Transgressing the Binary, Transforming Policy and Transcending the Family: Towards a Framework for Trans Reproductive Justice in Canada

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With the onslaught of anti-trans legislation in the United States and the repeal of Roe v Wade*, a common American sentiment is to turn to its Canadian neighbours in search of better protections. But is Canada really a safe haven for trans reproductive justice? This article engages with the intersection of reproductive rights and trans rights to pinpoint a series of ongoing legal hurdles to trans reproductive justice in Canada: the medicalization of gender identity, the gendering of pregnancy and the inaccessibility of non-normative family models. In order to prevent a phenomenon of passive trans sterilization, this article recommends a series of legal and policy measures including untangling gender-affirming care from diagnoses of dysphoria, funding virtual trans healthcare, understanding pregnancy as a disability rather than inherently linked to sex and prioritizing kith-based models of family building.*

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I Dans la foulée de la multiplication des lois anti-trans aux États-Unis et de l'invalidation de l'arrêt Roe c. Wade, *nombre d'Américains ont tendance à se tourner vers le Canada à la recherche de meilleures protections. Mais le Canada est-il vraiment un lieu sûr en matière de justice reproductive pour les personnes trans? Cet article traite de l'intersectionnalité des droits reproductifs et des droits des personnes trans afin de relever une série d'obstacles juridiques persistants en matière de justice reproductive des personnes trans au Canada : la médicalisation de l'identité de genre, la sexospécificité de la grossesse et l'inaccessibilité des modèles familiaux non normatifs. Afin de prévenir un phénomène de stérilisation passive des personnes trans, l'article recommande une série de politiques et de mesures juridiques, notamment de dissocier les soins d'affirmation du genre des diagnostics de dysphorie de genre, de financer des soins de santé virtuels pour les personnes trans, d'assimiler la grossesse à une situation de handicap plutôt que de la considérer comme un élément intrinsèquement lié au sexe biologique, et de donner la priorité à des modèles familiaux fondés sur des relations affectives et choisies.*

Notes on Language

This article uses the term "trans" as an umbrella term that encompasses a series of non-normative gender identities, such as trans women and men, genderqueer, genderfluid, and non-binary people, and other non-conforming identities. This article also attempts to avoid the strict demarcation between sex and gender in favour of a critical queer approach that accepts the way sex and gender co-constitute each other.

I. Introduction

The United States' current political climate makes clear that legislative measures limiting access to abortions and those attacking trans rights represent two prongs of the same offensive against bodily autonomy. With rhetoric calling for the "eradication of 'transgenderism'"[1] and record-breaking years for the United-States in terms of anti-trans legislation in 2022 and 2023,[2] public discourse has begun to emulate the events that followed the overturning of *Roe v Wade*.[3] Much like calls on Canada to welcome Americans seeking abortions followed the *Dobbs* decision,[4] petitions now call on the federal government to accept trans Americans as refugees into

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1 Peter Wade & Erin Reed, "CPAC Speaker Calls for Eradication of 'Transgenderism' – and Somehow Claims He's Not Calling for Elimination of Transgender People" (6 March 2023), online: <rollingstone.com/politics/politics-news/cpac-speaker-transgender-people-eradicated-1234690924/> [perma.cc/28T4-VCAX].

2 Matt Lavietes & Elliott Ramos, "Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People" (20 March 2022), online: <nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418> [perma.cc/5QZ2-UKLU].; Koko Nakajima & Connie Hanzhang Jin, "Bills Targeting Trans Youth Are Growing More Common – And Radically Reshaping Lives" (28 November 2022), online: <npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports> [perma.cc/W8HW-Q7HA]. More recently, see Trans "2024 Anti-Trans Bills Tracker", online: <translegislation.com> [perma.cc/37J9-APVU]: "The number of anti-trans bills considered across the U.S. has broken records for four consecutive years. In 2023, the total number of bills surged more than three times the previous record".

3 *Dobbs v Jackson Women's Health Organization*, 597 US (2022) [*Dobbs*]; *Roe v Wade*, 410 US 113 (1973).

4 Andy Blatchford, "Canada is Open to Americans Who May Lose Access to Abortions, But There's a Catch" (5 May 2022), online: <politico.com/news/2022/05/05/canada-americans-access-abortions-00030209> [perma.cc/HGD3-FQVZ]; Mitchell Consky, "Canadians Open Their Doors to Americans Seeking Abortions" (28 June 2022), online: <ctvnews.ca/world/canadians-open-their-doors-to-americans-seeking-abortions-1.5966106> [perma.cc/2B3E-MUPP].

Canada.[5] In response, some have called into question whether Canada is in fact a safe haven for trans people,[6] an inquiry made all the more salient by growing anti-trans rhetoric taking place within the country.[7] A critical perspective invites us to reflect further on whether it is even possible for such a haven to develop within the colonial structures that form the premise of "Canada" as a nation. At a minimum, I argue that reproductive justice cannot be attained without addressing hurdles imposed by legal phenomena such as the medicalization of gender identity, the gendering of pregnancy and the inaccessibility of non-normative family models. Building on the foundations set by reproductive justice and queer theory, this article seeks to expand the understandings of what is required to attain trans reproductive justice. I argue that while positive steps have been taken to improve the state of trans reproductive justice in Canada, policymakers' work in this regard is far from complete.

Reproductive justice (RJ) is an interdisciplinary framework combining social justice and reproductive rights coined by Black feminists and rooted in the intersection of critical race theory and critical feminist theory.[8] It is a "praxis-based framework", grounded in self-determination and intent on ensuring practical access, rather than merely stopping at the gates of a legislatively protected 'choice':[9]

> We must not frame reproductive sovereignty as a single-issue struggle. Feminists of colour have long stressed the necessity of a holistic understanding of 'choice', with the

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5 Rachel Aiello, "Popular e-Petition Calling For Canada to Allow Trans People to Claim Asylum, But That Right is 'Already Established'" (14 March 2023), online: <ctvnews.ca/politics/popular-e-petition-calling-for-canada-to-allow-trans-people-to-claim-asylum-but-that-right-is-already-established-1.6310796> [perma.cc/BF8N-2CKP]; Nick Logan & Jason Vermes, "This Petition Asks Canada to Grant Asylum to Transgender People From The U.S. Could it Work?" (16 March 2023), online: <cbc.ca/news/canada/us-transgender-asylum-petition-1.6779692> [perma.cc46NY-HLJ3].

6 Sarah Do Couto, "More Than 130K Canadians Sign Petition for Trans People to Claim Asylum – Good News, it's Already Law" (14 March 2023), online: <globalnews.ca/news/9549932/trans-asylum-petition-canada-law> [perma.cc/46NY-HLJ3].

7 See e.g. Celeste Trianon, "Anti-Trans Legislative and Policy Risk Map" (4 October 2023), online: <celeste.lgbt/en/anti-trans-risk-map/> [perma.cc/M4JV-H4RZ]; see also Celeste Trianon, "Trans people Are Scared – Canada Needs to Act" (21 May 2023) , online: <thestar.com/opinion/contributors/trans-people-are-scared-canada-needs-to-act/article_f99f6648-108b-5790-94c1-b36a23366f34.html> [perma.cc/KCZ3-8CMN]; Corinne L. Mason & Leah Hamilton, "How The 'Parental Rights' Movement Gave Rise to The 1 Million March 4 Children" (20 September 2023), online: <theconversation.com/how-the-parental-rights-movement-gave-rise-to-the-1-million-march-4-children-213842> [**perma.cc/7T5B-CAR7**]

8 Michelle W Tam, "Queering Reproductive Access: Reproductive Justice In Assisted Reproductive Technologies" (2021) 18 Reproductive Health 1 at 2.

9 *Ibid*.

> reproductive justice movement explicitly combining agitation for reproductive rights with engagement around wider social issues. Proponents of reproductive justice have eschewed a tight focus on fertility control in favour of building networks of solidarity around housing, employment, childcare, and many other issues – all of which impact upon the ability to exercise meaningful choice.[10]

At the heart of this framework is a focus on intersectionality, with RJ arising from Black women's unique perspective that strictly pro-choice models obscure how reproductive privileges for some women rely on the reproductive discipline of others, and fail to account for, let alone challenge, how racism and other vectors of inequality inform an asymmetrical access to this right to choose.[11] As a result, an explicit goal of RJ is to "[c]enter the most marginalized",[12] including trans folks: a core tenet of RJ is the demand for gender freedom.[13]

In Loretta Ross and Rickie Solinger's articulation of RJ, they identify three central pillars to the framework: "(1) the right *not* to have a child; (2) the right to *have* a child; and (3) the right to *parent* children in safe and healthy environments".[14] This article will focus on the second and third pillars delineated by Ross and Solinger, namely, the right to have children and to raise them in safe and healthy environments. It will first examine a series of social, medical and legal influences that coalesce into conditions that promote coerced sterilization of trans folks that prevents access to the right under the second pillar. Then, it will canvass how trans parents' rights to raise their children in environments where they can flourish should include the right to non-heteronormative family structures. While trans people's right to *not* have children is also a necessary component of trans reproductive justice, the right under the first pillar is beyond the scope of this article, which rather emphasizes the various factors that restrict access to trans parenthood. Though I will comment on a range of social and legislative phenomena in various provinces that serve as indicia of anti-trans rhetoric in Canada, this article will primarily focus on the political and legal landscapes of Ontario and Québec.

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[10] Helen Hester, *Xenofeminism* (Cambridge, UK: Polity Press, 2018) at 117-118.

[11] Loretta J Ross & Rickie Solinger, *Reproductive Justice in the Twenty-First Century*, 1st ed (California: University of California Press, 2017) at 65 [Ross & Solinger, *Twenty-First Century*].

[12] Sister Song: Women of Color Reproductive Justice Collective, "Reproductive Justice", online: <sistersong.net/reproductive-justice> [perma.cc/9L2S-E9WF].

[13] Ross & Solinger, *Twenty-First Century*, *supra* note 11 at 65.

[14] *Ibid.*

Trans reproductive justice organizers identify a series of meanings and components for RJ. These include access to comprehensive health care for trans folks, economic justice, an end to physical violence against trans people, the necessity of inclusive language,[15] training for clinicians on cultural competence and non-discrimination, the incorporation of trans inclusion in medical grant guidelines and the elimination of policies that require sterilizing procedures.[16] In the spirit of RJ's emphasis on practical implementations, this article makes a series of concrete recommendations for policy changes specific to the Ontario and Québec contexts drawing on some aspects of these demands:

1. the requirement for a diagnosis of gender dysphoria to access gender affirming care should be removed;
2. funding should (continue to) be allocated to virtual trans healthcare;
3. pregnancy should be de-gendered and considered via the prohibited ground of disability rather than sex; and
4. legislation regarding family structures should permit families with two or more parents and allow people to become parents even where their intent to participate in parenthood only forms after the relevant child's birth.

Before delving into the above analysis, it is necessary to first assess the potential of the RJ framework given its emphasis on human rights. The Women of Color Reproductive Justice Collective that coined the concept of RJ in 1994 identifies it as "[r]ooted in the internationally-accepted *human rights framework* created by the United Nations" [emphasis added].[17] Critical legal scholars express healthy skepticism towards approaches that center the

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15 National Women's Law Center & Law Students for Reproductive Justice, "Fact Sheet: If You Really Care About Reproductive Justice, You Should Care About Transgender Rights!" (September 2015), online (pdf): <nwlc.org/wp-content/uploads/2015/08/rj_and_transgender_fact_sheet.pdf> [perma.cc/V6PX-XVTX]. See also Borealis Philanthropy, "Reproductive Justice is Trans Justice; Trans Justice is Reproductive Justice" (28 March 2023), online: <borealisphilanthropy.org/reproductive-justice-is-trans-justice-trans-justice-is-reproductive-justice/> [perma.cc/7CHN-RCH5].

16 National Center for Transgender Equality, "Transgender Sexual and Reproductive Health: Unmet Needs and Barriers to Care" (1 April 2012), online: <transequality.org/issues/resources/transgender-sexual-and-reproductive-health-unmet-needs-and-barriers-to-care> [perma.cc/M2ZV-JE9Z]. See also SPARK, "About Us", online: sparkrj.org/about-us/ [**perma.cc/RWM6-V43N** /].

17 *Sister Song*, *supra* note 12.

acquisition of rights as a means to deal with every social issue. Clément names this problem a phenomenon of "rights-inflation", where social problems are framed in rights-based language poorly designed to capture or address the systemic nature of these grievances.[18] Rights, legal recognition or legitimacy and other similar goals often fail to address systemic issues in society at large, favouring political and civil rights at the expense of economic or social improvements to communities' lives.[19]

Nevertheless, RJ's combination of human rights with social justice is indicative of its nature as a form of "differential consciousness".[20] Differential consciousness is a term coined by Chela Sandoval that has been adopted by critical trans legal theory to contextualize its claims,[21] and refers to a paradigm that does not privilege any particular form of resistance – whether focussed on equal rights, revolutionary action, supremacist assertions or separatist projects. Rather, it exemplifies a "consciousness-in-resistance" that shifts though different forms of resistance to move power in strategic ways, and is concerned with practical improvements to the lives of those both at the center and the margins of a given movement.[22] Though a critical lens cautions us to remain wary of considering reformist measures as a panacea capable of transforming a colonial country like Canada into any sort of "haven," especially within the context of trans liberation,[23] Sandoval's framework allows an examination of the ways in which RJ can assist with the improvement of the material conditions that govern trans people's lives. This is the lens within which I approach the question of trans reproductive justice in Canada, and more precisely, within Ontario and Québec.

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[18] Dominique Clément, "Human Rights or Social Justice? The Problem of Rights Inflation" (2018) 22:2 Intl JHR 155 at 156.

[19] *Ibid* at 158.

[20] Chela Sandoval, *Methodology of the Oppressed* (Minneapolis: University of Minnesota Press, 2000).

[21] Dean Spade, "Methodologies of Trans Resistance" in George E. Haggerty & Molly McGarry, eds, *A Companion to Lesbian, Gay, Bisexual, Transgender and Queer Studies* (New Jersey: Blackwell, 2007) 237 at 240 [Spade, "Methodologies of Trans Resistance"].

[22] *Ibid*.

[23] See e.g. Dean Spade, "Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change" (2009) 30 *Women's Rights Law Reporter* 288; Dean Spade, "Their Laws Will Never Make Us Safer" in Ryan Conrad, ed, *Against Equality: Prisons Will Not Protect You* (Lewiston, ME: Against Equality, 2012) 1; Spade, "Methodologies of Trans Resistance", *supra* note 21.

II. The Second Pillar: The Right to Have Children

A. Barriers to Trans Reproductive Justice Under the Second Pillar

To provide recommendations for the improvement of trans reproductive justice, an analysis of the way reproductive oppression affects trans people is first required. This section will examine how various vectors of power impact trans folks' ability to have children under the second pillar of the RJ framework. Though the focus of reproductive activism often centers around access to abortions and the right to *not* have children, the right to have children is a fundamental inclusion in the RJ framework to counter eugenic policies. Ross and Solinger highlight the long history of intersecting racial and reproductive oppression aimed at halting or reducing the reproduction of women of colour, and especially that of Black and Indigenous women.[24] These interactions between reproductive justice and eugenics are linked by the concept of repronormativity, which posits that states explicitly encourage the reproduction of some while limiting that of others.[25] Repronormativity reveals the two faces of reproductive injustice, where the main facet of injustice experienced by cis white women is and has been primarily concerns of access to abortion and birth control, while women of colour were and continue to also be targets of forced sterilization.[26] In Canada, the active and ongoing sterilization of Indigenous women, which also extends to Two-Spirit people according to the Native Women's Association of Canada,[27] is the most obvious example of ongoing eugenics.[28]

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[24] Ross & Solinger, *Twenty-First Century, supra* note 11 at 89-90.

[25] Anna L Weissman, "Repronormativity and the Reproduction of the Nation-State: The State and Sexuality Collide" (2017) 13:3 Journal of GLBT Family Studies 277 at 279.

[26] *Ibid* at 280.

[27] Native Women's Association of Canada (NWAC), "Forced Sterilization" (2024), online: <nwac.ca/policy/forced-sterilization> [perma.cc/DRL2-GP6L]. I also recognize that the term "Two-Spirit" is not an Indigenous equivalent to "transgender", but rather I attempt to highlight here the assault on various types of gender nonconformity.

[28] Olivia Wawin, "De Jure and De Facto Discrimination: Sterilization and Eugenics in Canada" (24 November 2021), online: <mjlh.mcgill.ca/2021/11/24/de-jure-and-de-facto-discrimination-sterilization-and-eugenics-in-canada/> [perma.cc/Y2Q2-4276]; Yvonne Boyer & Judith Bartlett, "External Review: Tubal Ligation in the Saskatoon Health Region: The Lived Experience of Aboriginal Women" (11 July 2017), online (pdf): <senatorboyer.ca/wp-content/uploads/2021/09/Tubal-Ligation-in-the-Saskatoon-Health-Region-the-Lived-Experience-of-Aboriginal-Women-Boyer-and-Bartlett-July-11-2017.pdf > [perma.cc/4XRQ-7MCX]; Senate of Canada, *The Scars the We Carry: Forced and Coerced Sterilization of Persons in Canada – Part II* (July 2022) (Chair: Salma Ataullahjan).

Trans people are also a target of such sterilization. In several parts of the world, sterilization continues to be a requirement for the recognition of a legal transition.[29] In some cases, these requirements are accompanied by other conditions that applicants be unmarried, as though insulating the nuclear family from the threat posed by trans parents.[30] This corresponds to a model of "active" eugenics, employing policies that explicitly aim to discourage reproduction among certain demographic groups. In the last decade or so, Canadian policy has moved away from the active eugenics model and towards a self-determination model. Starting in Ontario in 2012, the Human Rights Tribunal of Ontario held that surgery was no longer a requirement to change one's registered gender for Ontario documentation.[31] Around 2015 or so, most other provinces amended their *Vital Statistics Act* so that individuals could change their birth certificates to accurately reflect their gender "without having to provide proof of genital surgery", or removed the requirement via other policy changes.[32]

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[29] See e.g. Liam Stack, "European Court Strikes Down Required Sterilization for Transgender People" (12 April 2017) online: <nytimes.com/2017/04/12/world/europe/european-court-strikes-down-required-sterilization-for-transgender-people.html> [**perma.cc/45P6-LDZW**]; Trans Rights Map, "Sterilisation" (2023) <transrightsmap.tgeu.org/home/legal-gender-recognition/sterilisation> [perma.cc/MMH2-XKYL]; Kristen Gelineau, "Dubbed Torture, ID Policies Leave Transgender People Sterile" (10 November 2022), online: <apnews.com/article/transgender-sterilization-e2cd525389eb17bf5201fa0fcbabdbf3> [perma.cc/9S4R-5SPG]. See also Lara Karaian, "Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law" (2013) 22:2 Soc & Leg Stud 211 at 221.

[30] AJ Lowik, "Reproducing Eugenics, Reproducing while Trans: The State Sterilization of Trans People" (2018) 14:5 Journal of GLBT Family Studies 425 at 435.

[31] *XY v Ontario (Government and Consumer Services*), 2012 HRTO 726.

[32] Lowik, supra note 30 at 438-439. For Alberta, see Caley Ramsey, "New Policy Makes it Easier For Transgender Albertans to Change Birth Documents" (21 February 2015), online: <globalnews.ca/news/1842763/new-alberta-policy-makes-it-easier-for-transgender-people-to-change-birth-documents/> [perma.cc/TL82-P9PJ]. For British Columbia, see Ashifa Kassam, "'The System's Violating Everyone': The Canadian Trans Parent Fighting to Keep Gender Off Cards" (6 July 2017), online: <theguardian.com/world/2017/jul/06/the-systems-violating-everyone-the-canadian-trans-parent-fighting-to-keep-gender-off-cards> [perma.cc/67XG-8K4Y]. For Newfoundland and Labrador, see CBC News, "Reassignment Surgery Not Necessary to Change Gender Markers on ID, Ruling Says" (9 December 2015), online: <cbc.ca/news/canada/newfoundland-labrador/human-rights-transgender-birth-marker-1.3356863> [perma.cc/9AXE-B3BD]. For Nova Scotia, see The Canadian Press, "Transgender Nova Scotians Can Identify Gender on Birth Certificate" (24 September 2015), online: <cbc.ca/news/canada/nova-scotia/transgender-nova-scotians-birth-certificates-1.3242382> [perma.cc/7RXX-3DMZ].
For Québec, see Educaloi, "New Legal Rights for Trans People" (17 November 2015), online: <web.archive.org/web/20190402075119/https://www.educaloi.qc.ca/en/news/new-legal-rights-transgender-people> [perma.cc/ZT3E-BTP8]. For Manitoba, see Bill 56, *The Vital Statistics Amendment Act*, 3rd Sess, 40th Leg, 2014. Some provinces followed suit slightly later, with Prince Edward Island and Saskatchewan in 2016, and New Brunswick in 2017.

Nevertheless, Canada continues to implement passive eugenic policies. According to Radi, passive eugenics refers to the "choice" that trans people – especially trans people of colour – are often faced with: to choose between their gender identity and their reproductive health.[33] Passive eugenics, then, encompasses policies that may not have the explicit objective to undermine trans reproduction, but nevertheless have that effect. In the following pages, this article will canvass how passive eugenics plays out in Ontario- and Québec-based measures regarding identification, access to healthcare, and medicalization.

i. Identification

Despite the above, an attempt to legislate a requirement for sterilization was made as recently as 2021 with Québec's proposed *Bill 2*.[34] Originally, *Bill 2* was meant to be a response to the *Centre for Gender Advocacy* ruling,[35] which held that trans, non-binary and intersex people have the right to documents that reflect their identities. The proposed legislation sought to create a gender marker in addition to the sex designation already found on identity documents. Trans people would have been permitted to have a gender marker that matched their identity (X, F or M), but their sex designation would have remained unchanged "unless [they] proved they underwent surgery to change their 'sexual organs'".[36] As some gender-affirming surgeries involving genitals lead to sterility,[37] trans individuals' access to documentation that recognized their identity, respected their dignity and preserved their safety[38] would have had to be exchanged for their reproductive abilities. Moreover, the original *Bill 2* would have also created a new "undefined" sex designation for intersex people, which

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33 Blas Radi, "Reproductive injustice, trans rights, and eugenics" (2020) 28:1 Sexual and Reproductive Health Matters 396 at 396.

34 Bill 2, *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, 2nd Sess, 42nd Leg, Quebec, 2021 (first reading 21 October 2021, assented to 8 June 2022), SQ 2022, c 22 [Bill 2].

35 *Centre for Gender Advocacy v Quebec (AG)*, 2021 QCCS 191.

36 Samuel Singer, "Quebec must reverse course on Bill 2 and restore January's historic trans rights victory" (2 November 2021), online: <theglobeandmail.com/opinion/article-quebec-must-reverse-course-on-bill-2-and-restore-januarys-historic/> [perma.cc/8NFL-HK3V].

37 Lowik, *supra* note 30 at 426.

38 Bill 2 was also criticized as jeopardizing trans people's safety by essentially forcibly outing those who had not had surgery, which is exponentially dangerous when identification is often requested in already tense situations, such as interactions with police.

Zavelsky highlights would have encouraged the practice of non-consensual intersex genital mutilation surgeries to make intersex children's anatomy conform to the male/female model. It was only due to concerted community pressure on the Québec government that *Bill 2* was amended, and the surgical requirement and "undefined" sex designation were removed.[39]

Despite these amendments, Trianon writes that some flaws related to the identification of trans parents persist. For instance, non-binary people are not allowed the "mother" or "father" designation, contributing to a narrow perspective of non-binary identities as some "third gender" rather than as the challenge to gender categorization they encompass.[40] Particularly relevant to our case study is how *Bill 2* creates a possibility for trans parents to be outed:

> [A]s children older than 14 are allowed to object to their parents' change of label (e.g., from "mother" to "father") – in this case, the parent will be assigned the "parent" designation rather than the desired "mother" to "father". As the "parent" designation remains new, those with the label risk being outed.[41]

Measures of this nature embody a belief that there is something inherently harmful, for a child, about their parent's transness. This belief also occasionally makes its way into jurisprudence. In a British Columbia parenting dispute between two separating mothers, one of which had recently transitioned, the judge ordered the cis mother to refer to her ex-spouse correctly. However, he also held that the children should be allowed to refer to her however they wished, though subject to their counsellor's recommendations.[42] Though the question of whether children should be subject to court orders regarding correct pronoun/gendered term use is beyond the scope of this article, this example serves to make apparent the undercurrent on which the *Bill 2* provision is founded.

In short, *Bill 2* is a cautionary tale. Though Canadian provinces have made strides towards a self-determination model, such approaches are not immune to political shifts and require ongoing vigilance from trans and

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[39] Anna Zavelsky, "Bill 2 Amendments Mark a Victory for Trans Rights" (15 June 2022), online: <mcgilldaily.com/2022/06/bill-2-amendments-mark-a-victory-for-trans-rights/> [perma.cc/7W56-82F4].

[40] *Ibid*.

[41] *Ibid*.

[42] *CP v SP*, 2020 BCSC 1043 at para 54.

allied communities.[43] Had *Bill 2* been adopted in its original form, it would have marked a return to active eugenics by effectively holding trans individuals' access to adequate identification hostage in exchange for their reproductive abilities.

ii. Inaccessible Reproductive Healthcare

Beyond legislative attempts at restricting trans reproductive autonomy, a series of social and medical barriers in Canada coalesce into precisely the sort of passive eugenics discussed by Radi. For instance, social components such as heteronormativity and the invisibility of trans reproduction lead to inaccessible reproductive healthcare, including natal healthcare for trans pregnancies as well as assisted reproduction. It is important to note that Ontario has one of the most inclusive, if not the most inclusive, publicly funded fertility programs. Under the Ontario Fertility Program (OFP), "individuals under the age of 43 with a uterus and valid Ontario Health Insurance plan (OHIP) card are eligible for one funded IVF cycle regardless of sex, gender, sexual orientation, and family status".[44] The OFP is not, however, accompanied by guidelines on how to prioritize access to the program, resulting in non-standardized waitlists[45] and a two-tiered system. Likewise, though interrupted from 2015 to 2021, public coverage of assisted reproductive treatments was reintroduced in Québec as of November 15, 2021, including for queer women and single women.[46] Despite this, access to these services can become inaccessible due to discriminatory conduct experienced in the clinics themselves.

Dietz accurately identifies trans people engaging in reproduction as "unexceptional" and engaging needs contiguous with rather than distinct from those of cis pregnancies.[47] However, because cisheteronormativity establishes cisness as the dominant norm and transness as the minority

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[43] See e.g. Celeste Trianon, "Anti-Trans Legislative and Policy Risk Map" (last modified 4 October 2023), online: <celeste.lgbt/en/anti-trans-risk-map/> [perma.cc/AU6A-Z6DT].

[44] Tam, *supra* note 8 at 3.

[45] See Tamas Gotz & Claire Jones, "Prioritization of Patients for Publicly Funded IVF in Ontario: A Survey of Fertility Centres" (2017) 39:3 J Obstetrics & Gynaecology Can 138; see also Tam, *supra* note 8 at 3.

[46] CBC News, "Free In-Vitro Fertilization Treatment is Back in Quebec, but There Are Restrictions" (10 November 2021), online: <cbc.ca/news/canada/montreal/in-vitro-fertilization-funded-public-1.6244008> [perma.cc/YT2Z-8XJH].

[47] Elizabeth Dietz, "Normal parents: Trans Pregnancy and the Production of Reproducers" (2021) 22:1-2 Intl J Transgender Health 191 at 191.

other, trans reproduction is at once made invisible and exceptionalized. For Radi, trans pregnancies only fit into three available social models: either they are illegal, unviable or invisible – and "[e]ven when visible, trans pregnancy is represented as the first and only one",[48] despite rapidly increasing trends towards trans parenthood.[49] This rhetoric then serves to justify an absence of trans reproductive policies.

As a result, reproductive healthcare services systematically overlook the needs of this demographic, assume they will be unable to serve trans patients and sometimes consider trans patients as hostile to a feminist movement for reproductive healthcare. In a 2015 study, a majority of trans individuals attempting to access assisted reproductive technologies (ARTs) in Ontario characterized their experiences as negative due to issues with clinical documentation and providers' cisheteronormative assumptions.[50] Participants of this study reported that few clinics provided intake forms that allowed them to correctly describe themselves and their needs, and that misperceptions about participants' gender and sexual identities prevented clinics from accurately responding to their reproductive needs. One study participant reported being repeatedly dismissed by clinic staff when he disclosed his identity as a trans man, but able to receive assistance if he omitted this last piece of information.[51] In a more recent Ontario study from 2018,[52] trans participants' stories revealed that a problem with the conflation of body parts, sexuality and gender persists within fertility clinics. For example, one lesbian couple was categorized as straight because one of the partners was a trans woman. Because their chosen method of conception was insemination rather than intercourse, they were categorized by the clinic as having "male factor infertility", though sperm quality was not what

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[48] Radi, *supra* note 33 at 400.

[49] See "Trans pregnancy: Fertility, Reproduction and Bodily Autonomy (Editorial)" (2021) 22:1-2 Intl J Transgender Health 1 at 1: "Attempts to quantify pregnancy and birth amongst men, trans/masculine, and non-binary people point to a rapidly increasing trend toward visible parenthood amongst trans populations worldwide. There are currently approximately 5,000 members of an international internet support group for trans birth parents, partners, and allies, while 246 men were recorded by Medicare as giving birth in Australia between 1 July 2013 to 30 June 1010. UK support and self-help organizations report that young trans men are increasingly requesting advice around hormone use for these reasons, pointing to the need for future health care practice and policy to take account of the specific requirements of men, trans/masculine, and non-binary people who become pregnant and give birth."

[50] S James-Abra et al, "Trans People's Experiences With Assisted Reproduction Services: a Qualitative Study" (2015) 30:6 Human Reproduction 1365 at 1369.

[51] *Ibid* at 1370.

[52] Rachel Epstein, "Space Invaders: Queer and Trans Bodies in Fertility Clinics" (2018) 21:7 Sexualities 1039 at 1046.

brought them to the clinic. As a result, this participant was not recognized by the clinic as a mother. In contrast, when two partnered trans men sought reproductive healthcare services from a clinic, the partner who chose to carry the pregnancy was perceived as the mother in a heterosexual relationship with his partner, rather than a gay man and father. Epstein writes, "[b]ecause Stacey is providing sperm, her femaleness is unrecognizable. Because Sam is getting pregnant, his maleness is unrecognizable".[53] Trans men have also reported difficulties getting appointments for ultrasounds when their health cards indicate their gender as male.[54] Similar findings are reported in the fertility preservation context, with heteronormative overtones and assumptions surrounding the provision of straight sexually explicit magazines to stimulate ejaculation.[55]

Misgendering is documented to cause psychological harm,[56] and trans people must be able to access reproductive healthcare without this added burden. In addition, these clinics' systemic failures to account for trans identities and partnerships leads to their erasure, as they are filed into categories that do not represent them. In this cyclical fashion, lack of knowledge and policies regarding trans issues, trans needs, and trans-specific healthcare persist.[57]

Fertility preservation is another important facet of trans reproductive healthcare. A series of recommendations from the World Professional Association for Transgender Health's (WPATH) Standards of Care 8 assert that discussions relative to fertility preservation and impact of a desired hormonal therapy or surgery on future fertility should always be discussed prior the pursuit of said measure, as part of a framework of informed consent.[58] Despite this, Kukura shares that providers often fail to assess fertility counseling as appropriate for patients considering medical transition, with "38% of transgender men and 51% of transgender women

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53 *Ibid* at 1047.

54 Greta R Bauer et al, "'I Don't Think This Is Theoretical; This Is Our Lives': How Erasure Impacts Health Care for Transgender People" (2009) 20:5 J Assoc Nurses in AIDS Care 348 at 355.

55 AJ Lowik, "'I Gender Normed as Much as I Could': Exploring Nonbinary People's Identity Disclosure and Concealment Strategies in Reproductive Health Care Spaces" (2022) Women's Reproductive Health 531 at 538 [Lowik, "I Gender Normed"].

56 *Ibid* at 540.

57 Bauer, *supra* note 54 at 354.

58 WPATH, "Standards of Care for the Health of Transgender and Gender Diverse People, Version 8" (2022) International Journal of Transgender Health S1 at recommendations 5.3.g, 8.4, 10.11, 16.1, 16.1.a-d, 16.2, 16.3, 10.12.

report[ing] they would have considered gamete cryopreservation if they had been counseled about its availability before medical transition".[59] In the Canadian context, one study found that although 32% of participants wanted to have children in the future, only 21.7% had a health care provider discuss fertility preservation with them prior to medical transition[60].

As for natal healthcare, Kukura identifies that trans people are significantly more likely to avoid natal healthcare from hospitals and instead seek midwifery care at higher rates due to fears of transphobia in hospital settings.[61] Even with midwifery, one non-binary participant in a 2022 study shared that they were regularly misgendered as a trans man and sorted into binary gender categories.[62] Administrative inconsistencies, like a hospital's electronic records system being unable to recognize a pregnant man, also lead to inaccessible care such as the case of a trans man who was denied an epidural because the hospital system did not allow the necessary fetal monitoring for a male patient.[63] The framing of trans reproductive justice as novel, distinct and lacking in demand is also what leads to understandings of trans reproduction as necessarily in conflict with cis women's reproductive needs.[64]

iii. Medicalization & "Medical Necessity"

For many trans people, medical transition–whether via hormone replacement therapy, gender-confirming surgeries, or both–allows us to lead lives where we feel whole and like ourselves. In many regards, the medical aspects of transition can be life-saving. Regret rates are generally far lower than for non-transition related surgeries, with approximately only 1% of trans folks having had surgeries experiencing regret.[65] Trans folks' decisions to pursue medical transition, then, is a deliberate exercise of our agency.

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59 Elizabeth Kukura, "Reproductive Health Systems: Caring for Trans, Nonbinary, and Gender-Expansive People During Pregnancy and Childbirth" (2022) 50 J L, Medicine & Ethics 471 at 480.

60 Jake Pyne et al, "Transphobia and Other Stressors Impacting Trans Parents" (2015) 11:2 Journal of GLBT Family Studies 107 at 122.

61 *Ibid* at 477.

62 Lowik, "I Gender Normed", *supra* note 55 at 539.

63 Kukura, *supra* note 59 at 477.

64 Radi, *supra* note 33 at 402.

65 Lindsey Tanner, "How Common is Transgender Treatment Regret, Detransitioning?" (5 March 2023), online: <ctvnews.ca/health/how-common-is-transgender-treatment-regret-detransitioning-1.6299679#:> [perma.cc/E7TE-6G2D].

Nevertheless, the interaction between gender norms, and the criterion for care to be "medically necessary" in order to attract coverage, is a factor in this overarching passive sterilization. The reasons for this are twofold. First, this phenomenon tends to preclude the possibility of being trans and worthy of dignity without resorting to medical procedures, thus erecting sterilizing surgeries as the be-all-end-all of transness. Second, by centering medicalized criteria to gatekeep access to medical transition, trans folks who desire a medical transition but do not fit medical professionals' ideals of a trans person may be restricted from accessing an embodied future in the desired body. This can interact with trans parents' right under the third pillar – to navigate the gendered experience of parenthood in the desired manner and to give children access to parents who are able to experience the full breadth of trans joy and to share that wellbeing with their children.

To undertake this analysis, we must canvass the tenuous history of coverage for gender-affirming medical care. According to the *Canada Health Act*,[66] medically necessary procedures provided by hospitals and medical practitioners must be insured.[67] Medical necessity is not defined in the *Act* itself, though Cattapan identifies three factors in the Ontario context that lead to the socio-political construction of a service or procedure as medically necessary: medicalization, efficiency and urgency.[68] Delisted in 1998 by the new Conservative government, coverage for gender confirming surgery was only relisted in 2008 following tireless trans activism,[69] and funding criteria was updated in 2016 to align with the WPATH standards of care for gender dysphoria.[70] Cattapan's framework applies neatly to the case of gender-affirming medical care. Public discourse advocating for coverage draws attention to high suicide rates of trans folks experiencing gender dysphoria, emulating the urgency factor, while emphasis on its ability to drastically

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66 *Canada Health Act*, RSC 1985, c C-6.

67 See *Ibid*, s 9 in conjunction with definitions of "physician services" and "hospital services" at s 2.

68 Alana Cattapan, "Medical Necessity and the Public Funding of In Vitro Fertilization in Ontario" (2020) 53:1 Can J Political Science 61.

69 The ArQuives, "Trans Health Care Activism in Ontario, 1998-2008", online: <digitalexhibitions.arquives.ca/exhibits/show/trans-surgery-activism-ontario/history-gender-surgery-ontario> [perma.cc/Y2VF-4A6F].

70 Trans Health Expansion Partnership, "Transition-Related Surgery (TRS)*" at 1, online (pdf): <camh.ca/-/media/files/transrelatedsurgery-faq-en-pdf.pdf> [perma.cc/V3AK-FJES].

reduce these rates and improve mental health corresponds to the efficiency factor.[71]

With the mainstream's historical tendency to pathologize queer and trans existences, the medicalization of gender affirming care is the bigger double-edged sword of the three factors. For example, the coverage for prescribed hormones and some surgeries is contingent on a diagnosis of gender dysphoria. According to Rainbow Health Ontario:

> Some people are not comfortable with the terms "gender dysphoria," or with being diagnosed as experiencing gender dysphoria, because they do not feel that their identity should be listed as a kind of mental disorder. However, the diagnosis of gender dysphoria is what allows the medical insurance system to pay for transition-related health care, including surgeries.[72]

In Ontario, chest surgeries require one assessment from a qualified doctor or nurse practitioner that confirms the patient's gender dysphoria. Genital surgeries require an additional assessment that can also be from a psychologist, registered nurse or social worker, which not only confirms the diagnosis of persistent gender dysphoria but vouches that the individual has completed 12 months of hormone therapy and has lived in their gender identity for that length of time.[73] These criteria only somewhat align with the WPATH's Standards of Care 8 (SOC8), which is considered a move away from the gatekeeping model toward a collaborative model of trans healthcare.[74] Notably, SOC8 does not explicitly require a diagnosis of gender dysphoria, but rather notes that a diagnosis "may be necessary in some regions to access transition-related care".[75] Though the SOC8 acknowledges that a diagnosis may be mandatory to access care in some systems, it also emphasizes that "the use of rigid tools for 'transition readiness'" are not necessarily in the best interests of trans people and may reduce access to the necessary care.[76] As will be discussed further in this article, alternative means of ensuring that gender-affirming care is insured exist. In terms of a

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[71] Alex Vincent, "Trans-affirming Care is Life-saving Care", online: <nursesunions.ca/canada-beyond-covid-magazine/trans-affirming-care-is-life-saving-care/> [perma.cc/P2HE-MJE5].

[72] Rainbow Health Ontario, "Why is a Diagnosis of Gender Dysphoria Relevant?", online: <rainbowhealthontario.ca/trans-health-knowledge-base/why-is-a-diagnosis-of-gender-dysphoria-relevant/> [perma.cc/6VYJ-HKM4].

[73] Ontario, "Gender Confirming Surgery" (last modified 2 March 2023), online: <ontario.ca/page/gender-confirming-surgery> [perma.cc/QB8D-GS4L].

[74] Riki Lane, "'We Are Here to Help': Who Opens the Gate for Surgeries?" (2018) 5:2 Transgender Studies Quarterly 207 at 208-209.

[75] WPATH, *supra* note 58 at recommendation 5.3.b.

[76] *Ibid* at S35.

requirement of prior hormone therapy, SOC8 recommends that health care professionals consider gender-affirming surgeries for non-binary people, even in the absence of hormonal treatment, where hormone therapy is not required to achieve the desired result. Ontario's rigid requirement is not reflective of this nor of the range of experiences trans people can have.[77]

Though the process of medicalization leads to undeniable benefits, such as the access to insured healthcare, it can also have negative social effects that adversely impact trans people's access to reproductive justice.[78] In doing so, medicalization cements heteronormative medical practices for the mainstream, contributing to the issues identified above with regards to socially inaccessible natal healthcare and ARTs.

For Seraji, the social impacts of medicalizing gender dysphoria go much further with regards to reproductive healthcare barriers. Drawing on Foucault's notion of disciplinary power,[79] Seraji argues that the medicalization of gender dysphoria "forces trans people to constrain their identities and presentation into two distinct and rigid gender categories", consequently "reproduc[ing] the very binaries that many of us aim to deconstruct".[80] More broadly, medicalization in the case of trans identities contributes to social pressures that may lead some trans individuals to feel as though a medical transition is the only viable option to feel recognized and valued in their embodied identity. By centering a diagnosis-based approach, medicalization:

> [P]resumes that normative constructions of masculinity and femininity are valid. It assumes that trans people feel distress and discomfort only because we are in a wrongly sexed body, and not because of an established world order of forced conformity to accepted gender norms. Gender-related treatment therefore centers around making sure our bodies conform to the "new" gender category.[81]

Another feature of this aspect of medicalization is that it may serve to gatekeep gender-affirming care for individuals who do not fit neatly into heteronormative notions of gender intelligibility, and therefore are not

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77 *Ibid* at recommendation 8.3.

78 Angelo Galluzo, "The Medicalization of Gender Nonconformity Through Language: a Keywords Analysis" (2021) 14 Sprinkle 1 at 1.

79 See Stephen M Young, "Michel Foucault: Discipline" (26 February 2019), online: <criticallegalthinking.com/2019/02/26/michel-foucault-discipline/> [perma.cc/AM5F-3W8Q].

80 Samira Seraji, "Reproduction and Gender Self-Determination: Fertile Grounds for Trans Legal Advocacy" (2022) 28:2 Mich J Gender & L 251 at 255.

81 *Ibid* at 259.

strictly understood to experience gender dysphoria. For example, some people may want genital surgery but not chest surgery, some may want surgery but not hormone therapy, and vice-versa. This phenomenon, described as "trans-normativity", holds trans people accountable to "a specific set of binary and medicalized standards" that prioritize legitimacy in the eyes of the political, legal and healthcare systems.[82]

These influences arise not only from social pressures to conform, but also from misguided medical professionals who assume that trans patients seeking reproductive healthcare wish to have their reproductive organs removed to soothe their gender dysphoria and thus over-recommend procedures such as hysterectomies for trans men.[83] In the spirit of the "trans broken arm syndrome" described by Dietz as healthcare professionals' tendency to link all health concerns to their patients' trans identities,[84] anecdotal evidence shows that physicians recommend hysterectomies even when they are unnecessary.[85] This is the other side of the hurdle that white cis women seeking hysterectomies face, who are routinely rejected due to heterosexist, paternalist and pro-natalist biases.

Not only does trans-normativity, fuelled by medicalization, exclude a range of ways of being trans and accessing trans healthcare in a variety of combinations and timelines, it also complicates the existence of intersex people. In 2021, Egale Canada filed a constitutional challenge relative to section 268(3)(a) of the *Criminal Code*.[86] This provision exempts from criminal liability certain surgeries performed on intersex children with the objective of streamlining their sex and gender into an intelligible either/or, male/female, boy/girl framework. Egale, like SOC8 and intersex activist groups, holds that such surgeries should be postponed until the involved children are old enough to have a sense of their gender identity and how they would like it to be affirmed.[87]

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[82] AJ Lowik, "Betwixt, Between, Besides: Reflections on Moving Beyond the Binary in Reproductive Health Care" (2020) 26:2 Creative Nursing 105 at 106.

[83] *Ibid* at 268.

[84] Dietz, *supra* note 47 at 196.

[85] Jonah Welch, "This is Something I Wasn't Told When I Started T Over 10 Years Ago" (8 April 2023), online (video): <tiktok.com/@jonahwelch/video/7219737940694502698?t=8bbCqfEmX14&_r=1> [perma.cc/8EKK-TZL3].

[86] *Criminal Code*, RSC 1985, c C-46, s 268(3)(a).

[87] Hilary Ball, "The Push for Intersex Rights Recognitions in Canada" (28 February 2022), online: <mjlh.mcgill.ca/2022/02/28/the-push-for-intersex-rights-recognitions-in-canada/> [perma.cc/6QLA-HLX4]; WPATH, *supra* note 58 at recommendation 10.9.

This article does not suggest that the social construction of gender affirming care as a medical necessity was a misplaced endeavour. Access to covered healthcare for trans folks is a cornerstone of a society that values trans lives and trans wellbeing. Still, it is medicalization processes like these that lead to proposals such as *Bill 2*,[88] where medical transition becomes the only legitimate form of transition in the eyes of the state. When trans people exercise our agency in accessing gender-confirming healthcare, it should be accompanied by the right to do so free from systemic state and institutional pressures.

iv. Trans People Considered Unfit Parents: Some Canadian Case Studies

The problems outlined above coalesce into more than just the sum of their parts and reveal a systemic issue that goes beyond individually held transphobic beliefs. Seraji names two hypotheses to explain the medical industry and policymakers' apathy towards trans sterilization. First, a "choice" hypothesis suggests that medical providers and lawmakers believe trans people choose to self-sterilize to match their bodies to the sex opposite the one assigned to them at birth. In this model, the medical profession and legislatures would be led by a "misguided belief" that trans people do not value their reproductive capacity.[89] The second, "compulsory" hypothesis is less forgiving, and posits an underlying belief that trans people are not fit to reproduce or be parents.[90] Importantly, Seraji notes that these hypotheses are not mutually exclusive but rather tend to overlap in insidious ways.[91] While individual physicians may not personally hold these beliefs, the compulsion hypothesis merges the systemic[92] social, economic and institutional pressures that underscore limits to trans reproduction as reflecting "an overall belief that trans people should not reproduce and raise children".[93] In Canada, while active eugenics policies have for the most part

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88 Bill 2, *supra* note 34.
89 Seraji, *supra* note 80 at 267.
90 *Ibid*, at 270-74.
91 *Ibid*, at 274.
92 Bauer, *supra* note 54 at 350: "Whereas transphobia may be a useful concept in understanding the motivations underlying the actions of individuals, its use as an explanation has obscured the more systematic nature of trans marginalization by isolating the particular problem to acts rather than embedding the problem in broader cultural and political contexts".
93 Seraji, *supra* note 80 at 270.

been left behind, these models contribute to the continuation of passive eugenics.

In Canada, both dimensions of this paradigm are alive and well. In an Albertan case regarding custody of a gender non-conforming child in 2018, the mother testified that her six-year-old child had told her that "he never wanted to be a boy".[94] In response, the mother researched a playgroup for gender creative children and let her child wear dresses on a few occasions. In one instance, she posted a picture of her child wearing a dress on social media.[95] By the time of the trial, the child's gender expression was no longer gender nonconforming. Retrospectively, the judge concluded that the mother's behaviour had been "inappropriate", refusing to refute language put forth by other parties that she was "encourag[ing] [him] to be transgender" as well as allusions that dressing one's child in a dress as potentially concerning behaviour sexualizing the child.[96] While the mother was nevertheless granted day-to-day parenting, rhetoric of this kind equates the exploration of gender as something innately sexual and parents who allow their children such freedom as possible groomers. It is not difficult to understand how this perspective would also paint trans people as unfit parents: if gender nonconformity is considered inherently sexual, it will also be considered unsafe for children.

A series of policy and social measures across various provinces point to a recent increase in the belief that "gender ideology" – and by proxy, trans parents – is inappropriate for children. In New Brunswick and Saskatchewan, new policies have cropped up making parental consent mandatory for teachers to use the chosen names and pronouns of students under 16.[97] Under the New Brunswick Policy 713,[98] students who do not feel prepared – meaning, safe enough – to ask their parents for their consent are encouraged to speak with a professional to help them "develop a plan to speak with their parents",[99] forcing children to either confront unwelcoming

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94 *Gordon v Brown*, 2018 ABPC 44 at para 99.

95 *Ibid* at paras 100-102.

96 *Ibid* at paras 194-196.

97 Bill 137, *An Act to amend The Education Act, 1995 respecting parental rights*, 3rd Sess, 29th Leg, Saskatchewan, 2023, online: <publications.saskatchewan.ca/#/products/122291> [**perma.cc/D2XQ-VYDZ**]; Policy 713, *Sexual Orientation and Gender Identity*, New Brunswick, 2023, online (pdf): <gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/policies-politiques/e/713-2023-07-01.pdf> [perma.cc/9AQT-2JPT].

98 *Ibid*.

99 *Ibid* s 6.3.2.

parents and risk their physical, emotional, and psychological wellbeing and access to safe housing, or continue to bear the harms of continuous misgendering.[100] In Saskatchewan, an injunction was granted in September 2023 halting the policy's implementation while awaiting a hearing on the constitutional challenge.[101] In response to the injunction award, the premier of Saskatchewan invoked the notwithstanding clause.[102] In New Brunswick, the Department of Education and Early Childhood Development made clarifications to Policy 713 in August 2023, after the Child and Youth Advocate stated that the policy violated children's rights, though they do not respond to the crux of the issues identified by the Advocate and other activists.[103] Beyond the obvious risks to impacted children, some of whom will face either forced misgendering or being outed to their parents before they are ready and/or when it is unsafe, these policies uphold the premise that gender expressions outside of the airtight experience of being cisgender are dangerous to children. In such a political climate, trans parents are inherently characterized as being against the best interests of their children. Trianon identifies Ontario as trailing close behind New Brunswick and Saskatchewan as a "high-risk" province, with the Ontario Education Minister recently announcing during a press conference that "parents 'must

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100 Hadeel Ibrahim, "Students Face Uncertainty as Legal Battle Brews Over N.B.'S Gender-Identity Policy" (5 September 2023), online: <cbc.ca/news/canada/new-brunswick/gender-identity-policy-713-pronouns-school-1.6954807.> [perma.cc/TTN4-3US5].

101 *UR Pride Centre for Sexuality and Gender Diversity v Saskatchewan (Minister of Education)*, 2023 SKKB 204.

102 Saskatchewan, "'Parents' 'Bill Of Rights' Passed and Enshrined In Legislation" (20 October, 2023), online: <saskatchewan.ca/government/news-and-media/2023/october/20/parents-bill-of-rights-passed-and-enshrined-in-legislation> [perma.cc/AD4F-8GTY]; see also Caitlin Salvino & Nathalie Des Rosiers, "Saskatchewan's use of the notwithstanding clause reveals its fundamental flaw" (29 September 2023), online: <policyoptions.irpp.org/magazines/september-2023/saskatchewan-notwithstanding/> [perma.cc/VU24-S2HZ]; CBC News, "Sask. premier 'Jumping the Gun' With Turn to Notwithstanding Clause For Pronoun Policy: Expert" (2 October 2023), online: <cbc.ca/news/canada/saskatoon/experts-consider-sask-jump-to-notwithstanding-clause-1.6984702> [perma.cc/3Q6B-QDTN]; Jason Warick, "Sask. Premier to Use Notwithstanding Clause to Veto Judge Ruling on School Pronoun Policy (28 September 2023), online: <cbc.ca/news/canada/saskatchewan/judge-grants-injunction-school-pronoun-policy-1.6981406> [perma.cc/C2UL-WN74].

103 Hadeel Ibrahim, "Advocate Says N.B.'s Gender-identity Policy Violates Children's Rights" (15 August 2023), online: <cbc.ca/news/canada/new-brunswick/new-brunswick-policy-713-review-advocate-1.6935967> [perma.cc/VEE7-YZVU]; Government of New Brunswick, "Clarifications Made to Policy 713 following Child and Youth Advocate recommendations" (23 August 2023), online: <gnb.ca/content/gnb/en/news/news_release.2023.08.0416.html> [perma.cc/ZLJ9-UVCZ].

be fully involved if their child chooses to use a different pronoun at school".[104]

It would not be the first time Ontario has grappled with such ideas. Before the question of pronouns came the contentious issue of sex ed curricula. In 2018, scrapping the previous Wynne-era sex-ed curriculum was a campaign promise for Doug Ford's Conservative leadership race.[105] Once elected, the Ford government repealed this curriculum in favour of a 1998 version, removing content that addressed same-sex relationships and gender identity among other things and introducing a "snitch line" – a website where teachers who continued teaching content from the previous curriculum could be reported.[106] Trans students in particular took issue with this, with some filing human rights claims related to the curriculum change.[107] Student, teacher and parent activism ultimately led to the implementation of a new curriculum in 2019 that included anew the topics that had been removed – sexual orientation, gender identity, consent, etc. – though topics surrounding gender identity were pushed from grade 3 to grade 8, "well after most students have started puberty and begun thinking about gender".[108] The repercussions of this controversy further cement the idea that nonconforming gender identities are inappropriate for children, fuelling the belief that trans people are unfit to be parents.

The more recent targets of these biases are drag queens, whose children's story-time events – designed to promote tolerance, anti-bullying and

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104 Celeste Trianon, "Anti-Trans Legislative and Policy Risk Map" (2023), online: <celeste.lgbt/en/anti-trans-risk-map/>[perma.cc/4PAF-FEEM].

105 Hanna Maitland, "Whatever Happened to Ontario's Sex Ed Curriculum? The Complete Timeline" (4 January 2022), online: <shamelessmag.com/blog/entry/whatever-happened-to-ontarios-sex-ed-curriculum-the-complete-timeline> [perma.cc/QDY2-TZHG].

106 Nicole Thompson, "Ontario Students Walk Out of Class to Protest Sex-Ed Curriculum Changes" (21 September 2018), online: <cbc.ca/news/canada/toronto/student-walkout-protest-ontario-sex-ed-changes-1.4833097> [perma.cc/3SZY-6HCA]; Maitland, *supra* note 105.

107 *AB v Ontario (Education),* 2019 HRTO 685; Muriel Draaisma, "2 Toronto Transgender Students File Human Rights Claims Against Province Over Sex Ed" (17 September 2018), online: <cbc.ca/news/canada/toronto/toronto-transgender-students-human-rights-claims-ontario-government-1.4827023>[perma.cc/RF3C-QPGF]; Paola Loriggio, "Transgender Girl Says Sex-Ed Repeal Made Her Nervous About Returning to School" (22 January 2019), online: <cbc.ca/news/canada/toronto/human-rights-tribunal-sex-ex-repeal-1.4988069>[perma.cc/RT9D-KNL8].

108 Laura Bialystok, "The Politics Behind Ontario's Sex-Ed Curriculum" (29 August 2019), online: <macleans.ca/opinion/the-politics-behind-ontarios-sex-ed-curriculum/> [perma.cc/2NR3-H9WA].

literacy – are being targeted by protests.[109] These have since been followed by the pan-Canadian "1 Million March 4 Children" on September 20, 2023, where protestors rallied across the country in opposition to students being exposed to "gender ideology", citing a "parental right" to know.[110] Some protests even took place outside schools themselves, such as those that took place outside the Victoria Park Collegiate Institute in North York, Toronto.[111] These protests make explicit the belief that trans parents are dangerous to children, and that trans people are unfit to be parents at all.

In response to earlier protests of drag story-time events, Ontario NDP MPP Wong-Tam proposed a private members' bill, the *Protecting 2SLGBTQI+ Communities Act*,[112] to designate certain areas as "2SLGBTQI+ Community Safety Zones" for prescribed periods of time, making anti-2SLGBTQI+ hate speech, intimidation or harassment within 100 metres of the zone fineable.[113] It is no coincidence that these measures emulate bubble zone legislation for abortion clinics: discourse that paints gender nonconformity as inappropriate for children represents the compulsory model of trans sterilization in action.

B. Recommendations

Though some of the identified obstacles have roots in medical professionals' or others' personal biases, courts and lawmakers are not without responsibility, nor without ability, to address these systemic barriers. The first recommendation policymakers should prioritize is to rein in the medicalization of gender by modifying the criteria for eligibility to

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109 Jacquie Miller, "Hundreds Show Up to Support NAC Drag Story Time as 30 Protest Against Event" (9 February 2023), online: <ottawacitizen.com/news/local-news/hundreds-show-up-to-support-nac-drag-story-time-as-30-protest-against-event> [perma.cc/354F-M3HF].

110 The Canadian Press, "Cross-Country Rallies Against 'Gender Ideology' in Schools Meet With Counter-Protests" (20 September 2023), online: *CTV News* <ctvnews.ca/canada/cross-country-rallies-against-gender-ideology-in-schools-meet-with-counter-protests-1.6569373>[perma.cc/AY9G-7J99].

111 Janet Hurley, "Anti-2SLGBTQ+ Rights Protest Outside Toronto High School Met With Counterprotest" (22 September 2023), online: <thestar.com/news/gta/anti-2slgbtq-rights-protest-outside-toronto-high-school-met-with-counterprotest/article_32059a35-3e92-502d-b518-54c719687597.html>[perma.cc/SS3F-ZJC9].

112 Bill 94, *An Act to enact the 2SLGBTQI+ Community Safety Zones Act, 2023 and to establish the Ontario 2SLGBTQI+ Safety Advisory Committees*, 1st Sess, 43rd Leg, Ontario, 2023 (first reading 4 April 2023).

113 Ontario New Democratic Party, "Drag Artists Support Wong-Tam's Legislation to Protect 2SLGBTQI+ Communities From Rising Hate Crimes" (4 April 2023), online: <ontariondp.ca/news/drag-artists-support-wong-tams-legislation-protect-2slgbtqi-communities-rising-hate-crimes>[perma.cc/8LVW-HG3F].

gender confirming care. Removing state messaging that dictates what transition should look like centers trans people's agency and facilitates access to gender-affirming care that is not rooted in legibility, but rather in trans people's wants and needs, including reproductive desires. The second recommendation is to recognize the medical necessity of virtual healthcare in the context of queer and trans healthcare. The third recommendation is one either courts or lawmakers, or both, can tackle: to de-gender reproduction, and more specifically, pregnancy.

Firstly, the medicalization of gender identity in Ontario can easily be attenuated by removing the requirement for a diagnosis of gender dysphoria to access gender confirming care. As suggested by Ducar, in the case of gender confirming care, medical necessity should be determined by reported identity, or gender modality, rather than by diagnosis.[114] Ducar points out that many other covered procedures are deemed medically necessary by virtue of factors other than diagnoses, such as age or gender in the case of colonoscopies or mammograms.[115] More importantly, the DSM-5 criteria for gender dysphoria largely codify social pressures trans people may experience that narrows sterilizing surgeries into the only way to safely be trans in a cisheteronormative society. These factors include an "incongruence" between a person's expressed gender and sex characteristics, a conviction that one has "the typical feelings and reactions of the other gender," and in children, a preference for toys stereotypically used by the other gender and playmates of the other gender, among others.[116] These indicia point to the partially socially constructed reality of gender dysphoria essentially as a state of non-adherence to the accepted binary of equally socially constructed gender identities. In doing so, they pose the binary continuum of "male/female towards man/woman towards masculine/feminine" as the natural order from which all other identities are a deviation. As a result, the diagnosis of gender dysphoria is premised on the notion that gender-affirming care should result in bodies that adhere to

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[114] Dallas Ducar, "Giving Gender-Affirming Care: 'Gender Dysphoria' Diagnosis Should Not Be Required" (11 March 2022), online: <statnews.com/2022/03/11/giving-gender-affirming-care-gender-dysphoria-diagnosis-should-not-be-required/> [perma.cc/KP7M-34AL]; Florence Ashley et al., "Beyond the trans/cis binary: introducing new terms will enrich gender research" (10 June 2024), online: Nature <https://www.nature.com/articles/d41586-024-01719-9> [https://perma.cc/WX4K-6V2W].

[115] *Ibid*.

[116] American Psychiatric Association, "What is Gender Dysphoria" (August 2022), online: <psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [perma.cc/972H-RKDG].

this binary continuum, to bring the body in line with that person's experience of gender identity – rather than on the idea that trans people may want to pursue body modification for a range of subjective desires, including joy and pleasure rather than solely continuity and legibility. This serves to limit, for example, possibilities of feminine transmasculine individuals or masculine transfeminine individuals, precluding access to gender nonconforming bodies through healthcare. By enshrining these social pressures to have a "coherent" gender expression, medicalization of gender dysphoria participates in this process of passive eugenics by constructing sterilizing surgeries as "remedies" for gender dysphoria that stems, at least partially, from rigid mainstream understandings of gender.[117]

Although movements towards depathologization within the DSM-5 have moved away from prior diagnoses of "transsexualism" in the DSM-III and "gender identity disorder" in the DSM-IV,[118] Dewey and Gesbeck write that "the seemingly progressive changes to the recent *DSM-5* […] may not be enough to alter the underlying structure of social control and power that diagnostic categories have over trans people, but rather work to further deepen and normalize non-normative gender expressions as deviant and pathological".[119] For example, being intersex is labelled in the DSM-5 as a "disorder of sex development (DSD)," and it is located within the gender dysphoria diagnosis. [120] In short, one can have a either a diagnosis of gender dysphoria with DSD, or without it, though Faheem et al note that only 8.5%-20% of intersex people experience gender dysphoria.[121] This amalgamation of gender dysphoria and DSD dangerously suggests that being intersex is something to be corrected. This is what leads Kraus to suggest DSD be removed from the DSM-5 entirely.[122] Other concerning diagnoses also continue to figure in the DSM-5, including transvestic disorder – which refers to sexual arousal related to cross-dressing that

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[117] For myself and many trans folks, though certainly not all, gender dysphoria is a relational phenomenon – something that is experienced because of how interactions with *others* ascribe social norms to our bodies, rather than something purely internal.

[118] Abdul Faheem et al, "Gender Dysphoria in Adults: Concept, Critique, and Controversies" (2022) 8 J Current Research Scientific Medicine 4 at 7.

[119] Jodie M Dewey & Melissa M Gesbeck, "(Dys) Functional Diagnosing: Mental Health Diagnosis, Medicalization and the Making of Transgender Patients" (2016) 41:1 Humanity & Society 37 at 41.

[120] Cynthia Kraus, "Classifying Intersex in DSM-5: Critical Reflections on Gender Dysphoria" (2015) 44 Arch Sex Behav 1147 at 1149.

[121] *Ibid* at 1148; Faheem et al, *supra* note 118 at 8.

[122] Kraus, *supra* note 120 at 1163.

causes distress or impairment – and autogynephilia – which is defined as "a male's paraphilic tendency to be aroused by the thought or image of himself as a woman".[123] Hectors proposes that these gender-related diagnoses are in fact part of a continued covert pathologization of homosexuality that devalues femininity and considers femininity expressed by "ostensibly" male bodies worthy of correction.[124] Within this context, where heteronormative cisgender male and cisgender female identities are implicitly upheld as the standard against which others are measured, a diagnosis of gender dysphoria must be evaluated critically. Such analyses have also led other authors to outline principles for clinicians to follow, which include avoiding diagnoses of gender dysphoria where possible.[125]

Moreover, the requirement to have lived 12 continuous months in the identified gender identity to access genital surgery should also be removed. Various social factors may make this criterion difficult to meet, such as the difficulties of socially transitioning in the workplace or in other unwelcoming environments. Other medically necessary procedures adjacent to some gender affirming care surgeries, like medically necessary breast reductions, do not require a sustained intent of this nature.[126]

Secondly, Cattapan's framework makes sense of how virtual healthcare rapidly underwent a transformation into something medically necessary during the pandemic, only to be delisted soon after.[127] In late 2022, when government attitudes largely deemed the pandemic to be over, cuts to telehealth followed, leading to closures of essential services for trans people like the Connect-Clinic.[128] Whereas other medical professionals providing services to a community navigating stigma were exempted from these rate cuts, like in the case of addiction medicine, trans healthcare providers were not.[129] This is likely to impact trans reproductive healthcare in several ways,

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123 Arin Hectors, "Homosexuality in the DSM: A Critique of Depathologisation and Heteronormativity" (2023) 38:1 New Zealand Sociology 18 at 23.

124 *Ibid* at 24-25

125 Stephanie L Budge & lore m dickey, "Barriers, Challenges, and Decision-Making in the Letter Writing Process for Gender Transition" (2017) 40:1 Psychiatric Clinics of North America 65 at 74.

126 The Plastic Surgery Clinic, "Does OHIP Cover Breast Reduction Procedures" (11 March 2022), online: <theplasticsurgeryclinic.ca/blog/ohip-cover-breast-reduction/> [perma.cc/37BL-UASH].

127 Cattapan, *supra* note 68.

128 Greta Bauer et al, "Expert Opinion: Cuts to Telehealth in Ontario Mean Fewer Trans and Non-Binary People Will Have Access to Life-Saving Healthcare" (2 February 2023), online: <theconversation.com/cuts-to-telehealth-in-ontario-mean-fewer-trans-and-non-binary-people-will-have-access-to-life-saving-health-care-198502> [**perma.cc/3XRD-KBPJ**]. Since this piece, the Connect-Clinic has joined PurposeMed to launch a new service, the Foria Clinic.

129 *Ibid*.

as trans healthcare is often easier to access online. Navarro et al write that virtual health care helps connect trans people to health care providers who are "clinically and culturally competent to address TNB [trans and non-binary] issues", regardless of their place of residence, when most clinics specializing in gender-affirming care are limited to major urban centres.[130] Not having access to such resources increases the likelihood that individuals seeking medical transition will not have appropriate opportunities to discuss and be counselled on fertility preservation. It also increases risks that patients with uteruses may not receive proper counseling about the interaction between taking testosterone and reproductive ability. A common misconception is that taking testosterone acts as birth control, leading to a higher rate of unwanted pregnancies in trans men and transmasculine people.[131] This interferes with the right not to have children under the first pillar.

Finally, de-gendering pregnancy would assist with the reduction of factors identified above limiting access to ARTs and natal healthcare for pregnant trans men or nonbinary folks, and would "expand the protected class of pregnant subjects".[132] Since *Brooks v Canada Safeway Ltd*, Canadian jurisprudence and corresponding human rights legislation has considered pregnancy-related discrimination as discrimination on the basis of sex.[133] Critical legal scholars of different stripes have suggested that modifying the legal classification for pregnancy to disability, rather than sex, would improve trans and cis women's lives and recognize that reproductive struggles are in solidarity with one another.[134] An approach of this kind would allow for the evaluation of physical and biological dimensions of

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[130] Jose Navarro et al., "The Preferences of Transgender and Nonbinary people for Virtual Health Care After the COVID-19 Pandemic in Canada: Cross-sectional Study" (2022) 24:10 J Med Internet Res 1 at 2. For example, Ottawa – the Canadian capital – has only just recently announced that it is getting its first gender-affirming surgery clinic, see Joseph Tunney, "New Ottawa Gender-Affirming Surgery Clinic a First in Ontario" (11 January 2024), online: <cbc.ca/news/canada/ottawa/new-clinic-gender-affirming-care-1.7080801>[perma.cc/H3R3-RDBE].

[131] Kimberley Thornton & Fiona Mattatall, "Pregnancy in Transgender Men" (23 August 2021), online (pdf): <ncbi.nlm.nih.gov/pmc/articles/PMC8412429/pdf/193e1303.pdf>[perma.cc/6SZB-DKZD]; Brittany Charlton et al, "Unintended and Teen Pregnancy Experiences of Trans Masculine People Living in the United States" (2021) 22:1-2 Intl J Transgender Health 65 at 70.

[132] Karaian, *supra* note 29 at 222.

[133] *Brooks v Canada Safeway Ltd*, 1989 CanLII 96 (SCC).

[134] See Karaian, *supra* note 29, from a critical feminist and queer perspective; But see Jeanette Cox, "Pregnancy as 'Disability' and The Amended Americans with Disabilities Act" (2012) 53:2 Boston College L Rev 443 for a critical disability lens.

pregnancy without compulsory association to the female sex; would recognize the physical, psychological and emotional intensity of pregnancy and reproductive work; would allow for the adoption of the social model of disability in relation to pregnancy;[135] and would continue to permit cis women to address the specificity of their experiences linked to their sex and gender thanks to the intersectional analysis encouraged between different prohibited grounds in human rights law. Cox highlights that disability law has often included in its scope "minor temporary physical limitations comparable to pregnancy's physical effects",[136] suggesting that the exclusion of pregnancy from this category until now primarily stems from intersections between ableist and misogynistic biases.

This would not be the first instance where Canadian legislation has moved in the direction of de-gendering parenthood. As canvassed above, Québec's *Bill 2*, though it could go further still, allows for the recognition of forms of parenthood that are neither motherhood nor fatherhood. In the next section, I will also examine Ontario's *All Families Are Equal Act* ("*AFEA*"),[137] which Alaattinoğlu and Margaria describe as "embrac[ing] familial diversity by avoiding gendered references and assumptions, instead defining parenthood through existing varieties of biological reproduction and social bonds".[138] Still, the *AFEA* model stops at "decoupling legal gender from parenthood",[139] rather than moving towards the decertification of legal gender, an approach that would instead dismantle the legal categories of sex and gender and remove them from legislation entirely. Some authors have pointed towards decertification as a potential avenue for critical trans legal activism: eliminating sex from birth certificates, for example, removes state regulation of gender and correspondingly renders moot most of the legal components of transition.[140] Nevertheless, several disadvantages

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[135] Pauline Rosenbaum & Ena Chadha, "Reconstructing Disability: Integrating Disability Theory Into Section 15" (2006) 33:2 SCLR 343 at p 348.

[136] Cox, *supra* note 134 at 443.

[137] *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016, SO 2016, c 23 [*AFEA*].

[138] Daniela Alaattinoğlu & Alice Margaria, "Trans Parents and The Gendered Law: Critical Reflections on The Swedish Regulation" (2023) 21:2 Intl J of Con L 603 at 616.

[139] *Ibid* at 617-618.

[140] Davina Cooper, "Decertification: Researching a Prefigurative law Reform Proposal" (2022) 2:2 Legalities 133 at 135. See also Florence Ashley, "'X' Why? Gender Markers and Non-binary Transgender People" in I. C. Jaramillo & L. Carlson, eds., *Trans Rights and Wrongs* (Springer Nature: Switzerland, 2021) at 33 on abolishing gender markers. The example of *Centre for Gender Advocacy v AG Québec*, *supra* note 35, also corresponds with an attempt at decertification of gender in terms of gender markers.

accompany proposals for decertification, including the concern that a "gender-neutral" approach would essentially convey a return to formal equality, would hinder law's ability to respond to gender inequalities in areas of family law such as child care and sexual violence, and would diminish state responsibility for addressing social inequality.[141] As a result, Cooper, one of the forerunners of decertification research, identifies it as a "prefigurative" field of law: while the pursuit of total decertification may not yet be a feasible endeavour when unaccompanied by the deeper social work of deconstructing gender and state investment in ameliorative measures, it allows for the exploration of how law "can represent different futures and then help guide these futures into being".[142] While being mindful of the risks that accompany measures towards decertification, I suggest that the above approach towards de-gendering pregnancy by considering it under the header of disability constitutes a middle ground between an approach like the *AFEA*, that merely decouples legal gender from legal parenthood, and total decertification. Instead, by relying on intersectionality to bridge the gap between the varied experiences of different marginalized groups and to prevent a gender-neutral application of the law, considering pregnancy as a ground of discrimination on the basis of disability corresponds with Cooper's prefigurative approach to decertification.

III. The Third Pillar: The Right to Parent Children in Safe and Healthy Environments

A. Trans Parents More Likely to Prefer Non-Heteronormative Family Models

For Ross and Solinger, the right to parent one's children in safe and healthy environments includes freedom from individual or state violence, and the right to raise children "with the social supports [needed] to provide

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[141] See e.g. Davina Cooper & Flora Renz, "If the State Decertified Gender, What Might Happen to its Meaning and Value" (2016) 43:4 J L & Soc 483 at 488; Alaattinoğlu & Margaria, *supra* note 138 at 622; Cooper, *supra* note 140 at 144.

[142] Cooper, *supra* note 140 at 145.

safety, health, and dignity".[143] I argue that for trans parents, this pillar includes a right to nonheteronormative parenting and family structures. By this, I do not mean families that are considered nonheteronormative purely by virtue of parents being queer or trans. While this is certainly one piece of the puzzle, neither trans parenthood nor even trans pregnancy are "inherently site[s] of radical transformation".[144] As canvassed above, trans identities should not be erected as exceptional, as this would correspondingly solidify cis parenthood as ordinary, normal and natural. Rather, by nonheteronormative parenting and families, I refer to structures that do not adhere to the nuclear model: coparenting friends, multiple couples raising children together, polyamorous parenting, multigenerational parenting and other models of communal parenting. In this section, I suggest that trans parents are more likely to fall into such models of parenting than their cisgender counterparts. As little data exists tracing the correlation between trans gender identities and non-nuclear parenting structures, I rely on queer theory to support what anecdotally I see to be true for many members of trans communities.

Though gender identity should not be conflated with sexuality, trans people frequently also identify as queer. In fact, Ontario studies from the last decade have found that most trans men and most trans women were not straight.[145] One broader study suggests that up to 77% of trans people identify on the queer spectrum.[146] Overlap between queer reproduction and the issues with trans sterilization examined above make it so that trans parents are more likely to need help from their community to have children: whether through friends or community members as their surrogates,[147] or

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[143] Loretta J Ross & Rickie Solinger, "Reproductive Justice and the Right to Parent" in Loretta J Ross & Rickie Solinger, eds, *Reproductive Justice* (California: University of California Press, 2017) 168 at 192, 171; See also Natasha Bakht & Lynda M Collins, "Are You My Mother? Parentage In A Nonconjugal Family" (2018) 31 Can J Fam L 105 at 109.

[144] Dietz, *supra* note 47 at 199.

[145] Greta R Bauer & Rebecca Hammond, "Toward a Broader Conceptualization of Trans Women's Sexual Health" (2015) 24:1 Can J Human Sexuality 1 at 3, 5; see also Greta R Bauer et al, "Sexual Health of Trans Men Who Are Gay, Bisexual, or Who Have Sex With Men: Results From Ontario Canada" (2013) 14:2 Intl J Transgenderism 66 at 66.

[146] Jaime M Grant et al, "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey" (2011) at 28, online (pdf): <thetaskforce.org/app/uploads/2019/07/ntds_full.pdf>[perma.cc/B6NQ-GJFC].

[147] See e.g. *DWH v DJR*, 2011 ABQB 608 wherein a gay couple made an agreement with a lesbian couple to conceive a child that would be raised by the two men.

through crowdfunding for ARTs,[148] for example. With a higher prevalence of non-nuclear means of reproduction, it is correspondingly more likely that the ensuing family structures accommodate for additional members in the child's life.[149]

Queer theory can deepen our understanding of these trends by looking into the forces that shape queer and trans lives. According to Halberstam, queer parenting is one of many queer "failures" in its refusal to accept dominant models, i.e., in the way that it intentionally fails to replicate the nuclear family:

> Queer culture, with its emphasis on repetition (Butler), horizontality (Muñoz, Stockton), immaturity and a refusal of adulthood ([Halberstam]), where adulthood rhymes with heterosexual parenting, resists a developmental model of substitution and instead invests in what Stockton calls "sideways" relations that grow along parallel lines rather than upward and onward. This queer form of antidevelopment requires healthy doses of forgetting and disavowal and proceeds by way of a series of substitutes.[150]

Halberstam's other work discusses a notion of "queer time", according to which queer and trans people do not follow the traditional cisheteronormative timeline of milestones at the same pace, nor in the same order, nor necessarily at all.[151] This also contributes to a need for non-normative family structures. Where the cisheteronormative expectation is for couples to date, marry, buy property, and then have children, queer time theory tells us that trans people may want children long before accomplishing these preliminary steps. This is especially the case when milestones like dating and marriage can be postponed by the time it takes to uncover one's identity and transition towards an embodied existence where connection with others feels possible. Bauer and Hammond, for example, identify a marked delay between the recognition of trans women's experience of gender and their ability to socially and/or medically transition.[152] In these circumstances, trans folks may want to raise children

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[148] See e.g. Rick Zentler, "Gay Transgender Couple Seek IVF & Surrogacy", online: *GoFundMe* <gofundme.com/f/transIVF>[perma.cc/VAQ9-MJ4Y].

[149] See e.g. *ibid*, where the parents in the bio discuss an excitement to introduce their future child to "Auntie Rachel", the surrogate assisting them.

[150] J. Jack Halbertsam, *The Queer Art of Failure* (London: Duke University Press, 2011) at 73. Here, Halberstam uses the phrase queer not strictly in the sense of sexual orientation, but also to denote a specific queer politics.

[151] J. Jack Halberstam, *In a Queer Time & Place: Transgender Bodies, Subcultural Lives* (NYC: NYU Press, 2005).

[152] Bauer & Hammond, *supra* note 145 at 6.

with friends instead of a long-time partner, or may only be able to raise their child in a communal living space because they have yet to own property. Other factors, such as unwelcoming biological families, may also lead trans parents to turn to other relationships and ties to fill their children's lives.

B. Limits to Non-Heteronormative Family Models as Barriers to Trans Reproductive Justice

Access to such structures raises legal questions surrounding multiple parentage and non-conjugal parentage. While some Canadian provinces have very accommodating legislation on this front, that is not the necessarily the case for all of them. In Québec, despite challenges to the contrary, the law only allows for two (2) parents.[153] Even with calls from a judge to allow multi-parent families, stating that "the best interests of the child would require that the law allow the recognition […] [of] three parents", the province's latest proposed legislation upholds the prohibition on legally recognized multi-parent families.[154] When *Bill 2*, discussed above, was introduced in 2021 to "reform family law to adjust it to new social realities," the Minister of Justice was quick to insist that such reforms did not include multi-parenting possibilities.[155] Nearly two years later, the Québec government is doubling down on its statement that "the family unit has only two parents" with Bill 12.[156] The provisions in Bill 12 aimed at regulating surrogacy do not allow or contemplate the possibility of multiple parenthood even where several adults are involved in planning a child's birth. For example, where the surrogate refuses to consent to part with the child, their lack of consent is in a way mutually exclusive in that it precludes pairs of intended parents from also being parents alongside the surrogate unless, through judicial intervention, they are recognized as parents instead of the surrogate, rather than in addition.[157] Likewise, the usual presumption

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[153] Verity Stevenson, "Quebec Families With More Than 2 Parents Fight For Recognition" (12 May 2018), online: <cbc.ca/news/canada/montreal/quebec-families-with-more-than-2-parents-fight-for-recognition-1.4659522>[perma.cc/R3WZ-LPYD].

[154] *Droit de la famille — 18968*, 2018 QCCS 1900 at para 42.

[155] Bill 2, *supra* note 34; The Canadian Press, "Quebec to Regulate Surrogate Pregnancies as Part of Major Update to Family Law" (22 October 2021), online: <montreal.ctvnews.ca/quebec-to-regulate-surrogate-pregnancies-as-part-of-major-update-to-family-law-1.5634025> [perma.cc/LDN4-389D].

[156] The Canadian Press, *supra* note 155; Bill 12, *An Act to reform family law with regard to filiation and to protect children born as a result of sexual assault and the victims of that assault as well as the rights of surrogates and of children born of a surrogacy project*, 1st Sess, 43rd Leg, Quebec, 2023 (royal assent 6 June 2023) [Bill 12].

[157] Stefanie Carsley, "Reforming Quebec's Surrogacy Laws" (2023) 53:1 RGD 5 at 29.

that the spouse of the person who gave birth is a parent of that child does not apply even if the surrogate refuses to consent to part with the child. [158]

Even in provinces where the law is progressive regarding multiple and non-conjugal parentage, some improvements remain beyond reach for now. For example, despite being the first province to overhaul "antiquated parentage laws in the province since 1978" with the *AFEA* in 2016, Bakht and Collins note that Ontario still precludes some forms of non-conjugal parenting.[159] The legislation is otherwise some of the most progressive in its recognition of alternative families. In terms of multiple parentage, where a pre-conception agreement reveals an intention to form such a family, up to four people can now be recognized as parents.[160] More generally, the *AFEA* also recognizes that the birth parent and their spouse are, in the case of children born through assisted reproduction, the parents. This eliminates the need for non-biological parents to have their parental status recognized through courts, which is also significant for queer and trans parents.[161] Nevertheless, Bakht and Collins highlight that with its emphasis on pre-conception intent, the *AFEA* "may foreclose the possibility of courts exercising their *parens patriae* jurisdiction to recognize certain non-normative families".[162] As with step-parents, loving adults may come into children's lives after their birth and still provide care and support that is in the child's best interests. However, the *AFEA* restricts courts' ability to grant declarations of parentage by listing the factors in favour of such a remedy at section 13(5) of the *Children's Law Reform Act* (*CRLA*) as follows:

> 1. The application for the declaration is made *on or before the first anniversary of the child's birth,* unless the court orders otherwise.
>
> 2. Every other person who is a parent of the child is a party to the application.
>
> 3. There is evidence that, *before the child was conceived*, every parent of the child and every person in respect of whom a declaration of parentage respecting that child is sought under the application *intended to be, together, parents of the child*.

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158 See Bill 12, *supra* note 156 at ss 541.17, 541.20.
159 *AFEA, supra* note 137; Bakht & Collins, *supra* note 143 at 131.
160 Bakht & Collins, *supra* note 143 at 132.
161 *Ibid* at 131-132.
162 *Ibid* at 132.

4. The declaration is in the best interests of the child [emphasis added].[163]

Conversely, the *AFEA* provides that declarations of parentage should be discouraged where they would lead to a child having more than two parents.[164] Though the *parens patriae* jurisdiction is an inherent power likely protected by section 96 of the Constitution, the *AFEA* "appears to at least attempt to fetter judicial discretion in this regard" through the use of decisive language such as *shall* rather than *may*.[165] Implicit in these provisions remains the unfounded assumption that multiple and non-conjugal parentage are in conflict with the best interests of the child, and thus – for the reasons laid out above – that trans parentage is as well.

C. Alternative Family Models: Prioritizing Kith Over Kin

This intentional parenthood framework only replaces the model of biological primacy instead of dismantling it. Here, it is helpful to define the concept of *kith*: "'kith' denotes a form of dynamic relation between beings, a bond similar to 'kin,' but one whose ground is in knowledge, practice, and place, rather than race, descent, and identity."[166] Rather than broadening our notions of family to prioritize kith over kin, as Lewis suggests, the intentional parenthood model merely provides a new definition of "kin" founded on intent rather than biology. Van Zyl thus argues that intentional parenthood, "despite being put forward as a liberal theory," will ultimately protect the nuclear family and inhibit the formation of alternative family structures.[167] The intentional theory of parenthood redefines kin through conjugal status rather than biological relationships, failing to rectify the bigger problem with the traditional family models – not solely its assumption of biology as the essence of parenthood, but also its view of the family "as a self-enclosed, exclusive unit".[168] Intentionality is not designed to undermine this unit, but rather to identify the "real" parents to the

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[163] *Children's Law Reform Act,* RSO 1990, c C.12 [*CRLA*] at 13(5).

[164] *Ibid* at 13(4).

[165] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, Appendix II, No. 5; Bakht & Collins, *supra* note 143 at 134-135.

[166] Sophie Lewis, *Abolish the Family: A Manifesto for Care and Liberation* (NYC: Verso, 2022) at 85-86: "(In her essay 'Make Kith, Not Kin!' McKenzie Wark speaks of *kith*'s 'nebulous senses of the friend, neighbor, local, and the customary.') What if we reacquainted ourselves with it, and attempted to gently edge out the primacy of kinship, with which *kith* obviously massively overlaps?".

[167] Liezl van Zyl, "Intentional Parenthood and the Nuclear Family" (2002) 23:2 J Medical Humanities 107 at 107.

[168] *Ibid* at 114.

exclusion of others.[169] In the same manner, Springett reflects on the artificially constructed mutual exclusivity between genetic parenthood, intent-based parenthood, and gestational parenthood, concluding that the intent criterion prevents dual parenthood for intended parents *and* surrogate parents primarily to promote nuclear families.[170] A kith-based understanding of the family would, instead of precluding multiple concurrent forms of parenthood, allow it where it is in the child's best interests.

In more communal parenting contexts, the best interests of the child would not necessarily be predicated on every prospective parent's individual capacity to perform all the "normative acts of care" for their children, but would rather focus more broadly on whether children's needs are met.[171] This a remedial perspective of parentage that originates from critical disability theory, which is not only adaptable to the kith-based family model, but also provides a more intersectional understanding of trans parents. Many trans people will have a disability at one point in their life, especially those who undertake medical surgeries with long recovery times.[172] Social determinants of health also increase the likelihood of trans adults having a disability due to the compounded effects of minority stress and the impact of discrimination in arenas such as the healthcare system.[173] Parenting models like the kith-based framework explored above, then, are compatible with trans reproductive justice in several ways. They could support trans parents with disabilities in fostering multiple venues for their children's best interests to be met, and they allow space for "found families" that trans folks often find solace in. Moreover, they question the perceived

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169 *Ibid* at 116.

170 Lauren Springett, "Why the Intent Test Falls Short: Examining the Ways in Which the Legal System Devalues Gestation to Promote Nuclear Families" (2019) 52:3 Colum JL & Soc Probs 391 at 391.

171 Jasmine E Harris, "Legal Capacity at a Crossroad: Mental Disability and Family Law" (2019) 57:1 Fam L Rev 14 at 17-18.

172 GrS Montréal, "Les Chirurgies" (last visited 14 April 2024), online: <grsmontreal.com/fr/chirurgies.html> [perma.cc/W7CC-63ZT]. According to GrS Montréal, convalescence times for gender-affirming surgeries can range from 1 week for a breast augmentation to 12 weeks for a vaginoplasty, with most recovery times ranging around 3-8 weeks.

173 Madeline Smith-Johnson, "Transgender Adults Have Higher Rates Of Disability Than Their Cisgender Counterparts" (2022) 41:10 Health Affairs 1470 at 1470-1471. One American study found that there is a complex but understudied relationship between transmasculine parents with a physical disability and an increased likelihood of parenthood, see N. Eugene Walls et al, "Transmasculine Spectrum Parenting: Beyond a Gendered Fatherhood" (2018) 42:3 Soc Work Research 223 at 233.

inherent safety of nuclear families[174] where many trans parents themselves experienced violence in their childhood, leading them to seek alternate methods of raising their own children.

Though Canada has some provinces with progressive family structure legislation, such as Ontario and British Columbia that has since emulated the *AFEA* model,[175] it is important to neither overstate its trans-inclusiveness in terms of reproduction, nor ignore the significance of the rights that are conferred. Canada may appear as a sanctuary for trans folks experiencing worse conditions, but in order to transcend actuality in favour of a future that exceeds it, we must be able to imagine and formulate new possibilities of being, including new ways of forming families. By continuing to deny some non-normative family structures that are beneficial to trans parents, the sentiment that trans people are unfit to be parents is likely to persist. When we deprive trans people of the tools that are most likely to ensure happy lives for themselves and their children, including family structures that are best suited to the varied needs of the children and those involved in their care, we perpetuate stigma against trans parenthood.

IV. Conclusion

In Spade's methodologies of trans resistance, we are invited to consider legal trans activism through the lens of a series of questions.[176] What effect would a campaign or action have on the most vulnerable individuals in the trans community? Is any portion of the trans community marginalized or excluded by a certain strategy or framework, and if so, who? How does a proposed measure fit into the overall vision of our desired perspective of the world – does it legitimize an oppressive structure, and if so, is that concern offset by "immediate gains in terms of survival and political participation"?[177]

These questions should be asked not only when trans activism is being contemplated, but should also be mobilized to critically evaluate the status quo. This article has canvassed a series of social, medical and legal obstacles to embodied trans parenthood, and suggested several corresponding policy

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[174] Lewis, *supra* note 166 at 2.

[175] Bakht & Collins, *supra* note 143 at 137.

[176] Dean Spade, "Methodologies of Trans Resistance" in George E. Haggerty & Molly McGarry, eds, *A Companion to Lesbian, Gay, Bisexual, Transgender and Queer Studies* (New Jersey: Blackwell, 2007) 237 at 256.

[177] *Ibid.*

measures that can be taken to immediately improve trans reproductive justice in Canada. These include reducing the medicalization of gender identity by removing the prerequisite diagnosis of gender dysphoria to access gender affirming care, funding virtual healthcare for trans people, de-gendering pregnancy in the legal arena by considering it as a disability rather than intrinsically linked to the female sex and filling the gaps left by the intentional parenthood model with a kith-based understanding of the family.

Children's best interests can be respected only when their parents are empowered to access the models of care, support and acceptance they require to form families that meet their and their children's needs. Reproductive justice is based in coalition politics: without trans reproductive justice, reproductive justice for cis women is impossible.[178] Trans liberation has always been, and must continue to be, a core principle of the reproductive justice framework. Advocacy for trans liberation and trans reproductive justice mirrors mobilisations for access to safe abortions because both fights are intertwined via the lens of bodily autonomy. Likewise, limits on the ability to access safe abortions for cis women and other people who are able to get pregnant is but one of the prongs of repronormativity; the other is the passive sterilization of marginalized communities such as trans people, including trans people of colour and trans people with disabilities. Passive eugenics is a twofold project that relies not only on hindering the reproduction of some, but on promoting the reproduction of others. In this capacity, abortion access and trans reproductive justice are twin movements that must inform one another to be able to truly address the vectors of power at play in the mutual disempowerment over our bodies. A critical trans outlook on the state of reproductive justice in Canada is the toolbox that will allow us to conceive of possibilities that the status quo struggles to imagine.

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[178] Ross & Solinger, *Twenty-First Century, supra* note 11 at 77.