CONTESTING SEX CLASSIFICATION: THE NEED FOR GENDERQUEERS AS A COGNIZABLE CLASS

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INTRODUCTION

> "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[1]

After years of neglect, transgender people and the issues they face increasingly are being taken up by social activists and legal scholars. The current draft of the Employment Nondiscrimination Act (ENDA) bars employment discrimination on the basis of gender identity as well as sexual orientation, despite attempts to exclude the former in the name of compromise.[2] In a strange twist of fate, trans people may even find themselves with federal anti-discrimination protections before lesbians and gay men do: the Equal Employment Opportunity Commission's recent ruling in *Macy v. Holder* adopts the reasoning of some lower courts in interpreting Title VII's "because of sex" language to include gender transitioning as well as transgender status.[3] However, there is still much to be done. The stunning poverty rate for trans people[4]—often driven by cycles of family rejection, employment and public services discrimination, constant outing due to inaccurate, gendered government identification, and incarceration—calls into question whether large portions of the transgender community will be able to avail themselves of new protections.[5] Further, those who do manage to win identity-affirming treatment from one state or agency always face the prospect of having to fight that battle over again, and on another state or agency's terms.[6]

Still, at this seeming moment of opportunity it is important for those of us interested in challenging gender rigidity to consider

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1. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parent of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

2. Stuart Biegel, *Unfinished Business: The Employment Nondiscrimination Act (ENDA) and the K-12 Education Community*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 357, 372-377 (2011).

3. Macy v. Holder, EEOC Appeal No. 0120120821 (2012).

4. Jaime M. Grant et al., The National Center for Transgender Equality, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, 22 (2011) (finding transgender respondents four times more likely than the general population to make under $10,000 a year).

5. Dean Spade, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 82-83 (South End Press 2011) [hereinafter NORMAL LIFE].

6. *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008) [hereinafter *Documenting Gender*]; David Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 HARV. C.R.-C.L. L. REV. 51 (2011).

not only a multitude of strategies for moving forward but also who is at risk of being left out. This paper aims to do both by considering possibilities for and benefits of strategic litigation by genderqueer plaintiffs. Existing legal literature discussing genderqueer people is sparse to nonexistent. Often genderqueers are mentioned only in passing or in footnotes as part of a laundry list of queer terms.[7] Genderqueer is commonly described as a "catchall," and has been associated with the idea of a post-identity politics movement to challenge gender norms.[8] These understandings, while perhaps attempts to acknowledge the diverse and disparate ways in which genderqueer people problematize gender, fail to recognize the development of a distinct genderqueer identity. Similarly, the use of *transgender* as an umbrella term to include genderqueers may have the unfortunate side effect of limiting how we think about the kinds of challenges that can be brought to the current system of gender classification.

This paper proceeds in three parts. Part I briefly establishes working definitions for the rest of the paper and explains the critical distinctions between trans and genderqueer people. In Part II, I discuss how genderqueers could take advantage of existing state and emerging federal employment discrimination law. In doing so, I argue that asserting genderqueers' rights in the workplace could also serve to subvert traditional notions of gender in ways that would be beneficial to trans people and gender nonconforming people more generally. Part III turns to government sex classification and considers constitutional challenges to that regime. Others have articulated the need for a due process right to gender self-determination on the basis of the wide variety of gender identities.[9] Here, in focusing more narrowly on the means to win that right, I argue that genderqueers are in a unique position to challenge not just the difficulty of changing one's legal sex, but also the very practice of classification itself.

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7. *See, e.g.*, Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 622 (2011); Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 113 (2006); Sharon Stapel, *Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence*, 52 N.Y.L. SCH. L. REV. 247, 277 (2008); Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 219 (2006).

8. *See, e.g.*, Pauline Park, *GenderPAC, the Transgender Rights Movement and the Perils of a Post-Identity Politics Paradigm*, 4 GEO. J. GENDER & L. 747 (2003).

9. *See*, Laura K. Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. C.L. & C.R. 101 (2006); Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 8 (1995).

I. GENDERWHAT?

"Transgender" is sometimes defined as an umbrella term for those whose gender identity does not conform with the sex assigned to them at birth.[10] While this definition technically includes genderqueers, discussions and common understandings of trans people are often limited to trans men and trans women, that is, those who transition from female to male or male to female.[11] Transitioning may or may not include the use of (or desire to use) hormone therapy or gender-confirming surgery, which requires a diagnosis of Gender Identity Disorder,[12] a psychological condition recognized as such by mental health professionals.[13] Much gender-related scholarship has also been devoted to the intersex, or persons who are born with any one of a number of conditions that defy typical understandings of male and female genitalia.[14]

"Genderqueer" refers to those who do not (or do not always) identify as either a woman or a man.[15] Some who consider themselves genderqueer may identify as a man one day and a woman the next.[16] Others identify as neither man nor woman, seeing themselves as between or beyond genders.[17] Some reject gendered pronouns, preferring to be referred to as "*they*," or "*ze*" (a recently created, gender-neutral pronoun) or simply by their name.[18] Genderqueer has also been described as "a growing group of people who have said, 'to hell with gender,' and they define themselves,

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10. 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, 266 (2005).

11. *See, e.g.*, Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1 (2011) (discussing issues facing gay men MTF people in sex-segregate prisons); Riki Wilchins, *A Continuous Nonverbal Communication*, *in* GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY 11, 15 (Joan Nestle et al. eds., 2002) (noting that advances in understanding regarding those who are gender nonconforming have been almost entirely focused on male-to-female (MTF) and female-to-male (FTM) people).

12. "Gender Identity Disorder" is being removed from the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, a publication of the American Psychiatric Association. Instead, trans people will now be diagnosed "Gender Dysphoria," which is not to be considered a mental disorder. The practical implications of this move are yet to be seen. *See* Zack Ford, APA Revises Manual: Being Transgender Is No Longer A Mental Disorder, *http://thinkprogress.org/lgbt/2012/12/03/1271431/apa-revises-manual-being-transgender-is-no-longer-a-mental-disorder/* (Dec. 3, 2012).

13. *See* Romeo, *supra* note 9, at 724.

14. *See* Jessica L. Adair, *In a League of Their Own: The Case for Intersex Athletes*, 18 SPORTS LAW. J. 121,125 (2011).

15. *See*, Vade, *supra* note 10.

16. Jennifer Conlin, The Freedom to Choose Your Pronoun, N.Y. TIMES, *http://www.nytimes.com/2011/10/02/fashion/choosing-a-pronoun-he-she-or-other-after-curfew.html* (Sept. 30, 2011).

17. *See*, Vade, *supra* note 10.

18. *See* Conlin, *supra* note 16.

based on that rejection,"[19] and is defined by the Practicing Law Institute as a "term for people who challenge the binary gender system of femininity/masculinity; often used because of its subversiveness/overtly political/activist aspects; incorporates ideas from gender theory into personal identity."[20] While *transgender* and *genderqueer* are not necessarily mutually exclusive, for simplicity's sake *transgender* or *trans* in the remainder of this paper will refer specifically to male-to-female (MTF) or female-to-male (FTM) people.

But what does it mean to "incorporate ideas from gender theory into personal identity"? It seems any discussion of the deconstruction of gender must mention, if only briefly, the works of Michel Foucault and Judith Butler. In many ways, Foucault laid the groundwork for what we now call "gender theory" with his deconstruction of "the homosexual" in his 1976 book The History of Sexuality.[21] In a historical analysis, Foucault details how behaviors that were considered abnormal or sinful came to signify an identity, writing, "The nineteenth-century homosexual became a personage. . . The sodomite has been a temporary aberration; the homosexual was now a species."[22] Foucault therefore revealed the contingency of our sexual identities and called forth questioning of other categories: if *the homosexual* is just something we made up, could gender categories also be oversimplified constructions? Enter Judith Butler. Her 1990 work Gender Trouble annunciated a definition of gender that is now widely accepted by theorists: "Gender is the repeated stylization of the body, a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being."[23] That is, gender is not a neutral, discoverable fact, but rather something that is produced and reproduced, in accordance with certain ideological perimeters. While many of us may read and agree with the works of Foucault, Butler, and other gender theorists as a matter of principle, genderqueers live these ideas as a matter of personal identity. But, of course, theory alone cannot explain identity.

While they are few and far between, there are some examples of lived genderqueer experience in print. In the interest of people speaking for themselves, some excerpts are reproduced below.

> It depends on the day, really, and what clothes I'm wearing. I don't like to pigeonhole it. It's private.

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19. John M. Ohle, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 274 (2004).

20. Kim Forte, *LGBTQ Terminology* in ELEVENTH ANNUAL CHILDREN'S LAW UPDATE 177 (Practicing Law Institute 2008).

21. Michel Foucault, THE HISTORY OF SEXUALITY (Robert Hurley trans., Vintage Books 1980).

22. *Id.* at 43

23. Judith Butler, GENDER TROUBLE 33 (Routledge 1990).

> Sometimes I'm in the mood to be referred to as she. It feels natural to me to go back and forth. I've been doing this since I was a kid . . . I thought everyone did that, too . . . If I referred to myself as "she" or peed sitting down at my grandparents', I'd get in trouble. People freaked out. But it's fun to be able to wear what you want to and not have to worry about what society says you can't do.[24]

Here, the author describes identifying sometimes as a man and sometimes as a woman. The common legal-academic discourse on trans rights presumes a permanent transition from one gender to another, thus failing to take account of genderqueers like the above author.

> As a mixed-gender person, I am continually questioned about my gender identity. Sometimes people ask, "How do you identify, gender-wise?" or "What pronouns do you use?" More often, it's simply the less sophisticated "Are you a woman or a man?" If I were a woman or a man, these questions would be easier to answer. Since I'm neither of those two things, my answer is always long and complicated, and leads to an entire conversation about my identity. Instead of talking about bicycle repair, or how to make an amazing vegan curry, or the great German film that was screened last night, we end up talking about my gender identity, and this is not what I prefer.[25]

While the author here seems to be talking about gender illegibility in social situations, we can easily imagine how similar conversations might play out in different contexts—in the workplace or when seeking government services, for example. Making genderqueers legible to the law—or, rather, making law that is comfortable with gender ambiguity—could be a first step in mitigating the sort of perpetual self-explanation that is demanded of people like the above author.

> There were people who called themselves transgender who seemed to fit into neither of the pre-existing categories of man and woman. And furthermore, it seemed as if I might be one of those people! I changed my name, asked my friends, colleagues, and family to

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24. *A Conversation with J.T. LeRoy*, *in* GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY 98 (Joan Nestle et al. eds., Alyson Books 2002).

25. Telyn Kusalik, *Identity, Schmidentity*, in GENDER OUTLAWS: THE NEXT GENERATION 54 (Kate Bornstein & S. Bear Bergman eds., Seal Press 2010).

> call me by gender-neutral pronouns, and continued to express myself in the multifariously gendered ways that I always had. And yet, I resisted jumping into labeling myself as transgendered. If I don't believe there to be only two genders, how can I say that I've crossed something? If there is no hard and fast line separating masculine and feminine, how can I have crossed the border? I experimented with calling myself genderqueer. Definitely fit. My gender was queer as all get-out, but there was something lacking in that term. Or rather, it wasn't enough . . . When I told my boss I wanted to be called *ze* and *hir*, and that I was genderqueer, she misinterpreted the term to mean that I was defining my gender based on my sexuality. When I wrote her a letter identifying myself as transgender, she understood me much better. There were books for her to read, articles, websites, references. She had heard the term before, and that gave it validation in her eyes, which in turn validated me. . . I do not feel that I fit into man or woman, but it seems that I also do not fit into trans.[26]

Above, we see illustrated not only the distinction between trans and genderqueer as a matter of identity, but also how that distinction can play out in the employment context. Even when employers want to understand and support their genderqueer employees, their ability to do so is limited by a lack of resources and common understanding.

Hopefully these excerpts are illuminating. But while personal narrative can give us insight into individuals' experience, and we can identify common threads throughout these accounts, some readers may still opine, "What about data?"

A Gender Not Listed Here offers for the first time a demographic look at genderqueers, examining the subset of respondents to the National Transgender Discrimination Survey who marked "other" in response to the question "What is your primary gender identity today?"[27] Most of the fill-in-the-blank responses were "genderqueer," "queer," or something conceptually similar, including "neither," "both," "non-binary," "androgynous," "gender does not exist," and "gender is a performance" (a specific reference to Judith Butler's work).[28] The report gives insight not only into the

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26. Katie Diamond & Johnny Blazes, *Transcension*, in GENDER OUTLAWS: THE NEXT GENERATION 170 (Kate Bornstein & S. Bear Bergman eds., Seal Press 2010).

27. 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. 13 (2012).

28. *Id.* at 20.

demographic makeup of genderqueers, but also into the particular modes of discrimination they face.

Perhaps most strikingly, despite having completed college or graduate degrees at significantly higher rates (58% compared to 46%), genderqueers are much more likely to live on $10,000 a year or less (21% compared to 14%) and much less likely to bring in more than $50,000 a year (31% compared to 43%) than other survey respondents.[29] Additionally, genderqueers are much more likely to have been assigned female at birth than non-genderqueer trans respondents (73% compared to 40%).[30] Genderqueer respondents are also generally younger (89% under the age forty-five compared to 68%) and less white (70% white compared to 77%) than other survey participants.[31] We should understand the diversity of genderqueers as a group with an eye towards the intersectional oppressions many of them may face.

Genderqueers reported higher rates of harassment and sexual assault due to bias in primary school than other respondents (83% compared to 77% experienced harassment while 16% compared to 11% experienced sexual assault).[32] When it comes to the workplace, while genderqueers were less likely to report having lost a job due to bias (19% compared to 27%), they were more likely to be out of work (76% compared to 56%) and to find work in underground economies including sex work and the drug trade (20% compared to 15%).[33] Genderqueers were also less likely to have been denied medical care due to bias (14% compared to 20%), but more likely to avoid medical care when sick or injured for fear of bias (36% compared to 27%).[34] Police harassment was more commonly reported among genderqueers (31% compared to 21%), and perhaps therefore genderqueers are also more likely to feel uncomfortable seeking police assistance (25% compared to 19%).[35] Finally, genderqueers also report higher rates of physical violence (32% experienced physical assault due to bias compared to 25%; 15% report sexual assault due to bias compared to 9%).[36]

Dealing with raw numbers and comparing survey responses should not be taken as an attempt to rank oppressions. Rather, the startling numbers revealed above are a testament to the urgent need for a change in how our society treats the trans and gender nonconforming among us. As will be detailed further shortly, my proposal to focus legal services on the genderqueer community is

29. *Id.* at 19-20.

30. *Id.* at 18.

31. *Id.*

32. *Id.* at 21.

33. *Id.* at 22.

34. *Id.*

35. *Id.*

36. *Id.* at 22-23.

based in strategy rather than some sense of "who is more oppressed." Further, we should not read the statistics reproduced above without some sense of the intersectionalities at play. For example, lower income levels among genderqueers may in part be due to their relative youth. Similarly, higher levels of police harassment and mistrust of police may be due not only to gender nonconformity, but also to genderqueers' youth and higher proportions of people of color. Finally, higher rates of sexual harassment and sexual assault could be related to genderqueers' greater likelihood of having been assigned female at birth, and of being read as such by others.

Because of genderqueers' unique characteristics, it is time to start talking about genderqueers as a legal class. First, addressing the needs of trans people will not necessarily address the needs of genderqueers. Making workplaces more welcoming for those who permanently transition will not necessarily protect someone who presents and identifies differently from day to day; making it easier to change one's gender from *M* to *F* or *F* to *M* on government identification will not create space for someone who identifies as neither. On the other hand, if workplaces are required to accommodate genderqueers (thus eviscerating traditionally rigid understandings of gender), then accepting a trans person's permanent transition would be an easier pill to swallow. If people can request that no gender be listed on government IDs because of self-identification, then a pre-op or no-op trans person in a state where proof of sex assignment surgery is required to legally change gender could sidestep that requirement. This is what Dean Spade has called "trickle-up social justice," the idea that addressing the needs of those lower on the social radar will reap benefits for those who are more visible or more easily comprehended.[37]

Second, litigation involving genderqueers avoids the perverse need to present trans plaintiffs to courts as psychologically dysfunctional in order to fight for their rights.[38] Because Gender Identity Disorder has been considered a mental health condition, transgender plaintiffs have faced the constant medicalization of their identities.[39] While this can be helpful in cases dealing with healthcare access, it also has meant the constant medicalization and mental health stigmatization of trans identity in cases unrelated to

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37. Barnard Center for Research on Women, *Dean Spade: Trickle-Up Social Justice* (May 7, 2009), *https://www.youtube.com/watch?v=0i1fREeZXPI* (Except of Feb. 9, 2009 address at Barnard College by Dean Spade entitled "Trans Politics in a Neoliberal Landscape").

38. *See, e.g.*, Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619 (2011); Abigail W. Lloyd, *Defining the Human: Are Transgendered People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 175 (2005).

39. *See, e.g.*, Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004) (reversing trial court decision that trans man was medically male for marriage purposes on the basis of extensive medical testimony).

healthcare. Further, it has led some non-healthcare-related cases to get bogged down in technical, medical questions driven by extensive testimony from expensive medical experts.[40] Genderqueer litigants have the opportunity to litigate gender identity discrimination without being medicalized or pathologized.

Finally, because genderqueer identity is informed by, or at least congruent with, important concepts of modern gender theory, winning the law's recognition of genderqueers as people may be the best way to import ideas from gender theory into the law. In accepting genderqueers, the law would implicitly acknowledge that gender is fluid, performative, arbitrary, constructed. Such an understanding could reap untold benefits for the way our society treats gender in general.

Before proceeding to substantive legal arguments, one more practical note on genderqueers as litigants is warranted. The question of "perfect plaintiffs" has received much hay among public interest lawyers, as well as much criticism.[41] Put simply, the desire for perfect plaintiffs is the idea that, in doing impact litigation to advance the rights of many, public interest lawyers should find plaintiffs who will be most palatable to judges and juries. For example, gay marriage cases tend to feature plaintiffs who are white, white collar, monogamous, and have children – that is, as close to being an "upstanding straight couple" as possible.[42] Similarly, trans rights cases often feature white plaintiffs who are involved in law enforcement or national security.[43] While the perfect plaintiff strategy is intended to minimize the effects of legal decision makers' personal biases, the strategy also works to whitewash discrimination claims, to minimize difference, and to avoid consideration of intersectional oppressions.[44]

I have argued that making genderqueers legible to our legal system could benefit everyone who feels constrained by gender regulation, but this says nothing of how genderqueer litigants will be understood or misunderstood by personalities within the legal system. Genderqueers may be perfect plaintiffs for the kind of law we would like to create, but are they the perfect plaintiffs to present

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40. *Id.*

41. *See, e.g.* Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006).

42. *Id.* at 239.

43. *See, e.g.* Macy v. Holder, EEOC Appeal No. 0120120821 (2012) (plaintiff a police officer seeking job at the Bureau of Alcohol, Tobacco, and Firearms); Schroer v. Billington, 577 F. Supp. 2d 293 (D.C. Cir. 2008) (plaintiff a US Army veteran seeking job as counterterrorism analyst); Smith v. Salem, 378 F. 3d 566 (6th Cir. 2004) (plaintiff a firefighter).

44. Cf. Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Politics and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (detailing courts' reluctance to consider black women's claims as black women, as black women representing women in general, and as black women representing black men and women).

to a judge or jury? Genderqueer people are demographically younger, which may mean some people would be more likely to think that genderqueers are simply *confused* or *going through a phase*. Because of the relatively recent emergence of genderqueers and because of ideological or theoretical component to genderqueer identity, legal decision makers may get distracted in considering whether people choose to be genderqueer. Finally, normatively gendered judges or juries may feel threatened by genderqueer litigants, viewing them as radicals attempting to force gender neutrality on everyone.

But these concerns are not so overwhelming as to suggest that even trying is not worth it. The relative newness and obscurity of genderqueer identity means that litigants will have the extraordinary opportunity to educate as they litigate. Because judges and juries are unlikely to know what genderqueer is, they are less likely to be influenced by stereotypes and other preconceived notions. Rather, it is most likely that the very concept of genderqueer will be defined in the minds of legal decision makers for the first time by plaintiffs fighting for their rights. This means that genderqueer litigants could have the unprecedented chance to control the conversation surrounding their identities and to define themselves to the people who will decide each case. Lawyers should encourage them to seize this opportunity.

II. EMPLOYMENT DISCRIMINATION

As groups, genderqueer and trans people are highly educated. 58% of genderqueers and 46% of trans people hold bachelors or advanced degrees[45] compared to 28% of the general population.[46] Despite this level of educational attainment, discrimination in the workplace remains a serious issue for trans and genderqueer people. Fully 90% report facing verbal harassment, barriers to advancement, as well as a pervasive fear of these outcomes.[47] Nineteen percent of genderqueers and 27% of trans people report having lost a job due to bias, while 20% of genderqueers and 15% of trans people have worked in underground economies, including sex work and the drug trade.[48] There is thus a serious need to make workplaces safer for and more accepting of genderqueer and trans people. Genderqueer litigants have the potential to do just that for themselves as well as for trans people. If employers are required to understand and accept employees who reject gender or who are differently gendered on

45. Harrison, *supra* note 27, at 19.

46. National Center for Education Statistics, Percentage of persons age 25 and over with high school completion or higher and a bachelor's or higher degree, by sex and state: 2008-10, *http://nces.ed.gov/programs/digest/d12/tables/dt12_013.asp* (2012).

47. Harrison, *supra* note 27, at 22.

48. *Id.*

different days, then they are more likely to accept and understand those who transition from one gender to another. However, if employers come to understand that they must accept someone who is or has transitioned, they are still likely to believe that there are only two genders, that even if people can switch between them, everyone must still be one or the other. Genderqueers are therefore in the unique position to deconstruct gender in the workplace, thus collaterally expanding rights and opportunities for trans, gender nonconforming, and women workers.

Genderqueers are likely already covered by state laws prohibiting discrimination on the basis of gender identity, federal judicial and administrative interpretations of Title VII, as well as by the current proposed version of the federal Employment Non-Discrimination Act (ENDA).[49] While it is unlikely that government actors had genderqueers in mind when creating such rules, the use of general language such as *gender identity* and *gender expression*, as opposed to a focus on transitioning, includes genderqueers as a matter of definition. Further, given that genderqueer is a relatively emergent identity, genderqueers may find themselves in the unique position of being covered by antidiscrimination law before they are widely understood or even heard of as a class. That is to say, because employers often will not know that they are barred from discriminating against genderqueers, there is an opportunity for a legal *sneak attack* of sorts, mitigating against some of the obstacles to employment discrimination claims put in place by the courts. Because of this unique position, employment discrimination claims are an ideal means by which to introduce the courts to genderqueers, thus paving the way for more ambitions claims in the future.

Twelve states and the District of Colombia currently have statutes in place barring employment discrimination on the basis of gender identity.[50] Of these, six jurisdictions include "gender identity" directly as a protected classification.[51] Another six states include sexual orientation as a protected class, and then statutorily define sexual orientation as including gender identity and gender expression.[52] Finally, California includes sex as a protected

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49. *See*, Biegel, *supra* note 2.

50. NATIONAL CENTER FOR LESBIAN RIGHTS, STATE BY STATE GUIDE TO LAWS THAT PROHIBIT DISCRIMINATION AGAINST TRANSGENDER PEOPLE, http://www.nclrights.org/site/DocServer/StateLawsThatProhibitDiscriminationAgainstTransPeople.pdf?docID=7821 (2010) (identifying the 12 states as California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington State).

51. They are Iowa (IOWA CODE 216.6.1(a) (2009)), New Jersey (N.J. STAT. ANN. § 10:5-4 (West 2007)), New Mexico (N.M. STAT. ANN. § 28-1-7(A) (2008)), Rhode Island (R.I. GEN. LAWS § 28-5-7 (2003)), Vermont (VT. STAT. ANN. tit. 21, § 495(a) (2007)), and the District of Columbia (D.C. CODE §§ 2-1402.11 (2006), 32-408 (2008)).

52. They are Colorado (COLO. REV. STAT. 24-34-401(7.5) (2007)), Illinois (775 ILL. COMP. STAT. 5/1-103(O-1) (2012)), Maine (ME. REV. STAT. tit. 5, § 4553(9-C) (2012)),

classification, and then defines sex in its statutes as including gender identity and gender expression.[53] Three states include some form of protection from discrimination on the basis of gender identity, but do not extend those protections to employment. While Hawaii's anti-discrimination laws include gender identity and expression for the purposes of public accommodations[54] and real estate,[55] Hawaii has yet to make these advances in employment discrimination law. Similarly, Maryland and North Carolina do not include gender identity in their employment discrimination laws, but do reference gender identity in anti-bullying statutes.[56] Additionally, there are 143 city and county ordinances with anti-discrimination laws that take account of gender identity.[57]

The particular statutory definitions of gender identity are of some import. The majority of states that include gender identity in their anti-discrimination laws define gender identity as something to the effect of, "gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth."[58] These definitions facially include genderqueers because they do not limit gender identity to identification as either man or woman, male or female. Two states' definitions are somewhat peculiar, though, and one of those two is drafted in such a way that could prevent genderqueers from availing themselves of the state's anti-discrimination protections.

New Mexico defines gender identity as "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth."[59] This definition conditions employment discrimination protections on identifying as either male or female, and thus would not apply to those genderqueers who identify as neither male nor female. Those who identify sometimes as male and sometimes as female would be quite literally included as identifying as "male or female." A potential plaintiff who identifies as both male and female

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Minnesota (MINN. STAT. § 363A.03, subd. 44 (2003)), Oregon (OR. REV. STAT. § 174.100(6) (2007)), and Washington (WASH. REV. CODE § 49.60.040(26) (2009)).

53. *See* CAL. GOV. CODE § 12926(q)(2) (2013).

54. HAW. REV. STAT. § 489-3 (1986).

55. HAW. REV. STAT. §§ 515-3 (2011) (real property transactions), 515-5 (2005) (financial assistance related to real property), 515-6 (2005) (restrictive covenants based on gender identity prohibited).

56. MD. CODE. ANN., EDUC. § 7-424(a) (West 2008); N.C. GEN. STAT. § 115C-407.15(d) (2009).

57. *See* Transgender L. & Pol'y Inst., U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression, *http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions* (2011).

58. D.C. CODE § 2-1401.02(12A) (2010).

59. N.M. STAT. ANN. § 28-1-2(Q) (2007) (emphasis added).

could argue that the "or" should be read conjunctively; that the word "or" was used carelessly in that its use excludes some who the statute is intended to include.[60]

Minnesota includes gender identity within its definition of sexual orientation and references gender identity as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[61] This definition is broad enough to include genderqueers because gender neutrality, for example, is a self-image "not traditionally associated with one's biological maleness or femaleness."[62] However, reference to "biological maleness and femaleness" may be irksome to potential litigants who believe that sex, not just gender, is a harmful construct.[63] While this is more of a conceptual problem than a practical one for litigation purposes, the language "assigned sex at birth" used in most statutes recognizes that sex is not necessarily a natural, discoverable fact.

Colorado offers perhaps the most expansive definitional protections against discrimination on the basis of gender identity. The Colorado Anti-Discrimination Act includes sexual orientation as a protected classification and defines sexual orientation as "a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer's perception thereof."[64] "Transgender status" is then defined by the Colorado Civil Rights Commission as, "having a gender identity or gender expression that differs from societal expectations based on gender assigned at birth."[65] The Commission further defines "gender identity" as "an innate sense of one's own gender,"[66] and "gender expression" as "external appearance, characteristics or behaviors typically associated with a specific gender."[67] These definitions happily avoid discussing gender as a binary; an "innate sense of one's own gender" is not explicitly limited to either *M* or *F*. Additionally, the Colorado Civil Rights Commission specifically defines "sexual orientation harassment" as including the deliberate

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60. *See, e.g.*, De Sylva v. Ballentine, 351 U.S. 570, 573 (1956) (reading "or" to mean "and" where it seemed that legislators had used the word carelessly).

61. MINN. STAT. ANN. § 363A.03, subd. 44 (2002).

62. *Id.*

63. *See, e.g.*, Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination-the Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141 (2011); Demoya R. Gordon, *Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?*, 97 CAL. L. REV. 1719, (2009); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 8 (1995).

64. COLO. REV. STAT. 24-34-401(7.5) (2007).

65. COLO. CODE REGS. § 708-1:81.2(B) (2009).

66. COLO. CODE REGS. § 708.-1:81.2(C) (2009).

67. COLO. CODE REGS. § 708-1:81.2(D) (2009).

misuse of preferred names and gender pronouns.[68] This requirement similarly does not reference the gender binary, so employers could find themselves liable for refusing to refer to a genderqueer employee as *ze* or even as *he* on one day and *she* on another, according to the employee's preference. Litigating these issues could serve to widen the margins of gender in the workplace, making employment safer for trans and gender nonconforming people of all sorts.

Emerging federal doctrine is also working to expand the law's conception of gender in ways that implicitly include genderqueers and that could be pushed even further by genderqueer litigants. A recent Equal Employment Opportunity Commission decision incorporating the trans-inclusive interpretation of Title VII makes employment claims of this nature more accessible, as they are more likely to be resolved at the agency level. In *Macy v. Holder,* the Commission ruled that it would treat a trans policewoman's complaint against the Bureau of Alcohol, Tobacco, and Firearms—that revoked an offer of employment when it learned of her trans status—as a Title VII complaint.[69] In doing so, the Commission relied on *Price-Waterhouse v. Hopkins*, the landmark Supreme Court decision that first interpreted "sex" in Title VII to include gender stereotyping claims,[70] as well as successive circuit court cases allowing trans plaintiffs to bring gender stereotyping claims.[71] The EEOC explained,

> If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.[72]

In clarifying that Title VII includes discrimination on the basis of one's relation to femininity and masculinity, the EEOC has cleared

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68. COLO. CODE REGS. § 708-1:81.8(A)(4) (2009).

69. Macy v. Holder, EEOC Appeal No. 0120120821 (2012).

70. 490 U.S. 228 (1989).

71. *See, e.g.*, Smith v. Salem, 378 F. 3d 566 (6th Cir. 2004) ("Sex stereotyping based on a person's gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior."); Schroer v. Billington, 577 F. Supp. 2d 293 (D.C. Cir. 2008) ("In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination.")

72. *Holder*, *supra* note 3, at 6-7.

the way for Title VII claims by those who find themselves outside the gender binary.

The latest proposed version of the federal Employment Non-Discrimination Act also covers gender identity in such a way that genderqueers would be included. The draft ENDA defines "gender identity" as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[73] While genderqueer plaintiffs already have the *Macy* decision to rely on, the passage of ENDA would further solidify Title VII's application to genderqueers.

There are those who question the usefulness of expanding Title VII's application or even in passing ENDA. Dean Spade points out that not only does the cost of litigation often leave poorer victims unable to seek redress, but also the burden of proving discriminatory intent makes it exceedingly hard for claims to succeed.[74] As I see it, these are arguments not for abandoning rights-based remedies, but rather for allocating pro bono and public interest law resources wisely. As mentioned above, genderqueers' relative newness and obscurity means that those who discriminate against them will likely not understand the need to cover their tracks in doing so, making intent easier to show.

Spade's claim that proving intent makes employment discrimination claims an unpractical solution to transphobia in the workplace is rooted in the critical race account of intent-based anti-discrimination law.[75] Analogizing employment discrimination against people of color and trans people may be appropriate in this respect because both groups are generally known to the public, both negatively stereotyped in the public mind. But the same cannot be said for genderqueers, so intent requirements may not be such a detrimental bar to litigation success. Further, because understanding *what a genderqueer is* in some sense requires understanding the nuances and expansiveness of gender identities, successful claims by genderqueer litigants means that employers seeking to limit their liability would have to incorporate such an understanding into their employment policies, thus creating space for trans and gender nonconforming people of all sorts. Finally, as the Title VII door is already open for genderqueers, bringing such claims is an ideal way to familiarize federal courts with a new identity, preparing them for future constitutional litigation.

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73. Employment Non-Discrimination Act, H.R. 1397, 112th Cong. § 3(a)(6) (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. § 3(a)(6) (2011).

74. *See*, NORMAL LIFE, *supra* note 5.

75. *See, e.g.*, Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407 (1990).

III. THE CONSTITUTIONAL QUEERING OF SEX CLASSIFICATION

Government sex classification causes harm to those who defy or otherwise trouble classification. For those who do not identify as the sex assigned to them at birth, the constant need to show identification to employers or state actors ensures that they will be outed and face the possibility of harassment, or even violence, in those encounters.[76] The immediate need to classify newborns on the basis of sex encourages the surgical mutilation of the intersex.[77] On a more basic level, the law's use of sex classification creates male and female populations, suggests that these are the only possibilities in life, and interferes with the individual's ability to develop hir own gender identity.[78] Because of genderqueers' unique position outside of the gender binary, they are in an equally unique position to bring constitutional challenges sex classification policies.

A. Equal Protection Arguments

Gender-based classifications are reviewed under the Equal Protection Clause with the intermediate scrutiny standard.[79] That is, when a state actor discriminates on the basis of gender, the state must show that it does so to advance an important state interest, using means that are substantially tied to that interest. The standard is gender-neutral: it protects both men[80] and women.[81]

At the heart of gender-based Equal Protection jurisprudence is the idea that individuals should not be limited in their privileges and opportunities on the basis of outmoded gender stereotypes. In *Craig v. Boren*--the case that established intermediate scrutiny--a state statute that allowed women, but not men, to buy certain kinds of beer at age 18 was struck down in part because it was founded in stereotype: young men are reckless and young women virtuous.[82] The state's proffered justification--that 1.82% more 18-21-year-old men were arrested for drunk driving than 18-21-year-old women--did not amount to a substantial relation between the disparate treatment

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76. *See*, *Documenting Gender*, *supra* note 6.

77. *See* Adair, *supra* note 14, at 124.

78. *See* Cruz, *supra* note 6, at 63-64 (explaining, "legal identities, in this case sex identity, should be understood as relationships among classes of people recognized in law for practical, forward-looking purposes, rather than being shorthand for naturally occurring divisions of people into classes based on certain properties inherent in them.").

79. Craig v. Boren, 429 U.S. 190, 197 (1976).

80. *See id.*

81. *See*, United States v. Virginia, 518 U.S. 515 (1996).

82. *Boren*, 429 U.S. at 203. ("The very social stereotypes that find reflection in age-differential laws are likely substantially to distort the accuracy of these comparative statistics. Hence "reckless" young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home.") (internal citation omitted).

of genders and the important objective of highway safety. Twenty years later the Court went even further to say that alleged "inherent differences" between men and women could not justify sex-segregated public education designed to train "citizen soldiers." *United States v. Virginia* overturned the Virginia Military Institute's ban on female students, whom VMI did not consider physically strong enough or mentally tough enough to withstand the rigorous training they offered.[83] Again, reliance on mere stereotype did not make VMI's single-sex policy substantially related to the "important objective" of military-style education.

The most basic gender stereotype of all is that there are only men and women, that people will forever identify as the sex assigned at birth. Those who are neither men nor women are denied the opportunity to apply for accurate state-issued identification and are therefore stereotyped as either man or woman whenever they are required to present such ID for goods and services (including state services). Mere stereotype is not enough to justify a gender-based classification. Rather, the classification must be substantially related to an important governmental objective. The state has important governmental objectives in, for example, licensing automobile drivers or issuing passports for foreign travel. Further, the state has an important interest in accurate identification for law enforcement and national security purposes. But is forced classification as either man or woman substantially related to those interests? Men and women's driving privileges and opportunities for foreign travel do not vary because of the *M* of *F* listed on their IDs. As for accurate identification by law enforcement, the *M* or *F* is likely to bear little relation to genderqueers' gender expression. Further, photos already serve as a far more helpful method of identification. The display of gender classification on state-issued ID bears no relation to the important governmental objectives that photo identification serves.

B. Due Process Arguments

Genderqueer plaintiffs may have more luck in asserting their rights under the Due Process Clause of the Fourteenth Amendment. The Due Process Clause protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[84]

Both in affirming the right to an abortion[85] and in striking down anti-gay sodomy laws[86] the Supreme Court has explained the root liberty interest that protects those specific personal decisions:

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83. *United States v. Virginia*, 518 U. S. at 515.

84. *Lawrence*, 539 U.S. at 574.

85. *Planned Parenthood of Eastern PA v. Casey*, 505 U.S. at 851.

86. *Lawrence*, 539 U.S. at 579.

"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[87] That is, it is not the content of protected personal decisions that makes them into rights. Rather, it is because those decisions grow out of the right to define one's own concept of existence that they are rights in themselves.

Conceptions of gender are intimately related to, if not inherent in, "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." In fact, we are incapable of understanding these sorts of personal decisions without reference to our notions of gender. In most jurisdictions, people are still limited as to whom they can marry on the basis of gender. American family life is also by and large still marked by traditional gender roles: the vast majority of women take on their husbands' surnames and are unequally burdened with child-rearing responsibilities and household chores. As for procreation, women are expected to physically bear children and are socially suspect when they do not share that expectation of themselves. Women are maligned for seeking fair access to contraception and demonized or terrorized for seeking abortions. In education, boys and girls still receive messages about what they can and can't do well, and largely segregate themselves when it comes time to choose their fields of study. The Supreme Court has repeatedly asserted that every individual has the right to make these decisions regardless of gender, yet gender itself, like these gendered decisions, is at the core of, "one's own concept of existence, of meaning, of the universe, and of the mystery of human life"[88]

Genderqueer litigants, then, should argue that they are entitled to be able to define their own concepts of gender free from the compulsion of the state. By conditioning such facts of life as state services, state-regulated travel, access age-restricted products and venues (both mandated so by the state) on the possession and production of state-issued, gendered identification, the state coerces people into declaring their 'gender' to both state officials and members of the public.

Government defendants would likely respond that the impositions are justified by a government interest in proper identification for law enforcement and national security purposes.[89] However, genderqueers' very existence belies the plausibility of that claim: how could the government's claim to use sex classification for national security purposes be legitimate when there is a whole class of people who are not accurately identified by that classification?

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87. *Id.*

88. *Id.*

89. *Cf.* Korematsu v. United States, 323 U.S. 214 (1944).

Because genderqueers present to the world as androgynous, or sometimes as a man and sometimes as a woman, the simple presence of an *M* or *F* on their state-issued ID could even serve to further confuse matters.

C. The First Amendment: Sex Classification as Compelled Speech

By requiring that government identification display either *male* or *female*, states also violate genderqueers' free speech rights. The right to free speech includes a prohibition on state-compelled speech, especially that speech which conveys an ideological message.[90]

The compelled speech doctrine was first announced by the Supreme Court in 1943 in *West Virginia State Board of Education v. Barnette* and was extended in 1977 by *Wooley v. Maynard*. Both cases involved Jehovah's Witnesses who found compelled expressions of militaristic nationalism in conflict with their moral, religious, and political beliefs. In *Barnette*, the Court struck down a policy conditioning public school attendance on participation in the daily Pledge of Allegiance and "stiff-arm" salute to the American flag.[91] In doing so, the Court noted that for some to abstain from the pledge does not affect others' right to participate,[92] and further explained,

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[93]

Decades later in *Wooley v. Maynard*, the Court extended the compelled speech doctrine to include even the mere passive display of a state ideological message. There, Maynard successfully challenged a New Hampshire statute requiring non-commercial drivers to display a license plate bearing the state motto, "Live Free or Die," and imposing a criminal penalty on those who modified or concealed any part of the license plate.[94] In rejecting the issue posed by the District Court, Justice Burger accepted Maynard's framing, quoting him as saying, "I refuse to be coerced by the State into

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90. *See, e.g.*, W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705 (1977).

91. *Barnette*, 319 U.S. at 628-629.

92. *Id.* at 630.

93. *Id.* at 641-42.

94. *Wooley*, 430 U.S. at 707-708.

advertising a slogan which I find morally, ethically, religiously and politically abhorrent."[95] The state in Wooly advanced two countervailing interests, neither of which was found sufficiently compelling: easy identification of non-commercial vehicles by law enforcement, and promotion of history, individualism, and state pride.[96] The Court explained that non-commercial New Hampshire license plates were distinct in a number of ways apart from the motto and held that, although displaying a motto on a license plate is not an affirmative act like saluting the flag, the state could not compel its citizens to serve as "mobile billboards" for a message that is counter to their beliefs.[97] Reiterating the purpose of the compelled speech doctrine, the Court wrote, "The fact that most individuals agree with the thrust of [the motto] is not the test. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[98]

For many, identifying as genderqueer is at least in part and ideological act: while the feeling of being neither man nor woman is not an active decision, presenting and identifying as genderqueer is. Or rather, perhaps more importantly, to identify as genderqueer is to object to an ideology and to recognize as ideological the system of common understanding which says not only that gender is biologically determined, but also that there only two genders and every person must be one of the two. The rigid ideology of gender classification is embodied by government-issued identification that offers only two options (*M* and *F*), often with onerous requirements in switching from one to the other.[99]

Moreover, presenting one's identification is required in a wide range of circumstances – dealing with law enforcement and government agencies, traveling by plane, purchasing age-restricted products, entering age-restricted venues – and to present identification is to assert the truthfulness and accuracy of information on identification. For those who identify as neither *F* nor *M*, then, every time they are required to present identification they are also forced into affirming not only an incorrect representation of their gender identity, but also the legitimacy of the gender binary itself. That the ideology of the gender binary is widely accepted, or uncritically presumed, is not the test.[100] "The First Amendment protects the right of individuals to hold a point of view different from

95. *Id.* at 705.

96. *Id.* at 716.

97. *Id.*

98. *Id.* at 715.

99. *See generally, Documenting Gender*, *supra* note 6.

100. *Wooley*, 430 U.S. at 715.

the majority and to refuse to foster . . . an idea they find morally objectionable."[101]

Presenting identification lies somewhere between the passive display in *Wooley* and the affirmative salute in *Barnette*. While identification cards are not displayed to the world as a "mobile billboard," the implicit assertion of true and accurate information on one's identification, especially given the knowledge and concern that IDs may be fake, is a more affirmative endorsement than simply displaying the same license plate as everyone else. And while the implicit affirmation of true and accurate identification is not as affirmative an act as saluting the flag and reciting the pledge, it is still an affirmation. Further, just as affirmation or endorsement of the state's ideological message was a condition on attending public school in *Barnette* and on driving an automobile in *Wooley*, possession and presentation of government-issued identification is a condition on a huge number of benefits and services. Though a challenged state may argue that listing *M* or *F* on state-issued IDs serves a compelling governmental interest in ease of identity verification, state-issued IDs already offer even more alternate means of identifying a person--height, weight, hair and eye color, a photo--than did non-commercial license plates in *Wooley*.[102] Finally, allowing some the opportunity to opt out of gendered identification does not affect the ability of others to participate in that system, just as the abstention of some from the pledge in *Barnette* did not affect others' participation.[103]

In the last thirty years, the compelled speech doctrine has become a popular tool for litigants in opposition to LGBTQ causes, and they have used it with much success. In the 1980's, Georgetown University successfully argued that Washington, D.C.'s anti-discrimination ordinance, requiring the school to recognize a gay student organization, violated the university's free speech and free association rights--alleging that recognition was tantamount to condemnation.[104] Similarly, the organizers of a St. Patrick's Day parade in Boston used *Wooley* to reinstate their exclusion of an Irish-American LGB group, arguing that to allow the group would be an implicit show of support.[105] The same argument was used as a successful defense yet again when a gay Scoutmaster attempted to challenge his expulsion from the Boy Scouts.[106]

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101. *Id.*

102. *Id.* at 716.

103. *Barnette*, 319 U.S. at 630.

104. *See* Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987).

105. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

106. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

Most recently, though, a conservative graduate student in psychology failed in using the compelled speech doctrine. In *Keeton v. Anderson-Wiley*,[107] the plaintiff asserted during her training that if she came across an LGBTQ patient in her role as a school counselor, she would explain that "homosexuality" is wrong and would work to change the patient's behavior.[108] The student's state school required that she partake in a "remediation program" designed to teach her to work with LGBTQ patients.[109] The student attempted to enjoin the remediation program using the compelled speech doctrine, but failed.[110]

Except for the last, these cases represent a sort of *colorblinding* of the compelled speech doctrine. Just as constitutional and statutory provisions that were intended to combat the subordination of people of color have been sterilized to make suspect race-conscious remedial programs,[111] the compelled speech doctrine was intended to protect unconventional minority views and has become, at least in part, a tool for the suppression of sexual and gender minorities. For genderqueers to bring a compelled speech claim would be to revive the use of compelled speech doctrine for whom it was intended, for persons who differ with widely held, widely celebrated views.

CONCLUSION

Because genderqueers blow up the gender binary as a matter of personal identity, gaining recognition for them in the law has tremendous potential to expand our legal conceptions of gender. Genderqueer plaintiffs should use evolving Title VII law as a first step, then seek to challenge government sex classification as excluding them in violation of the Fourteenth Amendment. If successful, benefits in both the employment and classification contexts would extend to trans people, the intersex, and gender nonconforming people around the country.

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107. 664 F. 3d 865 (11th Cir. 2011).

108. *Id.* at 867.

109. *Id.*

110. *Id.*

111. *See, e.g.*, Lawrence Tribe, *In What Vision of the Constitution Must the Law be Color-Blind?*, 20 J. MARSHALL L. REV. 201 (1986).