Article

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Making Up Peoples? Conferralism about Nationality

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Abstract: I will apply Ásta's conferralist account of sex and gender to nationality, and distinguish two different ways in which nationality is conferred – by institutions (legal nationality), and in social interactions (social nationality). I will then turn to the moral and political conflicts that arise where different understandings of nationality and different ways of conferring it overlap and collide. My main thesis is that these conflicts are never simply factual disputes about who and what belongs to a nation, they are always normative conflicts about who ought to belong. This, in turn, means that we cannot think about the ontology of nationality without thinking about what nationality ought to be, a conclusion that is well in line with the basic tenets of conferralism.

Keywords: Nationality; Ontology of nations; National identity; Nationality and gender; Institutional facts.

1 Introduction

Over the last couple of decades, philosophical interest in the nature of social categories and social groupings has been increasing. This interest has translated into the establishment of critical social ontology as its own field with a growing track record of publications. The philosophical analysis in this field focuses heavily on the categories of sex, gender and race, and, to a significantly lesser extent, class. Still missing is an ontological analysis of *nationality*.[1] Nation-states are studied

1 As far as I can tell, none of the recent works in the fields (for instance, Haslanger 2012) engage with the concept of nationality; and neither do "classical" constructionists like Ian Hacking (1999) and John Searle (1995, 2010) although the latter mentions nation-states as a paradigm case of social institutions.

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empirically by historians and sociologists and normatively by political philosophers, often with deep skepticism by the first group[2] and with measured enthusiasm by the latter.[3] But their ontology has not attracted much scholarly interest; rather, it has been treated as an afterthought of scholarship, both by political philosophers who seek to defend some normative version of nationalism, and by historians who explore the social and economic conditions of the emergence of nation-states.

In his modern classic *Imagined Communities*, Benedict Anderson (2006, p. 5) outlines three "paradoxes" that have "perplexed" and "irritated" social theorists and historians; paradoxes that should motivate philosophers to engage with ontological questions.

1. Nations are historically recent phenomena, but nationalists typically invent national histories that far predate the historical emergence of nation-states. Indeed, it can be argued that the invention of such histories was instrumental to the political project of nation-building.
2. Nationality is a formally universal concept in that everybody is supposed to have one, but each particular nationality is necessarily *sui generis*. (You would not be able to figure out what all nations have in common by comparing Greeks and Germans, for instance.)
3. Nationalism continues to be a powerful political ideology, but it has not produced any political philosophy of its own that would match this power.

Anderson's observations suggest parallels to the ontology of sex and gender, and can be formulated in direct analogy:

1. The assumption that there is some kind of "natural" basis to gender ascriptions is crucial to the normative function of these ascriptions: gender as a mechanism of social order depends on it. The same goes for the "invention" of national history and the normative function of nationality as a mechanism of social order.
2. Gender is a formally universal concept in that everybody is supposed to have one, but each particular gender expression is necessarily *sui generis*. Thus,

2 Important figures in this group include Eric Hobsbawm (1992), Craig Calhoun (1993) and Rogers Brubaker (1996).

3 In this group, the debate about "liberal nationalism" (Tamir 1993), which in many ways superseded and internationalized the US-centric debate between liberals and communitarians of the 1980s, was crucial; apart from Yael Tamir's monograph, important publications include Miller (1995), Moore (2001), Tan (2002) and Laegaard (2007). While the general interest in *liberal* nationalism as a topic of scholarship seems to have waned somewhat in recent years, the questions and concerns raised by those who participated in this debate are still very much present in public discourse regarding, for instance, immigration and the global threat of terror.

the normative character of gender is obscured by treating gender expressions as features of authenticity rather than conformity.

3. Gender continues to be a powerful ideology of social order, but its defenders have not yet produced any social philosophy of its own that would match this power (rather, it is the critics of the current social order who have done that).

In what follows, I will loosely pursue these parallels in order to sketch an ontology of nationality. So the aim of this paper is twofold: first, I want to show that thinking about the ontology of gender and the ontology of nationality in parallel yields philosophically fruitful insights. Second, I want to show that a feature that critical social ontology widely accepts for gender also applies to nationality: gender is not a normatively neutral concept. We cannot think about the ontology of gender without thinking about its practical, political, and moral consequences. The same goes for nationality.

I will apply Ásta's[4] conferralist account of sex and gender to the issue, and distinguish two different ways in which gender and nationality are conferred: by institutions, or in a network of social interactions. In either case, the social property (of having a specific gender or a specific nationality) is *ascribed* to a person, and whether and how that person's *self-identification* plays a role in this process is a further practical and normative question; a question, which, as we shall see, can be exploited for rhetorical and political purposes.

My main reasons for choosing Ásta's conferralism as my background theory are that it brings out the double character of sex and gender (as both ascription and normative structure) very clearly, and that it offers an attractive description of how sex and gender differ. In the same way in which Ásta distinguishes between legal sex as a one-time authoritative conferral of a property and gender as a decentralized process of conferrals from various sources, I will distinguish between legal and social nationality in order to bring out the normative conflicts around these processes. But before we turn to this part of my argument, a brief description of the theoretical location of conferralism within social ontology is in order.

2 The Location of Conferralism in Social Ontology

Conferralism is a metaphysical theory about *human kinds* (Ásta 2013b) as a subclass of *social kinds*, and as opposed to *natural kinds*: It explores how certain

4 Icelanders have no surnames. Ásta herself prefers to be referred to by her given name only and not her patronymic (Sveinsdóttir).

social groupings among humans (genders, nations, professional statuses) come into existence. It is a version of *constructionism* in that it suggests that these social objects are dependent on our beliefs, intentions or our agency; and thus in some sense constructed by us, as opposed to being defined by their physical properties alone. As a constructionist theory, it differs from both *error theories* and *reductionism* about social kinds (cf. Ásta 2015, p. 6). The error theorist believes that social kind terms refer to nothing; the reductionist believes that, if social kind terms are to mean anything, they must ultimately refer to physical properties. Regarding gender, for instance, the error theorist might say that it is a mere ideology with no grounding in reality,[5] and the reductionist insists that gender as a social kind term ought to be understood in terms of biological differences between males and females (and obviously, the error theorist in this case could also be a reductionist, and vice versa). In contrast to both, the constructionist insists that gender refers to a social reality that is neither illusory nor fully captured by biological explanations.

To see more clearly what both the error theorist and the reductionist are missing, consider one of John Searle's (1995, p. 32–34, p. 52–53) favorite examples of a social kind: money. More concretely, consider the 50 Cent coin I have in my wallet: I could describe it as a composition of natural kinds, namely the elements in the copper alloy *Nordic Gold* from which the coin is made. But knowing what metals the coin consists of does not (at least not by itself) provide me with an understanding of *how it is money*. Conversely, I do not need to know anything about *Nordic Gold* (in fact, I had never heard about it until I looked it up when I wrote this paragraph) in order to use the coin properly, that is, to display a practical understanding of what kind of *social* object it is (valid currency in all states that use the Euro). And in order to understand how something is a valid currency, I need an understanding of social structures, in this case central banks, financial policy, trade practices, and the like. So while the reductionist would have to implausibly claim that there is nothing more to understand about the 50 Cent coin than that it is made from *Nordic Gold*, the error theorist might say that the coin is merely an illusion and refers to nothing at all. This latter view about

5 Political activists who define themselves in opposition to a supposed "gender ideology" typically hold such a view (for a recent sociological investigation of this type of activism in Europe, see the contributions assembled in Kuhar and Paternotte 2017). What is philosophically puzzling about "anti-gender" reasoning is that it simultaneously acknowledges and denies the social reality and causal efficacy of *gender*. In making the point that gender is a dangerous ideology, it appears to admit something it wants to refute, namely that categories of gender (as opposed to the biological category of sex) have become a causally efficacious part of our social world – for how could they be dangerous, if no one took them seriously?

money might have been held by some anarchists and communists, but it fails to explain why we can talk sensibly about money and why it has causal efficacy in our daily lives.

Apart from the question of whether social and human kinds actually exist, there are further theoretical debates internal to constructionism that are relevant to the issues at hand.[6] One of them is the debate between *nominalists* and *realists*.[7] Nominalists (like Ian Hacking) argue that human kinds "[come] into being with being named and [do] not exist independently of the name" (Ásta 2015, p. 6). Critical realists (like Sally Haslanger) argue that social kind terms map existing social structures.[8] Applied to the case of money, the nominalist might insist that coins and bills cannot exist independently of someone declaring them money; while the realist could argue that the social kind "money" exists because of how our economies evolved, from localized barter economies to national and later global markets for goods and services. Conferralism preserves both the nominalist and the realist impulse.[9] Insofar as it defines conferred properties as properties that (try to) track other properties, it can maintain that particular currencies and denominations are *conferred* properties that come into existence nominalistically, as a result of the actions of institutions and the intentions of collectives; but that as money, they have grounding properties that track broader economic realities.[10] So in order to exist as money, my 50 Cent coin needs both the conferral

6 One debate which I will ignore here is that between *causal constructionists* and *constitutive constructionists* (Ásta 2015, p. 3–6; see also Marques 2017 and the literature cited therein). I am sympathetic to Marques' view that "any actual kind X, if X is socially constructed in the constitutive sense as a K, then X is socially constructed in the causal sense as a K" (2017, p. 5). I also think that it is both compatible with conferralism (insofar as conferralism can make sense of how the conferral of a social property might track non-social properties, but the conferral itself is a causative social act that brings the property into existence) and applicable to nations (nations as social constructs must be defined by reference to social factors, and social factors play a causal role in the construction of nations).

7 The philosophical debate between nominalists and realists is much broader and much older than the field of social ontology, but I will limit myself here to this particular field.

8 Haslanger (2012) writes specifically about gender and race and she regards the underlying social reality of these categories as necessarily hierarchical. I can only speculate what she might say about money as a social kind, but I take it that a critical realism in her spirit could argue that it tracks not just economic realities, but more specifically, economic hierarchies.

9 In her papers "Siding with Euthyphro" (2008) and "Knowledge of Essence" (2013a), Ásta argues for an "essentialist position that is not realist" (2013a, p. 22) But this anti-realism about essences does not seem to imply anti-realism about social kinds as such.

10 Again, I can only speculate whether Ásta would consider this a fair characterization and application of her conferralist framework, but it seems clear that she has sympathies for both Hacking's "dynamic nominalism" and for the 'debunking' spirit of Haslanger's critical realism (Ásta 2015, p. 6–7).

of its denomination from the European Central Bank as well as an economic structure in which such a coin has a practical use.[11]

Regarding the practical and normative implications of social ontology, the debate between *ascriptivists* and *voluntarists* is relevant. The leading question of this debate is when and how someone falls under the norms that apply to a specific social status. "For the ascriptivist," as Charlotte Witt puts it (2011, p. 44), "social position occupancy […] is secured by social recognition," and so recognition alone can trigger the norms attendant to the position. For the voluntarist, this requires an active identification with a social position. Witt mentions a priest as an example of a voluntarist social position (the priest needs to identify with their social role in order to fall under the norms of priesthood) and a citizen as an example of an ascriptivist social position (citizens fall under the norms of citizenship, regardless of whether they identify with the role; Witt 2011, p. 44). The privileged role of recognition on the ascriptivist view triggers serious normative questions. Witt wants to defend an ascriptivist view of gender, and an important element of her defense of this view is to explain how gender as a social structure can ever be reformed, if that structure's normative force comes from recognition alone.[12]

Conferralism looks like an ascriptivist theory, since it privileges recognition over identification. If property P is conferred upon person O by the authority of person S (if S *recognizes* O as P), then O has that property, whether or not they identify with it (this is still true, in virtually all contexts, of legal sex ascription). Unlike Witt's, however, Ásta's theoretical framework can mitigate this ascriptivist force. Witt's account of gender is that of a monolithic social super-structure. Ásta's account of gender (but not, as we will see, her account of sex) is contextual and allows the sharing of ascriptivist authority (at least in principle; see

11 In the case of hyperinflation in the Eurozone, the 50 Cent coin would literally become *useless*. The case of hyperinflation also serves to further illustrate the connection between the nominalist and realist aspects of money. In order to get out of a hyperinflation (that is, failed fiscal policies and measurable economic misery) states typically introduce a new currency: in November 1923, the Weimar Republic introduced the *Rentenmark* to replace the collapsing *Reichsmark*; and in August 1946, at the end of the worst-ever hyperinflation, Hungary re-introduced the *forint* to replace the *pengő* (which itself had been introduced in 1927 to stop the hyperinflation of the *korona*). These are cases in which governments literally invented a new kind of money, but nevertheless responded to and ultimately changed economic realities.

12 Concrete example: how can the ascriptivist view accommodate trans persons, when it seems to imply that a trans person's identification with a specific gender is never enough to bring them under the normative force of that gender? In other words: If, on an ascriptivist view, recognition trumps self-identification, then it is difficult to see how self-identification can generate normative force.

Ásta 2011, p. 61–62 and 2013, p. 724). So while gender is primarily a matter of recognition, it is not a monolith. It can be negotiated differently in different situations; and ascriptions of gender do not presuppose a unified authority. Rather, S and O could share power over the conferral of property P (they could decide together that S ought to recognize O as P).

3 The Social Ontology of Nations

Let us briefly consider how the general metaphysical theories I just sketched would apply to the case of nations and nationalities. An error theorist would argue that there are no nations: When we speak of "Germans" or of "France", we do not actually refer to anything; we are instead "making up peoples" (to paraphrase Ian Hacking (1986) out of context). Normatively, an error theory about nations easily lends itself to some form of *eliminativism* in the service of freedom of movement and residence, similar to the way an error theory about the concept of race lends itself to eliminativism in the service of racial justice (Appiah 1994). Joseph Carens' seminal paper "Aliens and Citizens", in which he argued for generally open borders, at times comes close to such a position.[13] He says: "Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely" (Carens 1987, p. 252). He *might* have said: "Like feudal birthright privileges, the conceptions of "nationality" that are thought to ground restrictive citizenship are mere illusions, invented and upheld for political reasons, and as such, they are unfit to justify anything."

In contrast to the error theorist, a reductionist would hold that nations as social objects correspond to some "natural" truth about national identities, communities, and cultures. Early nationalists from the Romantic period, like Fichte or Herder, seem to have held this view (Calhoun 1993, p. 221–222); and it still resonates with some contemporary nationalists who view nations as grounded in largely homogeneous national "cultures" who predate the historical emergence of nation-states (Meisels 2009; Miller 1995, 2016). David Miller, for instance, says: "The cultural components of national identity will *naturally* reflect the historic culture of the majority of native-born citizens" (Miller 2016, p. 145; emphasis mine). For the reductionist, then, the political order of nation-states is likely to reflect a sort of natural order; and for this reason, reductionists about nationality

13 I say "comes close" because when discussing potential objections to his view in Michael Walzer's (1983) spirit, he invokes "moral traditions" (pushing "us" toward a liberal position on immigration; Carens 1987, p. 269–270), which is definitely not compatible with an error theory about nations.

tend to be *conservationists* (that is, eager to preserve the said political order) or *independentists* (arguing that some "natural" nations have not yet been given their own state and ought to).[14]

In contrast to both error theories and reductionism, constructionism about nations and nationality could take quite different forms. We could be nominalists or critical realists about nations, or conferralists who borrow from both camps. Or we could, like Charlotte Witt (2011) did for gender, ask whether and in what sense nationality is an essential social property.[15] Would I be the same person if I had been born in a different country? Is there some property that all Germans necessarily have in common? Is there some property that all nations necessarily have in common? We could also question Witt's claim that citizenship is ascriptivist: Is it true that I fall under certain norms, merely because I am recognized as German and regardless of whether I identify with Germany?[16]

Moreover, we can use constructionist understandings of nations and nationality for different normative aims. The claim that nations are socially constructed but real social kinds can be used by eliminativists (similar to the way Critical Race Theorists employ their understanding that race is socially constructed and a real social kind to argue that it ought to be eliminated). But it can also be used by reformists (who might think that nations serve an important purpose but ought to be "improved") or by conservationists (who see nothing wrong with the current political order, but do not subscribe to a reductionist understanding of nationality).

My purpose here is not to advocate a particular normative conclusion (although my own sympathies lie with reformism and eliminativism). Rather, I want to show that the social ontology of nations is necessarily a normative undertaking. We cannot think about what nations are without thinking about what (and whether) they ought to be. In contrast, the reductionist suggests (or pretends) that they can give a normatively neutral ontological account of nations; while the error theorist doubts that we can give an ontological account of nations at all.

Ásta's conferralism is particularly suited to bring out this conclusion, since it suggests

> that membership in a certain human kind comes with constraints and enablements that are not justified with reference to the presence of the property that is taken to define the kind.

14 For a reformist version of reductionism about social categories in general, see Bach 2016.

15 For an application of conferralism to debates about essentialism, see Ásta 2013a. I will set questions of essentiality aside for the purposes of this paper.

16 Legally, the ascriptivist claim is trivially true. As a citizen and resident of Germany, I *do* have a legal duty to pay taxes, which in no way depends on whether I identify with my role as a German taxpayer. If I were a citizen and resident of Australia, I would have a legal duty to vote, which in no way depends on whether I identify with the role of an Australian voter.

> These constraints and enablements are as a result of the conferred status, and it is the conferral of this status […] that is in need of justification. (Ásta 2011a, p. 729)

Applied to nations: if nationality is indeed a conferred property, it is always in need of justification. Conferralism also provides a useful framework for sketching the most relevant normative conflict regarding nationality: between authoritative ascription (S confers a *legal nationality* upon O), contextual ascription (a *social nationality* is conferred upon O, but not by a unified authority) and voluntarist identification (O embraces a *national identity*). This way of putting it makes it clear that I will look primarily at the question of how individuals come to fall under a specific nationality, rather than at the question of how nations come into existence. While the latter question is both philosophically and historically interesting and obviously related to an investigation of nationality, for the purposes of this paper, I will simply take the current political order of nation-states as the background against which my argument unfolds. Before we turn to nationality, however, I want to go through Ásta's account of how conferralism works for sex and gender, thus setting the stage for the normative conflict I just outlined.

4 Conferralism about Sex and Gender

In its general form (S confers property P upon O), conferralism has five elements:[17]

1. P^C: the conferred property
2. S: the subject(s) responsible for the conferral
3. A: the "attitude, state or action" of the subject(s) that matter for the conferral
4. C: the context and the conditions of the conferral
5. P^G: the grounding property (Ásta 2013b, p. 720).

Ásta uses the examples of Euthyphro (and his debate with Socrates about the nature of piety; 2008 and 2013b, p. 719) and baseball, specifically the concept of *strike* in baseball (2013b, p. 719–720) to show how this works in practice. In baseball, a strike (P^C) is conferred by the umpire's (S) judgment (A) in the context of a baseball game (C) upon a pitch that travels from the pitcher's hand to the catcher's glove without being hit by the batter, passing through an imagined rectangle in front of the catcher's chest (P^G). While the property of being a strike is *grounded* in spatial attributes (the ball passing through the imagined rectangle in front the

17 In Ásta 2013a, she leaves out the fifth element; and one might add a sixth, namely the object, event or subject O, upon which property P is conferred.

of the catcher's chest) its conferral is not dependent on whether these physical characteristics are actually present. That is, when an umpire calls a pitch a strike even though a replay might show it to be clearly outside of the strike zone, the pitch would still *be* a strike *because* the umpire called it. We can make a similar point about football, for instance, the property of being a goal:

1. P^C: being a goal
2. S: the referee and their assistants
3. A: the referee's judgment, in coordination with their assistants
4. C: a football match
5. P^G: "the whole of the ball passes over the goal line, between the goalposts and under the crossbar, provided that no infringement of the Laws of the Game has been committed previously by the team scoring the goal" (FIFA 2015/2016, p. 35).

While P^G functions as an epistemic guide as to what spatial and other properties referees and assistant referees ought to track in their decisions, the actual presence of P^Gs is neither a necessary nor a sufficient condition for the conferral of P^Cs. For instance, a referee might overlook an offside position (an infringement of the Laws of the Game) before a goal is scored, but if the referee awards the goal, it *is* a goal. In the qualifiers for the FIFA World Cup 2018, which just concluded, Panama needed a win in their last match to qualify; they beat Costa Rica by two goals to one. However, Panama's first goal in this match was a "ghost goal": video of the scene shows a few things that a referee might or should have acted upon, but not the "whole of the ball passing over the goal line between the goalposts".[18] Nevertheless, the referee decided to award a goal to Panama, and so Panama is going to the World Cup. Now, while one may argue that this is *unfair* (especially the US Soccer Team, which was eliminated from the tournament by Panama's win, complained vocally) it does not change the ontological *fact* that Panama's "ghost goal" is a goal because the referee made it so.

Ásta applies this conferralist account of sports refereeing (where the conferral of a property hinges on the authority of one person's judgment) to the assignment of legal sex (Ásta 2011, p. 62–64; 2013a, p. 726):

1. P^C: being male or female (or being of a "third sex", I will consider that case in a moment)
2. S: "legal authorities, on the testimony of doctors, or other medical personnel, and parents"

18 While video review will be used in the final tournament of the World Cup, it was not used in the qualifiers. The question what, if anything, changes in this conferralist picture of sports when video review is available, is philosophically interesting, but not one I will answer here.

3. A: "the recording of a sex on a birth certificate"
4. C: "at birth [or] after surgery and hormonal treatment", or after presenting an official diagnosis of gender dysphoria or gender identity disorder, or (in the case of jurisdictions that allow adults to change their legal sex by declaration) after making an official request
5. P^G: "the presence of sex-stereotypical physical characteristics, including genitalia, chromosomes, and hormonal levels; doctors perform surgery in cases where it might help bring the physical characteristics more in line with the stereotype of male and female".

"Sex-stereotypical, physical characteristics" are to the legal assignment of sex what the rulebook of football is to the referee's decisions: something that the relevant authorities ought to track, but neither a necessary nor a sufficient condition for the conferral of specific (sex or sports) properties. In this way, the conferralist framework allows that sex is a socially constructed and maintained category, but it does not have to deny that "nature" and "biology" put limits on the scope and the flexibility of this category; nor does it have to deny that sex categories are real.

> Unlike the conferral of sex, the conferral of gender is not a one-time act, but rather involves a standing attitude, namely the perception by the subjects in the context that the person have the relevant grounding property. This perception can be in error and the person may in fact not have the property. (Ásta 2011, p. 61; see also: Ásta 2013b, p. 724)

According to the conferralist framework, gender is an ongoing process of recognition and self-identification, which lacks a central authority. The concept of gender can track different things at different times and in different contexts, and some of these things are social rather than biological. Ásta gives the concrete example of the preparation of food at family gatherings as "women's work" (2011, p. 61 and fn. 22) and she points out that "in some gender contexts, at least one of the things being tracked is sex assignment" (Ásta 2013b, p. 726), which as such is a social property (although it tracks physical features).

For the purposes of my argument, I am specifically interested in the divergent conceptions of the conferring subject in the cases of sex and gender. In the case of legal sex assignment, there is a clearly defined authority within an institutional structure that is responsible for the conferral (often, the first medical doctor who sees the infant). In the case of gender, no such institutional authority exists; rather, the power structures that are operative in the conferral of gender are (more or less) decentralized. This feature distinguishes Ásta's account of gender from Haslanger's and Witt's: Unlike their accounts of gender as (hierarchical) super-scripts, Ásta's contextualism leaves room for local negotiations over gender ascriptions.

Consider the following anecdotal example: earlier this year, I was stranded in Dublin on my way to the United States and the airline put us up in a hotel. When I approached the agent who I had been told would arrange transport to the hotel, he initially addressed me as "Sir" and I did not correct him. When I showed him my passport, however, he pointed out (more to himself than to me) that the sex designation in the passport did not correspond to his gendering of me; and he then proceeded to address me loudly and repeatedly as "Ma'am". How can we make sense of this little scene? Initially, the agent conferred a gender on me based on what he took as a stereotypically masculine appearance. A look into my passport challenged this strategy and now he made a point out of conferring a gender based on my legal sex. On the one hand, his confusion illustrates the extent to which our general social scripts are (still) dependent on gender scripts. Marilyn Frye's (1983, p. 23) point still stands:

> One of the shocks, when one does mistake someone's sex, is the discovery of how easily one can be misled. We could not ensure that we could identify people by their sex virtually any time and anywhere under any conditions, if they did not announce themselves, did not *tell* us in one way or another.

And "tell us" they must, or else we might get lost: in the same text, Frye describes how she is completely stunned by her inability to tell the gender of one of her student's friends (1983, p. 26). On the other hand, we might read the scene as a normative opening. Two potential grounding properties for conferring a gender onto someone else (appearance, legal sex) conflict in this case; they cease to be reliable epistemic guides. This might have been an opportunity for the airline agent to ask me about my *gender identity*; and it might have been an opportunity for me to involve him in a conversation about it (had I been in the mood).

Now, I do not want to claim that any such occasion in which there is confusion about someone's gender ought to be regarded as an opportunity to have a conversation about our practices of gendering people. Rather, I want to make a general point: our practices of gendering leave room for confusion and that means that they also leave normative openings that can be exploited to make these practices less rigid. For instance, think of the strides that trans persons have made in terms of social recognition and acceptance.[19] Many of their

19 Often, of course, against considerable and ongoing political opposition and threats of violence. I believe that the conservative fury that spawned the so-called "bathroom bills" in the United States can be explained in this way: it was never about security concerns, it was about the unwillingness to adapt particular social scripts of gendering to changing social and moral realities. As Jamie Nelson Lindemann (2016) has pointedly argued, the "drive [of these bills] is to use the law, not only to limit trans presence in public spaces, but […] to delegitimize transgender people as such."

successes can be described as the establishment of gender identity as an adequate grounding property for gender ascriptions. Concretely: trans activism has made it possible (in some contexts) to prioritize identification with a gender over external perception. In that regard, it has profoundly challenged the normative structure of gender.

In some respects, this challenge has also had an effect on legal practices of conferring a sex on someone. Many jurisdictions around the world still forbid legal sex changes and, in most of those that allow it, expert testimony (for instance, in the form of a diagnosis of gender identity disorder) is required. However, there are at least three jurisdictions that I am aware of where identification alone is enough to apply for a legal sex change: Argentina, Denmark, and Malta. Another case in which identification is about to have an effect on legal practices are the campaigns for the introduction of a third legal sex in California and Germany. In Germany, intersex persons recently won the right to a "positive entry" (BVerfG 2017) of their civil status gender, as opposed to the "blank" on birth certificates that had been available since 2013. In practice, this decision of Germany's highest court signals an important ontological shift: instead of treating intersex persons as biological "undefinables" (who might be forced to undergo surgery and other medical procedures in order to become "definable" as male or female), the decision now requires that people's (future) gender identity (which might be masculine, feminine, or a "third option")[20] is allowed to play a role in the determination of their legal sex.

However, the "normative openings" that make such a partially voluntaristic re-interpretation of practices of sexing and gendering possible also lead to normative conflicts. There is no straight causal line from sex to gender to gender identity, nor from gender identity to gender to legal sex designation. Biological sex markers do not strictly define that someone will be perceived and will identify as a woman; and neither will her identification as a woman guarantee that she will be perceived as one. Precisely because this is so, thinking about what sex and gender are demands that we also think about "what we want them to be" (Haslanger 2000).[21]

20 "Third option" (*dritte Option*) was the slogan with which intersex groups in Germany campaigned for the introduction of a "positive entry" for a third sex.

21 So for instance, while the mere existence of what the medical establishment now calls "disorders of sex development" (and used to call "hermaphroditism") does not imply that we ought to create a legal category for "hermaphrodites", the fact that infants' genitals are still needlessly mutilated in the name of the sex binary might.

5 Conferralism about Nationality

In analogy to the distinction of *legal sex*, *gender*, and *gender identity*, we can distinguish *legal nationality*, *social nationality*, and *national identity*. For legal nationality, the conferralist picture would look as follows:

1. P^C: being German
2. S: legal authorities
3. A: the issuance of identity documents that state legal nationality (passports, for instance)
4. C: applying for such identity documents with appropriate "breeder documents" (birth certificates, for instance)
5. P^G: evidence of administrative actions that show these "breeder documents" to be valid, or the relevant testimony of other persons.

For social nationality, it would look like this:

1. P^C: being perceived as German
2. S: subject S in a particular context C
3. A: the perception of subject S that a person is German
4. C: a variety of situations in which perceived nationality might become salient: casual conversations on public transport, parties, academic conferences, etc.
5. P^G: legal nationality, the person's appearance, behavior, manner of dress, speech, etc.

Once again, what is of particular interest to me in this context is the difference between a single administrative act (legal nationality) and a multipolar social process (social nationality). Since the conferral of social nationality lacks a central authority, it can, like gender, become a site of confusion and contestation. Another anecdotal example: at international conferences in Europe, I have been mistaken for an American because of my accent, while my name might be taken to suggest Scandinavian heritage and my badge (until last year) showed that I lived and worked in Sweden. So when I start speaking German in such a setting, a fellow German might praise my perfect command of the language, taking me for someone who learned German as a second or third language; and their surprise suggests that some routine social scripts (for instance, expectations about what Germans or Americans "sound like") have been disrupted.

The same confusion that is a source of harmless amusement for me, can, however, easily turn into insult and disenfranchisement, both socially and legally. Consider refusals to recognize someone as German or American when they do not conform to stereotypical expectations of "German-ness" or "American-ness" (and in analogy for other nationalities). On the legal and political level, consider

the ongoing "debates" in many European countries about whether Muslims can ever be full citizens of a liberal democracy; or consider how frequently non-White citizens in White-majority countries are regarded as "foreigners", even when they are citizens by birth.[22] For a plenitude of historical examples, consider the United States, which had explicitly racist immigration policies from the Chinese Exclusion Act of 1882 until at least the 1960s,[23] and which during and after World War II, inscribed "[a] homosexual-heterosexual binary […] in federal citizenship policy" in order to prevent gays and lesbians from immigrating and from serving in the army and the administration (Canaday 2009, p. 3).

What all these examples have in common is that groups of people are cast as "not really belonging" despite the fact that they are citizens. Their legal nationality is put in conflict with perceived social nationality. Sometimes such contestations do affect the legal framework: Germany allowed dual citizenship only after long and arduous debates, and introduced citizenship tests when the formal requirements for naturalization were relaxed; and the United States is still mired in hyper-polarized political debates about immigration and naturalization.[24] It is precisely the lack of a central authority in matters of social nationality that makes the concept an attractive battleground for those who advocate a more restrictive legal framework, that is, less immigration, fewer naturalizations, and more limits on how citizens can serve their country. The state, the argument goes, should be in the business of protecting communal national identities, and so the full entitlements of legal nationality should be reserved for those who (in one way or another) have proven that they have adopted this communal identity.[25]

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22 Until 2016, the Dutch Central Bureau of Statistics (CBS), classed citizens as *allochtoon* ("from a different soil") when one of their parents was born outside of the Netherlands, with a further distinction between "Western" and "non-Western" *allochtoon*. Similarly, the German Federal Office for Migration and Refugees (BAMF) still uses the concept *Migrationshintergrund* ("migratory background") for actual immigrants (legal residents), naturalized citizens, and citizens by birth, if one of their parents did not possess German citizenship at birth.

23 Not to speak of the many ways in which many of these policies were and still are implicitly racist.

24 As for sexual citizenship, the United States allowed gays and lesbians to openly serve in the military only in 2010, and against considerable opposition from within the military and from the broader public. How President Trump's announcement that he intends to "ban trans" from the US military will affect the actual legal and political situation for LGBT persons in the armed forces remains to be seen; for the moment, it looks like his attempt to ban trans people from serving openly has been successfully blocked by the courts.

25 This argument has been pushed time and time again by David Miller, who suggests that one of the state's most important functions is the promotion and protection of national cultures (see, for instance, Miller 1995, p. 88).

6 Epistemic Authority and Nationality

But how do states actually make decisions about the conferral of legal nationality? Criteria for legal nationality must be formulated in such a way that a range of different institutions can use and understand them. They must be generalizable across different contexts and they must not allow ambiguous answers. This leaves us with the following problem: it seems that either there is going to be an infinite regress of criteria with an arbitrary cut-off point or that legal nationality must be responsive to social nationality or national identifications (in the same way that legal sex ascription can become receptive to gendering practices and gender identifications). The problem of a potentially infinite regress of purely institutional criteria for nationality ascription is at its core a problem of epistemic authority. If we cannot or do not want to rely on a bureaucratic "paper trail" in order to determine nationality (and, by extension, citizenship), then we need to bring in other epistemic criteria and risk creating a double-bind of self-identification (where citizenship might be awarded based on individual testimony alone) and zealous cultural nationalism (where the term "culture" is used to exclude those who are marked as "foreign" and "impossible to assimilate").

To see the epistemic problem more clearly, consider the criterion for legal nationality that assigns nationalities according to place of birth (*ius soli*). The criterion "place of birth" looks like it straightforwardly refers to some objective, geographical location. But the geographical location in this context is relevant only insofar as it lies within a particular territory. This territory, in turn, belongs to a nation-state: an institution. Second, the fact that a given geographical location was the place of birth of a new citizen must be recorded by an institution; the task of doctors or nurses who enter the date, time, and location of birth into a form and of civil servants who record the births in an official registry. These institutions themselves are either a part of or connected to the institutions of the nation-state. And either way, the interesting question is where do all these institutions get their power: by whose authority is a given territory part of a nation-state, and by whose authority can an institution make binding declarations about births having occurred in a specific place?

If the answer is "by the *nation's* authority, naturally" we face a new puzzle. For either "the nation" refers to pre-institutional facts or it is – what Searle's critics have called – "a freestanding Y term" (Searle 2010, p. 20): a social construction that has no basis in facts that are not themselves constructed. So it looks like we either need to accept that nation-states act in the name of some pre-institutional national identity or that the authority of the nation-state is inescapably circular: it acts in the name of a citizenry it also defines.

7 The Myth of the Pre-Institutional Nation

Every nation-state is in the business of nation-building. And any nation, especially a new one, needs national symbols: a flag, a coat of arms, an anthem, patriotic songs, and holidays. But nation-building does not stop at symbolism; it must also create and maintain institutions with real causal powers, for "the state was the machine which had to be manipulated if a 'nationality' was to turn into a 'nation'" (Hobsbawm 1992, p. 96). One example for this "manipulation" is the role of language in nation-building. National languages are not innocent pre-political facts that get picked up along the way by emerging political nationalisms. Rather, national languages are political and institutional creations, which require "writers, teachers, pastors, and lawyers" who invest their time and energy in recording oral traditions and transforming them into a written product that can be mass-(re)produced (Anderson 2006, p. 74–75). National languages also require heavy financial investments in universal primary education, where young citizens-to-be are instructed in the correct use of the standardized language. This means that local and regional dialects and languages, which (often unlike the new national language) *are* grounded in local and regional traditions, are pushed back (Anderson 2006, p. 78).[26] In Ernest Gellner's words, nation-building is

> the general imposition of a high culture on society, where previously low cultures had taken up the lives of the majority […]. It means that generalized diffusion of a school-mediated, academy-supervised idiom, codified for the requirements of reasonably precise bureaucratic and technological communication. (1983, p. 57)

The case of language illustrates the general epistemic dilemma of nationalism: if national languages are political creations of emerging nation-states, then there are no pre-institutional linguistic facts that could determine why a particular version of French, German or Spanish would be particularly suited to become the national standard. The issue might seem obvious in cases of multilingual states, which *must* make decisions about official language(s) according to political expediency, but it is often obscured in the case of *de facto* or *de iure* monolingual ones.

Similarly, if national cultures and traditions are creations of emerging nation-states (and not, as nationalists often suggest, pre-institutional facts that strive towards their political realization in a nation-state), then there are no pre-institutional cultural facts that determine why (say) some tradition counts as German

26 My grandparents, who still spoke Low German (*Plattdüütsch*) at home, remembered how village teachers forced children to only speak High German at school; whereas when I was in elementary school, there were various initiatives (like reading competitions) to bring back *Plattdüütsch* from the brink of extinction.

and another does not. "German culture" is a political product and the nationalist appeal to an allegedly pre-political version of this culture is itself an exercise in political ideology. This is shown quite clearly in an ongoing debate about the German term *Leitkultur*, which was re-ignited in the spring of 2017 when Minister of the Interior, Thomas de Maizière, published ten theses about what *Leitkultur* consists in in the tabloid paper *Bild am Sonntag*.[27] De Maizière was widely ridiculed and criticized for what he had intended as a "discussion starter", but a closer look at the content of his theses is instructive for our purposes. His theses read like a political pamphlet, not like a dispassionate description of what Germany is like. Indeed, this ambiguity between political claims and descriptions is inherent in the very term *Leitkultur*, which can be translated neutrally as "mainstream culture", but also normatively as "guiding culture".

Take his claim (Thesis 6) that "religion brings our society together and doesn't tear it apart," and that the "German state is neutral, but friendly toward the Churches and religious communities." As descriptive claims, both are false: Not only was "the German state" not always friendly toward the Churches (Otto von Bismarck, the first chancellor of the unified German Reich, was notoriously *unfriendly* toward the Catholic Church and mobilized the state against it), but in the current climate of heightened fear of immigration and terrorism (both projected primarily onto Muslims) religion has also become something that divides German society. De Maizière actually exploits this division when he states (Thesis 1) that "we are not burqa" [sic][28] and that "we" show our faces in public and shake hands when we greet each other. Other claims that he makes are so vague as to apply to a wide range of societies: that "we" appreciate education as a value in itself, not merely as a means to an end (Thesis 2); that "we" demand quality performance and reward achievement (Thesis 3); and that "we" solve our conflicts by civil means and strive for compromise (Thesis 7). None of this is exclusively German, nor is any of this historically German, especially not Thesis 7.

27 The text was also published on the website of the German Ministry of the Interior, at http://www.bmi.bund.de/SharedDocs/Interviews/DE/2017/05/namensartikel-bild.html (visited on 2 May 2017) which is the version that I will be referring to. All translations from German to English are mine.

28 In this context, it is worthwhile to note that just a few days prior to the publication of de Maizière's theses, the German parliament passed a law that would prohibit civil servants (and those acting in official functions akin to those of civil servants) from wearing a burqa, hijab, or niqab while performing their duties. According to media reports, this law currently applies to *no one* – there are simply no known conflicts of the kind addressed by the law. It is merely political symbolism, in lieu of a general (but likely unconstitutional) "burqa ban", which would itself target at most a few hundred individuals.

So what was de Maizière doing? I expect him to be aware of the illiberal and violent traditions that have played a role in the historical development of contemporary Germany. Hence, if we do not want to take him to be ignorant, we must read him as engaging in a normative debate about what *should* count as German: a commitment to education, the peaceful solution of conflicts, mutual respect but also the rejection of specific customs that many Germans find alien and threatening, like covering one's face in public. What makes de Maizière's claims rhetorically effective is precisely their ambiguity: he wavers between the language of *ought* and the language of *is*. "We are not burqa" means both "The majority of Germans find burqas alien and threatening" and "This majority is correct to feel this way." But while rhetorically effective, theses like de Maizière's offer no neutral *epistemic* criteria for deciding what counts as German and what does not, for the *Leitkultur* he envisages is a normative agenda only thinly disguised as a set of observations.

There are no pre-institutional identities, cultures or linguistic communities from which the political and social borders between nation-states and their citizens are derived. These borders are political products and their drawing and re-drawing is a continuous political process. This means that claims about "national cultures", which supposedly provide rationales for drawing borders in a particular way and place, must be engaged with normatively (and cannot be debunked merely by exposing their lack of empirical grounding). If there are no pre-institutional entities that provide such grounding, then the deployment of such terms must be regarded as a politically and morally charged act, even and especially where those who deploy them pretend that they are "just stating facts." When it comes to nation-states, there are no value-neutral facts: "all nations are "created", none are truly primordial" (Calhoun 1993, p. 222).

8 Conferralism and Political Morality

Let me now bring this discussion back to the starting point of this paper: the application of conferralism about sex and gender to nationality. My main suggestion in the previous section can be reformulated as follows: The conferral of social nationality is a continuous and normatively charged social process that lacks a central authority. As such, it is an arena for competing understandings of what this identity ought to be and who belongs to it. These competing understandings can lead to conflict, and sometimes violence. For an extreme example, we might think of Nazis threatening and attacking those whom they perceive as "aliens". Such conflicts acquire a different quality when the state itself gets

involved on the side of ethnic or cultural homogeneity and purity and becomes what Brubaker (1996, p. 83–84) calls "nationalizing states." Nazi Germany can in this way be understood as an extreme nationalizing state, which considered genocide a legitimate means of settling conflicts about national identity. The Nazis conceived of German nation as a racially pure body (*Volkskörper*) and identified Jews, Communists, and gays as "germs" and "pests"[29] that threatened this body's health – a supposed threat they set out to "eliminate" by mass murder (Emcke 2016, p. 121–123). Not every nationalizing state resorts to violence, but the example illustrates the general moral dangers that lurk behind a state siding with one particular social understanding of national identity. Where *legal nationality* is receptive to vague but nevertheless highly normative and exclusionary notions of *social nationality* (and especially where such definitions appeal to fears of losing this nationality), the resulting policies are likely to fuel discrimination and hatred that divide rather than stabilize civil society.

Of course, I also argued that the category of legal nationality cannot simply be grounded in value-*neutral* facts either. For instance, to decide that five years rather than ten years of uninterrupted residence are sufficient for naturalization is a *political* decision and as such, it belongs to a particular normative framework. Those backing the decision cannot appeal to any pre-political, pre-institutional or pre-normative facts to support their argument; but neither can those opposing it. They must (or at least ought to) engage in political and moral debate. And they must reveal their normative presuppositions and not attempt to hide them behind reductionist talk. As long as nation-states exist, the necessity for such debates will be with us and the geographical, legal, and ideological borders of nation-states will be contested.[30] The fact that these disputes are moral and political does not mean that their outcomes are arbitrary or meaningless. Just like Nazis can be resisted with moral arguments and, in appropriate cases with morally backed coercion, debates between supporters and opponents of relaxed requirements for naturalization can and indeed must resort to moral reasoning in order to be intelligible and (at least in principle) resolvable. As long as the moral character of such debates is visible, there is hope that this will make it more difficult for those with a reductionist "nationalizing" agenda to hijack them.

29 Nazi propaganda films juxtaposed images of Jews living in the squalor of the ghettoes with images of rats and cockroaches.

30 Eliminativists might retort at this point that our preferred strategy should be to transcend these debates by abolishing the nation-state for the sake of cosmopolitan justice. This raises a question which I cannot answer here: namely to what extent institutions that are so entrenched as nation-states are can be simply abolished (rather than reformed).

A similar reasoning applies to sex and gender. Both are politically and morally charged categories and the political and moral disputes around them are not going to be resolved by an appeal to "nature" or "biology" – no matter how fervently some participants in these debates might clamor for such a resolution. Whether or not same-sex couples should have the right to marry does not hinge on whether gays and lesbians are "born that way". Nor does it hinge on whether the institution of marriage has a "natural" basis in human procreation. It hinges instead on whether a modern liberal democracy can reconcile a denial of this right with its own grounding values. Whether or not trans people ought to be legally recognized and protected does not hinge on whether they are "really" men or women, nor on whether their status as "trans" has a psychosocial or biochemical cause. It hinges on whether a modern liberal democracy can afford to refuse them protection and recognition. Similar observations can be applied to historical controversies, for instance regarding women's suffrage or women's right to work. These controversies were never really about the "natural abilities" of women; they were about a moral and political question: on what grounds could a modern state possibly refuse women access to vast areas of social and political life? This question (about access and participation) is now being recast for queers as well as for migrants and refugees. This makes it imperative to keep its normative impact at the forefront of these debates; for neither the "realness" of nations, nor the "realness" of sex and gender, is grounded in static biological or cultural facts, but in institutional facts that are susceptible to political and moral agency.

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