

# Breaking the Binary: Assessing the Impact of ‘Legal Sex’ on ‘Gendered Parenting’

Freya Cole Norton

## Abstract

‘Legal sex’, the formal registration and categorisation of sex, initiates a sex/gender binary discourse in the UK that limits substantive sex equality and gender diversity. This article, employing a Foucauldian legal feminist method, takes an alternative theoretical approach, and investigates the systems of power that produce and sustain the sex/gender reality which society accepts as truth. It explores the extent to which ‘legal sex’ contributes to the social construction of the sex/gender binary discourse. It examines the intersection between ‘legal sex’ and ‘gendered parenting’ to determine the effect of this system of power. It discusses decertification to evaluate a method of dismantling the system of power. This article posits that ‘legal sex’ initiates a ‘truth regime’ by creating a discourse that is accepted by society as the truth. This discourse informs and constrains the interactional practices of parents, resulting in ‘gendered parenting’, which entrenches and perpetuates the discourse. Decertification of ‘legal sex’, despite limitations, provides a potential means of dismantling the system of power by undermining the discourse and weakening the ‘mechanisms of control’. Ultimately, it replaces the discourse for one that promotes the intra-variation of sex and gender, and in doing so advances sex equality and gender diversity.

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## 1 Introduction

‘...I believe that one of the meanings of human existence – the source of human freedom – is never to accept anything as definitive, untouchable, obvious, or immobile. No aspect of reality should be allowed to become a definitive and inhuman law for us.’<sup>1</sup>

The procedure of formally registering a new-born’s sex, thus assigning a ‘legal sex’, creates a harmful sex/gender binary that is prevalent throughout western society and contributes to sex inequality and gender diversity oppression. This article considers the effect of ‘legal sex’ on the sex/gender discourse in society, the influence on (and of) ‘gendered parenting’, and the possibility of decertification.

This section will introduce the negative effects of ‘legal sex’ and ‘gendered parenting’ and the Foucauldian Legal Feminist method. Section two, employing Foucault and Lorber’s theories, explores the effect of ‘legal sex’ on the social construction of the sex/gender ‘truth regime’ and binary discourse. Section three investigates the influence of the ‘truth regime’ on the interactional practice of ‘gendered parenting’. The intersection between the ‘truth regime’ and West and Zimmerman’s concept of ‘doing gender’ is utilised to realise the relationship between the legal institution and parental interaction. The fourth section promotes decertification of ‘legal sex’ as a tool to dismantle the current ‘truth regime’ and ‘re-do gender’. This article will posit that ‘legal sex’ produces a ‘truth regime’ that sustains and entrenches a binary sex/gender discourse through mechanisms of constraint. The ‘truth regime’ informs and constrains the interactional practices of parents, coercing them into imposing the discourse onto

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<sup>1</sup> Michel Foucault, ‘Discussion of “Truth and Subjectivity”’ (Lecture at the UC Berkeley 1980) in Graham Burchell (tr), *About the Beginning of the Hermeneutics of the Self* (University of Chicago Press 2015) 93, 93.

their children via ‘gendered parenting’. Decertification would, it is argued, begin to dismantle the system of power by undermining the discourse and weakening the ‘mechanisms of control’, making space for a new discourse promoting sex and gender intra-variation.

### 1.1. The Negative Effects of ‘Legal Sex’ and ‘Gendered Parenting’

At first glance, ‘legal sex’ and ‘gendered parenting’ practices appear benign, but this article will argue they set in motion a discourse that negatively impacts sex equality and gender diversity.<sup>2</sup> Although equality has been formally achieved in statute, and there has been some increased understanding of gender diversity in society, certain practices continue to create a social structure that negatively impacts development, the ‘gender gap’ in achievement, occupational segregation, the gender pay gap, and violence against women and girls.<sup>3</sup> Research into the ‘gender gap’ in achievement has found that ‘...constructions of gender difference...produce different behaviours which impact on achievement.’<sup>4</sup> Occupational segregation, linked to the skills and achievement gap, is consciously felt by 51 per cent of people affected by stereotypes.<sup>5</sup> Research has found that only 5 per cent of children believed a plumber was a role ‘for girls’.<sup>6</sup> Girls, and subsequently women, are encouraged into female-dominated occupations which typically pay less than male-dominated roles.<sup>7</sup> This

<sup>2</sup> Josh L Boe and Rebecca J Woods, ‘Parents’ Influence on Infants’ Gender-Typed Toy Preferences’ (2018) 79(5) *Sex Roles* 358, 377.

<sup>3</sup> Leah Culhane and Andrew Bazeley, ‘Gender Stereotypes in Early Childhood: A Literature Review’ (*Fawcett Society*, 2019) <<https://www.fawcettsociety.org.uk/gender-stereotypes-in-early-childhood-a-literature-review>> accessed 27 May 2022.

<sup>4</sup> Department of Children, School and Families, *The Gender Agenda: Gender Issues in School – What Works to Improve Achievement for Boys and Girls* (DCFS 2009) 2 <<http://dera.ioe.ac.uk/id/eprint/9094>> accessed 27 May 2022.

<sup>5</sup> Culhane and Bazeley (n 3).

<sup>6</sup> *ibid* 29.

<sup>7</sup> Judith E Owen Blakemore, Sheri A Berenbaum and Lynn S Liben, *Gender*

contributes to the 15.5 per cent gender pay gap.<sup>8</sup> Children who are unable to express their gender diversity because of peer judgement may experience negative effects on their physical and psychological well-being due to repressed feelings and often subsequent mental health issues.<sup>9</sup> Boys with rigid beliefs, adhering to the discourse, are more likely to carry out violence against women and girls.<sup>10</sup> Childhood development is affected by stereotypical toy choices, resulting in differential skills being developed by girls and boys. ‘Feminine toys’ promote less technical skills, limiting optimal development and increasing sex differences.<sup>11</sup> Such social practices and the sex/gender discourse in the United Kingdom operate as a limiting factor to substantive equality and inhibit the flexibility needed for gender diversity to flourish.

## 1.2. Foucauldian Legal Feminist Method

This article, reinvigorating the ‘stalled revolution’ of substantive equality and gender diversity for the majority,<sup>12</sup> takes a Foucauldian Legal Feminist approach to the gaps in sex, gender, and law literature. Foucauldian and feminist scholars are allied in their common interest of analysing the operation of power, and its means of social control.<sup>13</sup>

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*Development* (Taylor & Francis Group 2008) 10.

<sup>8</sup> Office for National Statistics, ‘Gender Pay Gap in the UK: 2020’ (ONS 2020) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkhours/bulletins/genderpaygapintheuk/2020>> accessed 27 May 2022.

<sup>9</sup> Culhane and Bazeley (n 3).

<sup>10</sup> H. Luz McNaughton Reyes and others, ‘Gender Role Attitudes and Male Adolescent Dating Violence Perpetration: Normative Beliefs as Moderators’ (2016) 45(2) *Journal of Youth and Adolescence*; Women and Equalities Committee, *Sexual Harassment and Sexual Violence in Schools, Third Report of Session 2016–17* (September 2016) 156 <<https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/91/91.pdf>> accessed 27 May 2022.

<sup>11</sup> *ibid.*

<sup>12</sup> Karin A Martin, ‘William Wants a Doll. Can He Have One? Feminists, Child Care Advisors, and Gender-Neutral Child Rearing’ (2005) 19 *Gender & Society* 456, 458.

<sup>13</sup> Vanessa E Munro, ‘Legal Feminism and Foucault – a Critique of the Expulsion of

The third ‘wave’ of Foucauldian Feminist theory is employed, focusing on ‘...Foucault's assertion that prevailing categories of sex identity are the result of the transition to a modern regime of power and a proliferation of subjectifying discourses...’.<sup>14</sup> Foucault’s ‘truth regime’ is employed as an analytical framework and fused constructively with a feminist approach, with law and parenting as sites of struggle,<sup>15</sup> to conceptualise the forms of power that operate in legal and social institutions, in order to characterise contemporary sex/gender binary culture.<sup>16</sup>

## 2 ‘Legal Sex’ and the ‘Truth Regime’

‘Legal sex’ marks the primary site where harmful sex/gender norms are created and become consolidated into institutional and societal conceptions.<sup>17</sup> This section will consider the contribution of ‘legal sex’ to the sex/gender norms and its operation as the ‘...scaffolding in the conduct of modern [legal] life...’.<sup>18</sup>

### 2.1. ‘Legal Sex’

‘Legal sex’, the process of registering and categorising the sex of a new-born as female or male, rooted in the Victorian era, fails to keep up with contemporary concepts of sex and gender.<sup>19</sup> Since 1836, when

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Law’ (2001) 28(4) *Journal of Law and Society* 546, 549.

<sup>14</sup> Monique Deveaux, ‘Feminism and Empowerment: A Critical Reading of Foucault’ (1994) 20(2) *Feminist Studies* 223, 223.

<sup>15</sup> Lois McNay, *Foucault and Feminism: Power, Gender and the Self* (Polity Press 1992) 3.

<sup>16</sup> Annie Bunting, ‘Feminism, Foucault, and Law as Power/Knowledge’ (1992) 30 *Alta L Rev* 829.

<sup>17</sup> Tey Meadow, ‘“A Rose is a Rose”: On Producing Legal Gender Classifications’ (2010) 24(6) *Gender & Society* 814.

<sup>18</sup> *ibid* 820.

<sup>19</sup> Julie McCandless, ‘Reforming Birth Registration Law in England and Wales?’ (2017) 4 *Reproductive Biomedicine & Society Online* 52, 52.

the birth registration system was centralised and the registration of births was made compulsory,<sup>20</sup> ‘legal sex’ has become an unquestioned and essential legal practice. The sex, exclusively female or male, is determined at birth by a medical professional, who applies socially agreed-upon biological criteria,<sup>21</sup> namely external genitalia.<sup>22</sup> Following registration of the birth, the new-born’s sex is documented on the birth certificate and with the General Register Office.<sup>23</sup> ‘Legal sex’, referred to as the ‘breeder document’,<sup>24</sup> becomes the basis of all subsequent documentation and interactions that require authentication of sex. ‘Legal sex’ thus ‘...marks a point when identity becomes not just a psychological, personal or social phenomenon, but one that has standing in the eyes of the law.’<sup>25</sup> It determines the individuals’ legal legitimacy and their interactions with legal institutions. For instance, it regulates access to maternity rights, equality laws, and dictates retirement age. ‘Legal sex’ also operates as a universally accepted organising principle, determining physical positioning.<sup>26</sup> For instance, it determines the single-sex spaces an individual can access.<sup>27</sup> The state has failed to abandon registration and categorisation on the basis of sex, despite renouncing categorisation based on race, ethnicity, or class. This is arguably an egregious error, promoting the damaging belief that sex divisions are an essential, normal, and natural

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<sup>20</sup> Birth and Deaths Registration Act 1836.

<sup>21</sup> Candace West and Don H Zimmerman, ‘Doing Gender’ (1987) 1 *Gender & Society* 125, 127.

<sup>22</sup> Amy S Wharton, *The Sociology of Gender: An Introduction to Theory and Research* (John Wiley & Sons 2009) 19.

<sup>23</sup> ‘General Register Office’ *Gov.uk* <<https://www.gov.uk/general-register-office>> accessed 27 May 2022.

<sup>24</sup> Paisley Currah and Lisa Jean Moore, ‘“We Won’t Know Who You Are”’: Contesting Sex Designation in New York City Birth Certificates’ (2009) 24(3) *Hypatia* 113, 126.

<sup>25</sup> J Michael Ryan, ‘Born Again?: (Non-) Motivations to Alter Sex/Gender Identity Markers on Birth Certificates’ (2020) 29(3) *Journal of Gender Studies* 269, 271.

<sup>26</sup> Isabel Marcus, ‘Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York’ (1987) 42 *University of Miami Law Review* 55, 58.

<sup>27</sup> Judith Lorber, *Paradoxes of Gender* (Yale University Press 1994).

framework for modern life.<sup>28</sup>

## 2.2. The Social Construction and ‘Truth Regime’

‘Legal sex’ is considered by most as a mere formality, but it continues to dominate lives long after the initial registration.<sup>29</sup> It initiates a sex/gender ‘truth regime’, a form of knowledge and truth, that contributes to the socially constructed cultural pattern, practice, and perception of sex and gender.<sup>30</sup> The ‘truth regime’ is the ‘... “general politics” of truth . . . that is, the types of discourse [a society] accepts and makes function as true.’<sup>31</sup> ‘Legal sex’ initiates a discourse because the practice itself creates messages about sex/gender that are accepted by society. This discourse is chiselled into society through ‘...a system of ordered procedures for the production, regulation, distribution, circulation and functioning of statements...’.<sup>32</sup> ‘Legal sex’ has shaped reality by composing a truth that invests in the belief that sex is purely biology and, sex and gender are naturally and normatively dimorphic.<sup>33</sup> The discourse, based on biological essentialism, produces a reality for society by filtering the thoughts and conversations through this set of background suppositions, without individuals being fully aware of the process occurring.<sup>34</sup> The truth is sustained through circular systems of power that produce then continuously sustain the discourse.<sup>35</sup> Thus truth is then dispersed

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<sup>28</sup> Judith Lorber, ‘Using Gender to Undo Gender: A Feminist Degendering Movement’ (2000) 1(1) *Feminist Theory* 79, 80.

<sup>29</sup> Marcus (n 26) 57.

<sup>30</sup> *ibid.*

<sup>31</sup> Michel Foucault, ‘Truth and Power’ in Paul Rabinow (ed), *Essential Works of Foucault 1954–1984* (The New Press 2000) 131.

<sup>32</sup> Michel Foucault, ‘The Political Function of the Intellectual’ (1977) 17(13) *Radical Philosophy* 126, 133.

<sup>33</sup> David Allen Rubin, ‘“An Unnamed Blank That Craved a Name”: A Genealogy of Intersex as Gender’ (2012) 37(4) *Signs* 883, 889.

<sup>34</sup> Sharon Cowan, ‘“Gender Is No Substitute for Sex” A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity’ (2005) 13 *Feminist Legal Studies* 67.

<sup>35</sup> Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings*,

throughout society. At the interactional level, individuals wield some limited power over the truth, creating heterogeneous relations to power.<sup>36</sup>

It is argued, therefore, that the ‘truth regime’ contributes to the social construction of sex and gender.<sup>37</sup> Legal knowledge is the source of authority and legitimacy for maintenance of the sex/gender binary and provides individuals with appropriate means, ends and justifications for constructing themselves and environments in line with the binary.<sup>38</sup> Society’s beliefs are not inherent or natural, but the result of the discourse being ‘done to society’.<sup>39</sup> Sex/gender truth does not emerge from biological characteristics but from the legal and social processes.<sup>40</sup> ‘Legal sex’ launches the process that constructs sexed and gendered individuals, beginning with the legal assignment to a sex category.<sup>41</sup> The truth gives rise to and is built into major institutions, including family and economy.<sup>42</sup> Therefore, sex/gender can be said to be socially constructed through the process of ‘legal sex’ initiating a ‘truth regime’. Only by raising awareness and questioning the mechanism behind the dominant discourse is society able to deconstruct the socially created narrative. To fully express this ‘truth regime’, we follow Foucault’s theory and examine each element.<sup>43</sup>

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1972–1977 (Harvester Press 1980) 133.

<sup>36</sup> Lorna Weir, ‘The Concept of Truth Regime’ (2008) 33(2) *Canadian Journal of Sociology* 367, 385.

<sup>37</sup> Judith Lorber, ‘Shifting Paradigms and Challenging Categories’ (2006) 53(4) *Social Problems* 448.

<sup>38</sup> Kirsi Eräranta and Johanna Moisander, ‘Psychological Regimes of Truth and Father Identity: Challenges for Work/Life Integration’ (2011) 32 *Organization Studies* 509, 510.

<sup>39</sup> Davina Cooper, ‘Beyond the Current Gender Wars’ (2019) 25(4) *IPPR Progressive Review* 393.

<sup>40</sup> Judith Lorber, ‘Seeing Is Believing: Biology as Ideology’ (1993) 7 *Gender & Society* 568.

<sup>41</sup> Wharton (n 22) 21.

<sup>42</sup> Wharton (n 22) 13.

<sup>43</sup> Daniele Lorenzini, ‘What is a “Regime of Truth”?’ (2015) 1(1) *Le Foucauldien* 1, 2.



### 2.2.1. ‘...(1) the types of discourse [society] harbors and causes to function as true...’<sup>44</sup>

‘Legal sex’ produces the dominant sex/gender discourse, controlled by the ‘truth regime’, that has power over the social world. The discourse is a conglomeration of narratives, concepts, and norms which govern society’s insight into the socially constructed reality. It produces and reinforces power. It is not merely a description but articulates norms which affect relationships, authority, and power relations.<sup>45</sup> Consequently, the discourse governs, controls, and regulates the perception of truth, and hence behaviour and thought. Put simply, the ‘...discourse simultaneously constitutes a truth about subjects, and constitutes subjects in terms of this truth regime.’<sup>46</sup> The intricacies of the discourse are detailed below.

The most widely accepted narrative is that assigned sex is essentially and entirely biological. The process of assigning a new-born as being exclusively female or male, based on biological criteria, underpins this narrative. It has been deeply ingrained and reinforced by scientists.<sup>47</sup> The development of scientific research on the differences between females and males has bolstered the biological approach to verifying and classifying sex. The coercive powers of the ‘truth regime’ support the perception that individuals have a ‘natural reality’,<sup>48</sup> and that we have a biological ‘essence’ that lives beyond the confines of social life.<sup>49</sup> Therefore, society accepts that ‘...one’s sex category presumes

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<sup>44</sup> *ibid.*

<sup>45</sup> Charles Taylor, ‘Foucault on Freedom and Truth’ (1984) 12(2) *Political Theory* 152.

<sup>46</sup> Wendy Brown, ‘Power After Foucault’ in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press 2008) 71.

<sup>47</sup> Lorber, ‘Using Gender to Undo Gender’ (n 28) 83.

<sup>48</sup> Suzanne J Kessler and Wendy McKenna, ‘Toward a Theory of Gender’ in Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Taylor & Francis Group 2006) 122.

<sup>49</sup> Diane Richardson, ‘Conceptualising Gender’ in Victoria Robinson and Diane Richardson (eds), *Introducing Gender & Women’s Studies* (4th edn, Macmillan

one’s sex...’. This is difficult to escape given its unanimous acceptance, thus sustaining the ‘truth regime’.<sup>50</sup>

Next is the narrative that ‘...only two biological sexes exist and...all people fit neatly into either the category male or female.’<sup>51</sup> This conceptualises sex as binary and takes the polarised view that there is ‘one sex in everybody’.<sup>52</sup> It asserts that each individual must be assigned, categorised, and organised into one of the two mutually exclusive ‘legal sexes’.<sup>53</sup> It does not acknowledge or recognise intersex or non-binary persons.<sup>54</sup> While transgender individuals can swap their sex category through the Gender Recognition Act 2004, this does not interrupt but rather maintains and perpetuates the binary categories. The cis-centric narrative, that gender is directly linked to sex, advances the belief that gender corresponds to, and is the cultural and social interpretation of, biological sex.<sup>55</sup> Sex acts as the framework on which gender is built. This presumes that biologically sexed females will identify as women and inevitably develop feminine characteristics.<sup>56</sup> The female body, born with the biological ability to carry a child, will link directly to women having maternal nurturing instincts.<sup>57</sup> Transgender individuals do not confront this narrative; instead, as they change their legal and external biological sex criteria

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International Higher Education 2015) 8, 11.

<sup>50</sup> West and Zimmerman, ‘Doing Gender’ (n 21) 127.

<sup>51</sup> Julie A Greenberg, ‘Defining Male and Female: Intersexuality and the Collision between Law and Biology’ (1999) 41 *Ariz L Rev* 265, 275.

<sup>52</sup> Richardson (n 49) 8.

<sup>53</sup> Betsy Lucal, ‘What It Means to Be Gendered Me: Life on the Boundaries of a Dichotomous Gender System’ (1999) 13(6) *Gender & Society* 781, 783.

<sup>54</sup> Cowan (n 34) 87.

<sup>55</sup> Louise Richardson-Self, ‘“There Are Only Two Genders – Male and Female...” An Analysis of Online Responses to Tasmania Removing “Gender” from Birth Certificates’ (2020) 1(1) *International Journal of Gender, Sexuality and Law* 296, 297.

<sup>56</sup> Thekla Morgenroth and Michelle K Ryan, ‘The Effects of Gender Trouble: An Integrative Theoretical Framework of the Perpetuation and Disruption of the Gender/Sex Binary’ (2021) 16(6) *Perspectives on Psychological Science* 1113.

<sup>57</sup> Lorber, ‘Using Gender to Undo Gender’ (n 28) 84.

to match their gender, they reaffirm the link.<sup>58</sup> The belief that ‘legal sex’ reflects the individual’s genuine gender further supports the binary ‘truth regime’.<sup>59</sup>

The most harmful and persistent narrative is that there is a hierarchy between the sexes. This belief is partly based on the belief that the categories are distinguished by opposite traits. This ensures the differences are reiterated and reaffirmed in subcultural situations where there is contact between the sexes.<sup>60</sup> The social order has seen some improvement — for example, being female no longer deprives the right to vote,<sup>61</sup> own property,<sup>62</sup> and benefits from statutory equal pay.<sup>63</sup> Nevertheless, the female category continues to be devalued.<sup>64</sup> The discourse and ‘truth regime’ support this division through subordination. For instance, the narrative that gender is directly linked to sex sees biological females being encouraged to display nurturing traits. Then, women are regarded as better suited to remain at home with children, resulting in women having a lower earning capacity and becoming dependent on their partner. Sex markers act as a privileging mechanism for men while being a source of patriarchal dominance and control over women.<sup>65</sup>

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<sup>58</sup> Gender Recognition Act 2004

<sup>59</sup> Richard Kohler, Alecs Recher and Julia Ehrt, ‘Legal Recognition in Europe: Toolkit’ (2013) *Transgender Equality Network* 1, 8.

<sup>60</sup> Laurel Westbrook and Kristen Schilt, ‘Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System’ (2014) 28(1) *Gender & Society* 32, 37.

<sup>61</sup> Representation of the People Act 1918.

<sup>62</sup> The Law of Property Act 1922.

<sup>63</sup> Equal Pay Act 1970.

<sup>64</sup> Lorber, *Paradoxes of Gender* (n 27) 61.

<sup>65</sup> Marcus (n 26) 61.

### 2.2.2. ‘...(2) the mechanisms and instances which enable one to distinguish true from false statements...’<sup>66</sup>

These ‘mechanisms of control’ enforce the discourse. The state wields ‘disciplinary power’, a series of techniques by which the individuals and their actions are controlled through methods of coercion.<sup>67</sup> ‘Legal sex’ creates a bureaucratic ‘disciplinary power’ which operates as ‘...a machine for creating and sustaining a power-relation independent of the person who exercises it...’.<sup>68</sup> At this stage the power moves top to bottom.<sup>69</sup> The ‘mechanism and instances’ are made up of three elements: surveillance, normalisation and examination.

Legal sex categories can be regarded as a ‘metric for bureaucratic surveillance’.<sup>70</sup> Surveillance is a ‘calculated gaze’ whereby the state puts the sex/gender behaviour of individuals under a ‘microscope of conduct’ through constant observation. It is ‘...a mechanism that coerces by means of observation...the means of coercion make those on whom they are applied clearly visible.’<sup>71</sup> ‘Legal sex’ operates as a ‘mechanism of control’ because it arranges individuals, by requiring registration on the General Register, to ensure continuous visibility and enable the state to persistently observe the sex of individuals.<sup>72</sup> Surveillance can occur on a more localised level when, for example, an individual is required to prove eligibility for access to single-sex spaces such as sports teams or refuges, and to prove entitlement to state services, for instance sex-specific hospital wards or pensions.<sup>73</sup>

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<sup>66</sup> Lorenzini (n 43) 2.

<sup>67</sup> Michel Foucault, *Discipline and Punish: The Birth of Prison* (Alan Sheridan tr, Pantheon Books 1977).

<sup>68</sup> *ibid* 201.

<sup>69</sup> Johanna Oksala, *How to Read Foucault* (Granta Books 2012).

<sup>70</sup> Meadow (n 17) 831.

<sup>71</sup> Foucault, *Discipline and Punish* (n 67) 170.

<sup>72</sup> ‘Research Your Family History Using the General Register Office’ *Gov.uk* <<https://www.gov.uk/research-family-history>> accessed 28 May 2022.

<sup>73</sup> Davina Cooper, Emily Grabham and Flora Renz, ‘Introduction to the Special Issue

Legal and social agents, who have legitimacy bestowed by the legal institution, are empowered to observe the individual by requiring proof of ‘legal sex’, usually a birth certificate. The individual is observed to ensure their adherence to the discourse, based on their ‘legal sex’, is being carried out successfully.

‘Legal sex’ has been normalised, it is argued, through repeated enactment, as an essential, inevitable, and unquestioned practice of the legal and social order.<sup>74</sup> Normalisation — the construction of an idealised norm of conduct — is the process by which discourses, and associated behaviours come to be seen as ‘normal’. Observation is at the root of normalisation because judgements of individuals are based on their observed adherence to norms. The individual is then judged, put into a hierarchical system, and marked as normal or abnormal.<sup>75</sup> ‘Legal sex’ has become ‘normal’ and essential to society’s functioning through constant enactment. Individuals are divided into two mutually exclusive categories and constituted in terms of the discourse, resulting in individuals repeatedly behaving according to predetermined appropriate norms.<sup>76</sup> These behaviours, including registering and categorising ‘legal sex’, are repeated over and over, to become habitual and ‘normal’. The perceived normality is further ingrained by the consistent importance of ‘legal sex’ in the legal field, for access to rights, privileges, obligations, and resources.<sup>77</sup> Normalisation is abetted by sex being utilised as the primary organisational principle arranging education, sport, marriage, and parenthood.<sup>78</sup> Over time, it is argued, the repetition of ‘legal sex’ and

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on the Future of Legal Gender: Exploring the Feminist Politics of Decertification’ (2020) 10(2) *feminists@law* 5  
 <<https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/937>> accessed 28 May 2020.

<sup>74</sup> Dianna Taylor, ‘Normativity and Normalization’ (2009) *Foucault Studies* 45, 47.

<sup>75</sup> Foucault, *Discipline and Punish* (n 67).

<sup>76</sup> Taylor (n 74).

<sup>77</sup> David Cruz, ‘Disestablishing Sex and Gender’ (2004) 2 *Dukeminier Awards: Best Sexual Orientation Law Review* 253, 263.

<sup>78</sup> Wharton (n 22) 10.

associated behaviours have become embedded in society, to the extent that individuals cannot see past this ‘normal’ practice. Normalisation has thus become a prominent instrument of power.<sup>79</sup>

Examination of ‘legal sex’ and associated behaviours involves the scrutinisation and grading of individuals.<sup>80</sup> Examination combines the ‘mechanisms of control’ to place individuals under a ‘normalising gaze’, a form of observation that facilitates the qualification, classification and subsequent punishment or rewarding of behaviour.<sup>81</sup> The purpose is to determine whether an intervention, sanction or reward is appropriate. The normalisation of ‘legal sex’ means that an individual’s sex category can be relevant in a plethora of situations, and the individual’s performance, based on the discourse relevant to their sex, can be subjected to evaluation.<sup>82</sup> Examination has three actions. First the individual is made visible, a sign of subordination to the examining body, through the General Register Office and birth certificates. Second, it brings individuals to the ‘field of documentation’ and allows the individual’s performance to be tracked and compared to the norm. The registration of sex enters individuals to the ‘field of documentation’ where their adherence to the discourse can be compared to their sex category. Third, the process makes each individual a ‘case’; an individual case is then classified as to be rewarded, corrected, punished, or excluded for the behaviour.<sup>83</sup> As I will examine in the next section, the individual can face punishment if they fail to meet the discourse, for example if their gender does not match their registered sex. These ‘mechanisms of control’ arguably show that ‘[t]he individual is...a reality fabricated by this specific technology of power that I have called “discipline”’.<sup>84</sup>

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<sup>79</sup> Foucault, *Discipline and Punish* (n 67).

<sup>80</sup> Oksala (n 69).

<sup>81</sup> *ibid* 184.

<sup>82</sup> West and Zimmerman, ‘Doing Gender’ (n 21) 139.

<sup>83</sup> Foucault, *Discipline and Punish* (n 67) 191.

<sup>84</sup> *ibid* 194.

### 2.2.3. ‘...(3) the way in which each is sanctioned...’<sup>85</sup>

If, upon examination, an individual falls outside of the normalised discourse, the state has been said to undertake the ‘art of punishing’.<sup>86</sup> The purpose of the sex/gender ‘truth regime’ is to regulate the thoughts and behaviour of individuals and to punish those who transgress.<sup>87</sup> This punishment is corrective, serving to enforce the ‘truth regime’ by ordering individuals to meet the models of thought and behaviour. Individuals are sanctioned by two means: legal invalidity and social unintelligibility. Legal invalidity occurs when an individual identifies outside the discourse. For example, an intersex individual is unable to be legally recognised as intersex and instead has to legally assert themselves as female or male,<sup>88</sup> forcing them to place themselves as a ‘site of truth to be mastered’.<sup>89</sup> If the individual refuses to be mastered, a ‘de-subjugation of the subject’ takes place.<sup>90</sup> This makes access and involvement in the legal system difficult — for instance, basic transactions like proving identity for a passport become traumatic events.<sup>91</sup> Social unintelligibility can be said to occur when individuals face interactional repercussions, like misattribution.<sup>92</sup> Individuals are scrutinised in daily situations, including when presenting identity papers.<sup>93</sup> In these situations, they face being called

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<sup>85</sup> Lorenzini (n 43) 2.

<sup>86</sup> Foucault, *Discipline and Punish* (n 67).

<sup>87</sup> Dean Spade, ‘Mutilating Gender’ in Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Taylor & Francis 2006) 315, 459.

<sup>88</sup> Nikoletta Pikramenou, *Intersex Rights: Living Between Sexes* (Springer Nature 2019) 61.

<sup>89</sup> Riki Anne Wilchins, ‘What Does It Cost to Tell the Truth’ in Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Taylor & Francis 2006) 547, 549.

<sup>90</sup> Michel Foucault, ‘What Is Critique?’ in Sylvere Lotringer and Lysa Hochroth (eds), *The Politics of Truth* (Lysa Hochroth tr, Semiotext 1997) 32.

<sup>91</sup> Kohler, Recher and Ehart (n 59) 8.

<sup>92</sup> Lucal (n 53) 785.

<sup>93</sup> Lena Holzer, ‘Sexually Dimorphic Bodies: A Production of Birth Certificates’ (2019) 45(1) *A Fem LJ* 91.

to account and sanctioned through social dislocation, harassment and exclusion.<sup>94</sup> Individuals are thus unlikely to resist the ‘truth regime’, because rebels can be publicly penalised.<sup>95</sup>

**2.2.4. ‘...(4) the techniques and procedures which are valorised for obtaining the truth...’ and (5) ‘...the status of those who are charged with saying what counts as true...’<sup>96</sup>**

The technique first valorised for obtaining the truth is the application of the predetermined set of biological traits. Scientists, who have classified certain traits as the sex criteria, and delivering physicians, who apply these criteria, are designated the status of determining the ‘true’ sex of the new-born.<sup>97</sup> They are held in high esteem, being in a position of knowledge and power. Later in life, the documentation holding the sex marker is valorised for holding the truth. Legal agents are charged with obtaining the truth about an individual in necessary situations. For example, entering a women-only refuge would require an agent to check the documentation to establish female sex. In cases of confusion over the true sex of an individual, the courts become valorised for obtaining the truth. In *W v W*, to determine the validity of a marriage, the court decided whether an intersex individual was female or male, based on their own biological criteria.<sup>98</sup> Notably the individual is not valorised for obtaining their own truth, these decisions are made on their behalf by powerful authorities.

‘Legal sex’ contributes to the formulation and enforcement of the

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<sup>94</sup> Lucal (n 53) 785.

<sup>95</sup> Lorber, *Paradoxes of Gender* (n 27) 10.

<sup>96</sup> Lorenzini (n 43) 2.

<sup>97</sup> Heath Fogg Davis, *Beyond Trans: Does Gender Matter?* (University of New York Press 2018) 127.

<sup>98</sup> *W v W* [2001] Fam. 111, [2001] 2 WLR 674.



harmful sex/gender discourse of the ‘truth regime’ in the legal and social sphere. It has been argued that ‘...the coupling of a series of practices with a truth regime forms an operative knowledge-power system (dispositif) which effectively inscribes in the real something that does not exist...’<sup>99</sup> This regime does not operate in a vacuum but is arguably dispersed throughout society. Accordingly, ‘legal sex’ is now contextualised with reference to parenting.

### 3 The ‘Truth Regime’ and ‘Gendered Parenting’

When ‘...treated as a “real force” that operates in the web of social connection, the law can embed an idea of gender that crosses the “limits of this representation or reproduction”’.<sup>100</sup> This section explores the scarcely researched intersection between the ‘truth regime’ and the notion of ‘doing gender’, with ‘legal sex’ argued to form a facet of the ‘doing gender’ approach to parenting.<sup>101</sup>

#### 3.1. ‘Gendered Parenting’

‘Gendered parenting’ can be described as messages presented to children from parents about how they should behave to comply with the sex/gender discourse, and has been argued to have a powerful influence over thought and behaviour into adulthood.<sup>102</sup> Parents, from

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<sup>99</sup> Michel Foucault, ‘The Birth of Biopolitics: Lectures at the College de France 1978–1976’ (Lecture at the College de France, 1979) in Darrow Schecter (ed), *The Critique of Instrumental Reason from Weber to Habermas* (Continuum International Pub Group 2010) 173.

<sup>100</sup> Valeria Venditti, ‘Gender Kaleidoscope: Diffracting Legal Approaches to Reform Gender Binary’ (2020) 1 *International Journal of Gender, Sexuality and Law* 56, 72.

<sup>101</sup> James W Messerschmidt, “‘Doing Gender’”: The Impact and Future of a Salient Sociological Concept’ (2008) 23 *Gender & Society* 85, 86.

<sup>102</sup> Judi Mesman and Marleen G Groeneveld, ‘Gendered Parenting in Early Childhood: Subtle but Unmistakeable if You Know Where to Look’ (2018) 12 *Child Development Perspectives* 22, 22.

the announcement of ‘it’s “a girl”’ or ‘it’s “a boy”’, form expectations based on the discourse and begin to raise their children in differentiated ways.<sup>103</sup> The first experiences of a child are with their parents, making this role fundamental to development.<sup>104</sup> As the first source of information, they convey messages about appropriate sex/gender behaviours, attitudes and expectations.<sup>105</sup> By two years old, the child is conscious of the social relevance and stereotypes of their own and other sexes and genders.<sup>106</sup> Although there are advantages to ‘gendered parenting’, particularly that it prepares children for the reality of their current social environment and how to function to be accepted, the disadvantages are argued to outweigh these benefits.<sup>107</sup> The negatives, as discussed in the introduction, are vast. Personal identities and choices are constrained,<sup>108</sup> and opportunities in education, family, and careers are limited.<sup>109</sup> Parental interaction is, then, key to the child’s sex/gender development.<sup>110</sup>

Parents, as the most fundamental authority over their children, hold the power to rebel against the discourse. Despite this potential, displayed with the rise of second-wave feminism and gender-neutral parenting,<sup>111</sup> a ‘stalled revolution’ has occurred.<sup>112</sup> The times are changing, with explicit parenting practices of boys and girls resulting

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<sup>103</sup> Marcus (n 26) 59.

<sup>104</sup> Mesman and Groeneveld (n 102) 22.

<sup>105</sup> Culhane and Bazeley (n 3).

<sup>106</sup> Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7).

<sup>107</sup> Mesman and Groeneveld (n 102) 25.

<sup>108</sup> Susan M McHale, Ann C Crouter and Shawn D Whiteman, ‘The Family Contexts of Gender Development in Childhood and Adolescence’ (2003) 12(1) *Social Development* 125, 134.

<sup>109</sup> Alina Morawska, ‘The Effects of Gendered Parenting on Child Development Outcomes: A Systematic Review’ (2020) 23 *Clinical Child and Family Psychology Review* 553.

<sup>110</sup> Culhane and Bazeley (n 3).

<sup>111</sup> Elizabeth P Rahilly, ‘The Gender Binary Meets the Gender-Variant Child: Parents’ Negotiations with Childhood Gender Variance’ (2015) 29(3) *Gender & Society* 338, 340.

<sup>112</sup> Martin (n 12) 458.

in more similar experiences and opportunities,<sup>113</sup> yet this change is arguably not occurring quickly enough.<sup>114</sup> Implicit and unconscious practices remain prevalent,<sup>115</sup> practices so embedded in interactional processes that they are invisible to parents and children.<sup>116</sup> Even those who take on a gender-neutral approach, and resist the harmful discourse, can fall into the ‘gender trap’.<sup>117</sup> This trap causes even the most progressive parents to practice ‘gendered parenting’, often unconsciously, feeling ‘...accountable to a modicum of gender normativity in public...’,<sup>118</sup> and to the pull of peers.<sup>119</sup> Any parent fighting against the discourse must wage active and constant battle to protect their children from sex/gender binary expectations.<sup>120</sup>

### 3.2. The ‘Truth Regime’, ‘Doing Gender’ and Parenting

The ‘truth regime’, intersecting with the ‘doing gender’ approach, sets in motion ‘gendered parenting’ by informing and constraining parents’ perceptions of sex and gender. ‘Gendered parenting’ is thus an effect of the ‘truth regime’. The discourse acts as the material base upon which ‘gendered parenting’ is formed.<sup>121</sup> It is not a mere ideology but constitutes individuals in terms of the truth.<sup>122</sup> It operates as a scaffolding that the social and interactional elements of the ‘truth regime’ are built upon.<sup>123</sup> The social construction of the sex/gender

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<sup>113</sup> Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 1.

<sup>114</sup> Andrée Pomerleau and others, ‘Pink or Blue: Environmental Gender Stereotypes in the First Two Years of Life’ (1990) 22 *Sex Roles* 359, 366.

<sup>115</sup> Mesman and Groeneveld (n 102) 23.

<sup>116</sup> Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 5.

<sup>117</sup> Emily W Kane, *The Gender Trap: Parents and the Pitfalls of Raising Boys and Girls* (University of New York Press 2012) 149.

<sup>118</sup> Rahilly (n 111) 341.

<sup>119</sup> Lorber, *Paradoxes of Gender* (n 27) 32.

<sup>120</sup> *ibid* 57.

<sup>121</sup> *ibid* 56.

<sup>122</sup> Taylor (n 45).

<sup>123</sup> Candace West and Don H Zimmerman, ‘Accounting for Doing Gender’ (2009)

discourse, operating as a capillary, disseminates the truth into society and onto parents, who accept it as reality. The discourse, wielded as an instrument of power, is argued to govern insight into the sex/gender reality and oblige the parent to conform. The discourse initiates and encourages the repetition of the truth about the binary nature of sex and gender, which may be absorbed into parenting practices,<sup>124</sup> imposing a ‘law of truth’ onto them which they must then recognise in their children.<sup>125</sup> It then ‘...determines the obligations of individuals with regard to procedures of manifestation of truth...’.<sup>126</sup> Parents are then constructed, organised, and positioned by the ‘truth regime’ to meet the discourse, with the effect arguably that their thoughts and behaviours towards their children are in adherence to the discourse. This, therefore, links the legal and social institutional and parenting interactional levels, which legitimises social arrangements based on ‘legal sex’ and reproduces these arrangements within ‘gendered parenting’ interactions.<sup>127</sup>

Parents, having adopted the discourse into parenting practices, can be argued to contribute to the sustainment, entrenchment, and extension of the ‘truth regime’ by producing rituals of truth. The ‘truth regime’, intersecting with ‘doing gender’, informs the interactional practices of parents. ‘Doing gender’, the social doing, involves ‘...interactional portrayals of what we would like to convey about sexual natures, using conventionalised gestures.’<sup>128</sup> The interactional context sets the stage for depictions of the discourse. The discourse conveys information and provides guidelines on how to raise the child.<sup>129</sup> The

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23(1) *Gender & Society* 112, 115.

<sup>124</sup> Gundula Ludwig, and Stefanie Wohl, ‘Governmentality and Gender: Current Transformations of Gender Regimes Revisited from a Foucauldian Perspective’ (ECPR Conference on Gender and Politics, 2009).

<sup>125</sup> Michel Foucault, ‘The Subject and Power’ (1982) 8(4) *Critical Inquiry* 777, 781.

<sup>126</sup> Michel Foucault, *On the Government of Living: Lectures at the Collège de France 1979–1980* (Graham Burchell tr, Palgrave Macmillan 2014) 93.

<sup>127</sup> West and Zimmerman, ‘Doing Gender’ (n 21) 126.

<sup>128</sup> *ibid* 130.

<sup>129</sup> Wharton (n 22) 123.

requirement for parents to adopt the discourse generates these interactional practices and rituals of truth by the actualisation of truth through parenting practices.<sup>130</sup> Parents are not merely passive conduits nor free agents, but a combination.<sup>131</sup> They hold the power to induce and extend the ‘truth regime’ but have to operate within the confines of the discourse. Therefore, parents are agents of socialisation. This power is utilised to construct and enact parenting methods, materialising as the performance of ‘gendered parenting’. The constant performance of the discourse through ‘naturalised scripts’ becomes the primary source of an infant’s knowledge.<sup>132</sup> The child learns, through these interactions, the appropriate expectations, characteristics, and behaviours associated with being born ‘a girl’ or ‘a boy’.<sup>133</sup> Parents, thus, ‘do gender’ by reproducing the ‘truth regime’ through interactions with their children.<sup>134</sup> This can contribute to the circular system of power and represents a recrudescence effect between the legal institution, the social institution, and the social construction of sex and gender.<sup>135</sup> ‘Gendered parenting’, a ‘truth effect’ of the discourse,<sup>136</sup> is argued to ‘...simultaneously sustain, reproduce, and render legitimate the institutional arrangements that are based on sex category.’<sup>137</sup>

### 3.3. ‘Gendered Parenting’ Practices

‘Doing gender’, pursuant to the ‘truth regime’, is evident through parenting practices. These early parenting practices set in motion

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<sup>130</sup> Michel Foucault, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice* (University of Chicago Press 2014).

<sup>131</sup> Kane (n 117) 149.

<sup>132</sup> Wharton (n 22) 90.

<sup>133</sup> Richardson (n 49) 3.

<sup>134</sup> Kane (n 117) 149.

<sup>135</sup> Lorber, ‘Using Gender to Undo Gender’ (n 28) 83.

<sup>136</sup> Marianne W Jørgensen and Louise J Phillips, *Discourse Analysis as Theory and Method* (Sage Publications 2008) 14.

<sup>137</sup> West and Zimmerman, ‘Doing Gender’ (n 21) 146.

‘lifelong messages’ about sex and gender.<sup>138</sup> Two examples of mechanisms of gender socialisation by which parents impose the dominant discourse upon their children are discussed below.<sup>139</sup> Within these parenting practices each element of the discourse of the truth regime, detailed in the previous section, is evident.

Parents, by creating a gendered world for their children, undertake sex/gender differentiated parenting through channelling.<sup>140</sup> As the gatekeepers to the world, they have the power to shape their children to meet typical traits and behaviours. Creating differential environments has a direct impact on the child’s perception and development of sex/gender specific skills. Channelling takes many forms, including the naming, dressing, and room décor for the newborn. Names are highly gendered,<sup>141</sup> and the conspicuous use of blues and pinks in clothing makes it impossible not to identify the sex, both practices making the child’s sex instantly visible to society.<sup>142</sup> Age-old colour schemes are also evident in children’s bedrooms.<sup>143</sup> By the age of three or four, parents can begin channelling their children through gender specific activities, for instance boys may play football and girls may participate in ballet.<sup>144</sup> The most researched area of channelling/shaping has been the influence of parent-purchased toys. Toys are an integral element of child development sending explicit and implicit cues for the child’s sex/gender evolution. Girls can be restricted to domestic items, dolls, and dress up.<sup>145</sup> Boys are often

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<sup>138</sup> Boe and Woods (n 2) 369.

<sup>139</sup> Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 272.

<sup>140</sup> *ibid* 272.

<sup>141</sup> Denis K Burnham and Mary B Harris, ‘Effects of Real Gender and Labelled Gender on Adults’ Perceptions of Infants’ (1992) 153(2) *Journal of Genetic Psychology* 165, 173.

<sup>142</sup> Madeline Shakin, Debra Shakin and Sarah Hall Sternglanz, ‘Infant Clothing: Sex Labelling for Strangers’ (1985) 12(9–10) *Sex Roles* 955.

<sup>143</sup> Culhane and Bazeley (n 3).

<sup>144</sup> Burnham and Harris (n 141) 165.

<sup>145</sup> Judith E Owen Blakemore and Renee E Centers, ‘Characteristics of Boys’ and Girls’ Toys’ (2005) 53(9–10) *Sex Roles* 619, 620.

encouraged to play with vehicles, guns, and construction sets.<sup>146</sup> The creation of a gendered world encourages a child's development to align with the discourse. Channelling or shaping is a practice that sustains the discourse because '...rigid gender-typing reinforces a binary in which boys and girls are different, and it creates a power structure...' where girls can be perceived as inferior to boys.<sup>147</sup>

Differential treatment, that is, the distinct interactions parents have with children of different sexes,<sup>148</sup> is visible in a variety of situations, including initial expectations, interactions involving play, socialisation of emotion, and discipline. The initial expectation parents have of their infants can differ based on their sex, despite the absence of any characteristics at this stage.<sup>149</sup> Male new-borns are perceived as larger and stronger while female infants are seen as gentle and soft.<sup>150</sup> As the child grows, there is evidence of differential interaction during play.<sup>151</sup> Girls can be rewarded for playing with 'feminine' toys, and boys may face a punitive reaction to cross-gender play.<sup>152</sup> The socialisation of emotion, even in infancy, differs.<sup>153</sup> Girls are encouraged to show and discuss emotion, while boys can be discouraged from doing the same.<sup>154</sup> Discipline is also often a site of difference,<sup>155</sup> as parents may be more harsh and more likely to use physical punishment on boys

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<sup>146</sup> Judith E Owen Blakemore, 'Children's Beliefs About Violating Gender Norms: Boys Shouldn't Look Like Girls, and Girls Shouldn't Act Like Boys' (2003) 48 *Sex Roles* 411, 418.

<sup>147</sup> Boe and Woods (n 2) 369.

<sup>148</sup> Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 272.

<sup>149</sup> *ibid* 239.

<sup>150</sup> Katherine Hildebrandt Karraker, Dena Ann Vogel and Margaret Ann Lake, 'Parents' Gender-Stereotyped Perceptions of Newborns: The Eye of the Beholder Revisited' (1995) 33(9) *Sex Roles* 687, 693.

<sup>151</sup> Boe and Woods (n 2) 361.

<sup>152</sup> Judith H Langlois and Chris Downs, 'Mothers, Fathers, and Peers as Socialization Agents of Sex-Types Play Behaviors in Young Children' (1980) *Child Development* 1237, 1243.

<sup>153</sup> Leslie R Brody and Judith H Hall, 'Gender and Emotion in Context' (2008) 3 *Handbook of Emotions* 395, 405.

<sup>154</sup> *ibid*.

<sup>155</sup> Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 283.

than girls. This differential treatment of interactions reinforces the discourse and can, ‘...whether consciously or unconsciously guided, reinforce a strict gender binary, placing certain characteristics at extreme ends of a perceived continuum of feminine to masculine.’<sup>156</sup>

### 3.3.1. ‘...the mechanisms and instances which enable one to distinguish true from false statements...’<sup>157</sup>

The ‘mechanism and instances’, the means by which the ‘truth regime’, intersecting with ‘doing gender’, is enforced, operate a ‘disciplinary power’ through decentralised and informal methods of coercion operated by peers. The ‘disciplinary power’ is decentralised and disseminated from the formal institution of ‘legal sex’ to all individuals. Therefore, any member of society can operate the ‘mechanisms of control’.<sup>158</sup> The legal institution is not needed to directly control behaviour,<sup>159</sup> because the mechanisms are operated in an interactional context. These informal methods of control can operate laterally among parents and apply a ‘constant pressure to conform’.<sup>160</sup> If parents fail to meet the discourse, then ‘mechanisms of control’, operated by their peers, can hold them to account.

Surveillance is undertaken by peers on ‘gendered parenting’ practices and interactions.<sup>161</sup> The ‘truth regime’ and ‘doing gender’ intersection actuates lateral peer surveillance because accountability to fellow parents is a fundamental feature of interactional and social practice.<sup>162</sup>

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<sup>156</sup> Boe and Woods (n 2) 360.

<sup>157</sup> Lorenzini (n 43) 2.

<sup>158</sup> Foucault, *Discipline and Punish* (n 67) 202.

<sup>159</sup> Angela C Henderson, Sandra M Harmon and Jeffrey Houser, ‘A New State of Surveillance? An Application of Michel Foucault to Modern Motherhood’ (2010) 7(3/4) *Surveillance & Society* 231, 236.

<sup>160</sup> Oksala (n 69).

<sup>161</sup> Foucault, *Power/Knowledge* (n 35) 104.

<sup>162</sup> West and Zimmerman, ‘Doing Gender’ (n 21) 137.



This represents a ‘carceral continuum’ that is disseminated but remains as powerful.<sup>163</sup> Parents are surveyed ‘...through interpersonal communication and observation, ranging anywhere from conversations...to a covert, silent monitoring...’.<sup>164</sup> This type of observation may become automatic and commonplace for parents and peers alike, and can be undertaken by any individual a parent comes into contact with. The parent is judged by the observations made, according to how well their behaviour meets the ‘truth regime’, which pressurises parents to adhere to the norms.

The knowledge of consistent surveillance means that parents may ‘internalise the gaze’. Parents begin to act as though they are being watched constantly, heightening self-awareness, and causing them to regulate their own behaviour.<sup>165</sup> Essentially, individuals who have been subject to the formal rules of ‘legal sex’ and the regulation of peer observation begin to internalise those rules. Individuals then partake in self-surveillance which is ‘...the attention one pays to one’s behaviour when facing the actuality or virtuality of an immediate or mediated observation...’.<sup>166</sup> Therefore, the relationship between the ‘truth regime’ and accountability results in the internalisation and re-enactment of the dominant sex/gender discourse. The normalisation of ‘gendered parenting’ acts as a further means of social control over parents.<sup>167</sup> ‘Gendered parenting’ has become normalised through consistent enactment and is ingrained into society; it is not only viewed as a set of prevailing norms but is seen as the natural order of things. Normalisation has made parenting practices homogeneous, making explicit the differences between normal parents who ‘do gender’ in accordance with the ‘truth regime’ and those who fail to, and are considered abnormal.<sup>168</sup> This disciplinary mechanism works

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<sup>163</sup> Henderson, Harmon and Houser (n 159) 235.

<sup>164</sup> *ibid* 231.

<sup>165</sup> *ibid* 235.

<sup>166</sup> Paulo Vaz and Fernanda Bruno, ‘Types of Self-Surveillance: From Abnormality to Individuals “At Risk”’ (2003) 1(3) *Surveillance & Society* 272, 273.

<sup>167</sup> Taylor (n 74) 46.

<sup>168</sup> David Murakami Wood, ‘Beyond the Panopticon? Foucault and Surveillance

by creating situations of ‘petty humiliation’.<sup>169</sup> This can instil a fearful paranoid behaviour where parents cannot stop comparing their practices and behaviour to the perceived norm. In doing so, parents may continue the self-control pattern, internalise the work of supervision, and ‘...begin to interrogate [them] “selves” to see if they are acceptably ‘normal’.’<sup>170</sup>

Examination marks the point at which individuals’ adherence to the ‘truth regime’ is judged based on their parenting.<sup>171</sup> Examination involves the judgement of a parent’s performance, and categorisation of it as either normal or requiring punishment, thereby linking surveillance to normalisation to form a situation where parents are simultaneously observed and evaluated.<sup>172</sup> When an individual becomes a parent, they enter the ‘field of documentation’ and become visible. The intersection between the ‘truth regime’ and ‘doing gender’ forms social interactions, meaning that parents are examined and accountable to their peers.<sup>173</sup> Peers may judge the parents based on the extent to which their parenting practice adheres to the discourse and, because sex is omnirelevant, examination can take place anywhere at any time.<sup>174</sup> The examination of behaviour determines whether the parent is rewarded or suffers being stigmatised, condemned, or criticised. This leads to social isolation and a sense of disconnection from society.<sup>175</sup> The result of this mechanism of coercion is that parental practices may be ‘...designed with an eye to

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Studies’ in Jeremy W Crampton and Stuart Elden (eds), *Space, Knowledge and Power: Foucault and Geography* (Routledge 2016) 247.

<sup>169</sup> Oksala (n 69).

<sup>170</sup> Anne Schwan and Stephen Shapiro, *How to Read Foucault’s Discipline and Punish* (Pluto Press 2011) 120.

<sup>171</sup> Oksala (n 69).

<sup>172</sup> West and Zimmerman, ‘Doing Gender’ (n 21) 139.

<sup>173</sup> BJ Risman, ‘Gender as a Social Structure: Theory Wrestling with Activism’ (2004) 18 *Gender & Society* 429, 430

<sup>174</sup> West and Zimmerman, ‘Doing Gender’ (n 21) 136.

<sup>175</sup> Lorber, *Paradoxes of Gender* (n 27) 30.

their accountability, that is, how they might look and how they might be characterized.’<sup>176</sup>

### 3.3.2. ‘...the way in which each is sanctioned...’<sup>177</sup>

If, after a parent’s parenting is examined, they do not fully realise the ‘truth regime’ or discourse, then the parent and child can be held accountable.<sup>178</sup> The ‘art of punishing’ arranges the behaviours that parents display into hierarchies to differentiate individuals who should be punished from those requiring rewards.<sup>179</sup> The discourse is ‘...enforced through informal sanctions of gender-inappropriate behaviour by peers and by formal punishment...’.<sup>180</sup> The formal sanctions are the reporting or referring the parent to more formal institutions. For instance, a parent failing to conform — evidenced through their child displaying ‘abnormal’ behaviour — can, in extreme circumstances, be reported to social services by peers. More commonly, informal sanctions include the interactional consequences of social dislocation for both parents and children. This is where they become removed from mainstream society and shunned by their peers.<sup>181</sup>

The ‘truth regime’, intersecting with the ‘doing gender’ approach, instigates and informs parental practices and coerces the practice of ‘gendered parenting’. Simultaneously ‘gendered parenting’ sustains, entrenches, and actualises the discourse as a socially accepted interactional practice. Therefore, as we contemplate reform, we must consider the need for change at both the institutional and social level of ‘legal sex’ and the interactional level of the discourse.

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<sup>176</sup> West and Zimmerman, ‘Doing Gender’ (n 21) 136.

<sup>177</sup> Lorenzini (n 43) 2.

<sup>178</sup> Wharton (n 22) 63.

<sup>179</sup> Foucault, *Discipline and Punish* (n 67).

<sup>180</sup> Lorber, *Paradoxes of Gender* (n 27) 32.

<sup>181</sup> Lorber, *Paradoxes of Gender* (n 27) 32.

## 4 Decertification of ‘Legal Sex’

The harmful nature of the sex/gender discourse drives demand to decertify ‘legal sex’ to facilitate the dismantling of the current ‘truth regime’, creating space for a more favourable discourse. Effectively, ‘[i]t is time to disestablish sex and gender.’<sup>182</sup>

Having identified the mechanisms through which the sex/gender binary is produced and ingrained in society, an alternative approach can be offered to disrupt the current system and contribute to the ‘feminist de-gendering movement’ by ‘envisioning a feminist utopia’.<sup>183</sup> To dismantle the current discourse, the underlying framework that generates and sustains the ‘truth regime’ must be broken down.<sup>184</sup> In turn, the practice of ‘gendered parenting’ could be attenuated, with a goal of creating a just society where ‘legal sex’ has much reduced legal and societal meaning. Dismantling the dichotomous discourse could help to remove sex stereotypes and create more space for gender diversity to flourish.<sup>185</sup> Although reform would not automatically reverse the harmful effects of the sex/gender binary, it is hoped that decertification would be the first step to breaking the binary.<sup>186</sup> In turn, the social interactions, particularly ‘gendered parenting’, would be ‘redone’. The potential effect of this is that a more favourable discourse would be initiated, and the state would be unable to force individuals into the formal and legal sex/gender edifice.

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<sup>182</sup> Cruz (n 77) 255.

<sup>183</sup> Risman (n 173) 446.

<sup>184</sup> Lila Braunschweig, ‘Abolishing Gender Registration: A Feminist Defence’ (2020) 1 *International Journal of Gender, Sexuality and Law* 76, 86.

<sup>185</sup> Lena Holzer, ‘Smashing the Binary? A New Era of Legal Gender Registration in the Yogyakarta Principles Plus 10’ (2020) 1 *International Journal of Gender, Sexuality and Law* 98, 123.

<sup>186</sup> Braunschweig (n 184) 92.

From a practical standpoint, reform would remove the legal requirement to register a new-born's sex on their birth certificates but birth, and sex, information would continue to be stored on the General Register. This aligns with the approach of the Committee on Women and Equality, who argued that '[t]he Government should be moving towards 'non-gendering' official records as a general principle and only recording gender where it is a relevant piece of information.'<sup>187</sup> Termed decertification,<sup>188</sup> this involves the legal institution and state stepping back from publicly assigning, registering, and categorising sex at birth.<sup>189</sup> Decertification removes the legal status of sex and the formally assigned aspect of personhood, verified by the state.<sup>190</sup> This active de-gendering requires interrupting the repeated presence of 'legal sex' on documentation, most importantly the birth certificate, and removing the presence of sex and gender from legal institutional regulations, which are usually unnecessary.<sup>191</sup> Maintaining the legal requirement for information to be registered with the General Register office is important in the event that an individual needs legal proof of their sex.<sup>192</sup> This would put sex/gender on par with other informal aspects of personhood, including race.<sup>193</sup> It would also mitigate objections to reform that feel the removal of 'legal sex' altogether is

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<sup>187</sup> Women and Equalities Committee, *Transgender Equality* (HL First Report of Session 2015–16, HC 390) <<https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>> accessed 28 May 2022.

<sup>188</sup> Davina Cooper, 'Diversifying, Abolishing, Equalising Gender...Can the Law Do All Three?' (The Future of Legal Gender, 22 August 2018) <<https://futureoflegalgender.kcl.ac.uk/2018/08/22/diversifying-abolishing-equalising-gender-can-the-law-do-all-three/#>> accessed 28 May 2022.

<sup>189</sup> Davina Cooper and Robyn Emerton, 'Pulling the Thread of Decertification: What Challenges Are Raised by The Proposal to Reform Legal Gender Status' (2020) 10(2) *feminists@law* 1, 2 <<https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/938>> 28 May 2022.

<sup>190</sup> Cooper, Grabham and Renz, 'Introduction to the Special Issue on the Future of Legal Gender' (n 73) 5.

<sup>191</sup> Braunschweig (n 184) 91.

<sup>192</sup> Holzer (n 185) 105.

<sup>193</sup> Cooper and Emerton, 'Pulling the Thread of Decertification' (n 189) 2.

too extreme. Essentially, the disestablishment, instead of complete abolition, would be an appropriate way forward.<sup>194</sup>

Support, and models, for decertification can be found in international jurisdictions. In 2019, Tasmania, a pioneer, introduced an opt-in system,<sup>195</sup> whereby birth certificates do not show the sex marker upon a new-born's birth certificate unless the parent or individual (once over 16) request it.<sup>196</sup> The sex continues to be recorded on the birth register.<sup>197</sup> Tasmania has, it may appear, accepted that the sex/gender binary is a socio-legal product rather than a natural state requiring codification. The recent nature of, and sparse literature on, this reform limits a more in-depth analysis. The German Federal Constitutional Court, in 2018, recognising the discriminatory nature of binary registration, held that parliament must either offer a third gender option or remove sex from documentation. Although Germany, unsurprisingly, chose the former option, this ruling signifies the court's readiness to accept the de-gendering of birth certificates.<sup>198</sup> At the international level, the Third International Intersex Forum declared that '...sex or gender should not be a category on birth certificates...'.<sup>199</sup> Recently, Principle 13 of the Yogyakarta Principles demanded that '[States should] end the registration of the sex and gender of the person in identity documents such as birth certificates...'.<sup>200</sup> These examples represent the demand and readiness

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<sup>194</sup> Cruz (n 77) 341.

<sup>195</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019.

<sup>196</sup> CL Quinan and others, 'Framing Gender Identity Registration Amidst National and International Developments: Introduction to "Bodies, Identities, and Gender Regimes: Human Rights and Legal Aspects of Gender Identity Registration"' (2020) 1 International Journal of Gender, Sexuality and Law 1, 19.

<sup>197</sup> Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 s 22.

<sup>198</sup> Braunschweig (n 184) 77.

<sup>199</sup> ILGA and ILGA Europe, *Third International Intersex Forum* (2013) <<https://www.ilga-europe.org/resources/news/latest-news/3rd-international-intersex-forum-concluded>> accessed 28 May 2022.

<sup>200</sup> Stefano Osella, "'De-Gendering' The Civil Status? A Public Law Problem' (2020) 18(2) IJCL 471, 472.

for decertification, and, Tasmania in particular, provides a model for reducing state control over ‘legal sex’.<sup>201</sup>

#### **4.1. Dismantling the ‘Truth Regime’ and ‘Redoing Gender’**

Decertification would begin the process of deconstructing the ‘truth regime’ by undermining the current discourse and weakening the ‘mechanisms and instances’ of control. The aim here is to produce a new ‘politics of truth’ whereby the current discourse no longer holds favour, and the mechanisms are not sufficient for constraining individuals. The battle for the truth is not the search for an ‘absolute truth’. Instead, it is the battle over ‘...the rules according to which the true and false are separated and specific effects of power are attached to the true...’, thereby detaching the power of truth from the operation of ‘legal sex’ registration.<sup>202</sup> Decertification would interrupt the circular system of power that gives rise to the current truth by disrupting the socially accepted reality.<sup>203</sup> This dismantling would not abolish the entrenched norms immediately given the long-lasting nature of such regimes. For example, fragments of the once powerful Christian Church ‘truth regime’ are still evident in the Sunday traditions of today.<sup>204</sup> Dismantling the ‘truth regime’ would leave behind remnants but this would not prevent the new discourse’s development.

The new ‘truth regime’, when intersecting with the ‘doing gender’ approach, would alter the information bestowed on parenting. It would free individuals whose competence as parents is hostage to the ‘doing’ of gender, modifying ‘gendered parenting’ practices to produce

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<sup>201</sup> Holzer (n 185) 104.

<sup>202</sup> Michel Foucault and Paul Rabinow, *The Foucault Reader: An Introduction to Foucault's Thought* (Penguin 1991) 75.

<sup>203</sup> Foucault, *Power/Knowledge* (n 35) 133.

<sup>204</sup> Norman Jackson and Pippa Carter, *Rethinking Organisational Behaviour: A Poststructuralist Framework* (Pearson Education Limited 2007) 109.

different interactional parenting methods.<sup>205</sup> In this sense, '[g]ender is not undone so much as redone.'<sup>206</sup> The 'redoing' of gender would reposition parents in relation to the new truth and disrupt the regulatory process of parenting.<sup>207</sup> Parents would take on the new discourse and set into motion the actualisation and normalisation of the new truth through revised interactional practices. Simultaneously, the replacement parenting practices would change the interactional norms and parents would cease to sustain or entrench the current 'truth regime'. Operating as agents of socialisation, they may then impose the new discourse onto their children. This would modify, as opposed to break, the 'doing gender' approach to the system.<sup>208</sup> The desired effect of this is the 'de-gendering of interaction', meaning that the form of interaction would not be dependent on the sex category of the individuals.<sup>209</sup> There would be no more state-endorsed cries of 'it's a girl' or 'boy'.<sup>210</sup> Ultimately, '...decertification symbolises the possibility of living and raising children beyond gender, while providing a practical and discursive support for those who refuse to accede to gender's terms.'<sup>211</sup>

## 4.2. Undermining the Discourse

The discourse marks a point at which the 'truth regime' can be undermined in order to constitute a new 'politics of truth'.<sup>212</sup> The discourse can act as '...a hindrance, a stumbling point of resistance and a starting point for an opposing strategy.'<sup>213</sup> The discourse thus

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<sup>205</sup> West and Zimmerman, 'Doing Gender' (n 21) 126.

<sup>206</sup> West and Zimmerman, 'Accounting for Doing Gender' (n 123) 118.

<sup>207</sup> Judith Butler, *Undoing Gender* (Psychology Press 2004) 43.

<sup>208</sup> Ryan (n 25).

<sup>209</sup> Wharton (n 22) 228.

<sup>210</sup> Cooper and Emerton, 'Pulling the Thread of Decertification' (n 189) 24.

<sup>211</sup> *ibid* 8.

<sup>212</sup> Michel Foucault, *The History of Sexuality: An Introduction* vol I (Robert Hurley tr, Pantheon 1978) 114.

<sup>213</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality* vol I (Penguin Books 1998) 100.



becomes the ideal site of resistance,<sup>214</sup> where the sex/gender ‘truth regime’ is fragile and possible to frustrate.<sup>215</sup> Decertification would create a new truth, or opposing strategy, that would undermine the current discourse. The new discourse would be altered to reflect the fact that sex and gender, although treated so by the legal, social, and scientific institutions, are not binary.<sup>216</sup> This would weaken the naturalisation of sex and gender-based differences.<sup>217</sup> It would also undermine the assumption that there is one dominant and one subordinate sex.<sup>218</sup> It would create space for sex and gender diversity to expand, challenging the belief there are only two categories.<sup>219</sup> The new discourse could also stop sex and gender from being seen as a legal status and characteristic. The female and male marker would be separate to gender development, separating the female from femininity.<sup>220</sup> In essence, the decertification of ‘legal sex’ would have a liberating effect because the essentialist truth of sex and gender would no longer have a legal basis.<sup>221</sup> By undermining the discourse, it may no longer have the ability to produce or transmit power and, therefore, would be mitigated in controlling society’s perception of reality. It could become ineffectual at constraining behaviours, thoughts, or interactions.

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<sup>214</sup> Jonathan Gaventa, ‘Power After Lukes: An Overview of Theories of Power Since Lukes and Their Application to Development’ (Participation Group, Institution of Development Studies, 2003) 1, 4 <[http://www.powercube.net/wp-content/uploads/2009/11/power\\_after\\_lukes.pdf](http://www.powercube.net/wp-content/uploads/2009/11/power_after_lukes.pdf)> 28 May 2022.

<sup>215</sup> Foucault, *The Will to Knowledge* (n 213) 100.

<sup>216</sup> Lorber, ‘Using Gender to Undo Gender’ (n 28) 82.

<sup>217</sup> Cooper and Emerton, ‘Pulling the Thread of Decertification’ (n 189) 8.

<sup>218</sup> Holzer (n 185) 101.

<sup>219</sup> *ibid* 112.

<sup>220</sup> Davina Cooper, ‘Bringing the Utopian Into Our Gender Politics’ (*Social Politics and Stuff*, 2015) <<https://davinascooper.wordpress.com/2015/01/25/bringing-the-utopian-into-our-gender-politics/>> accessed 28 May 2022.

<sup>221</sup> Andrea Büchler and Michelle Cottier, ‘Legal Gender Studies’ (2012) Dike.

### 4.3. Weakening the ‘Mechanisms of Control’

The ‘mechanisms and instances’ component would also be weakened by decertification because the ‘mechanisms of control’ would no longer be adequate to wield ‘disciplinary power’ successfully. ‘Disciplinary power’ operated over parents, specifically decentralised lateral mechanisms operated by peers, are weakened by the norms being altered and, therefore, the pressure to conform being reduced. The ‘truth regime’ is hence further dismantled by the inability of the system to sustain coercive power over society.

Resistance to surveillance, or ‘revolts against the gaze’,<sup>222</sup> would undermine the state’s ability to observe an individual’s sex category. The state may find it more difficult to put individuals under a ‘microscope of conduct’ because decertification of ‘legal sex’ would arrange individuals in a manner that obstructs constant observation. This new arrangement, namely the removal of sex from official documents, diminishes the relevance of sex for identification purposes and hence surveillance could be reduced.<sup>223</sup> Sex would be stored with the General Register Office, which would allow the state to monitor the population at a general level. However, this would not facilitate surveillance by agents of legal or social control in the day-to-day lives of individuals. Informal observation by peers would also be undermined because the sex category would be less visible. The subversion of the discourse further weakens the power of surveillance because the truth against which the individual is judged has altered. The ‘internalised gaze’ would also be modified to meet the new discourse. Surveillance, or the ‘calculated gaze’, is not altogether removed from society, but the standard to which behaviour is compared is revised. Without constant surveillance based on ‘legal sex’, and with a more liberal standard against which to judge

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<sup>222</sup> Felix Driver, ‘Power, Space, and the Body: A Critical Assessment of Foucault’s Discipline and Punish’ (1985) 3(4) *Environment and Planning D: Society and Space* 425, 441.

<sup>223</sup> Holzer (n 185) 104.

behaviour, the ‘truth regime’ would not be able to control the truth or individuals freed from the pressure to adhere to the discourse.

Normalisation would be weakened by the reform of ‘legal sex’ because the act of registering and categorising sex would no longer be a habitual practice and the normalised discourse would be destabilised. The current ‘truth regime’ would be replaced with a new normal. Decertification would prevent the entrenchment of the current discourse into society’s functioning, because ‘legal sex’ would no longer be essential or integral to legal or social life. The process of dividing individuals into two mutually exclusive groups, which initiates the discourse, would be made visible enough to be questioned. ‘Gendered parenting’ practices would be unsettled as the norms that have informed parents are changed and parents alter their practices to adhere to the new discourse. The new ‘normal’ standard of behaviour, informed by the new discourse, would become ingrained in society through constant enactment and performance. It would then be used to evaluate an individual’s behaviour. Certification, obliging the repetition of sex and gender across various situations, which has arguably helped to create both the legal institutional and social interactional norms, would be weakened to the extent that the ‘truth regime’ could wield impotent power.<sup>224</sup> In essence, ‘[e]liminating legal gender categories thus seems promising for the purpose of breaking with normative ascriptions about legitimate genders and [sex]...’<sup>225</sup>

Examination would be undermined. The visibility of sex categories would be concealed, and individuals would not enter the ‘field of documentation’. Therefore, examination, as a method of control, would be unable to coerce individuals into compliant behaviour. The discourse is currently ‘...the ground against which peers evaluate one

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<sup>224</sup> Davina Cooper and Flora Renz, ‘If the State Decertified Gender, What Might Happen to Its Meaning and Value?’ (2016) 43 *Journal of Law and Society* 483, 487.

<sup>225</sup> Holzer (n 185) 123.

another's conduct.'<sup>226</sup> The removal of 'legal sex' could make the individual's sex category invisible and consequently the examining body could not track the individual's performance. The sex category's importance, although required in limited situations, would be reduced. By making 'legal sex' imperceptible, the individual cannot become a 'case' where they are trained or corrected.<sup>227</sup> Therefore, parents no longer need to face sanctions, for instance social dislocation, or be trained to conform to 'gendered parenting' practices. Instead, they have more freedom. Decertification can thus reduce the policing of the discourse and supports sex/gender liberation.<sup>228</sup>

#### 4.4. The New Discourse

It is envisioned that the new discourse would involve the promotion of sex and gender as varying along a spectrum. It would involve the emancipation from state control such that society, especially parents, would be liberated from the constraints of the current discourse. The current 'truth regime' produces a binary discourse and does not acknowledge the intra-variability of sex or gender.<sup>229</sup>

The new discourse would recognise the complexity of individuals and conceptualise sex as '...plural, and as a spectrum, a field or intersecting spectra or continua.'<sup>230</sup> The possible combinations of genitalia, hormones, brain structures, bodies and mannerisms produce boundless varieties of sex in human beings.<sup>231</sup> It challenges the belief that birth means destiny and supports the notion that a sex/gender binary does not reflect reality.<sup>232</sup> Rather, male and female are two ends

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<sup>226</sup> West and Zimmerman, 'Accounting for Doing Gender' (n 123) 118.

<sup>227</sup> Foucault, *Discipline and Punish* (n 67).

<sup>228</sup> Holzer (n 185) 107.

<sup>229</sup> Cowan (n 34).

<sup>230</sup> Surya Monro, *Gender Politics: Citizenship, Activism and Sexual Diversity* (Pluto Press 2005) 36.

<sup>231</sup> Lorber, *Paradoxes of Gender* (n 27) 22.

<sup>232</sup> Greenberg (n 51) 275.

of the spectrum within which there is tremendous intra-group variation.<sup>233</sup> There is a great disparity between the biology of individuals, and ‘...on close inspection, absolute dimorphism disintegrates even at the level of basic biology. Chromosomes, hormones, the internal sex structures, the gonads, and the external genitalia all vary more than most people realize...’.<sup>234</sup> The individual’s sex is a mosaic — for example, androgens and oestrogen are not distinct sex hormones but instead vary in each individual.<sup>235</sup> Therefore, legal assignment of individuals based on genitalia is a major simplification. This signifies the need to change the legally and socially promoted, but scientifically erroneous, perspective of sex as a binary.<sup>236</sup>

There is a heterogeneity of gender identities that represent a diversity of expression beyond the simplified binary gender paradigm.<sup>237</sup> Individuals are not born, but taught to be, gendered. Gender, described as a kaleidoscope, is a ‘...relational, fluctuating, everchanging space that we inhabit, instead of essential and unchanging feature...’.<sup>238</sup> Gender is a spectrum with masculinity and femininity at opposing ends. These identities are not necessarily static, but can evolve, shift, and develop.<sup>239</sup> For example, the concept of ‘woman’ denies the multiplicity, complexity, and variation within this ‘category’.<sup>240</sup> Gender diversity is already recognised in a number of limited identities, including transgender, agender, and non-binary. However, under the new discourse the freedom of expression would be further encouraged, and diversity would be celebrated instead of tolerated.

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<sup>233</sup> Cruz (n 77) 259.

<sup>234</sup> Ann Fausto-Sterling, ‘The Five Sexes, Revisited’ (2000) 40(4) *Sciences* 18, 20.

<sup>235</sup> Janet Shibley Hyde and others, ‘The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary’ (2019) 74(2) *American Psychologist* 171, 174.

<sup>236</sup> Elizabeth M Saewyc, ‘Respecting Variations in Embodiment As Well As Gender: Beyond the Presumed “Binary” of Sex’ (2017) *Nursing Inquiry* 1.

<sup>237</sup> Cooper and Renz (n 224) 486.

<sup>238</sup> Venditti (n 100) 59.

<sup>239</sup> Cooper and Renz (n 224) 503.

<sup>240</sup> Lorber, *Paradoxes of Gender* (n 27) 5.

Parenting practices would teach diversity instead of binary. This allows individuals the freedom to shape their own identities or live without a gender label.<sup>241</sup> This article agrees that ‘...a utopia in which even gender polarisation has been so completely dismantled that...the distinction between male and female no longer organizes either the culture [or] the psyche’ is desirable.<sup>242</sup>

#### 4.5. Practical Implications

The practical implications of decertification are evident when proof of sex is needed for the state to determine rights and obligations or manage the population. However, the challenges of informalising sex are easily reworked and overcome when sex is treated as is any other informal element of personhood, such as race or sexuality.<sup>243</sup> ‘Legal sex’, displayed on the birth certificate, is used as a mechanism for managing and organising the population.<sup>244</sup> The presence of the category can determine state-enforced obligations, distribution of resources,<sup>245</sup> and dictates entry into single-sex spaces.<sup>246</sup> These include welfare benefits, maternity pay, pension age, and access to refuges. Critics are concerned that decertification would make division based on sex difficult and be detrimental to women’s safety in single-sex spaces.<sup>247</sup> However, the importance of ‘legal sex’ in these situations has diminished following reforms, for example the equalisation of pension age for women and men born after the 1960s, resulting in the ‘legal sex’ criteria no longer being essential for access to certain resources and spaces.<sup>248</sup> Even in situations where sex is still relevant,

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<sup>241</sup> Cooper and Emerton, ‘Pulling the Thread of Decertification’ (n 189) 13.

<sup>242</sup> Sandra Lipsitz Bem, ‘Defending *The Lenses of Gender*’ (1994) 5(1) *Psychological Inquiry* 97, 101.

<sup>243</sup> *ibid.*

<sup>244</sup> Ryan (n 25) 271.

<sup>245</sup> Currah and Moore (n 24) 116.

<sup>246</sup> Laura Greenfell and Anne Hewitt, ‘Gender Regulation: Restrictive, Facilitative or Transformative Laws’ (2012) 34 *Syd LR* 761.

<sup>247</sup> Cooper and Emerton, ‘Pulling the Thread of Decertification’ (n 189) 9.

<sup>248</sup> Women and Equalities Committee, *Transgender Equality* (n 187).

the General Register Office provides access to proof. ‘Legal sex’ is also a critical site for antidiscrimination law and affirmative action.<sup>249</sup> The Equality Act 2010 protects people on the grounds of sex discrimination, and section 159 legalises forms of affirmative action for those who have a ‘protected characteristic’. There are concerns that women could struggle to make claims under the Equality Act 2010 if sex was not marked on their birth certificates. However, decertification does not remove access to equality on the grounds of sex.<sup>250</sup> Sex would be treated like other ‘protected characteristics’ that are not recognised as a legal identity or subject to a precise legal definition, including disability and race.<sup>251</sup> It also does not pose a risk to affirmative action because it is rarely dependent on ‘legal sex’ but instead ‘...works independently of a personal status registration and thus legal gender.’<sup>252</sup> Decertification would mean that sex, a piece of personal information, does not make a functional difference to legal processes.<sup>253</sup>

## 5 Conclusion

The purpose of this article was to determine the effect ‘legal sex’ has had upon the creation of the sex/gender binary, and thus the influence it had over ‘gendered parenting’. And, whether decertification of ‘legal sex’ would break the binary system parents impose on their children. It has been argued that the archaic practice of registering and categorising ‘legal sex’ initiates a sex/gender ‘truth regime’ that, operating as a form of power, contributes to the social construction of sex and gender. ‘Legal sex’ fabricates a discourse that governs and regulates society’s insight into the ‘truth’ and is accepted as reality. ‘Mechanisms of control’ enforce the discourse and compel individuals

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<sup>249</sup> Cooper and Emerton, ‘Pulling the Thread of Decertification’ (n 189) 11.

<sup>250</sup> *ibid* 9.

<sup>251</sup> Susanne Lilian Gossli and Berit Volzmann, ‘Legal Gender Beyond the Binary’ (2019) 33(3) *IJLPF* 403, 420.

<sup>252</sup> *ibid*.

<sup>253</sup> Women and Equalities Committee, *Transgender Equality* (n 187).

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to conform. The practice of ‘gendered parenting’ is the inevitable result of the ‘truth regime’, intersecting with ‘doing gender’ to inform and compel the interactions of parents. The discourse, operating as an instrument of power, disseminates the truth and obligations to conform throughout society, especially to parents. Parents may actualise the discourse through conventionalised rituals of truth, which sustain and entrench the ‘truth regime’ further. The ‘mechanisms of control’ operate at a decentralised lateral level to exert ‘disciplinary power’ over parents, who fear social dislocation. As demonstrated in Tasmania, the decertification of ‘legal sex’ demonstrates the potential to dismantle the operation of the ‘truth regime’s’ power, by undermining the discourse and weakening the ‘mechanisms of control’. A new narrative, acknowledging the intra-variation of sex and gender, would be initiated by removing ‘legal sex’ and thus the messages it promotes. The ‘mechanisms of control’ could be weakened, by removing sex as a visible characteristic and scaling down the standard of accountability. This would dismantle the current ‘truth regime’, and hence ‘redo gender’, to ultimately break the binary system that parents impose on their children, arguably advancing sex equality and promoting gender diversity within society. Although decertification may feel like a far-off utopia for its advocates, this article seeks to place the consideration of decertification firmly into the debate by highlighting the operation of ‘legal sex’ and ‘gendered parenting’, and arguing that their effects are harmful