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The Gender Recognition Act 2004 and Transgender People's Legal Consciousness

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Abstract

Until the Gender Recognition Act (GRA) came into force in 2004 trans people in the UK were not able to legally change their birth certificates and other documents to accurately reflect the way they experienced their gender identity. Previous case law defined sex and gender in primarily biological terms and made several highly problematic assumptions about trans people. For example, it assumed that trans people were intentionally deceiving either potential partners or indeed the state, by wanting to access marriage rights while being in homosexual relationships. The GRA has supposedly revolutionised gender rights in the UK by moving away from a biological understanding of sex/gender and by making it possible for trans people to change their birth certificates, gain access to legal rights, and as a result enjoy protection against discrimination. However, it contains several provisions that effectively encourage trans people to regulate their gender identity. This regulation aims to enforce a binary gender framework; regardless of whether this binary reflects people's own understanding of gender.

Overall, the GRA seems designed to create subjects that govern their behaviour and self-expression in a way that aligns with a purely binary model of sex/gender and sexuality. Although a deviation from these norms does not incur any direct punishment it indirectly leads to a denial of rights and legal protections, which is particularly worrisome when considering the impact on those people, who are not just unwilling, but unable to meet the standards set out in the GRA. By reviewing relevant legislation and case law, and through qualitative research with people engaged with the GRA, I argue that instead of uncritically accepting or completely rejecting the GRA trans people engage with this law in a more sophisticated way. The GRA does not accurately reflect many trans people's own understanding of their gender identity or their sexuality. As a result people have to make strategic choices about how they present themselves to officials throughout the recognition process.

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Births and Deaths Registration Act 1953
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Vancouver Rape Relief Society v. *Nixon* [2005] BCCA 601

Introduction

Trans[1] people are increasingly becoming the focus of much current research in, amongst other areas, sociology, medicine and law. There is also a growing social and cultural awareness of transgender issues as evidenced by the still rare, but increasingly frequent, inclusion of trans characters in mainstream television programmes such as *Hollyoaks* (Kilkelly, May 15 2014), *Orange is the New Black* (Steinmetz, 29 May 2014) and *Transparent* (Hughes, 23 January 2015) to name but a few. This is also evident in the inclusion of trans voices in national newspapers. The US *Time* magazine has argued that society has reached the "Transgender Tipping Point" with transgender rights becoming the new civil rights frontier (Steinmetz, 29 May 2014). However, in most of these contexts trans people, and the social/legal issues affecting this group disproportionately, are still treated as marginal or outliers in terms of their specific concerns.

This increase in public awareness of trans issues is supported by a growing body of literature on transgender identities, primarily in the sociological and medical context (see, e.g. Ekins and King, 1996; Ekins, 2005; Prosser, 1998; Hines, 2007; Hines and Sanger, 2010; Sanger, 2010; Davy, 2012). Work also exists on transgender politics and political movements; however, this focuses mainly on the pre-Gender Recognition Act context and the subsequent introduction of the Gender Recognition Act 2004 (GRA), which allows the legal change of one's gender (Monro, 2005; Ekins and King, 2006; Stryker and Whittle, 2006). The GRA has now been in force for over ten years and has recently been amended to reflect the introduction of same-sex marriage. Much of the scholarship on the legal issue of transgender identities predates the GRA (see, e.g Cowan, 2004b; Sharpe, 2002; Collier, 1995) or focuses primarily on the GRA's theoretical legal ramifications (see e.g. Cowan, 2009a; Sandland, 2009; Sharpe, 2009; Sharpe, 2010; Grabham, 2010; Cowan, 2004b; Cowan, 2005). However, there is currently a lack of research on the connection between theoretical and normative problems within the GRA, and the impact the provisions in the GRA have on a day-to-day basis. As a result of this lack of research the material effects of the GRA are often not readily apparent.

[1] I am using "trans" rather than "transgender" or "transsexual" to accommodate a variety of identity categories that may not necessarily align with a binary understanding of sex and gender, encompassing identities such as genderqueer and agender more readily than the medically defined "transsexual".

Until the GRA came into force in 2004 trans people in the UK were not able to legally change the sex/gender as recorded on their birth certificate, and no consistent guidance existed for amending other types of identity documents. Previous case law defined sex and gender in primarily biological terms and made several highly problematic assumptions about trans people, for instance that they were intentionally deceiving potential partners about their gender identity or that they were in fact in a homosexual relationship but wanted access to marriage rights (see, e.g. *Corbett v Corbett* [1971] P 83; *J v ST (formerly J)(transsexual ancillary relief)* [1998] Fam 103; *Bellinger v Bellinger* [2003] 2 AC 467). The GRA was supposed to remedy discrimination against trans people, in the form of the denial of amended birth certificates (*Goodwin and I v. United Kingdom* [2002] 35 E.H.R.R. 18), by allowing trans people to amend their birth certificate by obtaining a Gender Recognition Certificate (GRC). The GRA has supposedly moved away from a biological[2] understanding of sex/gender and does make it possible for trans people to change their birth certificates and, as a result, gain access to legal rights and protection against discrimination. However, it contains several provisions that effectively encourage trans people to regulate their gender identity to fit within a binary framework that may not actually reflect their own understanding of gender.

More recently, the new and widely celebrated advances in LGB rights made by the introduction of same-sex marriage have also affected the rights of trans people. The Marriage (Same Sex Couples) Act 2013 also directly amends the GRA. The new changes made to the GRA were supposed to remedy existing discrimination affecting the marriage rights of trans people. Previously, in the original version of the GRA, a GRC was granted as long as the following conditions were fulfilled: the applicant is over the age of 18; has medical evidence supporting their diagnosis with gender dysphoria; has lived in their "new" gender for two years prior to the application and commits to doing so for the rest of their life; and is not currently married or in a civil partnership (Gender Recognition Act 2004, ss.1-3). An applicant who is married or in a civil partnership at the time of their application can only obtain an "interim" GRC which is valid for six months, to give the applicant time to dissolve their relationship. Additionally, and also related specifically to the context of marriage, the GRA amends the Matrimonial Causes Act 1973 to the effect that non-disclosure about the fact that one has obtained a GRC makes marriages

[2] I am using "biological" here to denote an understanding of sex/gender found in earlier case law, which was based primarily around genital configurations and in some cases chromosomes.

voidable,[3] highlighting the fundamental role gender as assigned at birth plays in official understandings of marriage. The Marriage (Same Sex Couples) Act 2013 removes the "divorce" requirement for pre-existing relationships and, instead, applicants who are in a legally recognised relationship at the time of their application now need to show evidence of their spouse's consent before they can obtain a full, rather than an interim, GRC.

Several provisions within the GRA, as well as the legal framework of the Act more generally, have been widely criticised by academics as well as activists and campaigners working in this area. However, to date, there has been relatively little research about the way trans people negotiate engagement with a law that they might not necessarily agree with in the context of their everyday lives. Overall, the GRA is designed to create subjects that govern their behaviour and self-expression in a way that aligns with a purely binary model of sex/gender and sexuality. Although a deviation from these norms does not incur any direct punishment, it indirectly often leads to a denial of rights and legal protections, which is particularly worrisome when considering the impact of this denial on those people who are not just unwilling but actually unable to meet the standards set out in the GRA. For instance, non-binary people are at present not able to apply for a GRC and are therefore are unable to change their gender marker on a range of documents, such as HMRC records. Aside from the emotional impact of having to maintain documentation that does not reflect one's gender identity, having a mismatch between one's documents and one's gender presentation can out and put a trans person at risk of physical violence.[4] The GRA effectively encourages a very specific form of passing,[5] in that one's legal or bureaucratic personality[6] has to pass as appropriately gendered in the eyes of the panel in charge of determining GRC applications. This process is also inherently determined by issues of class and social as well as economic capital as successful applications primarily depend on the ability to provide the right types of documents, a process which is significantly easier for those with access to

[3] For a detailed critique of this specific provision see Sharpe (2012)
[4] As recently as 2016 a student was murdered in the UK in a transphobic hate crime, see *R v Arnold* (Manchester Crown Court 01 August 2016) (BBC News, 01 August 2016) .
[5] "Passing" in the context of trans issues generally refers to the act of performing a gender identity, one that is different from the sex one was assigned at birth, well enough that this "mismatch" between sex and gender is not readily apparent to an observer. Passing and the privilege of being able to pass have received some criticism in the context of trans scholarship (see, e.g. (Sycamore and Sycamore, 2006), particularly due to the problematic links between the concept of passing and the lasting impact of the slave trade and racial segregation (Bergman, 2009).
[6] Bureaucratic personality in the sense that the application is largely based on evidence in the form of official documentation. This will be discussed in more detail in Chapter 1.

private healthcare.[7] It also creates a clear hierarchy between those trans people who are able and willing to submit to this process, and those who, for a variety of reasons, are excluded from it. Although the GRA ostensibly only affects a minority of the population, it nevertheless raises issues that also have a wider relevance such as the question of how and to what extent states should, and perhaps more crucially can, regulate identities such as gender, race, religion, etc. This thesis will explore people's engagement and understanding of law in their everyday life while using the GRA as a specific example of this kind of issue. I seek to understand the strategies people use to resist, accept and respond to laws that attempt to shape not just their behaviour, but also their identity. Specifically I suggest that trans people's legal consciousness in this specific context is centered primarily on a strategic engagement with the GRA. This is at least in part due to the negative affective response that the current framework for legal gender recognition triggers in many trans people who engage with it.

The research questions this project is based on partially evolved over the course of this research. Two of the key research questions this project was conceived around are whether a governmentality reading of the GRA can help to elucidate some of the normative underpinnings of this law relating to issues of sex, gender and sexuality? Secondly, can the concept of agency be used to highlight the ways in which trans people behave in ways that may be contrary to the normative aims of the GRA? These questions were based on my initial theoretical research around the GRA and strongly inform the early chapters of this thesis. However, as the field work for this project commenced, this also encouraged me to reflect on and expand my research questions. As such additional questions this project seeks to answer are to what extent can a legal consciousness approach explain some of the differences between the GRA and trans people's actual decision making process and life choices? Further, what role does affect play in trans people's engagement with the GRA or in decisions not to engage with the GRA? Particularly this latter question derived strongly from the findings of my initial pilot interviews. With the aim to be reflective of themes emerging from this pilot, this became a topic that I focused on more explicitly in the subsequent interviews and it forms the basis for several of the later chapters of this thesis.

[7] This is at least in part due to the fact that NHS-funded gender clinics currently suffer from extremely long waiting lists (UK Trans Info, October 2015). In addition, private healthcare providers tend to, at least anecdotally, require shorter waiting periods for patients between various treatment steps, such as the duration between an initial assessment and hormone prescription (Davy, 2010; 2012).

Overall, this research project seeks to make original contributions to existing knowledge and debates in a threefold way. Firstly, as mentioned above, there is currently a lack of empirical research about the GRA and trans people's engagement with it and the application process. This was explicitly referred to by the 2015 Transgender Equality report (House of Commons Women and Equalities Committee, 2015), which noted the difficulty of evaluating both critiques and reform proposals of the GRA without such empirical data. As such this research seeks to provide at least some empirical data regarding the impact and use of the GRA. Secondly, this research seeks to make a contribution to literature on regulation by highlighting the particularly strong affective content of identity regulation in the context of the GRA. As the following chapters seek to highlight, both the application process and the actual GRC is imbued with (positive and negative) emotional significance, for many trans people. This seems to be a crucial point for creating a fuller and more in-depth account of how people engage with seemingly "everyday" frameworks of regulation, particularly in the context of identity regulation. Finally, this thesis makes a contribution to debates around legal consciousness. In particular I draw out the apparently pluralistic nature of legal consciousness that seems key to understanding how trans people engage with the GRA. As such the GRA becomes intertwined with both medical and normative knowledge that takes on a quasi-legal function in this specific context. This suggests that it is in fact not possible to "read" the GRA in isolation, but rather that it needs to be analysed in conjunction with prevailing medical and normative discourses around sex, gender and sexuality.[8]

Proving Your Identity: Gender at Stake

Asylum claims made by LGBT people and their treatment by official representatives of the state provide a useful point of comparison with GRC applications for several reasons: Firstly, on a practical level, because asylum claims by LGBT people have generated a relatively large and diverse body of literature including both empirical and more theoretical work (see, e.g. Hanna, 2005; Morgan, 2006; Berg and Millbank, 2009;

[8] This latter point seems particularly crucial in the context of any potential reform attempts. It seems highly likely that any reform proposal that does not also consider, for instance, the medical gender transition process is likely to produce unintended and undesired consequences.

Johnson, 2011; Middelkoop, 2013), whereas there is only limited research engaging with the GRC application process. Secondly, in both settings applicants are confronted with officials and a state system that inherently doubt their identity and, in some cases, actively seek to discredit them, generally by demanding complete disclosure of intimate details in a way that would be considered intrusive or impossible in most other contexts. Thirdly, both scenarios deal with identity claims made by people who are in some way thought to deviate from what is considered "normal" behaviour; applicants thus have to persuade or come into contact with officials who are unlikely to have first-hand knowledge of the specific identity in question. Finally, in both instances, despite the fact that there seems to be an imperative to disclose the most intimate details of one's life, only certain facts are considered valid or are treated as intelligible evidence by officials. I will now consider these three issues in turn.

Although obtaining a GRC may no longer be as foundational for changing identification documents as it was 10 years ago, it is nevertheless the only way to fully change one's legal gender.[9] However, there currently exists only limited legal academic commentary on the specific application requirements of the GRA. In contrast to this, there is a large body of work considering the demands placed on LGBT asylum claimants in Western countries who similarly have to convince officials of the validity of their identity claims. I will therefore use some of the more prominent criticisms made about the asylum process as a starting point for a more in-depth consideration of the GRC application process. As such I will use some of the more prominent criticisms made about the asylum process as a starting point for a more in depth consideration of the GRC application process.

The fear of fraudulent asylum claims resonates with similar official preoccupations of fraudulent claims about one's gender identity. Sexual orientation has been a recognised ground for claiming asylum in the UK since the decision in *Shah and Islam* ([1999] UKHL 20). Nevertheless, a 2014 (Vine) report commissioned by the then Home Secretary highlights persistent homophobic behaviour on behalf of caseworkers assessing asylum claims. Jenni Millbank (2009a) argues that since sexual orientation became an officially recognised ground for asylum claims, there has been a gradual shift from a wholesale rejection of these claims to an implicit stance of officials that while sexual

[9] Other forms of identification documents can now be amended without a prior legal change of gender (see, for instance, the guidance on changing the gender marker on one's passport GOV.UK, 18 March 2015). This was not always the case prior to the introduction of the GRA..

orientation may be a valid ground for asylum, individual claims should nevertheless be treated with suspicion and, to some extent, disbelief unless proven otherwise.[10] This mirrors the questioning of the authenticity of transgender identity claims which Sharpe (2002) discusses in relation to the pre-GRA case law. In those cases trans people were often presumed to be homosexuals who were trying to evade legal restrictions or sanctions through changing their gender and thereby avoiding the stigma of same-sex relationships. Morgan (2006, p.154) highlights that the same reasoning process that was evident in the debates around the GRA is actually made very explicit in requiring third party evidence in LGBT asylum cases. That is, to do otherwise would encourage a flood of fraudulent claims. In both cases this seems to have led to a situation where a discriminatory burden is placed on applicants to disclose the most intimate details of their lives in an attempt to persuade a system that is inherently biased against their claims. The issue here is a questioning of allegiance, whether this is to a specific gender or a specific nation, and the right one has to belong to a that nation or gender.

This lack of understanding or awareness puts asylum seekers in the position of constantly having to explain themselves to others, essentially to educate them as well as justify their own claim, if they wish their claims to be successful.[11] For instance, Shakhsari (2013, p.568) notes that Iranian trans people trying to claim asylum through the UNCHR specifically rehearse and perform their gender identity in multiple interviews in such a way as to match the idea of "transsexual authenticity" frequently propagated by both the medical and legal systems in this context. Shakhsari (2013, p.569) specifically highlights that many feel their presence is only tolerated as long as they are able and willing to "answer" not just officials dealing with their asylum claims, but also requests by NGO's and media organisations. In effect, the rights and recognition which most people take for granted, for trans refugees becomes conditional upon the ability to provide an intelligible account of oneself and the most intimate aspects of one's identity to officials or the public more generally. This fits with the imperative for disclosure in regards to stigmatised identities individuals which I will discuss in Chapter 1 (Goffman, 1968, p.83). It is likely

[10] It should be noted that this default mode of official disbelief is of course not limited solely to LGBT asylum claimants (see for instance the issue of "disbelief" in the context of rape narratives by asylum seekers, Baillot et al., 2014; Cowan et al., 2009)

[11] Berg and Millbank (2009) specifically note that in many instances officials in asylum cases failed to comprehend that some applicants may not wish to disclose their sexual orientation to everyone in their lives. Thus, claims made by people who had only "come out" to specific individuals were less likely to succeed (Berg and Millbank, 2009, p.215). Being forced to come out in this sense also forces asylum claimants and trans people to put themselves at risk of real physical danger by disclosing their identity to potentially hostile people. This ultimately works to the clear detriment of both asylum seekers and trans people.

that trans people are subject to this imperative for disclosure not just in the context of the GRA but, in fact, in most of their encounters with official scrutiny or public attention in Western cultures.

“Authentic” Identities and Unbreakable Promises

What, then, is the effect that the lack of official knowledge has on interactions between LGBT individuals and officials? In practice it seems that only specific narratives are considered to reflect the “authentic” LGBT experience. Those who fail to provide these narratives are effectively denied legal status and protection. Louis Middelkoop (2013), for instance, discusses the shift in Dutch asylum law from the principle that lesbian and gay people should hide their sexual orientation to a test of whether the person concerned can be considered to be gay in the first place.[12] Middelkoop (2013, p.157) highlights that officials consider self-identification to be insufficient evidence of someone’s sexual orientation.[13] She specifically notes that embarrassment or an unwillingness to provide details or answer questions is not seen as evidence of a subject being considered too personal to share with an unknown other, but rather as evidence that the asylum claimant must be lying (Middelkoop, 2013, p.160).[14] Again, this suggests strong parallels between asylum applications and applications for a GRC, which both seem to deviate from the normal rules of social interaction, perhaps due to the specific demands for rights and recognition they make of officials and the state more generally.

As a result, any deviation from the norm, which in this case is heterosexuality, triggers a much higher burden of proof than that placed on people with supposedly “normal” identities (Spijkerboer, 2013, p.225). Therefore, the interrogation of the most intimate details of one’s life by officials is justified as it is necessary to prove that one is indeed different enough to be recognised as such, with difference being overall being treated as unlikely or a cause for suspicion. Arguably, this also applies in the context of the GRA

[12] This mirrors the similar development discussed by Millbank (2009a) in the context of Australian and UK asylum legislation, and is prevalent in many legal regimes that allow LGBT individuals to claim asylum. Thefore, the European Court of Justice ruled in its *Judgment in Joined Cases C-148/13 to C-150/13 A, B, C v Staatssecretaris van Veiligheid en Justitie* ECLI:EU:C:2014:2406 that officials were no longer allowed to request or examine video evidence to assess sexual orientation claims.
[13] The requirement for third party evidence is in line with Sedgwick’s (1990, 79) argument that demands for evidence or outside authority regarding the validity of one’s sexual orientation reveal “how far authority over its [gay identity] definition has been distanced from the gay subject her- or himself”.
[14] This is contrary to, for instance, Erving Goffman’s (1955) argument that in normal interactions between two parties both parties generally accept the identity presented by the other to be valid to allow them both to save face; here, instead, the burden of proof always falls on the asylum claimant. The analysis of the GRA application as a social interaction will be further explored in Chapter 1.

where claims to a normative male or female identity can be officially recognised, but those that rely on a non-binary gender system, for example, cannot; equally, trans people have to show a much stronger and normative commitment to their gender identity than cisgender people. Thus both trans people and asylum claimants have to match their identity performance to what are officially considered viable forms of existence and living.

Ironically, in the asylum context, trans people are occasionally under somewhat less intense suspicion than lesbian and gay asylum claimants, due to the fact that their identity is (or is perceived as) more readily apparent. However, Berg and Millbank (2009) argue that this may be more the case in the limited US legal framework and related research on this issue than in other national contexts. Berg and Millbank (2009, p.196) highlight that in contrast to most other claims, asylum claims based on sexual identity involve "the presentation of a very internal form of self identity", which is why they can rarely be verified through third party evidence or documentation. In contrast to this, transgender identity claims could actually be considered to relate to a more external form of identity that can be confirmed through visual clues, in a way that sexual orientation cannot. However, both deal with uniquely personal and individualistic information. They suggest that to succeed, claimants have to look like "what is being looked for" (Berg and Millbank, 2009, p.917; Millbank, 2009b), which wholly ignores that sexual orientation and gender identity can take many forms other than the Western definition of a linear, fixed identity formation.[15] Arguably, this means that while claimants are being interrogated about intimate details of their life, only those very specific details that align with the normative definition of sexual orientation utilised by officials are being heard and recognised.

Further parallels may be drawn between the linear coming-out narrative, which is generally expected of asylum claimants, and the narrative of being born in the wrong body, which is generally expected of trans people. Berg and Millbank (2009, p.210) specifically criticise the over-reliance of officials on this narrative as evidence in asylum cases, as it creates the impression that there is only "one single path" " towards establishing one's identity, which in turn invalidates all others. The same could be said of

[15] This particularly affects asylum claims brought by those who might be more accurately described as bisexual rather than homosexual (Rehaag, 2009). As a result, these asylum claims are unlikely to succeed because they fail to provide a narrative that fits into the more traditionally accepted heterosexuality/ homosexuality binary and, in addition, are subject to greater prejudice and suspicion by adjudicators. Again, this raises an important parallel to claims about trans identities, particularly the treatment of those who do not identify with a binary definition of sex/gender and thus struggle to obtain legal recognition. I will discuss this issue in more detail in Chapter 4.

the wrong-body narrative, well propagated through the medical system as well as the media in the form of articles and television programmes. This usually involves accounts of identifying exclusively with the "opposite" gender from birth and is finally resolved through gender confirmation surgery. Although this narrative may well be accurate for some (see, e.g. Prosser, 1998), an over-reliance on it by officials means that anything that diverts from it, for example a decision against surgery, may be seen as evidence that a claim is false or deceptive. It could thus be argued that, similarly to the asylum process (Hinger, 2010), the GRC process erases the specificities of individual identities even while demanding official disclosure of the most intimate details.

Only certain narratives appear to be intelligible to officials in the context of asylum claims as well as gender recognition. Applicants are forced to choose between conforming to those narratives, remaining silent or actually rejecting legal recognition and protection. However, are there possibilities of resistance or subversion that do not require a wholesale rejection of legal recognition? To some extent, silence can function as resistance to this bureaucratic identification process. Johnson (2011, p.63) notes that the judges involved in asylum claims expect specific narratives and claimants, often through their lawyers, have to provide them if they wish to make a successful claim. However, asylum seekers may be able to resist this specific demand for disclosure through the tactical use of silence. In GRC applications, although no direct testimony is given, there may well be a space for "restive silence" (Johnson, 2011, p.72) as a form of resistance. The completed application form will ultimately contain no trace of what has been left out in favour of producing a more linear account of normative gender identity: the illegally obtained and self-administered hormones; the lack of desire for a normatively gendered body; the reasons behind choosing one type of surgery over another; the non-binary self-identification that is temporarily covered by choosing to tick the "male" or "female" box. If restive silence in LGBT asylum cases can be conceived of as "dwelling just beneath the surface of the skin" (Johnson, 2011), then perhaps in GRC applications it is dwelling just beneath the surface of the completed form. This also connects to Erving Goffman's (2005, p.76) argument about the importance of "avoidance rituals" in maintaining an individual's sense of identity and the necessary privacy and autonomy to sustain that identity. Goffman suggests that in settings where people do not have the freedom to engage in avoidance, for instance asylums, they eventually suffer a loss of their identity.

The treatment of LGBT asylum seekers provides one of the more extreme examples of the official scrutiny those who deviate from accepted norms of sex/gender and sexuality are subject to. Asylum seekers are confronted at best with a lack of official knowledge but at worst with suspicion and hostility in regard to their identity claims. This lack of comprehensive knowledge is directly connected to the fact that these asylum claims, and implicitly the identity claims behind them, are generally treated as in need of special scrutiny. The same dynamic can also be observed in the context of GRC applications, which I discuss in Chapter 1.

Theorising Law and the Individual: Governmentality

My starting point for considering how individuals relate to law in the context of the GRA is Foucault's theory of governmentality, particularly as developed by Mitchell Dean (1996; 2010; 2013) and Nikolas Rose (see e.g. Barry et al., 1996; Rose, 1996b; Rose, 1999; Rose, 2000). Governmentality as a theoretical lens allows for a detailed consideration of how states attempt to "steer" individuals and their behaviour. This is a particularly useful starting point for considering some of the requirements and provisions contained within the GRA. The GRA is generally considered to be a "progressive" piece of legislation that allows trans people to legally change their sex/gender by obtaining a GRC without an explicit requirement for gender reassignment surgery (Sharpe, 2009).[16] Yet, it contains some provisions, such as the new spousal consent requirement, which seem to have too severe an impact on trans people's lives to be justified purely by reference to practical or administrative reasons. A governmentality reading helps illuminate some of the less explicit norms and officially desired outcomes underpinning the GRA. Additionally, a study of governmentality may to some degree explain the importance that medical/psychiatric knowledge plays in this context and the impact this has on the creation of trans people/communities and their decision-making processes. The GRA as a form of governance functions by indirectly encouraging certain types of behaviour and identity traits; however, in keeping with this type of indirect governing, the rules to which trans people are supposed to adhere are rarely stated explicitly (Cooper, 1998, p.13). This lack of clarity in regard to rules and their enforcement encourages a

[16] However, I suggest in Chapter 1 that there does in fact seem to be an unofficial surgery requirement, or at least an official presumption that surgery constitutes an essential part of one's "commitment" to a gender identity.

particular type of self-regulation in which trans groups or organisations advise a type of conduct that goes beyond what the GRA sets out in its requirements. I consider this issue in more detail in Chapter 1 in the context of the GRC application process.

Nevertheless, the specific requirements touched upon here also highlight some of the difficulties of considering the GRA solely through a governmentality lens. Due to the fact that there is no formal surgery requirement, it may indeed be possible, as some commentators have suggested, for somebody to "look" like one gender in most contexts short of intimate relationships, while being legally recognised as another (Whittle and Turner, 2007). Although surgery may be an implicit requirement, and an individual intentionally deciding to forego such medical intervention could potentially complicate the process of obtaining a GRC (Cowan, 2009a), at least in its most literal interpretation the GRA is capable of recognising a whole range of other new and varied gender expressions without considering the impact this might have on the norms concerning the marriage and sex/gender institution it so carefully tries to protect in this and other sections. However, recognition in this sense is still inherently limited to the available categories of "female" and "male" due to the framing of the GRA.[17]

The combination of medical and legal knowledge, as discussed in the previous section, also means that the rules and processes of the medical transition process, which generally precedes a GRA application, also impact the GRA itself. For instance, an explicit decision not to undergo surgery may prevent a trans person from being diagnosed with gender dysphoria in the first place (see, e.g. Sharpe, 2007, p.71), thereby closing off the legal process entirely to them due to a diagnosis being a key requirement. While this might not necessarily be a direct outcome of the rationalities underpinning the GRA, it does illustrate that governmentality can assemble a variety of different technologies and processes – some of which support and some which contradict each other – that affect their targeted subjects and populations (Miller and Rose, 2008, p.200). It would be difficult to argue that the explicit political rationality for including medical knowledge in the GRA was to prevent recognition of non-normatively gendered people, but there does seem to be some connection between the governmental rationalities and knowledge about sex/gender/sexuality and the technologies used in this context to regulate trans people. Overall, governmentality is a useful concept for understanding the GRA and some of its

[17] The recent Transgender Equality report (House of Commons Women and Equalities Committee, 2015) includes some suggestions that this should be reconsidered in future versions of the GRA.

theoretical underpinnings, and even inherent contradictions. However, as it focuses on the notion of subjects acting out relations of power it may not necessarily capture how people engage with law on an individual level.

Theorising Law and the Individual: Agency as mediatory concept

Using governmentality to analyse the GRA is productive in outlining how gender is governed through formal/legal processes of transition, which trans people are subject to. However, governmentality may be somewhat less helpful when considering how individuals engage with the requirements set out in the GRA in practice. A consideration of agency could potentially be understood as diametrically opposed to a governmentality analysis of the GRA as a process intended to regulate and shape behavior, as some conceptualisations of agency suggest acting in ways that refuse the 'conduct of conduct'. I would suggest that both governmentality and agency are necessary concepts for producin a more thorough understanding of the relationship between individuals and law. Drawing on Lois McNay's (2000, p.16) work agency as a concept can provide an important "mediatory category" to show how the impact of governmental strategies, such as the GRA on people's actual day to day existence, is mediated and more diverse than one might expect.

Transgender studies is producing a steadily evolving range of literature and empirical work about trans people and many aspects of their everyday lives. Zowie Davy (2010; 2012), for instance, considers the issue of agency for trans people in the context of engagement with the medical system and medical professionals. This work in particular focuses on the way agency is not just shaped by individual subjectivity, but also by material factors such as capital and access to certain services (Davy, 2010, p.115). Hines (2007, p.56; 2010, p.369) also considers agency and the exercise of power when she describes the way in which trans people deploy a narrative of being born in the "wrong body" in their engagement with the medical system. I would further suggest that trans people do not just exercise power in a strategic way in a medical context and through the use of the wrong-body narrative, but also in their engagement with legal structures. Using only a theory of governmentality tends to ignore or erase these deployments of agency, which is problematic not just on an analytical level, but also on a political level because it encourages a view of trans people as passive subjects of law and medicine without considering the diverse and creative choices that trans people make in this context.

Building on the existing literature on agency and governmentality I hope to show the complex interplay between the normative elements of the GRA and people's actual engagement with this law and its specific requirements in their everyday lives. I would suggest that McNay's approach to agency is particularly useful in this context as it presumes that individuals are not just influenced by social and cultural factors but are also capable of a degree of self-awareness and self-determination in their engagement with such constraining influence. This is combined with a notion of embodied existence and of identity formation that allows for contradictions and change over time. An inclusion of embodiment seems particularly important in this context when considering criticism made for example by Prosser (1998) about the lack of acknowledgement of the bodily experiences of trans people in queer theory.

Agency can be divided into two complementary processes: firstly, individuals do not just passively accept and reiterate social roles; secondly individuals are capable of actions that challenge and transform norms in a political sense (McNay, 2008). Both aspects are crucial for understanding trans people as not just passively ceding to the demands of the GRA, but instead actively engaging with it and making choices that reflect their own individual identities and circumstances. For this purpose it is important to conceptualise identity in a way that allows for agents who are creative, able to reflect critically and also capable of self-transformation over time. Obviously, this is not to deny the impact of social structures and existing power relations on identity as well as agency. Furthermore, I do not mean to suggest all actions by trans people that may be understood as contrary to the implicit aims of the GRA should be understood as resistance. If norms are rarely translated directly or completely into individual actions and behaviour, then describing actions that are contrary to those norms solely as resistance can erase more nuanced types of behaviour (McNay, 2003a, p.140). This is particularly relevant in relation to trans people who show a high degree of awareness of the type of behaviour or identity that is expected of them and who in turn navigate official institutions in a way that goes beyond "mere" resistance, but also at times reflects the norms that the GRA embodies. As a result, actions that do not conform entirely with existing norms are not inherently resistant; in fact, modern exercises of state power are often capable of accommodating and subsuming nonconformity into an existing framework.

Bridging the Gap Between Governmentality and Agency: Legal Consciousness

While both governmentality and agency both provide useful insights into how the GRA operates, legal consciousness as a theoretical framework provides a third useful angle for considering the relationship between individuals and law. Legal consciousness studies, especially in their original design, are arguably useful not just for academics, but also for policy makers and legislators, as they can reveal some important practical concerns about a specific law or piece of legislation. Dave Cowan (2004a, p.940) suggests that they are particularly useful in correcting certain opinions held about a group of people, such as the idea that benefit recipients know the specific details of legislation and use them to manipulate the benefit system to their advantage. Additionally, a legal consciousness approach can, in this context, reveal flaws in a particular law; for instance, in practice many of the definitions included in it can be misinterpreted, or people feel it treats them unfairly and denies them dignity (Cowan, 2004a, p.942). This makes legal consciousness particularly useful as a framework in areas where the law has recently been changed or is under review. More importantly, it can provide a focus for resistance to existing laws (Harding, 2011, p.7). Both apply in the context of the GRA, a fairly new piece of legislation on which only limited data exists, and which, along with the subsequent amendment, has led to much criticism from trans people themselves (Belcher, 4 April 2014).

Legal consciousness as a concept was developed mainly in the context of North American work on law and society/culture (Cowan, 2004a, p.928). As a result, the focus of this type of approach is primarily the wider effects law has on society and how legal change may affect this. Legal consciousness, or the study of how people engage with and understand law in the context of their everyday lives, is based on this second approach to understanding law (Ewick and Silbey, 1998). However, to utilise legal consciousness as an effective theoretical framework it is crucial to rely on a legal pluralist definition of what should be considered "legal" in this context. As Rosie Harding (2011) points out, heteronormativity takes on an equally important role to law in shaping the lives of lesbians and gay men. Especially in light of a governmentality reading, it is obvious that normative assumptions about sex, gender and sexuality have been incorporated into the GRA or are implicit in its functioning. It is crucial to highlight the workings of these structural constraints – particularly in regard to what gender options are considered viable by officials – in any discussion of how trans people engage with law and law-like

structures, for instance the requirements of the medical system. Thus, any legal consciousness analysis of the way trans people understand law needs to be inclusive of such law-like frameworks. Overall, I argue that to provide an effective theoretical framework legal consciousness needs to include normative structures such as heteronormativity as law-like rules in its analysis of law, which necessarily also involves a redefinition of the categories of legal consciousness that Ewick and Silbey (1991) originally described.

Research Design and Methodology

My research is based on a qualitative study of trans people's engagement with the GRA. This section provides a brief overview of the research and my methodology as a basis for the discussion of the interview material in the following chapters. This research is primarily based on semi-structured interviews with 30 trans people carried out in England and Wales. Questions focused on a number of issues related to the GRA, such as the application process for a GRC, the emotional value of obtaining a GRC, recent legal changes and the medicalisation of the application process. The interviews and the questions themselves were intentionally left open-ended to allow participants to tell their individual life stories without being overly constrained by the format of the interview (Plummer, 1995). The intention was also to create a relationship of trust with the interviewees, as many of the topics under discussion can be considered very sensitive and deeply bound up with one's identity; thus, a more confrontational and less responsive interviewing style would have seemed inappropriate (Rubin and Rubin, 2011, p.36). Interviewees were asked a variety of open-ended questions about their engagement with the GRA. These questions varied depending on whether or not the interviewee had applied for a GRC. So for instance participants who had applied for a GRC were asked about their experience of the application process itself and how accessible they found this. In contrast participants who had not applied were asked about their reasons for not applying. All applicants were asked a number of questions to establish a basic overview of participant characteristics, as well as wider questions focusing on their understanding of specific provisions of application, such as the evidentiary requirements and the new spousal consent requirement.

Prior to commencing recruitment of participants, ethical approval from the University of Kent ethics committee was obtained for the project. In making this application both the *Socio Legal Studies Association's* Statement of Principles of Ethical Research Practice, in particular the principles relating to 'Obtaining consent' (7.1) and 'Gatekeepers' (7.4) and the *ESRC's* Research Ethics Framework were taken into account. As part of the ethics application I paid particular attention to the issue of the potential vulnerability of participants and the sensitive nature of the topic. To reflect this the call for participants specifically highlighted that participants could take place via phone/skype and at a time convenient to them to minimise the risk of participants inadvertently revealing sensitive information to a third party during the interviews or being 'outed' through their participation in the research. Similarly, the interviews were recorded but participants were not required to identify themselves and as initial contact with participants took primarily place via e-mail participants were not required to provide their names, unless they were happy to do so, to ensure anonymity and privacy. Further, due to the extreme sensitivity of the topic, participants were not asked any questions regarding medical treatment they had undergone, as this was not the core focus of the research. More generally, as the interviews dealt with sensitive information more broadly both the participant information sheet and the consent form highlighted that participants were able to refuse to answer questions they found uncomfortable or distressing and could withdraw at any point during the interview. This was additionally verbally reiterated at the beginning of the interview. The information sheet for participants also included my contact details should participants decide after the interview that the interview raised issues, positive or negative, that they would like to discuss further or if they required some additional information about the research. Indeed, one participant decided to contact me after the interview to provide some additional information. In part based on the consideration of the ethical concerns discussed in this section, I decided early on to interview only participants aged 18 and above, which I then clearly highlighted in all recruitment material. To preserve participants' anonymity all names have been changed and any obvious identifying details have been removed (see Appendix 1).

In evaluating potential ethical concerns surrounding this project it also seems important to take into account the potential benefits of carrying out this research. There are clear potential benefits to this research project, specifically regarding the need to assess the effect of laws and regulations on people and their decision making process and people's engagement with law. Further, it is important that the everyday effects of specific laws

and regulations, such as the GRA, are clearly understood, especially when they deal with such impactful areas like gender identity and sexuality. Existing research on this topic has largely focused on the social regulation of sex/gender identity and as such the specific impact of the Gender Recognition Act in a more legal context has largely remained in the shadows. To ensure participants also received some direct benefit from this research, every participant was provided with a brief summary of the findings once the project had been completed. Indeed one participant later confirmed that she would use these findings in her own advocacy work for trans people.

Participants for both the pilot and the main study were recruited by circulating a request for participants via email to 73 LGBT and trans-specific groups based in England and Wales, as well as posting the request for participants on online forums. Some of the criteria for the selection of groups were representativeness in terms of geographic region, gender and age. Most of the groups I contacted agreed to forward my call for participants through their email lists or publish it on various social media platforms such as Facebook and Twitter. Further participants were recruited through snowball sampling (see, e.g. Biernacki and Waldorf, 1981; Browne, 2005; Noy, 2008) once a number of interviews had taken place. As such several participants in the pilot study passed my details on to other people they thought might be interested in taking part in the study. Participants approached me over email either to ask some clarification questions or to say immediately that they would be happy to be interviewed. As such the recruitment was to some extent participant-led as potential participants would first see the call for participants circulated either via a group mailing list or by a previous participant and could then decide whether or not to approach me without being put under any pressure regarding their decision to participate. The interviews took place in person, via video chat, over the phone and, in three cases, through email communications. This variation in interview methods was used primarily to accommodate the wishes of the participants regarding timing and privacy, for instance to enable participants to fit the interview around employment. This flexibility in methods also allowed for more diversity in terms of the location of participants as no travel was required. Each interview lasted between one and two hours and was digitally recorded with the interviewee's permission. It should be noted that although there seemed to be no obvious thematic difference between in-person and remote interviews, on average remote interviews over phone/skype tended to be slightly longer than in-person interviews. This may be due to the fact that people felt

more comfortable and at ease during remote interviews and indeed two separate interviewees briefly interrupted the interview in order to replace their beverages.

In terms of the timing of the interviews, in 2013 I conducted an initial pilot study consisting of seven interviews to test my interview questions and gather some initial material on which to proceed with my research. As a result of the pilot study, I used purposive sampling (Ritchie et al., 2013, p.113) and focused more explicitly on recruiting trans men and those who identified as masculine or genderqueer as the respondents to my original call for participants were mainly women. Due to the fact that in the UK context trans women seem more strongly represented in both media and policy discourses it seemed particularly important to ensure some measure of diversity in terms of participant's gender identity. This main round of recruitment and interviews took place in late 2013 and during 2014. No follow up interviews took place although on one occasion a participant emailed me after the interview with some further information.

In terms of participant characteristics, 14 participants described their gender as male or masculine; 10 described their gender as female; two participants described their gender as genderqueer; two participants described their gender as non-binary; one participant described his gender as transmale; and one further participant described his gender as mostly male and "somewhat agender". In terms of age 13 participants were age 18-30; 5 were age 30-40; 7 were age 40-50; 3 were age 50-60; 2 participants were age 60+. The participants were from a range of educational backgrounds and occupational groups including unemployed, retired, self-employed, students, unskilled and skilled and professionals. All participants were currently residing in the UK and were from both urban and rural areas. Due to the fact that the specifics of the GRA vary between England and Scotland, potential participants who had applied under Scottish rules had to be excluded due to the scope of this research project. All but three participants were UK citizens and two of these participants had dual nationality. Despite purposive sampling and attempts to make contact with groups aimed specifically at LGBT people from minority ethnic backgrounds, only one participant was from a minority ethnic background which seems to be a recurring difficulty in research about transgender issues (see e.g. Hines, 2007, p.195; 2013, p.6). Due to the complex relationship between race, ethnicity and gender it seems likely that race does impact the GRA to some extent but this remains a under-researched area (Hines, 2007, p.194). In terms of their engagement with the Gender Recognition Act a majority of interviewees had either obtained a GRC at

the time the interview took place or were planning to do so in the near future. Only one person had their application rejected, and 8 interviewees had chosen not to apply and 3 more declared that they were not eligible for various reasons. The sampling strategy both during the pilot and the main interviews was intended to maximise the diversity of participants, however, it should be noted that it is not fully possible for a sample of this size, which is in part defined by the limitations of undertaking a PhD research project, to be completely representative.

Data from the interviews took primarily the form of digital interview recordings. In addition to the recordings, I also produced detailed notes for each interview, with the exception of interviews that had taken place via email. These notes were initially produced during the interview and I would then take time after each interview to supplement these notes, as well as keeping a record of general impressions regarding a certain interview or any key themes that had emerged during it. My analysis was based on both these detailed notes as well as the interview recordings to which I would listen repeatedly during the analysis stage of the project and which I used specifically in order to reproduce the quotes from participants that can be found in this thesis. The interviews were analysed both individually and across the set for emerging key themes, such as the strong affective reaction produced by the application process and interviewee's views and understanding of specific provisions within the GRA, such as the new spousal consent amendment.

As Linda McDowell (1992, p.409) suggests it is important to acknowledge both our own position as well as that of participants within our research practice. Regarding my own position within this research project being a white, non-British, person who is part of the LGBTQI community has arguably affected my interaction with this field of study in multiple ways. My position within society more broadly has already given me a critical insight into how legal regulation affects people. As such, I also had perhaps a more in-depth understanding of the topic than someone who is not part of the LGBTQI community. However, while I do maintain connections with people from LGBTQI groups, recruitment took place independent of this and none of the interviewees were known to me prior to the interviews. It is difficult to estimate to what extent interviewee's perception of me affected our interactions during the interviews. Indeed the only "personal" question I was asked by two interviewees was where my accent was from. Following Gillian Rose (1997, p.318) there seem to be some inherent limitations

to one's own ability to fully analyse the "relation between researcher and researched" without at the same time also reifying the power of academic analysis and over-optimistically presuming that "self and context are, even if in principle only, transparently understandable". Therefore I do not intend to suggest that this research project produces any type of absolute knowledge about the various topics discussed, but rather that it contributes to existing debates about topics such as the regulation of gender identity and the affective content of regulation, as well as empirical questions regarding the GRA.

In addition to interview materials I also draw on materials available via publicly accessible personal blogs and discussion forums to supplement my qualitative interview data and provide a more in-depth account of some of the issues raised by participants. I am also using the available Hansard records of the legislative debates leading up to both the Gender Recognition Act 2004 and the Marriage (Same Sex Couples) Act 2013, which introduced some amendments to the GRA. These parliamentary records provide useful background information about the reasoning behind specific provisions contained within both these legal texts. To provide a more in-depth account of the application process and as a result of some of the problems with the application process which interviewees mentioned, I repeatedly attempted to contact the Gender Recognition Panel which is in charge of determining applications for a GRC, however these attempts proved unsuccessful.

Key Arguments

In this thesis I develop three key arguments. Firstly that, the application process for a GRC is seemingly intended to produce trans subjects who are adhering as closely as possible to a cisgender model of binary sex/gender performance, primarily through official insistence for documentation that proves one's willingness to undergo medical treatment. As such, despite the fact that surgery is not explicitly required, it seems to function as an implicit requirement and additional barrier for applicants (see Chapter 1). This seems to be due to the fact that the GRA is inherently limited by frequent

transphobic assumptions[18] that became most explicitly apparent in the parliamentary debates, mainly through expressions of distrust of trans people and their gender identity. This distrust of trans peoples' own identity claims are expressed most explicitly in the requirement to provide two medical reports, which suggests that an "expert's" assessment of a trans person's identity is more valuable than their own. As a result any reform of the GRA short of moving to a form of legal recognition based purely on self-determination,[19] will to some degree be hampered as these norms are at the heart of the GRA. This became even clearer with the recent amendment of the GRA, which was supposed to rectify discrimination against trans people, but instead introduced a new provision affecting married trans people, which may be even more harmful to trans people despite supposedly being intended to be 'progressive'.[20]

Secondly, due to the implicit bias against trans people's identity claims, which is primarily expressed through official distrust of trans peoples' identity claims, a specific type of legal consciousness can be observed in this context. Trans people are both highly critical of law and at the same time caught up within it. I would argue that instead of uncritically accepting or completely rejecting the GRA trans people engage with this law in a more sophisticated way. The GRA does not accurately reflect many trans people's own understanding of their gender identity or their sexuality. As a result people have to make strategic choices about how they present themselves to officials throughout the recognition process. Additionally the legal recognition process also creates financial and bureaucratic barriers that can in practice be difficult to negotiate and encourage the view that trans people have to constantly defend the authenticity of their gender identity. This raises wider concerns about state, and specifically legal, regulation of fundamental aspects of identity.

My final argument focuses on the affective aspects of the GRA. The GRA involves affective reactions and engagements in multiple intersecting ways. On the one hand, affective relations to others (even hypothetical others) seemed to frequently be the

[18] For instance the requirement for a two year waiting period before an application for a GRC becomes possible. This inherently suggests that trans people are somehow less certain about their gender identity than others and need extra state intervention to prevent them from making the wrong choice. I will discuss this and other requirements in more detail in the following chapter.
[19] For such a self-determination based approach to legal gender recognition see, e.g. the Irish Gender Recognition Act 2015.
[20] This harm is firstly symbolic. In the sense that the new spousal consent requirement (s.3(6B)) continues to make the legal recognition of a person's identity conditional upon another person's consent. Secondly, it can be harmful in practical terms as it may allow one spouse to only grant consent in return for other benefits, such as for instance "better" divorce terms (for a full discussion of this issue see Chapter 2).

motivation for those who critically questioned administrative requirements and barriers, even when those requirements did not pose a direct hurdle for themselves. On the other hand, part of the GRA's 'effectiveness' also seems to derive from the affective content wrapped up within it. Due to the onerous evidentiary requirements, which I will discuss in the following chapter, receiving a Gender Recognition Certificate is almost always the last part of the transition 'process'. Therefore many interviewees tended to associate very positive emotions with obtaining a GRC, which may even overshadow negative aspects or experiences of the process. In this sense affect can also encourage a less critical engagement or understanding of the GRA.

Overall, my thesis shows that the GRA is in urgent need of reform. Both its underpinning norms and its administrative execution cause distress and anxiety to trans people, even if they successfully obtain a GRC. This is largely due to what may be construed as an intentional lack of clarity in regards to the evidentiary requirements, which force trans people to present in a way that conforms as much as possible to existing gender norms and a stereotypical ideal of "transsexuality". This was often expressed in the form of silences in interviews when the topic of discrimination by officials was brought up. Many interviewees would at first express surprise at the fact that they, contrary to their expectations had not experienced any discrimination or undue burden in relation to the GRA. However, they would later circle back to the same topic and suggest that many others are likely to be subject to such discrimination. In this way the systemic discrimination inherent in the GRA seems to be an issue that is at times too difficult to express on a personal level and can instead be more easily discussed in the context of other lives. In particular, the more medicalised aspects of the GRA seem to most frequently cause some measure of harm to applicants and prospective applicants. However, in practice, and considering the recent attempt to reform the GRA via the Marriage (Same Sex Couples) Act 2013, it is doubtful whether any reform attempt can ever fully address and rectify the exclusionary nature of the GRA.

Chapter Overview

Chapter 1 is intended to provide a brief overview of the application process for a GRC itself. I consider how the legal rules of the GRA are implemented in practice through the application form. I also use the work of Erving Goffman (1991) to consider the

application process specifically as a type of social interaction mediated through the application form itself. I also analyse the findings from my interviews to substantiate my theoretical arguments. Overall, I suggest that the application process forces trans people who want or need legal recognition to disclose highly personal, intimate details of themselves that have to be presented in such a way as to meet the panel's view of an ideal applicant. Thus, the gender recognition process does not just recognise only a very specific group of trans people that are able and willing to meet its requirements, but at the same time also aims to create subjects that are imbued with specific racialised, classed and gendered attributes.

In Chapter 2 I use a governmentality reading of the GRA to connect some of the present provisions to the original case law. This helps to highlight the underpinning norms and desired outcomes which are never explicitly mentioned within the act itself, but do in some cases appear to be the only viable explanation for sometimes contradictory legal requirements. By focusing on the historical development of transgender jurisprudence and some of the themes within it, it becomes possible to recognise certain persisting official concerns, for example the need to maintain sex/gender as a fixed binary category, which implicitly shape the GRA. I argue that the GRA can be understood as one way of governing from a distance by imbuing law with prevailing social norms, which in turn encourages a greater adherence to law.

In Chapter 3 I focus primarily on the use of agency as a theoretical concept to explain the disjuncture between the GRA as a piece of legislation and people's lived experiences, which do not necessarily align with the provisions of the GRA. I consider several different theoretical approaches to agency, mainly those found in the work of Foucault, Bourdieu and Butler. I draw on material from my interviews in this chapter to illustrate my arguments. By using interviews from my fieldwork, I suggest that rather than accepting the requirements set out by the GRA and regulating themselves and their identities accordingly, trans people in fact engage with this law in creative and often contradictory ways without ever entirely submitting to its demands. Drawing on Lois McNay's (2000) work, I argue that a concept of agency provides an important "mediatory category" to explain the modified and at times unpredictable impact of governmental strategies such as the GRA on people's actual day-to-day existence. However, ultimately neither governmentality nor agency can fully account for the specific ways in which trans people interact with the GRA and are shaped by it in turn.

I will suggest in Chapter 4 that legal consciousness may provide a particularly useful analytical concept to consider legal attempts at identity regulation and also trans people's agency and capacity for decision making in the context of the GRA. It is also likely that the categories proposed by Ewick and Silbey (1991) and refined by Harding (2011) in regard to lesbians and gay men will require some further amendments to accurately describe the legal consciousness of trans people. Drawing on my interview material, I suggest that rather than solely relying on existing legal concepts in their demand for equality, trans people are far more willing and able to deploy strategic narratives to fit within the accepted medical or legal discourse while they are engaged in it, but ultimately abandon these narratives once they have achieved their desired outcome. There is also a greater tendency among trans people to reject legal recognition and, to an extent, law's power entirely, not out of fear or their inability to adhere to law's demands, but rather as a means of actively protesting against and challenging law's authority and hegemony. However, in many cases both the medical and legal attempts to regulate trans people's behaviour have a clear impact on individuals' ability to imagine positive changes to the GRA. Overall, this differs significantly from the categories Ewick and Silbey (1991) describe in their analysis of legal consciousness.

In Chapter 5 I consider the figure of the "heroic interviewee", which was a theme that emerged from many of my interviews. Trans people and transgender movements, like all movements, represent a wide range of opinions and thoughts in regard to what constitutes a useful law and what the solution would be to any problem. Trans people are at times only united by the fact that they are not cisgender and it would therefore be surprising to find an entirely coherent or consistent viewpoint that unites every single trans person. However, while there is a vast range of opinions about the GRA and just as many suggestions about how it could be improved, or why any improvement would be impossible, there is also a remarkable amount of empathy for other trans people, or even intersex people, who are often assumed to be in very different circumstances. Throughout my fieldwork, expressions of empathy were primarily focused on issues around the accessibility of the GRA or a lack of inclusivity, particularly in regard to people who do not identify with a binary structure of sex/gender. Empathy, to some extent, seems to be limited or fenced in by the binary logic of the GRA. While many interviewees suggested that the GRA should be opened up to allow access for less normatively gendered people, they were in favour of some limitations being imposed on applicants. Perhaps it is not

necessarily the logic of the law itself that proves difficult to escape, but the fact that binary gender norms are so deeply entrenched within society more generally as well. Interviewees were less attached to the administrative parts of the GRA, which they were willing to subvert and criticise, but the underlying norms seemed to be harder to abandon. Due to the limitations of the GRA itself and its brutally binary logic, no amount of empathy makes it possible for individuals who apply for a GRC to turn their use of the GRA into a queer reworking of the law, at least not if we understand queer as the opening up of new gender spaces and forms of being.

In Chapter 6 I consider the GRA and its potential for reform in the wider context of the legal regulation of gender. Challenging the existing medicalisation of the GRA and its normative background can only ever be a first step in challenging the gender-making practices of law more generally. Removing the legal regulation of gender is unlikely to eliminate gender-based oppression or binary gender norms; however, it would arguably remove some of the pressure to conform to these norms. While it may be tempting to assume that allowing for gender self-determination would sufficiently destabilise gender, there is a risk that this option would be solely exercised by a small minority, with little impact on gender-based oppression. What is needed is a fundamental challenge to gender as a socially determined organising principle – perhaps a more relational understanding of gender(s) as a set of practices that go beyond the purely aesthetic, which are constantly being defined and negotiated not just by the individual, but in our relation to others.

Chapter 1

Proving "Commitment": GRC Applications and the Performance of Normative Gender Identities

In this chapter I consider how the legal rules of the Gender Recognition Act 2004 (GRA), the development of which I will consider in Chapter 2, are implemented in the application form that one has to complete to obtain a Gender Recognition Certificate (GRC). This chapter will provide some important background information about the application itself, which I draw on in both the following theoretical chapters as well as the later fieldwork-based chapters. To analyse the application form as an object in itself, I use the work Jacques Derrida (2005) and draw on Erving Goffman (1991), considering the application process specifically as a type of social interaction mediated through this application form. I am also analysing here some of the findings from my interviews to substantiate the theoretical arguments in this chapter. Overall, I suggest that the application process forces trans people who want or need legal recognition to disclose highly personal, intimate details of themselves that have to be presented in such a way as to meet the panel's view of an ideal applicant. Thus the gender recognition process does not just recognise only a very specific group of trans people that are able and willing to meet its requirements, but at the same time also aims to create subjects that are imbued with specific racialised, classed and gendered attributes.

My key arguments about the GRC application process are based around three primary concerns. Firstly, it involves a high degree of medicalisation by incorporating medical concepts/terminology and relying primarily on medical evidence and medical experts. In this way legal and medical knowledge about trans people seem to converge to deny or overshadow trans peoples' own understanding of their identities. Secondly the application process in many ways functions as a social interaction between the applicant and the state. However, this is a social interaction involving an inherently unequal distribution of power, which in turn seems to further trans peoples' experience of being at the "mercy" of experts in regards to access to resources such as legal recognition. Finally, the official imagination of the gender recognition process requires some degree of "buying into" gender by behalf of applicants to assuage official fears about fraud or inauthenticity of

gender, which on the one hand allows applicants some degree of agency but on the other hand also requires medical interventions as evidence.

Applying for a GRC

Anyone wishing to apply for a GRC needs to complete the form available from the Courts & Tribunal Service website (GOV.UK, September 2016). The form is supplemented by several guidelines provided by the government (HM Courts & Tribunal Service, June 2016), which in turn refer to charities and support groups as sources of further guidance for applicants if. The form itself is relatively straight forward and seems to demand a limited amount of detailed personal information from applicants. However, most of the particularly sensitive information, which is crucial for the recognition process, is actually provided by others in the form of two medical reports, which the applicants have to include with their application.

The first part of the form deals with fairly standard personal information, which applicants have to provide, i.e. name, title, phone number, etc. It also asks applicants to provide a password, which they need if they enquire about their application status (HM Courts & Tribunal Service, November 2016, p.3). This suggests there is an awareness that the information provided, as well as the application process is likely to deal with confidential and very personal information. Indeed it is a criminal offence for any of the officials involved to disclose that an applicant is transgender (*Gender Recognition Act 2004,* s.22(1*)*) to people who are not involved in the application process. By itself, the initial part of the application form is fairly straightforward and should be easy to complete for most applicants. However it also states that applicants have to declare their "gender as stated on birth or adoption certificate: Male/Boy Female/Girl" (HM Courts & Tribunal Service, November 2016, p.4). This is somewhat surprising as birth certificates actually use "sex" as the relevant term and category and the options that can be written in seem to be "male" and "female". The addition of "boy" and "girl", and gender instead of sex, as terms in the GRC application is interesting for several reasons. First, it shows a conflation of sex/gender which, intentionally or not, ignores widely accepted medical and social discourses that consider them to be separate categories. Instead, it assumes that gender causally follows from sex and is actually determined at birth rather than socially

constructed. Otherwise, it would be illogical to ask for “gender as stated on birth certificate” because gender is in fact not stated on the birth certificate at all. It also suggests that the applicant cannot in fact change their sex despite the GRA stating that both sex and gender are treated as changeable in this context.

The Real-Life Test

The most crucial parts of the application are sections 5 -7 (HM Courts & Tribunal Service, November 2016, pp.6-10), which are effectively an implementation of the evidence requirements set out in the GRA (s.3 *Gender Recognition Act 2004*). Section 5 deals with the evidence that shows that an applicant has lived in their gender for at least two years prior to the application. The application form here specifically refers to the applicant's "new" gender (HM Courts & Tribunal Service, November 2016, p.6). Although this term may be used simply for linguistic ease and to avoid confusion, it nevertheless implies two underlying rationalities. Firstly, that the applicant has not always been that gender, which is a type of reasoning that contradicts the lived experience of many trans people who would argue that they have in fact always been that gender but have not been recognised as such by society at large. Secondly, that there is a specific point at which one changes from one gender to another with no acknowledgement that there may be an in-between position or a more gradual change or even a context dependent move back and forth between these categories. This second point is also supported by the fact that applicants have to provide the year and the month from which they can provide evidence for their "acquired"- again this is the term used in the official documents- gender identity.

The imperative to provide official documentation of this “acquisition” of gender also implies a propertied conception of gender. Following Macpherson (1962; 1977) capitalist economies are increasingly defined by a property-based understanding of individual’s, their selves, and even their rights. This is reflected in the application process where gender is understood as a good that can be obtained through specific legalistic processes and perhaps also in exchange for one’s “existing” gender (see also, Cooper and Renz, 2016). Furthermore, gender as property also implies a valuation of specific dominant identities over others (Harris, 1993; Grabham, 2009; Keenan, 2014; Cooper and Herman, 2013). Although this often comes to mean a prioritisation of masculinity over femininity (Adkins and Lury, 1999; Adkins, 2001) here value becomes attached to a gender identity

that comes as close as possible to being cisgender. Thus the GRC potentially allows one to obtain a higher status identity, in the sense that one is no longer legally identified as transgender by incongruous identity documents.

Although the evidence requirement overall may hypothetically exist for practical reasons, as it saves the panel from calculating if the evidence does indeed date back two years, it nevertheless also supports the idea that there are clear, recognisable boundaries between the two different modes of existence. It also ignores the fact that merely being able to provide two years' worth of documents that refer to the applicant as being, for example, male does not mean that the applicant does not also have documents for the same time period that refer to them as female. This may be because someone chooses to present themselves as trans or as a specific gender only in certain contexts, or because on a practical level it is very difficult to change all manner of everyday documents like bills and bank statements in their entirety.[21] Overall, however, this means that the recognition process privileges certain narratives - those that support a stable, fixed and, most importantly, binary model of sex/gender identity, over others that are effectively deemed unworthy of recognition. Obviously some trans people actively approve of this approach to legal recognition, particularly if they themselves identify with this definition of gender identity. However, most interviewees seemed to favour a more open process based on self-identification, despite many of them identifying solely as male or female. Ian described this type of approach in a fairly detailed way: "If there was a third option I would not have taken it, it is very important to me to be recognized as male and to be treated as male. But I think there are lots and lots of people who do not identify as male or female and it is unfair to ask people to fit into a male or female space if they do not identify as such." Most of the interviewees, who supported the opening up of the GRA to include non-binary people, did so by making reference to others. For instance, Fiona stated the following*:* "The government does not decide who I am. The government should just get rid of gender, I fit into the binary but many don't." This suggests that even when applicants acquiesce to the demands of the GRA, this does not constitute a wholesale acceptance of the norms that underpin it. Although the questioning of specific principles of the GRA, such as the binary gender norms, is effectively silenced during the application process it is nevertheless taking place in other spaces.

[21] As it is not possible to change one's gender marking on some documentation prior to obtaining a GRC, such as for instance HMRC records (GOV.UK, 08 November 2016), it is almost inevitable that the evidence submitted will only ever reflect a partial narrative.

Furthermore, the requirement of two years' worth of documentation matching the "acquired" gender identity implicitly legalises the medicalisation of transgender, as it mirrors similar requirements imposed in the context of medical treatment, a fact that was actually considered commendable by politicians involved in the debate around the GRA:

> "Therefore, for a change, the test in law will be similar to the medical test that is applied. Would that we had so many consistencies between the law and medicine, for example, in the law of provocation for diminished responsibility in relation to homicide. However, we do not have that consistency and the law and medicine frequently have to apply quite different criteria. In this case they will be the same and that is useful." Lord Carlile of Berriew (House of Lords, 13 January 2004, Column GC27)

Particularly in the medical context, the generally two-year-long real-life test is intended to test an individual's dedication to their gender identity (Irving, 2008) and the legal process has taken up the idea of the two year requirement as a form of testing an individual's "commitment" to their gender. The fact that effectively imposing this test twice on most applicants - first through the medical system then through the legal system - might create an excessive barrier has not been discussed in the debates on the GRA. This also mirrors the presumption that identity claims should always be treated with suspicion, which Millbank (2009a) criticises in the context of asylum claims (see Introduction).

Trans people who had applied for a GRC already or considered doing so at some point were acutely aware of this official sense of suspicion that could only be assuaged by providing specific types of evidence and narratives. The GRA in this sense connects to the "wrong-body" narrative that is often present in the medical literature on this topic and which some commentators, like Stone (1994) criticise. In fact, Hines (2007, p.63) highlights that trans people in the UK when accessing medical services today still use the kind of narratives that they think are most likely to be accepted by officials, rather than providing an accurate account of themselves, which they fear may potentially lead to a denial of medical treatment. The GRA does not just take up the medical narrative of the "wrong body"[22] but ensures that this is perceived as the most viable narrative for those desiring legal recognition of their gender. More recently Preciado (2013, p.257) has

[22] In fact Stone (1994) highlights that trans people in America in the early days of gender identity clinics, rather than actually describing how they experienced their gender identity, simply presented the dominant narratives set out in medical textbooks if they wanted access to medical treatment (for a detailed discussion of this see e.g. Stone, 1994; Cromwell, 1999; Bolin, 1998).

described the medical treatment of trans people in France and Spain, which largely draws on the same guidelines as the American and English system, as requiring the deployment of "a series of calculated falsehoods" and the rewriting of history if one wishes to truly conform to the label of "transsexual" (Preciado, 2013, p.398). It is highly likely that trans people interested in legal recognition will similarly match their narratives to the official ideal in order to obtain the services they want and need. When questioned about how he expected the application process to work, Ian stated: "I expected the process to work, which it kind of didn't. […] It was more of a foregone conclusion, they should have given me this months ago, it was nothing but a hassle." Especially because the long wait for a GRC delayed his wedding, he felt very unfairly treated throughout the process, which seemed to be unnecessarily complex and bureaucratic. Cameron explicitly echoed a criticism made of many bureaucratic processes namely that it is primarily "a lot of red tape." This criticism implies both that such processes are both unnecessary and that they are inefficiently executed.

Dan specifically noted that throughout the process he felt pressured to provide a certain image of himself: "It makes you feel powerless, you have to convince others and rely on other's discretion. The cost as well is ridiculous. […] You get the impression that people are looking for a specific thing, it's very stereotypical. You just pick out certain things that match that narrative." In line with these statements, many interviewees gave the impression that they were paying lip service to the requirements of the GRA. While this did not necessarily involve a questioning of those requirements, it also is not an exact reiteration of the norms espoused by the application. The sense of being disbelieved by officials also fundamentally impacted many people's understanding of the GRA. Because the experience of being treated as untrustworthy was so pervasive within the medical system, interviewees consequently imagined the Gender Recognition Panel (GRP) to be equally suspicious of their claims. In practice, these imaginings seem to be largely supported by the application process.

Additionally, the guidelines suggest that the applicant should provide a "selection of documents" which should be around five but not "a large number of documents unless absolutely necessary" (HM Courts & Tribunal Service, June 2016, p.13). The same document also repeatedly mentions that all applications are dealt with on an individual basis and as such only general guidelines can be provided. While this is probably factually accurate it also creates a sense of uncertainty as the advice does not even offer any guidance about which documents might be the most persuasive. For example in most

contexts where one has to provide proof of one's identity, such as a Criminal Record Check, a passport carries more weight than a utility bill. This vague and unspecific guideline is likely to create unnecessary anxiety and worry for applicants who have no way of determining how likely the granting of their application is based on this requirement.[23]

Many interviewees commented on the lack of clarity and available information in this area: "It was reasonably clear but it took some getting together, about two weeks. It's a bit vague in what they want. […] The evidence thing could be cleared up a bit, I just went by how much I could stuff into an envelope" (Gemma, interview notes, 2014). Although Gemma found the application form itself relatively clear, others, such as Fiona found the form more difficult to understand: "There really is nowhere else to go for advice. Clear instructions are just missing, it makes you actually worried about accidentally committing fraud." This lack of clarity is particularly striking, and seems intentional, considering that other parts of the application are meticulously detailed. For instance, the statutory declaration guidance contains very specific guidelines as to who can legally verify this declaration. Similarly, as mentioned above other types of official identity confirmation procedures generally provide clearly detailed criteria and requirements. Thus the omission in regards to supporting documents seems to create an almost intentional sense of uncertainty for applicants. Additionally, suggesting that applicants should provide at least five documents sets a particularly high standard for proving one's identity. In fact this makes GRC applications more thorough than Criminal Record Checks, which only require three different forms of identity documents. The notion that individuals may in fact wish to change their gender to escape a criminal record was actually mentioned several times during the debate on the GRA (Baroness Buscombe (House of Lords, 18 December 2003, Column 1294)), which may explain why so many documents are considered necessary. Unsurprisingly, to date there have been no reports of such an incident occurring. However, this does highlight the suspicion trans people are faced with and the extent to which this appears to be based on purely hypothetical scenarios rather than actual facts or evidence. Requiring at least five different official documents to cover a range of two years suggests that trans people cannot be trusted when making statements about their gender identity and that their claims should always subject to special scrutiny and supported by external evidence. Unsurprisingly, this pervasive suspicion creates

[23] If an application is refused applicants can appeal if they think the decision was wrong on a point of law. However, at present there seems to be no records of such an appeal taking place.

anxiety in applicants, who in turn often feel they need to submit far more than the minimum amount of documents merely to be believed.

Overall the type of evidence that is required for this section mainly takes the form of official documentation. The guidance document (HM Courts & Tribunal Service, June 2016, p.6) suggests that applicants provide "a passport, driving license, letters or documents from official, professional or business organisation or utility bills" that reflect one's "acquired" gender. However, overall these are all official documents, which are generally issued by the state or private businesses. This means that most "trustworthy" evidence is either produced by the state itself or by business, which could perhaps be read as an extension of a capitalist system of governance. The application excludes any personal evidence, such as photographs or letters from friends or family. This could be connected to wider suspicions around the validity of trans people's identity claims, which is why specifically official sources are required for this type of evidence. Interestingly, during the debate stage in the House of Commons on the GRA, government ministers suggested that under this section family members would and should have an opportunity to give evidence (David Lammy MP (House of Commons, 23 February 2004, Column 58)). However, this suggestion never seems to have been implemented in practice. Instead the type of evidence required to meet the two year requirement is also likely to give an indication of an applicant's employment status and socio-economic position, which presumably should have no bearing on the application process itself. However, following Irving (2009), it may be that the GRA does produce subjects who not only have a specific gender identity, but that also meet certain economic or class-based ideals.[24] Interestingly, the evidence requirements also seem to at least partially erase the social aspect of sex/gender as it is expressed and constituted in interaction with others.

Although the application form itself does not require a change of name via deed poll to be included, it implies that a change of name has to take place prior to the application. The charity GIRES (2015) – The Gender Identity Research and Education Society – specifically states that it is "pointless" to apply without having changed one's name to one that is appropriate to the "adopted gender". Although this is most likely accurate, where it leaves those with gender-neutral names or names that may not be easily recognisable as gendered in an English-speaking country is unclear. This suggests that appropriately gendered subjects are not only produced through explicit body modifcation

[24] This is at least partially supported by the fieldwork material – those who had successfully obtained a GRC tended to be older and financially stable.

required by the government itself, but also implicitly through the modification of cultural gender signifiers such as first names, which is enforced by other members of the same social group and not just government officials.

Medical Reports

Following Hines (2007, p.59) I would suggest that the GRA is "shaped by a medical perspective of transgender". However in practice the GRA is not just shaped by medical definitions but rather incorporates and propagates them by not just utilising the medical term of "gender dysphoria"[25] but more poignantly by making medical statements the key component of the evidence, which applicants have to submit in order to apply for a GRC. Although in practice most medical practitioners are likely to be aware of what these reports should contain, the application form itself offers no specification on this. Instead applicants have to refer to the guidance notes and advice provided by support groups, which is a practice specifically recommended by the Courts and Tribunal Service itself.

The guidance note is somewhat more helpful on this part of the application. The government suggests that:

> "This report must include specific details of your treatment. For example exactly what treatments (eg hormones) you are taking and whether you have undergone, are undergoing or are planning to undergo surgery for the purpose of modifying sexual characteristics. If you have had surgery the exact details of the surgery need to be included. It is not sufficient for the doctor to state "gender reassignment surgery" (HM Courts & Tribunal Service, June 2016, p.14).

This requires applicants to reveal very intimate details about themselves, albeit through a third party. Furthermore, it suggests that even practitioners cannot be believed or trusted on this issue, which is why the panel needs to scrutinise their claims in some detail. The concerns expressed by members of the government during the debate stages of the GRA are put into practice through the guidance note. The panel does not just assess the validity of trans people's identity claims, it also assesses the validity of the diagnosis made by qualified medical professionals. Again, this mirrors the asylum process to the extent that the default presumption of officials seems to be that claims should be doubted and

[25] The requirement for an official diagnosis also means an application is impossible unless one accepts being patholigised in the first place (see, e.g.Butler, 2004)

disbelieved. However, the fact that medical knowledge and expertise also come under scrutiny in this context suggests that law here functions as the final arbiter of identity claims.

Indeed some people who had applied for a GRC already were acutely aware of the fact that the requirement for medical evidence imposed a further test or barrier on them. Henry said that for him: "The form was straight forward enough, but the medical evidence was a bit of a pain. […] It felt a little bit intrusive and it is just not justified to ask for invasive details like that. Why do I have to jump through all these hoops?" However some interviewees agreed with the government's reasoning behind requiring medical information: "I can sort of see why they need it. It shows determination to change […] without the evidence you could be anyone applying for it" (Gemma, interview notes, 2014).

It is telling that even those subject to the intrusive demands of the GRA echo the official suspicion behind the evidentiary requirements. The GRC seems to act not just as a mechanism for a change of gender, but also as the ultimate determiner of one's identity, which in turn justifies intrusive demands for disclosure. This, for some applicants, creates an inherent tension throughout the application process. Resistance to disclose intensely private medical information comes into conflict with the need to obtain a GRC, in part to avoid future instances where disclosure might become a necessity.

Also, the requirement for medical evidence is not a neutral demand, which could be satisfied by any factual patient assessment. Instead, the language used in the guidance note, as well as in the application form itself, implies that some type of surgery is expected to take place and applicants are presumed to undergo continuous hormone replacement therapy in line with their gender identity. A similar emphasis on the importance of surgery and hormones as evidence can be found in the explanatory notes to the legislation (legislation.gov.uk, 2004) as well as in the specific advice available to medical practitioners: "If the patient has not had surgery then the report must explain why" (HM Courts & Tribunal Service, October 2014, p.2). The expectation is that surgery should take place and all official documents suggest that this is the norm, with any deviation from it requiring an official explanation. Similarly, it is stated further on in the same document that:

> "You should list the drugs prescribed and the specific surgical procedures that your patient has undergone for purpose of modifying sexual characteristics. If your patient

> has not undergone surgery for this purpose, one of their reports will need to explain why not" (HM Courts & Tribunal Service, October 2014, p.2).

While there is an acknowledgement that not everyone will have undergone surgery, taking hormones is simply presumed across all different documents and even in advice from charities. Although surgery may be more drastic, hormones nevertheless play a crucial role in creating an appearance in line with social norms concerning gender, especially for trans men.[26] Thus, the ideal applicant should clearly conform to specific (Western) aesthetic gender norms in their appearance. Treating cross-gender (in the sense that they do not match the gender assigned at birth) hormones primarily as evidence of a "valid" desire to change sex/gender, or to be legally recognised in that sex/gender, obviously ignores the fact hormones do not just affect a person's sex/gender but a wide variety of bodily functions and organs in a less desirable way, including bone density and cholesterol levels.

Davy (2012, pp.82-83) highlights that hormones, especially for trans men, are considered "the primary positive step in relation to transitioning" and notes that the resultant side effects were considered "manageable" by all but one of the participants in her research. She also suggests that many trans men modify their appearance by working out at the gym to achieve a more muscular body, irrespective of whether or not they take hormones (Davy, 2012, p.87). Despite the fact that this is an activity aimed at appearing more masculine, there is no suggestion in the GRA or any of the supporting documents that it would be considered as evidence of "commitment" to a male gender identity. An argument for focusing primarily on surgery and hormones as evidence of "commitment" to a gender identity may be that they produce permanent results in contrast to less permanent forms of body modification, such as the wearing of a binder or regular weight lifting. However, this ignores several more nuanced aspects of all these body modification processes – for instance, some of the visible effects of testosterone fade over time if use is discontinued by someone whose body still produces oestrogen. Conversely, wearing a binder over a prolonged period of time actually causes permanent changes not just to the outward appearance of a person's upper body, but also to bones and musculature. Thus, the main difference between the officially "approved" indicators of

[26] Although hormone treatment is used by trans women as well as trans men, the effects of testosterone on a body assigned female at birth are generally more visible and permanent than the effects of feminising hormones on a body assigned male at birth. While feminising hormones primarily cause changes in fat and muscle distribution, and some breast development, testosterone causes very visible facial and body hair growth (depending on ethnicity and genetic predisposition), male-pattern baldness (depending on genetic predisposition), a deepened voice and clitoral enlargement, the combination of which allows many trans men to "pass" as cisgender without ever undergoing any surgery (Coleman et al., 2012).

commitment to a gender and those that are not mentioned in the forms is not qualitative, but simply that hormones and surgery are both recommended medical procedures carried out under the supervision of a specialist, whereas other types of body modification rely primarily on the agency and aesthetic concerns of the individual in question.

Although the guidelines and the application form do not suggest that surgery is a requirement, the legal campaign group Press for Change suggests that the recognition process will be easier for those applicants who have undergone surgery. In fact, it states that those who do not wish to have any type of surgery should tell their doctor not to declare this in the medical report as it may cause the panel to doubt their commitment (Press for Change, 2014). Obviously, this is not an official guideline, nor is it endorsed by the government or tribunal services; however, the fact that the government's own website suggests that applicants consult groups like Press for Change before applying implies that views expressed by such groups may influence applicants and their applications.

Lord Filkin (House of Lords, 29 January 2004, Column 375), in the parliamentary debate around the GRA specifically mentioned that panels should scrutinise those applications, where surgery had not taken place, more closely as this may be evidence that "at heart there was doubt in the person's mind about whether he or she was going to make a committed and permanent change". Based on the literature available from Press for Change and comments made by members of the GRP, this does indeed seem to be the case in practice (UK Trans Info, 2011b; UK Trans Info, 2013; UK Trans Info, October 2015). This can also been seen as evidence of some degree of identity policing of trans individuals by members of the same group. [27] Considering these requirements in light of the normative underpinnings of the GRA (see Chapter 2) the intention of this process is to produce normatively gendered bodies and to restrict legal recognition primarily to these. Similarly, Press for Change assumes that those who are applying will be undergoing some type of hormone therapy. In fact, the possibility that someone may not be using hormones is not even considered in their guidance for the application process, whereas the fact that someone may not be willing to have surgery is at least acknowledged. This suggests that even support groups are operating on the assumption that those applying for a GRC will fit within the gender binary rather than for example identify as genderqueer.

[27] This type of identity policing which often favours very heteronormative modes of existence has in fact been widely discussed in the context of the medical transition process (Davy, 2012; Ekins, 2005; Hird, 2000).

This is despite the fact that there are valid medical reasons for not undergoing hormone treatment, primarily the risk of liver damage (Moore et al., 2003).[28]

GIRES ((2015) actually describes the recognition process as a “somewhat traumatic experience” and a “challenge to be faced up to”, largely because it forces trans people to engage with their previous life history in a way that may not necessarily be comfortable. This suggests some degree of awareness of the potentially invasive or intrusive nature of the legal process in this context. Although GIRES’ advice focuses less on the level of detail required for a suitable medical report, it nevertheless highlights the importance of one’s gender identity being considered as “permanent” by medical professionals. Similarly to Press for Change, GIRES suggests that applicants need to show that they have taken “major steps” to modify their appearance.

Statutory Declaration

Section 7 of the application form (HM Courts & Tribunal Service, November 2016, p.9) asks applicants to provide a statutory declaration in regards to the evidential requirements of the GRA (s.3(4) Gender Recognition Act 2004).[29] Although this may be standard practice for an official change of personal details, it also serves as a another layer of "official validation" of trans people's identity claims as the declaration will need someone to act as a witness in an official capacity.[30] This seems to further emphasise the importance of official – either legal or medical – determination of one’s identity.

The suggestion that the applicant needs to live in their gender "full time", which is repeated throughout most of the documents combined and conflated with an insistence on permanence, is again repeated in part three of the statutory declaration. From this statement alone it is not entirely clear what it means to be for example full time male, rather than part time, or how it would be possible to enforce this requirement at all. Indeed Emily Grabham (2010) argues that the permanence requirement itself is redundant and administratively unenforceable in practice. This section highlights the underlying cisnormativity of this declaration, as only trans people are required to commit to living in

[28] Similary the fact that hormones cause a large amount of physical changes not all of which may be desirable, for example trans men who take testosterone will experience their voice changing which can be detrimental for those with an interest, professional or otherwise, in music (Constansis, 2008).
[29] A matching statutory declaration now insists for spouses of applicants, who in their declaration have to confirm that they intend to continue their relationship (HM Courts & Tribunal Service, 2014b).
[30] Until 2016 the statutory declaration was part of the application form itself, but now needs to be submitted as a separate document.

their gender permanently or "full time", whereas those who are presumed to be cisgender are subject to no such requirements to prove the validity of their identity or day to day existence. The use of “full time” as the specific determinant of one’s gender is also striking in that it is a term normally applied to labour conditions, which seems to suggest a particularly performative conceptualisation of gender in this context that may be different from the type of gender performance expected of cisgender people. Similarly, only trans people are expected to demonstrate that they are “committed” to their gender identity by undergoing medical treatment.

The application form concludes with a statement reminding applicants that "to make a false application is an offence" (HM Courts & Tribunal Service, November 2016, p.16). Although this may be a standard statement on an official form such as this, it nevertheless suggests that some applications, and as such claims about the applicant’s gender identity, may indeed be false or inauthentic. In practice this would most likely refer to the personal details or evidence provided by the applicants.

Waiting for a Decision

Once the application itself has been completed applicants have to wait for it to be processed by the panel. Roughly 90% of applications for a GRC each year result in the granting of a full certificate; there is little information available on why the remaining 10% are rejected (Ministry of Justice, 4 April 2013, p.6). Only a quarter of applications for a GRC each year are made by trans men, while the majority are made by trans women (Ministry of Justice, 4 April 2013, p.5). Although this may reflect more general accounts of the proportion of trans women to trans men within a given population, it may also be indicative of other factors that are likely to influence decisions about the application process and access to both medical treatment and legal recognition procedures. Coleman, Eli, et. al (2012, pp.169-170) provide an overview of existing research on the prevalence of transgender people within society and suggest that the figure seems to be between “1:11,900 to 1:45,000 for male-to-female individuals (MtF) and 1:30,400 to 1:200,000 for female-to-male (FtM) individuals”.[31] However, they also note that trans men are often much less visible to researchers and medical staff and as such existing figures may be

[31] However, it should be noted that this non-place specific figure also suggests a biological conception of transsexuality, i.e. a presumption that it is constant across place and time and not affected by social and legal conditions in a given society.

somewhat skewed.[32] The high number of successful applications may suggest that the evidence requirements discussed here are not enforced in an unduly harsh manner by the panel, however there is also likely to be a process of self-selection at work here. Considering the amount of official advice, as well as that provided in a semi-official capacity by charities and support groups, it is likely that those who apply will strategically modify their application to obtain a favourable outcome, while those who are unlikely to be able to meet the requirements may be deterred from applying for a GRC in the first place. Indeed this was confirmed by interviews, as those who presumed they were unlikely to be granted a GRC, had generally decided not to apply.

Overall, the description of the application process provided by charities and support groups is not entirely favourable, with the panel being described as both “pedantic” in regard to their interpretation of medical evidence, and “delphic” in the advice they provide to unsuccessful applicants. Charities such as GIRES are generally also very clear about the fact that medical reports are expensive, especially as many trans people rely on private medical treatment, which is easier to access and, unlike the certificate, does not allow for a fee waiver. This may prevent those who lack sufficient financial resources from applying, even if they meet the criteria set out in the GRA. Although GIRES’ description of the panel itself is not entirely positive, it nevertheless does not criticise any of the requirements outright, but merely provides advice on how to best navigate them. Its focus is thus on providing practical advice and suggestions rather than on deterring trans people from applying more generally. It is worth mentioning that GIRES and Press for Change are both suggested as resources for additional advice by the government, which means they implicitly become part of the recognition process through the advice they provide to applicants. Thus, charities and groups may serve as an extra layer of reinforcement for the gendered rationalities of the GRA.

The Act of Filling out a Form

Beyond considering the specifics of the GRC application form, it may be useful to think about how the form functions as an object in itself.[33] If, following Jacques Derrida (2005,

[32] Incidentally more recent studies on adolescents diagnosed with gender dysphoria seem to suggest that there may in fact be an equal number of trans men and trans women (Cohen-Kettenis and Pfäfflin, 2003)
[33] Unlike other types of government processes, the GRC application process (GOV.UK, September 2016) cannot be completed either in person, electronically or over the phone, but instead takes the form of a

p.41) paper is the "thing that can be felt, seen, and touched, and is thus contingent" then the fact that the application form and the resulting certificate are paper is an important element of the gender recognition process, as the paper form[34] makes gender and gender history tangible, material, perhaps readable for officials. Indeed, Derrida (2005, p.44) suggests that paper itself has always had some degree of legitimising force, which is the ability to credit or discredit specific claims and identities. Consequently the paper application for a GRC, and the hopefully resulting certificate, have the power to legitimise or delegitimise specific gender identities through the act of granting or denying a GRC.

Derrida (2005, p.54) argues that paper is an inherent part of a chain of act and as such is generally inseparable from “the force of law”, which it symbolises and embodies: "Paper often became the place of the self's appropriation of itself, then of becoming a subject in law." Although Derrida here discusses the slow disappearance of paper from modern life, this statement nevertheless still seems to hold true for the GRC and GRC applications, which exemplify this specific process of becoming a legal subject. For Derrida specifically the signature on a form becomes to represent this self-identification with a statement or piece of paper: "[...] the ultimate juridical resource still remains the signature done with the person's "own hand" on an irreplaceable paper support." Based on this, specifically the statutory declaration in the GRC application, which needs to be signed by the applicant, may carry special importance or relevance in the application process.[35] Especially if, according to Derrida (2005, p.57), it literally represents the body of the individual on paper. In the context of the GRC it may actually serve to pin down bodies and genders that are officially perceived as too immaterial and in need of stabilisation and regulation. Interestingly in the case of the GRC, it effectively requires self-identification with a signature that may be new or changed to match the appropriate gender. Effectively the signature authorises a text or document, which simultaneously authorises the (new) signature As such the process of "appropriation of itself" is laid bare in the application form not just by the information an applicant has to provide, but also by the physical act

paper application that needs to be posted directly to the Gender Recognition Panel, together with supporting evidence.

[34] Although the form can be downloaded electronically, it needs to be submitted as a paper hardcopy together with the relevant evidence. Although many official procedures can now take place entirely electronically, such as for instance the filing of one’s taxes, it is notable the specific gender certification process of the GRA still relies fundamentally on paper as its primary medium for transmitting and verifying information.

[35] Although in theory it would be possible to complete most of the application form electronically, the statutory declaration requires an original signature by the applicant as well as a signature by an official witness (see Appendix 3) (cf. Grusin, 2006 on the iterability and alienability of electronic signatures).

of signing a document which tells a story about one's gender identity. Paper's specific role in this process, as suggested by Derrida (2005, p.56), may also explain why the additional evidence, which this process requires, is likely to take the form of more paper documents as this is further material evidence of this process of self-identification with what has been stated on the paper of the form.

"For a certain time to come, a time that is difficult to measure, paper will continue to hold a sacred power. It has the force of law, it gives accreditation, it incorporates, it even embodies the soul of the law, its letter and its spirit" (Derrida, 2005, p.58). Following this it seems unsurprising that it is not possible to submit an electronic copy of the application form, rather than a paper hard copy. Filling out the application and posting it to the panel may as such be literally seen as submitting to the power of the law and fitting one's narrative and identity within legal terms and limits. However, the actual GRC, which supposedly carries or embodies the legal accreditation of one's gender, is rarely used by most people and has seemingly little relevance in people's everyday lives. Does this then mean the individual's submission to law becomes irrelevant or even unnecessary? Far from it; Derrida notes that to be "paperless" or more generally to lack the paper that supports one's identity claims, be this a passport, visa or GRC, has very real consequences for people in the form of discrimination, marginalisation and even deportation. In his discussion of the legitimising force of paper Derrida himself makes the link to asylum claimants and illegal immigrants and the issue of possessing "papers" more generally. Similar to trans people, both groups need "papers" or legitimisation of their identity/status through paper as their own statements about, or understanding of, their identity does not carry sufficient persuasive weight. He suggests that despite moving towards electronic forms of storing information, society seems unable to move away from this paper based form of legitimisation and regulation of bodies. Legal protection and rights continue to be based on the possession of certain papers but papers also only legitimise those specific aspects of identity which can be put down on paper and which can be included in the original form that the final paper is based on (Derrida, 2005, p.60). Effectively the gender recognition process, in stark difference to earlier cases like *Corbett v Corbett* seems to define sex/gender not primarily through biology, culture, society or aesthetics/appearance but literally through what is visible on paper and through what can be proven on paper by official documents. Being "paperless" in the context of the GRA can mean the erasure or even denial of one's gender identity; it can make it difficult, if not impossible, to change a variety of different official records.

To return to the idea of paper as the place where one becomes “a subject in law” (Derrida, 2005, p.54), the GRC application may also serve in a sense as a contract between an individual and the state in regards to their gender identity.[36] The state grants applicants legal rights based on their “changed” gender identity but only as long as applicants are able to meet certain conditions, which I will discuss below in more detail. There is even an explicit financial consideration in the form of an application fee, but perhaps implicitly, having undergone or showing a willingness to undergo surgery or hormone treatment may also be seen as a type of payment made by applicants in return for legal rights and protection. Michel Callon (1998), drawing on Goffman’s work (1971), argues that contracts function in economics in the same way that Goffman’s frame functions in interactions between individuals, i.e. both establish a boundary and a limited set of acceptable and expected actions. This means that contracts stabilise and structure specific interactions at a given point in time. When applied to the GRA, the GRC may be understood as a contract intended to stabilise the applicant’s gender identity at the time of the application or at the time the certificate is granted and it specifically does so by writing both the applicants gender history, as well as their “new” state certified gender identity on paper. It also formalises and stabilises the legal relationship and interaction between the state and the applicant in regards to the applicant’s gender identity. This may perhaps by understood as result of official, although generally not explicitly expressed, fear of uncertainty, instability,[37] inauthenticity in regards to trans people’s gender identity which I discuss in Chapter 2 in the context of governmentality and the pre-GRA case law.

The GRC Application as a Social Interaction

The work of Erving Goffman (2005) on social interaction may provide a useful starting point for the analysis of an application for a Gender Recognition Certificate as not just an administrative process but rather as an interaction between an applicant, the panel, state

[36] In particular law and the GRC application process can be conceived as being situated within the public sphere in which individuals are expected to conform to the “cultural status quo” (Cooper, 1996, p.538), in this case by demonstrating acceptance of specific gender norms.
[37] Emily Grabham (2010) provides a detailed discussion of the concept of permanence as a means to counter the perceived instability of trans identities.

and law, albeit one mediated through forms and documents.[38] Although Goffman's approach to human interaction in general seems applicable to the GRA as a whole, his discussion of the concept of stigma seem particularly relevant in the context of the GRA as it may explain why trans people are consistently treated as being under suspicion in the context of the application process. Considering the notion of "stigma" seems crucial for a comprehensive understanding of the GRA as despite its appearance it is not simply a law that provides the basis for an administrative change of personal details, like for example a legal change of one's name, but it is in fact a process that is only aimed at one specific group of people which even today often face marginalization, discrimination and physical and state violence within society.

Goffman (1968, p.15) states:

"By definition, of course, we believe the person with stigma is not quite human. On this assumption we exercise varieties of discrimination, through which we effectively, if often unthinkingly reduce his life chances. We construct a stigma theory, an ideology to explain his inferiority and account for the danger he represents, sometimes rationalising an animosity based on other differences, such as those of social class."

Stigma is commonly understood as a characteristic that leads to social disgrace, exclusion and even punishment. Expanding on Goffman, Link and Phelan (2001, pp.367-368) note that the groups which are stigmatised based on their "human difference" are always to some extent arbitrary, with specific characteristics only having a stigmatising effect in a specific time and place. However, this does not mean that they do not lead to real social, economic and political discrimination. Being trans, particularly in the context of the GRA, seems to be associated with the concept of stigma as defined by Goffman (1968, p.14) with trans people being at once discredited,[39] if they are unable to pass as cisgender and also discreditable, if they are able to pass, within a wider social context.[40] Although Goffman suggests that in the context of intimate relationships most stigmatised

[38] Although actor network theory (see, e.g. Law and Hassard, 1999; Latour, 2005; Callon, 1987) could also provide fruitful insights into this area, instead, I will use Goffman's work to focus here on the specific social aspect of the application process. Unlike other legal processes, the GRC application involves no direct interaction between the applicant and the person tasked with making a decision, here the Gender Recognition Panel, nevertheless I would suggest that reading the application as a social interaction can provide an important understanding of particularly the affective element of this process.

[39] Eve Sedgewick (1990) argues that invisible identities, i.e. those that can be hidden from others like sexuality and gender identity, are subject to a particular kind of stigma, as they do not just trigger negative reactions but also disbelief.

[40] The fact that failure to disclose a legal change of gender identity through the GRA makes a marriage voidable (Sharpe, 2012), lends further support to the thesis that trans people are continuously subject to an enforced imperative to disclose their identity.

individuals may feel some form of moral obligation to disclose their stigma, in the case of trans people, at least those who have obtained recognition, the GRA actually forces this disclosure in the context of intimate relationships. Firstly, by making disclosure to spouses mandatory if one seeks to obtain a GRC; and secondly, by making marriage voidable as a result of non-disclosure. Thus, being trans and wanting to transition legally, as well as having obtained legal recognition, are both stigmatised, and the imperative to disclose not only the sex they were assigned at birth, but also, more specifically, their transgender status to presumably unknowing second parties effectively forces trans people to discredit themselves.

Goffman (1968, p.95) also highlights that most stigma carries with it a conflict between "candour and seemliness" and suggests that most people will generally favour the latter as it would simply be inappropriate to disclose some details to virtual strangers. However, the GRA leaves no doubt about the fact that absolute candour is very much required, with no consideration for what level of detail an applicant may consider "seemly" to disclose. This inherent tension about disclosure seems to be reflected in engagements between trans people and officials involved in the GRC application process. Officials frequently complain that medical reports only contain the "bare minimum" and are as such insufficiently detailed.[41] Trans people are not "merely" stigmatised but there also seems to be an impetus to continuously discredit them, in Goffman's terms, or to make their transgender status officially known at specific moments, usually in the context of intimate relationships or circumstances where they may pose a purely hypothetical danger (Schilt and Westbrook, 2009) e.g. Lord Moynihan's comments on trans women's participation in sports which he argued could cause cisgender women to be at greater risk of injury (House of Lords, 18 December 2003, Column 1320).

Goffman (1968, pp.24-25) specifically suggests that stigmatised individuals may feel that they are constantly subject to a greater degree of public scrutiny and as such are forced to scrutinise their own daily conduct in an effort to match it to what is expected of them. This observation seems an appropriate description of the situation many trans people find themselves in, especially if they want to pass or "go stealth", as illustrated for example by the variety of websites, which are dedicated to providing advice on how exactly one

[41] The deputy president of the panel stated that "the Panel often receive the bare minimum of evidence from applicants and issue directions to see more evidence" (UK Trans Info, 2008, p.5). This appears to be an ongoing conflict, with more recent meetings still resulting in similar complaints by officials. In a meeting in 2013 it was again noted that "[t]here are still problems with obtaining details of a surgery in some cases" (UK Trans Info, 2013, p.2).

should dress to achieve a more masculine or feminine look.[42] However, this particular form of self-consciousness is also officially encouraged through the GRA as those who apply for a GRC, or any medical treatment preceding it, have to meet a much higher standard of proof in regards to their identity claims than cisgender individuals, which may be based on the fact that trans people make a demand of the state here which requires an active response whereas cisgender individuals generally make no such explicit demands of the state.[43] Expanding on Goffman's work on stigma, Crocker and Major (1989, p.608) note that stigmatised individuals use a variety of strategies to manage their self-presentation towards others and to protect their own self-esteem from the damaging consequences of stigmatisation which means that being stigmatised or being part of a stigmatised group does not necessarily lead to low self-esteem. They specifically note that stigmatised individuals often make ingroup comparisons to protect their self-esteem (Crocker and Major, 1989, p.614). This seemed to come up several times in interviews especially in regards to the forms with many interviewees noting that it was easy for them but they knew others who struggled or might have struggled. One Interviewee, Ian, specifically referred to his educational background, which enabled him to deal with the challenges that arose during the transition process: "I got a good level of education, so I didn't have too many problems with that. […] I printed out the statute, this is where education got into play, but for that I had to understand enough about law to know what a statute is." Similarly, Ben stated*:* "It was easy for me but it would be really difficult for people with disabilities and dyslexia. […] The forms are really not very accessible for some people I know with [learning] difficulties."

In this sense then comparing oneself to hypothetical others who may experience greater difficulty may also allow individuals to reclaim some authority and self-esteem in a highly intrusive process. It may also allow some to project any difficulties they experienced onto others, and so being able to simultaneously accept and criticise the requirements of the GRA. Interestingly Goffman (1968, p.83) also notes that "the more there is about the individual that deviates in an undesirable direction from what might have been expected to be true of him, the more he is obliged to volunteer information

[42] The "The FTM's Complete Illustrated Guide to Looking Like a (Hot) Dude" (2015) is perhaps the most well known of these guides, but there also exist a variety of others (see, e.g. Ryans, 2015), as well as dedicated video channels that cover everything from makeup tutorials to exercise guides (Turner, 2015; Sanjati, 2015).

[43] This may be comparable to the burden placed on prospective adoptive parents to prove beyond all doubt that they are fit parents; a requirement not placed upon those who have children without state involvement. See, for instance Hicks (2006) for a discussion of the stigma affecting gay men who adopt.

about himself".[44] I will discuss this imperative for disclosure in regards to specific stigmatised minorities in more detail further on.

In his essay "On Face-Work" Goffman (2005, p.11) suggests that a general rule applies to most human interactions:

> "The combined effect of the rule of self-respect and the rule of considerateness is that the person tends to conduct himself during an encounter so as to maintain both his own face and the face of the participants."

Obviously, GRC applications are not made face to face, but Goffman (2005, p.33) also applies this schema to mediated interactions.The fact that the panel assessment is fundamentally contrary to this rule may create some discomfort on behalf of applicants. Instead of taking an applicant's declaration of gender to be accurate, the panel is supposed to explicitly question and assess it, which means applicants are implicitly subject to disbelief and doubt.[45] In fact members of the GRP described their role as "critically evaluating the evidence" (UK Trans Info, 2007, p.2), which seems to suggest that the initial orientation of the GRP towards application is one of suspicion. Goffman (2005, p.31) suggests that an individual's willingness to perform face-work and to help others in turn perform theirs shows a general adherence to basic rules of social interactions and makes individuals less vulnerable in these interactions. In the context of the application process trans people are denied a chance to interact face to face with the panel[46] and are instead put in a position where their identity claims are doubted, not just by someone in front of them, but by an anonymous, faceless groups of others. This creates an inherent power imbalance and vulnerability in this specific social interaction, which is likely to contribute to the feeling by some that this is a "traumatic" process. To successfully obtain a GRC applicants effectively have to provide a convincing "dramatization" of the gender identity they want to have legally recognised (Goffman, 2012, p.51) the evidence they provide does not simply have to be accurate but should also create a very specific impression, what Goffman (2012, p.56) might term "expressive stresses" in the audience, in this case the Gender Recognition Panel. They have to show

[44] Although in this passage he is primarily describing the American middle-class of his time, this nevertheless seems apt in regards to the GRA, which places, as discussed previously, a uniquely high standard of proof on trans people.
[45] Current statistics (Ministry of Justice, 10 September 2015, p.25) show that 89% of applicants are successful in obtaining a full GRC. However, at present these statistics do not show whether the remaining 11% were rejected or received an interim certificate.
[46] This seems to have been considered during earlier debates around the GRA but was not mentioned again in the final debate.

that they can successfully inhabit the gender role they now wish to have confirmed by law, however what actually constitutes a successful performance in this case is unclear.

Goffman (1963, p.7) argues that the idea of normality, and conversely of stigma, is not a "natural" one but is instead socially constructed through narratives generally provided by popular culture, bureaucracy and the medical system. Particularly the latter two seem to play a particularly strong role in defining what constitutes a "normal" gender identity of even a "normal" way of being trans in the context of the GRA. Misztal suggests that social life can in fact be understood as a "ongoing process of displaying normality". Drawing on Goffman, Misztal (2001, p.317) suggests that stigmatised individuals are under a constant obligation to adjust, i.e. to come as close to this display of normality as possible: "The good adjustment effort results in the conditional acceptance of the stigmatised, in the maintenance of social order, and in the development of tacit cooperation between "normals" and "stigmatized". As such the GRA may actually codify this adjustment effort by setting out, or attempting to do so, what is required for the display of a "normal" gender identity, which may also require the disclosure of one's transgender status in specific contexts, such as marriage. The evidence that is required suggests that ideally applicants should not just show that they inhabit the role of the ideal transgender person, i.e. one who is subject to medical supervision and accepts the recommended "treatment" in the form of surgery and hormone therapy, but one of a productive liberal subject who can show economic participation in the form of payslips and bills. As such applicants have to make sure that they communicate only information, or control the information communicated by others, in such a way that it only produces the intended expression, i.e. that of someone wishing to transition without disrupting the binary sex/gender order either in their actions or appearance. In turn, the panel's examination of the medical reports, which are supposedly the main part of the application process, may be understood as an attempt at an "uncovering move" (Goffman, 1971, p.18) to determine whether the claims made by applicants can be sustained under an examination. Interestingly Goffman (1971, p.58) suggests that the more an observer distrusts a subject, the more they will want to rely on expressions that cannot be fabricated. If this holds true in regards to the GRA then the reliance on evidence provided or created primarily by those other than the applicant, medical professionals, employers, utility companies, may be seen as a clear sign of distrust on behalf of lawmakers and panel members. This becomes readily apparent in repeated complaints by GRP panel members about a lack of sufficiently detailed and coherent evidence, despite acknowledging that this evidence meets the minimum standard of the GRA (UK Trans

Info, 2007; UK Trans Info, 2008; UK Trans Info, 2013; UK Trans Info, 2011a; UK Trans Info, 2011b). Obviously these documents could still be fabricated but seem to be presumed to carry more weight than evidence that is solely based on the applicant. In one sense these documents may also have to give a convincing (and overwhelmingly middle class) narrative about the applicant and their gender identity as a combination of bills, identity documents, employment and medical records is likely to provide a reasonably comprehensive overview of the applicant's life.

Despite taking place "on paper" and without a direct meeting between the GRP and an applicant, the application process itself can be viewed as a very specific kind of social interaction. In this interaction trans people have to convince the panel, and through it the state and law, not just that they are the gender they feel themselves to be but also that they can convincingly perform that gender to meet specific normative expectations about sex/gender. This performance takes place indirectly through the inclusion of evidence that shows that such a performance has taken place in a variety of contexts, such as the medical system and various contractual relationships. It is also an inherently imbalanced interaction; trans people's claims seem to be regarded as inauthentic and this presumption can only be rebutted through the disclosure of the most personal details and through the confirmation of those details by third parties. The transposition of the GRA into the application form effectively allows the GRP to reenact a similar type of invasive interrogation that seems to be the norm in LGBT asylum claims (see Introduction). While it could be argued that the lack of direct contact between the panel and applicants may spare the applicants some embarrassment, it also seems curious that the GRP has at times insisted that medical evidence is the most important element of the application (UK Trans Info, 2011a, p.2). Despite this insistence, the GRP is only assessing this evidence as summarised by two medical reports, rather than considering this evidence through an engagement with the person about whom those reports are written. The lack of direct contact may provide an explanation for the fact in some instances the GRP seems to utilise a wide interpretation of the GRA. For instance the GRP argues that if no surgery has taken place "a more detailed diagnosis of gender dysphoria is required" (UK Trans Info, 2006, p.4), which, while not contrary to the lack of surgery as an official requirement, seems to place a much stronger emphasis on permanent bodily modification as a requirement for a successful application. While perhaps solely based on practical considerations, the lack of personal interaction also seems to suggest that the person who is the subject of the application is almost superfluous to the process itself. Instead, "experts" create both evidence and the final decision, and are apparently in a better

position to legally and medically determine the gender identity of the applicant. This also resonates with wider debates about the convergence of law and 'psy' disciplines, which enables law to perform both control and regulatory functions (Smart, 1989). Ultimately this also means that while the application process itself can be read as a type of social interaction, gender here becomes solely a matter of medical and legal evidence (and subject to surveillance through both disciplines), while its social/cultural function and constitution are erased.

Concluding Thoughts

Due to trans people's status as a stigmatised minority there seems to be a lack of official understanding of the reality of their lives, as evidenced by the introduction of the consent requirement, the emphasis on surgery, the demand for hormone treatment, and the intense scrutiny of medical documents. The same sense of suspicion and unease about trans identity claims can also be observed both in the parliamentary debates around the GRA and in the many superfluous requirements in the GRC application process. Lastly, the GRC process is intended to produce trans subjects who are adhering as closely as possible to a cisgender model of binary sex/gender performance. Again this suggests that the ideal applicant who can successfully navigate this interaction with officials and the state itself is likely to adhere to specific class, gender and race norms, with little or no room for individual deviation.

Trans people are effectively expected to prove their "commitment" to a gender identity that is different from one that the state assigned them at birth by providing evidence of their willingness to undergo surgery. Surgery in particular seems to function in the official imagination as a disproportionately significant marker of commitment and permanence. Only showing willingness to suffer pain and risk complications seem to be sufficient evidence to cross this artificial "commitment" threshold which the GRA imposes as an additional barrier, apparently to prevent people from crossing from one end of the gender binary to the other too easily. Although this is less discriminatory than legal frameworks for gender recognition that require trans people to undergo sterilisation it nevertheless suggests a disbelief of trans people's identity claims which can only be at least partially assuaged by showing that one has/or wants to undergo some type of surgery for the purposes of body modification. The law seems unable to accept

individuals who make the conscious decision to live in a sex/gender different from the one they were assigned at birth without wanting also to match their aesthetic presentation to the one generally expected of bodies designated “male” or “female”[47].

Prospective applicants are effectively forced to accept the demands of the process, if they wish to successfully obtain a GRC. The relatively high rate of successful applications could in theory suggest that the application process is largely effective and unproblematic. However, on the one hand many potential applicants who believe they are unlikely to obtain a GRC are excluding themselves from the process. Due to widespread existing knowledge of official suspicion about their claims, those who are aware their application would not be received favourably, generally choose not to apply. The effect of this on the success rate of the GRC process is difficult to track through official statistics alone. On the other hand, even those who successfully go through the application process, or are planning to do so, do not always fully accept the demands of the GRC. While the form of the application largely obscures resistance attempts, many applicants nevertheless question the requirements of the GRA, or provide an artificial narrative that does not reflect their own lives but will likely be received favourably by the GRP.

[47] Similarly law and society more generally seems often incapable to accept the non-binary bodies of intersex people at all.

Chapter 2

A Governmentality Reading of the Gender Recognition Act 2004

In the previous chapter I provided an outline and analysis of the specific requirements of the GRC application process. Although most people only engage with the application form, rather than the GRA, it is fundamental to also consider how the application process is shaped through the GRA. In this chapter I will use Foucault's theory of governmentality to critically analyse the requirements and provisions contained within the Gender Recognition Act 2004 as amended most recently by the Marriage (Same Sex Couples) Act 2013. The GRA was at the time of its passing considered to be a progressive piece of legislation, as it allows trans people to legally change their sex/gender by obtaining a GRC. However, it contains some provisions, such as the newly introduced spousal consent amendment,[48] which have too severe an impact to be justified purely by reference to practical or administrative reasons.

This chapter will focus on the legal framework of the GRA, as well as on the preceding case law. The inclusion of the pre-GRA case law provides an important genealogy of this law, which can shed light on the specific provisions of the GRA. By highlighting the workings of power within the regulatory framework of the GRA Foucault's work on the concept of governmentality can help to highlight the intersections between discriminatory practices affecting trans people today, and the now redundant case law. It further serves to emphasise the (re)production of gender norms as part of the legal gender recognition process and the way in which the GRA draws on techniques of self-governance and responsiblisation.

[48] The so-called 'spousal veto' has been introduced to replace the previous requirement that a married applicant had to first dissolve their relationship before applying for a GRC. Instead married applicants now need to obtain written consent from their spouse before they can obtain a full GRC (Renz, 2015)

Governmentality

In the first part of this chapter I aim to provide a brief outline of Michel Foucault's concept of governmentality and its theoretical development in recent years, focusing in particular on the works of Mitchell Dean (1996; 2010; 2013) and Nikolas Rose (Rose, 1990; Rose, 1996b; Rose, 1996a; Rose and Valverde, 1998; Rose, 1999; Rose, 2000) in this area. I will argue that while Foucault himself (see e.g. , 2007, p.99) only briefly considered law within his lectures on governmentality, more recent work on governmentality by other scholars (see e.g. Rose and Valverde, 1998; Valverde, 2010; Tadros, 1998; Dean, 2013) suggests that law can be accommodated within the framework of governmentality. Therefore law makes a valid object for a governmentality-based analysis. Considering the GRA through the lens of governmentality can not only highlight some of the official rationalities connected to it, but also the ways in which it attempts to construct and shape particular legal subjects to align with these rationalities through the use of particular types of expertise, language and reason. Governmentality as such can be used as an analytic set of tools rather than as an overarching social theory itself (Rose et al., 2006, p.18). Furthermore, it can be used to explain the increasing intermingling between the GRA and medical/psychiatric discourses and forms of knowledge production about trans people, which I will discuss in the context of my fieldwork findings in Chapters 4 and 5.

In his lecture at the Collège de France, Michel Foucault (2003, p. 35) sets out that in parallel to the historical evolution from feudal society to parliamentary democracy the type of power exercised by the state also changed. Therefore the increasing emphasis on legal frameworks through which justice is administered to some extent hides the disciplinary techniques being implemented. Hence, such disciplinary power is subtler in its encouragement of specific forms of conduct. Indeed, Mitchell Dean (2013, p. 30) characterises this shift in the economy of power as an "insidious spread of techniques of domination", in which politics are neutralised and deflected onto "juridical ground". Disciplinary power as such is inherently tied to the issue of norms, "which establish the conduct required in various practices" (Dean, 2013, p.36). Norms are therefore prescriptive standards, intended to encourage specific types of behaviour by individuals and populations (Foucault, 1979, p. 21).

However, this type of disciplinary power becomes partially overshadowed in Western democracies at the end of the eighteenth century, with the emergence of a new "biopolitics" (Foucault, 2003, pp.242-243). Similar to the move from sovereign power to disciplinary power, this again involves a new object of power. Instead of operating on an individual level, as disciplinary power does, for Foucault (2003, p.243) biopolitics instead target "the human race" as a whole. Norms again, play a key role in the exercise of power in this context. They no longer target the individual, but function instead as a tool for targeting "the random element inherent in a population" (2003, p.246) and compel desirable outcomes at a population level. This allows states to achieve important goals such as population control more efficiently and without necessarily having to target lone individuals. Hence, norms provide an important link between disciplinary and regulatory power as they "make it possible to control both the disciplinary order of the body and the aleatory events that occur in the biological multiplicity" (Foucault, 2003, p.252).

Foucault (2007) first described the concept of governmentality in his lecture series *Security, Territory, Population* and further expanded on it in the following lecture series *The Birth of Biopolitics* (Foucault, *2010)*. He describes governmentality as:

> "[…]the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of a very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument" (Foucault, 2007, p.108).

In this series of lectures Foucault shifts from a discussion of biopower to a discussion of the concept of government as a form of power. Foucault's discussion of governmentality to some extent moves away from the chronological ordering of power in which disciplinary power replaced sovereign power. Instead he sketches out a triangle of "sovereignty, discipline, governmental management" in which population is the main target (Foucault, 2007). Each of these economies of power is characterised by a matching *dispositif* or apparatus through which power is exercised through law, discipline, and security. Foucault (1980, p.194) defines dispositif as a "system of relations between elements." This system is heterogeneous and consists of discourses, laws, administrative measures, etc. Thus, governmentality is in turn made up of "the institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has population as its

target" (Foucault, 2007, p.108). The aim of this type of governance is to regulate populations as efficiently as possible with a minimum of expense and actively disciplinary measures.

Governmentality is used by Foucault to describe specifically those forms of liberal governance developing during and after the nineteenth century. In fact, Rose (1999, p.22) suggests that all modern exercises of power, especially those described in Foucault's terms as discipline and normalization, take place in the context of government and governmentality. While the object of modern governmentality is essentially the population as a whole, individual governmental regimes can focus on more specific groups as objects in need of regulation (Dean, 2010, p.29). This new form of government relies not just on certain types of language but also on forms of knowledge production which create the language needed to govern and describe the objects of such governance (Rose, 1999, pp.29-30). This knowledge and the truths it produces serve to create new categories, which in turn create new subjects described by those categories. While at the same time only imbuing them with a limited notion of individual freedom (Rose, 1999, p.47).

Instead of treating such freedom as a problem to be managed, modern modes of governance also encourage and value a limited conception of individual freedom. Rose (1996b, p.45) argues that liberal democracies are specifically built around the notion of individual freedom and the protection of rights to such an extent that many governmental norms and principles incorporate and champion individual freedom. However, freedom in this sense is carefully delineated by processes of governance. Dean (2010, p.193) also highlights this limited notion of individual freedom as central to neoliberalism more generally. Indeed, modern forms of government fundamentally rely on this type of freedom and encourage people to, in effect, govern themselves (Rose, 1996b, p.63) as opposed to interfering in their lives in a more disciplinary way. Walters (2012) argues that, hence, governmentality as an analytical framework is particularly well suited to the analysis of contemporary liberal societies because it is capable of taking into account that governance is no longer limited to the state and other key institutions such as religious bodies, but has also become an individual project as exemplified, for instance, by the proliferation of the wellness and diet industry (see, e.g Walters, 2012, p.38-39).

Rose (1999, pp.92-93) suggests that combining individual freedom or autonomy with those types of knowledge centered around technologies of self-knowledge and improvement means that the responsibility for monitoring individual behaviour effectively moves from the government to the individual under the guise of autonomy and freedom. In particular, the use of therapeutics (Miller and Rose, 2008, pp.170-171), which essentially serves to reconstruct the experience of "distress" not as something that is caused by outside factors, but something that is due to the pathological behaviour of the individual, marks the rise of individual rather than state responsibility for life choices and welfare. This in turn means that individuals have a duty to become "experts" themselves and modify their behaviour in accordance with their newly acquired knowledge of what constitutes desirable ways of being. Rose (1999, pp.86-87) seems to suggests that this explicit focus on individual freedom can cover up some of the underlying normative principles that are the foundation for processes of governance. For example marriage is presented as individual lifestyle choices made by "autonomous individuals", without any apparent governmental influence on their decisions. Individuals are subtly encouraged to improve themselves and aspire to a state of being that, through the proliferation of technology, mirrors the ambitions of various authorities (Rose, 1990, p.213). However, as Rose notes, authorities as well as assemblages of technologies are varied and heterogeneous and as such the ultimate outcome of a governmental programme is unlikely to directly reflect one specific rationale but rather is bound to contain sometimes contradictory elements of several different rationales.

While many governmental programmes rely on technologies of self-regulation (Miller and Rose, 2008, p.39), governing through the encouragement of particular forms of subject and identity formation (Rose and Valverde, 1998) finds a particularly obvious expression in state attempts to regulate gender and sexuality (Valverde, 2009, p.91). This is particularly relevant in regard to the GRA, which, at least superficially, is primarily concerned with individual choices rather than the active shaping of society in a specific way. For instance, non-binary gender identities are not criminalised. In effect, trans non-binary people are not breaking the law by refusing to adhere to normative portrayals of gender. However, the refusal to grant legal recognition to non-binary gender identities encourages and implicitly privileges certain types of gender expression (see, e.g. House of Commons, 01 December 2016). As Irving (2008) suggests, allowing for a legal recognition process can indirectly discourage challenges to the status quo by

discouraging certain types of behaviour in return for (limited) rights and freedoms. This attempt at identity regulation is most clearly exemplified by the fact that the GRA does not recognise non-binary forms of gender identity. It thereby clearly delineates what types of gender identity and presentation are considered legally valid and desirable (for a more detailed discussion of this issue see Chapter 5).

Rose and Miller (2008, p.98) argue that this shift from government itself being responsible for populations to individual subjects being responsible for their own lives, essentially serves to cause a divide. A divide between those who are able and willing to conduct themselves in a responsible fashion and adhere to existing norms, and those whose lifestyle is perceived as deviant from governing norms. Kinsman (1996), for instance, provides an example of this type of "responsibilizing" in his study of governmental strategies in dealing with HIV/AIDS (on reponsibilisation and HIV see also Rangel and Adam, 2014). He (Kinsman, 1996, p.394) argues that those who successfully meet the standards of responsible behaviour are in essence allowed to self-regulate whereas those who fail to meet this standard are subject to more obvious government interference through criminal law or public health measures. Similarly lesbians and gay men are encouraged to self-regulate. Whereas those who fail to meet these standards are subject to more obvious government interference through criminal law or public health measures. Access to legal recognition and rights in this case is predicated on types of behaviour considered responsible by government programmes. Arguably the GRA can be seen as serving a very similar function regarding trans people.

Rose's (1999, p.46) notion of subjectification as "simultaneously individualizing and collectivizing" suggests that governmental processes encourage not only specific types of subject formation, but also of community formation. In fact membership of a certain group creates additional encouragement for certain types of moral or responsible behaviour in line with the ethical principles of that group (Rose, 1996a, p.334). This further shifts responsibility from the state and government to individuals, who are not just responsible for their own behaviour but also that of their community members. Therefore, governmental rationales have an active investment in construction of communities and community membership. Technologies of government do not directly and artificially create a community but, similarly to subjectification, there is an incentive to reconstruct community membership a way that aligns with aims and

rationales of government.[49] This serves to encourage members to regulate each other's behaviour, making direct and potentially punitive intervention by government authorities superfluous. Indeed according to Sanger (2008, p.47) there is evidence to suggest that some trans people are openly dismissive of those who fail to adhere to traditional normative expression of gender thereby a hierarchy of acceptable behaviour is created within the community, which supports the regulatory effects of the GRA.

Considering the issue of normative self-regulation in the context of the GRA, norms affect trans people in two distinct but inherently linked ways. Firstly, in the disciplinary sense, which compels certain types of bodily existence and presentation. This becomes most readily apparent in the context of the physical transition process, which is primarily regulated by the medical system and operates most obviously on an individual level (see e.g. Davy, 2012). Secondly, in the context of the legal regulation of gender identity, norms function on a population level. They compel specific types of behaviour in response to the undeniable statistical fact that in a society where sex/gender is legally determined at birth a certain percentage of the population contests this determining. On the other hand they also affect the population as a whole as theyrestrict a change of one's legal gender to those people officially recognised as suffering from the medical condition of "gender dysphoria". Furthermore, legal and medical apparatuses and knowledge are difficult to separate in this context, as they seem to have effectively merged in the attempt to manage "unruly transgender bodies" (Monro, 2002, p.280). This merging of legal and other types of discourses (see also Smart, 1989) is by no means limited to the GRA, rather it is part of a wider shift in the working of law and the types of technologies it deploys.

Law and Governmentality

In his *History of Sexuality I* Foucault (1979, p. 144) argues that the effect of modern, normalising power is that "law operates more and more as a norm" and, as part of this process, "juridical institutions" become incorporated into a largely regulatory group of apparatuses such as medical and administrative organisations. While Foucault (2007, p.99) says relatively little on how law features in the process of governmentality, Golder

[49] This can for instance be seen in the strong connection between government, the legal system and trans support group in the context of the GRC application process as discussed in Chapter 2.

and Fitzpatrick (2009, p.34) suggest that Foucault's comment about "employing laws as tactics" implies that law essentially becomes another technology or process to be used to achieve a specific outcome. In fact, they argue that law is particularly responsive to forms of knowledge produced in different contexts and tends to incorporate them within its own framework (Golder and Fitzpatrick, 2009, p.79). This suggests that applying a governmentality analysis to laws and legal regulation is not entirely different from using governmentality to analyse any other governmental regime.

In contrast, Hunt and Wickham (1994, pp.62-63; Hunt, 1992) argue that Foucault essentially marginalises law in the context of modernity by portraying it as a primarily punitive and repressive process stemming directly from sovereign power and as ultimately superseded by disciplinary techniques. Hunt and Wickham claim that Foucault's account of law and its relation to sovereignty fails to accurately reflect the relationship between law "and modern forms of power". They suggest that, with the shift from sovereignty to discipline, biopower and governmentality, law loses its relevance, as, according to Foucault, punishment is no longer the result of violating laws, but can also be the result of transgressing norms. Golder and Fitzpatrick (2009, pp.61-67) reject this claim and argue that modern forms of power and law do in fact co-exist and sustain each other, although their particular claim is largely focused on the relation between law and discipline. One issue with Hunt and Wickham's criticism is that they overstate Foucault's intent to provide any type of legal theory. While the suggestion that according to Foucault law is mainly connected to sovereignty may be an appropriate claim regarding some of his earlier writing, particularly in *Discipline and Punish* (Foucault, 1991), it does not take into account that Foucault considered law at different times in its specific historical context and that his discussion of law is far from consistent across his different writings (see also Tadros, 1998, p.80).

Although it is difficult to claim that law takes on a central position in Foucault's work in general, its inclusion within a study of governmentality is somewhat less contentious. Hunt and Wickham (1994) provide a detailed analysis of law and governmentality. Like Golder and Fitzpatrick (2009) they argue that law is one of the many processes of governance and is in fact essential to those modern forms of government that are based on a strong notion of regulation (Hunt and Wickham, 1994, pp.108-112). They claim that governmentality is by its nature always an incomplete form of governance, which is constantly being challenged and changes itself in response to those challenges - a theory

they also apply to law as an extension of governmentality. Drawing on Weber and Durkheim they suggest that law is always concerned with achieving conformity with different norms which are established through a historical process (Hunt and Wickham, 1994, p.102). Ewald (1990), and Rose and Valverde (1998) argue that within a modern system of government norms and laws are increasingly interlinked and concerned with the shaping of conduct. This applies to the Foucauldian idea of the normalisation of behaviour specifically to laws and the legal process. As I suggest later the GRA could be seen as a clear example of this hybridisation of law and norms. Although the inclusion of law within the realm of governmental tactics does indeed suggest that law is no longer the central mechanism for regulating behaviour, this does not negate the possibility of using Foucault's theory to analyse a piece of legislation, such as the GRA, as one of the instances in which power and knowledge combine to govern subjects (Valverde, 2010). Similarly to other processes of governmentality law also draws on multiple types/areas of knowledge and expertise to define the objects of its processes. The subtle encouragement of certain types of identity formation and subjectification which can be found in other technologies of government also finds its expression in law (Rose and Valverde, 1998, p.547). While these processes of subjectification, of which the GRA can be read as one example, do not reflect one specific type of knowledge or rationality and do not go as far as attempting to create one specific and coherent legal subject, they draw on non-legal knowledges and technologies to encourage certain types "self-identification" (Rose and Valverde, 1998, p.548). This is reflected in the GRA which draws heavily on psychiatric and medical knowledge and the medical concept of gender dysphoria in its construction of the legal transgender subject.

Governmentality and Legal Technologies

Dean (1996, p.217) suggests that rather than allowing us to focus on individual behaviour, studies of governmentality can help problematise conduct otherwise viewed as "natural". They can further serve to highlight some of the unwritten rules and norms that underpin this conduct. Based on this, a governmentality analysis seems particularly appropriate in the context of legal statutes, which by themselves rarely contain explanations of their intended outcomes. Furthermore this type of approach can also outline some of the ways in which governments construct and describe populations they consider in need of regulation and management, rather than an empirical analysis of

how human subjectivity is shaped for example through psychological factors (Dean, 1996, p.225). Hence an analysis of governmentality should include a discussion of the subjectifaction of those populations that are considered to be in need of guidance or regulation through legal power and of the technologies that encourage certain types of actions and behaviour (Lemke, 2011, p.18). This seems particularly important in the context of modern government processes which often rely on individual's supposedly autonomous choices to achieve certain outcomes (Dean, 2010, p.20).

Rose (1999, p.20) suggests that focusing on how authorities want to achieve certain outcomes can help highlight inherent underlying contradictions which are often ignored when the status quo is taken for granted. One example of this in the context of the GRA would be the fact that the application process demands that applicants live in their "acquired" gender for at least two years (see Chapter 1), while at the same time parliamentary debates around the new spousal consent amendment presumed that a trans person's partner would be surprised by their application for a GRC (House of Lords, 24 June 2013). This focus on underpinning governmental rationalities seems particularly relevant to the GRA, which at first glance suggests a clear break from the decision reached in earlier cases. Following Rose's approach may serve to illuminate some of the continuing connections between the norms at the heart of judicial decision in previous cases and the supposedly more progressive piece of legislation in force now. However the link between governmental rationalities and the technologies associated with them is rarely visible. Technologies such as the GRA are not the mere implementation of one particular form of knowledge; they also serve to constitute that knowledge and are thus unlikely to ever be the direct result of the implementation of one specific rationality (Valverde, 1996, p.358).

Indeed, Dean (2010, p.32) suggests that governmentality studies often take place where there is a conflict between the expressly stated aims and methods of a regime of practice and the knowledge and rationales that they are linked to. For instance, both past and present governments repeatedly referred to the UK's status as a supposed leader in trans rights (see, e.g. Government Equalities Office, July 2016) while at the same time relying on a strongly medicalised approached to legal gender recognition that prioritises legal and medical expertise over trans people's identity claims. Process of governmentality as such relies not just on subjects with at least limited autonomy but also on technologies and mechanisms to translate rationalities "into the domain of

reality" (Miller and Rose, 2008, p.35). Miller and Rose (2008, p.28) suggest that there is a more obvious equivalence between rationalities and technologies. Modern governmentality relies on a variety of knowledges, which can produce multiple and sometimes contradictory mechanisms and technologies. What is most striking about this conception of the relationship between rationalities and technologies is that the political character of governmental rationalities is essentially lost in the translation process. Technologies serve to encourage behaviour in accordance with, sometimes contradictory but nevertheless political, norms or objectives but are rarely considered as political themselves (Miller and Rose, 2008, p.200).[50] Interpreted this way the GRA is not just a largely administrative legal framework for recognising gender identity but rather a piece of governmental technology that incorporates political rationalities and knowledges about gender, sexuality and family life. This is not to say that the GRA is the effect of a direct implementation of a consistent rationality, but that it has "a meaning and effect" (Miller and Rose, 2008, p.200) on people which is far less apolitical than an initial reading would suggest. These issues will be the basis for the following analysis of the GRA, focusing specifically on: a) the way in which forms of knowledge are used to create new subjects, and b) the ways in which legislation attempts to encourage specific types of behaviour as a reflection of political rationalities.

Governmentality studies can, however, be somewhat limited in their focus due to the relative lack of importance accorded to notions of individual agency, freedom and resistance within governmentality as an analytical framework. As discussed above, Dean and Rose (1999, p.279) both consider a limited notion of individual freedom to be central to the workings of liberal government. Rose (1999) suggests that while governmentality does indeed take into accounts certain types of individual freedom, the related concept of "resistance" is insufficient to describe the power relations at work here. This makes it difficult to fully grasp the workings of counter-hegemonic practices within the context of the GRA. While the concept of resistance has indeed been criticised for oversimplifying behaviour, Rose does not provide any alternatives for describing behaviour that intends to destabilise or question mainstream conceptions of truth and knowledge. Dean (2010, pp.81-82) is also sceptical of the use of accounts of individual experiences of oppression to contest the workings of power. He argues that

[50] See for instance Powell's (2014) use of governmentality as an analytical tool to highlight that trust in healthcare professionals is not a "natural" occurrence, but is in fact carefully managed and cultivated through a variety of tools and techniques to ensure individual compliance.

this places an undue presumption of truth on accounts made by those who consider themselves to be oppressed by existing governmental processes (Dean, 2010, pp.85-86). Even a focus on agency, especially that of minority groups, can never occur outside pre-existing power relations. This therefore makes agency merely another concept which, like freedom, is subsumed into governmentality. Indeed, Dean (2010, p.87) goes so far as to suggest that studies of such resistant agency are often incorporated into the knowledge utilised in government processes, thereby serving to improve existing forms of regulation of conduct. Although Rose (1999, p.280) acknowledges that acts of resistance to governmental technologies and rationalities do exist, he argues that these types of "minority politics" should be examined not because of the nature of individual agency utilised within them but because of the "creative" forms and mechanisms of contestation they utilise. Therefore, Rose suggests that these forms of contestation rarely lay claim to being effective political action and, if they do so, may become absorbed within the mainstream political process. Although Rose states that in this system of liberal governance individuals inherently have a right to question the normative value of the truths and technologies used within that system, his focus in this context is primarily on the techniques "minority politics"[51] utilise rather than on the motivations underpinning them (Rose, 1999, p.284).

Bell (1996, p.83) argues that some of the difficulty of defining the concept of freedom in this context stems from the fact that Foucault himself seems to suggest different approaches at different points in his writing. She suggests that while his theory describes relations of power as ultimately inescapable, thereby defining freedom very narrowly, there is also room for freedom and agency within those same power relations (Bell, 1996, p.83). For Bell (1996, p.91) argues that freedom in the latter sense can be exercised by those actively engaging with the present, rather than those trying to achieve some radically different future. This however does to some extent mirror Rose's conception of freedom as something inherent in the governmentality process. While an analysis of the governmental logics processes at work within certain types of legal regulation can reveal some of their underlying norms and intended outcomes, there seems to be some limit to the usefulness of this framework when faced with individuals who are trying to affect change or engage with legal rules in new and different ways.

[51] Rose uses for instance the very visible protest strategies utilised by the campaign group Greenpeace as one example of such politics. Perhaps the more recent Women's Marches organised as protests against the election of Donald Trump in the US (BBC News, 21 January 2017) and which encouraged the wearing of so-called "Pussyhats" (Kamerman, 21 January 2017)could provide a more current example of how creative techniques of protest are deployed by minority groups.

The Gender Recognition Act 2004 and Governmentality

Using the concept of governmentality as discussed above, the following part of this chapter will aim to provide a governmentality reading of some of the more significant aspects of the GRA, such as the combination of medical and legal techniques, the new spousal consent requirement, and the fact that there is to be no explicit surgery requirement within the GRA itself (see the discussion of this in the context of the application form in Chapter 1). The focus of this section will be on highlighting key rationalities and technologies (Miller and Rose, 2008) that first become apparent in earlier cases attempting to deal with trans people and their claims to recognition, and which arguably still underpin legislation today. Based on Rose's suggestion that governmentality studies serve to connect the past to the present and the idea of governmentality as genealogy (see, e.g. Walters, 2012), it is useful to briefly consider some of the cases[52] that took place before the GRA was passed, before attention is paid to the specific provisions contained within the GRA.

Through the analysis of both the GRA and earlier case law, it becomes possible to trace some persisting rationalities regarding gender more generally and the gender identity of trans people more specifically. I will consider three key rationalities that emerge through relevant cases and the more recent legislation. Firstly, the official understanding of trans people's gender identity as inherently unstable and in need of control and regulation. Secondly, the idea that trans people's identities constitute a form of deception. Finally, I will consider official concerns about the supposed impact of one person's transition on others. Throughout all three rationalities the use of medical/psychiatric knowledges and technologies are core elements of the law's attempts to shape trans people's conduct and identity. Therefore, I will highlight the use of such knowledges and technologies in the context of all three rationalities where relevant.

[52] Although other cases also consider the trans people's legal identities, I will focus specifically on the line of cases formed by *Corbett v Corbett* [1971] P 83, *J v S-T (J v S-T (formerly J) (transsexual ancillary relief)* [1998] Fam 103 and *Bellinger v Bellinger (*[2003] 2 AC 467 at 477).

(Trans)gender Difference

One official rationality that can be found in both case law and present-day legislation concerns the need to maintain a specific definition/construction of sex and gender. *Corbett v Corbett* ([1971] P 83), the perhaps most well known case focusing on transgender identity claims, deals with the case of April Ashley. Ashley is a trans woman who had been married to Mr Corbett for several years, during which he was aware that she had been assigned male at birth. Corbett later demanded that the marriage be declared void on the basis that Ashley was 'really' male and therefore the marriage was legally impossible or, alternatively, on the ground that the marriage had not been consummated. Ormrod J agreed and declared that the marriage was void as "the biological sexual constitution of an individual is fixed at birth (at the latest)" (*Corbett v Corbett* [1971] P 83, p.104). Hence the court declared that Ashley had always been male. Based on the test in *Corbett* sex was considered in law a permanently fixed category, which is determined at birth ("at the latest") through biological factors. Consequently, gender as a category is not considered to carry sufficient weight to justify legal recognition for trans people.

A later and closely related case, concerning trans identities specifically in the context of marriage is *Bellinger v Bellinger* ([2003] 2 AC 467). In this case a trans woman sought a judicial declaration that her marriage to a cisgender man was indeed valid. In his judgement and in line with the preceding cases, Lord Hope in ([2003] 2 AC 467 at 477) expressly mentioned his intention to maintain the existing categories of sex/gender as he believed that recognising sex reassignment would blur the lines between male and female. He also made repeated mentions of the biological distinction between the sexes, which according to him, permeates nature and society. Sharpe (2002, p.56) terms this the "(bio)logical approach" and argues that this allows for the view that sex is immutable and therefore the basis for any gender identity. This idea that both sex and gender should be treated as purely binary, with gender being perhaps the more flexible of the two categories is the underpinning norm for all cases and legislation dealing with trans people up to this point.

Moving on from these cases, the GRA is clearly a positive development in transgender jurisprudence. It not only provides a method of obtaining legal recognition of one's gender identity and as such brings English law in line with the decision made by the European Court of Human Rights in *Goodwin and I v UK ((28957/95)* [2002] EHRR

18), but also proves to be a more progressive method of recognition than those currently available in some other countries as it does not make gender reassignment surgery an official requirement (Gender Recognition Act 2004, s.3). The shift from *Corbett* to the GRA also suggests a change in governmental rationalities, presumably to some extent due to the need to adhere to the standard set out by the European Court of Human Rights and the shifts in expert knowledge from 1970 to 2000. The GRA dispenses entirely with sex as the determining factor of a person's identity and in fact uses the terms "sex" and "gender" interchangeably (Gender Recognition Act 2004, s.9), which is a clear departure from the biological approach still implemented a year previously in *Bellinger* ([2003] 2 AC 467 p.477).[53] Indeed combined with its lack of insistence on surgery or any form of bodily modification this could be seen as a complete change from sex to gender as the determining factor of a person's identity (Sandland, 2005, p.52). Thereby perhaps the GRA reflects some change in the norms that underpin the legal governance of sex/gender as categories.

However, although the GRA operates on the presumption that one's legal gender can change, this is not to suggest that the GRA does not incorporate a very specific construction and understanding of sex and gender. In particular, the legal use of psychiatric or medical knowledge serves to validate and reinforce this pre-existing knowledge and its connected technologies. Section 3 of the GRA exemplifies this most clearly when describing the evidence applicants need to provide, which need to come from either a "registered medical practitioner" (Gender Recognition Act 2004, s.3(1)(a)) or a "registered psychologist" (Gender Recognition Act 2004, s.3(1)(b)), thereby explicitly (re)introducing medical/psychiatric discourses into this area of law. In fact, the GRA goes so far as to set out specific requirements of the nature of the medical report, the diagnosis within it and even the type of treatments the applicants are supposed to be undergoing (Gender Recognition Act 2004, ss.3(3)(a) & (b)). This section produces a very specific type of trans subject, who will be able to successfully use the GRA to obtain legal recognition of their gender identity. As Hunt and Wickham's (1994, p.108) suggest, law, in instances such as this, does not just rely on knowledge from other disciplines but also helps to produce its own objects who

[53] However, it should be noted that gender in this context does not seem to be equivalent to the common understanding of the divide between sex and gender, in which sex is primarily biological while gender is the social or cultural expression of sex. Instead "gender" in the legal sense functions more closely to a biology based understanding, as evidenced by the emphasis on surgery and medical treatment in the application form itself, which presumably would be superfluous if gender was understood as a purely social concept.

correspond to the knowledge produced by those disciplines. This means that applicants under the GRA will have to conform to the criteria set out by the psychiatric/medical community in this context. The GRA, here, draws on medical discourses to define its subjects but in turn also serves to produce subjects that conform to that specific discourse, as those who fail to do so are unlikely to successfully obtain a GRC.

In its use of medical knowledge the GRA ultimately seeks to produce subjects that meet specific ideals both regarding gender identity and presentation but also relevant to wider issues such as class and specific governmental rationalities delineating responsible conduct. Dan Irving (2008) for instance highlights how the real life test employed in the medical treatment of transgender people,[54] and which the GRA effectively copies and gives legal meaning to, does not just serve to distinguish appropriate candidates for medical transition from inappropriate ones, but also serves as a test for fitting into a neoliberal middle class society.[55] This was further supported by my interviews, according to which respondents felt that the medical transition involved questions around permanent housing, income, education, family support, employment and financial stability. Hence the invasion of privacy by the medical system does not just serve to produce normatively gendered bodies but also bodies that are able to contribute to society in specific ways and capacities. In fact the Harry Benjamin guidelines, which are still a frequently used guideline for the medical treatment of trans people today,[56] and which specifically highlight the importance of mentioning to trans people that they should be employed, were referenced several times in the parliamentary debates surrounding the GRA (Lord Filkin, House of Lords, 29 January 2004, Column 387).

Similarly, the goal of any psychotherapy involving trans people in this context should be “a long-term stable lifestyle with realistic chances for success in relationships, education, work, and gender identity and role” (Levine et al., 1999). While it might be realistic to suggest that trans people suffer very real negative consequences in these contexts as a result of negative social attitudes towards being trans, this repeated

[54] The “real life test” refers to the frequently used treatment criteria, which requires trans people to live in their “new” gender for at least two years before medical professionals will grant access to gender confirming medical treatments.

[55] Irving (2008) notes that particularly in the early days of gender identity clinics patients had to provide detailed accounts of not just their medical background but also of their economic situation and even that of their parents and that recommendations for treatment or lack thereof were often based on specific class indicators.

[56] Formerly “The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorder”. The most recent version is “Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, version 7” (Coleman et al., 2012).

guidance implies that trans people inherently do not generally have a "stable lifestyle" as a result of being trans (Levine et al., 1999, p.22). Although these guidelines are not an official governmental policy and are not explicitly mentioned in the GRA, it still is important to highlight that they were frequently referred to by law-makers and are likely to have some form of impact on the assessment process, since the legal recognition process is heavily medicalised throughout. As outlined in the previous chapter, the two medical reports are key parts of the application, and are likely to be based on guidelines such as the psychotherapy one quoted above. This is highly problematic, as in practice it means that the legal recognition process is based heavily on now outdated medical guidelines, which have been updated in parts due to criticism by trans people. Yet it is unlikely that the GRA will be amended to reflect these changes.

The requirement in the GRA that any change has to be permanent negates any possibility for the view of gender as fluid and changeable, in stark contrast to some of the personal accounts reported by trans people in other contexts who rarely described their experience of gender in such absolute terms (Hines, 2010, p.98). The provision in s.2 is particularly unusual because this requirement to prove that gender is permanent and fixed until death does not apply to people in any other context (Grabham, 2010, p.109).[57] Arguably this provision is implicitly based on the same concerns over "fraud" and "inauthenticity" that were expressed in some of the cases discussed above. Indeed Grabham (2010, p.110) suggests that the perceived flexibility of their gender identity is what, in the eye of the state, marks trans people as in need of governmental regulation and discipline. She also suggests that this personal commitment to living in the acquired gender 'until death' is somewhat unnecessary from an administrative perspective since applicants, as discussed in the previous section, already have to provide detailed medical evidence which serve a similar purpose (Grabham, 2010, p.116). Additionally it is somewhat unclear what kind of actual negative consequences there would be if an applicant does choose to change their gender again. Presumably the process of applying for a GRC would remain the same, although some requirements may be harder to meet in this case, and it seems doubtful that this kind of application would significantly impact the total number of applications to a point where Gender Recognition Panels become unable to function. In this context the GRA has successfully mobilised "liberal, procedural norms" (Cooper, 2004, p.108) in the form of the statutory declaration to

[57] For instance, when acquiring one's first driving licence or passport – both of which also contain gender markers – no similar vow of permanence is required to certify that the information provided will not change at a future point in time.

certify permanence and in the application itself more generally. Following Davina Cooper these types of procedural norms are generally inherent to "liberal rule" and in this instance become linked to specific social norms and values about gender, sexuality, class, etc. In the context of the GRA, the legal framework encourages deference to prominent liberal values, such as for instance reliance on expert knowledge, a limitation of privacy in return for legal protection, and the affirmation of the state as an arbiter of individual identities. These procedural values are infused with prevalent sex/gender norms, which arguably encourage individual compliance and self-regulation. As I will discuss in more detail in the context of my fieldwork analyses in the following chapters, some applicants themselves support the strict enforcement of norms such as the idea that gender should be permanent. That is not to say that trans people are passive subjects of this legal framework. In fact several interviewees favoured robust evidence requirements but also drew on equality and rights discourses to suggest that everyone deserves legal protection in the form of having their gender identity recognised.

The combination of knowledges from the medical and legal discipline, as discussed in the previous section, also means that some commentators have argued that not intending to undergo surgery may prevent a trans person from being diagnosed with gender dysphoria in the first place (Sharpe, 2007, p.71), thereby closing the legal process entirely. While this may not be necessarily a direct outcome of the rationalities underpinning the GRA this does illustrate that governmentality can assemble a variety of different technologies and processes some of which may support each other and some of which may be contradictory. However, these technologies and processes affect their targeted subjects and populations (Miller and Rose, 2008, p.200). It would be difficult to argue that the political rationality for including medical knowledge in the GRA was to prevent recognition of non-normatively gendered people, but there does seem to be some connection between governmental rationalities and knowledge about sex/gender/sexuality and the technologies used in this context to regulate trans people. Like other normative processes the GRA is not coercive in its intention to reaffirm a normative view of gender (Butler, 1999, p.42) but instead enforces gender norms in an indirect way as those who adhere to such gender roles are likely to have less difficulty obtaining a GRC. Additionally, the decision to permanently adhere to a normative gender is rewarded with the granting of legal rights and protection. As a result, while the GRA may remove the causal link between sex and gender it is still based on a

biological understanding of sex similar to *Corbett* and does continue to reinforce the construction of sex/gender as exclusively binary.

Trans people's gender identities are perceived as inherently in conflict with this more 'stable' official construction of sex/gender. The requirement for any change to be permanent, discussed both here and in Chapter 1, is to be one of several technologies designed to manage trans people's conduct in line with this perception of their gender identity.[58] The requirement that applicants need to live in their gender for at least two years prior to an application (see Chapter 1) also implicitly encourages trans people to adopt a more stable gender identity. This is not to suggest that trans people's gender identities are factually different from those of cisgender people, but rather to highlight that this notion of factual/biological differences underpins both the GRA and the application form.

The Deceptive Trans Person

The understanding of trans people's gender identity as somehow different to cisgender gender identities seems to also be closely linked to a further theme emerging clearly in the context of case law and the GRA. The second, and perhaps most notable, rationality to emerge in the context of transgender jurisprudence is the presumption that trans people intend to deceive others through their identity claims. Although this concern is expressed in different ways, in both earlier case law and more recent legislation, it nevertheless is a consistent theme and one that strongly underpins the application process discussed in Chapter 1.

In addition to the description of sex as unchangeable and purely binary, discussed above, Ormrod J (*Corbett v Corbett* [1971] P 83, pp.106-107) also argues that marriage is an institution that is based on (biological) sex and not gender and, more specifically, the capacity for penetrative heterosexual intercourse. This suggests that some of the reluctance to recognise Ashley as female is based on a deep-seated fear of inadvertently allowing homosexual marriages.[59] This is somewhat ironic as based on this judgment Ashley would be able to marry a woman, which most people would probably consider to be much closer to same-sex marriage than her relationship with Corbett. Ormrod J's

[58] Indeed several peers referred to the idea that trans people's gender identity is seemingly less stable than that of cis gender people (House of Lords, 13 January 2004, Columns 377-378)

[59] Sharpe (2001, para. 3) suggests that the entire judgment is based on some degree of homophobia as evidenced by Ormrod's (*Corbett v Corbett* [1971] P 83, p.107) insistence to determine the exact nature of sexual relations in this relationship.

judgment does supports the argument advanced by Judith Butler (1999, p.22) that heteronormativity is one of the central elements underpinning the sex/gender binary, a fact which *Corbett* essentially enshrines in law. However, official concern about retaining marriage as a heterosexual union is not just limited to *Corbett*.

The repeated references to the 'nature' of the marriage are directly linked to concerns about "fraud" or "inauthenticity" of trans people, which some commentators have suggested is in fact a thinly veiled excuse for homophobia. According to Sharpe (2001, para. 3), *Corbett* in particular is "riddled with homophobic anxiety". This is an anxiety is largely be expressed through concerns about "natural sexual intercourse" (Bessant, 2003), which Ormrod J perceives as elementary to marriage (*Corbett v Corbett* [1971] P 83 p.106), and through the description of Ashley as a "female impersonator" (*Corbett v Corbett* [1971] P 83 p.104). Collier (1995, p.121) argues that in fact the test for determining sex in *Corbett* is based on the nature of marriage as described by Ormrod J. This would account for the fact that even though Ashley had been recognised as female for insurance purposes, the court here denies her recognition in the context of marriage law. Indeed when describing Ashley's surgery Ormrod J (*Corbett v Corbett* [1971] P 83 p.107) states that any intercourse taking place in this relationship would be nearly indistinguishable from homosexual intercourse. This anxiety, that in particular trans women are 'pretending' to be women to circumvent the law, does structure legal thinking and appears throughout much of the case law (Sharpe, 2002, p.54). Concerns about fraud are not limited to only earlier case law, but do in fact still underpin both the GRA and the current application process.[60]

Similar normative rationalities and attempts to regulate both gender and sexuality can be found in the later case of *J v S-T (J v S-T (formerly J) (transsexual ancillary relief)* [1998] Fam 103). This case concerned a trans man who had undergone a double mastectomy, but not a phalloplasty and had been married to a woman for several years. A decree of nullity was granted and Ward LJ (*J v ST (formerly J)(transsexual ancillary relief)* [1998] Fam 103, p.109) specifically discusses in his decision that S-T had no sexual experience, which allowed J to 'pretend' to be male. He also draws attention to the heterosexual character of marriage and as such considers J's deception to be undermining marriage itself (*J v ST (formerly J)(transsexual ancillary relief)* [1998]

[60] In Chapters 4 and 5 I will consider specifically how trans people relate to this official understanding of their identity.

Fam 103, p.141). Overall Ward LJ, just like Ormrod J in *Corbett,* conflates homosexuality and transsexuality, resulting in repeatedly expressed concerns over damage to the heterosexual institution of marriage, even though J might well consider himself to be heterosexual. In contrast Lord Nichols in *Bellinger v Bellinger* ([2003] 2 AC 467, p.473) specifically mentions that homosexuality and transsexuality are not to be confused. Nevertheless, he also points out the essentially heterosexual character of marriage (*Bellinger v Bellinger* [2003] 2 AC 467, p.480), once again establishing that marriage is a privileged institution that needs to be maintained in its current form. This is supported by Lord Hope (*Bellinger v Bellinger* [2003] 2 AC 467, p.482), stating that gender confirmation surgery can only ever provide "an imitation", which is evidence of the lingering concern about the nature of the intercourse taking place and thus a concern over the nature of marriage. Overall the cases taking place prior to the GRA are based on specific normative concerns about maintaining the nature of marriage and the suspicion that trans people are in fact trying to pass as heterosexual to hide their 'real' homosexual identity.

It could be argued that while earlier case law was clearly underpinned by official concerns about the creation of same-sex marriages, this is no longer the case in current legislation due to the legalisation of same-sex marriage. The new and widely celebrated advances in LGB rights made by the introduction of same sex marriage also affected the rights of trans people. The Marriage (Same Sex Couples) Act 2013 amends the GRA, by removing the requirement to legally dissolve one's relationship before applying for a GRC.[61] The changes made to the GRA were supposed to remedy existing discrimination affecting the marriage rights of trans people. Previously, in the original version of the GRA, a GRC was granted as long as applicant was not currently married or in a civil partnership (Gender Recognition Act 2004, ss.1-3). An applicant who was married or in a civil partnership at the time of their application could only obtain an "interim" GRC, valid for six months, to give the applicant time to dissolve their relationship.[62] The Marriage (Same Sex Couples) Act 2014 removes the original "divorce" requirement for

[61] This may also mirror the original medical requirements for the "treatment" of trans people, with many clinics originally demanding that patients divorce before undergoing treatment, again because of fears of "inadvertent" same sex marriages, however medical guidelines have since abandoned this requirement (Fausto-Sterling, 2000, p.107).

[62] Indeed, Stephen Whittle (2006, p.270), who took part in the drafting of the GRA, explains that the original divorce requirement was specifically introduced to alleviate Christian lobby group's concerns over the inadvertent creation of same-sex marriages by allowing transsexuals to obtain a GRC without having to dissolve their relationship. This supports the notion that far from being the implementation of one specific rationality, the GRA does in fact reflect multiple rationalities and forms of knowledge.

pre-existing relationships, previously contained in ss. 4-5 of the GRA. Instead applicants who are in a legally recognised relationship at the time of their application, now need to show evidence of their spouse's consent before they can obtain a full, rather than an interim, GRC. The GRA as a whole suggests a causal link between sex/gender and sexuality, which means that a change of one's sex also leads to a change of one's sexuality. Trans individuals who want legal recognition of their gender identity have to conform to dominant knowledge about the relationship between gender and sexuality.

The legalisation of same-sex marriage is obviously a positive development in so far as trans people will no longer be forced to choose between either the legal recognition of their relationship or the legal recognition of their gender identity. However, the amendment introduces a new requirement, which states that the non-transitioning spouse must give written consent before their partner can obtain a full rather than an interim GRC and that the spouse will be officially notified once the application is made (Marriage (Same Sex Couples) Act 2013, sch. 5 s.2). The completed consent form needs to be submitted together with all other evidential documents and the application will then be processed as usual (for a detailed discussion of the process see Chapter 1).[63] However if a relationship has broken down but still exists legally, without their spouse's consent trans people will only be able to apply for an interim GRC, which expires after six months at which point they have to restart the entire recognition process (Marriage (Same Sex Couples) Act 2013, sch. 5 s.3). Apart from the emotional cost of this process, the financial cost of re-starting the legal process can be significant as there is a fee for each application. The creation of this amendment highlights that the debate around whether trans people are inauthentic or potentially trying to deceive someone is still very much present in legal discourse, especially in the context of intimate relationships.

The imagined threat that trans people supposedly pose is articulated in official accounts repeatedly in different and not necessarily consistent ways. For instance, the idea that

[63] HM Courts & Tribunal Services (HM Courts & Tribunal Service, 2014a; HM Courts & Tribunal Service, 2014b) have released new statutory declaration forms for trans people and their spouses. However, neither form specifies whether a spouse will indeed be notified once an application for a GRC has been made. As this was one of the key purposes of the new amendment as cited by legislators who supported it, it seems somewhat perplexing that this has not been implemented.

people seeking to change their gender are actually seeking to escape a criminal record,[64] the idea that trans people are seeking to escape the stigma of homosexuality (*Corbett v Corbett* [1971] P 83, p.107), or the fear of the hypothetical danger trans women could pose in sporting competitions (House of Lords, 18 December 2003, Column 1320). These concerns are clearly reflected in the demands for multiple types of evidence of an applicant's gender identity and the demand for a medical diagnosis (see also Chapter 1). While medical evidence and opinion has always to some degree influenced transgender jurisprudence, as evidenced by reference to medical experts in cases such as *Corbett*, the GRA does make this cooperation of medical and legal experts official by not only making psychiatric evaluation a requirement (Gender Recognition Act 2004, s.3(1)), but also by including medical experts in the Gender Recognition Panel (Gender Recognition Act 2004, sch 1(2)(a) and (b)). While there is no explicit intention here to use this process to create subjects who present their gender in a particularly normative way, this nevertheless is the likely outcome of this regulatory process. As Miller and Rose suggest (2008, p.32), "processes of examination and assessment" are often seemingly mundane tools, that nevertheless can be utilised to encourage and enforce specific types of conduct in line with official rationalities. However, as I will discuss in later chapters, many trans people actively challenge the legitimacy of both medical and legal expertise over their gender identity claims. As a result, trans people are encouraged to seek official 'certification' of their gender identity through medical experts as their own accounts of their gender identity are not considered trustworthy.

The Effect of Transitioning on Others

The final key rationality that emerges from the GRA and the related parliamentary debates is the need to manage the presumed impact of a person's transition on others. This concern can also already be implicitly found in earlier case law such as *J v ST*. In this case the effect trans people have on others is expressed both in general terms – allowing trans people to marry someone of the opposite gender will damage the institution of marriage (*J v ST (formerly J)(transsexual ancillary relief)* [1998] Fam 103, p.141) – and more specifically in the idea that J's trans status also affected his partner in a harmful way. It is therefore unsurprising that this understanding of transition as a relational process is also expressed in the debate of the GRA:

[64] This was such an area of concern that it was brought up by several peers in the House of Lords during the debates of the GRA (House of Lords, 18 December 2003, see Columns 1294 and 1322).

"In the guidance that will be given to the panel, we will make it clear that, if an applicant is married and/or has children, it is particularly important to recognise the burden placed on that person by the social situation that they are in and to test whether they have thought through the seriousness of the change that they are making and the effect that it will have on others, as well as themselves" (Lord Filkin, House of Lords, 29 January 2004, Column 387).[65]

This statement explicitly highlights the supposed harm trans people are causing by transitioning and the idea that they are somehow 'irresponsible' unless guided otherwise by professionals, a concept that was frequently alluded to by law-makers in the debates of the GRA and which was referenced more recently in the Marriage (Same Sex Couples) Act 2013 debates.

Such official concerns about the presumed effect of transitioning are most evident in debates of the Marriage (Same Sex Couples) Act 2013. Until the final reading in the House of Lords there was some confusion, even on part of law makers, whether consent was meant to be to a spouse's transition or the continuation of the relationship itself (House of Lords, 24 June 2013, Column 296). The language used during the debates in both houses of parliament constructs the spouses of trans people as being in need of additional legal protection and remedies other than those available to couples already. For example during the third reading in the House of Commons, Helen Grant MP specifically discussed that not disclosing the possession of a GRC makes a marriage voidable and argued that this could not be changed as it was crucial to protect cisgender spouses from not being aware of their partner's 'real' gender. She then carried on to explain that she had seen no evidence of cisgender spouses obstructing their partner's transition process out of spite, or to gain some material advantage, which was one of the key concerns mentioned by critics of the amendment (House of Commons, 21 May 2013, Column 1146). The obvious problem with Grant's reassurance is that until now spouses have never before been in a position to do so.

Julian Huppert MP (House of Commons, 21 May 2013, Column 1146-1147) actually highlighted some of the problematic assumptions about trans people made by many

[65] The exact version of the standards of care which Lord Filkin was referring to seems to have been the sixth updated version of these guidelines, which states in the context of processes that medical providers should guide trans people through: "acceptance of the need to maintain a job, provide for the emotional needs of children, honor a spousal commitment, or not to distress a family member as currently having a higher priority than the personal wish for constant cross-gender expression" (Levine et al., 1999, p.23). Apart from implying that trans people are incapable of prioritising their needs appropriately, this also creates an implicitly class-based standard for appropriate gender expression.

MP's in the context of this debate which he argued seemed to suggest that legislators thought spouses actually were never fully or properly consenting when they married a trans person:

> "I was worried by some of the language about not fully consenting to a marriage, although I am sure the Minister did not mean to imply that people need to be protected from transgender spouses or transgender people—I am sure that is not what was intended" (House of Commons, 21 May 2013, Column 1146-1147).

However, other MPs were unwilling to engage with his argument, presumably at least in part due to a lack of awareness of trans issues, and the debate continued without acknowledging the problematic undertones of this new amendment, which was in general not covered in any detail by much of the media.

As a result of very vocal complaints by trans people about the new requirement for spousal consent, Baroness Barker (House of Lords, 24 June 2013, Column 516) in the House of Lords tabled an amendment which would have placed a time limit of 6 months on spouses' ability to withhold consent:

> "The amendments would do two things. First, they would give a spouse the right to be notified. I understand that at the moment the first time a spouse may receive any notification that a partner is going through gender reassignment is when court papers are delivered seeking an annulment " (House of Lords, 24 June 2013, Column 516).

Although this would have limited the damaging effect of the consent amendment somewhat, Barker nevertheless suggested that it was important that spouses would be notified when their partner applied for a GRC, based again on the unrealistic assumption that spouses are often not aware of their partner transitioning. This shows that, at the very least, law makers have little awareness of how the legal recognition process actually works and at worst they assume trans people are actively trying to deceive their partners. Similarly, Baroness Butler-Sloss who was generally very supportive of trans issues when sitting in the Court of Appeal described the spouses of trans people as "those who are left behind" and argued that they needed special legal protection. Regarding the GRA even those who are critical of this amendment assumed that trans people's spouses need additional legal protection that goes beyond the legal remedies that are already available to couples when a relationship breaks down. This can only really be explained if we accept that there is a presumption that the spouses of trans people are somehow more at risk than everyone else:

> "The Bill seeks to strike a fair balance between the Article 8 rights to respect for the private and family life of both spouses. The trans spouse has a right to be granted their gender recognition without unnecessary delay, but the non-trans spouse also has a right to have a say in the future of their marriage following their spouse gaining gender recognition" (Baroness Stowell of Beeston, House of Lords, 24 June 2013, Column 520).

Baroness Stowell of Beeston argued that while trans people could simply divorce a spouse who refused to give consent to their transition, the other spouse needed a remedy other than divorce, without ever articulating why exactly this was the case. The language used about balancing the rights of the two spouses here obscures the fact that the cisgender spouse is treated by default as a victim. Additionally most peers in the debate assumed that the cisgender spouse in need of legal protection would be female. This may be a coincidence but it also links back to cases such as *J v ST* where the female spouses of trans people were described as particularly vulnerable and as essentially victimised simply by the transgender status of their partner. This also gives support to Schilt's and Westbrook's (2009) argument that policy makers generally make laws and regulations concerning trans people based on purely hypothetical examples with little or no regard for the day to day realities of living as a trans person in a specific society. In this case law makers imagined a married person who was assigned male at birth suddenly deciding to transition and being able to do so successfully in a matter of weeks with little regard for their spouse's feelings about this matter. The fact that this scenario is entirely unrealistic was of little importance to legislators.

Concluding Thoughts

The limited recognition provided by the GRA clearly encourages a particular subject formation for trans people and could to some extent be interpreted as foreclosing any radical challenge to existing sex/gender norms. Trans people are supposed to become responsible legal subjects through regulating their own behaviour as well as that of other members of their community (Sanger, 2010, p.33) as such they actively participate in their own regulation (Lamble, 2009, p.114). This is not to say that the possibility for legal recognition of one's gender is inherently negative but rather that it is far from politically neutral. On a practical level the "conceptual tensions" between different

rationalities and different technologies can clearly make access to rights and legal protection difficult and uneven for some individuals, even where this is not necessarily the intention of law makers.

As such a governmentality reading helps to illuminate some of the less explicit norms and desired outcomes underpinning the GRA. By focusing on the historical development of transgender jurisprudence and on some of the themes and rationalities within it, it becomes possible to recognise certain concerns/anxieties, for example the need to maintain sex/gender as a fixed binary category, which implicitly shape the GRA and the application process. Additionally a study of governmentality helps to highlight the merging and mutual constitution of medical and psychiatric knowledge and discourse in this context and the impact this has on the formation of trans subjectivity. Overall governmentality is a useful concept for understanding the evolution of the GRA, its underpinning rationalities, and the technologies it deploys. However an analysis of these rationalities is inherently limited when it comes to explaining how people engage in practice with a law that attempts to regulate some of the most private and personal aspects of everyday life.

There is a danger that in focusing solely on governmentality in the context of the GRA an overly abstract understanding of governance in this context is being promoted. Governmentality allows us to account for the rationalities underpinning much of the current GRC application process, but what it does not address is how people respond to these rationalities. Do applicants ‘simply’ adjust their conduct to what is demanded from them and for instance adopt a binary gender identity? Is there freedom to act creatively in relation to these governmental and administrative rationalities? The specific requirements of the GRA discussed here may already highlight some of the limits of a governmentality reading of specifically this piece of legislation. In particular the two central rationalities of the GRA namely that firstly trans people’s identity claims are not to be taken at face value and, secondly, that trans people’s gender identity needs to be constrained and stabilised will form the basis for analysis of the interview material in Chapters 4 and 5. However, it is first necessary to consider how agency can be conceptualised in the context of the legal and regulatory processes of the GRA.

Chapter 3

Agency as a Mediatory Concept

As I have argued in the previous chapter, governmentality as an analytical tool can help to illuminate the mechanisms and rationalities through which people are guided to manage themselves in the context of the Gender Recognition Act 2004 (GRA). The GRA encourages individuals to express gender identity in ways that adhere to existing normative presumptions about sex/gender, by making legal gender recognition conditional upon fulfilling certain requirements. In contrast to a disciplinary approach to law-making there are no explicit sanctions or punishments attached to a failure to meet the standards of the GRA, but instead the implicit and less immediately obvious sanctions are a denial of the Gender Recognition Certificate (GRC), and the subsequent rights and legal recognition.

This regulation of identity is based around several key issues. Firstly, the GRA is based around an assumption that gender is, and should be, binary and ideally static rather than manifold and fluid. Therefore, applicants must declare they will live in their gender for the rest of their lives and gender "options" are limited to male and female. This effectively serves to restrict access to a GRC to those who are willing and able to, at least on paper, adhere to this mode of existence. As discussed in the previous two chapters the GRA draws heavily on medical knowledge and medical expertise, which can often function as an additional barrier to recognition for many trans people. GRCs are only available to those who have been diagnosed with gender dysphoria and can provide statements from two separate doctors in support of this. Existing work in this area (see e.g. Davy, 2012; Hines, 2007; Sanger, 2008) indicates that medical professionals explicitly and implicitly encourage service users to adhere to stereotypical gender norms. Those who present in less normatively gendered ways, for example a trans woman presenting as a butch lesbian, have greater difficulty obtaining necessary medical services and diagnoses (see e.g. Hines, 2007). Although the GRA itself does not require applicants to undergo surgery to modify their bodies in gender 'appropriate' ways and as such contains the possibility for some less normatively gendered forms of identity, a diagnosis with gender dysphoria is crucial to a successful application for a

GRC. Hence, the maintenance of the gender binary is effectively policed through the medical as well as the legal system (see also the discussion of rejected applications in Chapter 5).

Using Foucault's work on governmentality to analyse the GRA can highlight the governmental rationalities underpinning the GRA. However, governmentality, arguably to a lesser degree than some of Foucault's earlier work, struggles to explain how individuals engage with such regulatory attempts on a day-to-day basis. By using interviews from my fieldwork, I suggest that rather than accept the requirements set out by the GRA and regulate themselves and their identities accordingly, trans people in fact engage with legal provisions in creative and often contradictory ways without ever entirely submitting to its demands. Drawing on McNay's (2000, p.16) work, I argue that a specific conceptualization of agency provides an important "mediatory category" to explain the impact of governmental strategies, such as the GRA, on people's actual day-to-day existence. I suggest that trans people are not merely submitting to the rationalities of the GRA, but instead engage with them in strategic, creative, and sometimes unexpected ways.

Transgender studies have produced a great range of literature and empirical work about trans people and the varied aspects of their everyday lives. However, the focus of these studies is not generally on engagement with specific laws or legal provisions. Sally Hines (2007) and Tam Sanger (2010) in particular have written widely on transgender identities and relationship forms. Hines (2010; 2013) engages with the GRA in her more recent work by considering the role law plays as a gatekeeper to citizenship for trans people and in the reinforcement of a binary sex/gender structure. Zowie Davy (2010; 2012) specifically considers issues around agency for trans people in the context of engagement with the medical system and medical professionals. This work in particular focuses on the way agency is not just shaped by individual subjectivity but also conditioned by material factors such as capital and access to certain services (Davy, 2010, p.115).

In what follows, I argue that trans people do not only exercise power in a strategic way within a medical context utilising wrong body narratives, but also within legal and family structures. Further, these narratives do not always comply with dominant ideas of what a binary gendered body looks like. Using solely a theory of governmentality, as

an analytical tool, tends to ignore or erase these deployments of agency. This is problematic not just on an analytical level, but also on a political level because it encourages a view of trans people as passive and accepting subjects of law and medicine.

In contrast to more recent sociological literature, much of the primarily legal work focusing on trans people in the UK was either written before the GRA or shortly after its implementation, and as such focuses primarily on material aspects of discrimination and the theoretical framework of the GRA (Cowan, 2005; Sandland, 2005; Whittle and Turner, 2007). Alex Sharpe's (2007; 2009; Sharpe, 2010) work in particular is useful in highlighting the role implicit moralistic concerns play, not just in the earlier case law, but also in the context of the GRA. She elucidates how specifically concerns about fraud or inauthenticity played out before the GRA existed as well as after its implementation. Building on this literature, the complex interplay between the normative elements of the GRA and people's actual engagement with this law becomes apparent. In this sense, I suggest that Lois McNay's (see, e.g 2000; 2003a; 2004; 2010) approach to agency is particularly useful, as it presumes that individuals are not just influenced by social and cultural factors but are also capable of a degree of self-awareness and self-determination in their engagement with such constraining influences. This reflexive account of agency is combined with a notion of embodied existence and of identity formation that allows for contradictions and change over time. An inclusion of embodiment is particularly important in this context when considering the criticism made by Prosser (1998) about the lack of acknowledgement of the bodily experiences of gender identity in queer theory. Hines and Davy both draw on McNay's work in their discussion of agency, which suggests some broader resonance between embodiment and transgender studies more generally (Hines, 2007, p.27; Davy, 2010, p.122).

In what follows, I will consider some of the key components of McNay's work on agency, which I think are particularly useful for supplementing a governmentality analysis of the GRA itself. The focus will be primarily on: the idea of agency as repetition or reiteration; the connection between agency and identity; the importance of reflexivity for agency oriented towards the future; and the problem of conceptualising agency as resistance. I will consider these issues in turn by focusing primarily on Lois McNay's work, as well as on the wider recent feminist literature on agency.

Conceptualising Agency

Throughout her work Lois McNay draws on Foucault, Butler and Bourdieu in her conceptualisation of agency. McNay (2004, p.175) describes agency as a "mediating concept" that allows for a detailed analysis of the effect social structures have on identity formation. Drawing on Bourdieu she suggests that agency is the embodied practice of repetition and reiteration that allow individuals to navigate everyday interactions and to help crystallise change. Therefore, while she does not agree with all aspects of his theory, McNay (2000, p.36) argues that Bourdieu's account provides a more accurate description of the interaction between social forces and the body than Foucault's concept of disciplinary power, because habitus in effect contains a temporal element as norms are not just enforced upon the body but also mediated through it every time they are reiterated. This is echoed in her criticism of Foucault's view of individuals as primarily "docile bodies" rather than active agents.

According to Bourdieu (2001, p.8), power is culturally and symbolically created and legitimised, through the interplay between agency and structure. Habitus is inherently influenced by those things that are constructed as normal or natural. He illustrates this point in *Masculine Domination* regarding the binary division of the sexes, which forms a structural system that fundamentally impacts thought and actions in all areas of life. He suggests that the implicit construction of bodies and minds, which constantly reoccurs, has real embodied effects by limiting what is "feasible and thinkable" (Bourdieu, 2001, p.23-24). This also suggests that social construction is pervasive and difficult, if not impossible, to escape entirely as it inherently limits what individuals perceive to be possible and viable modes of existence. However, that is not to say that once something is constructed as normal it remains uncontested. According to Bourdieu (2001, p.14) "there is always room for a cognitive struggle over the meaning of the world".

Similarly, to Foucault's concept of discourse, Bourdieu's definition of habitus leaves room for contradictions and change over time. In particular his notion of the social field has a strongly temporal aspect as it develops over time and through interaction between individuals (Lovell, 2003, p.6). However, based on the examples Bourdieu selects from

his fieldwork, which deal primarily with the resignification of speech acts by women that ultimately do not result in social change, it is unclear whether such individual acts of resistance can ever have a productive impact upon social structures. Perhaps resistance to and change of symbolic constructions will eventually have embodied effects but Bourdieu does not give a clear indication of how this would work in relation to individual actions. There is a sense in Bourdieu's work that change and transformation of social structures is possible but this is rarely considered in relation to individual actions (Lovell, 2003, p.6). Further, Lawler (2004, p.122) argues that for Bourdieu resistance occurs during domination but not as a direct result of domination, and therefore, he differentiates between individual acts of resistance and social change. This differentiation is fundamental to understanding agency in the context of engaging with governmental technologies and rationalities, such as the GRA.

In criticising Bourdieu's conception of gender as "pre-reflexive and unconscious", Bev Skeggs (2004, p.25) suggests that this conception is factually inaccurate, as evidenced by the constant attempts to socially and culturally reinforce specific notions of gender. While this seems particularly relevant to gender, it presumably also applies to many other characteristics, which are constantly being reinforced by society at large. Skeggs argues that Bourdieu's construction of habitus is simply not capable of accounting for the myriad ways gender is expressed, reconstructed and subverted in everyday life (Skeggs, 2004, p.27). This is largely due to lack of emphasis on reflexivity in Bourdieu's account of habitus, which is crucial in the context of gender identity and engagement with the GRA. In fact, all interviewees were critical of aspects of the GRA and its efforts to regulate gender identity. Even those who had benefitted from it on a practical level, by obtaining a GRC without much difficulty, were aware of its limitations and the negative effect it can have on others. One interviewee who had used the fast-track procedure available during the GRA's implementation phase had obtained a GRC and did not feel like the regulations in the Act affected him personally in a detrimental fashion. At the same time, however, he was immediately able to list a variety of examples of ways in which the Act had had a negative impact on friends and acquaintances; particularly those less able to navigate the complex bureaucratic requirements contained within it.

Indeed, Bohman (1998, pp.132-133) argues that by relying on habitus to explain how agents are endowed with certain dispositions and come to accept social order, Bourdieu

has to rely on a strong and deterministic definition of "cultural constraints". These constraints are more limiting than mere norms or regulations. As such, agents are to be almost entirely limited by structures of which they are generally not aware, as they have been internalised. In this framework, creative forms of agency and resistance that have an effect on those structures are difficult to imagine. Judith Butler suggests that in Bourdieu's account there is no clear distinction between habitus and field, while norms or regulations are always bound up in habitus itself. Therefore "the rules or norms, explicit or tacit, that form that field and its grammar of action, are themselves *reproduced* at the level of *habitus* and hence implicated in the *habitus* from the start" (Butler, 1999, p.117). Butler (1997, p.142) suggests that in this process Bourdieu does not sufficiently account for the discrepancies between norms and "bodily speech" - what she terms "the performativity of habitus".

Butler most extensively engages with Bourdieu's notion of habitus in *Excitable Speech* (1997). Similarly to Bourdieu, agents are also depicted as inherently constrained in Butler's work to some extent: "The one who acts (who is not the same as the sovereign subject) acts precisely to the extent that he or she is constituted as an actor and, hence, operating within a linguistic field of enabling constraints from the outset" (1997, p.16). Butler (1993, p.13; 1997, pp.133-135) suggests that agency is inherently limited by the construction of the subject through norms and more specifically by norms, which delineate what is considered legible speech or action. As such, agency is never free from some outside influences. She describes agency as "a rearticulatory practice" which is bound up in existing power relations, as it is exercised through repetition and sometimes resignification of pre-existing forms of speech and norms. This does mean that agency in this context is to some extent based around the past and prior events, rather than being entirely oriented towards the future.

She goes on to suggest that failure to adhere to existing norms within a society, gender expression being just one example of this, and speak in a way that is considered "impossible" will always have consequences either on a psychological level or as an active punishment by the state (Butler, 1997, p.136). This is not entirely different from Bourdieu's argument according to which subjects need to have some measure of authority or authorisation for their speech to be effective. Butler is not saying that impossible speech – that is speech that violates widely accepted norms - will be inherently ineffective, but instead for Butler impossible speech leads to a negative

outcome for the speaking subject. She does in any case note that performativity is always a continuous process, which relies on repetition to take effect, even when such a performance incurs sanctions or opposition (Butler, 1993, p.95). Presumably while individual acts of performance can be a form of agency, effective social change relies on continuous repetition in interaction with others and collective action over time (Lovell, 2003, p.14). This suggests that individual acts of resistance by themselves may have some symbolic value. However, for large scale change of norms or regulations, these acts need to be taken up in a wider context. For example, one interviewee described that while she had gone through the medical aspects of transition she had decided against applying for a GRC as this would involve her marriage having to be dissolved and then changed into a civil partnership, something she objected to on principle. In fact, all interviewees objected to the idea of having to potentially divorce solely to obtain a GRC. Considering the fact that this requirement was removed from the GRA with the introduction of the Marriage (Same Sex Couples) Act 2013, in this case individual acts of resistance as well as collective campaign work by groups of activists could be interpreted as having reached a sufficient level to impact on wider political debates and lead to practical changes. Presumably in part because this particular issue also resonated with wider debates around equal marriage rights for same sex couples.

Similar to Foucault and Bourdieu, for Butler there is no natural, unconstructed subject and performativity is bound up in pre-existing power relations rather than opposed to them or even outside them. Performativity in this sense specifically involves the reconceptualisation of existing norms and social rules primarily through speech acts and is as such always oriented towards the past rather than the future, similar to habitus. However, for Butler, identity categories and specifically sex/gender are less fixed and foundational than they are, for example, in Bourdieu's work. This suggests that performativity – at least in the context of gender - may allow for more diverse forms of agency than habitus (McNay, 1992, p.113). Performativity suggests that identity is shaped through discourse and the constant reiteration of certain authoritative statements.

Butler (1997, p.38) argues that the act of being named and as such constructed as a subject is always to some extent traumatic because it is imposed on the individual from the outside, but at the same time it is also the foundation for agency because it includes one in linguistic and social life. She suggests that agency relies on being recognised or

even misrecognised by the other; indeed she goes on to say that "resistance and insurgency are spawned in part by the powers they oppose" (Butler, 1997, p.40). As resistance takes on particular relevance when a person feels misrepresented by the existing social framework or even language itself. The GRA explicitly performs such a naming function in a twofold process. Firstly by demanding that individuals who wish to change their legal gender must also accept the imposition of a psychiatric diagnosis, "gender dysphoria". Secondly by then amending their legal gender to male/female without recognising other forms of gender identity. Although much of this mirrors the existing medical process, the GRA reiterates and reinforces this constitutive naming process as a condition of granting legal recognition.

Butler's conceptualisation of agency stemming from external attempts at subject formation, mirrors Foucault's statement about resistance being the result of the exercise of regulation and power. Butler argues that in particular political agency tends to stem from those times and places where the "performative apparatuses of power fail". This type of agency expresses itself primarily through attempts by minority groups to reclaim the very concepts that are often used against them, for instance the reclaiming of the term "queer" by the LGBT movement (Butler, 1997, p.93). Although this type of action does leave space for agency and agency as a resistant practice, Butler does not explain how such an agency could have a clear political impact beyond merely reclaiming terms and concepts. Lovell (2003, p.2) argues that while Butler does conceptualise agency generally in a valid way, she fails to explain how individual agency then leads to "transformative political agency". Indeed in this conceptualisation agency is portrayed as the unavoidable outcome of the way in which norms are conceived and enacted "rather than as the result of social practice" (McNay, 2000, p.45). This therefore to some extent subsumes individual action into an 'automatic' reaction to the working of existing norms.

McNay (2008, p.195) takes up the notion that agency is based around repetitions and reiterations that allow individuals to navigate everyday interactions and to help crystallise change. She furthermore suggests that habitus – as a way of conceptualising agency – has greater capacity for accommodating notions of embodiment than alternative models like performativity which are primarily based around language. Habitus is a particularly useful concept as it provides a middle ground between subjects determined solely by social structures such as class, gender, race and subjects that are

shaped solely by their individual experiences and voluntaristic actions (McNay, 2008, p.181). This seems a particularly helpful approach in the context of the GRA, where there is an obvious tension between the way social structures such as gender are expressed through a legal framework and individual accounts of experience and identity.

Conceptualising agency as inherently involving acts of repetition and reiteration also serves to highlight the impact of existing power relations. Considering agency without considering the impact of social structures such as class, race and gender can obscure the way individuals are affected and constrained by pre-existing power relations (McNay, 2008, p.34). This is McNay's (2013, p.80) specific criticism of radical democratic theorists such as Mouffe who, she argues, fail to consider the social context within which agency takes place and as a result ignore the material factors that limit political agency. This is particularly important when considering political agency and social movements who engage in resistant practices. Indeed, for McNay (2008, p.163), agency should fundamentally be understood as a "lived relation", i.e. a specific engagement with the world that is obviously impacted by existing power relations and as such always context specific. She argues that theories that construct agency primarily as connected to discourse and language, such as Butler's, often lose sight of the importance of the specific social and historical background of actions. In turn this limits the political efficacy of these theories as they ignore the underlying tensions involved in the (re)production of normative identities:

> "This perspective on embodied agency in context not only powerfully illustrates the uncertainties and negotiations that accompany the reproduction of normative gender identity but it also brings into view other dimensions of power apart from the symbolic medium of language, most notably, class" (McNay, 2008, p.170).

Additionally McNay (2003b, p.10) suggests that identity needs to be conceptualised as involving some embodied elements to avoid reducing agency solely to language and ignoring primarily "non-verbal" ways of being. Similarly Krause (2011, pp.305-307), drawing on new materialism as presented for instance in the work of Diana Coole (2007) and Jane Bennett (2004), argues that unintentional communicative gestures such as facial expression or posture constitute a vital part of embodied agency. Krause's use of materialism goes somewhat beyond the approach advocated by McNay in describing the body itself as agentic. As a result she considers some bodies, for example those of

"effeminate men and lesbians" (Krause, 2011, p.314) to be inherently transgressive and more likely to be resistant to norms. However, this presumption ignores exercises of power that are capable of accommodating such nonconformity and additionally relies too strongly on resistance as a key indicator of agency, an issue that I will discuss in more detail later on. While defining agency as partially corporeal is useful, attributing a greater agentic potential to some bodies than others neglects issues of social context and individual reflexivity. Certainly, within a neo-liberal governmentality framework where conformity with norms is encouraged indirectly through notions of individuality and freedom, rather than through sanctions, the concept of transgressive bodies is overly simplistic.

Although McNay's definition of agency is perhaps less focused on the actual body compared to some of the approaches which rely more strongly on materialism, it is crucial to conceptualise agency as more than 'just' language. Specifically, in the context of the GRA, which is heavily influenced by medical discourses about what types of bodies are considered normal or appropriately gendered, it would be highly problematic to ignore the ways in which agency finds its expression through bodies. As I have discussed in the two preceding chapters, even though there is no official requirement to modify one's body in order to obtain a GRC, there is a strong presumption that surgery will take place, both in the legal provision and its administration, as well as within support groups. In addition, it is unlikely that the legal "permanence" requirement could be met without some type of medical intervention (see the discussion of this in Chapters 1 and 2). Hence, a wholesale acceptance of the GRA would have to be enacted through embodied practices. In fact, agency and transformation of norms may at times be more apparent in the way bodies look rather than in what is being said. Particularly when considering trans people or those who identify as genderqueer who specifically reject the idea that bodies should always adhere to specific sex/gender norms. There is a strong argument for defining agency, at least in part as acts of embodied repetition and reiteration. Although not all agency has to, or does, involve repetition, it is likely that for agency to have a lasting impact actions – including embodied actions – need to occur more than once.

Agency and Identity

I will now move to briefly consider the interrelation between agency and identity more generally. This connection is particularly relevant when considering the role of agency not just on an individual level, but also rather in the context of wider social groups. In this sense agency as repetition can also be witnessed in rights discourses which, while relying on a somewhat limited notion of identity, they encourage the solidifying of new norms (McNay, 2009, p.72). One recent example of this would be campaigns for same-sex marriage, which have and are taking place across many Western democracies and often deploy a very specific definition of LGBT rights.[66] This suggests that, at least in regards to political movements, there can be some strategic advantage in relying on a somewhat inaccurate notion of identity to advocate for the extension of rights and legal frameworks. McNay (2009, p.74) describes rights as "performative tools", which do not actually reflect social or individual identities, but rather rely on specific political identities, which are limited to a specific context. This can be seen in trans advocacy work prior to the GRA, which relied on very specific types of discourses about rights and identity that were advantageous on a political level even when they did not necessarily reflect people's actual sense of self.[67] Similarly, Nancy Fraser (2003, p.26) notes that the politics of recognition always relies on an oversimplified notion of group identity for strategic reasons, which often obscures the tensions inherent in individual identity and can in fact discourage people from expressing themselves in a way that does not conform to the prescribed group identity. However, relying on group identities that are primarily defined in relation to specific characteristics such as class, gender and sexuality seems more problematic when considering agency as an analytical concept. As I will discuss in Chapters 4 and 5 in the context of my fieldwork, trans people's engagement with existing legal provisions is strongly heterogeneous and cannot be reduced to one single type of (inter)action solely based on belonging to a specific group.

McNay (2000, p.73) notes that Bourdieu's account of subjectivity and agency is fairly limited, mainly because in the context of habitus his agents are constructed as lacking self-awareness and the capacity to reflect on their actions and identity; as such his subjects may be oversimplified in their internal coherence. Her argument in *Gender and*

[66] For instance, conceptualising "marriage" as a key right for LGBT people rather than arguing, for example, that economic security is a key right for LGBT people.
[67] Specifically the idea of trans people being 'born in the wrong body' which was used in early studies of trans people and quickly taken up by the wider community who used those scientific works as evidence that their condition was a medical problem and as such deserving of treatment (Hines, 2007).

Agency (McNay, 2000, p.75) is primarily that theorists such as Bourdieu, Foucault and Butler fail (in different ways) to coherently explain how subjects actively construct and interpret their own identity through narratives. In turn this means that their accounts of agency tend to conceptualise agency as somewhat passive and as largely based around resistance and opposition to pre-existing norms. She argues that in modern systems of power what appears to be a resistant act may in fact serve to merely support existing methods of social control, which is why a more sophisticated account of identity and agency is essential (McNay, 2008, p.192). This is a particularly important concern in the context of legal gender regulation. The question here would be whether, for instance, engagements with the GRA, which subvert embodied expectations of gender identity – for instance applicants who have not undergone surgery - and may as such be construed as resistance, may simultaneously also reaffirm the state's legitimacy in regulating and recognising gender. As such it is important to focus more closely on the way in which individuals engage with social structures, such as gender norms expressed in the GRA, and the differential effects such engagement may have, rather than treating groups and movements as homogenous.

McNay (2008, p.162) notes that agency is often too closely tied to a unified sense of self which rarely exists as such in the material world: "The essential passivity of the subject underlying the negative paradigm results in an etiolated conception of agency which cannot explain how individuals may respond in an unanticipated or creative fashion to complex social relations." Instead she suggests that focusing on continuous personal narratives as an essential part of the construction of identity allows for a more nuanced understanding of subjectification and the resulting agency of individuals. Narrative as a concept can account for identity as constructed rather than natural, but also accommodates the fact that the way in which one's self-understanding can be changed will always be constrained and limited by structural factors (McNay, 2000, p.80).

This raises similarities to, for example, Butler's notion of speech as limited by what the subject considers speakable and even thinkable. Narrative can also accommodate a concept of identity that is not just defined in negative terms and shaped exclusively by social constraints (McNay, 2003a, p.140). McNay (2000, pp.81-82) argues that the stories we tell ourselves about our experiences over time shape our identity just as much as social categories and identification with such categories do. As such narrative

provides a link between often conflicting forces of reflexive accounts of experience and outside social categories or norms. According to McNay (2000, pp.111-113) if seen as a result of narrative then “identity is neither completely in flux nor static” as it tries to accommodate different experiences over time into a coherent form.

This focus on narrative and embodiment as key to identity is especially relevant in the context of transgender identity, which is so powerfully constructed in relation to the dominant narrative of “being born in the wrong body”. Following McNay, the pre-dominance and retelling of this narrative, which is often encouraged by professionals and in academic literature, constitutes a far from passive act of identity formation and agency but may also suggest where the limits of changes to one’s identity lie. This notion of identity as something constructed through a narrative was in fact expressly mentioned by several interviewees who described telling specific stories about themselves and their identity to service providers because they assumed that this was necessary to gain access to hormone prescriptions for example. They also provided anecdotes of those who had not been able or willing to conform to that particular narrative and as a result officials did not accept their transgender status.

McNay’s focus on narrative may provide a useful middle ground when considering agency in relation to trans people as it combines a variety of different approaches to agency, identity formation and the impact of social norms. Particularly her suggestion that narrative and identity are always temporal processes is relevant in this context, since more recent accounts of gender identity, particularly in queer theory, consider gender a fluid process than a fixed natural state. In contrast, the prevalence of social norms and power in both Foucault and Bourdieu’s work is somewhat difficult to combine with gender as a not necessarily voluntaristic but nevertheless at least partially a conscious process. However McNay (2008, p.180) specifically argues against the notion of a fully rational pre-existing subject who can objectively evaluate all of their choices and is not limited by social constraints.

McNay (2002, p.91) at times seems wary of reducing subjectivity and agency purely to narrative when this means that the focus is solely on issues of identity, as this can obscure “structural and institutional dimensions of gender oppression”. McNay (2010, p.514) argues specifically against reducing agency to sexuality, which she claims has become an overly dominant focal point within strands of feminist theory and which

ignores a more nuanced understanding of identity. Again, this suggests that identity is not solely determined by one specific factor, be it social structure or sexuality, but involves engagement with a variety of structures and exercises of power. McNay (2003b, p.6) favours narrative in the sense that it allows for identity to be defined as a "dynamic unity", which relies on some degree of permanence but also allows for contradictions and change over time. This can be read as a reminder that agency does not exist in a vacuum but is instead always bound up in the exercise of power. She suggests that, in particular, politics of recognition can obscure the type of power structures that underpin and shape the very types of identity that are supposed to be recognised within such politics (McNay, 2008, p.294). As a result wider oppressive structures, such as economic inequality, may be left unchallenged in favour of specific identity politics.

Agency and Reflexivity

Although repetition and reiteration of past actions and norms play a key role in McNay's analysis of agency, she is also concerned with its inherent orientation towards the future and its capacity to effect change. Emirbayer and Mische (1998) specifically consider the temporal components of agency and suggest that while agency's relation to the past in the form of reiteration and repetition has been theorised in great detail there has been less focus on its relation to the future. They argue that because agency is always about specific engagements with the social world, it is necessarily oriented towards the future as actions are generally intended to achieve something that has not yet happened (Emirbayer and Mische, 1998, p.973). This notion of action as intended to achieve specific aims requires agents to have some potential to reflect on their actions and to imagine new possibilities that move beyond a reiteration of the past. McNay (2003a, p.143) specifically criticises theories of agency and subject formation that fail to acknowledge the role played by anticipation as this fails to acknowledge how norms are not just adopted and repeated but also transcended every time they are translated into real actions. As such, it is important to conceptualise agency in a way that includes an orientation towards the future.

McNay (1992, p.59) does note that in Foucault's later work there is a clearer acknowledgement of the fact that the "relationship between social structures and individuals" is more dynamic than just a direct adoption by individuals of prevailing

norms. She suggests that in particular governmentality and practices of the self allow for a notion of the individual who has the capacity to engage with norms and regulations in a more active sense. In this context individuals are capable of "self-critique and the exploration of new modes of subjectivity" (McNay, 1992, p.87). This moves away from the construction of individuals as purely docile bodies and allows subjects the capacity to at least reflexively engage with norms. Therefore, I would argue that a framework that presumes that individuals are aware of and can actively engage with norms is crucial in the context of the GRA. As discussed in the previous chapter the GRA is underpinned by several rationalities, focusing primarily on a binary understanding of sex/gender and a distrust of trans people's identity claims. Interviewees seemed to be acutely aware of the fact that the GRA represented a binary approach to sex/gender and several described presenting themselves and their personal history in a highly strategic way to medical professionals and the GRC panel to achieve the desired results. Further, as I will discuss in the following chapter, trans people expect that their claims will frequently be disbelieved and therefore understand the GRC application process as explicitly designed to test their 'commitment' to their gender identity. Even if these presentations did not necessarily represent the reality of their day to day lives. This goes beyond mere acceptance of norms or an uncritical self-regulation.

Indeed, one interviewee who is very involved in activist work explained that she felt "the system encouraged dishonesty" as in her personal experience many trans people did not identify as entirely male or female but felt pressured into obfuscating this fact when engaging with the legal or medical system. For her, gender seemed to be something that involved a great deal of personal reflection rather than something that was merely imposed by the outside. Although she felt that they essentially tried to "brand her" with a specific identity, she did not feel that this was something she wanted to or had to accept. Instead, she chose to transition medically, but not legally to maintain her marriage in its existing legal status. On a purely rational level she would most likely have been capable of self-regulating her identity in such a way as to meet the requirements in the GRA but chose not to do so, because of a variety of other concerns, particularly the potential future impact on her marriage.

Archer (2000, pp.265-267) suggests that political agency agency is inherently contingent on actors being aware of their own desires and being able to articulate them. More specifically she argues that actors need to have the capacity for creativity and

reflexivity to be able to transform their chosen social roles and to prioritise between them (Archer, 2000, p.288). Although she is primarily talking about 'roles' in the sense of employment or production, it is possible to extend this concept to social categories more generally. Similarly Friedman (2003, p.38) suggests that for action to have effects agents must have at least the potential for reflection and reflexivity, and that caring more about a specific issue changes the way in which agency is utilised by individuals. Presumably transforming 'woman' or 'wife' as a role requires a similar degree of creativity and reflexivity. Archer's and Friedman's discussion of agency as inherently involving the prioritisation of some roles or issues over other is particularly useful in the context of the GRA. This is because applicants may choose to prioritise their role as a spouse or parent and consequently decide not to apply for a GRC to avoid having to dissolve their existing relationship.

McNay (2003a, p.141) suggests that defining agency in terms of anticipation and an orientation towards the future is also only possible when identity is not just defined in negative terms, that is in opposition to existing norms. Being able to reflect on and engage in actions aimed at the future rather than the present requires one to be able to move beyond and challenge existing constraints, which is only possible if individuals are not solely defined by those very constraints, such as gender norms for instance. Similar to Archer she suggests that engaging with an uncertain future requires creativity and innovation within the exercise of agency (McNay, 2008, p.183). She engages with this issue further in her more recent work, where she suggests that particular political agency inherently requires critical reflexivity, a fact that is often neglected in post-identity politics (McNay, 2010, p.514). Again, this suggests that while identity does not determine agency and how it is deployed, it is still difficult to conceptualise one without the other, in particular in regards to political movements. However, despite McNay's argument that agency always engages with potential future outcomes, this does not mean that it should be solely defined as indeterminacy. As discussed earlier agency involves reiteration and repetition to reaffirm existing norms as well as solidify changes. While some actions may have indeterminate outcomes and indeed individuals' ability to predict the outcome of their actions may be inherently limited, simultaneously, many everyday acts involve some degree of certainty. This is further explored in the following section.

Agency Beyond Resistance

Treating agents as capable of critically reflecting on the past and present and as able to imagine and actively work towards a different future, also allows agency as a concept to move beyond resistance to norms as primary evidence of agentic potential. Hutchings (2013, p.21) argues that in fact conceptualising agency solely as resistance tends to involve normative judgement about what types of actions are properly resistant and which are merely reiterations of oppressive structures. This in turn constructs some individuals as lacking in agency if they fail to show the expected forms of resistance.

Focusing primarily on resistant acts as forms of agency can also serve to overstate their actual impact, as resistance is not the sole method through which coercive norms can potentially be changed (Hemmings and Kabesh, 2013). Hemmings and Kabesh suggest that instead agency can be a useful concept for analysing and mediating coercive norms by outlining their limitations or limited effectiveness in everyday life. Mahmood, (2005) in her study of the Egyptian women's mosque movements, specifically highlights that agency can still involve actions that outsiders might consider to be a repetition or reiteration of potentially oppressive norms or power relations. She focuses specifically on *sabr,* or the ability to be patient even when suffering, which is considered a virtue by the women she interviews but which, particularly to Western feminists, might appear to be merely an acceptance of women's oppression. In her work, she highlights the different ways in which women approach these issues and the fact that most of them saw *sabr* as something to be aspired to and worked on in an active sense rather than by merely passively accepting prevailing social norms. Considering trans people specifically, Pfeffer (2012, p.593) notes in her study of the trans people's life choices and decision making in the context of intimate relationships with cis gendered people that: "Enacting agency may involve strategies virtually *requiring* participation within oppressive social structures and institutions, particularly among those in marginal social positions."

The idea of agency as more than just resistance also is applicable to trans people's engagement with the GRA. Obviously, many people comply with the requirements set out in the GRA and in fact many describe their gender identity in mainly binary terms. However, this seems to be a form of agency that involves conscious choices about identity and life paths rather than a passive acceptance of norms and of the status quo.

This is particularly important to keep in mind in regards to trans people for whom access to many basic legal rights such as marriage and obtaining legal documents is dependent on at least officially adhering to the gender norms expressed within the GRA.

Furthermore, Madhok and Rai (2012) suggest that particularly in the context of political or social movements it is important to remain aware of the fact that agency always involves a degree of risk. Since agency is always exercised in relation to existing power structures, individuals can suffer negative effects if they challenge norms. This highlights the need to be aware of pre-existing power relations, which can impact agency in a variety of ways. It also is logical to assume that when individuals are aware of the potential negative consequences their actions can have on themselves and others, they are less likely to exercise agency in a way that can be characterised as openly resistant but may instead engage in more subtle forms of resignification. Renegar and Sowards (2009) argue that it might be helpful to define agency as contradiction of what they term “the status quo”. While this is an interesting way of conceptualising agency it is somewhat difficult to find the difference between “contradiction” and resistance in this conceptualization of agency, which opens this model up to the same criticisms that are made in relation to agency as resistance. Additionally Renegar and Sowards seem to rely on the idea that some choices are more “authentic” than others without elucidating how those specific choices are free from constraining power relations.

McNay suggests that resistance, as a defining characteristic of agency, is particularly questionable when seen as an analytical category. If, as discussed previously, norms are rarely translated directly or completely into individual actions and behaviour, then describing actions which are contrary to those norms solely as resistance can erase more nuanced types of behaviour (McNay, 2003a, p.140). This is especially relevant in relation to trans people, who show a high degree of awareness of the type of behaviour or presentation that is expected of them and who in turn navigate official institutions in a way that go beyond ‘mere’ resistance. However, not conforming entirely to existing norms does not mean certain actions are inherently resistant; in fact modern forms of state power are often capable of accommodating and subsuming nonconformity into an existing framework, as discussed in the preceding chapter.

Conclusively, McNay (2008) states that there are two distinct notions involved in the concept of agency, firstly that individuals do not just passively accept and reiterate

social roles and secondly the ways in which individuals are capable of challenging and transforming norms in a political sense. Both aspects are crucial for understanding trans people not just as passively ceding to the demands of the GRA but instead actively engaging with it and making choices that reflect their own individual identities. For this purpose, it is clearly important to conceptualise agency in a way that allows for agents who are creative and able to critically reflect and also capable of self-transformation over time. As such both agency as an embodied and as a narrative practice are key to analysing trans people's engagement with existing legal provisions.

While governmentality as an analytical lens can help to elucidate some of the normative reasoning contained within the GRA, it is not by itself capable of explaining how specific individuals engage with it and are affected by it in practice. In fact, there was not a single interviewee who entirely accepted the GRA and entirely regulated their behaviour and identity in relation to it. Considering this discrepancy between the legal framework and real life, it is clear that individuals have some degree of agency in their engagement with the legal framework and the GRA and are not solely influenced by legal concerns. Overall, I would argue that Lois McNay's approach to agency is particularly useful, as it presumes that individuals are not just influenced by social and cultural factors but are also capable of a degree of self-awareness and self-determination in their engagement with such constraining influences. This reflexive account of agency is combined with a notion of embodied existence and of identity formation that allows for contradictions and change over time. Such a multi-faceted conceptualization of agency is a vital component for highlighting that trans people are not mere passive subjects of the GRA, but rather exercise agency in creative and strategic ways in relation to it. Further a concept of agency is needed in order to fully understand how people engage with the rationalities and technologies of the GRA in practice. Although a study of governmentality can help to illuminate the types of rationalities and technologies that are bound up within the GRA, it focuses on individual engagements with these to a lesser degree. Therefore considering both governmental rationalities and technologies and people's day-to-day engagement and responses to them, will provide a more in-depth understanding of how the GRA functions in practice and what its effects are. In the following chapter I will draw on my fieldwork materials, as well as on legal consciousness as an analytical framework, to consider how trans people interact with and view the specific provisions of the GRA.

Chapter 4

Trans People and Legal Consciousness

Having considered the importance of agency in the context of the GRA, I will now briefly outline one interviewee's specific experience of the GRA. This narrative highlights several of the key issues that will form the basis for both this, and the following, chapter. For one interviewee, Alice, the decision to begin changing her gender identification on official documents was severely impacted by both a lack of information and financial concerns. Due to the fact that her previous employment had been part time and badly paid, she could not afford to pay any fees required for new documents. She had been trying to research which identification documents she would be able to obtain for free but the available information was often sparse or contradictory. As a consequence without an updated passport she found it harder to find new employment as a passport is frequently required to prove one's eligibility to work and using her old passport would have forced her to disclose her sex as assigned at birth.[68] However, she had effectively been working around her lack of up to date documents by using her old driving license when necessary and explaining when asked that she had changed her name. She would then later call the organisations that she had shown her driving license to and complain that her gender marker had been recorded wrongly, which by her account generally lead to an apology and a quick change of her records. This strategy meant she did not have to disclose her birth sex but could instead provide a believable narrative about a clerical error. While both narratives might ultimately lead to the same outcome - her gender being recorded correctly - the second narrative allowed her to both avoid an involuntary disclosure and reassert her agency against a system that made it unduly difficult to obtain the correct documents by imposing economic barriers. However, while her particular approach was primarily

[68] This also means that trans people are directly affected by new immigration-based security policies and laws, such as UK measures that require passport checks as a precondition for employment and housing (GOV.UK, 05 January 2017).

motivated by a lack of economic capital, it is also a strategy that relies on the ability to pass as cisgender, an option that is only available to some trans people. It is also a strategy that is only temporarily sustainable as it subverts legal rules, which demand official forms of identification and even in its temporary practice reduces access to, for instance, employment opportunities.

Alice eventually obtained an updated passport, primarily motivated by a desire to change employers, but said she was unlikely to ever obtain a Gender Recognition Certificate, which she described as a "tranny license". Her rejection of this particular legal process was based on three interlinked reasons. Firstly, after having navigated the medical transition process she was tired of having to face another "assessment" of her gender identity and to provide further evidence to support her identity claim. She also found that both the medical and the legal process were easily manipulated and recounted "lying" to medical officials, in regards to her desire to undergo surgery, to expedite the often very lengthy assessment process. Based on her own experience and that of friends she argued the medical system and legal system clearly favoured some trans people, particularly those who identified as binary, were white, British, able-bodied, financially secure, and had no history of mental health problems. Secondly, she worried about the potential impact of effectively being added to a list of "known transgenders"[69] if she obtained a GRC. Finally, for her the GRC symbolised special legal protections, regarding discrimination protection and privacy, that were only available to select trans people rather than everyone. She considered the GRC to be a gatekeeping document that reflected who had been determined as a "worthy trans" person, by officials and as a result was afforded extra legal rights. She saw the idea of legal gender recognition as inherently suspect and lacking in validity. Although Alice was particularly outspoken in her criticism of both the medical and legal aspects of transition, her narrative in many ways reflects the particular concerns of those whose experience of the medical/legal system has been less positive. This is often at least in part due to the effect of class-based economic barriers that make access to documents and officials prohibitively expensive. Frequently this is further compounded by age, as particularly younger trans people are less likely to have access to both the social and financial capital necessary to navigate this process. Finally the explicit rejection of the GRA is often also a reflection of wider personal politics, as this was an opinion

[69] This refers to the Gender Recognition Register which records all changed birth certificates by showing the link between the old and the new, changed, birth certificate and which can only be accessed with a court's permission.

frequently expressed by those trans people who were also more generally critical of state involvement or regulation in matters perceived as inherently private.

To situate my further analysis of my field work material, I will now turn to legal consciousness to explore in more detail the specific ways in which trans people engage with the legal regulation of their gender identity. Although the development of legal consciousness has been described repeatedly by multiple authors (see e.g. Silbey, 2005; Cowan, 2004a; Engel, 1998) it nevertheless is useful to start with a brief overview of its history to highlight some of its key capacities, as well as possible limitations. I will begin this chapter with a short discussion of the origins of legal consciousness. I will then consider some of the criticisms of legal consciousness as a framework, specifically those related to the definition of "law" in legal consciousness studies and whether other structural factors such as race and gender should be included in such an analysis. Overall I will suggest that when based on a pluralist understanding of law, legal consciousness can perhaps more accurately account for normative structures such as heteronormativity (Harding, 2011), cisnormativity, as well as class and race. These structures function as law-like structures that and impact legal consciousness in a variety of ways. In the final part of this chapter I will draw on my research finding to consider the types of legal consciousness, which trans people develop in their engagement with the laws regulating gender recognition. Although a legal change of gender is officially only enacted through acquiring a Gender Recognition Certificate (GRC), in practice changing one's gender on other identification documents, such as passports and driving licenses, often fulfills a similar function. Indeed these separate processes are generally intuitively grouped together by trans people, support groups, and officials, and are collectively viewed as the legal element of transition and as such will be considered together in this chapter.

In particular I will consider three key issues related to legal consciousness in this context. Firstly, the relation between law and other discourses; specifically the impact of both medical knowledge and gender norms on trans peoples' legal consciousness. Secondly, the idea of law as something that needs to be managed by trans people in multiple different ways. Finally, the idea that in the context of the GRA law becomes both unknowable and inherently hostile or biased.

Legal Consciousness

Legal consciousness studies especially in their original design are arguably useful not just for academics but also for policy makers and legislators as they can reveal how people experience, and live with, the effects of law (see, e.g. Macdonald and Kleinhans, 1997). In particular they can be useful in problematising opinions held about a group of people, for instance the idea that benefit recipients know the specific details of legislation and use them to manipulate the benefit system to their advantage (Cowan, 2004a, p.940) Additionally a legal consciousness approach can in this context reveal flaws in a particular law such as that people feel it treats them unfairly and denies them dignity (Cowan, 2004a, p.942). As such one argument for the use of legal consciousness as a framework is that it can be particularly useful in areas where the law has recently been changed or is under review and more importantly can also provide a focus for resistance or reform to existing laws (Harding, 2011, p.7). Further, legal consciousness focuses not just on particular laws but also more broadly on perspectives on law in general, which may emerge from particular situated relationships to law.

Legal consciousness as a concept developed mainly in the context of North American work on law and society or law and culture (Cowan, 2004a, p.928). Earlier work on legal consciousness (Sarat, 1977; Engel, 1984; Merry, 1990) took place in primarily legal settings such as courts and lawyer's offices and the legal needs of individuals. More recent work in this area however has moved its focus away from purely legal institutions or legal services (see, e.g. Sarat, 1990) to for instance immigration campaigns (Abrego, 2011), anti-abortion campaigns (Wilson, 2011), migrants' experience of criminalisation (Kubal, 2014), same-sex marriage ceremonies (Nicol and Smith, 2008; Harding, 2011; Hull, 2003), environmental activism (Fritsvold, 2009), disability (Engel and Munger, 2003), and employment (Marshall, 2005; Hirsh and Lyons, 2010).[70]

This more recent work takes as its starting point the idea that "legality is an emergent feature of social relations rather than an external apparatus acting upon social life"

[70] This is not to say that recent legal consciousness work does not engage with officials at all. Liu (2013), for instance, uses a legal consciousness approach to analyse the effects of globalisation on the legal profession. Similarly, drawing on legal consciousness work, Moorhead and Hinchley (2015) study the ethical consciousness of lawyers.

(Ewick and Silbey, 1998, p.17). This approach suggests that it is impossible to analyse either law or society without also studying and understanding the other at the same time, as both law and society are constantly influencing and re-constituting each other. Additionally this type of research focuses also on how "ordinary" people and not only legal experts make sense of and engage with law, when trying to navigate their day to day existence. True to their socio-legal nature, legal consciousness studies intend to portray law in the context of everyday life and although the definition of legal consciousness varies depending on the aims of the project (Engel, 1998), the focus on individuals from specific groups and their understanding of a concept or situation is always at the core. This means that aspects of normal life and society, which are unlikely to be included in a purely doctrinal study of law, are utilised by legal consciousness studies to provide a more experiental picture of the interaction between law and society. Much legal consciousness work is focused on the difference or gap between law as it exists in books and legal statutes and the way it actually functions in everyday life (Sarat, 1985; cf. Silbey, 2005). More recently legal consciousness has moved away from this approach and instead focuses more closely on how people engage with legal concepts in situations that may not necessarily be part of a legal setting. The idea is that rather than focusing on how well people understand law, legal consciousness studies can be used to highlight "the way that law shapes how people make sense of their experiences" (Marshall, 2005, p.7); often these experiences do not involve legal settings or legal experts but rather the transposition of legal concepts into everyday life and culture.[71]

Ewick and Silbey's work on legal consciousness has established itself as the foundation on which many other approaches to legal consciousness are based. Analysing the data they gathered through their interviews they describe three main types of legal consciousness that are most commonly found in individuals. These are "conformity before the law" (Ewick and Silbey, 1998, p.45), in which law is perceived as a power or authority to which one has to defer; "engagement with the law", in which law provides a set of rules that can be used by everybody; and "resistance against the law" where the law is seen as something that individuals need to escape to avoid negative consequences

[71] While individual studies take different approaches to defining and studying legal consciousness they all broadly focus on how non-legal actors engage with law in their day to day lives. As a result, despite focusing on often vastly different topics many studies take a more or less similar methodological approach to their subject matter. Most if not all recent legal consciousness studies use in-depth interviews with "ordinary" people to examine their stories and narratives about specific issues. Some have also used court transcripts (Merry, 1990) and open-ended online surveys to gather similar materials (Harding, 2008; Harding, 2011)

for themselves. A “before the law” perspective sees law as a separate sphere from everyday life with the assumption that law and legality has a specific formal order and functions in a rational and objective manner. As Harding (2011, p.20) argues this type of understanding of law is mainly focused on “juridicial power” as a specific commodity.[72] Harding applies Foucault’s analysis of power to this schema and argue that people who take a “before the law” perspective essentially perceive themselves as powerless, or give up their power in order to appeal to law for a solution over which they might not have any control. As such in this type of view law is understood as “relatively fixed and impervious to individual action” (Ewick and Silbey, 2003, p.507) and as such this understanding of law seems to have the least capacity for accommodating creative forms of individual agency that are contrary to existing legal and social norms. In contrast a “with the law” perspective perceives law as a game of skill that is primarily based on “self- interest” and the capacity to produce “strategic gains” (Silbey, 1998, p.48). In this case people do not inherently perceive themselves as powerless when confronted with law or a legal setting but rather the adversarial aspect of legality is an inherent aspect of law’s nature. This perspective also has a much greater scope for accommodating agency as in theory everyone is able to play law’s game as long as they possess the necessary social and cultural capital to utilise law strategically to further their own objectives.

The third type of legal consciousness, “against the law” is again radically different from the other two. It is primarily based on the notion that law is something to be resisted or “something to be avoided” at all costs to escape potentially damaging consequences (Ewick and Silbey, 1998, p.192). Although this perspective on law mirrors the first one in so far as people understand themselves as powerless, or less powerful than law and legal institutions, based on this type of consciousness they do not submit to or accept law’s power but rather exercise their agency to subvert or escape it (Ewick and Silbey, 1998, p.49). This third type of legal consciousness becomes the most important one in Ewick and Silbey’s analysis of their own data and as such it is unsurprising that this is the part of their work that has created the most commentary. As Harding (2011, pp.20-21) suggests this type of understanding “includes resistance to the disciplinary power of law” rather than just an acceptance of its juridical power. Instead of accepting the negative consequences of an engagement with law people actively and strategically try

[72] In defining law as a commodity or resource, Harding draws on a Foucauldian understanding of law as power and therefore as something that one can both possess and transfer. However, she suggests that when individuals conceptualise an issue as a specifically *legal* problem, they thereby accept that it is legal actors who hold power in this context.

to undertake small “violations of conventional and legal norms with a strong sense of justice and right” (Ewick and Silbey, 1998, p.49) or even engage in organised or institutionalised forms of resistance (see e.g. Abrego, 2011 on legal conscioussness and reform efforts in the context of illegalised migration). This clearly shows that power here does not function in a solely negative fashion but rather can be creatively exercised by everyone to create new types of resistance and knowledge. Clearly this type of legal consciousness is of key importance in analysing and understanding how trans people engage with law in their everyday lives.[73] Although the three different types of legal consciousness are discussed separately by Ewick and Silbey (1998, p.50), none of them are mutually exclusive conceptions of law but instead co-exist and their prevalence and exact definition can vary from person to person: “legal consciousness is neither fixed nor necessarily consistent; rather it is plural and variable across contexts, and it often expresses and contains contradiction.” Because legal consciousness is made up of a myriad of spoken and unspoken statements[74] and actions the legal consciousness of an individual can change over time. Furthermore legal consciousness can be contradictory if considered in the context of large social groups (Hull, 2003, p.630), as well as on an individual level as people often hold multiple conflicting views about many issues at the same time (Ewick and Silbey, 1998, p.50).

Legal Consciousness and Minority Groups

There has been some suggestion that the type of legal consciousness displayed by minority groups may potentially expand the Ewick and Sillbey’s original three categories of legal consciousness. Hull’s (2003)study of the commitment ceremonies

[73] Many commentators suggest that in particularly this last view of individuals acting or living “against the law” can provide the basis for resistance or change to the law or existing legal system (Hull, 2003, p.631; Marshall, 2005; Harding, 2011), as such legal consciousness studies do not just reveal how the law is affecting people, or how it is understood, engaged with and perpetuated, but also how individuals are attempting to change it.

[74] Harding in particular argues that consciousness in this context should also include the unconscious or subconscious, although in practice this would prove somewhat difficult to study. However legal consciousness does not just refer to factual knowledge about law but rather to an individual’s affective experience of and engagement with law. Hull (2003, p.630) suggests that in fact legal consciousness can be seen as a type of “narrative” about experiences with the law over the lifespan of an individual or a group. Similar to narratives about other events, a narrative about law may often reveal or be based on underlying/subconscious emotions, assumptions, values, etc.

held by same-sex couples actually showed that these couples were unlikely to view their relationship with law as fitting within the “against the law” type of legal consciousness. This is in stark contrast to Ewick and Silbey’s assumption (1998, p.234) that marginalised groups are most likely to take this specific view of law due to their negative experiences with law more generally. Instead Hull (2003, p.630) suggests that commitment ceremonies were effectively “cultural practice and legal ambition” that is to say that they were evidence of a challenge to law, as they were enacted in opposition to law’s previous refusal to grant legal recognition to same-sex couples, while at the same time acknowledging the power that law and specifically legal recognition holds. Hull highlights that lesbian and gay couples in this context clearly understand law in strategic and political terms and utilise legal concepts to achieve specific ends. [75]

The work of Hull (2003) and of Nicol and Smith (2008) on the legal consciousness of lesbian and gay couples suggests that at the very least in this specific context the three types of legal consciousness described by Ewick and Silbey need to be reconceptualised. In fact this more diverse understanding of legal consciousness, particularly its focus on the strategic use of law, does not seem to be restricted to lesbian and gay couples engaged in legal activism. Abrego’s (2011) study of undocumented migrants in the US and their children clearly shows that while the parents could be understood as displaying an “against the law” type of legal consciousness, their children instead actively utilise liberal legal concepts such as equality and fairness to publicly challenge the law. Potentially there is a correlation here between minority status and active engagement with and awareness of law and legal reforms that may make certain groups more likely to develop a type of legal consciousness that shifts the boundaries of Ewick and Silbey’s tripartite schema by falling within multiple categories at the same time.

Legal consciousness studies additionally are particularly relevant in the analysis of how marginalised groups/minorities interact or chose not to interact with the law (Garcia-Villegas, 2003, p.365). As minority groups struggle the most to make their views and opinion heard, accurate studies of how law affects them in everyday life are undeniably an important issue not just for academics but also for policy makers. There has been a range of studies focusing on minority groups such as Cowan’s (2004a) study of homelessness applications and Sarat’s (1990) study of welfare recipients. Sarat (1990,

[75] This is mirrored in Nicol’s and Smith’s (2008) study of political movements in favour of same-sex marriage in Canada and the US. This movement, they argue, “uses the power and legitimacy of law to engage in political resistance and civil disobedience” (Nicol and Smith, 2008, p.684).[75]

p.344) suggests specifically that minority groups may have a particularly strong legal consciousness due to their more frequent, and often negative, interactions with law which seems to be supported by Harding's claim that legal consciousness studies are particularly useful when they focus on "structural constraints" such as race, class or sexuality which shape peoples perspective of law in certain ways. Political affiliation, ideology may also similarly impact people's engagement with law and make it strongly context specific (Cooper, 1995). It is hardly surprising that those who most often experience the negative and constraining aspects of law, for example in the context of housing applications, have a particularly strong view of how exactly law works in practice and how it affects them as conflicts do make the effects of law most obvious (Ewick and Silbey, 1998, p.28). Trans people are undoubtedly a minority group within any given population.[76] Therefore existing research about minority groups and legal consciousness is particularly relevant to an analysis of trans people's legal consciousness. In particular, trans people are more likely to have negative interactions with law, both due to the nature of the GRA, which I discussed in detail in Chapters 1 and 2, and prevailing experiences of inequality in many areas of life, such as employment, healthcare, etc. I will now move on to briefly outline the importance of wider social structures for understanding trans people's legal consciousness.

Legal Consciousness and Social Structures

Some commentators (see, e.g. Mezey, 2001) have suggested that legal consciousness studies may not be the most approprotate method for assessing the prevalence of law in ordinary people's lives as they overestimate the place law actually has in every day events. These issues arises in part from the different definitions of what events are "legal" that are used in different projects (Engel, 1998, p.119). It could be argued that this is supported by the way in which many legal consciousness studies are conducted; Cowan (2004a, p.938) for example explains that rather than specifically asking about law or what his participants would consider legal, he interprets the participant's statements to a certain degree which could potentially contribute to the impression that

[76] Recent studies suggest that for instance only about 1% of the population could be classified as having gender dysphoria (Zucker and Lawrence, 2009)

law's presence or relevance is overstated in legal consciousness studies. Additionally some studies work with very specific definitions of what constitutes law for the purpose of a project and as such a lack of definitional clarity can hardly be considered a problem inherent to all work on legal consciousness (Genn and Beinart, 1999, pp.22-23). Nevertheless, Ewick and Silbey arguably use a very wide and sometimes vague definition of what is considered "legal" in the context of their study as the focus of their project is not law but rather "legality". They (Ewick and Silbey, 1998, p.16) suggest that in fact law exists in many different forms for people when they go about their daily lives "in courthouses; parking meters; marriage; birth; death and mortgage certificates". Avoiding the use of explicitly law related terms in their research questions and interviews can potentially provide a more accurate picture of the prevalence of law as it allows the respondents to define for themselves what constitutes law in their individual lives and those kind of individual accounts are after all the primary focus of legal consciousness (Cowan, 2004a, p.931). Defined this way law, and more specifically legality, is obviously relevant to everyday life in almost all circumstances, which supports Ewick's and Silbey's (1998, p.22) definition of law as "the meanings, sources of authority, and cultural practices that are commonly recognized as legal". However obviously this does not entirely answer the question of whether law actually has relevance to "ordinary" people outside of the specific parameters set by legal consciousness studies.[77] However, it may be useful to, as Marshall (2005, p.14) argues, think of legal consciousness as a "mid-range theory", i.e. one that is centred primarily around one specific legal issue and its social and political context avoids many of the theoretical difficulties associated with earlier work on legal consciousness. Although wider social structures, such as binary gender categories for instance, do not rise to the level of being 'legal' themselves, it is important to retain an awareness of the degree to which such structures are read into or underpin people's engagement with law.

To acknowledge the importance of social structures, Nielsen's (2000) study of the legal regulation of hate speech takes an intentionally intersectional approach by including her respondent's class, race and gender in her analysis. She argues that law should be seen "as one of many competing forces that shape social life" which is inherently impacted by other social forces and that this should be given greater priority in legal consciousness work (Nielsen, 2000, p.1061). While the overall outcome of her study showed that most participants were against a regulation of hate speech there were

[77] Similarly some studies have focused on very specific legal issues such as sexual harassment (Marshall, 2005) or same-sex marriage (Hull, 2003) where law has practical relevance even to non-legal actors.

nevertheless clear variations based on the respondent's race and gender. However, while one may argue that class is considered implicitly rather than explicitly, Ewick's and Silbey's (1991) analysis, particularly of Millie Simpson's[78] engagement with the legal system, is inherently also an analysis of the impact of class in this context.[79] Although Levine and Mellema (2001, pp.190-191) make a valid argument in saying that law is not the only determining factor for people's behaviour, this does not mean that quasi-legal concepts do not structure everyday life. Indeed they themselves acknowledge that their respondents rely on legal constructs such as fraud and rape in making sense of their own lives. Instead it could be argued that this merely shows the need for a form of legal pluralism, i.e. that there can be different kinds of rules that underpin behaviour and contribute to the formation of different types of legal consciousness in different groups.

Indeed Harding (2011, p.30) suggests that one possible way of avoiding the problem that legal consciousness studies often underestimate the impact of extra-legal factors is to rely on a specifically pluralist definition of what "law" and "legality" mean in this context. Rather than relying on legal pluralism in its original form, i.e. a way of describing a system where there is more than one type of law (Merry, 1990) she instead relies on a notion of legal pluralism that suggest "that there are many normative orders of various descriptions that are not attached to the state, but which nevertheless are 'legal'" in the sense that they fulfill a similar function (Harding, 2011, p.30).[80] She argues that this allows for the incorporation of normative social structures, such as heteronormativity for example, into a reading of existing laws despite the fact that such structures may not ordinary be considered as "law" but which do effectively function as such by providing a clear framework of rules and potential sanctions for a breach of such rules. This type of approach obviously is most relevant when studying minority groups as they are far more likely to be negatively affected and constrained not just by

[78] The case study of Millie Simpson's engagement with the law in the context of a court case forms the basis for some of the key elements of Ewick's and Silbey's (1998) analysis of legal consciousness.
[79] Such social structures which may impact legal consciousness are not limited to class, for instance their study of judges decision making in possession proceedings Dave Cowan, et al. (2006) highlight that judges' general perspective on human nature frequently defined how they understood the cause of someone being in rent arrears in social housing, irrespective of the specific legal rules applying in this situation.
[80] This can be compared to Hertogh's (2004) European conception of legal consciousness. Hertogh argues that this European approach, which he sees as based primarily on the work of Eugen Ehrlich (1913), focuses on the law as something that exists in individual's minds and does not necessarily resemble the official law as written in statutes or court decisions. As a result this definition of law accommodates "social norms and values" even when they are not included in official laws. This seems similar to Harding's argument in favour of legal pluralism although perhaps less importance is placed on the wider cultural effects of social structures such as class and race.

law but also by other social structures such as class, race and gender.[81] As such it may be possible to argue that some people may approach and think of the binary sex/gender structure prevalent in society in a similar way to how one engages with the legal system in the sense that it functions as a complimentary set of social rules. In this sense sex/gender may be understood as a similar ordering principle, which sets out certain types of rules or acceptable conduct.[82] An example of this would be the construction of sex/gender as purely binary, where a transgression of this construction can lead to a variety of sanctions, from interpersonal violence to exclusion from specific rights frameworks. To this extent social structures can fulfil a 'law-like' function, which in turn de-centres law and highlights that law is inherently part of a wider social and cultural framework. Harding (2011) specifically relies on this to justify the inclusion of heteronormativity in her analysis of concepts such as marriage and family. Arguably this could be said to be of similar relevance in the case of trans peoples engagement with law which often involves similar issues of heteronormativity and is clearly continuously constrained by existing normative assumptions about the relationship between gender and sexuality. More importantly treating the sex/gender binary as another type of 'social-law' is highly fruitful in the context especially of the Gender Recognition Act, which so fundamentally relies on gender norms. Highlighting the effect of such normative structures does not just challenge the primacy of law as an organising principle of society but also challenges the effect they have on social life.

Legal Consciousness and Legal Pluralism

Existing literature on legal pluralism is frequently focused on what exactly can be defined as law, and in turn what can be defined as legal pluralism (see e.g. Tamanaha, 2000; Macdonald and Kleinhans, 1997)? According to MacDonald and Kleinhans (1997, p.40) "critical legal pluralism 'takes as its starting point the assumption that all

[81] This effectively circumvents the critique made in particular by Levine and Mellema (2001) about the undue importance placed on law by legal consciousness studies: "The problematic of whether or not 'law' is actually salient in everyday life becomes a moot point if 'law' is anything that people, in their social practices, treat as law" (Harding, 2011, p.31).
[82] This analysis does not mean to suggest that gender is in fact law or that it even functions analogously in all instances. However, it seems important to be aware of the power gender can hold as a social ordering principle when analysing a law, such as the GRA, which as discussed in chapter 2 is strongly underpinned by sex/gender norms.

hypotheses of normativity merit consideration from a legal point of view'". Similarly for Bonaventura de Sousa Santos (1995, pp.428-429) law is "a body of regularized procedures and normative standards, considered justifiable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, couple with the threat of force". While more specific than the definition provided by MacDonald and Kleinhans, this definition encompasses among other things the enforcement of norms by (state) institutions and clearly goes beyond merely recognising for instance the coexistence of state and customary law. For Tamanaha (1993, pp.298-299; 2000) these particularly wide definition of law is inherently problematic as it precludes any attempt to distinguish law from social life and norms more generally. He is critical of this approach, as according to him it encourages the conflation of law and norms, which he suggests does not encourage a more in-depth analysis of either concept. Instead law should be viewed a "cultural construct" (Tamanaha, 2000, p.313), which can never be accurately defined by one single description. Law as such is a social practice, which for Tamanaha refers to "an activity that contains aspects of both meaning and behaviour, linked together by a loosely shared body of (internally heterogenous) norms and activities." This approach according to Tamanaha (2000, p.314) is wide enough to include a variety of practices but also narrow enough to allow for the effective study of a specific field. Legal pluralism then exists where more than one such type of law is recognised by one group at the same time. He argues (Tamanaha, 2000, p.315) that one key arbiter of legal pluralism in this model is whether a phenomenon is in fact characterised or described as "law" by the people engaging with it. In this context then neither does state law inherently dominate all other normative systems, nor do those systems inherently run parallel to state law. Instead the relation between the two is highly complex, situational and variable (Tamanaha, 2008, p.411).

A pluralistic understanding of law can also allow us to think of law reform attempts in different ways. Roderick MacDonald and Hoi Kong (2006) for instance argue that law reform attempts need to be based on a conception of law that is pluralistic and takes into account the constitutive interaction between law and society. While their discussion focuses predominantly on state law, arguably attempts to reform other normative orders also need to consider the interaction between different normative orders and/or society. As such while a specific law may be aimed at regulating a certain type of behaviour, in turn it also creates new types of actions and interactions (MacDonald and Kong, 2006, p.25). MacDonald and Sandomierski (2006) argue in favour of re-imagining legal

subjects as legal agents with the capacity to make normative actions, rather as passive subjects who are solely determined by prescriptive law. Drawing on legal pluralism Young (2014), in her analysis of Hawaiian Cockfighting frames the issue of what practices constitute legal consciousness as an issue of "second-order" legal consciousness. While the enforcement of a law can affect certain practices, beliefs about how such enforcement will be acted out by, as determined by the legal consciousness of the enforcer, further shape existing practices and become embedded within them, they effectively create a second set of laws and regulations. As such external "law", as well as the subjective understanding of such laws, one's knowledge of other people's understanding of law, as well as co-existing normative structures all contribute to our overall understanding and experience of law. Following Young, trans people's understanding of the GRA itself could be conceptualised as "first-order" legal consciousness, while their knowledge of how the GRA is understood by those legitimised to enforce it, for instance, members of the Gender Recognition Panel, medical/legal professionals, and support groups, would constitute "second-order" legal consciousness; both of which ultimately shape a person's engagement with the GRA.

I would assert that particularly in the context of the Gender Recognition Act sex/gender, and the resulting hetero- and cisnormativity, create at least one secondary legal order in people's understanding of the GRA in addition to the more obviously legal provisions of the GRA. While sex/gender always functions as a structuring principle within society and consequently also within a legal context, in the case of the GRA sex/gender norms, such as that gender should be binary and permanent, become explicitly written into law as seen in the evidentiary requirements of s.3 Gender Recognition Act 2004 (see, e.g. Grabham, 2010). However, sex/gender norms to some extent also exceed the requirements of the GRA. For instance there is at present no explicit requirement to undergo gender reassignment surgery, which means there is no direct link in the GRA between sex/gender as a legal concept and as a biological or aesthetic concept. Nevertheless in practice most trans people feel they have to undergo most, or all, available surgical options before they can apply for a GRC, despite the lack of an official surgery requirement.[83] This provides just one example in which sex/gender norms work in tandem with legal regulation and are effectively read into the law not just

[83] The tension between this lack of an official requirement for surgery and the de-facto presumption that some surgery should take place is something that I have already highlighted in the context of the GRC application form in Chapter 1.

by trans people who are engaging with the GRA but also by service providers and support groups and potentially even GRP members.

The working of sex/gender norms as legal rules is compounded by the fact that the GRA intentionally codified both the language and the practices the medical system has propagated in its engagement with trans people, an issue I discussed in Chapters 1 and 2. The medicalisation of the GRA is highly problematic due to the fact that the medical system has been and continues to frequently focus on adherence to heteronormative and cisnormative ideals, rather than the outcomes desired by service users. As a result until relatively recently only heterosexual trans people were able to access gender clinics (see, e.g. Coleman and Bockting, 1989), and presently those who reject a binary model of sex/gender and lack the privilege afforded by certain types of race and class presentations, still report serious difficulties in accessing services. Consequently trans people frequently treat the medical and legal frameworks they have to engage with as one and the same and the higher "evidentiary" requirements of the medical system are treated as also applying to the GRA.

Legal Consciousness and Trans People

In the preceding part of this chapter I have provided a brief outline of key themes within existing work on legal consciousness. I will now turn to my fieldwork findings to explore some crucial characteristics that emerge when considering trans people's legal consciousness. In particular, I want to consider whether legal consciousness in this context is based solely on knowledge of law, or whether other types of knowledge may also be involved in the creation of legal consciousness. Further, I will aim to link the discussion of trans people's legal consciousness to the issue of agency within this legal framework, which I outlined in Chapter 2. Finally, and drawing on some of the themes emerging in Chapters 1 and 2, I will analyse how trans people engage with a legal framework that is inherently negatively disposed toward their specific identity claims.

Ewick and Silbey (1991) primarily describe legal consciousness as a type of storytelling, in that it focuses on the stories people tell themselves and others about their engagements with law or about their everyday lives while utilising legal categories and

concepts in a variety of ways. These stories always describe “a struggle between desire and the law, social structure and human agency” (Ewick and Silbey, 1998, p.29). As such legal consciousness provides obvious theoretical links to both agency and governmentality. Although the “before the law” category as described by Ewick and Silbey may only contain limited potential for agency and active engagement with law, this is also the category that seems to be least important in not just Ewick and Silbey’s analysis but also in most of the later studies based on this work. In fact most writers focus on the “against the law” and to a slightly lesser extent “with the law” categories.[84] Presumably because these categories show a much greater potential for analysing an active and creative understanding of and interaction with law, whereas a “before the law” approach often comes to symbolise acquiescence and acceptance of law. However as Harding (2011)highlights both the “before” and “against” category clearly needs to be redefined in light of more recent work, especially studies focusing on LGBT people. Although it is unlikely that this “new” type of legal consciousness that is situated between these categories is solely restricted to LGBT identified people it nevertheless finds a particularly strong expression in the movement for same-sex marriage that has gained momentum over the last decade. It can also be found in the frequent debates around the value of same-sex marriage versus the danger of assimilationist politics (see e.g. Harding and Peel, 2006; Barker, 2012), which clearly display an understanding of law that go beyond just seeing it as a game played by legal professionals or something to be avoided.

Although existing studies focus primarily on lesbian and gay men it is likely that a similarly modified version of legal consciousness can also be observed in trans people who have been engaged in very similar legal activism in recent times. Especially in their engagement with the medical system and the medical process for gender recognition trans people have shown an acute awareness of the way in which they need to deploy specific narratives or concepts to achieve the outcome they desire. Rather than submitting to the medical system and accepting its power or avoiding it entirely as a mirror of the “with” and “against the law” perspectives respectively, trans people instead creatively engage with the medical system to access the services they are interested in while avoiding excessive regulation of their gender identity by medical

[84] However, it may also be possible to understand law and legal consciousness in less strictly categorised terms. See, for instance Davina Cooper’s (2002) discussion of nuisance as a concept that can produce both hegemonic and counterhegemonic. Read this way, the suggestion that the GRA intentionally creates a series of “hoops” one has to jump through to obtain a GRC, which I alluded to in Chapter 1 and which I will discuss in more detail in Chapter 5, could perhaps also be read as an accusation against the state of creating a nuisance through the burdensome application requirements.

professionals. For example many trans people obtain their initial hormone prescription from private GPs rather than using the NHS system to avoid often inexperienced NHS practitioners as well as extremely long waiting times,[85] which they see as negatively impacting their right to self-determination. Indeed several interviewees reported using private health care providers due to the inadequacies of the NHS system. It is highly likely that a similarly strategic engagement with official institutions and attempts at regulating their gender identity can also be found in trans people's engagement with the legal system.

However, to utilise legal consciousness as an effective theoretical framework it is crucial to rely on a legal pluralism definition of what should be considered "legal" in this context. As Harding rightly points out heteronormativity clearly takes on an almost legal function in shaping the lives of lesbians and gay men. Especially in light of the governmentality reading of the GRA discussed in the Chapter 2 it seems obvious that normative assumptions about sex, gender and sexuality have clearly been incorporated into the GRA or are implicit in its functioning. Clearly it is crucial to highlight the workings of these structural constraints, particularly in regards to which gender options are considered viable by officials, in any discussion of how trans people engage with law. As such any legal consciousness analysis of the way trans people understand law needs to be intersectional by its very nature.

It is also likely that the categories proposed by Ewick and Silbey (1998) and refined by Harding in regards to lesbians and gay men can be amended even further to accurately describe other forms of legal consciousness. As I will discuss in the following sections, rather than just relying on existing legal concepts in their demand for equality, trans people are far more willing and capable of deploying strategic narratives to fit within the accepted discourse while they are engaged in the medical or legal discourse but ultimately abandoning them as soon as they have achieved their desired outcome. There also is to be a greater tendency to reject legal recognition and to an extent law's power entirely, not out of fear or inability to adhere to laws demands but rather as a form of active protest and challenge to law's authority and hegemony. This seems to go far beyond what Ewick and Silbey describe in their analysis of legal consciousness.

[85] The most recent report on waiting times suggest that more than 65% of patients had to wait over 18 months before they were able to obtain their first appointment at a NHS gender clinic; with more than 4000 individuals currently on the waiting list for a first appointment (UK Trans Info, October 2015).

Legal Consciousness and Legal Transition

Having provided an outline of the conceptualisation of legal consciousness that I am drawing on, I will now turn to consider the type(s) of legal consciousness emerging from my interviews. In my analysis of trans people's legal consciousness I will focus on three key issues. Firstly, the extent to which my data supports existing literature on legal consciousness, for instance in regards to issues such as the relationship between class and legal consciousness. Secondly I will consider some findings, which may complicate the existing literature, for instance trans people's view that law is inherently hostile towards them while at the same time relying on it for strategic purposes. Finally I will consider the extent to which other forms of knowledge, for instance medical knowledge, take on a law-like character in the context of the GRC application process.

Engaging With Law

To a certain extent many interviewees reflected a "with the law" type of legal consciousness. This means that recalling Ewick's and Silbey's definition (1998, p.45), they treated law primarily as a resource that was available to everybody and could be used to produce specific "strategic gains". For those interviewees who were generally in favour of legal rights and recognition specifically for trans people, law was generally perceived as a positive or neutral force, if sometimes not entirely effective. Members of this group perceived law primarily as a tool that could be used to achieve individual aims, but also wider social reforms in the sense of greater equality for trans people within society.

Some of this group suggested that law, specifically in its attempts to protect trans people, would achieve greater equality if only individual biases in society, particularly as represented by law enforcement and other officials could be erased. In fact Sophia described that she had been involved in multiple training events with the local police force to raise awareness and educate them about trans issues and found that this had some positive impact. This group frequently mentioned law, particularly equality and anti-discrimination law, as positive and providing protection, which suggests a certain amount of positive association with law more generally. In fact access to legal remedies was generally perceived as a right and more than one person recounted stories of

threatening or beginning legal proceedings against institutions, which discriminated against them based on their gender identity. These legal proceedings seemed to be primarily intended as a strategic threat and were abandoned once the desired outcome, e.g. a change of official records, had been achieved. Faults in these systems were often blamed on society or individual failings, particularly a lack of education for the police. This group of interviewees generally held positive views of law and law enforcement more generally.

What was particularly notable when interviewees discussed these types of positive or strategic engagements with the law was the role society plays in this specific understanding of law. In contrast to the "conformity before the law" perspective, where a clear divide exists between law and social life (Ewick and Silbey, 1998, p.45), in this "with the law" approach interviewees were keenly aware of the continuous interaction between law and society or social norms. Interviewees took the position that while law was either positively disposed towards trans people, or at least neutral, society itself might be more hostile towards them. As such people like Sophia took an active role in combatting perceived biases by actively engaging with people involved in law enforcement. This type of engagement may in fact be an expansion of the "with the law" category as it treats law as a tool or game, but more specifically as a game where the rules can be changed through specific types of social interaction. While this does not rise to the level of law reform attempts it nevertheless shows an attempt to change the way in which law is administered. In this sense trans people actively utilise their individual agency, not to reform the GRA itself, but rather to affect and change the ongoing interaction between law and social attitudes towards trans people. In line with this approach to law some interviewees perceived legal regulation, particularly of gender identity, as something that was necessary at least in the short term to grant trans people legal rights, but ultimately would become redundant as society more generally changed. However, a subset of these people questioned law's authority or legitimacy in assessing someone's gender identity more generally.

In contrast to this optimistic understanding of the interaction between law and society, several interviewees strongly questioned law's ability to be beneficial for trans people. This was primarily due to assumptions or experiences of discrimination against trans people on behalf of those tasked with administering law. Several mentioned negative encounters with the police or stated that they were unlikely to report any incident, whether related to their gender identity or not, to the police.

> "But If I had to [report a crime] you know, I wouldn't. …You know just in case that there is some, I was going to use some swearing words, some not so open minded people there. And I think that it's not actually really comfortable because I feel I'm invisible in that sense and I might not get ridiculed but I get ignored completely" (Morgan, interview notes, 2014).

The reasoning behind this varied, some either had little trust in law enforcement's ability to help them, or they were afraid of being subject to further prejudice from police officers themselves. This group tended to be more sceptical about law's ability generally to effect social change and suggested that instead it was necessary to better educate society in general about trans people, before law could be further reformed in a way that would be beneficial to trans people. While coming to a different conclusion about the nature of the interaction between law and society than the more clearly "with the law" approach discussed above, these interviewees nevertheless understood law and society as inherently interactional. In fact more than one interviewee suggested that what was needed was a "revolution" within society before law could ever become beneficial. Law was perceived as useless or ineffective due to the limitations of society more generally, with frequent references to the fact that society would need to be changed before law can follow. Even though this group was not actively engaging with people involved in administering law there was at least a tentative feeling that law could potentially be useful and something to be used for specific goals as long as existing biases could be changed or erased.

In part perhaps due to concerns about discrimination and prejudice, a small but very vocal minority of interviewees expressed serious concerns about being included in an official record of trans people, as is the case with the Gender Recognition Register. Andrew, for instance, specifically objected to the idea of the register:

> "I know this sounds a bit paranoid and stuff but I'm Jewish and I just feel there is a bit of history with being put on a register because of your identity so that's something that would really concern me a lot if I applied."

Similar to Alice's account at the beginning of this chapter, they questioned why this type of record was necessary in the first place and who might be able to access it and for what purpose. Interestingly, all of them began their objection by apologising for perhaps

sounding paranoid, with several humorous references to "tin foil hats"[86], but were ultimately very firm in their objection to this type of official record keeping. While they generally acknowledged that law in theory had the power to be beneficial to them by legalising their identity, they were more concerned about law's capacity to monitor and potentially harm them. Two people raised concerns about the creation of an official record of their change of gender identity, which they worried could be used against them through record or background checks. They also generally had little faith in equality type legislation or in small scale reform proposals for the GRA and instead largely rejected the validity of a legal assessment of their gender identity. For this group wider concerns about society ultimately outweigh any potential benefits of strategically engaging with law. Instead law is perceived primarily as negative, at least in part due to its mutually constitutive interaction with society, which in turn moves these interviewee's understanding of law closer to Ewick's and Silbey's (1998, p.192) "against the law" category. Although these interviewees did not necessarily understand law itself as hostile towards them, but rather feared what use law could be put to by others, ultimately this meant that for them law became "something to be avoided".

Maintaining Agency in an Unknowable Legal System

What was particularly notable across a large number of very different interviews was the perceived lack of agency in the context of an inscrutable legal process. Regardless of whether or not interviewees had applied for a GRC and whether this application had been successful, many expressed a strong sense of anxiety about the powerlessness evoked by the application process. The Gender Recognition Panel was perceived as inscrutable due to its remote decision-making and largely anonymous composition. While some interviewees perceived the instructions provided to them as largely helpful, others found them vague or impossible to fulfill. For instance Rachel, who had applied for an interim GRC, instead received additional directions from the panel due to questions about her children. She described her surprise and anger at receiving the statement from the panel, which she considered to be contradictory and inherently offensive as it implied that having a wife and children negated her gender identity. At least partially as a result of this interaction she had become a very active campaigner for

[86] A popular culture reference to the notion that believers in conspiracy theories supposedly wear hats made of aluminum foil to protect themselves from imagined electromagnetic fields or mind control. It has become a symbol for paranoia and persecutory delusions (see e.g. (Holm, 2009)).

reform of the GRA. Several interviewees also questioned a “stranger’s right” to determine their own gender identity when they were not even allowed to be present for this decision. Law, in these instances as embodied by the Gender Recognition Panel, was perceived as having a disproportionate amount of power over their lives. This at times had a serious, if temporary, impact on individuals’ ability to manage their own lives. For instance Ian had to postpone his wedding by several months due to problems with the application process and a lack of communication from the panel. For those who ultimately received a positive decision this type of problem was mainly treated as a temporary inconvenience. However, those who received a negative decision or knew they were likely to should they apply[87], were clearly negatively affected by this process. For instance, Taylor, whose application had been rejected specifically discussed the emotional impact of this event: “Getting rejected caused me a lot of anxiety and depression and I’m still quite bitter about it. It just makes basic practical things like tax and travel and stuff so much harder than they need to be.”

While some provisions of the GRA, such as the new requirement for one’s spouse to consent before transitioning provoked very similar reactions in nearly all interviewees, other provisions were not subject to such universal feelings. There were strongly differing views, for instance, about the mandatory two year waiting period before one can apply for a GRC. While some interviewees approved of this and argued that it deterred people from making rash decisions they might regret; others experienced this is an intentional and needless barrier that merely duplicated the medical process and enhanced the sense that the application was a test of one’s “worthiness”, an issue that I will discuss in more detail in Chapter 5. Both Sarat (1990, p.347) and Young (2014, p.617) highlight the issue of as time as power in the context of legal consciousness; when someone is made to wait they are also denied agency about their actions. In line with this many interviewees considered the two-year period a barrier intentionally created to test their commitment and worthiness, but also as something that deprived them of agency. It was frequently described with varying degrees of irritation, generally directly correlated to the interviewee’s attitude about the validity of legal gender regulation more generally. Nevertheless, this irritation at the intentional delay in legal recognition tends to be somewhat mitigated by trans people’s experience of their own agency within the process.

[87] These were generally people who did not define their gender identity in strictly binary terms or who did not wish to undergo surgery.

Due to the fact that both the medical system and the legal system use the same two-year waiting period, the "real life test" in the medical context, it is in theory possible to undertake both processes simultaneously. This does, however, require a potential applicant to be highly organised and have the resources to collate documentary evidence for the legal process while transitioning medically. Indeed many interviewees proudly highlighted their efforts to organise and plan their transition as efficiently as possible. For some the process of organisation and knowledge acquisition took on an almost ritualistic character, it became a strategy to emphasis that you deserved a positive outcome due to your hard work. Conversely, more than one interviewee blamed troubles or delays in the transition process on themselves. For instance Dean, who at the time of the interview had no fixed address and only limited access to his documents, argued that it was his "own fault" that he would have to wait several more months before applying for a GRC despite transitioning medically some years ago. Rather than questioning the validity of the demand for extensive evidence as might be the case from an "against the law" perspective, he suggested that, if he had been more organised about record keeping during his medical transition process, the GRC application would be "fairly straightforward". Even in this instance where invoking the spectre of organisation actually led to self-blame, it arguably provides a greater sense of agency than the impersonal and seemingly unchangeable evidence requirements of the GRA. In this context of the GRA law also becomes an ordering process where trans people are, firstly, sorted into three different categories based on their ability to produce evidence[88] and, secondly, need to order their own life story in a way that is deemed acceptable by GRP.

In a sense this idea of law as inherently requiring one to be "organised" could be understood as an extension of Ewick's and Silbey's "with the law" category. They note that in the context of their research (Ewick and Silbey, 1998, p.48) law's adversarial character was understood primarily as an inherent component of law, rather than as a positive or negative factor. As such a requirement for organization could perhaps be understood as a situational variation of this adversarial character without necessarily changing the base definition of the "with the law" category. However, whereas the adversarial nature of legal disputes would in theory affect everybody, the requirement to be organised is primarily one-sided, and was perceived by interviewees to mainly apply

[88] The application process can result in three potential outcomes, either a full or an interim GRC can be granted, or the application is rejected entirely.

in the specific context of the GRA. I will discuss the potential effect on this and on the existing literature on legal consciousness in more detail in the following two sections.

Managing Law and Legal Bias

What is immediately apparent across nearly all interviews is the fact that much thought was given to both the intention of the legislators who drafted the GRA, and the intention of those now tasked with administering it. Firstly, nearly all interviewees experienced the GRA not as a "mere" unbiased recognition process but viewed it as an intentional barrier to trans people gaining recognition. They were acutely aware of the prevailing narrative about trans people, which according to Alex Sharpe is primarily based around the image of the "deceptive transsexual" (2010). As a result most interviewees assumed that the application process, and the officials involved in it, were inherently biased against them and they would have to overcome this bias by acquiring knowledge, being "organised" as discussed in the previous section, and in many cases simply providing every available document they had to confirm their gender identity. Secondly, approval or disapproval of this test-style approach very much seemed to be related not just to whether applicants themselves had been successful in this process, but also to their general views of legal gender regulation. While nearly all interviewees viewed law as embodied by the GRA as oppressive and powerful, similarly to both Sarat's (1990) and Cooper's (1995) informants, they also saw it as intentionally hostile towards them in this specific instance:

> "It just felt utterly arbitrary to me. I don't understand what the significance of all these documents is supposed to be. They seem to have this weird fear that people are having some bad motive when they transition" (Harry, interview notes, 2014).

In practice this legal bias could be managed through different strategies, but also at times meant that some decided against applying for a GRC, either because they assumed it would be denied to them, or because they objected to the process on principle. Even those who did not necessarily consider law to be biased felt that their gender identity had to essentially be proven beyond all reasonable doubt and that they would not easily be believed in this context. In fact participants almost universally used the language of "barriers", "tests" and "proving" one's gender identity to describe their experiences. Perhaps due to assumptions about the hostility they would face, or because of the inherent power differences between applicants and the panel, not one interviewee

treated the application process as analogous to a game, subject to a certain set of rules, or something to be taken lightly. If the application process is a game, then it is one where only one side has been given a rule book. Even if someone declared that the GRC had no practical value to them or described the process in fairly humorous terms, it was nevertheless treated as a very serious matter at the time, one where failure generally had serious negative consequences.

However, regardless of inherent social status or capital the capacity and willingness to acquire knowledge and plan ahead may also explain why trans people in some cases face less opposition or difficulties than they might expect.[89] Due to the fact that applications are generally preceeded by a long period of research and careful consideration to achieve the best possible outcome trans people often know more about the processes and requirements of the GRA than the professionals officially in charge of the process. Charlie in particular argued that it was essential for a successful application "to be able to plan ahead" and to carry out one's own research about the legal aspects of transition in order to facilitate this. This type of planning could be focused both on the correct sequence of steps to take, as well as more specific issues, such as what evidence to collect:

> "'I started collecting proof of living as female from day 1 of transition. This means I was well prepared and able to send a good variety of evidence. If I had not been prepared, I would have struggled to provide two years of documents showing that I use my current name." (Fiona, interview notes, 2014)

In the context of their engagement with legal recognition participants divided into three different strands of thought in roughly equal numbers. Firstly, some interviewees were generally supportive of the project of legal gender recognition, although they might take issue with the GRA on an administrative level in practice. In fact many in this group had already successfully obtained their GRC and described little or no difficulties in this process. As a result they tended to only suggest limited reforms that might be necessary for the GRA and frequently approved of the idea that the application process required some degree of effort, in the form of evidence, on behalf of applicants. Zoe was one of the interviewees who voiced this approach most clearly: "I think self-declaration [of

[89] In the context of trans people's experiences in the workplace Bender-Baird (2011, p.118) notes the level of planning and research that many trans people engaged in before transitioning and/or coming out in their workplace seemed to contribute to some people having a more positive experience in the workplace post-transition.

gender] would trivialise the process. It needs to be something you don't enter into lightly. Similarly to how the GIC [Gender Identity Clinic] does it." This group fits perhaps most closely within the "with the law" category as described by Ewick and Silbey and was also made up of a majority of those who felt that law could be beneficial to trans people more generally as long as those involved with it were sufficiently educated about trans issues. A second group was constituted of those who were somewhat ambivalent about the legal recognition of gender and criticised specific provisions of the GRA, other than the spousal consent requirement, but nevertheless appreciated the practical value of obtaining a GRC. Indeed many of this group had already obtained a GRC, but were in hindsight critical of the process and its requirements. Finally, a third group was made up of those who were opposed to the legal regulation of gender entirely, especially in the form of the Gender Recognition Act. Kimberley Richman (2014), in her analysis of the meanings of marriage for same-sex couples, notes that many couples who were politically opposed to marriage nevertheless chose to get married with the stated political intent to reform the institution of marriage from the inside. In the context of the Gender Recognition Act however, those who were opposed to legal gender regulation and generally also to a binary ordering of sex/gender, rejected the legal strategy of recognition entirely:

> "I think this idea of a binary is just really damaging. Forcing it on people like that is really a violation of your human rights. I mean ultimately the GRC is just trying to control people, like the rest of all those laws do, it's really about marriage" (Morgan, interview notes, 2014).

Conversely, those who had obtained a GRC, did not do so with the intent to reform either the application or recognition process or gender categories more widely. Instead they generally foregrounded the practical value of the GRC despite any reservations they might have about the process itself.

The, perhaps accurate, impression that officials and experts are biased against trans people, which was expressed not just by those who rejected the application process entirely, was not just limited to encounters with the legal system. Many interviewees recalled conflicts already arising with officials in the context of the medical side of transition. Jordan argued that in his experience the Gender Clinics use an almost "vigilante"-style system of dealing with service users. When he had been attending a Gender Clinic this clinic operated a "three-strikes" policy, under which they would

discharge anyone missing three appointments for any reason.[90] While a patient of this Clinic he received a letter falsely stating that he had missed an appointment and any further missed appointments would result in him being discharged entirely. As the only officially sanctioned way of communicating with the clinic was by mail, Jordan immediately sent a letter contesting the Clinic's account but never received a response. He described the Clinic's attitude as "incredibly hostile" and suggested that the Clinics were happy to "abandon" patients. For him the fact that the only way to change an appointment or any personal details was by post, with no possibility to contact the Clinic via telephone or through an online system as is the case for other NHS services, created a one-way system of communication that intentionally made life more difficult for trans people.[91] The GRC process mirrors, perhaps not incidentally, this one-way communication system. The difficulties and frequent negative experiences that arise in the context of the medical system undoubtedly inform trans people's later engagement with the legal system. As such the impression that law's inherent bias against trans people needs to be "managed" or mitigated may be compounded by hostility experienced in the medical transition process.

This pervasive sense of law as inherently biased against trans people lies at the heart of a clear deviation from the tripartite schema present in much of the existing literature on legal consciousness. Whereas "with the law" normally implies at least a neutral position between law and its subjects, "against the law" is normally the only category that assumes an explicitly hostile relationship between the two. In contrast this group of trans people clearly view law as hostile towards them and find themselves from the outset in a less favourable position than others. This plays a key role even when a person's engagement with the law could otherwise be characterised as in line with the "with the law" category. This particular understanding of law almost combines "before", "with" and "against" the law positions; in the sense that law is something that has a reasonably clear set of rules and can be used strategically ("with the law), but at the same time those rules are inherently hostile towards trans people and hence any use of law carries an implicit risk of rejection and discrimination ("against the law").

[90] This seems to be reflected in current Gender Clinic policies as well. For instance a London Gender Clinic automatically discharges patients who miss their first or second appointment and do not notify the clinic at least 48 hours in advance (West London Mental Health, July 2015). Service users are not able to contest this decision and will potentially require a new referral from their GP, which would put them at the bottom of the Gender Clinic waiting list.

[91] This also mirrors similar punitive approaches to welfare in the UK where communications are similarly solely conducted via mail and missed appointments are also harshly sanctioned (see, e.g. Dwyer and Wright, 2014).

Arguably there is also an element of "before the law" as defined by Harding (2011, p.11), in the sense that trans people often feel powerless due to the inscrutable and unpredictable nature of the process. Law then becomes something to be carefully managed and approached, rather than just used, strategically. Managing law can help to combat law's inherent hostility, but also creates additional emotional, practical, financial resource demands that go beyond the 'mere' demand of the literal legal requirements. This in turn makes the GRC process inherently exclusionary and privileges those with better access to resources. The cost of this can be most readily seen in cases where the GRP rejected applications or demanded additional evidence, but also in successful cases in the amount of preparation that was required. To some extent this process of managing laws allows trans people to (re)acquire agency in an otherwise overpowering and invasive process by demonstrating more in-depth or accurate knowledge than the officially designated 'experts', an issue I will cover in more detail in Chapter 5. However, this agency is not necessarily exercised to resist or reform the GRA.

Knowing "law"

A further issue that was directly related to the idea of the GRA as something to be managed were narratives about having to be knowledgeable about the process in part due to the inherently "unknowable" character of law discussed above. These narratives also often relate to the type of knowledge many trans people already possess. While most trans people were very familiar with the rules and requirements that governed access to medical services, such as how one should dress or present themselves during medical assessments, on average there was less clarity about the legal aspects of transition. This knowledge disparity was present irrespective of whether or not a person had already gone through the medical transition process. One explanation, other than the fairly recent introduction of the GRA, could be that while the medical transition process is fairly linear, those aspects of transition that considered primarily legal, such a changing one's name, passport, driving licence, national insurance number and birth certificate, are subject to a greater variety of evidentiary requirements.[92] In practice this

[92] For instance HMRC requires a GRC before amending their records; to change your passport you need to submit either a medical statement and a deed poll, or a GRC, or a new birth certificate; changing the

meant that if there was any doubt, trans people applied their existing knowledge of the medical transition process, with its emphasis on normative gender presentation, to the legal process as well. Once interviewees had engaged with the legal transition process, even if they decided against applying for a GRC, they showed an exhaustive knowledge of the legal process, often being more knowledgeable than officials involved in the process a fact which they frequently recounted with a great deal of pride

In practice much of the knowledge about the legal process was acquired from other trans people, who took on expert status in this process due to a lack of clear official sources. This means that many trans people have vastly differing views about how that application process works depending on their information source. This was particularly noticeable in regards to the fact that, while in theory there is no official legal surgery requirement, many trans people understand there to be a requirement in practice. This understanding was to be strongly influenced by previous encounters with the medical system. Jordan recounted that at several times during his medical transition he felt pressured into agreeing to certain medical interventions, or that there was a presumption that he would eventually want more surgery despite his express statement to the contrary. He noted that that in his experience trans support groups also encouraged everyone to "become as masculine as possible" by having surgery or taking hormones. Indeed more than one person mentioned that despite the lack of an official surgery requirement, they assumed that the panel assessed applications as if there was one, which caused some concerns particularly for male applicants who had decided to undergo only limited surgical interventions. As such a network of different officials and "experts" creates an almost law-like presumption in favour of gender reassignment surgery, if not quite an outright legal requirement. This is further compounded by the intentional official conflation of the legal and medical process, which I analysed in detail in Chapters 1 and 2.

Similarly the requirement for documentary evidence to reflect that one has lived in their gender for two years was generally interpreted as a request to submit as much evidence as possible in part due to perceived bias, despite the fact that official statements on this are fairly ambiguous. Finally, several interviewees argued that it was important to provide specific narratives in one's application to convince legal officials. This again is a strategy based on knowledge from the medical system, where specific narratives are

gender marker on a driving license in theory requires no evidence but anecdotally people have been asked to provide further documentation.

encouraged by officials as well as support groups to expedite the process. Alice for instance mentioned using specific narratives to "expedite the medical process" and suggested she would do the same if applying for a GRC. This was often connected to fears that while the GRA may be seemingly neutral on paper in practice it enforced specific values about normative gender identities. In fact more than one person noted that they felt both the medical and legal system were based on a "white", "Western" ideal of gender that primarily favoured heterosexual trans women. This also mirrors the experiences of LGBT asylum seekers, which I discussed in the Introduction, who similarly are constrained by very specific official conceptions of gender and sexuality.

Trans people in this context frequently infer or create their own meaning based on existing experiences and knowledge, where there is a lack of accurate information. In this sense both the medical transition process and the highly normative sex/gender/sexuality model it enforces, function as additional legal orders and at times even usurp the explicit legal requirements, particularly in regard to the physical aspects of transitioning. In this context then, the acquisition of knowledge may be a strategy to counter the feeling of powerlessness that is experienced when one's identity will be determined by a panel of strangers. Relying on other types of knowledge to an extent "stabilizes" the hostility of law and on an individual level creates certainty and serves an almost talismanic function. In this context medical knowledge and some types of expert knowledge, for instance from support groups, are treated as "law-like", in the sense of being almost legal and normative provisions, and become enmeshed in the requirements of the GRA. Law then becomes more than just the GRA itself but also involves an awareness of the wider social understanding of (trans)gender, medical knowledge, and also certain pre-existing expectations of law regarding fairness, clarity, bias, etc. The combination of these factors means that trans people's understanding of the GRA goes far beyond the literal law and takes on almost pluralistic nature, a fact that may also be encouraged by officials involved both in drafting and administering the GRA.

Concluding Thoughts

Overall there are three key issues emerging from my field work in regards to legal consciousness. Firstly, the relation between law and other discourses; in many instances

other forms of knowledge are used to supplement knowledge-gaps and take on a law-like function for trans people involved in the application process. Trans people's understanding of and engagement with the GRA was strongly influenced by their understanding of how it had been conceived and was now being enforced by officials, which almost forms a second-order legal consciousness. This may be further encouraged by the intentional merging of law and medicine in this context, a fact that was explicitly encouraged during the initial drafting of the GRA (see Chapter 2). Secondly, trans people clearly understand law as something to be managed, which has effects on several levels. On the one hand it allows trans people to re-acquire agency in an otherwise overpowering process by displaying more in-depth knowledge than the official 'experts'. On the other hand this management only becomes necessary due to the inherent bias of law against trans people. This bias provides a third issue as law for trans people becomes primarily unknowable, hostile and frequently irrational or unpredictable. The combination of these factors creates a specific understanding of and engagement with law in this specific context.

Ultimately trans people are highly critical of law, particularly in its engagements with trans people but nevertheless are caught up within it. I will discuss specific instances where some interviewees simultaneously defended and criticised GRA in more detail in Chapter 6. However, due to perceived bias and practical necessity trans people's legal consciousness transcends the existing "with" and "against the law" categories. In many instances trans people have no choice but to engage with a law, which they experience as hostile towards them. This in turn means any such engagement has to be necessarily strategic and at times takes on a resistant quality while simultaneously complying with the legal and normative requirements of the GRA.

Chapter 5

Emotional Engagements with the GRA

Trans people and transgender political movements like all movements clearly represent a wide range of opinions and thoughts in regards to what constitutes "good" law and how specific issues affecting this population can and should be addressed. Trans people are at times only united by the fact that they are not cisgender and as such it would be almost surprising to find an entirely coherent or consistent view point that unites every single trans person. However, while there is a vast range of opinions about the GRA and just as many suggestions about how it could be improved (or even why it cannot be improved at all), there was also a remarkable amount of empathy among participants for other trans people, or even intersex people, who are often assumed to be living in very different circumstances. Throughout my fieldwork expressions of empathy were primarily focused on issues around the accessibility of the GRA, or a lack thereof, particularly in regards to people who do not identify with a binary structure of sex/gender. Interviewees expressed less concern for those who might reject the regulatory approach to gender identity offered by the GRA in its entirety and are as such subject to a greater extent to social norms in regards to acceptable gender presentation.

Empathy to some extent is limited or fenced in by the binary logic of the GRA; while many interviewees suggested that the GRA should be opened up to allow access for less normatively gendered people, they also favoured some limitations that should be imposed upon applicants. Perhaps it is not necessarily the law itself whose logic proves difficult to escape, but rather the fact that binary gender norms are so deeply entrenched within society more generally.[93] In contrast to this, interviewees were significantly less invested in the administrative parts of the GRA, which they were willing to subvert and criticise. Due to the limitations of the GRA itself and its incessantly binary logic no amount of empathy seems to make it possible for individuals who apply for a GRC to

[93] However, the recently published Transgender Equality Report (House of Commons Women and Equalities Committee, 2015), although drawing on a limited sample of respondents, suggests an increasing degree of willingness to accommodate non-binary identified individuals.

turn their use of the GRA into a queer reworking of the law, at least not if we understand queer as the opening up of new gender spaces and forms of being.

In this chapter I will consider the figure of the "heroic interviewee" and the idea of heroism, in the sense of overcoming challenges, within the context of engagement with the GRA. Much of this discussion follows on directly from Chapter 5 and the conceptualisation of law as something that needs to be managed to mitigate bias and hostility. I will then turn to the issue of empathy and the question of how empathy for others can motivate a critical engagement with the GRA. As the two preceding fieldwork chapters (Chapter 1 and Chapter 4) have primarily focused on the experience and knowledge of law, in this chapter I will turn to the emotional aspect of engaging with and experiencing law.

The Heroic Interviewee

Throughout the interviews, nearly all participants at one point or another highlighted their own relationship to other individuals or groups. This often took the form of comparisons to friends or acquaintances, or references to their professional connections as a potential explanation for their successful transition and the equally successful completion of the GRC process. Within these narratives two distinct but interrelated elements frequently emerged. Firstly, the need to establish oneself as "deserving" of legal gender recognition, primarily through establishing one's access to specific types of resources and knowledge and a willingness to "suffer" in order to achieve recognition. Secondly, the idea that one has to nevertheless be lucky or fortunate to successfully navigate both the legal and medical transition process.

In regards to the first element, Dan Irving (2008) among others, suggests that in a neoliberal democratic system trans people frequently have to prove their status as "deserving" to access legal benefits and protection. As a result they often have to rely on, what he describes as, "hegemonic bargains" with high-ranked members of specific race, class and national categories in order emphasise their own belonging within those categories and to access the cultural capital that is part of belonging to those categories (Irving, 2009, p.375). Frequent references by interviewees to their own connections and

belonging within specific groups to offer an explanation for their success, may provide one example of such hegemonic bargains. Generally this took the form of references to a specific level of education, or to being a member of a specific profession, usually the medical profession or of the health care system more generally.[94] One interviewee, James, for instance discussed at length his experience of working for the NHS both and after his transition: "Yeah I think most of my transition was achieved really because I worked in the NHS. Otherwise people aren't confident enough but you need to be able to say "this is what I want"". For James membership of this specific institution gave him and symbolised, firstly, access to a necessary competency, and secondly, the ability to engage in a specific type of discourse. Belonging to a specific group, particularly one with access to "expert" knowledge can perhaps enable a certain degree of agency – at least in the view of the person belonging to this group – that may not be available to those without such expert knowledge. Expert group membership, however, does not just have to include official "experts", such as healthcare providers, but can also derive from activism. Jessica, a leading member of a trans advocay group explained that her understanding of the application process might be better than that of others, due to "an above-average understanding of the legislation" (Jessica, interview notes, 2014). Implicit in both narratives is the fact that this expert status is not derived from an unearned privilege, such as inherited wealth, but rather that this status is achieved through individual willingness to engage in specific types of labour. Furthermore, what also becomes apparent in these narratives is that any status or advantage that one has, has to be employed in a strategic way, for instance through the display of "confidence", to achieve the desired outcome.

While no interviewee specifically used the language of "deserving" or "undeserving", many explicitly highlighted their professional credentials, as can be seen in the narratives discussed above, or educational achievement.[95] Two interviewees in particular, Edward and Dan, emphasised their level of education and offered them as potential explanations for their successful management of the application process. Edward did so somewhat more implicitly: "It was all really pretty straightforward

[94] Indeed in the context of the medical transition proves Irving (2009, p. 386) specifically notes that in the North American context those who are students or work in the medical professions are treated more favourably.
[95] Cf. Irving's (2009, p.376) discussion of how transmen in North America specifically emphasise their 'professional capacities', qualities traditionally associated with normative masculinity, to convince judicial professionals. Although in Irving's analysis this frequently involved an economic component my fieldwork mainly evidenced this in regards to 'cultural capital' rather than literal capital.

because I had worked and studied pretty much the entire time so I just gave them loads of evidence". In this narrative both professional and educational achievement affect the application process more indirectly, specifically through the generation of a paper trail that can be used as evidence for the 'real life' part of the evidentiary section in the application (see also Chapter 1). In Ian's narrative education had a more direct effect on his ability to successfully obtain a GRC: "I've got a good level of education so I didn't have too many problems but it might have been very different if I didn't" (Ian, interview notes, 2013). He then went on to provide an example of how someone with a lesser level of education, or even learning difficulties, would be likely to struggle with the complexity of both the form and the evidence requirements.

In a sense then, professional or educational achievement can function as a way of signaling one's "deserving" status in this interaction with the state. In this context the GRA, although perhaps only indirectly, reinforces wider neoliberal knowledges about who is a "deserving" recipient of state resources and protection (cf. Wacquant, 2009, p.42 on the workings of the "charitable state"). Similarly to access to welfare,[96] and perhaps because of its officially presumed destabilising effect on wider societal gender norms, changing one's gender effectively becomes a limited resource to which only a worthy few are granted access by the state.[97] This serves to limit the option of changing one's gender not just to transgender people, but to a very specific and tightly regulated subset of transgender people. Highlighting one's deserving status can also be viewed as a further strategy to manage the perceived bias of the GRA (see Chapter 4).

Within these accounts there was also a wider sense of having to earn legal recognition.[98] While in the medical context gender identity is validated through literal physical pain and suffering, when applying for a GRC this physical suffering is still evident but is also supported and perhaps even re-validated through a second period of emotional suffering. Indeed, the few interviewees who did not provide a specific example of battling officials almost universally emphasised how lucky they had been and how

[96] In fact there seem to be a number of parallels between applicants for welfare payments and applicants for a GRC. Both are subject to attempts to "normalise" and regulate their behaviour and identity, and are subject to a significantly more invasive type of state surveillance and intervention than other citizens (see, e.g. Fergueson, 2010 for an analysis of "normalising" interventions in the context of the South African welfare system).

[97] This analysis also seems to be supported by the onerous requirements imposed upon applicants, with the specific aim to deter those who are insufficiently committed (see Chapter 4).

[98] This may also be related to the idea of law as something that needs to be "managed" (see Chapter 4), for instance through the act of preparation and information gathering. In a sense the ability to manage law becomes another way of demarcating one's "deserving" status.

unusual, and implicitly more straightforward, their specific case had been. To draw a parallel to ancient Greek literature, the accounts almost always contained stories of suffering and physical, as evidenced by the medical reports, as well as emotional pain. Undergoing major surgery, with a risk of potentially serious complications, clearly provides the most visible example of literal suffering as part of the application process.[99] In contrast to this, emotional suffering was often hidden at first glance and implicit within the narratives presented, rather than explicitly described. In this many narratives almost match the ideal of Greek tragedies which are, as Hall (2010, p.6) terms them, "an enquiry into suffering, an aesthetic question mark performed in enacted pain", which are supposed to cause the audience to question the causes of suffering for their own edification rather than the pain itself. While the specific narratives provided by interviewees may not have quite such an explicit motive they nevertheless have a similar effect, particularly when referencing the suffering of others, often those less "fortunate". For instance, Edward highlighted the issue of those people who cannot – rather than choose not to- undergo surgery: "I'm quite glad that full surgery is not a requirement, because I personally don't plan to have any other surgery. Personally I know quite a few people who can't have surgery so it's good that you don't need to have it". Although Edward's comment also references implicit his own hypothetical difficulties if there was an explicit mandatory surgery requirement, others discussed suffering solely in the context of other people's experiences. As such Jennifer suggested that trans people who do not "pass" are the ones most acutely affected by prejudice and discrimination: "I think people like that, who do not pass, should be our role models and our heroes. I want a world where people are just accepted for what they are. People who are non-binary are people too". This particularly statement implicitly links suffering, here on the basis of discrimination, to a heroic status. Interestingly it also simultaneously flags up the status of the speaker as someone who can "pass" and as such is not subject to the same degree of hostility.

However, this type of narrative can also create a problematic binary between the fortunate/lucky ones and the unfortunate ones whose applications will never succeed due to their specific personal characteristics. In such narrative constructions this division becomes as a coincidence purely based on the arbitrariness of luck or individual attributes and circumstances, which does not fully account for the fact that this divide is clearly created by the specific demands of the GRA. Nevertheless a

[99] For a detailed discussion of surgery and medical evidence in the application process see Chapter 1

reoccurrence of narratives about being lucky or fortunate has also been noted in the context of trans people's perception of employment discrimination or the lack thereof. Kyla Bender-Baird (2011, p.106) in a study of transgender employment experiences analyses the prevalence of what she terms the "I'm lucky" phenomenon. By this she refers to trans people's expectation that they will face workplace discrimination and, when this fails to materialise, the assumption that they must have been lucky in some way. Bender-Baird highlights that this phenomenon is rarely connected to the amount of discrimination people had actually faced but did usually occur in conjunction with a participant recounting discrimination faced by others. As a result participants who had witnessed discrimination against others felt "grateful" if they themselves were not discriminated against once their trans status was known in their workplace (Bender-Baird, 2011, p.107). As a result of discrimination being almost expected or presumed as the normal state of affairs, those who did not experience discrimination framed their experience as an 'anomaly'. Similarly trans people who did not have difficulties changing identity documents or applying for a GRC often framed their narratives around the notion of being 'lucky' or the idea that they were the exception to the rule. Andrew in particularly made frequent references to the presumed uniqueness of his circumstances: "The whole process was incredibly easy but I guess I had a bit of an atypical case because I started doing it all when I was quite young." – "I had personally a pretty uncharacteristically easy time of things."- "Many people don't fit into gender binaries. I've been pretty lucky in that I do". Notably in this context even gender identity, or fitting within the gender binary, is attributed to luck rather than for instance a voluntaristic understanding of gender. This suggests that in a way luck is a stand-in for a biological understanding of sex/gender, which is beyond one's control and instead something a person is born with. Luck was further credited by Dean for his ability to access private healthcare and consequently having less difficulty procuring documents: "But I'm lucky, I've got a copy of everything because I went to a private clinic and they sent me all the documents to my home". Luck here functions as a code or signifier for something that is not entirely arbitrary, specifically access to resources. Ignoring the fact that resources and privilege are not randomly distributed throughout society, obscures the fact that some groups clearly have disproportionate access to resources (cf. Fraser and Honneth, 2003).

Interestingly Bender-Baird (2011) notes that in her study even participants who did face severe discrimination often still described themselves as lucky due to other factor such

as access to healthcare, support networks or their ability to pass. Those who had positive experiences tellingly often credited this to their superior qualities as an employee, however Bender-Baird (2011, pp.109-110) suggests that this may not entirely reflect reality as others who were also proficient in their occupation nevertheless faced harassment.[100] This would suggest then that by utilising social capital, especially by appealing to neo-liberal and capitalist values stigmatised minority populations, such as trans people in this instance, can "reclaim" their status as good citizens and workers and thereby avoid at least some the negative consequences of transitioning or being visibly trans.

More generally narratives that emphasised an interviewee's "deserving" status frequently emerged in the context of anecdotes about a specific hardship that interviewees managed to overcome through skill, persistence and occasionally luck. These anecdotes often involved conflict with bureaucracy or officials and the need for the interviewee to educate them about a specific issue, which they were ignorant of despite their professional qualifications. What was particularly notable is that in those narratives interviewees almost always 'fought' alone, they were not supported by groups or professionals, instead they were lone heroes armed with their own superior legal/medical/bureaucratic knowledge and generally came up against a far higher ranking opponent, e.g. judges, medical professionals, members of the GRP. In this they almost matched mythical Greek heroes who have to undergo a period of suffering before achieving their heroic deed and defeating the 'monster' that is the medical/legal bureaucracy of the GRP. While these narratives were largely phrased in positive terms and ultimately resulted in success they nevertheless at the time involved a great deal of emotional and administrative effort for the person involved. It should also be noted that while Irving's analysis for instance, focuses specifically on trans men in my field work this archetype was not limited to trans men although it tended to be more prominent and explicit in their narratives, a number of which are reproduced here to illustrate the issue:[101]

[100] Bender-Baird does note that certain factors, such as 'socioeconomic class attributes' like education and job classification however did fairly reliably contribute to a more positive experience in the context of employment.

[101] Irving (2009, p.383) does note that while the self-made man is generally a male archetype it is not tied to a specific sex/gender but is rather part of the 'universal neo-liberal socio-economic (male) subject', which is an ideal that all genders are supposed to aspire too.

> "I had an issue with my car insurance. They said they needed my GRC before changing anything and I know that's illegal but they kept insisting. So I had to threaten them, say that I would take them to court. So then they changed it and gave me £100 compensation which I guess is better than nothing" (Laura, interview notes, 2014).
>
> "The passport was easy but the driver's licence was a bit more difficult. It was almost like they were making mistakes on the form on purpose. They kept misspelling my name and it just made no sense where they got that from. So I just kept going and going and going until I got the result I wanted. I must have sent my license back at least three times but I got there" (Dean, interview notes, 2014).
>
> "They asked me if I had any previous names so I just lied and said no, that I didn't have any previous names even though I have legally changed my name three times. And it was completely fine, she never even asked for my birth certificate or anything" (Stuart, interview notes, 2014).
>
> "I had some problems because I had already legally changed my birth certificate [in a different country] and changed my name through a different process. The Panel completely didn't understand how that law worked and said that I needed to get a court order for my name change, which actually just isn't possible. I printed out the statute, which is where education got into play, and made the court there sign it before submitting it to the panel, but for that I had to understand enough about law to know what a statute is. I'm not sure if everyone could deal with these kinds of things" (Ian, interview notes, 2014).

Constructing these narratives about individual successes may allow individuals to reclaim some degree of agency and also partially reject the superiority of officials that is imposed through the GRC process. Particularly the last narrative also suggests a specific type of gender performance where masculinity is demonstrated through confidence and expertise in taking on authority, values that are have frequently been associated with masculine identities. This need to reclaim some measure of agency is particularly acute in the context of the GRC were many interviewees felt they were at the mercy of GRP, a situation exacerbated by the often unclear requirements of the application process, an issue that I discussed in the previous chapter regarding people's experience of the application process itself. In this context it may be useful to consider Hannah Arendt's discussion of heroic action. Although Arendt (1957 (2000), p.164) highlights the importance of narrative, particularly in an autobiographical narrative, as a way of

locating oneself within history, she focuses primarily on action within the public space as the most valuable form of human activity (Arendt, 1998). Following the Greek tradition, for Arendt (1998, pp.50-52) it is political public space or the polis in which meaningful action can take place, whereas private spaces are primarily reserved for basic necessities and labour. If one was to remain solely within a private space this would mean the inability to be seen and heard and to relate to others through the material world (Arendt, 1998, p.58). To enter this public space and engage in political action requires "an original courage" in the form of "willingness to act and speak" (Arendt, 1998, p.186). Courage, for Arendt (1998, p.180), is essential due to the inherent risk of disclosure in the context of such action. As such any individual engaged in this type of action requires the same qualities generally ascribed to the "hero". For Arendt (1998, p.186) heroism, then, is not necessarily the willingness to risk suffering but rather "showing who one is, in disclosing and exposing one's self" within the public sphere. Due to humanity's relationality and each person's position within the existing "web of human relationships" (Arendt, 1998, p.184) it becomes difficult if not impossible for individual action to achieve a predetermined goal, however, actions nevertheless have effects that over time come to multiply and produce "stories".

In a sense many interviewees display the same qualities Arendt considers essential for the "everyman" hero engaged in (political) action. The "willingness to act and speak" (Arendt, 1998, p.186), although perhaps more accurately in this instance "act and write" is vital to both the decision to apply for a GRC and the decision not to. It is also clearly crucial to many of the individual narratives told by individuals in regard to the GRA process. Similarly, the risk of disclosure that Arendt sees as the basis for the heroism inherent in action as a meaningful and political activity, disclosure is clearly a crucial element in many of these narrative accounts. In fact navigating the issue of disclosure is a daily challenge for most trans people in all aspects of their daily lives, regardless of whether they are engaging in action in Arendt's sense. However, the type of heroic action described here sits at a tension point between the public and private sphere. In contrast to Arendt's suggestion that action is inherently limited to the public sphere, many of the stories told by interviewees occur within the private space of the home and may never be observed or witnessed, but they nevertheless involve interactions with the public sphere of the law and the court/tribunal system connected to the GRA. Furthermore, it could be argued that most of the "actions" described here are primarily concerned with individual issues of personal welfare and identity and as such belong

firmly within the private realm of Arendt's framework. Arguably, however, due to the GRA's inherent connection to wider societal gender norms (as discussed in more detail in Chapters 2 and 4) any challenge of GRA also functions as wider political action. In a sense by challenging officials and overcoming specific barriers, the actions described in the narratives here, bring seemingly private issues into the public political space. However, the effects of an interrelational or interconnected society were rarely explicitly addressed within these vignettes of personal success.

Theorising Empathy

The question that arises from these accounts of individual success, then, is if success is understood as a solitary endeavor, how do we understand a lack of success? And if success is primarily a question of individual responsibility, how does one relate to those who are unsuccessful? As a result a discussion about the concept of empathy is especially valuable in the context of trans politics, which as outlined at the beginning of this chapter encompasses a large spectrum of views and individual positions. Iris Marion Young (1996, p.127) suggests that communicative democracy may allow a heterogenous group of individuals to speak "across differences of culture, social position, and need, which are preserved in the process." She argues that this involves three processes which in turn allow for "the transformation in preference", by which she means a change in (political) opinion that is ultimately no longer focused on one's own well being. For Young the first key element to such a change of perspective is a growing awareness that one's own position is partial and situated within a specific experiential background and as such can never provide a total or objective account of any situation. The second insight that an individual has to come to is that others have the right to challenge one's claim in the process of finding an answer or solution; and finally that this process of challenging and discussing ideas or knowledge benefits all those involved in this process: "This greater social objectivity increases their wisdom for arriving at just solutions to collective problems" (Young, 1996, p.128). Following Young recognising the value of views other than one's own and the capacity to accept such views as equally valid to one's own is clearly key to social transformation that benefits a larger part of the population. Sedgwick (2003), drawing on Silvan Tomkins,

argues that affects as a motivating force can be clearly differentiated from drives. Drives are primarily biological, e.g. hunger, thirst, sexuality and as such both narrow in their objects and time limited (Sedgwick, 2003, p.18). In contrast affects are far less constrained in their objectives and not inherently subject to time constraints. In fact affects can be their own objects and rewards and as such allow for the understanding of a wider range of (re-)actions.

The study of empathy more generally can be seen as part of the wider "affective turn" which has risen to prominent within feminist theory over the last decade. As Pedwell and Whitehead (2012) suggest this may be connected to the greater prominence given to emotion in society, where emotion is seen as providing a specific kind of truth about the individual and about the individual's connection and relation with others. For some theorists in this field emotions or affect can be understood as doing the work of "grasping transformations" as such it signifies a body's potential to 'affect and be affected' (Greco and Stenner, 2008, p.11). This focus on emotion as inherently embedded within the body is relevant in the context of transgender studies, a field that is inherently bound up within the realities and physicalities of bodies (cf. Ahmed, 2004).

This "new" focus on materiality and the body has been criticised by some as effectively mischaracterising the history of feminist theory which in fact has long focused on notions of embodiment and materiality (Ahmed, 2008, p.25). Claire Hemmings (2005, p.54) suggests that affective theory runs the risk of ultimately oversimplifying or ignoring existing critical work by 'postcolonial and feminist theorists'. More recently Hemmings has argued that despite some of its theoretical difficulties affect theory and in particular a focus on empathy can have some productive value for feminist theory. She bases this claim on the idea that some degree of "affective dissonance" lies at the heart of all feminist theory. That dissonance can arise from not being recognised (or not being recognised accurately) by society, by considering oneself or other's undervalued, or from not seeing oneself fitting within social norms and rules (Hemmings, 2012, p.150). For Hemmings (2012, p.148) the response to this affective dissonance needs to be "affective solidarity" as it holds the potential for lasting social transformation. She suggest that "feeling for others" - empathy - may allow the bridging of the theoretical gap between ontology and epistemology: "Challenging the status of the expert, considering the importance of shared epistemic claims from below, thinking outside of one's own initial investments in the desire for clearer and more accountable knowledge;

these are all features of an affectively attentive epistemology that allows for transformation of all participants in the research field as well as knowledge itself" (Hemmings, 2012, p.151). Similarly Benjamin (1988, p.48) suggests that empathy should ideally be based on a moment of "mutual recognition" "without demanding control" of the feelings or information that has been shared.

Pedwell and Whitehead (2012, p.120) explicitly caution that to be theoretically and politically useful "affective politics thus requires attention to the ways in which feelings can (re)produce dominant social and geo-political hierarchies and exclusions". Similarly Ahmed (2004, p.12) argues that there is often a lack of attention to the emotions bound up in the reiteration and reification of specific social structures to the extent that social changes becomes almost impossible. Indeed it might actually be that "feelings might be how structures get under our skin", following Ahmed (2010, p.216) the way structures become so deeply ingrained is through their emotional content or the emotional attachments they encourage within us. The potential for feelings to (re)produce existing hierarchies and social norms which Pedwell and Whitehead, among others, discuss was aptly illustrated by some of the interviews in which interviewees repeatedly described obtaining a GRC as the ultimate confirmation of their identity or as "milestone" for their life journey. Indeed Zoe recounted in very emotional terms how she stood in court crying with happiness while swearing that she would live in her 'new' gender identity for the rest of her life: "That was just very emotional. Standing up in court like that and swearing that this is me. I was just crying. They could not have been more friendly and helpful."- "That was wonderful. It [the GRC] is up on the wall behind me actually. It's the final thing, it's the final act". For Zoe the emotional experience of receiving the GRC served to both officially validate her identity and to ultimately make the application process itself a positive experience, particularly based on her interactions with officials while obtaining her statutory declaration. In fact several interviewees, some of which had obtained a GRC and others who were anticipating doing so, saw obtaining as an achievement worth celebrating: "I don't think I have used it [GRC] for anything else but it felt quite celebratory" (James, interview notes, 2014). "I don't know…uhm…it just would be an achievement for me I think" (Ben, interview notes, 2014). The GRC symbolised the official validation of one's identity: "It puts me into my true identity. It means that yesterday is really in the past. It would be an affirmation, a mile stone really kind of like a flag. It will make me feel psychologically like "Yes! That's me!"" (Dean, interview notes, 2014). It is unsurprising that such validation is

experienced very positively, particularly keeping in mind the official doubts of their identity, which trans people are very aware of throughout the application process (see Chapters 1 and 4). As such the positive emotions associated with obtaining a GRC may also be a logical response to both the bias experienced by applicants and the experience of suffering or struggle as part of process, which I discussed in the previous section. While I do not mean to discount the importance that obtaining a GRC may have for many people and that it can indeed feel like the conclusion of an often difficult journey, these emotional accounts of the GRC nevertheless also support the idea that sex/gender is something that has to be recognised and certified by law and cannot simply be decided by a person for themselves.

The emotional content of existing structures can have both a positive and a negative impact, depending on an individual's relation to a specific structure and the power struggles bound up within this relation. As such unhappy feelings may actually highlight continuing injustices that remain open and unresolved and leaving those feelings behind may "erase" any sign of the continuation of this injustice (Ahmed, 2010, pp.200-202; Ahmed, 2004, p.197). To this, the desire to move beyond and away from suffering may not actually be productive as it creates stigma against those who are not moving in that same direction but instead remain within the realm of "bad feelings" such as anger, sadness and pain (Ahmed, 2010, pp.216-217). Similarly, it may be necessary to express negative emotions publicly even if they continue to persist afterwards to make oneself feel 'better' without necessarily resolving the underlying cause of these emotions (Ahmed, 2004, p.201).

Following Ahmed it also is important to acknowledge the 'bad' feelings interviewees expressed about the GRA. Although many different elements of the GRC and the application process were perceived negatively by individual interviewees, the one element that elicited a strongly negative and emotional reaction from all interviewees was the new spousal consent requirement. The idea that to obtain a full GRC a married applicant needs to rely on their partners consent was discussed with visceral outrage and disgust by every single interviewee. In fact nearly all accounts used the terms "insane", "crazy" and variations thereof to describe this new change to the GRA. I have included a number of these statements here to highlight the sense of anger and outrage expressed by many about this new legal change. Andrew, Dean, Zoe, Alex, Stuart and James all highlighted the perceived injustice of this new requirement:

> "In principle the idea that you have to get the consent of a person who is no more medically qualified than you are is just ridiculous" (Andrew, interview notes, 2014).
> "I just can't believe it. To have permission for your own gender that's…no, I just can't get my head around it" (Dean, interview notes, 2014).
> "I think it's stupid. Absolutely insane. The only class of people that can help is peevish spouses" (Zoe, interview notes, 2014).
> "It's just transphobic" (Alex, interview notes, 2014).
> "It is just barbaric and backward" (Stuart, interview notes, 2014).
> "Nobody should have to give you permission!" (James, interview notes, 2014).

Interviewees were clearly horrified and disturbed by the idea that one's gender identity could effectively be vetoed by another person.[102] In particular many read the amendment as defining gender as something that could be permitted or denied by one's spouse. This provision seems to treat gender as relational and therefore one person's gender change impacts on another person's gender and/or sexuality.

In contrast to the outrage and strong negative emotions elicited by the spousal veto amendment, the fact that the GRC application process effectively allows an entire panel of strangers to veto an application, and in a much more permanent way at that, elicited far less consistent outrage, generally only from those who were against the GRC process. For instance, Taylor, whose application had been rejected by the Gender Recognition Panel described feeling "bitter" about both the rejection and the process itself, in particular due to the fact that cis gender people were the ones determining the validity of the application: "Some cis person sitting there sorting everybody into categories like "Trans!" " Not Trans!"" This suggests that the imagined identity of the panel member may also affect their perceived authority in the eyes of applicants. It is likely that for applicants a trans member of the panel would be perceived as having more authority, due to their "insider" status. The negative emotions generated by the structure of the application process also further undermined the authority of the panel members:

> "I think the accusation that people go through it rashly is ridiculous. One doesn't do this shit for fun you know! I have always felt critical at the amount of control people have who really have no idea what they are doing" (Joe, interview notes, 2014).

[102] Indeed the new legal change is more commonly described as the 'spousal veto' by activists, e.g. the campaign by the Scottish Transgender Alliance (November 2013) to remove this provision from Scottish law . See also the detailed discussion of this provision in Chapter 2.

Jessica, who was asked by the panel to submit further evidence also cast doubt on the panel's understanding of the GRA:

> "The first two sentences of paragraph two [of a letter requesting more evidence for her GRC application] imply that having a wife and child is conflicting evidence that suggest I may not have lived as a woman for the last two years. That is utterly offensive, and not in keeping with the GRA."

This suggests that negative interactions with the officials involved increased doubts about their authority, whereas those without such negative experiences also viewed the process and the panel less criticially. Many, although by no means all, interviewees were resigned to the fact that some kind of official decision making process would take place in regards to their identity. Nevertheless, the highly emotionally charged comments about the spousal consent amendment may suggest that underneath that resignation or acceptance is a deeper sense of lingering injustice, although it may only surface when the intrinsic unfairness of a second party determining one's gender identity is made more visible, such as in the case of spousal consent amendment or when an application is rejected.

For Elspeth Probyn (2005, p.72) emotions are always intensely tied to our bodies, they become embodied through actions such as crying, as she describes sobbing when visiting Uluru. For Probyn shame in particular is enacted through the body and through physical expressions or displays. In a slight contrast to Eve Kosofsky Sedgwick she argues that while shame is contagious and occurs through proximity to others, shame does 'not permit any automatic sharing of commonality' as it limits communication (Probyn, 2004a, pp.328-329; Probyn, 2005, p.105). However, even when understood as limiting communication shame can produce interest and thereby erases one's capacity to remain ignorant (Probyn, 2005, p.106). Arguably this still amounts to relationality to some degree, as presumably the interest is about the other or about a specific act. Probyn (2004a, p.338) suggests that affect as expressed through the body may allow for more active and emotional agents than Bourdieu's habitus would otherwise invoke if bodies solely enact the past and are always constrained by habitus. In fact for Probyn (2004b, p.245) shame explicitly highlights the way in which a body wants to fit into a certain situation but fails to do so and experiences discomfort related to habitus as a result.

While anger may be the most obvious emotion caused by the sensation of being unfairly judged, shame clearly also plays an important role in this process. Sedgwick argues that shame itself can be a form of communication, similar to stigma. It is constituted from a "disruptive moment" in our communication with the other, which normally helps us constitute our own identity in the process of recognition by and of the other. In this disruption shame itself can constitute our identity. Most notably, for Sedgwick, shame proves to be contagious. We can be ashamed for and on behalf of somebody be it for something they have done, or something that is done to them. As such shame is individuating, by forcing every subject to confront themselves, but also the cause of "uncontrollable relationality" as we are forced to imagine what it would be like to be the other who is experiencing a shaming event (Sedgwick, 2003, p.37). Whereas guilt reflects on one's actions, shame is always inherently tied to one's sense of identity and identification but is also based on a sense of sociability and relationality; it cannot occur without at least the imagined presence or reaction of the other. Similarly Anna Gibbs (2001) and Teresa Brennan (2004) both suggest that feelings and affect in general are highly contagious if not necessarily relational. Read this way, feeling for and with others may not simply be based on the more positively understood notion of empathy but also more negatively by feeling shame for and with others. Imagining what the other is feeling as such may also involve feeling the shame they are experiencing because of stigma and the resulting mistreatment.

Shame may have a particularly great political potential as it is constitutive of identity while also leaving identity in the state of to-be-constituted and as such avoids an essentialist notion of identity (Sedgwick, 2003, p.64). Sedgwick suggests that particularly the politics of identification/solidarity, would be better understood with a greater focus on the relational aspects of shame. And while this may not hold true for all people, for some, in particular those who fall under the broadly defined term 'queer', shame can at times be a foundational, structuring element of identity (Sedgwick, 2003, p.64). Even those for whom identity is no longer strongly determined by shame, at one point experienced shame as a way of constituting their identity. As such attempts to rid groups of shame, witnessed for example in Pride-type events, are always doomed to failure (Sedgwick, 2003, p.62).

Following Sedgwick such negative emotions may allow for creative actions and reactions. In a similar vein Cvetkovich (2012, p.143) suggests that "political depression" within social movements is to some extent unavoidable and may even

occur as the result of “internal conflicts between assimilationist and radical positions”. She argues that the constant struggle between despair and hope in the face of ongoing oppression but also positive change needs to be patiently acknowledged rather than ignored or silenced. Indeed the fact that some interviewees actually associated very positive feelings with the GRA and described it as a very progressive framework while at the same time being critical about specific aspects of it or wider social issues affecting trans people may illustrate this very co-existence of hope and more negative emotions. For instance Edward noted that the lack of an official surgery requirement made the GRA a fairly “progressive” framework, which he characterised as “fairly good” overall. While perhaps not a ringing endorsement of the law this assessment of the GRA as acceptable but in need of some improvement was repeated across a number of interviews: “It’s important when society recognises it, even when the law doesn’t get it quite right. It needs to be revised but I don’t want to see it abolished.” (James, interview notes, 2014). Especially Cvetkovich’s observation that members of a group may feel painfully torn between “assimilationist” and more “radical” tendencies is particularly valuable in the context of trans politics. Empathy may provide an important bridge between those who can and have accessed the GRA and those who are excluded from it for various reasons.

Relating to Those Who Are Different

Empathy is of course not just limited to those with similar characteristics but may also be extended to those who we perceive as living very different lives from others. Indeed empathy always involves difference to one degree or another. Sara Ahmed (2004, p.30) specifically suggests that empathy “sustains the very difference which it may seek to overcome”, as such she describes empathy as a “wish feeling”. She argues that while a person might want to feel another’s pain, joy or sadness, they can never truly know it or feel it, like the person affected by it in the moment feels it. But Ahmed suggests that this inability or “ungraspability” of the emotions of others also highlights the ungraspability of one’s own emotions, which others can never experience or know in exactly the same way. As a result empathy can only ever cause us to partially act for others, as Ahmed (2004, p.31) suggests: “I would act only insofar as I knew how she felt, then I would act only insofar as I would appropriate her pain as my pain, that is, appropriate that which I cannot feel”.

This means that actions based on empathy always involve a degree of assumption and guesswork in regards to how others really feel and experience the world. Indeed Pedwell (2012, p.166) warns that empathy can also be a form of "projection and appropriation", particularly when there are vast (power) differences between two subjects. Instead she argues that empathy like all emotions should be understood as just "one important (embodied) circuit through which power is felt, imagined, mediated, negotiated and/or contested" rather than as an absolute truth of any kind (Pedwell, 2012, p.176). Similarly Davis (2004) suggests that problematically empathy can erase some characteristics of the other, as empathy may be limited to shared characteristics rather than focusing on those that are different. In her analysis of white women discussing black women's fiction, and focusing on shared experiences as women rather than on race, she states that "gender identification does not necessarily result in race-blindness, but it can legitimise a reading process that seeks only reflections of the self rather than deeper understanding of others" (Davis, 2004, p.407). Indeed Nael Bhanji (2012) recounts clearly the lack of awareness or empathy for the effect race might have on trans people of colour in an account of being part of a research project on trans access of healthcare. He clearly highlights that in many contexts there is a lack of understanding of other trans people's differing lives and backgrounds (Bhanji, 2012, pp.168-169). Lauren Berlant (1999, p.54) is even more explicit in her discussion of empathy's more problematic qualities, for Berlant the privatisation of the political, and the related championing of empathy and emotional reactions, is responsible for "sustaining the hegemonic field". As a result, Berlant (1998, pp.640-641) argues, empathy is unlikely to ever convince people to "identify against their own interests" and even if they might intellectually identify with a specific cause, this is unlikely to result in concrete actions. Elizabeth Spelman (1997, p.111) also claims that individuals will only ever try to dismantle their own privileges if they come to understand them not only as harmful to others "but also deeply disfiguring to themselves", something that she argues is only likely to occur through invoking feelings of shame at one's own complicity. For Berlant even when empathy occurs on a large scale it remains refined to the private or internal sphere and as such can have no productive impact. Indeed trans people who do identity with a binary definition of sex/gender may focus on the shared experience of being trans when considering people who do not identify as binary, thereby erasing some fundamental differences in other people's experience.

While many interviewees expressed empathy for others who might not identify with a binary sex/gender system, they did not necessarily advocate opening up the GRA to non-binary individuals or abolishing it entirely, which was often justified by reference to those individuals for whom the GRC was useful in its present form. For instance, Jessica argued in favour of "expanding" the GRA "to allow people with non-binary genders to have their gender legally recognised." In fact several interviewees suggested that including more gender categories within the GRA would either be too complicated for administrative purposes or allow people to make rash decision that they might later come to regret: "I don't think you should have to swear that, I can imagine the torment those [non-binary] people are in. It should be a bit more open really, only to a degree though, otherwise it all gets a bit confusing." (Ben, interview notes, 2014). Similarly, James also suggested that it was important to keep some of the existing requirements, such as the permanence requirement and the related evidence sections: "It's good that it's not something you can do over night, its just part of the process." Although both expressed empathy for those who were excluded by the present process, Ben even going so far as describing it as "torment", they also had some attachment to the current framework of the GRA; although neither fully explained what would happen if the GRA was opened up too far.

Nevertheless Davis (2004) suggests that it is important not to blame a lack of political action or change on an inherent quality of empathy as a concept. Instead she argues that there are many other factors, such as political apathy, a lack of trust in officials and the system as well as self-doubts that may limit political action. Instead she suggests that empathy despite its flaws remains a far more persuasive and consistent motivator of political action that more short-lived emotions such as rage (Davis, 2004, p.404). In this empathy also goes beyond other similar emotions like sympathy for example, in that it requires "imaginatively experiencing the feelings, thoughts and situations of another " and as such involves taking a different perspective from the one an individual usually inhabits, which may also foster greater understanding between groups by limiting aggression (Davis, 2004, p.403). Pedwell (2012, p.165-166) argues that as a result empathy may allow for a greater respect for another's "subjectivity and agency" and for a continuing critical examination of existing power structures. She suggests that particularly for "privileged" individuals empathy may lead to a "radical transformation in consciousness" and the realisation that they are actually complicit in the structures that cause suffering for others (Pedwell, 2012, p.166; Davis, 2004, p.405). In fact one

interviewee described how his position in regards to the GRA slowly evolved from initially applying for one quite eagerly to the point that he now chooses not to use it anymore: “I think I’ve become quite jaded and very cynical about it all. It’s all just a load of bollocks, like it’s just sticking a band aid on a gaping wound!”- “I’m not doing that again. Next time I’m going to say “I have a GRC but I’m not using it because I don’t believe in it.” I resist the process.” (Stuart, interview notes, 2014)

Empathy may erase some difference across individual experiences as well as favouring individual reflection over collective political action (On, 1993; Bailey, 2000). Indeed Hemmings (2012, p.152) suggests that one of the dangers of empathy is that it can slip into sympathy or pity which fundamentally shifts the power of authority away from the individual with whom one empathises and towards the individual feeling pity, something that Hemmings characterises as “failed empathy”. Similarly Dean (2003, p.96) suggests that this would be a “lazy empathy” “in which we take the other’s place” which Dean argues is particularly common when different types of suffering are treated as equivalent. This disingenuous empathy can be brought on by too much distance, whether literal or metaphorical, between the individual and the “other” (Dean, 2003, p.90). She suggests that the result is the confirmation of hegemony and the centring of one’s own experience at the expense of that of others (Dean, 2003, p.96).

Hemmings (2011) counsels against assuming that empathy will always be reciprocated as one’s own experience may actually be part of the existing power structures that the ‘other’ sees as fault for their suffering, expecting such reciprocity may again lead to the de-centering of other’s experiences in particular because empathy is only focused on those who are perceived as less fortunate or in need. Additionally, empathy is also not without limits which can ultimately lead to the reification of some distinctions between different individuals (Hemmings, 2011, p.221). Similarly Whitehead (2012, p.184) notes what she terms a “troubling economy of feeling” in her analysis of the novel Mother to Mother, where empathy is limited by our capacity to identify with and recognise certain conditions and individual circumstances. Elizabeth Spelman (1997, p.172) notes this even more harshly by suggesting that: “I acknowledge your suffering only to the extent to which it promises to bring attention to my own”. Ultimately Davis (2004, p.407) counsels that “universalizing moments” that allow us to empathise with others in very different circumstances should not become an excuse to ignore or erase difference, especially when that difference is associated with a history of social exclusion and oppression. A certain unwillingness to emphasise too much with non-

binary people and the challenges that they might face in regards to the GRC was clearly evident from several interviewees who suggested either that the GRA should not be opened up too far (as discussed above) or that it should be more closely connected with the medical transition process which also tends to be very discriminatory towards non-binary identified people. Laura, who had a fairly positive experience of engaging with medical professionals, in particular argued for a stronger link between the legal and medical aspects of transition: "I think it would be great if the GRC could be more tied in with the clinic rather than having a whole separate package. Like from day one they could tell you "you need to change these documents now" or "you need to keep this report" and so on." While the closer linking of the present medical transition route, which is generally not open to non-binary people, would make the GRA implicitly exclusionary to non-binary people, others went further and argued that the GRA should not be opened up at all (see Chapter 4).

In contrast those who were less binary identified tended to specifically emphathise with intersex people whereas non-binary people had been the reference point for binary identified trans people: "I don't think it would have to start here [reforming the GRA]. Personally I think we would have to start by acknowledging intersex children. There is just no legal help for them" (Edward, interview notes, 2014). Similarly, Alex also highlighted the struggles of children born with intersex conditions: "It think it should really recognise a wider variety of the gender and sex spectrum. Like if we just expand it to cover other gender identities that just helps trans people but you still have all those intersex children who are surgically forced into these categories so if we expand these categories too that would help them as well and ultimately everybody." (Alex, interview notes, 2014)

Concluding Thoughts

Overall empathy with others allowed participants to question administrative requirements and barriers, even when those did not impose a specific burden on themselves. Indeed many interviewees initially rejected any suggestion that the GRC imposed undue hardship on them outright but instead presented anecdotes about

overcoming ignorance on behalf of officials due to their superior knowledge and willingness to invest time and effort to get what they wanted. This in turn allowed them to express greater empathy for others who might be less fortunate or resourceful. However, as a result some issues like the binary gender categories or the permanence requirement were only challenged because of empathy with others, which for some interviewees lead to a radical rejection of governmental authority and regulation (again partially out of concern for others) but not necessarily a rejection of underlying norms. Those who did identify as non-binary tended to be far more resistant to gender norms and more vocal in their demands for radical change.

Part of the GRA's 'effectiveness' clearly comes from the affective content wrapped up within it. Due to the fact that by sheer necessity it is often the last part of the transition process many interviewees tended to associate strongly positive feelings with it, this was particularly notable in older interviewees and those who transitioned later in life. Conversely the GRA also creates strongly negative emotions although in many interviews this was primarily vocalised in regards to the spousal consent amendment which interviewees consistently found repugnant. Those interviewees who had decided against applying for a GRC or had not been able to obtain one were more willing to express very negative emotion in particular about the idea of being judged on one's gender identity by strangers.

There was clearly a huge divide between interviewees in regards to suggestions for legal reform, either to the GRA, or to other laws as well as in terms of views on gender norms. However, there was little suggestion made by interviewees that their opinion was the only one that was correct, instead they consistently referred to others (either real or hypothetical) in their narratives who might see things differently from them. Although it may be arguable that this could be a rhetorical device to justify views that they are less certain about or that they fear rebuke for it nevertheless suggests that despite the fact that this was a very diverse group of interviewees there was an enormous amount of willingness to consider the needs of others. Considering the complex and diverse ways in which such affective solidarity was expressed by various interviewees may shed further light on the complexities of social justice or legal reform movements. Empathy, and the varying degrees and expressions thereof, is a crucial element in motivating people to critique a specific legal instrument such as the GRA.

Chapter 6

Questioning the legitimacy of legal gender regulation

As the previous chapters have focused primarily on the GRA in its current form, I will now turn to the issue of potential different reform approaches. This is to reflect firstly, that this is an area of law that is currently subject to rapid change in many jurisdictions and, secondly, that interviewees frequently expressed a desire to see various types of reforms of the GRA. I have shown in the preceding chapters that the Gender Recognition Act is clearly flawed when considered as an administrative procedure and as a regulatory framework for gender identity, as well as in its underlying reasoning, which is frequently based on inaccurate stereotypes. In the first part of this chapter I will briefly analyse theoretical engagements with law reform in the area of trans rights. I will then move to outlining some of the key areas that would be affected by different reform models, and particularly by moves to deregulate gender identity entirely: primarily single-sex spaces, the monitoring and identification of individuals based on their gender, the gender-based distribution of benefits, and data collection involving gender. Finally, I will consider some of the key reform approaches advocated by interviewees namely the inclusion of non-binary people within the GRA and the move towards a self-determination based approach. However, any critique of the GRA is inherently limited if it is underpinned by the assumption that continuing state involvement in the regulation of gender, of which the GRA is just one example, is necessary, as such my final chapter is intended to question this necessity.

Transgender Theory Between Assimilation and Radical Refusal

Dean Spade (2011, p.10) suggests that there is a clear divide between activist groups focusing on rights and those focusing on resistance which creates a division between those two approaches, primarily delineated along the lines of equating lesbian and gay politics with assimilationist approaches and queer and trans politics with ‘resistance’. Spade (2011, p.13) argues that the “narrow legal reforms” advocated by some lesbian

and gay groups can be characterised as falling within a “disturbing” neoliberal framework, particularly when advocating in favour of expanded hate crime legislation and same sex marriage, whereas ‘critical queer and trans activists and scholars’ tend to reject this rights based approach. From this it is uncertain whether groups or individuals can bridge the neoliberal/critical divide or argue/utilise a rights-based approach while at the same time remaining capable of criticising and even rejecting it. Spade does not specifically mention trans activism focused on rights, something that might for example describe the pre-GRA activism of Press for Change, so it is unclear where such a project would fall within this divide. This may be largely explained due to the US based focus of his analysis. However, many interviewees actually expressed very positive views about hate crime laws specifically aimed at protecting trans people, which definitely suggests that not all trans people fall within this model of “resistance” (Lamble, 2013). Zoe, for instance, argued that the most important reform necessary was to improve relations between trans communities and the police: “Hate crime reporting is absolutely ghastly with trans people. I think the official number is far below what it should be. There needs to be improved reporting and improved trust with trans people.” Ben similarly suggested that one of the key function of a state was to ensure the safety of its citizens: “The government does have a duty. They should put a lot more money into preventing hate crimes.” For people like Ben and Zoe new criminalisation measures can symbolise a positive commitment towards trans rights (cf. Lamble, 2013).

Although Spade (2011, p.14) does not specifically address frameworks allowing for the legal recognition of gender identity, he does argue that formal legal change, which could describe for example the introduction of the GRA, is inherently limited and fails to address more widespread underlying issues around injustice inherent to the “structures of governance” it is part of. Interestingly many interviewees also came to this conclusion but perhaps from a somewhat different angle. They largely felt comfortable to use the GRA strategically to secure their own social/legal position while at the same time questioning its basis and authority to regulate gender identity. For Jennifer, for instance, the practical benefits of a GRC were enormously important: “The biggest benefit for me is getting a new birth certificate and hopefully a new wedding certificate. I have had to produce my birth certificate on several occasions since transition, which automatically outs me as trans and reveals my dead name.” Although the practical concern of needing an updated birth certificate is foregrounded in this narrative, it nevertheless also highlights the symbolic role a GRC can play in various

aspects of people's lives. For Jennifer, in this case, receiving a new wedding certificate that accurately reflects her relationship to her partner is clearly also not insignificant. The GRC process itself can also have implicit, although perhaps unintended by officials, benefits. As such it allowed Zoe to get her marriage annulled rather than having to divorce her wife. For religious reasons receiving an annulment, and therefore being able to remarry again, was very important for Zoe.

Spade (2011, p.17) argues that legal equality limits the possibility for resistance through the introduction of supposedly neutral "administrative system" which do in fact have a clear detrimental impact on specific population groups. In contrast he characterises "critical" types of activism as those that criticise such "neutral" system and who focus on wider less LGBT centric issues such as prison abolitionist and those fighting immigration restrictions. Obviously the GRA could be considered to be exactly such a neutral administrative system which does in fact benefit mostly those who are educated, (white) and at least middle-class while explicitly or implicitly excluding those who are queer, poor and have less resources at their disposable to navigate its barriers. As such the GRA is unlikely to align with a positive instance of law reform as defined by Spade although most trans people clearly see it as an improvement on the previous legal situation, which did not permit any type of legal change of gender.

Although it is unclear whether the GRA causes direct harm to individuals, it clearly is an expansion and codification of the sex/gender binary within the legal system. The idea that legal equality/ recognition also limits the possibilities for resistance are confirmed to some extent by the fact that while many interviewees criticised the GRA they nevertheless chose to apply for a GRC because the practical benefits outweighed their ideological concerns about the norms underlying the GRA or its administration in practice. While there is a fairly large body of work highlighting the fallacy of presuming that trans people as a whole are a more or less homogenous group (Cromwell, 1999, p.16; Green, 2004, p.10) the same criticism has only recently been extended to transgender movements. Transgender politics may often be perceived as more radical than mainstream LGB movements exemplified by groups such as Stonewall in the UK, whose recent public campaigns have largely focused on same-sex marriage, this perception is not entirely supported by all. In a critical assessment of modern trans politics and movements Haritaworn (2012, p.12) argues that (white) trans movements often "mimick the very gay identity politics which exclude them" which in turn means

that the dichotomy between “assimilated gays” and “transgressive trans people” is not accurate. Haritaworn highlights that far from being a radical challenge to conventional politics, trans and queer politics often mirror the very arguments they used to critique to now advance their own citizenship projects. This was also evidenced by the large amount of interviewees who suggested that the government should do more to integrate trans people, either by improving existing legislation or by creating additional protections for trans people. For instance Alex argued that existing protections under the Equality Act should be expanded to cover a wider range of people: “I think all those rules about not being allowed to out people and not being allowed to misgender people should be moved into the Equality Act so that they apply to everyone and not just people who got a GRC.”

Kate Bornstein (1994, pp.51-52) suggests in Gender Outlaw ‘that gender can have fluidity, which is quite different from ambiguity; if ambiguity is a refusal to fall within a prescribed gender code, then fluidity is the refusal to remain one gender or another’. Considering this statement in regards to the GRA, the possibility for ambiguity is inherently limited within this framework, at least when reading the Act literally. The GRA clearly operates on the presumption that gender is binary and propagates this presumption by encouraging surgery and hormone treatments, which generally limit the potential for at least visual or aesthetic ambiguity. The potential for gender fluidity as such is similarly limited considering the declaration that one will remain in the ‘new’, ‘opposite’ gender for the rest of one's life. As such it is doubtful whether following Bornstein's definition of gender ambiguity or fluidity, anybody applying for a GRC could be considered to represent either of these two concepts. Based on this it may indeed be possible to understand even the application for a GRC as a certain degree of acceptance of the heteronormative ideals of the GRA. Indeed ideas of gender fluidity were only referenced in regards to their own identity by those interviewees who were either very critical of the GRA or had not obtained a GRC. Therefore, the requirement that any change of gender identity should be permanent was only perceived as problematic by a relatively small number of participants. In contrast, some interviewees such as Dean actually found the permanence requirement important for their sense of self: “There is so much legal certainty. That’s what I strive for in all my life. It makes me feel really comfortable because that’s what I want.”

Similar to Kate Bornstein, Judith Butler (2011, p.95) seems hesitant to focus solely on notions of ambiguity as a way of subverting existing gender norms: “Performativity cannot be understood outside of a process of iterability, a regularised and constrained repetition of norms […] a ritual reiterated under and through constraint, under and through the force of prohibition and taboo, with the threat of ostracism and even death controlling and compelling the shaped of production, but not, I will insist, determining it fully in advance.” Clearly there are very real practical risks associated with subverting norms that are widely accepted throughout society and often even considered as foundational to Western culture. John Sloop (2004, p.8) similarly argues that Butler clearly warns of placing too much emphasis on the potential subversiveness of ‘gender ambiguity’ as it can often be simply an extension and reiteration of existing gender norms. For instance the uptake of “androgyny” in fashion at various periods in time, which arguably does little to challenge existing gender norms and can even be understood to reify them (Bergstrom, 1986; Crane, 1999; Entwistle, 2000). Applying this to the GRA process it is important to keep in mind that rejecting the Act and its authority over determining one's gender identity should not inherently be considered more ‘subversive’, or capable of destabilising existing gender norms, than any other form of engagement with the GRA. Further it may be to some extent problematic to encourage and demand that trans people challenge legal gender that they only recently have been granted access. This demand would place an unfair burden and a large share of the responsibility for challenging hetero-/cisnormativity on a very small and often disadvantaged group of individuals who still continue to experience very real violence and discrimination. Indeed the problematic elements of such demands are largely based on the negative consequences that a refusal of norms can have on the individual. Articulating and embodying a particularly transgressive position in public often leads to highly detrimental (physical, economical or ideological) consequences for the individuals advocating and representing such a position. The consistently high figures of violence against trans people (Press Association, 26 December 2014) as well as the disproportionally high homelessness rate of LGBT youth (Hunter, 2008) plainly suggests that conforming as much as possible to accepted norms about sex, gender and sexuality is by far the safer option on a practical level although it may be considered less radical on an ideological level. As such it is unsurprising that abandoning legal gender entirely is not an approach that was favoured by many participants. Even those who considered gender a superfluous category or ordering concept did not suggest that anybody should be denied the option of identifying solely as ‘male’ or ‘female’: “If

there was a third option I would not have taken it, it's very important to me to be recognised as male and to be treated as male. But I think there are lots and lots of people who do not identify as male or female and it's unfair to ask people to fit into a male or female legal space if they do not identify as such" (Ian, interview notes, 2014). Instead of "saying no to power" Halberstam (1998, p.9) argues in favour of an "I don't care approach" to power. Halberstam's argument could on the one hand be interpreted as a call for a wholesale rejection of the GRA, due to its extension of law/state power, however this veers closer to saying no to power, here in the form of law, entirely. More accurately perhaps it can be used to justify a more strategic approach towards the GRA, such as for example applying for a certificate for practical reasons but only following the requirements to an extent or abandoning them entirely once the certificate has been obtained or the specific aim has been achieved.

What Happens if Gender is no Longer Regulated?

There are clearly practical arguments that can be made for the continuing need for state regulation or certification of gender primarily focused around four key issues. Namely, the provision of single-sex spaces, the monitoring and identification of individuals, secondly the gender-based distribution of benefits, and finally the collection of data about gender. Particularly the latter two are intended to rectify and account for existing inequality within society and as such removing gender entirely may have a strongly negative impact on individuals already affected by structural inequality. As such it is necessary to at least briefly consider the role of gender in this context before discussing some strategies to diminish the legal enforcement of gender.

<u>Single-sex spaces</u>

Changing the GRA to either recognise multiple gender categories, or use different criteria for recognition of gender, would have obvious consequences for existing single-sex spaces and institutions. I will briefly consider three illustrative areas in which such contestations are currently occurring, namely sports, public bathrooms and education. These contestations tend to focus primarily on the inclusion of trans women in women's

spaces and activities. As such I will also briefly consider the critique of trans inclusion in women-only spaces coming from particular strands of feminism

Sports

Although most sporting competitions are regulated by their own set of rules and governing bodies, it is likely that a change of national legislation, such as the GRA would at the very least impact sporting bodies located in that jurisdiction. There has been a longstanding debate about the issue of trans inclusion in sports. However, this debate came to wider public attention most recently due to the success of South African runner Caster Semenya and the subsequent controversy about her gender identity. Semenya's case illustrates many of the key concerns about trans inclusion in sports,[103] namely the question of how gender should be determined for sporting purposes. Further, what would be appropriate ways of determining gender in this context? And finally, do trans people have an inherent advantage depending on which gender category they compete in? Despite there being no doubts about Semenya's legal gender, Semenya repeatedly had to undergo "gender testing" to try and "prove" her gender for the purpose of participating in professional sports.[104] Other athletes contested her inclusion in women's sports based on her frequent successes, the subsequent release of her medical files which showed high levels of testosterone, and finally her not normatively feminine appearance.

The IOC made sex testing based on chromosomes[105] mandatory in 1968 and this policy was in place until 1998 (Elias et al., 2000). At this point the IOC as well as other key international sporting bodies adopted various policies for the purpose of "gender verification" (Cooky and Dworkin, 2013). In response to repeated scientific challenges

[103] Semenya herself is not transgender, but rather has a type of hyperandrogenism – an excess of "male" sex hormones (McRae, 29 July 2016). However, this distinction was often lost in much of the reporting and her case also cast a spotlight on how sporting bodies regulate issues of gender determination more generally. It should also be noted that this illustrates that how gender is determined does not "just" affect trans people, but can often have a more far reaching impact.
[104] It is perhaps not a coincidence that most high profile cases of enforced gender testing in sports have involved non-white athletes. Dutee Chand, an Indian sprinter, was similarly barred from competing due to high testosterone levels until she brought a landmark case against the IAAF at the Court of Arbitration for Sports (27 July 2015). Due to fact that gender testing now only takes place if an athlete's gender is explicitly challenged, this opens the door to an aesthetic assessment of gender presentation, which inherently involves the imposition of racialised gender norms (Hoad, 2010; Nyongo'o, 2010).
[105] Interestingly chromosomal tests would allow athletes with XXY chromosomes to compete as women, whereas athletes who appeared anatomically female but had XY chromosomes and genetic disorders that affected androgen uptake would be classified as male (Buzuvis, 2010). This highlights to a certain extent the arbitrariness of sex/gender boundaries on a biological level.

to chromosomal and DNA-based sex testing the IOC removed their policy of mandatory sex testing in 2000; instead the sex of an athlete would only need to be tested if it had been challenged (Buzuvis, 2010; Wackwitz, 2003). This policy allowed athletes with some intersex conditions and other conditions that could lead to high levels of androgens to compete in women's athletic competitions. However, in 2011 and seemingly in response to the controversy surrounding Caster Semenya, the IAAF (May 2011) introduced new guidelines for athletes with hyperandrogenism that specified that their hormone levels should be below the "normal male range", which they argued was vital for "the fundamental notion of fairness". Although these policies are explicitly aimed at intersex athletes, they implicitly also affect trans athletes whose hormone levels and genetic makeup may similarly deviate from gender norms. Indeed the IOC only allows trans athletes to compete if they have undergone medical interventions in the form of gender confirmation surgery and hormone treatments (Vilain and Sanchez, 2012).

Sex/gender testing in sports, particularly elite sports, is based on two key assumptions: Firstly that sex is a clearly defined binary category. This assumption has repeatedly contested due to the fact that sex even in a biological sense is subject to at least some level of construction, in the sense that we assign certain values and interpretations to biological characteristics (Fausto-Sterling, 2000; Dreger, 1998). Furthermore, the very existence of both trans and intersex people clearly highlights the artificial division imposed by such a binary construction of sex. The second assumption involved in the use of sex testing is that athletes with high levels of androgens have an inherent advantage over those with lower levels. Cooky and Dworkin (2013) argue that because sex testing is only imposed on female athletes, this highlights the inherent fallacy of this assumption. Effectively sports bodies presume that only women can derive an unfair advantage from excessively high androgen levels, and despite the fact that men's androgen levels also vary widely, no similar presumption is imposed upon men. This seems to be based on the assumption that men are inherently superior athletes, whereas female athletes need to be protected from the encroachment of supposedly superior trans and intersex athletes.

Although the inclusion of trans athletes in high-level professional athletics is seemingly a minority issue, existing debates about the definition of sex/gender in the context of sport highlight the tensions inherent in sex and gender determination more generally. Any legal change to existing gender recognition, would undoubtedly also impact the

capacity of sports' governing bodies to restrict the ability to compete in competitions based on gender. Due to the inconsistency and inherent contradictions of the current sex/gender testing model there is to be a strong argument for allowing trans athletes to compete in sports based on their gender identity, regardless of their hormone levels or surgery status (see also Buzuvis, 2011).

Public Bathrooms

The use of public bathrooms has been a longstanding issue within the trans community. For instance many trans narratives focus specifically on the narrator using a public bathroom appropriate for their gender identity for the first time, or experiencing hostile reactions when using a public bathroom (see, e.g. Edwards, 2016; McBee, 2014; Bergman, 2009). Indeed several interviewees specifically discussed the problem of accessing bathrooms as a trans person. Ashley mentioned that they always worried about having to use the bathroom in public, particularly in unfamiliar spaces: "I just worry what people are going to say, you know? I don't feel comfortable in the ladies and I don't really pass enough to use the men's so most of the time I just use the disabled toilets or I wait till I get home…and its not like getting a certificate [GRC] would make that easier, you know?" This narrative highlights one of the key limitations of the GRA. A GRC is primarily designed to resolve any legal questions about a person's gender, but it may only be of limited use in day-to-day social interactions where gender is often determined based on an aesthetic assessment of a person (see also Schilt and Westbrook, 2009). Similarly, Edward argued that gender neutral bathrooms should be mandated through legislation: "I think one thing that would be really good would be dealing with toilets and changing rooms and stuff like that. I don't know how the law would exactly do that but maybe require gender neutral toilets and stuff like that." As such the gradual introduction of unisex bathrooms (Egleston, 13 December 2016; Peck, 31 March 2016) can be viewed as a process that has clear benefits to trans people, regardless of their legal status and ability to obtain a GRC. This development would likely accelerate if legal gender recognition were to be opened up further, as it would be difficult to defend the decision to maintain bathrooms as strictly "male" or "female" if one can have their gender legally recorded as "X" for instance.

However, the move towards gender-neutral bathrooms and the question of trans people's access to bathrooms more generally has not been uncontested, both on the

individual and on a legal level. I would now briefly like to consider one such legal contestation as illustrative of the debate. Since 2015 and at least partially in response to the legalisation of same-sex marriage, a number of state governments in the US have introduced or debated the introduction of so-called "religious freedom laws" (see, e.g. Missouri's Senate Joint Resolution No. 39; Arkansas HB 1228). In general these laws make it possible for service providers, for instance small business owners, to refuse to provide services and goods to customers, if doing so would violate their sincerely held religious beliefs. Although these laws do not specify who or what might constitute a violation of such religious beliefs, the relevant lawmakers have explicitly stated that these measures are intended to ensure that Christians will not have to provide services to LGBT couples and are protected from discrimination claims. While these laws are highly problematic and may in fact also conflict with US Constitutional Law (Teague, 04 May 2016) here I will focus on one specific version of such legislation, namely North Carolina's House Bill 2. This bill was introduced in conjunction with a religious freedom law, but specifically targets transgender and gender non-conforming individuals.

House Bill 2, or the "Public Facilities Privacy & Security Act" (23 March 2016), designates that all schools and public buildings have to provide single-sex bathroom facilities and changing-rooms (where applicable). While this may, at first glance, seem uncontroversial, the bill further specifies that "sex" in this context refers to a person's biological sex as recorded on their birth certificate (§115C-521.2. House Bill 2). House Bill 2, further explicitly prohibits schools or public buildings from introducing policies that do not rely on "biological sex" as the key criteria for assigning bathrooms (§115C-521.2. c) House Bill 2). Despite the fact that this Bill has already been enacted, it does not currently contain any details about how these requirements will be enforced in practice and indeed law enforcement have confirmed that at present they will not be enforcing it because of this lack of clarity (Villarreal, 11 May 2016).

The obvious question one might ask in relation to such a law is, why is this law necessary? Although the text of this legislation does not provide an immediate answer, advocates of this new law were very vocal about their reasons for both introducing and supporting it. The clear and present danger without this law was, so they argued, that a man could enter women's bathrooms and sexually assault cisgender women and children, while law enforcement would be unable to prevent or prosecute such a person

if they identified as transgender (see, e.g. Kopan and Scott, 24 March 2016). It is a well-documented fact that sexual violence is, and continues to be, dramatically underreported and disproportionally underprosecuted in most countries (see, e.g. Hanmer et al., 1989; Stanko, 2006; Stanko and Williams, 2009; Conaghan and Russell, 2014). As such, a benevolent assessment of this law might indeed suggest that this legislation is trying to address a real and deeply concerning issue, even if one might debate the implementation of this specific law. However, this fails to acknowledge two specific problems with this line of reasoning. Firstly, that sexual offences, whether inside or outside the bathroom, are already criminalised (for an example of the criminalisation of sexual violence at state level see, e.g. §14-27.20. - §14-27.36. North Carolina General Statues). This is not to suggest that a lack of enforcement of such provision is not a real issue, nevertheless it is unlikely that the creation of a more specific offence would rectify this problem. Secondly, the specific offence this law is aimed at, namely someone "pretending" to be a different gender in order to enter a single-sex space and commit an offence and somehow escaping prosecution based on their gender, does not yet seem to have occurred in the US (Bianco, 02 April 2015; Maza and Brinker, 20 March 2014). Although, obviously a lack of evidence does not mean that a phenomenon cannot exist, it is telling that in their discussion of this law lawmakers did not cite even a single substantiated example of such an offence occurring.

If one disregards the official reasoning I just outlined, then the only justification for this offense seems to be the hypothetical anecdote offered by many proponents of the Bill about a man entering the women's bathroom and posing a threat to other (implicitly cisgender) users. This law in fact actively draws on the image of the "deceptive transsexual" (Sharpe, 2010), who uses their "perceived" gender identity to prey on cisgender women and children. Particularly in the context of the regulation of intimate spaces and events such as the bathroom, this figure becomes an intensely anxiety-provoking spectre of deviant sex/gender and sexuality performance. The threat posed by this imaginary figure may be enhanced by the fact that, as Westbrook and Schilt (2014) suggest, in an intimate context official assumptions about gender are reduced to purely biological and inherently binary understanding of gender, which may not be the case in less "sensitive" contexts.

While this specific law is part of a wider "push-back" against the recent introduction of same-sex marriage at a US federal level, through the Supreme Court decision in

Obergefell v Hodges (2015) 135 S. Ct. 2584, and the federal and state level expansion of LGBT anti-discrimination legislation, it also in many ways fits the general schemata of earlier "gender panics" about transgender bathroom use (see, e.g. Westbrook and Schilt, 2014). In line with "moral panics" more generally the discourse utilised by proponents of the law contains an imagined threat [someone pretending to be transgender in order to assault somebody] and/or an entirely disproportionate response [forcing people to bring their birth certificate to the bathroom] to a real threat. In turn such moral panics frequently demonize the supposed perpetrators of such imagined threats without good cause.

While this could be viewed as an isolated example from a different jurisdiction, it is likely that the increasing introduction of gender-neutral bathrooms and even the more frequent use of bathrooms by trans people may generate a similar backlash in this country. Indeed similar concerns to those discussed above, were voiced by parents, whose children attended a primary school in London that introduced "unisex toilets for pupils" (Pasha-Robinson, 27 November 2016). While I do not seek to validate such concerns, which are seemingly not based on actual evidence, they nevertheless highlight that this in area where law reform would likely have a highly contentious impact.

Schools

At present in the UK there is no clear consensus as to how schools should accommodate trans students. As such provision is varied and decisions are generally made on a case by case basis (Burns, 6 April 2016). Richard, who at the time of the interview had just left secondary education, recounted that his school had refused to change his gender unless he obtained a GRC: "They just didn't get that you can't do that. I kept telling them that you have to be 18 to do that and they just kept saying "well that's the law". So I was kind of stuck and all my records still say "Miss" and have my old name." Indeed, only those over 18 can obtain a GRC and hence a school policy such as the one described by Richard makes it impossible for almost all pupils to change their gender marker on school records. Such policies clearly have far reaching impact as even in mixed schools gender can often still be an important factor in regard to uniform policies, bathroom access, school sports and of course how one is addressed by others. This issue becomes even more acute in the case of single-sex schools, which are inherently gender segregated and as such may struggle even more to accommodate both

a student who has already transitioned and a student who transitions while attending such a school.

Relatively little research about trans students' experience in education currently exists. Some research indicates that presently educators struggle to accommodate trans students (McKinney, 2005; Perifmos, 2008), particularly in early education (Payne and Smith, 2014). Small scale studies suggest at least some resistance to the presence of trans students in women only education (Marine, 2011). It is likely that future changes to the GRA, for instance the removal of the two year real-life test, which would allow people to legally gender their gender earlier, would make this issue even more pressing. Although single-sex education in the UK does not extend to higher education and as such largely affects those under 18, future reforms would likely increase the urgency for at least a consistent policy regarding trans students.

Gender-based Identification

At a governmental level the function of gender as an identity marker that allows for the identification of individuals may be one of the key areas that would be impacted by any change to the current gender recognition system. States may be considered to have a legitimate interest in regulating gender for the purpose of identification and monitoring of citizens and non-citizens in the context of, for instance, border crossings or law enforcement. Indeed, as mentioned in Chapter 2, several politicians expressed concerns about the potential of the GRA to allow individuals to circumvent checks by the Criminal Records Bureau and specific measures were introduced to prevent this (House of Lords, 18 December 2003). It is not entirely clear if the concerns were based on the fact that transgender people generally change their name to one more closely associated with their "new" gender identity or the actual change of gender itself. Nevertheless, it is clear that for a long time prior to the introduction of the GRA gender has served as a permanently fixed marker which can contribute to the identification of a person (Noiriel, 2001).

However, the GRA already questions the permanence and consequently the usefulness of gender as a method of identification in a legal context. Similar to one's name gender is now something that may not be consistent across all legal documents and legal identification processes have to take this fact into account. This does not in fact pose an undue burden on states as for instance Australia in 2013 introduced new regulations

which allows citizens to apply for passports with the gender markers “F”, “M” and “X”, with “X” standing for “(Indeterminate/Intersex/Unspecified)”. Interestingly the regulations specify that no medical treatment is a prerequisite for a change from one gender marker to another[106] and that individuals may have a valid reason, such as personal safety, for holding identification documents with “conflicting” gender markers (Australian Government, July 2013 pp.4-5). Similarly, Canada has recently updated their electronic Travel Authorization requirements to introduce “Other” as a new gender category in addition to male and female (CanadaVisa, 08 November 2016). Furthermore it is likely that gender is becoming increasingly less useful in identifying individuals in a legal context. The first generation of biometric passports was introduced across the EU in 2006 which include fingerprint, iris and facial recognition data (Hoepman et al., 2006). This data is likely to provide a much more accurate method of identifying individuals as it is highly specific, largely fixed over time and can be accessed and compared automatically; in contrast to gender, which relies primarily on a visual identification. This is not to suggest that this increase in what Nikolas Rose (2000, p.326) has called the “securitization of identity” is a positive development[107] but merely that for the purposes of identification and monitoring of individuals gender is increasingly obsolete.

Travel, and the issue of identification based on gender in this context, was an issue highlighted by several interviewees. Two interviewees were dual-nationals and part of their motivation for obtaining a GRC was to ensure that their documentation was consistent across jurisdictions. However, obtaining a GRC may not provide a solution to all travel related concerns affecting trans people. Morgan, who frequently travels to visit family member in other countries, mentioned that they were always worried when having to pass airport security. In particular due to concerns about the invasiveness of new body scanners and how these would account for non-normative anatomy. This seemed to be a particular concern for non-binary identified people. Ashley voiced similar concerns and recounted an anecdote from a recent visit abroad: “When I went through security I set off the metal detector – I think it was my shoes or something –

[106] However, it remains a somewhat medicalised process as a letter from a registered medical practitioner which describes the individual’s gender identity is required for the purposes of requesting a change of identification documents (Australian Government, July 2013 p.11).
[107] For instance, Magnet (2011, pp.48-49) raises concerns about the racialised and gendered nature of some biometric data, however biometric passports as used within the European Union circumvent at least some of the issues Magnet highlights by not including information about characteristics such as hairstyle, clothing or. Nevertheless, other technologies of identification such as body scanners continue to rely on strongly gendered expectations of what bodies should look like, which poses particular problems for transgender people and exposes them to the risk of harassment (see, e.g. Currah and Mulqueen, 2011).

and they wanted to pat me down. You know how they always have a man and a woman for the checks there right? So the man looked at me when the machine beeped and pointed at his colleague and said "Please go over to her" but when I moved that way his colleague turned around and was like "no, no, I can't pat him down that's a guy!" and I had to basically tell them my passport says I'm a woman and everyone just stared at me and it was horrible. It's really put me off flying." The idea that security checks are supposed to be carried out by a member of the same-sex is on its face intended to make the experience less uncomfortable for the person being searcher, however in instances like this one, it can actually serve to heighten the discomfort experienced. Clearly new legal measures that would allow for more varied gender markers on travel documents would be beneficial for many, however, there is clearly also a pressing need to address wider issues regarding gender and security measures to make them less exclusionary and discriminatory towards trans and gender non-conforming individuals.

Gender-based Benefits

A further cause for concern in the context of removing gender as a legal category, or not assigning people pre-emptively to a gender category, would be the impact on gender based benefits. In this context pension entitlements used to be perhaps the most obvious example. Indeed obtaining a GRC can affect a person's pension entitlements. This means that someone obtaining a GRC to certify their male gender when they are already over 60 years of age will lose their pension entitlement until they turn 65 (Barrett, 2007, pp.263-264). As pension ages have become equalised this particular issue should disappear over time. However, this nevertheless is still a concern for older trans people in particular. Zoe, who was nearing retirement age at the time of the interview, was just of the interviewees who mentioned concerns about her pension entitlement:

> "Well I did my GRC quite some time ago and I obviously changed everything with HMRC. I'm planning to retire soon and maybe just do a little bit of work for myself, but my employer, because they know I transitioned, keeps saying that they are not sure if I can actually get my pension. I mean I have of course checked and it says I can, but that still worries me a bit."

The lack of clarity, or perhaps more accurately the lack of relevant knowledge on part of employers, may cause unnecessary anxiety on part of trans people who are nearing retirement age.

Similarly entitlements to maternity leave are an obvious area affected by gender recognition and consequently also by the removal of gender. Until April 2015 the UK offered 52 weeks of maternity leave and one or two weeks paternity leave. More recently this has been amended to 52 weeks of shared parental leave, although this is nevertheless dependent on one partner ending their maternity leave first.[108] Although this may provide a more gender neutral framework it nevertheless relies on gender as a ordering concept as "mother" and "father" are still the key term used throughout the legislation. It seems difficult to assess what the impact would be of making this policy fully gender neutral. Parental leave legislation that provides more leave for mothers frequently reflects existing social patterns of care-giving responsibilities. It is unclear whether gender neutral parental does in fact have a positive impact on gender equality or exacerbates and conceals it (Ray et al., 2010). At present specifically gender based legal mechanisms, while perhaps reflecting social organising principles more generally, seem to do little to further remedy gender based oppression, they do however serve to further reify sex/gender as a concept within both law and society.

Gender and Data Collection

Finally, states may have an interest in knowing about and mapping data about gender to monitor issues specifically affecting a group based on their gender, such as gender based violence. In this context it could be argued that abandoning gender as a legal category entirely would erase valuable data and as such decrease awareness of issues disproportionally affecting women. In considering the potential effects of abandoning gender as a legal classification it may be possible to draw parallels between the statistical monitoring of race by governments, for instance on census forms.

In this context Kenneth Prewitt (July 12 2010) argues that specific race based categories should be replaced with open responses that allow respondents to fill in a description of their choosing. Similarly, Aspinall (2014, p.1843) recommends adopting a "structured free-text question" on ethnic origin in the UK context to better reflect increasingly diverse and mixed populations.[109] However, Prewitt (2013, p.207) seems to have revised this approach somewhat by arguing in favour of an open question about racial

[108] The Shared Parental Leave Regulations 2014 s.5

[109] For instance the inclusion of "Jewish" as one of the options for the "Religion" category in the 2001 UK census may in fact exclude those who define themselves as Jewish not in terms of religion, but in terms of ethnicity (see, e.g. Graham and Waterman, 2005; Aspinall, 2000).

identity while also including a question about the respondent's racial origin with a predetermined number of answers for the purposes of data collection for the time being, although his emphasis seems to be on phasing these questions out over a period of time. His main argument against the collection of simplistic data about race is that in asking "What is your race?" governments construct race, primarily in the context of law and census data (Prewitt, 2013, p.26). Furthermore, according to Prewitt (2013, pp. 25-27), data collection about race is methodologically flawed, as the definitions used are often inconsistent, lacking clear boundaries, and may be artificially imposing certain racial classifications through the limited categories available.

I would argue that data collection based on gender suffers similar methodological flaws, particularly when limited to binary gender categories. It becomes difficult to estimate how many individuals do not identify with the female/male binary, but may be treated as male/ female and be advantaged/ disadvantaged as a result when, in nearly all official documents, these are presented as the only available options. Similarly, Westbrook and Saperstein (2015) highlight that beyond just the limited categories available, a further issue with gender recording in surveys is that gender is generally presumed to be static and the lines between sex and gender are often blurred, which erases valuable information. The adoption of for instance the Australian model, which would allow a third gender option in the context of data collection,[110] seems to be a small step in the right direction even if solely considered from a methodological standpoint. However, providing three categories arguably would only be equivalent to the current model of allowing several options for race, the current status quo in census data, which Prewitt and Aspinall are criticising. To replicate their proposal in the context of gender one potentially inclusive option might be to divide the question of gender in two. With one part providing a limited set of options about "sex determined at birth", if this is considered vital in terms of population statistics, equivalent to Prewitt's suggestion for a question about racial origin, and an open question about gender identity. This would still allow the collection of statistically useful data about gender without imposing gender categories to the same extent. As such I would suggest that some of the concerns about a removal of gender as a legal category may not be as persuasive as initially assumed and could in fact be achieved by alternative and perhaps even more efficient means without necessarily legitimising the state regulation of gender.

[110] Australia, which in 2013 introduced a third gender category for identification documents has also published advice suggesting that government agencies and departments which monitor and collect sex/gender information should amend their documents as "individuals should also be given the option to select Male, Female or X (Intersex/Indeterminate/Unspecified)" (Australian Government, 2013, p.6).

Perhaps deregulating gender in a legal context could provide a stepping stone that allows a greater proliferation of gender identities and consequently the reconceptualisation of gender (Cooper and Renz, 2016). The playfulness and willingness to transgress norms that is oftentimes required to transgress accepted definitions of gender seems starkly limited while practical realities such as the GRA impose clear legal boundaries and limit access to rights and life chances based on codified gender norms. Indeed even when one does not want to identify with a specific gender, practical realities such as passport forms, by necessity supersede that desire. Rachel, who was married, had children and was currently a full-time carer, was particularly concerned about the real impact a lack of a GRC was having on her life:

> "The biggest benefit for me is getting a new birth certificate and hopefully a new wedding certificate. I have had to produce my birth certificate on several occasions since transition, which automatically outs me as trans and reveals my dead name. In addition it gives me peace of mind that I will have to be treated as female by almost everyone I encounter, rather than have a few rare situations where they may decide to treat me as male."

In this instances any potential concerns about gender norms or the GRA are outstripped by practical concerns. While the legal de-regulation of gender may not causally lead to social change it would seem to at least make it more feasible. In part due to the medicalised nature of the GRA discussed in Chapters 1 and 2, its absorption of medical knowledge seems to impose equally harsh boundaries on trans people. Several interviewees expressed the feeling irrespective of their personal gender identity that within the present legal and medical regulations a transgression of the binary sex/gender system was simply experienced as an impossibility.

While many trans people are finally able to obtain vital legal documents that reflect their gender identity through the GRA, the law makes no concession to even the existence of non-binary people. Morgan, who identified as a transguy and genderqueer, while considering a GRC potentially useful stated: "I'm dreading this thing. It's so binary, it's really damaging and actually against human rights." They argued that for them the whole gender recognition system: "just feels really exclusionary, they really need more than two categories and less of a genitalia based set-up. It just doesn't include spiritual health or the emotional side of things." Interestingly Morgan, as well as other interviewees tended to linguistically organise gender as a set of "categories" or "options". While this does not foreclose the possibility of multiplication of these

"categories" it nevertheless seems to be based on the presumption that there are certain gender differences by which individuals and populations can be grouped together and organised. Gender difference seemed to be rarely associated with a clear set of physical differences, such as genital configuration, it was however to some extent treated as a pre-existing fact. Taylor, who identified as non-binary, had attempted to apply for a GRC despite its limitations because "being gendered as female at least would be preferable, but getting a correct one would be better or more satisfying." Despite providing the required medical evidence, the application was rejected in the harshest terms, with the panel stating that "further treatment" was necessary. When describing their reaction to receiving the rejection Taylor recounted in emotional terms how serious the impact of this rejection had been. It seems impossible to deny that the denial of the validity of one's identity in such terms amounts to more than just the denial of a legal document. It constitutes the very real judgement, rejection and injury of those who fail to live up to law's standard of who and what constitutes 'male' and 'female'. There can be no stronger call for action against the harmful effects of gender regulation.

The Radical Feminist Critique of Trans Inclusion

I would now briefly like to turn to the radical feminist critique of trans inclusion, particularly within women's spaces. There has been a long-standing debate within feminism about the potential inclusion of trans people, and particularly trans women, within the feminist movement and women-only spaces. The publication of Janice Raymond's *The Transsexual Empire (1979)* is perhaps the most well known, but by no means the only, example of a radical feminist argument against the rights of trans women to be included within feminism and women's spaces. She claims that trans women, encouraged by medical and psychiatric professionals, represent an artificial femininity, which reinforces gender stereotypes and "colonises" women's bodies and spaces (Raymond, 1979, p.xx). Based on her argument there is a fundamental difference between trans women and "real" women, by which she means everyone who was declared female at birth. As a result trans women should not be included in women-only spaces and have no right to demand this inclusion. Their existence and demands for legal recognition furthermore serves to damage feminism, here defined primarily as the challenging and abolishing of gender norms and gender based domination. The resulting conflict between feminists who subscribe to Raymond's biological definition of

sex/gender and trans people is far from resolved. Despite the fact that trans people have increasingly gained legal rights that allow for the inclusion within specific gendered spaces the practicalities of their inclusion often lead to ideological conflicts.

The outright rejection of trans people and their designation as enemies of feminism by writers such as Raymond, Sheila Jeffreys (1997; 2014), and Bernice Hausman (1995) intentionally creates a total and artificial opposition between feminist and trans politics, which in turn makes it almost impossible to form productive alliances within this specific frame of reference. Although the specific emphasis varies between writers, this opposition is primarily created through the construction of trans people as either men 'pretending' to be women, or as women who have been 'duped' by the patriarchy into rejecting their gender. However, it seems important to highlight the value of a radical feminist critique of gender norms within the context of transgender theory. Whether they are recognised in their gender identity by radical feminists or not, it seems undeniably that trans people share with feminism an ongoing history of oppression.[111] On a general level trans people, whether "passing" or not, are clearly subject to oppressive gender stereotypes and expectations as much as every other person. Indeed A Finn Enke (2012, p.4 emphasis added) suggests that "binary gender norms *and gender hierarchies* are established and maintained through violence against those who visibly deviate from them", which arguably suggests that trans people – in particular those who do not or cannot pass as cisgender - experience many of the most serious instances of gender based oppression and should provide common ground for all those affected by this gender-based violence gender as well as exploitation and an unequal division of labour. Bettcher and Garry (2009) similarly suggest that one obvious intersection between trans and feminist activism and theory may be the issue of eradicating and resisting sexism and sexual violence, particularly for trans women. They add to this the important caveat that trans feminism necessarily needs to take into account that not only those who identify as women are affected by sexism, but also those on the masculine spectrum or those who do not identify strongly with either gender (Bettcher and Garry, 2009, p.5). While trans women may experience oppression based on being women after their transition, trans men are likely to have experienced it to some extent prior to their transition based on their socialisation as females (Hale, 2013, p. 102). I would argue that trans people, and more generally all people who

[111] By oppression I here mean the existence of asymmetrical power relations, which often result in an unequal distribution of resources based on specific characteristics, such as gender, class, race, religion, sexuality, ability, etc.

deviate from binary gender norms, are acutely aware of the frequently oppressive workings of gender within society. Across all interviewees there was a nearly universal awareness of the artificial enforcement and regulation of gender through legal and social regulatory practices.

Kath Browne (2009; 2011) highlights that there is in fact some measure of awareness of this shared "experience of discrimination" even for people organising "womyn-born-wymen" events such as Michfest in the US. In this specific context, however, these experiences of oppression are nevertheless defined as inherently "different" to those of "real" women which in turn serves as an explanation for the exclusion of trans women. While trans people, who are being excluded from the festival, feel they are subject to oppression by the festival organisers, those associated with the festival interpret protests and resistance to the women-only policy as acts of "male domination", irrespective of the gender identity of the people involved (Browne, 2009, p.549). Interestingly, while acts of resistance by trans men are constructed as expressions of a harmful masculinity, the festival does not officially exclude trans men and, according to Browne, the presence of transmasculine and genderqueer people is not seen as problematic by other attendees or organisers (Browne, 2009, pp.550-551). While this could be read as a prioritising of sex assigned at birth over gender identity and a further denial of the self-identification of trans people,[112] it also seems to suggest that a growing rapprochement between feminist separatist and trans people is possible on a practical level.

Interestingly, Bettcher and Garry warn that due to the fact that feminism and trans theory both focus on gender, although not necessarily in the same way, other important issues such as the impact of race, class and sexuality may be sidelined or ignored. As such they call for a "far broader dialogue" that accounts for multiple points of identification (Bettcher and Garry, 2009, p.5). Similarly, Viviane Namaste (2009, p.17) in her analysis of the Transgender Day of Remembrance notes that many discussions of violence against trans people focus solely on gender or gender identity as a factor for experiencing harm and violence. This prioritising of gender means that other factors that may be equally relevant for conceptualising violence, especially in the context of TDOR, are ignored which greatly impacts the political value of such an analysis (Namaste, 2009, p.18). Indeed several interviewees made implicit references to class, primarily characterised through educational attainment and financial resources, as well

[112] It may also reflect familiarity among a certain generation with butch gender performances within lesbian communities, compared to a lack of familiarity with trans women's presence within them.

as race as additional determining factors in an individual's ability to express their gender identity as they wish and to access the resources necessary for this.

While a shared experience of oppression, and resistance to this oppression, seem obvious points for making connections between radical feminism and trans theory, Scott-Dixon (2009, p.34) suggests that it is important to not treat all "feminist" and "trans" concerns as either identical or oppositional and different. Instead the reality seems to be "somewhere messily in between" with multiple overlaps, conflicts and contradictions inherent in not just the priorities of each group, but also in the theoretical approaches used and the communities involved in them. Therefore, politically effective approach does not need to be based on one single overarching strategy, but it does require a focus on individuals' lived realities and practical concerns.

Much of the work by radical feminists is clearly hostile to trans people's desire to define their own gender identity. In her analysis of the case *Vancouver Rape Relief Society* v. *Nixon et al*. ([2003] BCSC 1936; [2005] BCCA 601), a case in British Columbia, Canada, which considered whether a trans woman should be able to train as a rape counsellor, Lori Chambers (2007) notes that the conflict between different groups of feminists who argued either for or against Nixon's inclusion, hinged on who got to determine the category of gender to which a person belonged. She suggests that using anything other than self-identification to determine who belongs to a specific category, particularly in the context of women-only spaces, will reproduce the same oppressive structures that feminism has been seeking to abolish (Chambers, 2007, p.329).

Beyond merely accepting trans people's self-definition, feminism has much to gain by including trans perspectives. Cole and Cate (2008) attempt to outline an attempt to challenge the compulsory acceptance of a binary sex/gender system. Drawing on Adrienne Rich's work on compulsory heterosexuality, and her appeal to include lesbian perspectives within feminism, they specifically suggest that a politics of solidarity between trans and cisgender people should focus on highlighting that gender identity is always highly constrained and at times coerced, even in the case of the most "gender-conforming people" (Cole and Cate, 2008, p.279). An awareness of this imposed compulsion could eventually serve as a basis for political and social change that benefits not only trans people (Cole and Cate, 2008: 285). As such, beyond merely a shared rejection of a paternalistic medical and legal system, a more critical approach to the question of whether gender is compulsory could be gained.

It seems unhelpful to position trans people as either dupes of an oppressive, patriarchal system or as inherently transgressive gender warriors whose very existence disrupts the enforcement of gender norms. Clearly trans people can contribute valuable insights into the everyday workings of sex/gender to feminism, however trans people should not be expected to effectively prove their feminist credentials by 'having' to transgress gender norms as this type of transgression often carries very real risks and practical consequences. Indeed the existence of the Transgender Day of Remembrance, an annual event intended to raise awareness of the extreme violence committed against gender-variant people (see, e.g. Lamble, 2008), starkly demonstrates the potential danger faced by people who visibly challenge gender norms.[113] Even on a smaller scale several UK police forces have reported an increase of hate crimes committed against transgender people in 2014 (Press Association, 26 December 2014).

Undoing Gender?

> "Each person's expression of their gender or genders is their own and equally beautiful. To refer to anyone's gender expression as exaggerated is insulting and restricts gender freedom (Feinberg 1998, 24)."

Feminist opposition to trans people's inclusion is, as exemplified by Raymond, based on the idea that trans people perpetuate a sex/gender system which needs to be abandoned entirely to end women's oppresion. The suggestion that gender should be abandoned entirely, however, is by no means limited to feminist theory. Gilbert (2009) similarly argues from a transgender studies perspective that "non-genderism" is the only way to entirely eliminate oppression. Gilbert (2009, p.108) imagines that this would remove the connection between certain personal characteristics and a binary gender model and would ultimately eliminate the need for concepts such as "masculine" and "feminine" within society. Which seems to come fairly close to the genderless society imagined by Jeffreys. Whittle (2006, p.202) similarly and rather pointedly suggests that gender is always going to be oppressive to the majority of people who are not rich,

[113] Although this event was specifically created to remember murdered transgender people, this is not to suggest that it is only trans people who challenge existing gender norms and may be subject to both interpersonal and symbolic violence.

white, Western, male "and called Bill Clinton.". Fighting this very oppression should at least in theory unite both feminists and trans people. Although Gilbert suggests that non-genderism is the only truly non-oppressive way to re-conceptualise gender s/he offers the concession that:

> "[…] anything that can be done to reduce the tyranny of bigenderism is a forward move. Anything that aids in defeating bigenderism is progressive and liberating. Those activities and creeds that work toward this end include feminism, transgenderism, homosexuality, and heterosexuality devoid of heterosexism, all of which violate gender rules" (Gilbert, 2009, p.109).

The limitations imposed by a strongly gendered society were in fact raised by many interviewees, who argued that legislation that was more accommodating of gender variant people was unlikely to come into being unless the social enforcement of a binary gender system ceased.[114] For instance Sophie who, despite the fact that she transitioned later in life, described transition as "extraordinarily easy" compared to other people that she knew. She had spend a lot of time before beginning her transition researching the specific requirements and processes and as such managed to medically transition and change all her documents, including her birth certificate in less than three years. By the standards of the GRA this should clearly be considered a success story, however despite the fact that her experience had been relatively positive she was strongly critical of the underlying binary gender norms:

> "I had very little trouble with the gender clinic you know. There must have been something about me that made them think 'yeah she's one', but it's silly really. I mean what does it matter whether I'm male, or female, or neither. How does that affect anyone but me? The process is just completely binary. I think it is so deeply embedded in society, that's the trouble, we don't have birth certificates that allow for ambiguity. The idea of gender as strictly binary is past it. I really can't think of anybody who that helps."

Clearly, contrary to what Raymond and Jeffreys argue, even trans people who, like Sophie, have "successfully" navigated the medical and legal system of gender recognition are acutely aware of the limitations and damaging effects of the existing construction of gender. In this context Sophie seemed to understand gender as an

[114] Arguably this is a somewhat circular argument, as legislation accommodating non-binary identified people may become superfluous without a binary sex/gender system.

essentially personal form of identification which was regulated by for instance the medical system to remain binary contrary to lived experiences. Similarly, Stuart, who had successfully obtained a GRC several years ago, had become very critical of the binary gender logic connected to it in the intervening years:

> "I've gotten very jaded and cynical. It's all a load of bollocks. It's just sticking a band-aid on a gaping wound. I think we need to get rid of the biological male and female thing. The biological characterisation thing is just archaic."

Although many interviewees were very critical about the specific provisions of the legal regulation of gender affecting them, there is an underlying awareness that the problem is not solely a legal one but rather based on social norms and constraints.

However, undoing gender entirely as advocated by Raymond (1979) and Jeffreys (1997; 2014) for instance seems problematic not just in terms of how to achieve such a genderless society, but also, following MacDonald, due to the fact that a wholesale rejection of gender is frequently used as an argument against the inclusion of trans people. Indeed some interviewees, as discussed in the previous chapter too, were cautious even in terms of opening up the gender recognition act to non-binary people or those not undergoing some type of medical transition. Elizabeth suggested that: "You don't have to have surgery to get a GRC but for me it's a bit black and white. If you want to change your gender, you should do it completely. I think making it non-binary that causes some serious problems. It's a major headache. The poor person who has to set that out." Although her concerns about opening up the GRA seemed to be in part based on practical administrative concerns, the fact that she did not experience her own identity as non-binary clearly also played an important role.

As I discussed in Chapters 4 and 5, many interviewees felt great sympathy for non-binary people and several some argued specifically that the GRA should be amended to specifically include them. On one level this could be achieved by maintaining the existing binary categories as part of the GRA, but "simply" lowering or amending the evidential threshold currently required to show one's commitment to such a category. However, it seems doubtful whether this would be an acceptable change for non-binary people who specifically identify as belonging to neither category. An alternative option would be the introduction of a third category within the GRA, similar to Australia's "X" option perhaps. While this would rectify the explicit exclusion of non-binary people from the existing legal recognition process, the introduction of such a third category can

also be read as the introduction of a new normative category for the purpose of assimilation of currently non-normative genders (see also the critique of this by Monro, 2002; Monro, 2005; Monro, 2007). As this is a developing area, at the moment it is difficult to assess whether the introduction of a third gender category can challenge a binary understanding of gender or whether it instead simply reifies a tripartite system of gender categories. Ben, for instance, specifically voiced this issue by suggesting that there needed to be a clear limit to how many gender categories can exist in law: "I think maybe having an option three for gender would be easier but I don't think more than that." Perhaps there is a limitation to how many clearly specified categories of gender can exist while stay maintaining the idea that gender can be "categorised" at all.

Concluding Thoughts

Undoing gender entirely may face many practical difficulties and is unlikely to be desired by the majority of people in the UK at present; reconceptualising gender and detaching it from existing norms and biological understandings of sex seems a vital project in creating a society that treats a multitude of felt and self-defined genders and gender expression with respect and dignity. Indeed trans people and transgender theory has done much work in reconceptualising and redefining gender both in its embodied expressions and in its definitions, with an increasing acceptance of non-binary people. There seems to also be a strong but vocal minority of trans people who reject the GRC process despite for instance identifying clearly with an approved gender category such as 'female'. Alice, who had changed other ID documents, was extremely critical about the GRA process: "I'm not going to bother with that. Some people call them 'tranny licences' and I think that's spot on. I mean it says nothing about who I am. Like you have no chance if you are non-binary, because it's kind of a gate-keeping document. It's just supposed to decide who is worthy." Although financial concerns also played a role in her refusal to apply, Alice mainly seemed opposed to the gendered logic underpinning the GRA itself. Even those, who had like Sophie applied successfully for a GRC remained critical of the system of legal recognition itself: "I have this gay colleague at work, and I was thinking about it [the GRC] and I said to him 'goodness me, have you ever needed a certificate saying that you're gay?' and he just thought it was hilarious." Despite being told in a fairly humorous tone, even this brief anecdote

reveals that far from being ‘dupes’ of an oppressive patriarchal system, trans people are by and large very critical of the GRA and its underpinning gender norms, even when utilising it for practical purposes.

It seems increasingly vital to detach gender from its present connection to specific biological characteristics in the context of legal gender regulation. However, there seems to be no clear practical reason why gender and biology need to be causally linked in the context of legislation. The continuing privileging of physical characteristics and medicalisation over self-identification seems to be one of the most obvious barriers to less gender-based regulation. The importance attached to physical elements of transition such as surgery and hormones within the GRA, and the medical establishment which functions as a gate-keeper in this context, forces the very the adherence to idealised gender norms and roles which Raymond criticises. As long as a refusal to meet these norms is met with a concurrent refusal of legal recognition it remains highly difficult for anyone to live outside these boundaries. Such a delinking of sex/gender as a medicalised construct from legal gender recognition would clearly necessitate a radical restructuring of the GRA. Specifically it would mean the removal of the existing evidence requirements which most interviewees singled out as particularly invasive and difficult to comply with. Incidentally this is also the area in which the GRA most explicitly enforces gender norms, as discussed in previous chapters, and as such the removal or reworking of these requirements may open up the gender possibilities of the existing legal framework.

Challenging the existing medicalisation of the GRA and its normative background can only ever be a first step in challenging the gender-making practices of law more generally. Removing legal regulation of gender is unlikely to eliminate gender based oppression or binary gender norms, however it would arguably remove some of the pressure to conform to these norms. While it may be tempting to assume that allowing for gender self-determination would sufficiently destabilise gender, there is a risk that this would be an option solely exercised by a small minority with little impact on gender-based oppression. What is needed is a fundamental challenge to gender as a socially determined organisational category, in the sense that at present sex/gender is treated as a vital and inherently meaningful category in nearly all aspects of life, as evidenced by the fact that gender is a mandatory category on birth certificates, passports, most governmental documents, medical forms, employment applications, etc. Perhaps what is needed is a more relational understanding of gender(s) as a set of

practices that go beyond the purely aesthetic which are constantly being defined and negotiated not just by the individual but in relation to others. As such it seems unlikely that gender, as a legally defined category with clear requirements and boundaries, will ever be able to fully reflect the various gendered experiences of a population. In turn the existence of legal gender regulation will always be exclusionary to some extent, even if expanded to perhaps include a third gender as is currently the case in some jurisdictions. In a sense it seems as if reforming the Gender Recognition Act, to include for instance non-binary identified people, would always be a somewhat futile project, as it would be a measure targeted solely a trans people and fails to address the wider effects of legal gender regulation more generally. However, this of course raises further questions. For instance if there was no legal concept of sex/gender would it nevertheless be possible to have legal interventions based on gender, such as in the context of discrimination law? Similarly to the legal framework around sexuality and ethnicity, for instance, this poses the difference between social identifications or recognition by others that the law 'watches over' and the social identifications it assigns or certifies. How could this shift to a more distant legal involvement be achieved without necessarily referring back to an exclusionary definition of sex/gender? And would removing legal sex/gender classifications potentially run the risk of entrenching or erasing the continuing existence of unequal power relations based on gender within society?

Conclusion

> “Raadchai don’t care much about gender, and the language they speak – my own first language – doesn’t mark gender in any way. This language we were speaking now did, and I could make trouble for myself if I used the wrong forms. It didn’t help that cues meant to distinguish gender changed from place to place, sometimes radically, and rarely made much sense to me” (Leckie, 2013, p.3).

The quote above is one of the opening lines of the first novel in Anne Leckie’s critically acclaimed science fiction trilogy “Imperial Raadch”. Set in a universe in which the dominant culture has no concept of sex or gender and therefore “she” is used as a default pronoun for all characters; the series follows the journey of a genderless artificial intelligence trapped in a human body. Throughout the novels the protagonist, whose gender is never specified, comments on the strangeness and artificiality of the importance and values assigned to gender by the various character and cultures the protagonist encounters. Leckie received numerous awards for her series, with reviewers praising both her writing and the unusual setting (Flood, 1 May 2014).[115] Leckie’s novels are striking in the sense that they do not consider alternative ways of imagining (or even abandoning) gender as an issue primarily of interest to minority groups, rather this occurs in a mainstream, and in many ways traditional, science fiction setting that received an inordinate amount of positive public attention. The preceding chapters have animated the view that a different approach to legal gender regulation, or even non-regulation, is possible. In what follows I offer a synopsis of the main arguments as well as a brief prelude to future critical projects.

Within the lifespan of this project there have been seismic shifts in LGBT focused legislation in the UK. The introduction of same-sex marriage also made the part of the GRA, which required applicants to dissolve pre-existing relationships redundant (Renz, 2015). This was achieved at least in part due to sustained lobbying from trans rights

[115] However, the novels also attracted a fair share of controversy. Leckie is one of the authors frequently cited by science fiction authors and fans aiming to boycott the prestigious Hugo Awards for their perceived bias towards “Social Justice Warriors”, i.e. those whose narratives do not center on white heterosexual males (Wallace, 23 August 2015).

groups (Changing Attitude, 2011; Payton, 7 August 2015). More recently the government published its report on Transgender Equality (House of Commons Women and Equalities Committee, 2015), which constitutes one of the first official governmental documents in the UK that explicitly acknowledges the concerns of non-binary identified individuals. In the wake of this report governmental statements have also indicated that there are likely to be further amendments to the GRA in the near future (Press Association, 7 July 2016); partially to bring the GRA in line with other similar legal frameworks, which increasingly move away from the overtly medicalised approach utilised in the GRA. Nevertheless, these reports and legal instruments categorise "legal" gender (and the need to change this) as something primarily of interest to small minority groups, rather than as something impacting society itself in a more fundamental way. However, even in the light of such seemingly positive developments, it seems vital to be attentive to both the regulatory underpinnings of the GRA and the GRA's effects in practice. Without such a focus there is an inherent danger that any future amendments to the GRA will simply hide and replicate the GRA's normative and exclusionary effects. Part of the impetus for this research derived from the increasing contradiction between official governmental claims about the GRA as part of a "social inclusion" agenda[116] and the lived experiences of those subject to the GRA's administrative regime. In this conclusion, I review the tensions inherent in legal identity regulation between self-determined identities, state attempts to restrict or categorise individuals, and the question of who has the authority to determine individual (gender) identities.

In this thesis I set out to investigate the relationship between the GRA as a regulatory framework and trans people's engagement with this framework in their everyday lives. For this purpose in Chapter 1 and 4 I considered trans people's responses to the various requirements of the GRC application process. Throughout this process trans people are effectively expected to prove their "commitment" to a gender identity that is different from one that the state assigned them at birth by providing evidence of their willingness to undergo medical treatment and more specifically surgery. Surgery in particular seems to function in the official imagination as a disproportionately significant marker of

[116] David Lammy MP: "The Bill is part of the Government's commitment to reforming the constitution so that it better meets the needs of all people. It reflects, too, our commitment to social inclusion." – "It is essential that no one is left behind as we create the conditions for a credible and effective modern democracy." (House of Commons, 23 February 2004). Somewhat ironically the very same language of ensuring that "no one is left behind" was more recently used to justify new restrictions for trans people as part of the amendments introduced by the Marriage (Same-Sex Couples) Act 2013 (House of Lords, 24 June 2013).

commitment and permanence to a specific identity.[117] Showing willingness to suffer pain and risk complications seem to be sufficient evidence to cross this artificial "commitment" threshold, which the GRA imposes apparently to prevent people from crossing to one end of the gender binary to the other too easily. The law in this instance seems unable to accept individuals who make the conscious decision to live in a sex/gender different from the one they were assigned at birth without wanting also to match their aesthetic presentation to the one generally expected of bodies designated "male" or "female"[118]. Prospective applicants are ultimately forced to accept the demands of the process, if they wish to successfully obtain a GRC. As the discussion of my research in the previous chapters shows, the GRC application process is clearly intended to produce trans subjects who are adhering as closely as possible to a cisgender model of binary sex/gender performance. This means that the ideal applicant who can successfully navigate this interaction with officials and the state itself is likely to adhere to specific class, gender and race norms, with little or no room for individual deviation. The relatively high rate of successful applications could in theory suggest that the application process is largely effective and unproblematic (Ministry of Justice, 10 September 2015). However, in practice many potential applicants who believe they are unlikely to obtain a GRC are excluding themselves from the process. Due to widespread existing knowledge of official suspicion about their claims, those who are aware that their application may not be received favourably, generally choose not to apply. The effect of this hidden figure, which almost functions as an unofficial screening process, on the statistical "success rate" of the GRC process is difficult to track through official statistics alone.

To further investigate the GRA requirements outlined in Chapter 1, in Chapter 2 I used governmentality as an analytical tool to consider both the GRA and the preceding case law. A governmentality reading clearly helps to illuminate both officially desired outcomes and the more normative elements underpinning the GRA, which are rarely explicit in the legislation itself. In this context the prominence of a medicalised understanding of transgender as a phenomenon is clearly evident both in the parliamentary discussions around the GRA and in the subsequent legislation. By focusing on the historical development of transgender jurisprudence and some the themes within it, it becomes possible to recognise certain underpinning "official" concerns, for example

[117] This is also contrary to the suggestion made by officials in this context that surgery is not an inherent requirement for a GRC application (see, e.g. Cowan, 2009a).

[118] Similarly law and society more generally seems often incapable to accept the non-binary bodies of intersex people at all. This issue in particular also highlights the limitations of any attempt to reform the GRA. Due to its narrow focus on trans people it is unlikely to be of use to intersex people, who remain excluded from this process.

the need to maintain sex/gender as a fixed binary category, which implicitly shapes the GRA. Using governmentality also serves to highlight that some provisions, such as the newly introduced spousal consent amendment, seem to have an unduly severe impact on applicants to be justified purely by reference to practical or administrative reasons. Foucault's work, as well as the work by other scholars such as Mitchell Dean (1996; 2010; 2013) and Nicholas Rose (1990; 1996a; 1999; 2000; Miller and Rose, 2008), on the concept of governmentality can help to highlight the intersections between discriminatory practices affecting trans people today, and now redundant case law, and the construction of moralistic concerns about the way people should behave and express their (gender) identity. Due to trans people's status as a stigmatised minority there seems to be a lack of official understanding of the reality of their lives, as evidenced by the introduction of the consent requirement, the emphasis on surgery, the demand for hormone treatment, and the intense scrutiny of medical documents. The same sense of suspicion and unease about trans identity claims can also be observed both in the parliamentary debates around the GRA and in the many administratively superfluous requirements in the GRC application process.

However, a governmentality analysis also raises the question of how trans people can maintain any agency at all within such an all-consuming legal framework. Even those trans people who successfully go through the application process, or are planning to do so, do not always fully accept the demands of the GRC. While the form of the application largely erases resistance attempts, many applicants nevertheless question the requirements of the GRA, or provide an artificial narrative that does not reflect their own lives but will likely be received favourably by the GRP. As such in Chapter 3 I considered how the concept of agency can be used to highlight the ways in which trans people behave in ways that may be contrary to the normative aims of the GRA. For this purpose it is important to conceptualise identity in a way that allows for agents who are creative and able to critically reflect and also capable of self-transformation over time. As such both agency as an embodied and as a narrative practice are key to analysing trans people's engagement with existing legal provisions. While governmentality as an analytical lens can help to elucidate some of the normative reasoning contained within the GRA, it is not by itself capable of explaining how specific individuals engage with it and are affected by it in practice as this is beyond the focus of a purely governmentality based approach.

Chapter 4 continues this focus on people's position in relation to this legal framework by using a legal consciousness approach to explain some of the differences between the GRA and trans people's actual decision making process and life choices. Overall, three key issues emerged from my field work in regards to legal consciousness. Firstly, the relation between law and other discourses; in many instances interviewees used other forms of knowledge to supplement knowledge-gaps and a lack of official information. This meant that particularly experiences with the medical system often took on a law-like function for trans people involved in the application process. Further, trans people's understanding of and engagement with the GRA was strongly influenced by their understanding of how it had been conceived and was now being enforced by officials. Secondly, trans people clearly understand law as something that needs to be managed, which has effects on several levels. On the one hand it allows trans people to re-acquire agency in an otherwise overpowering process by displaying more in-depth knowledge than the official 'experts'. On the other hand this management only becomes necessary due to the inherent bias of law against trans people. This bias constitutes a third issue, as law for trans people becomes primarily unknowable, hostile and frequently irrational or unpredictable. The combination of these factors creates a specific type of legal consciousness in the sense that trans people are highly critical of law, but nevertheless seems to be caught up within it. However, due to perceived bias and practical necessity trans people's legal consciousness seems to transcend the existing "with" and "against the law" categories. In many instances trans people have no choice but to engage with a law, which is hostile towards them. Although it is of course possible to avoid engaging with the law in this context, by deciding not to apply for a GRC, this will of course have direct consequences as certain types of records can only be amended via a GRC.[119] This in turn means any such engagement has to be necessarily strategic and at times seems to almost take on a resistant quality while simultaneously complying with the legal and normative requirements of the GRA.

Based on the key themes emerging from my field work, in Chapter 5 I turned to the relationship between individual "heroism" and empathy/affect in the context of the GRC application process. Overall empathy with others allowed participants to question administrative requirements and barriers, even when those did not impose a specific burden on themselves. Indeed many interviewees initially rejected any suggestion that the GRC imposed undue hardship on them outright but instead presented anecdotes about

[119] This applies to for instance one's gender as recorded by HMRC. As a result many employers will also refuse to amend an employee's gender on payroll documents to avoid conflicts with HMRC.

overcoming ignorance on behalf of officials due to their superior knowledge and willingness to invest time and effort to get what they wanted. This in turn allowed them to express greater empathy for others who might be less fortunate or resourceful. However, as a result some issues like the binary gender categories or the permanence requirement were only challenged because of empathy with others, which for some interviewees lead to a radical rejection of governmental authority and regulation (again partially out of concern for others), but not necessarily a rejection of underlying norms, such as the idea that gender should be divided into (limited) categories. Part of the GRA's 'effectiveness' seems to come from the affective content wrapped up within it. Due to the fact that by sheer necessity it is often the last part of the transition process many interviewees tended to associate strongly positive feelings with it, this was particularly notable in older interviewees and those who transitioned later in life. Conversely the GRA also seems to create strongly negative emotions although in many interviews this was primarily vocalised in regard to the spousal consent amendment which interviewees consistently found repugnant. Those interviewees who had decided against applying for a GRC or had not been able to obtain one seemed more willing to express very negative emotion in particular about the idea of being judged on one's gender identity by strangers.

In the final Chapter of this thesis I examined the potential effects of abandoning the legal regulation of gender identity (see Afterword, for a discussion of some concrete reform proposals to the GRA). Such an endeavor is unlikely to eliminate gender based oppression or binary gender norms, however it would arguably remove some of the pressure to conform to these norms. While it may be tempting to assume that allowing for gender self-determination would sufficiently destabilise gender, there is a risk that this would be an option solely exercised by a small minority with little impact on gender-based oppression. What is needed is a fundamental challenge to gender as a socially and legally determined organisational principle, in the sense that at present sex/gender is treated as a vital and inherently meaningful category in nearly all aspects of life, as evidence by the fact that gender is a mandatory category on birth certificates, passports, most governmental documents, medical forms, employment applications, etc. As part of this gender is also linked to more systemic features such as for instance the coding of specific spaces as public and private and therefore also as masculine and feminine respectively (see, e.g. Boyd, 1997; Okin, 1998); and the definition of labour as either productive or reproductive/domestic/caring (Fudge, 2014; Fudge, 2016; Barzilay, 2012; Conaghan, 2005; Cooper, 2007). What is needed is perhaps a more relational

understanding of gender(s) as a set of practices that go beyond the purely aesthetic, which are constantly being defined and negotiated not just by the individual, but also in relation to others.

Managing Imagined Social Interactions

In the early parts of this thesis I draw on the work of Erving Goffman on social interaction to consider how people negotiated this process of regulated legal identity transition (Goffman, 1963; Goffman, 1971; Goffman, 2005). Using this work allows for the reading of an application for a Gender Recognition Certificate as not just an administrative process but rather as a social interaction between a (prospective) applicant, the panel, state and law, albeit one mediated through forms and documents. Although Goffman's work on human interaction in general is applicable to the GRA as a whole, his discussion of the concept of stigma (Goffman, 1968) is particularly relevant in the context of the GRA as it may offer one explanation as to why trans people are consistently treated as being under suspicion throughout the application process. Highlighting the workings of "stigma" and of stigmatised identities seems crucial for a comprehensive understanding of the GRA as despite its appearance it is not simply a law that provides the basis for an administrative change of personal details, like for example a legal change of one's name, but it is in fact a process that is only aimed at one specific group of people which even today often face marginalisation, discrimination and physical and state violence.

The application process inherently involves the managing or minimising of one's stigmatised identity in order to successfully obtain access to legal rights. As Goffman (1968, pp.24-25) suggests, stigmatised individuals may feel that they are constantly subject to a greater degree of public scrutiny and as such are forced to scrutinise their own daily conduct in an effort to match it to what is expected of them. As a result due to their stigmatised identities minority groups are forced do the work of managing the biased reactions of others in order to navigate both ordinary and extraordinary life events (see, e.g. Orne, 2013 for an analysis of sexuality based stigma). This situation need to manage bias becomes particularly acute in trans people's engagements with the legal system. Such interactions seem to characterised by a dichotomous imperative to both

prove one's trans identity to officials, but at the same time minimise/normalise one's differences in comparison to cisgender people (see also Miles, 2013 for a discussion of the management of trans identities in Chile). This particular form of self-consciousness is also officially encouraged through the GRA as those who apply for a GRC, or any medical treatment preceding it, have to meet a much higher standard of proof in regards to their identity claims than cisgender individuals, which may be based on the fact that trans people make a demand of the state here which requires an active response whereas cisgender individuals generally make no such explicit demands of the state (cf. Hicks, 2006). Drawing on Goffman, Misztal (2001, p.317) suggests that stigmatised individuals are under a constant obligation to adjust, i.e. to come as close to this display of normality as possible: "The good adjustment effort results in the conditional acceptance of the stigmatized, in the maintenance of social order, and in the development of tacit cooperation between "normals" and "stigmatized" (cf. the discussion of the concept and practice of "tolerance" Brown, 2006). As such the GRA may actually codify this adjustment effort by setting out, or attempting to do so, what is required for the display of a "normal" gender identity that makes trans people into "acceptable" citizens.

Much of the work drawing on Goffman's studies of identity work focuses primarily on "acceptance" and "hostility" as opposing reactions to the revelation of a stigmatised identity (Barretto and Ellemers, 2010; Snow and Anderson, 1987). However, what happens when a reaction is less categorised? How do individuals negate for instance conditional acceptance or vague hostility? Orne (2013) for instance highlights the use of less stigmatised identities in contexts where this may allow a person to manage hostility by relying on an identity that is not necessarily the one they primarily identify with but which is seen as more acceptable in a given context.[120] It may be possible to also connect this to the idea of "covering" or limiting the obtrusiveness of one's stigmatised identity (Yoshino, 2006).[121] Yoshino argues that covering is ultimately just as harmful to a stigmatised community as 'passing' as both fundamentally demand assimilation into a dominant culture. Both the notion of using a less stigmatised identity and the need to minimise the "obtrusiveness" of one's stigmatised identity raise interesting questions in the context of the GRA. The GRA explicitly demands that applicants prove their

[120] Orne in particular focuses on the use of "bisexual" as an identity descriptor by people who otherwise might describe themselves in terms less well known to a straight audience, such as "pansexual".
[121] Yoshino suggests that (previous) resistance to gay marriage in the US for instance can be understood as a demand for "covering"; homosexuality is not criminalized, but it also is not sanctioned by law either.

evidently highly stigmatised identity as trans people,[122] however for certain applicants this may actually be a less stigmatised identity, as those who identify as non-binary would receive an even more hostile response in the application process. At the same time once they have 'proven' their identity trans people are expected to engage in covering by conforming as closely as possible to cisgender ideals of gender performance, for instance by undergoing gender confirmation surgery. This paradox would suggest that in certain social interactions it becomes almost impossible to avoid an at least partially hostile interaction. Considering the genesis of the GRA as outlined in Chapter 2, hostility may be understood as a key feature of the application process, as both the application and the panel that assess it are intended to question the authenticity of the applicants identity. One further concern in this context is the role of the "imaginary" in social interactions like this one. As the GRC application process does not take place in person, it inherently requires the panel to "imagine" the applicant based on the evidence that is permissible and required as part of the application.[123] Goffman's work, and much of the more recent literature drawing on it, focuses primarily on social interactions occurring directly between individuals or groups. Many legal interactions, such as the GRA process, however take place primarily through the medium of paper and documented evidence. Although in some contexts the determination of trans people's identity on an "imaginary" level does not seem to benefit trans people (Westbrook and Schilt, 2014), the mediating role of paper and remote legal/administrative processes in social interactions seems to be an important area for future investigation both in regards to trans identity claims and other legal procedures.

Another related key theme emerging from this research is the experience of legal regulation and the 'enforced' performance of fitting within a regulatory framework and complying with its requirements, as discussed for instance in Chapters 4 and 5, particularly in regard to the production of appropriate evidence that legally signifies "commitment" to gender. In this context it may be possible to draw wider links between the GRA and other legal frameworks intended to regulate access to specific legal statuses, such as for instance marriage (Scott and Scott, 2015; Kuntz et al., 2015) or citizenship. All three do not just focus on the legal acquisition of a specific identity, but also involve

[122] For instance through the evidentiary requirements outlined in Chapters 1 and 2.
[123] Interestingly during the early parliamentary debate stages leading up to the GRA it was suggested that the application should take place in person and could include evidence from an applicant's family members (David Lammy MP (House of Commons, 23 February 2004, Column 58)). In theory such a real life interaction may have involved a greater emphasis on an applicant's ability to "pass" in an aesthetic sense.

official scrutiny of one's performance of that identity or status. These procedures also involve a similar paradox in the sense that they require a person to successfully perform a not yet existing identity, but the performance can only be successful if one already embodies this identity (Derrida, 1990). Finally, there is a similar tension in these procedures between the 'authenticity' of an identity as determined by others and 'authenticity' as determined by the individual in question.

In practice there are strikingly similarities particularly between recent iterations of the British citizenship process and the Gender Recognition Act 2004 (Grabham, 2009), both of which were strongly influenced and introduced by New Labour.[124] The new model of citizenship, particularly in the English speaking Western world, focuses particularly on the duties inherent in citizenship, such as allegiance to a country/head of state, rather than the rights gained through it (Delanty, 2003).[125] Delanty (2003) suggests that the British citizenship system in particular is taking an increasingly disciplinary turn (see also Aradau, 2015; Löwenheim and Gazit, 2009), in the sense that prospective citizens have to demonstrate that they meet, and can live within, specific narrowly defined categories to qualify for citizenship (McNamara and Roever, 2006).[126] Citizenship regulation procedures also implicitly construct an ideal of 'good' citizens, as even citizenship tests with low standards are exclusionary to poor or less educated applicants (Etzioni, 2007; Löwenheim and Gazit, 2009).

Although the current citizenship process, which requires applicants to prove their proficiency in English, take a test and attend a citizenship ceremony was designed to help people integrate into British society in the 'right' way; in practice it seems to reinforce an essential sense of "otherness" in applicants (MacGregor and Bailey, 2012; Aradau, 2015). Beyond that, citizenship tests also enforce a "compulsory visibility" (Löwenheim and Gazit, 2009) for examinees, who are forced to reveal their beliefs and their lives as a

[124] One could also draw deeper links between the regulation of gender and citizenship within various legal frameworks. For instance Fischer (2016) suggests that gender identity and citizenship may actually converge for trans people, which can perhaps be observed most vividly in the treatment of Pvt. Chelsea Manning in the U.S. whose failure to acceptably perform heterosexual masculinity has contributed to her categorisation as an "alien enemy" (Fischer, 2016, p.583).
[125] This model cannot just be found in the legal process of acquiring citizenship, but is also prevailing in citizenship education (Davies et al., 2005)
[126] Aradau (2015) highlights that for instance the 'Life in the UK test' that forms part of the British citizenship process requires applicants to display a very specific type of knowledge and understanding of Britishness, which may even amount to enforced 'ignorance'. Citizenship tests reinforce the type of appropriate knowledge/identities that can be displayed not just through the type of knowledge that is required, but also through the method of examination. Multiple choice tests and true/false questions, which are the most common form of examination, leave no room for deviation or complex understanding of issues (Löwenheim and Gazit, 2009).

condition for gaining legal status. Similarly to the GRA process, applicants also take an instrumental approach to the citizenship process, with most applicants simply wanting the benefits associated with a British passport.[127] Löwenheim and Gazit (2009, p.160) however note that 'rote' learning of the required knowledge and its repetition solely for the benefits of the assessors of citizenship tests may actually offer a moment of resistance to applicants, without negating access to the desired legal status.[128] While citizenship procedures are aimed at integrating "unruly strangers" (Amin, 2003) the GRA seems to integrate unruly genders through a similar process.

Regulating Gender Identity

A final key theme to emerge from my research is the confluence of legal rules, gender norms and medical knowledge as part of the GRA. The confluence of these disparate elements seems to limited or constrained agency in the context of the GRA to a certain extent. As a result the type of legal consciousness that is most notable in this process is a type of normative legal consciousness, in the sense that throughout the GRA both gender norms and the medical system's enforcement and perpetuation of these norms function similarly to actual law. The GRA involves a noticeable blending of discourses/technologies due to the incorporation of medical rules/procedures/terminology/experts within the GRA. This blending of discourse and norms is certainly not unique to the GRA, Carol Smart (1991; 1989) for instance highlights how women's bodies are a focus of power struggles involving for instance medical and legal knowledge and how law frequently assimilates medical discourse into legal regulation. It may be possible here to draw wider links between the regulation of gender identity as enacted through the GRA and other types of legal regulation.[129]

Although regulation, and the associated literature, is not a focal point of this research, there are nevertheless clear links between it and the themes discussed here. As outlined

[127] Interestingly, the participants in MacGregor's and Bailey's study (2012, p.374) use the same phrase about citizenship tests being a 'hoop to jump through' to get access to legal rights, as the participants in this research project did in regards to the GRC application.
[128] This also raises similarities to narratives of covert resistance in legal consciousness as discussed for instance by Ewick and Silbey (1998; see also Nielsen 2004; Sarat 1990)
[129] One example of this would be, for instance, rules governing the access to benefits, which similarly seek to encourage and enforce specific types of behaviour and identities (see, e.g. Cohen et al., 2014; Vonk, 2014; Hancock and Mooney, 2013; Miller and Rose, 2008).

particularly in the preceding chapters, the GRA is a legal regulatory framework that seeks to certify the validity of specific identity claims through legal and medical evidence. However, the GRA is perhaps not best understood as top-down legal regulation in which governments directly seek to punish or curtail specific actions through the threat of legal sanctions; what some scholars of regulation have termed a "command and control" model of regulation (Black, 2001, p.105; Baldwin, 1998; Sinclair, 1997). As I discussed in Chapters 1 and 2, the GRA and the related application process are based on a specific normative understanding of gender as fixed and binary. However, the GRA is not primarily punitive in nature although it does seek to regulate and create specific types of gender identity, primarily through the imposition of various evidentiary requirements (for the discussion of how these requirements operate in practice, see Chapters 1 and 4). Moving away from the "command and control" model of regulation, Black (2001) argues that in the context of regulation "decentring" instead refers to the idea that governments do not have a monopoly on regulation and the act of creating regulation, it further describes the fragmentation of governments and state apparatuses themselves. A decentred model of regulation as such presumes that regulation is an interactive process in which all parties involved in the regulatory process have a role in "co-producing" regulation (Offe, 1984; Black, 1998).[130] In this system the "new regulatory state" takes a hybrid approach, which draws on governmental and non-governmental actors and involves multiple strategies/instruments and is overall often an indirect rather than direct attempt at regulation (see, e.g. Braithwaite, 2000; Bartle and Vass, 2007).

The findings from this research also point towards the importance of emotion in the context of legal regulation. Much of the early work on legal regulation focuses primarily on cognitive processes (see, e.g. Lange, 2002) rather than the emotional aspects of legal regulation. Drawing on Goffman and Durkheim, Collins (1990, p.34) in particular highlights that both cognition and emotion are produced through group processes and rituals (for a detailed discussion of the cultural meaning and production of emotions, see also Ahmed, 2004). Although the GRC application process is individualistic in the sense that a single applicant produces each application, it is nevertheless also a process that certifies (gendered) group belonging. Lange (2002, p.204) notes that it would be a fallacy to assume that in the context of law most decisions by regulators and those who are being regulated are made on a primarily rational basis and only certain emotions ("anger,

[130] Decentered regulation is further characterized by complexity due to the range of institutions involved, which in turn leads to the 'fragmentation of the of the exercise of power and control', as well as a collapse of the distinction between public and private spheres of influence (Black, 2001).

compassion, mercy, vengeance, and hatred") can be found at all and are solely restricted to specific legal arenas, predominantly criminal cases. Instead emotion is key to various aspects of law (see, e.g. Gies, 2000; Maroney, 2006; Bornstein and Wiener, 2009). This seems particularly pertinent in the context of legal regulation, specifically the regulation of human behaviour (Black, 2001). Taking emotion and emotion-based actions into account can counter the bias in favour of solely rational decision making often found in law. The study of emotion in the context of legal regulation can also provide a fuller and more in-depth account of agency and structure. Regulation does not just function on a cognitive level, but also functions through the generation (whether intentional or not) of specific emotions between regulated and regulators (see e.g. Hochschild, 1990; Posner, 1984). Lange (2002, p.219) suggests that considering the role of emotion in legal regulation can to an extent help to bridge the divide between structure and agency.

The GRA may as such be understood as a form of decentred emotional co-regulation. As I described in Chapters 1, 4 and 5 it encourages people to "buy into" specific understandings of genders in order to "prove their commitment", rather than enforcing this commitment through explicit sanctions. I also highlighted in Chapter 5 how the application process generates emotion in various ways, whether this is frustration at "legal hoops" that one has to jump through, fear of rejection or joy at receiving a GRC. These emotional investments in the GRA encourage applicants in various ways to be involved in the regulation process. This raises wider issues about the role of regulation of gendered behaviour and identities; the authorship and rationalities of such regulation; and finally about appropriate subjects and topics for regulation, and what would happen if gender was no longer subject to legal regulation. Particularly in Chapters 4 and 5 I allude to the interconnected relations between intimacy, affect and public space in the context of legal identity regulation. The importance of emotion in this context, which I highlight at various points throughout these chapters, may point towards the need to complement an analysis of individual agency with a renewed focus on affective relations and reactions between individuals (see, e.g. Puar, 2007, pp.205-206).[131] Closely related to the discussion of the nature and potential constraint of agency in Chapter 3, this also raises parallel questions about what type of affective reactions are generated when states attempt to legally regulate intimate identities. Are such reactions inherently (pre-) determined by the legal framework in question? As such are the feelings described in the

[131] One example of this would be, for instance, the fact that empathy for others and their suffering, was one of the key motivators when interviewees critiqued the GRA .

previous chapters, which range from anxiety and fear throughout the application process to joy at a successful application, entirely reactionary? Reactionary, here, in the sense that they presume or are based on the acceptance of the normative value system inherent to the GRA. Or is it possible to imagine affective reactions that challenge and perhaps queer the cisnormative underpinnings of the GRA? This may become viable by considering the role of embodiment in the context of affective processes. For instance, Amit Rai (2011) suggests that an embodied understanding of affect generates “affective confusion”, which ultimately encourages the emergence of new politics. Existing research already highlights the importance of embodiment for trans people, as well trans narratives and transgender jurisprudence (see, e.g. Prosser, 1998; Sycamore and Sycamore, 2006; Irving, 2008; Grabham, 2009). Even if the GRA was reformed and for instance the medical evidence requirements were to be abandoned, this would do little to challenge wider gender norms inherent to today’s society. It would also continue to construct the issue of “legal” gender as one primarily, and perhaps even solely, relevant to minority groups, specifically trans and intersex people. gendered or transgender legal consciousness may open up new avenues of challenge. Going back to Leckie’s genderless futuristic landscapes, this project opens up a space for future rethinking and challenging existing regulatory attempts to delineate, construct and regulate gender.

Afterword

In this final section I would briefly like to turn to the Transgender Equality report, authored by the House of Commons Women and Equalities Committee (2015). This report is the first parliamentary review of legal and medical issues currently affecting trans people in the UK. In many ways the report addresses similar issues to those highlighted in this thesis. For instance, it notes the lack of legal provision for non-binary people (House of Commons Women and Equalities Committee, 2015, p.79). Further, the report is strongly critical of the medicalised approach of the GRA, particularly in regard to the evidentiary requirements contained therein (House of Commons Women and Equalities Committee, 2015, pp.79-80). This report goes on to recommend that the GRA should urgently be updated to reflect both of these concerns. Although this report is not legally binding and the government, in its response to the report, has so far only committed to reviewing the GRA with the intent to "streamline and de-medicalise the gender recognition process" (Government Equalities Office, July 2016, pp.10-11),[132] I would nevertheless like to briefly consider these proposals and their potential future implications as they suggest a fundamentally different approach to legal gender regulation than the one current implemented by the GRA. This report also resonates clearly with some of the themes discussed in Chapter 7, particularly in regard to the issue of non-binary people and the potential move toward a self-determination based model of legal gender recognition.

In regard to the current medicalised approach of the GRA, the report goes so far as to recommend an amendment of the GRA towards an approach based on "gender self-declaration" (House of Commons Women and Equalities Committee, 2015, pp.79-80). In many ways this would be a legal change that would have the support of many trans people and campaigners in this area. In fact, this is a solution that many of the interviewees who took part in my research specifically advocated. However, what this proposal does not fully address is how such a process would work in practice. Would this

[132] The report was further discussed a part of a parliamentary debate in response to both the report and the government's response to it (House of Commons, 01 December 2016). However the only motion passed in regard to this was to note the UK's "status as a pioneer in legislating for equality for LGBT people" and to urge the government to give "unequivocal commitments to changing the Gender Recognition Act 2004 in line with the principles of gender self-declaration" (House of Commons, 01 December 2016, Column 1727). Although this can be seen as a positive sentiment, it has no legal impact at present for those unable to obtain a GRC under the existing rules.

self-declaration model be open to anyone? Or would applicants still in some way have to prove their "trans" status to be eligible? The report also does not address the wider legal consequences of this. A potentially very immediate complication would be the still existing unequal pension entitlements for men and women, which would be, and currently are, directly impacted by a person's change of legal gender. Although one could argue that these concerns are simply beyond the scope of this specific report, it also contributes to the framing of gender identity as something that primarily affects those whose gender identity deviates from the 'normal' cis gender model of identity. Instead the report could have focused on legal gender more generally, for instance by (re-) considering the mandatory recording of gender on birth certificates (see Births and Deaths Registration Act 1953, s.33(2)), which would effectively make any further amendments of the GRA a moot point .

In many ways the report is ground breaking in the sense that it officially acknowledges the existence and concerns of non-binary identified people; a category that did not even rate a mention in previous official debates about the GRA (House of Commons Women and Equalities Committee, 2015, p.5). The key recommendation of the report in this area is that the government should "look into the need to create a legal category for those people with a gender identity outside that which is binary and the full implications of this" (House of Commons Women and Equalities Committee, 2015, p.11). Again, while this is tentatively suggested, there is no mention of the wider impact this could potentially have. For instance, if gender identity in a legal context is going to include three categories, would this also impact other gender based legislation, such as for instance the Equality Act 2010 in regards to sex-based discrimination? However, at the same time the report also suggests moving towards a "non-gendered" approach for recording official information (House of Commons Women and Equalities Committee, 2015, p.9). This latter recommendation would appear to be one of the most interesting recommendations, but it is sadly not developed further other than the suggestion that gender should only be recorded "where it is a relevant piece of information" (House of Commons Women and Equalities Committee, 2015, p.86). In general, the introduction of an additional category for non-binary people, while perhaps beneficial to some people, is likely to raise similar concerns to those related to the existing binary gender categories. Even if this category was purely based on a "self-declaration" approach, as mentioned above, it would be likely to still remain exclusionary towards some people, for instance those who do not identify with any gender at all.

There is an inherent tension within the report between the move towards a self-declaration model as part of the existing GRA system and a move away from official gender records entirely. Arguably, maintaining a self-declaration model could be a necessary concession if gender will still be regarded as "relevant" information in some contexts. Having a self-declaration model would allow most, if not all, people to ensure that their gender is recorded in line with their self-perception when necessary. However, this somewhat side-steps several key questions in this regard. Firstly, in what contexts is gender "a relevant piece of information"? The report hints at the fact that this would primarily be for "monitoring purposes" (House of Commons Women and Equalities Committee, 2015, p.86), but it is not clear if this means statistical monitoring to identify for instance unequal hiring practices or, for instance, monitoring in terms of surveillance or border policing. Secondly, what would the role of the state be in recording, determining and policing self-declared gender? The fact that the report recommends a self-determination based model, rather than an abandonment of gender certification by the state in its entirety, suggests that the report envisages a continuing role for the state in this regard. However, there are also other reasons that gender may remain relevant to the workings of states, for instance in the context of equality provisions which are attentive to gender. Finally, how (if at all) would the state intervene in disputes about an individual's gender identity? If future reforms would move towards a self-determination model and minimise official recording of gender, what would happen in instances where private institutions may want to contest an individual's definition of their gender identity? This may ultimately depend on the specific legislative framework and who would be in control decision-making regarding gender. One example of this issue in practice would be the Canadian case of Kimberley Nixon[133], who was refused a volunteering opportunity at a rape counselling service as the service did not consider her to be a woman by their definition (Cowan, 2009b; findlay, 2003; Boyle, 2004). More recently in the UK the case of *J v B* (*J-v-B and The Children (Ultra-Orthodox Judaism: Transgender)* [2017] EWFC 4), highlighted the trans identity claims and different communities' understanding of gender. This case dealt with two parents who separated when one of them transitioned. Both parents and the children are part of the Manchester Haredi community. In the ruling for this case Mr Justice Peter Jackson decided against allowing (J) access to her children. Mr Justice Peter Jackson argued that to allow J contact with her children would lead to the children and their mother being ostracised by their community based on their

[133] *Vancouver Rape Relief Society* v. *Nixon et al.* [2003] BCSC 1936; [2005] BCCA 601; *Vancouver Rape Relief Society* v. *Nixon* 2005 BCCA 601

religious beliefs and definition of gender. The decision did not hinge on J's *legal* gender identity, but rather on this specific community's understanding of gender identity. As such it is not clear if it would have made a difference if J had obtained a GRC in this context. If an analogous example were to occur under a new model of the GRA would either an individual or a specific group have recourse to the courts to defend their own definition of gender, or the criteria used to determine gender (for an in-depth discussion of this argument, see Cooper and Renz, 2016)?

At present the government's refusal to commit to either of the recommendations, regarding self-determination and the inclusion of non-binary people (Government Equalities Office, July 2016), suggests that any reform would likely be very incremental and at present any discussion of such reforms is purely speculative. However, it seems striking that neither the initial report, nor the government's response, address the far reaching implications reforms to the GRA could have for society at large. This is not intended to lend credence to conservative arguments against trans rights, such as the idea that granting trans people legal recognition may in some way 'destabilise' society. It is merely intended to highlight that while issues around trans rights are frequently treated as a minority rights concern, they do raise fundamental question about the legal regulation of gender that affect every member of society.

Appendix 1: The Participants

Adam:

Adam is 38 years old and is currently undertaking a postgraduate degree. He identifies as male and applied for a GRC several years ago in part to legally dissolve his existing relationship.

Ben:

Ben is 41 years old, identifies as male and works in the creative industry and volunteers with groups that support trans people. He obtained a GRC under the previous fast-track application process.

Cameron:

Cameron is 27 years old, identifies as male and works in IT. He has looked into applying for a GRC, but has not applied yet.

Dan:

Dan is 25 years old and currently a student. He is not yet eligible for a GRC and is not sure if he will apply once be becomes eligible. He identifies as male

Mara:

Mara is 51 years old, identifies as female and describes herself as a "woman of trans history". She is an active campaigner for trans rights. She has chosen not to apply for a GRC as she feels this would destabilise her family due to the change in her and her wife's relationship [note: this interview took place before the introduction of the spousal consent amendment].

Fiona:

Fiona is 28 years old and works in IT. She has not applied for a GRC so far, but has done research about the process. She identifies as female

Gemma:

Gemma is 24 years old and currently out of work. She is waiting for the GRP to determine her application. She identifies as female.

Harry:

Harry is 28 years old, identifies as male and works in local government. He applied for a GRC in order to be able to update documents that required a GRC.

Ian:

Ian is 32 years old and a researcher. He originally legally changed his gender in a different jurisdiction, but also applied for a GRC in the UK where he currently lives. He describes his gender as male and genderqueer.

Jennifer:

Jennifer is in her 60s and works as a counselor. She applied for a GRC as soon as the process became available. She identifies as female.

Kaz:

Kaz identifies as an "FTM transsexual" and is an active campaigner for trans rights, he is in his 30s. He has chosen not to apply for a GRC.

James:

James is 40 years old and works as a therapist. He identifies as a "transman" and male and obtained a GRC several hears ago.

Laura:

Laura is 41 years old, identifies as female and is and currently the primary carer for a family member. She is considering applying for a GRC once she is eligible.

Charlie:

Charlie is 23 years old and works as an administrator. She identifies as non-binary and as a "demi-girl". She says she would apply for a GRC if she thought that she would be able to obtain one as a non-binary person.

Andrew:

Andrew is 22 years old and currently a student. He identifies as male and is considering apply for a GRC in the future.

Richard:

Richard is 18 years old and currently a student. He identifies as male and is planning to apply for a GRC in the future.

Mary:

Mary is 49 years old and identifies as female. She obtained her GRC several years ago.

Edward:

Edward is 27 years old and currently a postgraduate student. He identifies as mostly male and somewhat agender. He has recently received his GRC.

Dean:

Dean is 46 years old and runs his own business. He identifies as male and will apply for a GRC in a few months when he has sufficient documents to meet the 2-year requirement.

Joe:

Joe is 23 years old and identifies as male. He is currently a student. He has decided not to apply for a GRC.

Stuart:

Stuart is 53 years old and currently undertaking a postgraduate degree. He identifies as transmale and obtained a GRC several years ago, after legally changing his gender in a different jurisdiction.

Zoe:

Zoe is 62 years old and identifies as female. She is a retired IT professional and recently received her GRC.

Taylor:

Taylor is 28 years old and works in IT. They identify as non-binary and their GRC application was rejected.

Rachel:

Rachel is 31 years old and a full-time carer and parent. She identifies as female and has received her GRC.

Elizabeth:

Elizabeth is 52 years old and identifies as female. She is currently a full-time carer and is planning to apply for a GRC in the future.

Morgan:

Morgan is 43 years old and works for an NGO. They identify as genderqueer and have decided not to apply for a GRC.

Sophia:

Sophia is 57 years old and works in IT. She identifies as female and just received her GRC.

Alice:

Alice is 25 years old and works as an administrator. She identifies as female and has decided not to apply for a GRC.

Ashley:

Ashley is 29 years old and works in advertising. They identify as genderqueer and have decided not to apply for a GRC.

Tim:

Tim is 36 years old and works in marketing. He identifies as male and has decided not to apply for a GRC.

Appendix 2: Consent Form for Participants

Consent to Participate

This research is part of a study on people's engagement with law in their everyday lives. The research, and its results, form part of a PhD project which is being undertaken at the University of Kent at Canterbury. The results of the work may be used to publish articles in academic journals and books and may be presented at academic conferences.

1. My participation in this project is voluntary. I understand that if I feel uncomfortable in any way during the interview session, I have the right to decline to answer any question or to end the interview without an explanation.

2. I understand that that all interviews will be anonymised in all reporting of research results. All reasonable steps will be taken to ensure that I am not identifiable from personal data such as age or gender.

3. My interview will be recorded electronically, not for dissemination in this manner but for ease of reference when collating results.

4. I will be provided with 1-2 page summary of the research findings by email once the research is completed.

5. I have read and understand the explanation provided to me. I have had all my questions answered to my satisfaction, and I voluntarily agree to participate in this study.

______________________________ ______________________________

My Signature Date

____

My Printed Name

For further information, please contact me by email at F.Renz@kent.ac.uk or by phone at 07538224714. Alternatively you may contact my supervisors, Professor Davina Cooper (D.S.Cooper@kent.ac.uk) or Dr Emily Grabham (E.Grabham@kent.ac.uk)

Appendix 3: GRC Application Form

HM Courts &
Tribunals Service

T450

Standard application for a Gender Recognition Certificate

This form should be used by applicants for a Gender Recognition Certificate who are not applying using either the alternative application route/track or the overseas process.

Applicants applying under this process must demonstrate that they have lived full time in their acquired gender for at least two years.

Before you start, please read the document 'The General Guide for All Users'(The General Guide), which explains the gender recognition process. Please note that both the Marriage (Same Sex Couples) Act 2013 and the Marriage and Civil Partnership (Scotland) Act 2014 introduced changes into the gender recognition process, particularly for those who are married or in a civil partnership.

The General Guide explains the consequences of applying for a Gender Recognition Certificate and the options open to you, particularly if you are married or in a civil partnership

The Guidance Notes (see 'Guidance on Completing the Standard Application Form for a Gender Recognition Certificate') should answer most of the questions you may have. We recommend that you read the notes before completing each section of the form. If you do find it difficult to complete on your own, you could ask a friend or someone from a support organisation to help you, or you can telephone the Gender Recognition Panel (GRP) administrative team on 0300 123 4503.

You must complete sections **1, 2, 5, 6, 7, 10, 11, 12** and EITHER section **3** OR section **4**, which ever applies to you and section **8** or **9** if you are married or in a civil partnership.

Please use black ink when completing this form.

The information in this publication is available in alternative formats on request. Please contact the GRP administrative team on 0300 123 4503 or grpenquiries@hmcts.gsi.gov.uk

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1. Your contact details

The names and title that you provide below will be used in all correspondence relating to your application.

1.1 Your preferred title

1.2 Full name you would like us to use when contacting you

1.3 Postal address

postcode

1.4 How would you like us to contact you if we have any questions.

☐ Post ☐ Phone ☐ Email

1.5 If you would like to be contacted by telephone please give a daytime number and the times and days when you will be available.

Phone number

Times and days available

1.6 If you would like us to contact you by e-mail, please provide your address.

Please remember that e-mail cannot be guaranteed as secure.

1.7 If possible, please list any dates when you know you will be unavailable for any periods of more than a week over the next six months.

2. Your personal details

A. The names and title you provided at 1.2 will be used in all future correspondence. Please read the guidance carefully before filling in this section.

2.1 Surname you wish to be recorded on a Gender Recognition Certificate.

2.2 First name(s) you wish to be recorded on a Gender Recognition Certificate.

B. In order to protect your privacy, you must supply us with a password. If you telephone the Gender Recognition Panel to enquire about your application we will ask you for this password before we give out any personal information. Before choosing a password, please read the guidance to this section.

2.3 Password (between six and 10 letters. Numbers must not be used).

2.4 Why is this significant to you?

C. You should read the guidance to the sections below before you decide whether to provide your National Insurance number.

2.5 Please enter your National Insurance number here.

2.6 If you are granted a full Gender Recognition Certificate do you want the Panel to pass this information to HM Revenue & Customs?

☐ Yes ☐ No

If No, and your application is successful you are legally obliged to pass on this information to HM Revenue & Customs. This will mean sending your Gender Recognition Certificate and National Insurance number to the HM Revenue & Custom.

This service only applies to UK tax payers. We are not able to inform the authorities in the Isle of Man or Channel Islands.

3. Birth registration information for births registered in the UK

If your birth was registered in the UK you must complete this section. This also applies if you were born to a UK citizen abroad but registered by a Forces registering officer, or with the British Consul or High Commission, or born on board a ship, aeroplane or hovercraft and registered under the Merchant Shipping or Civil Aviation provisions.

Please note, if you are adopted we require your adoptive parents' details (as shown on your birth certificate).

3.1 Your surname as recorded on birth or adoption certificate

3.2 Your forename(s) as recorded on birth or adoption certificate

3.3 Gender as stated on birth or adoption certificate ☐ Male/Boy ☐ Female/Girl

3.4 Date of birth D D / M M / Y Y Y Y

3.5 Place of birth

3.6 Father's Surname (if listed)

3.7 Father's forename(s) (if listed)

3.8 Mother's maiden name

3.9 Mother's forename(s)

It will help the relevant Registrar General to locate your original birth record if you provide the following information, if it applies to you.

3.10 If you know you were adopted in the United Kingdom, please tick here ☐

3.11 If your birth was registered by a Forces registering service, or with a British Consul or High Commission, or under Merchant Shipping or Civil Aviation provisions, please tick here ☐

4. Birth registration information for births registered outside the UK

If your birth was registered outside the UK you must complete this section. If not please proceed to section 5.

Please provide your original birth certificate or other official confirmation of your date of birth and birth gender and supply the information requested below.

4.1 Your surname as recorded on birth or adoption certificate	
4.2 Your forename(s) as recorded on birth or adoption certificate	
4.3 Gender as stated on birth or adoption certificate	
4.4 Date of birth	D D / M M / Y Y Y Y
4.5 Country where birth is registered	

If you are unable to supply certain pieces of information in section 4, above, please use the box below to explain why (continue on additional paper if required and include it on the list of evidence you have supplied in section 11).

5. Time living in your new gender

As part of your application, you must provide evidence to demonstrate that you have lived full time in your acquired gender for at least two years (up to the date of your application).

The evidence can take the form of letters from official documents such as a passport or driving licence, letters or documents from official, professional or business organisations or utility bills. Please see accompanying Guidance Notes for more details. If the evidence is in a different name to the one you have used on this form, you will need to show that it does relate to you.

5.1 Please give the date from which you can provide evidence that you have lived full time in your acquired gender | D D / M M / Y Y Y Y

Please use the box in section 11 of this application form to list the evidence you will provide.

6. Medical Report A (Provided by a practitioner in the field of gender dysphoria)

Note: the Gender Recognition Panel **do not** commission medical reports on your behalf.

The guidance notes to section 6 explain the nature of the report that is required. Please include the original report as given to you by your medical practitioner/registered psychologist; with your application and fill in the boxes below.

6A.1 Name of registered medical practitioner or registered psychologist practising in the field of gender dysphoria who provided the report

6A.2 Professional address (if the individual is still practising)

6A.3 Daytime contact number

6. Medical Report B

Note: the Gender Recognition Panel **do not** commission medical reports on your behalf.

The guidance notes to section 6 explain the nature of the report that is required. Please include the original report as given to you by your medical practitioner/registered psychologist; with your application and fill in the boxes below.

6B.1 Name of registered medical practitioner or registered psychologist who provided the report. The practitioner does not have to be practising in the field of gender dysphoria	
6B.2 Professional address (if the individual is still practising)	
6B.3 Daytime contact number	

7. Details of Gender Recognition Statutory Declaration

You are required to provide a statutory declaration making several statements about your circumstances and your application. This is to ensure that you meet the criteria for the grant of a Gender Recognition Certificate. The type of statutory declaration you will complete will depend on whether you are currently single, married or in a civil partnership. There are separate statutory declaration forms with guidance to help you understand what is needed.

PLEASE NOTE: This is not the same as your "change of name" statutory declaration.

Once you have filled in your statutory declaration it is necessary to have your signature to the statutory declaration witnessed by a person authorised to administer oaths. Please see the accompanying Guidance Notes for a list of those authorised to administer oaths. Please provide the information about the witness to the statutory declaration in the boxes 7.1 - 7.5 below.

7.1 Date of statutory declaration D D / M M / Y Y Y Y

7.2 Name of the authorised person who is the witness to the statutory declaration

7.3 Qualification which enables the authorised person to administer the statutory declaration

7.4 Address of the authorised person

7.5 Daytime contact telephone number of the authorised person

This form is not the statutory declaration. Please include the original statutory declaration with your application.

Applicant's further information

7.6	Are you currently married?	☐ Yes ☐ No
7.7	Are you currently in a civil partnership?	☐ Yes ☐ No
7.8	If you have answered Yes, to either question 7.6 or 7.7	☐ I am applying for an **interim** Gender Recognition Certificate ☐ I am applying for a **full** Gender Recognition Certificate

8. Marriage (please complete this section if you are currently married).

You may apply to the Gender Recognition Panel for a GRC while remaining married if:

- You were married under the law of England and Wales (your marriage is called a 'protected' marriage);
- Your marriage was solemnised in Scotland (your marriage is called a 'Scottish protected marriage');
- You were married under the law of a country or territory outside of the UK (your marriage is called a 'protected' marriage).

Your spouse will need to agree to the marriage continuing after your gender recognition by completing a statutory declaration.

8.1	Is your marriage a protected marriage or a Scottish protected marriage?	☐ Yes	☐ No
8.2.	If your marriage is a protected marriage or a Scottish protected marriage do you and your spouse intend to remain married following your gender recognition	☐ Yes	☐ No

Please provide your original marriage certificate or a certified copy.

8.3	Has your spouse made a statutory declaration of consent?	☐ Yes	☐ No
8.4	If you answered Yes to 8.3, is it enclosed with this application?	☐ Yes	☐ No

Once section 8 is completed, please go to section 10.

Section 9: Civil Partners

(please complete this section if you are currently in a civil partnership)

If your civil partnership is under the law of England and Wales or if it was registered in Scotland, it is possible for both partners to apply for a Gender Recognition Certificate at the same time. If successful you can be granted your full certificates together, without the need to first end your civil partnership in your birth gender.

9.1	Is your civil partnership under the law or England and Wales or was your civil partnership registered in Scotland?	☐ Yes ☐ No If Yes, please answer 9.2
9.2	Are both you and your partner applying for gender recognition at the same time?	☐ Yes ☐ No

Please provide your original civil partnership certificate or a certified copy.

10. Payment

The fee for applying for a gender recognition certificate is outlined in a separate leaflet called T455 - 'The General Guide for all users'.

If you quality for a fee remission you can complete the form EX160 - 'Apply for help with fees' on paper or online. The guide EX160A - 'How to apply for help with fees' can give you more information on how to apply.

If you fail to provide evidence, or the correct fee, your application will not be processed until the Gender Recognition Panel receives the correct documentation or payment.

10.1 Are you required to pay a fee of £140? ☐ Yes ☐ No, I'm applying for help with fees

Help with fees

☐ I am applying for help with fees using the online service - gov.uk/help-with-court-fees

or

☐ I am applying for help with fees and attach my application form EX160

If you have completed an online Help with Fees application,
you will receive a Help with Fees reference number.
You should write this reference number in the box below.

Help with Fees – Ref no. H W F – ☐☐☐ – ☐☐☐

Method of Payment

If you are required to pay a fee for your application, please indicate how you are paying it. If paying by cheque or postal order, you must include this with your application form.

☐ **Cheque** - payable to HM Courts & Tribunals Service

☐ **Postal Order** - payable to HM Courts & Tribunals Service

☐ **Debit/Credit card** (please see below)

If you would like to pay by Debit/Credit Card then please contact the GRP administrator on 0300 123 4503 within 10 days of receipt of application acknowledgment.

We can only take card payments from you over the telephone.

For security purposes, please have your GRP reference number and password to hand.

11. Checklist of documents in support of your application

This checklist will help you and the Gender Recognition Panel ensure that you have included everything that you are required to submit with your application. Please list every piece of evidence that you are including with your application. We will return documentation to you once it has been checked.

Documents	Enclosed
Statutory Declaration (Please note this document will not be returned)	☐
Your spouse's statutory declaration, where appropriate	☐
Your original birth certificate or a certified copy	☐
If you are currently married your original marriage certificate or a certified copy	☐
If you are currently in a civil partnership your original civil partnership certificate or a certified copy	☐
A copy of your decree(s) dissolving the marriage or civil partnership	☐
If your spouse or civil partner has died a copy of their death certificate	☐
A copy of all change of name documents or other documents to show any changes from the name appearing on your birth certificate to your current name	☐
Medical Report A – Please state the name of the medical report provider and the date of the report	☐
Medical Report B – Please state the name of the medical report provider and the date of the report	☐

Documents	Enclosed
Evidence of living full time in your acquired gender for at least 2 years prior to the date of application (List documents)	☐
Please list any other letters or documents you have enclosed with your application	☐

12. Declarations

If your birth was registered in the UK, to process your application, the Gender Recognition Panel needs to pass your details to the relevant Registrar General. Similarly if your marriage or civil partnership was registered in England and Wales or Scotland and you are applying for gender recognition while remaining married or in a civil partnership, then the Panel will need to pass your details onto the appropriate Registrar General.

If you consent below, the Registrar General will contact you (if your application is successful) to inform you about options for your new birth certificate (and where appropriate a new marriage or civil partnership certificate).

I consent to the Registrar General contacting me in relation to the issue of a new birth/marriage/civil partnership certificate, as appropriate.

I certify that all the information given in this application is correct to the best of my knowledge. I understand that to make a false application is an offence.

Signature of applicant

Date D D / M M / Y Y Y Y

When you have signed and dated the form, it should be sent, with all supporting documentation to:

GRP
PO Box 9300
Leicester
LE1 8DJ

You are strongly advised to send your application by registered post.

Section 22 of the Gender Recognition Act 2004 protects the information on your application form and information about your gender history if your application is successful. The data you provide will only be processed as permitted by the Act. It will be processed primarily for the purpose of determining your application (and any related legal proceedings) and for maintaining the Gender Recognition Register. The Guidance Notes to this application form and Explanatory Leaflet contain more information about how your data may be processed. Information about you will not be disclosed except where permitted by law, or where you have consented to it.

The Ministry of Justice is the Data Controller for the Gender Recognition Secretariat and Panel for the purposes of the Data Protection Act 1998. If you want to know more about what information we have about you, or the way we use your information, you can find details on the MoJ website www.justice.gov.uk/about/datasharingandprotection.htm

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