Žižek's Christ: Rethink Feminist Legal Theory

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I. INTRODUCTION

I'm positive you will get lost in there.

— Sadness, *Inside Out*[1]

Curiously, while we champion universal freedom and equality in this day and age, injustice against women persists and even flourishes.[2]

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The Author extends his gratitude to Ray, Martha, Joey, & Harvey. The Author's views are his own.

Cite as 68 ATENEO L.J. 810 (2024).

1. INSIDE OUT (Walt Disney Pictures and Pixar Animated Studios 2015).
2. *See*, *e.g.*, U.N. Women, Facts and Figures: Ending Violence Against Women, *available at* https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures (last accessed Jan. 31, 2024).

The crux of the matter lies in essentialism, which can be defined as "the set of fundamental attributes which are necessary and sufficient conditions for a thing to be [considered] a thing of that type."[3] Essentialism has consistently been a stumbling block of sex discrimination law.[4] It has been the bedrock of jurisprudence, both from the United States[5] (U.S.) and the Philippines, when denying sex discrimination claims.

Essentialism is prominently presented as biological real difference,[6] or inherent "physiological or anatomical characteristics"[7] of each sex. One of the most recent examples would be the highly controversial U.S. Supreme Court case of *Dobbs vs. Jackson Women's Health Organization*,[8] which overturned *Roe vs. Wade*.[9] *Dobbs* replaced the heightened scrutiny review that the abortion laws had to satisfy with a laxer rational-basis review based on "legitimate state interests[,]" such as respect for and the preservation of prenatal life at all stages of development; protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.[10] In this case, the U.S. Supreme Court argued that abortion laws were non-sex classifications because, as opposed to sex classifications, they were based on physical characteristics that are unique to either sex falling outside the ambit

3. Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 274 (1999) (citing M.A. Ntumy, *Essentialism and the Search for the Essence of Law*, 18 MELANESIAN L.J. 64, 64 (1990)).

4. *See generally* Melina Constantine Bell, *Gender Essentialism and American Law: Why and How to Sever the Connection*, 23 DUKE J. GENDER L. & POL'Y 163 (2016).

5. We also look into United States sex discrimination law because Philippine constitutional law has been modelled after American constitutional law. (*See* George A. Malcolm, *Constitutional History of the Philippines*, 6 A.B.A. J. 109, 110–11 (1920)). Thus, the Equal Protection Clause of the 1987 Philippine Constitution, which is integral to Philippine sex discrimination law, is modeled after the Equal Protection Clause under the Fourteenth Amendment to the United States Federal Constitution.

6. Bell, *supra* note 4, at 172 (citing SANDRA LIPSITZ BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY 2 (1993)).

7. Brief in Support of Motion to Dismiss Amended Complaint at 16, *in* Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444 (E.D. Va. 2019) (U.S.).

8. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2234 (2022) (U.S).

9. Roe v. Wade, 410 U.S. 113 (1973).

10. *Dobbs*, 142 S. Ct. at 2284.

of the Equal Protection Clause of the Constitution of the United States.[11] Even before this case, though, the U.S. Supreme Court has already upheld similar laws despite using heightened scrutiny, saying that the law overcomes strict scrutiny when based on biological characteristics unique to one sex.[12]

This trend follows a lengthy legal tradition sustaining biological real difference for supposedly being natural. As early as 1872, the U.S. Supreme Court held in *Bradwell vs. State* that "the constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[13] This case was followed by *Quong Wing vs. Kirkendall* in justifying legal difference under the premise of biological real difference.[14] In *Miller vs. Wilson*, the U.S. Supreme Court sustained a law that prohibited women from working in hotels for more than eight hours a day to preserve "wom[e]n's physical structure [and] maternal functions."[15] *Bosley vs. McLaughlin* also justified a maximum-hours law against women based on physical differences.[16] *U.S. vs. Virginia* confirmed these cases in contemporary times, explicitly stating that "[p]hysical differences between men and women ... are enduring[.]"[17] Most recently, *U.S. vs. Virginia* has been used to claim that real differences between male and female breasts are reasonable real differences, and thus, upholding criminal topless bans against women.[18]

Biological real differences are used not only in constitutional cases, but also in federal statutory sex discrimination cases. For one, case law on Title VII of the Civil Rights Act of 1964 (Title VII), regarding discrimination in the workplace, usually requires a "bona fide occupational qualification"[19] that "relate[s] to the essence, or to the 'central mission of the employer's business.'"[20] However, like what *Dobbs* did for abortion laws, lower courts

11. *Id.* at 2283.

12. *See* Nguyen v. INS, 533 U.S. 53 (2001).

13. Bradwell v. State, 83 U.S. 130, 141 (1873).

14. *See* Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912).

15. Miller v. Wilson, 236 U.S. 373, 380-81 (1915).

16. Bosley v. McLaughlin, 236 U.S. 385, 393-94 (1915).

17. United States v. Virginia, 518 U.S. 515, 533 (1996).

18. Tagami v. City of Chicago, 875 F.3d 375, 380 (7th Cir. 2017) (U.S.).

19. 42 U.S.C. § 2000e-2 (e) (2018).

20. Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 203 (1991).

have recently disregarded this requirement.[21] Also, a court concluded that gender-normed physical-fitness tests were non-sex classifications, because "[m]en and women simply are not physiologically the same for the purposes of physical fitness programs."[22] Further, other employment laws exclusively grant benefits to women on the basis of biological real differences on pregnancy and breastfeeding.[23] Another, Title IX of the Civil Rights Act of 1964[24] has been interpreted to be a prohibition on sex discrimination, including sex stereotyping.[25] However, there are a series of laws carving out exemptions on sex segregation and sex separatism on the grounds of biological real differences, specifically on "toilet, locker room, and shower facilities;"[26] "separate living facilities for the different sexes;"[27] and "separate [sports] teams for members of each sex."[28]

In sum, courts and laws make four assumptions when defending biological real difference as non-sex classification and therefore valid sex discrimination: (1) biological real difference is simply a matter of biological fact, not "invidious discrimination;"[29] (2) "there are only two sexes,"[30] each having "different body parts;"[31] (3) "generalized assertions of biological differences between men and women"[32] based on "what is true most of the time or in the vast majority of cases,"[33] such as different breasts; and (4) "men and women are

21. *See* McMahon v. World Vision, Inc., 704 F.Supp.3d 1121, 1140-41 (W.D. Wash. 2023) (U.S.).

22. Bauer v. Lynch, 812 F.3d 340, 350 (4th Cir. 2016) (U.S.).

23. Family and Medical Leave for School Paraprofessionals, 29 C.F.R. § 825.120 (a) (5) (2022) (U.S.); The Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (U.S.); & The Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 2713 (a) (4), 124 Stat. 119, 131 (2010) (U.S.) (codified at 42 U.S.C. § 300gg-13 (a) (4)).

24. 20 U.S.C. § 1681 (2018).

25. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ., 858 F.3d 1034, 1049-50 (2017) (U.S.).

26. 34 C.F.R. § 106.33 (2021) (U.S.).

27. 20 U.S.C. § 1686 (2018).

28. 34 C.F.R. § 106.41 (b) (2021) (U.S.).

29. Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1095 (2023).

30. *Id.* at 1096.

31. *Id.*

32. *Id.*

33. *Id.*

not fungible"[34] because history and tradition say so. These are detrimental assumptions because biological real difference: (1) "function[s] like sex stereotypes;"[35] (2) "[are] justifications [that] help to perpetuate other sex stereotypes;"[36] and (3) "rationalize and exacerbate substantive inequality."[37]

The same assumptions are present in Philippine case law. For example, in *Saudia vs. Rebesencio*, the Supreme Court noted that "at the risk of stating the obvious, *pregnancy is an occurrence that pertains specifically to women*,"[38] denying the existence of pregnant men.[39] Another, *People vs. Tionloc* is a rape case in which, following from a previous decision saying that "[r]esistance must be manifested and tenacious[,]"[40] the Court held that, "[a] mere attempt to resist is not the resistance required and expected of a woman defending her virtue, honor and chastity."[41] Besides, "it would be unfair to convict a man of rape committed against a woman who, after giving him the impression [through] her unexplainable silence of her tacit consent and allowing him to have sexual contact with her, changed her mind in the middle and charged him with rape."[42]

In holding that sex reassignment is an invalid ground for changing a person's first name, the Court in *Silverio vs. Republic* resorted to the vague assumption that "changing petitioner's first name for his declared purpose [(i.e., sexual reassignment)] may only create grave complications in the civil registry and the public interest."[43]

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34. *Id.* at 1074, n. 35.

35. Cahill, *supra* note 29, at 1102.

36. *Id.* at 1103.

37. *Id.* at 1105.

38. Saudia v. Rebesencio, G.R. No. 198587, 746 SCRA 140, 172 (2015) (emphasis supplied).

39. *See, e.g.*, Complaint and Jury Demand, at 3 (on file with the District Court of New Jersey), *in* Simmons v. Amazon.com Serv., Inc., D.N.J. No. 3:20-cv-13865 (2020); David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 311-12 (2019); Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173, 179 (2019); & Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CITY U. N. Y. L. REV. 223, 234 (2016).

40. People v. Amogis, G.R. No. 133102, 368 SCRA 232, 244 (2001).

41. People v. Tionloc, G.R. No. 212193, 818 SCRA 1, 13 (2017).

42. *Id.*

43. Silverio v. Republic, G.R. No. 174689, 537 SCRA 373, 387 (2007).

The Court mentioned that words "should ... be understood in their common and ordinary usage, there being no legislative intent to the contrary."[44] Accordingly, citing a 2004 edition of Black's Law Dictionary, the Court's decision was premised on the definition of "sex" as "the sum of peculiarities of structure and function that distinguish a male from a female" or "the distinction between male and female."[45] Also citing a single U.S. lower court decision, the Court further defined "female" as "the sex that produces ova or bears young" and male is "the sex that has organs to produce spermatozoa for fertilizing ova" to conclude that "it cannot be argued that the term 'sex' as used then is something alterable through surgery or something that allows a post-operative male-to-female transsexual to be included in the category 'female.'"[46] Finally, the Court mentions that sex is an "essential factor in marriage and family relations."[47] The Court relates the broad term "status of a person in law," which " includes all his personal qualities and relations, more or less permanent in nature, not ordinarily terminable at his own will."[48]

Shortly after, the Court in *Republic vs. Cagandahan* said that for intersex individuals, "in the absence of a law on the matter, the Court will not dictate on respondent concerning a matter so innately private as one's sexuality and lifestyle preferences, much less on whether or not to undergo medical treatment to reverse the male tendency[.]"[49] Referring again to a single U.S. lower court decision and a general secondary reference, the Court cites cultural and medical practices.

> Intersex individuals are treated in different ways by different cultures. In most societies, intersex individuals have been expected to conform to either a male or female gender role. Since the rise of modern medical science in Western societies, some intersex people with ambiguous external genitalia have had their genitalia surgically modified to resemble either male or female genitals. More commonly, an intersex individual is considered as suffering from a 'disorder' which is almost always recommended to be treated, whether by surgery and/or by taking lifetime medication in order to mold the individual as neatly as possible into the category of either male or female.[50]

44. *Id.* at 392.

45. *Id.*

46. *Id.* at 393.

47. *Id.* at 391.

48. *Silverio*, 537 SCRA at 390.

49. Republic v. Cagandahan, G.R. No. 166676, 565 SCRA 72, 87 (2008).

50. *Id.* at 85-86.

In fact, the Court assumes that "it is at maturity that the gender of such persons, like respondent, is fixed," resorting to biology and nature around which a person "order[s] ... [one's] life."[51] The Court stated that, "[r]espondent here has simply let nature take its course and has not taken unnatural steps to arrest or interfere with what he was born with. ... Nature has ... taken its due course in respondent's development to reveal more fully his male characteristics."[52]

Against this legal backdrop, we ask — how do we overcome essentialism in sex discrimination law? Parts II and III of this Article introduce the ideas of Slovenian philosopher Slavoj Žižek on Christianity and sexual difference to explain the concept of essence, and thus, provide a solid foundation in grasping and understanding essentialism. The resulting theoretical framework is then applied to feminism and feminist legal theory in Parts IV and V — first, to the theories of freedom, equality, power, and intersectionality of oppression, and second, to essentialism in sex discrimination law. Finally, Part VI provides the conclusion for our notion on overcoming essentialism in sex discrimination laws.

We submit that attempting to overcome essentialism and real differences by confronting only its biological manifestations is an incomplete effort that reinforces the problem. Biological real difference is thus exposed to be grounded not on biology, but on culture that we make up. So, as will be tackled, while sexual orientation and gender identity equality (SOGIE) and even intersectional equality unsettle biological real differences, they nonetheless operate on the level of real difference, albeit not in biological terms. In other words, if we want to eliminate biological real difference, which is culture, we should not simply be replacing this culture with another that still operates on the level of real difference. Instead, we should be questioning the very conditions in which culture operates. In this wise, the limitations of SOGIE and intersectional equality, which are the perceived antitheses of essentialism, are pointed out. Precisely, the Article examines the limitations of biological real difference, on one hand, and SOGIE and intersectional equality, on the other, both of which are two sides of essentialism.

II. ŽIŽEK'S CHRIST

At the outset, we clarify that we do not intend to offend religious feelings. We are only making a philosophical statement using Christian terms. Incidentally, we get to examine the philosophical underpinnings of Christian faith without

51. *Id.* at 87.

52. *Id.*

making a theological position. Also, theories arguing for the increased persuasiveness of combined religious and secular reasons for social action (e.g., liberalization, lifting oppression) must be accounted for,[53] especially since jurisprudence shows how religion has been invoked in perpetrating sex discrimination.[54] Accordingly, what other philosophical doctrines call "perfection," "objectivity," "objective truth," "pure reason," "absolute," "law," and "nature,"[55] initially coined in this Article as "God."

Suppose that there is a belief in the one perfect God.[56] If God is perfect, then corollary, the imperfect must exist.[57] By definition, God cannot be with us in the world because God, who is perfect, would be rendered imperfect. People (like Adam and Steve) had to "fall"[58] from God because if they remain with God, then God will no longer be perfect.

Yet, despite this fundamental perfect-imperfect distinction, people still think that they can directly interact with God. They think that there is an objective, right way to have faith and that God can tell them this. However, by definition, it is no longer belief if there is certainty.[59] People do not believe in God; they believe in this certainty on behalf of believing in God to relieve

53. *See, e.g.*, ROBERT AUDI, DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE 94 (2011).

54. *See, e.g.*, *Bradwell*, 83 U.S. at 141-42 (J. Bradley, concurring opinion); United States v. Windsor, 133 S. Ct. 2675 (2013) (U.S); Ang Ladlad LGBT Party v. Commission on Elections, G.R. No. 190582, 618 SCRA 32 (2010); & Imbong v. Ochoa, G.R. No. 2014819, 721 SCRA 146 (2014).

55. *See generally* IMMANUEL KANT, CRITIQUE OF PURE REASON (Paul Guyer & Allen W. Wood, eds. & trans., 1781).

56. Christians describe God as omnipotent, omniscient, and omnipresent: "Search me, O God, and know my heart; Try me and know my anxious thoughts; even before there is a word on my tongue, Behold, O Lord, You know it all." *Psalm* 139:23-4 (New American Standard).

57. In God's assertion and insistence on being perfect, they created the imperfect. A 3D being thus cannot exist in a 2D world. If you put a rock on paper, it would be standing on it but that's it. While a 3D being might intersect in a 2D world so we may see a specific part of them, that's pretty much it. The 2D cannot properly access the 3D and vice versa. We might be able to take snapshots of God, but it is a "not-All" of God. Our pictures *might* be of God, but we cannot get the full picture of God. Thus, all our objects, things, and ideas are almost always all-too-human.

58. *Genesis* 6.

59. "Now faith is the assurance of things hoped for, the conviction of things not seen." *Hebrews* 11:1.

them from their doubts. Most of the Old Testament (except Job)[60] functions like this, where people think they know what God wants them to do. A perfect example would be the ten commandments supposedly given by God to Moses.

This inconsistency in belief is resolved in the New Testament through Christ, who is both person and God.[61] The key event in Christ's life is the crucifixion, specifically when Christ asks, "[m]y God, my God, why have you forsaken me?"[62] What dies on the cross is not simply the historical body of Christ. What dies on the cross is the idea of God as a divine authority who has supposedly existed in exchange with people and who can tell us the right way to believe.[63] It is in God's failure to intervene on Christ's behalf that God realizes God's self. God shows not only us, but also God's self that the exchange formula or incentive structure is incompatible with the perfect-imperfect distinction.[64]

In other words, there is no "Big Other"[65] or master figure who can control the people (and the people can secretly keep control of), who can tell the people what to do, who can tell the people what they are not allowed to do, and who the people can live in accordance with.[66] Christ is not meant to be the representative of God on earth where Christ provides the right way to believe. Instead, Christ represents the fact that not even God can do the believing for the people.[67] The people have step into the gap between the people and God and do the believing themselves.[68]

60. *See generally* Slavoj Žižek, *The Fear of Four Words*: *A Modest Plea for the Hegelian Reading of Christianity*, *in* THE MONSTROSITY OF CHRIST: PARADOX OR DIALECTIC? 50–57 (Creston Davis ed., 2009).

61. There is a distinction between God the thinker and Christ the thought. Despite this fundamental distinction, God's thought would not be different of God because it is accurate. It is like God seeing God's reflection in a mirror and seeing Christ, like a video game where God uses Christ as an avatar. Thus, when Christ died, God did not die because natures do not die, people do. Nothing happens to natures. Things happen to people.

62. *Matthew* 27:46 & *Mark* 15:34.

63. *See generally* Žižek, *supra* note 60, at 24–109.

64. *Id.*

65. *Id.* at 61.

66. *Id.* at 24–109.

67. *Id.*

68. *Id.*

This is the message of the Bible — it cannot tell the people how to believe, the people must do the believing themselves, and they are solely responsible for their actions. The Bible is not a cookbook for belief. The things Christ did throughout his life, as recorded in the Bible, do not translate into a recipe telling us how to believe in God. In fact, Christ was probably wrong about God because Christ is a person. This is why by asking, "[w]hat would Christ do?" there is no believing because the people are rendering Christ as an example on how to believe in God that we should blindly follow, when even Christ cannot know how to believe (they cannot even be saved by God during the crucifixion). This is why belief is not just about tolerance and forgiveness.[69]

Belief is more accurately captured by love or *agape*.[70] Specifically, the insight on belief translates to "love one another."[71] God cannot be with the people, so the people only have each other. One cannot love God (even Christ cannot love God), so the people can only love each other.[72] When one loves a person, one does not simply love them for what they are, but also for what they are not.[73] People are not complete beings.[74] People are unfolding beings: incomplete, indeterminate, and lacking.[75] This is what it means to be imperfect. There is this gap in every person's being.[76] Love is about being all in by stepping into this gap and embracing love in our own stead.[77]

The moment one thinks he knows, for certain, what a person is and/or how to love said person, it is not love. Even saying, "I love you" is like leaving the loving to the words as signifier instead of demonstrating ineffable love

69. There is inconsistency in saying that the Bible is not meant to be read as a history book, yet still focusing on the history of Christ, that is, what they have done throughout their life, hoping to find the right way to believe. The same goes for saying that even Christ was probably wrong about God, yet treating them as a model on how to believe in God.

70. *See generally* John Milbank, *The Double Glory, or Paradox versus Dialectics: On Not Quite Agreeing with Slavoj Žižek*, *in* THE MONSTROSITY OF CHRIST: PARADOX OR DIALECTIC? 110–233 (Creston Davis ed., 2009).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *See generally* Milbank, *supra* note 70.

77. "For where two or three are gathered together in My name, I am there in their midst." *Matthew* 18:20.

every day in new and surprising ways. People must take responsibility for their actions within love. There is no deferring of responsibility.

In sum, the early Christian faith-maintained paganism focused on the spiritual as mystical, conceptualizing God as an entity beyond whom the people can directly interact with. Developments then emphasize the importance of the historical to the Christian faith. After all, Christ's prayer says, "on earth as it is in heaven."[78] Yet, it assumes that there is a heaven, one can know how it is in this heaven, and that Christ provides a way of making earth more like it. Instead of putting the spiritual on one hand and the historical on the other, the Christian faith should be thought of as historico-spiritual, or reconceptualizing the spiritual as something that the people do in their imperfect world by loving one another as unfolding beings.

Some might venture that the same outcome may be achieved by simply saying that there is no God. However, taking such a position would avoid the issue, which is the possibility of the existence of God. It is a mere position. The effect, then, is only the emphasis of a perceived opposite. Thus, the two sides (God or no God) present themselves as forced choice, and whichever position is taken, the certain existence of God is upheld. Accordingly, the best route is going through the concept of God, meaning analyzing the limitations of both positions presented to us as forced choice (un-God).

And circling back to the other philosophical doctrines, the result of the analysis is that if there is no Big Other or master figure, then in similar fashion, there is no truth, pure reason, absolute, law, and nature. There is a gap between objective truth and subjective reason.[79] One cannot properly access truth.[80] All the people have is imperfect human reason, tainted by the people's subjectivity.[81] So, is there truth? Maybe. Essence? Maybe. The only conclusive statement one can make, however, is that one cannot reach the truth, and literally, for the people, essence (or spirit) *is* subjectivity, and substance *is* subject.[82]

78. *Matthew* 6:10.

79. *See generally* KANT, *supra* note 55.

80. *Id.*

81. *Id.*

82. This refers to Hegelian dialectical materialism or "the rise of an eternal idea [or truth] out of the activity of people caught in a finite historical situation [or essence, subjectivity]." (SLAVOJ ŽIŽEK, ABSOLUTE RECOIL: TOWARDS A NEW FOUNDATION OF DIALECTICAL MATERIALISM 72 (2014)).

> The truth is the whole. However, the whole is only the essence completing itself through its own development. This much must be said of the absolute[.] It is essentially a result, and only at the end is it what it is in truth. Its nature consists precisely in this[.] To be actual, to be subject, that is, to be the becoming-of-itself. As contradictory as it might seem, namely, that the absolute is to be comprehended essentially as a result, even a little reflection will put this mere semblance of contradiction in its rightful place. The beginning, the principle, or the absolute as it is at first, that is, as it is immediately articulated, is merely the universal. But just as my saying 'all animals' can hardly count as an expression of zoology, it is likewise obvious that the words, 'absolute,' 'divine,' 'eternal,' and so on, do not express what is contained in them; — and it is only such words which in fact express intuition as the immediate. Whatever is more than such a word, even the mere transition to a proposition, is a becoming-other which must be redeemed, that is, it is a mediation. However, it is this mediation which is rejected with such horror as if somebody, in making more of mediation than in claiming both that it itself is nothing absolute and that it in no way exists in the absolute, would be abandoning absolute cognition altogether.[83]

83. GEORG WILHELM FRIEDRICH HEGEL, PHENOMENOLOGY OF SPIRIT 13 (Terry Pinkard ed. & trans., 2018). One has to simply implore everyone to commit to the Chalcedonian (and Hegelian) insight, which is the consideration of the specific and particular circumstances of each person (i.e., relevance). The Council of Chalcedon was the result of efforts to resolve the nature of Christ and Christ's relationship to God, which ultimately emphasized Christ's humanity, in contrast to the Council of Nicea, which exclusively focused on divinity and imposed an arbitrary identity on everyone. Just as all objects are accessed through subjectivity and thus are all-too-human, Christ's divinity is also all-too-and-for-human (meaning we cannot tackle Christ's divinity without Christ's humanity) — all the more written accounts of and interpretations of divinity. One's humanity is a reminder of the divine (the irreconcilability of one's individual subjectivities as reflected in imperfect symbolic order is a reminder that one cannot reach the perfect God and objective truth and vice versa). The Chalcedonian insight has been accepted by 95% of Christianity. The same insight, grounded on Jesus looking after the marginalized and embracing anyone and everyone (e.g., Samaritans, Syrophoenician women), is even more Biblical than its Nicene counterpart. All biblical accounts show that by and large, Christ asserted his personal circumstances and that of others in spite of an ignorant symbolic order. As for biblical accounts on responding to injustice, we question why the prevailing interpretation has always been the assimilation of those who are "part of no part" (i.e., those with no social identity) as part of an inflexible symbolic order (i.e., the patriarchal-capitalist system) that does not account for individuals' specific and particular circumstances which Christ was clearly against in the first place. The question then is, while those who look only into the Nicene Creed want more uniformity because they fear relativism, what about the consideration

In other words, all one has is his subjectivity.

III. ŽIŽEK'S CHRIST ON SEXUAL DIFFERENCE

What one calls the "penis" and the "vagina" are literally just flesh. Yet, one defines them completely. Even by saying that they are only for procreation, one defines them completely. What is this flesh to the people that they consider it more than the brute, material thing that it is?

In fact, the people are defining completely not only this flesh, but also themselves. The people have associated their very being with this flesh. The people use this flesh as a symbol of their very being. Even if the people change the meanings they attribute to the symbol or refuse to acknowledge the symbol altogether, the people cannot get rid of what the people have attached to it, which is their very being that they are defining completely and calling their identity ("I am," "I should be," "I want to be").

Thus, "sexual difference ... is neither a biological position nor a discursive construct, but an ontological category[.]"[84] Put simply, the succeeding discussion on ourselves (called "men and women") refers not to biology or the symbolic order, but to our very being.

For the longest time, some people have defined themselves ("men") in conjunction with their definition of *others* ("women").[85] To completely define

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of people offered by its Chalcedonian counterpart? When taken together with Christ's question "My God, my God, why have you forsaken me?" (which curiously has been treated by commentators as mere anomaly and merely referent to the Old Testament despite being the only last saying of Christ mentioned twice in the Bible), these insights point toward a different and more comprehensive line of argument derived from the Bible, which is the consideration of individual subjectivity. This interpretation may be reconciled with other Biblical doctrines such as the account of the Old Testament (all ideas that we now see are all-too-human positions thanks to the New Testament, as emphasized in the Old by Job) and the Lord's Prayer ("thy will be done," together with Genesis, allude to God's creation of the whole dialectical framework of love, meaning we are always already within love and we just have to acknowledge and be responsible for it; likewise, "Your Kingdom come" and "on earth as it is in Heaven" refer to the dialectical relations of subject and object, meaning substance equals subject, or essence is subjectivity). *Id.*

84. Ilan Kapoor, *Žižek, Antagonism and Politics Now: Three Recent Controversies*, INT'L. J. ŽIŽEK STUD., Volume No. 12, Issue No. 1, at 13.

85. *See generally* Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78 (2019) (discussing the manifestation of sex segregation in public accommodations law).

themselves, men completely define women.[86] Supposedly, woman completes man.[87] Things have gotten so out of hand that men have convinced everyone that there is an objective, fixed, right way to be man and woman.[88]

However, men's definitions are contingent and arbitrary; they have been making it all up.[89] The definitions can be changed and they are in fact changed all the time.[90] There is no objective way of defining women.[91] The definitions are subjective.[92] Thus, women can define themselves.[93] The definition of woman is a culmination of or symbolizes what women are, and women can do that on their own.[94]

Yet, both sides miss the point — there is inconsistency in defining ourselves completely when we are unfolding beings.[95] One's being is not just about what he is, but also about what he is not.[96] The people's definitions fail to account for the gaps in their being.[97] What is symbolized as complete is actually incomplete, indeterminate, lacking.[98] Hence, one should bring up the inherent tension in being defined completely.[99]

Accordingly, sexual difference as an ontological category is "the deadlock ... inherent to the symbolic order."[100] Put differently, "[t]here is no sexual relationship."[101] People have nothing to offer each other, or they do not

86. *See id*.

87. *See id*.

88. *See id*.

89. *See generally* JUDITH BUTLER, GENDER TROUBLE (1990) (discussing the performance of gender, i.e., the maintenance and perpetuation of defined distinctions between man and woman).

90. *See id*.

91. *See id*.

92. *See id*.

93. *See id*.

94. *See id*.

95. *See generally* Milbank, *supra* note 70.

96. *See id*.

97. *See id*.

98. *See id*.

99. *See id*.

100. Kapoor, *supra* note 84, at 13.

101. *Id*. at 13.

complete each other because people are unfolding beings.[102] Even one cannot complete himself.[103] All symbols fall short of one's being. So, instead of simply telling men that they should stop treating women as *other*, men should understand that there is *no other*. Specifically, "[man and] woman ... [do] not exist."[104]

At this point, it can clearly be seen why crimes against humanity are committed at the level of generalization and not particularization. People treat each other as universalized substance, subjectively eliminating the particularity of people as such. To completely define themselves as the chosen race of God, Nazis completely defined Jews as a stereotypical enemy deserving of genocide.[105] The Romans deluded themselves into thinking that they are the only ones worthy of rights, excluding everyone else.[106] They rationalized owning other people as property.[107] Then under the pretense that they make the empire weak and unholy, Romans used homosexuals as a scapegoat.[108] People condemned HIV or AIDS patients to justify their HIV or AIDS denial and sustain their righteousness.[109] The United States insisted that to end a world war, they had to drop two atomic bombs on Japan that killed at least 129,000 people, mostly civilians.[110] In the guise of protecting their territory

102. *See generally* Milbank, *supra* note 70.

103. *See id*.

104. *Id*.

105. *See* David I. Kertzer, *In the Name of the Cross*: *Christianity and Anti-Semitic Propaganda in Nazi Germany and Fascist Italy*, 62 COMP. STUD. SOC'Y & HIST. 456, 479 (2020).

106. Britannica, Roman Law, *available at* https://www.britannica.com/topic/Roman-law (last accessed Jan. 31, 2024) [https://perma.cc/2BXQ-WSZY].

107. "Rome used slaving as part of a larger imperial apparatus for the integration of conquered peoples into its world system." (Noel Lenski, *Slavery in the Roman Empire*, *in* THE PALGRAVE HANDBOOK OF GLOBAL SLAVERY THROUGHOUT HISTORY 87-107 (2023)).

108. *See* Michael Brinkschröde, *Christian Homophobia*: *Four Central Discourses*, *in* COMBATTING HOMOPHOBIA: EXPERIENCES AND ANALYSES PERTINENT TO EDUCATION 166 (Michael Groneberg & Christian Funke eds., 2011).

109. *See generally* ALEX DE WAAL, AIDS AND POWER: WHY THERE IS NO POLITICAL CRISIS - YET (2006); and Elizabeth Fee and Nancy Krieger, *Understanding AIDS*: *Historical Interpretations and the Limits of Biomedical Individualism*, 83 AM. J. PUB. HEALTH 1477.

110. *See* Harry Truman, *Harry Truman*: '*The Japanese Were Given Fair Warning*', THE ATLANTIC, Feb. 1947, *available at* https://www.theatlantic.com/magazine/archive/1947/02/president-truman-to-dr-compton/305432 (last accessed Jan. 31,

and identity, China denies the rights of ethnic minorities and neighboring countries.[111] To legitimize their murder of innocent civilian children and their erasure of entire families off the face of the earth, Israel and Hamas completely define themselves by completely defining each other.[112] To turn a blind eye from the suffering they cause, people completely define the environment.[113] To uphold their unitary being, men completely define themselves by completely defining women.

To clarify, this argument on sexual difference is not normative. Defining ourselves is not necessarily bad. But is it Christian when it limits individual subjectivity? Does one really love a person when they only look at what they are and ignore what they are not? Does one not leaving the loving to this *thing*

2024) [https://perma.cc/3MJA-FTEM]. *See contra* Karl T. Compton, *If the Atomic Bomb Had Not Been Used*, THE ATLANTIC, Dec. 1946, *available at* https://www.theatlantic.com/magazine/archive/1946/12/if-the-atomic-bomb-had-not-been-used/376238 (last accessed Jan. 31, 2024) [https://perma.cc/X6TX-23L5].

111. *See* BRITISH BROADCASTING CORPORATION NEWS, *Who Are the Uyghurs and Why Is China Being Accused of Genocide?*, May 24, 2022, *available at* https://www.bbc.com/news/world-asia-china-22278037 (last accessed Jan. 31, 2024) [https://perma.cc/W3HS-JUJ3] & Ryan McNamara, *The Environmental Collateral Damage of the South China Sea Conflict*, NEWSECURITYBEAT, Oct. 13, 2020, *available at* https://www.newsecuritybeat.org/2020/10/environmental-collateral-damage-south-china-sea-conflict (last accessed Jan. 31, 2024) [https://perma.cc/4QC5-YC3N].

112. *See* Amnesty International, Damning Evidence of War Crimes as Israeli Attacks Wipe Out Entire Families in Gaza, *available at* https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza/ (last accessed Jan. 31, 2024) [https://perma.cc/69HH-ZGKD].

113. *See*, *e.g.*, Alvin Powell, *Tracing Big Oil's PR War to Delay Action on Climate Change*, HARVARD GAZETTE, Sept. 28, 2021, *available at* https://news.harvard.edu/gazette/story/2021/09/oil-companies-discourage-climate-action-study-says (last accessed Jan. 31, 2024) [https://perma.cc/5F69-N2X9]; Diego Rojas, *The Climate Denial Machine*: *How the Fossil Fuel Industry Blocks Climate Action*, THE CLIMATE REALITY PROJECT, Sept. 5, 2019, *available at* https://www.climaterealityproject.org/blog/climate-denial-machine-how-fossil-fuel-industry-blocks-climate-action (last accessed Jan. 31, 2024) [https://perm a.cc/A8M6-2LR2]; & Robinson Meyer, *It Wasn't Just Oil Companies Spreading Climate Denial*, THE ATLANTIC, Sept. 7, 2022, *available at* https://www.theatlantic.com/science/archive/2022/09/electric-utilities-downplayed-climate-change/671361 (last accessed Jan. 31, 2024) [https://perma.cc/XS9D-8S3T].

because by focusing only on what people are, one assumes that he should always *be something*?

People love each other not by completing one another, but by aligning themselves with each other and committing ourselves to something beyond us (like a principle) despite each being independent. In this case, people commit themselves to the reality of their being. They achieve universal solidarity by confronting the inherent tension in being defined.

Bottom line, one gets a fresh perspective on identity and relevance. Christianity and the law stay relevant not only by respecting different identities, but also by grappling with the concept of identity itself. One examines identity vis-à-vis their being and knowing the state of their being, they are compelled to act on how one should live his or her life. People are not being themselves when they deny the underlying obstacle brought about by being defined. They are not living; they are escaping.

IV. ŽIŽEK'S CHRIST ON FEMINIST THEORY

A. On Freedom

Just like sexual difference, freedom is currently conceptualized on the level of generalization and universalization. Supposedly, one should be able to do anything and everything.

The concept of true freedom finds its roots in Anglo-American liberal legal premises. This comes from the Enlightenment view, where John Locke famously quipped — "[*m*]*en* are[,] *by* [*n*]*ature*[,] all free, equal, and independent."[114] Indeed, "[t]he law governing contracts, torts, and crimes typically assumes that the individual is capable of formulating a specific 'intent' to act, of exercising free 'choice' or 'consent,' and of behaving as a 'reasonable' person."[115] In relation to feminist legal theory, "[w]omen's rights advocates make similar assumptions when they argue that they should have freedom to control their own lives and make their own sexual and reproductive choices."[116]

However, " social theory has challenged the [e]nlightenment view of the self as autonomous and capable of acting independently of external influence,

114. SANDRA FREDMAN, DISCRIMINATION LAW 5 (2d ed. 2011) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330 (Peter Laslett ed. 1988)) (emphases supplied).

115. KATHARINE BARTLETT, ET AL., GENDER LAW AND POLICY 617 (3d ed. 2021).

116. *Id.*

conceptualizing the individual as constituted through multiple sources of identity and as subject to social, institutional, and ideological forces that construct and constrain individuals' desires, choices[,] and perceptions of reality."

This new perspective "reveals limitations in the traditional view of autonomy and underscores the need for pragmatic strategies to overcome these limitations."[117] Nonetheless, "the assumption remains that, in most matters, more [true] freedom is better than less."[118]

Yet, true, absolute freedom on this general and universal level cannot be properly achieved; it does not exist. Yes, people can do anything and everything, but until they actually do something, being able to do anything and everything means nothing. Further compounding on things, no one can tell one what they should do. In Christian terms, God cannot tell one how they should live their life, much less other people. So, not only does one have to do something, but one also does not know what they should do.

Freedom, then, is experienced as unfreedom. Freedom can be such a burden. To escape this burden, people create our their ideas of how they should live their lives and of what a good life is. They make their own incentive structures of what a valuable existence is, forever putting out of their reach the thing that they think will make them happy someday. We are taught that to be free means to be freer than other people; to do things other people could not do; and to be better, more successful, and happier than other people.

In other words, we look for master figures that come in the form of arbitrary rules so they can act freely within these preconceived sets of rules. People make up master figures to relieve them from the burden of their unfreedom.

Again, this is not necessarily bad. It can even make life feel easier. But we must critique our ideas, pointing out its logical consequences. We are simply emphasizing a different aspect that presents a more comprehensive line of argument.

People who give others preconceived pathways to true freedom are making them suffer because they do not allow others to see that others get to choose for themselves what they should do with their lives. So, should the people impose made up rules without the consideration of how each person wishes to live their lives, when the direct consequence is the limitation of

117. *Id.*

118. *Id.*

individual subjectivity and thus suffering? Should arbitrary rules be the primary consideration when people suffer?

What is being emphasized then, is that because of subjectivity, one gets to make his or her own ideas of, committing to, and asserting how he or she should live his or her life. The result is a primal irreconcilable difference and deadlock between every individual, which is why they come together in solidarity in one's imperfect symbolic order so that he or she may acknowledge antagonisms and conflicts and hash them out, which will never be perfect but are nonetheless filled with creativity, novelty, and empathy. People recognize that the symbolic order is not a perfect monolithic set of rules that are forever unmoved and that they should unquestionably follow. In fact, it should be the other way around. The symbolic order should always recognize the relevance of everyone's circumstances; it should adapt to people's lives. The symbolic order stays relevant only when it listens to the people. Otherwise, it loses its point. One's ideas along with the symbolic order will always be all-too-human. So, if anything, people commit to their preferences for no reason or any reason, for their own sake or reward even. This is how people embrace their unfreedom. Case in point, Christ. Yes, Christ stood for justice, and this justice refers to recognizing the specific and particular circumstances of individuals, especially those who are marginalized in society. Not to absorb them into an ignorant symbolic order, but to set them free from such a symbolic order. Thus, instead of asking "[w]hat would Christ do" the question should be "[w]hat if I can do what Christ did too?" What if Christ can serve as a reflection of our subjectivity, if we can serve as reflections of other people's subjectivity?

This is love. Recall that people love each other by aligning our independent selves with each other and committing ourselves to something beyond ourselves. Here, they commit themselves to doing things detached from any incentive structure. Although they act alone, when other people watch them, they will feel encouraged to do the same. This is what it means to take responsibility for their actions within love. This is what it means to embrace love in one's own stead.

No one can do the believing, the loving, and the act of setting ourselves free on other people's behalf. If one wants to believe, to love, and to be free, we must do it ourselves.

B. On Equality

Is one setting himself free, when the same universalization and generalization applies to the concept of equality? In feminist legal theory, there are two types of equality: formal and substantive equality.[119]

Formal equality is about consistency.[120] The fundamental principle is that "individuals who are alike should be treated alike, according to their actual characteristics, rather than stereotypes about them."[121] This framework "demands that an individual be treated as well as a similarly situated person, but it does not say anything about how well they should be treated, as long as they are treated the same."[122]

Formal equality involves "a belief in the importance of individual autonomy and the view that both women and men should be free to make their own choices, unconstrained by artificial barriers and prohibitions."[123] This framework puts "emphasis ... on examining the factual assumptions of sex-based constraints, exposing the stereotypes underlying those constraints, and removing the barriers to free choice."[124]

The other type of equality, substantive equality, acknowledges that equal treatment can in practice perpetuate inequalities.[125] It attempts to address these problems by pointing out that "equal treatment leads to outcomes that are unequal because of differences between men and women."[126] The law should thus "take account of these differences in order to eliminate the disadvantages they bring to women."[127]

In reconciling formal and substantive equality, "the argument is not that women should be entitled to whatever is most favorable to them, but that, depending on the circumstances, equality sometimes requires equal treatment

119 FREDMAN, *supra* note 114, at 2.

120. *Id.*

121. BARTLETT, ET AL., *supra* note 115, at 3.

122. *Id.*

123. *Id.*

124. *Id.*

125. FREDMAN, *supra* note 114, at 14.

126. BARTLETT, ET AL., *supra* note 115, at 4.

127. *Id.*

and sometimes requires special measures to counteract men's advantages over other people."[128]

Notice that both formal and substantive equality operate at the level of sexual relationship. Positive terms are used, such as "distinction," "classification," "universal individual," "difference," "identity," "characteristics," and "diversity." These positive terms refer to what we are, leaving out what we are not. The concept of equality focuses on what we are, thereby completing us and making up a sexual relationship as a master figure, when we are unfolding beings. The consideration of people's circumstances therefore, are still anchored on an arbitrarily imposed classification that ironically ignores said circumstances. Within the patriarchal-capitalist system, men, and thus people, get to dictate what the relevant circumstances are. This is how substantive equality is undermined. This is how equality, as currently conceptualized, may reinforce oppressive social structures.

Revisiting both sides, men completely define themselves by completely defining women, so women endeavor to reclaim and assert their capacity to define themselves. They are two sides of the same coin, both upholding the idea of sexual relationship as master figure. We completely define ourselves to relieve us from the burden of our freedom, even when people suffer. While identities are not bad, people suffer.

If the people wish to free themselves from sexual relationship, the solution is not only in being able to completely define themselves, which still sustains the master figure, but also in exemplifying how they are actually nonrelational, and how being defined is inconsistent with themselves as unfolding beings. As perfectly rendered —

> *It is literally impossible to be a woman*! You are so beautiful and so smart and it kills me that you don't think you're good enough. Like we have to always be extraordinary and somehow, we're always doing it wrong. You're supposed to be *thin*[,] but not *too thin*[;] and you can never say you want to be *thin*[,] you have to say you want to be *healthy*[,] but you also have to *be* thin. You have to have money but you can't ask for money because that's crass. You have to be a boss[,] but you can't be mean. You're supposed to lead[,] but you can't squash other people's ideas. You're supposed to *love* being a mother[,] but don't talk about your kids all the damn time. You're supposed to be a career woman[,] but always be looking out for other people. You have to answer for men's bad behavior, which is *insane*, but if you point that out then you're accused of complaining. You're supposed to be pretty for men[,] but not *so* pretty that you tempt them too much or threaten other women. You're supposed to be part of the sisterhood[,] but also stand out[,]

128. *Id.* at 6.

> but also always be grateful. You have to never get old[,] never be rude[,] never show off[,] never be selfish[,] never fall down[,] never fail[,] never show fear[,] never get out of line.[129]

Equality, therefore, is not just about the arbitrary imposition of norms or standards, but the equal participation of each individual in the symbolic order or the law so that their circumstances may be considered. Recall that we get to commit to our own ideas which make them irreconcilable, and this deadlock is precisely why we have laws in the first place, so we get to air out antagonisms and resolve conflicts creatively. Thus, equality also means equity, showing that our creative laws show contradictions and are never perfect and seamless as it strives to capture individual subjectivity as much as possible.

C. On Power

The theory of nonsubordination is critical of liberal theory's focus on gender-based differences between men and women, which serves to legitimize the power imbalance and "unequal distribution"[130] between them. So, they decided to focus on this aspect of power, developing the theory of nonsubordination.[131] The theory starts with the observation that there are "two alternate paths to equality for women ... within [the] dominant approach[:]" (1) to "be the same as men" or (2) to "be different from men."[132] Both judge "womanhood by ... distance from [man's] measure."[133] Thus, "masculinity, or maleness, is the referent for both."[134] Resultantly, "virtually every quality that distinguishes men from women is already affirmatively compensated in this society."[135] In fact, "gender might not even code as difference ... were it not for its consequences for social power."[136] Thus, nonsubordination theory "centers on the most sex-differential abuses of women as a gender," making it "critical of reality."[137]

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129. BARBIE (Heyday Films, LuckyChap Entertainment, NB/GG Pictures, and Mattel Films, 2023) (emphases supplied).

130. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 49 (1987).

131. *Id.* at 32–38 & 40–41.

132. *Id.* at 33.

133. *Id.* at 34.

134. *Id.*

135. *Id.* at 36.

136. MACKINNON, *supra* note 130, at 40.

137. *Id.* at 32–38 & 40–41.

Yet, ironically, the nonsubordination theory remains a permutation of sexual difference, making it "gender essentialist."[138] Under both frameworks, women simply demand what men have. Power is just one of our master figures, an idea or arbitrary rule we make up to pretend that our lives are under control. By nature, power splits itself into the powerful and the powerless. There are those who dominate or have accumulated power, and those who are subordinate, striving to empower themselves. Power relations revolve around this entire dynamic. Both sides are of the same coin, believing on behalf of power and thereby sustaining power as master figure. In effect, power allows the people to complete themselves either as powerful or powerless to make us feel like our lives are under control. Power makes people feel like they are truly free.

> ... [T]his poetry of the marginal, the one who is dislocated, half-excluded, and so on. I have two problems with this poetry of the power discourse that wants to centralize, systematize everything, and then we should speak on behalf of those who are excluded without proper place. First, I claim that here is the opposition between globality and universality. These half-excluded are the site of universality in the most radical, strict philosophical sense it can be developed. The second thing ... is: why ... [do we] think that when we speak about something which is disavowed, repressed, that, to put it in somewhat simplistic and ironic terms, it's always the good guys, ours, who are repressed? I claim isn't it that the power itself functions, the power itself has to disavow its own founding operation? ... This is what interests me, this obscene underside of power, how power, in order to function, has to repress not the opponent, but has to split in itself. You have a whole set of measures which power uses, but disavows them; uses them, but they are operative[,] but not publicly acknowledged. This is for me the obscenity of power ... the whole set of unwritten rules on which power relies.[139]

Unfortunately, just as there is no sexual relationship, power relations do not exist. People are nonrelational, or people do not complete each other. Like our other master figures, we just make up power to ease our burden. Even when people suffer. Power is not necessarily bad, but people suffer.

Setting oneself free, then, lies not only in empowering oneself because this still operates within the terms of power as master figure. Instead, one must point out the inherent tension in being defined completely, when people are unfolding beings who get to choose what they should do with our lives.

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138. Wong, *supra* note 3, at 280-85; DRUCILLA CORNELL, BEYOND ACCOMMODATION 4-6 (1991).

139. Slavoj Žižek, Human Rights and Its Discontents, Lecture at the Olin Auditorium, Bard College (Nov. 15, 1999), (transcript *available at* https://www.lacan.com/zizek-human.htm (last accessed Jan. 31, 2024) [https://perma.cc/Q3UF-VZ3R]).

People should not ask for part of the universal, which does not even exist, or ask for true freedom, which cannot even be properly accessed. Instead, the people look into their own particularity and embrace their unfreedom.

> My point is that the position which I'm attacking, the position of '[l]et's just demand our piece of the cake within the global order,' that already is the position of domination. It's not that I want all while the others want only their piece of the cake. Let's go to feminism. I claim that the only alternative to such [an] approach to feminism is, I think, what is the worst catastrophe for feminism, which is this grounding of feminism in the pre-Cartesian tradition. I have in mind here the claims that the Cartesian modern-age subject is a male chauvinist subject, before whose appearance there still was a proper place of women within the social body. Of course, it was — the subordinated place inscribed in nature itself. I claim that all this search for some primordial matriarchal society, whatever, where you would have a more appropriate role, place, within the social body of women is, I think, a catastrophe because, again, even if you find there some kind of privileged position of women, it's defined as position in kind of a total organic order, it's simply a specific position. I claim that feminism in the modern sense becomes possible only with this Cartesian notion of subject which is the anti-subject, the denaturized subject, subject with no natural properties. It's only in this way that you can ground radical feminism in the modern sense. Any return to this old organic notion, any feminism which plays the game of, 'in the modern age the masculine principle was expressed too strongly, we need to reestablish the balance between the feminine and the masculine principle.' The moment that you accept this, you are lost.[140]

D. On Intersectionality of Oppression

This emphasis on particularity of people as such or on people as unfolding beings is precisely what advocates of the intersectionality theory demand. Discrimination used to be exclusively measured using the standards of "otherwise-privileged members of the group," referring to white women.[141] Intersectionality theory critiques this single-axis framework, saying that "[t]his focus on the most privileged group members marginalizes those who are multiple-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination."[142] Simply put, the experiences of white and black women are distinct, and black women cannot "simply ... [be]

140. *Id.*

141. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex*: *A Black Feminist Critique of Antidiscrimination Doctrine*, *Feminist Theory*, *and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

142. *Id.*

include[d] ... within an already established analytical structure."[143] Such a move erases the experiences of black women because "the intersectional experience is greater than the sum of racism and sexism."[144] As a result, "any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated."[145] Through the intersectionality theory, the multiple facets and aspects of identity are acknowledged.

Intersectionality theory should not take a step back; it needs be taken a radical step further. Although the intent is to particularize people, we readily see that endless diversity of identities still operates at the level of universalization within a single idea of gender within the patriarchal-capitalist system because the focus is still on their definition of ourselves or what we are. As previously discussed, particularization of people means recognizing them as unfolding beings: incomplete, indeterminate, and lacking. Consequently, they cannot complete themselves. Instead of elevating identity and power on the level of master figure to relieve the people from their burden, people should acknowledge that they get to choose what we should do with our lives.

E. Synthesis

The ideas of freedom, equality, and power are not necessarily bad. They can even be useful. They can be valuable. They can bring order to our lives. They can give us a sense of purpose. They can ease our burden. They can make life bearable.

Yet, when merely assimilated to the patriarchal-capitalist system that dictates our lives, these ideas limit individual subjectivity, making people suffer. It is in this wise that we adopt previous criticism of the theory on strategic essentialism, which also points out that

> one cannot defend essentialism on strategic grounds without first showing that there is a homogenous set of essentialist assumptions that exerts a coherent influence on women's social experience — which amounts to defending essentialism on descriptive grounds (as well). Strategic essentialism has not resolved this problem, for it has not stably demarcated any merely political form of essentialism from the descriptive essentialism which critics have plausibly condemned as false and oppressive.[146]

143. *Id.*

144. *Id.*

145. *Id.*

146. ALLISON STONE, ESSENTIALISM AND ANTI-ESSENTIALISM IN FEMINIST PHILOSOPHY 142 (2004).

Sure, the people can improve our ideas in ways that minimize suffering. We can include ethical considerations in our frameworks. Even Christ did not tolerate injustice.

Still, people suffer.

Accordingly, if freedom, equality, and power or nonsubordination can be emancipatory; unfreedom, incompleteness, and powerlessness or nonrelation are equally so, to say the least.

Like the crucifixion for Christianity, there must be some way to inscribe the shortcomings of the symbolic legal-ethical order in itself. Perhaps a "general gender" in which we may refuse "gender distinctions that are on offer," and a radical indifference in which we may choose whatever gender we please because we are a little bit of everything,[147] to reflect that all symbols fall short of our being. As Žižek quipped on what he considers a genuinely transgressive politics of heroic indifference on the washroom issue, "I am ... a bit of this and that, a man dressed as a woman, etc., so I can well choose whatever toilet I want!"[148] For its part, the law should facilitate our act of choosing for ourselves what it is that we have to do with our lives, and doing things for their own sake. The law should remind the people of this in the first place. Corollary, the law should deter ideas that do not allow the people to make this choice.

Ultimately, however, it is all on us. We get to choose whether to deny or embrace our subjectivity. Either way, no one else can make the choice for us. If one wants to believe, to love, and to be free, we has to do it ourselves.

V. ŽIŽEK'S CHRIST ON FEMINIST LEGAL THEORY

We emphasize two points from our discussion, both derived from our subjectivity: (1) we get to choose what we should do with their lives; and (2) we do not complete each other. The law inherently contradicts these two points by imposing subjective positions as objective truth. Nonetheless, we are not naïve to the necessity of the law for our existence. Thus, even if impossible to be fully achieved, both sides need to be reconciled. What strikes us as peculiar, however, is that we seem to have forgotten that the law should be supporting one's subjectivity, not erasing it. We have put the law at the center of our lives, thinking that more limitations and intrusions to our subjectivity are objectively good for us. We have literally forgotten about ourselves in the name of law.

147. Kapoor, *supra* note 84, at 15.

148. *Id.* at 14-15.

Couched differently, the law, which we simply tolerate out of necessity, comes in the form of norms; it is normative. Essentialism, the issue at hand, is descriptive; it describes how our current norms are. The same goes for subjectivity. We are attempting to change the description of our norms, meaning ditching essentialism for subjectivity. People are trying to remedy their tendency to find essence in the norm itself by pointing out that there is no essence in the norm because essence *is* subjectivity. The norm is incidental, and subjectivity is essential. Accordingly, the incidents should be grounded on essence, meaning norms should be grounded on subjectivity, not the other way around.

This theoretical framework finds ready application in sex discrimination law.

To recall, essentialism "is the set of fundamental attributes which are necessary and sufficient conditions for a thing to be [considered] a thing of that type."[149] This prominently manifests itself in U.S. and Philippine law as biological real differences or inherent "physical or anatomical characteristics"[150] of each sex. Biological real differences are supposedly non-sex classifications that constitute valid sex discrimination because they are based on "biology alone"[151] and "physiology period."[152]

For example, U.S. judges have argued that the original meaning of "sex" as used in Title VII of the Civil Rights Act of 1964 refers only to the two biological sexes.[153] They claim that it could not have included "sexual orientation," which has a different meaning because other related statutes use the term "sex" and "sexual orientation" separately.[154]

In 1964, *Webster's*, accompanied by other dictionaries,[155] expanded the definition "sex" to mean three things: (1) biology or "[o]ne of the two divisions of organisms formed on the distinction of male and female;" (2) gender or "[t]he sphere of behavior dominated by the relations between male and female;" and (3) sexual orientation or "the whole sphere of behavior

149. Wong, *supra* note 3, at 274.

150. Brief in Support of Motion to Dismiss Amended Complaint, *supra* note 7, at 16

151. M.A.B. v. Bd. of Educ. of Talbot County, 286 F. Supp. 3d 704, 715 (2018) (U.S.).

152. Brief in Support of Motion to Dismiss Amended Complaint, *supra* note 7, at 20.

153. Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339, 359-65 (2017) (U.S.) (J. Sykes, dissenting opinion).

154. *Id.*

155. *See, e.g.*, THE AMERICAN COLLEGE DICTIONARY (1955) & FUNK & WAGNALLS STANDARD DICTIONARY (1963).

related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct."[156] Thus, the word sex is not only commonly understood as biology, but also gender and even sexual orientation.

This multi-faceted definition of "sex" was affirmed by subsequent literature explaining that sex, gender, and sexual orientation are inextricably linked to one another. On gender, previous literature noted that, "defining sex in biological or anatomical terms represents a serious error that fails to account for the complex behavioral aspects of sexual identity. In so doing, this definition elides the degree to which most, if not all, differences between men and women are grounded not in biology, but in gender normativity."[157] The article concluded that "[u]ltimately, there is no principled way to distinguish sex from gender, and concomitantly, sexual differentiation from sexual discrimination."[158] On sexual orientation, "for much of Western history, an important axis of sexual orientation was instead that of active/passive or penetrative/receptive. With this as the axis, women together with males who allowed themselves to be penetrated orally or anally were opposed and seen as subordinate to 'active' penetrative males."[159] Integrating the three concepts, "even though ... [they] popularly refer to putatively distinctive constructs, they formally and frequently conflate to forcibly homogenize human personalities, including sexualities. Through conflation, this triad of constructs regulates the social and sexual lives of everyone."[160] Further, "this conflation ... is both a formal, intellectual belief system that was codified through various clinical theories and a pervasive normative standard that shapes and governs human life more generally. This conflation, in other words, reflects, and simultaneously projects, the dominant Euro-American social and sexual order."[161]

156. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2296 (1961). *See also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1963) & WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1963).

157. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5 (1995).

158. *Id.*

159. Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 14 (1995).

160. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 6-7 (1995).

161. *Id.* at 7.

In contrast to the few U.S. lower court cases cited in *Silverio* and *Cagandahan*, U.S. Supreme Court decisions fortify the multi-faceted definitions of sex with legal basis. *Frontiero vs. Richardson* was the first case categorically holding that sex distinctions are sex stereotypes.[162] Since *Frontiero*, cases like *U.S. vs. Virginia* have struck down laws and policies that consist of "overbroad generalizations about the differences of males and females" because they are tantamount to sex stereotyping,[163] even if "unquestionably true."[164]

As early as 1996, this principle was carried over by the Supreme Court to SOGIE equality when it ruled that laws that discriminate against gay, lesbian, and bisexual persons without valid reasons violate the Equal Protection Clause.[165] Further, *Bostock vs. Clayton County*, the most recent case on Title VII claims, held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."[166] For example, *U.S. vs. Windsor*[167] and *Obergefell vs. Hodges* have struck down biological real differences as justifications for discrimination against same-sex couples, with the latter holding that "[t]here is no difference between same- and opposite-sex couples with respect to [parenting and marriage]."[168] Similarly, in *McLaughlin vs. Jones*, a U.S. lower court applies a State marital presumption that considers husbands of biological mothers as legal fathers of their children to wives of biological mothers as well, finding that husbands and wives are similarly situated when it comes to parentage.[169] Notably, these cases in favor of same-sex marriage and parentage overturn *Nguyen vs. INS*, the case which holds that heightened scrutiny is satisfied when based on biological characteristics unique to one sex.[170]

U.S. lower courts have also applied the same principle to public-facility access cases concerning transgender discrimination. Specifically, *G.G. ex rel. Grimm vs. Gloucester County School Board* and *Whitaker vs. Kenosha Unified School*

162. Frontiero v. Richardson, 411 U.S. 677, 685-88 (1973).

163. *Virginia*, 518 U.S. at 533.

164. City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 (1978).

165. *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

166. Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020) (U.S.).

167. United States v. Windsor, 570 U.S. at 2705-07.

168. Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) (U.S.).

169. McLaughlin v. Jones, 401 P.3d 492, 501-02 (Ariz. 2017) (U.S.).

170. *See Nguyen*, 533 U.S..

District No. 1 Board of Education[171] struck down policies that denied transgender people access to bathrooms associated with their gender identity, with the former even stating that "a hard-and-fast binary division [of sex] on the basis of reproductive organs ... was not universally descriptive," and that "[m]odern definitions of 'sex' ... implicitly recognize the limitations of a nonmalleable, binary conception of sex."[172] *Boyden vs. Conlin* held that excluding gender-affirming care from insurance coverage is sex discrimination, and that "sex" has both biological and nonbiological aspects, both derived from modern medical definitions. [173] Currently, transgender bans in sports have also been enjoined on sex-stereotyping grounds.[174]

The interconnection of sex, gender, and sexual orientation applies even if: (1) sex is only a motivating factor;[175] (2) the basis is sexual orientation but treated differently when compared to a man;[176] and (3) discrimination is only committed against some members of a class, which may even be presumptively considered as invalid sex discrimination when committed by reason of association, such as partners in a relationship, thus affecting all sexes equally without need of a comparator.[177] Employing the last approach, *Loving vs. Virginia* universally condemns biological real differences in relation to race.[178] *Frontiero* and *Corbitt vs. Taylor* analogized race to sex,[179] just like *Lawrence vs. Texas* which says that *Loving* applies especially to sexual orientation because both are intrinsically relational.[180] In transgender equality cases, lower courts have also condemned biological sex discrimination, equating it to White

171. *Whitaker*, 858 F.3d.

172. G.G. Ex Rel. Grimm v. Gloucester County School Bd., 822 F.3d 709, 721 (2016) (U.S.).

173. Boyden v. Conlin 341 F. Supp. 3d 979 (W.D. Wis. 2018) (U.S.).

174. *See* Hecox v. Little, 479 F. Supp. 3d 930, 981-82 (D. Idaho 2020) (U.S.); B.P.J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347, 353 (S.D. W. Va. 2021) (U.S.); & Brandt v. Rutledge 551 F. Supp. 3d 882, 893 (E.D. Ark. 2021) (U.S.)

175. *Hively*, 853 F.3d at 358.

176. *Id.* at 365.

177. *See* Loving v. Virginia, 388 U.S. 1, 11-12 (1967); Bob Jones University v. United States, 461 U.S. 574, 580-81 (1983); and *McLaughlin*, 401 P.3d at 501-02.

178. *Loving*, 388 U.S. at 11-12.

179. *Frontiero*, 411 U.S. at 687-88 & Corbitt v. Taylor, 513 F. Supp. 3d 1309, 1309-15 (M.D. Ala. 2021) (U.S.).

180. *See* Lawrence v. Texas 539 U.S. 558 (2003).

Supremacy.[181] Whichever approach is taken, and whichever aspect of sex is concerned, they all ultimately redound to the benefit of women as a class because the limiting ideas of how women should be are discredited.

The intersections of sex classifications can be pushed even further to intersections of sex with other classifications, such as race. A careful reading of the *Loving* case reveals that although race was the declared classification involved, the discrimination did not involve race *per se*, but sexual orientation because the classification actually ascribed was associational or miscegenosexual.[182] In other words, the class directly harmed is miscegenosexuals, not people of color, and thus race intersects with sex.[183] Yet, it ultimately redounds to the benefit of racial minorities because it dismantles White Supremacy ideology.[184] Also, lower courts and the Equal Employment Opportunity Commission have applied *Loving* not just to race or sex, but also to religion, even to its associational aspect relating to a partner's religion.[185]

Indeed, SOGIE and intersectionality equality jurisprudence are original meaning arguments that support the definition of "sex" as including gender and sexual orientation. Even further, this body of case law shows how classifications beyond sex intersect with one another, meaning classifications are related. Simply put, classifications are hard to differentiate; they "wrap around each other inextricably."[186]

Unfortunately, however, the legal landscape in the Philippines is different. Sure, while *Silverio* involves the 1930 Civil Registry Law, the case cites the 2004 edition of Black's Law Dictionary's definition of "sex," which is "the sum of peculiarities of structure and function that distinguish a male from a

181. *See Corbitt*, 513 F. Supp. 3d at 1315; *B.P.J.*, 550 F. Supp. 3d at, 350, 357; & Gonzalez v. Nevares, 305 F. Supp. 3d 327, 334 (D.P.R. 2018) (U.S.).

182. *Loving*, 388 U.S. at 11-12. *See generally* Anuj Desai, *Text is Not Enough*, 93 U. COLO L. REV 1, 37 (2022) (citing Andrew Koppelman, *Bostock*, *LGBT Discrimination*, *and the Subtractive Moves*, 105 MINN. L. REV. HEADSTONES 1, 19 (2020)).

183. *Id.*

184. *Id.*

185. Equal Employment Opportunity Commission, Compliance Manual on Religious Discrimination, tit. VII *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (last accessed Jan. 31, 2024) & Chiara v. Town of New Castle, 126 A.D.3d 111, 122 (N.Y. App. Div. 2015) (U.S.).

186. Hively v. Ivy Tech Community College, South Bend, 830 F.3d 698, 706 (7th Cir. 2016) (U.S.).

female" or "the distinction between male and female."[187] Also, the Court merely cited a U.S. lower court decision to define "female" as "the sex that produces ova or bears young" and male is "the sex that has organs to produce spermatozoa for fertilizing ova," leading it to conclude that "it cannot be argued that the term 'sex' as used then is something alterable through surgery or something that allows a post-operative male-to-female transsexual to be included in the category 'female.'"[188]

Yet concededly, the Court's opinion is still consistent with the fact that around 1930, Webster's defined "sex" in terms of biology.[189]

Nonetheless, this distinction from U.S. law proves itself most opportune to emphasize a different aspect that presents a more comprehensive line of reasoning. In the *Silverio* case, Mely herself invoked the ground of sexual reassignment to petition the change of her name.[190] This led the court to rule, at least on her petition to change her name, that "it had no merit since the use of ... [her] true and official name does not prejudice ... [her] at all."[191]

Curiously however, a hypothetical scenario is imagined where Silverio does not raise the ground of sexual reassignment. What if for example, someone whose name in their birth certificate is "Rommel Jacinto" would later file an administrative case via Rule 103 of the Rules of Court invoking Section 4 (2) of Republic Act No. 9048 before the proper local civil registrar seeking to change their name to "Mely?" That is, their only ground would be that they have habitually and continuously used their new first name or nickname, and that they have been publicly known by that first name or nickname in their community. There would be no mention of SOGIE. Indeed, they can even substantiate their petition with identification cards as evidence of habitual and continuous use of the new names within their community, with witnesses to authenticate the cards and testify as to the new names. The crucial question in this scenario is — could the registrar and later the courts deny their petition on the basis of their assumed SOGIE (by the registrar or court)?

It is submitted that the Court cannot deny their petition on the basis of their assumed SOGIE because that would be tantamount to gender

187. *Silverio*, 537 SCRA at 392.

188. *Id.*

189. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1931-32 (1923).

190. *Silverio*, 537 SCRA at 381.

191. *Id.*

discrimination in violation of the equal protection clause using the intermediate scrutiny test. The word "sex" in the Civil Registry Law of 1930, following the Webster's New International Dictionary of the English Language published in 1923, has clearly only meant "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism" and "the divisions of organisms formed on the distinction of male and female."[192] In other words, "sex" only refers to "physiological distinctions;"[193] there is no inclusion of given names. In fact, "sex" is distinguished from "gender," and it is "gender" which, at the time, referred to "distinctions in *grammar*," which does not even necessarily connote the inclusion of given names.[194] Sure, "gender" was referred to as a synonym of "sex," but we note that "gender" merely refers to "sex" colloquially, and that such reference was even rendered obsolete.[195] Thus, we emphasize the distinction made by the 1923 Webster's dictionary. If the registrar or court brings the concept of SOGIE into the petition, it would be going beyond physiological distinctions and conflating "sex" with "gender," in effect including the concept of "gender" to the case, which was never mentioned or contemplated by the Civil Registry Law of 1930. Worse, especially since it remains unclear whether "gender" includes given names as it merely refers to grammar, the registrar or court would be deciding the case on arbitrary grounds. Besides, the registrar or court would in effect be creating its own standard of what constitutes a male or female name. Even if they cite statistics or onomatology showing whether a name is more commonly male or female, the registrar or court cannot provide arbitrary standards based on loose-fitting generalities especially when there is no basis in law. Point of the matter is, it would be an arbitrary introduction and assumption (and thus stereotype) on the registrar or court's part of the petitioner's SOGIE. Whichever way then, there is cause for invoking the equal protection clause, even grave abuse of jurisdiction (lack of jurisdiction to create and impose arbitrary rules).

It must also be emphasized that it is Section 4, Republic Act No. 9048, which enumerates the grounds for changing one's first name or nickname:

> Section 4. *Grounds for Change of First Name or Nickname.* — The petition for change of first name or nickname may be allowed in any of the following cases:

192. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1931-32 (1923).

193. *Id.* at 1932.

194. *Id.* at 899 & 1932.

195. *Id.* at 899.

> (1) The petitioner finds the first name or nickname to be ridiculous, tainted with dishonor[,] or extremely difficult to write or pronounce;
>
> (2) The new first name or nickname has been habitually and continuously used by the petitioner and he has been publicly known by that first name or nickname in the community; or
>
> (3) The change will avoid confusion.[196]

Hence, if the Court later decides to adopt "prejudice"[197] as the yardstick for granting change of name, compliance with the abovementioned grounds must be construed as compliance with the prejudice requirement absent any factual or legal basis to the contrary. For indeed, while change of name is a privilege and not a right, and while such a petition is left to the sound discretion of the registrar or court, it does not excuse the creation or introduction of arbitrary classifications (i.e., gender) leading to discrimination on the basis of said classifications that would thus run afoul the equal protection clause. In this wise, the Court may no longer raise unsubstantiated and even unrelated fears of "grave complications in the civil registry and the public interest."[198] We may even argue that the resolution of our case need not defer to Congress' resolution of the SOGIE Bill, as it does not contest any provision of law on SOGIE grounds. We would be directly assailing an arbitrary classification introduced by the registrar or court nowhere mentioned in the

196. An Act Authorizing the City or Municipal Civil Registrar or the Consul General to Correct a Clerical or Typographical Error in An Entry and/or Change of First Name or Nickname in the Civil Register Without Need of a Judicial Order, Amending for This Purpose Articles 376 and 412 of the Civil Code of the Philippines, Republic Act No. 9048, § 4 (2001).

197. Ong Peng Oan v. Republic, 102 Phil. 468, 470 (1957). The Court only mentioned that there was "no showing that petitioner will be prejudice[d] by the continued use of his true name" without citing any legal basis for this ground. Prejudice was also referred to only in the context of a certificate issued by the Justice of Peace attached to a criminal record, as there is "evident interest in the use of a name other than his own, in an attempt to obliterate an unsavory record." In other words, there is another reason which renders the "fact that the applicant has been using a different name and has become known by it" as "not *per se* alone consistut[ing] proper and reasonable cause or justification." Thus, it is submitted that habitual and continuous use of a name as reflected by public knowledge in the community constitutes proper and sufficient cause for change of name when "intended neither for the petitioner to escape criminal and/or civil liability, nor affect the hereditary succession of any person whomsoever ... [.]" Republic v. Sali, G.R. No. 206023, 822 SCRA 239, 242 (2017).

198. *Silverio*, 537 SCRA at 387.

Civil Registry Law of 1930 and based on loose-fitting generalizations, which may be directly remedied through the self-executing equal protection clause.

It is also pointed out that before *Silverio*, Geraldine Roman, the first trans legislator, "had her [name and] gender marker changed 24 years ago after going under the knife for [sexual reassignment surgery]."[199] Even after the *Silverio* case on 18 October 2018, another petition by a transperson to change her official first name in the official register was granted by the Civil Registry Office.

The *Silverio* case also cites the late Senator Jovito R. Salonga's book entitled, *Private International Law*[200] which in turn references Dean Joseph S. Beale's *A Treatise on the Conflict of Laws* to justify its ruling, particularly in defining the term legal "status."[201] The case states that

> [t]he status of a person in law includes all his personal qualities and relations, *more or less permanent in nature, not ordinarily terminable at his own will*, such as his being legitimate or illegitimate, or his being married or not. The comprehensive term *status* ... include such matters as the beginning and end of legal personality, capacity to have rights in general, family relations, and its various aspects, such as birth, legitimation, adoption, emancipation, marriage, divorce, and sometimes even succession.[202]

However, the quoted text excludes Dean Beale's explanation for the emphasized portion. On the phrase "not ordinarily terminable at his own will," Dean Beale distinguishes between relationships which are temporary and not temporary through illustrative examples.[203] For the former, he presents the relationships of principal and agent, of master and servant, and the mere living together of grandparent and orphan as examples of those which begin and end at the mere will of the parties.[204] For the latter, he enumerates the relationship of father and child, as well as adoption and legal guardianship because they begin and end with the creation of a legal situation or ceremony with no necessary regard to the will of the parties which may involve a judicial

199. Chad de Guzman, *Philippine Laws Are Still Confused About Gender*, Nov. 20, 2018, *available at* https://web.archive.org/web/20231031135150/https://www.cnnphilippines.com/news/2018/11/20/philippine-laws-confused-gender.html.

200. JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 238 (1995) (emphasis supplied).

201. 2 JOSEPH S. BEALE, A TREATISE ON THE CONFLICT OF LAWS 649 (1935).

202. *Silverio*, G.R. No. 174689.

203. BEALE, *supra* note 201, at 650.

204. *Id.* at 650-51.

act.[205] In other words, while "status" should not solely depend on the will of the parties, their will is not necessarily excluded and thus merely references the creation of a legal situation or ceremony which may involve a judicial act. This is why the aforecited definition includes the qualifications "*not ordinarily* terminable" and "*more or less* permanent," which implies that "status" is definitely not immovable but on the contrary are subject to change within the bounds of the law.

We further allude to Dean Beale's characterization of "status" as "*not a pure* abstraction, *nor* ... real in a *physical* sense; but ... an existent legal quality of a factual situation."[206] He expounds by saying that

> [t]here is an infinite variety of factual conditions and relationships; and it is *only in so far as the law recognizes and gives effect to these relationships by giving them a legal sanction* that they are included in the term 'status.' Thus, a man desires such recognition by the law that he can enter into legal relations. He desires such standing in the community that his will may be done. He desires personal freedom to do his will untrammeled by the law.[207]

In relation to change of name, Dean Beale reveals that a name was not really considered a status especially around 1930; "it [only] has the qualities of a status because it is by his name that a man is registered in the Registry of Civil Status and a change of name must therefore appear on the Registry of Civil Status in order that he may be registered under his new name."[208] In fact, "[a]s it is not a status, it may be changed at will by the party."[209] While "[i]t is common to have a proceeding of some sort by which a name may be changed," still, "if a man had a name which displeased him there was nothing in law to prevent his changing it to any other he liked better, provided he could get the public to adopt and use the name he preferred.[210] In other words, "[i]t is the fact of common acceptance of a man's name by the public that is important in giving a name; and the purpose of the legal proceedings for a change is to avoid the necessity of proving a common usage of the name."[211]

In relation to the requirement of Republic Act No. 9048 of continual and habitual use for the change of name, if "it is proved that a man was commonly

205. *Id.*

206. *Id.* at 649.

207. *Id.* at 650 (emphasis supplied).

208. *Id.* at 654.

209. BEALE, *supra* note 201, at 654.

210. *Id.*

211. *Id.* at 655.

known by a name and not his patronymic, that is his name and not his patronymic or other regular name. Thus, a boy may be generally known by the name of his stepfather, and in that case that is his name."[212] Also,

> a man may take another name than his patronymic for any reason that he chooses and it will be his name. Thus, a man was known by a valuable trade name and he desired his son to take the same name. The son thereupon became known by that name. Thenceforth that became his name.[213]

In other words, the requirement of continuous and habitual use should be interpreted liberally. As such, we also raise the possibility that the "prejudice" requirement for change of name may constitute arbitrary judicial legislation, as such requirement has no legal basis and may have sprung from a misquotation of *Ong Peng Ong vs. Republic* which refers to "prejudice" only in the context of an existing criminal record, a circumstance unique to the case.[214]

As for the status of "sex," we reiterate that status is a legal concept, neither a pure abstraction nor a physical one. Thus, we must put into question the arbitrary imposition of a single idea of sex based on biology or physical characteristics, especially since the law has established equal protection considerations. Even more so in 1988 when this idea of sex is extended to marriage under the Family Code, when equal protection considerations have already been established, and "sex" was no longer defined based only on biology or physical characteristics. Relatedly, the status of "marriage" is also an ever-changing concept that considers people's specific and particular circumstances. For example, "[a]fter 1854, when divorce was allowed by law, [marriage] ... had to be understood as consistent with a legal divorce."[215] Another, "the courts have felt the need of some modification of this doctrine [of marriage] as they came in contact with civilizations which permit polygamy, or a freer divorce."[216] Accordingly, "[t]he American ... have been much more liberal ... in recognizing and giving effect to a polygamous marriage or to a marriage which permits free divorce."[217]

In other words, the statuses of name, sex and marriage are not perfect or seamless concepts but are in fact legal concepts that are filled in by people.

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212. *Id.*

213. *Id.*

214. *Ong Peng Ong*, 102 Phil. 468.

215. BEALE, *supra* note 201, at 665.

216. *Id.*

217. *Id.*

Thus, these concepts are inextricably tied with public discourse, striving to consider the relevant circumstances of people. Perhaps they may appear absolute to us, as in the case of personality, because "it has ... been so universally conferred by the law upon every living human being that one hardly realizes today that personality is not a natural phenomenon but a creature of law."[218] Yet, as we have enunciated, the law has always strived to consider people's relevant circumstances.

Finally, we remind everyone that Republic Act No. 9048 is a mere registration law, one that registers a person's sex assigned at birth. This is a mere recording by another person of one's supposed circumstance during birth. Yet, we allow this recording to dictate a person's circumstances based on loose-fitting generalities and condemn them to a restrictive life not of their own choosing, without even acknowledging the circumstances they wish to bring to the table for consideration. We consider this single entry in the registry as a person's entire immovable identity, ignoring their relevant circumstances.

In sum, our argument therefore centers on challenging the arbitrary imposition of a single idea of gender — the male-female dichotomy — whether it be presented as a binary or a spectrum. It is really the imposition of the oppressive patriarchal-capitalist system, even the imposition of empire, one that ignores the particular and specific circumstances of individuals (i.e., relevance). Professor Catharine A. MacKinnon, of the Harvard Law School, has long exposed that the male-female classification would not have even been imposed if not to reinforce oppressive social structures.[219] We, thus, simply implore everyone to commit to this insight.

Such argument may, thus, even be extended directly to gender structures. SOGIE and intersectionality equality case law also have gaps and limitations in their premises. For one, SOGIE equality may "reaffirm, rather than disrupt, essentialist understandings about the linkages between gender non-conformity and marginalized sexual orientations."[220] Courts have the tendency "to identify behaviors that are uniquely attributable to gay men and lesbians," leading to "strange discussions of sexual orientation stereotype."[221] In relation to Title VII, workers "who "look gay" often find [legal] protection ..., while plaintiffs thought to violate gender norms — through known or suspected

218. *Id.* at 652-533.

219. MACKINNON, *supra* note 130, at 32-38 & 40-41.

220. Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809, 832 (2017).

221. *Hively*, 830 F.3d at 709.

sexual activity, friendships, hobbies, or choice of partner — almost never win."[222] This incentive structure "run[s] counter to theories of antidiscrimination law that favor blindness and assimilation, and ... upend[s] accounts of "covering" that are widely accepted in discussions of law and sexuality."[223] Thus, ultimately, "perceived differences between gay and straight workers" are bolstered. [224] Another, transgender bathroom and sports cases focus only on the sex categories transgender people are forced into, not the larger issue of sex separatism in which forced choice between only two sexes is grounded.[225] Also, success in litigation is more likely when transgender people medically transition or are perceived to conform to conventional gender norms.[226]

On intersectionality of oppression, the Court has previously acknowledged the need for Title VII to recognize multiple parts and aspects of the identities held by claimants because they distinct harms.[227] Yet, while it established the connections between sex and SOGIE equality, the Court in *Bostock* closed the doors for any possibility of applying intersectionality theory in Title VII cases, ruling that as long as sex is one of the classifications alleged, then the Court need not delve on the rest, such as race.[228] Notably, Title VII uses the conjunctive word "or" instead of "and" when describing the identities of claimants.[229] In sum, while case law recognizes intersectionality of classifications, they do not seem to see any need to implement them as a matter of law.

Perhaps another testament to the limits of these frameworks would be possible calls to uphold or return to biological real difference, fed by the comforts that sex separatism brings like in the context of bathrooms and sports, as well as the benefits exclusively accruing to women in labor laws.[230] Although they are clearly overgeneralized assumptions on benefits and losses

222. Brian Soucek, *Perceived Homosexuals*: *Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 715 (2014).

223. *Id.*

224. *Id.* at 785.

225. Cahill, *supra* note 34, at 1132.

226. Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1874-76 (2022).

227. Phillips v. Martin Marietta, 400 U.S. 542, 543-44 (1975).

228. *Bostock*, 140 S. Ct. at 1746-47.

229. Elena S. Meth, *Title VII's Failures: A History of Overlooked Indifference*, 121 MICH. L. R. 1417, 1422 (2022) (citing U.S.C. § 2000e-2 (a) (1)).

230. Cahill, *supra* note 34, at 1123.

incurred by women from the *status quo*, literature has also noted that "fetishization of the law's power over identity" persists, further commenting that "it is almost as though there is an internalized sense, on the part of at least some judges, that if sex-based rules were not tolerated on occasion, we would all wind up in unisex tunics, having lost our sexed and gendered bearings."[231]

Proceeding from our philosophical insights and the premises in sex discrimination decisions, it is submitted that SOGIE equality and intersectionality theory's success is confined to discrediting real differences justified along the lines of biology. In the bigger picture, real differences are kept intact within the contours of sex discrimination jurisprudence. They have just taken a different form, but the content is the same. Biological real differences are never just about biology. Jurisprudence has articulated how we associate culture, such as gender identity and sexual orientation, to biology. Even when we think sex is just about biology based on our anatomy, the fact that we make generalizations about ourselves on the basis of biology is, in itself, cultural. Even physics is not immune to culture.[232] In other words, biological real difference is a pressing issue, not because it is about biology, but because it is about real difference, which is cultural and thus something we make up. This culture completely defines us, imposes on us the belief that there is a right way to live our lives, thereby limiting our subjectivity and ignoring one's specific and particular circumstances as individuals and making us suffer.

Hence, it is submitted that feminism should be reevaluated — not to discredit it, but to make it more responsive to societal issues. Currently, the site of feminism is the body; the body is political. The body is the site of the ideas that make us suffer, and the current solution of feminism is to reclaim the body and replace these ideas with others on freedom, equality, power, and intersectionality of oppression. Yet, even these new ideas have internal limits that reinforce the ideas we wish to abandon. Take intersectionality theory, for example, which highlights diversity in identities by emphasizing the multiple facets and aspects of our identity. To reiterate, focusing on identities completely defines us, limits our subjectivity, and makes us suffer. All our ideas, then, are all-too-human. Thus, when a single group imposes their own ideas on everyone, they constitute a pool of forced choices that make us suffer. The site of the political, therefore, is not the body, but our ideas themselves. Or more accurately, the concept of idea itself. We are trying to find essence

231. Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2133 (2014).

232. *See* M.D. Collet, *History and Contingency: A Transcendental-Materialist Approach*, 18 INT'L J. ŽIŽEK STUD. 1 (2024).

(in the form of identity) in our ideas and laws, when there is no essence to be found. Essence *is* subjectivity. And thus, our ideas and laws should be grounded on subjectivity, taking into consideration the particular and specific circumstances of each individual.

Accordingly, the overarching principles of sex discrimination law, which is rooted in the Equal Protection Clause, must be revisited. The Fourteenth Amendment to the United States Federal Constitution reads, "[n]o state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws."[233] Similarly, the 1987 Philippine Constitution states that, "[n]o person shall ... be denied the equal protection of the laws."[234]

Sex equality jurisprudence shows that the equal protection clause was intended to strike at the entire spectrum of sex stereotypes of what men and women are and should be; stereotypes, even when supposedly true, cannot be the basis for government action.[235] The equal protection clause, therefore, prohibits sex classifications because they overgeneralize people and force them to conform to sex norms.[236]

Sex equality, then, protects individuals, and does not require that all members of a class are injured.[237] Sex equality concerns itself with sex-based classifications that can apply equally to all individuals. The emphasis, therefore, has never been on favoring any class, but on the classifications forced on individuals. Sex equality is not meant to reinforce classification-making by creating and legitimizing classes, it has been about eliminating unwarranted classifications. As explained in *Craig vs. Boren*, "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning ... aggregate groups."[238] Simply put, sex equality refers to classifications, not classes.

This is the crucifixion moment of sex discrimination law — instead of upholding essentialism, it acknowledges essence; instead of simply creating more norms, it makes norms support individual subjectivity; and instead of imposing normativity, it prioritizes individuality and exceptionality.

233. U.S. CONST. amend. XIV.

234. PHIL. CONST. art. III, § 1.

235. *See Manhart*, 435 U.S. at 707; *M.A.B.*, 286 F. Supp. 3d at 715; Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); & *Phillips* 400 U.S. at 543-44.

236. *Frontiero*, 411 U.S. at 687-88.

237. *Boyden*, 341 F. Supp. 3d at 996.

238. Craig v. Boren, 429 U.S. 190, 192, 208-09 (1976).

Apparently, sex discrimination law has already inscribed in itself its propensity to fall short of subjectivity. We are the ones who seem to have lost our way by creating inconsistent doctrines in the name of essentialism instead of people.

Accordingly, the State should not impose its beliefs on what people are and should be,[239] especially since it is ill-equipped to determine people's characteristics.[240] Considering that the biased mind of perpetrators create the issue in the first place, these perpetrators and the State should bear the burden of proving that their classifications are warranted. Corollary, victims or claimants should not have to prove any sexual identity. At the very least, the more demanding intermediate scrutiny test should be employed in gender discrimination cases[241] because individual subjectivity is the paramount consideration, and classifications encroach upon individual subjectivity. The use of the intermediate scrutiny test necessarily connotes that gender classifications should only be employed as a means of implementing equality and equity. These classifications do not have to rest on a single idea of gender that is arbitrarily imposed whether as a binary or spectrum, and may in fact refer to classifications that result from the circumstances raised by individuals. This is how we consider the specific and particular circumstances of individuals without resorting to stereotypes. Even then, classifications that pass constitutional muster should be applied on a "case-by-case"[242] basis that considers and supports individual subjectivity as much as possible. In the workplace, specifically, the bona fide occupational qualification related to the essence of the business should be a requirement, not just a defense.[243] Finally, the justice served by sex discrimination law should not have to wait for norms to be sufficiently established; it should not be impeded by norms at all.

Yet one must not forget that there is a bigger picture to be made here. People should start thinking of ideas that account for individual subjectivity in novel, creative, and surprising ways in lieu of the patriarchal-capitalist system that is currently treated as a "Big Other" and ignores the relevance of one's specific and particular circumstances.

VI. CONCLUSION

A person may want to identify or completely define themself, and that is fine. The theories on freedom, equality, power, and intersectionality are

239. *See, e.g.*, *Boyden*, 341 F. Supp. 3d at 996-97 & *Corbitt*, 513 F. Supp. 3d at 1315.

240. *See* Matter of Childers-Gray, 487 P.3d 96, 120-23 (Utah 2021) (U.S.).

241. *Craig*, 429 U.S. at 218.

242. Carcaño v. McCrory, 203 F. Supp. 3d 615, 653-54 (M.D.N.C. 2016) (U.S.).

243. *See* Bauer v. Holder, 25 F. Supp. 3d 842, 861 (E.D. Va. 2014) (U.S.).

particularly useful in protecting a person who makes such a personal choice for themself.

However, these theories, by themselves, are incomplete at best, because they reinforce essentialism and real difference.

As such, the Article has endeavored to articulate a supplemental theory that caters to everyone, including a person who chooses to acknowledge that they cannot identify or completely define themself. This theory of subjectivity is committed to supporting a person's capacity to decide what they should do with their lives, thwarting impositions on what a person is and should be. This theory finds legal basis in the fundamental principles of sex discrimination law.

In so doing, it is hoped that theory, norm, and law support a person's decisions on what they should do with their lives, supporting their subjectivity.