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Heteronormative Identities as Property: Adversely Possessing Maleness and Femaleness

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HETERONORMATIVE IDENTITIES AS PROPERTY: ADVERSELY POSSESSING MALENESS AND FEMALENESS

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I. Introduction	140
II. The Development of Maleness and Femaleness as Property Interests	142
III. The Scope of Maleness and Femaleness.....	143
IV. Maleness and Femaleness’s Retention of the Characteristics of Property.....	144
A. Maleness and Femaleness Can Be Possessed	145
B. Maleness and Femaleness Can Be Used	146
C. Maleness and Femaleness Can Be Transferred.....	148
D. Owners of Maleness and Femaleness Can Exclude Others	150
V. Deconstructing Maleness and Femaleness through Adverse Possession	151
A. True Owners of Maleness and Femaleness.....	152
B. LGBT Individuals Can Demonstrate Actual Possession.....	152
C. LGBT Individuals Can Demonstrate Open, Visible, and Notorious Possession	154
D. LGBT Individuals Can Demonstrate Continuous Possession....	154
E. LGBT Individuals Can Demonstrate Hostile Possession	155
F. LGBT Individuals Satisfy the Public Policy Rationale For Adverse Possession.....	156
G. Case Studies	157
VI. Conclusion	162

* Law clerk to the Honorable Justice Kristina Pickering of the Nevada Supreme Court; King Hall, Class of 2013. Thank you to my family, particularly my husband, Jared, and son, Remi, for sharing their lives with me; to King Hall for fostering critical legal thinking; to Professor Courtney Joslin for selflessly offering her time, input, and encouragement; to Professor Rose Cuison-Villazor for opening my eyes to Critical Race Theory, and specifically the status property/adverse possession connection; and to the JGSPL staff for their invaluable edits.

I. INTRODUCTION

Legal scholars associated with Critical Race Theory (“CRT”) argue that racial “whiteness” emerged as a form of property when the legalized subordination of people of color intersected with property law.¹ According to this theory, though the meaning of whiteness changed over time, it retained the characteristics of property and was “ratified and legitimated in law as a type of status property.”² This paper exports CRT’s status property theory to the realm of sexuality and gender identity, arguing that certain heteronormative identities³ developed as forms of status property—similar to whiteness—through the legalized subordination of women and lesbian, gay, bisexual, and transgender (“LGBT”) persons. Further, this paper will demonstrate that, like whiteness, heteronormative identities retained the characteristics of property despite the law’s formal renunciation of subordination. This article then builds on that premise, arguing that LGBT individuals can access rights reserved for dominant groups through adverse possession.

Section II begins by describing the historical establishment of heteronormative identities (hereinafter “maleness” and “femaleness”) as property, and comparing that history to the roots of whiteness as explained by CRT’s status property theory. Section III defines the scope of these dominant identities, identifying and describing maleness’s and femaleness’s physical, behavioral, familial, and sexual dimensions. Section IV demonstrates that maleness and femaleness retain the characteristics of property despite subsequent changes in law. Section V delves into adverse possession by first explaining the doctrine and its potential application to identity generally, and then discussing three cases where courts denied marital or parental rights to LGBT persons. In *Kantaras v. Kantaras*,⁴ a Florida Appellate Court invalidated the marriage of a female-to-male transsexual⁵ to a heterosexual woman. In *In Re*

1. Cheryl L. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1709 (1993).

2. *Id.*

3. To avoid the misperception that this article conflates sexual orientation and gender identity, it will use the term “identity” to describe an individual’s sexual orientation and gender identity, and the descriptors “heteronormative” or “dominant” to indicate an identity that consists of both a heterosexual sexual orientation and a gender identity that correlates with the holder’s biological sex.

4. 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).

5. This paper will use the term “transsexual” to mean someone “preoccupied with their wish to live as a member of the other sex.” WILLIAM N. ESKRIDGE & NAN D.

Marriage Cases,⁶ a California Appellate Court invalidated the marriage of a lesbian couple (along with those of 3,999 other same-sex couples) by upholding a law that defined marriage as between a man and a woman. And in *Liston v. Pyles*,⁷ an Ohio Appellate Court denied a lesbian visitation rights to the child her former partner conceived via artificial insemination. The section concludes by demonstrating that, in each of these cases, the LGBT claimant could have changed the outcome by arguing that he or she adversely possessed a heteronormative identity—in *Marriage Cases* and *Liston* by making “use” of its sexual dimension, and in *Kantaras* through utilizing its behavioral dimension.

There are three caveats to this theory. First, like the CRT scholarship before it, this paper does not argue that maleness and femaleness *should* retain the characteristics of property to the subordination of women and LGBT individuals; rather, this paper identifies a new strategy for advocating within the existing legal framework. Second, adverse possession claims will be strongest where an LGBT individual has either “come-out” or transitioned, though this strategy may still be effectively utilized where an individual has not. Third, while one might worry that adverse possession requires LGBT individuals to claim an identity opposite their biological sex—a proposition that would be problematic for those homosexual and bisexual individuals who do not identify in that way, or those who reject all gender identification—under this adverse possession theory, the LGBT person is not claiming that he or she “is” female or male, but that his or her use of the characteristics of a dominant identity entitles him or her to the rights associated with it. Further, it bears emphasis that this adverse possession theory does not require an LGBT individual to relinquish rights in any other identity he or she claims and only increases the rights to which he or she is entitled.

One final point—while the three case studies presented herein all turn in some respect on the ability of LGBT people to marry, an area of law currently in flux, this theory’s usefulness is not limited to these circumstances. For example, a male-to-female transgender prisoner could use the concept of adverse possession to access a women’s facility, transgender individuals could claim it where their employer terminated or disciplined them for using the “wrong” bathroom,⁸ or a homosexual

HUNTER, *SEXUALITY, GENDER IDENTITY AND THE LAW* 58 (3d ed. 2011). Transgender will be used more broadly to describe any individual who exhibits gender-non-conforming behavior.

6. 49 Cal. Rptr. 3d 675, 686 (Ct. App. 2006) *review granted and opinion superseded*, 149 P.3d 737 (Cal. 2006) *and rev’d*, 183 P.3d 384 (Cal. 2008).

7. 97APF01-137, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997).

8. Perhaps a different outcome might have been reached in *Goins v. W. Grp.*, 635

biological parent could use it to challenge visitation restrictions based on his or her relationship with a member of the same sex.⁹

II. THE DEVELOPMENT OF MALENESS AND FEMALENESS AS PROPERTY INTERESTS

The historical intersection between sexuality, gender identity, and property laws in many ways mirrors that of race.¹⁰ Just as early Americans allocated property rights dependent on race, they also allocated them dependent on gender.¹¹ Under the early American system, a man's property rights were plenary. He could freely possess real and personal property, and, to the extent he was free of debt, pass it to his heirs.¹² A man's wife and her property were also his under *feme covert* laws.¹³ Moreover, men even owned their daughters, with courts recognizing a daughter's rape as a "trespass" against the father.¹⁴

In contrast, the law limited a woman's property rights, and not only by deeming her to be property of her husband or father.¹⁵ A woman's right to inherit property was further subordinated to that of her male kindred—even on her husband or father's passing, his sons inherited the entire estate to the exclusion of his wife and/or daughters;¹⁶ and even where he left no son, his living male kin divided two-thirds of the estate, leaving his wife and daughters only the remaining one-third.¹⁷ Moreover, his widow's right to that third was often conditioned on her chastity.¹⁸

Thus, as the law legitimated whites' ownership of blacks, it legitimated

N.W.2d 717, 723 (Minn. 2001), where the court held that Goins' employer could force her to use the men's restroom, consistent with her biological sex.

9. Consider the possibility of an opposite outcome in *Bottoms v. Bottoms*, 457 S.E.2d 102, 107 (Va. 1995), where the court gave custody to a child's grandmother over his lesbian mother based in part on her romantic involvement with a woman.

10. This discussion is only meant to demonstrate the appropriateness of exporting the CRT framework to this context, not to compare the circumstances of colonial women with those of slaves.

11. See Carole Shammass, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 160 (1987).

12. See *id.* at 148.

13. See *id.* at 147.

14. Thomas Lund, *Women in the Early Common Law*, 1997 UTAH L. REV. 1, 5 (1997).

15. See *id.* at 3.

16. See Shammass, *supra* note 11, at 146.

17. *Id.*

18. *Id.* at 147.

men's ownership of women. Just like freedmen,¹⁹ un-owned women possessed only relegated rights in property. Additionally, as black infants were born as slave owners' property,²⁰ girls were born as property of their father. The law created tension between "property and humanity" in both instances,²¹ and established whiteness, maleness, and, to a lesser extent, femaleness, as status property.

III. THE SCOPE OF MALENESS AND FEMALENESS

This historical discussion illustrates the nature of the status that property interests created. First, because only men had the ability to transfer property to heirs, the law created value in male virility and heterosexuality. Also, *feme covert* laws' increased the value to men of acting as breadwinners, household heads, and physical guardians by linking the "wing, protection, and cover" they offered to women to an increase in their property holdings.²² Inasmuch as a female typically²³ had no separate legal identity, and was merely the counterpart to "her husband [or father], her baron, her lord," she was therefore presumed to be entirely dependent and submissive, though equally capable of producing male heirs to which a man could pass property.²⁴ To the extent a woman fulfilled these legal expectations, she also was entitled to certain rights in property, diminished though they were, even, as noted above, receiving a premium for her chastity.²⁵

19. See, e.g., A. Leon Higginbotham, Jr. & Greer C. Bosworth, "Rather Than the Free": Free Blacks in Colonial and Antebellum Virginia, 26 HARV. C.R.-C.L. L. REV. 17, 37 (1991) (noting that during slavery free blacks had less restrictions on their property rights than other rights, but still were more restricted than whites).

20. See Harris, *supra* note 1, at 1719.

21. *Id.*

22. Yvette Joy Liebesman, *No Guarantees: Lessons from the Property Rights Gained and Lost by Married Women in Two American Colonies*, 27 WOMEN'S RTS. L. REP. 181, 183 (2006) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *442).

23. Occasionally—owing to "loopholes" in the law and through great effort—an older, unmarried woman was able to exercise some of the same rights as a man, though such cases were the exception and the new laws that the American Revolution ushered in closed these "loopholes." See Deborah M. Thaw, *The Feminization of the Office of Notary Public: From Feme Covert to Notaire Covert*, 31 J. MARSHALL L. REV. 703, 709-11 (1998).

24. See *id.*; Shammass, *supra* note 11, at 160.

25. See e.g., Liebesman, *supra* note 22, 183-86 (discussing the doctrine of necessaries which required that a husband provide for his wife's necessities); Thaw, *supra* note 23, at 709 (noting that "[t]he sole concession to the married woman under the system of feme covert was that no husband could convey property without the free consent of his wife"); Shammass, *supra* note 11, at 160.

By endowing men and women with different property rights, and enhancing the value of their respective rights dependent upon their adoption of certain characteristics, the law created and enforced distinct physical, behavioral, familial, and sexual dimensions of dominant, heteronormative identities. As the previous discussion demonstrates: physically, strength and virility belong to maleness, weakness and fragility to femaleness, and both demand fertility; behaviorally, leadership and dominance are aspects of maleness; submissiveness and chastity, femaleness;²⁶ in the familial dimension, maleness retains leadership and femaleness retains obedience, coupled with an awareness that she must “realize [herself] only within the confines of the household”²⁷; likewise, in the sexual dimension, maleness is associated with an attraction to women, femaleness to men.²⁸ For the purposes of this discussion, individuals who satisfy all four dimensions are “true owners” of a dominant identity, those capable of exercising all the rights and reaping all the value associated with those identities. Thus, any fertile, heterosexual, biological man who presents as a man, exhibits leadership and dominance, and is viewed as a breadwinner is—in context of the discussion framed above—a true owner of maleness. Infertile, effeminate, homosexual, or transgender men are not. Likewise, any fertile, heterosexual, biological female who presents as female and is submissive and chaste is a true owner of femaleness. Whereas non-traditional, infertile, homosexual, or transgender women are not.

IV. MALENESS AND FEMALENESS’S RETENTION OF THE CHARACTERISTICS OF PROPERTY

CRT’s status property theory argues that whiteness as property persists despite the demise of formal racial hierarchies.²⁹ Similarly, the formal legal structure linking gender and gender identity to property rights disappeared during the mid-nineteenth century when most states eliminated coverture.³⁰ But, maleness and femaleness retained the characteristics of property law’s “bundle of sticks”—as demonstrated herein, they are capable of possession, usable, transferrable, and exclusive to the holder—which demonstrates that, formal renunciations of the legal hierarchy aside, the law perpetuates and protects the value of maleness and femaleness, like

26. *See Thaw, supra* note 23, at 707.

27. *Id.*

28. *See id.*

29. *See Harris, supra* note 1, at 1757-58.

30. 41 Am. Jur. 2d *Husband and Wife* § 253 (2014).

whiteness, as status properties.³¹

A. Maleness and Femaleness Can Be Possessed

The right to possess is a person's right to exercise dominion over some, existing thing.³² Despite the fact that the law no longer expressly enforces gender stereotypes,³³ the existence of dominant identities persists inasmuch as individuals' understanding of sex and gender remain aligned with the definitions of maleness and femaleness proffered above.³⁴ For example, when asked, individuals rank "masculine" traits that correlate with the dimensions of maleness—leadership, aggressiveness, and dominance—as more desirable for biological men, and "feminine" traits that correlate with the dimensions of femaleness—gentleness, shyness, and love of children—as more desirable for biological women.³⁵ Thus, the question is not whether these heteronormative identities are existing "things", but whether one is capable of controlling one's identification, or non-identification, with their various dimensions.

On the one hand, researchers have posited that sexuality is affected by internal biological forces, rooted more deeply than to be within an individual's dominion.³⁶ Perhaps unsurprisingly then, most LGB individuals do not feel that they chose their non-identification with the sexual dimension of heteronormative identities.³⁷ The experience of transsexual persons may point to a similar uncontrollable biological influence in all the dimensions of identity discussed above: though physicians identify a transsexual as one gender, and his or her family may act to reinforce that gender, his or her internal identity develops inappositely.³⁸ But, that an individual's identification, or non-

31. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945); Kristine S. Tardiff, *Analyzing Every Stick in the Bundle: Why the Examination of a Claimant's Property Interests Is the Most Important Inquiry in Every Fifth Amendment Takings Case*, 54 *FED. LAW* 30, 31 (2007).

32. *Black's Law Dictionary* (9th ed. 2009).

33. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (ruling state enforcement of gender stereotypes to be unconstitutional).

34. Deborah A. Prentice & Erica Carranza, *What Women and Men Should Be, Shouldn't Be, Are Allowed To Be, and Don't Have To Be: The Contents of Prescriptive Gender Stereotypes*, 26 *PSYCHOL. OF WOMEN Q.* 269, 269 (2002).

35. *Id.*

36. Roger L. Worthington et al., *Heterosexual Identity Development: A Multidimensional Model of Individual and Social Identity*, 30 *THE COUNSELING PSYCHOLOGIST* 496, 503 (2002).

37. Brief for Appellees at 2, *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011), (No. 10-16696).

38. John Money, *Matched Pairs of Hermaphrodites: Behavioral Biology of Sexual*

identification, with certain aspects of dominant identities is seemingly irrepressible is not dispositive in this analysis—possession does not require that an owner have total ability to control his or her property.³⁹ Rather, possession may be demonstrated through use.⁴⁰ And, as the following section demonstrates, maleness and femaleness are “usable,” and individuals in fact utilize them.

B. Maleness and Femaleness Can Be Used

The utility of maleness is wide-ranging. Its familial dimension—and specifically, the assumption that a biological male is his family’s breadwinner—is utilized to obtain economic power for biological men: on average, men earn eighteen percent more than women,⁴¹ and wage gaps between heterosexual married males and females⁴² and fathers and mothers⁴³ are the most sizeable. Maleness’s sexual dimension, the assumption that a biological male is attracted to biological females, is also used to gain power in the workplace inasmuch as about ninety-six percent of CEOs in Fortune 1000 companies are male,⁴⁴ and, as of July 2012, not a single openly LGBT individual was counted among them.⁴⁵ Likewise, true owners of maleness use their presumed heterosexuality and breadwinner status to acquire political power: every American president has identified as a heterosexual male, about eighty-one percent of congressional members are male, and the vast majority of congressmen are in heterosexual

Differentiation from Chromosomes to Gender Identity, J. ENGINEERING AND SCI. 34, 39 (1970) available at

<https://vpn.law.ucdavis.edu/2796/1/DanaInfo=calteches.library.caltech.edu+money.pdf>.

39. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 6 (2d ed. 2007).

40. See, e.g., *Jarvis v. Gillespie*, 587 A.2d 981, 988 (Vt. 1991).

41. Ariane Hegewisch et al., Institute for Women’s Policy Research, *The Gender Wage Gap: 2011* (Sept. 2012), http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2011/at_download/file.

42. Markus Gangl & Andrea Ziefle, *Motherhood, Labor Force Behavior, and Women’s Careers: An Empirical Assessment of the Wage Penalty for Motherhood in Britain, Germany, and the United States*, 46 DEMOGRAPHY 341, 341 (2009).

43. Michelle Budig, *Parenthood Exacerbates the Gender Pay Gap*, CNN: THE HILL (Sept. 30, 2010, 4:24 PM), <http://thehill.com/blogs/congress-blog/economy-a-budget/121869-parenthood-exacerbates-the-gender-pay-gap>.

44. *Women CEOs of the Fortune 1000*, CATALYST KNOWLEDGE CTR. (May 15, 2014), <http://www.catalyst.org/knowledge/women-ceos-fortune-1000>.

45. Leslie Kwoh, *A Silence Hangs Over Them*, WALL ST. J. (July 25, 2012) online.wsj.com/news/articles/SB10000872396390443295404577547043705374610#printMode.

marriages.⁴⁶ The behavioral and sexual dimensions of maleness are also used in the context of professional sports; as an athlete is more likely to be drafted higher and offered more money if he is perceived as a “ladies man.”⁴⁷ These same dimensions are even used in prison where heterosexual, aggressive “prison heavies” top the hierarchy.⁴⁸ Thus, the value of maleness’s utility tracks its dimensions—where biological males are concerned, dominant, heterosexual, fertile, and breadwinning identities are valued most highly.

The utility of femaleness, though real, is somewhat more limited. As one example, emergency relief organizations have determined that women are both more vulnerable during emergencies and more likely to distribute resources among family members, specifically children, and so they prioritize getting supplies to women.⁴⁹ Femaleness’s use in such circumstances is closely tied to its behavioral and familial dimensions—the holder of femaleness is endowed with certain privileges because she is seen as vulnerable, nurturing, and likely to have borne children whose needs she will put above her own. A second example is that of divorcés’ use of femaleness to gain custody of children via courts’ presumption of maternal custody.⁵⁰ Like femaleness’s utility in emergencies, this use of femaleness is strongly tied to its behavioral and familial dimensions: evidence that a woman is not maternal enough, or that she engaged in sexual infidelity or an “improper” romantic relationship, can rebut the strong presumption.⁵¹ In the sexual dimension, femaleness can also be used to earn a high price for genetic material, and the value of this utility is directly related to femaleness’s sexual dimension.⁵²

46. *Congressional Demographics*, CONGRESS.ORG, <http://www.congress.org/congressorg/directory/demographics.tt?catid=all> (last visited Mar. 4, 2013).

47. Daniel D’Addario, *Wade Davis on NFL’s Gay Witch Hunt: “These Athletes are Very Vulnerable,”* SALON.COM (Mar. 4, 2013), http://www.salon.com/2013/03/04/wade_davis_on_nfls_gay_witch_hunt_these_athletes_are_very_vulnerable/.

48. Tony Evans & Patti Wallace, *A Prison Within a Prison?: The Masculinity Narratives of Male Prisoners*, 10 MEN AND MASCULINITIES 484, 487 (2008).

49. Kyle Knight, *Documents and Disasters: Can Proper ID Save the Lives of Transgender People in Emergencies?*, HUFFPOST GAY VOICES (Nov. 11, 2011), http://www.huffingtonpost.com/kyle-knight/documents-and-disasters-c_b_1092721.html.

50. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 828 (3d ed. 1997).

51. *Id.*

52. Paul Raeburn, *Egg Donors vs. Sperm Donors: Who Is Valued More and Why*, ALTERNET (June 11, 2007),

Perhaps most relevantly in 2014's political climate, both maleness and femaleness can be used to marry, while most states still prohibit the use of non-heteronormative identities for that purpose.⁵³ Proponents argue that these marital limitations promote the state's interest by channeling heterosexual couples "who might beget children 'by accident'" into marriages.⁵⁴ In so doing these proponents explicitly link the right to marry, what many might perceive as a valuable right, to a couple's ability to procreate "naturally," likewise linking this use of heteronormative identities to their sexual dimensions.

Thus, facilitated by law, maleness and femaleness are usable, in ways that correspond to their dimensions, satisfying the requirements of both possession and use.

C. Maleness and Femaleness Can Be Transferred

Perhaps the most obvious way that a heteronormative identity may be transferred is genetically. An infant's biological sex is determined by the chromosomes it inherits from its parents,⁵⁵ and because most infants' genetic coded sex will ultimately correlate with their gender identity, and most individuals will identify as heterosexual, an infant's biological sex influences whether that individual will later possess certain attributes of maleness or femaleness.⁵⁶ In this way, parents may genetically transfer maleness or femaleness to their offspring. The law enables this genetic transfer by protecting procreation as a fundamental constitutional right.⁵⁷

Families may also transfer maleness or femaleness to new generations through non-genetic forces. For instance, a Quebec University study found that families more often provide boys with sports equipment, tools, and vehicles to play with, while giving girls toys that encourage domestic play.⁵⁸ The families studied also dressed girls in pink clothes and jewelry more often, while boys wore blue, red, and white.⁵⁹ The researchers

http://www.alternet.org/story/53817/egg_donors_vs._sperm_donors%3A_who_is_valued_more_and_why.

53. See *Littleton v. Prange*, 9 S.W.3d 223, 230-31 (Tex. Ct. App. 1999).

54. Brief for Appellees, *supra* note 37, at *90.

55. Arthur P. Arnold, *Sex Chromosomes and Brain Gender*, 5 NATURE REVIEWS NEUROSCIENCE 701, 702 (2004).

56. *Id.* Though, this study also suggests that identity is a product of a genetic code's interaction with the external environment.

57. *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 536, 62 S. Ct. 1110, 1111, 86 L. Ed. 1655 (1942)

58. Andree Pomerleau et al., *Pink or Blue: Environmental Gender Stereotypes in the First Two Years of Life*, 22 SEX ROLES 359, 360 (1990).

59. *Id.* at 365.

suggested that the physical environment and daily experiences the families provided these infants with impacted whether that individual later identified with gender stereotypes.⁶⁰

Additionally, most children will be born to heterosexual parents, many of whom will maintain roles consistent with the dimensions of maleness and femaleness.⁶¹ Some sociologists suggest that children of these parents are more likely to embrace characteristics of dominant identities, either because of exposure to their parents' example or explicit instruction.⁶² Conversely, some studies suggest that children raised by same-sex partners are less likely to strictly identify with the dimensions of heteronormative identities.⁶³ Inasmuch as the law protects *heterosexual* parents' fundamental right to make decisions "concerning the care, custody, and control of their children,"⁶⁴ the law does not similarly protect homosexuals' ability to form families, adopt, and raise children,⁶⁵ and thus facilitates a traditional understandings of sex and gender.

External forces assisted by law also transfer heteronormative identity, perhaps most notably through popular media.⁶⁶ As one example of this phenomenon, a study of advertisements in popular media found that they portrayed women less often as a voice of authority, more often in familial roles, and more often as a passive sex object, thus depicting proper biological female identity as aligned with the dimensions of femaleness.⁶⁷ Moreover, because the law prohibits the government from silencing these advertisements simply because they reflect antiquated understandings of sex and gender, it also ensures the continued transmittal of these stereotyped images.⁶⁸

60. *Id.* at 359, 366.

61. Worthington, *supra* note 36, at 503-04.

62. *Id.* at 504.

63. It should be noted that these studies did not demonstrate that children of same-sex couples were more likely to identify as homosexual, but that they were less likely to behave in ways traditionally associated with their gender.

64. *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804, 812 (11th Cir. 2004).

65. *Id.* at 827.

66. Scott Coltrane & Michele Adams, *Work-Family Imagery and Gender Stereotypes: Television and the Reproduction of Difference*, 50 J. OF VOCATIONAL BEHAV. 323, 324-25 (1997).

67. *Id.* at 337-38.

68. *Cf. Sorell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2653 (2011) (holding that a burden placed on protected expression by statute could not be justified by the State's asserted interests in physician confidentiality, protecting doctors from harassing sales behaviors, and protecting doctor-patient relationships, and thus the statute did not advance the State's policy goals of lowering the costs of medical services and

The law also facilitates the transfer of dominant heteronormative identities through the requirements it places on medical practitioners. For example, by requiring that, once a child is born, the delivering doctor selects a gender marker “as soon as possible.”⁶⁹ Unsurprisingly given this temporal limitation, doctors rely on stereotypes from the physical and sexual dimensions of maleness and femaleness to make their determination: they visually compare the infant’s genitalia with the “‘correct’ length of the penis and vaginal capacity.”⁷⁰ And, though in 1.7 to 4% of births, a child’s genitalia are ambiguous,⁷¹ the law only offers “male” or “female” markers.⁷² Thus doctors recommend cosmetic genital surgery for non-conforming genitalia to ensure that a child’s anatomy meets the demands of heteronormative identities’ physical and sexual dimensions.⁷³

All of these examples demonstrate that different forces transfer dominant identities and that the law facilitates their transfer. Thus, the discussion has reached the final element necessary to establish maleness and femaleness as property; to wit, whether an owner of maleness or femaleness can exclude others from it, a right the Supreme Court has called “one of the most essential sticks” in property’s bundle.⁷⁴

D. Owners of Maleness and Femaleness Can Exclude Others

The law undoubtedly endows holders of heteronormative identities with this crucial right to exclusivity. Take, for instance, the legal requirement that identity documents include a male or female gender marker. For the document to have any value, its holder’s appearance must match that marker. Thus, the law rewards compliance with the physical and behavioral dimensions of dominant heteronormative identities, and excludes and penalizes those who fail to comply with them.

“Gay or transsexual panic” defenses (hereafter “panic defenses”) offer a second example of the law’s protection of possessors of heteronormative identities’ ability to exclude.⁷⁵ In panic defenses, a heterosexual admits to

promoting public health).

69. Kristin Zeiler & Annette Wickstrom, *Why Do ‘We’ Perform Surgery On Newborn Intersexed Children? The Phenomenology of the Parental Experience of Having a Child With Intersex Anatomies*, 10 FEMINIST THEORY 359, 360 (2009).

70. Suzanne J. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, 16 J. WOMEN IN CULTURE AND SOC’Y 3, 3 (1990); *Littleton*, 9 S.W.3d at 230.

71. Zeiler & Wickstrom, *supra* note 69, at 359.

72. *Id.*

73. *Id.*

74. *Kaiser Aetna v. U. S.*, 444 U.S. 164, 176 (1979).

75. Libby Adler, *The Future of Sodomy*, 32 FORDHAM URB. L.J. 197, 211 (2005).

physically assaulting an LGBT person⁷⁶ but asserts that his or her responsibility is mitigated because he or she panicked in the face of the victim's homosexuality, or upon discovering the victim's biological sex.⁷⁷ These panic defenses take the analogous concept behind certain "stand your ground laws"—those which presume that an owner of real property had the reasonable fear necessary to use deadly force against a trespasser⁷⁸—and export it from circumstances where trespass on real property is at issue to those where the trespass is made upon gendered status property. Thus, panic defenses similarly presume that the owner of a dominant identity was harmed by, and reasonably fearful of, an LGBT person's "trespass" onto the identity's sexual or behavioral dimension. By allowing the defense, and through its presumption of harm, the law legitimates the holders of heteronormative identities' ability to exclude gender non-conformers. Unsurprisingly, the law does not offer the same protection to nonconforming individuals—just as a person with no protected rights in property typically cannot "stand his ground" under the laws mentioned above⁷⁹—an LGBT defendant cannot raise a "straight panic" defense.⁸⁰

Thus, the law endows the holders of heteronormative identities with all the rights in the "bundle of sticks," and maleness and femaleness—like whiteness—originally enshrined as status properties through the legalized promotion and valuation of dominant identities, continue to carry value and prestige for their holders, even today.

V. DECONSTRUCTING MALENESS AND FEMALENESS THROUGH ADVERSE POSSESSION

Advocates of gender and LGBT equality would be right to question the propertied system of heteronormative identity and the subordination in which it results. But, given the persistence of the property framework, ending subordination might require them to work within it. Thus, this section analyzes one approach for doing so—adverse possession.

In adverse possession claims, a person asks the law to recognize his right

76. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 471 (2008).

77. *Id.*

78. E.g., Zachary L. Weaver, *Florida's "Stand Your Ground" Law: The Actual Effects and the Need for Clarification*, 63 U. MIAMI L. REV. 395, 399 (2008).

79. See *id.* (noting that such statutes only apply where the trespasser was entering the assailant's occupied home or car).

80. Peter Rosenstein, *Fighting the Gay Panic Defense*, THE BLADE, Jan. 22, 2010, <http://www.washingtonblade.com/2010/01/22/fighting-the-%E2%80%98gay-panic-%E2%80%99-defense>.

to property that she holds in opposition to the true owner.⁸¹ For her claim to be successful, the adverse possessor must have actually, openly, visibly, notoriously, and continuously held the property, with hostility, for a statutorily defined period.⁸² This section will first demonstrate that many LGBT individuals could successfully adversely possess a dominant identity. Second, it will offer concrete examples where a claim of adverse possession might have changed a case's outcome.

A. True Owners of Maleness and Femaleness

As noted briefly above, only individuals who satisfy the physical, behavioral, familial, and sexual dimensions of either dominant identity are “true owners” for the purposes of this analysis; that is, only one who completely conforms to the heteronormative expectations of maleness or femaleness is able to exercise all the associated rights and privileges and extract from it all its potential value. The potential number of these true owners is not limited; thus, every individual who satisfies the dimensions of a heteronormative identity is a true owner, and one can only be divested of his or her rights in the status property through non-compliance with the aforementioned dimensions. This article posits that individuals who are unable or unwilling to comply with every dimension, and thus are excluded from taking advantage of certain rights awarded to true owners, can still claim those rights through adverse possession, and they do so without, as would be the case in the real property context, displacing true owners' claims to the same identities. Through adverse possession a claimant only expands the universe of those eligible to exercise rights in dominant identities.

B. LGBT Individuals Can Demonstrate Actual Possession

Possession is “actual” when it is sufficient to alert a reasonable owner to the adverse possessor's use of the property and the adverse possessor has used the property as a reasonable owner would.⁸³ Open homosexuals can easily establish this element because they use an identity's sexual dimension as a true owner would, and true owners are alerted to their use. Transgender persons who present as the opposite gender openly make use of an identity's behavioral and physical dimensions and likewise satisfy actuality. Closeted LGB persons, transgender persons who have not yet begun to transition, and those who reject the dimensions of both genders may have harder claims to make.

81. *Property — Adverse Possession*, 11 HARV. L. REV. 553, 553 (1898).

82. 3 Am. Jur. 2d *Adverse Possession* § 10 (2014).

83. 3 Am. Jur. 2d, *supra* note 82, § 18.

Indeed, at first blush it might seem that only open LGB persons or transgender persons in who have at least begun the process of transition could satisfy this prong. But, the actual possession standard is objective—it requires only that a “reasonably diligent owner” would unearth the adverse possessor’s use⁸⁴—and it is possible to argue that a reasonably diligent owner of a dominant identity could discover its uninvited use, even where that use is understated. For example, one study found that heterosexual men are capable of identifying homosexual men solely by observing their answers to completely neutral questions,⁸⁵ suggesting that diligent possessors of dominant identities are able to recognize non-conformers whether or not they are closeted or have transitioned.

A potential wrench to an LGBT persons’ meeting the “actual” possession requirement is that an adverse possessor is generally only deemed to have actually possessed the section of property of which he or she made use.⁸⁶ And, while a true owner of maleness embraces its every dimension, a lesbian or transgender man, as examples, may not do the same—a lesbian might utilize the sexual dimension of maleness, at least, through her same-sex attraction, and a transgender man may utilize the behavioral dimension through his presentation, but both may eschew maleness’s familial dimension, and neither will be capable of fulfilling its requirement for natural reproduction with a biological female.

However, it is not dispositive to an adverse possessor’s claim that the true owner might have used property more fully.⁸⁷ And moreover, an adverse possessor may lay a broader claim to “an entire plot of land through actual occupation of a part”—under the doctrine of constructive possession—where that possessor has “color of title,”⁸⁸ or operates under the persuasion of “any fact, extraneous to the act or mere will of the claimant [that] has the appearance, on its face, of supporting the claimant’s claim of a present title to [property].”⁸⁹ As noted above, persons’ identification (or non-identification) with the various dimensions of dominant gender identities goes beyond an exercise of their “free will,” and appears to be, at least in part, biologically determined. Thus, an LGBT individual who does not identify with every dimension of either dominant identity is still entitled to lay claim to them in whole.

84. *Vezev v. Green*, 35 P.3d 14, 25 (Alaska 2001).

85. Scott G. Shelp, *Gaydar*, 44 J. OF HOMOSEXUALITY 1, 12 (2009).

86. *N.A.S. Holdings, Inc. v. Pafundi*, 736 A.2d 780, 784 (Vt. 1999).

87. *Id.* at 787.

88. *Id.* at 784.

89. *Id.* at 785 n.3.

C. LGBT Individuals Can Demonstrate Open, Visible, and Notorious Possession

To meet this requirement, an adverse possessor must “advertise to the world” that he or she is claiming the property as his own.”⁹⁰ Again, open homosexuals and transgender individuals who present as a different gender will plainly meet this mark. But it is more problematic for closeted LGB persons, or transgender individuals who have not yet transitioned, because they may actually avoid “advertising” their sexual orientation or gender identity to the world.⁹¹

Still, closeted LGB persons or pre-transition transgender individuals may engage in gender atypical play or pursue gender atypical interests, even prior to “coming out” or transitioning.⁹² In the context of real property, even non-obvious actions, like the intermittent gathering of natural crops⁹³ and the seasonal grazing of animals,⁹⁴ can establish “open, visible, and notorious” possession. Inasmuch as gender atypical behavior by the adverse possessor of gendered status property could be likened to grazing and gathering by the adverse possessor of real property, in that they are all examples of the adverse possessor’s sporadic and nearly invisible use of the natural bounty of the property he or she is claiming, even LGBT persons who are not open about their identity may satisfy this element.

D. LGBT Individuals Can Demonstrate Continuous Possession

As discussed above, there is evidence that identity is determined in part by biology and early childhood experiences.⁹⁵ And, while some LGBT persons may have experienced their identity consistently from that point on, many members of the LGBT community find that their identity changes over time.⁹⁶ Adverse possession requires that a claimant’s possession has

90. *Turnipseed v. Moseley*, 27 So. 2d 483, 486 (Ala. 1946).

91. Michele J. Eliason & Robert Schope, *Shifting Sands or Solid Foundation? Lesbian, Gay, Bisexual, and Transgender Identity Formation*, in *THE HEALTH OF SEXUAL MINORITIES: PUBLIC HEALTH PERSPECTIVES ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER POPULATIONS* 20-21 (2007).

92. *Id.* at 20.

93. *See Merrill v. Tobin*, 30 F. 738, 741 (N.D. Iowa 1887).

94. *See GOS Cattle Co. v. Bragaw’s Heirs*, 38 P.2d 529, 533 (N.M. 1933).

95. *See supra* Part III.

96. Kelly K. Kinnish et al., *Sex Differences in the Flexibility of Sexual Orientation: A Multidimensional Retrospective Assessment*, 34 *ARCHIVES OF SEXUAL BEHAV.* 173, 179 (2005). Indeed, opponents of marriage equality have attached to this lack of continuity in sexual orientation as a way to challenge the immutability of homosexuality.

been continuous and uninterrupted for some defined statutory period,⁹⁷ but even those individuals who have experienced some fluidity in their identity can demonstrate continuity.

First, courts deem possession to be continuous, even where the adverse possessor's use was sporadic or seasonal, as long as it was appropriate given the "particular locality and quality of the property."⁹⁸ Because some dimensions of identity appear malleable across the human population,⁹⁹ perhaps the "appropriate" use of maleness or femaleness allows for variation. Further, courts have found this element satisfied where requiring absolute continuity would ignore "nature's laws . . . and the thing supposed to be necessary [to achieve adverse possession] would never be done."¹⁰⁰ As established, if maleness and femaleness are used in accordance with "nature's laws," some change in identity is expected. Thus, if courts required rigid continuity in the experience of identity, contrary to nature's laws, the necessary action of continuous possession could never be done.

In sum, whether a non-conformer's experience with identity has been static or changing, that individual can demonstrate continuous possession. It must be noted that the continuity element requires that possession be established for a certain length of time, as set by statute, in order to satisfy this element.¹⁰¹ Such statutory periods vary, generally ranging from ten to twenty years.¹⁰² For adults, this requirement does not pose a problem—as previously discussed, there is evidence that identity is determined to some degree before birth, and shaped in childhood.¹⁰³ Some minors may find it more difficult to satisfy this element, but there is hope: The adverse possession doctrine exempts minors from some requirements in other contexts.¹⁰⁴

E. LGBT Individuals Can Demonstrate Hostile Possession

Though different jurisdictions treat the hostility requirement differently in the real property context, a large majority only require that the adverse possessor use the property without the true owner's permission.¹⁰⁵ That most LGBT persons feel that their identity was not a matter of choice, but

97. *Turnipseed v. Moseley*, 27 So. 2d 483, 486 (Ala. 1946).

98. *Webber v. Clarke*, 15 P. 431, 434 (Cal. 1887).

99. Kinnish, *supra* note 96, at 179.

100. *Webber*, 15 P. at 435.

101. SPRANKLING, *supra* note 39, at 462.

102. *Id.*

103. *See supra* Part III.

104. *See* SPRANKLING, *supra* note 39, at 462.

105. *Id.*

of biological predetermination,¹⁰⁶ suggests that they would occupy status properties even without the true owners' approval. Inasmuch as LGBT persons often face true owners' prejudice and disapproval, they actually occupy their identities over the express and sometimes violent objection of true owners.¹⁰⁷ Thus, in most jurisdictions this element is unproblematic.

A "dwindling minority"¹⁰⁸ of states require more, namely that the adverse possessor believe he is the true owner, mistakenly, but in good faith.¹⁰⁹ However, even in these states LGBT persons can demonstrate hostility—if most LGBT persons believe they had "little or no choice in their orientation,"¹¹⁰ they also believe, in good faith, that their use of certain aspects of a dominant identity is natural and that they share the right to do so with the identity's true owners. Thus, the hostility element can be met in many cases.

F. LGBT Individuals Satisfy the Public Policy Rationale For Adverse Possession

An adverse possessor has been compared to "a tree in the cleft of a rock . . . [that] gradually shapes [her] roots to [her] surroundings."¹¹¹ At some point, those "roots" are so deep that public policy weighs against displacing the possessor.¹¹² As discussed above, people's roots in identity establish themselves prior to birth, and are shaped by their early childhood experiences and surroundings. What is more, many LGBT persons view the form these roots take as biologically predetermined, not chosen. Thus an LGBT person's roots in gender identity are even deeper and more intricate than those of adverse possessors of real property; so much so that they usually cannot be displaced without psychological trauma.¹¹³ Thus,

106. See Worthington, *supra* note 36 at 503.

107. See, e.g., Clifford J. Rosky, Fear of the Queer Child, 61 BUFF. L. REV. 607, 618-39 (2013); *Gay Marriage and the Supreme Court: Judge Not?*, THE ECONOMIST (Mar. 30, 2013), <http://www.economist.com/news/united-states/21574510-same-sex-marriage-reaches-highest-court-first-time-justices-may-rule> (noting that eighty-four percent of California weekly churchgoers opposed marriage equality).

108. *Webber v. Clarke*, 15 P. 431, 434 (Cal. 1887).

109. *Id.*

110. *Women CEOs of the Fortune 1000*, CATALYST KNOWLEDGE CTR. (May 15, 2014), <http://www.catalyst.org/knowledge/women-ceos-fortune-1000>.

111. Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2456 (2001).

112. *Id.*

113. Human Rights Campaign, *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN (Apr. 29, 2013), <http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy> (noting that, as compared to those who are not rejected by their families, LGBT people who are

even ignoring that an LGBT person can often make a case for adverse possession by satisfying the legal test's elements, public policy—to wit, protecting and nourishing the roots of an individual's identity and avoiding the psychological trauma that comes with displacement—supports an LGBT person's right to adversely possess maleness or femaleness.

G. Case Studies

The previous sections demonstrated that an LGBT person could theoretically adversely possess a dominant heteronormative identity. The remainder of this section will offer concrete examples of cases in which the raising of an adverse possession claim might have changed the outcome.

Kantaras v. Kantaras.¹¹⁴ Michael Kantaras was born Margo Kantaras in 1959 in Ohio. In 1986, Margo changed his name to Michael, began hormonal treatments, and eventually underwent a total hysterectomy and double mastectomy.¹¹⁵ In June 1989, he met his future wife, Linda, who was pregnant at the time.¹¹⁶ He and Linda married one month later, with Michael indicating that he was male on their marriage license.¹¹⁷ Following the birth of Linda's son, Michael applied to adopt him.¹¹⁸ Several years later, Linda was inseminated with Michael's brother's sperm, and gave birth to a daughter.¹¹⁹ Sadly, the Kantaras family unraveled six years later; Michael filed for divorce and custody of the children.¹²⁰ In return, Linda claimed that their marriage was void *ab initio* because it violated Florida's ban on same-sex marriage and that Michael's adoption of her son was similarly illegal.¹²¹ She further denied that Michael was entitled to custody of her daughter because he was not the child's biological or legal father.¹²²

The Florida Court of Appeal for the Second District focused on whether Michael was male at the time of marriage, and determined that he was not.¹²³ An individual's sex, the court held, was determined at birth.¹²⁴

rejected by their families are eight times more likely to have attempted suicide, six times more likely to report depression, three times more likely to use illegal drugs, and three times more likely to be at high risk of contracting HIV).

114. 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

115. *Id.* at 155.

116. *Id.*

117. *Id.*

118. *Id.* at 156.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 161.

Thus, Michael's marriage was void *ab initio* and the trial court's determination of custody in his favor was similarly reversed and remanded.¹²⁵

Had Michael raised a claim of adverse possession, what outcome? His possession of maleness was sufficient to alert others of his attempted dominion in that from a young age he "refused to wear female clothing"—to the extent that his high school picture was taken in male clothing¹²⁶—and he changed his body to conform to stereotypes of masculinity in every way conceivably visible to the casual observer by removing his breasts, growing facial hair, and deepening his voice.¹²⁷ One might analogize Michael's restructuring of his physical self to present consistent with his identity to the adverse possessor of real property who physically develops the parcel in question, an activity that is almost always sufficient to establish actual, open, and notorious possession.¹²⁸ Moreover, Michael applied for marriage as a man, adopted children as a father, and assumed the "male" role in household chore performance,¹²⁹ making use of maleness as a true owner would. These actions also "advertised" his possession of maleness to the world, qualifying as actual, open, visible, and notorious. Finally, Michael's testimony that he perceived himself as male from the beginning, "always,"¹³⁰ would easily satisfy both continuity and any statutory requirement.

Under the majority approach to "hostility" Michael's claim is arguably mixed. There is some evidence that he had permission to use maleness: the trial court noted that his family and community had accepted him as "male"; and, the legal community allowed him to change his name and gender markers. However, Michael could argue that while these groups implicitly recognized his attempts at adversely possessing maleness, they did not give him permission to do so, and in any case that he would have utilized maleness even without the sanction of his community.¹³¹ Michael would likely satisfy even the minority's "good faith" approach in that he believed he "should have been born a boy" and "always" perceived himself as such.¹³² Therefore, Michael probably could demonstrate that he

124. *Id.*

125. *Id.*

126. *Id.* at 156.

127. *Id.*

128. SPRANKLING, *supra* note 39, at 457.

129. *Id.*

130. *Kantaros*, 884 So. 2d at 156.

131. *Id.* at 156-61.

132. *Id.* at 156.

adversely possessed maleness. Moreover, as a successful adverse possessor he would hold the same rights as a true owner, using maleness to marry a female and adopt her children.

Indeed, when Michael presented evidence that he deemed himself and others deemed him to be male, he implicitly raised the claim that he had adversely possessed maleness. Though the court refused to accept his argument because the legislature did not intend “the term ‘male’ . . . [to] include a female-to-male postoperative transsexual,”¹³³ were Michael to make his adverse possession claim explicit, the court’s objection would no longer be valid. Michael would not be arguing that he “was” male, or that the legislature intended him to be included in the word “male”; instead his argument would be that his adverse possession of maleness entitled him to the rights associated with it. The distinction is perhaps clearer given an example from the real property context: while the Florida legislature did not expressly name adverse possessors, nor were even likely to have had them in mind, when it gave all “property owners” the right to display the American flag,¹³⁴ the successful adverse possessor could not be denied the right to do as a result.

In re Marriage Cases:¹³⁵ In *Marriage Cases*, the San Francisco mayor instructed the County Clerk to provide marriage licenses “without regard to gender or sexual orientation.”¹³⁶ Based on the mayor’s instruction, the County Clerk’s office issued about 4,000 marriage licenses to same-sex couples.¹³⁷ The California Supreme Court held the 4,000 same-sex marriages performed in the city void because California law provided that “only marriage between a man and a woman [was] valid or recognized.”¹³⁸ The California Appellate Court upheld those laws against constitutional challenge.¹³⁹

The adverse possession doctrine offers an avenue by which some of the same-sex couples could preserve their unions without raising a constitutional challenge. Take, for example, the circumstances of lesbian rights activists Phyllis Lyons and Del Martin, one of the first couples to marry following the mayor’s announcement.¹⁴⁰ In their case, either partner

133. *Id.* at 158.

134. *See* Fla. Stat. Ann. § 720.3075 (West 2013).

135. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *review granted*, 149 P.3d 737 (Cal. 2006), *rev’d*, 183 P.3d 384 (Cal. 2008).

136. *Id.* at 686.

137. *Id.* at 687.

138. *Id.* (citing Cal. Fam. Code § 308.5 (West 2000)).

139. *Id.* at 685.

140. Rachel Gordon, *Lesbian Pioneer Activists See Wish Fulfilled*, S.F. GATE, June 16, 2008, <http://www.sfgate.com/news/article/Lesbian-pioneer-activists-see-wish->

could have successfully demonstrated her adverse possession of maleness through her use of its sexual dimension.¹⁴¹ The pair founded the first national lesbian rights organization more than 40 years prior to their marriage, were leading advocates for women's and homosexual rights, and co-wrote a book titled *Lesbian/Woman* in 1972.¹⁴² This demonstrates that their possession was actual, open, visible, and notorious.

Either could have established continuity of possession; they were in a committed same-sex relationship for more than 50 years.¹⁴³ As open lesbians at a time when their jobs were at risk for so being,¹⁴⁴ they clearly took possession of maleness' sexual dimension without permission from its owners. Moreover, Lyon could at least satisfy the good faith requirement in that she had compared the struggle for same-sex marriage to that for interracial marriage,¹⁴⁵ suggesting that she believed her sexual orientation to be immutable and her possession rightful. Had either partner successfully demonstrated that she adversely possessed maleness, she would be entitled to all its associated rights, including the right to marry a woman.¹⁴⁶

Liston v. Pyles:¹⁴⁷ Tamara Pyles and Marla Liston separated after a sixteen-year lesbian relationship.¹⁴⁸ Three years prior to their separation, Pyles bore a son, Connor, conceived through artificial insemination.¹⁴⁹ When the couple separated, Pyles challenged Liston's right to visit Connor.¹⁵⁰ The Tenth District Court of Appeals of Ohio agreed with Pyles, holding that Liston was not a "parent" within the meaning of the statute. Because of Liston's gender, the court assumed she could only claim

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141. It should be noted, however, that only one of the two women could claim to have adversely possessed maleness, else they would again be attempting to enter into a same-sex marriage.

142. *Id.*

143. *Id.*

144. Phyllis Lyon, *It Never Was Much of an Issue For Us*, L.A. Times, (May 26, 2009,) <http://articles.latimes.com/2009/may/26/opinion/oe-lyon26>.

145. *See id.*

146. *Id.* It is worth noting that Lyon herself might object to the adverse possession analogy in that she has been quoted as saying, "the sex act itself is neither male nor female: it is a human being reaching out for the ultimate in communication with another human being."

147. *Liston v. Pyles*, No. 97APF01-137, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997).

148. *Id.* at *1.

149. *See id.*

150. *Id.*

parentage as a female.¹⁵¹ And, Liston was not Connor's biological mother, nor did she have biological ties to any man who had asserted paternity.¹⁵² But, using the adverse possession doctrine, Liston could claim rights under maleness as Connor's natural *father*, thus eliminating the need to demonstrate any blood ties to the child.

As in *Marriage Cases*, the existence of a long-term, co-habiting, open lesbian relationship between the parties sufficiently establishes actuality, openness, visibility, notoriety, and continuity. Even without more specific information on Liston, one can demonstrate hostility on the part of all open and active lesbians in that, as noted above, they use maleness' sexual dimension without the permission, and indeed often against the wishes of, its true owners. And that Liston identified as homosexual for at least sixteen years likely satisfies any statutory requirement.

Fatherhood is part of the familial dimension of maleness, so as an adverse possessor, Liston could claim it where a true owner could,¹⁵³ and Liston's circumstances demonstrate that if she were a true owner of maleness she would have been able to claim rights as Connor's father. First, she had a romantic relationship with his mother, and Connor was born during the course of that romantic relationship.¹⁵⁴ In states where these circumstances alone entitle a fertile, heterosexual man—a true owner of maleness—to a presumption of fatherhood, an adverse possessor like Liston would also be entitled.¹⁵⁵ Some states maintain “holding-out” statutes where a man is deemed a child's father if he identifies himself as the child's parent to the child and others, and the child resides with him.¹⁵⁶

151. *See id.* at *4.

152. *Id.*; Ohio Rev. Code Ann. § 3111.02 (West 2000) (stating that “the parent and child relationship between a child and the natural father of the child may be established by an acknowledgment of paternity”). Indeed, even in jurisdictions where former lesbian partners have prevailed in circumstances similar to Liston, they have been recognized as one of the child's “natural” mothers. *See Elisa B. v. Super. Ct.*, 117 P.3d 660, 665 (Cal. 2005).

153. It is irrelevant that Liston did not identify herself as a father, and apparently preferred that Connor call her “mommy.” *See* Deborah Wald, *And Now a Word From . . . Kate Kendell*, WALDLAW BLOG, <http://debwald.blogspot.com/2007/02/and-now-word-from-kate-kendell.html> (2007); *Liston*, 1997 WL 467327 at *1. As discussed above, an adverse possessor is entitled to claim a dominant identity in its entirety, even if she only actually makes use of a part of it.

154. *Liston*, 1997 WL 467327, at *1.

155. It does not matter that the rationale for the presumption as applied toward fertile men does not apply to Liston; as discussed above, she is entitled to claim all the rights a true owner of maleness is entitled to. It is beyond the scope of this article, but interesting to note that this could also potentially expand the parental rights of infertile men.

156. *See e.g.*, Okla. Admin. Code 340:25-5-176.1 (West 2013) (noting that

Liston identified herself as Connor's parent to Connor and others,¹⁵⁷ she participated in his caregiving, and he resided with her and his biological mother as a family.¹⁵⁸ Ohio's holding-out statute also required that the father acknowledge paternity.¹⁵⁹ However, the acknowledgement could be made even after the commencement of a suit.¹⁶⁰ Therefore, Liston could have acknowledged herself as Connor's "natural father" subsequent to her adverse possession claim and still won visitation.

VI. CONCLUSION

In the CRT context, Professor Cheryl I. Harris identified the core characteristic of whiteness as a status property as "the legal legitimization" of white power and control, which reifies the racial status quo.¹⁶¹ This piece attempted to demonstrate that something similar might be said of heteronormative identities—the law's subordination of women and LGBT persons created a paradigm of dominant identities, and endowed their possessors with special rights, thus establishing maleness and femaleness as status property. The law continues to legitimate this structure, and so, has successfully preserved the heteronormative identity paradigm. Given the law's attempted preservation of that status quo, this article identified adverse possession as a means by which advocates could claim rights for LGBT individuals.

Oklahoma Child Support Services would not recognize objections to paternity where the parties "cohabited . . . engaged in sexual intercourse [or] the husband . . . held out the child as his own"). In general, hold-out provisions "provide for parentage when [a] child lives with a non-biological parent who holds the child out as his biological child. Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 816-17 (2004).

157. Wald, *supra* note 153.

158. Liston, 1997 WL 467327, at *1.

159. Ohio Rev. Code Ann. § 3111.02 (West 2014).

160. See Liston, 1997 WL 467327 *4 (quoting *In re Martin*, 626 N.E.2d 82 (Ohio 1994)) (noting that the parents of a child's natural father were only barred from asserting visitation or custody rights "until" the natural father legally acknowledged his paternity).

161. Harris, *supra* note 1, at 1721-24.