

## Genderfucking as a Critical legal Methodology

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Résumé de l'article

Dans cet essai, je théorise le *genderfucking* en tant que méthodologie juridique critique. Le *genderfucking* se caractérise par un accent mis sur les besoins et les expériences des personnes qui « *fuck* » avec le genre, c'est-à-dire celles qui troublent les régimes disciplinaires du genre, résistant de ce fait les tentatives de gouvernance du genre à travers les lois, les politiques et les pratiques. En adoptant une politique du désordre, le *genderfucking* critique la politique de la reconnaissance et remet en question la légitimité de l'État à définir et à contrôler la catégorisation de genre. Le *genderfucking* propose une approche riche et fertile pour analyser un monde social, politique et juridique marqué de manière indélébile par les régimes du genre et, ce faisant, s'engage sur la voie de libération du genre.

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## GENDERFUCKING AS A CRITICAL LEGAL METHODOLOGY

*Florence Ashley\**

In this essay, I theorize genderfucking as a critical legal methodology. Genderfucking is defined by its focus on the needs and experiences of those who ‘fuck’ with gender, resisting attempts at gender governance through laws, policies, and practices. Adopting a politics of messiness, genderfucking is critical of recognition and calls into question the state’s legitimacy in defining and policing gender categories. Genderfucking offers a rich and fertile approach for analyzing a social, political, and legal world indelibly marked by regimes of gender and, in so doing, steps on the path towards gender liberation.

Dans cet essai, je théorise le *genderfucking* en tant que méthodologie juridique critique. Le *genderfucking* se caractérise par un accent mis sur les besoins et les expériences des personnes qui « *fuck* » avec le genre, c’est-à-dire ceux qui troublent les régimes disciplinaires du genre, résistant de ce fait les tentatives de gouvernance du genre à travers les lois, les politiques et les pratiques. En adoptant une politique du désordre, le *genderfucking* critique la politique de la reconnaissance et remet en question la légitimité de l’État à définir et à contrôler la catégorisation de genre. Le *genderfucking* propose une approche riche et fertile pour analyser un monde social, politique et juridique marqué de manière indélébile par les régimes du genre et, ce faisant, s’engage sur la voie de libération du genre.

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\* Assistant Professor, University of Alberta Faculty of Law and John Dossetor Health Ethics Centre, and biorg-witch with flowers in their hair. I am particularly grateful to Chan Tov McNamara, whose gracious comments greatly nourished some of my edits. I would also like to thank Jay De Santi, Corinne Green, Samuel Singer, Erez Aloni, and Peter Wills for their insightful feedback.

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## Introduction

Gender interpellates us, and we are expected to heed the call by ‘figuring out’ a relatively stable and legible gender identity. What happens when people refuse? What happens when you have cisgender girls who want to use masculine names and pronouns being asked to prove their gender identity in family court? Trans men who prefer women’s facilities for safety or comfort? People who refuse or can’t seem to figure out their gender being asked to pick a gender marker? In other words, people whose relationship to gender places them at the margin of gender regimes, if not wholly outside them. How might we craft laws, policies, and practices that are responsive to their needs and experience? In this paper, I theorize genderfucking as a critical legal methodology. Genderfucking offers an analytical lens for critiquing laws, policies, and practices by centering the experiences and needs of people who ‘fuck’ with gender and thus resist attempts at gender governance.

Complementing liberal approaches to trans legal scholarship that emphasize recognition of trans people’s genders, genderfucking gestures towards a politics of refusal that asks us to rethink the place of gender in society and law. Integrating trans people within existing gender regimes may fulfil the needs and desires of some, but it cannot fulfil all. Existence is too messy, gender regimes too oppressive. Rather than emphasizing recognition, genderfucking brings into focus the messiness of human experience and highlights how law’s attempts at regulating and managing gender inevitably fail to attend to the needs and experiences of some people. By expounding genderfucking as a critical legal methodology, this paper offers a rich and fertile approach for criticizing and changing a social world that is profoundly and perhaps indelibly governed by gender.

In the first section of the paper, I theorize genderfucking as a critical legal methodology and explain how it emerged out of limits of recognition in trans legal scholarship. In the second section, I offer guidance on how to apply genderfucking and highlight some conceptual tools that are useful in applying it. In the third section, I give examples of how the methodology can be applied to law and policy questions, notably regarding gender markers, gendered spaces, and social gender affirmation for youths. In the fourth section, I situate the methodology of genderfucking in relation to queer theory, trans theory, and applied trans studies.

While my paper focuses on the substantive elements of genderfucking, stylistic elements are also integral to the approach. The present article as well as several of the past writings I mention include puns and jokes, many of them sexual. More than incidental, I would suggest that these stylistic elements are an extension of genderfucking’s substance into the realm of form and style. For just as genderfucking rejects the politician’s idea that gender must be policed, so does it reject the academician’s idea

that writing must be policed.<sup>1</sup> The name ‘genderfucking’ itself offers a challenge to dominant mores around sex and profanity. Are sex jokes not a celebration of scholarly fucking? Is there not something peculiarly trans about sex jokes?<sup>2</sup> Beyond their substantive teachings,<sup>3</sup> puns and jokes embody genderfucking’s commitment to questioning social norms about gender and sexuality and help pierce the obscuring veil of scholarly formalities and detachment.<sup>4</sup> I enthusiastically encourage scholars who deploy genderfucking to demonstrate levity—nay, impiety—in their own writing.

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<sup>1</sup> Unfortunately, many editors seem to disagree with my stance on irreverent comments and puerile jokes. I was once forced to remove the following as a condition of publication: “People often refer to ‘castration’ in such negative terms. To them I say: don’t knock it ‘til you try it.” I’ve also been told once or twice that my orgasm jokes are unbecoming, but, honestly, I think that orgasm jokes are the most be-coming of jokes.

<sup>2</sup> The centrality of sex jokes to trans culture no doubt owes much to the sexualization of transfemininity, which often engenders shame (see Julia Serano, “Psychology, Sexualization and Trans-Invalidations” (Keynote lecture presented at the 8th Annual Philadelphia Trans-Health Conference, Philadelphia, 12 June 2009) at 8–14).

<sup>3</sup> Ludwig Wittgenstein once allegedly claimed, “a serious and good philosophical work could be written that would consist entirely of jokes” (Norman Malcolm, *Ludwig Wittgenstein: A Memoir*, 2d ed (Oxford, UK: Clarendon Press, 2001) at 27–28). Take the following passage, which I had to remove along with the castration joke mentioned in footnote 1: “Speaking of creativity, I cannot help but admire community-created surgical neologism like ballbusting, chop chop, cuntsmithing, Free Willy, genital origami, genital switcharoo surgery, his-terectomy, junk removal, late-term circumcision, Madame Novaries, meat delete, misterectomy, ovulation defenestration, pawning the family jewels, penisn’t, pussycrafting, snatch switch, snip snip, teetus deletus, teet yeet, The Dickening, tits for tat, top crop, treating the nut allergy, tuck everlasting, vaginomania, yeeterus, and yeetitties. Interestingly, most of these terms de-emphasize the gendered aspects of the surgeries compared to terms like ‘sex reassignment’ and ‘gender confirmation’, which many criticize for being outdated and essentializing.” Is it not making an important point about how trans people relate to gender as a form of governance? To those terms, I was also invited to add bofaectomy, construction, and ad-dadictomy.

<sup>4</sup> Deviating from the traditional style of legal writing has been central to multiple scholarly traditions such as Critical Legal Studies and Critical Race Theory (see J Paul Oetken, “Form and Substance in Critical Legal Studies” (1991) 100:7 Yale LJ 2209 at 2220; Qudsia Mirza, “Patricia Williams: Inflecting Critical Race Theory” (1999) 7:2 Fem Leg Stud 111 at 114). Legal scholar David Feldman once distinguished British from United Statesian Critical Legal Studies based on the latter’s “humour, dash and refusal to take themselves or anyone else too seriously,” which “[t]hey often seem to do ... only to annoy, because they know it teases; but it does make people think” (David Feldman, “The Nature of Legal Scholarship” (1989) 52:4 Mod L Rev 498 at 514, n 56. For an example, see also JT Knight, “Humor and the Law” [1993] 3 Wis L Rev 897). For a performative critique of sex negativity in academia, see Florence Ashley, *Gender/Fucking: The Pleasures and Politics of Living in a Gendered Body* (Troy, NY: CLASH Books, 2023) at 137–52.

## I. Theorizing Genderfucking

To understand genderfucking, we must first appreciate the limits of the politics of recognition that underpin liberal trans legal scholarship in societies mired in Western gender ideologies.<sup>5</sup> Captured in the slogan “trans women are women,” liberal approaches to law reform centre on the importance of recognizing trans people’s gender identities, qualifying them for full and equal membership in the corresponding gender category. According to the politics of recognition, most famously formulated by philosopher Charles Taylor, our self-understanding is shaped by how others perceive us.<sup>6</sup> When they misrecognize our personal identities, they not only disrespect us but “can inflict a grievous wound, saddling its victims with a crippling self-hatred.”<sup>7</sup> Since self-esteem and sense of self are bound up with society, recognition is a “vital human need.”<sup>8</sup> These remarks are borne out in psychological studies. Failing to recognize and support trans people in their gender is associated with poorer mental health and social functioning.<sup>9</sup> Philosophical writing on trans issues has stressed the importance of recognition and the gravity of gender misrec-

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<sup>5</sup> By Western gender ideologies, I roughly mean ideologies of gender that can be found in predominantly white societies that see themselves as heirs of so-called Greco-Roman civilization. Identifying those societies with more precision is difficult. At a minimum, I mean to include Europe, Canada, the United States, Australia, New Zealand, and countries that share in their gender ideologies with little to no major differences.

<sup>6</sup> Charles Taylor, “The Politics of Recognition” in Amy Gutmann, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25 at 25; see also Hilde Lindemann, “Holding on to Edmund: The Relational Work of Identity” in Hilde Lindemann, Marian Verkerk & Margaret Urban Walker, eds, *Naturalized Bioethics: Toward Responsible Knowing and Practice* (Cambridge: Cambridge University Press, 2009) at 69.

<sup>7</sup> Taylor, *supra* note 6 at 26.

<sup>8</sup> *Ibid.*

<sup>9</sup> Arjee Restar et al, “Legal marker and change is associated with response to gender-based mistreatment and improve mental health outcomes among trans populations” (2020) 11 *SSM - Population Health* 100595 at 6; Ashley B Taylor et al, *Being Safe, Being Me 2019: Results of the Canadian Trans and Non-Binary Youth Health Survey*, (Vancouver, BC: Stigma and Resilience Among Vulnerable Youth Centre, 2020) at 43; Stephen T Russell et al, “Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth” (2018) 63:4 *J of Adolescent Health* 503 at 505; Kevin A McLemore, “A perspective on experiences with misgendering” (2018) 3:1 *Stigma and Health* 53 at 54; Kevin A McLemore, “Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals” (2015) 14:1 *Self and Identity* 51; Greta R Bauer et al, “Reported Emergency Department Avoidance, Use, and Experiences of Transgender Persons in Ontario, Canada: Results From a Respondent-Driven Sampling Survey” (2014) 63:6 *Annals of Emergency Medicine* 713 at 718; Ayden Scheim, Greta Bauer & Jake Pyne, “Avoidance of Public Spaces by Trans Ontarians: The Impact of Transphobia on Daily Life” (2014) 4:1 *Trans PULSE e-Bulletin* 1 at 2.

ognition or misgendering.<sup>10</sup> Much of my own work has stressed the importance of recognition.<sup>11</sup>

When applied as a politico-legal conceptual framework that stresses state and institutional recognition of individual gender identities, however, we run into the limits of a politics of recognition.<sup>12</sup> It is one thing to want society to recognize and respect my gender; it is quite another to ask states and institutions to administer gender recognition. Applying a politics of recognition to trans legal issues makes significant concessions, accepting gender as an organizing category of social life while arguing that membership in gender categories should be predicated on gender identity rather than sex assigned at birth.<sup>13</sup> For those who fall outside of the man-woman binary, recognition rapidly reaches its limits. Under a politics of recognition, non-binary identities are often relegated to a supporting role, inescapably marginalized by the pervasiveness of the binary. I may be

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<sup>10</sup> See e.g. Stephanie Julia Kapusta, “Misgendering and Its Moral Contestability” (2016) 31:3 *Hypatia* 502; EM Hernandez, “Gender-Affirmation and Loving Attention” (2021) 36:4 *Hypatia* 619.

<sup>11</sup> See e.g. Florence Ashley, “Qui est-ille? Le respect langagier des élèves non-binaires, aux limites du droit” (2017) 63:2 *R Service social* 35 at 36; Florence Ashley, “Gatekeeping Hormone Replacement Therapy for Transgender Patients is Dehumanising” (2019) 45:7 *J Medical Ethics* 480 at 481; Florence Ashley, “Adolescent Medical Transition is Ethical: An Analogy with Reproductive Health” (2022) 32:2 *Kennedy Inst Ethics J* 127 at 137–38; Florence Ashley, “Youth Should Decide: The Principle of Subsidiarity in Paediatric Transgender Healthcare” (2023) 49:2 *J Medical Ethics* 110 at 111–12 [Ashley, “Youth Should Decide”].

<sup>12</sup> This is only one way of operationalizing a politics of recognition. Nancy Fraser, for instance, distinguishes between affirmative and transformative responses to remedying injustice, including misrecognition. Whereas affirmative responses emphasize acknowledging and revaluing marginalized identities, transformative responses aim to challenge the underlying systems of governance and discipline that underwrite oppression. Within this conceptual framework, genderfucking could be understood as an idiosyncratic transformative response to misrecognition (see Nancy Fraser, “From Redistribution to Recognition? Dilemmas of Justice in a ‘Postsocialist’ Age” in Steven Seidman & Jeffrey C Alexander, eds, *The New Social Theory Reader*, 2nd ed (New York: Routledge, 2008) 188 at 194–96).

<sup>13</sup> Expecting recognition can also be a source of disappointment. As Viviane Namaste said:

I could tell them that the chances of living in poverty were high. But those who would go down that path were incredibly strong. ... We shouldn’t go back to that time when trans people couldn’t change their papers. But there is something instructive about a social context which required people to gather enough strength to live without the expectation of recognition in the immediate moment (Viviane Namaste & Dalia Tourki, “Trans Justice and the Law: From Then to Now, From There to Here: A Conversation between Dr. Viviane Namaste and Dalia Tourki” (On the Margins of Legal Change Public Conference Keynote delivered at the Faculty of Law, McGill University, 2 May 2019 (2020) 35:2 *CJLS* 159 at 165–66).

glad that my pronouns and gender label will be respected, but what am I to do when all single-user bathrooms are occupied? Pee on the floor? The limits of recognition are also evident for people whose precarious legal status—undocumented immigrants, people who are homeless and/or do not have identity documents, and minors—makes the pursuit of recognition at best futile and at worst dangerous. A politics of recognition expands our gender imaginary but does little to challenge our collective reliance on gender categories. It is unable to offer a radical critique of the institutionalization of gender. Conceding that gender offers a natural or acceptable junction for social categorization is already conceding far too much.

Genderfucking as a critical legal methodology emanates from an appreciation of the limits of recognition. To my knowledge, the term was first used in the methodological sense I intend in “Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities,” which I published in the *Dalhousie Law Journal* in 2018.<sup>14</sup> The paper bore on the criminalization of trans people who did not disclose their gender modality<sup>15</sup> before engaging in sexual acts, considering the omission a form of sexual fraud. In so-called gender fraud cases, individuals who did not

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<sup>14</sup> Florence Ashley, “Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities” (2018) 41:2 Dal LJ 339 [Ashley, “Genderfucking Non-Disclosure”]. I should however note June L Reich, “Genderfuck: The Law of the Dildo” (1992) 15:1 Discourse 112 at 121, which deployed the idea of genderfucking in a broader sense of gender non-conformity alongside anti-trans discourse that labelled transitude as “work[ing] to stabilize the old sex/gender system”. This deployment of genderfucking as a queer metaphor contrasted with the regressive nature of trans existence is unfortunately common. This identification of transitude with dominant gender norms, in contrast to genderfuckers, betrays an unfortunate willingness to attend to the realities of trans people and the genderfuckers among them. Outside of methodology, the vocabulary of genderfucking has long circulated as an identity or political practice, see Katelyn Elizabeth Elder, *From Genderfuck to Nonbinary: Negotiating Gender in Performance* (Master of Arts thesis, Texas A&M University, 2016) [unpublished]; Deryn Guest, “From Gender Reversal to Genderfuck: Reading Jael Through a Lesbian Lens” in Teresa J Hornsby & Ken Stone, eds, *Bible Trouble: Queer Reading at the Boundaries of Biblical Scholarship* (Atlanta: Society of Biblical Literature, 2011) 9; Erin Runions, “Zion is Burning: Genderfuck and Hybridity in Micah and *Paris Is Burning*” in Elizabeth A Castelli, ed, *How Hysterical: Identification and Resistance in the Bible and Film* (New York: Palgrave Macmillan, 2003) 93; Sylvie Constantine, “Genderfuck Takes Lesbian Literature for a Loop” (1997) 3:3 Lesbian Rev Books 24. However, none seem to have done so within the context of a legal or policy critique.

<sup>15</sup> The most common gender modalities are cisgender and transgender. Gender modality refers to “how a person’s gender identity relates to gender they were assigned at birth” (Florence Ashley, Shari Brightly-Brown & G Nic Rider, “Beyond the trans/cis binary” (2024) 630 Nature 293 at 294). See also Florence Ashley, “‘Trans’ is My Gender Modality: A Modest Terminological Proposal” in Laura Erickson-Schroth, ed, *Trans Bodies, Trans Selves: A Resource By and For Trans Communities*, 2nd ed (Oxford: Oxford University Press, 2021) 22 at 22.



want to out themselves were recharacterized as devious actors trading in active deception, even in the absence of affirmative misrepresentation—implying a duty to disclose. According to the standard critique of these cases, criminalizing trans people as sexual offenders for not disclosing their gender history is wrong because trans men are real men and trans women are real women.<sup>16</sup> The law is wrong because it misrecognizes their gender, turning them into second-class men and women.

While the answer is rhetorically and perhaps legally effective, I found it dissatisfying. By privileging trans men and women to the detriment of others, its deployment of recognition sustained transnormative attachments. Transnormativity is an ideological framework that elevates a narrow conception of transitude into a norm based on its proximity to hegemonic gender ideology.<sup>17</sup> Transnormativity's role in the standard critique becomes particularly blatant once we consider the counterargument that the sexual fraud is not about the person's gender but rather, for example, the use of a dildo rather than a flesh penis. A politics of recognition offers no easy response to these arguments, seemingly limiting its usefulness to only those trans men and women who have medically transitioned in accordance with dominant expectations of gender embodiment. Recognizing the full and equal authenticity of trans people's genders offers little help to those who are non-binary, questioning their gender, or who cannot access genital surgeries due to economic precarity or immigration status, among others. The standard critique failed to capture what I saw as the crux of the problem with 'gender fraud' laws, namely the inappropriateness of governments involving themselves in the gender regulation of our sexual lives. I therefore sketched a privacy-based argument against the criminalization of so-called gender non-disclosure by staking a claim in what I called a "genderfuck politics," which "fucks with' gender by rejecting the call to neatly locate ourselves within gender categories."<sup>18</sup> By deploying a thick conception of privacy rooted in material realities, I sought to defend not only those who fell outside the gender binary but also those who do not or cannot put forward a "well-defined, clear, and stable" nar-

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<sup>16</sup> This is not to suggest that the standard critique is the sole critique. Alex Sharpe, for instance, has offered a nuanced and multifaceted critique of sexual fraud laws alongside the standard critique. See generally Alex Sharpe, "Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent" (2014) 3 Crim L Rev UK 207; Alex Sharpe, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal and Ethical Debate* (New York: Routledge, 2018). See also Aeyal Gross, "Gender Outlaws Before the Law: The Courts of the Borderland" (2009) 32:1 Harvard JL & Gender 165.

<sup>17</sup> See generally Nova J Bradford & Moin Syed, "Transnormativity and Transgender Identity Development: A Master Narrative Approach" (2019) 81:5–6 Sex Roles 306. Refer to Part II, *below*, for a discussion of transnormativity.

<sup>18</sup> Ashley, "Genderfucking Non-Disclosure", *supra* note 14 at 343.

rative of gender.<sup>19</sup> Gender? I hardly know ‘er! My gender is not the government’s business, and the government has no place demanding that I account for my gender to avoid a criminal conviction.

This conceptualization of genderfucking was *ad hoc*. I had developed it to address that legal issue and did not initially refer to it in my work.<sup>20</sup> As my scholarship evolved, however, I started to think about genderfucking not only as an *ad hoc* concept but as a rich methodology that was embodied by many of my writings and played a structuring role in my political advocacy. By asking who is not served by laws, policies, and practices, I unwittingly adopted genderfucking as a guiding principle of my writing and activism. That it emerged so organically is perhaps proof of its merits.

My original conceptualization of genderfucking as a legal methodology drew heartily from Dean Spade’s notion of critical trans politics and the politics of refusal theorized by Indigenous scholars Audra Simpson and Glen Coulthard.<sup>21</sup> Critical trans politics calls for a move beyond recognition and inclusion, “seeking instead to transform current logics of state, civil society security, and social equality” by centring material needs and liberatory praxis.<sup>22</sup> A politics of refusal challenges the state’s authority and legitimacy in doling out recognition.<sup>23</sup> Unlike interpersonal recognition, which may involve equality and mutual recognition, political recognition is predicated on inequality and dominance. When government institutions recognize your gender, they speak for the state as a powerful force that stands above the individual. The act of recognition presupposes and reinforces the claim to legitimacy of the person or entity offering recognition. As Audra Simpson points out, recognition by the settler colo-

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<sup>19</sup> *Ibid.*

<sup>20</sup> I appeal to the notion of “genderfucking politics” in Florence Ashley, “X Why? Gender Markers and Non-Binary Transgender People” in Isabel C Jaramillo & Laura Carlson, eds, (*Ius Comparatum - Global Studies in Comparative Law*) *Trans Rights and Wrongs: A Comparative Study of Legal Reform Concerning Trans Persons* (New York: Springer, 2021) 33 at 39 [Ashley, “X Why?”].

<sup>21</sup> Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*, 2nd ed (Durham & London: Duke University Press, 2015) [Spade, *Normal Life*]; Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham & London: Duke University Press, 2014); Glen S Coulthard, “Subjects of Empire: Indigenous Peoples and the ‘Politics of Recognition’ in Canada” (2007) 6:4 *Contemporary Political Theory* 437. This is not to say that they are the only Indigenous scholars who have written on the politics of refusal—on the contrary. However, they are the two scholars who have most influenced my thinking.

<sup>22</sup> Spade, *Normal Life*, *supra* note 21 at 1; see also Ido Katri, “Transgender Intrasectonality—Rethinking Anti-Discrimination Law and Litigation” (2017) 20:1 *U Pa JL & Soc Change* 51 at 66 [Katri, “Transgender Intrasectonality”].

<sup>23</sup> Simpson, *supra* note 21 at 11.

nial state fundamentally fails to acknowledge the sovereignty of Indigenous communities.<sup>24</sup> In the context of Indigenous refusal, recognition reinscribes the sovereignty of the settler colonial state. Because recognition by the state presupposes legitimate authority, a politics of recognition cannot ground a radical challenge to the role of the state and its institutions in governing and administering difference.<sup>25</sup> Applied to gender, a politics of refusal challenges “the state’s authority and legitimacy in policing gender categories.”<sup>26</sup> When laws, policies, and practices ask us to account for our gender, we can say no.

While critical of recognition and demonstrating an openness to gender refusal, genderfucking is not intrinsically a politics of refusal. Institutional appeals to gender are always suspect but not always wrong.<sup>27</sup> Though it questions the role of gender in law, policy, and practices, genderfucking does not inescapably reject it. It is open to the possibility of gender serving a remedial role through affirmative action schemes, for instance. This ambivalence towards institutions of power is informed by Kimberlé Crenshaw’s argument that abandoning legal rights altogether, though radical, is too idealistic to address the present needs of Black people living in the United States.<sup>28</sup> Although genderfucking values the radical potential of refusal, it acknowledges that refusal may not always align with the need to make life more livable for those who cannot or do not wish to bear the sharp costs of withdrawing from powerful institutions’ sphere of influence—for doing so can too often mean withdrawing from society altogether.

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<sup>24</sup> *Ibid* at 16, 20.

<sup>25</sup> *Ibid* at 20.

<sup>26</sup> Ashley, “Genderfucking Non-Disclosure”, *supra* note 14 at 362. Unlike Indigenous refusal, which challenges settler colonial sovereignty and reasserts Indigenous sovereignty, gender refusal does not challenge the state’s legitimacy *in toto* but only challenges its authority surrounding gender. Gender refusal may still involve putting forward claims—e.g. of privacy—in the dominant legal system and would not oppose the state’s authority in abandoning gender governance. In that sense, it works within the system. Unlike Indigenous refusal, gender refusal “does not and cannot claim to be a decolonizing force, as it could be mobilised in furtherance of colonial projects” (362).

<sup>27</sup> On the productiveness of seeing administrative and legal structures as sources of problems rather than solutions, see William Hébert, Samuel Singer & DT, “Trans Rights, Trans Justice: A Conversation About Key Trans Legal Issues in Canada” (2022) 34:2 *CJWL* 354 at 374.

<sup>28</sup> Kimberlé Williams Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law” (1988) 101:7 *Harv L Rev* 1331 at 1385; see also Mari J Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1989) 11:1 *Women’s Rts L Rep* 7; Derrick Bell, “Racial Realism” (1992) 24:2 *Conn L Rev* 363.

er.<sup>29</sup> And so, genderfucking first and foremost tries to centre those pushed to the margins by gender.<sup>30</sup>

Instead of a politics of refusal, I would characterize genderfucking as a politics of messiness. A politics of messiness is predicated on the idea that human life is messy and that material realities always exceed categories available for recognition.<sup>31</sup> Genderfucking refers to the application of a politics of messiness to gender. Sharing in critiques of recognition, genderfucking calls into question how recognition stabilizes gender, acting as a pressure valve that maintains gender's operation as a disciplinary regime.<sup>32</sup> It isn't just that the law has failed to recognize our wealth of identities in all their messiness but that it cannot do so. Seeing the law's limits, we must contemplate the need to limit law.<sup>33</sup> Similar and different, a politics of messiness stands in kinship with a politics of refusal and frequently converges with its solutions but does not foreclose the possibility of recognition's partial redemption.

Attuning a politics of messiness to the governance of gender, genderfucking is a methodology that critiques laws, policies, and practices based on the needs and experiences of people who defy the demand to make their gender intelligible for governance. That is, people whose relationship to gender is not well-defined, clear, or stable. Genderfuckers, as we

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<sup>29</sup> Samuel Singer, "Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice" (2020) 35:2 CJLS 293 at 300ff [Singer, "Trans Rights Are Not Just Human Rights"]; for a similar point in relation to anti-racist politics, see Bell, *supra* note 28 at 377.

<sup>30</sup> This intent to centre the margins owes much to Critical Race Theory, see generally Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stan L Rev 1241 [Crenshaw, "Mapping the Margins"]. In deploying it, I am also thinking of the Combahee River Collective's point not to "mess over people in the name of politics" (The Combahee River Collective, "The Combahee River Collective Statement" in Keeanga-Yamahatta Taylor, ed, *How We Get Free: Black Feminism and the Combahee River Collective* (Chicago, Illinois: Haymarket Books, 2017) at 21). See also Hébert, Singer & DT, *supra* note 27 at 371; Katri, "Transgender Intrasexuality", *supra* note 22.

<sup>31</sup> While situated in a different literature and speaking to a different audience, I find powerful resonances of a politics of messiness in Cameron Awkward-Rich, "Trans, Feminism; Or, Reading like a Depressed Transsexual" in *The Terrible We: Thinking with Trans Maladjustment* (Durham: Duke University Press, 2022) 67. Although I only read Awkward-Rich's book after composing this essay, I would feel remiss if I didn't point my readers to it as a source of rich insight on the messiness of trans life as human life.

<sup>32</sup> Hébert, Singer & DT, *supra* note 27 at 377; Dean Spade, "Intersectional Resistance and Law Reform" (2013) 38:4 Signs: J Women in Culture & Society 1031 at 1035; Dean Spade, "Documenting Gender" (2008) 59 Hastings LJ 731 at 802.

<sup>33</sup> I borrow the dichotomy between the law's limits and limiting law from Hébert, Singer & DT, *supra* note 27 at 368–70.

might call them, trouble regimes of governance that see gender as an instrument for population categorization, control, and management. They include people whose gender is slippery, ungovernable, illegible, contradictory, unintelligible, labyrinthine, unstable, contextual, multifarious, tangled, incoherent, ephemeral, or uncontainable. People who look at gender and shrug. People whose gender cannot be kept inside the lines.<sup>34</sup> People whose gender is an eldritch horror adorning a seven-dimensional tentacle cock.<sup>35</sup> People whose gender oscillates so fast that it undergoes spontaneous fission.<sup>36</sup> You can't handle the truth of their gender.

Genderfuckers are unintelligible and illegible under the hegemonic narratives and counternarratives of gender that circulate in the self-proclaimed Western world.<sup>37</sup> They fuck with gender by refusing or failing to heed the call “to neatly locate ourselves within gender categories.”<sup>38</sup> Indeed, many genderfuckers fuck with gender by quite literally fucking beyond the confines of gender's reproductive imperative.<sup>39</sup> Attempts at re-

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<sup>34</sup> Perhaps it needs “erupting, just like a volcano” (Eric B & Rakim, “Eric B Is President” on *Paid in Full* (New York: 4th & Broadway Records, 1987)).

<sup>35</sup> ...don't kinkshame me.

<sup>36</sup> I am assuming that said gender would reach the oscillation frequency necessary for fission before reaching the point at which hadronization occurs. If hadronization were to occur, a narrow jet of gender particles would be ejected—in other words, the gender fluid would start leaking. It's a metaphor, don't double-check my physics.

<sup>37</sup> For a discussion of terminology, see *supra* note 5. Genderfuckers could perhaps be understood as extreme examples of what Robin Dembroff calls critical gender kinds, i.e. groups of people that “collectively destabilize one or more core elements of the dominant gender ideology in that society” (Robin Dembroff, “Beyond Binary: Genderqueer as Critical Gender Kind” (2020) 20:9 *Philosophers' Imprint* 1 at 12). However, some differences are worth mentioning. As noted below, whether one is a genderfucker depends on the law, policy, or practice under consideration. Many members of critical gender kinds don't perturb specific laws, policies, and practices—all trans people fall under the former concept yet certainly are not all genderfuckers. As for the inverse, it is nearly always true that genderfuckers are part of a critical gender kind, but it is nevertheless a contingent truth to the extent that laws, policies, and practices could reflect an idiosyncratic gender regime that does not correspond to dominant gender ideology. Genderfucking challenges all attempts at disciplining gender; what happens to gender ideologies themselves outside of governance is secondary. Moreover, it is unclear whether genderfuckers are sufficiently cohesive as a group or group of groups to form a kind.

<sup>38</sup> Ashley, “Genderfucking Non-Disclosure”, *supra* note 14 at 343. Though the failure is more appropriately that of gender than that of genderfuckers. See also David Jackson-Perry, “The Autistic Art of Failure? Unknowing Imperfect Systems of Sexuality and Gender” (2020) 22:1 *Scandinavian J Disability Research* 221 at 221, 225, 227; Katri, “Transgender Intrasectonality”, *supra* note 22 at 64.

<sup>39</sup> Florence Ashley & Blu Buchanan, “The Anti-Trans Panic Is Rooted in White Supremacist Ideology” (19 May 2023), online: <truthout.org> [perma.cc/Z9K4-LDCD]; Silvia Federici, *Caliban and the witch*, 2nd revised ed (Brooklyn, NY: Autonomedia, 2014) at 8, 22, 100.

forming gender regimes lead to nearly inevitable failure or self-defeat. You either fail to capture all experiences of gender, or you defeat your initial purpose in establishing a gender regime.<sup>40</sup>

The standpoint assumed by genderfucking is context-sensitive. Gender ideologies and regimes are not static. They vary across time and space. Someone is always a genderfucker *in relation* to a particular law, policy, or practice. Nobody is a genderfucker always and everywhere—much to my dismay.

Being a genderfucker does not imply intent. People may defy the call to gender and destabilize attempts at gender governance without wishing or intending to do so. A friend fucked with my plans for the weekend without intending to do so, by mere happenstance, just as I may fuck with the government's plans regardless of whether I seek to. In fact, I suspect that most genderfuckers are simply trying to go about their day while staying true to their (non)sense of gender. The act of surviving in a world that wants you gone is a radical one, a 'fuck you.' Much more eloquent a person has expressed similar thoughts. In a world structured by white supremacy, with all its gendered dimensions, they were often spoken by Black feminist writers. We may think of Audre Lorde: "Caring for myself is not self-indulgence, it is self-preservation, and that is an act of political warfare."<sup>41</sup> Or we can turn to the poetry of Lucille Clifton:

won't you celebrate with me  
 what i have shaped into  
 a kind of life? [...]  
 both nonwhite and woman  
 what did i see to be except myself?  
 [...] come celebrate  
 with me that everyday  
 something has tried to kill me  
 and has failed.<sup>42</sup>

Their experiences are not mine, but their words evoke in me a sense of familiarity through this idea of a world that wants you gone—and of life as a form of resistance.

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<sup>40</sup> See Ashley, "X' Why?", *supra* note 20 for an example of this difficulty.

<sup>41</sup> Audre Lorde, *A Burst of Light and Other Essays* (Mineola, New York: Ixia Press, 2017) at 95. See also Che Gossett & Juliana Huxtable, "Existing in the World: Blackness at the Edge of Trans Visibility" in Reina Gossett, Eric A Stanley & Johanna Burton, eds, *Trap Door: Trans Cultural Production and the Politics of Visibility* (Cambridge, Mass: The MIT Press, 2017) at 39.

<sup>42</sup> Having only reproduced parts of the poem, I highly encourage readers to read its full form (Lucille Clifton, "won't you celebrate with me" (1993), online: <poetryfoundation.org> [perma.cc/4ECW-HTPB]).

As much as it may be tempting to imagine genderfucking as a transcendent, radical ideal of genderqueerness, the reality is quite different. Many genderfuckers are not non-binary at all. They are trans guys who do not want to go to male prisons regardless of what we say about recognition.<sup>43</sup> They are trans women who do not want to be ‘out’ in every context. They are transmasculine people who feel most at home and perhaps even feel their gender most affirmed in women’s colleges.<sup>44</sup> They are trans migrants who cannot safely change identity documents or who do not want to because of how it would impact their relationship with their family or country of origin.<sup>45</sup> They are Two-Spirit people whose sense of gender cannot readily be reduced to Euro-American colonial understandings of gender, nor to the colonial binary of gender identity or sexual orientation.<sup>46</sup> And they are, yes, non-binary people for whom the expanse of gender cannot be matched by adding a third, fourth, or fifth checkbox.<sup>47</sup> Each defies in their own way. Some more than others, perhaps, but all do. Pigeon-holing<sup>48</sup> or homogenizing genderfuckers would defeat the very purpose of genderfucking as a methodology.

Genderfucking is more accurately described as a lens than a framework. Frameworks are clunky and rigid, providing sole and comprehensive structural support for those building towards an inflexible edifice-truth. As philosopher Susan Sherwin explains,

the image of frameworks implies the availability of alternative structural choices, it does not encourage us to combine or shift frameworks from within. Once we are committed to a framework, we seem to be unable to draw on the resources of any other, at least for the current issue.<sup>49</sup>

By contrast, lenses can be readily changed to highlight different features of that which is being observed, striving towards greater under-

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<sup>43</sup> See e.g. Spade, *Normal Life*, *supra* note 21 at x.

<sup>44</sup> See e.g. Awkward-Rich, *supra* note 31 at 67, 81.

<sup>45</sup> Namaste & Tourki, *supra* note 13 at 166.

<sup>46</sup> Sarah Hunt, *An Introduction to the Health of Two-Spirit People: Historical, Contemporary and Emergent Issues* (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2016) at 5. See also Arielle Twist, “On Translating the Untranslatable” (20 June 2018), online: <canadianart.ca> [perma.cc/CU2R-EUAZ]; Marie Laing, *Urban Indigenous Youth Reframing Two-Spirit* (New York: Routledge, 2021); Qwo-Li Driskill, “Doubleweaving Two-Spirit Critiques: Building Alliances between Native and Queer Studies” (2010) 16:1/2 GLQ 69; Saylesh Wesley, “Twin-Spirited Woman: Sts’iyóye smestiyexw slhá:li” (2014) 1:3 TSQ: Transgender Studies Q 338.

<sup>47</sup> Ashley, “‘X’ Why?”, *supra* note 20 at 39–40.

<sup>48</sup> Which, I might add, is much more boring than cornholing.

<sup>49</sup> Susan Sherwin, “Foundations, Frameworks, Lenses: The Role of Theories in Bioethics” (1999) 13:3/4 Bioethics 198 at 204.

standing not only by itself but in combination with other lenses wherever useful. Genderfucking is not meant to be a totalizing approach. Not everything can or should be critiqued using the methodology of genderfucking, and rarely would a critical conversation not be improved by the addition of a new lens.<sup>50</sup> Genderfucking should be used no further than the extent to which it is found useful. It would be a disservice to the methodology than to apply genderfucking like a cold and lifeless algorithm, without drawing insight or perspective from other scholarship traditions.<sup>51</sup> Genderfucking's methodological focus on gender is prone to tunnel vision, erasing the intersections between different axes of oppression and stifling its radical potential.<sup>52</sup> More than anything, perhaps, genderfucking should be in conversation with Indigenous and Black feminist critiques. Ideologies of gender and their attendant regimes of governance are racialized and form part and parcel of the settler colonial project.<sup>53</sup> The materiality of gender, on which genderfucking nucleates, is an incident of its role in sustaining white supremacy.<sup>54</sup> By speaking of genderfucking as a lens, I do not mean to underestimate its importance. On the contrary, I intend to stress its analytical and political value when deployed in coalition and solidarity across difference. A rising tide lifts all boats.

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<sup>50</sup> Not all legal problems faced by trans people arise from gender regimes, at least on the face of it. See William Hébert et al, *A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada* (Ottawa: Department of Justice Canada, 2022). Sex work laws, for instance, do not facially distinguish based on gender despite disproportionately disadvantaging Black and Indigenous trans women.

<sup>51</sup> However, this is not to say that every lens should feature in a single article. Manipulating multiple lenses at once can be difficult and too often leaves the writing clunky and confused.

<sup>52</sup> Crenshaw, "Mapping the Margins", *supra* note 30 at 1265; Richard M Juang, "Transgendering the Politics of Recognition" in Susan Stryker & Stephen Whittle, eds, *The Transgender Studies Reader*, 1st ed (New York: Routledge, 2006) 706 at 707; Sarah Lamble, "Retelling Racialized Violence, Remaking White Innocence: The Politics of Interlocking Oppressions in Transgender Day of Remembrance" (2008) 5:1 *Sexuality Research & Soc Pol'y* 24 at 25; C Riley Snorton & Jin Haritaworn, "Trans Necropolitics: A Transnational Reflection on Violence, Death and the Trans of Color Afterlife" in Susan Stryker & Aren Z Aizura, eds, *The Transgender Studies Reader 2* (New York: Routledge, 2013) 66 at 67.

<sup>53</sup> V Varun Chaudhry, "On Trans Dissemblance: Or, Why Trans Studies Needs Black Feminism" (2020) 45:3 *Signs: J Women in Culture & Society* 529 at 530; See generally Marquis Bey, "The Trans\*-ness of Blackness, the Blackness of Trans\*-ness" (2017) 4:2 *TSQ: Transgender Studies Q* 275; Hortense J Spillers, "Mama's Baby, Papa's Maybe: An American Grammar Book" (1987) 17:2 *Diacritics* 64; Driskill, *supra* note 46 at 71; María Lugones, "Heterosexuality and the Colonial / Modern Gender System" (2007) 22:1 *Hypatia* 186; Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Durham, CT: Duke University Press, 2015) at 1.

<sup>54</sup> Ashley & Buchanan, *supra* note 39.



Genderfucking is a critical methodology. What makes it critical is its commitment to emancipation rather than inclusion, which is wedded to an understanding of governmental and social institutions as essentially oppressive.<sup>55</sup> It is “dedicated to transgressing and undermining social conformity, passivity, and similar values of capitalist ideology, in hopes of bringing about social emancipation.”<sup>56</sup> It seeks to deconstruct and overhaul institutions rather than engage in low-level reform, defining itself in contradistinction to mainstream liberal scholarship such as Critical Race Theory and Critical Legal Studies have before it.<sup>57</sup> As a critical methodology, genderfucking strives to unearth the function of laws, policies, and practices as instruments of discipline, control, subordination, and dominance. Because of its emancipatory aspirations, it privileges material realities and needs over bare identities. Identities matter, to be sure, but only insofar as they are material, only insofar as they tell us something about how people feel, navigate, and live the social, political, and legal world. Identities matter, but that doesn’t mean we should organize the world around them rather than against the operations of gender as a disciplinary ideal.

Genderfucking is also a practical methodology. As Karl Marx famously said: “Philosophers have hitherto only *interpreted* the world in various ways; the point is to *change* it.”<sup>58</sup> Genderfucking’s impetus to action is built into the word—it *fucks*. Genderfucking cannot be purely theoretical, criticizing law, policies, and practices without offering a path forward. To embrace genderfucking as a methodology means embracing the quest for change. To talk about fucking with gender is not the same as fucking with gender. And fuck we must.

The practical dimensions of genderfucking translate into quasi-abolitionism towards gender, an incident of its commitment to messiness

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<sup>55</sup> James Bohman, “Critical Theory” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2021), online: <plato.stanford.edu> [perma.cc/SU9U-8JZ].

<sup>56</sup> Jeffrey Bardzell & Shaowen Bardzell, “What is ‘Critical’ about Critical Design?” in *CHI '13: Proceedings of the SIGCHI Conference on Human Factors in Computing Systems* (Paris, France: ACM, 2013) 3297 at 3298.

<sup>57</sup> Kimberlé Williams Crenshaw, “Twenty Years of Critical Race Theory: Looking Back To Move Forward” (2011) 43:5 Conn L Rev 1253 at 1264 [Crenshaw, “Twenty Years”]; Kimberlé Williams Crenshaw, “The First Decade: Critical Reflections, or ‘A Foot in the Closing Door’” (2002) 49:5 UCLA L Rev 1343 at 1347–48; Mark Tushnet, “Critical Legal Studies: A Political History” (1991) 100:5 Yale LJ 1515 at 1537–38; Roberto Mangabeira Unger, “The Critical Legal Studies Movement” (1983) 96:3 Harv L Rev 561 at 585.

<sup>58</sup> Dave Renton, *Marx on Globalisation* (London, UK: Lawrence & Wishart, 2001) at 107. Karl Marx’s Theses on Feuerbach can also be accessed on the Marxists Internet Archive, online: <www.marxists.org> [perma.cc/CV36-ZZCZ].

and orbit around a politics of refusal. We cannot reduce the infinite richness of gender to a checkbox. To the extent that gender has any legitimate role to play in the sociolegal sphere, it should be confined to a remedial function—refined to be as narrow as possible—and should not rigidly turn on identity categories without regard for the oppressive operations of gender beyond those identity categories. This doesn't mean ignoring gender, as certain liberal philosophies propose. Critical Race Theorists have amply demonstrated how colourblind politics reproduce white supremacy.<sup>59</sup> We have little reason to believe that ignoring gender would fare much better. Quite the contrary, Kimberlé Crenshaw's writings on intersectionality highlight the dangers of ignoring the operations of sexism, synergistic as it is with racism.<sup>60</sup> But she also shows the dangers of reducing sexism to neat identity categories without attending to the material experiences of those oppressed by it. Hearkening her words, genderfucking does not ask that we ignore gender but does call for us to resist political ideologies that turn on the reification of gender categories.

Genderfucking asks us to skip the proxies and get to the heart of the material realities of gender, which never perfectly conform to labels. Genderfucking invites us to cut the intermediary, delve into the heterogeneity of gender, and contemplate how to best nourish personhood in its unfathomable richness. Policies that rely on rigid or, worse, essentializing categories rather than material experiences are bound to disappoint. Trans rights may mean recognizing and centring the gender identities of trans people, but trans liberation requires nothing less than rethinking the place of gender in society, politics, and law.

## II. Applying Genderfucking

There is no singular way of applying the methodology of genderfucking. It cannot be reduced to a mindless algorithm or two-part test with two subparts.<sup>61</sup> Do not artificially constrain yourself, nor fear imaginativeness. A good starting point is to ask about who is in tension with the law, policy, or practice; to ask what shape someone's gender would need to

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<sup>59</sup> Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind'" (1991) 44:1 *Stan L Rev* 1 at 16; Bell, *supra* note 28 at 376; Kimberlé Crenshaw et al., *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995) at xxviii; Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax, NS: Fernwood Publishing, 1999) at 139; Crenshaw, "Twenty Years", *supra* note 57 at 1327; Dorothy E Roberts, "The Politics of Race and Science: Conservative Colorblindness and the Limits of Liberal Critique" (2015) 12:1 *Du Bois Rev* 199 at 205.

<sup>60</sup> Crenshaw, "Mapping the Margins", *supra* note 30.

<sup>61</sup> #TeamJacob? #TeamEdward? No, #TeamOakes: *R v Oakes*, 1986 CanLII 46 at 138—39.

have in order not to ‘fit’ within the contemplated system. What would happen if someone:

- (1) varies in their gender identity across time and context, whether slowly or quickly,
- (2) has medical, social, or legal desires and needs that do not correspond to what is typically expected for their gender,
- (3) cannot or does not want to figure out their gender,
- (4) cannot pursue recognition because of their relationship to the state,
- (5) has a gender identity that exceeds the possibilities of a three-box ternary, or
- (6) has a sense of gender that is simultaneously more and less than gender?

Asking these questions tends to reveal the paradoxes, incoherencies, normativities, and limits of the gender regime being considered. It may reveal what gender is being used as a proxy for, and whether the gender regime furthers hegemonic ideologies or suffocating counternarratives.

Guided by this emergent critique, genderfucking proceeds to ask how the law, policy, or practice could be changed to reflect the needs and experiences of those who are left out.<sup>62</sup> Once the seed of a solution germinates, the methodology is applied anew, asking whether the contemplated alternative would also marginalize genderfuckers—perhaps in another region of gender experience. Through iteration, genderfucking may uncover further insights into the operations of ideology and power.<sup>63</sup> Genderfucking’s iterative process is never over, as the law’s normative pull forever threatens to distort genderfucking’s proposals into new forms of normalization and governance.

Deploying genderfucking as a methodology is not the same as asking what would genderfuckers do. I do not own any WWGD bracelet—although that would rock, let’s be honest.<sup>64</sup> How people navigate a network of practical constraints may be informative, of course, but the ques-

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<sup>62</sup> This approach resonates with intrasectional analysis, proposed by Katri, “Transgender Intrasectionality”, *supra* note 22.

<sup>63</sup> Reform does not necessarily entail the creation of new genderfuckers, as we can imagine laws, policies, or practices that account for everyone’s experiences and needs relating to gender. However, it is not possible to identify genderfuckers without them being marginalized, since being a genderfucker is defined by marginalization.

<sup>64</sup> By placing genderfuckers in the expression “What Would Jesus Do?,” am I suggesting that genderfuckers are somehow divine or messianic? Perhaps.

tion is concerned with a different level of action than the critical methodology of genderfucking. Genderfucking is about institutional and systemic action, not individual action. Likewise, genderfucking does not seek to judge how people navigate a world of constraints. If a government mandates blue cakes for boys and pink cakes for girls, my individual response may be to declare myself a girl for a pink cake, to twice wait in line for one of each, to refuse any and all cakes, or to go around back and steal all their cake.<sup>65</sup> Regardless of my decision, the fact that I am neither boy nor girl messes with, fucks with their plans. But the institutional solution, the genderfucking solution, may instead be a rainbow of cakes left to individual preference—or, better, a broader range of choices including a rainbow of cakes and more nutritious options.

The notions of gender modality, transnormativity, and transnationalism are conducive to the application of genderfucking as a critical legal methodology due to their ability to shed light on the operations of gender and liberal reform. These notions are by no means the only valuable conceptual tools when applying genderfucking. They are, however, ones that I have drawn upon time and time again and feel the most comfortable describing.

The term gender modality refers to “how a person’s gender identity relates to the gender they were assigned at birth.”<sup>66</sup> Encompassing notions like ‘trans’ and ‘cis’ yet surpassing them, gender modality offers a capacious term that deliberately makes space for the messiness of trans/gender. In coining the term, I had in mind the countless people whose relationship to gender is flattened by the trans/cis binary, including many non-binary people, gender creative youth, intersex people, detrans people, people who were raised in a gender-neutral manner, and people whose gender cannot be captured by Euro-American colonial understandings of gender.<sup>67</sup> The concept of gender modality is helpful in naming and writing about people whose needs and experiences are not recognized by laws, policies, and practices of gender.

Transnormativity and transnationalism offer conceptual resources to think through the ways in which law reform projects and gender counter-narratives may simultaneously repair and reify oppression. As explained earlier, transnormativity is an ideological framework that elevates a particular conception of transitude into a norm based on its proximity to heg-

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<sup>65</sup> With thanks to Chan Tov McNamara for suggesting the cake illustration.

<sup>66</sup> Ashley, Brightly-Brown & Nic Rider, *supra* note 15 at 294.

<sup>67</sup> Twist, *supra* note 46; Bey, *supra* note 53; Hunt, *supra* note 46; Spillers, *supra* note 53.

emonic gender ideology.<sup>68</sup> The most common form of transnormativity holds that gender can be changed, but that it is nevertheless binary, based on biology and genitals, and reflected in gendered behaviours and preferences.<sup>69</sup> Under transnormativity, recognition is reserved for the ‘respectable’ trans subject who is ‘just like everyone else’ except for their transitude. People who do not fulfil this mandate by being non-binary, defying gender norms, or eschewing gender-affirming interventions that would satisfy cis-centric bodily norms are doomed to misrecognition. Transnormativity is no more a monolith than dominant ideologies of gender; different people draw different lines at different times. Yet all reflect prejudices about who deserves recognition in their gender and/or transitude. The notion of transnormativity is helpful in identifying who is and is not served by laws, policies, and practices of gender.

Because they do not inherently enact a radical perturbation of regimes of gender governance, transnormative subjects are at risk of being recuperated and enlisted by the neoliberal political economy, racial capitalism, and nation-building projects.<sup>70</sup> Through this recuperation, termed trans-nationalism,<sup>71</sup> trans people are strategically redeployed as agents of dominance. Trans communities become rhetorical markers of cultural superiority, excuses for expanding regimes of surveillance and repression in the name of protection and human rights, and ‘safety valves’ for failing institutions.<sup>72</sup> As Jin Haritaworn has noted, “hate crime legislation served

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<sup>68</sup> Bradford & Syed, *supra* note 17 at 307; J E Sumerau, Lain AB Mathers & Dawne Moon, “Foreclosing Fluidity at the Intersection of Gender and Sexual Normativities” (2020) 43:2 *Symbolic Interaction* 205 at 221.

<sup>69</sup> Jacob Hale, “Are Lesbians Women?” (1996) 11:2 *Hypatia* 94 at 102–03; Bradford & Syed, *supra* note 17 at 312–13. By the way, do you see the footnote number? And the volume number? Noice.

<sup>70</sup> See generally Jin Haritaworn, “Colorful Bodies in the Multikulti Metropolis: Vitality, Victimology and Transgressive Citizenship in Berlin” in Trystan T Cotten, ed, *Transgender Migrations: The Bodies, Borders, and Politics of Transition* (New York: Routledge, 2012) 11; Jasbir K Puar, “Homonationalism As Assemblage: Viral Travels, Affective Sexualities” (2013) 4:2 *Jindal Global L Rev* 23 [Puar, “Homonationalism As Assemblage”]; Alyosxa Tudor, “Dimensions of Transnationalism” (2017) 117:1 *Feminist Rev* 20. I focus here on how one’s experience of gender fits in society’s gender schema. However, this isn’t to say that individuals who would be deemed acceptable under transnormativity must be less radical than genderfuckers: they can greatly perturb regimes of gender governance by their words and actions.

<sup>71</sup> I separate “trans” and “nationalism” to avoid confusion with the word “transnational” in the sense of “across national boundaries.”

<sup>72</sup> See e.g. Laura Briggs, *Somebody's Children: The Politics of Transracial and Transnational Adoption* (Durham: Duke University Press, 2012) (“[w]hite queers (or those rhetorically imagined as white in policy debate) disproportionately served as the safety valve in this [increasingly underfunded child welfare] system, unburdening child welfare agencies of their ‘hard-to-place’ children, either as foster parents or as adoptive

to convert the [British] police into the main patron of LGBT community events such as Pride, LGBT History Month and the Trans Community Conference in 2008, at the very same time that racialized populations were experiencing ever-increasing levels of stop and search and other re-vanchist and anti-terrorism measures.”<sup>73</sup> The notion of trans-nationalism is helpful in teasing out the function and *raison d'être* of gender regimes that were reformed to better include trans people.

### III. Examples of Genderfucking in Action

Having described the application of genderfucking in general terms, I now turn to a few examples of genderfucking in action. In the following subsections, I survey the critical insights offered by genderfucking with regard to gender markers, gendered spaces, and social gender affirmation for youth. These are but a few of the many topics to which genderfucking can find application. They are but an *amuse-gueule* to illustrate how the methodology is applied and, hopefully, give readers a taste for it. Since I have already discussed it, I will not revisit the application of genderfucking to ‘gender fraud’ law.

#### A. Gender Markers

Applying genderfucking to gender marker regimes for birth certificates and identification documents offers valuable insights into the limits of reformism.<sup>74</sup> In the book chapter “‘X’ Why? Gender Markers and Non-binary Transgender People,” I deployed the methodology of genderfucking to explore the possibilities and impossibilities of gender markers amidst the growing availability of ‘X’ gender markers.<sup>75</sup> The essay makes explicit the iterative dimensions of genderfucking, sequentially considering ‘X’ gender markers and free-form gender markers before concluding that gender markers inevitably reproduce elements of cisnormativity and recommending the abolition of gender markers—something many other trans scholars have also called for.<sup>76</sup>

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parents” at 264). Regarding trans inclusion in the military, see Tudor, *supra* note 70 at 30–31.

<sup>73</sup> Haritaworn, *supra* note 70 at 26.

<sup>74</sup> For a discussion of gender information management beyond gender markers, see generally Florence Ashley, “Recommendations for Institutional and Governmental Management of Gender Information” (2021) 44:4 NYU Rev L & Soc Change 489.

<sup>75</sup> See generally Ashley, “‘X’ Why?”, *supra* note 20.

<sup>76</sup> See notably Ido Katri, “The Perils of Gender Self-Determination: Global Shifts in Sex Reclassification Law and Policy” Am J Comp L (2023) 71:3 707 at 740–41; Heath Fogg Davis, *Beyond Trans: Does Gender Matter?* (New York: New York University Press,

The flaw of ‘X’ gender markers is rapidly evident. Whereas men and women see their specific gender label reflected, ‘X’ gender markers offer no recognition for the diversity and specificity of non-binary identities, marginalizing them under a catch-all ‘everyone else’ label. Full and equal recognition beyond the binary requires acknowledging the variations in people’s identities, as some governments have done—such as Argentina, which recognized the gender of “*femineidad travesti*” pursuant to a court decision that opened the door for individualized gender markers.<sup>77</sup> Yet those free-form gender markers are limiting as well. Free-form gender markers run into difficulties upon considering those who cannot communicate their gender in one or two words—perhaps preferring a poem, song, or scent.<sup>78</sup> Not only are free-form gender markers typically limited to a short, ASCII<sup>79</sup> string and represented by a single letter on identification documents, but they are also static. They remain incredibly constraining for those who do not wish to disclose their gender identity or transitude in every sphere of life, for those who cannot afford a gender marker change, for those who object to having their gender marker decided at birth, and for those who adopt different gender roles at different times or across different contexts—such as some genderfluid people. Although the option of removing gender markers offers some relief, it singles out people for scrutiny in a society where gender markers are the norm.<sup>80</sup>

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2017) at 52; Spade, *Normal Life*, *supra* note 21 at 15; Anna James Neuman Wipfler, “Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents” (2016) 39:2 Harv JL & Gender 491 at 513.

<sup>77</sup> Mariana Iglesias, “Ni femenino ni masculino: su documento dirá ‘femineidad travesti’”, *Clarín* (1 March 2019), online: <clarin.com> [perma.cc/Z882-XJC8].

<sup>78</sup> Ashley, “X Why?”, *supra* note 20 at 34–35, 40, 43; see also Christine Feraday, *For Lack of a Better Word: Neo-Identities in Non-Cisgender, Non-Straight Communities on Tumblr* (MA Thesis, Toronto Metropolitan University and York University, 2016) [unpublished] at 88; Christine Feraday, “Making a Name for Yourself: Neo-identities and Tumblr” in Susan Driver & Natalie Coulter, eds, *Youth Mediations and Affective Relations* (Cham: Palgrave Macmillan, 2018) 197 at 210; Florentin Félix Morin, “EGO HIPPO: the subject as metaphor” (2017) 22:2 *Angelaki J Theoretical Humanities* 87 at 88.

<sup>79</sup> The American Standard Code for Information Interchange (ASCII) is a standard for character encoding that largely limits itself to the Latin alphabet, Arabic numerals, a few punctuation marks, and a few diacritic characters. It is a narrow and limiting standard that sees widespread use in administrative and government settings.

<sup>80</sup> Concerns over singling out were integral to trans communities’ demand that Québec’s *Bill 2* allow anyone to be listed as a ‘parent’ rather than ‘mother’ or ‘father’ on children’s birth certificate (see Loïs Crémier & Ariane Marchand-Labelle, *Mémoire présenté par le Conseil québécois LGBT à l’égard du Projet de loi 2, Loi portant sur la réforme du droit de la famille en matière de filiation et modifiant le Code civil en matière de droits de la personnalité et d’état civil* (National Assembly of Québec, 2021) 3 at 26).

Gender markers carry an inevitable risk of outing and, thus, discrimination.<sup>81</sup> This risk is heightened for those who are more likely to engage with institutions obsessed with gender classification, such as people whose immigration status is not secure, who experience homelessness, who engage in sex work, and/or who are overpoliced due to racism.<sup>82</sup>

While we could try and imagine transcendent possibilities for gender markers—why not scratch-and-sniff gender markers; why not multiple cards with different gender markers; why not wait until later to record a gender marker—these possibilities seem beyond reach. Governments already scoff at free-form gender markers. They would certainly dismiss as absurd anything more imaginative. Taking note of that sense of absurdity itself reveals cogs in the inner workings of power. The impression of absurdity arises because reforms that achieve full and equal recognition of everyone’s gender would run afoul of the very *raison d’être* of gender markers. Absurdity reveals that the purpose of gender markers is not recognition but governability. Even through reform, gender markers sustain themselves on the remnants of cisnormativity offered by gender intelligibility, spatiotemporal stability, and at-birth assignment.<sup>83</sup> Including genderfuckers would undermine gender markers’ usefulness as a means of identification, social categorization, and surveillance. Because genderfuckers are ungovernable, they will never be represented in reforms short of abolition.

Québec’s *Bill 2*, which was adopted in response to a judicial finding that its gender marker regime was discriminatory, expounds the limits of governments’ gestures towards inclusion.<sup>84</sup> Despite requests for free-form gender markers by some trans advocates, the government satisfied itself with the addition of a catch-all ‘X’ gender marker.<sup>85</sup> While the government

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While the demand was adopted by the government, it was unfortunately closed to the possibility of non-binary parents being recognized as ‘mother’ or ‘father’.

<sup>81</sup> Hébert et al, *supra* note 50 at 26–27.

<sup>82</sup> Edward Ou Jin Lee, “Responses to Structural Violence: The Everyday Ways in Which Queer and Trans Migrants with Precarious Status Respond to and Resist the Canadian Immigration Regime” (2019) 10:1 *Intl J Child, Youth & Family Studies* 70 at 82; Nora Butler Burke, “Double Punishment: Immigration Penalty and Migrant Trans Women Who Sell Sex” in Elya M Durisin, Emily Van der Meulen & Chris Bruckert, eds, *Red Light Labour: Sex Work Regulation, Agency, and Resistance* (Vancouver: UBC Press, 2018) 203 at 205; *ibid* at 24.

<sup>83</sup> Spade, *Normal Life*, *supra* note 21 at 87.

<sup>84</sup> Hébert, Singer & DT, *supra* note 27 at 357, 359, 363–64; see also *Centre for Gender Advocacy v Attorney General of Quebec*, 2021 QCCS 191.

<sup>85</sup> Jocelyne Richer, “Bill 2: Quebec adopts family law reform”, *Montreal Gazette* (7 June 2022), online: <montrealgazette.com> [perma.cc/EKT3-NGKX]. It bears noting that the request for free-form gender markers was not a point of consensus among trans advo-



eventually allowed anyone to become listed as a parent on their child's birth certificate rather than a mother or father, they did not allow non-binary parents to be listed as mothers or fathers, defying the preferences of many non-binary parents and depriving them of the opportunity to avoid gender disclosure in contexts involving their child. And although the government removed filing costs for gender marker changes, it only did so for the first change and, on a temporary basis, for those who want an 'X' marker—which disadvantages those who detransition or otherwise desire further gender marker change. As for the idea of making gender markers optional at birth, forget it. It was never on the table.<sup>86</sup> The government's willingness to extend recognition to trans communities is kept in check by the strictures of cisnormativity. Gender must be governable, or it will be misrecognized.

### *B. Gendered Spaces*

Genderfucking is also an auspicious lens with which to critique the maintenance of gendered spaces, whether formally policed such as carceral facilities or informally policed such as bathrooms and changing rooms. A philosophy of recognition would mandate housing trans men in male carceral facilities, and trans women in female carceral facilities. Similarly, trans women should use women's bathrooms and trans men should use men's bathrooms. No clear guidance is offered for non-binary people. Gendered bathrooms and changing rooms are occasionally supplemented by single-user options, but they are few in number and push

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cates, some of whom questioned the strategic wisdom of the request given the government's conservative orientation.

<sup>86</sup> In Québec, courts rejected the claim that making gender markers mandatory at birth constituted discrimination, finding that its use for the purpose of identification was proportionate (see *Centre for Gender Advocacy c Attorney General of Quebec*, *supra* note 84 at para 101). The judge did not seem to consider the fact that the usefulness of gender markers for identification depends on the recourse to gender stereotyping, which is both unreliable and contributes to oppression. Nor did the decision recognize how mandatory gender markers can legitimate harmful non-consensual surgeries and hormonal interventions on intersex newborns on the pretext that aligning with dominant gender categories is psychosocially beneficial (see Janik Bastien-Charlebois & Vincent Guillot, "Medical Resistance to Criticism of Intersex Activists: Operations on the Frontline of Credibility" in Erik Schneider & Christel Baltes-Löhr, eds, *Normed Children: Effects of Gender and Sex Related Normativity on Childhood and Adolescence* (Bielefeld: Transcript-Verlag, 2018) 257 at 264; Tiffany Jones et al, *Intersex: Stories and Statistics from Australia* (Cambridge: Open Book Publishers, 2016) at 105; Birgit Köhler et al, "Satisfaction with Genital Surgery and Sexual Life of Adults with XY Disorders of Sex Development: Results from the German Clinical Evaluation Study" (2012) 97:2 J Clin Endocrinology & Metabolism 577; M Joycelyn Elders, David Satcher & Richard Carmona, "Re-Thinking Genital Surgeries on Intersex Infants" (June 2017), online (pdf): <palmscenterlegacy.org> [perma.cc/B7QJ-RTHQ]).

non-binary people to the margin of society by excluding them from communal spaces. Equally significantly, the preservation of gendered spaces necessitates the policing of gender norms and presentation, which injects hostility, harassment, and violence into the lives of those who do not conform to dominant expectations.<sup>87</sup> As animosity towards trans communities has grown in recent years, many gender non-conforming cis women have found themselves being investigated or attacked in bathrooms.<sup>88</sup> The existence of gendered spaces depends on some degree of policing. In predominantly anonymous spaces like bathrooms and changing rooms, policing depends on visual and audio assumptions or gatekeeping at entry. Assumptions reify stereotypes, whereas gatekeeping through, e.g., identification documents fails those who do not have access to the requisite proof. At best, a politics of recognition moves policing from the truth of the body to the authenticity of the mind. How that authenticity can be proven is unclear, and its ascertainment is rife with double standards. How often do trans women hear things like: “I know it’s not politically correct to say but she has a masculine way about her; if she was really a woman, wouldn’t she try harder?”<sup>89</sup> Perversely, non-binary people whose appearances roughly conform to dominant expectations, like me, find gendered spaces much easier to navigate.

An even greater difficulty is posed by carceral facilities, which have no equivalent to single-user bathrooms.<sup>90</sup> Under a recognition-based framework, the carceral placement of non-binary individuals is in question.<sup>91</sup> Given the state’s investment in placing non-binary people in *some* facility and its attachment to cisnormativity, the person’s gender assigned at birth will often dominate the decision, especially if they did not pursue genital surgery.<sup>92</sup> If it could be argued that the person’s preference should

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<sup>87</sup> Ellen DB Riggle, “Experiences of a Gender Non-conforming Lesbian in the ‘Ladies’ (Rest)room” (2018) 22:4 J Lesbian Studies 482 at 488–89.

<sup>88</sup> See generally Jasmine Andersson, “Butch Lesbian Opens Up About ‘Increasing Harassment’ She Faces When She Uses Public Toilets” (19 January 2021), online: <inews.co.uk> [perma.cc/5XNT-D24G].

<sup>89</sup> See e.g. *Mamela v Vancouver Lesbian Connection*, 1999 CanLII 31595 (BC HRT); Morgan M Page, “Crazy Trans Woman Syndrome”, *Ravishly* (30 March 2015), online: <ravishly.com> [perma.cc/XL5X-XXWN]; Hannah Rossiter, “She’s Always a Woman: Butch Lesbian Trans Women in the Lesbian Community” (2016) 20:1 J Lesbian Studies 87 at 88–89.

<sup>90</sup> Some facilities have units dedicated to trans people, but they are not the norm and remain situated within a larger, gendered institution.

<sup>91</sup> Florence Paré [Florence Ashley], “Réalités transféminines et violences carcérales” (2018) 74 *À bâbord* 36 at 37.

<sup>92</sup> As pointed out by Cael M Keegan, policies that are firmly or flaccidly predicated on genitals promote “an essentialist assumption that penises, rather than misogynistic and sexist forms of socialization, are the source of physical and gendered violence” and

be the foremost or even only factor in placement decisions, liberal philosophies of inclusion and recognition make no headway towards that answer. Nor would they accede to the wishes of those trans men who prefer being housed among women than among men, fearful of the threat male carceral facilities pose to their safety.<sup>93</sup> As for the trans woman who prefers a male prison so that she can find a boyfriend, she is dismissed as capricious. Applying genderfucking, we are bound to acknowledge that no placement policy can simultaneously address the state's investment in carceral segregation and resolve the violence of that placement for genderfuckers. Placement enacts material violence onto trans bodies—placement policies merely change who bears the brunt of that violence. And while it may be tempting to satisfy ourselves with centring material experiences of gendered violence and self-determination, the violence of incarceration cannot be escaped. No matter what, genderfuckers will stick out like sore thumbs and be punished for it. Trans people will always experience more carceral violence than the norm—even in gender-concordant prisons—because prisons exist to dole it out.<sup>94</sup>

A politics of recognition distracts us, trapping us in the question of placement and away from the ineluctable realization that prisons are at their heart sites of untold violence.<sup>95</sup> As carceral institutions pat themselves on the back for new policies notionally recognizing the gender of a few trans people, they whitewash their role in maintaining white supremacy through the over-incarceration and disenfranchisement of Black, Indigenous, queer, and trans communities.<sup>96</sup> Once we abandon the quest for recognition and realign ourselves with politics of messiness and refusal, it becomes easier to accept the existential necessity of rethinking incarceration. There is no such thing as a safe prison. Prisons exist to oppress.

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“erases cis women’s capacity for violence and produces a false sense of security in cis women’s spaces” (“On Being the Object of Compromise” (2016) 3:1/2 TSQ: Transgender Studies Q 150 at 154).

<sup>93</sup> Spade, *Normal Life*, *supra* note 21 at x; cf William Hébert, “Trans Rights as Risks: On the Ambivalent Implementation of Canada’s Groundbreaking Trans Prison Reform” (2020) 35:2 CJLS 221 at 235–39.

<sup>94</sup> Hébert et al, *supra* note 50 at 41–43.

<sup>95</sup> In Canada, focusing on making prisons safer for trans women by housing them in women’s facilities without simultaneously fighting against overincarceration and the prison-industrial complex could have the perverse effect of promoting the incarceration of some trans women who are, at present, accorded conditional or shorter sentences in recognition of the dangers posed by incarceration (see e.g. *R v HF*, 2021 ABPC 68 at paras 95–98).

<sup>96</sup> Puar, “Homonalism As Assemblage”, *supra* note 70 at 28; Jasbir K Puar, *Terrorist Assemblages: Homonalism in Queer Times* (Durham: Duke University Press, 2007) at 2, 23.

### C. *Social Gender Affirmation for Youth*

At the heart of my doctoral research was the question of how courts should approach social gender affirmation for trans youth, especially in the context of the family. Often, judges recommended that parents respect their child's chosen name, pronouns, and/or gender expression based on how certain they were that the child was trans, which was in turn predicated on unwarranted assumptions about what trans childhood is like.<sup>97</sup> As a result, youth who were questioning, non-binary, or gender non-conforming, saw social gender affirmation withheld from them, and youth who later detransition saw their life path treated as a mistake—regardless of how they felt about it.<sup>98</sup>

Rejecting transnormative conceptualizations of trans childhood and judges' marked preference for cissitude, a genderfucking lens leads us away from an understanding of social gender affirmation as something to be 'earned' by youth for deploying a well-defined, clear, and stable narrative of gender coupled with gender conforming preferences, attitudes, and behaviours. Whereas a politics of recognition may call for us to acknowledge the diversity of trans girlhood, genderfucking goes further in holding that transitude is not needed for social gender affirmation. If social gender affirmation is to make space for all youth, it cannot be predicated on an assessment of gender identity or attempt to predict whether the youth will remain trans in the future. Youth who are questioning their gender, youth who wish to explore their gender, and youth who identify with the gender they were assigned at birth yet relate to gender beyond the strictures of dominant expectations, all deserve to determine their own name, pronouns, and gender expression.

Following the methodology of genderfucking, I suggest conceptualizing social gender affirmation as a form of radical gender exploration. Radical gender exploration understands gender as dynamic, relational, and

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<sup>97</sup> Florence Ashley, *Trans Youth's Family Lives Where Law Meets Science* (SJD dissertation, University of Toronto, 2023) [unpublished] at 248–49; see also Jules Gill-Peterson, *Histories of the Transgender Child* (Minneapolis: University of Minnesota Press, 2018).

<sup>98</sup> Many people who detransition do not experience regret and some even express gratefulness at their opportunity to transition socially and/or medically (see Jack L Turban, Jeremi Carswell & Alex S Keuroghlian, "Understanding Pediatric Patients Who Discontinue Gender-Affirming Hormonal Interventions" (2018) 172:10 JAMA Pediatrics 903; Lily Durwood et al, "Retransitioning: The Experiences of Youth Who Socially Transition Genders More Than Once" (2022) 23:4 Intl J Transgender Health 409 at 422–23; Kinnon R MacKinnon et al, "Health Care Experiences of Patients Discontinuing or Reversing Prior Gender-Affirming Treatments" (2022) 5:7 JAMA Network Open 1 at 6–8).

undisciplinable.<sup>99</sup> Although gender may be stable, it is a dynamic equilibrium; our sense of gender is constantly re-constituted through our interactions with the world. Proceeding from that understanding of gender, it makes no sense to see gender exploration as something that precedes social gender affirmation and transition, as social gender affirmation and transition are themselves forms of gender exploration. That is why, for instance, some people who detransition express gratefulness at their opportunity to transition, seeing it as an integral part of their gender development and as having allowed them to find a place of comfort within the gender complex.<sup>100</sup> Social gender affirmation also plays an important role in sociomoral development, fostering the development of self-esteem and self-trust as well as sustaining healthy attachment to caregivers.<sup>101</sup> Sociologist Karl Bryant, who was denied social gender affirmation and identifies as a cisgender gay man today, explains that rejection “made me feel that I was wrong, that something about me at my core was bad, and instilled in me a sense of shame that stayed with me for a long time afterward,” leaving him with a lasting impression that “the people closest to me, and that I trusted the most, disapproved of me in some profound way.”<sup>102</sup> Social gender affirmation offers uptake for the person’s sense of self and relationship to the world, supporting their autonomy. As the parent of a trans child expressed in a recent study: “If this turns out to not be who she is, the worst-case scenario is that she grows up knowing she’s loved and supported for who she is, regardless.”<sup>103</sup>

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<sup>99</sup> I set out this conception of gender exploration in Florence Ashley, “Thinking an Ethics of Gender Exploration: Against Delaying Transition for Transgender and Gender Creative Youth” (2019) 24:2 *Clinical Child Psychology and Psychiatry* 223 at 227. My understanding of gender identity is further developed in Florence Ashley, “What Is It like to Have a Gender Identity?” (2023) 132:528 *MIND* 1054 at 1064–65.

<sup>100</sup> Turban, Carswell & Keuroghlian, *supra* note 98 at 904; Jack L Turban & Alex S Keuroghlian, “Dynamic Gender Presentations: Understanding Transition and ‘De-Transition’ Among Transgender Youth” (2018) 57:7 *J Am Academy Child & Adolescent Psychiatry* 451 at 452; see also Durwood et al, *supra* note 98.

<sup>101</sup> Robert Wallace & Hershel Russell, “Attachment and Shame in Gender-Nonconforming Children and Their Families: Toward a Theoretical Framework for Evaluating Clinical Interventions” (2013) 14:3 *Intl J Transgenderism* 113; Catriona Mackenzie, “Embodied Agents, Narrative Selves,” (2014) 17:2 *Philosophical Explorations* 154 at 168; Catriona Mackenzie, “Feminist Conceptions of Autonomy” in Ann Garry, Serene J Khader & Alison Stone, eds, *The Routledge Companion to Feminist Philosophy*, 1st ed (New York: Routledge, 2017) 515 at 525; Quill R Kukla, “A Nonideal Theory of Sexual Consent” (2021) 131:2 *Ethics* 270 at 283.

<sup>102</sup> Beth Schwartzapfel, “Born This Way?”, *The American Prospect* (14 March 2013), online: <prospect.org> [perma.cc/CE2J-B5G3].

<sup>103</sup> Cal Horton, “‘I Was Losing That Sense of Her Being Happy’—Trans Children and Delaying Social Transition” (2022) 18:2 *LGBTQ+ Family: An Interdisciplinary J* 187 at 194.

In practical terms, radical gender exploration entails respecting youth's gender self-determination in the moment—heeding their requested name, pronouns, and gender expression—while erecting scaffolding that supports their autonomy and ability to make the best possible decisions for themselves. Scaffolding includes such things as ensuring:

- (1) trust towards parents and [people in their social world], (2) the concrete ability to change one's mind at will without recrimination, shame or extended negotiation, (3) [the] ability to effectively communicate and understand each other, (4) a broader social context that does not undermine the agency of trans youth, such as gate-keeping, transnormativity and ongoing threats to access to gender [affirmation], (5) self-trust and a stable sense that one's gender, values, cares, and commitments are worth expressing and acting on, (6) testimonial credibility within and outside clinical, familial, and social relationships, (7) ability to obtain redress and hold others accountable when they fail in their duties, (8) being socially connected such as having a support network, a check on reality, and a community that holds people accountable.<sup>104</sup>

Regardless of whether youth know their gender well,<sup>105</sup> nobody is better placed to navigate the world of gender in their name. Only they can catch glimpses or gaze upon the shape of their gender mosaic. Under a gender-fucking lens, gender self-determination seems the only way to properly account for the needs of all trans youth, including those who defy attempts at disciplining gender.

Radical gender exploration can be operationalized in law by abandoning the notion of gender identity, which sustains the medicalization of transitude with its endless assessments and clinical expert recommendations, and replacing it with an understanding of gender expression that includes social gender affirmation, names, pronouns, appearances—the whole shebang.<sup>106</sup> The best interests of the child cannot and should not be considered in isolation from human rights principles, which recognize gender self-determination. While underexplored in Canadian law, the protected ground of gender expression is best interpreted as a matter of self-determination in line with other protected grounds including gender identity.<sup>107</sup> Ascertaining the best interests of the child by reference to

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<sup>104</sup> Ashley, “Youth Should Decide”, *supra* note 11 at 113; itself adapted from Kukla, *supra* note 101 at 282.

<sup>105</sup> Which seems to generally be the case given low rates of regret and a dearth of evidence that gender assessments prevent or predict regret (Florence Ashley et al, “Do Gender Assessments Prevent Regret in Transgender Healthcare? A Narrative Review” (2023) *Psychology Sexual Orientation & Gender Diversity*; Durwood et al, *supra* note 98).

<sup>106</sup> \*snickers\*

<sup>107</sup> *Oger v Whatcott (No 2)*, 2018 BCHRT 131 at para 26.

gender expression rather than a medicalizing assessment of transitude would cohere with the right to identity offered by the *Convention on the Rights of the Child*<sup>108</sup> and the expansive protections of gender expression set out by the *Yogyakarta Principles* and *Yogyakarta Principles plus 10*.<sup>109</sup>

#### IV. Situating Genderfucking

Trans studies have long sought and at times struggled to distinguish themselves from queer theory, which is defined by its emphasis on queering as a methodology that blurs the boundaries of gender and sexual belonging.<sup>110</sup> Some authors have controversially proclaimed the death of trans studies for its inability to “establish a robust, compelling set of theories, methods, and concepts that would distinguish itself from gender studies or queer studies.”<sup>111</sup> Queer theory and queering as a methodology are esoteric and unfastened, regrouping a diverse array of conceptualizations and practices that escape limpid definition.<sup>112</sup> If we follow Eve Kosofsky Sedgwick in understanding queer as “the open mesh of possibilities, gaps ... and excesses of meaning when the constituent elements of anyone’s gender, of anyone’s sexuality aren’t made (or can’t be made) to signify monolithically,” then perhaps genderfucking is not so distinct from

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<sup>108</sup> *Convention on the Rights of the Child*, UNGA, 44th Sess, UN Doc A/RES/44/25 (1989) GA Res 44/25 at art 8. Commentators and some courts have interpreted the right as including sexual orientation and gender identity, which would extend *mutatis mutandis* to gender expression (see John Tobin & Jonathan Todres, “Art. 8 The Right to Preservation of a Child’s Identity” in John Tobin, ed, *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) 281 at 282; Phil CW Chan, “No, It Is Not Just a Phase: An Adolescent’s Right to Sexual Minority Identity Under the United Nations Convention on the Rights of the Child” (2006) 10:2 Intl JHR 161; *Re Alex*, [2004] FamCA 297 (AustLII) at paras 220–23).

<sup>109</sup> “The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity” (March 2007), online (pdf): <yogyakartaprinciples.org> [perma.cc/UHX5-Q84P]; “The Yogyakarta Principles plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles” (10 November 2017), online (pdf): <yogyakartaprinciples.org> [perma.cc/UQB3-YXVU].

<sup>110</sup> Cael M Keegan, “Against Queer Theory” (2020) 7:3 TSQ: Transgender Studies Q 349 at 351; Thomas J Billard, Avery R Everhart & Eriqre Zhang, “Whither Trans Studies? On Fields, Post-Disciplines, and the Need for an Applied Transgender Studies” (2022) 1:1–2 Bull Applied Transgender Studies 1 at 2, 5.

<sup>111</sup> Andrea Long Chu & Emmett Harsin Drager, “After Trans Studies” (2019) 6:1 TSQ: Transgender Studies Q 103 at 103.

<sup>112</sup> Brenda Cossman, “Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)” (2019) 6:1 Critical Analysis L 23.

queering.<sup>113</sup> Yet such generalized emphasis on anti-normativity would belie the specificity and care of genderfucking, which shares more with non-normativity than anti-normativity.<sup>114</sup> Whereas queer theory has tended to treat trans lives as a rhetorical image, which has long been criticized by scholars such as Viviane Namaste,<sup>115</sup> genderfucking attends not so much to these lives' meaning within the ideological landscape, but to their needs and experiences—displaying a form of loving care that queer theory has unfortunately often failed to exhibit.<sup>116</sup> If David L. Eng, Jack Halberstam, and José Esteban Muñoz are right to articulate queer theory around “a firm understanding of queer as a political metaphor without a fixed referent,” then the materiality of genderfucking's love for its subject-object<sup>117</sup> excludes genderfucking from queerness.<sup>118</sup>

My interest in whether genderfucking amounts to queering satisfies itself with observing that if it is queering at all, genderfucking is a particular form of queering that does not feel heard in the mainstream of queer studies. Reducing genderfucking to queering is either mistaken or misleading, obscuring the tangible and unique ways in which genderfuckers resist gender governance. While genderfucking shares in playing with the porosity of categories, questioning their fixedness and stability, it is only interested in them insofar as they represent living, breathing people whose materiality is being denied.<sup>119</sup> Genderfucking is not interested in

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<sup>113</sup> Eve Kosofsky Sedgwick, “Queer And Now” in Donald E Hall et al, eds, *The Routledge Queer Studies Reader* (London & New York: Routledge, 2013) 3 at 8.

<sup>114</sup> Chu & Harsin Drager, *supra* note 111 at 107–08.

<sup>115</sup> Viviane Namaste, “Undoing Theory: The ‘Transgender Question’ and the Epistemic Violence of Anglo-American Feminist Theory” (2009) 24:3 *Hypatia* 11; Cáel M Keegan, “Getting Disciplined: What’s Trans\* About Queer Studies Now?” (2020) 67:3 *J Homosexuality* 384 at 388.

<sup>116</sup> Hernandez, *supra* note 10; cf Christopher Castiglia & Christopher Reed, “Conversion Therapy v Re-education Camp: An Open Letter to Grace Lavery” (11 December 2018), online (blog): <blog.lareviewofbooks> [perma.cc/4U5G-MD7Q]. Although the Christophers are hardly representative of queer theory's leading opinion, their approach remains emblematic of queer theory's tendency to abstract.

<sup>117</sup> In speaking of “subject-object,” I understand genderfucking as “about us, for us, by us,” defining it as a methodology that is about trans people but does not reproduce the objectifying gaze of most cisgender scholarship about trans communities (Ian Khara Ellasante, “Dear Trans Studies, Can You Do Love?” (2020) 7:3 *TSQ: Transgender Studies Q* 421 at 424; Billard, Everhart & Zhang, *supra* note 110 at 2).

<sup>118</sup> David L Eng, Judith Halberstam & José Esteban Muñoz, “What’s Queer about Queer Studies Now?” (2005) 23:3–4 *Social Text* at 1; cf Ellasante, *supra* note 117 at 425; David M Halperin, “The Normalization of Queer Theory” (2003) 45:2/3/4 *J Homosexuality* 339.

<sup>119</sup> This orientation towards life and materiality has a long and powerful history in trans legal and policy scholarship (see Samuel Singer & Ido Katri, “Foreword” (2020) 35:2 *CJLS* 147 at 149–50; Namaste & Tourki, *supra* note 13 at 161–62; Singer, “Trans



deviance but in life.<sup>120</sup> Take what you find useful from queer theory, and leave the rest behind.

Unsurprisingly, given its linkages to queer theory, genderfucking equally departs from those conceptualizations of trans theory that find home in abstraction from trans individuals through the notion of transing, an analytic of boundary-crossing unmoored from gender or trans existence.<sup>121</sup> To put it bluntly, trans theory is too masturbatory. As Ian Khara Ellasante heart-wrenchingly asks:

Dear Transgender Studies ... How is it that, according to these pages, your roots were more entangled with the dusty theories of white cis men than they were suffused with the embodied knowledges of QT2BIPOC gender-expansive folks like me?

It began to occur to me that perhaps we were not going to get along so well—that maybe it wasn't going to work out between me and you. Me, with all of my praxis and being and doing. You, with all your theories and, well, just philosophizing at length.<sup>122</sup>

We are living at a time of unprecedented hostility towards trans communities. Black, Latine, and Indigenous trans people are dying. Youth are being forcibly removed from their families by the state. The availability of gender-affirming care is dwindling. The legality of transitude in public spaces is eroding. We know the power and authority that law holds, a power that can perhaps be used as a balm. While there is a place for masturbation—I am the first to admit enjoying it—I cannot bring myself to write from a place of such abstraction today. Trans theory is important, but not all trans scholarship can or should be trans theory.<sup>123</sup>

In situating genderfucking, I find alignment with the burgeoning post-discipline of applied trans studies.<sup>124</sup> Applied trans studies is a post-

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Rights Are Not Just Human Rights”, *supra* note 29; see generally Spade, *Normal Life*, *supra* note 21; Viviane K Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Chicago: University of Chicago Press, 2000)). Despite often circulating in different scholarly circles, much of this scholarship is aligned in method and spirit with applied trans studies, which I discuss below.

<sup>120</sup> As DT says, “[s]ometimes ... girls just want to have fun!” (Hébert, Singer & DT, *supra* note 27 at 370).

<sup>121</sup> On the notion of transing, see Susan Stryker, Paisley Currah & Lisa Jean Moore, “Introduction: Trans-, Trans, or Transgender?” (2008) 36:3/4 *Women’s Studies Q* 11.

<sup>122</sup> Ellasante, *supra* note 117 at 421; see also Kadji Amin, “Whither Trans Studies?: A Field at a Crossroads” (2023) 10:1 *TSQ: Transgender Studies Q* 54 at 56–57.

<sup>123</sup> The irony of complaining about theory in a theoretical article is not lost on me, but how else to fan the flames of a methodology?

<sup>124</sup> The emergence of applied trans studies as a distinct and named post-discipline can be traced to the creation of the *Centre for Applied Transgender Studies* in 2021, which was shortly followed by its flagship journal, the *Bulletin of Applied Transgender Studies*. I

discipline, eschewing the demand to resolve disciplinary tensions that would force it to locate itself within, e.g., gender or queer studies, and instead draws “on networks of scholars archipelagated across fields of study, each with their own theories and methods, to address issues of shared pragmatic concern.”<sup>125</sup> Applied trans studies does not define a method but rather a commitment to the trans subject-object, considered in its materiality and liveliness. Applied trans studies substitutes trans theory’s politics of theory with a politics of everyday life, striving not only to understand “domination, marginalization, and social injustice” but also to “alleviat[e] them in real, material ways.”<sup>126</sup> Applied trans studies is critical of attempts to congeal trans studies within queer or gender studies, due to their inability to bridge the gap between high theory and praxis, often marginalizing trans scholars who work outside critical humanities and leaving them without a scholarly home. Sharing its political commitments and faith in disciplinary pluralism, genderfucking tucks itself comfortably under the warm mantle of applied trans studies while establishing its own subdomain as a critical legal methodology defined by its subject-object. The disciplinary situationship of applied trans studies resolves the existential conundrum that has plagued trans theory. Inasmuch as applied trans studies defines itself foremost around *who* rather than *how* it studies, it is easy to distinguish from queer theory. Regardless of the similarities and differences between queering and transing, applied trans studies is anchored by trans communities. In the same vein, genderfucking conceptualizes itself apart from queering by centring genderfuckers in their unabashed richness.

Abandoning the terrain of trans studies for that of legal scholarship, genderfucking is best understood as a departure from the liberal roots of trans legal scholarship. Trans women are women—but that’s not enough. Acknowledging the value of recognition as much as its limits, genderfucking is simultaneously a trans legal method and something else entirely. Whereas trans rights movements have tended to emphasize the right to equality, trans legal scholars like Samuel Singer and Dean Spade have questioned the stranglehold that equality has had over trans law.<sup>127</sup> Drawing wisdom as much from queer legal scholarship as from their lived experience and political engagements, trans jurists are thirsty for jus-

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was a founding junior fellow at the *Centre* and am a founding member of the *Bulletin’s* editorial board. Applied trans studies was defined in the seminal essay of Billard, Everhart & Zhang, *supra* note 110 at 12–14, which appeared as the introduction to the inaugural double issue of the *Bulletin*.

<sup>125</sup> *Ibid* at 3.

<sup>126</sup> *Ibid* at 9–10.

<sup>127</sup> Singer, “Trans Rights Are Not Just Human Rights”, *supra* note 29; Spade, *Normal Life*, *supra* note 21 at 15. See also Hébert et al, *supra* note 50 at 48.

tice—not just rights. As professor Samuel Singer explains, liberatory scholarship “moves away from the promises of equality rights to the grinding work of creative legal advocacy,” illustrating how “not only are trans legal strategies outside of human rights plentiful and effective, they are also imperative.”<sup>128</sup> The similarity between these words and how I understand genderfucking is no accident; I have benefited greatly from Samuel Singer’s mentorship and Dean Spade played an important role in the early development of my legal thinking.<sup>129</sup> Holding on to their ambivalence towards equality, genderfucking tends to draw from rights beyond anti-discrimination law—especially privacy and autonomy given their privileged relationship to refusal. Equality law does not have a monopoly on justice. Or equality, for that matter.

## Conclusion

In one of the foundational texts of trans studies, Sandy Stone ushered in a posttranssexual age by inviting trans people to dare write themselves into (trans)gender discourses and thus break free from the chains of transnormativity.<sup>130</sup> Genderfucking offers us a critical legal methodology with which to heed her call, welcoming the

dissonances of the transsexual body [that] produce not an irreducible alterity but a myriad of alterities, whose unanticipated juxtapositions hold ... the promises of monsters—physicalities of constantly shifting figure and ground that exceed the frame of any possible representation.<sup>131</sup>

Her call echoes in contemporary trans politics, yet too often lies unheeded. Gender interpellates us. It hails at us like an inopportune acquaintance on the transit home from work. A hopeful heir to Sandy Stone’s vision, genderfucking pursues reprieve for those who have no wish to heed its call, no desire to figure out their place in one of the few pre-approved categories. Legal methodologies exclusively predicated on recognition cannot achieve trans liberation, because they presuppose the legitimacy of gender regimes possessed by a desire to discipline, control, subordinate, and dominate. Attempting to reform the law without attend-

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<sup>128</sup> Singer, “Trans Rights Are Not Just Human Rights”, *supra* note 29 at 293, 314.

<sup>129</sup> Samuel Singer has expressed disagreement with my assessment, suggesting I rephrase it along the lines of “I have graciously tolerated Samuel Singer’s pestering.” Said disagreement is noted, and respectfully rejected.

<sup>130</sup> Sandy Stone, “The *Empire Strikes Back: A Posttranssexual Manifesto*” in Susan Stryker & Stephen Whittle, eds, *The Transgender Studies Reader* (New York: Routledge, 2006) 221 at 232.

<sup>131</sup> *Ibid.*

ing to the irrepressible messiness of gender risks abandoning genderfuckers to the *intempéries* of transnormativity and trans-nationalism.

Genderfucking is a rich and fertile approach, offering a way of making visible and attending to the needs and experiences of those who cannot or will not neatly locate themselves within well-defined, clear, and stable gender categories. Because when laws, policies, and practices won't make space for the richness of our worlds, it is time to change them.

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