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## Identity and Form

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## Identity and Form

Jessica A. Clarke\*

*Recent controversies over identity claims have prompted questions about who should qualify for affirmative action, who counts as family, who is a man or a woman, and who is entitled to the benefits of U.S. citizenship. Commentators across the political spectrum have made calls to settle these debates with evidence of official designations on birth certificates, application forms, or other records. This move toward formalities seeks to transcend the usual divide between those who believe identities should be determined based on objective biological or social standards, and those who believe identities are a matter of individual choice. Yet legal scholars have often overlooked the role of formalities in identity determination doctrines. This Article identifies and describes the phenomenon of “formal identity,” in which the law recognizes those identities*

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*individuals claim for themselves by executing formalities. Drawing on Lon Fuller's classic work on the benefits of formality in commercial law contexts, it offers a theory explaining the appeal of formal identity. But it concludes that reformers should be skeptical of the concept. Formal identity may set traps for the unwary, eliminate space for subversive or marginal identities, and legitimize identity-based systems of inequality. Ultimately, this Article urges critical examination not merely of formal identity, but of the functions identity categories serve in the law.*

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## INTRODUCTION

Controversies over identity claims have commanded the attention of courts and the public in recent years. At oral argument in a 2013 Supreme Court case involving the validity of affirmative action, Chief Justice Roberts asked whether a person who is “one-eighth Hispanic” ought to “check the Hispanic box” on her application to the University of Texas.<sup>1</sup> In another case that term, the Supreme Court was asked to address whether a man who

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1. Transcript of Oral Argument at 32–33, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

renounced his custody rights via text message still counted as a “father.”<sup>2</sup> In 2013, a Utah district court held that cohabiting “sister wives” were not legally “wives” for purposes of Utah’s prohibition on bigamy.<sup>3</sup> Recently, those states that only allowed marriage between a man and a woman grappled with how to categorize transgender individuals.<sup>4</sup> And in the months leading up to the 2012 presidential election, President Barack Obama faced scrutiny over whether he was a “natural born citizen” eligible for the office.<sup>5</sup>

As these examples demonstrate, the law requires determinations of individual identity in a variety of contexts and across a range of categories, such as race, sex, family, and citizenship.<sup>6</sup> When identity disputes arise, a common move is to call for records like birth certificates, marriage licenses, application forms, or other documents to settle the issue.<sup>7</sup> These types of formalities may take on a special importance to individuals and the law, functioning not merely as evidence of identities, but as their conclusive proof.<sup>8</sup>

Consider the everyday importance of a marriage license and ceremony in constituting a marital union, adoption papers in creating a parent-child relationship, or a passport in establishing citizenship. A birth certificate may be considered the final word on a transgender individual’s sex, and a checkbox may be considered the answer to the question about a multiracial individual’s race. But while formalities are quintessential legal practices, legal scholarship has largely overlooked their role in determining race, sex, family, and citizenship.<sup>9</sup> Instead, debate on identity has navigated between two poles: the

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2. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013) (holding that an unwed biological father who never had custody of the child and abandoned the child prior to birth could not block an adoption under the Indian Child Welfare Act).

3. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1178 (D. Utah 2013) (holding that cohabiting “sister wives” and their husband were not engaged in bigamy because the husband had officially married only one of his wives).

4. *See, e.g., Radtke v. Misc. Drivers & Helpers Union*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (concluding, in a case challenging a marriage between a man and a transgender woman, that “it is logical” to determine a spouse’s sex based on the “‘designation appearing on [his or her] current birth certificate’”). Since this case was decided, Minnesota has legalized same-sex marriage. *See* MINN. STAT. § 517.01 (2014).

5. *See, e.g., Michael D. Shear, Citing ‘Silliness,’ Obama Shows Birth Certificate*, N.Y. TIMES, Apr. 28, 2011, at A1.

6. This Article analyzes race, sex, parentage, marriage, and citizenship rather than other identity categories because they provide the richest set of examples of controversies over formal identity. *See infra* notes 29–32 and accompanying text.

7. *See, e.g., supra* notes 1–5.

8. My focus here is on identities in the sense of demographic properties of individuals, particularly citizenship, family, sex, and race, not identification in the sense of verifying an individual’s unique personal identity for security purposes.

9. Though scholars have noted the importance of identity formalities in isolated contexts, no scholarship has offered a theory of formal identity. *See, e.g.,* ESTELLE LAU, PAPER FAMILIES: IDENTITY, IMMIGRATION ADMINISTRATION, AND CHINESE EXCLUSION (2006) (historical analysis of the role of documents in creating immigrant families during the era of the Chinese Exclusion Acts); Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 362 (2014) (examining the birth certificate); Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage*

idea that identities are (or should be) a matter of essential status versus the idea that they are (or should be) freely chosen.

This Article introduces the phenomenon of “formal identity”<sup>10</sup> to the legal literature, offers a positive theory explaining its appeal,<sup>11</sup> and identifies potential problems with the use of formalities to resolve contested claims to citizenship, family, sex, and race. This Article defines formal identity as the view that identity is conferred through the execution of formalities by individuals claiming identities for themselves.<sup>12</sup> It defines formalities as practices intended to confer status in the eyes of the law. Formalities may be documentary, like signing paperwork, or ceremonial, like saying “I do.” These practices do not simply reflect an underlying identity status; they create and constitute that status for legal purposes. They may also take on cultural significance.

This Article asks whether formal identity might expand the legal and social space to resist prevailing conceptions of identities. The question is relevant to issues such as whether the transgender rights movement should focus on urging governments to allow people to more easily change the sex designations on their birth certificates,<sup>13</sup> whether Native Americans should have to provide tribal enrollment numbers to qualify for affirmative action,<sup>14</sup> whether immigrants’ rights groups should advocate for expanding access to

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*System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 23–24 (2010) (noting that the debate over common law marriage is between formality and informality, among other theoretical distinctions); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 738–39 (2008) (describing the formalities of legal gender classifications and calling for their reduction). The work that comes closest to such an examination is Christopher A. Ford’s *Administering Identity: The Determination of Race in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1280–85 (1994). Ford, however, viewed legal classifications as reflective of biological, political, or social identities, not as constitutive of those identities. *Id.* at 1237–40. He therefore did not offer a theory of formal identity.

10. I do not mean “formal” in the sense of Platonic forms or the philosophy of legal formalism exemplified by *Lochner v. New York*, 198 U.S. 45 (1905), although formalities are related to both forms and formalism. See Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941). I discuss these distinctions further in Part I.C.

Much scholarship has considered abstract legal “forms” of identity but not concrete formalities. For example, the term “formal race” has been used to describe the Supreme Court’s color-blind ideology, but not the role of formalities in racial determinations. See, e.g., Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 38 (1991). Other scholars have used the term “formal” in the context of parenthood to mean traditional. See, e.g., Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 428 (2013) (defining formal parenthood as any “traditional” definition based on “status-based indicators such as biology, adoption, marriage, and the use of presumptions”). This Article employs a more specific concept of formality.

11. This theory draws from Lon Fuller’s classic work on the benefits of formality in commercial law contexts. Fuller, *supra* note 10. This Article’s title is a tribute to Fuller’s.

12. This Article does not include in its definition of formal identity those identities conferred by formalities executed by someone other than the individual laying claim to an identity, such as birth certificate race designations assigned by hospital staff. See *infra* note 129 and accompanying text.

13. See *infra* notes 324–48, 571–78, 598, 611, 618 and accompanying text.

14. See *infra* notes 392–402, 586–87, 598, 615 and accompanying text.

naturalization,<sup>15</sup> and whether reconceptualizing marriage and parenthood as nothing more than matters of formal registration would better accommodate new types of families.<sup>16</sup> This Article contributes to these debates by examining the limitations of social justice projects that seek to expand formal routes to legal identities. It argues that, while formal identity has significant appeal, it risks disadvantaging those without resources, conferring the power to define identities on bureaucratic processes, opening the door to discriminatory enforcement, forcing individuals to fit their lives into Procrustean categories, and legitimating exclusionary arrangements. This examination of formal identity not only reveals its stakes, but also forces reconsideration of the many functions identity categories serve in the law.

The formal model of identity responds to deficiencies in models that understand identity categories as ascriptive or elective. Ascriptive models determine identities based on certain biological or social standards considered to be objective. Elective models, by contrast, view identities as self-determined labels that each individual may freely adopt and change. For example, a particular race might be ascribed to an individual based on her appearance, or she might be free to choose her own racial identification.

Both ascriptive and elective definitions create problems for legal doctrines. Legal actors are skeptical of the accuracy and fairness of ascriptive definitions, and they are concerned about the potential for fraud and lack of administrability of elective ones. By requiring formalities as prerequisites to identity claims, the law avoids troublesome efforts to ascribe identities, protects an individual's interest in self-determination, and provides a degree of stability and a safeguard against inauthentic claims.

To explain how formalities work in identity contexts, this Article borrows from Lon Fuller's classic work on contracting, *Consideration and Form*, in which Fuller described three functions of legal formalities: (1) evidentiary, or providing proof of the underlying validity of the claim; (2) cautionary, or ensuring that the parties take care in making the claim; and (3) channeling, or ensuring that everyone understands and can organize their behavior around a clear distinction.<sup>17</sup> This Article transposes Fuller's theory, which was intended to illuminate commercial contexts, to the context of identity. Consider, for example, a requirement that a person designated male at birth change her birth certificate if she wishes for the law to recognize her as a woman. This requirement serves the evidentiary purpose of providing ready proof of her sex in the event of future controversies. It serves the cautionary purpose of ensuring that she has fully considered her choice and is serious enough about it to follow the requisite bureaucratic procedure for changing a birth certificate. And it serves the channeling purpose of making clear that if she fails to change

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15. See *infra* notes 175–76, 560–62, 612 and accompanying text.

16. See *infra* notes 228–53, 279, 563–70, 599–602, 613, 614 and accompanying text.

17. See Fuller, *supra* note 10, at 800–01.

her birth certificate, the law will continue to recognize her as a man rather than a woman.

Formal identity seems an attractive compromise between ascriptive and elective definitions. Formalities capture some of the advantages of ascriptive definitions. Because they are thought to be neutral and authoritative, formalities appeal to those who seek to avoid fraudulent claims or exclude newcomers from contested identities. But the fact that formalities lack substance may strengthen the argument of those seeking to contest the ascriptive meaning of an identity category. Formalities can curtail the use of discretion by authorities who might apply ascriptive definitions in discriminatory ways. Formalities might also be manipulable by members of subordinated groups, serving as “weapons of the weak.”<sup>18</sup> Additionally, they may have expressive value for individuals who seek official recognition of contested identities. Conversely, by making clear that identities will not be ascribed to those who do not formalize them, formalities may give people the option to live their lives off the legal grid.

But requiring formality may perpetuate systems of inequality linked to identity status. The costs of complying with administrative requirements to lay claim to an identity may effectively commodify that identity status.<sup>19</sup> For example, those who cannot afford legal counsel may be unable to overcome the formal hurdles along the path to citizenship.<sup>20</sup> Claimants without legal sophistication may find themselves estopped from asserting certain identities based on past identifications. Thus, someone who disclaims paternity on a legal document will have trouble later establishing that he is a father.<sup>21</sup> Further, parties with less bargaining power may find themselves on the losing end of identity disputes. A woman who cannot convince her cohabiting partner to agree to a formal marriage, for instance, may find herself without property rights when the relationship dissolves.<sup>22</sup> Formalization of identity may also give bureaucratic processes a monopoly on defining the terms and conditions

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18. See JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* xvi (1985) (describing the significance of “ordinary weapons of relatively powerless groups” such as “foot dragging, dissimulation, desertion, false compliance . . . and so on” that “typically avoid any direct, symbolic confrontation with authority”).

19. See *infra* Part III.A. Whether administrative cost or any other theoretical disadvantage is a reason to resist a move to formality in a particular situation depends on the potential alternative legal rules. See *infra* Part IV (discussing alternatives).

20. See *infra* notes 419–21 and accompanying text.

21. See *infra* note 444.

22. Common law marriage has been justified by the argument that women in relationships with men often do not have the bargaining power to insist on formal marriage. See, e.g., Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 756–57 (1996). On the other hand, some cohabitating women may prefer to remain formally unmarried, particularly if their potential spouses are not financially stable. See generally JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014) (discussing the interactions of economic forces and trends in marriage, divorce, and childrearing).

of identities, legalizing spheres of human interaction that would otherwise have socially generated meanings or be domains for experimentation.<sup>23</sup>

Moreover, formalization is likely to be partial, leaving intact ascriptive definitions of identity that perpetuate discrimination.<sup>24</sup> Formal requirements may be imposed only on certain claimants, such as the nongestational lesbian mother who must adopt her child, while others achieve identities by default, such as the gestational mother.<sup>25</sup> Formalities may pigeonhole liminal, marginal, disruptive, diverse, and dynamic identities into a set of ill-fitting options, or penalize them with nonrecognition.<sup>26</sup> For instance, while the transgender rights movement in the United States has often succeeded in persuading governments to allow changes to sex designations on birth certificates, those documents, by and large, still require that all individuals be designated “male” or “female,” with no possibility for permutations or rejections of those two binary categories.<sup>27</sup>

And finally, formalization may reinforce the legitimacy of regulatory projects based on citizenship, family, race, and sex, discouraging much-needed scrutiny of those projects.<sup>28</sup> The appeal of formal identity as an ostensibly neutral doctrine risks obscuring questions about the substantive ends of identity determinations in the law. By appearing to transcend controversies over ascriptive versus elective definitions of identities, formalities depoliticize identity disputes, turning them into legal questions to be resolved on the basis of simple evidence. Individuals come to experience their identities as “real” only once those identities are formalized through processes such as naturalization, marriage, adoption, or birth certificate changes. These experiences may prove difficult to disrupt. By rendering identity somewhat more responsive to individual choice and far more easily administrable, formality invites new forms of identity-based regulation. This is a particular risk as technological advancements better standardize identity documentation practices, making regulation more feasible and efficient.

The potential dysfunctions of formal identity suggest that legal reformers should be cautious about adopting this model for the adjudication of identity claims. Rather than debating which definition of identity ought to apply across the board, this Article urges reexamination of the many purposes of identities for law. Legal distinctions based on marriage, for example, might serve the ends of subsidizing caregiving, enforcing agreements between spouses, ensuring family unity, or promoting traditional forms of intimacy. Once the

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23. See *infra* Part III.B.

24. See *infra* Part III.C.

25. See generally Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009).

26. See *infra* Part III.D.

27. See *infra* notes 307–08 and accompanying text.

28. See *infra* Part III.E.



substantive purposes of legal identities are disaggregated, it may be possible to ask whether a formal, ascriptive, or elective definition is best in each context.

Formal definitions may be appropriate where the evidentiary, cautionary, and channeling functions of formality serve the substantive ends of the law. In some contexts, evidence may facilitate reliance on stable identities, while in others, stability may be stifling. Formalities do not serve cautionary purposes unless they make clear their consequences, are universally accessible, and induce a level of circumspection proportional to the rights at stake. And examining formal identity in terms of its channeling function requires that reformers ask what purposes the law serves by inducing individuals to sort themselves into channels based on sex, race, family status, and citizenship. Rather than pointing toward formal identity, this inquiry might reveal reasons to resist identity-based regulation altogether.

This Article proceeds in four Parts. Part I explains the two prevailing models of identity as ascriptive and elective, introduces the formal model, and outlines the theoretical reasons for formal identity's appeal over the other models. Part II provides examples of formal identity in four legal contexts—citizenship, family, sex, and race determinations—and discusses the functions of formality in each. Part III identifies potential dysfunctions of formal identity, which it describes under the labels commodification, bureaucratization, discrimination, pigeonholing, and legitimation. Part IV argues for rethinking and disaggregating the many substantive purposes identities serve for the law rather than moving wholesale toward formalization.

## I.

### MODELS OF IDENTITY

This Article analyzes identity determination doctrines—the legal frameworks used by courts to determine whether a particular group status, such as national, racial, or sexual identity, or a particular kinship status, such as parent or spouse, should be attributed to an individual. Identity determination doctrines assign labels to individuals such as citizen or alien, parent or stranger, white or minority, man or woman.<sup>29</sup> These types of identity are generally considered fundamental characteristics of human beings, contributing to a person's "sense of self and place in the world."<sup>30</sup> But claims to these identities also have legal import, as demands for public recognition or redistribution of

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29. These types of identity are frequently "associated—implicitly and explicitly—for purposes of contrast and comparison in daily life, as well as by investigators across the political and methodological spectrum." JACQUELINE STEVENS, *REPRODUCING THE STATE* 14 (1999); *id.* at 15–17 (analogizing citizenship, family, race, and sex).

30. AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 54 (2009) (describing one understanding of citizenship); *cf.* Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 25 (Amy Gutmann ed., 1994) (defining identity as "a person's understanding of who they are, of their fundamental defining characteristics as a human being").

resources, cutting across domains such as employment, immigration, public benefits, and tax law.<sup>31</sup> Although there are many examples of legal identity categories, this Article focuses on citizenship, family, sex, and race, because there are legal controversies over whether these identities are formal, and because their definitions frequently overlap.<sup>32</sup>

National, familial, sexual, and racial identities might be ascribed based on biological or social definitions, chosen by individuals, or established by formalities. Consider the following table, which lays out examples of the core meaning of a claim to identity under each of these models:

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31. See generally NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 1–2 (Joel Golb et al. trans., 2003) (discussing problems of recognition, such as disrespect for cultural differences, and problems of redistribution, such as economic exploitation or deprivation of material resources).

32. See *infra* Part II (discussing examples of formal citizenship, family, sex, and race). This Article does not examine age, sexual orientation, religion, disability, or other identity categories due to the limited number of legal examples demonstrating how those identities might be “formal” in the specific sense that term is used in this Article. See *infra* Part I.C (defining formal identity). However, this Article’s framework for analysis may be applied to future or hypothetical controversies involving formalization of many other kinds of identity.

The law also assigns identities to individuals in many commercial contexts, to name just a few: employee, customer, landlord, tenant, partner, shareholder, property owner, and taxpayer. Cf. Halley, *supra* note 9, at 31 (asking whether being “married or single” could become more like “being a toll-payer on the turnpike”). I do not focus on commercial or professional statuses because their formal dimensions do not want for scholarly attention.

TABLE 1: THREE MODELS OF IDENTITY

	<b>Ascriptive</b>	<b>Elective</b>	<b>Formal</b>
<b>Citizenship</b>	<ul style="list-style-type: none"> <li>• Birthplace</li> <li>• Physical Presence</li> <li>• Parentage or Marriage</li> <li>• Language</li> <li>• Civics</li> <li>• Moral Character</li> <li>• Belonging</li> </ul>	<ul style="list-style-type: none"> <li>• Consent of Individual and State</li> </ul>	<ul style="list-style-type: none"> <li>• Naturalization Papers and Ceremony</li> <li>• Passport</li> </ul>
<b>Marriage</b>	<ul style="list-style-type: none"> <li>• Commitment, Love, and Attachment</li> <li>• Spiritual Union</li> <li>• Interdependence</li> </ul>	<ul style="list-style-type: none"> <li>• Bilateral Agreement</li> </ul>	<ul style="list-style-type: none"> <li>• License and Ceremony</li> <li>• Changing Surnames</li> </ul>
<b>Parenthood</b>	<ul style="list-style-type: none"> <li>• Gestation</li> <li>• Genetics</li> <li>• Commitment, Love, and Attachment</li> <li>• Caretaking or Support</li> </ul>	<ul style="list-style-type: none"> <li>• Intention</li> </ul>	<ul style="list-style-type: none"> <li>• Adoption Papers</li> <li>• Birth Certificate Designations</li> <li>• Voluntary Acknowledgments of Paternity</li> <li>• Putative Father Registries</li> </ul>
<b>Sex</b>	<ul style="list-style-type: none"> <li>• Chromosomes</li> <li>• Hormones</li> <li>• Genitals and Secondary Sex Characteristics</li> <li>• Comportment</li> </ul>	<ul style="list-style-type: none"> <li>• Self-Identification</li> </ul>	<ul style="list-style-type: none"> <li>• Changing Sex Designations on Identity Documents</li> <li>• Changing First Names</li> </ul>
<b>Race</b>	<ul style="list-style-type: none"> <li>• Genetics</li> <li>• Phenotype</li> <li>• Ancestry</li> <li>• Comportment</li> <li>• Associations</li> <li>• Reputation</li> </ul>	<ul style="list-style-type: none"> <li>• Self-Identification</li> </ul>	<ul style="list-style-type: none"> <li>• Changing Race Designations on Identity Documents</li> <li>• Tribal Enrollment</li> </ul>

These models serve to answer a normative question about what is at the core of an identity claim: an ascriptive status, a choice, or a formality?<sup>33</sup> A distinct question is what legal rules flow from each model. In certain cases, each model might support the same legal rule. For example, a legal rule might defer to the sex designation on a birth certificate because it demonstrates the claimant is phenotypically female (ascriptive identity), because it reflects her choice to be female (elective identity), and because it shows she has complied with the requisite administrative procedure to claim a female identity (formal identity).

This Article claims that the formal model is influential, in both law and culture, particularly in those liminal cases in which identity determinations are

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33. These models answer the question “what is identity?” An entangled question is “who decides?” Under the ascriptive model, the law defers to experts or community standards. Under the elective model, the law defers to the individual claiming the identity. Under the formal model, the law defers to the evidence that the formality was executed—generally a document demonstrating that the individual complied with the official rules to claim the identity.

most difficult and rights are at stake. For this reason, formal identity deserves theoretical scrutiny. This Article does not claim that the formal model has replaced ascriptive or elective models. Nor does this Article claim that these models are discrete. Indeed, due to identity's complications, overlap is inevitable. Finally, this Article does not claim that these models exhaust the possibilities for understanding identity. Rather, the claim is that they are useful for examining the role of formalities in legal definitions of identities.

This Part will begin by providing background on the ascriptive and elective models. It will explain these models and discuss why they are controversial for legal definitions of citizenship, family, sex, and race. It will then introduce formal identity and outline the theory that supports it. Drawing on Fuller's explanation of the functions of legal formalities, it will discuss generally how formality might resolve some of the controversies generated by ascriptive and elective identity definitions, leaving more detailed examples for Part II.

#### A. *Ascriptive Identity*

The ascriptive model understands identity categories like race, sex, family, and citizenship as pertaining to an individual's objective underlying status—whether that status is determined based on her phenotype, decided by her genetics, enacted in her behaviors, or formed by her life experiences. Historically, the term “ascriptive” was often applied to status roles fixed at birth.<sup>34</sup> Modern theorists use the term to refer to any number of identity definitions that do not understand the core meaning of identity to be an individual's subjective choice.<sup>35</sup> More specifically, I use the term to refer to any definition that assigns identity labels based on whether an individual meets certain biological, social, or cultural standards that are considered objective. Legal actors employing ascriptive definitions consider the process of assigning labels to be independent of the underlying reality of the identity; it is not understood as constituting or bringing about that identity. Ascriptive definitions may measure conformity to medical or other scientific standards, or to social or cultural norms. They may include “performative” definitions that examine an individual's course of conduct to determine if she acted in the manner expected of a member of her group, as opposed to those definitions concerned only with her subjective intent to belong.<sup>36</sup>

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34. Cf. STEVENS, *supra* note 29, at 16 n.34.

35. See, e.g., RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 117 (2005) (using the term ascriptive in this sense); AMY GUTMANN, *IDENTITY IN DEMOCRACY* 117 (2003) (describing ascriptive identities as those “largely beyond people's ability to choose”).

36. See, e.g., Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 564 (2005). In theory, performative definitions may also be elective, insofar as they are concerned with an individual's intent to affiliate with a particular group. See Murad Hussain, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 922 (2008) (“Unlike ascriptive group identities

Ascriptive definitions enjoy common sense acceptance but are out of vogue among theorists and are sources of trouble for the law. This is because of three problems: (1) there is extensive disagreement over how to define an identity, (2) any definition will entail essentialism, and relatedly (3) ascriptive definitions are deterministic.

Definitional disagreements plague legal and scholarly efforts to determine the metrics for measuring identities. Race, for example, has been defined based on “appearance, ancestry, reputation, status, performance, science, and associations.”<sup>37</sup> Courts resist definitions based on physical appearance, holding that even expert opinions on visual racial identifications are “just eyeball[ing]” and lacking in scientific support.<sup>38</sup>

Racial definitions based on ancestry are also controversial. Consider Chief Justice Roberts’s question at oral argument about what percentage of Hispanic ancestry an individual must have to qualify as Hispanic for purposes of a university’s affirmative action program.<sup>39</sup> The premise behind such a question may be that race is transmitted through ancestry.<sup>40</sup> In the eras of slavery and Jim Crow, “[c]ase law that attempted to define race frequently struggled over the precise fractional amount of Black ‘blood’—traceable Black ancestry—that would defeat a claim to whiteness.”<sup>41</sup> It was once thought that “the presence of Black ‘blood’—including the infamous ‘one-drop’—consigned a person to

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based on passive pigmentation or phenotype, ‘cultural’ group identity can be viewed through the lens of performativity, whereby an individual can affiliate herself with a community by embracing traits and conduct that continually recommit her to membership within it.”). In practice, when the law recognizes performative identity, it does not generally defer to an individual’s choice to perform an identity role; rather, it focuses on whether that performance was a successful one, meeting social standards and being accepted by the community. See Clarke, *supra*, at 564.

37. Ariela J. Gross, Reply, *Book Review Symposium: What We Do When “Blood Won’t Tell,” Reviewing Ariela J. Gross, What Blood Won’t Tell: A History of Race on Trial in America (2008)*, 83 S. CAL. L. REV. 495, 497 (2010).

38. EEOC v. Kaplan Higher Educ. Corp., 748 F.3d 749, 753 (6th Cir. 2014). In *Kaplan*, the EEOC alleged that an employer’s policy of using credit reports to screen job applicants had a disparate impact on black applicants. *Id.* at 750. To prove this claim, the EEOC had to present statistics about the racial breakdown of Kaplan’s job applicant pool. *Id.* Because Kaplan had not collected racial data, the EEOC subpoenaed the driver’s license photos of approximately nine hundred job applicants from state Departments of Motor Vehicles, and hired five individuals with advanced social science degrees to determine the races of the individuals in each photo. *Id.* at 751. The district court held the testimony was not admissible because there was “no evidence that determining race by visual means is generally accepted in the scientific community.” EEOC v. Kaplan Higher Learning Educ. Corp., No. 1:10 CV 2882, 2013 WL 322116, at \*9 (N.D. Ohio Jan. 28, 2013), *aff’d*, 748 F.3d 749 (6th Cir. 2014). The court also rejected the plaintiff’s alternative argument that racial identifications are fact questions within common knowledge, not requiring expertise. *Id.*

39. Transcript of Oral Argument, *supra* note 1, at 32–33.

40. This may not have been the purpose of Justice Roberts’s question. He may have intended to use this example to challenge the very possibility of racial determinations, in support of the premise that admissions ought to be “colorblind.” He may also have intended to express skepticism about the idea that racial disadvantage could result from a small number of relatives in a far off branch of one’s family tree.

41. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1738 (1993).

being ‘Black.’”<sup>42</sup> This rule of “hypodescent” is now disregarded as based in outdated notions of racial purity.<sup>43</sup> But modern science on racial differences does not supply ready answers either. Even if we were to assume that the measure of race is genetic (a topic on which there is much disagreement),<sup>44</sup> there is no agreement on what sort of genetics would qualify one as a member of a particular race.<sup>45</sup>

Social definitions of race compete with those based on appearance, ancestry, and genetics.<sup>46</sup> For example, legal historians such as Ariela Gross and Daniel Sharfstein have examined cases determining whether individuals were white for purposes of slavery and Jim Crow laws, and demonstrated that courts often deferred to evidence of whether an individual acted according to social expectations for white persons—for example, did the claimant go to a white church or school, live in a white neighborhood, and have the manners expected of a white person?<sup>47</sup> These approaches create problems for the law because they require judges or juries to determine what sorts of conduct are at the core of a racial identity—questions subject to vast contestation and ever-shifting social meanings.<sup>48</sup>

Similar disputes trouble ascriptive definitions of sex (i.e., male or female). Determining whether a person is a man or a woman is generally thought to be a matter of common sense. As one judge put it, “There are some things we

42. *Id.* at 1737 (citing F. JAMES DAVIS, WHO IS BLACK? 5 (1991)).

43. *Id.* at 1738. Blood-quantum rules continue to apply in federal Indian law. For example, the Department of the Interior issues “Certificates of Degree of Indian Blood.” Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 252 (2008). The requirements for procuring such a certificate are “famously murky.” *Id.* at 253.

44. See, e.g., DOROTHY ROBERTS, FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY xii (2011) (“After five years of intense research [on genomic science] and soul-searching, I found not one shred of evidence to counter my belief in the political nature of race. In fact, my journey only strengthened my understanding of our common humanity and the dehumanizing consequences of believing in innate racial differences.”).

45. Geneticists refer to regional “ancestry” rather than “so-called racial groups,” and to “estimation” rather than determination. See, e.g., Charmaine D. Royal et al., *Inferring Genetic Ancestry: Opportunities, Challenges, and Implications*, 86 AM. J. HUM. GENETICS 661, 670 (2010). Although geneticists have identified certain genetic “ancestry informative markers,” or “AIMs” that correlate with geographic regions, “not all people from a given population have the AIM(s) identified with that population, and people from different populations can have the same AIM(s).” *Id.* at 665–66. “Population genetic inference is ultimately a statistical exercise, and rarely can definitive conclusions about ancestry be made beyond the assessment of whether putative close relatives are or are not related.” *Id.* at 668.

46. See, e.g., DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA 141–46 (2013); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 188 (2006).

47. ARIELA J. GROSS, WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 48–72 (2008); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1475 (2003).

48. See, e.g., CARBADO & GULATI, *supra* note 46, at 148 (explaining that asking a court to decide whether someone was discriminated against because she “acted black” involves “messy” and “controversial” questions about “the degrees of blackness of particular plaintiffs”).

cannot will into being. They just are.”<sup>49</sup> But medical tests based on chromosomes, hormones, and phenotype do not always give consistent “male” or “female” answers.<sup>50</sup> In 2008, Professor Dean Spade conducted a comprehensive study of state, local, and federal regulations on changing sex classifications on identification documents, and found a great deal of variation, even with respect to what types of surgeries were required.<sup>51</sup> And like performative definitions of race, performative definitions of sex are controversial for recognizing certain behaviors as the core of male or female identity.<sup>52</sup>

Ascriptive definitions also run through family law, raising disputes about whether family is defined by biology, culture, or performance. That biological definitions have traction in the context of parenthood is obvious: consider the neologisms “bio-mom” and “bio-dad” often heard in discussions of stepparenting and assisted reproductive technologies.<sup>53</sup> Biological notions of parenthood also shape arguments about the meaning of marriage. For example, some have asserted that marriage ought to be limited to a man and a woman because only a man and a woman can have biological children.<sup>54</sup> Marriage, in turn, shapes the meaning of parenthood, as the law often presumes that the husband of a woman who gives birth to a child is the child’s father.<sup>55</sup> Biological definitions compete with social, functional, or performative understandings of family. Some jurisdictions, for example, employ multifactor

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49. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (holding that a marriage between a man and a transgender woman was invalid).

50. See, e.g., SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 18–19 (1998) (discussing medical management of incongruent results from chromosomal, hormonal, and phenotypical tests of sex); *id.* at 88 (discussing “chromosomal mosaics, neither completely XX nor XY”). “Intersex” is a term “used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male.” *What is Intersex?*, INTERSEX SOC’Y N. AM., [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Apr. 3, 2015).

51. Spade, *supra* note 9, at 735 fig. 1; see also Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 388 (2013) (discussing various treatment options).

52. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 933 (2002) (“Protecting particular traits as constitutive of particular identities thus risks essentializing those identities as always embracing those traits. If feminine behavior is protected because it is constitutive of being a woman, then nonfeminine women . . . will be told that they are covering simply because they do not conform to that stereotype.”).

53. Due to DNA testing, “almost every parent who chooses to do so can discover the truth of biological parenthood, whether or not a court chooses to admit the evidence.” June Carbone & Naomi Cahn, *Marriage, Parentage and Child Support*, 45 FAM. L.Q. 219, 219 (2011). To complicate biological definitions of motherhood, the gestational mother may not be the egg donor. See, e.g., Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 431 (2007) (“[S]cience has . . . split biological motherhood into two parts: begetting by the ‘genetic mother’ and bearing by the ‘gestational mother.’”).

54. There are good reasons to be skeptical of this argument. See Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1473–74 (2013). I offer it only as an example.

55. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 119–20 (1989).

tests to determine whether a person acted according to social expectations for parents (i.e., by providing care or financial support to the child).<sup>56</sup>

Ascriptive notions of citizenship are also controversial. U.S. citizenship may be ascribed based on territory (place of birth)<sup>57</sup> or ancestry (parentage).<sup>58</sup> Territorial citizenship is contested by those who argue that place of birth is not meaningful.<sup>59</sup> Ancestry-based citizenship is criticized for being parasitic on controversial ascriptive definitions of family.<sup>60</sup> The concept of American citizenship has long been parasitic on ascriptive notions of race as well.<sup>61</sup> The name for the process of becoming a U.S. citizen—naturalization—implies a transformation of one's natural status rather than a simple choice.<sup>62</sup> The requirements for naturalization, which include moral character,<sup>63</sup> proficiency in the English language, and knowledge of American civics,<sup>64</sup> reflect an understanding of U.S. citizenship as a set of specific behaviors or performances.<sup>65</sup> Citizenship also has a variety of disputed ascriptive meanings

56. See Clarke, *supra* note 36, at 630–41; Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 590–97 (2013).

57. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

58. 8 U.S.C. § 1401(c) (2012) (both parents citizens); *id.* § 1401(g) (parents married; one a citizen); *id.* § 1409 (parents unwed; one a citizen); see STEVENS, *supra* note 29, at 9–10 (discussing the idea that nationality is transmitted through intergenerational inheritance).

59. Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 75–76 (2012) (describing arguments against territorial citizenship from conservative politicians and legal scholars).

60. See, e.g., Victoria Degtyareva, Note, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 YALE L.J. 862, 864 (2011) (discussing the overlap between family and citizenship).

An individual can also be naturalized as a U.S. citizen after living in the United States as a lawful permanent resident for a certain period of time and meeting other requirements. 8 U.S.C. §§ 1423–1424, 1427. See generally U.S. CITIZENSHIP & IMMIGRATION SERVS., A GUIDE TO NATURALIZATION (2012), available at <http://www.uscis.gov/files/article/M-476.pdf>. Most individuals who meet the residency requirement for naturalization are eligible to become permanent residents based on family relationships with U.S. citizens. Degtyareva, *supra* at 863–64. Thus, citizenship is also parasitic on ascriptive definitions of marriage. See, e.g., Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 407 (2013).

61. See, e.g., GROSS, *supra* note 47, at 6–8 (2008).

62. See HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 115 (2006) (describing the origins of the phrase “to naturalize” as lying “in a time when divine will and natural law were thought to explain why someone was born a subject of one worldly ruler or another”).

63. Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1572 (2012).

64. PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION 33–59 (2008).

65. Social or performative definitions of citizenship may “require controversial interpretation” when translated into law. Seyla Benhabib, *Birthright Citizenship, Immigration, and Global Poverty*, 63 U. TORONTO L.J. 496, 509 (2013) (arguing that “one must be wary that a ‘thick’ interpretation of what constitutes a ‘real and effective link’ or ‘genuine and affective ties’ [to a political community] can lead to problems of under-inclusion, by subjecting ambiguous cases to substantive and stringent criteria”). For an argument on how citizenship may be performed subversively by engaging in acts of political



for political theorists, for example, as acting according to civic norms or holding various rights and duties.<sup>66</sup>

Thus, ascriptive definitions are the source of tremendous controversy, whether based in nature or nurture, biology or culture. Apart from definitional disagreements, ascriptive definitions are prone to the interrelated problems of essentialism and determinism. Essentialism means assuming that a particular category has a “unitary and coherent essence” that is its true, real meaning.<sup>67</sup> In the context of identities, essentialism entails stereotyping in the form of assumptions about how groups are, or the assumption that individuals possess characteristics typical of their groups.<sup>68</sup> Essentialist understandings can create a false sense of stability between and within categories that might otherwise be malleable. They may result from biological understandings of categories like race or sex that presume certain aptitudes, interests, or roles flow naturally from genetics. But social understandings of the meanings of categories like “father” and “mother” may also involve stereotypes about what is entailed or required for each.<sup>69</sup> These stereotypes may reflect the biases of dominant groups.<sup>70</sup>

Essentialism may also take the form of determinism: prescriptions about how group members should behave that may narrowly circumscribe an individual’s life choices.<sup>71</sup> Identities may be ascribed to individuals who did not fully intend to adopt them. Thus, ascriptive understandings of identity lend themselves to the idea that identity is destiny.

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participation, see Kathryn Abrams, *Performative Citizenship in the Civil Rights and Immigrant Rights Movements* (UC Berkeley Pub. Law Research Paper No. 2409971, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2409971](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409971).

66. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 463, 470 (2000) (discussing various definitions of citizenship from social and political theory, including “the enjoyment of certain important rights and entitlements” and “active engagement in the life of the political community”).

67. Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1242 (2011).

68. *Id.*

69. Essentialist understandings include but are not limited to those based on “biological causation.” Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 547–48 (1994) (“Essentialism assumes at minimum that a pure and perfect definition of a particular thing can be found. . . . Attribution of a *natural* essence, then, is but one kind of essentialism.”).

70. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

71. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) (asserting that the Constitution forbids not simply race-conscious measures, but rather “a classification that tells each student he or she is to be defined by race”). Biases may also result in pressure on individuals to assimilate, downplaying aspects of their selves experienced as authentic but understood to be consistent with stereotypes about subordinated groups. See generally YOSHINO, *supra* note 46.

### B. Elective Identity

The elective model is a second paradigm for understanding identity.<sup>72</sup> Professor Camille Gear Rich has described this model as one that “places primary emphasis on . . . voluntary, . . . self-identification decisions.”<sup>73</sup> Elective identity is akin to a contractual right to opt into or out of a particular identity. This choice may be ad hoc or a narrative process. It may be partial, inconsistent, or context dependent.<sup>74</sup> The elective model allows individuals “free entry into and exit from” identity categories, as well as opportunities to revise their identities.<sup>75</sup>

“Self-identification” is the key concept for the elective model in the context of identity characteristics like race. The EEOC, which requires employers to submit data on the racial composition of their workforces, discourages employers from relying on any method other than self-identification.<sup>76</sup> Institutions that administer affirmative action programs generally defer to self-identification as well.<sup>77</sup>

Self-identification is also important in the context of sex. An elective concept of sex or gender<sup>78</sup> would require legal recognition of all choices by individuals to identify as men or women. For example, a bill passed in 2013 by the California legislature provides: “A pupil shall be permitted to participate in

72. Cf. GUTMANN, *supra* note 35, at 24 (contrasting ascriptive and voluntary identities).

73. Camille Gear Rich, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 GEO. L.J. 179, 183 (2013). Professor Rich analyzes elective identity in the context of race. This Article applies the theory to other identity categories as well.

74. See Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1529 (2014).

75. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 333 (2003). According to Professor Kennedy, these rights should be limited only by a good faith requirement. *Id.*

76. *Questions and Answers – Implementation of Revised Race and Ethnic Categories*, EQUAL EMP. OPPORTUNITY COMM’N, questions 13 & 14, <http://www.eeoc.gov/employers/eeo1/qanda-implementation.cfm> (last visited Apr. 4, 2015) (providing that an employer must accept an employee’s self-identification, even if it does not believe the employee, and may only use visual means if an employee refuses to self identify); see also Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,782 (Oct. 30, 1997) (providing that “[r]espect for individual dignity should guide the processes and methods for collecting data on race and ethnicity; ideally, respondent self-identification should be facilitated to the greatest extent possible, recognizing that in some data collection systems observer identification is more practical”). For a discussion of EEOC policy, see Rich, *supra* note 74, at 1520–23.

77. See Rich, *supra* note 73, at 195 (“[E]mployers and other entities charged with the administration of affirmative action now tend toward capacious definitions of race that are extremely accommodating of an individual’s self-identification choices.”).

78. I use the terms “sex” and “gender” deliberately. Gender is commonly understood as social, while sex is commonly understood as biological. Elective models eschew both social and biological meanings in favor of individual choice. I note, however, that legal actors often use the term “gender” to mean “sex,” out of concern that “sex” may connote “what occurs in porno theaters.” Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995) (discussing Ruth Bader Ginsburg’s avoidance of the term “sex” in constitutional sex discrimination litigation in the 1970s).

sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."<sup>79</sup> "[H]is or her gender identity" is not defined any further. The language "his or her" suggests the choice between these options is left entirely to the student. Although there is some suggestion in the legislative history that gender identity must be "consistently expressed," this language was not incorporated into the statute.<sup>80</sup>

Many legal scholars and advocates for transgender rights<sup>81</sup> also support elective sex.<sup>82</sup> One advocate has proposed the term "trans\*" with an asterisk to better signify the open ended nature of sex and gender identifications.<sup>83</sup> The asterisk here is used in the computer-programming sense of a wildcard.<sup>84</sup> The point is, "[t]he asterisk allows for the inclusion of many identities . . . . Rather than enumerating a single subset of identities, the term trans\* recognizes our incredibly diverse community and widely varying self-identification."<sup>85</sup> The "trans\*" label may include, for example, people who identify as "genderqueer,"<sup>86</sup> which may mean that they identify with neither or both gender categories.<sup>87</sup>

79. CAL. EDUC. CODE § 221.5(f) (West 2015).

80. CAL. ST. ASSEMB., BILL ANALYSIS OF AB 1266, at 2 (Apr. 25, 2013), available at [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1251-1300/ab\\_1266\\_cfa\\_20130501\\_170107\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_cfa_20130501_170107_asm_floor.html).

81. The term "transgender" describes an individual whose current gender identity does not match the sex he or she was assigned at birth. *Transgender Terminology*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Jan. 2014), available at [http://www.transequality.org/sites/default/files/docs/resources/TransTerminology\\_2014.pdf](http://www.transequality.org/sites/default/files/docs/resources/TransTerminology_2014.pdf).

82. See, e.g., Mottet, *supra* note 51, at 386 (arguing that an Argentine law allowing individuals to update the sex designation on their birth certificates without "any proof of gender identity, other than the person's statement, is enlightening and encouraging."); Eric A. Stanley, *Introduction: Fugitive Flesh: Gender Self-Determination, Queer Abolition, and Trans Resistance*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 1, 5 (Eric A. Stanley & Nat Smith eds., 2011) ("[G]ender self-determination at its most basic suggests that we collectively work to create the most space for people to express whatever genders they choose at any given moment. It also understands that these expressions might change and that this change does not delegitimize previous or future identifications").

83. Olga Tomchin, Comment, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans\* People*, 101 CALIF. L. REV. 813, 815 n.4 (2013).

84. Cf. Julie Scelfo, *An Evolving Glossary*, N.Y. TIMES, Feb. 8, 2015, at ED19 (defining trans\* as "[s]hort for transgender, with the asterisk meant to indicate the wide range of identities beyond the norm").

85. Tomchin, *supra* note 83, at 815 n.4 (quoting *Trans\* Guide*, OHIO UNIVERSITY LGBT CENTER, <http://www.ohio.edu/lgbt/resources/transgender.cfm>).

86. *Id.*

87. *Definition of Terms*, GENDER EQUITY RESOURCE CTR., [http://geneq.berkeley.edu/lgbt\\_resources\\_definition\\_of\\_terms#gender\\_queer](http://geneq.berkeley.edu/lgbt_resources_definition_of_terms#gender_queer) (last visited Apr. 4, 2015) (defining "genderqueer" as "[a] person whose gender identity is neither man nor woman, is between or beyond genders, or is some combination of genders").

Elective identity concepts operate in family law, too, alongside ascriptive presumptions.<sup>88</sup> Marriage is often discussed in terms of its elective dimensions.<sup>89</sup> As Professor Mary Anne Case put it, “The history of marriage in Anglo-American law seems thus far to have been one of movement from contract to status and only part way back again.”<sup>90</sup> The earliest English laws treated marriage as an elective agreement: a contract for the sale of a woman from her father to her husband (although wives were chattels, not parties).<sup>91</sup> These private agreements did not require formalities such as licenses or ceremony.<sup>92</sup> It was not until the eighteenth century that the English government began an aggressive campaign to regulate marriage as an official status that entailed a husband’s duty of care and a wife’s duty of obedience.<sup>93</sup> The return to marriage as contract, in the more egalitarian form of a bilateral agreement between spouses, has long been a theme of legal scholarship.<sup>94</sup> The modern move to no-fault divorce is an example of the idea of marriage as an elective agreement that a person can opt out of for any reason.<sup>95</sup>

Or consider the concept of intentional parenthood, that “[t]he law grants parental rights and responsibilities to those who caused a child to come into being with the intent of parenting that child once it was born.”<sup>96</sup> Intent can play different roles in parenthood determinations.<sup>97</sup> Sometimes it can serve as a tiebreaker where biological definitions conflict; for example, if two potential mothers both have biological claims to a child, one as egg donor and one as

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88. See *supra* notes 53–56 (discussing legal presumptions related to ascriptive definitions of family based in biological, social, functional, and performative metrics).

89. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting) (contrasting the “consent-based” view of marriage with the “traditional” view).

90. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1766 (2005). The reference to the story of “status to contract” is to Henry Maine, who posited that civilized societies progress from orders based on family status to orders based on contractual liberty. See HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 140 (Dorset Press 1986) (1861). Maine’s distinction between status and contract maps roughly onto the distinction between ascriptive and elective.

91. Case, *supra* note 90, at 1766 (citing 1 GEORGE ELLIOTT HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 285 (1904)).

92. *Id.*

93. *Id.*

94. See, e.g., Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 208 & n.2 (1982) (discussing marriage as a contract “in the modern sense of design of the relationship’s expectations and obligations by prospective intimate partners rather than in the older sense of marriages arranged between families of prospective marriage partners”). For a summary of legal scholarship on marriage as private ordering, see Adrienne Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2040 n.280 (2010).

95. Halley, *supra* note 9, at 18.

96. Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 701 (2008). This is a less radically elective concept than elective race, sex, or marriage, in that the rights and duties of parenthood are not up for renegotiation or easy exit.

97. Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 227–30 (2012).

gestational surrogate, a court might defer to the individual who intended to be the child's mother.<sup>98</sup> Or intent may help courts determine who is a parent before a child is born, when definitions that evaluate a parent based on her conformity with social norms about how a parent should act are hard to apply.<sup>99</sup>

Citizenship, too, is often envisioned as an elective regime, or a sort of social contract between an individual and the state, at least in theory.<sup>100</sup> For most, U.S. citizenship is ascribed based on birthplace, but for many, it is an identity that is chosen and then formalized through naturalization.<sup>101</sup> Elective elements had more of a driving force in determinations of citizenship for white immigrants in the early years of the United States than they do today. Under the first naturalization statutes, any "free white person[]" of "good character" could become a citizen by filing "first papers" declaring an intent to become a citizen and meeting a residency requirement.<sup>102</sup> A mere declaration of intent to naturalize by a free white person could entitle him to vote or subject him to the draft.<sup>103</sup>

The elective model responds to the definitional problems, stereotyping, and determinism of the ascriptive model by deferring to an individual's own decision as to his or her identity and what that entails. Under the elective model, there is no need to decide among the various biological, social, and performative definitions of identities—the law ought to recognize an individual's intent. Such recognition respects an individual's liberty and autonomy to choose her own status, as well as her dignity and privacy in having that choice respected.<sup>104</sup> That elective identities are more "capacious" and "fluid" is considered a virtue because they can "destabilize" stereotypical or deterministic views of those identities.<sup>105</sup> Thus, elective models have tremendous appeal for scholars and activists, who prefer that individuals—

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98. See Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 818–20 (2006).

99. *Id.* at 820.

100. See, e.g., PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 25 (1985) (describing a concept of citizenship "based on the tacit or explicit consent of an individual who had reached the age of rational discretion" along with the agreement of the members of the existing community). Citizenship may also have an elective meaning when defined as "the affective ties of identification and solidarity that we maintain with groups of other people in the world" or "patriotism, a term denoting identification with and loyalty to one's country and compatriots." See Bosniak, *supra* note 66, at 479–80 (footnote omitted).

101. See *supra* notes 58–66.

102. See MOTOMURA, *supra* note 62, at 115–16 (describing naturalization law from 1795 until 1952). From the perspective of persons deemed nonwhite, this naturalization regime embodies more ascriptive and fewer elective components than today's rules. See *id.* at 116.

103. See *id.* at 116, 118; Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 379–81 (2013).

104. Rich, *supra* note 74, at 1505.

105. Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1407 (2008).

rather than the state or society—select and define the content of the categories that will apply to them.<sup>106</sup>

But there are two main problems with elective identity for legal regulation: inauthenticity and disuniformity. The inauthenticity problem is that elective identity claims may be made in bad faith to commit fraud, made in good faith on the basis of a sincerely held but disputed understanding of identity, or made under conditions of coercion and constraint. Fears of inauthenticity have particular salience when a claim to an identity is a claim for redistribution of resources. Thus, concerns about fraudulent identity claims arise with respect to affirmative action based on self-identification, particularly for the categories Hispanic and Native American.<sup>107</sup> In a variety of legal contexts, authorities police against marriage fraud by evaluating the substantive validity of marriages.<sup>108</sup> Until very recently, elective notions of sex met with the objection that same-sex couples might fraudulently represent the sex of one partner to marry in states that only allowed cross-sex marriage.<sup>109</sup> Relatedly, California's law requiring schools to respect students' self-identified gender identities has been criticized based on the hypothetical possibilities that boys might fraudulently assert female gender identities to infiltrate girls' bathrooms<sup>110</sup> or join girls' sports teams.<sup>111</sup> Due, perhaps, to the great number of perceived benefits associated with U.S. citizenship today, the concept of purely elective citizenship has little political traction.<sup>112</sup>

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106. See, e.g., Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1189 (2001); Rodríguez, *supra* note 105, at 1406; YOSHINO, *supra* note 46, at xii.

107. Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367, 369 (2006).

108. See generally Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1 (2012).

109. Mottet, *supra* note 51, at 413. Mottet noted, however, that there were no reported cases of individuals who did not identify as transgender attempting to change the sex designations on their identity documents just to facilitate marriage. *Id.*

110. *The O'Reilly Factor* (Fox News television broadcast Aug. 9, 2013) (statement of host Greg Gutfeld, "As a devious teen growing up, I would tell girls that I'm a girl trapped in a boy's body, just so I could sneak into the girls' bathroom.").

111. Don Thompson, *Transgender Bathroom Rights Bill Passed by California Lawmakers*, HUFFINGTON POST (July 3, 2013, 9:08 PM), [http://www.huffingtonpost.com/2013/07/03/transgender-bathroom-rights\\_n\\_3543601.html](http://www.huffingtonpost.com/2013/07/03/transgender-bathroom-rights_n_3543601.html) ("Sen. Steve Knight, R-Palmdale, and Sen. Rod Wright, D-Inglewood, each said that male athletes who are mediocre in competition against their own gender could game the system by competing against female athletes."). For a response to this point, see Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 277-79 (2013) (arguing that the fear that boys will join girls' sports teams for competitive advantage is speculative, and that "in the context of youth sports, the physical differences between males and females are not significant enough" to justify concerns about unfairness).

112. See Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 66 (1997) ("An 'open borders' policy [allowing anyone to claim American citizenship] may be impractical, but it is notoriously difficult for liberal political theory to justify restrictions upon immigration."). *But cf.* Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359, 373-76 (2012) (making arguments sounding in contractual principles for recognition of unauthorized immigrants).

The concern about fraud usually assumes that an individual is engaged in deliberate impersonation of a member of an identity group to which she knows she does not belong.<sup>113</sup> The concern might be voiced as the fear of opportunism: that an individual is only claiming an identity on an ad hoc basis to accrue some advantage, while avoiding any disadvantages that the identity might entail under other circumstances. A purely elective regime has no principled basis for policing entrance into and exit out of identity categories,<sup>114</sup> or ensuring that individuals must take on both the benefits and burdens of particular legal identities.<sup>115</sup>

A related problem is the subjectivity of elective definitions. What if an individual who is white by all indications, but whose grandmother claimed to be African American, considers himself African American?<sup>116</sup> If identity is elective, who is to say his claim is inauthentic? By reference to what objective standard? Concerns that elective definitions are too expansive may lead to controversy and calls for ascriptive limitations on who may claim identities.<sup>117</sup>

A final variation on this critique questions the premise that law can protect authentic self-determination in any meaningful sense, when individuals choose their identities under conditions of constraint imposed by social relationships, cultural norms, or systemic inequality.<sup>118</sup> An example might be a woman who chooses to become a mother in a community that applies overwhelming pressure on all women to be mothers.<sup>119</sup>

A second drawback to the elective model is lack of uniformity. This relates to the “*numerus clausus*” principle, a phrase from scholarship on property law.<sup>120</sup> Most legal doctrines offer individuals a limited menu of

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113. See, e.g., *supra* notes 108–111.

114. Kim Forde-Mazrui, *Live and Let Love: Self-Determination in Matters of Intimacy and Identity*, 101 MICH. L. REV. 2185, 2197–98 (2003).

115. See Rich, *supra* note 74, at 1559 (discussing this concern in the context of race).

116. See *infra* notes 363–67 (discussing *Malone v. Haley*, No. 88-339, slip op. at 3 (Mass. Sup. Jud. Ct., Suffolk Cnty., July 25, 1989)).

117. See *id.*

118. Professor Martha Minow argues that identities are necessarily “negotiat[ed] . . . in relation to others and against the backdrop of social and political structures of power.” Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 127 (1991). “Paradoxically, underestimating individuals’ latitude for choice despite their assigned identities, and failing to acknowledge the constraints on individuals despite the powers to choose, are two central mistakes in legal assessments of identity.” *Id.*

119. To give another example, those who elect naturalization may do so defensively, “in response to increasing anti-immigrant sentiment.” Paul M. Ong, *Defensive Naturalization and Anti-Immigrant Sentiment: Chinese Immigrants in Three Primate Metropolises*, 21 HARV. J. ASIAN AM. POL’Y REV. 39, 40 (2010–11).

120. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000). I do not mean “*numerus clausus*” in the sense of a limit on the number of racial minorities who may be admitted to an institution, as that term has been used in affirmative action debates. “*Numerus clausus*” here means “the number is closed” and it refers to the principle that legal rights “must conform to certain standardized forms” that are “fixed and limited in number.” *Id.* at 4–5. For example, property law recognizes only a limited number of arrangements as property, as opposed to contract law, which

choices in terms of identity categories, or standard forms, for purposes of administrability.<sup>121</sup> Often, these categories must be binary and exclusive—for example, with respect to a child, a person is either a parent or a legal stranger.<sup>122</sup> Individuals, however, may self-identify in an unlimited variety of manners, combinations, and shades of gray, or not at all. Such wildcard identifications may not be intelligible to legal rules. The concept that identities might require lengthy narratives to be truly understood magnifies problems of administrability, as narratives require even more individualized consideration, a time consuming task for legal actors.

### C. Formal Identity

The formal model is an alternative way for the law to understand identity. Fuller described legal formalities as things “deliberately used” and “intended to be so used, by the parties whose acts are to be judged by the law.”<sup>123</sup> Fuller’s classic example was the wax seal, affixed to a letter as a symbol of its legality.<sup>124</sup> Today the signature has replaced the seal. Although documentation practices like signing paperwork are paradigmatic formalities,<sup>125</sup> formalities have historically included other practices as well, such as swearing an oath or taking part in a ceremony.<sup>126</sup> Twenty-first century formalities may increasingly be electronic.<sup>127</sup> Following Fuller, this Article defines formalities as practices used to render a legal status an official designation. It uses the terms “form”

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allows parties “the freedom to ‘customize’ legally enforceable interests.” *Id.* at 3. Allowing free customization of property rights would “create unacceptable information costs to third parties” who must be able to easily ascertain what other’s property rights are to avoid violating them, to acquire them, and to maintain an efficient market for them. *Id.* at 26. It would also create “administrative costs” for government. *Id.* at 38.

121. See, e.g., Forde-Mazrui, *supra* note 114, at 2197 (arguing against racial self-determination on the ground that “[o]nly by using the same definitions can American society identify the people likely disadvantaged by historical discrimination and determine whether the effects of such discrimination have been remedied”).

122. See June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1014 (2003) (“The law draws bright line distinctions between parents and non-parents and attributes decision-making power exclusively to the former (or those acting in their stead).”).

123. Fuller, *supra* note 10, at 801.

124. *Id.*

125. *Id.* at 800–02 (discussing the statute of frauds).

126. For example, the “medieval ceremony of ‘livery of seisin’ . . . gathered the buyer and the seller of a land parcel in a field to exchange ownership by handing over a clod of dirt.” Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1189 (1999).

127. They may also be mediated by corporations. See, e.g., Jesse Fox & Katie M. Warber, *Romantic Relationship Development in the Age of Facebook: An Exploratory Study of Emerging Adults’ Perceptions, Motives, and Behaviors*, 16 CYBERPSYCHOL., BEHAVIOR, & SOC. NETWORKING 3, 3 (2013) (discussing the concept of “going Facebook official” or inaugurating a romantic relationship through designation on a social networking website).



and “formality” in this sense of a device, not in the sense of an abstract rule as contrasted with a contextual standard.<sup>128</sup>

This Article defines a formal identity as one that comes into being through the execution of a formality by the parties laying claim to a particular identity. Although formalities are sometimes executed by third parties, this Article is concerned with formalities that individuals use to claim identities for themselves. Formalities executed by third parties, such as the designation of a baby’s race on a birth certificate by hospital staff, are likely to be considered mere reflections of ascriptive definitions of identity.<sup>129</sup> This Article is focused on formalities that constitute identity statuses for legal purposes, rather than those thought to merely reflect a status.<sup>130</sup> For example, through licensing and ceremony, a couple *becomes* married.<sup>131</sup>

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128. See Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 112 (2000) (discussing Rudolf von Jhering’s explanation of the difference between the question of formalities and the debate over rules versus standards). It is true that formalities are often required by rules rather than standards. And the reasons for preferring rules to standards, such as certainty, predictability, and administrability, may also be reasons for requiring formalities. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79 (1989) (discussing virtues of rules). But not all legal rules require formalities. Some legal rules may confer recognition on informal arrangements. For example, one could imagine a rule recognizing a couple as married after a certain number of years of cohabitation. Whether the law employs rules or standards is a separate issue from whether an identity is conceptualized as formality, choice, or ascriptive status.

For similar reasons, formalities are not the same as legal formalism, nor are they opposed to legal realism. Formalism “describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles.” Thomas Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 9 (1983). Legal realists stress judicial idiosyncrasies, fact situations, and social realities over abstract rules, viewing law as a tool for shaping private behavior. See, e.g., LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, 3, 6–7 (1986); see also Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 71–94 (2009) (discussing variants of legal realism). Formalities may appeal to formalists when they facilitate the application of objective and abstract rules, and they may appeal to realists as useful tools for shaping private behavior.

129. A different set of policy considerations, such as those pertaining to authority, institutional competence, and res judicata, may attend to questions of whether the law should defer to identity formalities executed by those other than the parties whose identities they govern. I deliberately refer to “parties” here and not individuals so as to include, in the context of marriage, both members of a couple, and in the context of citizenship, both the citizen and the polity.

130. French philosopher Louis Althusser described this process as “interpellation”: the process through which an ideology “hails” an individual as a “subject,” as when a police officer shouts “Hey, you there!” to a person on the street, and the person turns around, acknowledging he is the subject of the address, and is subjected to the law. Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Towards an Investigation)*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS 173–74 (Ben Brewster trans., 1971). Ideologies, according to Althusser, are ways of representing our social “reality,” *id.* at 158, that are manifested in rituals, behaviors, and practices, *id.* at 160–67.

131. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 99–100 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975). J.L. Austin uses the term “illocutionary” for utterances that perform acts, like saying “I do” at a marriage ceremony. *Id.* The marriage example is discussed further in Part II.B.

Although Fuller discussed formality in commercial contexts,<sup>132</sup> his theory has applications to identity determinations as well. In the context of contracting, formal requirements can serve contract law's substantive aims, such as protecting private autonomy, facilitating reliance, and avoiding unjust enrichment.<sup>133</sup> As elective understandings of identity come to compete with ascriptive ones, and identities begin to look more like contracts,<sup>134</sup> formal requirements may serve the substantive aims of identity regulation as well. Formalities facilitate individual self-determination, but in a different sense than rules recognizing elective identities.<sup>135</sup> Fuller contrasted the concept of autonomy, defined as self-governance, against "the will theory," under which a party "must be free to change his mind at any time, since it is his will which sets the rule."<sup>136</sup> On this view, autonomy is not unconstrained freedom; it is the ability to choose the laws that govern oneself.<sup>137</sup> Formalities, as modes of governance, ensure a degree of stability by setting rules that facilitate reliance and avoid unjust enrichment. This distinguishes formality from election. Moreover, regulators can limit who is eligible to enter into formalities and delineate what types of formalities the law will recognize.

In the identity context, the formal model offers a way to sidestep the main drawbacks of the ascriptive model (definitional disagreements, essentialism, determinism), and the elective model (inauthenticity, disuniformity). It does so by performing the three functions of form that Fuller identified: (1) evidentiary, (2) cautionary, and (3) channeling.<sup>138</sup> These functions are "formal" rather than "substantive" because they are related to "considerations of administrability."<sup>139</sup>

The evidentiary function is to provide reliable proof of the validity of the claim in the event of a dispute.<sup>140</sup> The seal, for example, streamlines judicial

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132. Fuller offers an explanation for the requirement of "consideration" in contract law. Fuller, *supra* note 10, at 814–24. For a contract to be enforceable, both sides must offer something in exchange. This raises many questions. For example, why shouldn't the law enforce promises to give gifts without any exchange? Why doesn't the law inquire into whether the "consideration" is of far less value than what it is to be exchanged for? Fuller argued that the requirement of consideration fulfilled the purposes of formality. *Id.* at 815.

133. *Id.* at 799. Other considerations animate contract law as well, but these three concerned Fuller. See Kennedy, *supra* note 128, at 160–61, 172–73.

134. See *supra* note 90 (discussing Maine's distinction between status and contract as a rough analogue to the distinction between ascriptive and elective).

135. See Fuller, *supra* note 10, at 805.

136. *Id.* at 807.

137. *Id.*

138. *Id.* at 799.

139. See Kennedy, *supra* note 128, at 96.

140. Fuller, *supra* note 10, at 800. Accordingly, many documentary formalities are admissible in court. Public records of vital statistics, defined as "record[s] of a birth, death, or marriage, if reported to a public office in accordance with a legal duty," are exceptions to the hearsay rule under the Federal Rules of Evidence. FED. R. EVID. 803(d); see also FED. R. EVID. 902 (providing that certain public documents and other records do not require extrinsic evidence of authenticity to be admitted).

decision making by “furnish[ing] a simple and external test of enforceability.”<sup>141</sup> Similarly, identity formalities set aside the definitional quandaries that plague ascriptive notions of identity. There is no need for debates over nature versus nurture or biology versus experience, no need to mediate among conflicting cultural understandings, because the formality provides the answer. Additionally, formalities generate documentary records that provide security to individuals seeking recognition of their identities, and may estop those who executed them from challenging their legitimacy or terms. This assurance allows identity claimants and third parties to take action in reliance on the identity.<sup>142</sup> Finally, records mitigate the concerns about fraud that afflict the elective model, by providing a way to disprove those bad-faith or opportunistic identity claims that are unsupported by documentation.<sup>143</sup> Formal requirements can therefore prevent the unjust enrichment of parties who seek the benefits but not the burdens of identities.

The second function of formality is cautionary: to ensure that the parties take care in making claims so they do not later reverse, resist, or regret their decisions. Formality thus serves as “a check against inconsiderate action.”<sup>144</sup> Fuller described how the “seal” fulfilled this role: “The affixing and impressing of a wax wafer—symbol in the popular mind of legalism and weightiness—was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future.”<sup>145</sup> Others have called this the “ritual function,” emphasizing the psychological impact of formalities on individuals.<sup>146</sup> Ceremony is required because “[p]eople are often careless in conversation and in informal writings.”<sup>147</sup>

Scholars have often discussed the cautionary function with respect to wills and trusts, an area of the law in which formalities predominate. The specific formal requirements for a will vary based on the state, but states most commonly impose three requirements: (1) attestation of witnesses who are not receiving any bequests from the will, (2) signature of the testator, and (3) a

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141. Fuller, *supra* note 10, at 801. Fuller argued this streamlining function was classified under “channeling” but, following more recent scholarship, I classify it under the heading “evidentiary.” See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 124 (1989) (“[T]he evidentiary function of legal formalities is to provide information to courts in order to lower the costs of subsequent decision making.”).

142. Fuller, *supra* note 10, at 810.

143. See Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 68 (1974) (“Witnesses are subornable, but forgery is a difficult art.”).

144. Fuller, *supra* note 10, at 800.

145. *Id.*

146. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 4 (1941); cf. Perillo, *supra* note 143, at 45 (describing the cautionary function of form as appealing to “conscious, rational” decision-making processes while the ritual function appeals to the “unconscious, non-rational” ones).

147. Gulliver & Tilson, *supra* note 146, at 3; see also Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181, 1190 (2005) (“Rituals command attention.”).

writing.<sup>148</sup> These requirements take the creation of a will out of the realm of mundane communications and impress upon the testator the significance of the document for the law.<sup>149</sup> They are meant to ensure that the will represents the testator's carefully considered intent, and to protect the testator against fraud, undue influence, and incapacity.

In identity contexts, formal requirements may caution individuals against hasty decisions that they will later regret. By clarifying the moment when an individual may (or must) choose her identity, formalities provide some safeguard against creeping social forces that shape identity. Thus, the cautionary function addresses the authenticity concerns related to elective identity choices.

The third key function of formality—the channeling function—ensures that everyone understands how to stake a legal claim and can organize their behavior around “a neat division between the legal and the non-legal.”<sup>150</sup> A formality “offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention.”<sup>151</sup> By channeling, formalities facilitate both private and public ordering.

The clarity offered by legal channels “facilitate[s] private ordering”<sup>152</sup> by informing parties of the steps they should take to claim a particular legal status.<sup>153</sup> It allows individuals to arrange their own lives, thus avoiding the problems of essentialism and determinism that afflict ascriptive definitions. So long as the law does not erect barriers to who may enter into a formality, formalities can open space for individuals who do not meet ascriptive definitions to achieve legal recognition.<sup>154</sup> Professor Duncan Kennedy explained, “Formalities are premised on the lawmaker's indifference as to which of a number of alternative relationships the parties decide to enter.”<sup>155</sup>

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148. Margaret Ryznar & Angelique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1, 7 (2013).

149. Gulliver & Tilson, *supra* note 146, at 4 (explaining that these formal requirements fulfill the cautionary function by “impressing the transferor with the significance of his statements and thus justifying the court in reaching the conclusion, if the ceremonial is performed, that they were deliberately intended to be operative”).

150. Fuller, *supra* note 10, at 803.

151. *Id.* at 801.

152. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1691 (1976).

153. To illustrate how the evidentiary and channeling purposes are separate, Fuller mentions debates over the parol evidence rule, which prohibits a judge from considering evidence outside the four corners of a contract. Fuller, *supra* note 10, at 804. The objective of this rule may be evidentiary, on the premise that the contract is the best and only evidence of the parties' intent, or it may be channeling: inducing the parties to channel their agreement into a legal formality, on pain of nonrecognition. *Id.*

154. Halley, *supra* note 9, at 24.

155. Kennedy, *supra* note 152, at 1691.

For this reason, Professor Janet Halley has written, “[a] libertarian could love formality.”<sup>156</sup>

At the same time, formalities facilitate public ordering.<sup>157</sup> By channeling, formality avoids the disuniformity of idiosyncratic elective identities. “The form furnishes *uniformity*—regularity, repeatability, reiterability, predictability—to identity, rendering it accordingly accessible to administration.”<sup>158</sup> Regulators can place limits on who is eligible to execute formalities. The law can also limit those forms of identity that an individual may choose, following the principle of *numerus clausus*.<sup>159</sup> The census, for example, provides five options for racial identification: White, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian or Other Pacific Islander.<sup>160</sup> This ensures some degree of uniformity in classifications and facilitates statistical analysis.<sup>161</sup> Additionally, regulators can discourage the development of informal identities by rendering them legally invalid.<sup>162</sup>

Thus, in theory, formal identity captures some of the advantages of both elective identity and ascriptive identity. It facilitates private autonomy with respect to identity choices, while also allowing the law to place some ascriptive limits on identity claims, which fosters stability, reliance, and efficient regulation.

156. Halley, *supra* note 9, at 24. Actual libertarians, however, seem to be frightened by formal identity’s Orwellian potential. *See, e.g., NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION* (Carl Watner & Wendy McElroy, eds., 2004).

157. JOHN D. CALAMARI & JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 238 (6th ed. 2009) (“[F]orm requirements can serve regulatory and fiscal ends, to educate the parties as to the full extent of their obligations, to provide public notice of the transaction, and also to help management efficiency in an organizational setting.”). Fuller did not appear to contemplate this set of advantages, possibly because he envisioned the private domain of contract as separate from the public domain of “administrative regulation.” *See* Kennedy, *supra* note 128, at 162. With respect to channeling, Fuller discussed how formalities might simplify the tasks of judges, but not administrators. *See* Fuller, *supra* note 10; *see also supra* text accompanying note 141.

158. DAVID THEO GOLDBERG, *RACIAL SUBJECTS: WRITING ON RACE IN AMERICA* 31 (1997); *see also* Dorothy Smith, *Textually Mediated Social Organization*, 36 INT’L SOC. SCI. J. 59, 66 (1984) (“[T]he formality, the designed, planned and *organized* character of formal organization depends heavily on documentary practices, which co-ordinate, order, provide continuity, monitor, and *organize* relations between different segments and phases of organizational courses of action.”).

159. *See supra* note 120.

160. *Race: About*, U.S. CENSUS BUREAU (July 8, 2013), <http://www.census.gov/topics/population/race/about.html>.

161. It does not ensure complete uniformity, in that people have the option of selecting more than one race, or writing in another race that is not listed. *See* U.S. CENSUS BUREAU, U.S. CENSUS FORM 2 (2010), *available at* [http://www.census.gov/2010census/pdf/2010\\_Bilingual\\_Questionnaire\\_Info.pdf](http://www.census.gov/2010census/pdf/2010_Bilingual_Questionnaire_Info.pdf).

162. *See* Fuller, *supra* note 10, at 801.

## II.

## FUNCTIONS OF FORMAL IDENTITY

This Part provides examples of how the drawbacks of ascriptive and elective models of identity have generated interest in formality with respect to citizenship, family, sex, and race. It provides insight into the law's regulation of these identities by showing how formalities serve the evidentiary, cautionary, and channeling functions. It also reveals some unexpected ways that formal definitions create opportunities for individuals to challenge exclusionary ascriptive definitions of identity, and demonstrates that formal identities can be experienced as profoundly significant.

The aim of this Part is to describe the functions of formal identity rather than endorse any particular legal rules. It does not claim that there is a trend toward formalization of identity; rather, it discusses both historical and contemporary examples that illuminate how identity formalities function. Nor does this Article claim that these identities are entirely formalized. For instance, not every parent may or must formally adopt her child. Rather, formal requirements exist alongside legal presumptions, barriers, and exceptions that reflect ascriptive and elective understandings. This Part aims to untangle the formal dimensions of identity doctrines and expose their functions. Part III will turn to dysfunctions of formal identity.

A. *Formal Citizenship*

A Russian subject consist[s] of body, soul, and passport.

Russian Proverb<sup>163</sup>

Formal understandings of citizenship exist alongside ascriptive and elective meanings.<sup>164</sup> In the United States, the process of naturalization entails a series of administrative requirements culminating in formal ceremony.<sup>165</sup>

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163. Isaac A. Hourwich, *The Czar's Police*, 8 SOCIALIST REV. 138, 138 (1920).

164. I focus here on U.S. citizenship. For discussion of claims to citizenship in terms of formal identity in developing countries, see KAMAL SADIQ, *PAPER CITIZENS: HOW ILLEGAL IMMIGRANTS ACQUIRE CITIZENSHIP IN DEVELOPING COUNTRIES* 101–35 (2008), and in South Korea, see Jaeeun Kim, *Establishing Identity: Documents, Performance, and Biometric Information in Immigration Proceedings*, 36 LAW & SOC. INQUIRY 760, 763 (2011).

165. During the debate over the requirements for naturalization in 1803, Congress rejected a purely formal rule that would have allowed aliens to become citizens simply by making a declaration. One Republican criticized the formality for supposing there was “magic” in a declaration, a kind of legerdemain—which by hocus pocus, converted aliens suddenly into a fitness for citizenship[.] What was its slight-of-hand process, that it gave to the alien an impromptu knowledge of our Constitution and our laws? Did it possess an alchymical power, capable of an instantaneous transmutation of a base into a pure being?

12 Annals of Cong. 576 (1803) (statement of Representative Michael Lieb). Although the “empty sound of declaration” could not convert alien to citizen, five-year’s residence was thought to instill the civic understanding and “common interest” necessary to the “pure being” of citizenship. *Id.* This language evokes an ascriptive concept of citizenship as civic spirit. But the five-year requirement might also be thought of as a sort of formality intended to induce caution by applicants and ensure they truly intended to elect citizenship, as continued presence in the United States was “the surest standard

Immigrant becomes citizen upon taking a public oath of allegiance.<sup>166</sup> At the ceremony's conclusion, the new citizen is provided with a certificate of naturalization, which serves the evidentiary function.<sup>167</sup> The ceremony serves the cautionary function by "inducing the circumspective frame of mind appropriate in one pledging his future."<sup>168</sup> Many experience it as a ritual of great emotional significance.<sup>169</sup> And finally, the naturalization ceremony serves the channeling function: without it, citizenship is not conferred, even if the applicant meets all the ascriptive prerequisites for citizenship and otherwise expressed an election to become a citizen.<sup>170</sup>

Documents such as certificates of naturalization, passports, and birth certificates not only play mundane evidentiary roles as proof of citizenship in a variety of administrative contexts,<sup>171</sup> but may also function as keepsakes of profound importance to their bearers.<sup>172</sup> Federal judge Denny Chin, who regularly conducted the swearing in ceremony for new citizens while a district court judge, hung his grandfather's certificate of naturalization on the wall in his chambers.<sup>173</sup> Judge Chin has remarked:

[E]ach time that I perform the naturalization ceremony, I tell the new U.S. citizens about my grandfather [who, due to the Chinese Exclusion Acts' restrictions on immigration from China, entered the United States illegally with false papers in 1916]. I show them my grandfather's naturalization certificate, which I take off the wall, frame and all.

And when I show it to them, I think of my grandfather, of how hard he

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by which to test the desire for citizenship; it was action, and not declaration; it was fact and not theory." *Id.* It might also serve a cautionary function for the polity, helping the state avoid hasty admittance of unfit citizens.

166. 8 U.S.C. § 1448(a) (2012).

167. 8 C.F.R. § 338.1 (2015).

168. Fuller, *supra* note 10, at 800.

169. See, e.g., Tovin Lapan, *Dozens Fulfill Dream of Citizenship in Emotional Las Vegas Ceremony*, LAS VEGAS SUN (Sept. 17, 2014, 5:15 PM), <http://www.lasvegassun.com/news/2014/sep/17/dozens-fulfill-dream-citizenship-emotional-las-veg/> (quoting new citizen Dominik Kuna of Poland as saying, "During the oath it really hit me, I feel like (the United States) is part of me, and for the first time I'm part of it.>").

170. See, e.g., *Duran-Pichardo v. Attorney Gen. of United States*, 695 F.3d 282, 285 (3d Cir. 2012) (holding petitioner who "did everything that was required for naturalization except take the Oath" was a noncitizen subject to removal, even if his failure to take the oath was a result of administrative error); *Okafor v. Gonzalez*, 456 F.3d 531, 534 (5th Cir. 2006) (holding petitioner was removable as a noncitizen where petitioner's application for naturalization had been approved and he had signed a document containing the oath, but he failed to take the oath during the required public ceremony).

171. See, e.g., 42 C.F.R. § 435.407 (2014) (ten-page list of "satisfactory documentary evidence" of citizenship such as a passport or birth certificate for proving eligibility for Medicaid or Medicare).

172. See, e.g., Peter J. Spiro, *Book Review*, 61 J. LEGAL EDUC. 486, 486 (2012) (reviewing CRAIG ROBERTSON, *THE PASSPORT IN AMERICA: THE HISTORY OF A DOCUMENT* (2010) and discussing the author's deceased father's passport).

173. Denny Chin, *Representation for Immigrants: A Judge's Personal Perspective*, 78 FORDHAM L. REV. 633, 636–38 (2009).

worked for so many years waiting on tables, of how he became a citizen in 1947, of how he brought my parents into the country, of how they became citizens, and of how I, the son of a seamstress and Chinese cook, the grandson of a Chinese waiter, became a federal judge.<sup>174</sup>

Judge Chin's story illustrates how documentary formalities can become artifacts of identity. His grandfather's naturalization papers came to be a cherished reminder of his family's version of the American dream.

In this story, expansion of legal access to the formality of naturalization disrupted a racially exclusionary, ascriptive concept of U.S. citizenship.<sup>175</sup> Formalization of citizenship may take the form of decreasing barriers to naturalization, thereby admitting individuals who challenge ascriptive definitions of citizenship based on race, parentage, or place of birth. Consider the DREAM Act, which would provide certain individuals who arrived in the United States as minors with a formal path to legal residency and ultimately, eligibility for citizenship.<sup>176</sup>

Another example of formal citizenship is the equation of citizenship with passport.<sup>177</sup> By granting a passport, the state formally acknowledges the citizen. However, passports have not always carried this meaning.<sup>178</sup> In the nineteenth century, the law of citizenship rested expressly on ascriptive ideas about the racial character of America. Before the Civil War, only "free white person[s]" were eligible for naturalization.<sup>179</sup> Whether free nonwhite persons born in the United States were citizens was a controversial question.<sup>180</sup> Race, rather than documentation, was the marker of citizenship. For much of its history, the U.S. passport was not primarily used to identify a citizen, but rather to introduce its

174. *Id.* at 138; *see also infra* notes 258–68 and accompanying text (discussing the Chinese exclusion laws and "paper families").

175. The Chinese Exclusion Acts were repealed in 1943, allowing Chinese immigrants to apply for naturalization. LAU, *supra* note 9, at 17.

176. Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 4 (2013). While its procedures are formalities, the DREAM Act's conditions for eligibility reflect ascriptive visions of "model" American citizenship, such as educational attainment or military service. *See* Benhabib, *supra* note 65, at 509.

177. *See generally* CRAIG ROBERTSON, *THE PASSPORT IN AMERICA* 68 (2010) (discussing how the passport came to supplant other methods for determining U.S. citizenship).

178. *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835) (holding that a passport could not establish evidence of U.S. citizenship *per se*). In *Urtetiqui*, the Court was divided on whether the lower court had erred in admitting the passport into evidence, characterizing the passport as a "political" rather than a legal document. *Id.* To the extent this case stands for the holding that passports are not admissible as evidence of U.S. citizenship, it has been overruled by statute. *See* 22 U.S.C. § 2705(1) (2012).

179. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 153, 154–55. This racial limitation remained in effect until the Civil War. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; U.S. CONST. amend. XIV.

180. *See* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 511 (2013); *id.* at 520–26 (discussing controversy regarding the holding of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) that "free blacks could not be considered 'citizens' within the meaning of the Constitution . . .").



bearer to foreign officials, request that he<sup>181</sup> pass freely, and entitle him to the aid and protection of the United States while abroad.<sup>182</sup>

Before the Civil War, some African Americans used the idea that a passport might constitute citizenship to challenge the equation of citizenship and whiteness. In his history of the passport, Professor Craig Robertson describes how African Americans took advantage of the intermittent availability of passports and other such documents to stake claims to citizenship and the rights it entailed.<sup>183</sup> Between 1796 and 1868, thousands of free black sailors received “seaman’s protection” certificates stating the bearer was a “Citizen of the United States of America.”<sup>184</sup> While a runaway slave, Frederick Douglass borrowed such a certificate and dressed as a sailor to pass as a free man.<sup>185</sup> Robertson also tells the story of Robert Purvis, a “wealthy free man of color” who received a passport in 1834 after a well-connected white friend wrote a letter to the Secretary of State “invoking Purvis’s wealth and light complexion.”<sup>186</sup> In securing a passport, Purvis won not only a claim to citizenship but also a claim to whiteness. However, the Secretary of State noted that Purvis’s case should not serve as precedent, because Purvis was “a gentleman, a man of property, of scarcely perceptible African descent.”<sup>187</sup> These examples demonstrate how access to formalities may be variable, discretionary, and manipulable, creating opportunities for those excluded by ascriptive definitions to achieve recognition.

In the early twentieth century, passports again challenged ascriptive concepts that equated American citizenship with whiteness and “respectability.”<sup>188</sup> Before World War I, passports were generally not required to enter the United States during peacetime; rather, border officials allowed those appearing to be respectable white persons to pass freely while restricting the movement of others.<sup>189</sup> The threat of German spies during World War I called into question the equation of whiteness and citizenship, prompting the United States to require passports and visas at the border, to centralize the process for granting passports, and to request more documentary support for

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181. I use the masculine pronoun here deliberately, since most women were not issued their own passports until World War I; rather, their husbands’ passports would state “accompanied by his wife.” ROBERTSON, *supra* note 177, at 156.

182. *Id.* at 22–26; *see also* Kent v. Dulles, 357 U.S. 116, 123 (1958) (“[F]or most of our history a passport was not a condition to entry or exit.”).

183. *See* ROBERTSON, *supra* note 177, at 131–34.

184. *Id.* at 131.

185. *Id.* (citing Kelly S. Drake, *The Seaman’s Protection Certificate as Proof of American Citizenship for Black Sailors*, 50 LOG OF THE MYSTIC SEAPORT 1, 11–12 (Summer 1998)).

186. *See id.* at 132–33.

187. *See id.* at 133.

188. *Id.* at 102.

189. *Id.* at 160. In 1882, Congress passed legislation excluding Chinese laborers, “‘idiots,’” “‘lunatics,’” and those likely to become “‘public charges.’” *Id.* at 161. In 1891, polygamists, those guilty of crimes of moral turpitude such as prostitution, and those suffering from certain diseases were also excluded. *Id.*

the claims made on passport applications.<sup>190</sup> Thus, controversies over ascriptive meanings and concerns about fraudulent elective identities led to calls for formality. Journalists in the 1920s described the State Department's standardization of the types of documents required for proof of citizenship as "the passport nuisance."<sup>191</sup> This formalization of citizenship sparked a backlash from those with vested interests in the ascriptive notion of citizenship as white respectability.<sup>192</sup> These white citizens felt insulted that their citizenship was no longer assumed and now had to be documented.<sup>193</sup> A similar backlash occurred upon the tightening of passport requirements at the U.S.-Canada border after September 11, with many white Vermonters taking "umbrage" that their status as law-abiding citizens was no longer to be treated as "inherent and easily readable."<sup>194</sup> These examples demonstrate how formal requirements, if applied uniformly, can level the privilege of those who meet essentialist ascriptive standards.

In more recent years, a few courts have treated citizenship as a matter of formality—the designation on documents—regardless of whether the bearer met ascriptive or elective standards.<sup>195</sup> A few courts have treated certain formalities not just as evidence of, or verdicts on, citizenship, but as constitutive of the status of citizenship, like title to property.<sup>196</sup> In *Hizam v. Clinton*, the plaintiff, Abdo Hizam, was born in Yemen and issued a U.S. passport at the age of nine, which was twice renewed, allowing him to live for periods of time in the United States.<sup>197</sup> Hizam, however, had never been eligible for U.S. citizenship, because his U.S.-citizen father had not spent the requisite ten years in the United States prior to Hizam's birth.<sup>198</sup> When Hizam

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190. *Id.* at 193; see Act of May 22, 1918, ch. 81, 40 Stat. 559, *amended by* Act of June 21, 1941, ch. 210, 55 Stat. 252, *repealed by* Immigration and Naturalization Act of 1952, ch. 477, § 403(a)(15), 66 Stat. 163, 279.

191. ROBERTSON, *supra* note 177, at 216.

192. *Id.*

193. *Id.*

194. Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 57 (2009).

195. See, e.g., *United States v. Clarke*, 628 F. Supp. 2d 15, 18 (D.D.C. 2009) (interpreting U.S. statutes to render certificates of naturalization and passports "complete" and "conclusive" evidence of citizenship, akin to a judicial order that could not be attacked collaterally by third parties); *Magnuson v. Baker*, 911 F.2d 330, 334–35 (9th Cir. 1990) (holding that the State Department could not revoke a passport based on "second thoughts" due to "the high value of citizenship. Given all the rights that stem from citizenship, Congress would rationally limit the withdrawal of proof of citizenship to only the most serious grounds"), *superseded in part by statute*, 8 U.S.C. § 1504 (2012). It is important not to overstate this point. See, e.g., *infra* note 198.

196. As one treatise explained: "Like a court decree, the certificate of citizenship issued by the Attorney General is not subject to collateral impeachment, and unless it is cancelled . . . it must be accepted as establishing the title to citizenship of the person to whom it is issued." 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 99.04[4] (Matthew Bender, rev. ed. 2008).

197. *Hizam v. Kerry*, 747 F.3d 102, 104 (2d Cir. 2014). Hizam also received a Consular Report of Birth Abroad of a Citizen of the United States. *Id.*

198. *Id.* at 105. On the application for Hizam's passport, his father had truthfully stated that he had only spent seven years in the United States, but consular officials issued the passport anyway. *Id.*

applied for U.S. passports for his two children in 2009, the State Department discovered its error and revoked the passport.<sup>199</sup> The district court was persuaded that the equities were on Hizam's side, beginning its opinion by emphasizing that Hizam had held his passport since the age of nine, and making repeated references to the twenty-two year period in which the State Department made no attempt to revoke it.<sup>200</sup> The district court held that provisions of the 1994 Immigration and Nationality Act that allowed the State Department to cancel "erroneous" passports did not apply retroactively, and therefore did not affect Hizam's passport, which was first issued in 1990.<sup>201</sup> It concluded that applying the law retroactively would unsettle the reliance interests of people like Hizam, who had made their homes in the United States, maintained family ties to the United States, and begun paying into U.S.-government benefits systems.<sup>202</sup> The Second Circuit Court of Appeals reversed, concluding that, "despite the equities in Hizam's favor," the courts had no power to declare him a citizen.<sup>203</sup> It noted, however, that the State Department had agreed to "support other lawful means to provide relief to Hizam, including a private bill in Congress should one be introduced."<sup>204</sup> Although he lost his appeal, Hizam still might win his citizenship, as a result of his decades of reliance on citizenship formalities. The emphasis on reliance interests calls to mind the evidentiary function of formalities in providing security to identity claimants.

Outside of the courts, employers seeking to comply with federal immigration laws prohibiting the hiring of unauthorized workers also apply formal understandings of citizenship.<sup>205</sup> In 1997, the U.S. Citizenship and Immigration Services made available an internet database called "E-Verify" that allows employers to confirm that new employees are authorized to work in

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Courts are less sympathetic in cases in which claimants have made material misrepresentations on their passport applications. *See, e.g.,* *United States v. Moreno*, 727 F.3d 255, 257 (3d Cir. 2013) (rejecting the rule that a passport constitutes conclusive proof of citizenship in a case in which the plaintiff misrepresented her birthplace). In *Moreno*, the Third Circuit held that a passport "constitutes conclusive proof of citizenship *only* if the passport was issued to a U.S. citizen." *Id.* at 257, 260 (construing 22 U.S.C. § 2705 (2012), which "provides that a passport will serve as conclusive proof of citizenship only if it was 'issued by the Secretary of State to a citizen of the United States.'"). The dissent argued, among other things, that "the inquiry is whether the State Department has *determined* the passport holder to be a U.S. citizen, not whether she actually is one." *Id.* at 264 (Smith, J., dissenting).

199. *Hizam v. Clinton*, No. 11 Civ. 7693, 2012 WL 3116026, at \*1 (S.D.N.Y. July 27, 2012), *rev'd & remanded sub nom. Hizam v. Kerry*, 747 F.3d 102 (2d Cir. 2014).

200. *Id.* at \*1, \*5, \*7.

201. *Id.* at \*7 (discussing 8 U.S.C. § 1504(a) (2012)).

202. *Id.*

203. *Hizam*, 747 F.3d at 105.

204. *Id.* at 111.

205. In 1986, Congress passed the Immigration Reform and Control Act, which prohibits employers from hiring "unauthorized aliens." Pub. L. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324a (2012)).

the United States.<sup>206</sup> E-Verify compares the information that an employee enters on her Form I-9<sup>207</sup> to data from U.S. passports, visas, immigration and naturalization records, Social Security Administration records, and state-issued identity documents such as driver's licenses.<sup>208</sup> Although only 7 percent of employers have enrolled in E-Verify, Congress has considered several proposals to make the system mandatory.<sup>209</sup> One of the justifications for the E-Verify program was to replace ascriptive methods of determining work eligibility, in which employers discriminated against certain job applicants perceived as foreigners due to race, ethnicity, immigration status, national origin, appearance, accent, or other factors.<sup>210</sup> Employers who use E-Verify must do so for all new hires, not just those who raise suspicions.<sup>211</sup> Thus, like passport requirements, E-Verify's formalities displace ascriptive definitions of citizenship and level privilege.

Another example of the view that citizenship is a formality is the common phrase "undocumented immigrant," which suggests the core meaning of citizenship is nothing but paper. In political discourse, the term "undocumented" has become the progressive alternative to the label "illegal."<sup>212</sup> By using "undocumented," progressives may mean to reveal the formal and therefore empty and arbitrary nature of exclusionary visions of American citizenship. In her study of the immigration justice movement, Professor Rose Cuison Villazor has described how self-proclaimed

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206. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., E-VERIFY USER MANUAL FOR EMPLOYERS 4 (June 2013), available at [http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify\\_Native\\_Documents/manual-employer\\_comp.pdf](http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/manual-employer_comp.pdf); see also Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U.C. IRVINE L. REV. 381, 392–94 (2012) (describing how E-Verify works).

207. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS. (revised Apr. 8, 2013), FORM I-9, EMPLOYMENT ELIGIBILITY VERIFICATION, available at <http://www.uscis.gov/i-9>.

208. *How E-Verify Works*, DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/e-verify/what-e-verify/how-e-verify-works> (last updated July 11, 2014). Many of these records may evidence formal identities in the sense that the term is used in this Article—that is, identities individuals enroll in themselves. But others may have been generated without an individual's consent.

209. NAT'L IMMIGRATION LAW CTR., VERIFICATION NATION: HOW E-VERIFY AFFECTS AMERICA'S WORKERS 1 (2013), available at <http://www.nilc.org/document.html?id=957> (discussing enrollment data as of 2012). Twenty states require at least some employers to use E-Verify, and the federal government requires it for certain federal contractors. *Id.*

210. Stumpf, *supra* note 206, at 394–96.

211. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C., § 404(d)(4), 110 Stat. 3009-664, 3009-664 to 3009-665.

212. See, e.g., Christine Haughney, *The Times Shifts on 'Illegal Immigrant,' But Doesn't Ban the Use*, N.Y. TIMES, Apr. 23, 2013, <http://www.nytimes.com/2013/04/24/business/media/the-times-shifts-on-illegal-immigrant-but-doesnt-ban-the-use.html>; see also Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2047–48 (2008) (observing that the term "undocumented" connotes that "[f]irst, it may be unclear whether someone's presence is unlawful, and second, even those whose presence is indisputably unlawful might not be deported").

“American[s] without papers”<sup>213</sup> and “undocumented Americans”<sup>214</sup> intend to focus attention on the role of law in “their political invisibility, powerlessness, and vulnerability.”<sup>215</sup> These activists have appropriated the metaphor of “com[ing] out of the closet” as “undocumented” to “change the way that people see undocumented immigrants.”<sup>216</sup> In this way, attention to formality can create opportunities for individuals who are excluded from citizenship to argue that the rules are arbitrary and in need of reform.

Thus, citizenship formalities serve a variety of functions. Documents such as passports serve an evidentiary function, streamlining decision making, avoiding fraudulent claims, and facilitating the reliance of citizens who pay taxes and take on other burdens of citizenship. Citizenship’s extensive formal rituals serve the cautionary functions of ensuring that new citizens are not admitted hastily and communicating the significance of the identity. Citizenship documents also serve formality’s channeling function, forcing individuals to sort themselves into immigration-status categories and allowing the state and employers to administer rules such as those determining work eligibility. Moreover, citizenship formalities may challenge exclusionary definitions in a variety of ways. They might replace rules that reflect ascriptive standards. They might be manipulable. And they might expose the arbitrariness of essentialist definitions.

### B. Formal Family

The formal identity model also provides insights into how the law regulates kinship. This Section will discuss the functions of formalities in constituting marital and parental identities.

*Marriage.* The requirements for legal recognition of marriage—generally a license, ceremonial solemnization, and registration—are paradigmatic “formalities” that render legal identities official.<sup>217</sup> In addition, from the late-1800s until the 1970s, wives were required to adopt their husbands’ surnames.<sup>218</sup> This is not to say marriage is only formality.<sup>219</sup> Many government

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213. Villazor, *supra* note 176, at 7; *see also* Abrams, *supra* note 65 at 20 (“[U]ndocumented youth often feel like they belong to American society: ‘we are citizens without the papers,’ activists frequently say.”).

214. Villazor, *supra* note 176, at 7, 51–52.

215. *Id.* at 8.

216. *Id.* at 3.

217. UNIF. MARRIAGE & DIVORCE ACT § 201, 9 U.L.A. 101 (1974) (setting forth the “Formalities” of marriage).

218. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 770 (2007); *see also id.* at 772 (describing how, during this time frame, a “married wom[a]n’s ability to engage legally in certain activities—such as driving or voting—was dependent on her bearing her husband’s name”).

219. It is elective in the sense that “the consent of the parties is essential.” UNIF. MARRIAGE & DIVORCE ACT § 201. Accordingly, states do not allow marriage between those whose consent might not be meaningful due to young age or mental incapacity. *See* John D. Fletcher, *Validity of Marriage*,

agencies refuse to defer to marriage formalities out of concern that the couple only married to receive immigration, tax, or social security benefits rather than to “establish a life together.”<sup>220</sup> These efforts to avoid “marriage fraud” assume the meaning of marriage is ascriptive, and they reflect the concern that marriage formalities do not prevent fraud because they are too easily revocable.<sup>221</sup>

Common law marriage, still recognized in eleven states, is another exception to the law’s deference to formal marriage.<sup>222</sup> Under this doctrine, a court may hold that a couple is married if they have carried on as if they were married for a certain period of time, even though the relationship was never formalized.<sup>223</sup> But even in common law marriage cases, courts consider whether the couple adopted other legal formalities evidencing the intent to be married. Courts consider whether the couple “consistently declared themselves” to be single or married “on legal documents and forms,”<sup>224</sup> such as tax returns,<sup>225</sup> deeds to property,<sup>226</sup> and medical records.<sup>227</sup>

Some scholars view formal marriage as a way of avoiding essentialist and confining ideas about what it means to be married.<sup>228</sup> Common law marriage, by contrast, historically required courts to measure relationships against gendered standards about the meanings of “wifely” and “husbandly” behavior, and in the process, reinscribed those standards.<sup>229</sup> Formal marriage is

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36 AM. JUR. PROOF OF FACTS 2d 441 § 1 (Supp. 2014). Marriage law reflects ascriptive views of the meaning of marriage as well. Accordingly, some states restrict marriage based on consanguinity or a prior, undissolved marriage by one of the parties. *Id.* § 1.51.

220. *Abrams*, *supra* note 108, at 5–6. For example, the Immigration Marriage Fraud Amendments require recently married immigrants to come forward with evidence such as documentation of joint property ownership or the birth certificates of the couple’s children. *Id.* at 32 (discussing 8 C.F.R. §§ 204.2(a)(1)(i)(B), 204.2(a)(1)(iii)(B), 216.4(a)(5) (2012)).

221. *Id.* at 44–46 (discussing how no-fault divorce facilitated “marriage fraud.”).

222. Common law marriage may still be valid in eleven states and the District of Columbia. COLO. REV. STAT. § 14-2-109.5 (2015); IOWA CODE § 252A.3(6) (2015) (for purposes of child support); KAN. STAT. § 23-2714(b) (for purposes of divorce); MONT. CODE ANN. § 40-1-403 (2015); N.H. REV. STAT. ANN. § 457:39 (West 2015) (only at death); S.C. CODE ANN. § 20-1-360 (2015); TEX. FAMILY CODE ANN. § 2.401 (West 2013); UTAH CODE ANN. § 30-1-4.5 (West 2014) (if validated by “court or administrative order”); *State ex rel. Okla. Bar Ass’n v. Casey*, 295 P.3d 1096, 1100 (Okla. 2012); *Zharkova v. Gaudreau*, 45 A.3d 1282, 1290 (R.I. 2012); *Creel v. Creel*, 763 So. 2d 943, 946 (Ala. 2000); *Coates v. Watts*, 622 A.2d 25, 27 (D.C. 1993). Six other states may recognize common law marriages that were grandfathered in before a certain date. GA. CODE ANN. § 19-3-1.1 (2015); FLA. STAT. § 741.211 (2015); IDAHO CODE ANN. § 32-201(2) (2015); IND. CODE § 31-11-8-5 (2015); OHIO REV. CODE ANN. § 3105.12(B) (2015); 23 PA. CONS. STAT. ANN. § 1103 (2014).

223. *See Clarke*, *supra* note 36, at 570–74 (discussing elements of common law marriage).

224. *Smith v. Smith*, 966 A.2d 109, 115 (R.I. 2009).

225. *See, e.g., In re Wagner*, 893 P.2d 211, 215 (Idaho 1995).

226. *See, e.g., DeMelo v. Zompa*, 844 A.2d 174, 178 (R.I. 2004).

227. *See, e.g., In re Estate of Love*, 618 S.E.2d 97, 101 (Ga. Ct. App. 2005).

228. *See, e.g., Case*, *supra* note 90, at 1774.

229. *See Ariela R. Dubler, Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 957–58 (2000); *id.* at 983–90 (discussing a 1932 case in which the following evidence of common law marriage was presented at trial: the wife asked for her husband’s permission before accepting employment, she shopped for him, department stores allowed her to use his line of credit,

potentially more “flexible, liberatory, and egalitarian.”<sup>230</sup> Like the law governing corporations, the law governing formal marriage does not require that the arrangement be entered into for any particular purposes.<sup>231</sup> As Professor Case has written, “Just as a valid driver’s license will help get you onto a plane even if you have not driven in thirty years, so ‘a simple certificate of the state, regardless of whether the spouses love, respect, or even see each other on a regular basis, dominates and is supported.’”<sup>232</sup> Formal marriage gives couples legal space to challenge conceptions of marriage as entailing traditional gender roles, monogamy, cohabitation, childrearing, or financial interdependence.<sup>233</sup>

Formal marriage also allows unmarried couples to stay off the grid, by clarifying that if they do not execute marriage formalities, the law will not treat them as married. This allows individuals to opt out of legal marriage and the benefits and burdens it might entail. *Brown v. Buhman* is a case in point.<sup>234</sup> That case involved the constitutionality of a Utah statute that criminalized polygamy, defined to include any relationship in which a person already married “purports to marry another person.”<sup>235</sup> The plaintiffs were five “self-described polygamists that publicly lived in Utah as a plural family.”<sup>236</sup> But the family patriarch, Kody Brown, had only sought a marriage license for his union with one of his wives.<sup>237</sup> The court held that Brown had not violated the statute because he had not “purport[ed] to marry” any wife other than his first.<sup>238</sup> To avoid unconstitutionality, the court narrowly construed the statute to prohibit only “the fraudulent or otherwise impermissible possession of two purportedly valid marriage licenses for the purpose of entering into more than one purportedly legal marriage.”<sup>239</sup> The court thus adopted a highly formalized

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she cared for him and fed him when he was sick, the couple lived together, and servants, friends, and hotel employees knew the wife by her husband’s surname).

230. Case, *supra* note 90, at 1774.

231. *Id.* at 1777.

232. *Id.* at 1771 (quoting Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in WILLIAM B. RUBENSTEIN, *LESBIANS, GAY MEN AND THE LAW* 721, 724 (2d ed. 1997)).

233. *See id.* at 1772–73.

234. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

235. UTAH CODE ANN. § 76-7-101 (West 2013). The statute also prohibited a person already married from cohabiting with another person. *Id.* At oral argument, the Utah County Attorney admitted that the prohibition on cohabitation would apply to religiously motivated plural marriage, but not garden-variety adulterous cohabitation. *Buhman*, 947 F. Supp. 2d at 1215. The court did not see any rational basis for the distinction, and struck down the statute’s cohabitation ban on free exercise grounds. *Id.* at 1176.

236. *Brown v. Herbert*, 850 F. Supp. 2d 1240, 1244 (D. Utah 2012) (upholding plaintiffs’ standing to challenge Utah statute). The plaintiffs were well known for their reality television series on a national cable network, *Sister Wives*. *Id.*

237. *Buhman*, 947 F. Supp. 2d at 1178.

238. *Id.* at 1234 (quoting § 76-7-101).

239. *Id.* The court rejected the plaintiffs’ alternative argument that the Constitution requires that states formally recognize polygamy. *Id.* at 1215.

view of marriage that allowed the plaintiffs to continue their informal plural marriage without prosecution.<sup>240</sup>

In holding marriage is formal, the court also challenged culturally essentialist views. The opinion placed the state's prosecution of Mormon polygamy in the historical context of "Orientalism," a colonialist worldview that saw Middle Eastern, African, and Asian cultures as savage and in need of correction and governance from superior Western nations.<sup>241</sup> The court criticized the Orientalist logic of the Supreme Court's 1878 decision, *Reynolds v. United States*, which upheld the criminalization of polygamy by describing the practice as one that had "always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."<sup>242</sup> Thus, the *Brown* opinion employed formal marriage to challenge certain ascriptive versions of marriage based on colonialist views of racial superiority.

Formality also provides convenient evidence of marriage. Formality cuts against the fraud concerns that plague elective marriage regimes, which must examine myriad forms of evidence for indicia of intent to be married. Formality serves the evidentiary purpose of demonstrating that one party did not "trick" the other into a common law marriage.<sup>243</sup> The law provides the default terms for marriage, or parties may contract around those defaults, to a certain extent, with formalities such as prenuptial agreements.<sup>244</sup> Those agreements play evidentiary roles in the event of conflict and may promote marital stability by settling the question of the parties' financial arrangement.<sup>245</sup>

Additionally, formal marriage fulfills Fuller's cautionary function by ensuring that the parties truly intend to be married.<sup>246</sup> This cautionary function

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240. Cf. Davis, *supra* note 94, at 1960 (discussing the irony in how other courts have conferred legal recognition on informal marriages to prosecute them).

241. As an "interpretive framework," the court drew on the work of postcolonial literary theorist Edward Said. *Buhman*, 947 F. Supp. 2d at 1182 n.12 (discussing EDWARD W. SAID, *ORIENTALISM* (Vintage Books 1979) (1978)).

242. *Id.* at 1186 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

243. See Dubler, *supra* note 229, at 999–1002 (discussing legislative efforts to abolish common law marriage out of concern that the doctrine allowed scheming women, adventuresses, and gold diggers to "prey[] mercilessly on the weakness and vulnerability of unsuspecting men" who had not intended to marry).

244. See William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1917 (2012) ("Either by legislation or by court decision, all the states in the union and the District of Columbia have replaced a mandatory rule (statutory division of assets upon dissolution of civil marriage) with a default rule that the spouses can override by contract, including antenuptial agreements.").

245. Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 505 (2005) ("[M]odern courts contend that prenuptial and postnuptial agreements about property distribution may actually encourage marriage (if the parties are not already married) and facilitate the stableness of a marital relationship in an era in which no-fault divorce is available and divorce rates are high.").

246. To ensure caution, some states impose waiting periods. See, e.g., TEX. FAM. CODE ANN. § 2.204 (West 2013) (imposing a seventy-two-hour waiting period that can be waived in several ways,



is well known in U.S. popular culture, giving rise to clichés such as “cold feet” and “left at the altar.”<sup>247</sup> If courts recognized informal marriages, certain individuals might find themselves with duties to spouses that they never expressly intended to undertake.<sup>248</sup> Requiring formality ensures that the law will not recognize a marriage unless the parties had a full and fair opportunity to agree to it. Formal requirements thus protect unwitting “spouses” from liability for alimony or property division.

Formal marriage also channels private behavior into forms that are useful for public ordering. The movement to abolish common law marriage has coincided with the growth of the administrative state and its distribution of benefits based on marriage.<sup>249</sup> Formal marriage makes these programs easier to administer by creating a clear test of who is married.<sup>250</sup> It also channels individuals into a single form of marriage. An elective marriage regime, by contrast, would recognize all sorts of forms of domestic ordering, so long as the parties agreed to them, allowing complete freedom of customization rather than enforcing the *numerus clausus*. With consent, dignity, and autonomy as the only guiding principles, such a regime could not preclude consensual polygamous marriages, marriages of defined and limited durations, or self-marriage<sup>251</sup>—arrangements that might throw a wrench in social programs premised on stable two-adult marriages. In *Brown v. Buhman*, the court reasoned polygamists should not be punished for their relationships as long as only one woman in each polygamous family could claim the formal “legal status” of wife.<sup>252</sup> Because only one wife could claim the legal benefits of marriage, the government interest in avoiding “misuse of government benefits associated with marital status” dropped out of the picture.<sup>253</sup> Thus, formal marriage secures evidentiary, cautionary, and channeling functions that make it more attractive for regulators than an unadministrable elective regime.

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including through premarital counseling); WIS. STAT. § 765.08 (2014) (five-day waiting period between application and license).

247. See, e.g., *RUNAWAY BRIDE* (Paramount Pictures 1999) (movie about bride who leaves a series of men at the altar).

248. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 855–57 (2005). The American Law Institute has recommended that property and support rules that apply to divorcing spouses also be applied to cohabitants, unless those cohabitants have expressly opted out. AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* ch. 6 (2002). To the best of my knowledge, no state has adopted this precise recommendation, although some provide rights to cohabitants in limited circumstances. See CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* 59 (2010).

249. BOWMAN, *supra* note 248, at 25.

250. At the same time, it may allow opportunistic couples to marry for the sole purpose of receiving benefits. See *supra* notes 220–21 and accompanying text.

251. See, e.g., Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CALIF. L. REV. 235, 248, 252 (2011) (discussing “renewable marriage” and “self-marriage”).

252. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1197 (D. Utah 2013) (quoting *State v. Holm*, 137 P.3d 726, 773–74 (Utah 2006) (Durham, C.J., dissenting in part)).

253. *Id.* at 1219 (quoting *State v. Green*, 99 P.3d 820, 830 (Utah 2004)).

*Parenthood.* Formalities often constitute parent-child identities,<sup>254</sup> with adoption being the paradigmatic example.<sup>255</sup> But there are other examples as well. Parental relationships have long been registered on birth certificates<sup>256</sup> and documented on other forms.<sup>257</sup> The remainder of this Section will focus on three examples of the functions of documents in constituting parent-child identities: Chinese-American “paper families,” Missing Angel Acts, and methods for establishing paternity.

A historical example of formal identity at the intersection of citizenship and family comes from the era of the Chinese Exclusion Acts.<sup>258</sup> Between 1882 and 1943, U.S. law imposed severe restrictions on immigration from China.<sup>259</sup> However, many Chinese immigrants had arrived in the United States before the exclusion laws took effect.<sup>260</sup> Under U.S. law, their children, whether living in the United States or China, were eligible for U.S. citizenship.<sup>261</sup> Estelle Lau has described how the practice of “paper sons and fictive kin” grew out of this

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254. Professors Pamela Laufer-Ukeles and Ayelet Blecher-Prigat have written on “formal parenthood” although they would put under this label anyone with “pre-determined parental status,” whether “biological, presumptive, or adoptive.” Laufer-Ukeles & Blecher-Prigat, *supra* note 10, at 421. These scholars use the term “formal” as opposed to “informal,” in the sense of compliance with abstract legal rules, rather than in my sense of an identity constituted by concrete formalities. See *supra* Part I.C.

255. Courts are resistant to enforcing private coparenting agreements, which are viewed as interfering with the principle of protecting the best interests of the child. See, e.g., Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1755–70 (2007).

256. Heather L. Brumberg et al., *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. PERINATOLOGY 407, 407 (2012). The law does not always treat birth certificates as constitutive of parental status. In *Adar v. Smith*, an unmarried same-sex couple living in New York adopted a child, born in Louisiana, under New York law and received an adoption decree from a New York court. 639 F.3d 146, 149 (5th Cir. 2011) (en banc). The adoptive parents then petitioned the Louisiana state Registrar of Vital Records and Statistics for a reissued birth certificate. *Id.* But under Louisiana law, only married couples may jointly adopt. *Id.* at 149–50 (citing LA. CHILD. CODE ANN. art. 1221). The Fifth Circuit held that the Full Faith and Credit Clause of the U.S. Constitution did not require the Registrar to issue a revised birth certificate, in part because a birth certificate is merely an “enforcement measure,” as distinct from the underlying legal status and its associated rights. *Id.* at 157–61. The dissent saw the linkage between the birth certificate and the identity status as more inextricable, and accused the majority of “mislabel[ing] recognition of an out-of-state judgment . . . as enforcement of such a judgment.” *Id.* at 166 (Wiener, J., dissenting).

257. See, e.g., *E.C. v. J.V.*, 136 Cal. Rptr. 3d 339, 349–50 (Cal. Ct. App. 2012) (reversing and remanding trial court’s finding that the former girlfriend of a child’s biological mother had no parental rights where the girlfriend had held the child out as her own by, inter alia, “sign[ing] up the minor for kindergarten and list[ing] herself as the minor’s stepparent or legal guardian on the registration form”).

258. See, e.g., Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (suspending the “coming of of Chinese laborers to [the United States]” for ten years) (repealed 1943); Geary Act, ch. 60, 27 Stat. 25 (1892) (continuing the prohibition on immigration by “Chinese persons and persons of Chinese descent” for ten years) (repealed 1943); Scott Act, ch. 1064, 25 Stat. 504 (1888) (making it “unlawful for any chinese laborer” who once resided in the United States but had since departed to return) (repealed 1943).

259. LAU, *supra* note 9, at 16–17.

260. *Id.* at 36.

261. *Id.*

“loophole.”<sup>262</sup> The practice worked as follows: U.S. citizens of Chinese descent would return to China, where they would report the birth of a fictitious child, usually a son.<sup>263</sup> This created a “slot” that would be sold some decades later to a person—unrelated to the U.S. citizen—who wanted to immigrate to the United States.<sup>264</sup> The “paper son” would receive a birth certificate<sup>265</sup> and would have to learn enough details about his paper family to pass a rigorous immigration inspection by skeptical authorities.<sup>266</sup> U.S. immigration authorities were unable to apply ascriptive modes of family determination, due to ignorance about various Chinese cultural practices and inability to discern family “resemblances” among Chinese.<sup>267</sup> And so they deferred to formalities and procedural rules.<sup>268</sup>

Through this process, new families were created. By the 1920s, it was not uncommon for Chinese families to have generations of paper relatives.<sup>269</sup> Over the course of the twentieth century, some of these “paper families” became just as real as any others, as individuals were required to live their lives in conformity with the stories they told to immigration officials to retain immigration status.<sup>270</sup> In this way, these counterfeit formalities were constitutive of the very types of family relationships they were thought to falsify.

Lau considers the paper families to be “weapons of the weak.”<sup>271</sup> The mode of domination—the immigration bureaucracy used to enforce a racial exclusion—was turned into an opportunity for resistance and subversion of exclusionary immigration laws on a micro, everyday level.<sup>272</sup> The history of paper families demonstrates how formal family definitions may appeal to regulators for their evidentiary functions at the same time that they prove manipulable by outsider groups. It also shows how legal formalities can create the families they purport to evidence.

Missing Angel Acts provide a more contemporary example of how legal formality constitutes parenthood. These laws allow parents of stillborn babies

262. *Id.*

263. *Id.*

264. *See id.*

265. *Id.* at 39.

266. *Id.* at 51.

267. *Id.* at 46, 100.

268. *Id.* at 78.

269. *Id.* at 37.

270. *Id.* at 132–33. When the government enacted a “Confession Program” in the 1950s that gave legalized status to those who agreed to disclose their fictive family relations, some “paper families” were further bonded, since a confession by any one member of the “family” could have repercussions for the whole network. *Id.* at 117–18.

271. *Id.* at 114–15 (discussing SCOTT, *supra* note 18).

272. *Id.* at 115. The downside, from the perspective of resistance, is that although “Chinese immigrants’ behavior was created by and responsive to the process of regulation,” regulators assumed the behaviors resulted from the inherent dishonesty and craftiness of the Chinese “as a race,” a stereotype that has had an enduring legacy for U.S. immigration law. *Id.* at 154–55.

to apply for birth certificates to document the life of the stillborn child.<sup>273</sup> Professor Carol Sanger has asked, “Why has the movement toward greater recognition of stillborns focused specifically on the documentation of birth?”<sup>274</sup> Part of her answer is that birth certificates attest to the identity of the parents as parents.<sup>275</sup> “The certificate is proof that a real child—real enough to have its birth re-corded—was born to a woman now registered as its mother.”<sup>276</sup> Parents of stillborns seek public recognition of that status, which they experience as made real by the physical birth certificate.<sup>277</sup>

Fatherhood is also defined formally under many state laws. Under the Model State Vital Statistics Act, if a mother is married, a birth certificate will list her husband as her baby’s father by default.<sup>278</sup> To the extent that marriage is defined formally as a licensed and solemnized relationship, fatherhood too is formal. A man becomes a father because of formal marriage, rather than because he is a genetic, functional, or intended parent. In cases in which the mother is unmarried, formalities may still be determinative. Federal law requires that all states allow paternity to be established by having the mother and putative father sign a “voluntary acknowledgement of paternity” (or VAP) at the hospital.<sup>279</sup> This serves a cautionary function because prior to signing, the

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273. Carol Sanger, “*The Birth of Death*”: *Stillborn Birth Certificates and the Problem for Law*, 100 CALIF. L. REV. 269, 281 n.57 (2012). The certificates are formalities in the sense I am discussing here because parents must decide to apply for them; they are not automatically conferred by the state. *Id.* at 306 n.193.

274. *Id.* at 272.

275. *Id.* at 273. Sanger also argues that the birth certificate serves “as an artifact of mourning” and “documentary proof of the baby’s existence.” *Id.*

276. *Id.* at 288.

277. *Id.* at 286. Quoting one mother: “To everyone else, it’s just a piece of paper, but to us it’s gold.” *Id.* at 281. Another described the document as “dignity and validation.” *Id.* at 287 (citation omitted).

278. CTRS FOR DISEASE CONTROL & PREVENTION, MODEL STATE VITAL STATISTICS ACT AND REGULATIONS § 21(e) (1992), available at <http://www.cdc.gov/nchs/data/misc/mvsact92b.pdf> [hereinafter MODEL STATE VITAL STATISTICS ACT]. See generally *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (upholding California statute creating a presumption that a man married to a child’s mother is the child’s father against due process challenge by the biological father).

279. 42 U.S.C. § 666(a)(5)(C)(iv) (2012). Another example of a formality that may establish paternity is a writing signed by a sperm donor, required by some states for a sperm donor to assert parental rights. See, e.g., CAL. FAM. CODE § 7613(b) (West 2014) (“The donor of semen . . . for use in assisted reproduction of a woman other than the donor’s spouse is treated in law as if he were not the natural parent of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child.”). But see, e.g., UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (2002) (“A donor is not a parent of a child conceived by means of assisted reproduction.”). Courts have also allowed motherhood to be defined in this manner. See *Frazier v. Goudschaal*, 295 P.3d 542, 553–58 (Kan. 2013) (interpreting KAN. STAT. ANN. § 38-1113, which allows maternity to be determined by a writing acknowledging parentage, to require enforcement of a coparenting agreement between two lesbian mothers of children born through assisted reproductive technologies (ART)).

In 2015, California amended its Family Code to create three form documents that allow sperm donors, egg donors, and spouses or registered partners using ART to express their intention to be parents. See CAL. FAM. CODE § 7613.5 (West 2015). The form documents suffice as the “writing”

parents must be afforded certain due process safeguards, including oral and written notice of the legal rights and responsibilities that attach to paternity.<sup>280</sup> The VAP also serves an evidentiary function, creating a rebuttable or conclusive presumption of paternity, depending on the state.<sup>281</sup> But in any event, it will be recognized as a basis for seeking child support without the need for further proceedings to establish paternity.<sup>282</sup> As the California legislature explained, the purpose of the VAP is to create a “simple system” that will result in a “significant decrease in the time and money required to establish paternity due to the removal of the need for a lengthy and expensive court process.”<sup>283</sup> The formality channels men into the categories of parents or legal strangers to the child—all-or-nothing arrangements—and furthers the “compelling state interest in establishing paternity for all children.”<sup>284</sup> This system facilitates other government programs like child support enforcement and distribution of benefits.<sup>285</sup>

The VAP may capture the benefits of elective paternity by formalizing a couple’s intent that a particular man become a parent, while ensuring stability in parental arrangements by estopping both parents from later contesting the acknowledgment.<sup>286</sup> In Illinois, for example, a man who signs a VAP may only challenge paternity on grounds of “fraud, duress, or material mistake of fact.”<sup>287</sup> The formality may also circumvent disputes over ascriptive (i.e., biological versus functional) definitions of parenthood. One Illinois court has held that a man who signed a VAP relinquishing his right to a genetic test could not later challenge paternity on the ground that he was not the child’s biological father.<sup>288</sup> The court treated the acknowledgement like a contract, and concluded that it allocated the “risk of such a mistake” to the father.<sup>289</sup> And

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required by Section 7613 for certain sperm donors and spouses to qualify as parents, although they do not preclude courts from considering other claims to parentage under California law. *Id.* § 7613.5(a).

280. 42 U.S.C. § 666(a)(5)(C)(i) (2012); 45 C.F.R. § 302.70(a)(5)(iii).

281. 45 C.F.R. § 302.70(a)(5)(iv) (2014).

282. *Id.* § 302.70(a)(5)(vii).

283. CAL. FAM. CODE § 7570(b) (West 2014).

284. *Id.* § 7570(a).

285. *Id.* § 7570(b).

286. *But see infra* notes 288–89 (discussing cases in which courts did not enforce VAPs).

287. 750 ILL. COMP. STAT. 45/6(d) (2014).

288. *In re N.C.*, 993 N.E.2d 134, 142 (Ill. App. Ct. 2013); *see also, e.g., State ex rel. Robinson v. Glenn*, No. W2006-00557-COA-R3-JV, 2007 WL 1227377, at \*4 (Tenn. Ct. App. Apr. 26, 2007) (“[W]hen a man executes a VAP, he acknowledges that he accepts responsibility of being a parent to the child, and most importantly, he specifically waives his right to genetic testing.”). *But see, e.g., Ipock v. Ipock*, 403 S.W.3d 580, 587 (Ky. Ct. App. 2013) (allowing VAP to be rebutted with genetic testing, and holding that “DNA evidence must overshadow considerations related to public policy”).

289. *In re N.C.*, 993 N.E.2d at 142. By contrast, under a Texas statute, a man who is not a child’s genetic father may petition for termination of the parent-child relationship if he “signed the acknowledgment of paternity . . . because of the mistaken belief, at the time the acknowledgment was signed . . . that he was the child’s genetic father based on misrepresentations that led him to that conclusion.” TEX. FAM. CODE ANN. § 161.005(c)(2) (West 2013).

whether or not a man meets any ascriptive definition of a father, if he signed the VAP, he can be required to pay child support.<sup>290</sup>

In addition to the VAP, twenty-five states maintain some form of “putative father registry.”<sup>291</sup> Laws creating these registries were enacted in response to high profile court cases in which biological fathers challenged adoptions.<sup>292</sup> The registries facilitate notice to putative fathers of court proceedings regarding adoption and termination of parental rights, serving a sort of cautionary function.<sup>293</sup> Registration does not automatically confer parental status, but in twelve states, an unwed father who fails to register is not entitled to notice of adoption or other proceedings regarding the child.<sup>294</sup> In *Lehr v. Robertson*, the Supreme Court upheld New York’s registration requirement against due process and equal protection challenges by a biological father contesting an adoption.<sup>295</sup> The Court emphasized the father’s failure to protect his rights by “mailing a postcard to the putative father registry.”<sup>296</sup> Thus, registries give unmarried men who intend to be fathers and who qualify as fathers under ascriptive state-law definitions a formal channel for protecting their rights. At the same time, the registries extinguish the claims of those who fail to make use of that channel.

In sum, formal family law doctrines can give individuals legal space to challenge ascriptive views of kinship and domestic ordering, which may reflect gender stereotypes, cultural biases, or one-size-fits-all visions of intimacy. Formalities play convenient evidentiary roles in establishing family: avoiding intractable debates between biological and social definitions, and difficult determinations of whether individuals intended to be family or acted like family. Like the naturalization oath, family law formalities such as the marriage ceremony and adoption proceedings are meant to induce caution and careful consideration. These formalities channel family arrangements into recognizable units for ease of administration by government programs, such as those that distribute benefits to spouses or require child support payments. They also carve out a space for intimate relationships that will not be subjected to marriage-like rights and duties, allowing people to avoid entangling the law in their intimate arrangements by refusing to formalize them.

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290. 45 C.F.R. § 302.70(a)(5)(vii) (2014).

291. CHILD WELFARE INFO. GATEWAY, DEP’T OF HEALTH AND HUMAN SERVS., THE RIGHTS OF UNMARRIED FATHERS 2 (Jan. 2014), available at <https://www.childwelfare.gov/pubPDFs/putative.pdf>.

292. See, e.g., Marc Zappala, *On the Benefits of a National Putative Father Registry*, 28 A.B.A. CHILD L. PRAC. 91, 91 (2009).

293. CHILD WELFARE INFO. GATEWAY, *supra* note 291, at 2. Like the VAP, the registries also enable collection of child support. *Id.*

294. *Id.* Other potential parents may challenge a putative father’s claim based on ascriptive definitions of parenthood under state law. See *id.* at 5–95 (providing survey of state definitions of fatherhood).

295. *Lehr v. Robertson*, 463 U.S. 248, 248–49 (1983).

296. *Id.* at 264; see also *id.* at 262 n.18.

### C. Formal Sex

In 2001, my mom, who had moved to San Francisco, called me and told me that my green card petition came through, that I could now move to the United States. I resisted it. . . . But then two weeks later she called me, she said, “Did you know that if you move to the United States you could change your name and gender marker?” That was all I needed to hear. My mom also told me to put two E’s in the spelling of my name. She also came with me when I had my surgery in Thailand at 19 years old . . . . At that time in the United States, you needed to have surgery before you could change your name and gender marker. So in 2001, I moved to San Francisco, and I remember looking at my California driver’s license with the name Geena and gender marker F. That was a powerful moment. For some people, their I.D. is their license to drive or even to get a drink, but for me, that was my license to live, to feel dignified.

Geena Rocero<sup>297</sup>

Formalities also receive deference in legal determinations of sex.<sup>298</sup> The most notable example is legal deference to the birth certificate designation in cases involving transgender<sup>299</sup> and intersex individuals.<sup>300</sup> The initial sex designation on a birth certificate is not a formality of the type analyzed in this Article because it is ascribed to an individual at birth by someone other than the individual making an identity claim. But the idea that an individual might elect to change this designation, and thereby change her legal sex, invites comparison with other identity formalities.

A discussion of formal sex requires some background on how sexes are initially assigned. Birth certificates have long required ascriptive descriptions of the sex of the infant, offering only two choices: boy or girl.<sup>301</sup> A federal agency, the National Center for Health Statistics (NCHS),<sup>302</sup> requires that states

297. Geena Rocero, *Why I Must Come Out*, TED (Mar. 2014), [http://www.ted.com/talks/geena\\_rocero\\_why\\_i\\_must\\_come\\_out/transcript?language=en](http://www.ted.com/talks/geena_rocero_why_i_must_come_out/transcript?language=en).

298. Courts sometimes refer to the concept of “legal” sex, as opposed to biological, social, or self-identified sex. *See, e.g.*, *Shaw v. District of Columbia*, 944 F. Supp. 2d 43, 48, 51 (D.D.C. 2013) (accepting as true the allegation that a plaintiff “had her sex legally changed [from male] to female” under District law and referring to her as “legally a female”); *In re Lovo-Lara*, 23 I. & N. Dec. 746, 750 (B.I.A. 2005) (referring to “a legal change of sex”); *Kantaras v. Kantaras*, 884 So. 2d 155, 157 (Fla. Dist. Ct. App. 2004) (referring to the question of whether a party was “legally male or female”).

299. *See supra* note 81 (defining “transgender”).

300. *See supra* note 50 (defining “intersex”), *see also* Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488, e488–89 (2006), available at <http://pediatrics.aappublications.org/cgi/reprint/118/2/e488> (defining “intersex” to refer to disorders of sex development (DSDs): “congenital conditions in which development of chromosomal, gonadal, or anatomic sex is atypical”).

301. W.A. Plecker, *A Standard Certificate of Birth*, 5 AM. J. PUB. HEALTH 1044, 1044–45 (1915) (recommending, in the interests of “[s]implicity” that birth certificates give the options of “Boy or Girl” rather than asking for “sex”).

302. Before the twentieth century, birth certificates were a matter of state and local practice. Brumberg, *supra* note 256, at 408. The NCHS, part of the Centers for Disease Control and Prevention,

gather data upon all births including the baby's sex.<sup>303</sup> States later use this information to generate birth certificates.<sup>304</sup> NCHS has issued a Model State Vital Statistics Act to provide guidance to states with the goal of creating uniformity in birth certificate practices.<sup>305</sup> The Model Act provides that a hospital official is to obtain and record the required personal data.<sup>306</sup> The options are "male," "female," or "not yet determined."<sup>307</sup> "Not yet determined" may apply to intersex infants. If a "not yet determined" is sent to NCHS, NCHS will follow up until it has obtained a "male" or "female" answer.<sup>308</sup> Some medical experts recommend that all intersex infants receive a sex assignment, after expedited but thorough expert evaluation, since "[i]nitial gender uncertainty is unsettling and stressful for families."<sup>309</sup> The NCHS does not specify whether the parents, doctors, or hospital officials are to decide on that initial category. Some advocates argue parents should make the ultimate decision, with the benefit of informed medical opinions.<sup>310</sup> Others argue the

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now develops a standard form "birth certificate," which individual states may supplement. *Id.* NCHS dictates its "standard form" birth certificate as a series of required electronic data fields. NAT'L CTR. FOR HEALTH STATISTICS, BIRTH EDIT SPECIFICATIONS FOR THE 2003 PROPOSED REVISION OF THE U.S. STANDARD CERTIFICATE OF BIRTH, item 3, at 1 (July 2012), *available at* [www.cdc.gov/nchs/data/dvs/birth\\_edit\\_specifications.pdf](http://www.cdc.gov/nchs/data/dvs/birth_edit_specifications.pdf) [hereinafter BIRTH EDIT SPECIFICATIONS].

303. BIRTH EDIT SPECIFICATIONS, *supra* note 302, item 3, at 1. NCHS proscribes worksheets for mothers and hospitals to fill out immediately after the baby's birth. *See* NAT'L CTR. FOR HEALTH STATISTICS, FACILITY WORKSHEET FOR THE LIVE BIRTH CERTIFICATE (Feb. 5, 2004), *available at* <http://www.cdc.gov/nchs/data/dvs/facwksBF04.pdf>; NAT'L CTR. FOR HEALTH STATISTICS, MOTHER'S WORKSHEET FOR CHILD'S BIRTH CERTIFICATE (Jan. 28, 2004), *available at* [http://www.cdc.gov/nchs/data/dvs/momswkstf\\_improv.pdf](http://www.cdc.gov/nchs/data/dvs/momswkstf_improv.pdf).

304. NCHS uses the term "birth certificate" to refer to the data it collects, not the paper certificate with a state seal commonly thought of as the "birth certificate." *See* NAT'L CTR. FOR HEALTH STATISTICS, REPORT OF THE PANEL TO EVALUATE THE U.S. STANDARD CERTIFICATES 2 (Apr. 2000 Addenda Nov. 2001), *available at* [http://www.cdc.gov/nchs/data/dvs/panelreport\\_acc.pdf](http://www.cdc.gov/nchs/data/dvs/panelreport_acc.pdf) [hereinafter NCHS PANEL REPORT] (emphasizing the "understanding that a 'certificate' is no longer represented by the piece of paper on which the data are collected, but by a standard vital statistics data base with a strong emphasis on electronic, automated data collection"). The "birth certificate" that an individual receives to prove facts about his or her birth is created later by state departments of vital statistics, drawing on the data collected at the time of the individual's birth, including the sex determination. *See* NAT'L CTR. FOR HEALTH STATISTICS, WHERE TO WRITE FOR VITAL RECORDS (Feb. 2015), *available at* <http://www.cdc.gov/nchs/w2w/w2w.pdf>.

305. MODEL STATE VITAL STATISTICS ACT, *supra* note 278, Preface (providing that the goal is to "build a uniform system that produces records to satisfy the legal requirements of individuals and their families and also to meet statistical and research needs").

306. *Id.* § 7(b) (providing specifications that apply to births in "an institution or en route thereto"); *see also* NCHS PANEL REPORT, *supra* note 304, at 6.

307. BIRTH EDIT SPECIFICATIONS, *supra* note 302, item 3, at 1.

308. *Id.* item 3, at 2.

309. Lee, *supra* note 300, at e491.

310. CONSORTIUM ON THE MGMT. OF DISORDERS OF SEX DEV., CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD 25 (2006), *available at* <http://www.accordalliance.org/dsdguidelines/clinical.pdf> ("The role of health care professionals in initial gender assignment is to obtain and help interpret test results concerning the etiology and prognosis of the child's DSD and concerning the status of the child's anatomy and physiology (e.g., hormone production, hormone receptors, gross anatomy), so as to inform the parents' decision about gender assignment.").



designation should be left blank or filled in with a third category.<sup>311</sup> The process for determining this initial designation is entirely ascriptive, as it involves the assignment of a sexual identity to an infant based on medical views of sex.

While the initial sex designation is ascriptive, individuals may later elect to change that designation through a formal process.<sup>312</sup> For the most part, state rules for changing birth certificate sex designations require surgeries.<sup>313</sup> It may be possible to make corrections to the sex designation with a document from the hospital admitting a mistake.<sup>314</sup> Absent such a letter, changes are more difficult.<sup>315</sup> For example, the Model Act allows for amendment to the birth certificate's sex designation "[u]pon receipt of a certified copy of an order of (a court of competent jurisdiction) indicating the sex of an individual . . . has been changed by surgical procedure."<sup>316</sup> Most states have adopted similar

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311. In 2013, Germany enacted a law allowing parents to leave sex assignments blank. *Germany Allows 'Indeterminate' Gender at Birth*, BBC NEWS EUROPE (Nov. 1, 2013), <http://www.bbc.co.uk/news/world-europe-24767225>. Germany, New Zealand, Australia, Bangladesh, Nepal, Pakistan, and India allow individuals to designate sex as "X," "other," or another third category for purposes of passports, voter lists, census forms, or national identity cards. *Id.*; see also Nelson Jones, *Germany Now Lets Parents Check "No Gender" on a Baby's Birth Certificate*, NEW REPUBLIC (Nov. 1, 2013), <http://www.newrepublic.com/article/115450/germany-offers-third-gender-option-birth-certificate>; Naftali Bendavid, *Countries Expand Recognition for Alternative 'Intersex' Gender*, WALL ST. J. (Oct. 30, 2013, 3:39 PM) <http://online.wsj.com/news/articles/SB10001424127887323893004579058822738037190>.

312. Mottet, *supra* note 51, at 382 (stating that forty-six states explicitly allow changes to sex designations on birth certificates). However, some state courts have adopted an understanding of sex as that recorded on the birth certificate *at the time of birth*, and have refused to consider amended birth certificates on grounds that amendments are contrary to their state's public policy or the legislature's intent. *In re Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*5-6 (Ohio Ct. App. Dec. 31, 2003) ("In this case, the amended birth certificate submitted by Nash as evidence of his sex was rebutted by the evidence already in possession of the trial court, to wit, Nash's original birth certificate designating Nash's sex as female."); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (referring to the original birth certificate as "official").

313. Mottet, *supra* note 51, at 400-02 (cataloguing state laws).

314. See OFFICE OF VITAL RECORDS, N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, CORRECTING A BIRTH CERTIFICATE (Jan. 2015), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/vr/bcorrect.pdf> (requiring a "[l]etter from hospital admitting error" to correct a child's sex on a birth certificate); cf. CAL. HEALTH & SAFETY CODE § 103225 (West 2014) (allowing an amendment "[w]henver the facts are not correctly stated in any certificate of birth" if supported by an affidavit from the person seeking the change and "the affidavit of one other credible person having knowledge of the facts").

315. The director of a legal advocacy group for children with intersex conditions has noted that it is growing more difficult to use state rules allowing corrections of "clerical error[s]" to change sex designations due to rules designed to limit changes to sex designations by transgender individuals. JULIE A. GREENBERG, *INTERSEXUALITY & THE LAW: WHY SEX MATTERS* 115 (2013) (quoting Anne Tamar-Mattis, director of Advocates for Informed Choice, as stating, "In the past" clerks would accept "a doctor's letter stating that a mistake was made . . . at face value," but "[n]ow that many states have adopted written procedures for addressing transsexuals' birth certificate amendment requests, bureaucrats automatically turn to those rules no matter how inappropriate or inapplicable they may be").

316. MODEL STATE VITAL STATISTICS ACT, *supra* note 278, § 21(d).

requirements, although there is variation on what specific surgical procedures are required.<sup>317</sup>

However, surgical requirements have received resounding criticism.<sup>318</sup> A growing number of states have adopted rules that do not require surgery.<sup>319</sup> California, for example, allows a change if the applicant produces a “physician’s affidavit” indicating he or she sought “clinically appropriate treatment for the purpose of gender transition.”<sup>320</sup> Although the sex designation on a birth certificate is generally the basis for the sex designation on other government identification records, such as passports, social security records, and driver’s licenses,<sup>321</sup> sometimes these other documents may be changed without a corresponding change to the birth certificate.<sup>322</sup> The rules for changing these documents are often more lenient. For example, several states allow changes to driver’s licenses with “(1) signed documentation from the license holder that they are seeking to have the gender on their license corrected to reflect their gender identity, and (2) the signature of a health or social service professional who attests, in their professional opinion, that the person’s gender is as stated.”<sup>323</sup>

A theory of formal identity might support enforcement of sex designation changes.<sup>324</sup> Some legal scholars have focused on birth certificate reforms as a

317. Mottet, *supra* note 51, at 400–02 (describing state requirements); *id.* at 401 (“[A]s a practical matter, sometimes any surgery will qualify an individual for correction, but other times an agency will have strict (generally unwritten) rules that a particular surgery must be shown.”).

318. See, e.g., Press Release, *AMA Calls for Modernizing Birth Certificate Policies*, AM. MED. ASS’N. (June 9, 2014), <http://www.ama-assn.org/ama/pub/news/news/2014/2014-06-09-modernizing-birth-certificate-policies.page>; *Identity Documents and Privacy*, NAT’L CTR. FOR TRANSGENDER EQUALITY, [http://transequality.org/Issues/federal\\_documents.html](http://transequality.org/Issues/federal_documents.html) (last visited Apr. 5, 2015).

319. See CAL. HEALTH & SAFETY CODE § 103430 (West 2014); D.C. CODE § 7-217(d) (2015); IOWA CODE § 144.23(3) (2014); N.Y. COMP. CODES R. & REGS. tit. 10, § 35.2 (2015); OR. ADMIN. R. 333-011-0275(1)(e) (2015); VT. STAT. ANN. tit. 18, § 5112(b) (2014); see also Mottet, *supra* note 51, at 403 (discussing Washington State’s administrative policy).

320. CAL. HEALTH & SAFETY CODE § 103430. The Social Security Administration has recently adopted a similar rule. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM SECTION: RM 10212.200 (Sept. 30, 2013), available at <http://policy.ssa.gov/poms.nsf/lnx/0110212200> (providing sample letter).

321. Mottet, *supra* note 51, at 392; GREENBERG, *supra* note 315, at 69.

322. Mottet, *supra* note 51, at 411–12; GREENBERG, *supra* note 315, at 69.

323. Mottet, *supra* note 51, at 412.

324. However, in older cases in which courts were required to determine sex for purposes of state laws that only allowed cross-sex marriage, some courts divided along ascriptive versus elective lines, without emphasis on birth certificate designations. Compare *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002) (refusing to defer to a birth certificate’s amended designation because “[t]he plain, ordinary meaning of ‘persons of the opposite sex’ contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria.”), and *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) (relying on the “understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth”), with *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976) (“The evidence and authority which we have examined, however, show that a person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character.”).

way out of the ascriptive versus elective sexual identity debate. For example, one scholar calls birth certificate reform the “path forward” out of the debate between courts, which rely on “physical attributes or presumed genetic traits of the body,” and transgender rights advocates, who point to “a person’s innate sense of themselves as male or female.”<sup>325</sup> The requirements for changes to birth certificates—whether they include surgery, hormonal therapy, or simply a physician’s letter—might be considered ascriptive standards based on medical understandings of sex.<sup>326</sup> But they might also be formalities, in that they are thought to provide simple evidence of sex, ensure a claimant has exercised due caution before making a legal transition, and channel a claimant into either a stable male or female identity.<sup>327</sup>

Controversies over who may use sex-segregated restrooms demonstrate how formal sex designations serve an evidentiary function. Many employers will not allow transgender employees to switch restrooms without changes to the sex designation on the employees’ driver’s licenses or other identification documents.<sup>328</sup> Far from being a trivial issue, disputes over transgender and intersex individuals’ use of restrooms have resulted in loss of employment, police harassment, and violence.<sup>329</sup> Consider one Minnesota city’s response to controversy over who may use sex-segregated restrooms and changing

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325. Mottet, *supra* note 51, at 379; cf. GREENBERG, *supra* note 315, at 71 (arguing against “rules that limit people’s right to have their official sex markers reflect their self-identified sex”). But see Spade, *supra* note 9, at 750 (arguing that “reliance on gender as a point of data and classification in these systems has less value than is assumed and should be reduced”).

326. One court refused to defer to a birth certificate designation because it was a “ministerial act[]” that did not “involve fact-finding.” *In re Marriage of Simmons*, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005) (holding “the mere issuance of a new birth certificate cannot, legally speaking, make petitioner a male”). The court noted that the plaintiff’s physician had “admitted that the only reason he signed the physician’s affidavit in connection with the issuance of the new birth certificate was to ‘help out’ petitioner and make it easier for him to legally change his sex from female to male,” and it was “clear that the reassignment ha[d] never been completed.” *Id.* at 308–10.

Another court expressed skepticism of the formality of a first name change from “Steven” to “Rebecca,” noting “[p]laintiff was not required to present any proof of biological sex or sex reassignment to legally change her name.” *Kastl v. Maricopa Cnty Cmty. Coll. Dist.*, No. CV-02-1531-PHX-SRB, 2006 WL 2460636, at \*1 n.3 (D. Ariz. Aug. 22, 2006) (employment discrimination dispute regarding whether plaintiff could use the women’s restroom facilities). In that case, the plaintiff’s birth certificate designation was not changed until after the alleged discrimination occurred. *Id.* at \*1.

327. See Mottet, *supra* note 51, at 416–17.

328. *Id.* at 394.

329. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1225 (10th Cir. 2007) (holding that an employer did not discriminate on the basis of sex when it terminated an employee with male genitalia for using female restroom facilities); GRANT BOWERS & WENDY LOPEZ, WHICH WAY TO THE RESTROOM? RESPECTING THE RIGHTS OF TRANSGENDER YOUTH IN THE SCHOOL SYSTEM 5 (Apr. 2012), available at <http://www.nsba.org/sites/default/files/reports/Respecting%20the%20Rights%20of%20Transgender%20Youth%20and%20appendices.pdf> (“[T]rans students may be subject to ridicule, abuse, or assault, physical or sexual, in public lavatories.”); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 17 n.5 (2003) (discussing the author’s experience “spen[ding] 23 hours in jail on a false trespassing charge” after “using a men’s room in Grand Central Station”).

facilities.<sup>330</sup> By way of background, Minnesota state law prohibits discrimination on the basis of a person's "self-image or identity not traditionally associated with one's biological maleness or femaleness."<sup>331</sup> The Minnesota Supreme Court has held, however, that by this provision the legislature did not intend to restrain employer discretion with respect to defining "men" and "women" for purposes of sex-segregated restrooms and changing facilities.<sup>332</sup> In that case, the court rejected a plaintiff's argument that her employer had discriminated by "designating restroom use according to biological gender" rather than "self-image of gender."<sup>333</sup> But the law does not require a "biological gender" rule; it also allows employers to opt for a self-identification rule if they so choose.<sup>334</sup> Faced with the choice between an ascriptive or elective rule, in April 2012, the City of Crosby, Minnesota, passed a "gender discrimination policy" that provides:

It is the policy of the City of Crosby that City facilities of any kind or nature that are labeled "Men" or "Women" or other words to indicate gender, are for use by those persons of the biological gender so indicated. If in doubt, the City may require proof of biological gender by means of production of a birth certificate issued by the State of the person's birth.<sup>335</sup>

The rule defers questions of sex determination to a formality. The assumption behind the policy is that birth certificate authorities verify sex based on a biological test. During debates over this measure, the city's attorney acknowledged that "[i]f a person has gender reassignment surgery, they can petition to have their birth certificate changed."<sup>336</sup> The formality simplifies sex determinations for city officials, avoiding the specter of on-site anatomical examinations and deferring controversies to birth certificate authorities.

In addition to this function, deference to formalities may serve the aim of forcing a measure of circumspection about claims to gender identity. Part of

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330. Linda Peeples, *Crosby Council Votes 'No' to Social Host Ordinance*, CROSBY-IRONTON COURIER, Apr. 11, 2012, at 1, 13.

331. MINN. STAT. §§ 363A.03 subd. 44, 363A.02 subd. 1 (2014).

332. *Goins v. W. Grp.*, 635 N.W.2d 717, 723 (Minn. 2001).

333. *Id.* Although the plaintiff had also alleged a Texas court had granted her petition for a "gender change 'from genetic male to reassigned female,'" the court did not consider a formal definition of sex for purposes of restroom usage. *Id.* at 721. I note that the court appears to be using the term gender as a synonym for sex, in a way that would seem oxymoronic to many feminists. *See supra* note 78.

334. *See Cruzan v. Special Sch. Dist.*, #1, 294 F.3d 981, 984 (8th Cir. 2002) (rejecting the argument that an employer's policy of allowing a self-identified female to use the women's restroom facilities constituted sexual harassment of other women).

335. Minutes of Crosby, Minnesota, City Council Meeting (Apr. 9, 2012) (on file with author) [hereinafter Crosby Minutes]. According to Mottet, challenges to access to sex-segregated restrooms generally do not arise for individuals with gender-conforming appearances. Mottet, *supra* note 51, at 419. But when controversies do arise, institutions typically turn to formal documentation, as the Crosby City Council did. *See id.*; Crosby Minutes, *supra*.

336. Peeples, *supra* note 330, at 13.

this motivation is paternalistic—ensuring that individuals are committed to a new gender identity and will not later come to regret their decisions.<sup>337</sup> But the cautionary function also protects third parties from “gender fraud.”<sup>338</sup> A person cannot easily elect to switch formal sex designations just for purposes of restroom misconduct if she must complete an administrative process every time. Thus, even in states that do not require surgery, formal definitions of sex may have appeal over elective ones by alleviating some of the fraud concerns related to restrooms.<sup>339</sup>

Deference to birth certificate designations also serves administrative interests in uniformity. In another Minnesota case, the plaintiff, Christine Radtke, had been dropped from enrollment in her husband’s employer-sponsored health care benefits fund based on the fund’s determination that she was a man and that therefore, her marriage to another man was illegal and she did not qualify as an eligible “family dependent.”<sup>340</sup> The court refused to adopt the fund’s proposed definition of sex as “an immutable biological determination at birth” because of definitional disagreements over the ascriptive meaning of sex.<sup>341</sup> Instead, the court reasoned that “[a]n individual’s sex includes many components, including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual.”<sup>342</sup> But it did not rely on Radtke’s self-identification as a woman alone.<sup>343</sup> Rather, the court analyzed, in detail, Radtke’s compliance with applicable state regulations for receiving a birth certificate designating her sex as female.<sup>344</sup> It held that to determine an individual’s sex for purposes of Minnesota’s marriage law, “it is logical to look to ‘the designation appearing on the current birth certificate issued to that person by the State in which he or she was born,’ and to the official government documents issued by the State of Minnesota, including court orders and marriage certificates and licenses.”<sup>345</sup>

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337. See Spade, *supra* note 329, at 21, 25 (describing how trans people must often conform to a medical understanding of “gender identity disorder” in which they feel “trapped in the wrong body” to convince mental health professionals they will not “regret” sexual reassignment surgery or legal gender-marker changes).

338. See *supra* notes 109–11 and accompanying text. Mottet points out that there are no reported cases of transgender individuals using antidiscrimination laws to access restroom or shower facilities for criminal purposes. Mottet, *supra* note 51, at 422.

339. See Mottet, *supra* note 51, at 435–36 (proposing an administrative procedure that would require a notarized statement from a physician). But see Spade, *supra* note 329, at 31 (discussing conversations with New York City birth certificate authorities “who [were] deeply concerned about people ‘changing back’ if they lower their [surgical] requirements”).

340. *Radtke v. Misc. Drivers & Helpers Union Local # 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1024 (D. Minn. 2012). Such a case would be unlikely to arise today, as Minnesota has since legalized same-sex marriage. See MINN. STAT. § 517.01 (2014).

341. *Radtke*, 867 F. Supp. 2d at 1032.

342. *Id.*

343. Radtke argued that as a result of the birth certificate change process, “[she] was judicially and administratively recognized for all purposes as female.” *Id.* at 1027–28.

344. *Id.* at 1025–26, 1035–36.

345. *Id.* at 1032 (quoting *In re Lovo-Lara*, 23 I. & N. Dec. 746, 752 (B.I.A. 2005)).

Behind the Radtke court's argument that it was "logical" to defer to the birth certificate designation were assumptions about formality's utility in facilitating sex-based regulation. The court explained, "The only logical reason to allow the sex identified on a person's original birth certificate to be amended is to permit that person to actually use the amended certificate to establish his or her legal sex for other purposes, such as obtaining a driver's license, passport, or marriage license."<sup>346</sup> It listed state and federal government agencies that had recognized Radtke as female for purposes of administering benefits programs and collecting taxes.<sup>347</sup> The court rejected the notion that the state might recognize Radtke "as female for some purposes . . . but not for others."<sup>348</sup>

When recognized by the law, formal sex may allow intersex and transgender individuals to achieve recognition and challenge the equation of certain biological traits with gender identities, norms, and stereotypes. Administrative and even medical treatment requirements for changes to sex designations might be understood as formalities, intended to ensure that individuals consider their decisions with caution, and to channel them into one of two binary identities, male or female, enabling sex-segregated institutions to readily categorize them without having to engage in debates about ascriptive versus elective meanings.

#### D. Formal Race

The concept of formal race has less traction in law than formal citizenship, family, or sex.<sup>349</sup> This may be on account of ideologies of colorblindness,<sup>350</sup> or because historically, racial registration and identification practices have been utilized for purposes of slavery, apartheid, and genocide.<sup>351</sup> In the early twentieth century, formal racial-identification practices facilitated enforcement of antimiscegenation laws in some U.S. states.<sup>352</sup> By the 1970s,

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346. *Id.* at 1034.

347. *Id.* at 1028.

348. *Id.* at 1034.

349. To clarify, I use the term "formal race" here in the particular sense of formalities that the law recognizes as conferring racial status, not in the sense of abstract or colorblind racial ideologies. *See supra* note 10.

350. *See* Gotanda, *supra* note 10, at 8 (discussing the ideology of "colorblind constitutionalism" in which "public officials exercising state powers operate according to the rule that race is *not* to be considered").

351. *See* Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 343–47 (2002) (discussing laws requiring slaves to carry passes in the United States prior to the Civil War, Nazi use of administrative means such as the census, identification cards, and passports to identify Jews during the Holocaust, South African laws requiring black citizens to carry passes during Apartheid, and identity cards distinguishing Hutus and Tutsis during the Rwandan genocide).

352. In 1924, Virginia passed the Act to Preserve Racial Integrity, which sought to ensure accurate registration of race to facilitate the state's ban on interracial marriage. Act to Preserve Racial Integrity, ch. 371, 1924 Va. Acts 534 (repealed 1975). As a result, Virginia's Bureau of Vital Statistics

most U.S. jurisdictions had repealed racial registration laws, but racial information was still commonly found on locally generated birth certificates.<sup>353</sup> These designations are not formal identities as the term is used in this Article because local officials assigned racial classifications based on ascriptive standards, and individuals did not opt into racial categories in any meaningful sense.

As with changes to sex designations, changes to racial designations on birth certificates could hypothetically be conceptualized as formal identities. However, modern birth certificates do not list an individual's race.<sup>354</sup> Rather, intake forms request the races of an infant's parents.<sup>355</sup> This has not stopped a parent's race from being imputed to a child. In the early 1980s, Suzy Guillory Phipps was denied a passport because she had claimed to be "white" on her application, while her birth certificate indicated that her deceased parents were "colored"—designations the midwife possibly ascribed to them when Phipps was born.<sup>356</sup> Phipps claimed the birth certificate had come as a "shock," since she had always considered herself to be white.<sup>357</sup> Phipps sued the State of Louisiana to change her parents' designations and lost.<sup>358</sup> On appeal, the court found Phipps had no right to challenge the birth certificate designations, because she herself had "not been racially classified," rather, it was her parents' races she sought to contest.<sup>359</sup> Adopting an elective concept of race, the court

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"began an aggressive effort to 'properly classify[] [Virginia's] population as to color,' and the agency unilaterally altered racial designations on birth, marriage, and death certificates." Sharfstein, *supra* note 47, at 1506–07. Other states also had general laws on racial classifications, or laws specific to certain legal domains, such as education and marriage. DAVIS, *supra* note 42, at 9.

353. Gotanda, *supra* note 10, at 35.

354. The federal Certificate of Live Birth, the standard intake form prescribed by NCHS for collecting birth data, has never included an item for the race of the infant. See NAT'L CTR. FOR HEALTH STATISTICS, U.S. VITAL STATISTICS SYSTEM: MAJOR ACTIVITIES AND DEVELOPMENTS, 1950–95, at 28–31 (1997) [hereinafter U.S. VITAL STATISTICS SYSTEM], available at <http://www.cdc.gov/nchs/data/misc/usvss.pdf>.

During its last review of the data to be collected on the form birth certificate, completed in 2003, NCHS rejected the suggestion that a "race of child" item be added to the birth certificate on grounds that sound in elective identity. NCHS PANEL REPORT, *supra* note 313, at 85. The subgroup charged with reviewing birth certificates was concerned about "ethical issues," in particular, that "[t]he child may very well later choose a different race than what the parents chose." *Id.*

355. See U.S. VITAL STATISTICS SYSTEM *supra* note 354, at 29. In 1989, a separate query for "Hispanic origin" was added. *Id.* For purposes of coding the race and Hispanic origins of infants in its database, NCHS assigns designations to infants based on the mothers' self-reports, although in the past, NCHS applied complicated formulas considering the race of both parents. *Id.* at 16; Ford, *supra* note 9, at 1257–60.

356. DAVIS, *supra* note 42, at 10. The Department of Homeland Security no longer requests an individual's race in its passport application, so such a case would be unlikely to arise today. See DEP'T OF STATE, APPLICATION FOR A U.S. PASSPORT (Sept. 2013), available at <http://www.state.gov/documents/organization/212239.pdf>.

357. DAVIS, *supra* note 42, at 10.

358. *Id.*

359. Doe v. State, 479 So. 2d 369, 371 (La. Ct. App. 1985). One judge dissented from this reasoning, and was "compelled to point out that the society in which plaintiffs grew up, and perhaps to

noted there was “no proof in the record” that Phipps’ parents “preferred to be designated as white.”<sup>360</sup> Indeed, “[t]hey might well have been proud to be described as colored.”<sup>361</sup>

Another case from the 1980s comes closer to a formal definition of race. In that case, two brothers were estopped from claiming black identities by past formalities.<sup>362</sup> Paul and Philip Malone were two Boston-area firefighters who, by all reports, appeared white, but self-identified as African American on job application forms after learning their maternal grandmother was African American.<sup>363</sup> The Malone brothers were hired under an affirmative action policy and then fired many years later after their claims to African American identity were brought to light.<sup>364</sup> The courts sided with the employer. When the Malones had first applied as firefighters in 1975, they had identified as “white.”<sup>365</sup> Moreover, birth certificates proved the Malone family had “reported consistently to be White” “for three generations.”<sup>366</sup> The court denied the Malones’ claim, interpreting their inconsistent identifications as fraud.<sup>367</sup>

Many documents collect racial information for purposes other than formalizing identities. Birth certificate race designations do not make appearances in later cases on racial identity, possibly because NCHS issued a revised form birth certificate in 1968 that instructed that data on the parents’ races were “for medical and health use only.”<sup>368</sup> Similarly, I have not located

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a lesser extent our present society, classify one according to ancestral designations, ‘you are what your parents are.’” *Id.* at 373 (Armstrong, J., concurring in part and dissenting in part).

360. *Id.* at 372 (majority opinion).

361. *Id.*

362. *See* Rich, *supra* note 73, at 216–17.

363. *Malone v. Haley*, No. 88-339, slip op. at 3 (Mass. Sup. Jud. Ct., Suffolk Cnty., July 25, 1989).

364. *Id.*

365. *Id.*

366. *Id.* at 19.

367. *Id.* at 24.

368. *Compare* NAT’L CTR. FOR HEALTH STATISTICS, VITAL STATISTICS OF THE UNITED STATES 1968: VOLUME I—NATALITY, app. 3-4, fig.3-A (1970) [hereinafter NATALITY 1968], available at [http://www.cdc.gov/nchs/data/vsus/vsus\\_1968\\_1.pdf](http://www.cdc.gov/nchs/data/vsus/vsus_1968_1.pdf) (1968 revised Certificate of Live Birth), with NAT’L CTR. FOR HEALTH STATISTICS, VITAL STATISTICS OF THE UNITED STATES 1956: VOLUME I, at XIV, fig.2 (1958) [hereinafter NATALITY 1956], available at [http://www.cdc.gov/nchs/data/vsus/Vsus\\_1956\\_1.pdf](http://www.cdc.gov/nchs/data/vsus/Vsus_1956_1.pdf) (1956 revised Certificate of Live Birth). The standard certificates are revised approximately every ten years. In both 1956 and 1968, NCHS reported that most states were conforming closely to their standard form. NATALITY 1956, *supra* at XIV; NATALITY 1968, *supra* at 3-3; *see* Sally Northam & Thomas R. Knapp, *The Reliability and Validity of Birth Certificates*, 35 J. OBSTETRIC, GYNECOLOGICAL & NEONATAL NURSING 3, 5 fig.1 (2006) (providing Texas’s data collection form as representative, which requests the mother’s and father’s races but indicates the information is “confidential,” “for medical and public health use,” and “will not be shown on certified copies”). Although California designates racial information “confidential” and “for public health use,” it will release the portion of the form including the racial data on request to certain persons, including the person named on the certificate and a parent who signed the certificate. CAL. HEALTH & SAFETY CODE §§ 102425–102430 (West 2014). In 1995, concerns about offensive racial descriptors prompted California to enact a law allowing a person to receive a new birth certificate if “his or her existing birth certificate contains a derogatory, demeaning,



any examples of the use of an individual's own census records to resolve disputes over that individual's race.<sup>369</sup> While the process of responding to the census plays a role in the formation of racial identities,<sup>370</sup> recent census records are kept confidential and used only for statistical purposes.<sup>371</sup>

Indian identity is an important exception to the general trend against formalization of race. Tribal membership is considered a category at the border of race and citizenship.<sup>372</sup> Many legal determinations turn on whether a claimant has Native American status. Status may determine eligibility to vote in tribal elections or run for tribal office; the existence of tribal, state, or federal court jurisdiction or taxing authority; rights to child custody, hunting, and fishing; and access to federal and tribal benefits programs in employment, education, healthcare, and other social services.<sup>373</sup> Each of these legal regimes defines Native American status differently. Some definitions are ascriptive—looking to descent from a member of a specific tribe, descent from a member of any tribe, or cultural affiliation with a tribe.<sup>374</sup> Other legal definitions are elective, relying on self-identification.<sup>375</sup>

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or colloquial racial descriptor,” meaning “any term that the registrant determines is insulting to a racial group.” *Id.* § 103260(a). It is left up to the individual whether terms “constitute racial slurs or are otherwise offensive.” *Id.* § 103355.

369. Census designations are not formal identities insofar as any person in a household may fill out the census form for everyone living in that household without the consent or knowledge of each person described. *See* U.S. CENSUS BUREAU, *supra*, note 161 (requesting that an unspecified recipient fill out information for everyone staying or living in the apartment, house, or mobile home).

370. The way the census accounts for multiracial identities has inspired political debate and scholarly attention. *See, e.g.*, Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1256–71 (2014) (discussing controversies over the purposes and consequences of racial data collection practices, which have at times sought to avoid “intermixing of the races,” to study and remedy racial discrimination, or to protect the rights of individuals to self-identify in ways that reflect their lived experiences and ensure their psychological health).

371. 13 U.S.C. § 9 (2012) (requiring that the government use census information only for statistical purposes and keep census forms confidential).

372. *See* *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (rejecting an Equal Protection challenge to a Bureau of Indian Affairs’ employment preference that was “not directed towards a ‘racial’ group consisting of ‘Indians’” but rather, that “applies only to members of ‘federally recognized’ tribes”). For commentary on this distinction, see generally Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CALIF. L. REV. CIRCUIT 23 (2013); Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 968 (2011); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801 (2008).

373. Berger, *supra* note 372, at 29–31.

374. *Id.*

375. When a defendant in a discrimination case disputes whether a plaintiff was a Native American and therefore a member of the “protected class,” courts frequently deny summary judgment based on evidence that plaintiff self-identified as Native American in the workplace. *See* *Wood v. Freeman Decorating Servs., Inc.*, No. 3:08-cv-00375-LRH-RAM, 2010 WL 653764, at \*4 (D. Nev. Feb. 19, 2010) (where “both Plaintiff and Defendant’s employees believed that Plaintiff was American Indian” despite lack of “definitive proof of ancestry” and “Plaintiff’s previous reporting on employment and other records describ[ed] himself as Hispanic and white”); *Eriksen v. Allied Waste*

But increasingly, the law is turning to formal definitions of Native American identity: reliance on whether an individual is formally enrolled in a federally recognized tribe.<sup>376</sup> The Bureau of Indian Affairs, a branch of the federal Department of the Interior, recognizes 562 tribes.<sup>377</sup> These tribes set forth their own requirements for membership in their constitutions, articles of incorporation, or ordinances.<sup>378</sup> Virtually all require that an applicant demonstrate she has descended from a member of a tribe.<sup>379</sup> But tribes do not require any sort of genetic test to prove descent.<sup>380</sup> Typically, applicants must provide documents tracing their descent to a tribal member listed on a registry known as a “base roll.”<sup>381</sup> Many base rolls were determined by a federally authorized census of tribal members, taken around the turn of the twentieth century.<sup>382</sup> Most tribes also require a “blood quantum,”<sup>383</sup> in the form of a requirement that a certain percentage of an individual’s ancestors appeared on a

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Sys., Inc., No. 06-13549, 2007 WL 1003851, at \*3, \*6 (E.D. Mich. Apr. 2, 2007) (where “Plaintiff represented herself as a Native American to her co-workers” despite “lack[ing] documentary or tangible evidence to substantiate family stories that she is descended from Native Americans”); *Greene v. Swain Cnty. P’ship for Health*, 342 F. Supp. 2d 442, 451 (W.D.N.C. 2004) (where “Plaintiff[] assert[ed] to Defendants that she was Native American” despite “evidence that the Plaintiff was not Native American based on her birth certificate, those of her parents, the fact she is not an enrolled member of an Indian tribe, and Plaintiff’s own representations on her employment application”).

376. Gover, *supra* note 43, at 244.

377. *Tribal Enrollment Process*, U.S. DEP’T OF THE INTERIOR, <http://www.doi.gov/tribes/enrollment.cfm> (last visited Apr. 5, 2015).

378. *Id.*; see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n.32 (1978) (“A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”). This is not to say that tribes select membership rules free of federal influence. See Gover, *supra* note 43, at 254–69 (describing varying levels of federal involvement in tribal membership policies).

379. Berger, *supra* note 372, at 28. Gover conducted an empirical survey of the enrollment policies of 245 federally recognized tribes. Gover, *supra* note 43, at 245–46. She explains that lineal descent rules have replaced rules based on parental enrollment or residency, because federal policies from approximately 1950 to 1970 encouraged many tribal members to sever ties with tribes and relocate from reservations. *Id.* at 248. Thus, lineal descent rules “are forms of self-help that are intended to reconstitute a tribe as a historically continuous community.” *Id.* Gover distinguishes these lineal descent rules from race-based exclusions by arguing that many tribes require descent *from that particular tribe*, as opposed to federal rules looking to descent from members of any tribe. See *id.* at 250–51.

380. Cf. *supra* notes 44–45 (discussing controversies over genetic definitions of race).

381. U.S. DEP’T OF THE INTERIOR, *supra* note 377.

382. See Gover, *supra* note 43, at 260–62; see also Cara Cowan-Watts, *Being an Indian: It’s About Ancestry*, N.Y. TIMES, Sept. 16, 2011, <http://www.nytimes.com/roomfordebate/2011/09/15/tribal-sovereignty-vs-racial-justice/being-an-indian-its-about-ancestry> (discussing membership criteria for the Cherokee tribe).

383. See Gover, *supra* note 43, at 251 (“Seventy percent of tribal constitutions now contain a blood-quantum rule . . .”). The Department of the Interior has pressured tribes to include blood quantum requirements because it “considers blood quantum to be a measure of a person’s political relationship to the tribe.” *Id.* at 264–65. These requirements are also considered necessary because “unqualified lineal descent rules would likely be over-inclusive for many tribes, and so place an unreasonable burden on tribal resources.” *Id.* at 297.

base roll.<sup>384</sup> But these blood quantum requirements are not thought of as ascriptive. Rather, “tribes . . . seek to avail themselves of blood quantum as a pre-existing, well-documented administrative device.”<sup>385</sup> Tribes may also impose additional requirements, such as residency or contact with the tribe.<sup>386</sup>

Ancestry requirements for tribal citizenship are defended against the charge of racial essentialism with appeals to their formality. For example, the Cherokee Nation requires applicants for citizenship “to provide documents” tracing their ancestry to “at least one direct Cherokee ancestor listed on the Dawes Final Rolls, a federal census of those living in the Cherokee Nation that was used to allot Cherokee land to individual citizens in preparation for Oklahoma statehood.”<sup>387</sup> One Cherokee official has defended the policy by explaining, “Being Cherokee is not about what you look like . . . . Today, Cherokee citizens come in every shape, size, and religious background.”<sup>388</sup> Rather, the ancestry policy rewards those whose ancestors elected Cherokee identity at a time when the burdens of that election were more onerous:

[The 1898 to 1914 era of the Dawes Rolls] was a defining time for Cherokee citizenship as many people of mixed ethnicity rejected citizenship in the Tribe. Their decision forever impacted their descendants who also lost citizenship with that choice. At a difficult time for Indian people, my ancestors chose to remain Indian and declare their citizenship with the Cherokee Nation when others walked away.<sup>389</sup>

This remark reflects a variation of the inauthenticity critique, that elective rules allow fair weather claims to identity. Formal requirements preclude such claims. They also serve a channeling function, evident in the official’s remark

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384. See Berger, *supra* note 372, at 28–29 (discussing how blood quantum requirements are “tied to descent from an individual listed on a particular census roll of a tribe at a particular time” rather than any sort of “biological” inquiry).

385. Gover, *supra* note 43, at 298.

386. See U.S. DEP’T OF THE INTERIOR, *supra* note 377.

387. *Citizenship*, CHEROKEE NATION, <http://www.cherokee.org/Services/TribalCitizenship/Citizenship.aspx> (last visited Apr. 5, 2015).

388. Cowan-Watts, *supra* note 382. Controversy arose in response to a dispute over the citizenship status of individuals descended from Cherokee Freedmen—African Americans who had been slaves of Cherokee tribe members before the Civil War. “Freedmen” are listed separately from “Cherokees by Blood” on the Dawes Rolls. *The Final Rolls of Citizens and Freedmen of the Five Civilized Tribes in Indian Territory, 03/04/1907*, NAT’L ARCHIVES, <http://research.archives.gov/description/300321> (last visited Apr. 5, 2015).

389. Cowan-Watts, *supra* note 382. This remark raises questions about whether the choices of ancestors should bind future generations. Additionally, scholars have noted that some Indians refused to be listed on the Dawes Rolls to protest the federal policy of breaking up tribal lands. See Krakoff, *supra* note 372, at 1068–69. Considered in this light, that their descendants are now precluded from asserting tribal membership is a “tragic irony.” *Id.* For other criticisms of the accuracy of base rolls, see Gover, *supra* note 43, at 260–62.

that “[t]o me, you are either Indian or you are not.”<sup>390</sup> Even a critic of formal membership rules must admit that “these are relatively bright lines.”<sup>391</sup>

In 2011, the American Bar Association (ABA) adopted a resolution urging law schools to adopt a formal definition of Native American identity.<sup>392</sup> Accompanying the resolution was a report that expressed skepticism of both ascriptive and elective concepts of Native American identity.<sup>393</sup> It criticized descent-based definitions on the ground that “distant ancestry is unlikely to be a part of a person’s current ethnic identity, or qualify one for tribal citizenship.”<sup>394</sup> It also expressed skepticism of elective concepts of Native American identity as allowing “fraud” and “box checking” by law school applicants misrepresenting themselves as Native American.<sup>395</sup>

While few people would indicate they were Asian-American or African-American on a law school application unless it was a part of their identity, for some reason there is a wide level of comfort about self-identifying as Native American even though they are not in fact Native American. This is particularly disconcerting given that being Native American is not just an ethnic identity, but is an actual citizenship in an Indian tribe or Nation which carries with it a formal tribal enrollment number, not unlike a social security number.<sup>396</sup>

The ABA’s evidence of fraud was the disparity between the number of self-identified Native American lawyers on the census (228) and the number reportedly graduated by ABA-accredited law schools over that same time period (approximately 2,610).<sup>397</sup>

The ABA’s response was a resolution urging that law schools require additional information from applicants who identify as Native American, such as “citizenship, Tribal affiliation or enrollment number, and/or a ‘heritage statement.’”<sup>398</sup> The resolution begrudgingly includes “and/or a ‘heritage statement’” as a nod to the idea that formal identity may be underinclusive. But the report makes clear that the “best practice[]” is for a law school to require proof of enrollment.<sup>399</sup> The report highlighted formality’s cautionary purpose of “provid[ing] at least some deterrent to an applicant who seeks to

390. Cowan-Watts, *supra* note 382.

391. See Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 1 (2013).

392. See A.B.A. House of Delegates, Res. 102 (Aug. 8–9, 2011), available at [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_102.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_102.authcheckdam.pdf)

393. See Patty Ferguson, Report Accompanying A.B.A. House of Delegates, Res. 102 (Aug. 2011), available at [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_102.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_102.authcheckdam.pdf) [hereinafter A.B.A. Report]. The author of the report was the President of the national Native American Bar Association. *Id.* at 6.

394. *Id.* at 5.

395. See *id.* at 1, 5.

396. *Id.* at 1.

397. See *id.* at 5.

398. *Id.* at 7.

399. *Id.* at 1.

misrepresent his or her race or ethnicity.”<sup>400</sup> It also appealed to formality’s channeling function, stating “Native American tribal identity is not an amorphous, ill-defined concept. It is a very concrete citizenship requirement, detailed and well-defined in tribal constitutions and laws, and recognized by the federal government.”<sup>401</sup> In rejecting opportunistic or ad hoc self-identifications, the report emphasized that formal identity entails not just rights, such as voting and land ownership, but also responsibilities, such as serving on juries and paying taxes.<sup>402</sup>

Thus, there are few contemporary examples of formal race operating in the law. Unlike regulators of citizenship, marriage, parenthood, and sex, government agencies regulating race, most notably the EEOC, have shifted away from ascriptive definitions and toward elective ones.<sup>403</sup> Concerns about racial fraud and lack of uniformity in racial classification have not had sufficient force to temper elective definitions with formal requirements. The best example of formal race is arguably the conflict over whether Native American identity is race or citizenship, a question that goes to the political status of tribes.

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In sum, formal identity doctrines mediate conflicts between and among ascriptive and elective identity models, with advantages for individuals, outsider groups, and the legal system. Individuals may consider formalities to have profound significance, as marking the moment when they first experience their identities as real. The expansion of access to formal processes for securing identity recognition can also have serious material consequences for those facing deportation, denial of marital or parental rights, expulsion from sex-segregated spaces, or exclusion from race-based remedial programs. Universally applied formal requirements may level privilege by replacing essentialist and discriminatory ascriptive rules. Outsiders may find formal barriers easier to surmount than other forms of identity gatekeeping. Formal definitions may expose that an identity status is merely “on paper,” creating space for new arguments about an identity’s meaning. Or formal understandings of identity may allow those who seek to disclaim identities to avoid legal entanglements by avoiding formal arrangements.

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400. *Id.* at 5.

401. *Id.* at 2.

402. *See id.* By contrast, in cases alleging employment discrimination on the basis of Native American status under Title VII, courts have held that plaintiffs are not required to show tribal enrollment to prove they are members of the protected class. *See, e.g.,* *Smith-Barrett v. Potter*, 541 F. Supp. 2d 535, 539 (W.D.N.Y. 2008) (“[W]hile official tribal membership may provide strong evidence of one’s claim to American Indian heritage, the absence of tribal membership does not . . . signify non-membership in the larger protected class.”); *Greene v. Swain Cnty. P’ship for Health*, 342 F. Supp. 2d 442, 451 (W.D.N.C. 2004) (noting plaintiff’s lack of enrollment was irrelevant to her membership in the protected class where her employer “surely knew that Plaintiff claimed she was Native American”).

403. *See* Rich, *supra* note 74, at 1521.

Formal definitions also have advantages over elective doctrines in terms of administrability. Formalities provide a check on fraud, an inducement to circumspection, and a degree of uniformity. Therefore, regulators who have been relying on ascriptive definitions may be more willing to move toward formal definitions than elective ones. Advocates of elective identity may see formality as an attractive second-best solution. The next Part of this Article will discuss reasons to be critical of formalization projects.

### III.

#### DYSFUNCTIONS OF FORMAL IDENTITY

Although formal identity has advantages over ascriptive and elective models, it also risks reinforcing inequality based on identity. This Part discusses reasons for skepticism about whether formalities are indeed useful tools for contesting the ascriptive meanings of legal identities.<sup>404</sup> It describes potential dysfunctions of formal identity: commodification, bureaucratization, discrimination, pigeonholing, and legitimation. While these costs may not outweigh the benefits of formalization in every situation, they should be considered by those who see progressive potential in, for example, an understanding of citizenship as documentation, marriage as license and ceremony, parenthood as a signature on an acknowledgment form, sex as a designation on a birth certificate, or race as a check box or enrollment number.

##### A. Commodification

The first potential dysfunction of formalization of identity is that it puts those without resources at a disadvantage, by making identity claims costly *ex ante* and setting traps for the legally unwary. Thus, requiring formality may effectively commodify identity status, restricting access to identities for all but the wealthy and legally sophisticated.<sup>405</sup> Although it is generally true that formalities impose costs and burdens on their users, whether this commodification argument has purchase in any particular dispute over formalization depends on the relative costs and complications of proving identity under alternative definitions.

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404. Fuller did not give sustained attention to the dysfunctional aspects of formality because he constrained his theory to a limited subset of contracts, and within that subset, he only gestured to questions of bargaining power, see Kennedy, *supra* note 128, at 125–26, and distributive justice, *id.* at 171–72.

405. I refer to commodification simply in the sense of putting a price on identity, and I use the label to discuss how access to formalities may depend on class. I do not argue that identities are matters of such importance that they should never be corrupted by pricing. Nor is my argument about identity as an item that might be exchanged for value or an aspect of an individual's human capital. *Cf.* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013) (criticizing “racial capitalism,” defined as the problem of white institutions extracting value from a student or worker's minority status for purposes such as showcasing diversity).

Formalization entails new transaction costs, such as legal fees, hassles, and lost time, for those who would otherwise be presumed to hold certain identities under ascriptive definitions or allowed to elect identities ad hoc.<sup>406</sup> Even costs that may seem minor to some, such as \$135 for a passport, or \$25 for a birth certificate or marriage license, may be prohibitive for the indigent.<sup>407</sup> Fee waivers for the indigent are only intermittently available, and it may be difficult for those without legal advice to apply for them.<sup>408</sup> For those who live in remote areas, the costs of travel to government offices with limited hours may impede access to formalities.<sup>409</sup> Documentation requirements may place individuals in a catch-22; for example, a birth certificate may be required to get a driver's license, but a driver's license may be required to get a birth certificate.<sup>410</sup>

Formal requirements can also set traps for the legally unwary.<sup>411</sup> The idea that formalities might serve a cautionary function assumes those making claims to identities have the sophistication to understand and utilize legal processes, and the knowledge and foresight to predict that their informal identities will not be recognized. Requiring compliance with bureaucratic formalities marginalizes those without legal sophistication and resources, as well as those

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406. On the other hand, ex ante formalization might be less costly than litigating post hoc disputes over identity claims about whether one meets ascriptive or elective definitions. For example, a marriage license and city hall ceremony is less expensive than a court battle over whether a common law marriage existed. Formalization may also be less expensive than changing one's appearance or behavior to meet an ascriptive definition. But if formalities are not universally accessible, only the wealthy and sophisticated will be able to take advantage of their cost-saving evidentiary functions.

407. KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 1, 14 (2012), available at [http://brennan.3cdn.net/f5f28dd844a143d303\\_i36m6lyhy.pdf](http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf). One survey suggests that citizens earning less than \$25,000 per year were twice as likely to lack access to a document proving their citizenship. BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 1, 2 (Nov. 2006) [hereinafter BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF], available at [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39242.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf) (telephone survey of 987 randomly selected voting-age citizens).

408. Certain immigration forms, not including passports, may be provided free to the indigent, upon satisfactory completion of a five-page form regarding inability to pay. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-912: REQUEST FOR FEE WAIVER (revised May 10, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-912.pdf>. The form has nine pages of instructions. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGRATION SERVS., FORM I-912: INSTRUCTIONS FOR REQUEST FOR FEE WAIVER (revised May 10, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-912instr.pdf>.

409. See GASKINS & IYER, *supra* note 407, at 1 ("Nearly 500,000 eligible voters do not have access to a vehicle and live more than 10 miles from the nearest state ID-issuing office open more than two days a week. Many of them live in rural areas with dwindling public transportation options.").

410. See Catherine Wiehl, *Reliance on Identification to Secure the Blessings of Liberty and Property*, 81 UMKC L. REV. 509, 510–11 (2012).

411. See Michael Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649, 659–62 (2012) (describing low levels of "legal literacy" in the United States). Ascriptive definitions may set traps for the unwary as well, but they are less likely to do so as they are generally intended to reflect accepted, extralegal standards.

who distrust, fear, or blindly defer to legal processes.<sup>412</sup> Many formalities, such as legal documents, are akin to contracts of adhesion—with terms drafted by lawyers or government officials, presented on a “take it or leave it” basis.<sup>413</sup> Those who sign (or do not sign) such documents may not have any meaningful understanding of their terms, may not believe they can renegotiate the form, or may have a distorted understanding of the purposes to which the formality will be put.<sup>414</sup> Or they may simply not be paying attention.<sup>415</sup> As sociologists have described, people lose focus when confronted with too many bureaucratic formalities purporting to be critical.<sup>416</sup> The party who fails at documenting her identity may experience losses that are disproportionate to her administrative errors. She may find herself deported, without the right to visit her children, without recognition of her marriage, or unable to claim a gender or racial identity.

The link between formalization and commodification is apparent in the citizenship context. To be sure, the buying and selling of citizenship is a criminal offense,<sup>417</sup> at odds with the “self-proclaimed legacies of immigrant nations that historically allowed newcomers from very modest beginnings the opportunity to pull themselves up by their bootstraps.”<sup>418</sup> Yet, as Professor Eleanor Brown has argued, the idea that rights to immigrate “are not being ‘sold’” is a carefully maintained “illusion.”<sup>419</sup> The formal path to citizenship is an expensive one, difficult to navigate without legal services. “[E]lite applicants typically employ attorneys and sometimes lobbyists who charge high fees to navigate the complexities of the Immigration and Nationality

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412. See Perillo, *supra* note 143, at 70 (“[R]ules of form unduly favor the party who has easy access to legal advice over the party who does not.”).

413. See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

414. Cf. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 711–18 (2011) (discussing reasons consumers fail to understand mandatory disclosures, including illiteracy, innumeracy, and comprehension difficulties); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) (“[I]n the usual case, the consumer never even reads the form, or reads it only after he has become bound by its terms. Even the fastidious few who take the time to read the standard form may be helpless to vary it. The form may be part of an offer which the consumer has no reasonable alternative but to accept.”).

415. Cf. Ben-Shahar & Schneider, *supra* note 414, at 689–90 (discussing the problem of the “accumulation” of mandated disclosures in modern life, which discloseses do not have time to process).

416. Carol A. Heimer, *Conceiving Children: How Documents Support Case Versus Biographical Analyses*, in DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE 95, 98 (Annelise Riles ed., 2006); cf. Margaret Jane Radin, *Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 CAP. U. L. REV. 617, 624–26 (2012) (discussing reasons consumers do not read boilerplate contracts).

417. See 18 U.S.C. §§ 1425–1427 (2012). However, the Immigration and Nationality Act creates a visa category for those who invest more than \$1 million in the United States and create at least ten U.S. jobs. 8 U.S.C. § 1153(b)(5) (2012).

418. SHACHAR, *supra* note 30, at 55–56.

419. Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 VAND. L. REV. 1047, 1049 (2011).



Act.”<sup>420</sup> It is often noted that an immigrant’s chance of success in removal or asylum proceedings depends on her access to quality legal services.<sup>421</sup> Immigrants unfamiliar with U.S. culture and distrustful of legal authorities may end up prey for unscrupulous and incompetent advisors, inadvertently waiving claims by failing to assert the correct legal arguments or assemble the right evidence early enough in the process.<sup>422</sup> Those who lack trust in official legal channels or do not have access to legal counsel may pay steep costs in the black market for identity documents.<sup>423</sup>

The E-Verify system for determining work eligibility provides another example of how formal identities may be inaccessible.<sup>424</sup> Its procedures create significant obstacles for low-wage workers.<sup>425</sup> Clerical errors are not uncommon, resulting from discrepancies in how names are recorded, mistakes in data entry on the employer end, and errors in the Social Security Administration or the Department of Homeland Security databases.<sup>426</sup> If a worker wants to challenge an initial determination that she is not authorized to work in the United States, she must contact the appropriate agency within eight days.<sup>427</sup> Sometimes an in-person visit to the agency’s office, which may be several hours away, is required.<sup>428</sup> It may be easier for some workers to meet these formal requirements than to conform to racial stereotypes about citizenship as whiteness.<sup>429</sup> But formal requirements impose more burdens than an elective citizenship regime that would not entail any sort of verification.

420. *Id.* at 1050.

421. *See, e.g.*, Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 5 (2008) (“While differences in success rates [between immigrants with and without lawyers] do not by themselves tell us about causation, these data uncomfortably suggest that outcomes can be affected by whether the immigrant can afford a lawyer or has the ability to access free legal services.”).

422. *Id.* at 7–9.

423. Brown, *supra* note 419, at 1050. The paper families of the early twentieth century provide a historical example. *See supra* notes 258–72 and accompanying text. Lau describes how “[e]very detail of the immigration process was commodified and sold—for cash or credit.” LAU, *supra* note 9, at 65. For example, one Chinese immigrant paid \$2,000 just for the false papers that were required for his son come to the United States. *Id.* at 64.

424. *See supra* notes 206–11 and accompanying text.

425. NAT’L IMMIGR. LAW CTR., VERIFICATION NATION: HOW E-VERIFY AFFECTS AMERICA’S WORKERS 3–4 (2013), available at <http://www.nilc.org/document.html?id=957>; Stumpf, *supra* note 206, at 399.

426. Stumpf, *supra* note 206, at 399, 408. A study commissioned by the U.S. Citizenship and Immigration Services reported that the rate of erroneous initial rejections by E-Verify is 0.3 percent. WESTAT, EVALUATION OF THE ACCURACY OF E-VERIFY FINDINGS x, 23 (July 2012), available at [http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify\\_Native\\_Documents/EVerify%20Studies/Evaluation%20of%20the%20Accuracy%20of%20EVerify%20Findings.pdf](http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/EVerify%20Studies/Evaluation%20of%20the%20Accuracy%20of%20EVerify%20Findings.pdf). Although this is a small percentage, if every U.S. employer used E-Verify, the number of false negatives would be between 150,000 to 500,000 individuals, a number approximately between the populations of Green Bay, Wisconsin, and Tucson, Arizona. NAT’L IMMIGR. LAW CTR., *supra* note 425, at 3.

427. NAT’L IMMIGR. LAW CTR., *supra* note 425, at 2.

428. *Id.* at 6.

429. *See supra* note 210 and accompanying text.

Formalization may also commodify family status. Formal marriage requires the couple to pay for a license and ceremony, and to have access to and willingness to utilize government services. This may disadvantage the party with less bargaining power (often the wife), who is unable to persuade her partner to comply with marital formalities, and then finds herself on the losing end of disputes regarding property division upon termination of the relationship.<sup>430</sup> This example, though, only works on the assumption that the couple would have easily been presumed married under an informal definition.<sup>431</sup> But consider same-sex couples who want to coparent, where one member of the couple is not a presumed parent under state law.<sup>432</sup> Requiring that parent to adopt may impose costs that an automatic presumption of parenthood would not.<sup>433</sup>

Formal parenthood disadvantages those unaware of the steps they must take to formalize their identities. For example, the biological father in *Lehr v. Robertson* lost his rights to custody because he failed to mail in a postcard registering his claim to paternity.<sup>434</sup> In dissent, Justice White criticized this reasoning as the “sheerest formalism.”<sup>435</sup> He noted that the father had alleged the mother had “concealed her whereabouts from him” after the child’s birth, and the father went so far as to hire a detective agency to find his daughter.<sup>436</sup> Shades of *Lehr* can be seen in arguments related to the meaning of parenthood in the Supreme Court’s decision in *Adoptive Couple v. Baby Girl*.<sup>437</sup> The issue in that case was whether a child’s biological father, a member of the Cherokee nation, could block his daughter’s adoption by a non-Indian couple under the Indian Child Welfare Act (ICWA).<sup>438</sup> ICWA was intended to prevent the breakup of Indian families.<sup>439</sup> In *Adoptive Couple*, the child’s biological parents were engaged to be married, but had a falling out before the baby was born.<sup>440</sup> The mother then sent the father a text message “asking if he would rather pay child support or relinquish his parental rights.”<sup>441</sup> The father replied, via text

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430. See *supra* note 22.

431. It may be difficult and costly to prove a common law marriage existed, and litigation is unlikely to be worthwhile unless the couple had enough assets to fight over.

432. See Polikoff, *supra* note 25, at 207.

433. *Id.* at 216. Second-parent adoptions typically cost \$2,000 to \$3,000 in home-study and legal fees. See *How Much Does Adoption Cost?*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/how-much-does-adoption-cost> (last visited Apr. 5, 2015). However, if the couple is unmarried, the adoptive parent would generally be entitled to a tax credit for these expenses. See I.R.C. § 23(d)(1)(C) (2012). The credit was \$10,000 in 1996, to be adjusted for inflation. *Id.* § 23(b)(1), (f).

434. See 463 U.S. 248, 248 (1983).

435. *Id.* at 275 (White, J., dissenting).

436. *Id.* at 269.

437. See *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013).

438. *Id.*; 25 U.S.C. §§ 1901–1963 (2012).

439. *Adoptive Couple*, 133 S. Ct. at 2558.

440. *Id.*

441. *Id.*

message, that he would relinquish his rights.<sup>442</sup> The father later testified that he believed he was relinquishing his rights to the mother, not the child, and that he did not know the mother planned to place the child up for adoption.<sup>443</sup> On the basis of these and other facts,<sup>444</sup> the Supreme Court held the provision of ICWA designed “to prevent the ‘breakup of the Indian family’” to be “inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child.”<sup>445</sup>

Formalization also imposes costs on claimants to racial and sexual identities. In the context of sex designations, rules requiring surgery or hormonal therapy as prerequisites to birth certificate changes have operated to commodify sexual identity for many transgender persons unable to afford medical treatment.<sup>446</sup> Even if medical treatment were not required, the costs of procuring a court order or pursuing an administrative process could be burdensome.<sup>447</sup> As most rules regarding racial identity in affirmative action programs are elective, increasing formalization—for example, a rule requiring evidence of past racial identifications or tribal enrollment—would likely increase the costs and complications of proving race for claimants.<sup>448</sup>

### B. Bureaucratization

[B]eing an Indian is in some ways a tangle of red tape. On the other hand, Indians know other Indians without the need for a federal pedigree, and this knowledge—like love, sex, or having or not having a baby—has nothing to do with government.

Louise Erdrich, *The Round House*<sup>449</sup>

Another criticism of formal identity is that it may reduce identities to bureaucratic processes. Max Weber described the “characteristic principle of

442. *Id.*

443. Brief for Respondent Birth Father at 7–8, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 1191183.

444. The biological father later signed papers stating he was not contesting the baby’s adoption, but he argued he did not realize their meaning, and he sought legal advice on how to contest the adoption the next day. *Adoptive Couple*, 133 S. Ct. at 2558–59. The Court also noted the biological father provided no financial assistance to the mother during her pregnancy or to the baby during her first four months of life, despite his ability to do so. *Id.* at 2559.

445. *Id.* at 2557. The Court assumed, for the sake of argument, that the biological father was a “parent” under ICWA. *Id.* at 2620.

446. See Mottet, *supra* note 51, at 407–10. Mottet writes: “A cascade of unnecessary expenditures result from surgeries, including depleting one’s personal financial resources, causing an interruption in one’s school or work, being unable to complete family care-giving duties, and relying on financial or care-giving resources from family members or others.” *Id.* at 410.

447. *Cf. id.* at 431 (advocating an administrative process over a court-order requirement to reduce costs).

448. Proving eligibility for tribal membership may require computer literacy or even the services of a professional genealogist. *Genealogical Research*, U.S. DEP’T OF THE INTERIOR, <http://www.doi.gov/tribes/research.cfm> (last visited Apr. 5, 2015).

449. LOUISE ERDRICH, *THE ROUND HOUSE* 30 (2012).

bureaucracy” as “the abstract regularity of the execution of authority.”<sup>450</sup> Formalities are useful instruments of bureaucracy because they are standardized, routinized, and universal.<sup>451</sup> The ideal formal identity doctrine makes identity claims a bureaucratic process of executing the correct legal formality, and uniformly enforces only those identity claims that comply with that process.

Formalization thus confers authority on bureaucratic processes rather than other social experiences or nonlegal experts. Those who see identities as based in community understandings, relationships, creativity, and spontaneous interactions might balk at the idea that they ought to be a matter of formal registration.<sup>452</sup> Weber described the bureaucracy with the dark metaphor of an “iron cage,”<sup>453</sup> and the bureaucrat as “only a single cog in an ever-moving mechanism which prescribes to him an essentially fixed route of march.”<sup>454</sup> The fact that people enroll in formal identities for themselves does not resolve this critique.<sup>455</sup> Individuals who execute formalities may begin to regard their lives as projects to be managed according to disciplinary norms, rather than projects entailing creativity and freedom.<sup>456</sup>

Bureaucratic forms of identity recognition may crowd out the imaginative space for other understandings of identity. The demand for formalities may reflect a sort of documentary essentialism in which documents become fetish

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450. MAX WEBER, ON CHARISMA AND INSTITUTION BUILDING 70 (S.N. Eisenstadt ed., 1968). Weberian bureaucracy is not, therefore, the same as common law reasoning, and is not an apt analogy for American judicial processes in general. See Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1450–52 (1983).

451. See generally David Dery, “Papereality” and Learning in Bureaucratic Organizations, 29 ADMIN. & SOC’Y 677 (1998).

452. In the context of contracting, Fuller noted that “[t]here is a real need for a field of human intercourse freed from legal restraints.” Fuller, *supra* note 10, at 813. This need is “not merely spiritual,” but essential to commerce, since business deals “can often emerge only from a converging series of negotiations, in which each step contains enough assurance to make worthwhile a further exchange of views and yet remains flexible enough to permit a radical readjustment to new situations.” *Id.* Fuller thought this to be all the more relevant in the context of marriage, arguing that “successful human association depends upon spontaneous and informal collaboration.” Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 371 (1978). For this reason, he concluded that courts should “refuse[] to enforce agreements between husband and wife affecting the internal organization of family life.” *Id.* This claim is very controversial. See Davis, *supra* note 94, at 1960–61 (discussing the extensive body of legal scholarship “analogiz[ing] marriage and intimacy commitments to business associational models”).

453. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 181 (Talcott Parsons trans., Charles Scribner’s Sons 1958) (1904).

454. WEBER, *supra* note 450, at 75.

455. Philosopher Michel Foucault famously argued that power may be “disciplinary”: exerting influence by training individuals, who become “instruments of its exercise.” MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 170 (Alan Sheridan trans., Vintage Books ed. 1979) (1975); cf. *id.* at 189–92 (discussing how documentation of individuals is a mechanism of disciplinary power in medical, military, and educational institutions).

456. Cf. Michel Foucault, *On the Genealogy of Ethics: An Overview of Work in Progress*, in THE FOUCAULT READER 340, 350 (Paul Rabinow, ed. 1984) (asking, “[C]ouldn’t everyone’s life become a work of art?”).

objects necessary for people to experience their identities as real.<sup>457</sup> Individuals seeking recognition fixate on acquisition of formalities like passports, birth certificates, or marriage licenses. Consider the mothers of stillborn babies seeking birth certificates to validate the lives of their children and their identities as mothers.<sup>458</sup> The outsized attention paid by the “birther” movement to President Obama’s purportedly fraudulent birth certificate is another example.<sup>459</sup> The craving for recognition may even cause identity claimants left out by ascriptive rules to mimic official formalities. For example, some same-sex couples whose states did not permit them to marry nonetheless pursued official name changes so that both members of the couple would have the same surname.<sup>460</sup> The fixation with official recognition may reaffirm the formality’s primacy in defining identities, to the exclusion of other sources of identity definition. The sincerity with which people pursue formal identities may preclude the sort of irreverent, hyperbolic, dissonant, jarring, or parodic performances of identity that could expose the cracks and fissures in essentialist definitions and create space for new identity configurations.<sup>461</sup> Judith Butler’s famous example of a playfully parodic identity is that of Divine, a drag queen whose “impersonation of women implicitly suggests that gender is a kind of persistent impersonation that passes as the real.”<sup>462</sup> Unlike formalities, informal practices of identity formation might be iterative, reflective, playful, and flexible. Legal rules that ascribe identities might better adapt to an understanding of identity as forged through multiple social relationships.

There are a number of objections to this bureaucratization argument. First, in identity contexts, formal rules may be preferable to the ascriptive ones they replace. Generally, ascriptive rules that assess whether identities meet social definitions reflect essentialist and deterministic scripts.<sup>463</sup> In his history of the

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457. To fetishize an object is to attribute human properties to it, such as social status. See generally Tim Dant, *Fetishism and the Social Value of Objects*, 44 SOC. REV. 495, 495, 497 (1996) (explaining theories of Karl Marx, Sigmund Freud, and Jean Baudrillard related to fetishism). The term is derived from the worship of religious objects. *Id.* at 497.

458. See *supra* notes 273–77 and accompanying text.

459. See Matthew W. Hughey, *Show Me Your Papers! Obama’s Birth and the Whiteness of Belonging*, 35 QUALITATIVE SOC. 163, 170–71 (2012).

460. See, e.g., *In re Daniels*, 773 N.Y.S.2d 220, 224 (Civ. Ct. 2003) (granting a woman’s application to change her last name to that of her same-sex life partner, despite the then-existing prohibition on same-sex marriage); Liza Mundy, *Mrs. & Mrs. Smith: How Some Gay Couples Reclaim Old Marriage Traditions*, ATLANTIC (May 29, 2013, 8:58 AM), <http://www.theatlantic.com/sexes/archive/2013/05/mrs-mrs-smith-how-some-gay-couples-reclaim-old-marriage-traditions/276307> (quoting one wedding officiant regarding same-sex couples seeking to marry who traveled from states that ban same-sex marriage to Washington, D.C.: “Returning home, they find that ‘being able to change their name is a way to have their home state recognize their marriage,’ in spirit if not in fact”).

461. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 30–31 (1990).

462. *Id.* at x (discussing the John Waters character featured in *Female Trouble* and *Hairspray*).

463. See *supra* note 36 and accompanying text.

passport, Professor Robertson described how the bureaucratization of identity entailed “a process of exclusion and marginalization,” as reliance on identification documents replaced “local forms of identification based on different understandings of authenticity, self, and status.”<sup>464</sup> This at first sounds as though something important was lost, but the local forms of identification that Robertson described were almost invariably based on distinguishing outsiders from insiders based on class, race, and disability.<sup>465</sup> Elective rules, by contrast, would give priority to self-determination. But under an elective-identity regime, there is no guarantee that individuals will see their identity options as anything other than those that follow routine scripts.<sup>466</sup>

Second, bureaucracy is incapable of squelching all creativity. Sociologists have demonstrated how the understanding of bureaucratic processes as “‘detach[ing] and obliterate[ing] social relationships’ and eras[ing] human agency” is too simplistic.<sup>467</sup> In their study of systems of classification, Geoffrey Bowker and Susan Leigh Star have observed that “[e]ven the most regimented infrastructure is ineluctably also local: if work-arounds are needed, they will be put into place.”<sup>468</sup> Estelle Lau’s paper families are an example of how outsiders found a work-around to exclusionary bureaucratic processes in immigration law. Perhaps unintentionally, the bonds between these paper families often came to be experienced as just as “real” as other family bonds.<sup>469</sup>

Third, there is some question as to whether formal identity doctrines eliminate the space for development of informal and off-the-grid identities. Consider again Judge Waddoups’s formal understanding of marriage as no more than license and solemnization.<sup>470</sup> By limiting legal recognition of Kody Brown’s marriages to just his formal wife, the court avoided criminalizing his other relationships.<sup>471</sup> Nonetheless, Kody Brown considers three other women to be his wives under the religious doctrine of “celestial plural marriage.”<sup>472</sup>

And yet, there is still some merit to the criticism that formal identity is stifling bureaucratization, because being off the identity grid may render individuals extremely vulnerable. Although formal identity may have saved the

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464. ROBERTSON, *supra* note 177, at 10–11.

465. *See, e.g., id.* at 12.

466. *See supra* notes 118–19 and accompanying text.

467. Heimer, *supra* note 416, at 96 (quoting Wendy Espeland, *Power, Policy and Paperwork: The Bureaucratic Representation of Interests*, 16 *QUAL. SOC.* 297, 299 (1993)).

468. GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* 314 (1999) (giving examples of how hospital workers use forms for unintended purposes); *see also* HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* 194–98 (1967) (explaining practical reasons why workers may keep “bad records”).

469. *See supra* notes 269–70 and accompanying text.

470. *See supra* notes 234–40 and accompanying text.

471. *See supra* notes 234–40 and accompanying text.

472. KODY, MERI, JANELLE, CHRISTINE & ROBYN BROWN, *BECOMING SISTER WIVES: THE STORY OF AN UNCONVENTIONAL MARRIAGE* 3 (2012). Advocates for polygamist families disagree on whether they would prefer “official recognition” in the form of “licensing and positive legal regulation” or for “the state to stay out of their intimate lives.” Davis, *supra* note 94, at 1960.

Brown family from prosecution, it excludes three of the “sister wives” from the potential protections of spousal status, including medical decision-making authority, eligibility for state, federal, and employer benefits programs, court-supervised division of property and payment of alimony upon divorce, and advantageous estate and other tax treatment.<sup>473</sup> In the context of parenthood, staying off the grid may leave a person without rights to be involved in the life of a child.<sup>474</sup> In the context of citizenship, it means living in constant fear of deportation, being vulnerable to exploitation by criminal networks, and being without access to social services or stable employment.<sup>475</sup> In the contexts of race and sex, it is difficult to find social space that might even metaphorically be said to be “off the grid.”<sup>476</sup>

### C. Discrimination

Ideally, formal identities would be universally available and formal requirements would be uniformly enforced.<sup>477</sup> But more often, legal identities are hybrids of formal, ascriptive, and elective elements, and enforcement takes place in contexts of inequality.<sup>478</sup> Under certain circumstances, formalization of identity may reinforce the problems of essentialism and determinism that plague ascriptive definitions of identities. These circumstances include when formalization is not allowed universally, but rather, is limited to those who meet ascriptive definitions. They also include when formalization is not a

473. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003).

474. See *supra* note 122.

475. See, e.g., Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1612 (2010).

476. This point is often made in response to calls for “colorblind” decision making. See, e.g., Gotanda, *supra* note 10, at 18 (“One cannot literally follow a color-blind standard of conduct in ordinary social life” because “[t]o be racially color-blind . . . is to ignore what one has already noticed.”). With respect to formalities, admissions officers may assume that those who select “decline to state” when asked about race on law school applications are white. Cf. Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 553 (2009); see also *id.* at 555 n.45 (finding no empirical evidence to suggest that those applicants selecting “decline to state” in response to inquiries about race on law school applications have any admissions advantage over those who select “white”). With respect to sex and gender, the moment of the declaration “It’s a girl” or “It’s a boy” may be the moment when a baby is recognized as human. See JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”* 232 (1993); see also *supra* note 309 (discussing recommendations that intersex babies be assigned a sex to avoid parental distress). But see, e.g., *supra* note 311 (discussing countries that allow the sex designation on identification documents to be left blank or filled in with a third alternative); Julie Scelfo, *A University Recognizes a Third Gender: Neutral*, N.Y. TIMES, Feb. 3, 2015, [http://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?\\_r=1](http://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?_r=1) (discussing efforts by the University of Vermont to give students the option of gender neutrality).

477. Cf. Fuller, *supra* note 10, at 802 (“[I]n the law, the ideal type of formal transaction would be . . . abstracted from the causes which gave rise to it and which has the same legal effect no matter what the context of motives and lay practices in which it occurs.”).

478. Cf. *id.* (“Most of the formal transactions familiar to modern law, however, fall short of the [ideal type]; the channels they cut are not sharply and simply defined.”).

universal requirement. If those who meet ascriptive definitions achieve identities by default, then individuals who must formalize their identities face unequal burdens. If formalization is required only to caution individuals against choosing certain identities but not others, it may express discriminatory preferences. Even if formalization is universally required, those who do not meet ascriptive definitions may be subjected to discriminatory policing of formal requirements. And finally, systems of formal verification may be designed in ways that cause more difficulties for members of subordinated groups or those who defy stereotypes.

Selective formalization may be discriminatory when those who do not meet ascriptive standards do not have the option to formalize their identities. When the formality is a state-issued license, the government may establish barriers that require individuals to meet certain ascriptive definitions before they may apply.<sup>479</sup> Examples include requirements that prospective citizens demonstrate their good moral character, that marriage be between only two people, that an adoptive couple show their fitness as parents, that transgender men have mastectomies, or that Indian tribes extend membership only to those with Indian ancestry. In these examples, ascriptive definitions play a leading role and formality is backstage. Formality merely moves the question of ascriptive meaning one level back, to the licensing authority. Yet the selectivity of these formalities may be forgotten in legal discussions. As the author of the only empirical study of tribal membership policies concluded, “[E]ven while the federal government’s relationship with ‘Indians throughout the United States’ is now almost exclusively confined to members of federally recognized tribes, public decision-makers and theorists alike often have no clear idea of who is included in the tribal class or why.”<sup>480</sup>

Selective formalization may also be discriminatory if certain people are assumed to be holders of identities by default. Those that must formalize their identities face disproportionate burdens. The unmarried father in *Lehr*, for example, had to take steps to formalize his paternal identity, while the birth mother did not.<sup>481</sup> The law presumes parental status from gestation. The birth certificate does not ask the mother to “acknowledge maternity.” By contrast, fathers who are married to birth mothers,<sup>482</sup> or who participate in the rearing of their children may not be required to preserve their rights with these

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479. See Case, *supra* note 90, at 1765 (describing the state’s involvement in marriage as “monopoly control over licensing”).

480. Gover, *supra* note 43, at 246.

481. See *supra* notes 295–96 and accompanying text.

482. See *Quilloin v. Walcott*, 434 U.S. 246, 248–49 (1978) (upholding, against an equal protection challenge, a law allowing a father of a child born in wedlock to challenge an adoption, but not the biological father of a child born out of wedlock who had not petitioned a court for legitimation of the child).



formalities.<sup>483</sup> They meet performative definitions of fatherhood, and so they are fathers by default.

Furthermore, formalities may express discriminatory messages when their cautionary aspects are meant to discourage individuals from changing their identities or deter individuals from adopting marginalized identities.<sup>484</sup> The cautionary function is by nature paternalistic, in that it is intended to serve an individual's own good by prompting her to "think twice" before entering into a legal arrangement.<sup>485</sup> This paternalism is troubling when cautionary barriers are not proportionate to the legal consequences of identities, and instead reflect unexamined social judgments prioritizing static identities. For instance, requirements that transgender individuals acquire authorization from medical authorities before they may change sex designations on identification documents may be intended to discourage changes, based on a view that sex should be binary, exclusive, and static.<sup>486</sup> Additionally, family law doctrines may reflect paternalistic stereotypes that women are more likely than men to experience regret about surrendering parental rights.<sup>487</sup>

A related problem is disparate policing of formal requirements by legal authorities. Arizona law S.B. 1070 requires police officers stopping, arresting, or detaining any person to request that person's driver's license or other citizenship documents if the officer has a "reasonable suspicion" regarding that person's immigration status.<sup>488</sup> This provision has been labeled the "show-me-

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483. See *Caban v. Mohammed*, 441 U.S. 380, 392 (1979) (striking down a statute that allowed a mother, but not a father, to veto an adoption, when the father had both admitted paternity and participated in the rearing of the children).

484. Cf. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1752–53 (2008) (discussing how waiting period restrictions on the right to abortion may be designed to "deter" abortion and "to persuade a woman to carry a pregnancy to term," expressing the government's interest in protecting fetal life).

485. See Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 802 (2014) ("Fuller here accepted that formalities can serve paternalistic ends, protecting a transferor against the hazards of subsequent regret.").

486. *Spade*, *supra* note 329, at 31 (discussing how New York City policymakers insisted on medical gatekeeping requirements to "police trans identity" and ensure those who change gender markers will not want to "chang[e] back"). Paternalism may also take the form of trying to deter an individual from changing her gender identity because the change is likely to subject her to discrimination or other negative social consequences.

487. Cf. Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 297–98 (2011) (discussing how court decisions protecting potential parents from regret often minimize the interests of fathers in paternity while assuming that women's interests in maternity are paramount).

488. ARIZ. REV. STAT. ANN. § 11-1051(B) (2015). The Supreme Court upheld this statute in *Arizona v. United States*, 132 S. Ct. 2492, 2507–09 (2012), against the challenge that it was preempted by federal law. The Court held that an officer could also verify an individual's citizenship status against the federal Immigration and Customs Enforcement database. *Id.* at 2508. Other states have passed similar laws. See, e.g., ALA. CODE § 31-13-12(a) (2015); IND. CODE § 11-10-1-2 (2014). Arizona also confirms immigration status before issuing a driver's license, although the trend among state legislatures is to move away from tying driver's licenses to immigration status. See NAT'L IMMIGR. LAW CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES 2–5 (Oct. 2013), available at <http://www.nilc.org/document.html?id=963>.

your-papers requirement.”<sup>489</sup> Such laws have been criticized for giving rise to racial profiling, since officers are likely to require documentary proof of immigration status only from those who appear Hispanic, speak Spanish, or are otherwise regarded as foreign by the officer.<sup>490</sup> Politicized demands for President Barack Obama’s long-form birth certificate have been interpreted as a species of racial profiling in which people of color are made to continuously verify their claims to belonging in the American polity.<sup>491</sup> Even when they do have the requisite formalities, those who do not meet ascriptive definitions of identity may be accused of forgery or asked for even more documentation.<sup>492</sup>

Similarly, those who fail to meet sex stereotypes may be targeted by formal requirements. For example, the Crosby, Minnesota, city council policy providing for sex segregation of certain facilities, such as locker rooms, allows city officials to request a birth certificate proving an individual’s “biological gender,” “[i]f in doubt.”<sup>493</sup> This policy reaffirms ascriptive notions of gender identity, since it requires that an official first have a “doubt” about a gender-nonconforming person using the locker room before requesting a birth certificate.<sup>494</sup>

Finally, many formalities are likely to create new difficulties for those who already face systemic discrimination based on gender, age, and race, because women, the elderly, and nonwhites are less likely to have accurate identification documents.<sup>495</sup> E-Verify errors are more likely to affect women, who more often undergo name changes upon marriage or divorce, as well as individuals from cultural groups with naming practices or spellings unfamiliar to U.S. employers.<sup>496</sup>

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489. Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 56 (2013).

490. See, e.g., Karla Mari McKanders, *Federal Preemption and Immigrants’ Rights*, 3 WAKE FOREST J.L. & POL’Y 333, 355–63 (2013); Marjorie Cohn, *Racial Profiling Legalized in Arizona*, 1 COLUM. J. RACE & L. 168, 170 (2012).

491. Hughey, *supra* note 459, at 164.

492. *Id.* at 166.

493. See Crosby Minutes, *supra* note 335.

494. The policy is typical. Mottet, *supra* note 51, at 419 (describing common employer practice as follows: “[T]he default rule is essentially a social one: if you look like a man, you can use the men’s room and if you look like a woman, you can use the women’s room. When a person’s gender is challenged, a person is likely to receive access only if they can present identification with a matching gender marker.”).

495. See BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF, *supra* note 407, at 3 (finding 18 percent of Americans over 65, and 25 percent of African American citizens did not have government-issued photo IDs); *id.* at 2 (finding that only 48 percent of voting-age women have a birth certificate with a current legal name, and only 66 percent of women with any proof of citizenship had a document with a current legal name); Brumberg, *supra* note 256, at 410 (noting that nonwhites have been less likely to have their births registered and are more likely to have missing data on their birth certificates).

496. Stumpf, *supra* note 206, at 400. For example, some individuals of Hispanic or Arab origins may have multiple surnames that are not recorded in the same way on all their identity documents. *Id.* (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-146, EMPLOYMENT

### D. Pigeonholing

The channeling function of formalities may be a vice as well as a virtue. Formalities are meant to mark clear divisions between identities so as to facilitate private and public ordering. But the channels they create may be perplexed by liminal, diverse, marginal, dynamic, and disruptive identities. And individuals claiming these complex identities may be frustrated by demands that they pigeonhole their lives into the channels offered by forms. As Fuller remarked, “[T]he legal alphabet” is controlled by “judges, legislators, and text-writers.”<sup>497</sup> Yet “the actual course of history is determined by a continuous process of compromise between those who wish to preserve the existing patterns and those who wish to rearrange them.”<sup>498</sup> In law, “forms have at times been allowed to crystallize to the point where needed innovation has been impeded.”<sup>499</sup>

Line drawing problems are characteristic of formal legal rules. Liminal identities—like those that go along with intersex status, pregnancy, or being in foster care—are troubling for formalities that ask whether one is a man, mother, or family member. These problems attend not just to identities constituted by formalities but to all abstract legal forms of identity. In theory, formalities could accommodate liminal identities with more nuanced categories.<sup>500</sup> For example, immigration law includes many intermediary designations between alien and citizen, such as visa holders in various categories or lawful permanent residents. Each of these categories is subjected to unique legal treatment. Foster parents are also the subjects of their own set of formalities. But intermediary statuses such as these create problems, because other legal regimes may be premised on binary identities. For example, is a foster child a “family member” who might inherit a rent-stabilized apartment in New York City?<sup>501</sup> Following the *numerus clausus* principle, formalities are generally utilized to channel individuals into a confined number of options.<sup>502</sup>

Formalities may also cause problems when identities are diverse rather than exclusive, such as multinational, multiracial, or intersex identities. Multiracial individuals may experience forms that offer exclusive choices as

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VERIFICATION: FEDERAL AGENCIES HAVE TAKEN STEPS TO IMPROVE E-VERIFY, BUT SIGNIFICANT CHALLENGES REMAIN 19 (2010)).

497. Fuller, *supra* note 10, at 802 (quotation marks omitted).

498. *Id.*

499. *Id.* at 803; *cf.* Merrill & Smith, *supra* note 120, at 35 (discussing how “the *numerus clausus* sometimes frustrates parties’ objectives” by preventing them from achieving legitimate goals); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 580 (1988) (discussing oscillation of legal forms between rules and standards).

500. *See, e.g.*, Laufer-Ukeles & Blecher-Prigat, *supra* note 10, at 473–75 (arguing for a registration system for “functional parents” or limited guardians with “flexible, limited, and consensual” parental rights and duties).

501. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(o)(2) (2015) (providing an eight-factor inquiry for determining whether an individual who is not “immediate family” is a “family member”).

502. *See supra* note 120 and accompanying text.

failing to recognize their complex identities and causing psychological and dignitary harms.<sup>503</sup> Or consider the case of the intersex plaintiff in *Johnson v. Fresh Mark*, who sued her employer after being restricted to using the men's restrooms.<sup>504</sup> When asked for a clinical opinion on her sex, the plaintiff submitted a letter from counsel stating she was “neither entirely male [nor] entirely female.”<sup>505</sup> Dissatisfied with this “decidedly non-clinical explanation,” the court concluded that “the company made a good faith effort to determine which facilities were appropriate for Plaintiff, but left with her counsel’s ambiguous response, was forced to rely on the unequivocal information provided on her driver’s license.”<sup>506</sup>

Still, formalities may accommodate diverse identities by giving respondents the option to choose more than one category or to choose none of the above.<sup>507</sup> However, if individuals choose multiple identities, they may subvert the formality’s function of channeling them into exclusive categories for administrative or other purposes.<sup>508</sup> Making options exclusive may further the administrative aim of limiting the number of persons eligible to demand resources based on particular formal identities. For example, since the 1960s, there has been an uptick in the number of Indian tribes prohibiting multiple tribal memberships.<sup>509</sup> The increase coincides with congressional confirmations of judgment awards to be paid out to tribal members.<sup>510</sup> One scholar argued that this development “provided incentives for tribes to formalize membership rules where informal rules had been used in the past, in order to limit membership to . . . conserve tribal resources by prohibiting the enrollment of persons likely to be served by other tribes.”<sup>511</sup>

Formalities also trouble those with marginal identities—members of groups who do not meet norms or stereotypes associated with that group—for example, white people with low economic or social status,<sup>512</sup> or masculine

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503. See, e.g., Lucas, *supra* note 370, at 1248 (discussing the multiracial category movement).

504. See *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 997–98 (2003), *aff’d*, 98 Fed. App’x. 461 (6th Cir. 2004).

505. *Id.* at 998.

506. *Id.* at 1000.

507. For example, since 2003, parents have been able to select more than one racial category to describe themselves on their child’s birth certificate, consistent with changes to the census form. Brumberg, *supra* note 256, at 409.

508. See, e.g., Lucas, *supra* note 370, at 1259 (discussing how Department of Education rules on collection of racial data “lump all self-identified multiracials into one category . . . which then has no specific or independent meaning within the DOE reporting structure”).

509. Gover, *supra* note 43, at 273.

510. *Id.* at 296.

511. *Id.* at 297.

512. Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1516 (2010) (discussing “whites who only enjoy white privilege in contingent, context-specific ways”); see also LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 149 (2007) (considering “the twenty-first-century legacy of Mexican Americans’ history as off-white—sometimes defined as *legally* white, almost always defined as *socially* non-white”).

women. Such individuals may find formalities coercive, and feel forced to make choices that do not ring authentic.

The most unique disadvantage of formal identities, relative to ascriptive and elective ones, is that they are confounded by dynamic identities: identities that change over time or depend on context. Formalities leave documentary traces that “inhibit forgetting.”<sup>513</sup> The idea that a past formality might estop an individual from claiming a different identity is based on an understanding of identity as impervious to change or reformulation depending on context. But people do not always experience identity in this static and acontextual way. Researchers have found that many multiracial individuals change their racial identifications in different situations and over their lifetimes.<sup>514</sup> For example, consider a multiracial woman who is only willing to identify as such if she believes her employer’s diversity program is genuine as opposed to tokenizing.<sup>515</sup> The effects can be passed down through the generations, as one whose ancestors did not sign the Dawes Rolls may not have a claim to tribal membership.<sup>516</sup> Or a person whose parents brought her to the United States without pursuing immigration formalities may find herself estopped from claiming U.S. citizenship. This estoppel problem is a growing risk as technology facilitates better collection and retention of records.

Formalities need not be static; as in contracting, they may be revocable or have conditions for termination. Some formalities, such as marriage and naturalization, are generally revocable through new formalities, while others, such as adoption, are not.<sup>517</sup> One explanation might be the extent to which revocation could affect third-party or public interests, such as the well-being of children.

Curiously, sex-designation changes, which would seem to affect few public interests outside the prison and restroom contexts, are considered irrevocable. Courts have held that sex changes should not be allowed on birth certificates unless the change is “irreversible” and “permanent.”<sup>518</sup> Even some advocates of allowing a change without proof of surgery have argued, “It’s the

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513. Dery, *supra* note 451, at 687.

514. Nancy Leong, *Half/Full*, 3 U.C. IRVINE L. REV. 1125, 1128 (2013) (discussing sociological research); Rich, *supra* note 74, at 1532–35 (same).

515. Cf. Jessica M. Vasquez, *Blurred Borders for Some but Not “Others”: Racialization, “Flexible Ethnicity,” Gender, and Third-Generation Mexican American Identity*, 53 SOC. PERSP. 45, 61 (2010) (discussing reasons for inconsistent racial identifications).

516. See *supra* note 387 and accompanying text.

517. Parents who give up adopted children may be guilty of the crime of abandonment and sued for child support. See Lisa Cornwell, *Cleveland and Lisa Cox, Ohio Couple, Give Back Adopted Son After 9 Years*, HUFFINGTON POST (Nov. 15, 2013, 1:20 PM), [http://www.huffingtonpost.com/2013/11/15/cleveland-and-lisa-cox-give-back-adopted-son\\_n\\_4283178.html](http://www.huffingtonpost.com/2013/11/15/cleveland-and-lisa-cox-give-back-adopted-son_n_4283178.html).

518. *In re R.W. Heilig*, 816 A.2d 68, 87 (Md. 2003); see also *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976) (holding that sex changes should be allowed on birth certificates if the changes are “consistent” and “irreversible”); Mottet, *supra* note 51, at 416–17 (discussing concerns by administrators and judges about “avoiding multiple corrections”).

permanence of the transition that matters most.”<sup>519</sup> The rationale for this concern is not articulated, and there is a lack of empirical evidence that individuals are likely to want to “switch back.”<sup>520</sup> The unstated anxiety may pertain to whether the formality is fulfilling the cautionary function of requiring the claimant to think carefully about his or her transition. For this reason, perhaps, advocates of more lenient rules recommend another layer of formality for a birth certificate change: a doctor’s letter attesting to the genuineness of the individual’s gender transition, rather than proof of surgery.<sup>521</sup>

Most troubling for formalities are disruptive identities that refuse categorization or seek to destabilize categories through such means as gender parody. Consider again Divine the drag queen, whose performance of gender norms is not about passing as a woman, but rather, calling attention to the constructed nature of gender and sex.<sup>522</sup> This performance may or may not subvert gender norms, depending on context.<sup>523</sup> In any event, such performances may not be intelligible to legal formalities.

#### E. Legitimation

[M]oral questions arise when the categories of the powerful become the taken for granted; when policy decisions are layered into inaccessible technological structures; when one group’s visibility comes at the expense of another’s suffering.

Geoffrey Bowker & Susan Leigh Star<sup>524</sup>

A potential risk of formal identity is that it may be so effective in channeling private behavior and facilitating public order that it legitimates distinctions based on identities. Legitimation is the idea that law is “a series of ideological constructs that operate to support existing social arrangements by convincing people that things are both inevitable and basically fair.”<sup>525</sup> Certain types of rights claims only succeed by reproducing ideological premises that

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519. Damien Cave, *New York Plans to Make Gender Personal Choice*, N.Y. TIMES, Nov. 7, 2006, <http://www.nytimes.com/2006/11/07/nyregion/07gender.html?pagewanted=all> (quoting then-New York City health commissioner Dr. Thomas R. Frieden).

520. Mottet, *supra* note 51, at 416–17.

521. *See id.*

522. *See supra* note 462 and accompanying text; Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 527 (1988).

523. *See* Butler, *supra* note 522, at 527.

524. BOWKER & STAR, *supra* note 468, at 320.

525. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350 (1988). For example, critical race theorists argued that the civil rights laws of the 1960s, while appearing to embody an “unambiguous commitment to antidiscrimination,” were founded on “many conflicting . . . interests” that “actually reinforce[d] existing social arrangements, moderated to the extent necessary to balance the civil rights challenge with the many interests still privileged over it.” *Id.* at 1348. Thus, the formal commitment to equality of opportunity contained the seeds of the ideology of colorblindness that obscures systemic and material inequality. *See id.* at 1343–46.

are neither inevitable nor fair. For instance, a law providing slaves with certain rights against their masters may constrain the behavior of slaveowners while at the same time reaffirming the institution of slavery.<sup>526</sup> By improving conditions for slaves, these rights may make the case against slavery seem less urgent, or they might make slavery appear fair and normatively palatable.<sup>527</sup> As an empirical matter, this may be debated, and attention to context is crucial.<sup>528</sup> Slaves who claim rights, for example, may be engaged in “strategic exploitation of loopholes in their legally prescribed status rather than constitutive reproductions of that status.”<sup>529</sup>

Legitimation arguments are often made against a variety of rights claims, not just those premised on formal identities.<sup>530</sup> However, claims to formal identity have unique ways of legitimating institutional arrangements. Formality may be seen as a way of transcending political controversies over ascriptive versus elective definitions of identities, turning those identities into legal questions that can be resolved objectively on the basis of simple evidence. Formal identity may also go along with documentary essentialism, in which people feel their identities are made “real” by formalities like birth certificates.<sup>531</sup> The significance of these real identities may prove difficult to challenge. Formalities may thus have a depoliticizing effect, shutting off avenues for debate over the purposes of legal rules that turn on identity classifications.

In addition to this sort of ideological legitimation, formal identity may facilitate regulatory projects by governments or corporations. If formal identities are to be useful they must be recorded, and those records may be put

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526. See John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 LAW & HIST. REV. 627, 645–46 (2000) (discussing this example).

527. Cf. Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative “Reform” of the Death Penalty?*, 63 OHIO ST. L.J. 417, 421–24 (2002) (discussing legitimation in the context of arguments over the death penalty). Steiker and Steiker referred to reforms that forestall broader change by improving conditions as “entrenchment” and to reforms that create a false sense of the normative legitimacy of a social practice as “legitimation.” *Id.*

528. See Crenshaw, *supra* note 525, at 1350 (arguing that the theory of legitimation is a “general one” that requires attention to the “reality of oppression”); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WISC. L. REV. 379, 426 (arguing that the concept of legitimation “leads researchers into easy hypotheses about the effect of legal phenomena without the necessity of empirical support”).

529. Witt, *supra* note 526, at 646.

530. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429 (1995) (“Legal scholars who write about legitimation concern themselves with the ‘hegemonic’ power and function of legal discourse and doctrine; they focus on the various ways in which law in all of its manifestations helps to generate ways of thinking that reinforce numerous aspects of social life that might otherwise be considered normatively undesirable.”).

531. See *supra* notes 458–59 and accompanying text.

to ill or unintended uses.<sup>532</sup> In his critique of systems of gender classification, Professor Dean Spade has argued, “[F]ormal recognition and classification bring new efficiencies to violence.”<sup>533</sup>

Consider, for example, formal identity in the immigration context. Some scholars have argued that legal reforms that incrementally expand the categories of people who may claim citizenship legitimate the concept of national citizenship, which is, at heart, exclusionary.<sup>534</sup> Formal citizenship—the idea that citizenship will be bestowed on those who follow the rules, wait their turn, and comply with the formalities of naturalization—now serves as an argument for the fairness of excluding those who have not pursued formal routes.<sup>535</sup>

Coinciding with the formalization of citizenship is the increased linkage of rights and duties to citizenship or other formal immigration statuses. In the twentieth century, the ability to travel across U.S. borders and to work in the United States became tied to immigration status. The E-Verify database is now used only to verify work eligibility, but could someday be used as part of a more comprehensive strategy of immigration enforcement.<sup>536</sup> Why, for example, should the right to practice law,<sup>537</sup> purchase health insurance,<sup>538</sup> or drive a car<sup>539</sup> in the United States depend on immigration status? Are the undocumented excluded from these rights as part of a strategy of “attrition through enforcement”: discouraging the presence of undocumented persons by

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532. Whether such harms materialize depends on the extent to which information is kept secure and privacy is protected. Transgender rights advocates argue for robust protections of privacy related to birth certificate changes. Mottet, *supra* note 51, at 437–47.

533. Dean Spade, *Be Professional!*, 33 HARV. J.L. & GENDER 71, 83 (2010).

534. See T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 FORDHAM L. REV. 1689, 1692 (2001) (“By defining insiders, the concept of citizenship necessarily defines outsiders; and by guaranteeing full and equal rights for those within the charmed circle, it supports fewer rights—or at least less attention—for those outside the circle.”); cf. Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2452–53 (2007) (recognizing that “work to make citizenship status easier to obtain” does not escape “the exclusions inherent in alienage” but aspiring to a “universal conception[] of citizenship” that “would challenge national restrictions on movement and membership”).

535. Cf. Hiroshi Motomura, *What is “Comprehensive Immigration Reform”? Taking the Long View*, 63 ARK. L. REV. 225, 233–34 (2010) (discussing the objection that “legalization endorses lawbreaking” and violates the “rule of law”).

536. See Stumpf, *supra* note 206, at 412.

537. See *In re Garcia*, 315 P.3d 117, 129, 133 (Cal. 2014) (asking, “Is there any reason, under state law, that undocumented immigrants, as a class or group, should not be admitted to the State Bar?” and concluding the answer is no).

538. NAT’L IMMIGR. LAW CTR., IMMIGRANTS AND THE AFFORDABLE CARE ACT (ACA) (revised Jan. 2014), available at <http://www.nilc.org/document.html?id=157> (noting that undocumented immigrants are not permitted to purchase health insurance from state insurance exchanges under the Patient Protection and Affordable Care Act).

539. See generally Kevin R. Johnson, *Driver’s Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 222–24 (2004) (arguing against state laws limiting immigrant eligibility for driver’s licenses).



wearing them down?<sup>540</sup> The concept of attrition through enforcement deserves normative and empirical scrutiny to determine whether it might have a deterrent effect or just force undocumented lives underground into dangerous black markets and informal economies.<sup>541</sup>

Legitimation arguments are common in debates over the meaning of marriage. Many have argued that expanding the right to marriage to same-sex couples legitimates the institution of marriage, to the exclusion of other forms of intimate ordering.<sup>542</sup> In 2004, the U.S. General Accounting Office found “1,138 federal statutory provisions classified to the United States Code in which marital status [was] a factor in determining or receiving benefits, rights, and privileges.”<sup>543</sup> Defining marriage based more on formal choice and less on ascriptive stereotypes makes this distribution more palatable. As a result of the legalization of same-sex marriage, some states have been phasing out marriage-like alternatives such as domestic partnerships and civil unions.<sup>544</sup> But why does the law channel intimate orders into just two categories: married couples or not? Why does the law distribute resources based on marriage, as opposed to other caregiving arrangements, like parenthood, eldercare, or extended families?<sup>545</sup>

Legitimation through formalization may operate in less obvious ways. Abortion-rights advocates have voiced opposition to Missing Angel laws that allow women to obtain birth certificates for stillbirths.<sup>546</sup> Their practical concern, that birth certificates might be issued to women who have had abortions, was allayed by clarifications in legislative language.<sup>547</sup> Still, Professor Sanger has asked whether public recognition of motherhood in the stillbirth context may have costs for “women who do not want to become mothers” in the abortion context.<sup>548</sup> By recognizing the fetus as a child, birth

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540. Note following ARIZ. REV. STAT. ANN. § 11-1051 (West 2012).

541. See Chantal Thomas, *Immigration Controls and “Modern-Day Slavery”* 6 (Cornell Law Sch. research paper No. 13-86, 2013), available at <http://papers.ssrn.com/abstract=2294656> (arguing that “the lack of valid immigration documentation and status enables . . . conditions of coercion” in which trafficked workers “remain under enslavement”).

542. See, e.g., Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT’L GAY & LESBIAN Q. (1989), reprinted in SAME-SEX MARRIAGE: PRO & CON 122 (Andrew Sullivan ed., 2004).

543. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Off., to Hon. Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

544. See, e.g., Inga Nelson, Note, *Recognition of Civil Unions and Domestic Partnerships as Marriages in Same-Sex Marriage States*, 98 MINN. L. REV. 1171, 1183–91 (2014).

545. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 231–32 (1995) (envisioning “a redistribution or reallocation of social and economic subsidies now given to the natural family . . . to support caretaking as the family intimacy norm”).

546. Sanger, *supra* note 273, at 305.

547. See *id.* at 307.

548. *Id.* at 310.

certificates for stillbirths may further a social understanding of all pregnant women as mothers, contributing, over time, to the erosion of *Roe v. Wade*.<sup>549</sup>

With respect to formal sex, Professor Spade has argued that “administrative classification of identities does invisible work of naturalizing categories of classification, inviting the question: Why is gender identification taken for granted as a legitimate domain of governance?”<sup>550</sup> While Professor Spade acknowledged that liberalization of the rules governing the requirements for changes to sex designations on identity documents would be a positive development, “to imagine only these reforms is to miss the greater insight that this matrix of policies allows.”<sup>551</sup> Instead, he argued that the incoherence of various state and federal policies on sex classifications should help bring into view the lack of utility of sex classifications for administrative schemes.<sup>552</sup>

Concerns over legitimation may explain the limited uptake of the idea of formal race at a time when many consider race to be anachronistic or altogether irrelevant. U.S. law prohibits the use of census data for anything other than “the statistical purposes for which it is supplied.”<sup>553</sup> In the World War II era, the U.S. government used statistical census data to determine the location of the Japanese American population for purposes of internment.<sup>554</sup>

In the affirmative action context, Native American identity is cast as more a question of citizenship than race. Yet in that context, debates about formal identity may overshadow questions about the substantive purposes of identity classifications. The ABA report urging law schools to adopt a formal model of Native American identity does not contain any discussion of how law schools use Native American identity status or what definition would best serve those purposes.<sup>555</sup>

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The “emptiness” of formality gives it appeal for reformers who seek to contest the ascriptive meanings of legal identities and allow greater self-definition. Formalities have evidentiary benefits, providing individuals with the security that the law will recognize their identity claims, and facilitating reliance on those identities by others. But formalities can become the sole arbiters of identity, bureaucratizing understandings of the self and constricting the space for creativity and improvisation. By inducing caution, formalities can ensure that identity choices are more meaningful. Yet some formalities may impede rather than induce deliberation, fail to make clear their purposes,

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549. *Id.* Sanger did not argue that Missing Angel Acts are motivated by any position on abortion; rather, she argued that “they contribute to a thicker mix of cultural signs and coordinates in which fetal and embryonic life are claimed as full human persons.” *Id.*

550. Spade, *supra* note 9, at 738.

551. *Id.* at 802.

552. *Id.* at 803.

553. 13 U.S.C. § 9(a)(1) (2012).

554. Sobel, *supra* note 351, at 349.

555. *See supra* note 393.

impose paternalistic barriers to disfavored identities, or be inaccessible to those without resources. Identity formalities also channel: facilitating private and public ordering by providing uniform and easily administrable categories. But in doing so, formal requirements may trap individuals into standardized and decontextualized legal packages or leave them outside the law's recognition. The ease of administration and seeming neutrality of formal identities may obscure underlying discrimination, and legitimate the use of identity-based classifications that should be subjected to scrutiny.

#### IV.

##### RETHINKING THE LEGAL FUNCTIONS OF IDENTITIES

The question of people's identity will forever be befuddling if detached from the purposes for which the question is being asked. Once the purposes are disclosed, the perspective of the inquirer, the perspective of the evaluator, the perspective of the community, and in some cases, self-proclaimed identity become critical. Neither perceptions by outsiders nor claims of insiders are "objective." Each reflects interests and a position, a perspective.

Martha Minow<sup>556</sup>

This final Part argues for reexamination of the many purposes of identity-based regulation rather than a wholesale move toward formalization. Formalization, in theory, is an attractive compromise between ascriptive and elective models because it serves evidentiary, cautionary, and channeling functions. But what substantive ends do these formal functions serve? In the context of contracting, formalities may serve the substantive purposes of protecting private autonomy, facilitating reliance, and avoiding unjust enrichment. In identity contexts, whether to adopt formal definitions depends on what substantive interests the particular identity classifications serve, whether those substantive aims are normatively justified, and if so, whether formal definitions are the best means of meeting those aims.

This Part argues for context-dependent, rather than all-purpose, identity definitions, which might be ascriptive, elective, or formal, depending on the substantive aims of the doctrine. Elective definitions may be appropriate where the law's concern is protecting privacy and autonomy. Ascriptive definitions may be appropriate where the law regulates identity as a proxy for another substantive interest apart from protecting the right to self-definition. Formal definitions may be appropriate when the law seeks to facilitate identity choices, but it is necessary to mark a clear division between those who do and do not hold particular rights or duties, to caution individuals before they choose those rights or duties, and to provide stability and security in those identities.<sup>557</sup>

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556. Minow, *supra* note 118, at 116.

557. Cf. Fuller, *supra* note 10, at 800 (arguing that the question of when to require formalities depended on whether they were needed to satisfy their formal "desiderata," in other words, the

To the extent that the law defers to formalities, those formalities should induce caution proportionate to the rights at stake, be accessible to everyone, and be transparent about their consequences. Although demands for formal evidence of identity may be premised on questionable fraud concerns, advocates may find that the security formality provides is an immediate imperative for those made vulnerable by identity-based regulation.

#### A. Questioning Channels

Thinking about identity formalities in terms of their channeling function raises questions about the need for clear, all-purpose divisions between who is, and is not, a certain type of person. These questions include: (1) should eligibility for rights and responsibilities hinge on a particular identity status, and (2) are there reasons to define identities uniformly across all legal domains, or might identities be “unbundled” and defined differently depending on the legal context? Answering these questions requires interrogation of the various uses of legal distinctions based on citizenship, family, race, and sex. Furthermore, addressing these questions requires shifting the focus from policing group membership lines to questioning the relevance of group membership.

Another commercial law analogy is helpful here. Property rights are often explained with the metaphor of a bundle of sticks.<sup>558</sup> Property is not simply an owner’s right to a thing, but rather, “a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision.”<sup>559</sup> Ownership is a bundle of rights, such as the right to exclude others from the property, the right to use the property, the right to sell the property, and so forth. Thinking of property ownership in this way denaturalizes property arrangements and opens the door to consider what it would mean to disaggregate the various sticks, or take apart the rights in the bundle. The bundle metaphor calls into question linkages between a status and its associated rights or duties that might otherwise be taken for granted.

Legal identities might also be susceptible to unbundling, allowing for different definitions depending on the particular context. Creating multiple legal definitions may avoid the suggestion that bureaucratic processes have the

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evidentiary, cautionary, and channeling functions, as well as the substantive bases of contract law); Kennedy, *supra* note 128, at 103 (“Viewing consideration doctrine as a formality, we ask the extent to which, in any given situation, it promotes the evidentiary, cautionary, and channeling functions Fuller peremptorily assigns to formalities. Viewing the doctrine as a restriction on freedom of contract, we ask whether the restriction confines enforcement appropriately, given the goals of securing private autonomy, compensating reliance, and preventing unjust enrichment.”).

558. J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 713 n.8 (1996).

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

power to render identities authentic in all spheres of social life. This variability may also avoid the inequalities that result when certain statuses are formally enshrined for preferential or disadvantageous treatment across the board. Defining identities contextually rather than for all purposes is less likely to pigeonhole individuals into categories that do not match their lived experiences. Rather than legitimating identity-based regulation, the bundle metaphor might reveal that identities are standing in as proxies for other concerns that the law might more directly regulate without the need to assign a status to an individual at all.

Consider the possibility of unbundling citizenship. Those who see liberatory potential in formal identity might call for expanding access to naturalization for certain undocumented immigrants. Legalization may help those who meet its prerequisites and can afford to pursue it. But so long as undocumented migration to the United States continues, this strategy will require repetition by every generation.<sup>560</sup> If we consider the substantive purposes of citizenship distinctions instead, we might question why ever more rights and duties are being tied to citizenship status. Professor Ayelet Shachar has examined the concept of “unbundling” the rights and duties associated with national citizenship.<sup>561</sup> This might entail a corresponding expansion of the notion of human rights or basic rights that all are entitled to, regardless of membership in political communities.<sup>562</sup> Unbundling citizenship rights might also prompt smaller-scale questions about whether documentation of citizenship should be a prerequisite for access to police services, health care, driver’s licenses, or employment.

Expansion of formal family might entail recognizing new forms of marriage, enforcing more parenting agreements, or abandoning presumptions of parenthood. But why are the identities of spouse and parent the focal points of regulation? As Professor Kerry Abrams has written, “Marriage has become the receptacle for all sorts of attempts to solve social problems, but it is no longer a robust enough institution to serve this function.”<sup>563</sup> Why should the tax code treat formally married couples differently?<sup>564</sup> Why are public benefits,

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560. See Motomura, *supra* note 535, at 240 (arguing that disputes over legalization will recur for the next generation if the United States pursues limited legalization programs rather than making permanent changes to expand who may pursue legal status under the immigration laws, “foster[ing] international economic development, and better serv[ing] the population in the United States that is most vulnerable to economic displacement by newcomers”).

561. SHACHAR, *supra* note 30, at 61–66.

562. *Id.* at 62; see also Bosniak, *supra* note 66, at 467–70, 502.

563. Abrams, *supra* note 108, at 6.

564. See, e.g., Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 343, 340 (1994) (arguing for “[m]andatory separate returns” because allowing joint returns makes marriage “bonuses or penalties unavoidable”).

such as social security, tied to marriage rather than dependency?<sup>565</sup> Policymakers should articulate the reasons for relying on marriage rather than treating it as a “reflexive depository for . . . largesse.”<sup>566</sup> Professor Martha Fineman has argued that if the purpose of the state’s endorsement of marriage is to facilitate private caretaking of dependents, the state might provide resources to caretakers directly.<sup>567</sup>

In addition to ensuring care for dependents, family law doctrines serve a variety of substantive purposes, including, for example, “autonomy, pluralism, privacy, and gender equality.”<sup>568</sup> To better serve these aims, many legal scholars have argued for disaggregation and reconfiguration of various parental rights and responsibilities.<sup>569</sup> To this end, rather than asking whether parenthood should be formal, ascriptive, or elective as a general matter, we might ask what substantive purposes the legal distinction is intended to serve in each context and what definitions are best tailored for them. The clarity offered by formal channels will not always secure these ends.<sup>570</sup>

Likewise, rather than seeking to extend the right to make formal changes to sex on birth certificates, reformers might ask what purposes sex designations are serving in the law. The Supreme Court has abandoned the premise that the sexes of spouses are relevant to marriage.<sup>571</sup> Yet the sex segregation of various physical spaces is rarely questioned. Professor Kenji Yoshino has argued that 2006 efforts to liberalize New York City’s rules for changes to sex designations

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565. Cf. Abrams, *supra* note 108, at 40–44 (discussing how public benefits are linked to marriage on the “assumption” that “most people were married and that most wives were financially dependent on their husbands”).

566. Abrams, *supra* note 108, at 66.

567. See FINEMAN, *supra* note 545, at 231–32 (arguing that rather than traditional families anchored by married couples, the state should subsidize “a non-traditional configuration of family” in the form of dependents and caretakers).

568. See Appleton, *supra* note 487, at 259.

569. See, e.g., Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 913 (2006) (arguing for separation of the economic responsibility for a child from custody rights); Michele Goodwin & Naomi Duke, *Parent Civil Unions: Rethinking the Nature of Family*, 2013 U. ILL. L. REV. 1337, 1342 (proposing that parental civil unions allowing more than two parents related by family or friendship replace the foster care system); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47, 72–77 (2007) (exploring legal recognition of more than two parents); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 388 (2008) (considering how the law might “facilitate and enable the care networks that support and assist parents”). Professor Glenn Cohen has argued that the right *not* to be a parent be disaggregated into “multiple possible sticks, including the right not to be a genetic parent, the right not to be a legal parent, and the right not to be a gestational parent.” I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1118 (2008).

570. Cf. Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2012 (2014) (discussing the rules versus standards debate and arguing for “thinking critically about how to take the best of both in designing frameworks that accommodate the dizzying rate of social and technological change manifesting itself in domestic relations disputes”).

571. As this Article was going to press, the Supreme Court issued *Obergefell v. Hodges*, Nos. 14–556, 14–562, 14–571, 14–574, slip op. (U.S. 2015).

on birth certificates failed because reformers did not consider the state interests involved in sex classifications.<sup>572</sup> Spaces such as restrooms, prison cells, and hospital rooms may be sex segregated in the interests of safety or privacy.<sup>573</sup> But in the debate over expanding access to formal sex, these policy concerns were not raised and so could not be contested.<sup>574</sup> If they had been, they might have been debunked.<sup>575</sup> There is an “absence of data” on whether segregated restrooms keep women safe from crime.<sup>576</sup> And as Professor Yoshino wrote, “To the extent that privacy concerns rest on a fear of sexual objectification, they rely on a specious assumption of universal heterosexuality.”<sup>577</sup> Rather than asking who belongs in which spaces, the question might be how spaces could be rearranged to ensure safety and privacy for everyone.<sup>578</sup>

Rather than using formality to channel individuals into easily administrable racial identities, we might similarly ask why the law relies on racial classifications. Professor Lauren Sudeall Lucas has argued for more

572. See Kenji Yoshino, *Sex and the City: New York City Bungles Transgender Equality*, SLATE (Dec. 11, 2006, 2:43 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2006/12/sex\\_and\\_the\\_city.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2006/12/sex_and_the_city.html) (arguing that reformers should have articulated the “interests that a person or the state might have in another person’s gender . . . more clearly . . . so they could have been contested”). In 2014, New York City reconsidered this issue and liberalized its rule to eliminate surgical and name-change requirements. BD. OF HEALTH, N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AMENDMENTS TO ARTICLE 207 OF THE NEW YORK CITY HEALTH CODE 2–3 (Dec. 2014), available at [http://rules.cityofnewyork.us/sites/default/files/adopted\\_rules\\_pdf/f-dohmh\\_12-12-14\\_b\\_art\\_207.pdf](http://rules.cityofnewyork.us/sites/default/files/adopted_rules_pdf/f-dohmh_12-12-14_b_art_207.pdf).

573. Yoshino, *supra* note 572. Yoshino also points to concerns regarding fraud and national security. *Id.*; see also Mottet, *supra* note 51, at 414–15 (discussing law enforcement concerns).

574. Other policy concerns are raised in favor of sex segregation in sports, such as the argument that women and girls will not otherwise have fair opportunities to compete. Skinner-Thompson & Turner, *supra* note 111, at 277. Whether these concerns justify sex segregation, and if so, how sex should be defined, depends on the sport. See, e.g., Erin Buzuvis, *Caster Semenya and the Myth of A Level Playing Field*, 6 MOD. AM. 36, 39 (2010) (arguing, with respect to the Olympics and other elite athletic competitions, that the “long term goal” should be to “reconceptualiz[e] sports to allow for more integrated competitions that group athletes by physical characteristics other than sex” and that the short term goal should be to move from ascriptive to elective rules with respect to sex verification, qualified by a good faith requirement); Skinner-Thompson & Turner, *supra* note 111, at 287 (explaining that many youth sports teams are integrated because differences between the sexes in physical abilities are not significant prior to puberty).

575. See generally Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 219–24 (Harvey Molotch & Laura Norén eds., 2010) (responding to the concerns that unisex restrooms would result in crime, be unclean, and eliminate an important space for “female sociability”).

576. *Id.* at 220. Professor Case argued that the “illusion of safety” in the women’s restroom may even facilitate crime, describing a case in which a female victim attempted to elude her male assailant by hiding in the women’s restroom, but he followed her into the restroom and killed her. *Id.*

577. Yoshino, *supra* note 572.

578. Case, *supra* note 575, at 217 (“If the model of the airplane toilet, a model much closer to the toilet stall in a typical women’s room than to the urinal in a typical men’s room, were to become the universal norm, ending sex segregation in the toilets need not mean a loss of privacy for women.”); cf. Elizabeth F. Emens, *Inside Out*, 2 CALIF. L. REV. CIRCUIT 95, 96 (2011) (arguing that rather than segregating gay and transgender inmates to protect them from sexual violence, prisons should be concerned with all types of vulnerability to violence).

careful consideration of the purposes to be achieved by racial classifications, by “untangl[ing]” elective race from ascriptive race.<sup>579</sup> Employment discrimination law, for example, seeks to ensure equal opportunity. Technically, the most common method of proving employment discrimination requires a plaintiff to show “that he belongs to a racial minority.”<sup>580</sup> But disputes over membership in racial groups are not often litigated under this doctrine.<sup>581</sup> Rather, courts ask whether the employer perceived the employee as a member of a particular race and discriminated on that basis. This ascriptive definition of race is tailored to the purpose of the law: to prohibit ascriptive racial classifications that are discriminatory; not to protect elective racial identifications. Formal racial identifications are not relevant to proving employment discrimination, except insofar as they shed light on whether an employer knew about an employee’s race.<sup>582</sup>

In the context of affirmative action, race is almost invariably defined based on individual election at the time of application—at least officially.<sup>583</sup> Unofficially, employers and educational institutions may use ascriptive notions of race based on appearance.<sup>584</sup> They may also consider formal designators of racial affiliation, such as resume lines listing the Black Law Student’s Association or La Asociación Latina.<sup>585</sup> In the context of Native American law school applications, the ABA now recommends deference to formal tribal enrollment.<sup>586</sup> Whether a definition of race based on appearance, community, election, or formal affiliation best serves the purpose of affirmative action is

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579. Lucas, *supra* note 370, at 1248–50.

580. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

581. See Greene v. Swain Cnty. P’ship for Health, 342 F. Supp. 2d 442, 451 (W.D.N.C. 2004) (noting there is “very little case law on what is required to show membership in a protected class”); Metoyer v. State, 874 F. Supp. 1198, 1203 (D. Kan. 1995) (holding that “the ‘membership’ requirement of the prima facie case must not be taken too literally” since “Title VII must not be used to promote further racial and ethnic categorization” (quoting Gilbert v. Babbitt, No. Civ. A. 92-1124(NHJ), 1993 WL 468465, at \*4 (D.D.C. Oct. 29, 1993))).

582. See, e.g., *supra* note 402 (collecting cases on Native American identity); Nieves v. Metro. Dade Cnty., 598 F. Supp. 955, 962 (S.D. Fla. 1984) (refusing to conclude that a plaintiff fell outside the protected class of Hispanic persons even though the plaintiff failed to identify himself as Hispanic on his employment application).

583. One law professor and former law school admissions officer has argued that institutions should require “diversity statements” to provide “the necessary context that would demonstrate why the self-identification is meaningful to [the applicant] by connecting identity with perspective.” Philip Lee, *On Checkbox Diversity*, 27 J. C.R. & ECON. DEV. 203, 215 (2013). I leave for another day the question of what this practice measures, and whether it requires that a candidate “perform” her identity according to certain stereotypical narratives. Cf. CARBADO & GULATI, *supra* note 46, at 116–33 (discussing the social and institutional meanings of “[a]cting [d]iverse”).

584. A former human resources employee at a large corporation told the author that they prefer to receive applications with pictures of the candidate so as to better identify those who might qualify for affirmative action.

585. Cf. EEOC v. Target Corp., 460 F.3d 946, 961 (7th Cir. 2006) (discussing plaintiff’s argument that her employer could have inferred her race from the African American sorority on her resume).

586. See *supra* note 392 and accompanying text.



seldom debated or discussed.<sup>587</sup> This may be due to discomfort around issues of race and disagreement on the validity of affirmative action in general.

Alternatively, hesitation to examine which definition of race is best for affirmative action might be due to disputes about which purposes affirmative action should serve: remedying patterns of discrimination, correcting historical injustice, ensuring equality of opportunity, breaking down stereotypes, achieving a diverse workforce or classroom, improving the institution's image, avoiding litigation, or something else. In the affirmative action context, Professor Camille Gear Rich has called for a move away from "authenticity inquiries," which are focused on determining "race writ large," and toward functionalist ones, which ask whether a person has experienced the sort of "racialization" that might contribute to the employer's remedial or diversity oriented goals.<sup>588</sup> Such an approach would call into question reliance on formal race, since "a person with a record of inconsistent racial designations may have a particularly insightful and interesting perspective on racialization that would be relevant in conversations about diversity."<sup>589</sup> It would also call into question a definition of Native American identity as formal citizenship rather than ascriptive racial identity.<sup>590</sup> And it would require critical examination of the argument that law school affirmative action policies ought to benefit only those Native Americans who take on the burdens of tribal membership, such as jury service and taxes,<sup>591</sup> and whose ancestors formalized their Indian status through census designations.<sup>592</sup>

### B. Inducing Proportionate Caution

Whether formalization is appropriate also depends on whether caution is required, and whether the requisite formality is effective at inducing the appropriate level of caution. Fuller argued that whether formality is required for cautionary purposes depends in part on the importance of the transaction.<sup>593</sup> As the stakes increase, so too should the elaborateness of the formality.<sup>594</sup> But at a certain point, the costs of formalities may be so high as to have a deterrent

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587. See A.B.A. Report, *supra* note 393, at 4 (referring vaguely to types of Native American ancestry that are not sufficient for "official academic and legal purposes").

588. Rich, *supra* note 73, at 198.

589. *Id.* at 208.

590. There are reasons to question whether formal tribal enrollment is a good metric of these concerns. See David Treuer, *How Do You Prove You're an Indian?*, N.Y. TIMES, Dec. 20, 2011, <http://www.nytimes.com/2011/12/21/opinion/for-indian-tribes-blood-shouldnt-be-everything.html> ("I know full-blooded Indians who have lived their entire lives on reservations but can't be enrolled because they have blood from many different tribes, and I know of non-Indians who have been enrolled by accident or stealth just because they'll get something out of it.").

591. See *supra* note 402.

592. See *supra* note 389.

593. Fuller, *supra* note 10, at 805.

594. *Id.* ("We must preserve a proportion between means and end; it will scarcely do to require a sealed and witnessed document for the effective sale of a loaf of bread.").

effect, limiting access to identities to those who can pay the price.<sup>595</sup> Moreover, the design of some formalities may induce disregard or confusion rather than careful contemplation.<sup>596</sup>

The stakes of identity determinations might be benchmarked against those of wills, trusts, and estates, which require the formalities of a writing, signature, and attestation.<sup>597</sup> These instruments may determine the distribution of property after an individual dies, or even custody of her children. Many of the rights and duties currently associated with citizenship and family have similar, if not more significant, consequences for individuals. The consequences increase as the law imposes more barriers to exit from identities. By contrast, the consequences of “mistakes” as to sex and race designations for individuals are rarely articulated. Onerous cautionary requirements for formal changes to sex or race may reflect a brand of paternalism rooted in stereotypes about authentic identities.<sup>598</sup>

In popular discussions of formal identity, the question of the proportionality of the formality to the stakes of recognition is often forgotten. In *Adoptive Couple v. Baby Girl*, the adoptive couple’s brief began with the phrase, “After unceremoniously renouncing his parental rights to his unborn daughter – Baby Girl – in a text message . . . .”<sup>599</sup> But the “unceremonious” nature of a text message, sent in the context of a conflict over a broken engagement, ought to suggest that it is exactly *not* the sort of formality that might ground a surrender of custody rights.<sup>600</sup> The format of the text message does not lend itself to careful contemplation of potentially binding obligations.<sup>601</sup> What sort of formal requirements might induce contemplation requisite to the stakes involved—such as signatures, notarization, waiting

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595. See *supra* Part III.A (discussing the commodification problem); Kennedy, *supra* note 152, at 1692 (“[W]hatever its purpose, the requirement of a formality imposes some cost on those who must use it, and it is often unclear whether the lawmaker intended this cost to have a deterrent effect along with its cautionary and evidentiary functions.”).

596. See *supra* notes 411–16 and accompanying text.

597. See *supra* note 148 and accompanying text.

598. See *supra* notes 484–85 and accompanying text.

599. Brief for Petitioners at 1, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 633597. This example begs the question of whether the father had any legitimate expectation of parental rights based on biology. The point is not to argue that he did; rather, it is to argue that formal identity obscures important questions about the functions of parenthood as an institution.

600. Cf. *Adoptive Couple*, 133 S. Ct. at 2558 (discussing adoption papers signed by the birth father stating he was “not contesting the adoption”).

601. The “median teen text user” sent sixty texts per day in 2012. See Amanda Lenhart, *Teens, Smartphones & Texting*, PEW RES. CTR. (Mar. 19, 2012), <http://www.pewinternet.org/Reports/2012/Teens-and-smartphones/Summary-of-findings.aspx>. That text messages have been featured in so many political sex scandals demonstrates the lack of sober contemplation required by the medium.

periods, witnesses, ceremonies, or court proceedings—is a question for empirical research.<sup>602</sup>

For formalities to be effective at helping individuals make considered choices, their roles must be widely understood.<sup>603</sup> The inference that an individual intended to disclaim an identity cannot be drawn from her failure to execute a formality if she was not on notice of the required formalities. Although many people are aware that legal marriage requires license and solemnization in the majority of states, popular myths may persist that cohabitation over a certain period of time gives rise to common law marriage.<sup>604</sup> If the law seeks to induce caution with formalities, it may make sense to refuse custody rights to a man who had the opportunity to sign a voluntary acknowledgment but decided against it. But it makes less sense to deny all custody rights to a father who failed to submit a written notice to a state's putative father registry, whether out of ignorance of the a child's birth or ignorance of the law.<sup>605</sup>

To be effective in inducing better choices, a formality must be clear about the purposes that identity elections will serve. The Voluntary Acknowledgment of Paternity, for example, provides notice to the father and mother of the rights and duties of parents.<sup>606</sup> By contrast, other formalities, such as check boxes for racial identification, may fail to communicate what an individual is signing up for. This sort of opacity prevents a formality from serving a cautionary purpose. An individual may be comfortable identifying as a Native American for purposes of making connections with other Native Americans in a diversity program, but not for a program that entails receiving different consideration for

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602. For an empirical examination of which types of formalities serve the cautionary function in contracting, see Zev J. Eigen & David A. Hoffman, *A Fuller Understanding of Contractual Commitment* 7 (Temple Univ. Beasley Sch. of Law Research Paper No. 2015-11, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2567830](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567830) (discussing the results of online experiments showing that recitals of consideration “did no significant work in motivating individuals to stick with their commitments,” while providing nominal amounts of money increased compliance).

603. This claim may be in tension with the argument that identities ought to be disaggregated. See *supra* Part IV.A. Without careful consideration of how to facilitate notice and enhance public understanding, disaggregation of traditional identities may increase complexity, create confusion, and impair decision making.

604. Sarah Primrose, *The Decline of Common Law Marriage & the Unrecognized Cultural Effect*, 34 WHITTIER L. REV. 187, 187 n.1 (2013) (discussing popular myths regarding common-law marriage in the United States). Although there is only anecdotal evidence of the extent of this misconception in the United States, empirical studies in the United Kingdom show a significant percentage of the population erroneously believes that cohabitants accrue spouse-like rights over time. Pascoe Pleasence & Nigel J. Balmer, *Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation*, 46 LAW & SOC'Y REV. 297, 299–300, 321–22 (2012).

605. The doctrine makes more sense if the core meaning of fatherhood is ascriptive rather than elective or formal. If fatherhood is defined as acting in some essential way—such as being married to the child's mother, cohabiting with the child, caring for the child, or providing financial support—then it is less troubling that a man who does not engage in these behaviors might waive his rights to the child by failing to register.

606. 42 U.S.C. § 666(a)(5)(C)(i) (2012).

purposes of hiring and promotions. Yet if that individual checks the Native American box on an employer form, she may find herself listed as Native American in a number of human resources databases, used for a variety of purposes.

If one aim of formal identity is to facilitate the expression of individual intent in a more meaningful way, the requisite formalities should be universally accessible. The inheritance law context is again instructive here. Many individuals die intestate due to “the relative inaccessibility of the will-making process because of its obscurity, complexity, and cost.”<sup>607</sup> The process entails transaction costs, including estate planning lawyers and a significant time investment, disproportionately disadvantaging those of lower socioeconomic status.<sup>608</sup> This distinguishes the will-making process from formalities like those required for legal marriage, which are more easily accessible.<sup>609</sup> This comparison suggests that marriage formalities may provide a more promising model for forms of identity with similar or lower stakes.<sup>610</sup> For example, for changes to the sex designation on a birth certificate, a simple and inexpensive administrative procedure is preferable to a rule requiring a court order or medical procedure.<sup>611</sup>

### C. Assessing the Role of Evidence

Finally, whether to move toward formalization requires assessment of the need for documentary evidence of identity. This raises questions about whether legal identities should be stable and transparent. By creating stable markers of identity, formalities may facilitate reliance on identities and avoid unjust enrichment resulting from bad faith or opportunistic claims. But stability may not always be necessary to meet the substantive goals of identity regulation. Moreover, in the identity domain, security may be stultifying and reliance may amount to confidence in confining stereotypes. The transparency that results from formal evidence may conflict with privacy concerns.

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607. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 879 (2012).

608. *Id.* at 878–79.

609. *Id.* at 879.

610. For example, a couple can marry in Seattle, Washington, after procuring a sixty-four dollar license, waiting three days, finding two witnesses, and paying an eighty dollar fee for a municipal court ceremony, although rates increase on weekends. *Marriage Ceremony Information*, SEATTLE MUN. COURT, <http://www.seattle.gov/courts/judmag/marriage.htm> (last visited Apr. 5, 2015); *King County Marriage Licensing*, KING CNTY., <http://www.kingcounty.gov/courts/marriage.aspx> (last visited Apr. 5, 2015).

611. Mottet, *supra* note 51, at 431–32 (discussing the costs of procuring a court order, which include “hiring an attorney competent in the matter, taking time off work or school to meet with an attorney and appear in court, traveling to the courtroom and attorney’s office (the cost of which, especially for non-residents of the state, may be significant and time consuming),” and recommending that people be allowed to change birth certificate sex designations through a simple administrative process instead).

Formal evidence may be thought to provide a check against fraud. But fraud concerns are often premised on contestable ascriptive notions of, for example, who is a “real” American and deserves work in the United States, who is “really” married and should qualify for public benefits, who is a “real” woman and may use the women’s locker room, or who is a “real” Native American and is eligible for affirmative action. Formalities only defer controversies over authenticity back to licensing authorities. Those authorities may not have applied definitions suited to the purposes of identity regulation. Accordingly, moves toward formalization intended to police the boundaries of authentic identity deserve closer scrutiny. Even when framed in terms of avoiding opportunistic or bad faith claims, fraud concerns assume that stable and consistent identities serve important interests, such as the reliance interests of third parties and the public. Those interests should be questioned.

Whether an identity ought to be stabilized so that others may rely on it bears on the issues of whether formalization is appropriate, whether formalities ought to be easily revocable and renewable, and what privacy guarantees ought to be attached. Stability against government disruption may be a worthwhile goal for citizenship because it would allow citizens to invest in building lives in the United States.<sup>612</sup> Likewise, children benefit from security and stability in parents.<sup>613</sup> Partners in a marriage may benefit from some level of stability as well, although there are reasons to regard this interest with suspicion.<sup>614</sup>

By contrast, the beneficiaries of stable and transparent sex, gender, and racial identities are often left unidentified. When policing of sex-segregated spaces is motivated by the desire to preserve traditional gender norms, the public’s reliance interest in those norms should be articulated and debated. With respect to race, institutional reliance on an individual’s past racial identifications may not be justified, depending on the purpose of the inquiry. If affirmative action policies are designed to address racial marginalization, deference to past formal identifications may be a poor proxy for that experience, as a person’s encounters with discrimination may change

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612. See *supra* note 202 and accompanying text. Similarly, formal tribal citizenship may foster investment in tribes. See *supra* note 402 and accompanying text.

613. See, e.g., ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 15–20, 45–47 (2004) (discussing benefits of continuity of care for children and society); JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 111–22 (2000) (discussing evidence of the benefits of stability in child-parent relationships).

614. See, e.g., Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1290–91 (1983) (discussing reasons to be skeptical of policies enacted to further the state interest in marital stability; for example, the fact that “state action can only encourage or discourage in a rough sort of way a relationship so dependent upon individual volition and commitment,” and because the goal of marital stability may be “predicated on a series of stereotypes” about gender and family).

throughout her life.<sup>615</sup> Moreover, these contexts implicate privacy concerns, as race, sex, and gender identities are often sources of stigma and discrimination.

Nevertheless, evidence provides an important measure of security to those claiming identities. Lives, livelihoods, and families may depend on stable recognition of citizenship, kinship, sex, or race. Advocates for those made vulnerable by identity-based regulation (such as DREAMers<sup>616</sup> or Geena Rocero<sup>617</sup>) may decide that formal identity best serves the immediate interests of their clients or constituencies.<sup>618</sup> Hopefully, the pursuit of formal recognition in these instances can coincide with longer-term questions about the justice of identity-based regulation.

#### CONCLUSION

Formalities may seem to provide a respite from the informal mess of the everyday experience of identity as a set of entangled relationships, complicated intersections, and power dynamics. Although it is productive to examine formal identity as an independent model, formality does not afford a clean break from the ascriptive versus elective identity debate. By establishing channels for the expression of identities, formalities can create new essentialist definitions of those identities. Formal identities may prove just as confining and static as those explicitly based on nature or nurture. Formal requirements may facilitate self-determination for some while setting traps for unwary others. This Article, which began as a critique of form, has ended as a critique of identity. Rather than expanding access to identities by replacing ascriptive definitions with formal ones, we might consider why legal rules hinge on identities at all, and if the reasons are valid, consider what definition of identity best serves the law's purpose.

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615. Rich, *supra* note 73, at 217. Rich discusses the Malone brothers, and queries whether they might have experienced discrimination after first identifying as black. *Id.*

616. See *supra* note 176 and accompanying text.

617. See *supra* note 297 and accompanying text.

618. Cf. Spade, *supra* note 329, at 29–30 (struggling with tensions between the ultimate policy goal of “deregulation of gender” and advocacy for transgender clients).

