what was at stake was the commercialization of a celebrity’s identity, and as the Sixth Circuit noted, “[i]f the celebrity’s identity is commercially exploited, there has been an invasion of his right whether or not his ‘name or likeness’ is used.”<sup>107</sup>

The Lanham Act<sup>108</sup> has also been used to protect an individual’s identity. Once described as “the federal equivalent of the right of publicity,”<sup>109</sup> the Lanham Act—which governs trademarks—creates a legal cause of action for persons or entities injured by commercial use of any “word, term, name, symbol or device” as well as any “false designation of origin, false or misleading description of fact, or false or misleading representation of fact” which is likely to cause confusion to consumers.<sup>110</sup>

Like the right of publicity, celebrities have utilized the Lanham Act to protect their commercial interest in their identities. One example is *White v. Samsung Elecs. Am., Inc.*<sup>111</sup> In that case, Vanna White, the longtime

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96. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

97. *Id.* at 563.

98. *Id.* at 563-64.

99. *Id.* at 564.

100. *Id.* at 566.

101. *See, e.g., Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (holding that performer Better Midler had a cause of action against Ford Motor Co. for Ford’s deliberate use of a sound-a-like in a commercial).

102. *Id.* at 463.

103. *See Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979).

104. *See Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

105. *See Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998).

106. For a comprehensive list *see Right of Publicity Statutes & Interactive Map*, RIGHT OF PUBLICITY, <https://rightofpublicity.com/statutes> [<https://perma.cc/66V6-3SS4>].

107. *Carson*, 698 F.2d at 835.

108. 15 U.S.C. §§ 1051-72.

109. *See ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003).

110. 15 U.S.C. § 1125(a)(1)(A).

111. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

hostess of Wheel of Fortune, sued over a commercial featuring a robot dressed in a wig, gown, and jewelry which resembled White's hair and dress.<sup>112</sup> In addition, "[t]he robot was posed next to a game board which is instantly recognizable as the Wheel of Fortune game show set, in a stance for which White is famous."<sup>113</sup> The Ninth Circuit found the "mark" in that case was White's persona, and after applying an eight-factor test, found that White's mark deserved strong protection.<sup>114</sup>

The common law and statutory rights of publicity, as well as the Lanham Act, protect an individual's right to commercialize or prevent others from commercializing their identity. From a property perspective, this would appear as a form of the right to exclude.<sup>115</sup> But the right to exclude is not the only property interest implicated by the Lanham Act and the right of publicity. The right to profit and the right to use are also both at play. It is safe to say then, that both common law and statutory law protect a person's property interest in their identity.

#### B. CRIMINAL PROTECTIONS

Just as civil laws protect a person's property interests in their identity, so too do state and federal criminal laws. Identity theft is a criminal act in which a person uses the personal or financial information of another to use that person's identity to commit a crime.<sup>116</sup> At the outset, theft implies the existence of a property interest, as theft is defined as "[1] a taking of property or an exercise of control over property [2] without consent [3] with the criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent."<sup>117</sup> In other words, the existence of a property interest is a condition precedent to the commission of a theft.

Identity theft, then, refers to a specific type of theft offense. Under federal law, an aggravated identity theft occurs whenever a person "during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person . . . ."<sup>118</sup> It is these means of

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112. *White*, 971 F.2d at 1396.

113. *Id.*

114. *Id.* at 1400 (holding the eight factors are: "(1) the strength of the plaintiff's mark; (2) the relatedness of the goods; (3) the similarity of the marks; (4) the evidence of actual confusion; (5) the marketing channels used; (6) the likely degree of purchaser care; (7) the defendant's intent in selecting the mark; and (8) the likelihood of expansion of the product lines").

115. Some common rights included in the "bundle of rights" are the right to exclude, the right to alienate, the right to use, the right to profit, and the right to destroy. *See* Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939).

116. *Identity Theft*, BLACK'S LAW DICTIONARY (11th ed. 2019).

117. *Mandujano-Real v. Mukaskey*, 526 F.3d 585, 589-90 (9th Cir. 2008).

118. 18 U.S.C. § 1028A(a)(1). The referenced subsection (c) violations include:

identification, which may include Social Security numbers, credit card numbers, and bank account information, which allow that perpetrator to assume the identity of their victim.

State legislatures have also provided similar protections. In New York, for example, a person is guilty of Identity Theft in the First Degree when

he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby:

1. obtains goods, money, property or services or uses credit in the name of such other person in an aggregate amount that exceeds two thousand dollars; or
2. causes financial loss to such person or to another person or persons in an aggregate amount that exceeds two thousand dollars; or
3. commits or attempts to commit a class D felony or higher level crime or acts as an accessory in the commission of a class D or higher level felony.<sup>119</sup>

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(1) section 641 (relating to theft of public money, property, or rewards, section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).

*Id.* § 1028A(c)(1)-(11).

119. N.Y. PENAL LAW § 190.80 (McKinney 2008).

New York also recognizes second and third degree identity theft offenses.<sup>120</sup>

Other states have enacted similar statutes. In Minnesota, a person is guilty of “identity theft” when that person “ transfers, possesses, or uses an identity that is not the person’s own, with the intent to commit, aid, or abet any unlawful activity.”<sup>121</sup> Like New York, the focus of the statute rests on the use of a person’s identifying information as a method of assuming a person’s identity.<sup>122</sup> California law provides both criminal<sup>123</sup> and civil<sup>124</sup> statutory protection against identity theft.

### C. IDENTITY IS A LEGALLY PROTECTABLE PROPERTY INTEREST

There are several things we can infer from the various legal protections for a person’s identity. First, many these protections are for aspects of identity. These include things such as voices,<sup>125</sup> likenesses,<sup>126</sup> catchphrases,<sup>127</sup> physical mannerisms such as a baseball pitcher’s windup.<sup>128</sup> Many of these identity aspects are easy to commercialize, meaning that there is a property interest in profiting from a person’s identity.

Second, while a person’s identity may not be protected *per se*, criminal laws prohibit misuse of a person’s identifying information such as a “name,

120. See N.Y. PENAL LAW §§ 190.79, 190.78 (McKinney 2008, 2002).

121. MINN. STAT. § 609.527(2) (2023).

122. See *State v. Reynua*, 807 N.W.2d 473, 478 n.1 (Minn. App. Ct. 2011) (noting “[i]t is the assumption of the identify of another under circumstances in which that identification . . . entails legal rights or privileges . . .”). Further, Minnesota actually defines “identity” as:

any name, number, or data transmission that may be used, alone or in conjunction with any other information, to identify a specific individual or entity, including any of the following:

- (1) a name, Social Security number, date of birth, official government-issued driver’s license or identification number, government passport number, or employer or taxpayer identification number;
- (2) unique electronic identification number, address, account number, or routing code; or
- (3) telecommunication identification information or access device.

MINN. STAT. § 609.527(1)(e) (2023).

123. See CAL. PENAL CODE §530.5(a) (2011) (“Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense . . .”).

124. CAL. CIV. CODE § 1798.93 (2022) (providing civil actions for victims of the crime of identity theft).

125. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

126. See *Lugosi v. Universal Pictures*, 603 P.2d 425, 441 n.17 (Cal. 1979).

127. See *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836 (6th Cir. 1983).

128. See *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 693 (9th Cir. 1998).

Social Security number, date of birth, official government-issued driver's license or identification number, government passport number, or employer or taxpayer identification number, . . . [or bank] account number."<sup>129</sup> The only reason a person would steal this information is to assume the identity of another, the actual types of stolen information are merely methods of verifying identification.

Finally, legislatures take the protection of individual's identities extremely seriously. We can infer this from the fact that criminal convictions for identity fraud are often felonies, as well as from the fact that violations of the Lanham Act may be subject to treble damages.<sup>130</sup> The severity of these deterrents show that protecting a person's identity is considered socially desirable.

## V. GENDER IDENTITY AND PROPERTY

It seems clear that the law protects certain property interests in a person's identity, or at least in aspects of a person's identity. This section considers whether gender identity fits within concepts of property law as well as what rights ought to attach to a property interest in one's gender identity.

### A. GENDER IDENTITY AND PROPERTY

Accepting that one can have a property interest in their identity—as evidenced by the protections afforded by criminal law and intellectual property law—the next question is whether there is a property interest in gender identity. There are two ways to consider this question: from a theoretical approach and from a reality based assessment of facts. Both merit consideration.

From a Hegelian and Lockean perspective, that is to say, one that is externally focused, then gender identity likely constitutes property. Hegel held that property accrued from the imposition of the will on an object,<sup>131</sup> while Locke argued that a person has “a property in his own person.”<sup>132</sup> It follows then that a person may impose their will on an object, which is nothing less than their own body.

A person may impose their will, which is to say their identity on their body, through their gender expression. Remember that a person's gender expression is demonstrated by their “outward characteristics—such as appearance, behaviors, and attitudes—that communicate a person's identity to society.”<sup>133</sup> Through these means, an individual imposes their will, in

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129. See MINN. STAT. § 609.5271(e)(1)-(2) (2023).

130. 15 U.S.C. § 1117.

131. HEGEL, *supra* note 58, § 44 at 41.

132. LOCKE, *supra* note 56, § 27 at 111.

133. DAVIS, *supra* note 19, at 142.

this case, their gender identity, onto an object—their body—through attire, hair styles, makeup (or its absence), and other indicators of gender. For a Lockean or Hegelian, this imposition of will, and the labor required to impose that will, creates a property interest.

Moving away from the theoretical and into the real world, the idea that gender identity and property overlap is not new.<sup>134</sup> Indeed, our history and tradition has tied gender to property for centuries.<sup>135</sup> This is most clearly demonstrated by the existence of coverture laws, which endured for centuries.

Coverture was a property doctrine which the colonies inherited from England.<sup>136</sup> Sir William Blackstone described coverture as suspending “the very being or legal existence of the woman” and melding her into her husband’s legal existence.<sup>137</sup> A wife was “covered” by her husband and conducted her business “under his protection.”<sup>138</sup> At the root of coverture was the idea that men and women occupy “separate spheres.”<sup>139</sup> Under this concept, women occupied the domestic sphere—raising children and maintaining the home—while men maintained dominion over the public sphere by working and providing for their families.<sup>140</sup>

The effects of coverture spanned several areas of law. A husband possessed rights to their wife’s earnings and were able to recover debts owed to her.<sup>141</sup> A wife could not sue or be sued unless her husband joined the suit as a party.<sup>142</sup> Because a husband and wife were considered to be one legal entity, one could not steal property from the other.<sup>143</sup> In the family sphere, husbands controlled custody of the couple’s children.<sup>144</sup>

In the realm of property law, coverture has been particularly prevalent. Husband’s controlled all property within a marriage, which extended to include any property owned by the wife prior to the marriage.<sup>145</sup> After

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134. See Lauren Wigginton, *Heteronormative Identities as Property: Adversely Possessing Maleness and Femaleness*, 33 AM. U. J. SOC. POL’Y & L. 139, 142 (2014) (drawing on critical race theory ideas of property to assign property value to gender identity).

135. *Id.*

136. Yvette Joy Liebesman, *No Guarantees: Lessons From the Property Rights Gained and Lost by Married Women in Two American Colonies*, 27 WOMEN’S RTS. L. REP. 181, 187 (2006).

137. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (1765).

138. *Id.*

139. Danaya C. Wright, “Well-Behaved Women Don’t Make History”: Rethinking English Family, Law, and History, 19 WIS. WOMEN’S L.J. 211, 236-37 (2004).

140. *Id.* at 236.

141. Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN’S L.J. 179, 180-81 (1998).

142. Amy D. Ronner, *Husband and Wife Are One - Him: Bennis v. Michigan as the Resurrection of Coverture*, 4 MICH. J. GENDER & L. 129, 133 (1996).

143. *Id.*

144. Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS U. L. REV. 73, 77 (2003).

145. Turano, *supra* note 141, at 180-81.

getting married, a wife could not sell or gift her property without her husband's permission.<sup>146</sup> Husband's creditors could potentially seize a wife's property—even property obtained prior to the marriage—to cover his debts.<sup>147</sup> Finally, husbands had the right to any monetary proceeds obtained by renting out their wife's property.<sup>148</sup>

Finally, the last section discussed at length the legal protections given to the economic aspects of identity. It is relevant, then, to consider the ability of a person to monetize their gender identity. Substantial data supports the fact that people assigned male at birth earn more than people assigned female at birth.<sup>149</sup> So while a person may be able to monetize aspects of their identity—their voice, likeness, etc.—a person may also receive a financial benefit merely by existing as a specific gender.

Luckily, coverture has been largely extinguished by statute.<sup>150</sup> Some holdovers, tenancy by the entirety for example, still exist in certain states.<sup>151</sup> The gender pay gap shows signs of shrinking.<sup>152</sup> These are both good things, but for purposes of this article, it is sufficient to say that the relationship between gender and property is deeply rooted in our history and tradition.

#### B. GENDER IDENTITY AND PERSONHOOD

If we accept that a person has a property interest in their gender identity, can we then go so far as to argue that that property interest falls within Radin's theory of property and personhood? Recall that the strength of a person's relationship with an object may be determined by the amount of pain a person would feel if it were lost.<sup>153</sup> Unfortunately, the sort of pain that a person might experience with loss of identity is well documented.

Gender dysphoria, which was defined in Section II, is a significant part of the cost of losing one's gender identity.<sup>154</sup> Research has tied the gender dysphoria to significant harms beyond the major psychological; a recently published article found that children and adolescents with Gender Dysphoria were more likely to be admitted to the hospital for suicidality or

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146. Turano, *supra* note 141, at 181.

147. *Id.* at 181-82.

148. *Id.* at 182.

149. Katherine Haan, Forbes Advisor, *Gender Pay Gap Statistics in 2024*, FORBES (Feb. 27, 2023), <https://www.forbes.com/advisor/business/gender-pay-gap-statistics/> [<https://perma.cc/6QLE-CPE3>].

150. Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 212, 216 (2014).

151. *Tenancy*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting tenancy by the entirety can only exist between a husband and wife).

152. Haan, *supra* note 149.

153. Radin, *supra* note 1, at 959.

154. *See supra* note 21 and accompanying text.

self-harm.<sup>155</sup> It would be difficult to argue that this level of pain would not cause a property interest in their gender identity to rise to the level of personhood.

Outside of our relationships with ourselves, our gender identity plays a role in some of our most important relationships. Being a parent is one of the most significant relationships a person can have, and the language and label a person chooses to use—mother, father, or simply “parent”—may be deeply personal. So too the way we label our relationships with our romantic partners, our siblings, and our own parents. There are genderless words a person could use for each of these relationships—partner, or spouse rather than husband or wife, sibling rather than brother or sister, child rather than son or daughter—and each of those identities would be valid. But as noted above, the degree of a person’s relationship to an object—tangible or intangible—is dependent on that individual themselves.

### C. WHAT PROPERTY INTERESTS DOES A PERSON HAVE IN THEIR GENDER IDENTITY?

Assuming that a person has a property interest in their gender identity, what types of rights might a person expect to wield over that identity? The traditional bundle of sticks includes a number of well-known rights: the right to exclude, the right to possess, the right to alienate, the right to profit<sup>156</sup>—some of which may not be relevant. The right to alienate, for example, may not be relevant because one could not transfer one’s gender identity to another individual. The rights to exclude and possess, however, may be assigned to gender identity.

#### i. RIGHT TO EXCLUDE

When Sir William Blackstone wrote, “[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,”<sup>157</sup> it is unlikely that he had property interests in gender identity in mind. Instead, he articulated what has become known as the right to exclude. In modern property, the right to exclude is considered preeminent among other rights, indeed Professor Thomas Merrill wrote that “the right to exclude others is more than just ‘one of the most essential[‘] constituents—it is the sine qua

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155. See Hannah K. Mitchell et al., *Prevalence of gender dysphoria and suicidality and self-harm in a national database of paediatric inpatients in the USA: a population-based, serial cross-sectional study*, 6 *THE LANCET CHILD & ADOLESCENT HEALTH* 876, 876 (2022).

156. See *supra* note 115.

157. 2 *SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND* 2 (1766).

non.”<sup>158</sup> The United States Supreme Court has also adopted a view that holds the right to exclude ascendant.<sup>159</sup>

The right to exclude is, of course, integral to basic understanding of real property rights. Trespass, for instance, is a form of tort allowing owners of real property to recover damages—even if only nominal damages—<sup>160</sup> for violations of the right to exclude. Patents, copyright, and trademark extend the right to exclude into the realm of intellectual property. Intellectual property shows that the right to exclude can extend to property that is not tangible.<sup>161</sup> That should include gender identity.

For many, if not most, of us, our biological sex—and by extension our gender—is chosen for us at the time of our birth. A person we have never met simply observes our external genitalia, and a monumental decision is made for us. Neither we as individuals, nor our parents or those who will raise us, have any control over how we will be presented to the world. This is done because some clinicians believe that immediate sex assignment is necessary so that parents are not confused about whether to raise their child as a girl or a boy and so that children are not confused about their gender identities and roles.<sup>162</sup>

In the context of gender identity, the right to exclude could involve excluding outside individuals—doctors, school boards, state legislatures—from determining what that person’s gender identity is. It should include limiting the ability of governmental organizations to dictate what pronouns a person must use,<sup>163</sup> which bathroom is appropriate,<sup>164</sup> and what clothes are appropriate.<sup>165</sup>

#### i. RIGHT TO POSSES

Possession is a central concept in property law, so it may come as some surprise that there is no universally agreed upon definition. One court explained this phenomenon as occurring because “its definition varies

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158. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

159. *See, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987).

160. *See, e.g.*, *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (1997).

161. *See* discussion *supra* Section IV.A.

162. KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* 55 (2008).

163. *See Florida bill seeks to place restrictions on use of pronouns*, CBS MIAMI (Nov. 21, 2022, 2:54 PM), <https://www.cbsnews.com/miami/news/florida-bill-seeks-to-place-restrictions-on-use-of-pronouns/> [<https://perma.cc/9RM9-MQ6H>].

164. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

165. *See, e.g.*, *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at \*8 (Mass. Super. Ct. Oct. 11, 2000).

depending on the context in which it is used.”<sup>166</sup> For the purposes of this article, “possession” is defined as the exercise of dominion and control over property.<sup>167</sup>

A government may bar an individual from exercising dominion and control over their identity through statutes, ordinances, or administrative policies. In early 2022, the Grapevine-Colleyville Independent School District, located in North Texas, took steps to limit students’ gender expression.<sup>168</sup> As enacted, the policies adopted by the school instituted sex-based distinctions in sports,<sup>169</sup> while also targeting the identities of both

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166. *Popov v. Hayashi*, No. 400545, 2002 WL 31833731, at \*4 (Cal. Super. Ct. Dec. 18, 2002). Ambiguity aside, the court, with the help of several law professors, identified two criteria to help assist with determining whether a person retains possession of an object:

(1) “[p]ossession requires both physical control over the item and an intent to control it or exclude others from it. But these generalizations function more as guidelines than as direct determinants of possession issues. Possession is a blurred question of law and fact.”

(2) [t]he orthodox view of possession regards it as a union of the two elements of the physical relation of the possessor to the thing, and of intent. This physical relation is the actual power over the thing in question, the ability to hold and make use of it. But a mere physical relation of the possessor to the thing in question is not enough. There must also be manifested an intent to control it.” *Id.* at 4.

167. *Possession*, BLACK’S LAW DICTIONARY (11th ed. 2019).

168. Emily Crane & MaryAnn Martinez, *Texas school district bans preferred pronouns, transgender sports participation*, N.Y. POST (Aug. 23, 2022, 6:44 PM), <https://nypost.com/2022/08/23/texas-school-district-bans-preferred-pronouns-trans-sports/> [https://perma.cc/34YC-QN9T].

169. GRAPEVINE-COLLEYVILLE ISD, *Interscholastic Athletic Competition Based on Biological Sex*, in BOARD POLICY MANUAL SECTION F 1, 8 (June 30, 2022), <https://pol.tasb.org/PolicyOnline/PolicyDetails?key=1102&code=FM#legalTabContent> [https://perma.cc/2GYZ-BB6M]. The policy states:

An interscholastic athletic team sponsored or authorized by a district may not allow a student to compete in an interscholastic athletic competition sponsored or authorized by the district that is designated for the biological sex opposite to the student’s biological sex as correctly stated on the student’s official birth certificate, as described below, or if the student’s official birth certificate is unobtainable, another government record.

Exception: An interscholastic athletic team sponsored or authorized by a district may allow a female student to compete in an interscholastic athletic competition that is designated for male students if a corresponding interscholastic athletic competition designated for female students is not offered or available.

Birth Certificate Statement: For purposes of this provision, a statement of a student’s biological sex on the student’s official birth certificate is considered to have correctly stated the student’s biological sex only if the statement was entered at or near the time of the student’s birth or modified to correct any type of scrivener or clerical error in the student’s biological sex.

transgender and non-binary students in the classroom. The text of the policy is clear in its intent:

District personnel and agents shall not teach, instruct, train, or otherwise require any other District personnel or agents to teach, instruct, train, or otherwise communicate to any individual or group topics regarding sexual orientation or gender identity unless and until those individual persons or the entire group has fully completed the fifth grade.

District personnel and agents, while acting as agents or representatives of the District, shall not teach, instruct, train, or otherwise promote gender fluidity, as defined herein. Nor shall District personnel and agents be required to adopt, support, or promote gender fluidity, as defined herein. This provision shall not be interpreted as requiring, and does not require, any District personnel or agent to violate any rules or regulations propagated by that individual's professional licensing authority.

For purposes of this policy, gender fluidity means any theory or ideology that:

1. Espouses the view that biological sex is merely a social construct;
2. Espouses the view that it is possible for a person to be any gender or none (i.e., non-binary) based solely on that person's feelings or preferences; or
3. Espouses the view that an individual's biological sex should be changed to "match" a self-believed gender that is different from the person's biological sex.

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The District shall not promote, require, or encourage the use of titles or pronoun identifiers for students, teachers, or any other persons in any manner that is inconsistent with the biological sex of such person as listed on:

1. The person's official birth certificate; or
2. If the person's official birth certificate is unobtainable, another government-issued record.

A statement of a student's biological sex on the student's official birth certificate is considered to have correctly stated the student's biological sex only if the statement was:

1. Entered at or near the time of the student's birth; or
2. Modified to correct any type of scrivener or clerical error in the student's biological sex.

However, to the extent that a student (with the written consent of such student's parent or legal guardian), parent, or legal guardian has specifically requested or directed the use of a specific title or pronoun for that particular student, District personnel interacting with the student may comply with such request at their discretion. District personnel shall not require a student, teacher, administrator, or any other person listed herein to use a title or pronoun in reference to another person that is inconsistent with the biological sex of such person as listed on:

1. The person's official birth certificate; or
2. If the person's official birth certificate is unobtainable, another government-issued record.

A statement of a student's biological sex on the student's official birth certificate is considered to have correctly stated the student's biological sex only if the statement was:

1. Entered at or near the time of the student's birth; or
2. Modified to correct any type of scrivener or clerical error in the student's biological sex.<sup>170</sup>

It's clear that this policy is intended to remove students own sense of agency in determining their identity, and limit the extent to which they can interact with their identity in their interactions with the world.

Arguably, when a state or local government entity, like the Grapevine-Colleyville School Board, claims the right to determine a person's gender through statutory regulation, it removes a person's control over their identity, in terms of both designation and expression. But if the law recognizes that a person has a property interest in their gender identity, then that person ought to possess the right to exclude the government from setting unreasonable boundaries on the expression of that identity.

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170. GRAPEVINE-COLLEYVILLE BOARD ISD, *Miscellaneous Instructional Policies: Teaching About Controversial Issues*, in BOARD POLICY MANUAL SECTION E 1, 4-5 (Sept. 21, 2022), <https://pol.tasb.org/PolicyOnline/PolicyDetails?key=1102&code=EMB#localTabContent> [https://perma.cc/P2GE-YRLG].

#### D. WHY IT MATTERS

As discussed in the introduction, much of the litigation involving gender identity has taken place within the context of Fourteenth Amendment protections and federal civil rights statutes.<sup>171</sup> Both are important avenues for establishing and protecting rights not just for a person's gender identity, but for the LGBTQ community generally. The problem is that ultimately, these federal protections come within the purview of the Supreme Court whose willingness to protect LGBTQ rights is inconsistent at best.<sup>172</sup>

Property disputes, however, are largely decided by state courts, which include questions of real property, as well as personal property.<sup>173</sup> What this means for gender identity as property is, in states choosing to recognize a property right in gender identity, the likelihood of interference by a hostile federal court is dramatically lower. That does not mean that recognizing property rights in gender identity is a panacea for legal transphobia. It does, however, present a possible route for progressive—or at least less hostile—state legislatures and local governments to protect its constituents.

### VI. CONCLUSION

Property and personhood have been closely tied together. Philosophers, scholars, and lawyers have explored this relationship at length and determined that there are times when an item of property is so valued that it becomes part of an individual's personhood. When such a thing occurs, that property becomes something more. Generally, the types of property which might be considered to become tied to a person's identity include things such as a wedding ring, a portrait, a family heirloom, or even real property.<sup>174</sup> These items may hold significant personal value to their owners, even if they are otherwise merely commodities: say for instance the same portrait in the possession of an art dealer, or the same wedding ring in the hands of a jeweler.<sup>175</sup>

Real and personal property may be closely tied to our personhood, but they are not alone in being aspects of personhood receiving legal protection. The law also recognizes that a person may have a property interest in their identity. This is most clearly defined through intellectual property law,

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171. See *supra* notes 9-10 and accompanying text.

172. Compare *Bostock v. Clayton*, 590 U.S. 644 (2020), with *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

173. See, e.g., *Boggs v. Boggs*, 520 U.S. 833, 861 (1997) (Breyer, J. dissenting) (noting “family, property, and probate—all areas of traditional, and important, state concern”); David Pratt, *Marriage, Divorce, Death, and ERISA*, 31 QUINNIPIAC PROB. L.J. 101, 102 (2018) (noting property passed through inheritance “has developed over hundreds of years, and is almost exclusively a matter of state . . . law”).

174. Radin, *supra* note 1, at 36.

175. *Id.* at 37.

which allows people to commercialize various aspects of their identity such as their likeness, their voice, and distinctive athletic traits, as well as criminal law, which protects a person's identity by prohibiting the illegal use or possession of a person's identifying materials.

Both of these identity protections—intellectual property and prohibitions on identity theft—share a common theme in that they protect a person from financial harm. It matters not whether that harm is lost income, or a fraudulent use of a person's identifying information on a credit application, both potentially result in serious economic harm. Thus far, the law seemingly limits identity protection to circumstances involving economic harms.

And yet, there is no reason why a person's gender identity should not also be subject to property protections. If economic harm were all that mattered, then the sheer body of evidence tying gender to earning potential and career advancement should be sufficient to warrant protection. But, if more argument were needed, our legal tradition includes a long history of tying gender to property interests through coverture. It follows then, that tying gender and property interests is part of our history and tradition.

Arguably the existence of a property interest in a person's gender identity is consistent with leading theories of both property and personhood. Whether operating under a Lockean theory of personhood, or a Kantian theory of freedom, a person's gender identity is their own and no one else's to possess or to own. This is so because a person's gender identity is so closely tied to their personhood.

Therein lies the ultimate point: a person's gender identity is their own possession, and their own property. Within that property interest lies the right to exclude others—whether medical professionals or government officials—from defining that identity. Similarly, that property interest bars others from exercising any form of dominion and control, which is to say, “possession” over that person's gender identity through statutory, regulatory, or other means. Simply put, a person's gender identity is their own property, and no one has the right to trespass upon that property.

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