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Adverse Possession of Identity: Radical Theory, Conventional Practice

The doctrine of adverse possession is an outlier in the rigid and formalistic realm of property law. Adverse possession rewards the squatter who pulls off a successful performance as the true owner of a piece of property, to the disadvantage of the original owner. Adverse possession, however, is not the only legal doctrine that confers legal status on those who are merely acting *as if* they have that legal status. Other familiar doctrines, such as common law marriage, provide recognition, and the accompanying rights and duties, to those who act *as if* they are husband and wife. But sometimes acting *as if* is not enough. If a person who comports herself as a woman is deemed to be a biological "man," she may find herself fired, without legal recourse, if she tries to come to work wearing a dress.[1]

When is acting *as if* one had legal status sufficient to secure that status in the eyes of the law? What normative rationales have been put forth by courts and commentators for transforming de facto performances into de jure protections? When should the law formalize a performance? This Article will take up these questions in three contexts: property law, family law, and the law of sex and race determination. Adverse possession confers property ownership on trespassers who have occupied land for a given period of time. Common law marriage statutes treat a couple as married upon dissolution of the relationship or death of one spouse, if that couple has behaved as if married for a certain amount of time. The evolving legal concept of functional parenthood grants custody rights to persons who fulfill

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[1] *See, e.g.*, Doe v. Boeing, 846 P.2d 531, 533 (Wash. 1993).

caretaking roles for children, even if those persons are not legal parents. Doctrines of race determination in the nineteenth century conferred legal rights to those who successfully acted out social expectations for behavior of white persons.

In each case, the elements of a legal claim are strikingly similar: physical proximity, notoriety and publicity, a claim of right, consistent and continuous behavior, and public acquiescence. Moreover, while the law protects the interests of the parties immediately concerned, protection of third-party interests and social expectations turns out to be the dispositive factor in each case.

This Article will also examine what is at stake when legal doctrines acquiesce to public performances, a phenomenon I will refer to as "performance reification." The theory behind performance reification seems to be that the law is public enforcement of a preexisting natural status or private arrangement. Law is not constitutive of that natural status or private arrangement. However, the doctrines of performance reification demonstrate that a legal doctrine can give shape to the very social behaviors that it attempts to describe. Indeed, these doctrines raise fundamental and profound questions about the nature of property, marriage, the family, and racial and gender identity. What distinguishes property from theft, marriage from prostitution, parenthood from kidnapping, passing from whiteness, male-to-female transsexuals from women? Is the difference one of private rights, social judgments, or legal forms?

At first glance, it appears that performance reification is a radical idea and a subversive phenomenon. By recognizing mere performance, these doctrines suggest that there is no underlying, extralegal, stable essence to property, marriage, parenthood, race and gender. Thus, the theory goes, these doctrines should open social conventions and legal institutions to contestation. However, upon closer examination, it becomes apparent that such performance reification might simultaneously and unpredictably shore up the power of the underlying norm to exact conformity from individuals. To the extent that courts are only counting a certain performance as worthy of reification, they are conditioning the grant of rights on conformity to a particular social norm. Individuals find that they must accede to many limitations in order to be cognizable as rights-bearing subjects. Therefore, I contend that doctrines of performance reification should be

approached cautiously by anyone who seeks progressive social change.

In Part I of this Article, I outline the symmetry between the doctrinal elements of adverse possession law, common law marriage, and functional parenthood, and examine the policy rationales for each doctrine. I extend this analysis to the historical doctrines of race determination in slavery and segregation cases, which bear a surprising similarity to adverse possession. Part I further analyzes contemporary doctrines of sex determination, in which performance is consistently inadequate to guarantee legal recognition. In Part II, I apply two legal theories: formalism and realism, in an attempt to build a conceptual framework to explain these doctrines. However, the analysis provided by these legal theories is incomplete, so I draw on Judith Butler's theory of gender performativity to demonstrate that the law here is engaged in recognizing a successful public performance. In turn, Part III analyzes the subversive and conservative aspects of performance reification to conclude that these doctrines are more likely to preserve conformist community expectations than to open social norms to contestation. Lastly, Part IV concludes that "one-size-fits-all" legal institutions, such as property, marriage, parenthood, whiteness, and sexual identity, should only be imposed upon ambiguous performances when strong third-party interests are at stake.

I

Analogous Doctrines of Performance Reification

Under what conditions is acting *as if* one was an owner, a spouse, a parent, or a white person sufficient for a court to recognize one's legal status as such? Interesting parallels emerge from comparison of the doctrines of adverse possession, common law marriage, functional parenthood, and trials of race determination. Interestingly, a similar doctrine of performance reification is not apparent from the case law on sex determination.

A. Property Law

1. Adverse Possession: Acting like an Owner

Adverse possession is the transfer of a legal interest in property from the original owner to one who has acted *as if* she

owned the land for a certain period of time, regardless of whether or not that person actually has title to the land. Carol Rose offers the following example:

> Suppose I own a lot in the mountains, and some stranger to me, without my permission, builds a house on it, clears the woods, and farms the lot continuously for a given period, say twenty years. During that time, I am entitled to go to court to force him off the lot. But if I have not done so at the end of twenty years, or some other period fixed by statute, not only can I not sue him for recovery of what was my land, but the law recognizes him as the title owner.[2]

Courts in most jurisdictions have developed a series of fairly uniform requirements for adverse possession, including "(1) an actual entry giving exclusive possession that is (2) open and notorious, (3) adverse and under a claim of right, and (4) continuous for the statutory period."[3]

An adverse possessor acts like a true owner: "the sort of *entry and exclusive possession* that will ripen into title by adverse possession is use of the property in the manner that an average true owner would use it under the circumstances."[4] One court explained, "[i]t has become firmly established that the requisite possession requires such possession and dominion 'as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition.'"[5] The adverse possessor must send a clear signal: acting like the owner in a way that is consistent and continuous throughout the statutory period.[6]

The notoriety requirement shapes which acts are sufficient to establish adverse possession. The acts must establish that the adverse possessor holds herself out as the legitimate formal owner of the property. Although building a house, farming the land, or putting up a fence may support a case for adverse possession, these are not prerequisites. Acting like a land owner can mean merely mimicking the legal formalities of land ownership. In the classic case of adverse possession, *Lessee of Ewing v. Burnet*, the

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2 Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 79 (1985).

3 JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 131 (4th ed. 1998).

4 *Id.*

5 Howard v. Kunto, 477 P.2d 210, 213-14 (Wash. Ct. App. 1970), *overruled on other grounds by* Chaplin v. Sanders, 676 P.2d 831, 861 n.2 (Wash. 1984) (citation omitted).

6 DUKEMINIER & KRIER, *supra* note 3, at 131. R

adverse possessor, Ewing, claimed a sand and gravel lot adjacent to his property.[7] Ewing paid taxes on the lot, claimed the exclusive right of digging and removing sand and gravel, made leases to others to remove the sand and gravel, and brought actions of trespass against others who attempted to remove sand and gravel without his permission.[8] As the Supreme Court stated:

> Neither actual occupation, cultivation nor residence, are necessary to constitute actual possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.[9]

Not only must the adverse possessor hold herself out to other potential owners as the rightful owner of the land, but the public must accept the adverse possessor as the owner. No claim of ownership will succeed unless the adverse possessor's presence on the property is exclusive. If the original owner reenters or brings a successful ejectment action before the end of the time period set by the statute of limitations, the claim of adverse possession fails.[10]

2. *Rationales for Adverse Possession*

What is the rationale behind adverse possession law? Some have suggested that it rewards the productive use of land.[11] However, this explanation does not explain why the common law requires that adverse possession be open, notorious, and under a claim of right. In *Ewing*, activities by the adverse possessor mimicking the legal role of a true owner, such as ejecting trespassers and paying taxes, established adverse possession. If productive use of land is the rationale, why does the law reward these activities, neither of which is necessarily pro-development? The re-

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[7] 36 U.S. 41, 49 (1837).

[8] *Id.*

[9] *Id.* at 53.

[10] DUKEMINIER & KRIER, *supra* note 3, at 131. **R**

[11] Henry W. Ballantine, *Title by Adverse Possession,* 32 HARV. L. REV. 135, 135 (1918) ("It has been suggested . . . that the policy is to reward those using the land in a way beneficial to the community."). *See* John G. Sprankling, *An Environmental Critique of Adverse Possession,* 79 CORNELL L. REV. 816, 816 (1994) ("The doctrine is . . . dominated by a prodevelopment nineteenth century ideology that encourages and legitimates economic exploitation—and thus environmental degradation—of wild lands.").

quirement that a claim be public indicates that the underlying justification is *certainty* in land ownership. Thomas Merrill gives four certainty-related justifications for adverse possession law: "the problem of lost evidence, the desirability of quieting titles, the interest in discouraging sleeping owners, and the reliance interests of [adverse possessors] and interested third persons."[12]

Adverse possession law is designed to protect the reliance interests of the possessor. Open and notorious trespassing puts the original owner "on notice" that she should complain in order to assert her rights to the property. If the owner does not attempt to eject the adverse possessor within the time period set by the statute of limitations, the adverse possessor should be able to assume that she can act as the new owner of the property without disruption. Joseph Singer explains:

> The possessor has come to expect continued access to the property and the true owner has fed those expectations by her actions (or her failure to act). It is morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependent party.[13]

The law protects the reliance interests of the adverse possessor. Nonetheless, commentators find the doctrine troubling insofar as it rewards squatters and punishes rightful owners.[14] The common law does not even require that the adverse possessor act under a good-faith belief of ownership.[15] Accordingly, it rewards

[12] Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1133 (1984).

[13] Joseph W. Singer, *The Reliance Interest in Property,* 40 STAN. L. REV. 611, 667 (1988). Holmes commented, "Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example." Oliver Wendell Holmes, *The Path of Law,* 10 HARV. L. REV. 457, 476 (1897).

[14] Holmes, *supra* note 13, at 476. ("[W]hat is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?"); Ballantine, *supra* note 11, at 135 ("[T]he doctrine apparently affords an anomalous instance of maturing a wrong into a right contrary to one of the most fundamental axioms of the law."). **R** **R**

[15] DUKEMINIER & KRIER, *supra* note 3, at 133. It is unclear if a particular subjective intent is required by the claim of right element. Margaret Radin lists three possibilities: "(1) state of mind is irrelevant; (2) the required state of mind is, 'I thought I owned it'; (3) the required state of mind is, 'I thought I did not own it [and intended to take it]." Margaret Jane Radin, *Time, Possession, and Alienation,* 64 WASH. U. L.Q. 739, 746-47 (1986). Some empirical research indicates that "where courts allow adverse possession to ripen into title, bad faith on the part of the possessor seldom exists. Where the possessor knows that he is trespassing, valid title does not accrue to him simply by the passage of years." R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 347 (1983). *But see* Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor* **R**

even the bad-faith adverse possessor who defrauds the community into believing that she is the true owner of property belonging to another.

Considerations other than the reliance interests of the adverse possessor must be pivotal, such as the public's interest in a clear system of land titles and the interests of third parties who rely on the representations of adverse possessors. Rose states succinctly why certainty in ownership is a public good: "clear titles facilitate trade and minimize resource-wasting conflict."[16] Land, as a durable resource, "sticks around indefinitely, while claims against land can go on and on, in layer after layer, to be lost, found, banished, restored, relished, then lost again to longstanding practice and prescription."[17] Adverse possession is necessary to any practical system of property rights in land as a "claim-clearing doctrine."[18] Vagueness in land ownership is inefficient. Rose explains, "[s]ociety is worst off in a world of vague claims; if no one knows whether he can safely use the land, or from whom he should buy it if it is already claimed, the land may end up being used by too many people or by none at all."[19] Another rationale for adverse possession is to protect the interests of third parties who act in reliance on the appearance that the adverse possessor is the owner of the property, such as the people who contracted with Ewing to remove sand and gravel from his lot.[20]

Thus, adverse possession is essential to property as an institution. Felix Cohen defined property as "a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision."[21] Because property is an agreement among people over a resource, clear communication and community

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Helmholz, 64 WASH. U. L.Q. 1 (1986) (arguing that the cases surveyed do not support Helmholz's conclusions).

16 Rose, *supra* note 2, at 81; *see also* PAUL E. BASYE, CLEARING LAND TITLES § 54 (2d ed. 1970) (claiming that adverse possession's purpose is to quiet titles); Ballantine, *supra* note 11, at 135 ("[T]he great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.") . **R**

17 Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety,* 108 YALE L.J. 601, 614 (1998).

18 *Id.*

19 Rose, *supra* note 2, at 78. **R**

20 *See* DUKEMINIER & KRIER, *supra* note 3, at 135. **R**

21 Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 373 (1954).

agreement is crucial. Rose calls this the "consent theory" of property rights: "the community requires clear acts so that it has the opportunity to dispute claims, but may be thought to acquiesce in individual ownership where the claim is clear and no objection is made."[22] At the root of property is a clear act of possession, and possession is at its core speech: communication to others.[23] Rose claims that "the clear-act principle suggests that the common law defines acts of possession as some kind of statement. As Blackstone said, the acts must be a declaration of one's intent to appropriate."[24] Property is "a kind of speech" and adverse possession requires "the acquiring party to keep on speaking, lest he lose his title."[25]

However, adverse possession also creates anxiety about the institution by laying bare a fundamental dilemma in the theory of property. If the origin of property is "the agreement among men legalizing what each had already grabbed, without any right to do so, and granting, for the future, a formal right of ownership to the first grabber," how is property any different from theft?[26] Rose explains, "The hidden skeleton in property's closet is what I shall call the Ownership Anxiety—that is, anxiety over the foundations for existing distributions."[27] Tracing title back into antiquity reveals that modern claims to ownership are based on unstable ground.

B. Family Law

1. Common law Marriage: Acting like Husband and Wife

The typical case of a common law marriage involves a cohabitating couple that never made it to the chapel, and yet lived together, shared a surname, maintained joint finances, held themselves out as husband and wife, raised children together, and listed each other as spouses on various legal and employment forms.[28] One spouse sues for recognition of marriage upon

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22 Rose, *supra* note 2, at 77. **R**

23 *Id.* at 78.

24 *Id.* at 77.

25 *Id.* at 79.

26 RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 131 (Rutgers Univ. Press 1951).

27 Rose, *supra* note 17, at 605. **R**

28 John B. Crawley, *Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine,* 29 CUMB. L. REV. 399, 409-10 (1998-1999).

the death of the other spouse or dissolution of the relationship. Under the doctrine of common law marriage, a court may hold that the couple was legally married because they had been acting like it.[29]

Although the specific legal elements of a common law marriage vary from state to state, generally, claimants must demonstrate capacity and agreement to marry, as well as cohabitation.[30] Furthermore, they must show that they "'held themselves out' to the public as married, and gained acceptance within their community as husband and wife."[31] These elements, although not exactly symmetrical, all have rough analogues with the elements of adverse possession.[32]

The element of cohabitation, considered a hallmark of marital behavior, parallels the element of actual entry, occupancy of property being a hallmark of ownership. The requirement that a couple must demonstrate capacity and agreement to marry is analogous to the requirement that an adverse possessor act under a claim of right. The capacity element requires that a couple demonstrate that they are not legally barred from marriage, for example, by a prior marriage or by age limitations. The agreement element requires that the couple demonstrate their intent to be married. Similarly, the claim of right element requires that the adverse possessor demonstrate his or her capacity and intent to claim title to the property.[33]

Just as adverse possession entails mimicking the legal formali-

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[29] Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 963 (2000). Over half of the states recognized common-law marriage in 1930. *Id.* at 1011. Today, only eleven states: Alabama, Colorado, Idaho, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and the District of Columbia continue to recognize common-law marriage. *Id.* Some states have recognized marriage-like contractual obligations of cohabitating couples. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (holding that cohabitating parties in nonmarital relationships have rights to enforce express contracts and assert equitable interests in property). One commentator argues that "jurisdictions that claim to have abolished common-law marriage have, in fact, resurrected the doctrine under another name." Crawley, *supra* note 28, at 400. **R**

[30] Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage,* 75 OR. L. REV. 709, 712 (1996).

[31] Dubler, *supra* note 29, at 970-71.

[32] One dissimilarity between the two doctrines is the statutory time period for adverse possession. By contrast, "no specific period of cohabitation is required" for common-law marriage. Bowman, *supra* note 30, at 713. New Hampshire is an exception, where there is a three-year cohabitation requirement. N.H. Rev. Stat. Ann. 457:39 (2004). **R**

[33] *See supra* note 15. **R**

ties of property ownership, acting like a married couple entails mimicking the legal formalities of marriage. The case *In re Estate of Wagner* is a modern example of a common law marriage.[34] In that case, the couple cohabitated but were not formally married.[35] When the "husband" died intestate, the "wife" filed an application claiming an interest in his estate as a spouse at common law.[36] Idaho law requires "mutual assumption of marital rights, duties, and obligations" as an element of common law marriage.[37] As in the *Ewing* adverse possession case, taxes were of particular significance.[38] The court was persuaded that no common law marriage existed by the fact that the couple filed separate tax returns, even though there might have been tax benefits to filing a joint return.[39] The court was also persuaded by the facts that the woman did not change her employment records to reflect her status as married, and the couple did not commingle their funds in a joint bank account and did not refer to one another as husband and wife.[40]

Just as adverse possession must be consistent and continuous, the relationship must be consistent and continuous to prove common law marriage.[41] In the case *In re Estate of Marden*, the court held that "long and continuous cohabitation" was required to give rise to a presumption of common law marriage.[42] The court found a lack of continuity in the relationship because, among other things, DuPuy maintained a private apartment in New York City and a separate social existence in the "cafe society" of New York City, apart from her home with Marden in

[34] 893 P.2d 211 (Idaho 1995).

[35] *Id.* at 213.

[36] *Id.*

[37] *Id.* at 214.

[38] In addition to tax returns and employment records, courts are persuaded by other evidence that the couple held itself out as married on legal instruments such as deeds to property and medical records, *see, e.g.*, Coleman v. Graves, 122 N.W.2d 853 (Iowa 1963); and insurance records, *see, e.g.*, Metro. Life Ins. Co. v. Johnson, 645 P.2d 356 (Idaho 1982).

[39] 893 P.2d at 215.

[40] *Id.*

[41] *See* Hampton v. Alabama, 69 So. 2d 727 (Ala. Ct. App. 1953) (continuous cohabitation raises a presumption of common-law marriage); Melton v. Texas, 158 S.W. 550 (Tex. Crim. App. 1913) (common-law marriage requires continuous living together as husband and wife); 1 WHARTON, LAW OF EVIDENCE, § 84, (2d ed. 1879) ("The fact of cohabitation as man and wife raises a presumption of a legal marriage; and this is particularly so after a long interval of time. But such cohabitation must be continuous and consistent to sustain the presumption.").

[42] 355 So. 2d 121, 126 (Fla. Dist. Ct. App. 1978).

Florida.[43] The court interpreted Marden and DuPuy's romantic liaisons with other men and women as evidence that the relationship was insufficiently consistent to be marital, pointing to the "undisputed fact" that Ben Marden was "an inveterate philanderer," and that DuPuy "was seen and escorted by male escorts other than Ben."[44] The court interpreted the parties' "nebulous attitude toward the basic customs of marriage" as evidence of no common law marriage.[45]

Ariela Dubler has noted that the requirement that a couple hold themselves out as husband and wife is akin to the notoriety requirement of adverse possession law.[46] Dubler provides an illuminating analysis of the court documents and contemporary media accounts of the 1930s case of Abraham Erlanger and Charlotte Fixel-Erlanger. To prove that the couple acted as if married, Fixel-Erlanger's attorney enlisted a parade of witnesses who had encountered the couple to testify to her wifely devotion.[47] Erlanger's servants testified that they and Mr. Erlanger addressed Charlotte Fixel-Erlanger as "Mrs. Erlanger."[48] Doctors, nurses, and hospital employees testified to how Fixel-Erlanger cared for Erlanger while he was sick.[49] Equating wifehood with "a particular type of agile consumerism," Fixel-Erlanger's attorney emphasized: "every department store in New York has charge accounts in the name of Mrs. Erlanger."[50]

Mr. Erlanger's lack of objection to Mrs. Erlanger's wifely behavior was legally significant because, as in adverse possession, Mrs. Erlanger's public conduct put him on notice of an imputed marriage.[51] Public opinion was important here. To "gain public recognition as Erlanger's wife," Fixel-Erlanger "needed a receptive audience to perceive and comprehend her displays of wifely behavior."[52] Therefore, her attorney based his case upon the testimony of numerous third parties who understood Mr. and Mrs.

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[43] *Id.* at 123.
[44] *Id.*
[45] *Id.* at 126.
[46] Dubler, *supra* note 29, at 988 n.139. Dubler attributes this insight to Carol Rose. *Id.*
[47] *Id.* at 982-83.
[48] *Id.* at 983.
[49] *Id.* at 985.
[50] *Id.* at 986.
[51] *Id.* at 988.
[52] *Id.* at 987.

Erlanger to be married.[53] In the end, the court issued a highly detailed opinion concluding that the relationship was "a blending of two lives which both in the seclusion of the domestic circle and in all their external and public aspects were such as are lived by the average husband and wife faithfully devoted to each other."[54]

2. *Rationales for Common law Marriage*

What are the rationales behind common law marriage?[55] Why must a common law husband and wife hold themselves out as married and be accepted by the community?

As in adverse possession law, where the law protects the reliance interests of the undisturbed trespasser, the doctrine of common law marriage protects the reliance interests of cohabitating spouses. During the heyday of the doctrine in the nineteenth century, common law marriage was premised on the idea that "law should protect innocent women from the whims and contrivances of irresponsible or rakish men."[56] Many cases involved women who relied on men's assurances that "'we were just as much married as if we had been married before a priest or a minister.'"[57] These women acted with the beliefs that upon the death of their putative spouses or dissolution of the relationship, they would be entitled to all the rights of wives, including inheritance, divorce remedies, social security, and other government benefits. Implicit in this view is the idea of marriage as a contract under which men provide for women economically. As consideration, women perform economic services in the private realm, such as childcare and housework, or provide emotional care or sex to their husbands. But just as there is no good-faith standard for the adverse possessor, there is no good-faith standard for the common law marriage. The cases do not delve deeply into whether or not common law spouses had the subjective intent to

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[53] *Id.*

[54] *Id.* at 993-94.

[55] Bowman argues that historical evidence is lacking for the often-cited theory that common-law marriage was necessary in early frontier America where couples lacked access to clergy and legal institutions to secure solemnization of their vows. Bowman, *supra* note 30, at 723 ("Common law marriage was valid in New York City, for example, but never in Wyoming."). **R**

[56] Dubler, *supra* note 29, at 964.

[57] Bowman, *supra* note 30, at 757 (quoting Travers v. Reinhardt, 205 U.S. 423, 434 (1907)). **R**

be married.[58]

Common law marriage statutes may also be explained by public and third-party interests. Just as adverse possession law serves the public interest in a clear system of land titles, common law marriage serves the public interest in the institution of marriage. Dubler explains how the doctrine of common law marriage affirms marriage as an institution:

> The doctrine allowed judges to efface the potentially threatening nature of nonmarital domestic relationships by labeling them marriages. Common law marriage thus transformed potentially subversive relationships— subversive in their disregard for the social and legal institution of marriage—into completely traditional relationships. In recognizing common law marriages, therefore, courts reinforced the supremacy of the institution of marriage by demonstrating that it could subsume under its aegis almost all long-term domestic forms of ordering.[59]

Thus, common law marriage is a method of subduing the threat to the social order posed by nonmarital cohabitation.

Common law marriage also serves the public interest in privatizing female economic dependency.[60] By making men (or their estates) liable to women for economic support, common law marriage "shielded the public fisc" from the claims of poor women.[61] However, as women's roles became more independent through the twentieth century, the state "shift[ed] from private to public solutions to female dependence."[62] These shifts also explain the move to abolish common law marriage.

Common law marriage also protects the reliance interests of third parties, for example, a hospital that relies on the representations of a common law wife that she can make medical decisions regarding an incapacitated husband, or an insurance company that presumes a common law husband is the beneficiary of his wife's policy, or a property owner who contracts with a married couple to purchase a home. Common law marriage affirms the public perception that a couple is married and alleviates any potential concerns that a relationship is illegitimate. Assuming that a hallmark of the marriage relationship is monogamy,

[58] Ariela R. Dubler, *Note, Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1895-96 (1998).

[59] Dubler, *supra* note 29, at 969 (citation omitted).

[60] Dubler, *supra* note 58, at 1886-87. **R**

[61] Dubler, *supra* note 29, at 969. *See also* Bowman, *supra* note 30. **R**

[62] Dubler, *supra* note 29, at 998.

recognizing common law marriage facilitates the public interest in clarity about who is unavailable for coupling. The interests of children, as third parties, are also protected, in particular their interests in not being branded "illegitimate."[63] Courts applied a strong presumption in favor of common law marriage in order to protect children from the stigma of illegitimacy.[64]

Just as courts may be loathe to award title to the bad-faith adverse possessor, the law is loathe to reward women for "fraudulent performances" as wives.[65] Dubler contends that the reason for the abolition of common law marriage in many jurisdictions was a shift in the backstory from a "vision of an innocent femininity vulnerable to scheming men" to "a vision of a dangerous femininity, of conniving and gold digging women preying on the goodwill of innocent men (or their estates) through false performances of wifely conduct."[66] The "gold digger" does not fulfill her end of the marriage contract: due to class privilege she does not have to worry about childcare or housework. She does not provide genuine authentic emotional support for her husband. She may provide her husband with sexual access, but this relationship more resembles prostitution than marriage. Hence, courts in common law marriage cases are careful to distinguish the cohabitation element of a common law marriage from sexual activity.[67]

Marriage here is performance: scripted wifely and husbandly behavior held out to the public and accepted as legitimate. Anxiety over this concept of marriage was one reason for the move to abolish the doctrine. Dubler explains the view of marriage as not only a contract, but a *status*:

> Marriage, they contended, was not merely a private relation between a man and a woman. It exemplified a private relation in which the state and society had a legitimate public interest. As the United States Supreme Court opined, marriage "is an

[63] *Id.* at 971.

[64] *Id.* at 972; *In re* Megginson's Estate, 28 P. 388, 389 (Or. 1891) ("[W]here the legitimacy of children is called in question, both upon authority and general principles of public policy and natural equity, every reasonable presumption is indulged in favor of legitimacy.").

[65] *See supra* note 15. **R**

[66] Dubler, *supra* note 29, at 964.

[67] *See, e.g.*, Beck v. Beck, 246 So. 2d 420, 428 (Ala. 1971) ("Cohabitation is not a mere gratification of sexual passion, or casual commerce between man and woman, and no presumption can elevate concubinage of whatever duration to the dignity of marriage.").

> institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[68]

Proponents of abolition also claimed that courts "could not accurately distinguish between marital and meretricious relationships."[69] By exposing marriage as "nothing more than a series of performances," common law marriage destabilized an institution thought to be "at the center of the social order."[70]

3. *Functional Parenthood: Acting like Mothers and Fathers*

The American Law Institute's (ALI) Principles of the Law of Family Dissolution is the first attempt by the ALI to codify family law into a Restatement-like volume.[71] The ALI Principles are a departure from traditional custody law in that they recognize the custody rights of persons other than biological or adoptive parents.[72] Oregon's statute defining a child-parent relationship provides an example of the concept of "functional parenthood":

> [A] 'child-parent relationship' . . . [is one] in which . . . a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs.[73]

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68 Dubler, *supra* note 29, at 971-72 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

69 *Id.* at 972.

70 *Id.* at 1008.

71 AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.03 (2002) [hereinafter ALI PRINCIPLES]. The ALI Principles differ from a Restatement in that they give more weight to "emerging legal concepts." GEOFFREY C. HAZARD, JR., FOREWORD TO PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Proposed Final Draft, pt. I Feb. 14, 1997), at xiii ("Given the current disarray in family law—the unparalleled volume of litigation and legislation—this approach seems more appropriate.").

72 *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753 (1982) (holding that "natural" parents have a right to "care, custody and management of their children").

73 OR. REV. STAT. § 109.119(10)(a) (2003). Oregon courts have discretion under a preponderance of the evidence test to determine the appropriateness of granting custody. *Id.* § 109.119(3)(a). One commentator notes that "similar statutory authority is rare across the American legal landscape." James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution,* 2001 BYU L. REV. 923, 933 (2001).

The ALI Principles describe three types of parents: legal parents, as defined by current state law; parents by estoppel; and de facto parents. A parent by estoppel is one who held him or herself out as an official parent with the agreement of the legal parent.[74] A de facto parent is one who accepted parental responsibilities because of the failure or incapacity of legal parents.[75] Both parents by estoppel and de facto parents are types of "functional parents." They must demonstrate that they lived with the child and accepted parental responsibilities.

Although the legal requirements of functional parenthood are not as widely agreed upon as the other two doctrines, they mirror those of adverse possession and common law marriage in many ways.[76] To be a functional parent, one must act like a parent.[77] For example, to qualify as a parent by estoppel under the ALI Principles, a father may prove that he had a good-faith belief that he was the biological father and "fully accepted parental responsibilities consistent with that belief."[78] The ALI Principles define acting like a parent as caretaking: providing for the child's needs.[79] To qualify as a de facto parent, a person must demonstrate that he or she at least "regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived."[80] The ALI provides an extensive list of caretaking functions, such as ensuring the health, safety, education, and development of the child.[81] The ALI defines a broader category of parenting functions as caretaking plus pro-

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[74] ALI PRINCIPLES, *supra* note 71, § 2.03(1)(b). **R**

[75] *Id.* § 2.03(1)(c). The de facto parent concept is akin to the doctrine of *in loco parentis*, which "creates parental rights and responsibilities in one who voluntarily provides support or takes over custodial duties." Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families,* 78 GEO. L.J. 459, 502 (1990).

[76] Gregory Loken has drawn the parallel: "Can parental rights—and, by implication, children—be acquired by adverse possession?" Gregory A. Loken, *The New 'Extended Family'—'De Facto' Parenthood and Standing Under Chapter 2*, 2001 BYU L. REV. 1045, 1045 (2001).

[77] ALI PRINCIPLES, *supra* note 71, § 2.03. Wisconsin has a similar statute. Wis. Stat. Ann. § 767.245(1) (West 2001). Wisconsin courts have established a test very similar to the elements of the ALI Principles. *See* Holtzman v. Knott, 533 N.W.2d 419, 435-36 (Wis. 1995). One Massachusetts court has cited the ALI Principles in establishing its own definition of de facto parent. E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999). **R**

[78] ALI PRINCIPLES, *supra* note 71, § 2.03(1)(b)(ii).

[79] *Id.* § 2.03(5).

[80] *Id.* § 2.03(1)(c)(ii)(B).

[81] *Id.* § 2.03(5).

viding economic support for the household and participating in decisions about the child's welfare.[82] Legal formalities also define functional parents. Any person upon whom child support obligations are imposed automatically qualifies as a parent by estoppel.[83]

Just as adverse possessors and common law spouses must behave in a manner that is consistent and continuous, functional parents must demonstrate that they acted as parents in a prolonged and unwavering manner. Generally, the ALI requires that parents by estoppel and de facto parents live with the child for at least two years.[84] The ALI uses descriptors such as "regularly performed" and "accepting full and permanent responsibilities" to define functional parents.[85] The requirement that a functional parent live with the child parallels the physical proximity requirements of cohabitation in common law marriage and the element of actual entry in adverse possession.[86]

Additionally, functional parents must behave in a way that is open and notorious. They must hold themselves out as actual parents, much like adverse possessors must hold themselves out as property owners. Parents by estoppel include individuals who lived with the child, "holding out and accepting full and permanent responsibilities as parent[s]."[87] When functional parents hold themselves out as legal parents, they put other potential parents on notice that they should object.[88] For example, in the Supreme Court case *Quilloin v. Walcott*, the biological father,

[82] *Id.* § 2.03(6).

[83] *Id.*

[84] *Id.* § 2.03(1)(b)-(c).

[85] *Id.*

[86] *But see* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Dist. Ct. App. 1986) (awarding visitation rights to a mother who did not live with the child but spoke with him daily, spoke with his biological mother daily, saw the child twice a week, and made parenting decisions about the child); Polikoff, supra note 75, at 522-23 (citing *In re* Adoption of A.O.L., No. 1JU-85-25 P/A (Alaska Super. Ct. July 23, 1985) (granting an adoption to a parent who did not live with the child)).

[87] ALI PRINCIPLES, *supra* note 71, § 2.03(1)(b)(iii). Interestingly, what distinguishes a parent by estoppel from a de facto parent is that de facto parents need not hold themselves out as parents. **R**

[88] A child's legal parents must be provided with official notice and an opportunity to appear at any legal custody hearing. *Id.* § 2.04 cmt. a. The ALI explains, "The requirement of notice and the opportunity to participate applies even in cases in which a parent has had little or no contact with the child." *Id.* § 2.04 cmt. c. The ALI also requires that notice be given to legal parents, parents by estoppel, and de facto parents who have continuously resided with the child for the past six months. *Id.* § 2.04(1). De facto parents who have not continuously resided with the child

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Quilloin, contested an adoption of the child by the husband of the biological mother.[89] The adoptive family had lived together for eight years prior to filing for legal custody.[90] The Court held for the adoptive family, reasoning that Quilloin's failure to act according to social expectations for parents barred his claim.[91] Quilloin "did not petition for legitimation of his child at any time during the [eleven] years between the child's birth and the filing of Randall Walcott's adoption petition,"[92] and he "[did] not complain of his exemption from [paternal] responsibilities and, indeed, he does not even now seek custody of his child."[93]

4. *Rationales for Functional Parenthood*

What are the rationales behind the doctrine of functional parenthood? The reliance interests of functional parents are at play. But courts also protect the interests of legal parents who relied on guarantees of functional parents to provide child support. Equitable estoppel in the context of child custody requires "(1) action or nonaction which induces (2) reliance by another (3) to his detriment."[94] In the case *Karin T. v. Michael T.*, the court imposed child support obligations on a transgendered domestic partner who had consented to the artificial insemination of his partner.[95] The court reasoned that the wife had acted in reliance on her husband's implicit promise to support the child: "There is nothing in the record to indicate that the wife would have undergone artificial insemination in the absence of the husband's consent."[96] The doctrine is also used to protect the reliance interests of functional parents in child custody cases. In *Atkinson v. Atkinson*, the court granted visitation rights to a nonbiological father who had developed a parental relationship with the child in reliance on the mother's guarantee that he was a

may still have standing if "the individual has attempted to exercise a parenting role but has been prevented by the parent from doing so." *Id.* § 2.04 cmt. d.

89 434 U.S. 246 (1978).

90 *Id.* at 247.

91 *Id.* at 253.

92 *Id.* at 249.

93 *Id.* at 256.

94 *In re* Paternity of D.L.H., 419 N.W.2d 283, 287 (Wis. Ct. App. 1987).

95 484 N.Y.S.2d 780 (N.Y. Fam. Ct. 1985). *See also* Wener v. Wener, 312 N.Y.S.2d 815 (N.Y. App. Div. 1970) (requiring a former husband to pay child support for a child he had agreed to adopt with the plaintiff, even though no formal adoption occurred); Gursky v. Gursky, 242 N.Y.S.2d 406 (Sup. Ct. 1963) (imposing child support obligations on husband who had consented to wife's artificial insemination).

96 484 N.Y.S.2d at 783.

legitimate parent.[97] Similarly, in the New York case *Jean Maby H. v. Joseph H.*, the court held that a mother was estopped from denying her husband's right to seek custody because she had held him out as the child's father and he had accepted the role.[98]

The ALI Principles are also concerned with the societal interest in parenting as a public good. The drafters make explicit mention of their concern with balancing society's interest in *parenting* against the legal interests of *parents*.[99] The ALI Principles "aim at resolving the tension between society's allocation of full legal recognition to traditional parents and the dawning reality that disallowing the interests of functional parents 'ignores child-parent relationships that may be fundamental to the child's sense of security and stability.' "[100]

Furthermore, the concept of functional parenthood protects third-party expectations and interests. Caretaking functions include many interactions with third parties, including "communicating with teachers and counselors," "arranging for health-care providers," and "arranging alternative care by a family member, babysitter, or other child-care provider or facility."[101] Those third parties rely on a parent's representations that she is the child's legitimate caretaker, with the authority to make decisions regarding the child's welfare.

Just like the figures of the bad-faith adverse possessor and the gold-digging common law wife, the specter of the kidnapper looms over the theory of functional parenthood. Despite the structural similarity of functional parenthood and adverse possession, courts resist the analogy. In the Maryland case *Montgomery County Department of Social Services v. Sanders*, the court granted custody to the biological mother after the child's temporary stay with a foster family.[102] The court held:

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97 408 N.W.2d 516, 519 (Mich. Ct. App. 1987). The husband was also required to pay child support. *Id.*

98 676 N.Y.S.2d 677 (N.Y. App. Div. 1998).

99 The classic dilemma of modern custody law is generally phrased as the conflict between the legal interests of biological parents and the best interests of the child. The best-interests-of-the-child standard is a proxy for the state's interest in ensuring the care of children. As Justice Cardozo stated: "The chancellor . . . does not proceed upon the theory that the . . . father or mother, has a cause of action against the other or indeed against any one. He acts as parens patriae to do what is best for the interest of the child." Finley v. Finley, 148 N.E. 624, 626 (N.Y. 1925).

100 DiFonzo, *supra* note 73, at 938. **R**

101 ALI PRINCIPLES, *supra* note 71, § 2.03(5). **R**

102 381 A.2d 1154 (Md. Ct. Spec. App. 1977).

> To allow a person to abscond with a child and then judicially condone the action after a pre-established time period has lapsed is to place a premium on disobedience of court orders and simultaneously to reduce the child to "personal property" to which any person can acquire some sort of "squatter's rights."[103]

Resistance to the analogy to property law in part stems from commodification anxiety: the fear that excessive commodification will "threaten human flourishing" and "sull[y]" human relationships.[104] But courts seem more concerned with the idea of adverse possession of children as a sort of legalized kidnapping. The *Sanders* opinion seeks to avoid a doctrine that would create incentives for functional parents to abscond with children and result in the absurd hypothetical in which criminals gained custody of a child by stealing him and keeping him safe for an extended period of time.[105]

The idea of parenthood that underlies the concept is not a parent as a biological relation to a child, but rather a parent as a caretaker. One commentator remarked that the ALI Principles reflect that "[p]arenthood is in the process of discarding its biological chrysalis and emerging in a more functional form."[106] The commentator predicted that "[h]owever sinuous the path of the law, its direction seems relatively clear: we are in a transitional stage along the continuum from sanctioning only biologically based families to legally recognizing functional families."[107]

Functional parenthood inspires anxiety because it threatens to detract from the special legal treatment of "natural" parents.

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[103] *Id.* at 1164. *See also* Bennet v. Jeffreys, 356 N.E.2d 277, 285 n.2. (N.Y. 1976) (rejecting "the notion, if that it be, that third-party custodians may acquire some sort of squatter's rights in another's child"). Nonetheless, the final result in the case was to grant custody rights to the functional parent. Bennett v. Marrow, 59 A.D.2d 492, 493 (N.Y. App. Div. 1977) (holding that "the interests of the child in custody cases are paramount and in no way subservient to the cold legal right of a parent").

[104] JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 118 (2000). Williams argues that "commodification anxiety serves to police traditional gender boundaries, as when the fear of a world sullied by commodification of intimate relationships feeds opposition to granting wives entitlements based on household work." *Id.*; *see also* May v. Anderson, 345 U.S. 528, 533 (1953) (arguing that child rearing constitutes a right "far more precious . . . than property rights"); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1927 (1987) ("Conceiving of any child in market rhetoric wrongs personhood.").

[105] 381 A.2d at 1164.

[106] DiFonzo, *supra* note 73, at 925. **R**

[107] *Id.* at 936.

One commentator fears that the ALI idea of de facto parenthood will lead to "parent inflation" and "sow uncertainty and fluidity about the meaning of parenthood."[108] At the same time, the ALI Principles attempt to strengthen the idea of parenthood by bringing within their ambit many relationships between adults and children that have previously been considered non-legal.

5. *Family Law Doctrines of Performance Reification as Analogues to Adverse Possession*

Striking similarities emerge from examination of the legal elements of adverse possession, common law marriage, and functional parenthood. The legal doctrine in each of these cases rewards the claimant who behaves privately as an owner, spouse, or parent. Courts and legislatures define the core private behavior that is constitutive of status as a close relationship of physical proximity: for adverse possession, it is actual entry onto the property; for common law marriage and functional parenthood, it is cohabitation with the spouse or child. However, this behavior cannot be a mere private domestic ordering. It is crucial that the claimant hold him or herself out to the public as an owner, spouse, or parent, and that the relationship be unchallenged over a period of time. Nor can the behavior be an isolated or sporadic occurrence: in all three cases it must be consistent and continuous. Courts often find it dispositive that the claimant mimicked the legal formalities of ownership, marriage, and parenthood, examining tax returns, employment records, and contracts with third parties. The interests protected in each of the three cases are those of the private parties (titular owner versus adverse possessor, common law husband versus common law wife, biological parent versus functional parent), the interests of the legal system in ensuring the stability and administrability of property, marriage, and custody law, and the interests of third parties who relied on the appearance of legitimacy.

These doctrines expose underlying conceptual difficulties for the institutions of property, marriage, and parenthood. The confusion can be charted as follows:

108 David M. Wagner, *Balancing "Parents Are" and "Parents Do" in the Supreme Court's Constitutionalized Family Law: Some Implications for the ALI Proposals on* De Facto *Parenthood*, 2001 BYU L. REV. 1175, 1184 (2001).

FIGURE 1

	Property	**Marriage**	**Parenthood**
Private Status	Owner	Husband/Wife	Biological Parent
Public Performance	Possession/ Trespassing	Cohabitation/ Prostitution	Caretaking/ Kidnapping
Legal Formality	Title	Marriage License and Ceremonial Solemnization	Legal Adoption, Custody, or Guardianship

When private status and public performance line up, the law is highly likely to enforce the rights and duties of the claimant, even without the right "paperwork" (i.e., the legal formality). When private status or public performance is in doubt, the situation gets more dicey. Adverse possession, common law marriage, and functional parenthood are cases in which a public performance is rewarded with all the benefits of legal formality, even though private status may be "inauthentic." However, the adverse possessor is only rewarded when she pays taxes, mimicking legal formalities, and calls herself "owner," mimicking the idea of property as status. The core interests protected here must therefore relate to administration of bureaucratic institutions.

C. Identity Determination

In the law of adverse possession, common law marriage, and functional parenthood, acting *as if* may imbue the actor with legal status. An interesting point of comparison is a body of legal concepts that I will refer to as the law of "identity determination": the doctrinal framework used by courts to determine whether a particular group status, such as racial or sexual identity, should be attributed to an individual for purposes of legal recognition. Historically, the issue of race determination arose in the legal context of eighteenth- and nineteenth-century institutions of slavery and segregation.[109] The issue of sex determina-

[109] The issue also arises in contemporary debates over the meaning of racial categorizations. For example, difficulties have been noted in identifying the proper recipients of race-based remedial programs, such as affirmative action. *See, e.g.*, Luther Wright, Jr., Note, *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 515-16 (1995) (describing cases of affirmative action "fraud" in which per-

tion has arisen in legal contexts such as marriage, legal documents, sumptuary laws prohibiting cross-dressing, and antidiscrimination. This Article will examine these case studies in identity determination.[110]

In the law of race determination, parallels to adverse possession are apparent. Cases on race determination reveal that juries have rewarded claimants who behaved privately *as if* they were white.[111] In the context of sex determination, courts prove unwilling to recognize gender performance as evidence of sex. Rather, decisions hinge on biological understandings of sex.

1. Race Determination: Acting like a White Man or Woman

The institutions of slavery and segregation required that all individuals fall on one side of the color line, clearly dividing members of the dominant and subordinate racial classes for purposes of division of labor, social association, and political participation. For those individuals whose race was not overdetermined by skin color, social standing, and ancestry, litigation was necessary in order to determine if they were entitled to the rights and privileges afforded white persons.[112] Trials in which a determination of a person's racial identity was the central issue were typical in nineteenth-century Southern courts.[113] These trials involved issues including "wills, marriage and divorce, transportation, immi-

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sons claimed minority status in order to secure jobs); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994) (discussing quandaries of "benign" race-based classification).

110 Due to the volume, scope, and depth of case law and scholarship on the issues of race and sex determination, this Article focuses narrowly on specific case studies in order to best highlight points of comparison with other doctrines of performance reification. I make no claim that every legal doctrine regarding categorizations of identity is analogous to the doctrine of adverse possession.

111 In focusing on a particular subset of cases and scholarship on race determination, I do not intend to reduce discussion of race to a black/white dichotomy or to marginalize the experiences of non-black peoples of color. I merely intend to limit the scope of my investigation so as to meaningfully examine a distinct legal doctrine. Additionally, by using the terms "black" and "white" in lieu of other signifiers, I intend to refer to historical labels, not to accurately describe any particular group or individual.

112 Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 122 (1998). *See also* Robert Westley, *First-Time Encounters: "Passing" Revisited and Demystification as a Critical Practice*, 18 YALE L. & POL'Y REV. 297, 300-01 (2000) (examining "the visually overdetermined racial situation of Black Americans in law and society" and the phenomenon of "passing" as a sort of "group identity trespass").

113 Gross, *supra* note 112, at 111. R

gration and naturalization, and libel and slander."[114]

Two scholars have undertaken particularly illuminating examinations of the types of evidence and factors considered by courts in making race determinations. Ariela Gross thoroughly analyzes sixty-eight cases of racial determination appealed to state supreme courts in the nineteenth-century South.[115] Daniel Sharfstein analyzes the law of race determination in the post-Reconstruction South.[116] Both Gross and Sharfstein conclude that the cases demonstrate that the meaning of race, and the proper mode of making race determinations, were understood as highly contested matters to Southerners.[117]

Although the "elements" of a claim of whiteness cannot be described with the precision of the elements of adverse possession, the types of evidence analyzed by Southern courts in making racial determinations provide a rough outline of a doctrine. Courts examined not only the claimants' physical appearances and ancestry, but also where the claimants lived, worked and socialized, whether they acted according to community expectations for white men and women, whether they held themselves out in their communities as white on a consistent and continuous basis, and whether or not they were recognized by those communities as white.[118]

Participants in these cases were attuned to the spaces occupied by claimants as evidence of race: in particular, churches and schools.[119] For example, in the case of Abby Guy, who sued for freedom from slavery for herself and her four children, witnesses testified to such matters as whether Guy "visited among white folks, and went to church, parties, etc."[120] Guy's daughter

[114] Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1475 (2003).

[115] Gross, *supra* note 112, at 120. **R**

[116] Sharfstein, *supra* note 114, at 1475-76. **R**

[117] Gross, *supra* note 112, at 111-12; Sharfstein, *supra* note 114, at 1476. **R**

[118] Gross, *supra* note 112, at 130. **R**

[119] *Id.* at 151 ("[W]itnesses remembered whether the person at issue had inhabited churches, schools, and other spaces that were designated white or black."); *see also* Sharfstein, *supra* note 114, at 1484 (noting that witnesses testified to "attendance at white schools and churches" as evidence of whiteness). **R**

[120] Gross, *supra* note 112, at 133 (quoting Transcript of Trial, Daniel v. Guy, No. 4109, at 20 (bill of exceptions) (Ark. Ashley County Cir. Ct. July 1855) (collection of Pulaski County Law Library, Little Rock, Ark., Ark. Supreme Court Records & Briefs), *rev'd in part*, 19 Ark. 121, 1857 WL 545 (Ark. 1857), *aff'd after remand*, 23 Ark. 50, 1861 WL 538 (Ark. 1861)). Gross describes and analyzes the case of *Daniel v. Guy* in great detail. Gross, *supra* note 112. **R**

"boarded out" so as to attend a white school.[121]

In determining whether a claimant was white, courts considered whether the claimant "held himself out as white and was accepted as white."[122] Evidence of a claimant's performance and reputation were so strongly considered that they were sufficient to trump contrary evidence of "negro ancestry."[123] Indeed, judges in these cases "repeatedly held that the determination of an individual's race was 'a question very proper for a jury,' because the jury represented the sense of the community."[124] Holding oneself out as white meant a particular sort of public performance: assimilating into white society, and taking on the legal rights and duties of white people.[125] Juries considered such performances to be evidence of white "blood."[126]

In the case of Abby Guy, "lay witnesses focused on her social identity, her associations with white people, and her having performed tasks that white people quintessentially performed."[127] Such evidence was commonly considered in these cases. In the slander case *Spencer v. Looney*, George Spencer sued George Looney for spreading the rumor that Spencer and his family were "nothing but God damned negroes," resulting in the expulsion of Spencer's child from school.[128] The jury held for Spencer, in large part because the evidence demonstrated that he had lived as an accepted member of the white community for more than fifty years.[129]

In both the cases of Abby Guy and George Spencer, courts held that the claimant was white because the claimant had lived continuously under a claim of whiteness for many years without

121 Daniel v. Guy, 1857 WL, at *2.

122 Gross, *supra* note 112, at 166. **R**

123 *Id.* at 164; *see also* State v. Cantey, 20 S.C.L. (2 Hill) 614, 614 (S.C. Ct. App. 1835); Sharfstein, *supra* note 114, at 1484-85. **R**

124 Gross, *supra* note 112, at 126 (quoting State v. Davis, 18 S.C.L. (2 Bail.) 558, 560 (S.C. Ct. App. 1831)). **R**

125 Gross, supra note 112, at 163.

126 *Id.*

127 *Id.* at 133; *see also id.* at 150-51 ("Acceptance in the white community could signify white identity, and certain kinds of associations with 'colored' people almost certainly meant blackness.")

128 Sharfstein, *supra* note 114, at 1474 (quoting Appellee's Brief at 5-9, Spencer v. Looney, 82 S.E. 745 (Va. 1914)). Sharfstein discusses *Spencer v. Looney* in depth. Sharfstein, *supra* note 114. **R** **R**

129 Sharfstein, *supra* note 114, at 1497. **R**

challenge from the community.[130] In the South Carolina case, *State v. Cantey,* the judge was required to determine whether or not sixteen men of ambiguous racial ancestry qualified as witnesses.[131] The judge noted that the men were "respectable . . . one of them is a militia officer, and their caste has never been questioned until now."[132] Thus, the judge protected settled expectations, arguing that the challenge to the one claimants' racial status was belated. The community was put on notice by, among other things, the claimant's militia service, and its failure to object within a reasonable period of time weighed heavily for the claimants.

Southern juries relied heavily on evidence of whether or not claimants acted out the legal formalities of whiteness. For men, this meant exercising the rights and privileges of whiteness, and for women, this meant acting out the "civic duties" of "pure white womanhood."[133] Witnesses very often mentioned voting, mustering in the militia, testifying in court, jury service, holding property and forming contracts as the types of activities that demonstrated whiteness.[134] In many cases, the claimant's civic participation was dispositive.[135] The case of *Bryan v. Walton*, which turned on whether or not Joseph Nunez was white, is illustrative.[136] At the end of the trial, there was conflicting testimony on Nunez's physical appearance, acceptance in the community, behavior, character, and ancestry.[137] However, there was agree-

[130] *Id.*; Gross, *supra* note 112, at 136. Abby Guy had lived as a free person for over a decade prior to her enslavement. *Id.* **R**

[131] 20 S.C.L. (2 Hill) 614, 614 (S.C. Ct. App. 1835). At the time, South Carolina law provided that only white persons could testify against other white persons. Thomas D. Morris, *Slaves and the Rules of Evidence in Criminal Trials*, 68 CHI.-KENT. L. REV. 1209, 1209 (1993).

[132] 20 S.C.L. (2 Hill) at 614 (finding claimants to be white because they had been accepted by society and had exercised legal rights); *see also* Gross, *supra* note 112, at 164 (discussing *State v. Cantey*). **R**

[133] Gross, *supra* note 112, at 157. **R**

[134] *Id.* at 113, 163, 166.

[135] *Id.* at 164 ("At the appellate level, when courts referred to performances of whiteness, it was civic performances that they found determinative.").

[136] This case involved a dispute over the property rights of Joseph Nunez, who died without heirs. Prior to his death, Nunez had sold six slaves to Seaborn Bryan. Hughes Walton, the administrator of Nunez's estate, sued Bryan to recover the slaves, on the theory that Nunez did not have the legal right to transfer the slaves because he was not a white man himself. *Id*. at 158 (citing Transcript of Trial, Bryan v. Walton, No. A-1154, (Ga. Houston County Super. Ct. 1859) (collection of Ga. Dep't of Archives & History, Atlanta, Ga., Supreme Court, Case F, Box 46)).

[137] Gross, *supra* note 112, at 161-62. **R**

ment from almost all witnesses that Nunez "had not exercised the privileges and rights of whiteness" such as voting and military duty.[138] The jury found that Nunez was not white.

2. *Rationales for Performance Reification in Race Determination*

What is the rationale behind this doctrine of race determination, in which evidence of "white" performance and acceptance in the white community were the criteria for determining whiteness? Such a rule is contrary to the standard of "hypodescent": the rule that race is an inherited, biological quality that descends through generations.[139] Application of this rule requires assignment of a particular quantum of black "blood" to those of mixed parentage or ancestry. Southern states developed varying blood quantum rules for determining race based on hypodescent.[140] As Cheryl Harris has noted, "In the commonly held popular view, the presence of Black 'blood'—including the infamous 'one-drop'—consigned a person to being 'Black.'"[141]

Although, presumably, whiteness was a function of ancestry, this factor was not controlling.[142] Neither was biological science determinative: out of the sixty-eight cases analyzed by Gross, only nine appeared to rely on expert scientific testimony about racial differences.[143] In *State v. Cantey*, the court found a group of witnesses to be white because they had been accepted by society and had exercised legal rights, despite evidence of black ancestry.[144] The judge held that "it may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of

[138] *Id.* at 162.

[139] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1738 & n.136 (1993) ("Case law that attempted to define race frequently struggled over the precise fractional amount of Black 'blood'—traceable Black ancestry—that would defeat a claim to whiteness.").

[140] *Id.* at 1738.

[141] *Id.* at 1737.

[142] Gross, *supra* note 112, at 118 ("[M]ost of the testimony in court traveled far afield from questions of ancestry."). *But see* Harris, *supra* note 140, at 1739-40 (concluding that determinations of "blood" or fractions of ancestry played a stronger role than social acceptance or performance). **R** **R**

[143] Gross, *supra* note 112, at 153. Gross concludes that the "precise fraction of the 'African blood' in Abby Guy's veins" was not determinative of the jury outcome. *Id.* at 137.

[144] 20 S.C.L. (2 Hill) 614, 614 (S.C. Ct. App. 1835).

blood should be confined to the inferior caste."[145] Even though there was evidence in *Spencer v. Looney* that Looney had himself acknowledged having "Negro blood," the jury nonetheless found him to be white.[146]

Gross notes the similarity to "prescriptive" doctrines in which "one might acquire a right to property after a prescribed number of years by virtue of having used the property and treated it as one's own for those years without challenge."[147] Courts here implicitly analogized whiteness to property[148] and protected the claimant's reliance interests in whiteness as they would have those of an adverse possessor.[149] In *State v. Cantey*, the judge held that it would be "very cruel and mischievous" to upset the expectation of whiteness for a claimant "whose caste has never been questioned until now . . . . Shall time and prescription, which secure and consecrate all other rights, have no effect in fixing the civil condition of an individual?"[150]

In addition to the reliance interests of particular claimants to white status, the law was also at work protecting the reliance interests of third parties. Reliance interests of innumerable third parties who had dealt with claimants as civic equals were at stake—such as Seaborn Bryan, who had contracted with Joseph Nunez under the assumption that he was a white man with the capacity to contract.[151] One decision applied a "reverse one-drop rule" to prevent a white husband from annulling his marriage on the grounds that he had discovered that his wife was black—in part to protect the interests of the couples' children by preventing the man from securing an easy divorce.[152]

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[145] *Id.*

[146] One of Spencer's friends "testified that while 'on a drunk' together, Spencer said that his family was 'mixed blooded, he said he had Negro blood in him, but he didn't object as it made him hardy.'" Sharfstein, *supra* note 114, at 1497 (quoting Transcript of Trial at 113, Spencer v. Looney, 82 S.E. 745 (Va. 1912)) (on file with Virginia State Law Library, Richmond, Va.) (testimony of Albert Stevenson). **R**

[147] Gross, *supra* note 112, at 165.

[148] Harris, *supra* note 140 (describing whiteness as a property interest). **R**

[149] Gross, *supra* note 112, at 136. **R**

[150] *Cantey*, 20 S.C.L. (2 Hill) at 614-16.

[151] *See* Transcript of Trial, Bryan v. Walton, No. A-1154 (Ga. Houston County Super. Ct. April 1853) (collection of Ga. Dep't of Archives & History, Atlanta, Ga., Supreme Court, Case F., Box 17), *rev'd*, 14 Ga. 185 (1853).

[152] *Id.* at 1503 (citing Ferrall v. Ferrall, 69 S.E. 60, 62 (N.C. 1910) (Clark, C.J., concurring)). The judge went so far as to suggest that the plaintiff should have moved to another locality where his wife's race was unknown, so as to shield his family. *Id.*

Additionally, the community's interests in the administrability of the institutions of slavery and segregation were at stake in these cases. Jim Crow era segregation required division of whites and blacks in every shared public space: "from public transportation to public parks, from the workplace to hospitals, asylums, and orphanages, from the homes for the aged, the blind, deaf, and dumb, to the prisons, from saloons to churches . . . parks, theaters, boarding houses, waiting rooms, toilets, and water fountains."[153]

To protect third-party interests in the institution of segregation and "minimize resource-wasting conflict," doctrines of race determination needed to provide a claim clearing function, as in adverse possession.[154] Overzealous policing of the color line threatened a large portion of white society that "had long included numerous people of African descent."[155] Sharfstein explains, "[i]f no one's racial status was secure without an exhaustive genealogy, the governmental apparatus of segregation and white supremacy would be perpetually threatening to whites."[156] Thus, "[w]ith unique access to the South's racial secrets, courts often worked to discourage anyone who would actively unearth them."[157] Such decisions "kept a segregated society's wheels greased."[158]

The doctrine also served a political role in maintaining segregation. In the trial of Abby Guy, a light-skinned woman, Guy's lawyers played on the community's "fears of hidden essences by telling a tale of white slavery."[159] The media used cases such as Guy's to "illustrate to their Northern readers the ultimate horror of slaveholders' evil: the possibility of white slavery."[160] By appeasing these concerns, verdicts such as Guy's had the paradoxical effect of making the institution of slavery more palatable to Southern and Northern audiences.

The doctrine of race determination described here also created anxiety by laying bare the fundamental dilemma of the

153 Leon F. Litwack, Trouble in Mind: Black Southerners in the Age of Jim Crow 233, 246 (1998).
154 *See* Rose, *supra* note 2, at 81. **R**
155 Sharfstein, *supra* note 114, at 1503. **R**
156 *Id.* at 1476.
157 *Id.* at 1499.
158 *Id.* at 1476, 1507.
159 Gross, *supra* note 112, at 127. **R**
160 *Id.*

unknowability of race and the lack of basis for the institutions of slavery and segregation. The idea that a black person could successfully pass for white also threatened white self-definition by revealing the arbitrariness of racial identity.[161] Just as the doctrine of adverse possession generated anxieties about thievery, common law marriage generated anxieties about gold diggers, and functional parenthood generated anxieties about kidnapping, the doctrine of racial determination generated the fear that persons with "negro blood" were "passing as white" and "making fools of those who accepted them."[162]

3. *Sex Determination: Being a Man or a Woman*

Based on the foregoing analysis, one might expect to see a doctrine of performance reification in the law of sex specification. Hypothetically, one could imagine a doctrine determining sex based on the following factors: whether the claimant behaved privately as a man or a woman, whether the claimant occupied certain gendered spaces (such as the men's or women's locker room), whether the claimant held out a consistent gendered image to the community on a continuous basis, whether or not the community accepted that image, and whether or not the claimant executed the legal formalities deemed appropriate to his or her purported sex. This doctrine would make sense because it would protect most third parties who came to rely on a person's gendered self-presentation in everyday interaction.

However, no such pattern is apparent from the case law on transgendered persons.[163] Courts have been called upon to determine the sex of such individuals in the context of laws defining marriage as a union between a "man" and a "woman"; official documents, such as birth certificates; eligibility for sporting events; and the abilities of transgendered individuals to state claims for sex discrimination.[164] In these cases, courts assume that biology overdetermines sex and disregard evidence of per-

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[161] *Id.* at 129, 166.

[162] *Id.* at 129.

[163] The term "transgendered people" refers broadly to individuals "whose appearance, personal characteristics, or behaviors differ from stereotypes about how men and women are 'supposed' to be." Jamison Green, *Introduction to Transgender Issues*, *in* THE POL'Y INSTITUTE OF THE NAT'L GAY AND LESBIAN TASK FORCE & NAT'L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 1 (Paisley Currah & Shannon Minter, eds., 2000).

[164] Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 324 (1999).

formance.[165] Despite medical literature demonstrating that sex is not fixed and unambiguous, cases attempting to determine sex generally rely on "rigid" biological tests involving "chromosomes, genitalia, gonads, or some combination thereof."[166] Indeed, the only transgendered claimants who receive recognition are certain transsexual persons[167] who are deemed to be engaged in authentic transition from one biological sex to another. In the law of sex determination, acting *as if* is not enough.

Case law related to gendered dress is particularly illustrative of the legal refusal to recognize a theory of gender as performance. Attire, as an aspect of self-presentation, is a crucial mode through which individuals hold themselves out to their communities as men or women. However, the law does not allow (or protect) these performances unless they match up with an individual's "sex," defined based on "biology."

Indeed, enforcement of sumptuary laws that proscribe certain sex-specific modes of dress demonstrates that courts will not accept performance as evidence of sex. Innumerable municipal ordinances have been enforced to prohibit cross-dressing.[168] Patricia Cain describes the widespread perception among gay

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[165] This is despite the analogous structure of race and sex classification systems. *See* Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 921-22 (2002) ("Most scholars and legal institutions now agree that race cannot be defined by biological factors and that race has been socially constructed. Sex classification systems, on the other hand, are still based primarily on the assumptions that sex is binary, unambiguous, and can be biologically determined, despite scientific research that indicates that none of these assumptions are completely accurate.").

[166] Greenberg, *supra* note 164, at 267, 325. **R**

[167] A "transsexual person" is defined as one who experiences "a conflict between one's physical sex and one's gender identity as a man or a woman." Green, *supra* note 163, at 3. **R**

[168] *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1564 n.85 (1993). In *People v. Gillespi,* for example, a New York vagrancy law that defined a vagrant as "a person, who having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway" was used to prosecute a man dressed as a woman. 202 N.E.2d 565, 565 (N.Y. 1964) (citing N.Y. CODE CRIM. PROC. § 887(7) (forbidding disguises except in cases of masquerade parties or by special permission)); *see also* People v. Archibald, 260 N.E.2d 871 (N.Y. 1970) (upholding the conviction of a man dressed as a woman under the same statute). Katherine M. Franke quotes George A. Chauncey, Jr. in her 1995 article, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender:* "by the turn of the century the police used [the law] primarily to harass cross-dressing men and women on the streets." Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1 (1995) (quoting GEORGE A. CHAUNCEY, JR., GAY NEW YORK:

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men and lesbians that they would violate the law for wearing too few gender-appropriate garments. Cain writes that there was an "understanding among gay men and lesbians in the 1950s and 1960s that they were subject to arrest unless they had on three garments appropriate to their gender."[169] In *City of Chicago v. Wilson*, the city gave four justifications for its sumptuary law: "(1) to protect citizens from being misled or defrauded; (2) to aid in the description and detection of criminals; (3) to prevent crimes in washrooms; and (4) to prevent inherently antisocial conduct which is contrary to the accepted norms of our society."[170]

Two of these justifications listed by the City of Chicago for its sumptuary law, namely, "to protect citizens from being misled" and "to prevent inherently antisocial conduct," indicate that sumptuary laws are intended to protect third-party interests and the public interest in the institution of stable gender identity. Third parties may be interested in knowing who is male or female for the purposes of enforcing gender roles and determining who is eligible for heterosexual coupling. The other two justifications for Chicago's sumptuary law, namely, catching criminals and "preventing crimes in washrooms," seem to conflate transvestism with other sorts of criminality.[171] These justifications are premised on the assumption that those who defy gender norms are likely to commit crimes.

However, transsexuals have secured protection from sumptu-

GENDER, URBAN CULTURE AND THE MAKING OF A GAY MALE WORLD, 1890-1940, 307 (1989)).

[169] Although Cain was unable to track down any statutory reference to the "three garment rule," she cites several anecdotal accounts of the widespread harassment of transvestites by legal authorities that generated this belief. Cain, *supra* note 168, at 1551 n.85 (citing MARTIN DUBERMAN, STONEWALL 299 n.39 (1993); LILLIAN FADERMAN, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA 185, 335 n.11 (1991) (two women arrested for cross-dressing in a gay bar in San Francisco in 1957); MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING & CULTURAL ANXIETY 141 (1992) (Joan Nestle reports that she was advised to "[a]lways wear three pieces of women's clothing . . . so the vice squad can't bust you for transvestism.")).

[170] 389 N.E.2d 522, 532 (Ill. 1978). Section 192-8 of the Municipal Code of the City of Chicago provided that "Any person who shall appear in a public place . . . in a dress not belonging to his or her sex, with intent to conceal his or her sex, . . . shall be fined not less than twenty dollars nor more than five hundred dollars for each offense."

[171] This may result from the tendency to "pathologize" transvestites and assume they are societal deviants likely to flaunt all legal norms. Franke, *supra* note 168, at 61.

ary ordinances. Martha Ertman writes that although "regulation of cross-dressing has long been used to harass gay people for failing to dress in gender-appropriate clothing," sumptuary "ordinances have been held unconstitutional as applied to transsexuals, individuals in transition from one sex to another."[172] In *City of Columbus v. Zanders*, the defendant was tried for wearing women's clothing and makeup and impersonating a female in violation of an Ohio municipal law.[173] The court held that the defendant was not guilty because the unlawful act was not a result of her free will: "the true transsexual suffers from a mental defect over which he has little practical control."[174] The court cited medical evidence that the defendant was a "true transsexual," "scoring very high on the feminine scale," and feeling like a "female trapped in a male body belonging to someone else."[175] The court also heard evidence that "[t]he legal motive is strong in all transsexuals. They want a change of their legal status. Red tape is their worst enemy."[176] In *City of Chicago v. Wilson*, the defendants were transsexuals undergoing psychiatric therapy in preparation for a sex-reassignment operation.[177] The court held that the city's alleged justifications amounted to an "aesthetic preference" that was outweighed by the defendants' medical needs.[178] The court pointed to an Illinois law authorizing a new certificate of birth following sex-reassignment surgery as evidence of the legislature's recognition of the validity of the procedure.[179]

Transsexuals have been less successful in securing the protection of antidiscrimination laws. Although Title VII of the Civil

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[172] Martha M. Ertman, *Sexuality: Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 Denv. U. L. Rev. 1107, 1128-29 (1996).

[173] 266 N.E.2d 602 (Mun. Ct. Ohio 1970). Section 2343.04 of the Columbus Municipal Code reads, "No person shall appear upon any public street or other public place in a state of nudity or in a dress not belonging to his or her sex, or in an indecent or lewd dress."

[174] *Zanders,* 266 N.E.2d at 606.

[175] *Id.* at 603.

[176] *Id.* at 605.

[177] 389 N.E.2d 522 (Ill. 1978). *See also* Doe v. McConn, 489 F. Supp. 76 (S.D. Tex. 1980). Section 28-42.4 of the Code of Ordinances of the City of Houston provided that "It shall be unlawful for any person to appear on any public street, sidewalk, alley, or other public thoroughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex." The statute was found unconstitutional as applied to transsexuals. *Id*. The opinion cited the holding and rationale of *City of Chicago v. Wilson*. *Id*. at 80.

[178] 389 N.E.2d at 525.

[179] *Id*.

Rights Act of 1964 prohibits employment discrimination on the basis of sex, case law has established that Title VII does not prohibit employer regulations that establish dress codes on a sex discriminatory basis.[180] In *Fagan v. National Cash Register Co.*, a man was fired from his job for long hair.[181] Women were not subject to similar regulations.[182] The man sued for sex discrimination under Title VII.[183] The court took notice of customary differences in dress, concluding that:

> [R]easonable regulations prescribing good grooming standards are not at all uncommon in the business world, indeed, taking account of basic differences in male and female physiques and common differences in customary dress of male and female employees, it is not usually thought that there is unlawful discrimination "because of sex."[184]

Several courts have followed this reasoning, holding that "distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunity" for the purposes of Title VII.[185]

Likewise, in *Terry v. EEOC*, an employer refused to hire a preoperative transgendered woman as a restaurant waitress/hostess.[186] The court dismissed the complaint because:

> [Terry] is still a male; at this point he only desires to be female. He is not being refused employment because he is a man or because he is a woman. Under these facts, Title VII and the constitution do not protect him. The law does not protect males dressed or acting as females and vice versa.[187]

Nor have transgendered individuals secured protection from

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180 Indeed, "[c]ourts have consistently refused to include transsexuals in the protected class of individuals under Title VII because they have assumed that 'sex' in the statute is used to denote 'traditional notions of sex.'" Greenberg, *supra* note 164, at 320, (citing Holloway v. Arthur Andersen, 566 F.2d 659 (9th Cir. 1977)). **R**

181 481 F.2d 1115 (D.C. Cir. 1973).

182 *Id.* at 1121.

183 *Id.*

184 *Id.* at 1117 n.3.

185 Willingham v. Macon Tel. Publ'g Co. 507 F.2d 1084, 1092 (5th Cir. 1975) (en banc) (man fired for long hair under grooming policy that applied only to men); *see, e.g.*, Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978) (man was not hired because interviewer believed he had "effeminate characteristics"); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388 (W.D. Mo. 1979) (female secretary fired for wearing a pantsuit to work).

186 No. 80-C-408, 1980 WL 334 (E.D. Wis. Dec. 10, 1980).

187 *Id.* at *3.

sex-specific dress codes based on the Americans with Disabilities Act, which prohibits employment discrimination on the basis of disability.[188] In *Doe v. Boeing*, the Washington Supreme Court rejected a disability discrimination claim by a preoperative transgendered woman who refused to follow the company's "transsexual dress code," which required her to avoid calling attention to herself with "obviously feminine clothing such as dresses, skirts, or frilly blouses."[189] The court held that the employer's policy was a reasonable accommodation of her condition, and thus did not violate Washington's Law Against Discrimination.[190]

What interests are served by sumptuary laws that regulate dress and Title VII grooming cases refusing to extend protection to transvestites? By refusing the claims of transsexuals, "courts underscored the futility of human agency to alter an individual's sex."[191] Sumptuary laws are relics of the feudal system. Marjorie Garber writes that in medieval and early modern Europe, sumptuary laws were designed to regulate dress in order "to mark out as visible and above all *legible* distinctions of wealth and rank within a society undergoing changes that threatened to blur or even obliterate such distinctions."[192] In the United States today, these laws serve a similar function: ensuring that gender distinctions remain legible. The legibility of sex/gender distinctions is the basis of sexual segregation in such quotidian contexts as restrooms.[193] Presumably, third-party and societal interests would be secured by a doctrine of performance reification. However, no such doctrine has emerged. This may be because certain of the public interests in the sex/gender system are not protected by a theory of performance reification. Courts explain the necessity of stable gender performances in terms of propagating the species. Katherine Franke notes that "some courts have been willing to go so far as to stake the survival of the species on the

[188] 42 U.S.C. §§ 12101-12213 (2000).

[189] 846 P.2d 531, 533 (Wash. 1993).

[190] *Id.* at 534.

[191] Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 920 (2002).

[192] GARBER, *supra* note 169, at 26. **R**

[193] In *Doe v. Boeing*, the litmus test for Doe's adherence to the dress code was her ability to use the men's restroom without complaint. 846 P.2d 531, 533-34 (Wash. 1993) ("[H]er attire would be deemed unacceptable when, in the supervisor's opinion, her dress would be likely to cause a complaint were Doe to use a men's rest room at a Boeing facility."). Katherine Franke remarks that "Curiously, in life and in law, bathrooms seem to be the site where one's sexual authenticity is tested." Franke, *supra* note 171, at 69.

ability to read gender correctly" because recognition of suitable sex partners is required to "reproduce the species."[194]

The threat of transgendered individuals to the human species may be overblown, but courts are nonetheless likely to protect the legibility of sex/gender in the current political climate, in which traditional gender roles are contested, transgendered individuals are equated with lesbians and gay men, and the debate over the normative equivalency of lesbian and gay sexualities is a "Kulturkampf."[195]

4. Identity Determination Doctrines as Performance Reification

In the racial determination cases, courts examined evidence that is structured much like the evidence that would support a claim for adverse possession. Just as the adverse possessor had to occupy the claimed property, a claimant to white identity had to occupy those segregated spaces marked as white: neighborhoods, schools, and churches. This behavior was not a mere private domestic ordering. Just as an adverse possessor had to hold himself out as the landowner under a claim of right, a person who passed for white had to do so expressly in the community, holding herself out as white on a consistent and continuous basis. The community had to accept the claimant as white and rely on that presumption. The interests protected here were the interests of the legal system in ensuring the stability and administrability of its regime of segregation—because of the arbitrary and porous nature of the color line, rigid enforcement of a true "one-drop rule" would have threatened the majority of white Southerners.

If the community accepted an individual as white, courts were willing to confer status on that person as white, even in the face of evidence that the claimant might have black ancestry. However, in the sex determination cases, a doctrine that gives primacy to performance is not discernable. Courts in this context look to evidence of "natural status." Presumably, only a seamless performance, such as that of the transsexual who undergoes a sex reassignment surgery, would succeed in the eyes of the law.

Unlike adverse possession, these doctrines of identity determination are troubled by biological conceptions of natural status. The chart below demonstrates the closer parallels between these doctrines and the concept of "functional parenthood":

[194] Franke, *supra* note 171, at 61.
[195] Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

FIGURE 2

	Parenthood	**Race**	**Sex**
Private Status	Biological Parent	White "Blood"	Biological Man/ Woman
Public Performance	Caretaking/ Kidnapping	Passing/Fraud	Appropriate/ Cross-Dressed
Legal Formality	Legal Adoption, Custody, or Guardianship	Race Designations on Birth, Death, and Marriage Certificates	Sex Designation on Birth Certificate, Driver's License, Passport

In the identity determination contexts, when private status and public performance line up, the law is highly likely to enforce the rights and duties of the claimant. However, when private status is in doubt, the situation becomes more difficult. The person attempting to pass as white, man, or woman may succeed even in the face of contrary evidence of "blood" or biology, so long as his or her performance is seamless and takes for granted the idea of race or sex as *natural status*.

II

THEORETICAL FRAMEWORKS FOR UNDERSTANDING PERFORMANCE REIFICATION

Can legal theory shed light on the driving forces behind these doctrines of performance reification? Neither legal formalism, which describes law as an attempt to codify a preexisting *natural status*, nor legal realism, which describes law as engaged in the enforcement of *private contracts*, is adequate to illuminate the doctrines of performance reification.[196] Another theoretical lens is necessary to examine the law engaged in recognition and reification of successful *public performances.* Application of Judith

[196] In mapping the status/contract distinction onto the formalist/legal realist one, I do not mean to gloss over important formalist theorizing about contracts or legal realist reification of status. Rather, I hope that this association will serve the provisional purposes of a descriptive account of jurisprudential shifts in theorizing about property, marriage, parenthood, and segregation. The notion of status I propose here is any characteristic deemed extralegal, essential, fixed, and immutable. Likewise, the notion of contract I propose here is not confined merely to economic transactions, but rather, is related to choice and agreement in many spheres of social interaction.

Butler's theory of performativity to doctrines such as adverse possession provides a crucial conceptual perspective.

A. Formalism and Realism

One theory of the meaning of legal institutions such as property, marriage, parenthood, and segregation is that these legal institutions stand apart from society, codifying natural phenomena according to a set of necessary rules derived from the common law. This description of law comes closest to the classical theory of legal formalism, as embodied in decisions such as *Lochner v. New York*.[197] Formalism "describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles."[198] Law is seen as autonomous from ideological considerations and immanent to the societal disputes it resolves.[199] For a classical formalist, legal reasoning is an exercise in the discovery of logical truths, not the forging of political compromises.[200] Formalist reasoning includes a preference for bright-line rules over standards.[201] A person is endowed with rights when they "vest," as though a metaphysical on/off switch were flipped.[202] The grand aspiration of formalism is to achieve clarity on the gapless grid-like classificatory scheme that provides

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197 198 U.S. 45 (1908) (invalidating statute setting maximum working hours for bakers due to its interference with bakers' freedom of contract in contravention of Due Process Clause, which protects freedom of contract as a natural liberty interest). Formalism was characteristic of U.S. jurisprudence in the late nineteenth century and is often associated with thinkers such as Christopher Columbus Langdell. *See, e.g.*, C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS (Little, Brown & Co. 1871). There are many types of formalism and disagreements on the precise meaning of the term. See THOMAS C. GREY, THE NEW FORMALISM, 1-5 (Stanford Public Law and Legal Theory Working Paper Series, Working Paper No. 4, Sept. 6, 1999), *at* http://papers.ssrn.com/sol3/delivery.cfm/991224402.pdf?abstractid=200732, for an illuminating taxonomy of contemporary formalisms.

198 Thomas C. Grey, *Langdell's Orthodoxy,* 45 U. PITT. L. REV. 1, 9 (1983).

199 Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 571 (1983).

200 Langdell saw law as a science: a complete system of deductive reasoning. *See* Grey, *supra* note 198, at 6. **R**

201 *See* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 496-99 (1988) ("[F]ormalism included a commitment to objective standards.").

202 For example, according to Joseph Beale, a theorist of conflicts of law, a state applied another state's law not for policy reasons, but because the claimant's rights had "vested" in the foreign jurisdiction. 2 JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS, § 5.4 (1935).

certain answers to all societal disputes.[203]

Formalism is often criticized for its abstract detachment and treatment of law as a closed system. Formalism thus takes for granted common law assumptions about status. It presumes the existence of a private sphere of behavior apart from the law that is protected based on a theory of natural rights.[204] Cass Sunstein explains:

> [T]he Lochner Court posited the existence of a natural and prepolitical private sphere, one that served as a brake on legislation . . . [T]he problem with the Lochner Court was its reliance on common law and status quo baselines; the Court was unable to see the ways in which those baselines were implicated in, indeed a product of law.[205]

One thread of formalistic reasoning suggests arguments against adverse possession-like doctrines. If objective bright-line rules are to be preferred over flexible standards, then formality should be required for ownership, marriage, family law, and segregation. The existence of formalities such as title to property, marriage certificates, official adoption papers, records of ancestry, and birth certificates would be determinative. This would serve the "practical social demand that official action be reasonably predictable, so that people may plan their lives."[206] Reliance on the presence or absence of formality avoids the need for courts to make sticky normative judgments about whatever else ownership, marriage, family, race, and sex may mean.

However, a case can be made for doctrines such as adverse possession from the perspective of classical formalism. The codification of social phenomena such as the adverse possessor, the common law spouse, the functional parent, the biracial person, and the transgendered person serves the classificatory aspirations of the formalist's gapless system. These doctrines can be derived

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[203] Unger, *supra* note 199, at 564 (describing formalism as a "search for a method of deduction from a gapless system of rules"); MAX WEBER ON LAW IN ECONOMY AND SOCIETY 62 (Max Rheinstein, ed., Edward Shils, trans., 1966) ("We refer to 'systematization' . . . it represents an integration of all analytically derived legal propositions in such a way that they constitute a logically clear, internally consistent, and, at least in theory, gapless system of rules, under which, it is implied, all conceivable fact situations must be capable of being logically subsumed lest their order lack an effective guaranty."). **R**

[204] Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1579 (1988).

[205] *Id.* at 1579-80.

[206] Grey, *supra* note 198, at 10-11.

through common law reasoning from principles of property, marriage, family law, and segregation. The logic is that in each of these cases, the claimant is possessed of an authentic natural status and therefore the absence of appropriate legal documentation is inconsequential. Performance is a proxy for status.

But what constitutes authentic, normative status as a property owner, parent, spouse, white person, man, or woman? Formalism conceals this foundational normative question with layers of deductive reasoning.[207] Normative judgments are taken for granted as descriptive features of the common law and necessary steps in logical chains of reasoning.

The formalist explanation is incomplete. The concept of "authenticity" is not doing the work in these squatter's rights doctrines. Good faith is not an element of adverse possession. Ancestry was not the pivotal factor in the race determination cases.[208] Rather, these cases turn on the reliance interests of claimants, third parties, and communities.[209]

A second theory of the meaning of property, marriage, parenthood, and segregation is that the aim of these institutions is to establish contractual rules to enforce private agreements. Legal realism is a jurisprudential reaction to the perceived difficulties with classical formalism.[210] Instead of viewing the law as a set of static, apolitical, doctrinal categorizations of social life, legal realists view the law as a tool for reflecting and shaping private behavior.[211] Laura Kalman writes that realists emphasize the "idiosyncrasy" of judicial decisionmaking, focusing on fact situations and social realities instead of abstract rules."[212] Law is forged through policy arguments, moral justifications, and institutional considerations, not discovered through deduction from abstract principles.[213]

Legal realism is often criticized as reducing the law to post hoc

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[207] *See* Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 900 (1997).

[208] *See supra* notes 14-15, 58, 106-106, 144-144, and accompanying text. **R**

[209] *See supra* notes 14-15, 58, 106-106, 144-144, and accompanying text. **R**

[210] *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (GLOUCESTER, MASS., PETER SMITH 1970) (1931); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Morris Cohen, *On Absolutisms in Legal Thought*, 84 U. PA. L. REV. 681 (1936); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924); Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930) .

[211] LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960, 3 (1986).

[212] *Id.* at 6-7.

[213] *Id.* at 176-81.

justifications or even what the judge ate for breakfast.[214] Contemporary formalists criticize legal realists for a vision of law without the advantages of "predictability, stability and constraint of decisionmakers."[215] Such an ad hoc system is antidemocratic because it allows judges to usurp the roles of legislatures, opens the door to arbitrariness and unfairness, and cannot maintain public legitimacy.[216] However, legal realists, like formalists, are concerned with the predictability of legal rules.[217] Legal realists posit that, "[s]ocial context, the facts of the case, judges' ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time . . . study of such factors could improve predictability of decisions."[218]

Legal realists forced common law assumptions and baselines out of the closet. In their analyses of *Lochner,* legal realists sought to demonstrate that the formalists' conceptions of "property," "freedom of contract," and "liberty" were not apolitical—they already embodied government involvement in the market, premised on common law assumptions that could be traced back to status-like rationales.[219]

However, while formalism risks masking normative judgments behind doctrinal compulsions, realism risks making law no more than crude politics, with no normative barometer, only competing subjective interests. The realist impulse to loosen formal doctrines to accommodate "social realities" is also a mode of masking normative judgments behind allegedly descriptive social science or observation. As Reva Siegel argues, "when a society undertakes to disestablish caste relations, it may instead translate them from an antiquated and therefore socially dissonant discourse to a contemporary and socially acceptable discourse."[220]

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[214] Singer, *supra* note 201, at 470. **R**

[215] Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 547 (1988). Schauer expounds an updated version of formalism, although he disagrees with the "formalistic" reasoning of *Lochner*. *Id.* at 511; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[216] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (Amy Gutmann, ed., 1997).

[217] Singer, *supra* note 201, at 471. **R**

[218] *Id.* at 470-71.

[219] *Id.* at 499; *see* Sunstein, *supra* note 204, at 1692 ("[T]he theoretical basis of the Lochner era foundered on a mounting recognition that the market status quo was itself the product of government choices. When private property was viewed as a creation of such choices, efforts to reallocate property rights could be understood as a legitimate effort to promote the public good."). **R**

[220] Reva B. Siegel, *The Modernization of Marital Status Law*, 82 GEO. L.J. 2127,

As a descriptive matter, legal realism illuminates a great deal about doctrines such as adverse possession. Realists critique the formalist definition of property as "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."[221] In response to the formalist idea of property as a natural and prepolitical relationship between a person and a resource, legal realists such as Felix Cohen defined property as "a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision."[222] This notion of property better fits adverse possession, which protects the contractual reliance interests of the claimant, rather than the formalist notion of despotic domain.[223]

In contrast to the formalist idea of marriage as status, legal realists reconceive of marriage as contract. Under the Blackstonian common law model, the married woman had no right to contract; her rights were submerged into her husband's under the doctrine of coverture.[224] During the nineteenth century, statutes gave married women rights to property, earnings, and to enter into legal transactions, under the rubric of the move from status to contract.[225] The twentieth-century movement towards no-

2210 (1994); *see also* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 222-24 (1987) (characterizing the "status to contract" story as fundamentally conservative).

221 WILLIAM BLACKSTONE, 2 COMMENTARIES *2. *But see* Rose, *supra* note 17, at 603-04 (arguing that Blackstone was well aware that this description of property was more of an idealized rhetorical trope than a self-evident definition). **R**

222 Cohen, *supra* note 21, at 373.

223 The impulse to examine property and contract in terms of reliance interests as opposed to doctrinal formalism is part of the intellectual tradition of legal realism. *See, e.g.*, L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*: *1*, 46 YALE L.J. 52 (1936); *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937) (reconceptualizing contract law away from formalistic consideration and towards policy analysis of reliance interests); Singer, *supra* note 13 (analyzing property law in terms of reliance interests).

224 BLACKSTONE, *supra* note 221, at *442 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything."). **R**

225 Siegel, *supra* note 220, at 2128. Siegel concludes that "[s]tatutory reform modified but did not abolish the law of coverture." *Id*. This argument was powerful because at the time, "the paradigm of contract exerted extraordinary influence in legal thought." Dubler, *supra* note 58, at 1891. **R** **R**

fault divorce, for example, represents the view that married status is not fixed and unchangeable, but rather, is freely chosen and can be undone.[226] Spouses can enter into antenuptial contractual agreements establishing the distribution of assets upon dissolution of the marriage.

The legal realist's preference for judicial discretion over inflexible doctrinal rules manifests itself in marriage law. Jane Murphy writes, "Nowhere is this ideal of individualized justice used to justify broad, unfettered judicial discretion more than in family law."[227] This resistance to formal rules comes from ideas about the "reality" of marital relations: "[f]amily law tries to regulate people in the most complex, most emotional, most mysterious, most individual, most personal, most idiosyncratic of realms. It is absurdly difficult to write rules of conduct for such an area that are clear, just, and effective."[228] The recognition of common law marriage is an attempt by the law to match up with social realities of "married" couples whose marriages are not solemnized through ceremony or licensed by the state. Dubler analogizes this to the legal realist's increasing reliance on "evidence of patterns of performance" in contract law.[229]

A legal realist would reenvision parenthood as a chosen relationship that serves practical goals, not a natural status. The

[226] *See* UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 91 (1979). All fifty states recognize no-fault divorce. *See* Andrea Brobeil, *Family Law Chapter: Marriage and Divorce*, 5 GEO. J. GENDER & L. 529, 538 (2004).

[227] Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment,* 70 N.C. L. REV. 209, 209 (1991); *see also* Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170 (1986) ("[I]n domestic relations law, more than in any other area of private law, trial judges have been expressly granted broad discretion to try to achieve individualized justice on a case-by-case basis.").

[228] Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2218 (1991); *see also* Murphy, *supra* note 227, at 211 ("[D]ecisions requiring complex judgments about past or future human behavior have been viewed as particularly inappropriate for formulae or rules."). R

[229] *See* Dubler, *supra* note 29, at 1007 (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 35-39 (1992)). However, Dubler argues that at the same time that legal realists were transforming contract law, many states were abolishing their doctrines of common-law marriage for formalist reasons: "A growing judicial reliance on sustained conduct, rather than the exact moment of the inception of a contract, presumably left courts vulnerable to the deceptive or misleading performances of the parties to the contract." *Id.* This fear of deceptive performances was fatal in the case of marriage because of the perceived importance of marriage to the social order. *Id.* at 1008.

Blackstonian idea of property-like rights in children[230] has been replaced with a pragmatic rule: the "best interests of the child" standard.[231] The ALI Principles replace the ideas of property-like rights in children with a preference for parenting plans: contract-like, voluntary agreements between the parties to a dispute.[232] The increasing availability of techniques of artificial insemination makes it hard for the law to even define a natural parent.[233] The move towards recognition of functional parents by the ALI resonates with the theories of legal realists. This movement is a "utilitarian metamorphosis": a self-consciously pragmatic shift from notions of status to notions of functionality—an attempt to mold the law into a better reflection of social life.[234] Furthermore, it is premised on scientific ideas about the best path to child development.[235] Formalist family law divided the world of parenthood into people who were legal parents, with a full set of rights and duties towards children, and people who were strangers, with no rights and duties towards children whatsoever.[236] Functional parents have rights and duties with regards to children that are not coextensive with those of legal parents, breaking down the clean formalist division. Of course, the ALI effort to classify and codify the rights and duties of func-

[230] BLACKSTONE *supra* note 221, at *446. R

[231] Francis J. Catania, Jr., *Learning from the Process of Decision: The Parenting Plan*, 2001 BYU L. REV. 857, 860 (2001) ("The 'best interests of the child' standard has been widely touted as the standard by which child custody disputes are adjudicated in the United States since the nineteenth century. The standard was certainly an improvement over ancient property-based approaches to child custody.").

[232] The ALI Principles suggest that in the resolution of custody disputes, parents propose contract-like "parenting plans," establishing the division of parenting tasks. ALI PRINCIPLES, *supra* note 71, at I8 ("Chapter 2 assumes that parental agreement is, generally speaking, good for children, and that it is difficult for courts to accomplish meaningful review that is likely to improve measurably those agreements."). R

[233] *See* John Lawrence Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991).

[234] Difonzo, *supra* note 73, at 927 (describing the ALI Principles as an "effort to adapt the law to the emerging social reality of functional families"). R

[235] *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 53 (1979) ("The least detrimental alternative . . . is that specific placement and procedure which maximizes, in accord with the child's sense of time on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.")

[236] *See* Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles,* 35 WILLAMETTE L. REV. 769, 769-72 (1999) (discussing the rights of "legal parents" versus "legal strangers").

tional parents into a "unified field theory of the family"[237] is a formalist impulse, contrary to the "largely limitless discretion . . . common in family law."[238]

Performance-based modes of race determination can also be analyzed as a realist phenomenon. Sharfstein writes that the idea of race as "blood" was a formalist concept: "[t]he conception of 'blood' as a kind of title gave whites, as owners of this 'property,' the right to exclude blacks, forming a legal infrastructure of inequality."[239] In response to the formalist idea of race as natural status and the "one-drop rule,"[240] legal realists reenvisioned race as functional, reflective of social life, and possibly even contractual.[241] Race based on association is a contractual concept: race is chosen based on whom an individual associates with.[242] Anachronistically, it is more possible to examine race from a contractarian standpoint: race is a freely chosen aspect of identity, determinable based on a person's self-identification via the

237 Difonzo, *supra* note 73, at 925. The Principles are a formalist codification of contractarian principles: "these features fuse to form the backbone of a unified field theory of the family, one whose unspoken aim is finally to consolidate the no-fault divorce revolution." *Id.* R

238 Ira Mark Ellman, *Brigitte M. Bodenheimer Memorial Lecture on the Family: Inventing Family Law,* 32 U.C. DAVIS L. REV. 855, 871 (1999). *See also* Difonzo, *supra* note 73, at 925 ("[T]he Principles conceive of family law as entering a consolidation phase, in which scattershot judicial discretion is displaced by delimiting rules."). R

239 Sharfstein, *supra* note 114, at 1479; *see also* Teresa Zackodnik, *Fixing the Color Line: The Mulatto, Southern Courts, and Racial Identity*, 53 AM. Q. 420, 424 (2001) (describing attempts to assign racial status based on performance as attempts by Southerners to divine "true" and "essential" racial identity through its outward manifestations in behavior). R

240 The "one-drop rule" is only one example of a formalistic rule of race determination—states also employed rules assigning "Negro" status to anyone with one quarter or one eighth "Negro blood." Sharfstein, *supra* note 114, at 1477. Sharfstein writes that these rules better reflected the racial status quo. *Id.* The move away from the "one-drop rule" thus can be interpreted as a shift from formalism to realism. R

241 "This story could be read as the triumph of custom over law, in which social practices of defining race through performance overwhelmed formal rules of ancestry and 'blood.'" Gross, *supra* note 112, at 181. Gross explores, but ultimately rejects, the theory that the cases on racial determination can be understood as the evolution from formalism to realism, for reasons I will detail in Part II.C, *infra*. R

242 One litigant proposed a definition of blackness as anyone "who fixes his own status, or has it fixed for him, by association with the negro race." Sharfstein, *supra* note 114, at 1505, (citing Plaintiff's Brief at 3, Ferrall v. Ferrall, 69 S.E. 60 (N.C. 1910) (on file with North Carolina Superior Court Library, Raleigh, N.C.)). The observation that someone's racial associations might be "fixed for him" demonstrates that the contractual model is not entirely apt. R

checkboxes on census forms, standardized tests, college admission applications, and employment forms.

By contrast, doctrines of sex determination have not made the jump from formalist, status-based reasoning to realist, contract-based reasoning. Indeed, the contractarian value of free choice is absent from the case law on sex determination, which protects only those who *lack* free choice in sexual determination. The transsexual defendant in *City of Columbus v. Zanders* was protected because her cross-dressing was *not* construed as a choice, but rather as "a mental defect over which he has little practical control."[243]

Legal realism explains a great deal about the squatter's rights doctrines. These doctrines can be conceptualized as protecting contractual interests while eschewing formalistic notions of authentic status. A contract requires mutual agreement and consideration. Adverse possession and analogous doctrines require a notorious claim of right that is acquiesced to by the public. These elements mimic the doctrinal elements of a contract. The claim of right that is notorious functions as an offer made by the adverse possessor. The requirement of acquiescence by the titular owner, common law spouse, or legal parent is akin to the contractual requirement of acceptance. Often the squatter relies on this acquiescence at considerable expense. For example, the adverse possessor behaves as an owner, maintaining the property, the common law spouse fulfills the "duties" of a wife or husband, and the functional parent takes care of the child. However, these services are not bargained for as consideration per se. Rather, it is reasonable and foreseeable for the original claimant to expect that acquiescence would induce the squatter's reliance.[244] Indeed, reliance interests play a large part in cases involving all three doctrines.[245] The Restatement recognizes reliance in lieu of consideration where enforcement of the contract is necessary to avoid injustice.[246] This doctrine is referred to as promissory estoppel.[247]

But a bare contract claim of this sort would not hold up in court. The mutual agreement element of the contract is lacking.

[243] 266 N.E.2d 602, 606 (Mun. Ct. Ohio 1970).
[244] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).
[245] See *supra* Parts I.A.2, I.B.2, I.B.4, & I.C.2.
[246] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).
[247] *See, e.g.*, Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898).

Here the former claimant accepts by silence. The Restatement of Contracts establishes that silence can constitute acceptance of a contract only under certain conditions: where the offeree accepts the services of the offeror knowing that they were offered with the expectation of compensation, or where it is clear from the offeree's previous statements or dealings that silence means acceptance.[248] In the case of the adverse possessor, courts do not require proof that the titular owner agreed to the adverse possessor's claim of right. Likewise, there is no requirement that common law spouses mutually agreed to treat each other according to the expectations of a legal marriage. In addition, there is no evidence that legal parents are aware that the child support activities of potential functional parents might confer rights to visitation. Nor is there evidence that white communities were aware at the time of segregation that the community's association with a person of uncertain racial status would grant that person the privileges of whiteness.

Furthermore, the contract model is merely an addition to, not a replacement for, the formalist status model. These institutions offer a one-size-fits-all, take-it-or-leave-it option.[249] Insofar as individuals have a choice, it is only at the outset. After they agree to enter the institution, they are stuck with a formalistic status. Thus, Marsha Garrison calls marriage a "status contract": "with terms that are largely determined by legislatures rather than by the individual marriage partners themselves."[250] This distinction "represents an extremely important qualification to the principle of freedom of contract."[251] As Merrill and Smith explain, with regards to contract, "there is a potentially infinite range of promises that the law will honor," but "[g]enerally speaking, the law will enforce as property only those interests that conform to a limited number of standard forms."[252]

These doctrines are justified as legal reactions to social realities that ensure efficiency and substantive justice. In each case, the interests of the "adverse possessor" are protected. However, a realist, law-and-economics approach to this issue requires an

[248] Restatement (Second) of Contracts § 69 (1981).

[249] Dubler, *supra* note 58, at 1902. R

[250] Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 Cal. L. Rev. 41, 106 (1998).

[251] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1, 5 (2000).

[252] *Id.* at 3.

examination of the sorts of ex ante incentives that are created by legal rules.[253] There may be contract-like reasons for treating adverse possession and its analogues like the institutions they mimic. But, if these institutions are about contracts, then the right legal rule would create incentives for people to "get it in writing": to manifest intent to contract through legal formalities. Legal formality is exactly that which is absent in the paradigm case of the adverse possessor. Imposing property, marriage, parenting, and segregation on persons who did not agree to them is in violation of the principles of autonomy and freedom of contract.

B. Performativity

As a theoretical lens, neither status-based formalism nor contract-based realism is sufficient to bring adverse possession and analogous doctrines into focus. However, both formalism and realism contribute insights. Although status-based formalism is allegedly retrograde, there is nonetheless the sense that squatter's rights are protected because the squatter is actually the true "owner" and has a prelegal right to recognition. The private contract model also explains a great deal. Squatters must communicate their intents to be owners, and there must be acquiescence from other potential owners. But two-party contract principles would demand more than mere silence as a manifestation of acceptance. There must be another angle. Why do these doctrines have a notoriety requirement that the squatter held him or herself out to the public at large? Why are third-party interests relevant? Why do courts examine mimicry of legal formalities, such as tax returns and voting records as evidence of "holding out"? These doctrines recognize public performances: mimicry of not only the social meaning of ownership, marriage, parenting, and whiteness, but also mimicry of specific legal rights, duties, and formalities.

Judith Butler's idea of performativity is a crucial theoretical lens through which to examine these doctrines.[254] Butler develops her theory of performativity in the context of gender. Her

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[253] *See* Merrill, *supra* note 12, at 1112 (arguing that adverse possession appears to have "escaped the attention of the modern law and economics movement" and proposing liability rules for bad-faith adverse possessors). **R**

[254] *See* Dubler, *supra* note 29, at 1006-09 (applying Butler's idea of parody to common-law marriage); Gross, *supra* note 112, at 112 n.6 (applying Butler's theory of gender performativity to trials of race determination). **R**

starting point is the theory that "one is not born, but rather, *becomes* a woman" through socialization.[255] But Butler's theory goes beyond social constructionism. For her, gender is constituted not just through shared social understandings, but "through a stylized repetition of acts."[256] A person "does" his or her gender through speech, dress, mannerisms, and so forth.

Butler critically questions a division that many feminists make between "sex" as biological and "gender" as social.[257] For Butler, gender has no essence, original, or ideal form, and neither does sex.[258] Genders and sexes purport to be natural and essential, but they are both constituted by "tacit collective agreement to perform, produce, and sustain discrete and polar genders."[259] Kenji Yoshino explains Butler's argument: "rather than conceiving of culture as a simple overlay on nature, culture must be seen as the very realm through which we fashion our concept of the natural . . . . Gender is actually constituting the thing whose effect it appears to be."[260]

Although she does not deny biology, Butler seeks to analyze how we come to understand the "biological," "material," and "natural" dimensions of the body as gendered.[261] Cultural conventions place limits on the possibilities that we have for understanding our embodiment, and we reproduce those conventions when we adopt them in order to understand our bodies as "male" or "female." Enacting gender is a way of "taking up"

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[255] JUDITH BUTLER, GENDER TROUBLE 33 (1990).

[256] Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 519 (1988).

[257] *Id.* at 521.

[258] *Id.*

[259] *Id.* at 522.

[260] Yoshino, *supra* note 191, at 866.

[261] The theory of performativity is not radical social constructionism: "*gender* is not a noun, but neither is it a set of free-floating attributes." BUTLER, *supra* note 255, at 24. Yoshino does not read Butler to be making the "strong performative claim" that "there is no biological substrate to sex." *See* Yoshino, *supra* note 191, at 866. Rather, he reads Butler to be making a "weak performative claim": **R**

> [T]here may be a biological component to sex, but that we will never be sure what that biological component is, as we can only apprehend it through culture (that is, gender). The weak performative claim thus differs from the strong performative claim in two respects. First, it is an epistemological rather than an ontological claim. Second, the weak performative claim suggests that "performative" modifies not categories of identity, but rather aspects of identity.

Id. at 868.

certain cultural possibilities.[262]

Performativity is deeply connected to communication. Butler's theory of performativity derives from J.L. Austin's theory of speech acts. Austin argues that speech has both constative and performative aspects.[263] Utterances are constative insofar as they purport to describe some material reality—they can be true or false.[264] Speech is performative insofar as an utterance enacts itself, for example, the statements "I promise" or "I bet you" bring about certain effects.[265] Austin further subdivides performative aspects of speech into "illocutionary" and "perlocutionary." Butler explains that illocutionary acts "are speech acts that, in saying do what they say, and do it in the moment of that saying; [perlocutionary acts] are speech acts that produce certain effects as their consequence; by saying something, a certain effect follows."[266] Butler combines this idea of performativity with the notion of interpellation: the idea that an act of discourse can call into being the subject to which it refers.[267] When a doctor utters, "It's a girl!" to a set of new parents, she "begins that long string of interpellations by which the girl is transitively girled; gender is ritualistically repeated, whereby the repetition occasions both the risk of failure and the congealed effect of sedimentation."[268]

Austin identifies what he calls "felicity conditions," that must be fulfilled "for the . . . 'happy' functioning of the performative."[269] The first of Austin's felicity conditions posits that: "[t]here must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances."[270] For an utterance to be successful, it must cite previous utterances. For "It's a girl!" to make sense, it must refer to a long string of gendered words that help the community understand

[262] *Id.* at 521.

[263] J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975). Austin begins by arguing that there are two types of speech, constative and performative, but as his argument develops, he acknowledges that all speech has both constative and performative aspects. *Id.*

[264] *Id.*

[265] *Id.* at 6.

[266] JUDITH BUTLER, EXCITABLE SPEECH 3 (1997).

[267] JUDITH BUTLER, BODIES THAT MATTER 121-22 (1993).

[268] Judith Butler, *Burning Acts: Injurious Speech,* 3 U. CHI. L. SCH. ROUNDTABLE 199, 204 (1996).

[269] AUSTIN, *supra* note 263, at 14. R

[270] *Id.*

what to expect out of babies called "girls." Utterances are a way of "making linguistic community": tapping into a set of established practices for a group of people that bind them in understanding one another.[271] In order for an utterance to achieve a performative effect, it must be applied by an appropriate person, in the appropriate circumstances, through a correctly and completely executed conventional procedure.[272]

The single utterance, "It's a girl!" does not a baby girl make. The drama of gender is a repeat performance—it must be reenacted continually to form a pattern. Butler writes, "the body becomes its gender through a series of acts which are renewed, revised, and consolidated through time."[273] She explains, "[t]his repetition is at once a reenactment and reexperiencing of a set of meanings already socially established; it is the mundane and ritualized form of their legitimation."[274] With each repetition, a convention increases its legitimacy and status as normal and natural: thus, gender "conceals or dissimulates the conventions of which it is a repetition."[275]

Although Butler's theory of performativity was developed to describe identity categories such as "man" and "woman," the theory also has descriptive power for legal institutions such as property, marriage, parenthood, and racial segregation. These institutions involve the conference of identity categorizations, such as "owner," "husband," "wife," "parent," and "white."[276]

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[271] AUSTIN, *supra* note 263.

[272] *Id.* at 14-15.

[273] Butler, *supra* note 256, at 523. **R**

[274] *Id.* at 526.

[275] BUTLER, *supra* note 267, at 12. **R**

[276] It may seem strange to say that "owner" is an identity category on par with "man" or "mother." This most likely stems from the fact that ownership is considered an economic label, and "commodification anxiety" prevents consideration of marriage or parenthood as economic transactions. *See supra* note 104. Ownership **R** also pertains to identity. Margaret Jane Radin explains, "[m]ost people possess certain objects they feel are almost part of themselves . . . they are part of the way we constitute ourselves as continuing personal entities in the world." Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (arguing for special legal protections for property rights to homes). As President Bush stated, "Owning a home lies at the heart of the American dream. A home is a foundation for families and a source of stability for communities." President George W. Bush, *Policy in Focus: Home Ownership*, Radio Address to the Nation, June 15, 2002, *at* http://www.whitehouse.gov/news/releases/2002/06/20020615.html. The income tax code contains tax incentives reflective of the psychic import of home ownership to American identity. *See* MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICES 357-58 (4th ed. 2002).

Adverse possession and analogous doctrines are best explained by this performative model. In each case, "acting as if" is tantamount to "being"—but only if a stringent set of felicity conditions is met. One who lives on the land in a manner that courts presume an owner would is an owner. These acts cannot be isolated or infrequent—continual, ritualized repetition is required. A woman who only behaves as a wife while on vacation with her husband in Florida is not a common law spouse. It is essential to each doctrine that the claimant hold her or himself out to the community as an owner, spouse, parent, or white person because these labels are fundamentally about communication to the public at large.[277] Two-party contract principles are not dispositive. The audience for this performance is everywhere. School teachers, health care providers, and child- care workers are the relevant audience when determining the status of a functional parent. Not only did the speech act have to be "notorious," it had to be successful, generating acquiescence from others who may dispute the claimant's rightful status, and acceptance from the community at large. Butler's theory of performativity indicates that if such an utterance is likely to be successful, it must cite back to previous utterances or performances of property, marriage, parenting, and whiteness. Hence, a court is most likely to recognize a functional parent if that person closely approximates the cultural archetype of the "normal" parent.

The squatter's rights doctrines demonstrate that the institutions of property, marriage, parenthood, and whiteness are fundamentally about communication and signaling to others—as public institutions, clarity is required to signal one's choice of legal forms to third parties and the state. The performative view exposes these institutions as rituals imbued with social meanings, performative in both the illocutionary and the perlocutionary sense. They are illocutionary insofar as they are inaugurated with particular socially recognized rituals of ceremony or legal formality, and perlocutionary insofar as they are repetitions of a set of sedimented practices known to the community to constitute property, marriage, parenthood, and whiteness. A legal formalist would have thought that rights "vested" and became metaphysically present upon the completion of these rituals.[278] However, the theory of performativity fits better with Rose's

[277] *See* Rose, *supra* note 2, at 77-79 (describing property as speech). **R**
[278] *See supra* note 202 and accompanying text. **R**

"consent theory" of property rights. "Clear acts" are required to put the community on notice of a claimant's intent to appropriate property, become married, or act as parent.[279]

The act of putting one's name on a deed or title is an illocutionary speech act that creates ownership. Today, most transfers of land require "a memorandum of sale" that "must, at a minimum, be signed by the party to be bound, describe the real estate, and state the price."[280] These illocutionary acts of legal formality can be analogized to the ceremonial "livery of seisin" required to transfer an estate before 1536.[281] That ceremony required the presence of the grantor, the grantee, and a witness.[282] The grantor transferred "seisin," a type of possession, to the grantee "by some symbolic act such as handing over a clod of dirt or putting the grantee's hand on the ring of the door and uttering such words as 'Know ye that I have given this land to [the grantee].' "[283] Adverse possession also demonstrates that property is performative in the perlocutionary sense: acting according to the expectations of ownership is required. This is not only for adverse possessors, but also for original owners who will lose their claims to land if they do not eject adverse possessors.

Likewise, marriage is performative in the illocutionary sense. The ritualistic "I do" of the marriage ceremony is Austin's paradigm example.[284] Butler writes, "The centrality of the marriage ceremony in J.L. Austin's examples of performativity suggests that the heterosexualization of the social bond is the paradigmatic form for those speech acts which bring about what they name. 'I pronounce you . . .' puts into effect the relation that it names."[285] The required formalities of state certification, such as the marriage license and solemnization, are similar forms of speech signifying an intent to marry.[286] Common law marriage

279 Rose, *supra* note 2, at 77. **R**

280 DUKEMINIER & KRIER, *supra* note 3, at 561-62. Estoppel is recognized as an exception to the statute of frauds, where one person was induced to change her position in reliance on an oral contract. *Id.* at 562. However, in a case of adverse possession, there is no oral contract. **R**

281 *Id.* at 228. Dukeminier and Krier point out that this "quaint" ceremony has many modern analogues. *Id.* at 228 n.25.

282 *Id.* at 228.

283 *Id.*

284 AUSTIN, *supra* note 263, at 5. **R**

285 Judith Butler, *Critically Queer*, 1 G.L.Q. 17, 17 (1993).

286 For example, to be married in New York State, a license is required "from a town or city clerk." N.Y. DOM. REL. § 13 (McKinney 1999). Ceremonial solemnization is also necessary: "the parties must solemnly declare in the presence of a clergy-

demonstrates there are innumerable daily actions that couples take that constitute "holding out" as married, actions with perlocutionary effects.[287]

Parenthood can also be analyzed as performative. The legal documentation of a birth or adoption certificate naming the child's parents is an illocutionary ritual. The child's act of naming his or her "mother" and "father" is constitutive of the parental relation. Functional parenthood exposes the institution of parenthood as perlocutionary: acts of caretaking constitute parenthood insofar as they signal to others the relationship of the particular adult to the child. Furthermore, an adult who does not perform these acts is stripped of his or her rights as a parent.[288]

Whiteness is also amenable to analysis as performative. Because whiteness was considered reputational property, a performative utterance, such as George Looney's reference to the Spencer family as "God damned negroes," was actionable slander.[289] Sharfstein describes a profound "shift from courts to bureaucracy as custodians of the color line" during the early twentieth century, at which time legal documentation, such as "racial designations on birth, marriage, and death certificates,"

man or magistrate and the attending witness or witnesses that they take each other as husband and wife." *Id.* § 12.

287 However, status and contract ideas still lurk in the statute books. Even a solemnized relationship may be annulled if one or both parties did not meaningfully consent, or if they are unable or unwilling to "consummate" the marriage. Grounds for annulment include incapacity to contract because of insanity, physical incompetence, fraud, duress, sham, bigamy, polygamy, incest, because the participants are of the same sex, because they are underage, or because the marriage was entered into in jest. Steve Escalera, *Part Four: Getting Divorced: California Marital Annulments*, 11 J. CONTEMP. LEGAL ISSUES 153, 156 (2000). A marriage may be annulled because either party was, "physically incapable of entering into the marriage state." CAL. FAM. CODE § 2210(f) (2003). This language means a marriage is voidable if one spouse is found physically incapable of sexual reproduction. Stepanek v. Stepanek, 14 Cal. Rptr. 793 (Cal. Dist. Ct. App. 1961). The test for physical capacity is not "fruitfulness," but rather, ability to "copulate." *Id.* at 774. Despite contract language, contract logic cannot be the reason for this: the California Supreme Court held in *Marvin v. Marvin* that a contract to perform sexual services is unenforceable. 557 P.2d 106, 112 (Cal. 1976).

288 "Courts find abandonment only when a parent has 'consistently fail[ed], over a substantial period of time, to communicate with the child, to support him, or to take any real interest in him.'" Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 421 (1996) (citation omitted). Abandonment is grounds for termination of all parental rights. *Id.*

289 Sharfstein, *supra* note 114, at 1474 (quoting Appellee's Brief at 5-9, Spencer v. Looney, 82 S.E. 745 (Va. 1914)). R

became the illocutionary moments of racial designation.[290] Gross draws on Butler's theory in order to conclude that "over the course of the antebellum period, law made the 'performance' of whiteness increasingly important to the determination of racial status."[291] "Doing the things a white man or woman did became the law's working definition of what it meant to be white."[292] By acting out the legal rights and obligations of white masculinity, a man laid claim to white status. By acting out the moral and civic obligations of white femininity, a woman similarly laid claim to white status. "To be white was to act white: to associate with whites, to dance gracefully, to vote. Blood may have been the signified, but the signifiers were social acts."[293] These perlocutionary acts constituted whiteness.

This view of legal institutions as performative does not map onto the formalist or the legal realist ideas. The formalist idea of preexisting natural status is akin to exactly the sort of determinism explicitly rejected by performativity. These doctrines cannot be explained as formalist by the logic that "performance" here is as a proxy for natural status. If that were the case, the law would not protect the bad-faith adverse possessor. Status cannot be analyzed apart from the legal discourse that creates it. The performative view of law creates a crisis for the idea that law protects an underlying natural status. Status is replaced with performance, and that performance may not be in good faith. Performance raises the specters of fraud, deceit, and duplicity: a thief masquerading as an owner, a gold digger masquerading as a wife, a kidnapper masquerading as a parent, a slave masquerading as a free man. We can only tell the difference if we have a normative baseline. Thus, these doctrines are focal points for cultural debates over the meanings of socially contested legal institutions. Why are long-term occupancy, cohabitation, caretak-

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290 *Id.* at 1507. Sharfstein describes the efforts of state bureaucracies in Virginia and Louisiana in the 1920s to "classify" citizens according to race in an effort to maintain segregation. *Id.* at 1506-07; *see* Doe v. Louisiana, 479 So. 2d 369 (La. Ct. App. 1985) (lawsuit brought to change racial designation on birth certificate from "col." to "white").

291 Gross, *supra* note 112, at 112; *see also* John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America,* 109 YALE L.J. 817 (2000). Tehranian applies Butler's theory in order to demonstrate that "whiteness was determined through performance" in race determinations in U.S. naturalization cases in the 1920s. *Id.* at 820, 828. **R**

292 Gross, *supra* note 112, at 112. **R**

293 *Id.* at 162-63.

ing, and civic participation considered the core activities constituting ownership, marriage, parenthood, and whiteness?

Neither does performativity square with the legal realist idea of freely chosen contract. Community agreement to tacitly endorse a performance does not meet the legal standard for contractual formation.[294] Additionally, the performer cannot be considered radically free: "Performativity is a matter of reiterating or repeating the norms by which one is constituted: it is not a radical fabrication of a gendered self."[295] Butler explains the role of free choice in the context of gender performativity: "Surely, there are nuanced and individual ways of *doing* one's gender, but *that* one does it, and that one does it *in accord with* certain sanctions and proscriptions, is clearly not a fully individual matter."[296] Gender, and also race, are neither an individual choice, nor are they fully inscribed on an individual by society, culture, and history. She explains that "actors are always already on the stage, within the terms of the performance."[297] But to say we are constructed is not to say we are programmed: "Construction is not opposed to agency; it is the necessary scene of agency, the very terms in which agency is articulated and becomes culturally intelligible."[298] When property, marriage, and parenthood no longer look like free contracts, normative questions are brought to the surface.

The idea that "acting as if" is enough to confer legal recognition forces confrontation with questions about property, marriage, parenthood, and segregation that are usually bracketed. In order to say whether or not someone is "acting as if," courts must define the exact contours of what it means to act as the archetypical owner, spouse, parent, white person, man, or woman. As observed by legal realists, this process is not merely descriptive of what the archetype *is*; this process inevitably involves normative judgments about what the archetype *should* be.

Courts are generally resistant to outright declarations on highly politicized normative questions. Status-based formalism provides a way to avoid engaging in normative debate through obfuscation: normative premises are disguised as inscrutable doc-

[294] *See supra* Part II.B.
[295] Butler, *supra* note 285, at 22.
[296] Butler, *supra* note 256, at 525. **R**
[297] *Id.* at 526.
[298] BUTLER, *supra* note 255, at 147. **R**

trinal or natural rights ideas. Contract-based realism avoids these questions through the rhetoric of volunteerism: legal institutions are normative because everyone already agreed to the relevant legal formality.

Both formalism and realism avoid normative questions with appeals to "ruleness": legal institutions are normative because rules are essential to completeness, closure, success, and consensus. Legal formality provides a self-referential answer to questions regarding who is a legal owner, wife, parent, or white person. The owner is the person who excludes trespassers with ejectment actions. The wife is the woman who is listed as a dependent on her husband's tax return. The parent is the person who signs the consent form for the child to undergo surgery. A white man is someone who joins the military and votes. These claimants are engaged in a specific sort of mimicry: mimicry of legally defined rights, duties, and formalities. The network of legal formalities creates the "realities" of ownership, marriage, parenthood, and identity.

The theory of performativity can expose these normative questions through transparent parody. Butler's paradigm case of gender norms is illustrative. Gender norms are rigidly enforced—confining in two related ways. First, they impose expectations of particular social roles on those defined as "men" or "women." Second, they purport to classify all of humanity into one category or the other. Butler examines gender as a historical *strategy*: "a strategy of survival" for a culture that depends on two genders, masculinity and femininity, to maintain its hegemony and transmit its norms.[299] Gender and sex hide their historical contingency by appealing to origins in science, biology, or natural fact. Gendered performances become compulsory and every repetition increases the credibility of the gender system: "[t]he authors of gender become entranced by their own fictions whereby the construction compels one's belief in its necessity and naturalness."[300] Punishment is the result of choosing not to conform to gender rules. Ostracism is a cultural strategy: "those who fail to perform their gender right are regularly punished."[301] The need for gender classifications in the face of ambiguous natural/social phenomena is reminiscent of the formalist impulse towards a

[299] Butler, *supra* note 256, at 522. **R**
[300] *Id.*
[301] *Id.*

gapless system of total legal classification. Butler writes, "[d]iscrete genders are part of what 'humanizes' individuals within contemporary culture."[302] Those who fail to meet the definition of either man or woman, for example, the intersexual, those born with both or neither male and female sexual organs, are considered monstrous and inhuman, creatures that need to be surgically "fixed" to meet the definition of either "man" or "woman" for acceptance as human.[303]

However, there is room for resistance. Parodic repetition of gender norms is one way to disrupt their coherence, generating anxiety for those with vested interests in the status quo.[304] Butler asks, "[a]re there forms of repetition that do not constitute a simple imitation, reproduction, and hence, consolidation of the law . . . ?"[305] When we see gender as performance, and not as a substance that emanates from a natural, fixed, stable source, it is possible to challenge dominant and hegemonic norms about how gender should be enacted. The result could be a proliferation of gender performances. The drag queen, for example, takes up gendered scripts of femininity and applies them to a body that has been called male. The drag queen's repetition of the scripts of femininity is "incorrect."[306] Her mocking repetition calls into question the very idea of an origin of gender.[307] Repetition without an original calls attention to the fact that repetitions of gender have no originals. Alternative gender performances open up a space to reconceptualize dominant categories and provide more freedom for identity. In her later work, Butler turns from the word "repetition" to "citation." Citation is a way of referring back to a previous iteration, but it is a more open concept than the idea of repetition, which implies that no change in patterns is

[302] *Id.*

[303] *See* SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXUAL 12-32 (2000) (describing the responses of parents and medical professionals to the births of intersexual infants).

[304] Butler's philosophical poststructuralism gives rise to this sort of anxiety on a broader level, insofar as she disputes the very idea of ontological grounding. I need not defend poststructuralism to make my point here about the lack of grounding for particular legal institutions.

[305] BUTLER, *supra* note 255, at 31. **R**

[306] *Id.*

[307] Butler does not claim that all drag performances are necessarily subversive. Butler, *supra* note 256, at 527 ("[T]he sight of a transvestite onstage can compel **R** pleasure and applause while the sight of the same transvestite on the seat next to us on the bus can compel fear, rage, even violence.").

possible.[308] Change is possible to the extent that citations lose their compelling authority through parody.

III

Conservative Dimensions of Performance Reification

When the law acquiesces to a successful public performance through doctrines such as adverse possession, does this create opportunities for parody of repressive social norms? In a sense, every legal form creates opportunities for parodic repetition—citation to a doctrine in a new context can result in evolutionary change to the doctrine itself. But not every parody is likely to be culturally intelligible and generate success in terms of wider cultural uptake or acceptance within legal discourse. The set of felicity conditions that must be met are stringent. The penalties for failure are high. As Robert Cover wrote, "[l]egal interpretation takes place in a field of pain and death."[309] Those who are not recognized as property owners may be imprisoned for theft. Those who are not recognized as married are denied access to a myriad of legal benefits. Those who are not recognized as parents may be cut off from contact with their children. Under slavery, those who were not recognized as white may have been forced into servitude.

The performance reification doctrines generate chances for repetition and subversion of both status-based identity categories and legal classifications. By allowing a person who has black ancestry the rights of a white person, the law subverts the idea that race is carried through "blood." By recognizing a mother who is neither biologically related to a child, nor an adoptive parent, the legal doctrine of functional parenthood undermines the privileged status of the state in determining who is or is not a parent. Alternatively, the law could be containing potentially subversive social phenomena, such as the cohabitating couple, by bringing them within the ambit of its classificatory schemes.

Dubler points out that a copy either pays homage to the legal form or subverts it through parody.[310] Acts of homage are likely to be recognized by the law, parodies denied. Although at first glance they may appear to present opportunities for parody of

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[308] Butler, *supra* note 267, at 13. R

[309] Robert M. Cover, *Violence and the World*, 95 Yale L.J. 1601, 1601 (1986).

[310] Dubler, *supra* note 29, at 1008.

conventional norms, doctrines such as adverse possession are structured in order to avoid disruption of conventional norms. Those marginal social actors who attempt to utilize these doctrines are required to reproduce conventions in order to gain recognition as bearers of legal rights. They must cite to convention, and as those citations accumulate, the normative force of that convention builds. Thus, by holding herself out as a conventional property owner, the adverse possessor contributes the sedimentation of convention into the edifice of the institution of property. Such a strategy does little to challenge the privileged status of an institution or to disrupt the status quo allocation of entitlements.

Katherine Franke's study of slave marriages demonstrates the ways in which legal recognition of "outlier" phenomena can be profoundly conservative.[311] Franke analyzes the effects of the right to marry being granted to newly freed slaves in the late nineteenth century. Franke's review of primary archival sources demonstrates that "African Americans emerged out of slavery accustomed to forming a spectrum of culturally sanctioned intimate adult relationships."[312] However, in the postbellum period, Southern-state bureaucracies became concerned with ensuring that African-American women and children did not become dependent on the public fisc.[313] Legitimizing African-American marriages was one way to privatize dependence—so long as freedmen were forced to support their wives and children. Thus, postbellum Southern states undertook "robust enforcement of bigamy, fornication, and adultery laws" that "served to domesticate African American people who were either unaware of, or ignored, the formal requirements of marital formation and dissolution, or who chose to conduct their intimate sexual relationships in ways that fell outside the matrimonial norms of Victorian society."[314]

Through the institution of marriage, African Americans "were transformed in subtle and not so subtle ways into the kinds of citizens upon which southern society depended at that time."[315] This "paradox of legal recognition and regulation" draws "into

[311] *See* Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999).
[312] *Id.* at 273.
[313] *Id.* at 299-303.
[314] *Id.* at 256-57.
[315] *Id.* at 255.

question the fiction of a rights discourse that fixes as victory participation in institutions such as marriage."[316] However, Franke does *not* extol the abandonment of rights-based struggles. Rather, she concludes that any social movement that demands institutional access must "be accompanied by a critique of the institution to which access is being sought," which includes "an analysis of the way in which the state always retains the power to manipulate participation in an institution in ways that may be at odds with the interests of the rights holders."[317]

Doctrines of performance reification provide institutional access to otherwise excluded social groups and individuals. However, in each case, the state retains the power to manipulate participation in ways that may be more conservative than subversive, thereby entrenching confining social norms rather than creating opportunities for parody. "Beneficiaries" of these doctrines must therefore tread with caution. In each case of performance reification, the driving force behind the law is protection of third-party and public interests. These interests dictate that community norms be preserved—a conservative proposition. Thus, despite the fact that doctrines of performance reification expose the normative foundations of property, marriage, parenthood, and identity as socially constructed, those doctrines nonetheless entrench the power of status quo baselines and bolster formalist/realist attempts to create a gapless web of concepts to mold and channel social life.

A. Property Law

Adverse possession is fundamentally a conservative doctrine, in two ways: first, by uncritically imposing pro-development norms of land ownership; and second, by eliminating the chance for persons to have any legitimate relation to land other than "sole and despotic dominion."[318]

The performative model reveals that adverse possession is about the repetition of norms of property ownership: courts ask, how would a reasonable owner of land behave? At a bare minimum, occupancy of the land is required—but what does occupancy entail? The Locke/Blackstone idea of property dictates that acting like an owner means putting labor into the land. John

[316] *Id.* at 253.
[317] *Id.* at 308-09.
[318] *See* BLACKSTONE, *supra* note 221, at *2.

Sprankling surveyed hundreds of post-1950 adverse possession cases and concluded that they display a "prodevelopment bias."[319] Courts construe imitating the "reasonable owner" to mean utilizing the land for economic purposes. Indeed, "courts have . . . found the following activities sufficient for 'actual possession': fishing, harvesting natural hay, seasonal stock grazing, cutting small amounts of timber and gathering firewood."[320] However, "acts characteristic of an environmentally-conscious owner, such as camping or other non-economic visits, fail to constitute the possession necessary to defeat exclusivity."[321]

The very idea that adverse possession requires occupancy excludes the claims of "preservationist owners, such as conservation organizations, land trusts and other private owners who . . . may affirmatively minimize or avoid visitation. The presence of humans on such lands is ultimately inconsistent with complete preservation."[322] Sprankling's fears reflect commodification anxiety: "[w]ild lands are valued only for the material wealth that they can provide to humanity in the short term. Accordingly, a wild land tract is considered a commodity, as fungible and mundane as an automobile, a pencil or an orange, destined for consumption."[323] Sprankling's response is to propose limits on the doctrine of adverse possession.[324]

But the performative view of law suggests that adverse possession may provide opportunities for parody of norms about land usage in addition to mere uncritical repetition.[325] An effective

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319 *See* Sprankling, *supra* note 11, at 832-33. *See also* William G. Ackerman & Shane T. Johnson, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession,* 31 LAND & WATER L. REV. 79, 79 (1996) (arguing that adverse possession should be abolished "because current public policy prefers land and resource preservation versus exploitation"). **R**

320 Sprankling, *supra* note 11, at 832 (citations omitted). **R**

321 *Id.* at 838 (citations omitted).

322 *See id.* at 839.

323 *Id.* at 856-57.

324 He argues for an "exemption of privately-owned wild lands from adverse possession." *Id*. at 863. Sprankling's argument casts adverse possession as a formalist doctrine with roots in the common law. He argues that the requirements of notoriety, acquiescence, and the passage of time do not play a large role in cases involving wild lands. *Id.* at 821. Sprankling also discusses the policy arguments behind adverse possession, including the coherence of the title system, and concludes that they are less salient to the context of wild lands. *Id*. at 873-85. His response to the arguments about reliance interests is to assert a normative notion of ownership: ownership means following the rules and acquiring formal legalities such as title—third parties should know to do good title searches. *Id.* at 883.

325 However, adverse possession is more often used to defeat novel approaches to

parody might be an adverse possession case brought on behalf of conservationists, arguing that their efforts to preserve wild lands constituted "acting as if" they owned the land.[326] My research yields no evidence of a successful claim of this nature, although similar claims have been brought.[327] In the Alaska case *Nome 2000 v. Fagerstrom*, the court held that "use of trails and picking up of litter, although perhaps indicative of adverse use, would not provide the reasonably diligent owner with visible evidence of another's exercise of dominion and control."[328] The court noted that the adverse possessor's attempts to mark the boundaries of their claims with stakes were insufficiently clear signals of ownership.[329] It remains to be seen if a court would accept a claim of adverse possession by a conservationist who undertook conservation activities on the land, posted clear notice of the boundaries of the claim, and ejected trespassers.

A second conservative dimension of adverse possession is the doctrine's contribution to the legal systematization of all relations to land under the rubric of ownership. By clearing title, adverse possession serves a crucial role in the smooth functioning of any system of land ownership.[330] The aspiration of the title system of property ownership is the formalist aspiration of a

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conservation, such as conservation easements. John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 328-29 (1997). Conservation easements allow landowners to sell their property with specific contractual provisions prohibiting certain forms of development. *See* UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 163 (1981) (establishing tax benefits for landowners who convey lands with conservation easements).

[326] There is a growing movement by conservationists to buy up wild lands for protection. *See* The Nature Conservancy, *at* http://nature.org/; Trust for Public Land, *at* http://www.tpl.org/.

[327] For example, in *Estate of Welliver by Welliver v. Alberts*, the Wellivers maintained trails throughout the forest, which they used for "walking, horseback riding, cycling, and snowmobiling, and the 'woods' for camping." 663 N.E.2d 1094, 1096 (Ill. App. Ct. 1996). The court noted that "the plaintiffs presented testimony that, following Ed Welliver's death, they spread his ashes throughout the woodland trails." *Id.* Nonetheless, the court held that the actual ownership must still be more than "mere mental enclosure." *Id*. at 1099. Additionally, the court asserted that "it is well established that use of vacant, or wild and undeveloped and unoccupied land is presumed to be permissive and not adverse." *Id.* However, the requirement that adverse possession be aggressively adverse is not established precedent in the United States. DUKEMINIER & KRIER, *supra* note 3, at 133 (explaining that some sources assert that the dominant view is that the adverse possessor's state of mind is irrelevant, while others suggest a good-faith standard). **R**

[328] 799 P.2d 304, 311 (Alaska 1990).

[329] *Id.*

[330] *See supra* Part I.A.2.

gapless grid. The 1785 Continental Congress sought to survey all lands in the public domain, following Thomas Jefferson's "gridiron plan of development":

> Jefferson thought that a rectangular survey was easy to lay out, comprehensible by unsophisticated settlers, and, like geometry, a thing of beauty. In addition, the imposition of a formal rectilinear order on the wilderness served social purposes. It encouraged division of land into small uniform tracts, which could be—and were—given to soldiers who had fought in the continental army.[331]

In the United States today, there is no *terra nullius*; every tract of land has an owner: "in every American state, statutes provide for land title records to be maintained by the county recorder (or other equivalent public official) in each county."[332] These indexes are organized spatially, tract by tract, where feasible, but more often temporally, creating a "chain of title" from the present owner back to the first owner.[333] If no private owner holds title, title is held by the local, state, or federal government.[334] The title recording system in the United States is highly developed; indeed, private insurance companies sell title insurance to land purchasers. Because of this, "security of title in the United States ought to be, and is, very high."[335]

The purpose of the gapless title system is economic. Law and economics scholars argue that the system avoids costly disputes over land ownership, facilitates greater marketability, and avoids the potential tragedy-of-the-commons effect.[336] It also reflects an aesthetic preference for formal rectilinear order. In the American colonial imaginary, wilderness was "instinctively understood as something alien to man—an insecure and uncomfortable environment against which civilization had waged an unceasing struggle . . . . Its dark, mysterious qualities made it a setting in which the prescientific imagination could place a swarm of demons and spirits."[337]

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[331] DUKEMINIER & KRIER, *supra* note 3, at 665 n.3. **R**

[332] *Id.* at 652.

[333] *Id.* at 653. The tract method is not used in most states because land has not been subdivided into identifiable parcels. *Id.*

[334] *Id.*

[335] *Id.* at 651.

[336] *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights,* 57 AM. ECON. REV. PA. & PROC. 347 (1967).

[337] RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 8 (4th ed. 2001). This view is culturally specific. Rose explains:

Likewise, Henry David Thoreau's statement that "in Wildness is the preservation of the world" can be read as more than a preference for undisturbed nature, but rather, a critique of the modern impulse towards classification, management, and control as the human relationship to land.[338] Federal Indian law today continues to be an exception to the neat gridlike formalist divisions of the title system.[339] It takes a stretch of the imagination to conjure *terra nullius* today: perhaps the emergence of a volcanic island in the middle of the ocean.[340] Even outer space and Antarctica are governed by formal treaties.[341] Imagine a hypothetical strip of forest with an ancient title in a community of conservationists that has long enjoyed the land as a wild preserve. If they wish to prevent "adverse possessors" from turning the forest into a Wal-Mart parking lot, they must establish their own claim to ownership through adverse possession. Wildness is not an option.

However, adverse possession may also have a subversive element, undermining the pro-development and totalizing classificatory ambitions of property law. The performative view of adverse possession allows for the possibility that adverse posses-

> At least some Indians . . . prided themselves on not marking the land but rather on moving lightly through it . . . . The doctrine of first possession . . . reflects the attitude that human beings are outsiders to nature. It gives the earth and its creatures over to those who mark them so clearly as to transform them, so that no one else will mistake them for unsubdued nature.

Rose, *supra* note 2, at 87-88. Ironically, this argument has been attempted as a means to prevent Native Americans from making out a claim for adverse possession. In *Nome 2000 v. Fagerstrom*, the plaintiff and titular owner, Nome 2000, brought an action to eject Charles Fagerstrom, a Native American. 799 P.2d 304, 308 (Alaska 1990). Nome 2000 presented expert testimony from an anthropologist that "the traditional Native system does not recognize exclusive ownership of land," but rather, only "stewardship" of nature. *Id*. Thus, following the crude essentialist logic, as a Native American, Fagerstrom could not have intended to possess the land under a claim of right. This, despite Fagerstrom's insistence that he "'frown[ed]' upon people camping on 'my property.'" *Id.* at 308 n.5. R

338 Henry David Thoreau, *Walking*, *in* EXCURSIONS, THE WRITINGS OF HENRY DAVID THOREAU 275 (Riverside ed., Ticknor & Fields 1863); Jack Turner, *In Wildness Is the Preservation of the World, in* DEEP ECOLOGY FOR THE 21ST CENTURY 331 (George Sessions ed., 1995); *see also* Thomas Birch, *The Incarceration of Wildness: Wilderness Areas as Prisons, in* DEEP ECOLOGY FOR THE 21ST CENTURY 339 (George Sessions ed., 1995).

339 *See, e.g.*, Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 7 (1991) (arguing that Federal Indian law is "an entryway to understanding the complex relations between property and sovereign power in United States law").

340 DUKEMINIER & KRIER, *supra* note 3, at 12. R

341 *Id.*

sion may reward fraudulent performance—a parody that undermines the original notion of property ownership. Instead of a standard of subjective mental intent, the doctrine of adverse possession has the requirements of notoriety and acquiescence from the community: presumably if the claimant's possession is illegitimate, the true owner will attempt to eject her, or the community will refuse to act in reliance on her ownership. The test is merely whether or not the claimant's act of communication is successful as a performative act.[342] Legal status is granted to a successful performance, regardless of the performer's authenticity by other normative measures.

This mimicry exposes that on a broader scale, the normative foundation of the system of property ownership is a tenuous set of social agreements. Rose explains:

> At the outset of private property, people have to cooperate to set up the system—they have to get themselves organized, go to the meetings, discuss the options, figure out who gets what and how the entitlements will be protected . . . . And indeed, even after a property regime is in place, people have to respect each other's individual entitlements out of cooperative impulses, because it is impossible to have a continuous system of policing and/or retaliation for cheating. Thus a property system depends on people not stealing, cheating, and so forth, even when they have the chance.[343]

"Ownership anxiety" comes from the realization that the property system merely is "the agreement among men legalizing what each had already grabbed."[344]

Rose argues that the responses to ownership anxiety are formalism and legal realism: "the comfortable notion that existing distributions of property are justified simply because they are intricately detailed and interrelated, or because the general institution of property may happen to be a useful one."[345] Some critical scholars elect to confront ownership anxiety head-on, arguing:

> [A]ny particular property right has no firm foundation and is still subject to the claims of all humankind. In turn, all humankind may have something to say about the way you use your

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342 *See supra* Part I.A.2.

343 CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 37 (1994).

344 SCHLATTER, *supra* note 26, at 130-31 ("[T]he normative case for first possession – its force as a justification – is commonly thought to be rather weak."); DUKEMINIER & KRIER, *supra* note 3, at 15. **R**

345 Rose, *supra* note 17, at 613. **R**

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> property . . . . [P]roperty is a social construction and a product of law, a way to get at some larger social goals, of which, of course, redistribution may be one.[346]

Insofar as actual cases of adverse possession tend to reward the good-faith adverse possessor over the bad-faith one, assist the wealthy in taking land from unwilling sellers, or serve the function of clearing title on ancient claims, the doctrine is not only a repetition but a critical piece of the system of property ownership and its reproduction of the existing distribution of resources. There seems to be very little support for wholesale deconstruction of this property rights regime.[347] But adverse possession law itself may provide the potential for smaller-scale redistributive deconstructions. Seth Borgos describes squatting as the "time-hallowed response of the landless to the contradiction between their own impoverishment and a surfeit of unutilized property."[348] One commentator suggests that in the context of homeless persons, "property theories provide a means to argue for recognition of limited property interests in abandoned or government-owned buildings based on both economic utility and a squatter's personal identification with the property."[349] Even though their legal claims of adverse possession may not be successful, "squatting has proven to be an effective tool for the homeless, not only in the direct manner of producing low-income housing, but also as a means of mobilizing public opinion."[350]

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[346] *Id.* at 628-29. Rose cites many examples of scholarship calling for redistribution in this vein, including Reich's *The New Property*, arguing for redistribution because subsistence rights are required for political participation, and Singer's *Sovereignty and Property*, arguing for reconceptualization of property rights of Native Americans. *Id.* (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785-86 (1964)); Singer, *supra* note 339, at 5-6. **R**

[347] Anthropologist George Marcus explains, "[t]here appears to be no real or powerfully imagined 'outside' to capitalism now, and where oppositional space is to be found, or how it is to be constructed within a global economy, is perhaps the most important fin-de-siécle question of left-liberal thought." George Marcus, *Introduction to the Volume and Reintroduction to the Series, in* CONNECTED: ENGAGEMENTS WITH MEDIA 6 (1996).

[348] Seth Borgos, *Low-Income Homeownership and the ACORN Squatters Campaign*, *in* CRITICAL PERSPECTIVES ON HOUSING 428, 429 (Rachel G. Bratt, Chester Hartman & Ann Meyerson eds., 1986).

[349] David L. Rosendorf, *Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights*, 45 U. MIAMI L. REV. 701, 722 (1990-1991).

[350] *Id.* at 724.

B. Family Law

1. Marriage

Like adverse possession, common law marriage has more conservative than subversive potential. The conservative aspects of the doctrine can be subdivided into two sorts: (1) those based on certain normative assumptions behind what acting like a married couple means, and (2) those based on the totalizing classifications of marriage law itself. In examining common law marriage, courts ask how married couples are expected to behave in our society. David Caudill has noted that "common law marriage may actually reinforce the institution of marriage by its focus on the essence of a relationship."[351] The bare minimum requirement is cohabitation—but that will not suffice. Courts may enforce a number of confining social expectations when attempting to determine if a couple was "acting married." For example, notions of sexual fidelity were relevant to the court in *In re Estate of Marden*.[352] Good plaintiffs are those whose relationships conformed to the standards of "a most conventional, respectable and ordinary family life."[353]

In these cases, gender norms tend to crop up in the form of man as breadwinner and woman as homemaker. Dubler argues that "the doctrine of common law marriage provided jurists a tool with which to define the proper relationship between women, their potential male providers, and the state."[354] Paula Ettelbrick describes: "[s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis, the institution of marriage has long been the focus of radical-feminist revulsion."[355] This is despite the shift from status to contract in marriage law.[356] Reva Siegel argues that between the Civil War and the New Deal, courts shifted from the presumption that the married husband had the right to all of the products of

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351 David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage*, 49 TENN. L. REV. 537, 563 (1982).

352 *See supra* Part I.B.1.

353 Hewitt v. Hewitt, 380 N.E.2d 454, 457 (Ill. App. Ct. 1978), *rev'd,* 394 N.E.2d 1204 (Ill. 1979).

354 Dubler, *supra* note 58, at 1886. **R**

355 Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, *partially reprinted in* SAME-SEX MARRIAGE: PRO AND CON 118, 119 (Andrew Sullivan, ed. 1997).

356 Siegel, *supra* note 220, at 2130. **R**

his wife's labor to the presumption that a wife only owed her husband "the household labor she performed raising, clothing, feeding, educating, and nurturing her family."[357] Siegel argues that in doing so, "courts reformulated a putatively feudal body of status law so that the doctrine of marital service imposed upon the wife the duty to perform such work as is necessary to reproduce the labor force in a modern industrial economy."[358]

However, recent court decisions on common law marriage make different assumptions about what it means to "act married."[359] The contemporary marriage ideal has been profoundly influenced by the women's movement, with its emphasis on equality in marriage. Norms for "wifely behavior," such as taking the husband's last name and providing domestic services in exchange for financial support, are no longer so compulsory.[360] In most community property states, husbands are no longer entitled to be the sole managers of community property.[361]

The norm of "companionate marriage" reflects this influence. Mary Ann Glendon describes companionate marriage as the quest for personal happiness, "prompted by mutual attraction and interests [and desire for] close parent-child relationships."[362] Modern commentators describe the marital "contract" in emotional terms, such as the "goal of maintaining a caring, cooperative relationship" and "the normative goals of mutual commitment and relational stability."[363]

Legal professionals do not want to be in the business of examining evidence of emotional sorts.[364] In its place, the law turns to

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[357] *Id*.

[358] *Id*.

[359] Jana B. Singer, *The Privatization of Family Law,* 1992 Wis. L. Rev. 1443, 1458-59 (1992).

[360] *Id.*

[361] *Id.* at 1459.

[362] Mary Ann Glendon, The New Family and the New Property 14 (1981).

[363] Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract,* 84 Va. L. Rev. 1225, 1230-31 (1998).

[364] *See, e.g.*, *id.* at 1230 ("Law's domain is the area beyond the boundaries of social and relational norms."). This view is based on the legal preference for objective over subjective standards, efficiency arguments about social norms, and concerns based on privacy or autonomy such as the fear that "rights talk" pollutes intimate relations. *But see* Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 55 (N.Y. 1989) (recognizing a gay couple as a "family" based on "the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties"). However, as evidence of this subjective mental state, the court examined objective formalities, such as Braschi's driver's license and passport, safe deposit boxes, bank accounts, credit cards, medical documents, and life insurance. *Id.* In a move paral-

the familiar: bureaucratic formalities. *Wagner* suggests that courts in common law marriage cases today are most concerned with whether or not the couple mimicked the legal formalities of marriage, examining income tax returns, bank accounts, and employment records.[365]

Certain feminists have argued for common law marriage based on the *failure* of companionate marriage norms to create equality. Siegel argues that the ideal of companionate marriage masks the economic value of work in the home under the rubric of intimacy: "[u]nder this regime of judicially enforced 'altruism,' exchange relations in the family could not be formalized at law."[366] Joan Williams argues that this state of affairs continues to the present day:

> The problem is that women's work does not get translated into entitlements because the law delivers their earnings 'into the hands of manhood.' Under the common law that delivery was formal and explicit . . . Today the relevant law is in the divorce courts . . . [F]irst mothers are marginalized to enable fathers to perform as ideal workers while the children are raised according to the norm of parental care . . . Then, upon divorce, courts treat the ideal-worker's wage as his sole personal property.[367]

The presumption remains that marriage is an economic relationship, requiring pooled resources and a shared household. This presumption fits with the modern feminist goal of common law marriage: to ensure financial support for women who establish common households with men in which they play the homemaker role.[368] This particular feminist argument, while it may secure rights for individual women, also participates in the male-as-breadwinner-female-as-homemaker model of marriage. Such an argument is unlikely to subvert the work and family norms that contribute to the root of the problem.

Common law marriage is also conservative insofar as it reinforces the role of the state in classifying intimate relationships.

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leling the common-law-marriage context, the court also examined how the couple held themselves out as spouses to the public. *Id.; see* Dubler, *supra* note 29, at 1015-22 (discussing *Braschi v. Stahl Assocs. Co.*).

365 *See supra* Part I.B.1.

366 Siegel, *supra* note 220, at 2131. R

367 WILLIAMS, *supra* note 104, at 115. R

368 *See* Bowman, *supra* note 30, at 755 ("The nonrecognition of common law marriage often results in what appear to be substantial injustices to women who are especially vulnerable."). R

Common law marriage takes relationships without legal formalities and official solemnization and relabels them as marriage. This impulse is akin to the classificatory aims of formalist jurisprudence: an attempt to bring order to ambiguous social phenomena, the imposition of the grid onto wildness. Common law marriage allows the state to ensure the hegemony of the marital form as the predominant mode of social ordering of intimate relations. Bringing "nonmarital forms of domestic ordering and solemnized marriage . . . within the legal confines of marriage" enables regulation.[369]

However, common law marriage could be a threat to the state's regulatory role by removing incentives for marriage formalization. Like the title system, the state system of marriage registration enables a number of policies.[370] For example, some states have furthered alleged public health goals by requiring HIV testing as a condition for obtaining a marriage license.[371] Common law marriage evades this policy. Florida provides a marriage license discount to anyone who has taken a state certified "premarital preparation course."[372] Marriage is also a way for the state to identify a domestic unit for income taxes, default property rights upon death or dissolution of the relationship, health care decision-making, and social security benefits. To the extent that common law spouses imitate these legal formalities and receive recognition as married, they bolster the state's formal role as the arbiter of domestic relations.

Can the institution of marriage be successfully parodied through common law marriage? The debate over gay marriage provides helpful insights. Some theorists argue that "marriage between men or between women could . . . destabilize the cultural meaning of marriage."[373] Gay marriage defies the definition of marriage as a union between a man and a woman, exposing it as culturally specific and hence changeable. However, many queer theorists are not enthused about the subversive

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[369] Dubler, *supra* note 29, at 1011.

[370] *See* Caudill, *supra* note 351, at 558 (describing how legal formalities of marriage further the "state's interest in keeping records"). **R**

[371] *See* Michael Closen, Robert Gamrath, & Dem Hopkins, *Mandatory Premarital HIV Testing: Political Exploitation of the AIDS Epidemic*, 69 TUL. L. REV. 71 (1994).

[372] FLA. STAT. § 741.01(5) (2002).

[373] Nan Hunter, *Marriage, Law, and Gender: A Feminist Inquiry,* 1 LAW & SEXUALITY 9, 17 (1991).

potential of gay marriage. What is parodied is the normative status of heterosexuality, not marriage as an institution. Butler argues, "the bid to gain access to certain kinds of rights and entitlements that are secured by marriage by petitioning for entrance into the institution does not consider the alternative: to ask for a delinking of precisely those rights and entitlements from the institution of marriage itself."[374] Likewise, Michael Warner argues that gay marriage merely supports the ability of the state to "regulate the sexual lives of those who do not marry."[375] He also exhibits anxiety about classification of domestic relationships by the state, arguing that many queers "have an astonishing range of intimacies. Most have no labels."[376] Ettelbrick similarly argues that:

> [M]arriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream . . . attaining the right to marry will not transform our society from one that makes narrow, but dramatic, distinctions between those who are married and those who are not married to one that respects and encourages choice of relationships and family diversity.[377]

Franke argues that the best response to this situation is refusal altogether: "the best strategy to undermine the privileged status of marriage . . . is not to admit same-sex couples into the institution . . . but rather to give heterosexual couples a way to opt out."[378] Butler argues that this sort of refusal is congruent with the theory of performativity: "there is, I believe, a performativity proper to refusal which, in this instance, insists upon the reiteration of sexuality beyond the dominant terms."[379]

If the problem is the role of the state in marriage, can a common law marriage serve as an effective parody? Warner argues that common law marriage supports his historical argument that "[c]ountless systems of marriage have had nothing to do with a

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374 Judith Butler, *Competing Universalities, in* CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT, 136, 176 (Judith Butler, Ernesto Laclau & Slavoj _i_ek eds., 2000); *see also* MICHAEL WARNER, THE TROUBLE WITH NORMAL 121 (1999) (arguing that gay marriage would only further "bundle" marriage with social entitlements such as income tax advantages, public assistance, and community property laws).

375 WARNER, *supra* note 374, at 96.

376 *Id.* at 116.

377 Ettelbrick, *supra* note 355, at 119-20. **R**

378 Katherine M. Franke, Letter to the Editor, *Le Marriage: Vows, Redefined*, N.Y. TIMES, Apr. 23, 2000.

379 Butler, *supra* note 374, at 176-77. **R**

state fetish or with the regulatory force of law."[380] Thus, common law marriage exposes that the core of marriage is not de jure but de facto. He argues that the problem with those who support gay marriage is that they take for granted the constitutive role of the state.[381] Warner concedes, however, that the common law approach may have many of the same limitations as traditional marriage.[382] Insofar as common law marriage is itself defined by statute and legal precedent, it seems to be a stretch to call it a parody of legal formality. Indeed, in the popular imaginary, common law marriage is cohabitation for at least seven years—a formulation derived from what is assumed to be the legal statute of limitations.

Dubler tells the stories of marriage dissenters forced to define their relationships as "common law marriage" to avoid criminalization. She provides the example of Lillian Harman and Edwin C. Walker. Believing marriage to be a strictly private affair, the couple entered into a "civil compact" in 1886.[383] Walker stated that their arrangement was designed to avoid "so-called 'marital rights' with which this public acknowledgment of our relationship may invest me."[384] The couple was prosecuted under the state's cohabitation laws, and the court held that even if their union was a common law marriage, they could be punished because "[s]tate marriage regulations . . . serve the critical purpose of 'giv[ing] publicity to a contract which is of deep concern to the public.' "[385] The court saw the union between Harman and Walker as a parody of marriage and refused to enforce it.

These fears of common law marriage as parody tap into even deeper anxieties about the instability of the privileged status of marriage in U.S. society. Thus, common law marriage "revealed that there was, perhaps, little difference between common law marriages and solemnized marriages . . . The process of mimesis, in other words, may reveal that the institution being mimicked is no more stable or real than the mimetic result."[386] Dubler argues that defense of marriage as an institution at the center of the social order was another reason for the movement to abolish

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380 WARNER, *supra* note 374, at 124.
381 *Id.*
382 *Id.*
383 Dubler, *supra* note 29, at 958 (citing State v. Walker, 13 P. 279 (Kan. 1887)).
384 *Id.* at 959 (citing *Walker*, 13 P. at 281).
385 *Id.* (citing *Walker*, 13 P. at 286).
386 *Id.* at 1008-09.

common law marriage: "[t]he hallowed institution . . . emerged as hollow . . . To preserve marriage, therefore, the parody had to be eliminated."[387] Many defenders of traditional marriage today exhibit this logic, arguing that a shift to "postmodernity," defined as moral relativism, is the problem.[388] Others criticize the de facto view of marriage as making marriage a mere private "lifestyle choice," as opposed to a public commitment central to the social order.[389]

2. *Parenthood*

Although functional parenthood is a relatively recent legal concept, due to its structural similarities to adverse possession and common law marriage, advocates of progressive social change should approach it with caution. Functional parenthood may have profoundly conservative implications.

In contrast to the other doctrines, which do not explicitly lay out the core types of behaviors that constitute ownership and married life, the ALI is explicit with respect to functional parenthood. The ALI definition of functional parenthood provides a nonexclusive, eight paragraph list of activities that implicitly form the normative core of their vision of parenting.[390] The list ranges from the quotidian (managing the child's bedtime) to the lofty (providing moral and ethical guidance).[391] It includes arranging for the child's safety, health, education, and discipline, as well as helping the child to develop physical and social skills.[392]

Caretaking need not be direct contact with the child; it can involve taking responsibility to "direct, arrange, and supervise

[387] *Id.* at 1009.

[388] *See, e.g.*, GLENN T. STANTON, WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN A POSTMODERN SOCIETY 34 (1997); LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 3 (2000) (lamenting the move towards a "postmarriage culture").

[389] *See* Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1832 (1987) ("The de facto view, in contrast, focuses on the way of life."); WAITE & GALLAGHER, *supra* note 388, at 6 ("The single most dangerous myth . . . is the idea that marriage—or divorce—is, can be, or should be, just another lifestyle choice."). **R**

[390] ALI PRINCIPLES, *supra* note 71, § 2.03(5). Oregon's law includes a similar list in its definition of a person who has established a "child-parent" relationship. *See supra* text accompanying note 73. **R** **R**

[391] ALI PRINCIPLES, *supra* note 71, § 2.03(5).

[392] *Id.*

the interaction and care provided by others."[393] The ALI definition also includes the open-ended category of "parenting functions" that include "performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development."[394]

Some features of this list have conservative effects. Martha Fineman writes, "[b]ecause the legally constructed image of the family expresses what is appropriately considered family, it also constitutes the normal and defines the deviant."[395] Indeed, those who do not perform the caretaking tasks mentioned above may find themselves in court disputing the claims of de facto parents.[396] The definition is premised on certain highly specific contemporary assumptions about child development.[397] For example, the assumption that parents should be "providing discipline" by "assigning and supervising chores" is controversial.[398] Some parenting experts eschew the rhetoric of "chores."[399]

Frank Catania suggests that the basis for the ALI list is a social norm about parenting, in which, in the words of Elizabeth Scott: "[t]he value of children in a life plan is both basic and complex; it derives from a desire to pass on a cultural and personal heritage, to instill values, skills, and interests, and to enjoy the companion-

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393 *Id.*

394 *Id.* § 2.03(6).

395 Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 662 (1992).

396 ALI PRINCIPLES, *supra* note 71, § 2.03(1)(c)(ii). A de facto parent can sue as a result of the "complete failure or inability of any legal parent to perform caretaking functions." *Id.* Furthermore, the ALI Principles allocate custody rights upon divorce according to the proportion of caretaking tasks and parental responsibilities undertaken by each parent. *Id*. at I8. **R**

397 This reflects an ideal of motherhood as scientific managerialism: child-centered caretaking based a blend of "Dr. Spock" style expert advice and total emotional immersion. *See* JUDITH WARNER, PERFECT MADNESS: MOTHERHOOD IN THE AGE OF ANXIETY (2005); SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN (2004).

398 ALI PRINCIPLES, *supra* note 71, § 2.03(5)(c). **R**

399 Harvard Medical School professor Robert Brooks explains: "'Is there really any difference between asking a child to do a chore versus asking a child to help out?' I believe it is far more than a question of semantics. I think that children are more willing to do things and more likely to develop a responsible attitude, when they feel that they are being helpful." Robert Brooks, *Fostering Responsibility in Children: Chores or Contributions? Part I*, Nov. 1999, *at* http://www.drrobertbrooks.com/writings/articles/9911.html.

ship of persons sharing a unique and insoluble bond."[400] However, Scott's conception is not coterminous with the ALI definition. Scott's definition of parenting is not about actually engaging in caretaking activities—it is about the value and importance that individuals attach to those activities. Similarly, Thomas Laqueur argues for a conception of parenthood as "psychic labor."[401] Laqueur claims that "moral concern and action are engendered . . . by the degree to which the emotional and imaginative connections which entail love or obligation have been forged."[402] This sort of attitude is a necessary but not sufficient condition for parenting under the ALI definition.

The ALI definition is far more "hands-on." The premise is that actual performance of caretaking is a proxy for psychic labor:

> How caretaking was divided in the past provides a relatively concrete point of reference which is likely to reflect various qualitative factors that are otherwise very hard to measure, including the strength of the emotional ties between the child and each parent, relative parental competencies, and the willingness of each parent to put the child's interests first.[403]

Those with an emotional investment in children, but no concomitant chance to engage in the childcare activities, have no standing to sue. Julie Shapiro argues that in relationships where couples divide labor along breadwinning/caretaking lines, "the primary breadwinner will be unable to claim de facto parenthood."[404] Although the standard is phrased in gender-neutral terms, in many heterosexual couples, it is likely to favor women over men.[405] Martin Malin argues that "most men desire a greater role in child care but are precluded from it by significant workplace barriers."[406] Similarly, Loken argues, "grandparents, who have won the right in virtually every state to petition for visitation at least under some circumstances, would be precluded from initiating such a proceeding in court and would be

[400] Catania, Jr., *supra* note 231, at 860-61 (quoting Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce,* 76 VA. L. REV. 9, 25 (1990)). R

[401] Thomas Laqueur, *The Facts of Fatherhood*, *in* DEBATES IN FEMINISM 433, 439 (Evelyn Fox-Keller & Maryanne Hirsch eds., 1990).

[402] *Id.*

[403] ALI PRINCIPLES, *supra* note 71, at I8. R

[404] Shapiro, *supra* note 236, at 779.

[405] This standard has the potential to effect same-sex couples as well, insofar as it "may mirror the common breadwinner/homemaker form." *Id.* at 780.

[406] Marty Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1049 (1994).

able to intervene in ongoing custody proceedings only in 'exceptional cases.'"[407]

Furthermore, parents are presumed to have the financial resources to engage in, or delegate, a wide range of activities, even some that may seem supplemental, such as "special [educational] services appropriate to the child's . . . interests."[408] All of the activities on the list could be better performed by persons with the financial stability and job flexibility to take time out from work or hire a caregiver. Mary Romero writes that caretakers today have a great deal of legal responsibility with little public support.[409] Some mothers may "find no other option than to leave their children alone in order to take the mandated low-paying dead-end jobs."[410] Just as common law marriage served the function of privatizing female dependency at a time when public institutions did not have the resources to cope with the problem, functional parenthood creates incentives for persons with private resources to care for children.[411] By engaging in the wide range of parenting activities listed by the ALI, functional parents receive continuing rights to children.

Interestingly, hired caregivers are not eligible to apply for status as functional parents.[412] This may be reflective of a racial/class bias.[413] One commentator asks, "[i]s a rarely present biological father more part of the child's family than a loving, ever-present, in-house nanny?"[414] More likely, it is a response to commodification anxiety: although parenting, like marriage, requires serious investment and commingling of economic re-

[407] Loken, *supra* note 76, at 1053 (citation omitted).

[408] ALI PRINCIPLES, *supra* note 71, § 2.03(5). **R**

[409] Mary Romero, *Bursting the Foundational Myths of Reproductive Labor Under Capitalism: A Call for Brave New Families or Brave New Villages?*, 8 AM. U. J. GENDER SOC. POL'Y & L. 177 (2000).

[410] *Id.* at 179 (citing KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 125 (1997)).

[411] *See* Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT. L. REV. 1403 (2001) (arguing for public supports for those who care for dependents).

[412] The definition of a de facto parent specifies that the parenting must be "for reasons primarily other than financial compensation." ALI PRINCIPLES, *supra* note 71, § 2.03(1)(c)(ii). **R**

[413] Domestic workers are disproportionately poor women of color. Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation,* 79 N.C. L. REV. 45, 53 (2000) (citing BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES, EMP. & EARNINGS, 166 tbl.11 (Jan. 2000)).

[414] Alessia Bell, Note, *Public and Private Child:* Troxel v. Granville *and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 226 (2001).

sources, it cannot be for profit. A parent is a woman the child calls mother or a man the child calls father. Parenting and marriage are functional relationships, but they transcend the utilitarian.[415]

The ALI Principles are premised on a formalist impulse to systematize family law.[416] This creates anxieties for those who see the family as a special domain of highly contextualized interactions that should be evaluated on an ad hoc basis with more judicial discretion.[417] Unlike the Oregon statute, the social world envisioned by the ALI is one in which the law ensures that each child has one or two legal parents who perform vital caretaking functions; other adults are legal strangers.[418] Julie Shapiro explains a problem with this policy from the perspective of stepparents: "A stepmother, even though she may care for the child the majority of the time the child is in her home. . . may also fail to qualify as a de facto parent."[419] If the child resides in the legal mother's home for a majority of time, that mother likely performs a majority of the caretaking functions. However, "the father, who may perform no caretaking functions at all, will retain legal entitlement vis-à-vis the child."[420] The presumption that one or two people might regularly perform all caretaking tasks is culturally specific. Lucie White writes that many African-American families organize caretaking "through extended family networks and community-based caretaking institutions."[421]

Functional parenthood also has subversive dimensions. The ALI Principles force the question, "Does parental status begin and end with the biological link, or, on the contrary, is it the case that 'parents are as parents do'?"[422] By exposing parenthood as performance, a mere copy of conventional ideas about parenting, functional parenthood taps into broader debates about the

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415 Barbara Bennett Woodhouse, *Horton Looks at the ALI Principles,* 4 J.L. & FAM. STUD. 151, 155 (2002) ("[T]he ALI Principles seem to assume that couples who commit to a child are engaging in an arms length objective transaction. To the contrary, love and parenthood are essentially irrational commitments.").

416 *See supra* Part II.B.

417 *See, e.g.*, Woodhouse, *supra* note 415, at 165 ("[T]he ALI Principles place values of efficiency over individualized justice for children."). **R**

418 *See supra* note 73. **R**

419 Shapiro, *supra* note 236, at 780.

420 *Id.*

421 Lucie E. White, *Closing the Care Gap that Welfare Reform Left Behind,* 577 ANNALS AM. ACAD. POL. & SOC. SCI. 131, 134 (2001).

422 Wagner, *supra* note 108, at 1176.

changing meaning of the family in U.S. society. As Nancy Polikoff writes, "[d]eviation from the one-mother/one-father prescription for parenthood is common. Communal child rearing, surrogacy, open adoption, stepfamilies, and extramarital births all destroy the myth of family homogeneity."[423] It is unclear whether or not functional parenthood can be utilized by non-traditional "parents" to parody social norms and legal classifications.

C. Identity Determination

1. Whiteness

Doctrines of race determination recognizing whiteness as performance played fundamentally conservative roles in the antebellum South. These conservative roles included both shoring up normative premises about the value of whiteness, as well bolstering segregation as a totalizing institution by classifying persons of contested racial status on one or the other side of the color line.

Most obviously, these doctrines reflected and reaffirmed white supremacy by positing that acting white meant acting out "morality, virtue, [and] civic ability" and acting black meant behaving in accord with a degraded status.[424] In order to meet a performative standard of whiteness, claimants were required to endorse valorizing stereotypes about whites and degrading stereotypes about blacks. Thus, "raising a whiteness claim was a double-edged sword."[425] In order to secure freedom, rights, and privileges, a claimant was required to propagate the very stereotypes that justified the systems of slavery and segregation.

Performative definitions of race were not only marshaled by individuals seeking freedom from slavery; indeed, the argument was often used in order to classify persons as slaves. In some cases, the performative definition of race resulted in more people being labeled as "black" than a biological, blood quantum definition would have.[426] In the annulment case, *Ferrall v. Ferrall*, the plaintiff argued against a one-eighth blood quantum rule, which had been interpreted by North Carolina courts "to mean three generations removed from a 'pure African' ancestor."[427] The

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423 Polikoff, *supra* note 75, at 474.
424 Gross, *supra* note 112, at 182. R
425 *Id.*
426 Sharfstein, *supra* note 114, at 1505-06. R
427 *See supra* note 242. R

plaintiff argued that the statute fixed as black the "descendant of any person whose social status, associations and daily living stamped him as being a negro.' "[428] This performative definition would have had designated more people as black than the rigid "one-eighth rule."[429] Thus, evidence of performance "was invoked to assure the triumph of one-drop extremism" and "the social construction of race threatened to replace fractional definitions of race with an even more oppressive regime."[430]

These doctrines were also conservative insofar as they reinforced the role of the state in policing the color line. These performance-based doctrines preserved the expectations of the community, promoted clarity in racial determination, and reduced overzealous prosecution of individuals who had successfully assimilated into white communities.[431] Additionally, such doctrines served the political function of making the institution of slavery more palatable by appeasing concerns over "white slavery."[432]

These rules of race determination also worked to stabilize institutions of slavery and segregation by providing for ease of classification. Performance reification in the race context suppressed potentially subversive borderline figures: those whose racial status was not overdetermined by appearance and ancestry. Prior to challenges to the institution of slavery, persons identified as "mulattoes" occupied a separate status from slaves.[433] The "one-drop rule" became popular at a time when it was seen as necessary to create clear dividing lines and "preserve an imperiled sense of White superiority."[434] By placing these figures on one or the other side of the color line, the doctrine assisted the South in its efforts to avoid confrontation with the fundamental impossibility of defining race, and therefore, the hypocrisy of race-based segregation.[435]

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[428] *Id.*

[429] Sharfstein, *supra* note 114, at 1505. **R**

[430] *Id.* at 1506. "Although the state supreme court was not ultimately convinced, this argument did persuade the trial judge to rule for the plaintiff notwithstanding a jury verdict in favor of his wife." *Id.*

[431] *See supra* Part I.C.2; Sharfstein, *supra* note 114, at 1476, 1507. **R**

[432] *See supra* Part I.C.2; Gross, *supra* note 112, at 150. **R**

[433] Kenneth E. Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1245-46 (1996).

[434] *Id.* at 1244.

[435] *See* Zackodnik, *supra* note 239, at 424. ("Though social relationships in **R**

This was also effected through the law's self-referentiality in defining race. Gross notes the circularity of a doctrine that posits that acting white means exercising the formal rights of whiteness:

> In order to exercise rights, one must be white; in order to be white, one must exercise rights . . . . Part of the reason witnesses repeatedly gave evidence of race in terms of legal rights and disabilities is because the law undergirded so much of what people understood racial identity to mean in the nineteenth-century South. Embedded in their very way of speaking or conceiving various relations and identities—identities formed in and through relations to others—was law.[436]

Whiteness here is defined, not by reference to an internal natural status, nor by reference to an external social identity, but by reference to legal form. To be white was to execute the legal formalities of whiteness: voting, testifying in court, joining the militia. Such an argument carefully sidesteps debates over biological determinism versus social construction[437] in order to preserve settled expectations of whiteness as legal property.

Gross cautions against using this insight to "engender a sense of helplessness about the hegemonic function of law."[438] Although she would not suggest that the nineteenth-century South was a performativity theorist's dream: "a free-wheeling world in which people could 'try on' racial identities as they pleased with plenty of room for experimentation," there was indeed "room for the 'contestability' of racial definition under the law."[439] The discretion of juries and "the discourse of race as performance allowed some individuals who inhabited the constantly shifting 'middle ground' of race to challenge their own place in the hierarchy [through] claims of whiteness."[440]

America were everywhere miscegenated since the arrival of the first Dutch slaver and enslaved Africans in the colonies, courts of law have attempted to clarify and regiment those relationships in order to preserve a distinction between white and black.").

436 Gross, *supra* note 112, at 163. **R**

437 As has been noted by many commentators, in the context of race, arguments based on social construction are not necessarily progressive. *See, e.g*, Sharfstein, *supra* note 114, at 1504 (noting that "radical segregationists" argued against what they perceived as permissive judicial standards on the meaning of race by describing those standards as "mere social constructions"). **R**

438 Gross, *supra* note 112, at 181. **R**

439 *Id.* at 182.

440 *Id.*

2. Sex

Would possibilities for parodies of gender norms be opened by applying the logic of adverse possession to cases involving sex determination? The figure of the transvestite can serve as parody through defiance of the concept of stable gender essences. Yoshino suggests that the "significant minority" of decisions accepting that "the transsexual can become her postoperative sex . . . suggests judicial receptivity to the concept of sex as a performative category that might inspire some optimism about a broader judicial embrace of such a conception."[441] Transvestites may not consistently dress in the attire of men or women. They may hold themselves out to the public as men in feminine attire or women in masculine attire. This performance disrupts the system of binary gender identity but it is generally not accepted by the public as "authentic."

Applying the doctrine of adverse possession to gender identity is likely to involve more conservative repetition than parody. As Yoshino argues about the transsexual cases: "[t]he facially performative discourse of these courts keeps falling back into a kind of essentialization of sex."[442] Transvestites must behave "consistently and continuously" as members of the opposite sex, seamlessly blending in to societal expectations. Furthermore this performance must be under a "claim of right." Hence, in the case of sumptuary laws, transsexuals are more capable than transvestites of effectively claiming "squatter's rights" to gender identity, because transsexuals are more likely to make a claim to one particular gender identity. They are also more likely to consistently behave like someone of their claimed sex, hold themselves out to the public as such, and be accepted as legitimate. To require that this performance be consistent and successful in terms of public acquiescence is to entirely defeat the possibility for effective parody. Parody is only possible if at some point it is apparent that the performance does not match a stable essence. If Jane/John Doe can always go into either the men's room or the women's room, but not both, at work without complaint, she will never challenge the coherence of the sex/gender system. These legal doctrines will not protect "individuals who are challenging the obligatory two-gender system by blending public features of maleness and femaleness and/or taking bits and pieces of surgical

[441] Yoshino, *supra* note 191, at 920.
[442] *Id.* at 921-22.

options without 'going all the way.'"[443] Some transgendered people "disrupt gender by refusing to provide the kinds of cues that would accommodate either a male or female gender attribution and by treating biological signs of gender (including genitals) as bodily ornaments—neither more nor less elective than a face lift."[444]

Unlike the other squatter's rights doctrines, which are justified on contractual, functional, or institutional grounds, the case of gender identity is prone to status-based understandings. Many preoperative transsexuals, such as the plaintiff in *Zanders*, claim that the outward manifestations of their biological sexes do not reflect their true inner gender identities.[445] Surgery and cross-dressing are therefore necessary to bring their appearances into line with their gendered essences. The transsexual individual wants a seamless sex/gender identity that others can rely on. These performances reinforce the stability of the sex/gender system by confirming that a person has a gendered core, and the project of medicine is to ensure that his or her biological sex is a match. Yoshino explains, "like nested Russian dolls, the female soul is nested inside a male body which is nested inside a female performance."[446]

Why have legal understandings of sex/gender never made the move from status to contract? Perhaps it is because of the obstinacy of biologically based characterizations of sex.[447] But parenthood is also readily characterized as biological. As the ALI Principles demonstrate, many progressives view parenthood as more functional than biological. Why are the functional dimensions of parenting foregrounded, while the functional dimensions and legal interests in the sex/gender system are consistently backgrounded? Foregrounding the functional interests in parenthood serves to better privatize the dependency of children, which is considered an important public goal.[448]

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[443] Kessler, *supra* note 303, at 121 (internal citations omitted). **R**

[444] *Id.* at 122.

[445] City of Columbus v. Zanders, 266 N.E.2d 602, 603 (Mun. Ct. Ohio 1970).

[446] Yoshino, *supra* note 191, at 922.

[447] I am not making the claim that there is no biological component to sex. *See supra* note 261. However, I do claim that the legal discourse emphasizes the biological over other characterizations. **R**

[448] *But see* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire,* 101 COLUM. L. REV. 181 (2000) (arguing that proposals to provide state resources for child caretakers are premised on an irrational bias towards "repronormativity").

Foregrounding the functional interests in sex/gender merely often exposes them as trivial, irrational, or tautological.[449]

One reason that marriage and parenthood are resistant to the contract analogy is pervasive commodification anxiety: these institutions are economic arrangements valued precisely because they transcend the economic. It is hard to imagine that a contractual view of gender as a freely chosen agreement would create commodification anxiety. While marriage and parenthood are exalted as transcendent relationships, gender is degraded as natural status. Wendy Brown argues that the history of political theory has been a story of how "necessity, the body, and sensuality as well as women . . . have been pushed out or pushed down, scorned, or demeaned."[450] Even if gender is exalted, isn't the individual the only person who can say what gender is stamped on his or her "soul"?

Arguably, a contract-based model of sex in which individuals are free to self-identify as men or women would be preferable to the biologism of the status quo. However, the example of race determination demonstrates that a move from status to contract to performance would not necessarily open more space for gender parody. Recognition of performance may indeed unmoor gender from a status-based biological grounding. However, legal formalization of certain gendered performances as "male" or "female" is by definition solidification of gendered stereotypes. Culture, as opposed to biology, becomes deterministic. Individuals still do not have the ability to opt out of the sex/gender system, nor to reconfigure its terms. The price of legal rights is adherence to a rigid script of felicity conditions. The recognition that sex is performative does not mean that legal labels should be attached to gendered performances.

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449 *See* United States v. Biocic, 928 F.2d 112, 116 (4th Cir. 1991) (Murnaghan, J., concurring). Biocic, a woman prosecuted for topless sunbathing, argued that the law discriminated against her on the basis of sex. *Id.* at 114. Judge Murnaghan speculated that perhaps one day we will see the prosecution of Biocic as "trifling—perhaps even childish—a matter for a community to spend time and energy addressing." *Id.* at 118.

450 Wendy Brown, *Where is the Sex in Political Theory?*, 7 WOMEN & POLITICS 3, 5 (1987) (arguing that in the tradition of political theory, women become synonymous with the body, sex, and sexuality, and men become disassociated with sex and regarded as political subjects).

IV

When Should Law Reify Performance?

When should the law formalize a performance? If the goal is to allow more opportunities for parody of repressive social norms, then law should recognize performance when doing so does not constrain variability, but rather, opens up opportunities for new parodic performances. In his reconceptualization of the right to privacy, Jed Rubenfeld argues for this principle:

> People do not [m]eaningfully govern themselves if their lives are subtly but pervasively molded into standard, rigid, normalized roles. They simply reproduce themselves and their social institutions. A people may of course choose to reproduce their state; but they must be free in order to choose to do so. At a certain point, state control over the quotidian, material aspects of individuals' lives—even where the people have democratically imposed such control themselves—deprives them of this freedom.[451]

Where is that point? How can the legal forms of social institutions be crafted to ensure values such as predictability and stability, allowing people to plan their lives, without imposing this sort of control? Are there important, countervailing third-party and societal interests in uniformity in property, marriage, parenthood, race, and sex?

Whether or not law should recognize performance depends on what sort of performance is at issue. Is the question whether or not the performance is indicative of "true status"? To say the law should formalize that sort of performance makes the underlying notion of "true status" more robust. To agree to an idea such as this is to foreclose any chance of social contestation—a dangerous proposition. Furthermore, whenever the idea of "true status" exists apart from a functional, contractual, or performative definition, anxieties over fraud arise and the doctrine becomes politically untenable.

Perhaps the performance is mimicry of contract? Did someone agree to undertake all the functions of ownership, marriage, parenthood, racial or gender status in reliance on the acquiescence of the community? This notion of "choice" is too thin, for performance reification requires legal definition of exactly what persons engaged in ownership, marriage, parenthood, race, and gender are supposed to do, constraining autonomy. Further-

[451] Jed Rubenfeld, *The Right of Privacy,* 102 Harv. L. Rev. 737, 805 (1989).

more, these institutions are not contracts, strictly speaking. Although individuals must agree to enter them, they cannot change the terms—they must agree to the standard package of rights and duties, with little room for variation. The contractual view often gives way to commodification anxieties about the degradation of a transcendent status. For example, the argument that the functional parent is not just a caretaker, but rather the true parent, possessed of the "soul" of a parent. This sort of status idea both opens and closes space for performative notions of identity. Yoshino explains:

> The virtue of the soul is that it cannot be known except through behavioral signifiers—the indicia of the soul are thus performative indicia. The soul thus effectively reifies the performative acts in which the individual engages, but disguises that project of invention as a project of detection . . . . [T]he essentialist substrate has not been rejected, but rather shifted from body to soul.[452]

Finally, is the performance mimicry of legal form itself? Did the claimant behave in ways that communicated to third parties that she was the legal owner, spouse, parent, white/black, man/woman? Should their expectations be protected? Formalization of such a performance may do little to help individuals seeking legal rights because of the circularity of the rule that only those who execute legal formalities are entitled to do so. Furthermore, legal recognition of this performance may serve to protect the hegemonic form of the legal institution in question, preventing questioning about the value of the standardized institutional form, and eliminating any space for individuals to opt out.

There are no easy answers to these questions. Tentatively, the law should formalize performance where the reliance interests, institutional concerns, and expressive and functional values of endorsing certain patterns of behavior are deemed to be of great importance. However, these considerations must be balanced against the potential autonomy interests of other claimants, the chance that status-based views or other expectations will be reified, and the likelihood that formalizing patterns of performance will only prevent more systemic reforms to faulty standard institutional packages. Certain legal doctrines may tend to open space for reexamination of the normative ideas behind institutions, while others may tend to close it.

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[452] Yoshino, *supra* note 191, at 922 (citation omitted).

The legal rules involving adverse possession, common law marriage, equitable parenthood, and race determination provide certain opportunities for claimants to parody norms about ownership, marriage, parenting, and race. For example, the doctrine of adverse possession recognizes "acting as if" one was the legitimate owner, and that standard is contextualized to the particular type of property. Such contextualization opens space for claims that nontraditional ownership practices, such as conservation activities, deserve legal recognition. Even without a successful legal claim, social movements may be able to mobilize around arguments that the logic of these doctrines requires reform. Furthermore, the success of such a claim has the potential to alter the very meaning of ownership itself.

Formalization of performance, where that performance is mimicry of legal form, makes the most sense when the standard package provided by the legal institution is normatively sound. Legal institutions such as property, marriage, and parenthood impose a standard bundle of rights and duties.[453] Is this justified? By contrast, with regards to contract, "there is a potentially infinite range of promises that the law will honor."[454] Although the "building blocks" are limited, the system creates the potential for tailoring of property rights through recombinations of old forms.[455] Of course, this begs the question: is the law providing good building blocks? Are the rules of recombination such that substantial freedom remains for those inside, outside, and on the borders of these institutions?

In the context of marriage, however, the arguments for the available institutional forms are not as strong. Although mar-

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453 Thomas Merrill and Henry Smith build a case for a small number of standardized forms in the context of property rights. They reason:

> When property rights are created, third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them from present holders. The existence of unusual property rights increases the cost of processing information about all property rights. Those creating or transferring idiosyncratic property rights cannot always be expected to take these increases in measurement costs fully into account, making them a true externality.

Merrill & Smith, *supra* note 251, at 8. Merrill and Smith intend to update the "outmoded formalism" of theorizing about property with law and economics arguments. *Id.* at 6. **R**

454 *Id.* at 4. Merrill and Smith describe this principle as "numerus clausus" meaning "the number is closed." *Id.* They conclude that numerus clausus in the realm of property rights is not a significant infringement on contract liberty.

455 *Id*. at 8.

riage was certainly a one-size-fits-all "status contract" during the heyday of common law marriage, today there are a wider variety of options for individuals seeking to define their domestic relations, including civil unions, domestic partnerships, private contracts, and covenant marriages.[456] Jana Singer argues that "the increased legal acceptance of consensual alternatives to marriage and the decreased use of marital status as the basis for allocating public benefits and burdens allow individuals to choose other, less hierarchical, forms of intimacy without forfeiting important material and psychic benefits."[457] Martha Ertman has argued for even further flexibility based on the business law model: "business law's flexibility is compatible both with the various ways that people order their intimate lives and the range of legal and institutional responses to those arrangements."[458] Ertman "explores how the partnership model, the corporate model, and the limited liability company . . . model are similar in some ways to cohabitation, marriage, and polyamory."[459] With this array of options, common law marriage makes little sense. Why should the entire standard package of marriage be imputed to a couple when they had so many potential choices?[460] Common law approaches to marriage risk entrenching the idea that there is one standard form and preventing analysis of alternatives.

Third-party interests in quickly "determin[ing] the attributes of these rights, both to avoid violating them and to acquire them from present holders" are not as salient in the marriage context as in the property context, where standard forms and the title system facilitate alienability.[461] Determining quickly who is and

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456 Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905 (2001) (describing the move towards recognition of domestic partnerships and civil unions); Lynne Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31 (1999-2000) (describing "covenant marriage" statutes, which allow spouses to elect to marry without the option of no-fault divorce); Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417 (1999) (describing contract options for cohabitating partners).

457 Singer, *supra* note 360 at 1533-34. **R**

458 Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 82 (2001).

459 *Id.* at 84 (citations omitted).

460 This argument does not foreclose enforcing specific contracts between unmarried cohabitating couples, for example, to divide property, as in *Marvin v. Marvin,* 557 P.2d 106, 115 (Cal. 1976).

461 Merrill & Smith, *supra* note 251, at 8. **R**

is not available for coupling does not seem to be an important societal goal in the age of Internet dating; potential romantic partners can lie and cheat on their commitments to others in any case. Taxation could be restructured to work with new forms of intimate alliance.[462] Likewise, parties would be forced to contract for property rights upon death or dissolution of the relationship. Health care and employment benefits could be restructured as well. The advent of domestic partnership arrangements has already forced many states and employers to rethink these policies.[463]

However, in the context of parenthood, there may be arguments for a standard institutional form based on third-party interests: those of children. The ALI approach is premised on the idea that the law should place a particular set of responsibilities on particular adults for childcare. In one sense, the ALI has made parenthood a completely customizable contract. Parenthood is an agreement that can be structured by the parents themselves according to a parenting plan.[464] Parents decide for themselves their own custody and visitation arrangements, as well as childcare responsibilities. If an agreement breaks down, courts allocate responsibility based on past patterns of performance.[465] However, the parenting contract involves standard building blocks: there is a set of duties that must be allocated between the parties. The ALI defines the duties of parents from a child-centered perspective: each child has a list of needs that someone must take permanent responsibility for fulfilling.[466] Thus, Anne Alstott has described parenting as a "no exit obligation" and argues that because of this, the state should resource caretakers.[467] The ALI approach to functional parenthood makes sense insofar as one agrees with the list of necessary childcare tasks. However, it raises questions about whether individuals should be expected to undertake these tasks without support from private employers or the state.

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[462] *See* Ertman, *supra* note 458, at 109; Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 988 (1993) (arguing that the tax code serves as an "anchor against the emergence of more modern and flexible family models" and suggesting alternatives). **R**

[463] Ertman, *supra* note 458, at 108-09. **R**

[464] *Supra* note 232 and accompanying text. **R**

[465] *Supra* note 396. **R**

[466] ALI PRINCIPLES, *supra* note 71, § 2.03(5). **R**

[467] ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 52-72 (2004).

Formalization of performance in the case of race determination makes little sense. The idea that whiteness as an institution should be linked to rights and benefits no longer holds grip as an express ideology in U.S. politics. The historical debate over racial definition as "colored" versus "white," for purposes of segregation, has shifted to a contemporary debate over the salience of racial classification at all, even for remedial purposes in contexts such as education and employment.[468] Administration of remedial programs may require a limited number of standard institutional forms of race, signified by check boxes on institutional paperwork. Whether or not such standard institutional forms are valuable depends on one's opinion of the value of race-based remedial programs.[469] Standard institutional forms of race may be experienced as conservative and hegemonic insofar as individuals do not identify with any of the listed options, object to certain group labels, or do not subscribe to the concept of "race" at all. However, in relying on voluntary self-identification of claimants to racial identities, these forms provide opportunities for parody: individuals may opt out freely, check multiple boxes, write in alternatives, and so forth. A performative model of racial determination is likely to be even less progressive, enforcing rigid labels based on community definitions of race and racialized expectations for behavior.[470]

In the cases of sex determination, there are also strong arguments against imposition of standard institutional forms such as man/woman. The policy arguments for a stable, easily ascertainable, binary system of sex/gender are deeply linked to the kulturkampf over the meaning of marriage as a union of one man and one woman. These policy arguments should be analyzed with knowledge of the potential individual freedom and variability that is at stake. Biologist Anne Fausto-Sterling has argued that from an embryologic perspective, there are at least five sexes.[471] She concludes that "sex is a vast, infinitely malleable continuum

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[468] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003). This debate is too extensive to be rehashed here. For outlines of the arguments, see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind",* 44 STAN. L. REV. 1 (1991).

[469] An examination of the benefits and drawbacks of race-based remedial programming is beyond the scope of this Article.

[470] *See supra* Part III.C.1.

[471] Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are Not Enough*, SCIENCES 20, 20-24 (Mar.-Apr. 1993). She lists males, females, true hermaphrodites, female pseudohermaphrodites, and male pseudohermaphrodites. *Id.*

that defies the constraints of even five categories."[472] Likewise, Suzanne Kessler concludes from her research on intersexual individuals that "gender dichotomy is not a necessary feature of human life."[473] Kessler concludes that we should accept variation and begin to take "gender less seriously" and treat "genital formations as innate but malleable, much like hair."[474] To do so would call into question compulsory heterosexuality as well: "[i]f gendered bodies fall into disarray, sexual orientation will follow. Defining sexual orientation according to attraction to people with the same or different genitals, as is done now, will no longer make sense, nor will intersexuality."[475] Kessler's hope is that "[u]ltimately, the power of genitals to mark gender will be weakened, and the power of gender to define lives will be blunted."[476] These considerations militate against a legal doctrine that would utilize gendered performances to impose one or another gender onto ambiguous social phenomena.

Analysis of the question "should law recognize performance?" must proceed by examining the interests at stake in legal formalization balanced against the loss of potential variability caused by imposing a standardized form.

Conclusion

Property, marriage, parenthood, racial segregation, and the sex/gender system can be understood in terms of private status, public performance, and/or legal formality. The ways that people keep house: owning property, forming intimate relationships, raising families, and identifying as members of racial groups or genders, are certainly all "quotidian, material, aspects of individuals' lives," and we should pause before accepting rigid legal definitions of these intimate personal freedoms.[477] The doctrines of performance reification give courts the job of adjudicating whether people were really keeping house or merely playing house. Mere play is an inappropriate posture: these are serious institutions that require universal adherence to maintain their

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[472] *Id.*

[473] Kessler, *supra* note 303, at 80. **R**

[474] *Id.* at 132.

[475] *Id.* at 124; *see also* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 357 (2000) (contesting the "straight/gay binary" and its erasure of bisexual desire and asexuality).

[476] *Id.*

[477] Rubenfeld, *supra* note 451, at 805. **R**

cultural hegemony. But, if the number of available legal forms and their concomitant bundles of rights and duties are not normatively acceptable, then these doctrines, which impose those forms onto ambiguous phenomena, are not acceptable either.

The law may protect public performances of property, marriage, parenthood, race, and sex, but these protections are likely to come at a cost. Social actors will be required to hold themselves out to the public as conformists on a consistent and continuous basis. If the performance is not seamless, protection will be denied. Such conformity is likely to stifle individual creativity and diffuse the potential of playful parodies to contest oppressive institutions.