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# They, Them, and Theirs

Jessica Clarke

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# THEY, THEM, AND THEIRS

Jessica A. Clarke

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## THEY, THEM, AND THEIRS

Jessica A. Clarke\*

*Nonbinary gender identities have quickly gone from obscurity to prominence in American public life, with growing acceptance of gender-neutral pronouns, such as “they, them, and theirs,” and recognition of a third-gender category by U.S. states including California, Colorado, Minnesota, New Jersey, Oregon, and Washington. People with nonbinary gender identities do not exclusively identify as men or women. Feminist legal reformers have long argued that discrimination on the basis of gender nonconformity — in other words, discrimination against men perceived as feminine or women perceived as masculine — is a harmful type of sex discrimination that the law should redress. But the idea of nonbinary gender as an identity itself appears only at the margins of U.S. legal scholarship. Many of the cases recognizing transgender rights involve plaintiffs who identify as men or women, rather than plaintiffs who seek to reject, permute, or transcend those categories. The increased visibility of a nonbinary minority creates challenges for other rights movements, while also opening new avenues for feminist and LGBT advocacy. This Article asks what the law would look like if it took nonbinary gender seriously. It assesses the legal interests in binary gender regulation in areas including law enforcement, employment, education, housing, and health care, and concludes these interests are not reasons to reject nonbinary gender rights. It argues that the law can recognize nonbinary gender identities, or eliminate unnecessary legal sex classifications, using familiar civil rights concepts.*

*What gender am I? I bet you thought either male or female before I even asked the question. And this assumption is called the gender binary.*

*I was born non-binary, meaning my body and mind don't fit into either gender. At the age of 2, I told my parents I wasn't a girl. At 12, I was the only person on my football team without a penis. And today at 36, I can wield a chainsaw 50 feet up a tree, and I'm also really a soft sensitive artist type.*

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\* Professor of Law, Vanderbilt University Law School. Thanks to Toby Adams, Bradley Areheart, Genny Beemyn, Stephanie Bornstein, Mary Bryson, Erin Buzuvis, Mary Anne Case, Paul Castillo, Arli Christian, David Cruz, Heath Fogg Davis, Robin Dembroff, Deborah Dinner, Elizabeth Emens, Katie Eyer, Joseph Fiskhin, Andrea Freeman, Andrew Gilden, Michele Goodwin, Aimi Hamraie, Gautam Hans, Jill Hasday, Aziz Huq, Alex Iantaffi, Neha Jain, Dru Lefvasseur, Bill McGeveran, Shannon Minter, Amy Monahan, Rebecca Morrow, Douglas NeJaime, AJ Neuman Wipfler, Bethany Davis Noll, David Noll, Aaron Potenza, Jessica Roberts, Darren Rosenblum, Laura Rosenbury, Alan Rozenshtein, Naomi Schoenbaum, Jennifer Shinall, Russell Spiker, Maayan Sudai, Hudson Taylor, Ezra Young, the University of Minnesota Public Law Workshop, the Institute for Advanced Study at the University of Minnesota, the Vanderbilt LGBT Policy Lab, the University of Chicago Workshop on Regulation of Family, Sex, and Gender, and the law faculties at the University of Minnesota and the University of Florida for conversations and comments on this project. Thanks to Katie Hanschke of the Vanderbilt Law Library for tracking down sources. For research assistance and valuable substantive feedback, I am grateful to Maria Brekke, Emily Lamm, Sara Lewenstein, Jessica Sharpe, Derek Waller, Claire Williams, and the editors of the *Harvard Law Review*. All opinions expressed here are my own.

*Our identities, who we know ourselves to be, is affected by our biology and the environment, nature and nurture. There are non-binary folks who are intersex, they have ambiguous genitalia, chromosomes that are not XX or XY. 1 in 100 people have bodies that differ from standard male or female.*

*And there are non-binary folks who do have genitalia that is considered standard male or female, but our brains have always been transgender. And collectively, we are the solid evidence that there is, and always has been, a spectrum of gender variation in the human species.*

— Carly Mitchell<sup>1</sup>

## INTRODUCTION

With stunning speed, nonbinary gender identities have gone from obscurity to prominence in American public life. The use of gender-neutral pronouns such as “they, them, and theirs” to describe an individual person is growing in acceptance.<sup>2</sup> “All gender” restrooms are appearing around the country.<sup>3</sup> And an increasing number of U.S. jurisdictions are recognizing a third-gender category. In June 2016, an Oregon court became the first U.S. court to officially recognize nonbinary gender identity.<sup>4</sup> In October 2017, California passed its Gender Recognition Act,<sup>5</sup> a law allowing any individual to change the sex

<sup>1</sup> *Gender Identity: Female, Male, or Nonbinary: Hearing on S.B. 179 Before the Assemb. Standing Comm. on Judiciary*, 2017–2018 Leg., Reg. Sess. (Cal. 2017) [hereinafter *Cal. Assemb. Judiciary Hearing*] (statement of Carly Mitchell), <https://ca.digitaldemocracy.org/hearing/53965?startTime=705&vid=55910b927084f97bc382c39bfoecade2> [<https://perma.cc/H8T3-NJ6R>].

<sup>2</sup> See, e.g., THE ASSOCIATED PRESS STYLEBOOK 274 (Paula Froke et al. eds., 2017) (advising journalists in describing “people who identify as neither male nor female or ask not to be referred to as he/she/him/her” to “[u]se the person’s name in place of a pronoun, or otherwise reword the sentence, whenever possible. If they/them/their use is essential, explain in the text that the person prefers a gender-neutral pronoun. Be sure that the phrasing does not imply more than one person” (emphasis omitted)); Lexy Perez, *Super Bowl: Coca-Cola Represents “Them” in Non-binary Ad*, HOLLYWOOD REP. (Feb. 5, 2018, 10:37 AM), <https://www.hollywoodreporter.com/news/super-bowl-coca-cola-represents-binary-ad-1081767> [<https://perma.cc/JJ3B-4ZWD>] (discussing a Super Bowl advertisement featuring a person described as a “them” rather than a “him” or a “her”).

Not all nonbinary people use “they, them, and theirs” but these seem to be the most commonly used gender-neutral pronouns. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 18, 49 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [<https://perma.cc/35MN-AVDX>] (surveying 27,715 transgender people and reporting that 29% use “they/them,” *id.* at 49). Some people who have male or female gender identities use “they, them, and theirs” as well.

<sup>3</sup> Aimee Lee Ball, *In All-Gender Restrooms, the Signs Reflect the Times*, N.Y. TIMES (Nov. 5, 2015), <https://nyti.ms/1RxHpEM> [<https://perma.cc/789Q-N2TX>].

<sup>4</sup> *In re The Sex Change of Jamie Shupe*, No. 16CV13991, slip op. at 1 (Cir. Ct. Or. Multnomah Cty. June 10, 2016).

<sup>5</sup> S.B. 179, 2017 Leg., Reg. Sess. (Cal. 2017) (enacted).

designation on their official documents to “nonbinary.”<sup>6</sup> At the time of this writing, eight states, New York City, and Washington, D.C., have all adopted rules to allow “non-binary” or “X” designations on certain identification documents.<sup>7</sup> These U.S. jurisdictions are catching up with other countries, including Canada, Australia, India, and Germany.<sup>8</sup>

People with nonbinary gender identities do not exclusively identify as men or women.<sup>9</sup> The term “gender identity” generally refers to a person’s internal sense of whether they are a man or a woman<sup>10</sup> while “sex” refers to “bodily characteristics” or the male or female designation ascribed to an infant at birth.<sup>11</sup> Nonbinary people are often said to fit

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<sup>6</sup> *Id.* § 11 (allowing applicants to change the sex markers on their birth certificates and drivers’ licenses to “nonbinary” upon attestation that the change “is to conform the person’s legal gender to the person’s gender identity and is not made for any fraudulent purpose”).

<sup>7</sup> *Id.*; N.J. STAT. ANN. § 26:8-40.12 (West 2018) (allowing people to change their birth certificate gender markers to “undesignated/non-binary” effective February 2019); Nonbinary Identification Cards Amendment Act of 2018, D.C. Act 22-466, 65 D.C. Reg. 011402 (Oct. 9, 2018) (to be codified at D.C. CODE § 50-1401.01 after a 30-day period of congressional review) (allowing applicants for drivers’ licenses to “designate their gender as nonbinary”); WASH. ADMIN. CODE § 246-490-075 (2018) (allowing people to identify as X rather than M or F on birth certificates); N.Y.C., N.Y., ADMIN. CODE § 17-167.1 (Oct. 9, 2018) (allowing an “x” designation on birth records to designate “a sex that is not exclusively male or female,” *id.* § 17-167.1(a)); Press Release, Dep’t of the Sec’y of State, State of Me., Maine BMV to Offer Non-binary Gender Designation on Driver’s Licenses, ID Cards (June 11, 2018), <https://www.maine.gov/sos/news/2018/genderdesignationdclid.html> [<https://perma.cc/T9XA-Y9XQ>]; News Release, Or. Dep’t of Transp., “Not Specified” Gender Choice Coming to Driver Licenses (June 15, 2017), <https://content.govdelivery.com/accounts/ORDOT/bulletins/1a2bd9e> [<https://perma.cc/9JU4-86C4>]; Associated Press, *Minnesota Licenses Can Now Designate Gender as “Nonbinary,”* STARTRIBUNE (Oct. 3, 2018, 1:00 PM), <http://www.startribune.com/minnesota-licenses-can-now-designate-gender-as-nonbinary/495046021/> [<https://perma.cc/PJH5-5BDG>]; Curtis M. Wong, *Arkansas Has Been Offering a Nonbinary Gender Option on State IDs for Years,* HUFFINGTON POST (Oct. 17, 2018, 6:50 PM), [https://www.huffingtonpost.com/entry/arkansas-gender-neutral-state-id-option\\_us\\_5bc79f75e4bod38b5874a669](https://www.huffingtonpost.com/entry/arkansas-gender-neutral-state-id-option_us_5bc79f75e4bod38b5874a669) [<https://perma.cc/GF2K-ZA3S>]; *FAQ: Non-binary Sex Identifier on Driver Licenses and Identification Cards,* COLO. DEP’T OF REVENUE (Nov. 8, 2018), <https://www.colorado.gov/pacific/sites/default/files/CO%20non-binary%20sex%20identifier%20FAQ%2011.08.18.pdf> [<https://perma.cc/K6G6-M7L8>].

<sup>8</sup> Canada began offering nonbinary designations on identity documents in August 2017, joining Australia, Bangladesh, Germany, India, Malta, Nepal, New Zealand, and Pakistan, which all offer some form of nonbinary recognition. Niraj Chokshi, *Canada Introduces “X” as a Third Sex Category for Passport Holders,* N.Y. TIMES (Aug. 25, 2017), <https://nyti.ms/2wvdnRf> [<https://perma.cc/JG9H-CKU7>].

<sup>9</sup> GLAAD MEDIA REFERENCE GUIDE 11 (10th ed. 2016), <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> [<https://perma.cc/Z7PR-C8ZQ>]. I offer the definitions in this paragraph in the interest of clarity. I do not purport that these definitions are “correct” in any metaphysical or moral sense, nor do I argue the law should define these terms in any particular way in every context. See *infra* section II.A, pp. 933–36 (arguing against any one definition). I also note that terminology is in flux. While these terms and definitions are standard at present, they may one day be supplanted by others as social movements refine the relevant terminology to reflect evolving understandings.

<sup>10</sup> GLAAD MEDIA REFERENCE GUIDE, *supra* note 9, at 10 (defining “gender identity” as “[a] person’s internal, deeply held sense of their gender,” most commonly whether they are “man or woman (or boy or girl)”).

<sup>11</sup> *Id.* (explaining that “sex” means “a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics”).

under the heading “transgender”: “An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.”<sup>12</sup> But not all non-binary people identify as transgender, and many transgender people identify as men or women.<sup>13</sup> Nonbinary gender identity is not the same thing as intersex variation. “‘Intersex’ refers to people who are born with any of a range of sex characteristics that may not fit a doctor’s notions of binary ‘male’ or ‘female’ bodies.”<sup>14</sup> While some nonbinary people have intersex variations, not all do,<sup>15</sup> and many people with intersex variations have male or female gender identities.<sup>16</sup>

Nonbinary gender identities are not new,<sup>17</sup> but media attention to nonbinary people in the United States has increased significantly since 2015.<sup>18</sup> Nonbinary characters are now portrayed on television as

<sup>12</sup> *Id.* Gender expression means “[e]xternal manifestations of gender, expressed through a person’s name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics.” *Id.*

<sup>13</sup> See, e.g., Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 4–5 (Paisley Currah et al. eds., 2006).

<sup>14</sup> *Intersex Definitions*, INTERACT, <https://interactadvocates.org/intersex-definitions/> [<https://perma.cc/JA3P-JXA5>] (“Variations may appear in a person’s chromosomes, genitals, or internal organs like testes or ovaries. Some intersex traits are identified at birth, while others may not be discovered until puberty or later in life.”). The percentage of the population with intersex traits is estimated at less than 2%. Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 161 (2000) (surveying medical literature since 1955 and concluding that deviation from medical ideals of dimorphism in chromosomes, gonads, and genitalia could be as frequent as 2% of live births, although a much smaller percentage of those infants would be recognized as intersex). While this percentage may seem small, it is larger than the incidence of children born with Down syndrome. Kristin Zeiler & Anette Wickström, *Why Do “We” Perform Surgery on Newborn Intersexed Children? The Phenomenology of the Parental Experience of Having a Child with Intersex Anatomies*, 10 FEMINIST THEORY 359, 359 (2009).

<sup>15</sup> See *supra* note 1 and accompanying text.

<sup>16</sup> See, e.g., SHARON E. PREVES, *INTERSEX AND IDENTITY: THE CONTESTED SELF* 60–85 (2003) (interviewing people with intersex variations who struggle to be accepted as women or men).

<sup>17</sup> See, e.g., Gilbert Herdt, *Preface*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 11, 11 (Gilbert Herdt ed., 1996) (“For centuries the existence of people who did not fit the sex/gender categories male and female have been known but typically dismissed from reports of certain non-Western societies, while in the Western European tradition they have been marginalized, stigmatized and persecuted.”). While nonbinary gender identity has only recently become prominent in national media in the United States, people have been publicly identifying as nonbinary since at least the 1990s. See KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* 51–69 (Vintage Books 1995) (1994); GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY (Joan Nestle et al. eds., 2002).

<sup>18</sup> See, e.g., *Gender: The Space Between* (CBS News television broadcast Mar. 27, 2017), <https://www.cbsnews.com/video/gender-the-space-between/> [<http://perma.cc/9THJ-KNZL>]; Julie Scelfo, *A University Recognizes a Third Gender: Neutral*, N.Y. TIMES (Feb. 3, 2015), <https://nyti.ms/16rpyoY> [<https://perma.cc/B343-ABH4>]. This group identifies by a variety of terms, including “gender-queer,” “gender-nonconforming, bi-gender, non-binary, or just being fluid.” Steven Petrow, *Don’t Know What “Genderqueer” Is? Meet Someone Who Identifies that Way.*, WASH. POST (May 9, 2016), <http://wapo.st/1OhnQ14> [<https://perma.cc/7LSG-27HQ>].

sympathetic rather than silly.<sup>19</sup> In the largest survey of transgender people to date, 35% stated that they identify as nonbinary.<sup>20</sup> If that survey is representative, there may be about half a million people who identify as nonbinary in the United States, a population the size of the city of Miami.<sup>21</sup> These numbers are likely to increase as social acceptance of nonbinary gender identities grows.<sup>22</sup> Yet nonbinary people still face discrimination. Medical professionals are recognizing individuals with nonbinary identities as a population at risk of particular mental health problems due to stress stemming from marginalization and victimization.<sup>23</sup> Survey responses about transgender people's experiences with

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<sup>19</sup> See, e.g., Scott Collins, *Asia Kate Dillon on "Billions," Acting and Non-binary Choices*, VARIETY (June 6, 2017, 11:30 AM), <http://variety.com/2017/tv/awards/asia-kate-dillon-billions-acting-non-binary-choices-showtime-1202454977/> [<https://perma.cc/DP8Z-4799>] (discussing Asia Kate Dillon, who identifies as nonbinary and plays Taylor Mason, a nonbinary character on the cable-network show *Billions*); Danielle Corcione, "Chilling Adventures of Sabrina" Star Lachlan Watson on Non-binary Identity and Telling a Bit of Their Own Story Through Susie Putnam, TEEN VOGUE (Oct. 29, 2018, 2:54 PM), <https://www.teenvogue.com/story/lachlan-watson-susie-putnam-chilling-adventures-of-sabrina> [<https://perma.cc/CXL4-TL25>] (discussing a nonbinary actor who plays a character who "is exploring their gender" on a Netflix series); Jackie Strause, *Blowing Up the Binary: How "Transparent" Season 4 Is Personal for Jill Soloway*, HOLLYWOOD REP. (Sept. 25, 2017, 9:35 AM), <https://www.hollywoodreporter.com/live-feed/transparent-season-4-jill-soloway-gender-binary-1042629> [<https://perma.cc/PJZ9-CT3P>] (discussing an Amazon series that "features one character's journey to identifying as gender non-binary"). In the 1990s, the Saturday Night Live sketch "It's Pat" featured a character whose indeterminate sex was played for laughs. See MARJORIE GARBER, *VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* 207, 230–31 (1995).

<sup>20</sup> JAMES ET AL., *supra* note 2, at 18, 45 (describing the results of the U.S. Transgender Survey (USTS) and concluding: "With non-binary people making up over one-third of the sample, the need for advocacy that is inclusive of all identities in the transgender community is clearer than ever," *id.* at 5). The USTS defined its study population to include "individuals who identified as transgender, trans, genderqueer, non-binary, and other identities on the transgender identity spectrum . . . at any stage of their lives, journey, or transition." *Id.* at 23.

<sup>21</sup> This rough calculation assumes 35% of the 1.4 million transgender adults in the United States identify as nonbinary. ANDREW R. FLORES ET AL., WILLIAMS INST., *HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* 2 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf> [<https://perma.cc/M9LJ-3HHQ>] (estimating that 1.4 million adults identify as transgender). This figure may not reflect the growing number of people who do not identify exclusively as men or women. In a 2017 survey of 31,217 college students, 1.5% reported that they describe their gender identity as something other than man, woman, trans man, or trans woman. AM. COLL. HEALTH ASS'N, NATIONAL COLLEGE HEALTH ASSESSMENT, FALL 2017 REFERENCE GROUP DATA REPORT 55, [https://www.acha.org/documents/ncha/NCHA-II\\_FALL\\_2017\\_REFERENCE\\_GROUP\\_DATA\\_REPORT.pdf](https://www.acha.org/documents/ncha/NCHA-II_FALL_2017_REFERENCE_GROUP_DATA_REPORT.pdf) [<https://perma.cc/A9T9-NELK>] (surveying students from fifty-two postsecondary institutions in the United States).

<sup>22</sup> One commonly reported experience is a "moment" when a nonbinary person first realized that a gender identity other than man or woman might be possible and "everything . . . fell into place and made sense." *Gender: The Space Between*, *supra* note 18, at 11:36 (interview with Ela Hosp). The Internet is facilitating this moment. See *id.* at 21:00 (interview with Talia Bellia).

<sup>23</sup> See, e.g., H  l  ne Frohard-Dourlent et al., "I Would Have Preferred More Options": Accounting for Non-binary Youth in Health Research, 24 NURSING INQUIRY, Jan. 2017, at 1, 4; Christina Richards et al., *Non-binary or Genderqueer Genders*, 28 INT'L REV. PSYCHIATRY 95, 97–98 (2016).



education, health care, employment, and policing suggest that those with nonbinary gender identities are “suffering significant impacts of anti-transgender bias and in some cases are at higher risk for discrimination and violence” than transgender men and women.<sup>24</sup>

Nonbinary gender identity is not a niche concern. To the contrary, the legal response to nonbinary gender has important implications for a variety of other identity-based legal movements. Feminist legal reformers have long argued that discrimination on the basis of gender nonconformity — in other words, against men perceived as feminine or women perceived as masculine — is a harmful type of sex discrimination that the law should redress.<sup>25</sup> And scholars advocating for transgender rights have debated the role of what we might today call nonbinary identities in transgender rights struggles.<sup>26</sup> But surprisingly, the idea of nonbinary gender as an identity itself has appeared only at the margins of legal scholarship, not as a central object of study.<sup>27</sup>

This Article asks what American law would look like if it took nonbinary gender seriously.<sup>28</sup> What would it mean for the law to ensure

<sup>24</sup> Jack Harrison et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ POL’Y J. HARV. KENNEDY SCH. 13, 13 (2011–2012) (describing results of the 2008 National Transgender Discrimination Survey (NTDS), which surveyed 6450 transgender and gender-nonconforming people).

<sup>25</sup> See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2–3 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 3–5 (1995); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1774–88 (1998); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 9–10 (1995).

<sup>26</sup> See, e.g., Currah, *supra* note 13, at 4–5. Legal scholars have argued about whether sex discrimination law would protect nonbinary genders. Compare, e.g., David B. Cruz, *Acknowledging the Gender in Anti-transgender Discrimination*, 32 LAW & INEQ. 257, 258 (2014) (arguing that sex discrimination law forbids discrimination against “transgender people,” including those with an “inner sense of themselves as female or male (or less often, as both or neither)”), with Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J.L. & GENDER 399, 403 (2012) (arguing that “imperfect gender-nonconformists, whose gender identities are more difficult to understand from a binary perspective . . . would likely fall outside of the protection of federal civil rights law in its current formulation of gender non-conformity as sex discrimination”). The law review literature has advanced broad theories of gender deconstruction, including recent works such as Adam R. Chang & Stephanie M. Wildman, *Gender In/sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43, 54–63, 67–68 (2017) (outlining concepts); and Melina Constantine Bell, *Gender Essentialism and American Law: Why and How to Sever the Connection*, 23 DUKE J. GENDER L. & POL’Y 163, 206–220 (2016) (advocating an approach to challenge sex classifications grounded in Canadian doctrine).

<sup>27</sup> Christina Richards et al., *Introduction*, in GENDERQUEER AND NON-BINARY GENDERS 2 (Christina Richards et al. eds., 2017) (discussing “the dearth of existing literature” on nonbinary gender from various academic perspectives, and offering a chapter on U.K. but not U.S. law).

<sup>28</sup> No prior work of legal scholarship has asked this question. A few articles have focused on identity documents. See, e.g., Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 732–38 (2008) (discussing gender reclassification doctrines for transgender people); Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender*

nonbinary people's full participation in social, political, and economic life? This Article assesses the legal interests in maintaining systems that divide people into male and female categories in areas including law enforcement, employment, education, housing, and health care, and demonstrates that those interests are not reasons to reject the project of nonbinary inclusion. The law can recognize nonbinary gender using familiar civil rights tools and concepts. Nonbinary gender rights might take the form of recognition of a third-gender category, elimination of unnecessary legal sex classifications, or thoughtful integration of nonbinary people into rules or spaces that require binary categories. Many of the interventions suggested in this Article would require only modest extensions of existing law.

One contribution of this Article is to offer the legal literature a descriptive account of nonbinary gender. While nonbinary gender is not new, its legal possibilities are. Rights claims based on nonbinary gender require particular attention, because they are distinct from, if overlapping with, those focused on women or men who are gender-nonconforming, transgender, lesbian, gay, bisexual, or intersex. Nonbinary people pose a direct challenge to all modes of sex segregation, unlike transgender people seeking recognition as men or women.<sup>29</sup> Earlier iterations of feminist argument against binary gender took place within a cultural context in which alternatives to binary gender were scarcely imaginable. To many jurists and theorists, the concept of gender freedom seemed too "conceptually complex and practically costly" to implement.<sup>30</sup> Against this backdrop, challenges to binary gender appeared theoretical, utopian, and impossible, and therefore threatening to other feminist and LGBT projects. The increased visibility and advocacy of nonbinary people, as a minority, makes new legal arguments possible.<sup>31</sup> Yet nonbinary gender is, in many ways, a misfit for legal

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*Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491, 491 (2016) (advocating the eventual end of sex classification). My own work has explored binary sex classifications by analogy to the problem of *numerus clausus* in commercial law: When should there be a limited number of legal forms that the law recognizes, as in property, as opposed to a nearly infinite variety of agreements, as in contract? See Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 609 (2005); Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 768–69 (2015). For a different take on that analogy, see Sonia K. Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 398–400 (2017) (arguing that sex is better analogized to intellectual property than to real estate). This Article's ambition is different — it is to examine the very recent and dramatic advance in nonbinary visibility and to ask what the law would look like, as a practical matter, if it took nonbinary gender seriously.

<sup>29</sup> Cf. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1055 (7th Cir. 2017) (noting approvingly that "allowing transgender students to use [male or female] facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls").

<sup>30</sup> KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* 143–44 (2016).

<sup>31</sup> Cf. S. Bear Bergman & Meg-John Barker, *Non-binary Activism*, in *GENDERQUEER AND NON-BINARY GENDERS*, *supra* note 27, at 31, 33 (discussing how the "new social movement," as

categorization because nonbinary people defy categorization as a group. In resisting categorization, this minority casts new light on long-running debates over sex and gender regulation.

But this Article is not about theories of gender. Sex and gender regulation is an area of legal scholarship that might be described as *over-theorized*.<sup>32</sup> A second contribution of this Article is to suggest a contextual approach to debates over sex and gender regulation: analysis of the interests at stake in binary gender in each particular legal context. It examines recent legal, public, and legislative debates over nonbinary gender rights. These debates are often stymied by efforts to craft an all-purpose definition of sex or gender. They are hindered by simplistic assumptions about the shape that nonbinary gender rights must take. Opponents caricature the options as either creating a separate third-gender category that is afforded special legal treatment, or stripping law and society of all gender. For example, they ask, would nonbinary people require their own sports teams under Title IX?<sup>33</sup> Or would they demand the end of all women's sports under Title IX?<sup>34</sup>

This Article argues that U.S. civil rights law offers many options for addressing nonbinary gender rights. One strategy might be sex neutrality: eliminating the use of unnecessary sex classifications by government. This strategy would not attempt to abolish gender or mandate androgyny.<sup>35</sup> It would simply mean getting rid of rules that require people to choose the “male” or “female” category, when those rules do not serve important interests. For example, there is no good reason to designate

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well as “the longer histories of non-binary gender experience which have often been erased,” can “provide some sense of liveable non-binary lives”).

<sup>32</sup> See *infra* section II.A, pp. 933–36 (discussing theoretical debates about the definitions of sex, gender, and gender identity).

<sup>33</sup> See *Gender Identity: Female, Male, or Nonbinary: Hearing on S.B. 179 Before the S. Standing Comm. on Judiciary*, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (statement of Jonathan Keller, Chairman and CEO, California Family Council), <https://ca.digitaldemocracy.org/hearing/52473?startTime=465&vid=64fe0449e847fd5c9d8d349540eaa75> [<https://perma.cc/8HEA-SVDH>] (“The third gender would be subject to Title IX, which could mean that California’s 150 public universities, and over 10,000 public schools serving K-12 students would be required under federal law to not only provide male and female athletic teams and facilities, but non-binary facilities and teams as well.”).

<sup>34</sup> See *infra* section III.C.2, pp. 966–74.

<sup>35</sup> For example, it is telling that MTV’s first gender-neutral acting award went to an actor portraying a Disney princess. Hilary Lewis, *MTV Movie & TV Awards: Asia Kate Dillon Presents Gender-Neutral Acting Award to Emma Watson*, HOLLYWOOD REP. (May 7, 2017, 5:31 PM), <http://www.hollywoodreporter.com/news/mtv-movie-tv-awards-asia-kate-dillon-presents-gender-neutral-acting-award-emma-watson-1000935> [<https://perma.cc/DQ68-M2YF>] (discussing Emma Watson’s award for her role as the bookish princess Belle in Disney’s live-action *Beauty and the Beast*). This move toward gender neutrality is hardly the end of gender. Instead, it is a renegotiation of gender roles, which might be analyzed critically. See, e.g., PEGGY ORENSTEIN, *CINDERELLA ATE MY DAUGHTER: DISPATCHES FROM THE FRONT LINES OF THE NEW GIRLIE-GIRL CULTURE* 14 (2011).

single-user restrooms as men's and women's.<sup>36</sup> But sometimes, sex or gender classifications may serve useful functions. For example, at present, having an identification document with a sex designation that matches one's self-reported gender identity may protect a person from harassment by government officials.<sup>37</sup> In such cases, the appropriate strategy might be third-gender recognition: providing a third category to protect people with nonbinary gender identities and to express that they deserve the same respect as men and women. In a limited number of cases, there may be significant impediments to both third-gender recognition and sex neutrality. Sex-segregated prison housing might be an example.<sup>38</sup> In such cases, thoughtful integration of nonbinary people into binary categories may be the best short-term approach. This approach would redefine binary sex and gender categories to best fulfill the purposes of the regulation, while also respecting every person's gender identity, to the extent possible. This Article argues that these approaches are not mutually exclusive and that no one approach is the best fit for every context.

Opponents of nonbinary gender recognition argue that their "objections go well beyond the ideological" and pertain to the government's "many legitimate interests" in maintaining a system of binary sex classification.<sup>39</sup> They claim that the right to nonbinary gender identity will "open[] a Pandora's Box" of unforeseen evils.<sup>40</sup> A final contribution of this Article is to demonstrate this is not the case. Now that marriage law no longer needs to determine anyone's sex,<sup>41</sup> a diminishing number of legal arrangements rely on binary sex or gender classifications. This Article assesses the remaining legal interests in dividing people into male and female categories, including: ensuring the accuracy of identification documents and data; facilitating law enforcement; administering pregnancy protections; allowing people to use gendered pronouns without fear of liability for harassment; maintaining single-sex restrooms, educational programs, sports, and housing facilities; hiring members of one sex for particular jobs; and avoiding health care costs. It does not aim to rehash debates about transgender rights in general; it takes as a given

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<sup>36</sup> See *infra* section III.D.1, pp. 981–83.

<sup>37</sup> See *infra* section III.A, pp. 947–51.

<sup>38</sup> See *infra* section III.D.2, pp. 983–86.

<sup>39</sup> *WoLF Members Pushing Back Against Local "Gender Identity" Legislation*, WOMEN'S LIBERATION FRONT (Aug. 21, 2017), <http://womensliberationfront.org/wolf-members-pushing-back-against-local-gender-identity-legislation/> [<https://perma.cc/JH7T-F46M>].

<sup>40</sup> Tammerlin Drummond, *Not Male or Female: Proposed Law Would Create Gender-Neutral Option on California IDs*, EAST BAY TIMES (Aug. 21, 2017, 9:37 AM), <http://www.eastbaytimes.com/2017/08/20/not-male-or-female-proposed-law-would-create-third-gender-neutral-option-on-california-ids/> [<https://perma.cc/RVR6-KETB>] (quoting Jonathan Keller, CEO of the Family Research Council).

<sup>41</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

that the law should generally respect a transgender person's gender identity as a man or a woman.<sup>42</sup> This Article is interested in how non-binary gender changes the discussion in each particular context of binary gender regulation. Upon careful examination, it turns out that rather than opening Pandora's box, nonbinary gender rights may have unforeseen benefits.

This Article proceeds in three Parts. Part I describes nonbinary gender identity as a discrete phenomenon, advancing legal claims that both converge with and diverge from those of other civil rights movements. Part II argues for a contextual approach to nonbinary gender rights, demonstrating that civil rights law offers many possible legal models. Part III applies that contextual approach, cataloguing and assessing potential legal interests in keeping sex and gender binary, as opposed to the best legal alternatives in each context. It concludes the law does not require a universal definition of sex or gender that limits the options to two.

## I. NONBINARY GENDER

This Part describes nonbinary gender identities. It discusses the diversity of nonbinary genders and reasons for bias against nonbinary people. It then situates nonbinary gender with respect to movements around other identity issues, including feminist arguments for rights to gender nonconformity, the rights of transgender men and women, intersex advocacy, arguments for sexual-orientation nondiscrimination, and antiracist and postcolonial struggles. While there are overlaps between these rights claims, there are also areas of divergence.

This Part makes descriptive claims based on currently available data and information. These claims are provisional, by necessity, because nonbinary gender identities, terminology, and legal arguments are ever evolving. This Article does not presume to speak for any particular person or group. People with nonbinary gender identities and their advocates are developing a variety of arguments for inclusion, based on values such as liberty, equality, respect, privacy, and human flourishing. While I hope that some of these arguments may resonate with readers, this Article's goal is not to build the positive case for inclusion as an abstract matter.<sup>43</sup> I ask readers to assume that the law should treat

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<sup>42</sup> This Article cannot and does not attempt to persuade any reader who does not share this premise or is unwilling to assume it for the sake of argument. For a human rights argument, see Holning Lau, *Gender Recognition as a Human Right*, in *NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC* (Andreas von Arnould et al. eds., forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3056110](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3056110) [https://perma.cc/Q8WR-HBWB].

<sup>43</sup> One U.K. court made the positive case for nonbinary gender rights in terms of the rights to "private life" and "gender identification" protected by the European Convention on Human Rights.

nonbinary gender identities as having the same status as male and female ones. My question is what legal results would follow. This Article's normative argument, advanced in Parts II and III, is that the law has no abiding interest in maintaining a universal scheme of binary sex or gender regulation that would exclude nonbinary people.

### A. *The Diversity of Nonbinary Gender Identities*

There is no single model or even archetype of nonbinary gender identity. The following is a brief overview of the diversity of nonbinary gender identities. My purpose is not to offer anything approaching a precise definition of nonbinary gender, nor is it to flatten the diversity of nonbinary genders into a classificatory scheme.<sup>44</sup> Social media site Facebook offers its U.S. English-language users the option to describe their own gender identities in “a free-form field.”<sup>45</sup> As one set of survey researchers concluded, the wide array of gender identifiers listed by respondents “speak[s] to the creative project of gender identity creation” and “testifies to resilience, humor, and a spirit of resistance to gender indoctrination and policing.”<sup>46</sup> Nonbinary people may have any number of relationships to gender, including, to name a few, hybridity, rejection, dynamism, insistence on a third option, subversion, or all of these.<sup>47</sup>

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R (on the application of Elan-Cane) v. Sec’y of State for the Home Dep’t [2018] EWHC (Admin) 1530 [107]–[08], 2018 WL 03093374.

For thoughts on normative theories that might ground claims to nondiscrimination in the U.S. context, see Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015) (criticizing theories based on immutability and advancing theories based on antisubordination); and Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 377–78 (2014) (listing criteria that might apply to traits covered by discrimination law).

<sup>44</sup> I use the umbrella term nonbinary following the USTS, JAMES ET AL., *supra* note 2, at 4–5, while recognizing there is controversy over the best umbrella term to describe those people who do not exclusively identify as men or women, as well as controversy over whether an umbrella term is appropriate at all.

If anything, I aim to suggest a “nonce taxonomy” of individualized gender identities. “Nonce” means a term that can be used only once. Cf. EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 23 (1990). Sedgwick wrote of the diversity of desires — each one unique — but “nonce taxonomy” is also an apt descriptor for a discussion of nonbinary gender identities.

<sup>45</sup> Facebook Diversity, FACEBOOK (Feb. 26, 2015), <https://www.facebook.com/facebookdiversity/posts/774221582674346> [<https://perma.cc/SWN9-NZKZ>]; see also Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 261 (2005) (rejecting the analogy of gender to a “spectrum” and referring to it as a “galaxy”).

<sup>46</sup> Harrison et al., *supra* note 24, at 20.

<sup>47</sup> See, e.g., *id.* (“There appears to be no tension for many [survey respondents who wrote in their gender identities] between simultaneously identifying as fluidly gendered, multiply gendered, performing gender, or having no gender.”); Interview by Andrea Jenkins with Alex Iantaffi, Transgender Oral History Project 3 (Oct. 6, 2015) [hereinafter Iantaffi Interview], <https://umedia.lib.umn.edu/sites/default/files/archive/60/application/pdf/1553623.pdf> [<https://perma.cc/HM52-4G2Z>] (describing their gender identity as “non-binary gender-queer trans masculine”); Interview by Andrea Jenkins with Kate Bornstein, Transgender Oral History Project 3 (Aug. 20, 2015) [hereinafter Bornstein Interview], <https://umedia.lib.umn.edu/sites/default/files/archive/60/application/>

Examples of gender hybridity — combining gender roles into non-traditional configurations — might include bigender, pangender, and androgynous identities. For example, during an interview with the Transgender Oral History Project, therapist and scholar Alex Iantaffi described their identity as “mixed”: “not fully masculine, not fully feminine.”<sup>48</sup> They recall seeing the movie *Flashdance* when they were fourteen years old and identifying with the main character, named Alex, who “had sexual agency, she wears this tuxedo thing at one point, and she is a metal-welding dancer.”<sup>49</sup> College student Quinn Cox explains: “My gender identity, or how I feel inside, is more masculine, but still not fully male. If being female was like vanilla ice cream and male was like chocolate, I would be chocolate with a tiny vanilla stripe.”<sup>50</sup>

Examples of gender rejection — refusal to adopt traditional gender categories — might include agender, genderless, gender neutral, or unisex identities. For example, as one person explained: “I take agender a bit literally, in that my gender is more about the lack of it. Growing up, I never had that sense of being a guy, girl, or something else. My gender simply isn’t there.”<sup>51</sup> Gender rejection may also be about avoiding stereotyped expectations. Television producer and writer Jill Soloway observes that “when people see me as non-binary, I get treated more as a human being.”<sup>52</sup> They explain: “I identify as trans, which means that I am not seeking to synthesise my appearance with the label assigned to me at birth and instead am opting to live in a space where a label other than male or female is used to define me.”<sup>53</sup>

Examples of gender dynamism — gender identities that are not static over time — might include gender fluidity.<sup>54</sup> A gender fluid person

pdf/1337158.pdf [https://perma.cc/VZ6Z-Y5FH] (“[R]ight now I would call myself non-binary . . . femme-identified transsexual, or transgender . . . [T]here’s my sexual identity . . . I would call that diesel-femme. . . . Then there’s the identity I live every day now and I would call that, ‘little old lady.’ Really.”).

<sup>48</sup> Iantaffi Interview, *supra* note 47, at 16.

<sup>49</sup> *Id.*

<sup>50</sup> Quinn Cox, Opinion, *The Sex “X” Bill*, WESTERN HERALD (Nov. 9, 2017), [http://www.westernherald.com/opinion/article\\_3267eb80-c564-11e7-8548-f77dde6f35e1.html](http://www.westernherald.com/opinion/article_3267eb80-c564-11e7-8548-f77dde6f35e1.html) [https://perma.cc/9HYZ-7DJX] (describing their identity as “landing on the genderqueer spectrum”).

<sup>51</sup> Vera Papisova, *What It Means to Identify as Agender*, TEEN VOGUE (Jan. 20, 2016, 9:51 AM), <https://www.teenvogue.com/story/what-is-agender> [https://perma.cc/ACY6-YWSJ] (quoting an unidentified interviewee).

<sup>52</sup> Hadley Freeman, *Transparent’s Jill Soloway: “The Words Male and Female Describe Who We Used to Be,”* THE GUARDIAN (May 21, 2017, 10:00 AM), <https://www.theguardian.com/tv-and-radio/2017/may/21/transparents-jill-soloway-the-words-male-and-female-describe-who-we-used-to-be> [https://perma.cc/AFM6-ZZTS]. At the same time, Soloway has stated that they are “happy to speak on behalf of women and on behalf of feminism.” *Id.* They “agree that ‘woman’ shouldn’t mean a particular thing.” *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See, e.g., Harrison et al., *supra* note 24, at 14 (reporting that 20% of 2008 NTDS respondents selected “part time as one gender, part time as another” for their primary gender identity today).

might experience their gender differently at different times.<sup>55</sup> Actor Amandla Stenberg has said “I don’t think of myself as statically a girl.”<sup>56</sup> Gender fluid people may feel more male and use “he” pronouns on some occasions and feel more female and use “she” pronouns on others.<sup>57</sup> Or a person might be working on discovery of their gender identity, conceptualizing it as a journey or process. Professor Petra Doan’s experience of gender fluidity has prompted her to ask “whether one can perform the same gender twice.”<sup>58</sup> Author, playwright, and scholar Kate Bornstein has described gender fluidity as “the ability to freely and knowingly become one or many of a limitless number of genders, for any length of time, at any rate of change.”<sup>59</sup>

Examples of third genders — categories in addition to man and woman — might include “Two-Spirit (First-Nations)” or “Mahuwahine (Hawaiian),” or any number of other culturally recognized gender forms.<sup>60</sup> They might include “creative and unique” genders, “such as twidget, birl, OtherWise, and transgenderist.”<sup>61</sup> For example, Jessi Brandon, another participant in the Transgender Oral History Project, identified themselves as “non-binary, although [they] have had thoughts of maybe identifying . . . as a demiboy . . . where you feel partially like a boy but not really.”<sup>62</sup>

<sup>55</sup> Laura K. Case & Vilayanur S. Ramachandran, *Alternating Gender Incongruity: A New Neuropsychiatric Syndrome Providing Insight into the Dynamic Plasticity of Brain-Sex*, 78 MED. HYPOTHESES 626, 627 (2012) (studying the experiences of thirty-two bigender people who experience “involuntary” gender switches as frequently as “multiple times a day”).

<sup>56</sup> Abby Aguirre, *Amandla Stenberg Is a Voice for the Future*, VOGUE (Apr. 19, 2017, 9:01 AM), <https://www.vogue.com/article/amandla-stenberg-interview-gender-feminism-black-culture> [https://perma.cc/JSK2-7PA6].

<sup>57</sup> Vivian Giang, *What It’s Like to Be Young, Gender Neutral and in the Job Market*, FORTUNE (Oct. 20, 2015), <http://fortune.com/2015/10/20/gender-neutral-fluid-job/> [https://perma.cc/EQU8-2ZY9]; see also *Gender: The Space Between*, *supra* note 18, at 27:45 (interviewing Brendan Jordan and his friends with Jordan explaining that he is not offended when his friends use both “he” and “she” to refer to him).

<sup>58</sup> Petra L. Doan, *The Tyranny of Gendered Spaces — Reflections from Beyond the Gender Dichotomy*, 17 GENDER, PLACE & CULTURE 635, 639 (2010).

<sup>59</sup> BORNSTEIN, *supra* note 17, at 52.

<sup>60</sup> Harrison et al., *supra* note 24, at 14. Some cultures have more than three genders. See, e.g., SHARYN GRAHAM DAVIES, *GENDER DIVERSITY IN INDONESIA: SEXUALITY, ISLAM AND QUEER SELVES* 2, 10–11 (2010) (discussing the Bugis, an ethnic group in South Sulawesi).

<sup>61</sup> Harrison et al., *supra* note 24, at 14 (listing responses to the gender identity question on the 2008 NTDS); *id.* at 20 (describing other write-in genders including “Jest me, skaneellog, . . . gender-treyf, trannydyke genderqueer wombat fantastica, Best of Both, and gender blur”).

<sup>62</sup> Interview by Andrea Jenkins with Jessi Brandon, Transgender Oral History Project 6 (Nov. 27, 2016) [hereinafter Brandon Interview], <https://umedia.lib.umn.edu/sites/default/files/archive/60/application/pdf/1553882.pdf> [https://perma.cc/S77K-YGFQ].



Examples of subversive genders — gender identities that parody or deconstruct the gender binary — might include genderqueer.<sup>63</sup> For example, Bornstein describes their identity as a set of paradoxes, including “not man, not woman,” “lovable freak,” and “[s]mart blonde.”<sup>64</sup> In response to the question, “What is your primary gender today?,” some 2008 National Transgender Discrimination Survey Respondents wrote that “gender is a performance.”<sup>65</sup>

People with nonbinary identities may view their gender identity, in terms of their inner sense of self, as separate from their gender expression, in terms of their outward appearance.<sup>66</sup> They may sometimes be perceived as men or women.<sup>67</sup> High school student Star Hagen-Esquerria, for example, “likes to wear lacy dresses, dramatic cat-eye makeup, and their hair styled in cascading curls. They like to date straight boys. This made coming out as nonbinary harder, more confusing.”<sup>68</sup>

Like transgender men and women, nonbinary people may or may not seek or require medical treatment.<sup>69</sup> Some nonbinary people may not seek medical treatment because they do not wish to “pass” as men

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<sup>63</sup> The term “genderqueer” derives from “queer theory,” an academic theory that questions and critiques norms with respect to sex, gender, and sexuality. See Jen Jack Gieseking, *Queer Theory*, in 2 ENCYCLOPEDIA OF SOCIAL PROBLEMS 737 (Vincent N. Parrillo et al. eds., 2008) (describing queer theory); Riki Wilchins, *A Certain Kind of Freedom: Power and the Truth of Bodies — Four Essays on Gender*, in GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY, *supra* note 17, at 23, 27–29 (discussing the term “genderqueer”).

<sup>64</sup> Bornstein Interview, *supra* note 47, at 6.

<sup>65</sup> Harrison et al., *supra* note 24, at 20. Other subversive gender identities included “genderfuck, rebel, or radical.” *Id.* The statement “gender is a performance” may be a reference to ideas from queer theory. See *supra* note 63.

<sup>66</sup> See *supra* note 12 for a definition of “gender expression.”

<sup>67</sup> JAMES ET AL., *supra* note 2, at 48 (asking nonbinary respondents to the 2015 USTS “what gender they were perceived to be by people who did not know they were non-binary,” and reporting that 58% “assumed they were non-transgender women,” 17% “assumed they were non-transgender men,” and 19% “reported that assumptions about their gender varied”); *id.* at 50 (asking nonbinary respondents “[h]ow often people could tell they were transgender without being told,” and reporting that 6% said “[a]lways or most of the time,” 32% said “sometimes,” and 62% said “[r]arely or never”).

<sup>68</sup> Jessica Testa, *This 17-Year-Old Could Be the First Teenager to Put Nonbinary on Their Driver's License*, BUZZFEED NEWS (May 27, 2017, 10:04 AM), <https://www.buzzfeed.com/jtes/california-non-binary-gender-identity-recognition> [<https://perma.cc/NU6R-5WMV>].

<sup>69</sup> See, e.g., James Bellringer, *Surgery for Bodies Commonly Gendered as Male*, in GENDERQUEER AND NON-BINARY GENDERS, *supra* note 27, at 247, 249–50, 261–62 (discussing possible surgical options for nonbinary people); David Ralph et al., *Genital Surgery for Bodies Commonly Gendered as Female*, in GENDERQUEER AND NON-BINARY GENDERS, *supra* note 27, at 265, 267, 280 (same); Andrew Yelland, *Chest Surgeries*, in GENDERQUEER AND NON-BINARY GENDERS, *supra* note 27, at 225, 225–26 (same).

or women.<sup>70</sup> Others might seek medical treatment so as not to have physical features inconsistent with their gender identities.<sup>71</sup>

While nonbinary gender may be most prevalent among younger people, it is not limited to millennials.<sup>72</sup> In the 2015 U.S. Transgender Survey (USTS), 80% of nonbinary respondents “had female on their original birth certificate, and 20% had male on their original birth certificate.”<sup>73</sup> Most nonbinary respondents who reported having transitioned stated that they began their transitions between the ages of eighteen and twenty-four.<sup>74</sup> Nonbinary people do not share uniform views on political issues, not even those related to transgender rights.<sup>75</sup> Some nonbinary people are religious.<sup>76</sup> There is some evidence nonbinary people are less likely to be white and more likely to be multiracial than other transgender people.<sup>77</sup> They have a variety of sexual orientations,

<sup>70</sup> See Tim Murphy, *Non-binary Brown Alumni Discuss Life Beyond the Bounds of Gender*, NEWS FROM BROWN (Aug. 15, 2018), <https://news.brown.edu/articles/2018/08/nonbinary> [https://perma.cc/BT7U-36DK] (interviewing Dréya St. Clair (“I actually had started meeting trans women of color not on campus but in the broader Providence community, in clubs, and some of them were pressuring me into taking hormones, telling me that I had soft features and that I could easily transition and pass on the streets. But I didn’t want that. I was saying, ‘I’m a boy who’s feminine and dresses like a girl and there’s nothing wrong with that.’ And I’ve stayed on that course ever since.”)).

<sup>71</sup> Colby Sangree, *A Non-binary Perspective on Top Surgery*, HUFFINGTON POST (Mar. 23, 2017), [https://www.huffingtonpost.com/entry/a-non-binary-perspective-on-top-surgery\\_us\\_58d27b27e4b062043ad4ae76](https://www.huffingtonpost.com/entry/a-non-binary-perspective-on-top-surgery_us_58d27b27e4b062043ad4ae76) [https://perma.cc/K552-DBB5] (discussing reasons for seeking “top surgery”: “Everyone in my life told me that growing breasts defined femininity. No longer could I remain a tomboy — genderfluid, free to express myself — I was on my way to a forced womanhood”).

<sup>72</sup> JAMES ET AL., *supra* note 2, at 46 (reporting that 61% of nonbinary respondents to the 2015 USTS were aged eighteen to twenty-four, 35% were aged twenty-five to forty-four, and 5% were forty-five or older).

<sup>73</sup> *Id.* at 45.

<sup>74</sup> See *id.* at 48 (reporting that 24% of nonbinary respondents transitioned under the age of eighteen, 56% between the ages of eighteen and twenty-four, 16% between the ages of twenty-five and thirty-four, and 4% at the age of thirty-five or over). The survey defined transitioning as “living full-time in a gender other than that on their original birth certificate.” *Id.*

<sup>75</sup> For example, Jamie Shupe, the first person to win a U.S. court order changing their sex designation to nonbinary, has argued there can be “problems with transgender military service.” Jamie Shupe, *This Debate Is About Gender Dysphoria, Not Transgender Military Service*, MERCATORNET (Aug. 1, 2017), <https://www.mercatornet.com/conjugality/view/this-debate-is-about-gender-dysphoria-not-transgender-military-service/20168> [https://perma.cc/WL8H-GJ6A] (“President Trump is seriously mistaken in putting a blanket ban on transgender military service because not every trans service member is impacted by gender dysphoria. Neither does every trans person need to transition their sex. But the President and those that share his views are not completely wrong.”).

<sup>76</sup> Wail Qasim, *Being a Black, British, Queer, Non-binary Muslim Isn’t a Contradiction*, THE GUARDIAN (June 20, 2016, 4:00 AM), <https://www.theguardian.com/commentisfree/2016/jun/20/black-british-queer-non-binary-muslim-isnt-contradiction> [https://perma.cc/Z5VH-W8SL]; Brandon Interview, *supra* note 62, at 11 (“One of my main concerns was finding a place where I could be out as queer but I could also be a Christian and talk about how my queerness and my religion intersect . . .”).

<sup>77</sup> Harrison et al., *supra* note 24, at 18–19 (reporting that those selecting “gender not listed here” on the 2008 NTDS were 70% white, compared with 77% of other respondents; 18% multiracial,

although only 2% identify as “[s]traight or heterosexual.”<sup>78</sup> Some survey evidence suggests that this population has a significantly higher level of educational attainment than average, but a lower household income.<sup>79</sup> They may be more likely to live on the coasts and in the Northeast than transgender men and women.<sup>80</sup>

### B. Reasons for Bias Against Nonbinary People

Nonbinary people report that they face harassment, violence, and discrimination, with adverse health consequences. Out of nonbinary respondents to the 2015 USTS, 39% had attempted suicide, compared with 4.6% of the general population.<sup>81</sup> This may relate to other findings of the survey — that nonbinary people experience high rates of discrimination, family rejection, harassment, and assault.<sup>82</sup> Nonbinary people may encounter mistreatment for a variety of reasons, including disbelief in nonbinary identity, erasure of nonbinary experiences, dehumanization of those who do not fit conventional gender categories, concern that nonbinary people will undermine traditional gender roles, and politicization of nonbinary identity in a time of increasing polarization.

Bias against nonbinary people often takes the form of disbelief, disregard, disrespect, and paternalism. Nonbinary people report that one of the most common reasons for bias against them is the belief that they are insincere and attention seeking,<sup>83</sup> or that nonbinary identity is a

compared with 11% of other respondents; 5% Black, compared with 4% of other respondents; 3% Asian, compared with 2% of other respondents, and 4% Latino/a, compared with 5% of other respondents).

<sup>78</sup> JAMES ET AL., *supra* note 2, at 59 (reporting that, among nonbinary respondents to the 2015 USTS, 34% identify as queer, 21% identify as pansexual, 17% identify as asexual, 10% identify as bisexual, 8% identify as gay, lesbian, or same-gender-loving, 2% as straight or heterosexual, and 8% as an orientation not listed).

<sup>79</sup> Harrison et al., *supra* note 24, at 19–20. The 2008 NTDS respondents in general had a higher level of educational attainment than the general population. *Id.* at 20.

<sup>80</sup> *Id.* at 19.

<sup>81</sup> JAMES ET AL., *supra* note 2, at 114; *see also id.* at 105 (49% of nonbinary people reported current, serious psychological distress).

<sup>82</sup> *Id.* at 76 (32% reported family rejection since transitioning); *id.* at 133–34 (16% reported being physically attacked and 10% reported being sexually assaulted in K–12 schools because of the perception that they were transgender); *id.* at 135 (15% left a K–12 school because of mistreatment); *id.* at 150 (7% lost a job because of their gender identity or expression); *id.* at 186 (71% reported that they were never or only sometimes treated with respect by law enforcement).

<sup>83</sup> Papisova, *supra* note 51 (“For Mya, the biggest misconception they face about their gender identity is ‘definitely that it doesn’t exist, or that I’m just trying to get attention.’”); Brandon Interview, *supra* note 62, at 12 (describing the response: “They’re just being special snowflakes who want attention”). Psychologists regard it as unlikely that claiming a nonbinary gender is attention-seeking behavior. *See* STEPHANIE BRILL & LISA KENNEY, THE TRANSGENDER TEEN: A HANDBOOK FOR PARENTS AND PROFESSIONALS SUPPORTING TRANSGENDER AND NON-BINARY TEENS 14 (2016) (“Being . . . non-binary . . . is a difficult road to walk. . . . If your teen simply wanted to annoy you or try to get your undivided attention with their gender, they would likely do

trend or a political posture.<sup>84</sup> Some opponents of nonbinary recognition argue that science and religion demonstrate that everyone is either a man or a woman, and the idea of a third gender is “ridiculous,” “nonsense,” “insane,” “absurd,” and the result of “brainwash[ing].”<sup>85</sup> Another common reaction is that nonbinary identities should not be respected because those identities are a developmental phase, a result of confusion, or a form of experimentation.<sup>86</sup> Relatedly, bias against nonbinary people is often rooted in paternalism: beliefs by medical professionals, family members, and educators that nonbinary people must be protected from themselves, lest they make choices they will come to regret, such as medical intervention, or that will expose them to tragic and irreversible social consequences.<sup>87</sup>

Yet another form of bias is erasure — a sense of “feeling like the debris that is falling through the cracks” of policies aimed at transgender inclusion.<sup>88</sup> Some nonbinary people may be criticized for “not being trans enough” and left out of networks of support for transgender people.<sup>89</sup> Mistreatment of nonbinary people may sometimes result from

what teens have done for generations and use gender expression to assert their individuality and independence (think hair, makeup, clothing styles).”).

<sup>84</sup> See, e.g., Trav Mamone, *9 Things Not to Say to a Non-binary Person*, EVERYDAY FEMINISM (Feb. 15, 2017), <https://everydayfeminism.com/2017/02/things-not-to-say-non-binary-ppl/> [<https://perma.cc/SGL6-ZFNY>] (discussing people “who want to write off anything that doesn’t fit the binarist view of gender as ‘made up’” and the false charge that the social media site Tumblr “invented” nonbinary gender).

<sup>85</sup> Just Want Privacy, *Oppose 3rd Gender Option on WA Birth Certificates*, FACEBOOK (Dec. 5, 2017), <https://www.facebook.com/events/967556456753263/> [<https://perma.cc/2SMH-L3FX>] (quotations from a public Facebook page collecting comments on Washington State’s rule to allow a nonbinary designation on birth certificates).

<sup>86</sup> At the hearing for recognition of Star Hagen-Esquerra’s nonbinary gender identity, the judge asked them if they were making an impulsive decision. Hagen-Esquerra, an AP student, responded, “I’ve never made an impulsive decision in my entire life.” Testa, *supra* note 68; see also *Gender Identity: Female, Male, or Nonbinary: Hearing on S.B. 179 Before the Assemb. Standing Comm. on Transp.*, 2017–2018 Leg., Reg. Sess. (Cal. 2017) [hereinafter *Cal. Assemb. Transp. Hearing*] (statement of Jonathan Clay), <https://ca.digitaldemocracy.org/hearing/54049?startTime=0&vid=acf9eb2f37a98dafa47cac34d69378d8> [<https://perma.cc/ZC5J-VRR7>] (“We’ve been asked many times, is this a phase for our child? And the answer’s no. I mean, since a very early age, it’s now, looking back, been pretty apparent, that this was . . . the path our child is taking.”).

<sup>87</sup> Parents of transgender children commonly report concern that their children will never find romantic love, will be targeted for violence and discrimination, or will engage in self-harm. BRILL & KENNEY, *supra* note 83, at 19–20.

<sup>88</sup> Interview by Andrea Jenkins with Roze (R.B.) Brooks, Transgender Oral History Project 11 (Nov. 3, 2016) [hereinafter Brooks Interview], <https://umedia.lib.umn.edu/sites/default/files/archive/60/application/pdf/1553885.pdf> [<https://perma.cc/K5YB-PZM9>].

<sup>89</sup> Genny Beemyn, *Get Over the Binary: The Experiences of Nonbinary Trans College Students*, in TRANS PEOPLE IN HIGHER EDUCATION (Genny Beemyn ed., forthcoming 2019) (manuscript at 251) (on file with the Harvard Law School Library) (discussing nonbinary interviewees who were assigned male at birth and were “frequently critiqued by both cis and other trans people on how well they ‘do transgender’”).

ignorance or misunderstanding.<sup>90</sup> Policymakers may sometimes refuse to entertain the claims of nonbinary people because they believe it is only “a very small number of people” that “consider themselves to be of neither gender.”<sup>91</sup> A related form of discrimination is insistence that nonbinary people hide, “cover,” or downplay their nonbinary identities so as not to disrupt their schools or workplaces.<sup>92</sup> Many nonbinary people report that they often let strangers assume they are men or women, rather than spend their time trying to explain nonbinary gender identities.<sup>93</sup> Nonbinary respondents to the 2015 USTS were almost twice as likely as other transgender respondents to avoid asking their employers to use their correct pronouns.<sup>94</sup>

Other reactions to nonbinary identities may be dehumanizing. The moment the sonogram technician proclaims “It’s a girl!” or “It’s a boy!” may be the moment someone is first recognized as human.<sup>95</sup> Some people regard as monstrous “that which eludes gender definition.”<sup>96</sup> They may react with discomfort, disgust, or anger, feeling that a nonbinary person is trying to deceive them.<sup>97</sup> Nonbinary people may be targeted

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<sup>90</sup> Misunderstandings abound; there is an entire genre of online news articles that lists them. See, e.g., Suzannah Weiss, *9 Things People Get Wrong About Being Non-binary*, TEEN VOGUE (Feb. 15, 2018, 4:56 PM), <https://www.teenvogue.com/story/9-things-people-get-wrong-about-being-non-binary> [https://perma.cc/NDR5-3TSZ]; Meg Zulch, *7 Things Genderqueer People Want You to Know*, BUSTLE (Dec. 3, 2015), <https://www.bustle.com/articles/124009-7-things-genderqueer-people-want-you-to-know> [https://perma.cc/TA5M-YNZ9].

<sup>91</sup> Bergman & Barker, *supra* note 31, at 36 (quoting a U.K. Ministry of Justice statement that it is “not aware that that results in any specific detriment” to this group).

<sup>92</sup> JAMES ET AL., *supra* note 2, at 155 (reporting that 14% of nonbinary respondents to the USTS hid their “past transition to avoid discrimination in the past year”); Giang, *supra* note 57 (quoting one nonbinary job seeker: “I fear I and many other people may have to hide an essential part of who we are — our genders — in order to find jobs”). See generally KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS ix (2006) (“To cover is to tone down a disfavored identity to fit into the mainstream.”).

<sup>93</sup> JAMES ET AL., *supra* note 2, at 49 (finding that 44% of nonbinary respondents to the 2015 USTS “usually let others assume they were a man or woman, and 53% sometimes corrected others”). The most common reasons for not disclosing a nonbinary identity were: “[m]ost people do not understand so they do not try to explain it” (86%), “[i]t is easier not to say anything” (82%), “[m]ost people dismiss it as not being a real identity or a ‘phase’” (63%), and “[t]hey might face violence” (43%). *Id.*

<sup>94</sup> *Id.* at 154.

<sup>95</sup> See JUDITH BUTLER, BODIES THAT MATTER 232 (1993).

<sup>96</sup> PETER BROOKS, *What is a Monster? (According to Frankenstein)*, in BODY WORK 199, 219 (1993) (“Because a monster is that which calls into question all our cultural codes, including language itself, we can understand the persistent afterlife of Mary Shelley’s creation, which shows us that, quite literally, once you have created a monster, whatever the ambiguities of the order of its existence, you can never get rid of it.”); cf. Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 GLQ: J. LESBIAN & GAY STUD. 237, 250 (1994) (“Like [Mary Shelley’s] creature, I assert my worth as a monster in spite of the conditions my monstrosity requires me to face, and redefine a life worth living.”).

<sup>97</sup> Doan recalls an incident of street harassment in which a man confronted her with “smouldering anger” and “started yelling ‘I know what you are! You can’t fool me! You are disgusting!’” Doan, *supra* note 58, at 640.

for violence and assault because they are perceived as both socially vulnerable and without human feeling and dignity.<sup>98</sup> Nonbinary gender identities may unleash moral panic because they call into question accepted social norms about gender identity.<sup>99</sup> One agender person reports regularly being told to “throw myself on the tracks” when waiting for a subway train.<sup>100</sup> People may fear that those who are willing to transgress social norms with respect to binary gender may also be willing to transgress other social boundaries, posing threats to safety.<sup>101</sup> Or they may fear contagion. One nonbinary trans man reports that his father kicked him out of the house for fear that he would influence his younger sister to “be gay or be trans.”<sup>102</sup>

Investments in binary gender may also drive animus against nonbinary people. Those who celebrate and cherish gender difference may fear that nonbinary identities will render their views politically incorrect or even legally impermissible.<sup>103</sup> They may worry that binary gender will become a minority perspective that is no longer the default position respected by public discourse or institutions. Additionally, those who are privileged because they fall on the masculine side of the gender binary may fear a loss of that privilege if gender were reconceived as a free-form range of possibilities. Or, those whose feminine identities afford them particular forms of privilege — such as access to all-female social spaces or awards — may fear the intrusion of nonbinary people, the dilution of benefits as nonbinary people insist on spaces for themselves, or the dissolution of the very categories of women or femininity.<sup>104</sup>

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<sup>98</sup> Doan tells about an incident in which a drunken man in an elevator groped her breasts, expecting to find them false. *Id.* at 641. What was most hurtful about the assault was that the man had a female companion, which had “lulled” Doan “into feeling safe.” *Id.* Doan writes, “I am fairly certain that if he had tried to fondle a female whose femininity was unimpeachable, his companion would probably have pulled him back in horror. . . . This incident simply drove home the point that people whose gender does not seem quite right are fair game for all manner of treatment.” *Id.*

<sup>99</sup> See Tucker Carlson, *Are “Gender-Neutral” Babies the Future?*, FOX NEWS (July 17, 2017), <http://video.foxnews.com/v/5510847908001/?#sp=show-clips> [<https://perma.cc/FU8K-YQGY>] (“Well for all of our lives we’ve lived in a world of boys and girls but that is changing along with everything else in 2017. . . . Are we ready for a world here where baby boys and girls are replaced by baby somethings?”). For discussion of moral panics, see generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* (1972).

<sup>100</sup> *Gender: The Space Between*, *supra* note 18, at 7:00 (interviewing Brin Solomon).

<sup>101</sup> Cf. Kath Browne, *Genderism and the Bathroom Problem: (Re)materialising Sexed Sites, (Re)creating Sexed Bodies*, 11 GENDER, PLACE & CULTURE 331, 336–38 (2004) (discussing experiences of the “bathroom problem” “where individuals are challenged in toilet spaces and their gender questioned,” *id.* at 336–37, and hypothesizing that “where bodies are revealed as unstable and porous, flowing between sexes may be more threatening,” *id.* at 338).

<sup>102</sup> *Gender: The Space Between*, *supra* note 18, at 2:34 (interviewing Quinn Diaz).

<sup>103</sup> See *Cal. Assemb. Transp. Hearing*, *supra* note 86 (statement of Michael McDermott) (opposing California’s Gender Recognition Act because “the purpose of political correctness is neither to inform nor to educate, but rather to humiliate”).

<sup>104</sup> See Jessica Chasmar, *Girls Complain After “Non-binary” Boy [sic] Is Crowned Prom Queen in NYC*, WASH. TIMES (June 29, 2016), <https://www.washingtontimes.com/news/2016/jun/29/high->

General trends of increasing political polarization may increase hostility toward nonbinary people, who may be figured as emblems of the left's position on gender roles. Opposition to nonbinary gender identity may result in intentional "misgendering": the refusal to refer to a person by the correct pronouns or other gender designations.<sup>105</sup> Nonbinary people may be stereotyped as "difficult."<sup>106</sup> Underlying this concern may be a fear of causing social offense by using the wrong terms.<sup>107</sup> Nonbinary people may be associated with controversial ideas in higher education, such as "trigger warnings" or "political correctness."<sup>108</sup>

### C. *Convergences and Divergences with Other Rights Struggles*

Advocates of nonbinary recognition have framed their case in terms of universal values such as self-determination, love, safety, privacy, human flourishing, inclusion, and respect.<sup>109</sup> This section begins to map out some of the connections between the movement for nonbinary gender rights and feminist, LGBT, intersex, antiracist, and postcolonial

school-girls-complain-after-non-binary-boy-is/ [https://perma.cc/WB6N-CY8J] (discussing negative reactions on social media). *But see* Zoe Sullivan, *Wisconsin High School to Unveil Gender-Neutral Homecoming Court*, THE GUARDIAN (Oct. 16, 2015, 7:00 AM), https://www.theguardian.com/us-news/2015/oct/16/wisconsin-high-school-to-unveil-gender-neutral-homecoming-court [https://perma.cc/SY3S-WGYL] ("A high school in Wisconsin is poised to unveil a gender-neutral homecoming court after nearly half the student body signed a petition calling for changes to the court's structure. . . . Instead of being crowned 'king' or 'queen', the top vote earners at Madison West will be able to choose their titles.").

<sup>105</sup> Misgendering may also be negligent or accidental. Nonbinary people sometimes report that a consequence of accidental misgendering is a demand that the nonbinary person forgive and console the person who made the mistake. *See, e.g.*, Mamone, *supra* note 84; Paulus van Horne, *Introducing Myself as "They/Them/Their" at My Workplace*, at 19:58, PUB. RADIO INT'L (Aug. 8, 2016, 11:00 AM), https://www.pri.org/stories/2016-08-08/so-what-are-your-pronouns [https://perma.cc/WQK6-GNFD] (interview with Jack Qu'emi) ("You don't need to make a big deal about it. . . . I had somebody misgender me and then cry in front of me about it. I was uncomfortable . . .").

<sup>106</sup> Bergman & Barker, *supra* note 31, at 37.

<sup>107</sup> *See supra* note 105.

<sup>108</sup> Bergman & Barker, *supra* note 31, at 37.

<sup>109</sup> *See, e.g.*, *Cal. Assemb. Judiciary Hearing*, *supra* note 1 (statement of Cristina Garcia, Member, Assemb. Standing Comm. on Judiciary) (responding to an opponent of the Gender Recognition Act: "I do hope that as we move forward, we come from a place of love, a place of understanding, and a place where we let individuals decide for themselves what they need"); *id.* (statement of Ash Kalra, Member, Assemb. Standing Comm. on Judiciary) (arguing in support of the Gender Recognition Act as a way to "stand on the side of ensuring that we create not just a safe community for all but one in which everyone can live their full potential and live their lives in a way that allows them to be loved and supported by their community"); Press Release, Exec. Office of the Mayor of D.C., Mayor Bowser Announces Addition of Gender Neutral Identifier to Drivers Licenses and Identification Cards (June 23, 2017), https://mayor.dc.gov/release/mayor-bowser-announces-addition-gender-neutral-identifier-drivers-licenses-and [https://perma.cc/V4VS-8AYT] (quoting a Washington, D.C., official: "The implementation of a gender neutral identifier is consistent with our DC values of inclusion and respect").

advocacy, with an emphasis on legal arguments.<sup>110</sup> It is beyond the scope of this Article to canvass these connections in any comprehensive way. This section intends to provide an overview of some potential convergences and divergences among the legal interests of these identity movements. Its aim is to illustrate that nonbinary gender identity is worthy of independent analysis and has broad implications.

1. *Feminist Arguments.* — Feminist theory of the late twentieth century criticized binary concepts of gender, and those critiques found limited uptake in the law. Nonbinary gender rights advocacy today both draws on feminist arguments and diverges from them, opening new legal possibilities.

Early feminist critiques of binary gender were built on a distinction between sex as physical and gender as social.<sup>111</sup> In 1975, cultural anthropologist Gayle Rubin criticized the “sex/gender system,” which she analogized to Marx’s explanation of the relationship between race and slavery.<sup>112</sup> Rubin argued for critical analysis of the “social apparatus which takes up females as raw materials and fashions domesticated women as products.”<sup>113</sup> She described how kinship systems, resting on “[c]ompulsory heterosexuality,”<sup>114</sup> organized social life and production around marriage and “the sexual division of labor,” making men dominant breadwinners and women subordinate caretakers.<sup>115</sup> This system rests on “a taboo against the sameness of men and women, a taboo dividing the sexes into two mutually exclusive categories, a taboo which exacerbates the biological differences between the sexes and thereby *creates* gender.”<sup>116</sup> Thus, Rubin made the case for freeing women from the constraints of subordination. But her theory was also about broader gender freedom. She concluded: “Ultimately, a thoroughgoing feminist revolution would liberate more than women. It would liberate forms of sexual expression, and it would liberate human personality from the straightjacket of gender.”<sup>117</sup>

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<sup>110</sup> These topics were selected due to the extent of their overlap with nonbinary rights claims, but that is not to deny that there may also be useful intersections to explore with respect to disability, class, age, religion, and other identities.

<sup>111</sup> See, e.g., Donna J. Haraway, “Gender” for a Marxist Dictionary: *The Sexual Politics of a Word*, in *CULTURE, SOCIETY AND SEXUALITY: A READER* 82, 86–89 (Richard Parker & Peter Aggleton eds., Routledge 2d ed. 2007) (1999).

<sup>112</sup> See Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157, 158–59 (Rayna R. Reiter ed., 1975).

<sup>113</sup> *Id.* at 158.

<sup>114</sup> *Id.* at 198. This term was popularized in an essay by Adrienne Rich. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS: J. WOMEN CULTURE & SOC’Y* 631 (1980).

<sup>115</sup> Rubin, *supra* note 112, at 178.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 200.



Twentieth-century feminists debated whether this liberation would result in a sort of idealized androgyny, where all individuals combine the best of both masculine and feminine traits,<sup>118</sup> or in an unbounded diversity of gender identities, with each person determining their own reconfigurations of masculinity and femininity, and other genders off the spectrum.<sup>119</sup> Fiction, like Ursula Le Guin's novel *The Left Hand of Darkness*, assisted in the project of imagining different configurations of gender.<sup>120</sup>

At the same time, feminist lawyers pursued legal strategies that attempted to chip away at legally enforced sex roles for men and women, stereotype-by-stereotype, rather than engaging in wholesale critique of binary gender.<sup>121</sup> In these cases, men challenged rules that assumed that only women would be caretakers,<sup>122</sup> and women challenged rules that assumed only men would be breadwinners.<sup>123</sup> Today, the U.S. Supreme Court is skeptical of laws that classify on the basis of sex, requiring that they be supported by an "exceedingly persuasive justification."<sup>124</sup> That justification must hold up by present-day standards.<sup>125</sup> The Supreme Court's sex-stereotyping jurisprudence protects gender nonconformists: for example, women who want to attend military academies and men

<sup>118</sup> Compare CAROLYN G. HEILBRUN, TOWARD A RECOGNITION OF ANDROGYNY, at ix–x (1973) ("[O]ur future salvation lies in a movement away from sexual polarization and the prison of gender toward a world in which individual roles and the modes of personal behavior can be freely chosen."), with Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 45 (1988) (arguing that the problem with "subsuming women into a general 'human' identity" is that it brings us back "to the days when 'Man's' story was supposed to be everyone's story").

<sup>119</sup> See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1578 (1983) ("Rather than shades of grey as an alternative to all black and all white, I envision reds and greens and blues.").

<sup>120</sup> URSULA K. LE GUIN, *THE LEFT HAND OF DARKNESS* (1969) (depicting, in science fiction, an androgynous species in which individuals move back and forth between male and female reproductive roles). For a different fictional vision of androgyny, see MARGE PIERCY, *WOMAN ON THE EDGE OF TIME* (1976).

<sup>121</sup> See, e.g., Cary Franklin, *The Anti-stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 120 (2010).

<sup>122</sup> See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648–53 (1975) (holding unconstitutional a Social Security rule that provided benefits to mothers but not fathers).

<sup>123</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 688–91 (1973) (plurality opinion) (holding unconstitutional a statutory requirement that female officers, but not male officers, needed to prove the dependency of their spouse in order to receive benefits).

<sup>124</sup> *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996)).

<sup>125</sup> *Id.* ("Moreover, the classification must substantially serve an important governmental interest today, for 'in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.'" (alterations and omission in original) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015))).

who want to attend nursing schools.<sup>126</sup> Even without the Court's direction, the antistereotyping principle has succeeded in convincing legislatures to remove sex classifications from the statute books.<sup>127</sup>

But the force of the antistereotyping principle has been limited. The Court has distinguished laws based on "overbroad generalizations about the different talents, capacities, or preferences of males and females" from those sex classifications based on the "enduring" nature of "[p]hysical differences between men and women."<sup>128</sup> Thus, equal protection challenges against laws that forbid women, but not men, to bare their chests, have had mixed success.<sup>129</sup> Courts have refused to upset sex-specific rules they regard as reflecting "comfortable gender conventions" and having a trivial impact on women, such as job requirements that women, but not men, wear makeup.<sup>130</sup> And courts have upheld policies that consider sex for affirmative action purposes.<sup>131</sup>

In the twentieth century, the more radical feminist project of re-envisioning gender identity to include genders that are not male or female ran into opposition. Conventional wisdom is that everywhere one looks, one sees human life sorted into male and female categories — with counterexamples written off as exceptions to the rule.<sup>132</sup> The

<sup>126</sup> *Virginia*, 518 U.S. at 534 (holding that the exclusion of women from the Virginia Military Institute was unconstitutional); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729–31 (1982) (holding unconstitutional a policy of excluding men from a nursing school because it "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job," *id.* at 729).

<sup>127</sup> For example, although the Supreme Court in 1981 upheld a state statute defining statutory rape as sexual intercourse by a male with a female, *Michael M. v. Superior Court*, 450 U.S. 464, 472–73 (1981), all U.S. states have since amended their laws to apply to anyone who has sex with a minor, Carolyn Cocca, "16 Will Get You 20": *Adolescent Sexuality and Statutory Rape Laws*, in *ADOLESCENT SEXUALITY: A HISTORICAL HANDBOOK AND GUIDE* 15, 21 (Carolyn Cocca ed., 2006). Though the statutes may be gender neutral, it is important to note they are selectively enforced along gendered lines. See Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 204 (2017).

<sup>128</sup> *Virginia*, 518 U.S. at 533; see also *id.* at 550 n.19 (noting that physical differences between male and female cadets "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs"). In 2001, the Supreme Court upheld an immigration rule that "require[d] unwed U.S.-citizen fathers, but not mothers, to formally acknowledge parenthood of their foreign-born children in order to transmit their U.S. citizenship to those children." *Morales-Santana*, 137 S. Ct. at 1694 (discussing *Nguyen v. INS*, 533 U.S. 53, 62–63 (2001)). The explanation: because of the physical nature of pregnancy, a woman's parental status is established when she gives birth, while an unwed father's connection to a child requires some additional evidence. *Id.*

<sup>129</sup> Compare *Free the Nipple v. City of Fort Collins*, 216 F. Supp. 3d 1258, 1264–66 (D. Colo. 2016) (denying a motion to dismiss plaintiff's equal protection challenge), with *Tagami v. City of Chicago*, 875 F.3d 375, 380 (7th Cir. 2017) (upholding, in a divided decision, a law that allows men, but not women, to bare their breasts against equal protection challenge).

<sup>130</sup> YURACKO, *supra* note 30, at 45.

<sup>131</sup> See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 619–20 (1987) (Title VII challenge); *Schlesinger v. Ballard*, 419 U.S. 498, 499–500, 510 (1975) (constitutional challenge).

<sup>132</sup> See Joan C. Williams, *Feminism and Post-Structuralism*, 88 MICH. L. REV. 1776, 1778 (1990) (reviewing ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988)) (arguing that

critique of binary gender is often reduced to straw figures easily dismissed. For example, critics charge that feminists deny biological facts about sexual dimorphism in the human species or deny biology altogether.<sup>133</sup> Critics assume the only alternative is an impossible form of gender blindness or a tyrannical form of gender abolition.<sup>134</sup>

Some advocates for nonbinary people today frame their arguments in terms that recall Rubin's idea of "liberat[ing] human personality from the straightjacket of gender."<sup>135</sup> These new arguments emphasize the liberty and autonomy of each individual with respect to gender, rather than the potential for subordination in dualisms like male/female.<sup>136</sup> They also emphasize authenticity.

Consider the case brought by Dana Zzyym challenging the State Department's policy of requiring an applicant to mark either M or F on a passport application.<sup>137</sup> Zzyym is intersex<sup>138</sup> and nonbinary<sup>139</sup> and uses they/them pronouns.<sup>140</sup> Zzyym requested a passport with an X as the sex designation, and the State Department denied that request.<sup>141</sup> The district court ruled for Zzyym, holding that the State Department's "gender policy is arbitrary and capricious and not the product of rational decision making."<sup>142</sup> While the court's decision did not discuss the

theory cannot dissuade people, rather, feminists need "detailed redescription" in the form of "psychological data that allows us to see how a continuum of behavior variation is so consistently interpreted as a male/female dichotomy" in order to "help[] people recognize the artificiality of the gender verities they 'see' at work around them").

<sup>133</sup> Many feminist arguments have been "interactionist": about the relationship between biology and culture, not a denial of biology. Haraway, *supra* note 111, at 87.

<sup>134</sup> Suzanne B. Goldberg, Essay, *Risky Arguments in Social-Justice Litigation: The Case of Sex-Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2089, 2133 (2014) (arguing that judges may have "an internalized sense . . . 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," *id.* at 2133); Joan Williams, *Implementing Antiessentialism: How Gender Wars Turn Into Race and Class Conflict*, 15 HARV. BLACKLETTER L.J. 41, 81 (1999) ("We live in a world where most people feel awkward if they don't know whether you are a 'he' or a 'she.' A world where gender was as unimportant as eye color, many people feel, would leave them literally speechless. (The alternative of inventing a new language, which holds considerable appeal for intellectuals, probably holds little appeal for most people.)").

<sup>135</sup> Rubin, *supra* note 112, at 200.

<sup>136</sup> See, e.g., *Cal. Assemb. Judiciary Hearing*, *supra* note 1 (statement of Carly Mitchell) ("We need autonomy over our own bodies and minds, which means we need doctors taken out of this process.").

<sup>137</sup> *Zzyym v. Pompeo*, No. 15-cv-02362, 2018 WL 4491434, at \*1 (D. Colo. Sept. 19, 2018).

<sup>138</sup> *Id.*

<sup>139</sup> Reporter's Transcript Hearing on Pending Motions at 7, *Zzyym v. Kerry*, 220 F. Supp. 3d 1106 (D. Colo. 2016) (No. 15-cv-02362) [hereinafter *Zzyym* Transcript].

<sup>140</sup> *Id.*

<sup>141</sup> *Zzyym*, 2018 WL 4491434, at \*1.

<sup>142</sup> *Id.* at \*8. The court also held that the State Department had exceeded its statutory authority, because "[t]he authority to issue passports and prescribe rules for the issuance of passports under 22 U.S.C. § 211a does not include the authority to deny an applicant on grounds pertinent to basic identity, unrelated to any good cause as described in" Supreme Court precedents. *Id.* at \*9.

nature of the harm to Zzyym, Zzyym's rights claims were plainly important. The government's lawyer accused Zzyym of "cause litigation," arguing they were "asking the Court to upset the traditional binary that pervades our society."<sup>143</sup> The accusation of "cause litigation" suggests that theoretical arguments against binary gender are not persuasive, perhaps because they are political rather than legal. The government further argued that the passport "is not a matter of self-expression," rather, it "is a government form."<sup>144</sup>

The judge, however, asked questions suggesting the issue was the right of nonbinary people to travel internationally, without having to misrepresent their identities by selecting inaccurate F or M designations.<sup>145</sup> This argument stakes a claim to a type of liberty, but not in the thin sense of freedom of choice. It asserts that nonbinary people should not be forced to adopt a binary sex category that is a lie. As California Senator Scott Wiener explained in support of the Gender Recognition Act: "[W]e want people to live their authentic lives as who they are, and this is simply removing a government barrier."<sup>146</sup> Senator Wiener connected the Gender Recognition Act to the feminist critique of binary gender:

We have a history in this country and in this world of forcing people into gender roles. Whether it's forcing women to be a certain way in life or forcing young boys to be a certain way or forcing all manner of people to be who society says they are as opposed to who they actually are.<sup>147</sup>

While nonbinary gender rights claims may build on feminist arguments, it is important to note potential areas of divergence between feminist and nonbinary gender advocacy. Some feminists may be concerned that expanding the space outside binary gender will trade off with efforts to expand what it means to be a woman.<sup>148</sup> Others may believe sex discrimination law should challenge only the most egregious forms of subordination of women, rather than pursuing the libertarian project

<sup>143</sup> Zzyym Transcript, *supra* note 139, at 45.

<sup>144</sup> *Id.* at 52.

<sup>145</sup> *See, e.g., id.* at 14 (question from Judge Jackson asking the lawyer for the government to respond to the concern that a "person with . . . ambiguous genitalia, who is neither male or female, can't leave the country because you have to have the passport to get out legally, can't leave the country unless they lie. And by lie, they check 'F' or they check 'M.'").

<sup>146</sup> *Cal. Assemb. Judiciary Hearing, supra* note 1 (statement of Sen. Scott Wiener).

<sup>147</sup> *Id.*; *see* Brandon Interview, *supra* note 62, at 13 ("[T]o me, really, identifying as non-binary is really a rather cool notion because you're basically looking at centuries worth of this enforced expectation of the gender you were assigned at birth and just saying, 'Screw that, that's not how I feel, this is how I feel and I want this to be respected.'").

<sup>148</sup> *Cf.* Freeman, *supra* note 52 (discussing an interview with nonbinary writer and director Jill Soloway in which the interviewer voiced the concern "that the definition of a woman should be broader, as they have shown in their work. To retreat from being called a woman feels as if they are giving up the field").

of releasing all people from the straightjacket of gender.<sup>149</sup> And others have criticized moves toward gender neutrality on the ground that, due to the unique forms of subordination experienced by people who were socialized as women, certain spaces or opportunities should be reserved for only those who were assigned female at birth.<sup>150</sup> In debates over nonbinary gender rights, some radical feminists have expressed concerns about the “implications . . . for the safety, privacy, and bodily integrity of women and girls.”<sup>151</sup>

Other feminists have drawn upon transgender experiences without concern about how feminist projects would affect transgender people.<sup>152</sup> Feminists have been criticized for reducing transgender people to useful examples, rather than subjects in their own right. In the 1990s, Riki Wilchins described the evolution of academic approaches to transgender people as one in which “psychiatrists” first cast them as “patients,” and “[t]hen came the feminist theorists who — while erasing our own voices, and without soiling their pages with the messy complexities of our lived experience — appropriated us as illustrations for their latest telling theories or perceptive insights. We had become examples.”<sup>153</sup> A feminist movement focused on expanding the social space for gender nonconforming women or men does not necessarily make space for those who cast off those labels altogether.

As nonbinary people become increasingly visible, their existence may work to undermine the conventional wisdom that gender identities are binary and that sex-specific rules are largely inoffensive. The circulation of narratives about nonbinary people trying to navigate social and

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<sup>149</sup> See YURACKO, *supra* note 30, at 23–24 (describing how this view influences legal doctrine in the context of “sex-based grooming codes”).

<sup>150</sup> For an example of this genre of “radical feminist” writing, see Sheila Jeffreys, *The Politics of the Toilet: A Feminist Response to the Campaign to “Degender” a Women’s Space*, 45 WOMEN’S STUD. INT’L F. 42, 42 (2014). For background on arguments raised by radical feminists such as Jeffreys against transgender rights in general, see Michelle Goldberg, *What Is a Woman?: The Dispute Between Radical Feminism and Transgenderism*, NEW YORKER (Aug. 4, 2014), <https://www.newyorker.com/magazine/2014/08/04/woman-2> [https://perma.cc/565N-5DBQ]. For a thoughtful response to the radical feminist argument, see generally Lori Watson, *The Woman Question*, 3 TRANSGENDER STUD. Q. 246 (2016).

<sup>151</sup> *WoLF Members Pushing Back Against Local “Gender Identity” Legislation*, *supra* note 39 (“Will any man, for any reason, be allowed to declare himself to be ‘nonbinary gender’ and gain access to women’s spaces? Will the District’s special programs for women and girls become available to men who self-identify as ‘non-binary’?”).

<sup>152</sup> The same could be said of some feminist appropriations of postcolonial and antiracist struggles, without concern for how feminist projects might impact people of color. See *infra* section I.C.5, pp. 930–33.

<sup>153</sup> RIKI ANNE WILCHINS, *READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER* 21 (1997). This Article makes no effort to advance any particular gender theory. It does not intend to use nonbinary people as “patients,” “examples,” or, as Wilchins charges anthropologists with doing, as “natives.” *Id.* at 22. This Article attempts to ask what it would mean for U.S. law to take nonbinary people seriously as full and equal participants in social, economic, and political life.

legal institutions founded on binary sex classifications can compel empathy, understanding, and efforts at inclusion.<sup>154</sup> As the diversity of nonbinary gender identities becomes more apparent, it may defang the arguments that inclusion requires enforced androgyny, the end of gender, or the abolition of programs that benefit women.

2. *Transgender Rights.* — Some nonbinary people identify as transgender, but others do not.<sup>155</sup> Most transgender respondents to the 2015 USTS primarily identified as men or women.<sup>156</sup> From its inception, the transgender rights movement has included voices arguing for what might now be called nonbinary inclusion.<sup>157</sup> But the legal strategies of transgender men and women may sometimes diverge from those whose gender identities are nonbinary.

Whatever their gender identities, transgender people may share interests in self-determination with respect to sex and gender.<sup>158</sup> They may sometimes agree that the law should not classify people by sex or gender at all.<sup>159</sup> Advocates for nonbinary rights also stake their claims in terms of the commonalities of discrimination, oppression, and violence visited upon nonbinary people and transgender men and women.<sup>160</sup>

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<sup>154</sup> Cf. Edward Schiappa et al., *The Parasocial Contact Hypothesis*, 72 COMM. MONOGRAPHS 92, 94–97, 111 (2005) (discussing support for the “Contact Hypothesis”: that interpersonal contact with members of minority groups reduces prejudice, especially with respect to gay men and lesbians, and conducting experiments providing some support for the “Parasocial Contact Hypothesis”: that exposure to television and other mass media depictions of “gay men and male transvestites” also reduces prejudice, *id.* at 111); Martha Minow, *Rights of One’s Own*, 98 HARV. L. REV. 1084, 1099 (1985) (reviewing ELISABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON (1984)*) (discussing the history of women’s rights struggles, including “Lucy Stone’s unprecedented decision to keep her own name after marriage,” and reflecting that “[a]lthough one who takes extreme positions runs the risk of moving beyond the comprehension of people in the mainstream, being ‘ultra’ may also succeed in expanding the bounds of what is comprehensible”).

<sup>155</sup> For a definition of “transgender,” see *supra* text accompanying note 12. Out of nonbinary respondents to the 2015 USTS, 82% reported they were “‘very comfortable,’ ‘somewhat comfortable,’ or ‘neutral’ . . . with the word ‘transgender’ being used to describe them.” JAMES ET AL., *supra* note 2, at 40.

<sup>156</sup> JAMES ET AL., *supra* note 2, at 45 (reporting that 29% of USTS survey respondents identified primarily as a “transgender man” or a “man” and 33% identified primarily as a “transgender woman” or a “woman”). *But see* Rob Clucas & Stephen Whittle, *Law, in GENDERQUEER AND NON-BINARY GENDERS*, *supra* note 27, at 73, 74 (arguing it is “short sighted” to view transgender men and women as binary, because they too undermine the naturalization of gender).

<sup>157</sup> *See, e.g.*, Bergman & Barker, *supra* note 31, at 32–33 (discussing work by Kate Bornstein and Stephen Whittle written in the 1990s).

<sup>158</sup> *See, e.g.*, Clarke, *Identity and Form*, *supra* note 28, at 763–64 (discussing “elective” concepts of sex and gender).

<sup>159</sup> *See, e.g.*, Olga Tomchin, Comment, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans\* People*, 101 CALIF. L. REV. 813, 815 n.4, 818 (2013) (arguing that “only total elimination of ‘sex’ as a legal category will eliminate [the] harms” of rules such as those “governing marriage-based immigration for trans\* people,” *id.* at 818).

<sup>160</sup> *See, e.g.*, *Cal. Assemb. Judiciary Hearing*, *supra* note 1 (statement of Carly Mitchell) (“So, why do we need a non-binary identification? This week alone, I was harassed multiple times, because

These claims sound in universal rights to human flourishing and respect, rather than liberty. They tap into arguments against group-based stigma, caste, and subordination.<sup>161</sup>

But “who decides your sex or gender?” is a different question than “how many options are there?” In law, arguments for transgender rights have sometimes been in tension with critiques of binary gender.<sup>162</sup> Some transgender people may want legal recognition of their male or female gender identities, rather than elimination of those categories.<sup>163</sup> On the flip side, scholars and activists who critique binary gender have long debated whether the inclusion of transgender people in the existing categories of “male” or “female” will make it more difficult to reimagine those categories.<sup>164</sup>

Pragmatic legal advocates may calculate that it is strategic to decouple arguments for recognition of a male or female gender identity from arguments for recognition of nonbinary identities. Nonbinary gender may sound less sympathetic, more disruptive, and too novel to judges and the public. There is a Kafkaesque “man trapped in a woman’s body” narrative that is sometimes persuasive to non-transgender people, who can imagine what it would be like to wake up one day in the wrong body.<sup>165</sup> But nonbinary people may seem to disrupt this narrative. For example, Wilchins has said, “I’ve never been trapped in anyone else’s body, and I hope you haven’t either . . . I admit I do still occasionally

I deviate from my assigned gender. We are assaulted, imprisoned, murdered, and this daily stress has caused 41% of us to attempt suicide, like I did.”); *supra* p. 910.

<sup>161</sup> See Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809, 833–37 (2017) (book review) (discussing antisubordination theories and their potential in transgender rights litigation).

<sup>162</sup> See, e.g., JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 262–63 (2006) (asking how “insistence on the fluidity of all the elements of gender and sexuality” would “cope with the strong desire of many transsexuals to embody one gender or the other, *really*, and to consolidate themselves and their lovers as m or f all the way down”).

<sup>163</sup> See, e.g., Talia Mae Bettcher, *Trapped in the Wrong Theory: Rethinking Trans Oppression and Resistance*, 39 SIGNS: J. WOMEN CULTURE & SOC’Y 383, 385 (2014) (“Many trans people see themselves as men and women. Taken to its most extreme, the beyond-the-binary model suggests these people are mistaken (i.e., it invalidates their self-identities).”).

<sup>164</sup> See, e.g., WILCHINS, *supra* note 153, at 67 (expressing the concern that a “transgender rights movement . . . unable to interrogate the fact of its own existence, will merely end up cementing the idea of a binary sex which I am presumed to somehow transgress or merely traverse”). For a recent debate about how this plays out in legal arguments, compare YURACKO, *supra* note 30, at 174 (arguing that “[v]ictory” for nonconformists who rely on arguments about the immutability of gender identity “may come at the expense of greater rigidity of gender roles and expectations for all workers”), with Paisley Currah, *Transgender Rights Without a Theory of Gender?*, 52 TULSA L. REV. 441, 446 (2017) (book review) (arguing that Yuracko has no evidence of a causal connection between the successes of transgender plaintiffs who argue gender identity is immutable and the losses of other gender-nonconforming plaintiffs), and Cruz, *supra* note 26, at 277 (arguing that those authors concerned about tradeoffs “overstate what a court must do to rule for a transgender plaintiff”).

<sup>165</sup> Riki Wilchins, *Epilogue: Gender Rights Are Human Rights*, in GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY, *supra* note 17, at 289, 290.

awake quivering in the night with the conviction that I am trapped in the wrong culture.”<sup>166</sup>

Additionally, nonbinary gender seems to require more extensive social change in disrupting sex-segregated spaces and binary gender norms. In a 2017 case in which a transgender boy won the right to use facilities consistent with his gender identity, the court noted approvingly that “allowing transgender students to use [male or female] facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls.”<sup>167</sup> Courts may perceive requests for accommodation from nonbinary individuals as a much greater “ask” than requests to be integrated into male or female categories.

Opponents of the extension of discrimination law to cover gender identity may point to nonbinary people as demonstrating the purported absurdity of the project.<sup>168</sup> While these opponents may have been willing to agree that it is gender identity–based harassment for an employer to insist on referring to a transgender woman as “he” and “Mr.,” they may not agree that employers should be required to use more unfamiliar pronouns, such as “ze and hir.”<sup>169</sup> Issues related to pronouns are often distorted and politicized. After a guide on gender-neutral pronouns led to false reports that the University of Tennessee, Knoxville, had banned the use of “he” and “she,” the Tennessee legislature voted to defund the University’s Office for Diversity and Inclusion, and to forbid the University from using state funds “to promote the use of gender neutral pronouns.”<sup>170</sup> But sometimes, nonbinary gender recognition may be uncontroversial. When New Jersey passed its Babs Siperstein Law<sup>171</sup> recognizing the right of transgender people to change the sex designations on their birth certificates without the need for any medical

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<sup>166</sup> *Id.* at 290–91.

<sup>167</sup> *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1055 (7th Cir. 2017).

<sup>168</sup> See *supra* notes 85–86 and accompanying text (discussing unique reasons for opposition to nonbinary gender identities, including the idea that these identities are a trend or are absurd).

<sup>169</sup> Cf. Eugene Volokh, Opinion, *You Can Be Fined for Not Calling People “Ze” or “Hir,” If That’s the Pronoun They Demand that You Use*, WASH. POST: VOLOKH CONSPIRACY (May 17, 2016), <https://wapo.st/24Xqa6Y> [<https://perma.cc/3D4H-5B2E>] [hereinafter Volokh, *You Can Be Fined*] (“Or what if some people insist that their title is ‘Milord,’ or ‘Your Holiness’? They may look like non-gender-related titles, but who’s to say?”). Professor Volokh himself, however, has a number of First Amendment objections to harassment doctrine in general, and might not even agree that it should be illegal harassment to insult a transgender woman by calling her “Mr.” and “him.” See, e.g., Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1819–43, 1846 (1992). For a discussion of harassment law, see *infra* section III.B.3, pp. 957–63.

<sup>170</sup> TENN. CODE ANN. § 9-4-5119 (West 2018); see also Scott Jaschik, *Fear of New Pronouns*, INSIDE HIGHER ED (Sept. 8, 2015), <https://www.insidehighered.com/news/2015/09/08/10-tennessee-withdraws-guide-pronouns-preferred-some-transgender-people> [<https://perma.cc/L7R3-X2QT>].

<sup>171</sup> N.J. STAT. ANN. § 26:8-40.12 (West 2018).



documentation, the fact that the law also included a new “undesigned/non-binary” option did not seem to attract any specific opposition.<sup>172</sup>

A related novelty concern may be that legal claims that sex discrimination law prohibits discrimination on the basis of transgender status will be weighed down by nonbinary gender, because nonbinary gender was not envisioned by the drafters of civil rights-era statutes in the 1960s and 1970s.<sup>173</sup> This controversy turns on what “sex” discrimination means.<sup>174</sup> Federal courts increasingly agree that discrimination against someone for being transgender is a form of sex discrimination because it rests on sex stereotypes.<sup>175</sup> The Obama Administration explicitly extended this logic to nonbinary gender identity, promulgating regulations that clarify that “[sex] stereotypes can include the expectation that individuals will consistently identify with only one gender.”<sup>176</sup> This

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<sup>172</sup> Or at least, none is apparent from the legislative history. See *Hearing on A. 1718 Before the Assemb. Human Servs. Comm.*, 218th Leg., 2018 Sess., at 1:07:08 (N.J. 2018) <https://www.njleg.state.nj.us/media/mp.asp?M=A/2018/AHU/0312-0200PM-MO-1.M4A&S=2018> [<https://perma.cc/X5MA-BES2>].

<sup>173</sup> See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012). There is a good argument that the drafters’ intentions should *not* govern this question. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (Scalia, J.) (holding that, with respect to the meaning of “sex” discrimination in Title VII, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed,” *id.* at 79).

<sup>174</sup> See Clarke, *supra* note 161, at 824. Title VII and Title IX do not include “gender identity” as a prohibited ground for discrimination, although many state and local rules do. See *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps> [<https://perma.cc/2DQ3-C2QZ>] (cataloguing state laws that prohibit discrimination on the basis of gender identity in education, employment, identification documents, hate crimes, housing, public accommodations, and health care). *But cf.* Mary Anne Case, Essay, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1366–68 (2014) (discussing how “gender identity” provisions might be defined or interpreted so as to preclude coverage for nonbinary forms of gender identity and expression).

<sup>175</sup> *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 745–46 (E.D. Va. 2018) (discussing precedents from the First, Sixth, Ninth, and Eleventh Circuits). A recent Sixth Circuit opinion held that discrimination based on transgender status is sex discrimination because, among other reasons, it rests on sex stereotyping and might be analogized to discrimination based on religious conversion. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–76 (6th Cir. 2018).

<sup>176</sup> 45 C.F.R. § 92.4 (2017) (defining sex stereotypes in Department of Health and Human Services (HHS) regulations interpreting the Affordable Care Act); Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375, 31,392 (May 18, 2016) (responding to the comment that there was no authority for the proposition that “non-binary genders” are “a protected class” by explaining that prohibited “[s]ex stereotypes can also include a belief that gender can only be binary and thus that individuals cannot have a gender identity other than male or female”). The Affordable Care Act borrows its definition of sex discrimination from Title IX. 42 U.S.C. § 18116(a) (2012). For discussion of litigation over this regulation, see *infra* section III.E, pp. 986–90.

The Sixth Circuit noted its approval of the Obama Administration’s argument in a Title VII sex discrimination case, stating:

[D]iscrimination because of a person’s transgender, intersex, or sexually indeterminate status is no less actionable than discrimination because of a person’s identification with two

interpretation may be exploited by opponents of transgender rights.<sup>177</sup> Their argument: Congress's references to "one sex" or "the other sex" in another provision of the statute demonstrate that Congress could not have intended to cover nonbinary genders.<sup>178</sup> But no court has adopted this view. If a court were to agree with this argument, it would justify voiding the regulation only as to nonbinary gender, not as to transgender men and women.

3. *Sexual Orientation.* — Gender identity is conceptually distinct from sexual orientation.<sup>179</sup> Nonbinary people have a diverse array of sexual orientations. In response to the 2015 U.S. Transgender Survey, 17% of nonbinary people reported being asexual,<sup>180</sup> 2% reported being straight or heterosexual, and the other 81% reported various orientations, such as queer, pansexual, bisexual, gay, or lesbian.<sup>181</sup> In discussing why many nonbinary people prefer terms such as pansexual and queer, scholar Genny Beemyn explains: "They see *bisexual* as implying a binary, and they are attracted to individuals who are outside of a gender binary or identify outside of a gender binary themselves, or they consider bisexuals to be attracted to different aspects of gender in different people, whereas they are attracted to people regardless of gender."<sup>182</sup>

There are many convergences between arguments for equality based on nonbinary gender identity and arguments for lesbian, gay, and bisexual equality. Advocates for nonbinary recognition often phrase their claims in the same core values of the marriage equality movement, such as love and acceptance.<sup>183</sup> Legal arguments for nonbinary gender

religions, an unorthodox religion, or no religion at all. And 'religious identity' can be just as fluid, variable, and difficult to define as 'gender identity'; after all, both have 'a deeply personal[,] internal genesis that lacks a fixed external referent.'

*R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 575 n.4 (quoting Sue Landsittel, Comment, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1172 (2010)).

<sup>177</sup> See Plaintiffs' Brief in Support of Their Motion for Partial Summary Judgment or, in the Alternative, Preliminary Injunction at 13, *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 16-cv-00108), 2016 WL 9049696.

<sup>178</sup> *Id.* at 16 (quoting 20 U.S.C. § 1681(a)(2), (8)). The relevant provisions of Title IX include an exception for "father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex," 20 U.S.C. § 1681(a)(8), as well as an exemption for certain institutions transitioning from single-sex to admitting "students of both sexes," *id.* § 1681(a)(2).

<sup>179</sup> GLAAD MEDIA REFERENCE GUIDE, *supra* note 9, at 6 (defining sexual orientation as "an individual's enduring physical, romantic and/or emotional attraction to members of the same and/or opposite sex, including lesbian, gay, bisexual, and heterosexual (straight) orientations").

<sup>180</sup> See Emens, *supra* note 43, at 307–29 (discussing asexuality as a sexual orientation).

<sup>181</sup> See *supra* note 78 and accompanying text.

<sup>182</sup> Genny Beemyn, *Coloring Outside the Lines of Gender and Sexuality: The Struggle of Nonbinary Students to Be Recognized*, 79 EDUC. F. 359, 360 (2015) (discussing interviews of college students).

<sup>183</sup> See sources cited *supra* note 109.

inclusion in the United States are possible only against the backdrop of prior achievements in sexual orientation equality.<sup>184</sup> Before *Obergefell v. Hodges*,<sup>185</sup> opponents of nonbinary gender rights had the easy argument that binary sex definitions were required to ensure marriage was only between a man and a woman.<sup>186</sup> That argument is no longer in their quiver.

However, nonbinary people may end up with interests in conflict with some LGBT rights arguments, for reasons similar to the marginalization of bisexuality.<sup>187</sup> As Professor Kenji Yoshino has explained, one reason bisexuality is often left out of discussions of LGBT rights is that it seems to detract from the argument that sexual orientation is immutable.<sup>188</sup> “[I]mmutability offers absolution by implying a lack of choice.”<sup>189</sup> Yet bisexuals are perceived to have had the choice to engage in heterosexual relationships.<sup>190</sup> On the one hand, nonbinary gender identity might be perceived as mutable, particularly by those who see it as a phase, a political statement, or a trend.<sup>191</sup> On the other hand, nonbinary gender (like bisexuality) might be immutable in the sense of being an expression of one’s authentic self and a fundamental feature of identity that no one should be asked to change.<sup>192</sup> A second reason for bisexual erasure is that the LGBT community may perceive bisexuals as “flight risks — individuals who could at any time abandon the gay

<sup>184</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (holding that same-sex couples may not be deprived of the right to marry); *United States v. Windsor*, 570 U.S. 744, 751 (2013) (striking down a federal law that excluded same-sex partners from the definition of “spouse”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down a Texas statute criminalizing same-sex intimacy between consenting adults).

<sup>185</sup> 135 S. Ct. 2584.

<sup>186</sup> See, e.g., Mathew D. Staver, *Transsexualism and the Binary Divide: Determining Sex Using Objective Criteria*, 2 LIBERTY U. L. REV. 459, 473 (2008).

<sup>187</sup> See Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 452–53 (2012) (discussing how advocates in the marriage equality cases went to great lengths to ignore bisexuality and to characterize their clients as lesbian or gay); Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM. & MARY J. WOMEN & L. 699, 699–700 (2015) (arguing that bisexuals “remain largely invisible in the case law and in the popular understanding of discrimination”).

<sup>188</sup> See, e.g., Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 405–07 (2000) (offering several explanations for the marginalization of bisexuals in lesbian and gay rights movements).

<sup>189</sup> *Id.* at 406; see also Clarke, *supra* note 43, at 13–17 (discussing the “powerful intuitive appeal,” *id.* at 17, of the concept that a person should not be penalized for “‘accidents of birth’ . . . because they bear no relationship to individual responsibility,” *id.* at 16, and tracing this idea through equal protection law).

<sup>190</sup> Yoshino, *supra* note 188, at 406. This is despite the fact that some bisexuals report they could not live exclusively as heterosexuals or homosexuals. *Id.* at 407 n.294.

<sup>191</sup> See *supra* pp. 910–11; cf. Tran & Glazer, *supra* note 26, at 401–02 (“[W]hat troubles society most about transgender people is that they make choices about aspects of their gender that society believes are not their choices to make.”).

<sup>192</sup> See Clarke, *supra* note 43, at 23–28 (discussing this version of immutability).

community to lead straight lives.”<sup>193</sup> Similarly, one reason for bias against nonbinary people is fear that their choices as to gender identity will be reversed.<sup>194</sup> A third reason for bisexual erasure is that, by asserting that sex might not be the primary factor in desire, bisexuality threatens sex as a primary category of social organization.<sup>195</sup> Many variations on nonbinary gender identity do this explicitly rather than implicitly.<sup>196</sup> And finally, bisexual people make poor poster children due to stereotypes that they are “promiscuous.”<sup>197</sup> Nonbinary people, many of whom adopt sexual orientations other than straight, gay, or lesbian, may trigger this prejudice as well.

Yet there are also opportunities for convergence. To the extent that nonbinary legal advocacy challenges the need for legal sex classifications, it may assist legal arguments for nondiscrimination on the basis of sexual orientation. Federal antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964<sup>198</sup> and Title IX of the Education Amendments of 1972,<sup>199</sup> do not explicitly prohibit discrimination on the basis of “sexual orientation.” One controversy in federal courts is whether discrimination on the basis of sexual orientation is always a type of sex discrimination prohibited by federal law.<sup>200</sup> The Second Circuit has accepted the argument that it is, because to discriminate on the basis of sexual orientation, the discriminator must first classify people based on sex — for example, the discriminator must identify a person as a woman, and then disapprove of her sexual attraction for other women.<sup>201</sup> Opponents argue that this logic would void every sex classification by employers, disturbing, for example, sex-differentiated dress

<sup>193</sup> Yoshino, *supra* note 188, at 407.

<sup>194</sup> See *supra* notes 83–86 and accompanying text (discussing the fear of flightiness as a reason for bias against nonbinary people).

<sup>195</sup> Yoshino, *supra* note 188, at 413 (“Without a clear and privileged distinction between ‘man’ and ‘woman,’ there is no clear and privileged distinction between ‘straight’ and ‘gay.’”).

<sup>196</sup> See *supra* notes 95–98 and accompanying text. Some forms of third-gender identity may serve to underscore the importance of sex as a category of social organization. See *infra* note 236 and accompanying text.

<sup>197</sup> Yoshino, *supra* note 188, at 420.

<sup>198</sup> 42 U.S.C. § 2000e-2(a)(1) (2012).

<sup>199</sup> 20 U.S.C. § 1681(a) (2012).

<sup>200</sup> Compare *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc) (holding it is), and *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (same), with *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir.) (holding it is not), *cert. denied*, 138 S. Ct. 557 (2017).

<sup>201</sup> *Zarda*, 883 F.3d at 113–14. A similar argument is that discrimination against, for example, a lesbian, is sex discrimination because if she were a man, her employer would not object to her sexual attraction to women. *Hively*, 853 F.3d at 345. This argument is consistent with a concept of sexual orientation that recognizes people outside of sex and gender binaries. Robin A. Dembroff, *What Is Sexual Orientation?*, 16 PHILOSOPHERS’ IMPRINT, no. 3, Jan. 2016, at 1, 19–20.

codes for men and women.<sup>202</sup> As nonbinary people challenge the need for sex-differentiated rules across a number of domains of social life, and as nonbinary gender identities gain greater acceptance, they may undermine the persuasive force behind this type of argument.

4. *Intersex Variations.* — There are also obvious overlaps between intersex and nonbinary organizing.<sup>203</sup> But the intersex movement is a distinct one, with its own particular relationships to other social justice movements.<sup>204</sup> Many people with intersex variations have binary gender identities, but not all do.<sup>205</sup> And many people with nonbinary gender identities do not have intersex variations.<sup>206</sup> These groups may sometimes share legal interests, although their interests may sometimes diverge.

Individuals who are both intersex and nonbinary may be at the forefront of advocacy efforts, for strategic and practical reasons. Nonbinary people with intersex traits may seem more sympathetic to the public and judiciary, because intersex traits are regarded as somatic rather than psychological or elective.<sup>207</sup> In American legal discourse, psychological conditions are often treated with skepticism.<sup>208</sup> Nonbinary people like Dana Zzyym, whose claims appear to be grounded in their physical bodies, may have more legitimacy with a skeptical public and judiciary.<sup>209</sup>

<sup>202</sup> See *Zarda*, 883 F.3d at 150–51 (Lynch, J., dissenting); Brief for the United States as Amicus Curiae at 17, *Zarda*, 883 F.3d 100 (No. 15-3775), 2017 WL 3277292. There are also doctrinal arguments against this position, for example, that courts can and do handle dress code controversies under a special doctrinal framework.

<sup>203</sup> One advocacy group marries these two concerns, calling itself the Intersex & Genderqueer Recognition Project. INTERSEX & GENDERQUEER RECOGNITION PROJECT, <http://www.intersexrecognition.org/> [<https://perma.cc/L9NH-SWGS>].

<sup>204</sup> See, e.g., JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 97–105 (2012) (mapping out conflicts). To say the movement is distinct is not to say that everyone agrees “intersex” is an identity. See Ellen K. Feder & Katrina Karkazis, *What’s in a Name?: The Controversy over “Disorders of Sex Development,”* 38 HASTINGS CTR. REP., no. 5, Sept.–Oct. 2008, at 33, 35 (discussing controversies over conceptualizing intersex as an identity versus a set of “clinically specific diagnoses” that are “widely disparate” in their features).

<sup>205</sup> See, e.g., PREVES, *supra* note 16, at 60–85.

<sup>206</sup> See, e.g., JAMES ET AL., *supra* note 2, at 44 (describing a USTS survey question asking participants to check all items that described their gender identities in which 31% of respondents selected “non-binary” but only 3% selected “intersex”).

<sup>207</sup> See M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 988 (2015) (“One of the barriers to recognition and respect that transgender people face in the courts and beyond is that ‘brain sex’ is not readily apparent, and transgender people must be believed about who they are.” (footnote omitted)).

<sup>208</sup> See, e.g., Dov Fox & Alex Stein, *Dualism and Doctrine*, 90 IND. L.J. 975, 977–80 (2015) (arguing that “much of our doctrine . . . treats mind and body as if they work and matter in critically different ways,” often minimizing mental harm, *id.* at 979). Judges may be wholly unsympathetic to what they perceive as choices with respect to identities. See sources cited *supra* note 189 and accompanying text.

<sup>209</sup> See *supra* pp. 918–19. In the *Zzyym* case, the government argued that it could not issue passports with gender options other than M or F because of “uncertainty about how it would evaluate persons ‘transitioning’ to a third sex.” *Zzyym v. Pompeo*, No. 15-cv-02362, 2018 WL 4491434,

They may be able to secure legal changes that redound to the benefit of all nonbinary people. Intersex people in general embody the argument that sex is not a coherent set of binary traits: that chromosomes, hormones, and phenotype do not always provide a consistent answer to the question of whether a person is male or female.<sup>210</sup>

There is a risk, though, that legal efforts on behalf of people with intersex variations may be limited to those deemed to possess an immutable or natural trait.<sup>211</sup> This might exclude altogether the claims of nonbinary people without intersex traits. Or it might support arguments for medical gatekeeping — requiring that nonbinary people secure a physician’s opinion regarding their psychological gender as a prerequisite to legal protection.<sup>212</sup> Moreover, opponents of nonbinary recognition often point to the fact that a small percentage of the population is intersex as a reason the law should not protect nonbinary people at all.<sup>213</sup>

One area of potential convergence is with respect to ending the practice of unnecessary surgeries to “fix” intersex infants. The new visibility of nonbinary people may lend support to “[t]he primary goal of the intersex movement,” which “is to eliminate or decrease the number of medically unnecessary cosmetic genital surgeries being performed on infants with an intersex condition.”<sup>214</sup> A United Nations Special Rapporteur

at \*7 (D. Colo. Sept. 19, 2018). The court held that this argument “misse[d] the ball” because “intersex people are born as they are.” *Id.* This argument also misses the ball for people undergoing transitions to nonbinary gender identities. The State Department’s rules for receiving a passport with a different gender marker simply require a letter from a doctor “stating the applicant has had appropriate clinical treatment for gender transition to the new gender of either male or female.” U.S. DEP’T OF STATE, 8 FOREIGN AFFAIRS MANUAL 403.3-2(B)(d)(5) (2018), <https://fam.state.gov/FAM/08FAM/08FAM040303.html> [<https://perma.cc/K7CD-2863>]. Appropriate clinical treatment does not always entail surgery or hormone therapy. *See, e.g.*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 2, 8–9 (7th ed. 2011) [hereinafter WPATH STANDARDS]. If there is some reason a doctor’s certification is required, people with nonbinary gender identities might also provide letters certifying that they have received appropriate clinical treatment for their gender transitions.

<sup>210</sup> *See* sources cited *supra* note 14 and accompanying text.

<sup>211</sup> *See* Clarke, *supra* note 43, at 32–52 (discussing ways courts have artificially curtailed the reach of discrimination law to exclude protection for traits deemed mutable).

<sup>212</sup> *Cf.* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 24 (2003) (critiquing requirements that trans people perform a certain narrative of binary gender identity to medical professionals before receiving legal protection).

<sup>213</sup> *See, e.g.*, Letter from Women’s Liberation Front to John Wiesman, Sec’y, Wash. State Dep’t of Health, Comments on Preproposal Statement of Inquiry to Amend Chapter 246-490 WAC, Vital Statistics (Aug. 22, 2017), at 2–3 (Sept. 28, 2017) [hereinafter WoLF Letter], [http://womensliberationfront.org/wp-content/uploads/2017/09/Comment-on-wac-246-490-075-birth-certificates\\_final\\_9-28-17.pdf](http://womensliberationfront.org/wp-content/uploads/2017/09/Comment-on-wac-246-490-075-birth-certificates_final_9-28-17.pdf) [<https://perma.cc/C9UF-TKCC>].

<sup>214</sup> GREENBERG, *supra* note 204, at 4. *See generally* GEORGIANN DAVIS, CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS (2015); ALICE DOMURAT DREGER, HERMAPHRODITES

has characterized “involuntary genital normalizing surgery” as a form of torture.<sup>215</sup> An international coalition of medical authorities recommends delaying “unnecessary genital surgery to an age of patient informed consent.”<sup>216</sup> Surgeries on infants have been criticized for “caus[ing] more physical and psychological trauma than does growing up with atypical genitalia.”<sup>217</sup> One justification for these surgeries has been that binary sexual anatomy is crucial for parents to raise a child with a binary gender identity.<sup>218</sup> Parents are sometimes advised to allow these surgeries to avoid stigmatization of their child, or to ensure their child appears “normal.”<sup>219</sup> But, as Professor Georgiann Davis writes: “Intersex is a problem because it disrupts the traditional gender order. If our behaviors weren’t constrained by gender, if opportunities weren’t filtered through gender, and if gender weren’t tied to bodies and identities, it is doubtful that intersex would be as problematic throughout the world as it is today.”<sup>220</sup> As nonbinary lives become mainstream, parents and the medical profession may have less to fear for children with ambiguous genitalia or other sex characteristics, and these surgeries may decrease.<sup>221</sup>

5. *Antiracist and Postcolonial Struggles.* — Struggles for nonbinary gender rights also have convergences with and divergences from anti-racist and postcolonial arguments.

Some nonbinary people point to intersections with antiracist struggles. For example, Jessi Brandon reports that what resonated with them was the slogan “[r]espect my existence or expect my resistance,” because

AND THE MEDICAL INVENTION OF SEX (1998); KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* (2008); SUZANNE J. KESSLER, *LESSONS FROM THE INTERSEXED* (1998).

<sup>215</sup> Juan E. Mendéz (Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶ 77, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf) [<https://perma.cc/K72Z-U8M6>].

<sup>216</sup> Christopher P. Houk et al., *Summary of Consensus Statement on Intersex Disorders and Their Management*, 118 *PEDIATRICS* 753, 755 (2006); see also INTERACT & LAMBDA LEGAL, *PROVIDING ETHICAL AND COMPASSIONATE HEALTH CARE TO INTERSEX PATIENTS* 2 (2018), [https://www.lambdalegal.org/sites/default/files/publications/downloads/resource\\_20180731\\_hospital-policies-intersex.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/resource_20180731_hospital-policies-intersex.pdf) [<https://perma.cc/7X96-XMTC>] (“Leading medical associations, recognizing that irreversible and deeply life-altering procedures can be safely delayed to both ensure best outcomes and avoid the potential ramifications of anesthesia on the developing brain, are developing policies informed by the patient community to delay harmful, medically unnecessary procedures.”).

<sup>217</sup> GREENBERG, *supra* note 204, at 18.

<sup>218</sup> See, e.g., Zeiler & Wickström, *supra* note 14, at 367.

<sup>219</sup> *Id.* at 360; see also *id.* at 367.

<sup>220</sup> DAVIS, *supra* note 214, at 7–8.

<sup>221</sup> *But cf.* Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement’s Path to De-medicalization*, 41 *HARV. J.L. & GENDER* 1, 19–20 (2018) (discussing how some parents of intersex children may prefer medical understandings of intersex traits to avoid associating their children with the LGBT movement).

“all Black people want, what people of color want, all that queer people and non-binary people want is to be respected and treated as equals, as equals to someone who is cis gender or straight or white.”<sup>222</sup> Others point to how the intersection of racial and gender stereotypes can complicate nonbinary identity. As writer Cicely-Belle Blain explains: “Society does not allow space for black folks to be alternative, to be nerdy, to be weird, to be queer, to be different from the narrow boxes created for us throughout history.”<sup>223</sup>

Others argue by analogy. Lauren Lubin, a nonbinary athlete, criticizes application forms that force an applicant to select one of two categories for sex, asking: “Can you imagine if you did that with race?”<sup>224</sup> This argument invites a comparison to multiracial identities. In the race context, there is debate over whether racial fluidity makes it impossible to collect meaningful data about the persistence of racial disparities or to identify beneficiaries of affirmative action programs.<sup>225</sup> Those who “decline to state” their race on official forms may be making the political statement that they believe race should not be significant for purposes of diversity programs.<sup>226</sup> While it is unlikely that those nonbinary people who resist sex classifications are doing so because they oppose affirmative action, similar concerns might be raised about the impact of gender fluidity on data about sexism.<sup>227</sup> Moreover, there could be tensions between the goals of nonbinary rights movements and antiracist struggles. For example, advocates for nonbinary and other transgender

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<sup>222</sup> Brandon Interview, *supra* note 62, at 14. “Cis” is a term meaning the opposite of trans — in other words, a person who identifies with the gender associated with the sex they were assigned at birth.

<sup>223</sup> Cicely-Belle Blain, Opinion, *The Political Rebellion of Being Black and Non-binary*, XTRA (June 9, 2017, 1:34 PM), <https://www.dailyxtra.com/the-political-rebellion-of-being-black-and-non-binary-73646> [<https://perma.cc/JW4S-X7RM>]. Ashleigh Shackelford makes another intersectional argument: “As we see in the media and within our interpersonal spaces, femininity is significantly scripted through whiteness and thinness. I am none of those things.” Ashleigh Shackelford, *Why I’m Non-binary but Don’t Use “They/Them,”* HUFFINGTON POST (Feb. 21, 2017, 1:36 PM), [https://www.huffingtonpost.com/entry/why-im-nonbinary-but-dont-use-they-them\\_us\\_58ac875ee4b05e6b9b192c07](https://www.huffingtonpost.com/entry/why-im-nonbinary-but-dont-use-they-them_us_58ac875ee4b05e6b9b192c07) [<https://perma.cc/T6SH-QN6K>] (“The way whiteness and white supremacist ideology is set up, we’re not seen as feminine or woman or human. In many ways, the masculinizing of our bodies and performance has been the basis for our dehumanizing and denial of gender conformity.”).

<sup>224</sup> Aimee Heckel, *Lauren Lubin, Former CU Athlete, Subject of Documentary*, DAILY CAMERA (Sept. 5, 2016, 9:25 PM), [http://www.dailycamera.com/news/ci\\_30326197/lauren-lubin-former-cu-athlete-subject-documentary](http://www.dailycamera.com/news/ci_30326197/lauren-lubin-former-cu-athlete-subject-documentary) [<https://perma.cc/66Y4-7FYH>].

<sup>225</sup> See Lauren Sudeall Lucas, Essay, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1245 (2014).

<sup>226</sup> Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 549 (2009).

<sup>227</sup> See, e.g., WoLF Letter, *supra* note 213, at 4 (speculating about the impact of nonbinary gender recognition on the collection of crime statistics based on sex).



people might seek better enforcement of hate crime statutes.<sup>228</sup> But those laws operate within the context of a criminal justice system that disproportionately burdens racial minorities.<sup>229</sup>

Other advocates of nonbinary recognition may link their resistance with anticolonialism, pointing to the history of suppression of third genders in non-Western cultures.<sup>230</sup> Researchers highlight that nonbinary genders have existed “across time and place” to challenge the view that humanity is naturally and inevitably divided into male and female categories.<sup>231</sup> Historical and present-day examples include Indian Hijra, Thai Kathoey, Indonesian Waria, various Two-Spirit identities of First Nations tribes, and South American Machi identities, among others, each with a distinct meaning not reducible to man or woman.<sup>232</sup> These examples may suggest it is possible “for alternate genders and sexual categories to emerge in certain times and places, transcending sexual dimorphism.”<sup>233</sup> But these examples have been overlooked due to “ethno-centric Western interpretations of gender” that “have dominated the natural and social sciences.”<sup>234</sup> For example, when the British came to rule India, they passed laws criminalizing Hijra practices and removing state protection.<sup>235</sup> Cross-cultural and historical arguments may serve to denaturalize binary gender arrangements. But they may not point the way toward gender liberation. For example, in India, despite “the continued salience of the alternative gender role of the hijra,” hijras

<sup>228</sup> However, it is important to note that transgender people, particularly those who are people of color, are often reluctant to seek assistance from law enforcement. See JAMES ET AL., *supra* note 2, at 188 (reporting that 57% of transgender respondents to the 2015 USTS were “somewhat uncomfortable or very uncomfortable asking for help from the police”); *id.* at 189 fig. 14.9 (breaking down percentages by race and ethnicity). Seventy-one percent of nonbinary respondents to the 2015 USTS reported they were “never or only sometimes . . . treated with respect” by law enforcement, compared with 55% of transgender men and women. *Id.* at 186.

<sup>229</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012).

<sup>230</sup> See Iantaffi Interview, *supra* note 47, at 18 (“[T]here are the bigger issues tha[n] the gender binary itself . . . it’s part of this colonizing, Christianizing, white supremacist thing because the more we really look at evidence from anthropology, there have always been a variety of genders in lots of different cultures and places.” (ellipsis in original)).

<sup>231</sup> Ben Vincent & Ana Manzano, *History and Cultural Diversity*, in *GENDERQUEER AND NON-BINARY GENDERS*, *supra* note 27, at 11, 11; see also, e.g., Herdt, *supra* note 17; Vincent & Manzano, *supra*, at 18–25. Vincent and Manzano also point out that European history includes examples of nonbinary understandings of gender, such as English mollies, Italian femminielli, and Albanian sworn virgins. Vincent & Manzano, *supra*, at 13–17.

<sup>232</sup> See Vincent & Manzano, *supra* note 231, at 18–25. I cannot do justice here to these identities, so I will not attempt to explain them. I refer readers to the cited texts.

<sup>233</sup> Herdt, *supra* note 17, at 16 (posing this as a question).

<sup>234</sup> Vincent & Manzano, *supra* note 231, at 12.

<sup>235</sup> Serena Nanda, *Hijras: An Alternative Sex and Gender Role in India*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY*, *supra* note 17, at 373, 414. In 2014, India’s Supreme Court recognized a third gender category entitled to equal rights under India’s Constitution. *Nat’l Legal Servs. Auth. v. Union of India*, (2014) 5 SCR 119, 142–44.

remain stigmatized, and the “role functions in a culture in which male and female sex and gender roles are viewed as essential, sharply differentiated and hierarchical.”<sup>236</sup>

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Thus, nonbinary gender identities are diverse. Nonbinary people are targeted for discrimination due to animus, ignorance, disbelief, disregard, disrespect, and the threat they pose to traditional gender norms. The movement for nonbinary gender rights has complicated relationships with other identity-based legal arguments. It may sometimes be in tension with feminist, LGBT, intersex, and antiracist legal efforts, but it also offers these movements new opportunities and possibilities for convergence.

## II. A CONTEXTUAL APPROACH TO NONBINARY GENDER RIGHTS

This Part asks how the law might respond to rights claims by a diverse nonbinary minority.<sup>237</sup> Its purpose is not to prescribe any particular model for legal response. Rather, it is to argue that there are many ways the law might address nonbinary gender, and that efforts to find a one-size-fits-all theory stifle discussion. It argues instead for a contextual approach. It will begin by resisting the demand to define sex and gender with precision, arguing instead that these terms are and should be culturally contested, and must be defined with attention to each legal context. It will then discuss possible regulatory models, resisting the characterization of the issue as either third-gender recognition or gender abolition.

### A. *Against Universal Definitions of Sex and Gender*

Rather than attempting an all-purpose legal definition of sex or gender, this section argues that when a definition is required, it should be tailored to serve the interests at stake in regulation. Attempts to settle metaphysical debates about what sex and gender *are* distract from the question of how these concepts *should be* defined in particular legal contexts, if at all.

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<sup>236</sup> Nanda, *supra* note 235, at 417. *But see* Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 122 (2008) (discussing historical examples from Native American societies in which “[g]ender variance was fully incorporated into tribal life and was generally well-respected and valued within the community”).

<sup>237</sup> I note where these various approaches are already supported by U.S. legal doctrine, but I leave for another day questions about whether courts, legislatures, or agencies, or federal, state, or local governments are best suited to implement legal change.

Debates over procedural rules are instructive here.<sup>238</sup> In these debates, scholars ask whether rules should be “transsubstantive,” meaning the same in every substantive context.<sup>239</sup> The benefits of uniform rules are simplicity and depoliticization. Uniform rules are easier for courts, lawyers, and the public to learn.<sup>240</sup> They are depoliticizing, because they avoid debates over which rules apply in which contexts — debates that will inevitably entail political judgments.<sup>241</sup> The main disadvantage is that uniform rules may not serve the interests of particular substantive regulatory schemes. Uniform definitions are inappropriate for terms like “employee,” a concept that serves different purposes under the common law, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Tax Code, and so forth.<sup>242</sup>

The “simplicity” advantage of universal rules does not have much force in the context of sex and gender. Because there are relatively few contexts left in which the law requires an operative definition of sex or gender, devising contextual definitions is not an unwieldy legal project.<sup>243</sup>

The “depoliticization” argument works against universal definitions. Because sex and gender identities are deeply controversial, personal, and important to many people, any attempt at universal definition will be met with immediate resistance. Even the distinction between sex and gender, once the pivot point of feminist argument, is controversial.<sup>244</sup> Some on the left would prefer to deconstruct the distinction — following the views of influential theorist Judith Butler.<sup>245</sup> They argue that the hormonal, genetic, nervous, and morphological aspects of what we call sex are only about sex because we call them that.<sup>246</sup> Some on the right

<sup>238</sup> I have previously analogized legal sex to the property law “metaphor of a bundle of sticks.” Clarke, *Identity and Form*, *supra* note 28, at 829. Rather than thinking of ownership as a right to a thing, this metaphor suggests it “is a bundle of rights, such as the right to exclude others from the property, . . . to sell the property, and so forth.” *Id.* We might similarly think of legal identities as bundles of rights that can be unbundled. Sex might be unbundled into the right to use certain restrooms, to have particular occupations, to participate on certain sports teams, and so forth. *See id.* at 831–32; *see also infra* Part III, pp. 945–90.

<sup>239</sup> *See, e.g.*, Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 378 (2010).

<sup>240</sup> *Id.* at 387.

<sup>241</sup> *See id.* at 387–88.

<sup>242</sup> *See, e.g.*, Kristin E. Hickman & Claire A. Hill, *Concepts, Categories, and Compliance in the Regulatory State*, 94 MINN. L. REV. 1151, 1179–81 (2010).

<sup>243</sup> *See infra* Part III, pp. 945–90 (listing possible contexts).

<sup>244</sup> *See supra* section I.C.1, pp. 915–21.

<sup>245</sup> *See* JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1–34 (1990).

<sup>246</sup> Please forgive me for this oversimplification for the sake of brevity. *See, e.g.*, Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 522 (1988) (arguing that although sex and gender purport to be natural, they are both constituted by “tacit collective agreement to perform, produce, and sustain discrete and polar genders”).

would prefer to reconstruct an integrated understanding of sex and gender.<sup>247</sup> For example, the Catholic Church views traditional roles for men and women as natural rather than socially constructed.<sup>248</sup> The nuances of these debates may be altogether lost on the judiciary, which uses the word “gender” rather than “sex” because the term “sex” sounds salacious.<sup>249</sup> Ultimately, neither the Catholic Church,<sup>250</sup> nor the American Psychological Association,<sup>251</sup> nor the state of North Carolina<sup>252</sup> can settle ideological controversies over sex and gender by defining terms.

Moreover, “there is no logically necessary connection between showing or proving that gender is contingent and achieving any particular substantive outcome or result.”<sup>253</sup> Some opponents of transgender rights base their arguments on the premise that there is a distinction between sex and gender identity.<sup>254</sup> They argue sex should be primary.<sup>255</sup> Which definition of sex or gender should matter is a moral or political question. It cannot be settled with factual arguments.<sup>256</sup>

<sup>247</sup> Consider the views of the Vatican. See Mary Anne Case, *After Gender the Destruction of Man? The Vatican's Nightmare Vision of the "Gender Agenda" for Law*, 31 PACE L. REV. 802, 803 (2011) (“For the last several decades, the English word ‘gender’ has been anathema to the Vatican and those seeking to influence secular law and policy throughout the world on its behalf.”).

<sup>248</sup> The Church’s reasons include opposition to “ideologies which, for example, call into question the family, in its natural two-parent structure of mother and father, and make homosexuality and heterosexuality virtually equivalent, in a new model of polymorphous sexuality.” *Id.* at 806–07 (quoting Letter from Joseph Cardinal Ratzinger, Prefect, Congregation for the Doctrine of the Faith, to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World (May 31, 2004), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html) [<https://perma.cc/7J5R-NNAX>]).

<sup>249</sup> In a now-famous story, then-lawyer Ruth Bader Ginsburg began using the term “gender” rather than “sex” in the 1970s, after her assistant pointed out that judges would be distracted by seeing the term “sex” in legal briefs. For a colorful retelling, listen to *More Perfect: Sex Appeal*, WNYC STUDIOS (Nov. 23, 2017), <https://www.wnycstudios.org/story/sex-appeal/> [<https://perma.cc/946D-BR3J>].

<sup>250</sup> See Case, *supra* note 247, at 806–07.

<sup>251</sup> See AM. PSYCHOLOGICAL ASS’N, DEFINITIONS RELATED TO SEXUAL ORIENTATION AND GENDER DIVERSITY IN APA DOCUMENTS (2015), <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> [<https://perma.cc/CEA8-CWHH>] (adopting progressive definitions).

<sup>252</sup> See Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, § 1.3 (defining “biological sex” as “male” or “female”), *repealed by* 2017 N.C. Sess. Laws 4, § 1.

<sup>253</sup> Shannon Minter, *Why Gender Theory Should Not Determine Transgender Advocacy* 13 (2010) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>254</sup> See, e.g., *Boyden v. Conlin*, No. 17-cv-264, 2018 WL 4473347, at \*4 (W.D. Wis. Sept. 18, 2018) (discussing the argument of opponents of health insurance coverage for transition-related care that “sex is immutable, whereas gender identity is a developmental process”); WoLF Letter, *supra* note 213, at 2 (opposing nonbinary recognition on the ground that “[s]ex and ‘gender’ are distinct concepts” and arguing the law should only recognize sex).

<sup>255</sup> WoLF Letter, *supra* note 213, at 2–4.

<sup>256</sup> See David B. Cruz, Essay, *Getting Sex “Right”: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship*, 18 DUKE J. GENDER L. & POL’Y 203, 217 (2010) (“It misdirects our focus, to someone’s political detriment, to appeal to the natural or to ‘the facts’ of sex (as proclaimed by medical practitioners) as the basis for what are really political judgments about what identities and relationships to recognize.”); Robin Dembroff, *Real Talk on the*

Conversation might be facilitated by careful examination of the interests at stake in each potential area of sex or gender regulation.<sup>257</sup> Whether sex or gender should be defined based on genetics, hormones, morphology, physiology, psychology, elective choice, documentary evidence such as birth certificates, public perceptions, something else, or not at all — is a difficult question to answer in general.<sup>258</sup> The answer may be different if the law's purpose is to forbid discrimination, express respect for a person's identity, ensure accurate medical records, create fair divisions in sporting events, provide affirmative action for people disadvantaged by male dominance, or some mix of these goals. Meanings may change over time. Rather than attempting to settle questions once and for all, contextualized definitions might create opportunities for various constituencies to argue about what is at stake in each context of sex or gender regulation. To be sure, one danger of contextual analysis is that its results are contestable. Decisionmakers may ultimately prioritize interests in different ways and arrive at different outcomes.<sup>259</sup> But a particularized approach may create opportunities for discussion about nonbinary gender rights that are not foreclosed at the outset by ideological or theoretical disagreements about the meaning of sex or gender.<sup>260</sup>

### B. Regulatory Models for Nonbinary Gender Rights

Discussions of nonbinary gender rights are often stifled by the assumption that those rights must always take the form of gender neutrality or, alternatively, that the law must always recognize a third gender.

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Metaphysics of Gender 1–2 (May 15, 2017) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>257</sup> *But see* Talia Mae Bettcher, *Trans Women and the Meaning of "Woman,"* in THE PHILOSOPHY OF SEX: CONTEMPORARY READINGS 233, 243 (Nicholas Power et al. eds., 6th ed. 2013) (objecting to context-specific definitions of who is a woman because they mean that there could be contexts in which a trans woman's claims to being a woman might be false, while, on the author's alternative "multiple-meaning view, a trans woman can say that she is a woman in *all* legitimate contexts because those contexts in which she is not a woman occur in a dominant culture" with a view of gender that she rejects on philosophical grounds). While this Article assumes that people's gender identities are what they say they are, it does not begin from the premise that there could never be a context in which the law might legitimately offer definitions based on something other than self-identification. Instead, it examines each legal context.

<sup>258</sup> *See, e.g.,* Clarke, *Identity and Form*, *supra* note 28, at 760, 763–64, 792–99 (discussing alternative legal definitions of "sex").

<sup>259</sup> This objection is roughly analogous to a line of criticism of balancing tests in constitutional law. *See, e.g.,* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 982 (1987) (arguing that balancing approaches to constitutional law are problematic because, among other reasons, "[n]o system of identification, evaluation, and comparison of interests has been developed").

<sup>260</sup> Consider, for example, how some advocates of policies to address climate change have overcome polarization by framing discussions around individual legal or policy questions on a micro level. Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695, 701–02 (2016) (discussing research from psychology that explains why political polarization makes solutions to climate change at the federal legislative level impossible and proposing that change proceed locally by building consensus on specific proposals).

Rather than advocating either of these options as the best fit for nonbinary gender rights, this section describes potential upsides and downsides of each model. It proposes that there are variations on these models, and combinations of the two approaches, that might best fit different circumstances. There is also a third option: integrating nonbinary people into binary sex or gender regulations, but tailoring the definition of “sex” or “gender” so as to best fulfill the purposes of the regulation, while respecting every person’s gender identity to the extent possible.

1. *Third-Gender Recognition.* — A recognition model would provide a third option to better reflect the lived experiences of people who do not check the M or F boxes. This model has the potential upsides of conferring legal dignity and protection, as well as facilitating affirmative efforts at inclusion and accommodation. But recognition also has potential downsides: the forms of gender identity the law can recognize are limited. Additionally, a third legal option may generate backlash, reinforce stereotypes about the third category, and domesticate the radical potential of nonbinary gender.

A first potential benefit of third-gender recognition is in conferring legal status and protection. A recognition model responds to concerns about disbelief, disrespect, and disregard of nonbinary people. Recognition legitimates nonbinary identity as a “civil status”; in other words, it affirms the “position of a person within the legal system.”<sup>261</sup> By giving legal imprimatur to nonbinary gender, on par with the gender identities of men and women, recognition expresses the civil equivalence of nonbinary identities. Legal recognition may serve as a shield, giving nonbinary people authority in their demands for fair treatment from public and private actors.

Another advantage of recognition is that it might facilitate projects that see nonbinary gender as an aspect of organizational diversity that should be sought after. Recognition can facilitate the collection of data and information on the nonbinary population to identify problems and challenges people with nonbinary gender identities commonly face, as with the U.S. Transgender Survey. It might entail a right to affirmative changes in policy to accommodate nonbinary gender identities. The concept of “reasonable accommodation” found in disability law is a type

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<sup>261</sup> Press Release No. 95/2017, Bundesverfassungsgericht, Civil Status Law Must Allow a Third Gender Option (Nov. 8, 2017), <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-095.html> [<https://perma.cc/F5HP-MP8G>] (describing an order of the First Senate of the German Federal Constitutional Court recognizing the right to registration of a “diverse” gender other than male or female); Peter Dunne & Jule Mulder, Developments, *Beyond the Binary: Towards a Third Sex Category in Germany?*, 19 GERMAN L.J. 627, 636–37 (2018) (discussing how the German decision “expressly acknowledges and validates the legitimacy of non-male and non-female identities,” *id.* at 637).

of recognition.<sup>262</sup> On this theory, institutions must make reasonable adjustments to their policies and practices to accommodate people with disabilities.<sup>263</sup> When a person with a disability requests an accommodation, their employer must engage in an “interactive process” to come to a solution.<sup>264</sup>

Whether the Americans with Disabilities Act<sup>265</sup> (ADA) protects non-binary gender, as a legal matter, is a complicated question. The ADA explicitly excludes “gender identity disorders not resulting from physical impairments.”<sup>266</sup> But one court has construed this provision “narrowly to refer to simply the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons who identify with a different gender may have — such as . . . gender dysphoria.”<sup>267</sup> This reasoning could extend to those nonbinary people with gender dysphoria, but would not cover anyone unwilling or unable to assert they suffer from a “disabling condition.”<sup>268</sup> Some, but not all, nonbinary people may have gender dysphoria.<sup>269</sup> At present, U.S. sex discrimination law does not include any right to reasonable

<sup>262</sup> See, e.g., 42 U.S.C. § 12112(b)(5)(A) (2012) (providing that prohibited discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless . . . the accommodation would impose an undue hardship on the operation of the business”).

<sup>263</sup> *Id.*

<sup>264</sup> 29 C.F.R. § 1630.2(o)(3) (2018) (“To determine the appropriate reasonable accommodation [for a given employee,] it may be necessary for the [employer] to initiate an informal, interactive process with the [employee].”).

<sup>265</sup> 42 U.S.C. §§ 12101–12213.

<sup>266</sup> *Id.* § 12211(b)(1). For an argument that this exclusion is a violation of the Constitution’s Equal Protection Clause, see Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 551, 557–58 (2016).

<sup>267</sup> *Blatt v. Cabela’s Retail, Inc.*, No. 14-cv-04822, 2017 WL 2178123, at \*4 (E.D. Pa. May 18, 2017). Gender dysphoria is significant distress or impairment resulting from incongruence between one’s gender identity and one’s assigned sex. *Id.* at \*2 & n.1. The Trump Administration agrees that the ADA covers gender dysphoria when it results from a “physical impairment.” Statement of Interest of the United States of America at 3, *Doe v. Arrisi*, No. 16-cv-08640 (D.N.J. July 17, 2017).

<sup>268</sup> *Blatt*, 2017 WL 2178123, at \*3–4 (concluding that the plaintiff’s gender dysphoria was a disability because it “substantially limits her major life activities of interacting with others, reproducing, and social and occupational functioning,” *id.* at \*4). One concern may be that disability law pathologizes transgender identity. *But see* Kevin Barry & Jennifer Levi, *Blatt v. Cabela’s Retail, Inc. and a New Path for Transgender Rights*, 127 YALE L.J.F. 373, 386 (2017) (“This concern ignores the distinction between transgender identity and gender dysphoria. Transgender identity is *not* a medical condition. Gender dysphoria, on the other hand, *is* a medical condition; it is real, serious, and physically incapacitating, and often can only be ameliorated by medical care.” (footnote omitted)).

<sup>269</sup> In 2013, the American Psychiatric Association’s Diagnostic Statistical Manual updated the definition of “[g]ender dysphoria,” to “reflect[] a change in conceptualization of the disorder’s defining features by emphasizing the phenomenon of ‘gender incongruence’ rather than cross-gender identification per se.” AM. PSYCHIATRIC ASS’N, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5, at 14 (2013). It clarifies: “The experienced gender incongruence and resulting gender dysphoria may take many forms.” *Id.*

accommodation.<sup>270</sup> Whether or not the letter of the law applies, nonbinary people might make arguments for institutional inclusion that sound in the theory of reasonable accommodation: sometimes equality requires affirmative changes in structures and rules.

However, the recognition model also has potential drawbacks. One is that recognition may be purely expressive, amounting to lip service to nonbinary gender that does not disturb existing institutional arrangements that work to the advantage of the binary majority. Recognition does not always entail accommodation. For example, recognition could mean that a university includes “nonbinary” as an optional sex designation in its official records but does no work to educate staff or students about nonbinary gender identities, fails to respond to complaints of harassment from nonbinary students, and maintains only single-sex dormitories.

Additionally, precisely because it expresses the legitimacy of nonbinary gender identities, recognition may incur political backlash from those who are invested in maintaining binary gender. As new identities make claims for recognition, they are also met with resistance from those fatigued by identity politics in general.<sup>271</sup> To the extent that recognition is perceived to entail costly accommodations, it may incur all the more resistance.<sup>272</sup>

Moreover, adding an X option to M and F does not confer dignity on every gender identity; it only expands the list of legal sex classifications to three. The X designation may be a poor fit for those people who regard their gender identities as hybrids of M and F, altogether absent, or subversive. Conceivably, sex designations could be a blank form field, allowing people to choose whatever gender descriptor they might prefer, as on social media websites.<sup>273</sup> But in the law, infinite variation can be a problem. On the principle of *numerus clausus*, the law sometimes limits the types of social forms that will be legally recognized because third parties have an interest in understanding legal claims.<sup>274</sup> To the extent that there are third-party interests in understanding someone’s sex or gender identity, it may be impossible to

<sup>270</sup> This is relevant assuming that sex discrimination includes discrimination against someone for having a nonbinary gender identity. See *supra* p. 924.

<sup>271</sup> See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 794 (2011).

<sup>272</sup> See, e.g., Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 311–12 (2009) (identifying a “socio-legal backlash,” for which “[a] primary target . . . has been the ADA’s accommodation mandate”).

<sup>273</sup> See, e.g., Facebook Diversity, *supra* note 45.

<sup>274</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000). This is the case in property law, where a limited number of types of ownership are recognized. *Id.* In other instances, such as in contract law, the law enforces a nearly unlimited variety of forms of private agreements. *Id.* at 3. For applications of this theory to sex and gender, see Clarke, *Identity and Form*, *supra* note 28, at 769; and Katyal, *supra* note 28.



recognize an unlimited variety of identities. Many fill-in-the-blank gender identities are unlikely to have widespread social understanding or may be misunderstood.

By identifying a third gender, the recognition model also runs the risk of reinforcing new stereotypes, exclusionary categories, and stigmatizing practices. The X category may come to stand for a new “package” of gender stereotypes, rather than opening space for a diversity of gender identities.<sup>275</sup> Authorities may end up policing who is and is not a legitimate member of the third category. The history of racial categorization demonstrates that the addition of new categories can be in the service of subordination rather than liberation.<sup>276</sup> Even if it is freely chosen, the X may come to mark stigma. In those cultures that recognize third genders, the third-gender category is usually subordinate.<sup>277</sup>

A recognition model also risks domesticating nonbinary identity, in the way that queer theorists expressed concern that marriage would domesticate LGB people, blunting the edge of radical critiques of normative sexualities.<sup>278</sup> Integration of nonbinary people into a third category may remove the pressure to eliminate the state’s power to impose legal sex classifications.<sup>279</sup> But whether this is likely to be true in a given context is an empirical question. Social movements might pursue recognition as a stopgap strategy, while keeping more radical goals as long-term aspirations. Or they might pursue limited forms of recognition in some contexts and make more radical demands for sex or gender neutrality in others.

2. *Sex or Gender Neutrality.* — An alternative legal strategy is sex or gender neutrality. The term “gender neutrality” has long generated confusion.<sup>280</sup> One question is what aspects of sex or gender the law should treat neutrally. Another question is how neutrality is to be achieved. Neutrality is unlikely to mean enforced androgyny. Rather, the law might insist on masking gendered characteristics in certain contexts, eliminating rules that classify by sex, or decoupling certain traits

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<sup>275</sup> See Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305, 1306 (1998).

<sup>276</sup> Professor Mary Anne Case offers the example of “the ever finer slicing of racial classifications from Black and White to quadroon and octoroon in antebellum Louisiana, or the distinction between Black, White, and Colored in South African apartheid law.” Case, *supra* note 25, at 15 n.35.

<sup>277</sup> See, e.g., S.F. Ahmed et al., Review, *Intersex and Gender Assignment; The Third Way?*, 89 ARCHIVES OF DISEASE IN CHILDHOOD 847, 848 (2004). But see Gildden, *supra* note 236, at 122–23 (describing the “high status granted to gender variant individuals” in some Native American communities, *id.* at 123).

<sup>278</sup> See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 84–116 (1999); Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400–01 (2004).

<sup>279</sup> Cf. Currah, *supra* note 164, at 445–46 (discussing an analogous debate with respect to rights for transgender men and transgender women).

<sup>280</sup> See, e.g., Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 837–38 (1989).

from sex classifications. Alternatively, it might follow the nonendorsement or pluralism strands of the law's treatment of religion.

One view is that the law should be neutral not only with respect to sex, in the physical sense of that term, but also with respect to gender, in the social sense of masculinity and femininity.<sup>281</sup> This would mean abolition of gender — the old radical feminist dream of an androgynous or unisex society.<sup>282</sup> But ending gender is a troublesome legal project, for theoretical and practical reasons.<sup>283</sup> As a matter of theory — what would it mean to end gender? Would it mean no one could wear frilly dresses or suits and ties?<sup>284</sup> Would it mean jobs like firefighting, which prize traditionally masculine traits, like risk-taking and physical strength, must be restructured to give equal weight to traditionally feminine traits, like caretaking and gentleness?<sup>285</sup> As a practical matter, this version of “gender neutrality” would be difficult to implement and likely to encounter political resistance. The idea that law could eradicate social practices like race or gender, even if it tried, is questionable.<sup>286</sup> Whatever the virtues of gender abolition might be, the idea is unlikely to catch on in a culture in which gender remains a source of meaning and identity for many people, including many transgender men, transgender women, and nonbinary people.

Alternatively, gender neutrality might attempt a project of lesser ambition. It might aim not to eradicate gender across the board, but to “mask” gendered social characteristics in certain contexts, as in the famous orchestra auditions study in which aspiring musicians played behind a curtain so that the judges could not guess their sexes or gender

<sup>281</sup> Psychologists have devised measures for determining what traits are gendered in this social sense, such as the Bem Sex Role Inventory, which report the results of surveys about whether particular traits, behaviors, or characteristics are desirable in men or women. See, e.g., Andrew P. Smiler & Marina Epstein, *Measuring Gender: Options and Issues*, in 1 HANDBOOK OF GENDER RESEARCH IN PSYCHOLOGY 133, 134 (Joan C. Chrisler & Donald R. McCreary eds., 2010). Notably, these surveys allow masculinity and femininity to be assessed independently; individuals may be high in both male and female traits or low in both. See *id.*

<sup>282</sup> See *supra* p. 916.

<sup>283</sup> See YURACKO, *supra* note 30, at 144.

<sup>284</sup> See JULIA SERANO, EXCLUDED: MAKING FEMINIST AND QUEER MOVEMENTS MORE INCLUSIVE 128 (2013) (“What exactly is the ‘end of gender’? What does it look like? Are there words to describe male and female bodies at the end of gender? Or do we purge all words that refer to male- or female-specific body parts and reproductive functions for fear that they will reinforce gender distinctions? Do we do away with activities such as sports, sewing, shaving, cooking, fixing cars, taking care of children, and of course, man-on-top-woman-on-bottom penetration sex, because these have been too closely associated with traditional masculine and feminine roles in the past? What clothes do we wear at the end of gender?”).

<sup>285</sup> See YURACKO, *supra* note 30, at 146–48. Or would it mean somehow attempting to delink these stereotypical traits from gender?

<sup>286</sup> Antidiscrimination law has more moderate ambitions: to intervene in particular social practices that uphold racialized, gendered, or otherwise problematic hierarchies. See, e.g., Robert Post, 1998–99 Brennan Center Symposium Lecture, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 17 (2000).

identities, and as a result, more women ended up being selected.<sup>287</sup> This approach might aim to protect privacy in addition to ensuring equality.

Another limited form of neutrality is anticlassification. Rather than insisting that the law neuter society, this variation on neutrality would insist that legal rules stop classifying people based on sex.<sup>288</sup> Rather than adding a third-gender option to identity forms, this approach might mean eliminating the sex category altogether from official documents. It would mean treating sex more like race, which was once, but is no longer, a classification listed on the face of birth certificates<sup>289</sup> and a mode of segregating restrooms. Eliminating classifications makes it more difficult for governments and others “to locate and persecute members of stigmatized groups.”<sup>290</sup>

Yet another approach is decoupling. Neutrality might mean decoupling traits or characteristics associated with men or women from sex. To give another musical example, an a cappella group might limit its members to those with tenor, baritone, or bass voices, rather than to men only.<sup>291</sup> Family law rules might define their beneficiaries in terms of the category of “primary caretakers,” who could be mothers, fathers, or parents with nonbinary gender identities, rather than limiting their benefits to mothers.<sup>292</sup> Or a sports team might limit players to those with low levels of testosterone, rather than women per se.<sup>293</sup>

Thus, these limited forms of sex neutrality may reduce discrimination against nonbinary people. But sex neutrality may also have advantages for other transgender and gender-nonconforming people, and for society as a whole. One is that sex neutrality avoids the need for

<sup>287</sup> See Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 715–16 (2000).

<sup>288</sup> See HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* 10 (2017) (arguing that “[t]he administrative discretion to decide who is female and who is male is the essence” of a harmful type of sex discrimination that the author terms “sex identity discrimination”); Tomchin, *supra* note 159, at 861 (arguing that “legal sex classification . . . — which hurts so many — should be eliminated, much like the formerly ubiquitous system of legal racial classification,” but not proposing “gender-blindness,” which, “like race-blindness, would harm those who are most impacted by discrimination”).

<sup>289</sup> Racial data are still collected. See Clarke, *Identity and Form*, *supra* note 28, at 800.

<sup>290</sup> Laurie Shrage, *Does the Government Need to Know Your Sex?*, 20 J. POL. PHIL. 225, 228 (2012).

<sup>291</sup> See Pat Eaton-Robb, *Poof! Ivy League Glee Club’s Gender Restrictions Disappear*, ASSOCIATED PRESS (Feb. 11, 2018), <https://www.apnews.com/76974daffade44ed8119618f8437fca0> [<https://perma.cc/7BBA-7MH8>] (“The 14-member Whiffenpoofs, a group formed in 1909, will continue to comprise tenor, baritone and bass voices, and the Whims will continue to be for sopranos and altos.”).

<sup>292</sup> See, e.g., Williams, *supra* note 280, at 839–40 (“People disadvantaged by gender can be protected by properly naming the group: in this case, not mothers, but anyone who has eschewed ideal worker status to fulfill child-care responsibilities.”).

<sup>293</sup> See, e.g., Joanna Harper, *Athletic Gender*, 80 LAW & CONTEMP. PROBS. 139, 151–53 (2017) (proposing the concept of “athletic gender,” which would be determined based on testosterone levels solely for purposes of sporting events and considered distinct from one’s gender identity).

gender policing, which can be degrading and humiliating. Professor Heath Fogg Davis offers the example of the “male” and “female” stickers that the Southeastern Pennsylvania Transportation Authority insisted on affixing to bus passes up until 2013.<sup>294</sup> As a result of the stickers, many gender-nonconforming people were refused rides, harassed, humiliated, or had their passes confiscated.<sup>295</sup> This included both people who self-identified as LGBT and those who did not, such as younger and older people with more androgynous appearances.<sup>296</sup> Gender policing is often based on definitions of masculinity and femininity inflected with classism and racism.<sup>297</sup> A second set of advantages is expressive. Sex segregation may reflect archaic or confining stereotypes about men and women. Its unquestioned use sends the message that sex is a primary and important way of dividing people into groups.<sup>298</sup> It also suggests one’s sex is, and should be, a public matter or one left to the government.<sup>299</sup> A third advantage is practical: as with the a cappella example, it is possible that the best baritone is not a man. Confining the group to men means that the group may not include the best voices.

But even limited forms of sex neutrality have drawbacks. The anti-classification strand in race discrimination law is often faulted for failing to redress covert or implicit biases, disparate impacts, and structural inequalities.<sup>300</sup> These same criticisms are leveled at contemporary sex discrimination doctrine. Neutrality may be in name only. Neutral rules may have the purpose or effect of classifying based on traditional notions of sex, for example, if testosterone testing is intended to (or widely believed to) preserve women’s sports for “real women.”<sup>301</sup> In practice,

<sup>294</sup> DAVIS, *supra* note 288, at 2. The purported purpose of these stickers was to stop husbands and wives from sharing monthly bus passes. *Id.* at 2–3.

<sup>295</sup> *Id.* at 3 (describing “the widespread harm done by the stickers” to “people who self-identified as transgender and those who did not, as well as . . . riders who self-identified as queer and those who did not”).

<sup>296</sup> *Id.* at 5–6.

<sup>297</sup> *See, e.g., id.* at 30.

<sup>298</sup> *Cf. id.* at 14 (“We are asked to tick binary sex boxes on myriad bureaucratic forms ranging from school, job, mortgage, and apartment rental applications to government census forms, dental and medical intake questionnaires, online dating sites, social media and marketing surveys, and on and on.”).

<sup>299</sup> *Cf.* Robin Dembroff, *The Nonbinary Gender Trap*, N.Y. REV. BOOKS (Jan. 30, 2018, 7:00 AM), <http://www.nybooks.com/daily/2018/01/30/the-nonbinary-gender-trap/> [<https://perma.cc/DRV6-GTJF>] (“For me, adding ‘nonbinary’ to the list of legal gender options does not address the core problem: any legal system that requires a person to record their gender perpetuates government control over our bodies and identities.”).

<sup>300</sup> *See, e.g.,* Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 68 (1991); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 84–107 (2000).

<sup>301</sup> *Cf.* Katrina Karkazis & Morgan Carpenter, *Impossible “Choices”: The Inherent Harms of Regulating Women’s Testosterone in Sport*, J. BIOETHICAL INQUIRY 3 (Aug. 16, 2018), <https://>

supposedly neutral baselines often favor those who adopt traditionally male life patterns. Feminists have long argued that in workplace and family law, the sex-blind approach can result in rules tailored for the “ideal worker” who needs no flexibility because he is supported at home by a caretaking partner.<sup>302</sup> While women could theoretically meet the “ideal worker” standard, they rarely do because of the prevalence of gender roles. Moreover, a rule against all sex classifications could sweep away not only those classifications that perpetuate subordination, but also those designed to remedy it.<sup>303</sup> For example, some legal rules might give women favorable treatment.<sup>304</sup> To impose “neutrality” might mean “leveling down” by holding women to the same inhumane standards as men, rather than “leveling up” to give men the same humane treatment as women.<sup>305</sup>

Another version of the neutrality model would draw on religious freedom for support, employing concepts such as nonendorsement and pluralism.<sup>306</sup> Such a model might protect a panoply of beliefs about gender identity, just as the First Amendment protects a wide array of religious beliefs without endorsing any particular set of beliefs. For purposes of this Article, I will refer to pluralism strategies as those in which a sex or gender neutral option is created alongside a sex or gender segregated one. In practice, however, the neutral category may end up indistinguishable from a third-gender one, incurring all the disadvantages of third-gender recognition, such as the possibility of stereotyping and stigmatization. Moreover, a pluralism model invites objections from those with religious commitments to traditional, binary

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[link.springer.com/article/10.1007/s11673-018-9876-3](https://link.springer.com/article/10.1007/s11673-018-9876-3) [https://perma.cc/2ETP-QWPX] (arguing that even a testosterone rule that states that it does not intend to question a competitor's sex can “mete out both suspicion and judgment on the sex and gender identity of the athletes regulated”).

<sup>302</sup> JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2* (2000); *see also, e.g., id.* at 1–3.

<sup>303</sup> *See, e.g.,* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN 117* (1979) (proposing an alternative approach to sex classifications that would ask “whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status”).

<sup>304</sup> *See, e.g.,* *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689–93 (2017) (scrutinizing an immigration rule that gave favorable treatment to the children of unmarried citizen mothers over those of unmarried citizen fathers).

<sup>305</sup> *See id.* at 1701 (selecting leveling down as a remedy to apply the same harsh standard whether the child's U.S. citizen parent was their mother or father).

<sup>306</sup> *See* David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1005, 1040 (2002) (discussing the analogy to religious freedom and describing how U.S. law's neutrality, non-preferentialism, and nonendorsement approaches to religion could be translated to sex and gender); Katyayal, *supra* note 28, at 477 (advocating “gender pluralism as a replacement for the binary system” that would “demonopolize the classificatory power of the state in determining sex or gender identity”).

notions of sex, who will argue that their interests should win out over the interests of gender nonconformists when in competition.<sup>307</sup>

3. *Integration into Binary Sex or Gender Regulation.* — A final approach to nonbinary gender rights would be to integrate nonbinary people into binary sex or gender regulations, while tailoring the definition of “sex” or “gender” so as to best fulfill the purposes of each legal rule, and respecting every person’s gender identity, to the extent possible.<sup>308</sup> This approach would ask what interests sex segregation serves, and whether the definition of sex or gender used is tailored to meet that interest.<sup>309</sup> For example, if a program sought to increase gender diversity in a traditional, male-dominated workplace, it might define its beneficiaries as not just “women,” but also “people who do not identify exclusively as male and LGBT people.”<sup>310</sup> The advantage of this approach is that it may be the least disruptive to binary structures that would require time and money to change, such as physical or digital architectures, and so it might serve as a stopgap or compromise solution as regulators consider recognition and neutrality approaches. But integration strategies have all the drawbacks of third-gender recognition. In addition, they are likely to shoehorn nonbinary people into misfit categories at the expense of gender self-determination.

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Rather than being faced with a choice between third-gender recognition and gender neutrality, the law offers an array of options for the protection of nonbinary gender identities. Determining which legal model is optimal requires investigation of the interests at stake in binary sex or gender, and will therefore depend on context. Any definition of sex or gender should be tailored to serve the purposes of regulation.

### III. LEGAL INTERESTS IN BINARY SEX OR GENDER?

This Part responds to the claim that nonbinary gender rights would upset a host of legal interests that are ostensibly advanced by maintaining a single, uniform system of binary sex classification.<sup>311</sup> Nonbinary rights would have implications for the law with respect to identification documents, antidiscrimination, and sex-segregated physical spaces and

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<sup>307</sup> For an example of these arguments in the sexual orientation context, see *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1724 (2018).

<sup>308</sup> This integration strategy differs from the decoupling strategy described above only in that there is no formal attempt at neutrality — it uses binary categories that are explicitly about sex or gender.

<sup>309</sup> See *supra* section II.A, pp. 933–36.

<sup>310</sup> See *infra* section III.B.1, pp. 952–54.

<sup>311</sup> See *supra* p. 903.

activities.<sup>312</sup> These domains have also been sites of contestation for transgender people seeking recognition as men and women. It is often assumed that nonbinary people only complicate and heighten these challenges. But that assumption may be based on unquestioned premises about the need for binary categories and simplistic ideas about the legal options for advancing nonbinary gender rights.

This Part rebuts the argument that nonbinary gender rights would upset some foundational premise of the legal order, with unforeseen and catastrophic results. Rather than being a universal ordering principle, legal sex and gender classifications are diminishing and exceptional. A careful look at the remaining contexts in which the law regulates sex and gender reveals no abiding and universal interest in binary classification. Rather, it shows that the purported interests binary classifications serve are variable and context dependent. These interests might include protecting conventionally gendered ideas of privacy or safety; facilitating easy identification; preserving free speech; providing opportunities for women; collecting relevant data; creating educational, athletic, or health care programs tailored toward the needs of specific populations defined by sex or gender; or avoiding the costs of transition. This Part argues that in most instances, these interests are weak or unsubstantiated, or they can be accommodated, if not better served, by one of the regulatory approaches to nonbinary gender rights discussed in Part II: neutrality, recognition, or integration.

This Part builds from the premise that in most every context of sex or gender regulation, the law should recognize self-determination with respect to someone's gender identity as a man or woman.<sup>313</sup> It also takes for granted that nonbinary genders deserve the same legal status as binary ones, rather than making that case on abstract grounds.<sup>314</sup> It asks how the assumption that nonbinary gender identities should be accorded the same status as male and female gender identities would transform legal debates. It offers tentative conclusions on the best regulatory model for nonbinary gender rights in each context, considering how nonbinary rights claims might converge and diverge with those of other identity-based movements, including feminist and other LGBT interests. These conclusions reflect political judgments about how to prioritize the various interests at stake in each context. There is room for reasonable disagreement with my particular conclusions as to the best approach in each case. But my overall argument does not depend on the outcomes of these fine-grained legal debates. Rather, I aim to show that legal regimes that rely on binary sex or gender classification are

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<sup>312</sup> While my main focus is on legal rules, at points this discussion also considers how nongovernmental institutions might revise their rules and procedures to take nonbinary gender identities seriously. For detailed advice on how to conduct a "gender audit" to "make [an] organization[] more inclusive of people with diverse sex identities," see DAVIS, *supra* note 288, at 151.

<sup>313</sup> See *supra* note 42 and accompanying text.

<sup>314</sup> See *supra* note 43 and accompanying text.

exceptional, not inevitable, and not a reason to resist the larger project of nonbinary gender rights.

### A. Identification

One argument often raised against nonbinary inclusion is that it will render efforts at identification and surveillance by law enforcement more difficult. This argument has long been made with respect to *any* changes to official sex markers, even from M to F or F to M.<sup>315</sup> But the argument takes new forms with respect to nonbinary gender, which would also require the recognition of an X category or, alternatively, the elimination of any sex or gender markers altogether. The question is, does law enforcement need binary M and F sex markers to identify people, determine police or emergency response, or track crimes?<sup>316</sup> Third-gender recognition is the best option in this context, at least at present.

Those who assert the importance of binary gender markers for identification documents do not explain why law enforcement needs those markers in addition to photographs.<sup>317</sup> In *Zzyym v. Pompeo*,<sup>318</sup> the court concluded that the State Department's policy of requiring an applicant to mark either M or F on a passport application was arbitrary and capricious.<sup>319</sup> Not all law enforcement databases include sex or gender designations, and in the case of transgender individuals, the designations in various databases may already conflict.<sup>320</sup> The "identity fraud" argument — that criminals will change their gender markers so that their names do not come up in law enforcement databases — is not a unique problem with recognizing nonbinary gender; it is a problem with any system that allows corrections to gender markers. The State Department already allows sex marker corrections between M and F, without proof of surgery.<sup>321</sup> Moreover, fraud concerns are dubious considering the

<sup>315</sup> See, e.g., Lisa A. Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 413–15 (2013).

<sup>316</sup> See WoLF Letter, *supra* note 213, at 2 (arguing that the government has "legitimate interests in recording and maintaining accurate information about its residents' sex, for purposes of identification, tracking crimes, . . . and determining the appropriate emergency medical and police services").

<sup>317</sup> Even if photographs can be tampered with, those seeking to commit fraud can tamper with the gender marker as well, or can simply find false passports with M or F markers that match their own appearances. Facial recognition and other biometric forms of identification are better tailored to address fraud concerns.

<sup>318</sup> No. 15-cv-02362, 2018 WL 4491434 (D. Colo. Sept. 19, 2018).

<sup>319</sup> *Id.* at \*1. *Zzyym* brought suit under the Administrative Procedure Act, which disallows agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012).

<sup>320</sup> See *Zzyym*, 2018 WL 4491434, at \*6 (noting that a passport holder's identity could be verified without checking the gender designation because databases include "other fields" such as "social security number, date of birth, name, etc.").

<sup>321</sup> Mottet, *supra* note 315, at 415.



number of other countries, including Australia, New Zealand, and India, that have managed nonbinary markers without apparent incident.<sup>322</sup> The United States accepts passports from these countries with nonbinary gender markers.<sup>323</sup> The International Civil Aviation Organization, the UN agency that sets international standards for machine-readable passports, has long allowed “X” as a sex marker for “unspecified.”<sup>324</sup> As Judge Jackson put it during a hearing in the *Zzyym* case, “I’ll bet you that if the State Department rethought its policy and decided to accept the X designation, the sun would still come up tomorrow.”<sup>325</sup>

Another version of this argument might be that law enforcement and emergency services routinely use binary gender identifiers to visually identify crime suspects and people in need of assistance.<sup>326</sup> But authorities may use any number of descriptors for these purposes, not just perceived sex or gender presentation, but also race, age, height, weight, and other identifying features. Under equal protection doctrine, this limited use of visually identifying features, even racial ones, is widely regarded as permissible.<sup>327</sup> It is therefore implausible that recognition of nonbinary gender rights would invalidate the use of perceived gendered characteristics for purposes of visual identifications. Nor should it.

Opponents of nonbinary gender recognition have also expressed the worry that it would skew crime statistics, obscuring the fact that men commit more violent crimes than women.<sup>328</sup> But considering the vast disparities in violent crime rates between men and women, the number of criminals likely to identify as nonbinary is too small to have this effect.<sup>329</sup>

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<sup>322</sup> See *Zzyym* Transcript, *supra* note 139, at 37. The lawyer from the State Department in *Zzyym* was not aware of any evidence that jurisdictions that recognize an X designation had any law enforcement trouble. *Id.* at 46.

<sup>323</sup> *Id.* at 35–36 (discussing how the U.S. State Department will permit noncitizens from Australia to enter the United States with an X designation on their passports, but will not allow citizens of the United States to leave with an X designation).

<sup>324</sup> Int’l Civil Aviation Org. [ICAO], *Machine Readable Travel Documents*, at 14, ICAO Doc. 9303 (7th ed. 2015), [https://www.icao.int/publications/Documents/9303\\_p4\\_cons\\_en.pdf](https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf) [<https://perma.cc/H6DH-LFN4>] (allowing “F for female, M for male, or X for unspecified”).

<sup>325</sup> *Zzyym* Transcript, *supra* note 139, at 52.

<sup>326</sup> Bela August Walker, Note, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662, 671 (2003) (“The description of a criminal suspect, whether created by the victim, an eyewitness, or the police, always begins with race and gender.”).

<sup>327</sup> R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1090–95 (2001) (explaining that race-based suspect descriptions have not triggered equal protection scrutiny because “the prevailing approach [is to assume] that suspect description reliance should never be viewed as a racial classification”). Even if this were not the case, suspect descriptions might survive the test of strict scrutiny, as narrowly tailored to achieve a compelling state interest. See *id.* at 1119.

<sup>328</sup> See WoLF Letter, *supra* note 213, at 4.

<sup>329</sup> See *id.* (citing FBI statistics that men committed 88% of murders in 2015). The Williams Institute estimates that 0.58% of adults in the United States identify as transgender. FLORES ET AL., *supra* note 21, at 3.

Recognition of an X designation may have law enforcement *benefits*. Some nonbinary people do not consistently appear to others as men or women.<sup>330</sup> A third designation might better match how they are perceived. Providing an X designation might avoid friction from police, customs, or TSA officers who would otherwise question a person whose gender identity does not appear to match the designation on their documents.<sup>331</sup> This type of friction is administratively costly for law enforcement, leading to unnecessary delays and even wrongful arrests and detentions. More importantly, it harms nonbinary people and their families, who are forced to reargue their gender identities with officials on a regular basis.<sup>332</sup>

As many have argued, the fact that official documents include sex designations at all is offensive to the values of self-determination and privacy, and it reinforces state authority over sex and gender in a troubling way.<sup>333</sup> An X designation has the potential drawback of allowing those who would harm nonbinary people to identify targets for violence and abuse, although I am unaware of any examples in which identity documents have been used for this purpose.<sup>334</sup> At present, there are good reasons to prefer a recognition model to a neutrality one. Recognition is more politically palatable, it allows the limited collection of sex-differentiated statistics to continue, and identity documents that reflect a person's gender identity offer that person a measure of security and legitimacy. A partial solution is to make sex designators on identification documents optional, giving people the choice to leave them blank, as New York City does with its identification cards.<sup>335</sup>

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<sup>330</sup> See JAMES ET AL., *supra* note 2, at 48; *supra* p. 908.

<sup>331</sup> See JAMES ET AL., *supra* note 2, at 89 (reporting that 10% of nonbinary respondents to the 2015 USTS had been denied services or benefits when the name or gender on their identification documents did not match their gender presentation).

<sup>332</sup> *Cal. Assemb. Transp. Hearing, supra* note 86 (statement of Jonathan Clay) (discussing how a nonbinary child's incorrect ID "always opens us up to all sorts of questions going through security and other places. . . . Which is very difficult for my wife and I, because it puts [us] in a role where we are now having conversations with people, whether it's security, doctors, other folks. Having this conversation in a venue that we don't control, and unfortunately, it typically happens in front of our child which is also very difficult. Because that identity is very important to them").

<sup>333</sup> See, e.g., Spade, *supra* note 28, at 738 ("Why is gender identification taken for granted as a legitimate domain of governance?"); Wipfler, *supra* note 28, at 492 ("Ultimately, . . . so long as such documents include a sex designation field, new and seemingly progressive government policies of gender inclusivity harmfully reify sex classification.").

<sup>334</sup> This concern was initially raised in litigation over the X designation on U.K. passports, but dropped when evidence failed to substantiate it. *R (on the application of Elan-Cane) v. Sec'y of State for the Home Dep't* [2018] EWHC (Admin) 1530 [16], [82], 2018 WL 03093374. The U.K. court nonetheless refused to require an X designation on passports pending a "comprehensive review" of the implications of such a change by U.K. authorities. *Id.* at [124].

<sup>335</sup> Wipfler, *supra* note 28, at 526 (discussing this approach, which has been adopted by a number of municipalities, but arguing it "still runs the risk of outing those who choose not to include a sex designation as abnormal if the majority of bearers opt to display their gender"). Another idea would

One reason the drafters of California's Gender Recognition Act opted for the recognition model was because it had been used by the District of Columbia, Oregon, and countries outside of the United States without problems.<sup>336</sup> Additionally, federal regulations implementing the REAL ID Act require "gender" designations on identity documents, giving states discretion to define that term.<sup>337</sup>

Moreover, the federal government uses birth certificate sex data, just as it uses data on race, for purposes of collecting public health statistics.<sup>338</sup> Although this is an argument for continuing to collect the data, it does not suggest that the data must be displayed on the face of the certificate.<sup>339</sup> Collection of information on intersex infants and nonbinary gender identities might improve this data by allowing researchers to study the health of these populations.<sup>340</sup>

Additionally, identity documents with gender designations can act as shields against discrimination and sources of validation for transgender people, whether those designations are M, F, or X. Designations that better match a person's self-presentation may help avoid difficult and dangerous conflicts with law enforcement.<sup>341</sup> Transgender men and

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be to design application forms that leave the gender designation blank by default, requiring individuals who wish to have gender designations to affirmatively select them.

<sup>336</sup> *Cal. Assemb. Transp. Hearing*, *supra* note 86 (statement of Sen. Toni Atkins) (responding to the question, "why even have gender or sex on an ID card, or on a driver's license specifically" with the answer: "We could go the other route, but we really would then be further out of compliance with what other countries and states are doing").

<sup>337</sup> 6 C.F.R. § 37.17 (2018) ("To be accepted by a Federal agency for official purposes, REAL ID driver's licenses and identification cards must include on the front of the card (unless otherwise specified below) the following information: . . . (c) *Gender*, as determined by the State.").

<sup>338</sup> Wipfler, *supra* note 28, at 539.

<sup>339</sup> One scholar has proposed a partial neutrality approach: that the birth certificate provided to parents not include sex information on its face, but that data about the baby's phenotypical sex at birth be collected and sent to the National Center for Health Statistics, to be treated like data on race and kept confidential. See Elizabeth Reilly, *Radical Tweak — Relocating the Power to Assign Sex*, 12 CARDOZO J.L. & GENDER 297, 318 (2005) (proposing that the "sex" field on the birth certificate be moved from the section on identifying data to the one on "information for medical and health purposes only").

<sup>340</sup> How sex or gender should be defined depends on the aims of the research. Canada offers one model. See, e.g., *Gender of Person*, STAT. CAN. (Jan. 25, 2018), <http://www23.statcan.gc.ca/imdb/p3Var.pl?Function=DEC&Id=410445> [<https://perma.cc/CR2J-XNDM>] (urging that users of statistics exercise caution in comparing indicators for sex and gender, as "[s]ex and gender refer to two different concepts"); *Classification of Gender*, STAT. CAN. (Jan. 25, 2018), <http://www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=467245> [<https://perma.cc/Q4SK-EMY8>] (providing options for gender including "Male gender," "Female gender," and "Gender diverse").

<sup>341</sup> See *Cal. Assemb. Transp. Hearing*, *supra* note 86 (statement of Cecilia Aguiar-Curry, Member, Assemb. Standing Comm. on Transp.) ("In emergency services, and if someone were to come upon an automobile accident or something along that, be able to look at someone's identification and know that they're special and may need special handling, that would be really important to me as a family member."). Documents alone cannot always overcome prejudice. See DAVIS, *supra* note 288, at 55 (discussing an incident in which a bouncer harassed a transgender woman in the women's restroom, and when she showed him an ID demonstrating she was a woman, he said: "Your ID is

women may need readily available documentation to prove they are not trespassing in sex-segregated spaces like restrooms.<sup>342</sup> This may be a particularly acute concern “[f]or low-income trans women of color,” for whom an “‘accurate’ ID is essential to avoiding harassment or violence, being turned away for public assistance, or being placed in dangerous sex-segregated environments in detention facilities and/or homeless shelters.”<sup>343</sup>

Identity documents such as passports, driver’s licenses, and birth certificates can also play a meaningful role in a person’s conception of self.<sup>344</sup> The documentary formalities that recognize nonbinary gender can legitimate an individual’s claim to that status.<sup>345</sup> In recognizing nonbinary gender, state and local governments express its moral equivalence to male and female gender identities, which may undermine discrimination by delegitimizing arguments that nonbinary identity is not real or valid.

### B. Antidiscrimination Rules

Taking nonbinary gender seriously would entail protection from discrimination and harassment in housing, employment, education, public accommodations, and other domains.

As an initial matter, some might object that nonbinary identities are too diverse and amorphous to be included as a “protected class” for purposes of antidiscrimination law. But antidiscrimination law can protect a diverse array of nonbinary gender identities, just as it protects people of every race and religion.<sup>346</sup> Nondiscrimination rules do not generally define identity groups with precision; rather, they define prohibited grounds for discrimination (such as “sex” or “gender identity”).<sup>347</sup> The question in a sex discrimination case is not whether the plaintiff belonged to a particular class.<sup>348</sup> It is whether the plaintiff was mistreated because of sex. For example, it is sex discrimination for an employer to

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neither here nor there”); Wipfler, *supra* note 28, at 539 (arguing that in the short term, transgender people need IDs reflecting their gender identities to avoid “gender-probing” and other administrative problems).

<sup>342</sup> Wipfler, *supra* note 28, at 541.

<sup>343</sup> *Id.* at 540 (footnote omitted).

<sup>344</sup> See Clarke, *Identity and Form*, *supra* note 28, at 792.

<sup>345</sup> See, e.g., JAMES ET AL., *supra* note 2, at 85 (quoting one survey respondent: “As a non-binary person, not being able to change my gender on any of my identification documents is really disheartening, dysphoria inducing, and kind of dehumanizing. I’m not allowed to be me”).

<sup>346</sup> Including atheists. Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1402 (2015) (discussing antidiscrimination protection for atheists).

<sup>347</sup> Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 110 (2017).

<sup>348</sup> See *id.*; see also Cruz, *supra* note 26, at 278 (“Title VII sex discrimination doctrine . . . does not actually confine protection to a limited class of persons and so does *not* require courts to decide the sex/gender class to which a plaintiff belongs.”).

insist that a worker conform to sex stereotypes.<sup>349</sup> In the federal courts, there is an emerging consensus that discrimination on the ground of transgender status is a form of sex discrimination because it rests on sex stereotypes.<sup>350</sup> This logic extends to discrimination against someone for not adhering to sex stereotypes that require binary gender identity.<sup>351</sup> Those federal, state, and local rules that ban discrimination on the basis of “gender identity” should cover nonbinary gender identities as well.<sup>352</sup>

Most of the arguments against prohibiting discrimination against nonbinary gender identities are no different from the arguments against prohibiting discrimination against transgender identities in general. But there are some questions uniquely applicable to extending protection to nonbinary gender identities, including (1) whether it would eliminate data collection necessary to identify patterns of sex discrimination, and relatedly, whether it would eliminate affirmative action for women, (2) whether it would preclude pregnancy protections, and (3) whether harassment law would require the use of unfamiliar pronouns. This section will discuss these arguments, which apply to antidiscrimination doctrines generally. Later sections will discuss arguments that apply specifically to the operation of antidiscrimination law in particular domains, such as educational programs, the workplace, housing, and health care.

*1. Data Collection and Affirmative Action.* — With respect to data and affirmative action, recognition approaches work best.<sup>353</sup> Institutions collect information on racial identity, even though some people’s identities are multiracial and others refuse to state any racial information.<sup>354</sup> The existence of complicated racial identities does not preclude the enforcement of legal doctrines that depend on statistical underrepresentation of minority groups, despite the fact that a larger percentage of people identify as multiracial than transgender.<sup>355</sup> Neither

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<sup>349</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .”).

<sup>350</sup> See *supra* note 175.

<sup>351</sup> See *supra* note 176.

<sup>352</sup> See *supra* p. 924.

<sup>353</sup> For a discussion of theories of discrimination that rely on statistical patterns, such as “pattern or practice” and “disparate impact,” and an argument that these theories can work without a concept of the “protected class,” see Clarke, *supra* note 347, at 173–77.

<sup>354</sup> See Lucas, *supra* note 225, at 1249; Rich, *supra* note 226, at 549.

<sup>355</sup> See FLORES ET AL., *supra* note 21, at 3 (reporting that 0.58% of adults in the United States identify as transgender); NICHOLAS A. JONES & JUNGMIWHA BULLOCK, U.S. DEP’T OF COMMERCE, THE TWO OR MORE RACES POPULATION: 2010, at 4 tbl.1 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-13.pdf> [<https://perma.cc/7MNL-C2ZA>] (reporting that 2.9% of the population identified as two or more races).

should the existence of complicated gender identities be a barrier to collection of information on sex or gender identity.<sup>356</sup>

As for affirmative action, the Supreme Court has held that Title VII allows employers to consider an applicant's sex as a factor pursuant to an affirmative action plan.<sup>357</sup> Nonbinary gender and other LGBT identities can be factors recognized for diversity or affirmative action programs as well.<sup>358</sup>

Nor does nonbinary gender throw a wrench into gender-based affirmative action programs with numerical requirements.<sup>359</sup> The recognition that some people's genders are not binary does not render unadministrable laws that would require, for example, that corporate boards include one or more self-identified women.<sup>360</sup> The Democratic National Committee charter states that all committees "shall be as equally divided as practicable between men and women (determined by gender self-identification) meaning that the variance between men and women in the group cannot exceed one," and that "gender non-binary delegates . . . shall not be counted as either a male or female, and the remainder of

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<sup>356</sup> Equal Employment Opportunity Commission (EEOC) forms require data on race and sex to help the Agency identify discriminatory patterns and trends. Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1520 (2014). At present, these forms include only two options for sex, but multiple options for "Race/Ethnicity" including "Two or more races." See Equal Emp't Opportunity Comm'n, Standard Form 100, EMPLOYER INFORMATION REPORT EEO-1 (2006) <https://www.eeoc.gov/employers/eo1survey/upload/eo1-2-2.pdf> [<https://perma.cc/9DXU-VPTU>]. The rules for racial data collection prioritize self-determination and privacy. See Rich, *supra*, at 1520–27. Just as rulemakers give consideration to whether they are interested in data on race or ethnicity, they can give consideration to whether they are interested in data on sex, gender identity, or some other trait. See *supra* note 340 (discussing how Canada's national statistical agency takes this approach).

<sup>357</sup> *Johnson v. Transp. Agency*, 480 U.S. 616, 632 (1987) (allowing consideration of sex as a factor pursuant to an affirmative action plan designed to eliminate a "manifest imbalance" in a "traditionally segregated job category").

<sup>358</sup> See, e.g., Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967), Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014), reprinted as amended in 42 U.S.C.A. § 2000e (West 2018) (providing that federal contractors "will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin"); CAL. PUB. RES. CODE § 25230(a)(4), (b)(1) (West 2018) (requiring that a state commission that administers grants and loans "implement an outreach program" to minority businesses, including "LGBT business enterprises" defined as those that are "at least 51 percent owned by a lesbian, gay, bisexual, or transgender person or persons").

<sup>359</sup> These rules may fall outside the ambit of Title VII because Title VII applies only to employment relationships. They are not subject to constitutional requirements unless they are tied to state action.

<sup>360</sup> See 2018 Cal. Legis. Serv. 954 (S.B. 826) (West) (to be codified at CAL. CORP. CODE §§ 301.3, 2115.5). The question whether any particular gender-based affirmative action policy by a government entity will survive constitutional scrutiny has never turned on whether gender is or is not binary. Cf. Ajmel Quereshi, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-Based Affirmative Action Programs*, 21 AM. U. J. GENDER SOC. POL'Y & L. 797, 813–17 (2013) (outlining the various legal tests courts have applied to gender-based affirmative action under the Constitution).

the delegation shall be equally divided.”<sup>361</sup> Such a rule does not create incentives to exclude nonbinary people, but neither does it create any incentives to include them. Policymakers should go further to reconsider the purposes of these programs and ask whether those purposes might be better served by rules that aim to affirmatively encourage the inclusion of nonbinary and other LGBT people.<sup>362</sup>

2. *Pregnancy Protections.* — Like transgender men who become pregnant, nonbinary people may at first seem to pose a challenge to rules that prohibit discrimination on the basis of pregnancy and related conditions, or rules that afford accommodations for pregnancy<sup>363</sup> or special treatment for biological mothers.<sup>364</sup> In the pregnancy context, a decoupling approach works.<sup>365</sup> Pregnancy is distinct from gender identity. People of all gender identities can be pregnant,<sup>366</sup> and pregnancy protections can be neutral as to gender identity. Sometimes such protection requires no stretch of the statutory language. Title VII, for example, prohibits pregnancy discrimination by defining discrimination

<sup>361</sup> DEMOCRATIC NAT’L COMM., THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES 8 (2018), <https://democrats.org/wp-content/uploads/2018/10/DNC-Charter-Bylaws-8.25.18-with-Amendments.pdf> [<https://perma.cc/HG2Y-2J45>].

<sup>362</sup> The moral case may be stronger than the business one. See, e.g., Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 379 (2014) (“[T]he ‘business case for diversity’ is less compelling than other reasons rooted in social justice, equal opportunity, and corporate reputation.”).

<sup>363</sup> See NAT’L P’SHP FOR WOMEN & FAMILIES, REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS: STATE AND LOCAL LAWS (2018), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf> [<https://perma.cc/45XZ-PWLS>] (surveying state and local laws).

<sup>364</sup> See, e.g., Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2314 (2017) (reviewing the law of parentage with respect to artificial reproductive technologies and concluding that “even in an age of sex and sexual-orientation equality, courts and legislatures continue to treat *biological mothers* as the parents from whom the *legal family* necessarily springs”).

<sup>365</sup> I focus here on pregnancy rather than parenting in general, but with respect to parental leave, consider that even a scholar arguing for “fatherhood bonuses” to encourage fathers to take parental leave admits that these benefits should also be extended to “lesbian co-mothers” and even “single parents” who would receive double the benefits. Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 NW. U. L. REV. 1, 55 (2014).

<sup>366</sup> See, e.g., Lara Karaian, *Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law*, 22 SOC. & LEGAL STUD. 211, 212–13 (2013); Tori Truscheit, *All the Things I Worry About as My Nonbinary Partner Prepares to Give Birth*, THE CUT (Dec. 12, 2017), <https://www.thecut.com/2017/12/giving-birth-outside-the-gender-binary.html> [<https://perma.cc/7MVL-X2DA>]. Nonbinary people may also menstruate, see, e.g., James Michael Nichols, *Powerful Photo Shows that Women Aren’t the Only Ones Who Get Periods*, HUFFINGTON POST (Dec. 22, 2017), [https://www.huffingtonpost.com/entry/cass-clemmer-trans-periods\\_us\\_597101bce4b0aa14ea78a251](https://www.huffingtonpost.com/entry/cass-clemmer-trans-periods_us_597101bce4b0aa14ea78a251) [<https://perma.cc/7XWB-DYS4>] (discussing trans menstrual health advocate Cass Clemmer), and lactate, see, e.g., Trevor MacDonald et al., *Transmasculine Individuals’ Experiences with Lactation, Chestfeeding, and Gender Identity: A Qualitative Study*, 16 BMC PREGNANCY & CHILDBIRTH 1, 2 (2016), <https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/s12884-016-0907-y> [<https://perma.cc/6J8Y-3LEX>].

based on “sex” to include discrimination based on pregnancy.<sup>367</sup> This provision is not limited to discrimination against women.<sup>368</sup> But sometimes statutory language refers to females or women. For example, Title VII also includes a provision that states: “women affected by pregnancy, childbirth, or related medical conditions” are to be treated the same as nonpregnant workers “similar in their ability or inability to work.”<sup>369</sup> Rules such as this can be clarified to specify that they apply to all people who are pregnant.<sup>370</sup> In statutes governing family law as well, terms such as “gestational mother” might be replaced with “gestational parent.”<sup>371</sup>

One feminist objection might be that this logic severs pregnancy from women’s issues and indirectly hinders arguments for constitutional protection.<sup>372</sup> In 1974, the Supreme Court rejected an equal protection challenge to a state disability fund that excluded pregnancy coverage, reasoning that “[t]he program divides potential recipients into two groups — pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”<sup>373</sup> One rebuttal to this formalistic argument is to insist, just as formalistically, on the equivalence of women and pregnancy, because only “biological women” get pregnant.<sup>374</sup> This rebuttal has had some

<sup>367</sup> 42 U.S.C. § 2000e(k) (2012) (defining discrimination “because of sex” to include discrimination “because of . . . pregnancy, childbirth, or related medical conditions”).

<sup>368</sup> See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684–85 (1983) (allowing male employees to challenge employer benefits plans that covered female employees’ pregnancies but not male employees’ spouses’ pregnancies).

<sup>369</sup> 42 U.S.C. § 2000e(k).

<sup>370</sup> For an example of one fix, see Cal. Fair Emp’t & Housing Council, Amendments to the Fair Employment and Housing Act Regulations 25–26 (2015) (codified at CAL. CODE REGS. tit. 2, § 11035(f)–(g) (2018)) <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/FinalText.pdf> [<https://perma.cc/UPX7-TLUU>] (clarifying that an “eligible female employee” for purposes of pregnancy accommodation includes “a transgender employee who is disabled by pregnancy”).

<sup>371</sup> The 2017 Uniform Parentage Act’s definitions of parents have moved in the direction of gender neutrality. See, e.g., UNIF. PARENTAGE ACT § 107 (UNIF. LAW COMM’N 2017) (“To the extent practicable, a provision of this [act] applicable to a father-child relationship applies to a mother-child relationship and a provision of this [act] applicable to a mother-child relationship applies to a father-child relationship.” (alterations in original)). However, the Act still uses gendered terms such as “woman who gave birth to a child.” E.g., *id.* § 301. This language could be changed to “person who gave birth to a child” or “gestational parent” to include nonbinary people and transgender men.

<sup>372</sup> Cf. Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 229–30 (2016) (offering examples of this genre of argument against transgender inclusion in reproductive rights discussions).

<sup>373</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

<sup>374</sup> See, e.g., Vivian M. Gutierrez & Berta E. Hernández-Truyol, *UnSexing Pregnancy?*, in Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207, 233 (2010) (“A person/parent with a female reproductive system is pregnant, regardless of how that person presents socially or legally.”).



success in state courts interpreting their own constitutions to prohibit discrimination based on pregnancy.<sup>375</sup>

But the argument also has risks for feminists. If the law defines women as a class by their capacity to become pregnant, then this capacity appears to be a legitimate basis for discrimination against women.<sup>376</sup> In any event, there are any number of more substantive arguments linking pregnancy discrimination to sex: for example, that in practice, discrimination based on pregnancy drives women's inequality,<sup>377</sup> that it is based on the assumption that all workers meet a traditionally male norm,<sup>378</sup> or that it is a thinly veiled attempt to exclude women from the workplace.<sup>379</sup> The fact that nonbinary people, like transgender men, may also avail themselves of pregnancy protections in no way undermines these substantive arguments.

Likewise, in the family law domain, even scholars arguing for rules that would mostly benefit mothers are able to cast their prescriptive recommendations in sex-neutral terms.<sup>380</sup> Laws governing parents might go further in the direction of gender neutrality by recognizing more of the social as well as biological aspects of parenthood.<sup>381</sup> Nonbinary parents, like many other LGBT parents, may demonstrate the

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<sup>375</sup> A Connecticut state court advanced this formalistic argument, among several others, in holding that the Connecticut Constitution's Equal Rights Amendment prohibited the state from refusing to fund medically necessary abortions. *Doe v. Maher*, 515 A.2d 134, 159–60 (Conn. Super. Ct. 1986) (“Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination.” *Id.* at 159.).

<sup>376</sup> See, e.g., Cary Franklin, *Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes*, 2017 SUP. CT. REV. 169, 180 (“[P]regnancy is, in some instances, deemed to be a fundamental difference between the sexes that gives the state a legitimate reason to treat men and women differently.”).

<sup>377</sup> This was the type of argument that the *Doe* court regarded as “most important.” *Doe*, 515 A.2d at 159 (“Since time immemorial, women’s biology and ability to bear children have been used as a basis for discrimination against them. . . . This discrimination has had a devastating effect upon women.”).

<sup>378</sup> Cf. *id.* (holding that a benefits plan was discriminatory because “all the male’s medical expenses associated with their reproductive health, for family planning and for conditions unique to his sex are paid and the same is provided for women *except* for the medically necessary abortion that does not endanger her life”).

<sup>379</sup> See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (stating that “a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other” would be sufficient to constitute a violation of the Equal Protection Clause).

<sup>380</sup> See, e.g., Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 500 (2017) (arguing that genetics alone should not entitle a person to parental rights, but biology along with a relationship should).

<sup>381</sup> For an argument about how “[p]arentage law could move away from separate regulations of *maternity and paternity* and instead work toward general regulation of *parentage*” by considering social as well as biological connections, see NeJaime, *supra* note 364, at 2337–38. For an argument that the law should go even further to “unsex” pregnancy protections by encouraging nonpregnant partners to engage in more care work, such as setting up health care appointments, choosing a

importance of social bonds as well as biological relationships in family law, reproductive health care, and parenting.<sup>382</sup>

3. *Misgendering and Pronouns.* — Another concern is whether law will require the use of nonbinary pronouns and titles. Most transgender people, including many who identify as nonbinary, use gendered pronouns such as he and she.<sup>383</sup> However, 29% of transgender respondents to the USTS stated they use “they/them” pronouns.<sup>384</sup> Some transgender people may request even more unfamiliar pronouns, such as ze (pronounced “zee”) and hir (pronounced “hear”).<sup>385</sup> Rather than Ms., Mrs., or Mr., some may request the honorific prefix Mx. (most often pronounced “Mix”).<sup>386</sup> When nonbinary people request unfamiliar pronouns, they may encounter discrimination and harassment.<sup>387</sup> The law should recognize nonbinary gender identities in this context, just as it requires equal respect for male and female gender identities. Whether harassment law applies will depend on the circumstances: harassment

pediatrician, purchasing a car seat, or taking a childcare class, see David Fontana & Naomi Schoenbaum, *The Sexed Pregnancy*, COLUM. L. REV. (forthcoming 2019) (manuscript at 16–20) (on file with the Harvard Law School Library).

<sup>382</sup> This Article does not develop these arguments, because they have been discussed in other work. See e.g., Darren Rosenblum, *Epilogue and Response*, in Rosenblum et al., *supra* note 374, at 261, 269 (“Parenting should be unsexed to embrace both the fluidity of contemporary understandings of gender and the need for balancing roles within the family.”); *supra* note 381.

<sup>383</sup> JAMES ET AL., *supra* note 2, at 49 (reporting that 37% of nonbinary respondents to the 2015 USTS use he/his pronouns, 37% use she/her, 29% use they/their, 20% do not ask for any particular pronouns, and 4% use other unique choices).

<sup>384</sup> *Id.*

<sup>385</sup> See, e.g., *id.* at 49–50 (reporting that 2% use ze/hir); Beemyn, *supra* note 182, at 359. Beemyn explains that “students who want to be recognized as nonbinary have tended to gravitate toward ‘they/them/their,’ because it is language that others already have and its usage to describe one person is gaining support in the dominant society.” Beemyn, *supra* note 89, at 251 (discussing the results of a survey of 111 nonbinary college students in 2014). “The handful of students I interviewed who had chosen other pronoun options, specifically ‘ze/hir/hir,’ ‘ze/zim/zir,’ or ‘xe/xem/xir,’ often had difficulty, or did not try, getting people beyond their close friends to refer to them with these pronouns.” *Id.*

<sup>386</sup> Robin Henry, *Now Pick Mr, Mrs, Miss, Ms . . . or Mx for No Specific Gender*, THE TIMES (May 3, 2015, 1:01 AM), <https://www.thetimes.co.uk/article/now-pick-mr-mrs-miss-ms-or-mx-for-no-specific-gender-t2rb5bh62rs> [<https://perma.cc/B489-J2Y4>] (reporting that “[t]he first recorded use of Mx was in *Single Parent*, the American magazine, in 1977” and quoting an assistant editor of the Oxford English Dictionary as saying: “The early proponents of the term seem to have had gender politics as their central concern [and] saw the title as one which could sidestep the perceived sexism of the traditional ‘Mr’, ‘Mrs’ and ‘Miss.’” (second alteration in original)); *On the Pronunciation of Mx*, GENDER CENSUS (Apr. 25, 2016, 12:40 PM), <http://gendercensus.com/post/143382802540/on-the-pronunciation-of-mx> [<https://perma.cc/X83B-6BG6>] (informal online poll on pronunciation).

<sup>387</sup> See, e.g., Casey Parks, *Gresham-Barlow School District Agrees to Pay Transgender Teacher, Add Gender-Neutral Bathrooms After Complaint*, OR. LIVE (May 20, 2016), [http://www.oregonlive.com/education/index.ssf/2016/05/gresham\\_barlow\\_transgender\\_tea.html](http://www.oregonlive.com/education/index.ssf/2016/05/gresham_barlow_transgender_tea.html) [<https://perma.cc/Q8DW-JJAZ>]; Lori Rozsa, *Transgender Teacher Removed from Classroom After Some Parents Object to Gender-Neutral Prefix ‘Mx.’*, WASH. POST (Sept. 29, 2017), <http://wapo.st/2xLEiYL> [<https://perma.cc/BRN4-SDK5>].

law does not reach accidental or isolated remarks, nor does it generally require the use of any idiosyncratic pronouns a person might request.

Sincere questions about pronouns, as well as accidental or isolated misgendering, do not qualify as harassment. This is because the law generally requires that harassment be “severe or pervasive” to be actionable.<sup>388</sup> Even in the most protective of jurisdictions, harassment law does not reach “petty slights and trivial inconveniences.”<sup>389</sup> For example, the New York City Commission on Human Rights has issued a guidance document stating that City rules require employers, landlords, and providers of public accommodations “to use an individual’s preferred name, pronoun, and title (*e.g.*, Ms./Mrs.).”<sup>390</sup> It further provides that pronouns may include “they/them/theirs or ze/hir.”<sup>391</sup> As an example of a violation of the law, the guidance gives: “[i]ntentional or repeated refusal” to use the correct terms “after [a person] has made clear which pronouns and title she uses.”<sup>392</sup> Misgendering a nonbinary person could therefore be part of a pattern of prohibited gender-identity or sex-based harassment.<sup>393</sup>

Additionally, the law requires that harassment be objectively hostile, not just subjectively offensive.<sup>394</sup> Thus, the law must account for the social meaning of harassing language, not just the individual victim’s

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<sup>388</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

<sup>389</sup> *Nelson v. HSBC Bank USA*, 929 N.Y.S.2d 259, 264 (N.Y. App. Div. 2011). New York does not have a “severe or pervasive” requirement. *Id.* at 263.

<sup>390</sup> N.Y.C. COMM’N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23), at 4 (2016), [https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID\\_InterpretiveGuide\\_2015.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf) [<https://perma.cc/C994-QAMV>]. This Article generally avoids the term “preferred pronouns” because this phrasing suggests pronoun usage is a matter of mere preference rather than an issue of equal respect. It uses the term “correct pronouns” instead.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.* at 5; *see also* D.C. MUN. REGS. tit. 4, § 808.2 (2017) (providing that “[d]eliberately misusing an individual’s preferred name[,] form of address or gender-related pronoun” “may constitute evidence of unlawful harassment and hostile environment” considering “the nature, frequency, and severity of the behavior,” among other factors).

<sup>393</sup> A court might require a plaintiff to demonstrate some form of mistreatment in addition to refusal to use gender-neutral pronouns. I have found no cases in which a nonbinary person has brought a claim alleging discrimination based solely on a refusal to use gender-neutral pronouns. In one Oregon case, a schoolteacher alleged that their employer forbade other employees from using the correct pronoun (“they”), and their coworkers called them “she,” “lady,” or “Miss,” smeared Vaseline on their cabinets, yelled insults at them in the hallway, and conspired to prevent them from using the school’s only gender-neutral restroom. Parks, *supra* note 387. The teacher won a settlement. *Id.*

<sup>394</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII’s purview.”).

perspective.<sup>395</sup> Harassment that expresses disrespect for a person's gender identity is objectively hostile, just like harassment that expresses disrespect for a person's racial or religious identity. For example, imagine a scenario in which xenophobes harass a coworker they know to be from India by referring to him as an "Arab."<sup>396</sup> This deliberate ascription of an incorrect identity is a form of racism — among other things, it expresses the idea that all people with brown skin are "Arab" and that Indian identity is unworthy of respect.<sup>397</sup> Similarly, intentional misgendering expresses stereotypes about what real "men" and "women" are and informs its target that their own gender identity is unworthy of respect. It is unreasonable to refuse to refer to a person by their first name, for example, calling a man "Jane" rather than "John," due to a disagreement about whether his male gender identity is valid.<sup>398</sup> Likewise, it is unreasonable to insult him by referring to him as "she," as the Equal Employment Opportunity Commission has concluded.<sup>399</sup> And if a person uses they/them pronouns, it is unreasonable to insist on referring to them as "he" or "she."<sup>400</sup>

But what if a person who goes by the name Jane-John insists on a new set of pronouns that no one else uses?<sup>401</sup> At present, it does not seem unreasonable to deny this request, although it may be unkind. The law does not protect a person's right to be identified in any manner they wish; it prohibits harassment based on sex. Pronouns, unlike proper names, are "closed class words" that require particular "mental effort"

<sup>395</sup> Some courts may consider the inquiry to ask what a reasonable person would think, "from the victim's perspective," noting that men and women may view the same conduct differently. *See, e.g.,* *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). But not even this standard is a subjective one; it asks what a reasonable person in the plaintiff's circumstances would perceive.

<sup>396</sup> *See, e.g.,* *EEOC v. WC&M Enters. Inc.*, 496 F.3d 393, 401–02 (5th Cir. 2007) (reversing a district court's conclusion that an Indian plaintiff whose coworkers called him an "Arab" was unprotected by Title VII).

<sup>397</sup> *Cf.* Robin Dembroff & Daniel Wodak, *He/She/They/Ze*, 5 *ERGO* 371, 376 n.8 (2018). It also denigrates Arab identity, but that is not the only reason it is wrong.

<sup>398</sup> This is true whether or not John is transgender.

<sup>399</sup> *See* Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756, at \*11 (Apr. 1, 2015) ("While inadvertent and isolated slips of the tongue likely would not constitute harassment, under the facts of this case, S3's actions and demeanor made clear that S3's use of a male name and male pronouns in referring to Complainant was not accidental, but instead was intended to humiliate and ridicule Complainant. As such, S3's repeated and intentional conduct was offensive and demeaning to Complainant and would have been so to a reasonable person in Complainant's position.")

<sup>400</sup> *See* Dembroff & Wodak, *supra* note 397, at 372 ("[E]nough of the morally relevant facts that explain why it is wrong to misgender transgender women . . . are equally applicable to genderqueer individuals . . .").

<sup>401</sup> *Cf.* Brenda Cossman, *Gender Identity, Gender Pronouns, and Freedom of Expression: Bill C-16 and the Traction of Specious Legal Claims*, 68 *U. TORONTO L.J.* 37, 51 (2018) (discussing the "unsettled" controversy over whether Ontario's human rights law grants the right to choose *which* gender neutral pronouns to use).

to adopt.<sup>402</sup> They create a sort of *numerus clausus* problem.<sup>403</sup> What is objectively unreasonable is to misgender Jane-John as “he” or “she” when there are gender-neutral alternatives, like the singular “they” or “hir.” These options are not wholly idiosyncratic,<sup>404</sup> they are not novel,<sup>405</sup> and regulated entities in some places have been put on notice by administrative agencies that they might be required to use such terms.<sup>406</sup> Readers may object that harassment law offers no bright-line rule as to what modes of address are required, but there is never any bright-line test of what constitutes sexual, racial, or religious harassment.<sup>407</sup> The test cannot be pinned down with precision or frozen in time because it must depend on context and contemporary norms.<sup>408</sup>

There are special institutional contexts in which there might be particular reasons to compel recognition of any pronouns used by a person, including idiosyncratic ones. A California law known as the LGBT Senior Bill of Rights, passed in October 2017, makes it unlawful for nursing home staff to “[w]illfully and repeatedly fail to use a resident’s preferred name or pronouns after being clearly informed of the preferred name or pronouns,” unless that requirement is “incompatible with any professionally reasonable clinical judgment.”<sup>409</sup> Such a rule is warranted in the context of the long-term care industry, which involves a

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<sup>402</sup> See John McWhorter, *Goodbye to “He” and “She” and Hello to “Ze”?*, CNN (Oct. 14, 2015, 8:31 AM), <https://www.cnn.com/2015/10/14/opinions/mcwhorter-pronouns-gender-neutral/index.html> [<https://perma.cc/SU86-NJ55>].

<sup>403</sup> See *supra* p. 939.

<sup>404</sup> See *supra* p. 957.

<sup>405</sup> See, e.g., LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE* 71 (1998) (discussing the author’s use of “hir” and “ze” in the 1990s).

<sup>406</sup> See *supra* p. 958.

<sup>407</sup> See, e.g., Post, *supra* note 286, at 17 (“[A]ntidiscrimination law is itself a social practice, which regulates other social practices, because the latter have become for one reason or another controversial. It is because the meaning of categories like race, gender, and beauty have become contested that we seek to use antidiscrimination law to reshape them in ways that reflect the purposes of the law.”).

<sup>408</sup> Cf. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam) (holding that a court of appeals had erred by concluding that the insult “boy,” used to describe an adult African American man, was nondiscriminatory, and noting that whether a term is evidence of discrimination “depend[s] on various factors including context, inflection, tone of voice, local custom, and historical usage”).

<sup>409</sup> CAL. HEALTH & SAFETY CODE § 1439.51 (West 2018). This is a criminal rather than a civil statute because, when the law was first proposed, the long-term care industry objected to any private right of action. See, e.g., *Hearing on S.B. 219 Before the S. Standing Comm. on Judiciary*, 2017–2018 Leg., Reg. Sess. (Cal. 2017) [hereinafter *Cal. Hearing on S.B. 219*] (statement of Matthew Robinson, California Association of Health Facilities), <https://ca.digitaldemocracy.org/hearing/52473?startTime=52&vid=6c776ddd1a23558229f9c6de97aadecc> [<https://perma.cc/ZDK7-DB4U>]; *id.* (statement of Lori Ferguson, California Assisted Living Association). Violations are misdemeanors, which could technically be penalized with fines of up to \$2500, 180 days in county jail, or both, depending on factors including “[w]hether the violation exposed the patient to the risk of death or serious physical harm.” CAL. HEALTH & SAFETY CODE § 1290(c). If the statute were ever enforced, it is likely that prosecutors would seek small fines. Chris Nichols, *Claims Mislead About*

captive and vulnerable population of LGBT seniors.<sup>410</sup> Long-term care providers are charged with protecting the physical and mental health of this population and should not endanger the well-being of their charges by disrespecting their identities, however idiosyncratic.

A number of objections have been raised to the extension of harassment law to require recognition of nonbinary identity. Some object that by requiring pronouns other than “he” or “she,” government is taking sides on the acceptability of nonbinary gender identities, an issue on which public opinion polls are divided.<sup>411</sup> But discrimination law always takes sides in social controversies,<sup>412</sup> and harassment law inevitably intervenes in the use of language. Changing modes of address often express changes in the social status of groups. During the civil rights era, the Supreme Court once intervened to require that an African American woman be addressed with the honorific “Miss,” just like a white woman.<sup>413</sup> Formerly common modes of class-based address — such as “my lord” — have fallen out of favor.<sup>414</sup> Experience with “Ms.” demonstrates that new forms of address are possible and can quickly become culturally legible.<sup>415</sup>

Other objections are particular to pronouns. Law professor Eugene Volokh has argued that “[c]ompelling people to change the way they use the ordinary, commonplace words of everyday speech — turning plurals into singulars (or vice versa) — is a serious imposition.”<sup>416</sup> But why is

*California Forcing Jail Time for Using Wrong Transgender Pronoun*, POLITIFACT (Sept. 26, 2017, 5:13 PM), <http://www.politifact.com/california/article/2017/sep/26/claims-mislead-about-california-bill-forcing-jail/> [<https://perma.cc/U22T-QF5U>] (statement by the bill’s sponsor, Senator Scott Wiener, that “no one is going to jail” for incorrect pronoun use, an infraction that he predicts will be treated akin to a violation of the ban on smoking).

<sup>410</sup> See *Cal. Hearing on S.B. 219*, *supra* note 409 (statement of Sen. Scott Wiener) (“[T]hese seniors, people who are in their 70s, 80s, 90s and above today, are the people who created the modern LGBT community. . . . These are heroes, and they deserve to age gracefully and with the dignity and respect that they have earned 100 times over.”).

<sup>411</sup> See Josh Blackman, Opinion, *The Government Can’t Make You Use “Zhir” or “Ze” in Place of “She” and “He,”* WASH. POST (June 16, 2016), <https://wapo.st/1tt4rWZ> [<https://perma.cc/Q4MC-GTTW>] (opposing antiharassment rules that would require gender-neutral pronouns on the ground that “while a non-binary view of gender may be orthodoxy in certain segments of society, a near-majority of Americans reject it as a fact of life”).

<sup>412</sup> See Post, *supra* note 286, at 17.

<sup>413</sup> *Bell v. Maryland*, 378 U.S. 226, 248 n.4 (1964) (Douglas, J., concurring) (discussing *Hamilton v. Alabama*, 376 U.S. 650 (1964) (per curiam)).

<sup>414</sup> Titles of nobility never made it over to the United States. See U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States . . .”).

<sup>415</sup> “Ms.” has a long history, but quickly entered common usage in the 1970s due to feminist advocacy. See, e.g., Ben Zimmer, *Ms.*, N.Y. TIMES MAG. (Oct. 23, 2009), <https://nyti.ms/2k9ehvH> [<https://perma.cc/KQV6-CXDS>].

<sup>416</sup> Eugene Volokh, Opinion, *Claims by Transgender Schoolteacher (Who Wants to Be Called “They”) Yield \$60,000 Settlement, Agreement to Create Disciplinary Rules Regulating “Pronoun Usage,”* WASH. POST: VOLOKH CONSPIRACY (May 25, 2016), <https://wapo.st/1qJ29RU> [<https://perma.cc/X6NS-BMUX>].

this a “serious” imposition? The objection might be related to grammar, clarity, or compulsion.

Rules of grammar are often invoked to resist gender-neutral pronouns.<sup>417</sup> The primary problem with this objection is that it elevates rules of grammar over considerations of how to treat one another equally. But even on its own terms, the grammatical objection is dubious. Language is ever evolving. The American Dialect Society voted the singular “they” Word of the Year in 2015, noting that it was used by writers including Geoffrey Chaucer, William Shakespeare, and Jane Austen to refer to an unknown person.<sup>418</sup> Usage of the singular “they” to describe an unknown person is still ubiquitous, despite the strivings of Victorian grammarians to replace it with a universal “he.”<sup>419</sup>

A related objection may be the lack of clarity — is the referent of “they” a singular person or group? But context is usually clarifying, as with “you,” a pronoun that is both singular and plural.<sup>420</sup> While English speakers once distinguished “thou” (singular) from “you” (plural), “thou” has disappeared.<sup>421</sup> While new uses of language may at first cause friction, as new terms become more familiar, confusion abates. The English language is plastic, and “change is normal, ongoing, and entertaining.”<sup>422</sup> In any event, as philosophers Robin Dembroff and Daniel Wodak have argued, “[e]ven if using *they* slightly complicates communication, it is preferable to further maligning minority gender groups.”<sup>423</sup>

The objection may be about government compulsion of speech: mandating particular pronouns rather than forbidding misgendering.<sup>424</sup> Yet

<sup>417</sup> Some ersatz grammarians are insincere. Bergman & Barker, *supra* note 31, at 43 (pointing out that some people who oppose the singular “they” do not otherwise care about grammatical rules and hypothesizing that grammatical objections are easier to voice than the real sentiment: “I think your identity is invalid because it challenges my beliefs about the world”).

<sup>418</sup> 2015 Word of the Year Is Singular “They,” AM. DIALECT SOC’Y (Jan. 8, 2016), <https://www.americandialect.org/2015-word-of-the-year-is-singular-they> [<https://perma.cc/F3MD-V296>].

<sup>419</sup> Geoff Nunberg, *Everyone Uses Singular “They,” Whether They Realize It or Not*, NPR (Jan. 13, 2016, 1:00 PM), <https://www.npr.org/2016/01/13/462906419/everyone-uses-singular-they-whether-they-realize-it-or-not> [<https://perma.cc/9PDN-4LEP>].

<sup>420</sup> See McWhorter, *supra* note 402.

<sup>421</sup> See *id.*

<sup>422</sup> AM. DIALECT SOC’Y, *supra* note 418.

<sup>423</sup> Robin Dembroff & Daniel Wodak, *The Problem with Pronouns*, PHILOSOPHER (June 23, 2017), <https://politicalphilosopher.net/2017/06/23/featured-philosophers-robin-dembroff-daniel-wodak/> [<https://perma.cc/LUR6-UG5D>].

<sup>424</sup> See Cossman, *supra* note 401, at 42–45 (discussing the compelled speech objection to Canadian gender nondiscrimination law); Volokh, *You Can Be Fined*, *supra* note 169 (“New York is requiring people to actually say words that convey a message of approval of the view that gender is a matter of self-perception rather than anatomy, and that, as to ‘ze,’ were deliberately created to convey that . . . message.”).

harassment law constantly compels speech by requiring people to interact on equal terms with others they believe are unequal.<sup>425</sup> For example, a sexist police officer would be compelled to refer to a female colleague as “Officer,” even if he believes women should not have that title because their role is in the home. Alternatively, those who object to the gender-neutral honorific “Mx.” have the option of avoiding gendered honorifics altogether, and not referring to any students or coworkers as “Mr.” or “Ms.” An analogy to our instincts about harassment based on religion might be instructive. Should it be considered harassment on the basis of religion to refuse to refer to a person by religious titles such as “Your Holiness,” “Rabbi,” or “Imam,” when no one else in a school or workplace uses religious titles? To compel participants in secular life to use religious honorifics seems incorrect. Those who object to gender-neutral pronouns may use proper names to refer to everyone, as the district court ultimately did in one of its *Zzyym* opinions.<sup>426</sup> In close quarters, where it is impossible to avoid the use of pronouns, equal treatment means giving “them” the same respect as “he” and “she.”

### C. *Sex-Specific Roles and Programs*

The law allows binary sex segregation in some educational programs, sporting events, and workplaces. These limited contexts are not reasons to reject the project of nonbinary inclusion.

1. *Education.* — Many controversies over transgender students — such as whether schools should respect the gender identities of children over parental opposition — are not any different with respect to nonbinary gender, and so are beyond the scope of this Article. But nonbinary students may pose special challenges for sex-segregated schools, classrooms, and programs. Various neutrality, recognition, and integration strategies may be ways forward in these contexts.

Many feminist scholars have advocated for an anticlassification approach to education, based on research finding that single-sex programs have negligible educational benefits, they are costly, and they advance damaging gender stereotypes.<sup>427</sup> The existence of nonbinary students,

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<sup>425</sup> In 2006, the Supreme Court rejected a compelled speech objection to a law that required law schools to treat military recruiters like other recruiters, even though it compelled law schools to speak by including military recruiters in their promotional materials. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61–62 (2006). The Court noted that the regulation of speech is always “incidental” to the enforcement of antidiscrimination laws: the fact that Title VII “will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” *Id.* at 62.

<sup>426</sup> See *Zzyym v. Kerry*, 220 F. Supp. 3d 1106 *passim* (D. Colo. 2016) (referring to the plaintiff throughout as “Dana” without pronouns).

<sup>427</sup> See, e.g., Rebecca S. Bigler et al., *Analysis and Evaluation of the Rationales for Single-Sex Schooling*, in 47 *ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR* 225, 252–53 (Lynn S.



who do not fit the stereotypes behind single-sex education, provides another argument against these programs. But those who disagree on the policy arguments need not oppose inclusion of nonbinary people in general, because the law requires pluralism. Department of Education regulations permit funding of single-sex schools and classes, so long as student enrollment is “completely voluntary” and the school “provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.”<sup>428</sup> Thus, all students have the option of coeducational classes, while students who wish to claim binary gender identities can opt into segregated classes.

Nonbinary gender also creates challenges for private women’s colleges.<sup>429</sup> But these institutions have responded to these challenges with integration strategies: asking what interests sex-segregation serves and whether the definition of sex or gender used is tailored to meet those interests.<sup>430</sup> Thus, many are moving toward admitting any students who identify as transgender (men or women) or nonbinary.<sup>431</sup> The argument in favor of this move is that these institutions regard their missions as countering marginalization based on sex and gender identity.<sup>432</sup> Professor Davis suggests that these colleges should go further to become

Liben & Rebecca S. Bigler eds., 2014) (arguing that empirical research does not support rationales for single-sex education, and that studies that show benefits fail to control for selection effects); Diane F. Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 *SCIENCE* 1706, 1707 (2011) (discussing evidence of the stereotyping argument); Erin Pahlke et al., *The Effects of Single-Sex Compared with Coeducational Schooling on Students’ Performance and Attitudes: A Meta-Analysis*, 140 *PSYCHOL. BULL.* 1042, 1064–65 (2014) (meta-analysis of 184 studies of single-sex education concluding that those that used the best research methods demonstrated only trivial advantages, and noting that poorly designed studies may be fueling advocacy for single-sex schooling).

<sup>428</sup> 34 C.F.R. § 106.34(b) (2018). For an argument that this regulation is unconstitutional, see David S. Cohen & Nancy Levit, *Still Unconstitutional: Our Nation’s Experiment with State-Sponsored Sex Segregation in Education*, 44 *SETON HALL L. REV.* 339 (2014).

<sup>429</sup> Title IX includes an exemption for “any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.” 20 U.S.C. § 1681(a)(5) (2012).

<sup>430</sup> See DAVIS, *supra* note 288, at 98–101.

<sup>431</sup> See *Admission of Transgender Students*, MOUNT HOLYOKE, <https://www.mtholyoke.edu/policies/admission-transgender-students> [<https://perma.cc/BLV2-HDLZ>] (clarifying that it admits anyone “who is female or identifies as a woman” in whole or in part); Anna North, *Can Transgender Students Go to Women’s Colleges? Across the Country, the Answer Is Evolving.*, *VOX* (Sept. 22, 2017, 11:17 AM), <https://www.vox.com/identities/2017/9/21/16315072/spelman-college-transgender-students-womens-colleges> [<https://perma.cc/CAB3-MEXC>] (surveying women’s colleges and demonstrating the trend toward admitting all transgender students).

<sup>432</sup> Scott Jaschik, *Trans Applicants Welcome*, *INSIDE HIGHER ED* (Sept. 3, 2014), <https://www.insidehighered.com/news/2014/09/03/mount-holyoke-will-now-accept-applications-transgender-women> [<https://perma.cc/5NVG-GCQ6>].

“historically women’s colleges,” following the model of historically black institutions that now admit students of all races.<sup>433</sup>

Nonbinary students might also challenge school dress codes that prescribe different standards for boys and girls. This would be a good thing, because sex-differentiated dress codes perpetuate gender stereotypes that are harmful to all students, “communicat[ing] that girls’ bodies are inherently sexual, provocative, [and] dangerous” and that boys will inevitably objectify and harass girls.<sup>434</sup> The best practice is sex neutrality: to prohibit certain forms of inappropriate apparel or “mandate[] which body parts must be covered,” and to apply the rules uniformly.<sup>435</sup>

Another question is whether teachers should refer to students with gendered terms. A radical demand would be for gender-neutral early-childhood education, to allow young children to work out their own gender identities.<sup>436</sup> This would follow the model of some taxpayer-funded preschools in Stockholm, Sweden, where teachers assiduously avoid gendering their young charges, using the gender-neutral Swedish pronoun “hen,” calling them “friends” rather than “boys and girls,” and not treating them according to stereotypes.<sup>437</sup> In the United States, however, where publicly funded preschool is not even universally available, the goal of eliminating sex stereotyping in early childhood education

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<sup>433</sup> DAVIS, *supra* note 288, at 87; *see id.* at 107 (arguing that single-sex admissions policies are not essential to the mission of women’s colleges and suggesting instead that these colleges require essays that “ask prospective students to reflect upon how their own sex identities relate to the college’s commitment to fighting institutional sexism”).

<sup>434</sup> Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. RICH. L. REV. 1039, 1044 (2016); *id.* at 1047 (discussing successful equal protection challenges to discriminatory school dress codes).

<sup>435</sup> Kimmie Fink, *The Importance of Inclusive School Dress Codes*, HUM. RTS. CAMPAIGN (Jan. 30, 2017), <https://www.hrc.org/blog/the-importance-of-inclusive-school-dress-codes> [<https://perma.cc/J3NT-86HS>] (advising schools to “[a]void gender-specific policies altogether and instead allow all students the same clothing choices regardless of gender”).

<sup>436</sup> *See* Iantaffi Interview, *supra* note 47, at 18 (“I dream of a world where a child is born and, of course, we’re not going to know their gender until they tell us. So we just use gender neutral pronouns and then when they’re four or five, they’ll tell us because that’s when children tell you who they are.”).

<sup>437</sup> John Tagliabue, *Swedish School’s Big Lesson Begins with Dropping Personal Pronouns*, N.Y. TIMES (Nov. 13, 2012), <https://nyti.ms/2uLl7sq> [<https://perma.cc/CJT7-9S4Y>]. One study found that children at a gender-neutral preschool scored lower on a measure of gender stereotyping and were more willing to play with children of other genders. Kristin Shutts et al., *Early Preschool Environments and Gender: Effects of Gender Pedagogy in Sweden*, 162 J. EXPERIMENTAL CHILD PSYCHOL. 1, 12 (2017). Other Swedish psychologists are skeptical that the schools will have any long-term impacts on the children or society. Katy Scott, *These Schools Want to Wipe Away Gender Stereotypes from an Early Age*, CNN (Nov. 1, 2018, 8:39 AM), <https://www.cnn.com/2017/09/28/health/sweden-gender-neutral-preschool/index.html> [<https://perma.cc/8NK8-WG9E>].

seems a remote one.<sup>438</sup> Nonetheless, teachers might work to avoid language that excludes nonbinary students, using terms like “students” rather than “ladies and gentlemen.”<sup>439</sup> Educational institutions should provide nonbinary students with processes that allow them to decide when to disclose their pronouns, without requiring that they confront teachers or putting them on the spot to announce their gender identities in front of other students.<sup>440</sup>

2. *Athletics.* — Another domain in which nonbinary inclusion poses a challenge is sports. In the longer term, nonbinary athletes may inspire society to think creatively about forms of sport in which many different types of bodies are competitive. But in the shorter term, neutrality strategies may come at the cost of women’s participation, and integration of nonbinary athletes into the men’s or women’s divisions may be preferable. Whether neutrality or integration is the best solution will depend on the type of competition, the age of the competitors, and the reasons for sex-segregated events.<sup>441</sup> In any event, the legal issues that nonbinary gender raises for sports are not reasons to reject nonbinary gender wholesale.

Sex discrimination in athletics may run afoul of U.S. law, most notably Title IX, which forbids sex discrimination in sports programs at schools receiving federal funding.<sup>442</sup> In 1975, Department of Education

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<sup>438</sup> See, e.g., U.S. DEP’T OF EDUC., A MATTER OF EQUITY: PRESCHOOL IN AMERICA (2015), <https://www2.ed.gov/documents/early-learning/matter-equity-preschool-america.pdf> [<https://perma.cc/8ZX7-EXH3>] (describing the lack of access to preschool for many American children).

<sup>439</sup> Meg-John Barker et al., *Non-binary Staff and Student Guidance for Higher Education Institutions*, REWRITING THE RULES 4, <https://rewriting-the-rules.com/wp-content/uploads/2017/01/Non-BinaryGenderHigherEducationGuidance-1.pdf> [<https://perma.cc/UX7Y-GWS7>].

<sup>440</sup> *Id.* at 3–4; Beemyn, *supra* note 182, at 361 (interviewing over 200 college students who identify outside of gender or sexual binaries and reporting “[t]he interviewees who approached faculty members about their pronouns stated that most were willing to use the requested pronouns, but many of the students did not feel comfortable going to their instructors, not knowing how they would react or not wanting to have such a conversation with a professor”); Dembroff & Wodak, *supra* note 423 (“Your student should get to choose whether and when they disclose their gender identity to others; you should not force them to disclose this information to strangers, partly out of respect for their autonomy, and partly to protect them from serious risks of stigmatization and discrimination.”).

<sup>441</sup> Cf. DAVIS, *supra* note 288, at 113–14 (asking that, for each age and level of play, organizations reconsider the aims of sex segregation in athletics, which might be fostering equal opportunity, student athleticism, recreation, or elite competition, or catering to the desires of fans for gender specialization).

<sup>442</sup> 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance [with certain specified exceptions].”). Additionally, the Fourteenth Amendment may forbid sex discrimination by sports leagues that qualify as “state actors.” See *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 18 (1st Cir. 1999) (concluding that a “voluntary, nonprofit” basketball league, *id.* at 16, did not qualify as a “state actor”). Some state and local laws may forbid sex discrimination by sports leagues that qualify as public accommodations. See *Nat’l Org. for Women v. Little League Baseball, Inc.*, 318 A.2d

regulations carved out an exception to this rule, allowing sex-segregated teams “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”<sup>443</sup> If selection is based on competitive skill, members of the sex whose athletic opportunities were previously limited (generally women or girls) “must be allowed to try-out for the team offered unless the sport involved is a contact sport.”<sup>444</sup> The regulation requires that, on the whole, a school must “provide equal athletic opportunity for members of both sexes.”<sup>445</sup>

Third-gender recognition is an unlikely approach to athletics. Opponents of California’s Gender Recognition Act argued that recognition of nonbinary gender would require that schools establish separate sports teams just for nonbinary students.<sup>446</sup> Even assuming the regulation applies to nonbinary athletes despite its reference to “both sexes,” separate teams would not “effectively accommodate” nonbinary athletes because they are too small in number at present.<sup>447</sup> Moreover, without a critical mass of athletes, separate nonbinary divisions are likely to amount to stigmatization rather than inclusion.<sup>448</sup>

The best way to accommodate nonbinary athletes may be incremental moves toward eliminating sex classifications in sports.<sup>449</sup> Growing recognition of gender fluidity renders the project of classification of athletes into the male and female divisions more difficult and suspect.<sup>450</sup>

33, 37–38 (N.J. Super. Ct. App. Div. 1974) (holding that a Little League was a place of public accommodation and therefore could not discriminate on the basis of sex under New Jersey antidiscrimination law).

<sup>443</sup> 34 C.F.R. § 106.41(b) (2018). For legal discussion of the interaction between Title IX and equal protection standards, and an argument in favor of revision of the statute or Department of Education regulations, see Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133, 163–65 (2005).

<sup>444</sup> 34 C.F.R. § 106.41(b).

<sup>445</sup> *Id.* § 106.41(c).

<sup>446</sup> See sources cited *supra* note 33 and accompanying text.

<sup>447</sup> See 34 C.F.R. § 106.41(c) (discussing factors to consider in assessing “whether equal opportunities are available,” including whether the allocation of teams “effectively accommodate[s] the interests and abilities of members of both sexes”).

<sup>448</sup> A third category for intersex athletes is particularly troubling. Karkazis & Carpenter, *supra* note 301, at 6–7 (opposing the creation of an intersex division in track and field on the grounds that it forces people into the “third sex as punishment” for refusing to submit to medical treatments that would lower their testosterone and requires an athlete to disclose her “intersex variation violating her privacy and calling her identity into question,” *id.* at 7).

<sup>449</sup> Erin Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 WIS. J.L. GENDER & SOC’Y 29, 48 (2016) (“The approach of eliminating gender categories [in sporting events] would also be inclusive of those individuals whose gender-identities are non-binary or fluid.”); Alex Channon et al., *Introduction: The Promises and Pitfalls of Sex Integration in Sport and Physical Culture*, in SEX INTEGRATION IN SPORT AND PHYSICAL CULTURE 1, 3 (Alex Channon et al. eds., 2017) (discussing, as a benefit of sex-integrated sports, “greater inclusivity of non-binary people”).

<sup>450</sup> See Ronald S. Katz & Robert W. Luckinbill, *Changing Sex/Gender Roles and Sport*, 28 STAN. L. & POL’Y REV. 215, 241 (2017) (“[I]n a gender-fluid era, by what right does an organization or person dictate to another on the subject of that other’s sex or gender?”).

Nonbinary people's narratives of the cruelties and indignities of classification are also persuasive arguments for integrating sports.<sup>451</sup> Nonbinary athlete Lauren Lubin has said: "The first identity I ever formed, as a young child, was 'I'm an athlete,' before even a gender."<sup>452</sup> Lubin played women's college basketball until the dissonance with their internal sense of nonbinary identity caused them to quit the team and lose their scholarship.<sup>453</sup>

Reenvisioning sports without sex classifications aligns with the goals of much feminist theory. A large body of sociological research describes how sports inculcate gender roles: producing, maintaining, and validating male privilege and virtue.<sup>454</sup> While women's sports have given women a chance to "challenge the notion that it is only men who can be brave, competitive, and strong," the fact that sports remain sex segregated sends the message that men will always have the edge with respect to these characteristics.<sup>455</sup>

There are already many examples of integrated sports leagues for children in grades K–12.<sup>456</sup> Prior to puberty, children can play in the same games, and arguments about safety and fairness find no basis in statistical differences between boys' and girls' bodies.<sup>457</sup> Some sociological research supports the argument that at older ages, desegregated events — such as equestrian competitions, cheerleading, karate, tennis, korfbal, quidditch, and floorball — can emphasize "collaboration and teamwork" over "policing gender divisions and broadly help to establish

<sup>451</sup> Jon Shadel, *This Gender Neutral Athlete Wants to End Sex Segregation in Sports*, VICE (Nov. 10, 2016, 4:28 PM), [https://www.vice.com/en\\_us/article/mvk33x/this-gender-neutral-athlete-wants-to-end-sex-segregation-in-sports](https://www.vice.com/en_us/article/mvk33x/this-gender-neutral-athlete-wants-to-end-sex-segregation-in-sports) [<https://perma.cc/AKD9-53Y6>] (observing that nonbinary "athletes face a dizzying, seemingly impossible choice: disregard their gender identity — arguably an unhealthy and wholly unacceptable option given the negative effects of remaining closeted — or sacrifice their love of sports").

<sup>452</sup> NON-BINARY INCLUSION IN SPORTS (WNET New York Public Media 2015), <https://tpt.pbslearningmedia.org/resource/tp17.lgbtq.werun.nonbinary/non-binary-inclusion-in-sports/> [<https://perma.cc/K9Q2-LQVB>].

<sup>453</sup> Kristin Russo, *An Athlete Makes the Case for Gender Not to Matter in Sports*, TIME (Oct. 7, 2015), <http://time.com/4063096/how-important-is-gender/> [<https://perma.cc/6Z92-5J97>].

<sup>454</sup> Channon et al., *supra* note 449, at 1.

<sup>455</sup> *Id.* at 2; see also Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1275–78 (2018) (discussing how sex-segregated sports perpetuate gender stereotypes).

<sup>456</sup> Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 274–79 (2013).

<sup>457</sup> See *id.* at 287; see also Susanna Stenevi Lundgren et al., *Normative Data for Tests of Neuromuscular Performance and DXA-Derived Lean Body Mass and Fat Mass in Pre-Pubertal Children*, 100 ACTA PÆDIATRICA 1359, 1361 (2011) (finding "no constant gender differences" in neuromuscular performance such as balance and jumping in boys and girls under age twelve); Marnee J. McKay et al., *Reference Values for Developing Responsive Functional Outcome Measures Across the Lifespan*, 88 NEUROLOGY 1512, 1516 (2017) (comparing physical capabilities of children aged three to nine and finding no significant sex differences).

positive, supportive, mutually respectful relationships between men and women.”<sup>458</sup>

Sports might be redesigned so as not to advantage male or female bodies.<sup>459</sup> The Paralympic movement demonstrates how restructured games and the integration of technology can facilitate competition for athletes with different types of bodies.<sup>460</sup> It also suggests ways athletes might be classified other than by sex, including by age, body mass, or performance level.<sup>461</sup> Handicaps in golf and weight classes in wrestling are examples.<sup>462</sup> At some point in the future, the advantages of male bodies might be leveled out by genetic enhancements or e-sports.<sup>463</sup> When asked about how sports will change to include nonbinary people, Lubin said: “There’s not a single answer. I believe this is going to be the culmination of many different disciplines and institutions coming together to reorganize themselves.”<sup>464</sup>

But in the short term, inclusion of nonbinary athletes may require integration into sporting events that are segregated by sex (or that, like

<sup>458</sup> Channon et al., *supra* note 449, at 3; *see, e.g.*, Eric Anderson, “*I Used to Think Women Were Weak*”: *Orthodox Masculinity, Gender Segregation, and Sport*, 23 SOC. F. 257, 258 (2008) (studying “heterosexual men who were first socialized into the masculinized sport of high school football but later joined the feminized sport of collegiate cheerleading” and finding that “[v]irtually all informants who had not previously respected women’s athleticism reported changing their attitudes; and all informants said they had learned to better respect women’s leadership abilities and to value their friendship”); Adam Cohen et al., *Investigating a Coed Sport’s Ability to Encourage Inclusion and Equality*, 28 J. SPORT MGMT. 220, 226 (2014) (conducting qualitative analysis of the coed sport quidditch, including surveys and focus groups, and finding that “both females and males reported a stereotype reduction of the opposite gender occurring due to their participation in the sport”). This is not to say integrated sports are necessarily egalitarian; paternalistic sex stereotypes and male dominance may simply change form in integrated games. *See, e.g.*, Channon et al., *supra* note 449, at 4 (offering examples); Cohen et al., *supra*, at 230 (noting that among quidditch players, “some males held a degree of ambivalent sexism toward their female teammates . . . commend[ing] them for their efforts, but maintain[ing] the belief that they are sacrificing competitiveness for the sake of fairness or inclusivity”).

<sup>459</sup> *See* Leong, *supra* note 455, at 1286–87 (imagining a gymnastics competition combining men’s and women’s events, “floor, vault, beam, parallel bars, uneven parallel bars, high bar, pommel horse, and rings,” in which the best all-around athlete would win).

<sup>460</sup> For a critical take, *see* generally DAVID HOWE, *THE CULTURAL POLITICS OF THE PARALYMPIC MOVEMENT* 120–52 (2008).

<sup>461</sup> *See, e.g.*, Sean M. Tweedy et al., *Paralympic Classification: Conceptual Basis, Current Methods, and Research Update*, 6 PM&R S11, S12 (2014); *see also* Leong, *supra* note 455, at 1284.

<sup>462</sup> Another example is a recreational tennis league that divides athletes into A, B, C, and D skill levels, rather than by gender. *See* DAVIS, *supra* note 288, at 138.

<sup>463</sup> *Cf.* THE FUTURE OF SPORTS 14–15, 30–33 (Josh McHugh et al. eds., 2015), <https://www.gannett-cdn.com/usatoday/editorial/sports/The-Future-of-Sports-2015-Report.pdf> [<https://perma.cc/4DGP-98QN>] (predicting that genetic enhancements for athletes will one day become commonplace and regulated and that e-sports will grow in popularity). To say this might be possible as a technical matter is not to say it is likely that gaming culture will welcome non-male competitors. *Cf.* Giovanni Luca Ciampaglia, *Can Online Gaming Ditch Its Sexist Ways?*, THE CONVERSATION (Nov. 16, 2017, 7:59 PM), <https://theconversation.com/can-online-gaming-ditch-its-sexist-ways-74493> [<https://perma.cc/MB7X-2CPX>].

<sup>464</sup> Shadel, *supra* note 451.

mixed doubles tennis or pairs figure skating, require an athlete of each sex).<sup>465</sup> Integration requires careful analysis of the purposes for limiting eligibility in each division, so that definitions of eligibility can be tailored to meet those purposes.<sup>466</sup>

The arguments in favor of excluding “non-males” (however defined) from any male sports are weak. While some non-males may not have the ability to compete at high levels, that is not an argument for excluding those who do.<sup>467</sup> The exception for contact sports in Title IX’s implementing regulations is much criticized.<sup>468</sup> Courts have rejected the argument that certain games are too dangerous for girls,<sup>469</sup> and the number of girls playing football is on the rise.<sup>470</sup> To the extent that male games are too dangerous for women, girls, and nonbinary people, they are likely too dangerous for men and boys as well.<sup>471</sup> Paternalistic arguments support banning these games, or changing the rules or equipment to make them safer for everyone, rather than excluding non-males. Arguments that nonbinary and female athletes degrade homosocial male sporting experiences deserve particular skepticism for how they might perpetuate toxic gender ideologies.<sup>472</sup>

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<sup>465</sup> One alternative is a gender maximum rule. Quidditch, a game with seven athletes per team, requires that teams may not have more than four or five players “who identify as the same gender in play” at various points during the game. US QUIDDITCH RULEBOOK 10 (12th ed. 2018), [https://www.usquidditch.org/files/USQ\\_Rulebook\\_12.pdf](https://www.usquidditch.org/files/USQ_Rulebook_12.pdf) [<https://perma.cc/86QB-T3JL>]. This rule applies to “those who don’t identify within the binary gender system” as well as those who do. *Id.*

<sup>466</sup> For an argument that this analysis is required by the Constitution’s Equal Protection Clause, see Leong, *supra* note 455, at 1283–84.

<sup>467</sup> See, e.g., Greene, *supra* note 443, at 136 (“[T]he skills gap, long used to justify exclusion of females, is the best argument in favor of a reasonable one-way ratchet that allows women to participate in male-only sports without extending the same opportunity to males who wish to participate in female-only sports.”); Katz & Luckinbill, *supra* note 450, at 226 (“[P]rohibiting females from trying out for contact sports — has been consistently found by the courts to be unconstitutional. . . . Why should the 180-pound woman be prevented from trying out for football when the 97-pound male may do so?”); Skinner-Thompson & Turner, *supra* note 456, at 276 (“Put simply, courts have often rejected essentialist arguments claiming that girls are physically incapable of participating in youth sports with boys.”).

<sup>468</sup> See, e.g., Greene, *supra* note 443, at 160–63 (arguing that “[t]he contact sports exemption, even if it directly affects only younger athletes, eventually affects the interest and abilities of older ones,” *id.* at 160; that it limits the number of teams on which women can be involved and thereby excludes them from the educational, social, and health advantages of sports; and that it sends an expressive message enforcing gender stereotypes).

<sup>469</sup> Skinner-Thompson & Turner, *supra* note 456, at 275 (discussing cases rejecting arguments about “keeping girls safe”).

<sup>470</sup> Cork Gaines, *The Number of Girls Playing High School Football Is on the Rise Even Though Overall Participation Is Down*, BUS. INSIDER (Oct. 3, 2016, 2:47 PM), <https://www.businessinsider.com/more-girls-are-playing-high-school-football-2016-10> [<https://perma.cc/PPT7-7DCA>] (describing data from the National Federation of State High School Associations showing an increasing number of girls playing football).

<sup>471</sup> See Leong, *supra* note 455, at 1271–72.

<sup>472</sup> See, e.g., Anderson, *supra* note 458, at 257 (discussing how “segregation of men into a homosocial environment limits their social contact with women and fosters an oppositional masculinity

As for women's sports, this is a context in which gender neutrality can have the disadvantage of precluding equal opportunity for women.<sup>473</sup> Where the competitive stakes are low, as with most high school and amateur athletics, the best rule is one like California's or CrossFit's: deference to a person's choice to play in the women's division if it best matches their gender identity.<sup>474</sup> Some nonbinary people may be willing to play on women's teams.<sup>475</sup> A self-identification rule is best because "equal opportunity" in this context means giving everyone a chance to participate. It does *not* mean fairness in the sense of leveling any natural advantage that was not the result of hard work and training. Not just testosterone, but many traits give athletes advantages: height, body mass, better eyesight, larger hands, coordination, and lung

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that influences the reproduction of orthodox views regarding women"); Deborah L. Brake, *Wrestling with Gender: Constructing Masculinity by Refusing to Wrestle Women*, 13 NEV. L.J. 486, 488 (2013) (arguing that when boys refuse to wrestle girls, "what is really at stake in the incident is the construction of masculinity, both the masculinity of the forfeiter and the masculinity of the sport of wrestling — a masculinity that is deeply threatened by mixed-sex wrestling competition"); Channon et al., *supra* note 449, at 1 ("[T]he exclusion of women from many high-profile sporting competitions throughout much of the twentieth century preserved sport as a symbolic space for celebrating men's embodiment of . . . 'masculine' virtues, while the tendency to stigmatize and ridicule female athletes when they did enter the 'male' sporting arena helped prevent them from effectively challenging the legitimacy of men's symbolic ownership of sport and its requisite qualities.").

<sup>473</sup> See Buzuvis, *supra* note 449, at 48–49.

<sup>474</sup> See, e.g., CAL. EDUC. CODE § 221.5(f) (West 2018) ("A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on records."); Mary Emily O'Hara, *EXCLUSIVE: The CrossFit Games Will Now Allow Transgender Athletes to Compete*, THEM. (Aug. 4, 2018), <https://www.them.us/story/crossfit-games-trans-policy> [<https://perma.cc/UEZ4-TSQM>] (discussing the announcement by CrossFit's CEO that "[i]n the 2019 CrossFit competitive season, starting with the Open, transgender athletes are welcome to participate in the division with which they identify").

In 2016, the Obama Department of Education took the position that Title IX requires that schools defer to students' gender identities rather than the sex assigned at birth, but the Trump Administration rescinded that advice and is now reconsidering the issue. Dear Colleague Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & T.E. Wheeler, II, Acting Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx> [<https://perma.cc/SZX3-4E82>] (withdrawing the Obama Administration's May 13, 2016 letter "in order to further and more completely consider the legal issues involved").

<sup>475</sup> See, e.g., Kevin Majoros, *Breaking Barriers for Non-binary Athletes*, WASH. BLADE (Aug. 24, 2017, 3:51 PM), <http://www.washingtonblade.com/2017/08/24/breaking-barriers-non-binary-athletes/> [<https://perma.cc/X3JA-KPEG>] (discussing competitive swimmer G Ryan who "identifies as non-binary or genderqueer and swims on the women's team at the University of Michigan"); NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 15 (2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf) [<https://perma.cc/UL7N-A2L7>] (quoting Morgan Dickens, former Cornell basketball and rugby player, as saying: "There are differences between being male and female, but being gender fluid doesn't mean I reject these differences, it just means I'm rejecting the idea that I have to be defined one way or another").



capacity, among other accidents of birth.<sup>476</sup> Some male athletes have atypically high testosterone levels, but no one suggests they be barred from competition.<sup>477</sup> In any event, gains in “fairness” must be weighed against the costs of subjecting intersex and transgender athletes to cruel and demeaning sex-verification rules.

The specter of fraud haunts these discussions, but it is hard to find evidence of recent bad faith claims to gender identity in sports, however “bad faith” is defined.<sup>478</sup> Due to continued stigma and bias against transgender people, it is unlikely that many people would be willing to claim a gender identity not their own in any public context. A more likely “gender identity fraud” scenario is the man who chooses to identify as nonbinary in an effort to show how lax the self-determination standard is and thereby undermine the case for nonbinary rights.<sup>479</sup> A rule against bad faith conduct would screen out these types of behavior. The rule could forbid athletes from selecting nonbinary or female gender identities for the sole purpose of prevailing in or disrupting athletic competition. Such rules would not be inadministrable. The law of religious accommodation offers a model for how to ensure that claims to identity are not made insincerely.<sup>480</sup>

There may be different considerations in elite sports. There is typically a ten to twelve percent performance difference between male and

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<sup>476</sup> Buzuvis, *supra* note 449, at 43 (citing *Chand v. Athletics Fed’n of India*, CAS 2014/A/3759 ¶ 260 (CAS July 24, 2015)) (listing “increased hemoglobin levels caused by defective EPO receptors, tallness (in some sports), shortness (in others), low body mass index, unusually high lung capacity, mitochondrial conditions that increase aerobic capacity, acromegaly (i.e. large hands and feet), perfect vision, and unusually efficient systems for muscle growth and blood flow”).

<sup>477</sup> *See id.*

<sup>478</sup> *See* Katz & Luckinbill, *supra* note 450, at 242.

<sup>479</sup> Similar protest strategies have been attempted in school restroom cases. *See Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600, 603 (Me. 2014) (discussing how a transgender girl’s “use of the girls’ bathroom went smoothly, with no complaints from other students’ parents, until a male student followed her into the restroom on two separate occasions, claiming that he, too, was entitled to use the girls’ bathroom. The student was acting on instructions from his grandfather, who was his guardian and was strongly opposed to the school’s decision to allow [the transgender girl] to use the girls’ bathroom”).

<sup>480</sup> Courts are generally reluctant to find religious beliefs to be insincere. *See* Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 112 (2017) (“Even when religiously contradictory behavior is evident, the courts defer to the claimant’s explanations.”). But they can tell when a claim to religious faith is no more than a sham to gain some particular benefit. *See, e.g., Ideal Life Church of Lake Elmo v. County of Washington*, 304 N.W.2d 308, 318 (Minn. 1981) (holding that an institution was not a “church” where “the primary, and perhaps the sole, purpose for incorporating . . . was to provide [taxpayers] the benefit of a tax-free home while maintaining the same use and control they had prior to incorporation”); *see also* Ben Adams & Cynthia Barmore, Essay, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 59–60 (2014) (“There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity.”).

female competitors at elite levels.<sup>481</sup> Testosterone may be the reason, although the evidence on this is, to say the least, complex.<sup>482</sup> Professor Erin Buzuvis has argued: “If eliminating the binary in sport is a strategy for challenging gender stereotypes, it is one with great potential to backfire.”<sup>483</sup> At elite levels, gender neutrality would reduce the number of women who qualify for national teams and win medals.<sup>484</sup> If only a few women succeed, they will be written off as “outliers” and their small numbers will be used as evidence of women’s natural athletic inferiority rather than “an indictment of society’s suppression of female athleticism.”<sup>485</sup>

This Article’s task is to argue nonbinary gender inclusion is feasible; it cannot settle broader debates about intersex and transgender inclusion in elite women’s sports. But one principle to consider might be protecting the reliance interests of those people who have competed in women’s sports all their lives.<sup>486</sup> This principle avoids hormonal testing of athletes with intersex variations, which is widely regarded as a public referendum on a female athlete’s gender identity.<sup>487</sup> Athletes with intersex variations disqualified from women’s sports have faced stigmatization and shunning, and as a result of one case, an athlete attempted suicide.<sup>488</sup> On the ground, sex verification practices are suspiciously intertwined with racialized notions of femininity; it cannot be ignored that

<sup>481</sup> See, e.g., Robinson Meyer, *We Thought Female Athletes Were Catching Up to Men, but They’re Not*, THE ATLANTIC (Aug. 9, 2012), <https://www.theatlantic.com/technology/archive/2012/08/we-thought-female-athletes-were-catching-up-to-men-but-theyre-not/260927/> [<https://perma.cc/B6Y5-98HD>].

<sup>482</sup> Buzuvis, *supra* note 449, at 40–42 (discussing evidence that there is no linear relationship between endogenous testosterone and performance, that elite male and female performance levels often overlap, that women whose bodies are insensitive to testosterone are overrepresented among female athletes, and that many male athletes have low testosterone levels). *But see* Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 70–84 (2017) (arguing the ten to twelve percent performance gap is driven by differences in testosterone, even if there is no perfect mathematical correlation).

<sup>483</sup> Buzuvis, *supra* note 449, at 48.

<sup>484</sup> *Id.*

<sup>485</sup> *Id.* at 49.

<sup>486</sup> *Id.* at 54–55 (“Reliance is the legal principle that says in some circumstances, one’s rights are determined by the fact that one has been exercising those rights for a long time on the reasonable assumption that those rights were secure.” *Id.* at 54.); *see also* Katz & Luckinbill, *supra* note 450, at 241 (“[I]ndividuals should not have to go through invasive, humiliating and degrading procedures about one of the most personal subjects, one’s sex or gender.”). Bioethicist Alice Dreger has long taken this position. *See, e.g.*, Alice Dreger, *Intersex and Sports: Back to the Same Old Game*, HASTINGS CTR.: BIOETHICS F. (Jan. 22, 2010), <https://www.thehastingscenter.org/intersex-and-sports-back-to-the-same-old-game/> [<https://perma.cc/ELE4-637N>].

<sup>487</sup> *See* Buzuvis, *supra* note 449, at 47 (“[A]s long as the categories for participation are still called ‘men’s’ and ‘women’s,’ (rather than ‘above’ and ‘below’ 10 nmol/L) the hormone standard will likely be interpreted as a proxy for sex verification.”).

<sup>488</sup> *Id.* at 37.

women of color from the Global South are disproportionately (if not exclusively) scrutinized by sporting authorities.<sup>489</sup>

Some transgender men may also have reliance interests in playing women's sports, having been denied equal athletic opportunities for most of their lives.<sup>490</sup> But there are concerns that, due to high levels of testosterone from hormone treatments, these athletes will dominate and crowd out opportunities for others. Accordingly, the NCAA allows transgender men who are not taking testosterone to play women's sports.<sup>491</sup> Transgender women, however, may not have had the same history of disadvantage. Buzuvis therefore suggests a rule that "would exclude transgender women who have not undergone hormone treatment" from elite women's sports unless they "bring their testosterone level below the 'normal male range' cutoff of 10 nmol/L."<sup>492</sup> This same rationale would support allowing elite nonbinary athletes who have long competed in women's sports to continue to do so, as long as they are not pursuing masculinizing hormonal therapy.<sup>493</sup>

While nonbinary athletes present a long-term challenge to sex-segregated sports, in the short term, they may prompt rethinking of the rules of eligibility for particular events, along with transgender and intersex athletes.

3. *Workplaces.* — Another potential argument against nonbinary inclusion is that the labor market requires that men and women do different jobs. Although the majority of job categories are filled primarily by women (like administrative assistant) or men (like truck driver), formal occupational sex segregation is rare.<sup>494</sup> Title VII bars employer rules

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<sup>489</sup> Katrina Karkazis & Rebecca M. Jordan-Young, *The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes*, 30 FEMINIST FORMATIONS, 2018, at 1, 6 (discussing how "black and brown women from the Global South come to be the exclusive targets of the supposedly new, neutral, and scientific T regulation").

<sup>490</sup> Buzuvis, *supra* note 449, at 51–52 ("[A] transgender man may by virtue of his female body and birth assignment have been raised as female, a designation that influenced — and likely limited — his athletic opportunities." *Id.* at 52.).

<sup>491</sup> *Id.* at 52 (citing NCAA OFFICE OF INCLUSION, *supra* note 475, at 8).

<sup>492</sup> *Id.* at 53. The International Association of Athletics Federations now recommends a threshold of 5 nmol/L for certain track and field events. Press Release, Int'l Ass'n of Athletics Fed'ns, IAAF Introduces New Eligibility Regulations for Female Classification (Apr. 26, 2018), <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica> [https://perma.cc/3LSA-GCE5].

<sup>493</sup> See Buzuvis, *supra* note 449, at 55. For an argument that it is unwise and unfair to require any hormonal treatment as a condition of participation in collegiate sports, see Elliot S. Rozenberg, *The NCAA's Transgender Student-Athlete Policy: How Attempting to Be More Inclusive Has Led to Gender and Gender-Identity Discrimination*, 22 SPORTS LAW J. 193, 207–08 (2015).

<sup>494</sup> See, e.g., ARIANE HEGEWISCH ET AL., INST. FOR WOMEN'S POLICY RESEARCH, BRIEFING PAPER: SEPARATE AND NOT EQUAL? GENDER SEGREGATION IN THE LABOR MARKET AND THE GENDER WAGE GAP 13 (2010).

that classify by sex,<sup>495</sup> except where sex is a bona fide occupational qualification (BFOQ).<sup>496</sup> This defense is construed “narrowly,”<sup>497</sup> and applies to a diminishing number of jobs. The simple fact that customers might prefer men or women cannot support a BFOQ defense.<sup>498</sup> Nor can stereotypes about men or women.<sup>499</sup> Apart from the BFOQ defense, there are also judicially crafted exceptions to Title VII’s ban on explicit sex-based classifications with respect to sex-differentiated dress codes and physical standards.<sup>500</sup> In light of the small number of remaining employment contexts in which binary sex segregation is permissible, the main challenge in integrating nonbinary people into employment markets is overcoming the biases against them. Nonetheless, nonbinary workers may prompt renewed scrutiny of the validity of BFOQ defenses, dress codes, and physical standards, requiring that employers and courts rethink whether sex classifications meet important interests or reaffirm stereotypes.

(a) *The BFOQ Defense.* — The most commonly accepted sex-based BFOQ argument is that certain positions must be filled by men or women to protect the privacy interests of patients, customers, or inmates in being viewed or touched only by members of the same sex.<sup>501</sup> To the extent that nonbinary people throw a wrench in this doctrine, it is good riddance. The doctrine tends to disadvantage women in the labor market.<sup>502</sup> The cases are premised on a troubling assumption of universal

<sup>495</sup> See, e.g., *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978).

<sup>496</sup> 42 U.S.C. § 2000e-2(e) (2012) (allowing discrimination “on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”).

<sup>497</sup> *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

<sup>498</sup> See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (“[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”); 29 C.F.R. § 1604.2(a)(1) (2018).

<sup>499</sup> See, e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (“By adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing ‘to hire an individual based on stereotyped characterizations of the sexes.’ . . . The exception for a ‘bona fide occupational qualification’ was not intended to swallow the rule.” (footnote omitted)).

<sup>500</sup> Theories of discrimination that rely on statistical showings and affirmative action are discussed *supra* pp. 952–54.

<sup>501</sup> Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1259–60 (2003) (describing cases in which courts accepted this defense in “contexts including labor and delivery rooms, mental hospitals, youth centers, washrooms, and nursing homes” (footnotes omitted)).

<sup>502</sup> *Id.* at 1283 (describing how same-sex privacy BFOQs disadvantage women in labor markets because in the prison context, ninety-five percent of prisoners are men, and in the nursing context, they prevent men from filling jobs in lower-status care work); see also KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 116–17 (4th ed. 2006) (arguing that the BFOQ defense reinforces “age-old stereotypes that Title VII was meant

heterosexuality — that there is no same-sex sexual desire.<sup>503</sup> The cases overvalue traditional notions of female modesty and discount threats to men.<sup>504</sup> They sanction stereotypes about the female gaze as nonthreatening<sup>505</sup> and men as natural predators.<sup>506</sup> They are “shot through with discriminatory attitudes about class and possibly race.”<sup>507</sup> To give legal sanction to these attitudes is troubling.

However, there may be instances in which the privacy BFOQ holds up to scrutiny, involving physical touching or bodily exposure of vulnerable populations. Professor Amy Kapczynski has explained “the same-sex privacy BFOQ” as “a concession to the way people experience cross-sex bodily exposure as a threat or risk.”<sup>508</sup> She gives an example of a woman in a prison who was forced to undergo a clothed body search by a male correctional officer. The woman “was so distressed that ‘her fingers had to be pried loose from the bars she had grabbed; she returned to her cell-block, vomited, and broke down.’”<sup>509</sup> Kapczynski reflects:

We could insist, of course, that her reaction was a kind of false consciousness, that she was misidentifying all men as a threat, or at least misidentifying *this* man as a threat. There is a way in which these things in fact might be true — but is *this* the place to make that point? Would it be possible, in a context in which approximately eighty-five percent of women have been sexually or physically abused by men, to remake associations between gender and assault by ignoring them?<sup>510</sup>

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to condemn — i.e., women’s role washing and cleaning up after people, and men’s role as the skilled professional,” *id.* at 117).

<sup>503</sup> Kapczynski, *supra* note 501, at 1287.

<sup>504</sup> See *id.* at 1291 (discussing how courts disregard the threat of same-sex assault against male inmates).

<sup>505</sup> See Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1638–39 (2012) (“[S]urvey respondents consistently report much higher rates of sexual victimization by women staff than by fellow inmates.”).

<sup>506</sup> See, e.g., *Ambat v. City and County of San Francisco*, 757 F.3d 1017, 1028 (9th Cir. 2014) (reversing grant of summary judgment on a prison employer’s BFOQ defense because “the County has not shown that the Sheriff had ‘a substantial basis for believing that all or nearly all’ male deputies were likely to engage in sexual misconduct with female inmates, nor has it shown that ‘it is impossible or highly impractical . . . to insure by individual testing’ that a male deputy does not pose such a threat” (omission in original)); *Breiner v. Nev. Dep’t of Corr.*, 610 F.3d 1202, 1211 (9th Cir. 2010) (rejecting a BFOQ defense based on arguments that male correctional officers presented a risk of sexual misconduct in a women’s prison as based on “unproven and invidious stereotype[s]”); Kapczynski, *supra* note 501, at 1281.

<sup>507</sup> Kapczynski, *supra* note 501, at 1286 (“Courts have been more solicitous of the privacy interests of white collar men who fear that a cleaning woman might knock on their bathroom door than of the privacy interests of women and men incarcerated in prisons that are often the site of severe violations of physical and sexual integrity.” (footnote omitted)).

<sup>508</sup> *Id.* at 1274.

<sup>509</sup> *Id.* at 1288 (quoting *Jordan v. Gardner*, 986 F.2d 1521, 1534 (9th Cir. 1993) (Reinhardt, J., concurring)).

<sup>510</sup> *Id.* (footnote omitted). Men are also victims of sexual assault, including by other men. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1266–71 (2011). However, the law concedes here to social norms that construct cross-gender exposure as uniquely threatening to one’s

Kapczynski proposes that the costs of changing gender norms should not be imposed on particularly vulnerable persons, such as inmates and patients in residential care.<sup>511</sup>

The best approach to this problem is to ask: “Might there be technologies, if not today, then tomorrow, that can accomplish the state’s interest in engaging in bodily searches to maintain safety without raising the troubling issue of gender?”<sup>512</sup> In the interim, integration may be best. Whether any particular nonbinary person might trigger fear of sexual assault in vulnerable populations is not a question that can be answered in general, due to the diversity of the nonbinary population. Fears of sexual assault from nonbinary people may stem from anti-transgender biases in general, that, like racism, the law cannot endorse.<sup>513</sup> In the limited set of jobs involving bodily contact with vulnerable people, or exposure of naked bodies, a compromise would be to exclude those nonbinary people who will not identify as women (or men) for purposes of the job.

The BFOQ defense might also justify sex-specific casting calls in entertainment,<sup>514</sup> and sex-specific hiring for sex work, although there is little litigation on these questions.<sup>515</sup> The idea of a sex BFOQ for acting and sex work that might exclude transgender people is a strange one, as transgender people have long been actors and sex workers.<sup>516</sup> In the

dignity. See, e.g., *Byrd v. Maricopa Cty. Sheriff’s Dep’t*, 629 F.3d 1135, 1142 (9th Cir. 2011) (en banc) (holding that a strip search of a male inmate was unreasonable under the Fourth Amendment because it was conducted by a female officer in the absence of an emergency).

<sup>511</sup> Kapczynski, *supra* note 501, at 1291–92; see also *Teamsters Local Union No. 117 v. Wash. Dep’t of Corr.*, 789 F.3d 979, 990, 994 (9th Cir. 2015) (affirming summary judgment to a prison employer on its BFOQ defense for a narrow category of female-only job assignments to ensure inmate privacy, improve security by allowing more pat downs, and prevent sexual assaults); *Jones v. Henryville Corr. Facility*, 220 F. Supp. 3d 923, 929 (S.D. Ind. 2016) (granting summary judgment to an employer on its BFOQ defense where the prison preferred male employees for particular shifts in case a strip search of male inmates might be required).

<sup>512</sup> I. Bennett Capers, *Unsexing the Fourth Amendment*, 48 U.C. DAVIS L. REV. 855, 916 (2015) (footnotes omitted) (discussing advances in surveillance technologies).

<sup>513</sup> Cf. *TLDEF Helps Transgender Man Achieve Settlement in Discrimination Suit*, TRANSGENDER LEGAL DEF. & EDUC. FUND, [http://www.transgenderlegal.org/headline\\_show.php?id=429](http://www.transgenderlegal.org/headline_show.php?id=429) [<https://perma.cc/2DRK-3NY9>] (discussing a 2011 settlement in a discrimination case on behalf of a transgender man who was fired from a job “monitoring male outpatients as they provided urine samples for drug testing” after his employer learned he was transgender).

<sup>514</sup> See 29 C.F.R. § 1604.2(a)(2) (2018); Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 3 (2007).

<sup>515</sup> Those cases discussed in Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 157 & n.27 (2004), mostly involve dicta about the possibility of this defense. For an argument that discriminatory preferences should be allowed in “proximate sex work that involves physical contact or face-to-face interactions” because of the implications for “decisional privacy,” see Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1269 (2015); and also *id.* at 1262–69.

<sup>516</sup> Cf. Case, *supra* note 25, at 12 n.23 (“I find it bizarre that sex is considered a BFOQ, in the interests of ‘authenticity or genuineness,’ for the job of actor or actress. After all, the very essence

1950s and 1960s, “[t]ransitioning often led to sharp downward mobility, and for working class women especially, dancing and sex work were two of the most likely jobs after surgery.”<sup>517</sup> Nonbinary people might also play roles as men or women. Nonbinary actor Asia Kate Dillon, for example, has played female characters<sup>518</sup> as well as a nonbinary character.<sup>519</sup> Dillon has said they wished to play male characters as well.<sup>520</sup>

(b) *Dress Codes*. — Under a judicially crafted exception to Title VII, employers are permitted to prescribe sex-differentiated dress codes, so long as those dress codes do not impose “unequal burdens” on men and women.<sup>521</sup> This separate-but-equal doctrine is explained by courts’ desires to protect employer prerogatives and comfortable gendered social conventions, while avoiding subordination of women by ensuring women are not overly burdened.<sup>522</sup> Sex-differentiated dress codes may not be problematic for transgender people, so long as they are permitted to choose the set of rules consistent with their gender identities.<sup>523</sup> But they pose a challenge for those nonbinary people who do not feel comfortable complying with either set of rules.

While courts have not been persuaded by what they regard as freedom of expression arguments in favor of dress code noncompliance,<sup>524</sup> they are more likely to be persuaded by the claims of nonbinary people. One reason is that many nonbinary people make arguments in the register of immutability: that they have a core, authentic, essential identity that they should not be forced to sacrifice to keep their jobs.<sup>525</sup> A second reason is the increasing uptake of the argument that binary gender is

of this job is to pretend to be something one is not. All that a producer should be allowed to require is that the pretense be convincing.” (citation omitted).

<sup>517</sup> See Margot Canaday, *Pink Precariat: LGBT Workers in the Shadow of Civil Rights, 1945–2000* ch. 2, at 40 (Oct. 27, 2017) (unpublished manuscript) (on file with the Harvard Law School Library). Professor Canaday discusses transgender soap opera star Aleshia Brevard, who had a successful career as an actress in the 1960s. *Id.* at 35–40.

<sup>518</sup> Julie Miller, *Meet the Actor Breaking Down Hollywood’s Gender Barriers*, VANITY FAIR (May 5, 2017, 1:21 PM), <https://www.vanityfair.com/hollywood/2017/05/asia-kate-dillon-mtv-awards> [<https://perma.cc/F9BU-4Z8S>] (mentioning Asia Kate Dillon’s role as a female character on the television show *Orange is the New Black*).

<sup>519</sup> *The Ellen DeGeneres Show* (CBS television broadcast Mar. 20, 2017), [https://www.youtube.com/watch?v=f97aLkl\\_kWc](https://www.youtube.com/watch?v=f97aLkl_kWc) [<https://perma.cc/D3VC-FP9X>] (discussing the character Taylor Mason on *Billions*).

<sup>520</sup> *Id.* (discussing their childhood desire to play the title role in *Oliver!*).

<sup>521</sup> See, e.g., *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1108–11 (9th Cir. 2006) (en banc).

<sup>522</sup> See YURACKO, *supra* note 30, at 24.

<sup>523</sup> See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 572–74 (6th Cir. 2018) (rejecting the argument that enforcement of a sex-specific dress code that required men to wear a pants-suit with a necktie and women to wear a skirt-suit would be a defense against a discrimination suit brought by a transgender woman).

<sup>524</sup> See YURACKO, *supra* note 30, at 137–46.

<sup>525</sup> See Clarke, *supra* note 43, at 23–27 (discussing the persuasiveness of the “new immutability,” and the drawbacks of this argument).

itself a subordinating sex-stereotype that may not be enforced.<sup>526</sup> And a third reason is that, as nonbinary gender presentations become more mainstream, the implicit assumption that they are disruptive to employer prerogatives loses force.<sup>527</sup> This mainstreaming also makes it less likely that employers will respond to calls for neutrality by insisting that all workers dress in a blandly androgynous manner.<sup>528</sup>

(c) *Physical Standards.* — As for differential physical standards,<sup>529</sup> many of the same arguments that apply to segregated sports apply in this context as well.<sup>530</sup> But here, sex neutrality may be the best approach: leveling down to the minimum standard required to do the job. Courts have gone wrong by inventing legal rules that ask only whether different rules for men and women are “separate but equal,” and giving no consideration to whether the standard has any relationship to the job.<sup>531</sup> Disparate standards may perpetuate false stereotypes about women’s inferiority for law enforcement and fire-fighting jobs.<sup>532</sup> An inquiry into the business reasons for disparate standards is likely to reveal that the bar is set too high for men: if women can do the job by meeting a lower standard, then men can too.<sup>533</sup>

<sup>526</sup> See *supra* note 176.

<sup>527</sup> Cf. YURACKO, *supra* note 30, at 146.

<sup>528</sup> But see *id.* at 52 (“The employer who does not want to employ men in bob haircuts will simply not make this an option under its dress code, even if it does not mind women wearing them.”).

<sup>529</sup> A 2003 study found that approximately twenty-seven percent of police departments surveyed that use physical fitness tests apply different cutoffs for men and women. Kimberly A. Lonsway, *Tearing Down the Wall: Problems with Consistency, Validity, and Adverse Impact of Physical Agility Testing in Police Selection*, 6 POLICE Q. 237, 258 (2003).

<sup>530</sup> See *supra* section III.C.2, pp. 966–74.

<sup>531</sup> In one recent case, *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016), the Fourth Circuit applied the judicially invented “equal burdens” analysis, *id.* at 349, which asks only if men and women are equally burdened by separate tests. *Id.* at 349–51 (upholding a sex-differentiated standard for a push-up test against a challenge by a male applicant for a position as an FBI special agent). But the Supreme Court has prescribed a different rule in an analogous situation involving race. See *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). Under *Ricci*, a higher standard for men would only be allowed if an employer had a strong basis in evidence for believing that applying the same standard would have a disparate impact on women and if applying the same standard would not serve a business necessity. See *id.* There is no basis in the text of Title VII for rejecting this rule in a sex discrimination case. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.9 (1989) (plurality opinion) (“[T]he statute on its face treats each of the enumerated categories exactly the same.”). The only potential difference is the BFOQ defense, which applies to sex but not race. Like the *Ricci* framework, the BFOQ defense would have required an examination of the business justifications for the disparate standard. See Eve A. Levin, Note, *Gender-Normed Physical-Ability Tests Under Title VII*, 118 COLUM. L. REV. 567, 590 (2018) (arguing the BFOQ defense should have applied in *Bauer*).

<sup>532</sup> Cf. Ruth Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination*, 19 U.C. DAVIS L. REV. 761, 796 (1986) (“The stereotype that ‘more strength is better’ has led employers to use physical performance tests on a rank-order basis and thereby exclude women from employment opportunities.”).

<sup>533</sup> *Id.*; see also Case, *supra* note 25, at 88–94.



A number of nonbinary people serve in the military.<sup>534</sup> Title VII does not apply to the U.S. military, but the military too is moving away from sex classifications, even with respect to physical fitness standards.<sup>535</sup> Although the Supreme Court upheld the male-only draft system in 1981,<sup>536</sup> as of 2012, all positions in the U.S. military are formally open to women.<sup>537</sup> Only the Marine Corps still segregates male and female troops for basic training.<sup>538</sup> It is true that the status of transgender servicemembers is now uncertain. But the Trump Administration's legal arguments in favor of exclusion of transgender service members are based in speculation about medical costs and do not differentiate between binary and nonbinary gender identities.<sup>539</sup>

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<sup>534</sup> JAMES ET AL., *supra* note 2, at 168 (reporting that 22% of “non-binary people with male on their original birth certificate” and 2% of “non-binary people with female on their original birth certificate” were “[a]mong those with past or current military service”).

<sup>535</sup> See Jeff Schogol, *The PFT and CFT Can Be Gender Neutral. Here's How.*, MARINE CORPS TIMES (July 10, 2017), <https://www.marinecorpstimes.com/off-duty/military-fitness/2017/07/10/the-pft-and-cft-can-be-gender-neutral-here-s-how/> [<https://perma.cc/YN94-BEXM>] (quoting Lt. Col. Misty Posey, commander of the Marine Corps' only female recruit training battalion, as saying: “Whether intentional or not, the Marine Corps has been evolving toward a single fitness standard”). Air Force Major Mary Jennings Hegar argues, “I’ve seen firsthand that the warrior spirit is not directly proportional to how many pull-ups you can do. . . . In my opinion, you keep the standards very high and you maintain one standard. There shouldn’t be two standards for women and men, there should be a standard for this job: To do this job, you should have to do these things. And those requirements should be job-specific and not arbitrarily high in order to specifically keep women out.” *A Purple Heart Warrior Takes Aim at Military Inequality in “Shoot Like A Girl,”* NPR: FRESH AIR (Mar. 2, 2017, 2:56 PM) (alteration in original), <https://www.npr.org/2017/03/02/517944956/a-purple-heart-warrior-takes-aim-at-military-inequality-in-shoot-like-a-girl> [<https://perma.cc/37NJ-FRAS>].

<sup>536</sup> See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981). Should the draft return, it seems likely it would be gender neutral. See Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extra-judicial Constitutional Change*, 93 MINN. L. REV. 96, 134 (2008) (“[E]xtrajudicial changes since *Rostker* in women’s military status may undermine *Rostker* and support a Court judgment striking down male-only registration, conscription eligibility, and combat positions.”). In 2016, the Senate approved a bill that would extend the draft to women, although the effort ultimately failed. Jennifer Steinhauer, *Senate Votes to Require Women to Register for the Draft*, N.Y. TIMES (June 14, 2016), <https://nyti.ms/1UtDflf> [<https://perma.cc/TRN3-7UGS>].

<sup>537</sup> Memorandum from Martin E. Dempsey, Chairman of the Joint Chiefs of Staff & Leon Panetta, Sec’y of Def., to Sec’y of the Military Dep’ts, Acting Under Sec’y of Def. for Pers. and Readiness & Chiefs of the Military Servs. (Jan. 24, 2013), <https://dod.defense.gov/Portals/1/Documents/WISRJointMemo.pdf> [<https://perma.cc/C7AM-M9GD>]. Women have even begun Navy SEAL training, although none have yet made it through. Nancy Coleman, *First Woman Enlists to Become a Navy SEAL*, CNN (July 22, 2017, 11:19 PM), <http://www.cnn.com/2017/07/21/us/first-female-navy-candidates-seal-trnd/index.html> [<https://perma.cc/3YCQ-6MNC>].

<sup>538</sup> Associated Press, *The Marine Corps Is the Only Military Boot Camp that Separates Sexes. That Could Soon Change in Southern California*, L.A. TIMES (Aug. 8, 2017, 8:25 AM), <https://www.latimes.com/nation/nationnow/la-na-women-in-combat-training-20170808-story.html> [<https://perma.cc/8JTV-Q6TG>].

<sup>539</sup> See Defendants’ Motion to Dismiss and Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 33–34, *Karnoski v. Trump*, No. C17-1297 (W.D. Wash. Dec. 29, 2017), 2017 WL 7058272 (arguing that the exclusion “rests on the reasonable concern that at least some transgender

#### D. Sex-Segregated Spaces

The law allows, and sometimes requires, sex segregation of public and private spaces, most notably restrooms, changing facilities, and dormitories. But these arrangements are exceptional, not inevitable, and not a reason to resist the larger project of nonbinary inclusion.

1. *Restrooms and Changing Facilities.* — The restroom debate has engendered political controversy over claims for recognition of the gender identities of transgender people who are asking only to use the male or female facilities.<sup>540</sup> This Article is interested in how people with nonbinary gender identities change that debate. People with nonbinary gender identities, like many transgender men and women, report avoiding public restrooms altogether, with adverse health consequences.<sup>541</sup> Because their gender presentations may not accord with norms, the presence of a nonbinary person in either the men’s or women’s restroom may result in harassment or even violence.<sup>542</sup> The best solution is neutrality: to phase out gendered restrooms in favor of spaces that provide safety and privacy for each individual. This approach would require legal, architectural, and social change — but that is not an argument for disregarding nonbinary gender altogether. Stopgap efforts include integration: allowing people to use whichever male or female facility they are most comfortable in, or recognition: creating third options such as “family” restrooms, in addition to “male” and “female” ones.

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individuals suffer from medical conditions that could impede the performance of their duties,” *id.* at 33).

<sup>540</sup> See, e.g., G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 714–15 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.); Carcaño v. McCrory, 203 F. Supp. 3d 615, 621 (M.D.N.C. 2016).

<sup>541</sup> JAMES ET AL., *supra* note 2, at 228 (reporting that 53% of nonbinary respondents to the 2015 USTS stated they “[s]ometimes or always avoid[ed] bathrooms in the past year”).

<sup>542</sup> See, e.g., Hannah Boufford, *Transgender, Non-binary Students Discuss Bathroom Concerns*, IND. DAILY STUDENT (Feb. 19, 2017, 7:58 PM), <http://www.idsnews.com/article/2017/02/transgender-non-binary-students-discuss-bathroom-concerns> [<https://perma.cc/NN2B-ZFGG>] (quoting nonbinary student Spencer Biery: “They say you can use whichever [restroom] you’re comfortable with . . . . And I’m not comfortable going into a restroom with a bunch of guys, but I also know that if I went into a female restroom — which I also don’t really identify with — people would cause even more of a ruckus.”); Ashe McGovern, Commentary, *Bathroom Bills, Selfies, and the Erasure of Nonbinary Trans People*, ADVOCATE (Apr. 1, 2016, 6:01 AM), <https://www.advocate.com/commentary/2016/4/01/bathroom-bills-selfies-and-erasure-nonbinary-trans-people> [<https://perma.cc/NL5H-KYTV>] (“Most days, entering a bathroom means experiencing discomfort because of disapproving, confused looks and comments. But it also brings up memories of when I’ve been physically threatened and attacked because someone believes I’m in the ‘wrong bathroom.’ . . . As a white, masculine-presenting person, I know experiences like mine, although far too common, are also far from the worst ones.”); Jacob Tobia, *Why All Bathrooms Should Be Gender-Neutral*, TIME (Mar. 23, 2017), <http://time.com/4702962/gender-neutral-bathrooms/> [<https://perma.cc/CVK2-EQAJ>] (“If I choose the women’s restroom, I risk facing panicked women who take one look at my facial hair and assume that I’m a predator. If I choose the men’s restroom, I risk facing transphobic men who, with one glance at my dangling earrings, begin hurling slurs or throwing punches.”).

The ideal solution is neutrality: making all facilities “all gender,” with larger, open, public spaces and fully enclosed private stalls that would better ensure safety, accommodate families, and operate fairly and efficiently.<sup>543</sup> There are design ideas and architectural solutions that would enable “people [to] sort themselves out by the equipment they need rather than what they putatively *are*.”<sup>544</sup> As people gain experience using all-gender facilities, concerns about safety, cleanliness, and discomfort will deflate.<sup>545</sup>

One revelation of the locker room debate is that many students — whatever their gender identities — would prefer private spaces for undressing.<sup>546</sup> As the awareness and acceptability of same-sex desire have increased, the assumption that same-sex spaces are “no sex” spaces has withered.<sup>547</sup> And students may want privacy for reasons other than avoiding sexualization, such as maintaining autonomy over who can view (and possibly judge and shame them for) their naked bodies.<sup>548</sup> In one case, an investigation revealed that girls in a girls’ locker room had

<sup>543</sup> See, e.g., Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING* 211, 220–25 (Harvey Molotch & Laura Norén eds., 2010) (debunking the various arguments in favor of “urinary segregation”); Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 152 (2017) (“We should transition towards making large, communal public restrooms available to ‘all-comers,’ with a variety of private toileting options, as well as have available a limited number of single-stall restrooms.”); Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. REV. 1205, 1206, 1234–38 (2017) (discussing the sexist origins of separate men’s and women’s facilities, and arguing that “all gender, multi-user public restrooms,” *id.* at 1238, would best protect everyone’s privacy and safety); Joel Sanders & Susan Stryker, *Stalled: Gender-Neutral Public Bathrooms*, 115 S. ATLANTIC Q. 779, 781–88 (2016) (similar).

<sup>544</sup> Harvey Molotch, *On Not Making History: What NYU Did with the Toilet and What It Means for the World*, in *TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING*, *supra* note 543, at 255, 265; see also Lisa Selin Davis, *The Simple Design Solutions that Can Make Bathrooms Better — For All Genders*, QUARTZ (Mar. 16, 2017), <https://qz.com/933704/how-to-design-transgender-friendly-bathrooms-that-make-people-of-all-genders-feel-safe/> [<https://perma.cc/LT82-N4FV>].

<sup>545</sup> It is false that women’s restrooms provide safe hiding places from violent men, as men can and do enter women’s restrooms to commit violence. Case, *supra* note 543, at 220. And it is false that women’s restrooms are cleaner than men’s. See, e.g., Mary Schmuch, *Sharing Bathroom with Men Raises Question of Cleanliness*, CHI. TRIB. (Jan. 29, 2016, 5:02 AM), <http://www.chicagotribune.com/news/columnists/schmuch/ct-gender-neutral-bathroom-mary-schmuch-0129-20160128-column.html> [<https://perma.cc/4JMV-SRTM>] (reporting the comment of the owner of one commercial cleaning service that women’s restrooms are dirtier “hands down”). In any event, it is unfair to subject men or women to dirtier spaces based on stereotypes.

<sup>546</sup> See Clarke, *supra* note 161, at 829.

<sup>547</sup> Naomi Schoenbaum, *Heteronormativity in Employment Discrimination Law*, 56 WASHBURN L.J. 245, 249 (2017) (“[O]ne of the reasons behind sex-segregated bathrooms is the heteronormative assumption that same-sex spaces will not entail sexuality or acts of sex.”).

<sup>548</sup> *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 624 (M.D.N.C. 2016) (discussing the testimony of a school diversity officer who was “confident that the privacy interests of transgender and non-transgender students alike could be accommodated through the same means used to accommodate any student with body image or shyness issues” in locker rooms).

devised a “buddy system” in which friends would hold up towels to protect one another’s privacy while they changed into swimming attire.<sup>549</sup> The best solution might be to provide privacy curtains for all students who would prefer them.

But it is costly to upgrade old facilities. Moreover, some anachronistic building codes require separate spaces.<sup>550</sup> A pluralism approach is an interim solution: creating additional “all gender” or “family” spaces alongside the men’s and women’s ones.<sup>551</sup> This approach is not optimal, as it runs the risk of signaling that transgender people are different. Transgender people might end up being *required* to use inadequate or stigmatizing third facilities, when the male or female facilities would accord with their gender identities.<sup>552</sup> Another temporary solution is to permit nonbinary people to use whichever facility they feel the safest in, or which they believe best matches their sex or gender, just as transgender men and women should be able to.

2. *Housing.* — Nonbinary inclusion may also threaten interests in sex-segregated housing in unique institutional contexts such as incarceration, shelters, long-term care facilities, and education. Changing all spaces to neutral ones is worth consideration. Barring that, institutions can take an integration approach: determining the placement that will be the safest and most affirming.

Third-category recognition strategies have been tried in some contexts, but they have major drawbacks. In the prison context, one example is L.A. County’s special facility for LGBT inmates.<sup>553</sup> This approach is problematic in many ways, including that prison officials rely on stereotypes to determine which prisoners are LGBT; that it, in effect, excludes bisexual people; that it constructs gay and transgender people as victims; and that it forces inmates to disclose their LGBT status in the violent context of incarceration.<sup>554</sup> Sometimes correctional facilities may have space to house nonbinary people in individual sleeping

<sup>549</sup> Letter from Adele Rapport, Reg’l Dir., U.S. Dep’t of Educ., Office for Civil Rights, to Daniel E. Cates, Superintendent, Twp. High Sch. Dist. 211, at 6 (Nov. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf> [<https://perma.cc/A44V-GET9>].

<sup>550</sup> Colker, *supra* note 543, at 161.

<sup>551</sup> See, e.g., Keress Weidner, *I’m Non-binary, and “Trans-Accessible” Restrooms Should Include Me, Too*, GLSEN, <https://www.glsen.org/blog/i%E2%80%99m-non-binary-and-%E2%80%99trans-accessible%E2%80%9D-restrooms-should-include-me-too> [<https://perma.cc/V74X-D6EN>].

<sup>552</sup> See, e.g., G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716–17 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.).

<sup>553</sup> Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1309 (2011) (“The Los Angeles County Men’s Jail segregates gay and transgender inmates and says that it does so to protect them from sexual assault. But not all gay and transgender inmates qualify for admission to the K6G unit. Transgender inmates must appear transgender to staff that inspect them.”).

<sup>554</sup> *Id.* (among other drawbacks).

quarters, but there is a danger that they will end up isolated for too long, which can be psychologically damaging.<sup>555</sup>

As Professor Dean Spade has explained, gender-neutral prisons, or “co-corrections,” are not unprecedented.<sup>556</sup> Beginning in the 1970s, a number of minimum security prisons housed men and women together, although men and women had separate living units.<sup>557</sup> Some survey research suggests these programs provided more safety and better training opportunities for women, although they came with the disadvantage of increased surveillance.<sup>558</sup> But “[i]n the eyes of conservative politicians,” these “minimum-security facilities were . . . coed ‘country clubs.’”<sup>559</sup> The co-correctional experiment was a casualty of the “tough-on-crime” policies of the 1990s, and by 1999 there were no co-correctional facilities left.<sup>560</sup> The experiment is worth trying again.

From 2012 to 2018, the federal approach to housing gender-nonconforming prisoners was integration: determining the best placement for gender-nonconforming prisoners on a case-by-case basis.<sup>561</sup> Facilities were required to screen all individuals for their risk of perpetrating or experiencing sexual abuse, and to use that information to determine housing.<sup>562</sup> Rather than presenting an insurmountable challenge to sex classification in prisons, nonbinary people were assimilated into it. This ought to have allayed any fears that nonbinary gender might open a Pandora’s box of disruptive consequences for prison housing.<sup>563</sup> Yet the Trump Administration has revised the policy to give

<sup>555</sup> RHODES PERRY ET AL., N.Y.C. ADMIN. FOR CHILDREN’S SERVS., SAFE & RESPECTED: POLICY, BEST PRACTICES, & GUIDANCE FOR SERVING TRANSGENDER, GENDER EXPANSIVE, & NON-BINARY CHILDREN AND YOUTH INVOLVED IN THE CHILD WELFARE, DETENTION, AND JUVENILE JUSTICE SYSTEMS 26–27 (2017), <https://www1.nyc.gov/assets/acs/pdf/lgbtq/SAFEAndRespectedUpdate061417.pdf> [<https://perma.cc/56F4-F48S>].

<sup>556</sup> Spade, *supra* note 28, at 811.

<sup>557</sup> MICHAEL WELCH, CORRECTIONS: A CRITICAL APPROACH 195 (3d ed. 2011) (discussing a co-correctional facility, the Federal Correctional Institution in Fort Worth, Texas, which housed “low-risk and non-violent” inmates between 1971 and 1988).

<sup>558</sup> Sue Mahan et al., *Sexually Integrated Prisons: Advantages, Disadvantages and Some Recommendations*, 3 CRIM. JUST. POL’Y REV. 149, 149 (1989) (“Despite the shortcomings, staff and inmate responses were in general agreement with the statement: ‘For the most part the co-corrections institution is an agreeable place.’”); cf. James R. Davis, *Co-Corrections in the U.S.: Housing Men and Women Together Has Advantages and Disadvantages*, 23 CORRECTIONS COMPENDIUM, Mar. 1998, at 1, 3 (discussing the need for longitudinal studies on co-correctional facilities).

<sup>559</sup> WELCH, *supra* note 557, at 195–96.

<sup>560</sup> *Id.* at 196 (“In view of the tough-on-crime campaigns and President George Bush’s initiative to eliminate furlough and other unpopular policies, the U.S. Department of Justice worried that co-corrections did not uphold the ‘tough’ image of prison life that the White House had been fiercely promoting.”).

<sup>561</sup> 28 C.F.R. § 115.42(a), (c) (2018).

<sup>562</sup> *Id.*

<sup>563</sup> It should be worrying, however, that anyone can be assimilated into the system of mass incarceration. See generally ALEXANDER, *supra* note 229.

primacy to “biological sex” for purposes of placement of transgender and intersex inmates.<sup>564</sup>

Economically marginalized transgender people encounter difficulties seeking social services and shelters due to sex segregation.<sup>565</sup> As a result of fear of violence and harassment, transgender and nonbinary people who need these services may not even approach them.<sup>566</sup> The Department of Housing and Urban Development’s regulations require that single-sex emergency shelters and other services defer to a person’s stated gender identity,<sup>567</sup> but this policy does not assist in cases in which a person’s identity is nonbinary.<sup>568</sup> Gender-neutral social services may be the best option for survivors of gender-based violence.<sup>569</sup> Arguments related to women’s safety are troubling in this context.<sup>570</sup> The assumptions of masculine predation and invulnerability that underlie these defenses of sex-segregated services are not supported and are harmful to men.<sup>571</sup> There is some anecdotal evidence that trainings and education may help to undermine these assumptions.<sup>572</sup> Providing all residents with doors that lock, panic buttons, and other measures may improve safety and ensure a sense of security.<sup>573</sup> Nonetheless, for temporary shelters, or those that cannot afford private rooms or apartments, there may be a good argument for continuing to sex-segregate shared bedrooms by gender identity<sup>574</sup> — based on the same considerations that might

<sup>564</sup> FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, CHANGE NOTICE, TRANSGENDER OFFENDER MANUAL 6 (2018), <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf> [<https://perma.cc/AAA2-V85R>]. The policy allows assignment to facilities in accord with an inmate’s gender identity in certain cases “where there has been significant progress towards transition as demonstrated by medical and mental health history.” *Id.*

<sup>565</sup> Spade, *supra* note 28, at 752–53, 778–80.

<sup>566</sup> See, e.g., MICHAEL MUNSON & LOREE COOK-DANIELS, FORGE, GENDER-INTEGRATED SHELTERS: EXPERIENCE AND ADVICE 7 (2016), <http://forge-forward.org/wp-content/docs/gender-integrated-shelter-interviews-FINAL.pdf> [<https://perma.cc/9MWQ-G2ZG>] (reporting on a survey of 1000 transgender and nonbinary individuals in 2011, in which nearly two-thirds stated they would not, or might not, access domestic violence or rape crisis centers).

<sup>567</sup> 24 C.F.R. § 5.106 (2018). The Violence Against Women Act (VAWA), which provides federal grants to programs like emergency shelters, prohibits discrimination on the basis of “gender identity” by grant recipients. 34 U.S.C.A. § 12291(b)(13)(A) (West 2018). It allows “sex-specific programming” that “is necessary to the essential operation of a program,” so long as “comparable services” are provided to those who are excluded from those programs. *Id.* § 12291(b)(13)(B).

<sup>568</sup> MUNSON & COOK-DANIELS, *supra* note 566, at 8.

<sup>569</sup> *Id.* (arguing that integrated services are the most inclusive way to respond to VAWA’s requirement of offering “comparable services” to all, and noting that alternatives, such as putting male survivors up in hotels, are not cost effective).

<sup>570</sup> *Id.* at 23–28 (listing objections to integration such as the concern that cisgender men would assault women and children in the shelter).

<sup>571</sup> *Cf. id.* at 12–17 (offering anecdotes from staff at integrated shelters about men, including men who are not LGBTQ, who are survivors of abuse).

<sup>572</sup> *Id.* at 31–33 (discussing experiences with training shelter staff).

<sup>573</sup> *Id.* at 45–46.

<sup>574</sup> See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF JUSTICE, FREQUENTLY ASKED QUESTIONS: NONDISCRIMINATION GRANT CONDITION IN THE VIOLENCE AGAINST WOMEN

support the privacy BFOQ.<sup>575</sup> Nonbinary people might appropriately be placed where they are most safe and comfortable.<sup>576</sup>

As for housing on college campuses and in other educational and professional contexts, institutions are adopting a pluralism strategy. Campus housing is a problem for transgender students in general.<sup>577</sup> Many educational institutions are developing gender-inclusive housing policies.<sup>578</sup> One school, for example, “allows students to live in a suite with others regardless of their sex or gender identity” if they “complete a gender inclusive housing contract confirming their agreement.”<sup>579</sup> Some colleges designate certain residence halls or floors as gender neutral, or provide living space for students who identify as LGBTQ.<sup>580</sup> Others provide case-by-case accommodation.<sup>581</sup>

### E. Health Care

In the health care domain, the ideal approach would be an individualized sort of recognition: to tailor care to the particular needs of each

REAUTHORIZATION ACT OF 2013, at 6–7 (2014) (discussing situations in which sex-segregated housing may be appropriate, depending on the circumstances); MUNSON & COOK-DANIELS, *supra* note 566, at 39.

<sup>575</sup> See *supra* p. 976.

<sup>576</sup> See MUNSON & COOK-DANIELS, *supra* note 566, at 39–40.

<sup>577</sup> JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 33 (2011), [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) [<https://perma.cc/ZP9E-4JKE>] (reporting that nearly one-fifth of respondents in higher education were denied appropriate campus housing, and five percent were denied housing altogether).

<sup>578</sup> Joseph Erbenraut, *College Campuses Are More Trans-Inclusive than Ever, but Still Have a Long Way to Go*, HUFFINGTON POST (Dec. 6, 2017), [http://www.huffingtonpost.com/2015/05/18/trans-friendly-colleges\\_n\\_7287702.html](http://www.huffingtonpost.com/2015/05/18/trans-friendly-colleges_n_7287702.html) [<https://perma.cc/46ZG-HX52>]. For a list of the 267 colleges and universities with gender-inclusive housing, see *Colleges and Universities that Provide Gender-Inclusive Housing*, CAMPUS PRIDE, <https://www.campuspride.org/tpc/gender-inclusive-housing/> [<https://perma.cc/TFF5-P6QB>].

<sup>579</sup> *Harvard College Handbook for Students: Gender Inclusive Housing*, HARV. U., <https://handbook.fas.harvard.edu/book/gender-neutral-housing> [<https://perma.cc/8345-NEFX>].

<sup>580</sup> See, e.g., *Gender Neutral Program*, DARTMOUTH GROUP DIRECTORY, <http://dgd.dartmouth.edu/group/450> [<https://perma.cc/RXV9-RBVS>] (“Gender neutral housing allows for same-gender, opposite-gender or other-gender identities to live together regardless of biological sex. This program floor will provide a living/learning environment where residents can learn about and explore gender identity and expression in a supportive environment.”); *Inclusive Housing*, U. NEB. OMAHA, <https://www.unomaha.edu/student-life/housing-and-residential-life/prospective-students/inclusive-housing.php> [<https://perma.cc/22T8-ULSW>] (“Any student who is lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual, not straight, gender nonconforming, (LGBTQIA+) and/or ally is eligible to live in University housing including in an apartment designated as Gender-Inclusive Housing.”).

<sup>581</sup> See, e.g., *Contract*, U. WIS.-MADISON, <https://www.housing.wisc.edu/residence-halls/assignments/contract/> [<https://perma.cc/8FPA-5W7E>] (“University Housing acknowledges that not all students may identify as female or male, and we want to create a welcoming environment for you in the residence halls. We would be happy to work with students who may identify as trans\*gender, genderqueer, gender non-conforming, and/or non-binary regarding life in the halls.”).

nonbinary person, with awareness of the unique forms of bias that nonbinary people may face.<sup>582</sup> Like other gender-nonconforming people, nonbinary people may ask that reproductive health care be offered in ways that do not assume gender roles or stereotypes.<sup>583</sup> Nonbinary people, like transgender men and women, may require transition-related health care and be diagnosed with gender dysphoria.<sup>584</sup> However, the law requires no more than neutrality with respect to any transgender patient.

Health care providers are beginning to recognize the unique needs of nonbinary patients, and finding ways to provide more supportive and affirming care.<sup>585</sup> In addition to asking for a patient's "sex" assigned at birth, health care forms should also ask an open-ended question about "current gender identity."<sup>586</sup> Patients must be assured that their responses to questions about sex and gender identity will be kept confidential, like other health care information. One set of guidelines concludes, "all of the recommended practices could be easily implemented in any health care setting, without a need for large-scale structural change, or extensive knowledge on gender identity."<sup>587</sup>

Like transgender men and women, some nonbinary adults have sought or received access to transition-related health care services, such as hormone therapy, chest reduction or reconstruction, augmentation mammoplasty, phalloplasty, vaginoplasty, hair removal, and voice surgery, among other treatments.<sup>588</sup> Nonbinary children, like other transgender children, may seek reversible puberty-blocking hormones and other treatments.<sup>589</sup> Opponents liken such treatments to "elective

<sup>582</sup> See NAT'L LGBT HEALTH EDUC. CTR., PROVIDING AFFIRMATIVE CARE FOR PATIENTS WITH NON-BINARY GENDER IDENTITIES 8–9 (2017), <https://www.lgbthealtheducation.org/wp-content/uploads/2017/02/Providing-Affirmative-Care-for-People-with-Non-Binary-Gender-Identities.pdf> [<https://perma.cc/DDS7-CJ5T>].

<sup>583</sup> See *supra* note 366 and accompanying text.

<sup>584</sup> See Richards et al., *supra* note 27, at 3; see also *supra* note 269 and accompanying text.

<sup>585</sup> NAT'L LGBT HEALTH EDUC. CTR., *supra* note 582, at 3.

<sup>586</sup> *Id.* at 7. One sample form offers the options "male," "female," and "choose not to disclose" for sex assigned at birth. *Id.*

<sup>587</sup> *Id.* at 13.

<sup>588</sup> See, e.g., JAMES ET AL., *supra* note 2, at 99, 101 fig.7.13, 103 fig.7.15. In general, people who identify as nonbinary report less interest in these treatments than do transgender men and women. See, e.g., *id.* at 99 (reporting that 95% of transgender men and women have wanted hormone therapy, compared with 49% of nonbinary survey respondents).

<sup>589</sup> See Sara Solovitch, *When Kids Come in Saying They Are Transgender (or No Gender), These Doctors Try to Help*, WASH. POST (Jan. 21, 2018), <http://wapo.st/2DrsBL4> [<https://perma.cc/MG8N-645Z>].

In the United States, parental consent is generally required for minors seeking medical treatments. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1534–35 (2018). While there is research suggesting positive mental health outcomes from allowing transgender children to "socially transition" to their male or female gender identity, more research is required on nonbinary children. Jack L. Turban, *Transgender Youth: The Building Evidence Base for Early Social Transition*, 56 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 101, 102



cosmetic surgery” that is not covered by insurance.<sup>590</sup> But unlike elective cosmetic surgery, transition-related services are covered by health insurers as medically necessary to treat gender dysphoria.<sup>591</sup> Patients should not be required to conform to binary concepts of gender to receive care.<sup>592</sup> Under section 1557 of the Affordable Care Act<sup>593</sup> (ACA), any health program or activity that receives federal funds may not discriminate on the basis of sex.<sup>594</sup> Federal courts have interpreted such language to preclude discrimination against someone due to transgender identity.<sup>595</sup> A set of 2016 regulations interpreting the ACA clarified that providers could not discriminate based on “[s]ex stereotypes” including “the expectation that individuals will consistently identify with only one gender.”<sup>596</sup> Health plans may also be precluded from discriminating against transgender patients under Title VII, which bars sex discrimination in employment;<sup>597</sup> the Fourteenth Amendment, which bars sex discrimination by public entities;<sup>598</sup> and some state insurance laws, which bar discrimination based on gender identity.<sup>599</sup>

While health care providers should affirmatively accommodate non-binary patients and insurers should cover medically necessary care, the law seems to require, at most, neutrality. The 2016 ACA regulations provide that covered entities may not deny health care coverage “for specific health services related to gender transition if such denial . . .

(2017) (“Children have a range of identities along a spectrum that might not fall neatly into male or female categories. More data are needed to better understand the benefits of social transition in these gender-non-binary children.”).

<sup>590</sup> See, e.g., *Activist-Clinicians Tout “Cultural Humility” & Surgery-on-Demand for “Nonbinaries” & “Genderfluids,”* 4THWAVENOW (Dec. 27, 2015), <https://4thwavenow.com/2015/12/27/activist-clinicians-tout-cultural-humility-surgery-on-demand-for-nonbinaries-genderfluids/> [<https://perma.cc/EKF3-E2VC>] (characterizing nonbinary people seeking transition-related services as motivated by “[c]omfort, exploration, wants” rather than medical necessity). 4thWaveNow is a website that describes itself as “[a] community of parents & others concerned about the medicalization of gender-atypical youth and rapid-onset gender dysphoria.” *Id.*

<sup>591</sup> See AM. MED. ASS’N HOUSE OF DELEGATES, RESOLUTION: 122, SUBJECT: REMOVING FINANCIAL BARRIERS TO CARE FOR TRANSGENDER PATIENTS (2008) (recognizing “[a]n established body of medical research” that “demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and [gender-affirming] surgery as forms of therapeutic treatment for many people diagnosed with [gender dysphoria]”); WPATH STANDARDS, *supra* note 209, at 8; see also *Boyden v. Conlin*, No. 17-cv-264, 2018 WL 4473347, at \*11–15 (W.D. Wis. Sept. 18, 2018) (rejecting an “unsupported analogy,” *id.* at \*12, between gender-conforming surgeries and uncovered cosmetic surgeries on the ground that it does not rest on judgments about what is appropriate treatment according to medical standards and research).

<sup>592</sup> See, e.g., Spade, *supra* note 212, at 19–23.

<sup>593</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>594</sup> 42 U.S.C. § 18116 (2012).

<sup>595</sup> See, e.g., *supra* note 175.

<sup>596</sup> See *supra* note 176.

<sup>597</sup> *Boyden v. Conlin*, No. 17-cv-264, 2018 WL 4473347, at \*11–15 (W.D. Wis. Sept. 18, 2018).

<sup>598</sup> *Id.* at \*16–18.

<sup>599</sup> See, e.g., CAL. CODE REGS. tit. 10, § 2561.2(a)(4)(A) (2018).

results in discrimination against a transgender individual.”<sup>600</sup> Whether a denial constitutes “discrimination” is a difficult question. It may be discrimination if a provider acknowledges it declined coverage because the services in question were transition related.<sup>601</sup> Or it may be discrimination if similar services are covered for people who are not seeking transition-related care.<sup>602</sup> This latter rule is unlikely to apply in a scenario in which “a medical procedure would be denied as cosmetic or medically unnecessary in all other cases, but is in fact medically necessary to treat gender dysphoria.”<sup>603</sup> Thus, if for example, a health plan never covered hair removal, it would not have to cover hair removal as treatment for gender dysphoria. But in any event, the rules are likely to apply (or not), to transgender women, transgender men, and nonbinary people alike.

The 2016 regulation has been challenged in court and seems likely to be reversed by the Trump Administration.<sup>604</sup> The questions in litigation are whether there must be religious exemptions to the regulations, and whether the definition of “sex” should include “gender identity” at all, or is limited “to the biological differences between males and

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<sup>600</sup> 45 C.F.R. § 92.207(b)(5) (2017).

<sup>601</sup> Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,433 (May 18, 2016) (“OCR will evaluate whether coverage for the same or a similar service or treatment is available to individuals outside of that protected class or those with different health conditions and will evaluate the reasons for any differences in coverage. Covered entities will be expected to provide a neutral, nondiscriminatory reason for the denial or limitation that is not a pretext for discrimination.”). Sex stereotypes, such as the idea that transgender people should “maintain the physical characteristics of their natal sex,” will not suffice. *Boyden*, 2018 WL 4473347, at \*12.

<sup>602</sup> *Boyden*, 2018 WL 4473347, at \*12 (concluding that a health insurance plan discriminated on the basis of “natal sex” by covering care like reconstructive breast surgery for women who were assigned the female sex at birth, but not chest surgery for transgender women who had been assigned the male sex at birth); Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,433.

<sup>603</sup> Samuel Rosh, *Beyond Categorical Exclusions: Access to Transgender Healthcare in State Medicaid Programs*, 51 COLUM. J.L. & SOC. PROBS. 1, 20 (2017).

<sup>604</sup> In 2016, a number of states and health care providers brought suit, arguing that the rule’s provision with respect to “gender identity” violates the Administrative Procedure Act because it is incorrect as a matter of law, and that it violates the Religious Freedom Restoration Act because it fails to include religious exemptions. *Franciscan All., Inc. v. Price*, No. 16-CV-00108, 2017 WL 3616652, at \*1 (N.D. Tex. July 10, 2017). A federal district court in Texas granted a preliminary injunction, preventing the HHS from enforcing the regulation. *Id.* at \*2. The litigation is now stayed while the Trump Administration reassesses the regulation. *Id.* at \*5. But the injunction purports to apply only to government actions to enforce the regulation, not private parties seeking to enforce the statute’s nondiscrimination provisions. *See, e.g.*, *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1105 (S.D. Cal. 2017) (holding that a private action alleging gender-identity discrimination under the ACA could proceed based on the language of the statute and did not need to rely on the 2016 HHS regulations).

females.”<sup>605</sup> The resolution of this dispute does not turn on whether nonbinary people are covered.<sup>606</sup>

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This examination of the few remaining contexts of sex or gender regulation demonstrates that the law has no reason to require a universal definition of sex or gender that limits the options to two. The purpose of this Part has not been to definitively settle particular legal debates, but rather, to argue that U.S. civil rights law offers various tools to resolve controversies over inclusion of nonbinary gender identities. As U.S. states increasingly enact legislation to recognize nonbinary gender, researchers will have more opportunities to collect empirical evidence on the upsides and downsides of different interventions.<sup>607</sup>

### CONCLUSION

This Article has asked what it would mean for the law to take nonbinary gender seriously, in other words, to treat people with nonbinary gender identities as full participants in social, economic, and political life. It has argued for a contextual approach to nonbinary gender rights, rather than insisting on uniform definitions or universal rules. This approach would examine each context of sex or gender regulation, considering the relative merits of various strategies for achieving nonbinary gender rights, including third-gender recognition, the elimination of sex classifications, or integration into binary sex or gender categories. While opponents have argued that nonbinary gender rights would have unforeseen and dangerous effects on a host of legal regimes, careful analysis reveals that there are few contexts left in which the law relies on binary sex classifications after *Obergefell*. In those few remaining contexts of binary sex regulation, there are many possible paths forward for nonbinary gender rights.

Theoretical debates — such as how the law should define sex or gender as a general matter, or whether the optimal end state is third-gender recognition or gender neutrality — can make it appear as though there are irreconcilable conflicts among nonbinary gender rights claims and feminist and LGBT priorities, particularly those of transgender men and women. But analysis of each legal context suggests fewer such conflicts in practice. Existing sex discrimination law protects transgender men and women because bias against them is based on sex stereotypes, not

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<sup>605</sup> *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 688 (N.D. Tex. 2016).

<sup>606</sup> Opponents of the regulation pointed to the fact that it covered nonbinary gender identities in their legal briefs — as if that were a damaging fact for the government. See *supra* notes 177–178 and accompanying text. But it did not seem to matter in terms of the legal argument, and the court made no mention of it. See *Franciscan All., Inc.*, 227 F. Supp. 3d 660.

<sup>607</sup> International experience may also prove instructive. See *supra* note 8.

because they are a protected class or because their identities are immutable in some way. The same anti-stereotyping argument precludes discrimination against people with nonbinary gender identities. Rather than requiring dramatic legal changes or novel theories, protection of nonbinary rights may only require moderate extensions of existing law and the application of familiar civil rights concepts from doctrine on sex, race, and religion.

Feminists have long argued for release from the straightjacket of gender, but never before have nonbinary gender identities seemed so likely to go mainstream. This movement may be challenged by entrenched attitudes about the naturalness of binary gender and the belief that the legal options are limited to unpalatable forms of gender recognition or absolute gender neutrality. But on a closer look, it is apparent that neither human lives nor legal options are binary. Indisputably, nonbinary gender poses challenges to legal interests, but these challenges are not insurmountable, and the possibility of inclusion, which not long ago seemed unimaginable, is now beginning to seem inevitable.