The Dukeminier Awards

Best Sexual Orientation and Gender Identity Law Review Articles of 2024

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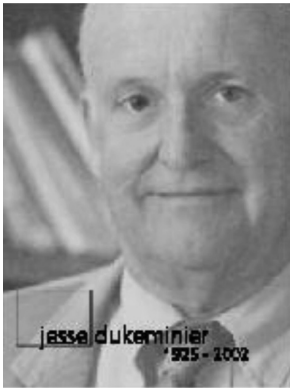
Student Note

The Dukeminier Awards Journal and the Williams Institute would like to thank Jeffrey S. Haber, Brondi Borer, Stu Walter, Chuck Williams, and the family and friends of Ezekiel "Zeke" Webber for their endowment gifts to fund individual prizes recognizing outstanding scholarship related to sexual orientation and gender identity law.

The Ezekiel Webber Prize is named after Ezekiel "Zeke" Webber, a UCLA Law student who died in 2004 at the end of his 2L year. During his time at UCLA, Zeke was extremely involved with the Williams Institute and the Public Interest Law Program.

IN MEMORY OF JESSE DUKEMINIER



This journal is named in memory of Jesse J. Dukeminier (1925–2003), who was a member of the UCLA School of Law faculty for forty years. The journal celebrates scholarly excellence in the field of sexual orientation, and Jesse Dukeminier was an excellent scholar and gay man. His own scholarly eminence is unquestioned, but he never wrote on topics centered on sexual orientation, nor was he what one would call an activist in the cause of gay rights. His field was property law, and in that field he was most certainly a star. His casebook (*Property*, coauthored with James E. Krier) is, in substance and in number of adoptions, by far the leading casebook in the field. The same can be said of his casebook, *Wills, Trusts, and Estates*, co-authored with Stanley M. Johansen. He was a nationally known authority on the Rule Against Perpetuities, and he contributed to the law's development not only in his scholarship but in the legislative process. Surely, however, the explanation for dedicating this journal to him lies elsewhere.

Jesse Dukeminier was a beloved teacher, among a handful of UCLA law teachers in the last generation who were revered by their students. (In his case it is not excessive to say "revered.") His sexual orientation was no secret; his union with David S. Sanders, a prominent psychiatrist, began around the time Jesse joined the UCLA Law faculty, and was well known to all. Long before it became widely understood that Coming Out was an important act of social and political construction, Jesse was Out, without ceremony—indeed, without raising the subject, unless someone else raised it first. He went about his life, in work and in recreation, as himself. Precisely because he was so admired, he contributed to the cause of equal citizenship by carrying on his day-to-day living under the assumption that his sexual orientation, although very much a part of his sense of self, was not especially noteworthy.

For others who self-identified as gay, lesbian, bisexual, etc., Jesse's behavior could help to ease the way to their own public acknowledgement of their sexual orientation. Imagine that the year is 1973, and that you are one of Jesse's students, a gay man or lesbian who has remained largely closeted. You may think, "If this highly admired man is Out, why should I not be?" And for those acquaintances who self-identified as straight, Jesse's presence in their lives helped them to redefine the meanings they attached to sexual orientation. Such a person might think, "If Jesse is gay, then the negative things I have heard about a gay orientation have to be false." Jesse was not vain, but he

was aware of his high standing among his students, his colleagues, and his friends. So, without ever getting on a soapbox, he was—knowingly—a walking advertisement for the proposition that equal treatment for every person, of any self-identified sexual orientation, is the proper social norm, the entitlement of all persons. The difference in public attitudes on this subject from 1973 to present day is remarkable and has made itself felt in legislation and in Supreme Court decisions. In a quiet-but-public way that was very much his own, Jesse Dukeminier was one local leader in that change.

When the generous donation that was to become the Williams Institute was offered to our school, Jesse Dukeminier was one of a group of faculty who participated in the Institute's design. He continued in active support of the Institute until his death. The UCLA Law School community is honored to dedicate this journal to his memory.

Kenneth L. Karst
2004, UCLA School of Law

INTRODUCTION

The Williams Institute and the student editors at the UCLA School of Law are pleased to publish Volume 24 of the *Dukeminier Awards Journal*, which annually recognizes outstanding achievements in recently published legal scholarship that engages with pressing sexual orientation and gender identity issues. With this release, we are honored to recognize the following Dukeminier Prize winners:

The Michael Cunningham Prize
Gender Regrets: Banning Abortion and Gender-Affirming Care, 2024 Utah L. Rev. 763 (2024)
Noa Ben-Asher & Margot J. Pollans

The Stu Walter Prize
Bending Gender: Disability Justice, Abolitionist Queer Theory, and ADA Claims for Gender Dysphoria, 137 Harv. L. Rev. F. 237 (2024)
D Dangaran

The M.V. Lee Badgett Prize
Transgender Students and the First Amendment, 104 B.U. L. Rev. 435 (2024)
Dara E. Purvis

The Ezekiel Webber Prize
Gender Data in the Automated Administrative State, 123 Colum. L. Rev. 2249 (2023)
Ari Ezra Waldman

In addition, each year the Journal publishes the winner of the Williams Institute's Annual Student Writing Competition. This year's winner is:

The Jeffrey S. Haber Prize for Student Scholarship
Queer Outrage: Why the Legal Vindication of LGBTQ Feelings Can Transform Dignitary Tort Law, 24 Dukeminier Awards J. 209 (2025)
Gabriel L. Klapholz

About the Prize Winners

Eligible articles for this year's Dukeminier Prizes were published between September 1, 2023 and August 31, 2024 and engaged with sexual orientation and gender identity legal issues in a sustained way. In September 2024, the articles editors ran relevant search terms in legal scholarship databases to cast a wide net for eligible articles. The students then narrowed that large group to nearly 200 articles that students deemed presumptively eligible for this year's awards. At this stage, the students were not reviewing the

articles for merit; instead, the students focused on the degree of attention given to relevant issues, broadly understood.

The Institute then invited nominations for articles through an open call and from over 50 law professors who regularly publish legal scholarship focused on sexual orientation and gender identity. We provided the professors with the students' list of eligible articles, but did not limit nominations to articles appearing in the list. Numerous law professors submitted nominations, as did the student editors and scholars affiliated with the Williams Institute. All articles that received nominations were automatically sent to our prize committee. Williams Institute legal scholars reviewed the remaining articles and selected a number to join the nominated articles and be considered by the prize committee.

The Institute convened a committee to select the winners from among those finalists in March 2025. Each Volume's prize committee is comprised of a group of Williams Institute legal scholars, former Dukeminier Prize winners, and *Dukeminier Awards Journal* senior editors. The Volume 24 Prize Committee was comprised of: Nancy Polikoff, visiting scholar at the Williams Institute and Professor of Law Emerita at American University Washington College of Law; Chan Tov McNamarah, Visiting Assistant Professor of Law at Cornell Law School; Cori Alonso-Yoder, Associate Professor at George Washington University Law School; Giam Nguyen, Judicial and Legal Education Director and Scholar at the Williams Institute and incoming faculty advisor for the *Dukeminier Awards Journal*; Ishani Chokshi, Williams Institute Daniel H. Renberg Law Fellow; Joshua Arrayales, Williams Institute Legal Fellow; Jet Harbeck, Editor-in-Chief of the *Dukeminier Awards Journal*; Jacob Ostermann, *Dukeminier* Chief Articles Editor; and myself, Will Tentindo, Staff Attorney at the Williams Institute and advisor for the Journal.

Each year, the members of the selection committee decide the precise criteria for that year, guided by the goals of the *Dukeminier Awards Journal*. The winning articles embody the best in this year's sexual orientation and gender identity legal scholarship. We recognize these articles for their original arguments and intersectional approaches, timeliness and impact, academic rigor, and quality of research and writing. The Selection Committee also valued the idea of recognizing developing scholars and works covering a broad range of issue areas. We viewed each article holistically and extensively discussed the finalists in light of these criteria, and selected the above four articles for prizes this year.

For the student note competition, a committee comprised of *Dukeminier* Editor-in-Chief Jet Harbeck, Senior Editor Shane Ball, Managing Editor Randall Jones, Chief Notes Editor Ania Korpanty, current faculty advisor for the *Dukeminier Awards Journal* and Williams Institute Legal Director and Interim Executive Director Christy Mallory, and myself selected the winner among entries received in the Fall of 2024 through an open call for submissions. To be eligible, articles must be authored by a student enrolled in a law

school during the 2024–25 academic year, regardless of degree track or progress. In selecting the winner, we focused on originality, scholarly contribution, timeliness, academic rigor, and overall quality of the research and writing. All entries were reviewed blind by the student note selection committee.

Three of our winning articles in this volume are authored by first-time Dukeminier Award winning scholars. In addition to our first-time winners, Professor Ari Ezra Waldman has won his second Dukeminier Award in as many years. On a special note, the number of presumptively eligible articles identified by our articles editors was larger than in any previous year. When the *Dukeminier Awards Journal* was first published, few scholars published on sexual orientation or gender identity law and policy, let alone focused on the area. Now, we see many individuals dedicate their careers to this field. While this makes the process of selecting merely four articles extraordinarily challenging, the legal profession—and society at large—is all the better for this growth.

This year's winning articles were published prior to the second Trump Administration, which in its first few months has brought significant changes to the realm of LGBTQ law and policy specifically, but also to law and academia generally. Despite these changes, the award-winning articles in Volume 24 remain timely, a testament to the arguments presented within and the authors' dedication in taking on challenging topics. It is especially important to highlight these articles at a time where certain rhetoric around queer studies as a scholarly endeavor has sought to diminish the field's merit. The articles published in Volume 24 represent a few of the many outstanding pieces published by a passionate community of scholars unafraid to research, teach, and debate some of the most contested legal issues of our time. The *Dukeminier Awards Journal* editors are thrilled to highlight these five pieces of scholarship, a small portion of the academically rigorous, well-reasoned, and prescient work recently authored on sexual orientation and gender identity law and policy. As always, we hope that republishing these articles in our Journal helps their authors' work reach an even larger audience of practitioners, professors, policymakers, and the public.

Congratulations to this year's winners!

Will Tentindo, J.D.
Staff Attorney
The Williams Institute
UCLA School of Law

GENDER REGRETS:
Banning Abortion and Gender-Affirming Care

Noa Ben-Asher* & Margot J. Pollans**

Abstract

Conservative politicians, lawmakers, and media have generated a national moral panic about transgender children and youth that has resulted, as of early 2024, in restrictions or bans on GAC for minors in twenty-four states. In these bans and the advocacy around them gender-affirming care for minors is presented as harmful, ideological, unnecessary, and likely to lead to future regret. The role of regret in the movement to ban gender-affirming care parallels the role of regret in the ongoing conservative campaign to ban abortion. In the years between *Roe v. Wade* (1973) and *Dobbs v. Jackson Women's Health Organization* (2022), politicians and lawmakers promoted the idea that pregnant people may come to regret the decision to end a pregnancy, and that laws should protect them from that decision.

This Article analyzes the use of "regret" in bans on abortion and on gender-affirming care for minors. It identifies two overlapping legal threads. First, both campaigns against medical care point to protection of patients from future regret as a legitimate state interest justifying restrictions on providing medical care. Second, both rely on alleged concerns about regret to redefine the legal meaning of "informed consent" and make it easier for potential future plaintiffs to prevail in civil suits against providers of medical care. In doing so, both treat the emotion of regret as a distinct injury that may give rise to a range of legal rights and liabilities. The Article reveals how conservative politicians and lawmakers use "regret" as a disciplinary tool to promote traditional family values, especially involving natalism and "biological" sex difference.

* © 2024 Noa Ben-Asher. Professor of Law at St. John's University School of Law.

** © 2024 Margot J. Pollans. Professor of Law at the Elisabeth Haub School of Law at Pace University.

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Introduction

In the spring of 2023, the *New York Times* published a piece entitled "How a Few Stories of Regret Fuel the Push to Restrict Gender Transition Care."[1] It features Chloe Cole, who lived as a transgender boy for several years but now identifies as a cisgender woman. Cole has become a poster child for the idea that gender-affirming care ("GAC") for minors may lead to later regret and should therefore be restricted by the state. Cole, who has been travelling the country as part of a conservative lawmaking effort to ban GAC, received a standing ovation after Florida Governor Ron DeSantis told her story in his State of the State address.[2] Cole and a few others have been invited by conservative politicians and lawmakers in several states to testify about the perils of providing GAC to children and youth.[3]

1. Maggie Astor, *How a Few Stories of Regret Fuel the Push to Restrict Gender Transition Care*, N.Y. Times (May 16, 2023), https://www.nytimes.com/2023/05/16/us/politics/transgender-care-detransitioners.html [https://perma.cc/8H64-B5TE].

2. Cole helped organize a "Detransition Awareness Day" rally in Sacramento, but only about forty people participated. *Id.*

3. A Wyoming bill to ban transition care for minors was named "Chloe's Law." *Id. See also* Jesse Singal, *When Children Say They're Trans,* The Atlantic, (July-Aug. 2018), https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749/ [https://perma.cc/7D2Z-URWT] (highlighting people who have come to regret their gender-affirming care); Rikki Schlott, *'I Literally Lost Organs:' Why Detransition Teens Regret Changing Genders*, N.Y. Post, (June 19, 2022, 10:50 AM), https://nypost.com/2022/06/18/detransitioned-teens-explain-why-they-regret-changing-genders/ [https://perma.cc/P3XL-VR3Z] ("[T]he politicization of the issue was shutting down proper clinical rigor. That meant quite vulnerable kids were in danger of being put on a medical path for

These politicians and lawmakers have generated a national moral panic about transgender children and youth that has resulted, as of early 2024, in restrictions or bans on GAC for minors in twenty-three states.[4] Three core beliefs drive this moral panic. First, many children and youth who identify as transgender are only following a social-media amplified fad, a "social contagion."[5] Second, gender dysphoria is the result of childhood trauma and should therefore be treated via psychological therapy only.[6] Third, cisgender children and adults are a preferable social outcome (over transgender children and adults).[7] Based on these three convictions, gender-affirming care for minors is presented as harmful, ideological, unnecessary, and likely to lead to future regret. The Supreme Court recently granted an emergency stay of a Ninth Circuit preliminary injunction against Idaho's GAC ban for minors.[8] In his concurrence, Justice Gorsuch echoed these sentiments when he quoted extensively from Idaho's application for stay, including language as to how the

treatment that they may well regret."). As a director at the Heritage Foundation has professed, "We are glad to work with individuals who are willing to stand up to the corrosive effects of gender ideology, especially when it is being pushed on children." Astor, *supra* note 1.

4. *See infra* note 30 (citing statutes); Nikolas Lanum, *Detransitioner Slams Clinics, Media for Politicizing 'Gender Affirming Care': 'They do Everything for Profit,'* Fox News, (Apr. 8, 2023, 3:54 PM), https://www.foxnews.com/media/detransitioner-clinics-media-politicizing-gender-affirming-care-everything-for-profit [https://perma.cc/7AMZ-GTAA] (discussing Walt Heyer, an outspoken anti-transgender rights advocate, attributing transgender identification to "social contagion," social media outlets such as TikTok, and adverse childhood experiences that are potentially traumatic). *See also* Hannah Grossman, *'Tomboy' Who Regretted Gender Transition Breaks Down Crying Describing Difficulty of Breast Removal Surgery*, Fox News, (Dec. 4, 2023, 5:00 AM), https://www.foxnews.com/media/detransitioner-breaks-down-describing-difficulty-breast-removal-surgery-something-wrong-me [https://perma.cc/Y3J7-E22F] (telling the story of an individual who had previously identified as transgender man but now identifies as a ciswoman, who "broke down" twice during the interview: "The first time, she discussed a point in her teenage years when her father left the family. She was devastated, and around that same time she began to experience gender dysphoric symptoms. During the second time, Teran described the challenging experience with complications from her breast removal surgery – a double mastectomy.").

5. Lanum, *supra* note 4.

6. *Id.*

7. *See also* Noa Ben-Asher, *Transforming Legal Sex*, 102 N.C. L. Rev. 335, 392 (2024) ("The underlying rationale of the current voluminous laws and policies against transgender children and youth . . . is that transgender children and adults are *not* desirable social outcomes.") [hereinafter Ben-Asher, *Transforming Legal Sex*]; Deborah L. Brake, *Title IX's Trans Panic*, 29 Wm. & Mary J. Race, Gender & Soc. Just. 41, 43 (2022) ("The new trans-exclusion bills that have recently swept through state legislatures overtly draw on the legacy and logic of Title IX to press a right-wing gender agenda, in sport and beyond. The result is a perfect storm for ushering in a new gender panic now playing out in sports."); Farhad Manjoo, *America Is Being Consumed by a Moral Panic over Trans People*, N.Y. Times (Sept. 1, 2022), https://www.nytimes.com/2022/09/01/opinion/america-is-being-consumed-by-a-moral-panic-over-trans-people.html. [https://perma.cc/8MGM-L7C5].

8. Labrador v. Poe, 2024 WL 1625724 (Apr. 15, 2024) (granting stay "except as to the provision to the plaintiffs of the treatments they sought").

law seeks to block "surgeries that sterilize or mutilate a child's genitals," and protect children from "lasting harm and irreversible damage."[9]

The role of regret in the movement to ban GAC parallels the role of regret in the ongoing conservative campaign to ban abortion. In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that pregnant people have no constitutional right to terminate an unwanted pregnancy.[10] The decision overturned *Roe v. Wade*[11] and *Planned Parenthood v. Casey*.[12] In the years between *Roe* (1973) and *Dobbs* (2022), advocates, politicians, and lawmakers repeatedly promoted the idea that pregnant people may come to regret the decision to end a pregnancy, and that laws should protect them from that decision.[13]

This Article analyzes the use of "regret" in the campaigns to ban GAC and abortion. It identifies two overlapping threads. First, both campaigns against medical care point to protection of patients from future regret as a legitimate state interest justifying restrictions on providing medical care. Second, both rely on concerns about regret to redefine the legal meaning of "informed consent" and make it easier for potential future plaintiffs to prevail in civil suits against providers of medical care. In doing so, both treat the emotion of regret as a distinct injury that may give rise to a range of legal rights and liabilities. The Article reveals a strategic conservative legal movement that has used "regret" as a disciplinary tool to promote "traditional family values," especially those of natalism and "biological" sex difference.[14]

The rise of anti-abortion legislation and restrictions on GAC are not isolated occurrences. These policies are closely linked within conservative political movements, legislative agendas, and court rulings.[15] A manifestation of this inter-connection is found in the Eleventh Circuit's decision in *Eknes-Tucker v. Governor of Alabama* where transgender teens, their parents, and

9. *Id.* (Gorsuch, J., concurring).

10. 142 S. Ct. 2228 (2022).

11. 410 U.S. 113 (1973).

12. 505 U.S. 833 (1992).

13. *See*, *e.g.*, Gonzales v. Carhart, 550 U.S. 124, 159–60 (2007) (upholding the constitutionality of the Partial Birth Abortion Ban Act of 2003, and reflecting that "It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.").

14. For an analysis of the resistance of conservative lawmakers and courts to the concept of "sex assigned at birth" and the promotion of "biological sex," see Jessica Clarke, *Sex Assigned at Birth*, 122 Columb. L. Rev. 1821 (2022). For an analysis of the backlash against the concept of "gender identity" in law and broader culture, see Ben-Asher, *Transforming Legal Sex*, *supra* note 7. For an analysis of the shifting classifications of sex in official state documents, see Ido Katri*, Transitions in Sex Reclassification Law*, 70 UCLA L. Rev. 636 (2023).

15. For example, Nebraska recently passed, in combined legislation "relating to public health and welfare," prohibitions on abortion ("Preborn Child Protection Act") and GAC for minors ("Let Them Grow Act"). Legis. B. 574, 108th Leg., 1st Sess. (Neb. 2023).

healthcare providers challenged Alabama's ban on GAC for minors.[16] In assessing whether parents have a Due Process right to consent to medical treatment of minors, the court turned to *Dobbs*: "To determine whether a right at issue is one of the substantive rights guaranteed by the Due Process Clause, courts must look to whether the right is deeply rooted in [our] history and tradition and essential to our Nation's scheme of ordered liberty."[17] The Eleventh Circuit concluded—as the Supreme Court did vis-à-vis abortion in *Dobbs*—that "the use of these medications in general—let alone for children—almost certainly is not 'deeply rooted' in our nation's history and tradition."[18] Accordingly, "[n] either the record nor any binding authority establishes that the 'right to treat [one's] children with transitioning medications subject to medically accepted standards' is a fundamental right protected by the Constitution."[19] The Sixth Circuit (relying on *Dobbs*) similarly rejected the parental Due Process right to consent to medical care of transgender minors.[20] This interpretation of "ordered liberty" undermines the rights of pregnant people to bodily autonomy and of parents to support a minor's gender identity.

A few words on terminology. First, regret can be a vague concept subject to a variety of definitions. We define it simply as the backward-looking preference that "things should have been otherwise."[21] Regret can also be understood by contrast to its inverse, "affirmation."[22] To affirm a decision or event "is to prefer on balance that [the past] should have the features it actually had."[23] Second, although conservative media, politicians, and lawmakers often refer to individuals who decide to discontinue GAC as "detransitioners," this Article refers to them as those who decided to desist gender-affirming care.

16. Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1210 (11th Cir. 2023). *See* Alabama's Vulnerable Child Compassion and Protection Act for its ban. Ala. Code § 26–26–4(a) ("no person shall engage in or cause" the prescription or administration of puberty blocking medication or cross-sex hormone treatment to a minor "for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's sex.").

17. *Eknes-Tucker*, 80 F.4th at 1220 (internal quotation marks omitted) (quoting *Dobbs*, 597 U.S. 215, 237–38 (2022)).

18. *Id.*

19. *Id.* at 1226 (applying rational basis review and concluding the district court erroneously reviewed the statute with heightened scrutiny and that the Parent Plaintiffs' likelihood of success does not justify a preliminary injunction).

20. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 473 (6th Cir.) ("This country does not have a 'deeply rooted' tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children."), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

21. R. Jay Wallace, The View from Here: On Affirmation, Attachment, and the Limits of Regret 6 (2013). We focus almost exclusively on what philosophers call "agent-regret," meaning regret about decisions and actions over which the regretter had control. *See* Bernard Williams, *Moral Luck*, Moral Luck Philosophical Papers 1973–1980 20, 27 (1981). This definition excludes a broad range of regret feelings that may relate general to the state of the world or past events that the regretter wishes did not occur but had no control over. *Id.*

22. Wallace, *supra* note 21, at 5.

23. *Id.*

The Article proceeds in three main parts. Part I explores the role of regret in state laws that restrict or ban access to GAC for minors, and the judicial treatment of those laws. Part II considers state abortion restrictions and bans, and the judicial treatment of those laws. Part III analyzes how the concept of regret is used by conservative thinktanks, politicians, and lawmakers to promote "traditional family values," especially involving natalism, traditional gender norms, and "biological" sexual difference. This Part also considers two other choices—the choice to have children and the choice to be childless. It contrasts regret narratives in these two contexts with those in the GAC and abortion contexts to reveal the work that regret is doing for anti-GAC and anti-abortion movements.

I. Banning Gender-Affirming Care

It is unusual for individuals to regret GAC. Available data from medical experts reveals two key findings. First, the phenomenon of desisting GAC among transgender teen and youth is infrequent.[24] Second, when it occurs, it often involves a range of complicated factors that cannot be easily reduced to regret.[25] According to Dr. Marci Bowers, a gynecologic and reconstructive surgeon and the president of the World Professional Association for Transgender Health ("WPATH"), there is a consensus among experts that gender-affirming

24. *See* Marci L. Bowers, Opinion, *What Decades of Providing Trans Health Care Have Taught Me*, N.Y. Times (April 1, 2023), https://www.nytimes.com/2023/04/01/opinion/trans-healthcare-law.html [https://perma.cc/7ULU-7NZ4]; Jen Christensen, *Transgender and Nonbinary Patients Have No Regrets About Top Surgery, Small Study Finds*, CNN (Aug. 9, 2023, 3:48 PM), https://www.cnn.com/2023/08/09/health/top-surgery-no-regrets-transgender-nonbinarystudy/index.html [https://perma.cc/4VQW-BCH9] (discussing Lauren Bruce, Alexander N. Khouri, Andrew Bolze, Maria Ibarra, Blair Richards, Shokoufeh Khalatbari, Gaines Blasdel, Jennifer B. Hamill, Jessica J. Hsu, Edwin G. Wilkins, Shane D. Morrison and Megan Lane); *Long-Term Regret and Satisfaction with Decision Following Gender-Affirming Mastectomy*, JAMA Surgery, Oct. 2023, at 1070–77 ("Of the participants, 139 – nearly 60% – answered the survey accurately and returned it to the researchers. Their median Satisfaction With Decision Scale score was 5 on a 5-point scale, indicating the highest possible level of satisfaction. The median Decision Regret Scale score was 0 on a 100-point scale, meaning not a single patient regretted their choice to have the surgery."); Lindsey Tanner, *How Common Is Transgender Treatment Regret, Detransitioning?*, AP News (Mar. 5, 2023, 6:55 AM), https://apnews.com/article/transgender-treatment-regret-detransition-371e927ec6e7a24cd9c77b5371c6ba2b [https://perma.cc/R8X4-PJWH] ("Some studies suggest that rates of regret have declined over the years as patient selection and treatment methods have improved. In a review of 27 studies involving almost 8,000 teens and adults who had transgender surgeries, mostly in Europe, the U.S and Canada, 1% on average expressed regret."); K.R. MacKinnon, F. Ashley, H. Kia, J.S.H. Lam, Y. Krakowsky & L.E. Ross, *Preventing Transition "Regret": An Institutional Ethnography of Gender-Affirming Medical Care Assessment Practices in Canada*, Soc. Sci. & Med., Oct. 2021, at 1, 7–8 ("[D]issatisfaction with surgical results, transition regret, and detransition are all conceptually and materially discrete outcomes"—"regret is an 'exceedingly rare' outcome . . . [and] evidence suggests that many people who detransition do so only temporarily and their trans identities often persist even whilst discontinuing gender transition (or their gender identities may shift dynamically).").

25. *See* Bowers, *supra* note 24.

care, including hormones and surgeries "improves the well-being of transgender people," and that "regret—a decision to either stop treatment or express unhappiness about one's decision to transition socially, medically or surgically—became even less common as surgical quality and social support improved."[26] A 2021 study reveals that "fewer than 1 percent of those who have received gender-affirming surgery say they regret their decision to do so, a much lower rate than has been reported for more common medical interventions like plastic surgery and orthopedic care."[27]

Conservative politicians and lawmakers have questioned the credibility of these studies, positing that they rely too heavily on self-reports without attention to those who may choose not to report regret.[28] These politicians and lawmakers have cited instead anecdotal regret stories to justify restrictions on access to care. This Part begins by investigating those restrictions, showing how they rest on prevention of future regret. Next, it considers how these laws expand potential tort liability of medical health professionals who provide gender affirming care.

A. *Preventing Future Regret: A State Interest in Restricting GAC*

In 2023, state legislatures introduced 185 bills aiming to restrict transgender healthcare access, with many imposing stringent guidelines or outright bans on GAC for minors.[29] As of January of 2024, twenty-three states have enacted laws or policies limiting youth access to GAC.[30] Regret is a central

26. *Id.*

27. *Id.* Bowers also mentions a separate survey of over 27,000 adults that found that those who stop gender-affirming care do so for a range of factors (family pressure, financial reasons, loss of access to care, etc.), and "not because they had been misdiagnosed or their gender identities had changed." *Id. See also* Kristina R. Olson, Lily Durwood, Rachel Horton, Natalie M. Gallagher & Aaron Devor*, Gender Identity 5 Years After Social Transition,* Pediatrics, Aug. 2022, at 1, 3–6 (tracking the gender identities of youth—317 in total—an average of five years after their initial social transitions). The Olson et al. study found that "most youth identified as binary transgender youth (94%), including 1.3% who retransitioned to another identity before returning to their binary transgender identity. A total of 2.5% of youth identified as cisgender and 3.5% as nonbinary." *Id.* The researchers also found that a later cisgender identification was more common amongst those whose initial social transition was before the age of six, and that in those cases the retransition often occurred before the age of ten. *Id.*

28. *See*, *e.g.*, Pamela Paul, *As Kids, They Thought They Were Trans. They No Longer Do*, N.Y. Times (Feb. 2, 2024), https://www.nytimes.com/2024/02/02/opinion/transgender-children-gender-dysphoria.html [https://perma.cc/CH8M-QXBQ].

29. *See Tracking the Rise of Anti-Trans Bills in the U.S.*, Trans Legislation Tracker, https://translegislation.com/learn [https://perma.cc/2RKW-22MP] (last visited Feb. 27, 2024).

30. *See*, *e.g.*, S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022); H.B. 1570, 2022 Leg., Reg. Sess. (Ark. 2021); S.B. 1238, 2022 Leg., Reg. Sess. (Ariz. 2022); S.B. 254, 2022 Leg., Reg. Sess. (Fla. 2022) (temporarily blocked in part); S.B. 140, 2022 Leg., Reg. Sess. (Ga. 2023) (in effect) (stating that the following "irreversible procedures or therapies" shall not be performed in a licensed institution "on a minor for the treatment of gender dysphoria": "Sex reassignment surgeries, or any other surgical procedures, that are performed for the purpose of altering primary or secondary sexual characteristics"); S.B. 14, 2022 Leg., Reg.

theme in a national legislative campaign to ban GAC for minors. Advocates for the Missouri Save Adolescents from Experimentation ("SAFE") Act, for instance, cited regret testimonies from individuals like Chloe Cole, who had desisted GAC.[31] Interestingly, Georgia's legislature acknowledges the absence of comprehensive studies tracking the long-term satisfaction or regret among those who underwent gender-related medical care as children.[32] Nonetheless, it cites rising anecdotal evidence of regret and permanent physical harm associated with such treatments to support a ban on GAC for minors.[33]

Pointing to the lack of evidence, several courts have rejected arguments justifying bans on regret-prevention grounds. For example, in *Koe v. Noggle*, a district court in Georgia imposed a preliminary injunction blocking legislation that had relied on the risk of future regret as an incentive to ban GAC.[34] The court reasoned that the state demonstrated "little in the way of reliable evidence of desistance or regret in those who would qualify for hormone therapy pursuant to the applicable standard of care."[35] Another court blocked an Arkansas ban on GAC for minors after lawmakers cited "detransitioner"

Sess. (Tex. 2022) (prohibiting physicians and healthcare providers from providing gender-affirming care to youth, including puberty blockers, hormone therapy, and surgeries); S.B. 49, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023) ("[N]o health care provider shall perform gender transition surgeries on any minor . . . . no health care provider shall prescribe or administer cross-sex hormones or puberty-blocking drugs to a minor for a gender transition . . . ."); H.B. 1570, 2021 Leg., Reg. Sess. (Ark. 2021). For a tracker of these bans, see Lindsey Dawson & Jennifer Kates, *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions* KFF, (Jan. 31, 2024), https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker/ [https://perma.cc/X856-C794].

31. Jill Carter, *Senator Jill Carter's Capitol Report #4*, Mo. Sen., https://www.senate.mo.gov/Media/NewsDetails/755 [https://perma.cc/6Z6T-Q87P] ("I presented Senate Bill 164, the Save Adolescents from Experimentation (S.A.F.E.) Act, to the Senate Emerging Issues Committee on Feb. 14 . . . . Senate Bill 164 would prevent children from being subjected to hormone therapy or life-altering sex change surgical procedures before the age of 18. My colleagues and I held a press conference with 18-year-old Chloe Cole and 21-year-old Luka Hein . . . . Chloe and Luka's stories are incredibly moving. As minors, Chloe and Luka both endured double mastectomy surgeries and hormone treatment. [They] both regretted these decisions, detransitioned and are still suffering from the harm these surgeries and hormones caused.").

32. S.B. 140, 157th Gen. Assemb., Reg. Sess. (Ga. 2023) (banning performing any procedures on a minor, including surgeries and hormone replacement therapy). The bill states: "No large-scale studies have tracked people who received gender-related medical care as children to determine how many remained satisfied with their treatment as they aged and how many eventually regretted transitioning." *Id.* § 1(5).

33. *Id.* ("[T]he General Assembly is aware of statistics showing a rising number of such individuals who, as adults, have regretted undergoing such treatment and the permanent physical harm it caused . . . .").

34. Koe v. Noggle, No. 1:23-CV-2904-SEG, 2023 WL 5339281 (N.D. Ga. Aug. 20, 2023). This case was decided one day prior to the Eleventh Circuit's judgment in *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023), which allowed Alabama's ban to go into effect.

35. Koe, 2023 WL 5339281, at *20 (the court added that "when gender-affirming care involving hormone therapy is provided in accordance with the WPATH standards of care, rates of regret are low.").

testimony that Christian spiritual awakening sparked their regret.[36] The court found the ban likely unconstitutional and dismissed the state's reliance on the risk of future regret as baseless speculation.[37] A federal district court in Florida also dismissed reliance on regret in laws that prohibit Medicaid payment for GAC.[38] These courts did not reject the premise that preventing regret might be a legitimate state interest. Instead, all three focused on the state's failure to establish adequate evidence of the potential for regret. And, as discussed in the introduction, as of this writing the Supreme Court, in Labrador, and two circuit courts, the Eleventh, in *Ecknes-Tuckner*, and the Sixth, in *Skrmetti*, have allowed GAC bans to go into effect.[39]

Among other areas of alleged concern, regret about future infertility is frequently raised in support of GAC bans. In Tennessee's ban on GAC for minors,[40] the ban at issue in *Skrmetti*,[41] the legislature warned that GAC

36. Arkansas Code § 20–9-1502 provides that "physician or other healthcare professional shall not provide gender transition procedures to any individual under eighteen (18) years of age." *See also* Tess Vrbin, *Federal Judge Strikes Down Arkansas Ban of Gender-Affirming Health Care for Transgender Youth*, Ark. Advocate (June 20, 2023, 7:46 AM), https://arkansasadvocate.com/2023/06/20/judge-strikes-down-arkansas-ban-on-gender-affirming-health-care-for-transgender-youth/ [https://perma.cc/Y8AG-CCXS].

37. *See* Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727, at *36–*38 (E.D. Ark. June 20, 2023) (issuing permanent injunction was warranted because the act violated equal protection, parents' rights to substantive due process, and the First Amendment). *See id.* at *34 (internal citations omitted) ("The State argues that minors with gender dysphoria will desist with age. They contend that there is a significant risk of harm to a minor who elects to undergo gender hormone therapy or surgery because they will eventually identify with their sex assigned at birth and regret the treatment they sought as a minor . . . To the contrary, the evidence proved that there is broad consensus in the field that once adolescents reach the early stages of puberty and experience gender dysphoria, it is very unlikely they will subsequently identify as cisgender or desist. The testimony confirmed that for most people gender identity is stable over their lifetime.").

38. *See* Dekker v. Weida, No. 4:22CV325-RH-MAF, 2023 WL 4102243, at *18 (N.D. Fla. June 21, 2023) (holding that rule and statute were subject to intermediate scrutiny and motivated by discriminatory purposes in violation of the Equal Protection Clause; that risks attendant to using blockers and cross-sex hormones were not rational bases for enacting rule and statute); Doe v. Ladapo, No. 4:23CV114-RH-MAF, 2023 WL 3833848, at *14 (N.D. Fla. June 6, 2023) ("Fluidity is common prior to puberty but not thereafter. Regret is rare; indeed, the defendants have offered no evidence of any Florida resident who regrets being treated with GnRH agonists or cross-sex hormones.").

39. *See supra* notes 8–9, 16–20 and accompanying text; Labrador v. Poe, 2024 WL 1625724 (Apr. 15, 2024) (granting stay "except as to the provision to the plaintiffs of the treatments they sought"); L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 491 (6th Cir.) (holding that challenges to GAC bans in Kentucky and Tennessee likely would not succeed; transgender individuals were not a suspect class, rational basis review applied; and factor related to harm largely favored states opposing preliminary injunction.), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023); Eknes-Tucker v. Governor of Ala., 80 F.4th 1205, 1231 (11th Cir. 2023) (similarly staying a district court preliminary injunction and allowing Alabama's Vulnerable Child Compassion and Protection Act). Neither of these decisions engage directly with questions of regret.

40. Tenn. Code § 68–33–101.

41. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 468 (6th Cir.), *cert. dismissed in*

"can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering adverse and sometimes fatal psychological consequences."[42] The Alabama Vulnerable Child Compassion and Protection Act ("V-Cap"), at issue in *Eknes-Tucker*, states a similar concern: "minors, and often their parents, are unable to comprehend and fully appreciate the risk and life implications, including permanent sterility, that result from the use of puberty blockers, cross-sex hormones, and surgical procedures."[43] Clinics treating transgender youth are, however, well-aware of the fertility risks involved in GAC, and conversations about fertility effects are a regular part of GAC for minors and adults.[44]

Conservative lawmakers in Congress have also cited potential future regret as a justification for proposed bans or restrictions on GAC for minors. On May 18, 2023, Senator J.D. Vance announced his intent to introduce legislation that would criminalize providing GAC to minors as a federal Class C felony, punishable by ten to twenty-five years in prison. The *Protect Children's Innocence Act* would block taxpayer funding for GAC procedures, ban coverage of the treatments from Affordable Care Act insurance plans, stop

part sub nom (holding that plaintiff's due process and equal protection challenge likely would not succeed; transgender individuals were not a suspect class, and factor related to harm largely favored states opposing preliminary injunction). Doe v. Kentucky, 144 S. Ct. 389 (2023); *but see* Doe v. Ladapo, No. 4:23CV114-RH-MAF, 2023 WL 3833848, at *12–*13) (N.D. Fla. June 6, 2023) ("There are legitimate concerns about fertility and sexuality that a child entering puberty is not well-equipped to evaluate and for which parents may be less-than-perfect decisionmakers . . . . There is a risk that a child later confronted with the bias that is part of our world will come to believe it would have been better to try to pass as cisgender. Risks attend many kinds of medical treatment, perhaps most . . . That there are risks of the kind presented here is not a rational basis for denying patients the option to choose this treatment.").

42. *Id.* § 68–33–101(b).

43. S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022).

44. *See*, *e.g.*, Joshua Sterling & Maurice M. Garcia, *Fertility Preservation Options for Transgender Individuals*, 9 Translational Andrology & Urology S215, S215 (2020) ("Options for transwomen at any point in their transition range from simply providing a semen sample to be used with assistive reproductive techniques to experimental techniques involving testicular cryopreservation followed by *in vitro* initiation of spermatogenesis. Transmen before and after starting hormone therapy can pursue any assistive reproductive techniques available for ciswomen."); Jensen Reckhow, Hakan Kula & Samir Babayev, *Fertility Preservation Options for Transgender and Nonbinary Individuals*, 14 Therapeutic Advances in Endocrinology & Metabolism 1, 1 (2023) ("The methods available for fertility preservation depend on the patient's pubertal status and utilization of gender-affirming therapies, and counseling and delivery of these services are complex and require a multidisciplinary approach . . . . Fertility preservation is an active and exciting area of scientific discovery and offers a wealth of opportunities to improve the care of transgender and nonbinary individuals."). *See also* Beth A. Clark, *Narratives of Regret: Resisting Cisnormative and Bionormative Biases in Fertility and Family Creation Counseling for Transgender Youth*, 14 Int'l J. of Feminist Approaches to Bioethics 157, 158 (2021) (identifying "bionormativity," or the preference for parentage via genetics and gestation, as a concerning bias in transgender care). For additional discussion of fertility and GAC, see *infra* Part III.B.1 (arguing that one function of GAC bans is to promote natalism and traditional gender roles).

universities from providing instruction on GAC, and deem noncitizens who have performed GAC on a minor ineligible to receive visas or admittance to the United States. Vance declared, "With this legislation, we have an opportunity to save countless young Americans from a lifetime of suffering and regret."[45] Republican Congresswoman Marjorie Taylor Greene proposed a similar bill that "will make it illegal to perform any gender-affirming care on minors. This includes puberty blockers, hormone therapy, and sex-change surgeries."[46] As Greene explained, "Children who are not allowed to drive, vote, or see an R-rated movie should not be allowed to make life-altering decisions that will forever alter their precious bodies."[47]

B. *GAC Regret as Actionable Injury*

Many of the GAC-restricting laws create future tort liability for GAC providers in the event that patients report regret about receiving medical care. These laws extend statutes of limitations for torts claims (sometimes for decades), recognize emotional harm as actionable in-and-of-itself, eliminate consent as a possible defense for physicians, or establish future negligence per-se claims against physicians based on statutory violations. For example, on March 2, 2023, several Republican senators introduced a bill that provides that a practitioner "who performs a gender-transition procedure on an individual who is less than 18 years of age shall . . . be liable to the individual if injured (including any physical, *psychological*, *emotional*, or physiological harms) by such procedure, related treatment, or the aftereffects of the procedure or treatment."[48] Furthermore,

> An individual covered by subsection (a) who receives a gender-transition procedure from a medical practitioner . . . may, not later than the day that is *30 years after the date* on which the individual turns 18 years of age, bring a civil action against such medical practitioner in a court of competent jurisdiction for—(1) declaratory or injunctive relief; (2) compensatory damages; (3) punitive damages; and (4) attorney's fees and costs.[49]

Senator Tom Cotton cited the risk of future regret as justification for this expansion of potential tort liability. He explained, "radical doctors in the United States perform dangerous, experimental, and even sterilizing gender-transition procedures on young kids, who cannot even provide informed consent. Our bill

45. Sabrina Eaton, *JD Vance Proposes Federal Ban on Gender Transition Care for Minors*, Cleveland News (July 18, 2023, 1:15 PM), https://www.cleveland.com/news/2023/07/jd-vance-proposes-federal-ban-on-gender-transition-care-for-minors.html [https://perma.cc/GY4A-2VVH].

46. *Congresswoman Marjorie Taylor Greene's Protect Children's Innocence Act Included in RSC Budget* (June 14, 2023), https://greene.house.gov/news/documentsingle.aspx?DocumentID=469 [https://perma.cc/5MQH-XKEM].

47. *Id.*

48. The Protecting Minor from Medical Malpractice Act of 2023, H.R. 1276, 118th Cong. (2023) (emphasis added).

49. *Id.* (emphasis added).

allows *children who grow up to regret these procedures to sue for damages*. Any doctor who performs these irresponsible procedures on kids should pay."[50]

Another example is Louisiana's ban, which went into effect in July 2023. This law provides that "a person who has been harmed as a result of [GAC] *with or without consent*, shall have a cause of action for damages in a court of competent jurisdiction."[51] It also clarifies that "Consent shall not operate as defense to a petitioner's claim that is filed pursuant to this Section,"[52] establishes a long statute of limitations,[53] and recognizes a broad range of injuries for which damages would be available.[54] Other state legislatures have adopted similar strategies. Arkansas's SAFE Act provides that "a person may assert an actual or threatened violation of this subchapter as a claim or a defense in a judicial or administrative proceeding and obtain compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief."[55] Those under eighteen may "bring an action throughout their minority . . . and may bring an action in their own name upon reaching majority at any time from that point until twenty years after reaching the age of majority."[56] The statute does not mention *any injury* that a plaintiff is required to show to recover from a medical provider. Real or alleged regret would seem to be enough to trigger liability even decades after medical treatment.[57] Indiana's GAC statute simi-

50. *Rubio, Cotton, Colleagues Introduce Legislation to Protect Minors from "Gender Reassignment" Surgery*, Marco Rubio U.S. Senator for Florida (June 23, 2022), https://www.rubio.senate.gov/rubio-cotton-colleagues-introduce-legislation-to-protect-minors-from-gender-reassignment-surgery/ [https://perma.cc/K8T3-BBGC] (emphasis added).

51. H.B. 648, 2023 Reg. Sess. (La. 2023) (emphasis added) (adding, "If a court finds that a person is entitled judgment pursuant to this Section, the court shall award damages, attorney fees, and all costs of the proceeding against the defendant for violation of this Part."). *Id.* at § 1098.5.D(1). The law of informed consent "is intended to ensure that patients are not just the objects of medical practice but also free and willing participants." Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 Am. J.L. & Med 567, 577 (2011). Medical malpractice claims raising issues of informed consent can sound in either battery or negligence claims. *Id.* at 575–78 (describing the evolution and permutations of informed consent doctrine).

52. H.B. 648, 2023 Reg. Sess. § 1098.5.E (La. 2023).

53. *Id.* § 1098.5.B ("The cause of action for damages shall be commenced before the later of either of the following: (1) The lapse of a twelve-year liberative prescription once the minor reaches the age of majority. (2) Within three years from the time the person discovered or reasonably should have discovered that the injury or damages were caused by the violation.").

54. *Id.* § 1098.5.D(2) ("Damages awarded by the court pursuant to this Section may include but is not to be limited to damages for infertility or sterility that is suffered by the minor as a result of the acts prohibited by this Part.").

55. Ark. Code § 20–9-1504(b); *but see* Brandt v. Rutledge, No. 4:21CV00450 JM, 2023 WL 4073727, at *36–*38 (E.D. Ark. June 20, 2023) (holding that a permanent injunction was warranted because the act discriminated based on sex and violated equal protection, violated parents' rights to substantive due process and the First Amendment).

56. Ark. Code § 20–9-1504(c)(2).

57. In addition, a private plaintiff under this statute is not required to exhaust available administrative remedies and is entitled to recover "reasonable attorneys' fees." *Id.* § 20–9-1504(d)–(e).

larly establishes a private right of action for teens or their parents to "assert an actual or threatened violation of this chapter as a claim or defense in a judicial or administrative proceeding and may seek to obtain compensatory damages, injunctive relief, declaratory relief, or any other appropriate relief."[58] And Nebraska's ban provides that "an individual that received [GAC] while they were younger than nineteen years of age, or the parent or guardian of such individual, may bring a civil action for appropriate relief against the healthcare practitioner who performed the gender altering procedure."[59] This ban also does not clarify what damages would qualify for a successful lawsuit.[60]

Overall, these laws replace existing medical standards of care, establishing new standards for care of gender dysphoria (in minors) that strongly deter any provision of care at all.[61] The combination of new statutory presumptions of negligence or battery, broad definitions of injury (including emotional and psychological harm), long statutes of limitations, and the absence of a consent defense means that medical professionals who violate these laws can

58. Ind. Code § 25–1-22–16. The statute extends the time to sue for ten years after minority. *Id.* § 25–1-22–17 ("If an individual was less than eighteen (18) years of age when the cause of action for a violation of this chapter accrued, when the individual is eighteen (18) years of age or older, the individual may bring a cause of action at any time until the individual reaches twenty-eight (28) years of age."). The law does not require plaintiff to demonstrate an injury or exhaust administrative remedies. *Id.* § 25–1-22–18. A preliminary injunction against this law was issued in *K. C. v. Individual Members of Med. Licensing Bd. of Indiana*, No. 1:23-CV-00595-JPH-KMB, 2023 WL 4054086 (S.D. Ind. June 16, 2023) (holding that plaintiffs were likely to succeed on merits of equal protection claim, physicians were likely to succeed on First Amendment claim, plaintiffs demonstrated irreparable harm in absence of preliminary injunction; and balance of harms favored issuance of preliminary injunction.).

59. Legis. B. 574, 108th Leg., 1st Sess. § 20 (Neb. 2023) (adding that "[a]ppropriate relief under this Section includes actual damages and reasonable attorney's fees [and the action shall] be brought within two years after discovery of damages.").

60. *See also* S.B. 538, 19th Gen. Assemb., 2023 Sess. (Iowa 2023) ("[A]n action under this Section may be commenced, and relief may be granted, in a judicial proceeding without regard to whether the person commencing the action has sought or exhausted available administrative remedies."); S.B. 150, 2023 Leg., Reg. Sess. (Ky. 2023) ("Any civil action to recover damages for injury suffered as a result of [providing GAC] may be commenced before the later of: (a) The date on which the person reaches the age of thirty years; or (b) Within three years from the time the person discovered or reasonably should have discovered that the injury or damages were caused by the violation . . . .").

61. *See generally* WPATH, The World Professional Association for Transgender Health: Standards of Care for the Health of Transexual, Transgender, and Gender Nonconforming People (7th ed. 2012), https://www.wpath.org/publications/soc [https://perma.cc/69ZH-5GCZ] (outlining contemporary medical treatment standards). In medical malpractice actions, "[t]he applicable standard of care is that employed by the medical profession generally and not what one individual doctor thought was advisable and would have done under the circumstances." McNabb v. Landis, 479 S.E.2d 194, 196 (Ga. Ct. App. 1996). *See* Mayo v. McClung, 64 S.E.2d 330 (Ga. Ct. App. 1951) (the standard of care is "not a question of what one individual doctor thought was advisable."); Slack v. Moorhead, 262 S.E.2d 186, 188 (Ga. Ct. App. 1979) (the standard of care is "not what a particular doctor would do in the circumstances"); 15 Ga. Jur. § 36:37 (2024).

potentially be liable for battery or negligence *per se* or both.[62] These laws have already had a chilling effect on medical providers who can no longer support their young patients without threat of significant tort liability.[63]

II. Banning Abortion

Data suggests that abortion regret rates are quite low. A 2020 study tracking people from the time of an abortion over five years found that the vast majority of abortion recipients affirmed their choice.[64] Nevertheless, anti-abortion advocates have repeatedly and successfully sought to give regret legal and political meaning. This Part turns to that effort, tracing abortion regret narratives from *Roe v. Wade* (1973) to *Dobbs v. Jackson Women's Health Org.* (2022) and beyond, underscoring stark parallels in legal rhetoric and strategy between anti-abortion and anti-GAC campaigns.

A. *Preventing Future Regret: A State Interest in Restricting Abortion*

Adopting a core argument of the post-*Roe* anti-abortion movement, the Supreme Court in *Gonzales v. Carhart* (2007) recognized preventing potential future regret as a legitimate state interest justifying abortion regulation.[65] In *Carhart*, the Court upheld the constitutionality of a federal law banning intact dilation and extraction ("D&E"), a form of late term abortion. In the majority

62. The doctrine of negligence *per se* allows a plaintiff to prove the duty and breach elements of a negligence claim by simply showing that the defendant committed or omitted a specific act that is prohibited or required by law. *See*, *e.g.*, Jacobs v. Great S. Shopping Ctr., LLC, 2024-Ohio-1180. Not all violations of a statute or ordinance will constitute negligence *per se*, however. Courts will consider factors such as whether the injured person falls within the class of persons the statute was intended to protect, and whether the harm complained of was the harm the statute was intended to guard against. A plaintiff must also demonstrate a causal connection between the negligence per se and the injury. Mercy Hous. Ga. III, L.P. v. Kaapa, 888 S.E.2d 346 (Ga. Ct. App. 2023).

63. *See*, *e.g.*, Jim Salter & Geoff Mulvihill, *Some Providers Are Dropping Gender-Affirming Care for Kids Even in Cases Where It's Legal*, AP News (Sept. 23, 2023), https://apnews.com/article/genderaffirming-care-providers-treatment-parents-liability-45012ee33f078eeea7871e622a5eee1d [https://perma.cc/HG3T-NHBY].

64. Corinne H. Rocca, Goleen Samari, Diana G. Foster, Heather Gould & Katrina Kimport, *Emotions and Decision Rightness over Five Years Following an Abortion: An Examination of Decision Difficulty and Abortion Stigma*, 248 Social Sci. & Med. 1, 4 (2020) (finding that while about half of the participants found that it was difficult to choose an abortion only about six percent had negative feelings about the abortion five years later). These researchers found that one week after an abortion seventeen percent of study participants felt mostly negative emotions about the abortion (including some combination of sadness, anger, guilt, and regret), but less than three percent felt it was the wrong decision. *Id.* at 3, 6.

65. Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the constitutionality of the Partial Birth Abortion Ban Act of 2003). For a history of the regret narrative in the anti-abortion movement, see J. Shoshanna Ehrlich & Alesha E. Doan, Abortion Regret: The New Attack on Reproductive Freedom (2019) (tracing the narrative back to the nineteenth century anti-abortion movement and citing the role of "Crisis Pregnancy Centers," religious quasi-medical pregnancy-related service providers, in entrenching the narrative in the modern anti-abortion movement).

opinion, Justice Kennedy justified the decision in part on the ground that the ban protected those who might later come to regret the decision to end a pregnancy. Justice Kennedy offered two interrelated arguments about the potential for abortion regret. The first relates to the abortion itself:

> [R]espect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.[66]

To support this statement, Justice Kennedy relied on an amicus brief, submitted by Sandra Cano, the named plaintiff in *Doe v. Bolton*, the companion case to *Roe v. Wade*. Although Cano never received an abortion, she lamented her role in *Roe*, claiming that she was pressured to pursue an abortion that she did not want and that she was manipulated into serving as the named plaintiff in the case.[67] Cano, joining with 180 women "injured by abortion," argued that abortion has serious psychological consequences and that those signing on to the brief experienced "depression, suicidal thoughts, flashbacks, alcohol and/or drug use, promiscuity, guilt, and secrecy. Each of them made the 'choice' to abort their baby, and they have regretted their 'choices.'"[68] Cano estimated that around one in ten women receiving abortions experience some or all these negative psychological consequences.[69]

Justice Kennedy's second use of regret was more narrowly related to the subject of *Carhart*, the intact D&E procedure. He explained,

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66. *Id.* at 159 (citations omitted).

67. *See generally* Affidavit of Sandra Cano, Cano v. Bolton, 2005 WL 3881370 (N.D. Ga. 2005) (No. 13676).

68. Brief of Sandra Cano et al. as Amicus Curiae Supporting Petition, Gonzales v. Carhart, 550 U.S. 124, at 22–24 (2007).

69. *Id.* at 25. Norma McCorvey, who was Jane Roe in *Roe v. Wade*, also became an anti-abortion activist and filed a lawsuit seeking to reopen the case on the ground that many women, years after their abortions, were finally reckoning with the psychological harm that they caused. *See* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 Colum. L. Rev. 1193, 1231–32 (2010) (describing this history). These legal efforts by Cano and McCorvey were part of a broader shift in the anti-abortion movement to situate abortion restrictions as protective of women. *See* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 Duke L.J. 1641, 1688 (2008) (tracing this history, focusing in particular on anti-abortion legislation in South Dakota in 2006 and 2008 that relied on an investigation of post-abortion regret and trauma). *See also* Khiara M. Bridges, *Capturing the Judiciary:* Carhart *and the Undue Burden Standard*, 67 Wash. & Lee L. Rev. 915, 930 (2010) (observing that "the Court's citation to the 'self-evident' fact that a woman will suffer more if she learns that her abortus resembled a child reveals that, also a part of this metaphysics, is the belief that the more the woman approximates motherhood, the more damage the procedure inflicts on her. Conversely, the less the object of the procedure approximates a child, the less the woman approximates motherhood, and as a result, the less the damage that is inflicted by the abortion.").

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[70]

He posited that "[i]n a decision so fraught with emotional consequence some doctors may prefer not to disclose details of the means that will be used, confining themselves to the required statement of risks the procedure entails."[71] Justice Kennedy concluded that many pregnant people will not understand the nature of the procedure at the time it is performed and expressed concern that they will later be disturbed by it.[72] Under *Carhart*, the potential for future regret justifies narrowing the range of procedures available for late term abortions.[73]

Carhart broadened what the Court had previously considered legitimate state interest in regulating abortion. While *Casey* and *Roe* identified state interest in protecting maternal health, including mental health,[74] and "potential life," *Carhart* introduced considerations related to "the integrity and ethics of the

70. *Carhart*, 550 U.S. at 159–60.

71. *Id.* at 159.

72. Although *Casey* did not speak overtly of regret, the plurality decision foreshadows this rationale. *See* Planned Parenthood v. Casey, 505 U.S. 833, 1002 (1992). In *Casey*, the court upheld a Pennsylvania law mandating disclosure, among other things, of the gestational age of the embryo or fetus. The plurality concluded that "women considering an abortion would deem the impact on the fetus relevant, if not dispositive of the decision." *Id.* at 882. To the plurality then, the disclosure "ensure[d] that a woman apprehend the full consequences of her decision, . . . further[ing] a legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Id.* For critiques of this use of regret, focusing on its misogyny and paternalism, see Susan Frelich Appleton, *Reproduction and Regret*, 23 Yale J.L. & Feminism 255, 268 (2011) (arguing that this view of regret relies on gender stereotypes about women as "ignorant, naïve, and unable to elicit pertinent information from health care providers, as well as emotionally fragile if not psychologically unfit" (internal quotation marks omitted)). Justice Ginsburg also makes this same argument in her dissent to *Carhart*. *See* Carhart, 550 U.S. at 183–85 (Ginsburg, J., dissenting).

73. For other scholarly critiques of the use of regret in *Carhart*, *see, e.g.*, Siegel, *supra* note 69, at 1688; Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 Geo. Wash. L. Rev. 1559 (2008); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 Duke J. Gender L. & Pol'y 223 (2009); Chris Guthrie, Carhart*, Constitutional Rights, and the Psychology of Regret*, 81 S. Cal. L. Rev 877 (2008) (arguing that *Carhart* misunderstands the fundamental nature of regret and its role in human decision-making); Jody Lyneé Madeira, *Aborted Emotions: Regret, Relationality, and Regulation*, 21 Mich. J. Gender & L. 1 (2014).

74. In *Roe*, the Supreme Court cited to mental health concerns as a reason to prohibit outright abortion bans, reasoning that "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent." Roe v. Wade, 410 U.S. 113, 153 (1973). *See* Suk, *supra* note 69, at 1214–23 (describing this reasoning as a precursor to *Carhart* because, although it reaches it the opposite result, it establishes precedent for the idea that "women's psychological trauma is a distinct danger in which the state is interested").

medical profession" and the "ethical and moral concerns" of society.[75] Justice Kennedy justified invocation of both by reference to regret that those who choose abortion may experience. Regret, in *Carhart*, demonstrates the grave moral risk associated with abortion generally and intact D&E in particular.[76] *Carhart*'s logic intertwines concerns over future regret with concerns over the immorality of abortion. In *Dobbs*, the Supreme Court did not expressly invoke regret.[77] Chief Justice Roberts' concurrence, however, relied heavily on *Carhart*. Roberts cited the three-page passage of *Carhart* in which the regret argument is laid out. He observed that *Carhart* expanded the legitimate grounds for state regulation of abortion to include a "broader array of interests, such as . . . maintaining societal ethics, and preserving the integrity of the medical profession."[78] The majority also repeated a similar list of legitimate state interests, citing *Carhart*.[79]

Since *Dobbs*, the risk of future regret has continued to play a meaningful role in shaping anti-abortion laws and policies. For instance, following Florida's 2023 passage of a law criminalizing abortion after fifteen weeks, the state posted the following passage on its website:

> "The bill that the Governor is signing will save babies. This bill will save mothers and fathers from the lifetime of pain that I have suffered, and for that I am so grateful," said Pro-Life Advocate Heather Grall Barwick. "I made a mistake [to get an abortion] at 21 years old that I cannot change but I can let others learn from my mistake. I choose to share my story for my 6-year-old daughter and my 19 nieces and nephews. I chose to speak up for the women who say abortion does not cause mental distress and the

75. *Carhart*, 550 U.S. at 157–58.

76. *Id.* at 160 ("The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.").

77. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). A number of amicus briefs relied heavily on regret arguments, including numerous anecdotes from individuals expressing regret about their own abortions. Brief for Advancing American Freedom, Inc. et. al. as Amici Curiae Supporting Petitioners, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (No. 19–1392) at *20–21; Brief for Priests for Life as Amicus Curiae Supporting Petitioners, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19–1392) at *11–12; Brief for 375 Women Injured by Second and Third Trimester Late Term Abortions and Abortion Recovery Leaders as Amici Curiae Supporting Petitioners, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19–1392) at *14–15.

78. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 350–52 (2022) (Roberts, C.J. concurring) (citing *Gonzales v. Carhart*, 550 U.S. 124, 157–60 (2007)); *see supra* notes 66–76 (analyzing and quoting from this three-page passage of Carhart).

79. Although the majority rejects Chief Justice Roberts's preferred disposition of the case, they seem to agree with his assessment of the legitimate state interests at stake. *Dobbs*, 550 U.S. at 301 (citing *Carhart*, 550 U.S. at 157–58, which includes the discussion of legitimate state interests). The majority neither discusses regret nor cites directly to the passage of *Carhart* discussing regret but given that the regret narrative was fundamental to *Carhart*'s conclusions regarding what qualified as legitimate state interests, the majority's reliance on *Carhart* is meaningful.

> women in their 70s who had abortions who just now are able to testify on the regret they have held for 40 years."[80]

Barwick implies that statements from women who claim not to regret their abortions should not be taken seriously.[81] Instead, these women are not yet willing or able to speak of their regret.[82] Here, the State of Florida identifies the desire to protect pregnant people from potential regret as a key function of a legislation that limits abortion in the state.

The risk of future regret is a key component of informed consent laws that anti-abortion advocates have promoted over several decades. At the time *Carhart* was decided, twenty-three states had already passed laws containing abortion-unique informed consent requirements.[83] These requirements serve at least two roles in the anti-abortion movement. First, they seek to dissuade those seeking abortions from going through with them.[84] Second, they have long served as part of a broader incrementalist strategy to undermine the right to an abortion.[85] Many informed consent laws were modeled on the Pennsylvania statute that the Supreme Court upheld in *Casey*, which included

80. *What They Are Saying: Governor Ron DeSantis Signs Bill to Protect the Lives of Florida's Most Vulnerable*, Ron DeSantis (Apr. 14, 2022), https://www.flgov.com/2022/04/14/what-they-are-saying-governor-ron-desantis-signs-bill-to-protect-the-lives-of-floridas-most-vulnerable/ [https://perma.cc/659Q-MVAM] (quoting a pro-life advocate in support of Florida's fifteen-week abortion ban).

81. *Id.*

82. *See* Suk, *supra* note 69, at 1232 (recounting a very similar story from other anti-abortion activists); *see infra* note 153 and accompanying text (elaborating on the rhetorical use of this phenomenon).

83. Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent,* Guttmacher Inst. (Nov. 8, 2007), https://www.guttmacher.org/gpr/2007/11/state-abortion-counseling-policies-and-fundamental-principles-informed-consent [https://perma.cc/WE9Q-8LYS]. Legal scholars have criticized these laws on a number of grounds, including as a form of "abortion exceptionalism," special legal treatment for abortion by contrast to other types of medical care. Manian, *supra* note 73, at 227 (describing the divergence of informed consent law in the abortion context). Legal Scholar Ian Vandewalker has referred to this type of disclosure law as "biased counseling," "placing requirements on providers and patients that are more demanding than for another medical procedure [in order to] discourage women from choosing to terminate their pregnancies." Ian Vanderwalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 Mich. J. of Gender & L. 1, 13 (2012). *See also id.* (identifying a range of laws including those that require specific statements, often false or misleading, on a broader range of topics from including the mental health risks of abortion to fetal pain). For another example of malpractice-related abortion exceptionalism, see *K.P. v. LeBlanc*, 729 F.3d 427, 442–43 (5th Cir. 2013) (upholding a Louisiana law excluding abortion providers from a state malpractice insurance fund).

84. *See* Katarzyna Kordas, *A Hurdle Too High: The Unconstitutionality of Mandatory Ultrasounds Under* Casey*'s Undue Burden Standard*, 23 Cardozo J. Gender & L. 367, 371–74 (2017) (exploring the purposes behind mandatory ultrasound laws).

85. Danielle Lang, *Truthful but Misleading? The Precarious Balance of Autonomy and State Interests in* Casey *and Second-Generation Doctor-Patient Regulation*, 16 U. Pa. J. Const. L. 1353, 1376–83 (2014); Kathryn A. Eidmann, Acuna *and the Abortion Right: Constraints on Informed Consent Litigation*, 20 Colum. J. Gender & L. 262, 271–74 (2011).

abortion-specific informed consent requirements such as a twenty-four-hour waiting period.[86] These laws included features such as waiting periods,[87] mandatory descriptions of all common abortion procedures (not just the procedure sought), descriptions of fetal development throughout pregnancy, and either a requirement to provide an ultrasound or to direct the pregnant person to where they might get an ultrasound.[88]

A common feature of anti-abortion informed consent laws is the mandate to disclose the risk of psychological harm.[89] Psychological harm is a stand in for regret.[90] Laws mandating disclosure often force the spread of what many have characterized as misinformation about the nature of the psychological risks.[91] Others have pointed out that these disclosure requirements could cause actual regret by increasing abortion recipient perceptions of abortion stigma.[92] Together, *Casey* and *Carhart* enabled state legislatures to rely on risks of coercion and psychological trauma to constrain abortion access.[93] Preventing

86. Planned Parenthood v. Casey, 505 U.S. 833, 1002 (1992). *Casey* established the undue burden test that governed review of abortion restrictions until the case was overturned by *Dobbs* in 2022. Manian, *supra* note 73, at 247–49 (characterizing *Casey* as a deviation from earlier Supreme Court precedent that was far more skeptical of abortion-specific informed consent mandates).

87. A waiting period is the duration of time after the patient has received mandated disclosures and before the procedure can be performed. Many states require that the initial disclosure be given in person, meaning that the waiting period necessitates a second visit to the doctor. *Counseling and Waiting Periods for Abortion*, Guttmacher Inst. (Aug. 30, 2023), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion [https://perma.cc/8GVP-ZWWJ] [hereinafter Guttmacher Inst., *Counseling and Waiting Periods for Abortion*].

88. *State Policy on Informed Consent for Abortion*, Guttmacher Inst. (2007), https://www.guttmacher.org/sites/default/files/graphics/gpr1004/gpr100406t1.pdf [https://perma.cc/37CN-DHLZ] [hereinafter Guttmacher Inst., *State Policy*]; Nadia N. Sawicki, *Tort Law Implications of Compelled Physician Speech*, 97 Ind. L.J. 939, 942–47 (2022) (summarizing these laws and explaining how they are different from traditional common law informed consent doctrine).

89. Katherine Shaw & Alex Stein, *Abortion, Informed Consent, and Regulatory Spillover*, 92 Ind. L.J. 1, 11 (2016). *See also* Guttmacher Inst., *State Policy*, *supra* note 88.

90. Alesha Doan, Carolina Costa Candal & Steven Sylvester, *"We Are the Visible Proof": Legitimizing Abortion Regret Misinformation Through Activists' Experiential Knowledge*, 40 Law & Pol'y 33, 33 (2017) (describing how these laws "conceptualize [regret] as a form of posttraumatic stress disorder").

91. *Id.* at 35–37 (tracking the use of regret misinformation in state abortion disclosure laws).

92. Appleton, *supra* note 72, at 316–17 (identifying a variety of ways in which public policy might generate regret of adoption and abortion decisions); *see* Rocca et al., *supra* note 64 (finding that regret increases with perception of abortion stigma).

93. In *Carhar*t, Justice Ginsburg, dissenting, proposed that any true concern regarding consent should be addressed not by banning the procedure but by mandating additional disclosures to patients. *See* Suk, *supra* note 69, at 1236–37 (positing that this remedy was unsatisfying to Justice Kennedy because the risk of trauma was too high to be bearable). Since *Carhart*, six more states have passed such laws and many states have added additional requirements to laws already on the books. Guttmacher Inst., *Counseling and Waiting Periods for Abortion*, *supra* note 87.

abortion regret is a legislative interest prevalent in informed consent laws, and courts have regularly upheld them.[94]

B. *Abortion Regret as Actionable Injury*

1. Tort Liability

Shortly after *Roe*, anti-abortion activists began using medical malpractice litigation strategically, seeking to dissuade abortion providers by increasing liability costs.[95] State legislatures have also taken up this strategy, passing strategic liability laws that create causes of action for recipients of abortions.[96] In some states, these laws are directly tied to informed consent, creating strict liability for doctors who violate statutory mandates.[97] Strategic abortion liability laws deviate from traditional medical malpractice standards, making it easier to prevail in lawsuits against medical practitioners.[98] Even in states without an express civil liability provision, the informed consent provisions may themselves create an implied right of action.[99]

94. *See*, *e.g.*, Bristol Reg'l Women's Ctr., P.C. v. Slatery, 7 F.4th 478, 481 (6th Cir. 2021), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (finding a rational basis for the law grounded in Tennessee's interest in "protecting the life of the unborn" and ensuring that a "woman's consent is informed and deliberate") (internal quotation marks omitted). Tennessee defended the law explicitly on regret grounds, relying in the District Court on expert testimony about rates about post-abortion regret, but the District Court, which found the law unconstitutional, found the evidence not credible and determined that it instead established the low incidence of post-abortion regret. *See id.* at 517–20 (Moore, J., dissenting) (concluding that "there is no evidence whatsoever that a waiting period improves decisional certainty or causes a woman not to have an abortion that she would have regretted"). When Indiana passed a similar law in 1995, with an eighteen-hour waiting period, concern about regret featured heavily in the legislative debate. A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 701–02 (7th Cir. 2002) (Coffee, J., concurring) (describing the legislative hearing).

95. *See* Eidmann, *supra* note 85, at 267; Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. Ill. L. Rev. 489, 494–96 (describing this history). Legal scholars dispute whether these laws expose doctors to more liability or narrower potential liability. *Compare id.* at 540–45 (arguing that many of these right to know statutes have the effect of insulating doctors from common law liability standards by creating exclusive causes of action based on violation of the statutes) *with* Sawicki, *supra* note 88 (arguing that these statutes relax liability standards and make it easier to sue abortion providers for malpractice related to informed consent).

96. *See* Sawicki, *supra* note 88, at 941–55 (citing and discussing numerous examples).

97. *See*, *e.g.*, Wis. Stat. § 253.10(6); *see also* Karlin v. Foust, 188 F.3d 446, 446 (7th Cir. 1999) (reading the Wisconsin law to establish strict liability where a physician omits any of the required disclosures).

98. *See generally* Sawicki, *supra* note 88 (arguing that these statutes relax liability standards and make it easier to sue abortion providers for malpractice related to informed consent); *but see* Northern, *supra* note 95, at 540–45 (arguing that many of these right to know statutes have the effect of insulating doctors from common law liability standards by creating exclusive causes of action based on violation of the statutes).

99. *See* Shaw & Stein, *supra* note 89, at 4 n.16 (explaining that violation of informed consent is a tort in every jurisdiction, that health and safety statutes typically create duties toward their beneficiaries, and that patients receiving abortions are typically the designated beneficiaries of informed consent laws).

Without identifying regret expressly, many of these strategic liability laws allow abortion recipients to seek recovery based on emotional injuries. *Carhart's* equation of regret and psychological harm makes mention of regret unnecessary.[100] Justice Kennedy emphasized how the later revealed information about the nature of the procedure could change the abortion recipient's understanding of the event, rendering it psychologically harmful and generating regret after the fact.[101] Other kinds of revelations, for instance religious conversions, could have the same result.

In the anti-abortion movement, regret and psychological harm have become synonymous. Consider some examples. In 1993, South Dakota amended its abortion laws to provide for both civil and criminal liability where an abortion is performed in violation of the informed consent requirements.[102] The provision provided for punitive damages in the amount of $10,000 and treble damages.[103] The Eighth Circuit read the provision to create strict liability and, applying *Casey*'s undue burden test, struck it down on the ground that "[t]he potential civil liability for even good-faith, reasonable mistakes is more than enough to chill the willingness of physicians to perform abortions in South Dakota."[104] This law would have allowed a person experiencing abortion regret to prevail if they could find any violation, however small or unintentional, of South Dakota's informed consent requirements.

A 1997 Louisiana law created even broader liability, establishing a cause of action based on harm to either the mother or the fetus resulting from

100. Commenting on *Carhart*, Jeannie Suk Gersen reflected that what was then the "newly prominent legal discourse of abortion regret" did not, as some critics had argued, come out of nowhere. Instead, "the reasoning continues a . . . feminist discourse of trauma around women's bodies and sexuality." Suk, *supra* note 69, at 1197; *see also* Noa Ben-Asher, *Trauma-Centered Social Justice*, 95 Tul. L. Rev. 95 (2020) [hereinafter Ben-Asher, *Trauma-Centered Social Justice*]. Reading *Carhart* closely, Suk Gersen viewed the psychological harm described as "more elaborate than regret." Suk, *supra* note 69, at 1234. Arguably, what it is more elaborate than run-of-the-mill regret, that is relatively easily processed. Guthrie, *supra* note 73 (explaining how *Carhart* misunderstands the way in which most people learn from and move on from feelings of regret). Central to the trauma narrative is the implication of *coercion*, that the abortion itself was not the result of free choice. Suk, *supra* note 69, at 1246–49 (tracing this thread in the anti-abortion rhetoric and tracing it to feminist arguments about coercion in sexual relationships). For parallel arguments about the choice to become a mother, *see infra* note 179 and accompanying text.

101. Suk, *supra* note 69, at 1234. This interpretation of *Carhart* potentially explains why the Justice Kennedy's apparent definition of regret is out of step with that of many philosophers, who emphasize that regret occurs when a person evaluates a past decision using knowledge that was not available to them at the time. *See* Appleton, *supra* note 72, at 267 (pointing out that in *Carhart*, the regret occurs instead when a woman evaluates the decision to get an abortion applying knowledge she has acquired later about the nature of the procedure that would have been available at the time of the decision).

102. S.D. Codified Laws § 34–23A-22 (1993).

103. *See id.* (also providing for fee shifting for successful plaintiffs).

104. Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1467 (8th Cir. 1995).

the abortion.[105] Defenders of the statute argued that the law was necessary to protect women who might experience psychological side-effects from the abortion.[106] The scope of statutory liability was vague, creating the possibility that an abortion recipient might successfully sue even in the absence of physical harm and even where a doctor had complied fully with any relevant standards of care.[107] A District Court found the law unconstitutional, expressing concern about "the removal of the cause of action from the realm of medical malpractice," and observing that the broad catchall provision directly contradicted the states informed consent law, which established compliance with disclosure obligations as an affirmative defense to tort suits alleging inadequate warning.[108] Further, the court observed that because the statute included harm to the "unborn child," any abortion would, by definition, give rise to liability.[109] This decision was reversed by the Fifth Circuit, sitting *en banc*, on jurisdictional grounds.[110] The civil liability provision in Louisiana remains on the books.

One final example illustrates how broad civil liability laws make regret an actionable injury. A 2010 Nebraska law established a variety of specific disclosure and informed consent requirements and provided that "failure to comply with [those] requirements shall create a rebuttable presumption that the pregnant woman would not have undergone the recommended abortion had the [disclosure requirements] been complied with by the physician."[111] Criticizing the bill, a federal court observed:

> For the woman who comes to regret having had an abortion, LB 594 provides her with a target to blame—a physician stripped of the usual statutory and common law defenses, and made civilly liable for the most extensive damages, by way of an "informed consent" mandate that is either impossible to satisfy, or so vague that the physician (and a jury) are left to speculate about its meaning. LB 594 also provides the remorseful woman and her lawyer with a very substantial financial incentive to initiate such litigation, whether or not she truly does regret her decision to obtain an abortion—her regret is presumed. Although this presumption is

105. La. Stat. § 9:2800.12 (establishing that compliance with informed consent requirements only reduces but does not eliminate liability).

106. Okpalobi v. Foster, 981 F. Supp. 977, 983 (E.D. La. 1998), *aff'd*, 190 F.3d 337 (5th Cir. 1999), and *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001).

107. *Id.* at 983–94.

108. *Id.*

109. *Id.* at 986.

110. *See generally* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001).

111. Planned Parenthood of the Heartland v. Heineman, 724 F. Supp. 2d 1025, 1034 (D. Neb. 2010) (granting a preliminary injunction against the bill after determining it was likely unconstitutional). The disclosures included detailed descriptions of the risks association with the abortion procedure and the gestational age of the child. Under traditional tort principles, a plaintiff bringing an action based on failure to provide informed consent would need to prove that they would not have undergone the procedure if they had been better informed. *See*, *e.g.*, Reynier v. Delta Women's Clinic, Inc., 359 So. 2d 733 (La. Ct. App. 1978) (applying this principle in the abortion context).

> "rebuttable," it is difficult to conceive how any defendant could effectively rebut such as assertion.[112]

As the District Court explains, regret, in this (and similar) legislation, was weaponized against doctors. Regret functionally makes what was a consensual medical procedure nonconsensual *in hindsight*. Applying *Casey*, the court refused to treat regret differently in the abortion context. The court observed that some degree of abortion regret is inevitable "because any major decision will lead to regret in some percentage of cases. The most important choices have consequences, and no matter how well-reasoned and fully deliberated, those decisions can lead to remorse. That is part of the price we pay for our freedom."[113]

Medical malpractice litigation is always a possible outcome of providing medical care, but for the most part, regret—absent physical harm or absent lack of consent—generates no physician liability.[114] A patient who changes their mind after a medical procedure has no recourse. Strategic abortion liability laws bypass this central common law principle, making regret alone actionable.

2. Standing

More recently, the North District of Texas and the Fifth Circuit have recognized regret as a distinct injury that might give rise to Article III standing. Typically, to establish standing to bring an action in federal court, a plaintiff

112. *Planned Parenthood of the Heartland*, 724 F. Supp. 2d at 1045 (internal citations omitted).

113. *Id.* at 1045 & n.12 (concluding, parenthetically, "Only Edith Piaf was without regret. Had she been sober, she, too, might have had second-thoughts."). The state consequently entered into a settlement agreement with the plaintiffs, agreeing not to enforce the provisions of the new law. *See generally* Planned Parenthood of the Heartland v. Heineman, Case no. 4:10CV3122 (D. Neb. 2010) (Order and Final Judgement). Nebraska currently enforces an older version of the law, which makes violation of the disclosure requirements "prima facie evidence of professional negligence," but establishes a "rebuttable presumption of full compliance" where the person upon whom an abortion has been performed signed, at the time of the procedure, a written certification that they received all the necessary disclosures. Neb. Rev. Stat. § 28–327.04 (the current evidentiary rule); Neb. Rev. Stat. § 28–327(7) (requiring the written certification as part of the informed consent process).

114. Most states apply an objective causation standard in informed consent malpractice claims, requiring that a plaintiff establish that a reasonable person would not have undergone the procedure had they been adequately informed. Explaining the choice of an objective standard over a subjective approach, the D.C. Circuit explained, "[i]n our view, [the subjective approach] of dealing with the issue of causation comes in second-best. It places the physician in jeopardy of the patient's hindsight and bitterness." Canterbury v. Spence, 464 F.2d 772, 790–791 (D.C. Cir. 1972). In the medical malpractice negligence context, regret alone would not form the basis for a cause of action even in jurisdictions recognizing emotional harms, plaintiffs must still establish breach of the duty of care. *Elements of Malpractice or Negligence in General*, Am. L. Rep. § 611 (2024); Restatement (Third) of Torts: Physical & Emotional Harm § 47 cmt. f (Am. L. Inst. 2012) (observing that some jurisdictions allow recovery for the emotional harm to the parent flowing from the negligent caused loss of a fetus or newborn).

must demonstrate, among other things, "an injury in fact."[115] In *Alliance for Hippocratic Medicine v. FDA*, Judge Matthew Kascmaryk of the Northern District of Texas relied on abortion regret to conclude that an association of doctors had standing to challenge FDA approval of Mifeprestone, a drug approved for early-term abortion.[116] The plaintiffs asserted standing on behalf of member doctors and on behalf of patients. Judge Kascmaryk accepted both, explaining that inadequacies in the FDA approval process meant that doctors could not adequately inform their patients about "potential negative emotional reactions like fear, uncertainty, sadness, regret, and pain."[117] In support of the conclusion that doctors have third-party standing on behalf of patients, Judge Kascmaryk observed, "Women who have aborted a child—especially through chemical abortion drugs that necessitate the woman seeing her aborted child once it passes—often experience shame, regret, anxiety, depression, drug abuse, and suicidal thoughts because of the abortion."[118] Judge Kascmaryk concluded that the plaintiff doctors "—rather than their patients—are most likely the 'least awkward challenger[s]' to Defendants' [FDA] actions."[119] The Fifth Circuit upheld these conclusions on appeal, agreeing that "treating mifepristone patients imposes considerable mental and emotional stress on emergency-room doctors. This is due to the unique nature of chemical abortions, which, according to the plaintiff-doctors, frequently cause 'regret' or 'trauma' for the patients and, by extension, the physicians."[120]

This case—which focuses on regret potentially experienced by those receiving chemical abortions and by the doctors administering them or treating recipients if something goes wrong—recognizes the validity of regret as

115. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (defining injury as the "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical").

116. All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 524 (N.D. Tex. Apr. 7, 2023) (analyzing plaintiffs' standing for a preliminary injunction on FDA's approval of mifepristone and relaxation of regulations).

117. *Id.* This is not the first time that regret has come up in the context of an abortion-related standing decision. In several pre-*Dobbs* cases, state defendants unsuccessfully contested the standing of medical associations who were challenging abortion restrictions, arguing that because of the possibility of future abortion decision regret, doctors had a conflict of interest with abortion patients and could not represent them on third-party standing theory. *See* Little Rock Fam. Plan. Servs. v. Rutledge, 398 F. Supp. 3d 330, 372 (E.D. Ark. 2019) (relying on abortion informed consent laws to conclude that the possibility of regret did not create a conflict of interest). *See also* Singleton v. Wulff, 428 U.S. 106, 113 (1976) (finding doctors have third-party standing to challenge abortion restrictions).

118. *All. for Hippocratic Med.*, 668 F. Supp. 3d at 526 (finding that "women who have *already* obtained abortions may be *more* hindered than women who challenge restrictions on abortion").

119. *Id.*

120. All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 232 (5th Cir. 2023), cert. granted sub nom. Danco Lab'ys, L.L.C. v. All. Hippocratic Med., No. 23–236, 2023 WL 8605744 (U.S. Dec. 13, 2023), and cert. granted sub nom. FDA v. All. Hippocratic Med., No. 23–235, 2023 WL 8605746 (U.S. Dec. 13, 2023), and cert. denied sub nom. All. Hippocratic Med. v. FDA, No. 23–395, 2023 WL 8605749 (U.S. Dec. 13, 2023).

a distinct injury.[121] Although regret is not the sole injury on which plaintiffs rely,[122] the attention to it is significant. Mere regret has historically not been enough to justify standing,[123] but courts have previously acknowledged the possibility that emotional trauma could be sufficient injury, so long as it is particularized to plaintiffs.[124] The Supreme Court has also been hesitant to accept arguments that standing flows from fear or anxiety of future events, especially where there is not a "real and immediate future threat."[125] Lower courts have frequently relied on tort law to determine whether a particular claim of emotional harm constitutes an injury, tying the federal law of standing to state tort law.[126]

In recognizing regret as an injury, the Northern District of Texas and the Fifth Circuit make two significant moves.[127] First, they implicitly accept the gravity of the regret concern—that regret is a serious harm to be avoided. Second, they further entrench the state's interest in preventing future regret by allowing litigants to use federal courts to vindicate an interest in regret avoidance.

121. Regret does not carry this same legal significance in all contexts. *See generally* Appleton, *supra* note 72 (comparing the legal significance of regret in the abortion context with a variety of other contexts involving reproduction, including adoption, where the regret of the birth mother, even in the face of strong evidence of manipulation by the adoptive parents, was not persuasive in establishing a standard more protective of birth mothers).

122. *All for Hippocratic Med.*, 668 F. Supp. 3d at 524 (discussing potential physical side effects of mifepristone among other related injuries).

123. *See*, *e.g.*, Eike v. Allergan, Inc., 850 F.3d 315, 318 (7th Cir. 2017) (rejecting standing in a class action suit against a manufacturer where standing was based on "a regret or disappointment" with the product).

124. *See* Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 Brook. L. Rev. 1555, 1578 (2016).

125. *Id.* at 1578–80 (describing this jurisprudence).

126. *See id.* at 1590–92 (describing this trend); *see supra* notes 124–25 and accompanying text (discussing principles of emotional harm in tort law).

127. As of this writing, this case has been fully briefed and argued before the Supreme Court, but the Court has yet to issue a decision. In its brief in opposition to certiorari, the Alliance for Hippocratic Medicine repeated these arguments but emphasized the emotional harm to doctors themselves rather than the emotional harm to abortion recipients. FDA v. All. Hippocratic Med., 2023 WL 9643014, at *34–*35 (Nov. 9, 2023) (Respondents' Brief in Opposition); *see also* Transcript of Oral Argument at 62, FDA v. All. for Hippocratic Med., (2024) (No. 23–235, No. 23–236), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22–235_q8l1.pdf [https://perma.cc/7JXT-5ZNP]. Numerous amici repeat the argument. Some to support standing analysis. *See*, *e.g.*, FDA v. All. Hippocratic Med., 2024 WL 948009, at *22 (Feb. 29, 2024) (Brief of Missouri, Idaho, & Kansas in Support of Alliance for Hippocratic Medicine). Some to support the claim, on the merits, that FDA approval of abortion-inducing drugs was flawed because the safety analysis did not adequately consider the harm of potential regret. *See*, *e.g.*, Brief of Amici Curiae Family Policy Alliance and State Family Policy Councils in Support of Respondents, FDA v. All. Hippocratic Med., 2024 WL 945351, at *13–*14 (Feb. 28, 2024).

III. Gender Regrets and Traditional "Family Values"

There are striking parallels between the use of regret in the movements to ban GAC and abortion. In both, advocates cite a hypothetical risk of future regret to support bans on medical care. Those seeking GAC or abortions must allegedly be protected from these procedures, the doctors who would perform them, and the parents who support them. This Part explores the ideological threads that tie these two movements together. Section A uses the writings of two conservative leaders—Pat Buchanan and Phyllis Schlafly—to illuminate the values underlying both movements. Section B demonstrates how both movements use regret as a disciplining tool to pursue conservative values, including natalism, traditional gender roles, and the male-female binary. Section C reflects on the use of regret to justify government action, calling for caution.

A. *A Fight for the "Soul of America"*

In a passionate speech in the summer of 1992 at the Republican National Convention in Houston, Patrick J. Buchanan declared a "cultural war" for the "soul of America."[128] "George Bush is a defender of right-to-life, and a champion of the Judeo-Christian values and beliefs upon which America was founded," he said, following, "Mr. Clinton, however, has a different agenda. At its top is unrestricted abortion on demand."[129] Buchanan warned Republicans:

> The agenda that Clinton & Clinton would impose on America – abortion on demand, a litmus test for the Supreme Court, homosexual rights, discrimination against religious schools, women in combat units – that's change, all right. But it is not the kind of change America needs. It is not the kind of change America wants. And it is not the kind of change we can abide in a nation that we still call God's country.[130]

The "cultural war," declared over three decades ago at the Republican convention that nominated George H.W. Bush, portrayed reproductive freedoms and gay rights as an attack on "God's country" and on "Judeo-Christian values."[131] Four years later, with President Bill Clinton in the White House,

128. Patrick Joseph Buchanan, Culture War Speech: Address to the Republican National Convention (Aug. 17, 1992), https://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text/ [https://perma.cc/Q469-K572] ("It is a cultural war, as critical to the kind of nation we shall be as was the Cold War itself, for this war is for the soul of America. And in that struggle for the soul of America, Clinton & Clinton are on the other side, and George Bush is on our side. And so, to the Buchanan Brigades out there, we have to come home and stand beside George Bush."). *See also* Adam Nagourney, *'Cultural War' of 1992 Moves in from the Fringe*, N.Y. Times (Aug. 29, 2012), https://www.nytimes.com/2012/08/30/us/politics/from-the-fringe-in-1992-patrick-j-buchanans-words-now-seem-mainstream.html [https://perma.cc/P7KD-G2D7].

129. Buchanan, *supra* note 128 (adding, "a militant leader of the homosexual rights movement could rise at that same convention and say: 'Bill Clinton and Al Gore represent the most pro-lesbian and pro-gay ticket in history.' And so they do.").

130. *Id.*

131. *Id.*

the Supreme Court in *Romer v. Evans* held that an amendment to Colorado's Constitution that denied antidiscrimination protections for gays and lesbians violated the Equal Protection Clause.[132] Justice Scalia dissented, with a dramatic exclamation: "The Court has mistaken a *Kulturkampf* [culture war] for a fit of spite."[133] Coloradans, according to Justice Scalia, discriminated against gays and lesbians not out of animus but due to a desire to "preserve traditional sexual mores."[134] Justice Scalia resisted an "elite class" that would impose its view that "'animosity' toward homosexuality is evil" on the rest of America.[135]

The GAC regulations examined here—like abortion regulations—often have overt Judeo-Christian grounding. For instance, Oklahoma titled its GAC ban the *Millstone Act*, referring to Matthew 18:6: "but whoever causes one of these little ones who believe in Me to sin, it is better for him that a heavy millstone be hung around his neck, and that he be drowned in the depths of the sea."[136] The Millstone Act is about disciplining sinners. The ban sets up heavy millstones—civil and criminal liability—to be hung on the necks of medical providers and parents who cause "these little ones" to sin by pursuing their gender identity. What is at stake here is not a dispute with medical science or, even, psychological regret. It is conservative Christian morality *defending against* transgender existence.

Phyllis Schlafly was a well-known critic of feminism and what she called the "equality principle." Her advocacy for "traditional family values" foreshadows and sheds light on twenty-first century campaigns to ban abortion and GAC.[137] From the 1960s and on, Schlafly was an influential conservative activist, a national leader and spokesperson of the conservative movement, and an anti-feminist.[138] In a representative piece published in 1994, Schlafly attacked the newly appointed associate justice of the Supreme Court, Ruth Bader Ginsburg (who, for Schlafly, represented feminism itself) for attempting "to induce changes in cultural stereotypes, social mores, and relationships between men and women."[139] Schlafly warned,

132. Romer v. Evans, 517 U.S. 620 (1996).

133. *Id.* at 636 (Scalia, J. dissenting) (emphasis added).

134. *Id.*

135. *Id.*

136. S.B. 129, 2023 Leg., Gen. Sess. (Okla. 2023) (prohibiting gender transition procedures or referral services relating to such procedures to anyone under the age of 26, authorizing the state's attorney general to enforce the act and those found guilty of violating it would be guilty of a felony and subject to license revocation).

137. Phyllis Schlafly, *How the Feminists Want to Change Our Laws*, 5 Stan. L. & Pol'y Rev. 65, 66–67 (1994).

138. *See*, *e.g.*, Valerie J. Nelson, *'Don't Call Me Ms . . . . It Means Misery: Phyllis Schlafly, Anti-feminist and Conservative Activist, Dies at 92*, LA Times (Sept. 5, 2016, 6:20 PM), https://www.latimes.com/local/obituaries/la-me-phyllis-schlafly-snap-story.html [https://perma.cc/54UV-NJZN].

139. Schlafly, *supra* note 137, at 66 ("To her and to other feminists, any route to that goal was acceptable: activist judicial re-interpretation of the Fourteenth Amendment to the U.S. Constitution (which she used for her winning Supreme Court cases), or ratification of the then-pending Equal Rights Amendment."). For an analysis of Justice Ruth Bader Ginsburg's

> *Sex Bias*[140] stands today as a textbook on how Ruth Bader Ginsburg and the feminists want to change our laws, our institutions, and our attitudes, in order to conform them to the "equality principle" and convert America into a "gender-neutral" society. It documents the radical and extremist goals of the feminists and how they seek to restructure our laws and society.[141]

As a thought leader for the conservative movement, Schlafly expressed pro-natalist views, most explicitly apparent in opposition to abortion and reproductive rights. She was also concerned with preserving traditional gender norms and was a fierce opponent of same-sex marriage.[142]

Twenty-first century policies and laws involving GAC and abortion echo Schlafly's agenda of traditional family values and a rigid system of binary sexual difference. Schlafly viewed gender equality *in all its manifestations* as an attack on the traditional American family because equality (as she saw it) upsets traditional gender roles of men as breadwinners and women as caregivers.[143] She associated Justice Ginsburg with "the typical 1970s feminist attitude that women's liberation and equality in the workforce required liberation from marriage, that is, easy divorce . . . ."[144] She was hostile to the no-fault divorce reforms that feminists had promoted as a tool to liberate women from oppressive marriages.[145] The primary role of woman, claimed Schlafly, was a homemaker and a mother.[146] Like conservative policymakers and lawmakers today, she underscored the role of women as birth-givers. She characterized

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approach to sex discrimination, see generally Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83 (2010); Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. Rev. 1187 (2016).

140. U.S. Comm'n on C.R., Sex Bias in the U.S. Code: A Report of the United States Commission on Civil Rights, v (1977).

141. Schlafly, *supra* note 137, at 66–67.

142. The Phyllis Schlafly Report, *Feminists Psychoanalyze Themselves Again*, 43 Eagle Forum 4 (2009), https://eagleforum.org/psr/2009/nov09/psrnov09.html [https://perma.cc/LRE2-K2XU] ("Attacks on the definition of marriage as the union of one man and one woman come from the gay lobby seeking social recognition of their lifestyle, from the feminist movement that opposes what they call the patriarchy (that supposedly makes women second-class citizens), and also from some libertarians . . . .").

143. Schlafly, *supra* note 137, at 67 (criticizing Justice Ginsburg for allegedly proposing "that the traditional family concept of husband as breadwinner and wife as homemaker must be eliminated.").

144. *Id.*

145. Eliminating no-fault divorce is now part of the Republican Party platform in two states. *See* Kimberly Wehle, *The Coming Attack on an Essential Element of Women's Freedom*, The Atlantic (Sept. 26, 2023), https://www.theatlantic.com/ideas/archive/2023/09/no-fault-divorce-laws-republicans-repeal/675371/ [https://perma.cc/6A27–48BU]; AJ Willingham, *What Is No-Fault Divorce, and Why Do Some Conservatives Want to Get Rid of It?*, CNN (Nov. 27, 2023, 9:49 AM), https://edition.cnn.com/2023/11/27/us/no-fault-divorce-explained-history-wellness-cec/index.html [https://perma.cc/D9AG-VU2X].

146. *Anniversary:* Roe v. Wade *with Phyllis Schlafly*, Wash. Post (Jan. 18, 2002, 3:00 PM), https://www.washingtonpost.com/wp-srv/liveonline/02/nation/nation_schlafly011802.htm [*https://perma.cc/U7TT-EF75*] (arguing that invalidating laws that favor wives and mothers ought to be seen as an attack on women).

Roe v. Wade as "the worst decision in the history of the U.S. Supreme Court" because it is "responsible for the killing of millions of unborn babies."[147] And she condemned Ginsburg's claim that "government has an affirmative duty to fund abortions for poor women [and that] anti-abortion laws interfere with a woman's ability 'to participate equally in the economic and social life of the Nation.'"[148]

Schlafly asserted that Ginsburg's positions on traditional gender roles, no-fault divorce, and access to abortion for poor people, "betray her as a radical, doctrinaire feminist, far out of the mainstream . . . [who] shares the chip-on-the-shoulder radical feminist view that American women have endured centuries of oppression and mistreatment from men."[149] Schlafly concludes,

> Feminists are split by a curious dichotomy. Do they really want a totally gender-neutral society in which we are all forced to pretend there is no difference between men and women? . . . Or, on the other hand, do they want special privileges for women, conveniently resting this demand on the theory that such privileges are needed to remedy centuries of discrimination? Does "equality" mean forever playing the role of victim and demanding affirmative action, protection against sexual harassment, and expensive employer and government benefits (such as family leave and daycare) to accommodate women's traditional family responsibilities?[150]

It is evident from Parts I and II of this Article that by 2024, Buchanan and Schlafly's conservative and traditionalist approaches to gender, sexuality, and the family are shaping state laws, policies and jurisprudence. In the twenty-three states that have so far passed laws restricting GAC, and the twenty-five states that have so far restricted or eliminated abortion access, natalism, a male-female sex binary, and traditional gender roles are legislative priorities.

B. *Using "Regret" in a Crusade for "Traditional Family Values"*

Regret has become an effective tool in a conservative campaign against reproductive justice and LGBTQ rights. Political and legal debates about GAC and abortion typically play out between anecdotal evidence (about individual regret) and statistical evidence (revealing low incidence of regret). In *Carhart*, for example, Justice Kennedy invoked the risk of regret while acknowledging the absence of "reliable evidence."[151] Dissenting, Justice Ginsburg critically

147. Schlafly also bashed Justice Ginsburg for "clearly believ[ing] that her 'equality principle' demands that taxpayer funding of abortions be written into the U.S. Constitution in order to give women 'equality' in the workplace." *Id.* at 70.

148. *Id.* at 71.

149. *Id.*

150. *Id.* For critique of this conservative approach, 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 (2011).

151. Kennedy cited to a brief recounting the experiences of 180 women describing their experiences with abortion regret. *See supra* notes 67–69 and accompanying text (citing and discussing these briefs); *see also* Doan et al., *supra* note 90 (exploring how anti-abortion advocates have relied on personal stories of regret to establish credibility).

observed that "the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence . . . ."[152] Ginsburg objected that "neither the weight of the scientific evidence to date nor the observable reality of [thirty-three] years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have."[153]

A similar pattern has emerged in the legislative, political, and public debates over GAC. A small group of former GAC recipients regularly participates in legislative hearings offering testimony about their regret and suffering,[154] while advocates for transgender individuals rely on scientific studies that reveal that incidence of regret is extremely low.[155]

These encounters between individual anecdotes and scientific data raise interesting questions about the task of lawmakers as truth seekers.[156] But legal and political struggles over GAC and abortion are part of a bigger national drama. At stake are traditional values, sexual morality,[157] and the so-called "soul of America."[158] Current bans on GAC and abortion are calculated ideological attempts to promote natalism and preserve the male-female binary as a way of defending against a perceived liberal and LGBTQ attack on conservative and Christian values.

1. Natalism, Regretting Children, Regretting Childlessness

Campaigns against abortion and GAC reflect, among other things, cultural anxiety about childbearing, reproduction, and fertility. In *Carhart*, for instance, Justice Kennedy observed that "Respect for human life finds an

152. Gonzales v. Carhart, 550 U.S. 124, 183 (2007) (Ginsburg, J., dissenting).

153. *Id.* at 183 n.7 (internal quotation marks omitted). Anti-abortionists often dismiss such scientific studies, alleging that many individuals do not feel comfortable telling their regret stories. *See supra* notes 80–82 and accompanying text. *See also* Siegel, *supra* note 69, at 1658–59 (citing anti-abortion literature making the argument that most, if not all, women experience regret and guilt but do not have safe spaces to talk about it). Prominent abortion opponent, Vincent Rue, has argued that those who claim not to be suffering from post-abortion trauma are simply repressing their emotions. Eidmann, *supra* note 85, at 276–77 (describing Rue's role in the anti-abortion movement). Rue explains that "The factors of being surprised and overwhelmed by the intensity of the emotional and physical response to the abortion-experience frequently act upon the post-abortive woman to cause her to resort to the defenses of repression and denial." *Id.* at 277 n.50.

154. *See supra* notes 1–3 and accompanying text (offering examples of this phenomenon).

155. Supporters of bans criticize the data primarily on the ground that it fails to consider the numbers of people who never report their regret. *See supra* note 28 and accompanying text.

156. The relationship between science, morality, and democracy has long plagued policymakers. *See generally* Dov Fox, *Subversive Science*, 124 Penn St. L. Rev. 153 (2019) (exploring the legal implications of scientific findings that conflict with widely held ideals); Frank Ackerman & Lisa Heinzerling, Priceless: On Knowing the Price of Everything and the Value of Nothing (2005) (critiquing the use of cost-benefit analysis in policymaking).

157. *See*, *e.g.*, Ben-Asher, *Transforming Legal Sex*, *supra* note 7.

158. *See supra* notes 128–31 and accompanying text.

ultimate expression in the bond of love the mother has for her child."[159] Indeed, natalism is a fundamental feature of all abortion restrictions that force pregnant people to carry unwanted pregnancies.[160] It is also expressed in biased counseling laws that require providers to warn about future fertility consequences of abortion.[161]

Natalism is also predominant in GAC bans, many of which warn that "sterility" is an inevitable consequence of GAC.[162] Despite evidence that fertility of transgender teens and youth can be (and often is) preserved in clinical settings,[163] the risk of infertility is high on the list of justifications for these bans. Arkansas's 2021 statute is representative on this point. It warns that "[i] t is of grave concern to the General Assembly that the medical community is allowing individuals who experience distress at identifying with their biological sex to be subjects of . . . irreversible, permanently sterilizing genital gender reassignment surgery."[164] These bans and the politics that surround them communicate one central untruth: GAC is necessarily a path to future childlessness and should thus be banned.

159. Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

160. Natalism, sometimes referred to as pro-natalism, is "an attitude or policy favoring or encouraging population growth." *Natalism*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/natalism [https://perma.cc/5LRX-96MU] (last visited Mar. 7, 2024).

161. Twenty-three states have laws with specific disclosure requirements related to risks of abortion for future fertility, and three of these states include misleading information in these disclosures. Guttmacher Inst., *Counseling and Waiting Periods for Abortion*, *supra* note 87.

162. *See*, *e.g.*, S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022) ("Introducing cross-sex hormones to children with immature gonads as a direct result of pubertal blockade is expected to cause irreversible sterility. Sterilization is also permanent for those who undergo surgery to remove reproductive organs . . . ."); H.B. 1570, 2022 Leg., Reg. Sess. (Ark. 2021) § 2(8)(A)(vii), (B)(viii) (identifying "irreversible infertility" as a risk of cross-sex hormone therapy); H.B. 71, 2023 Leg., Reg. Sess. (Idaho 2023) § 10(c), (d) (expressing concern that healthcare providers administer puberty-blockers and cross-sex hormones despite "scientific evidence that children who remain on puberty blockers may never recover lost development").

163. *See*, *e.g.*, T.H.R. Stolk, J.D. Asseler, J.A.F. Huirne, E. van den Boogaard, & N.M. van Mello, *Desire for Children and Fertility Preservation in Transgender and Gender-Diverse People: A Systematic Review*, 87 Best Prac. & Rsch. Clinical Obstetrics & Gynaecology (2023) (finding that for transmasculine people oocyte retrieval rates parallel those of cis people even with prior testosterone use and recommending semen preservation prior to hormone treatment in transfeminine people); Philip J. Cheng, Alexander W. Pastuszak, Jeremy B. Meyers, Isak A. Goodwin, & James M. Hotaling, *Fertility Concerns of the Transgender Patient*, 8 Translational Andrology & Urology, 209 (2019) (describing broad range of fertility preservation options and identifying discrimination, costs, and dearth of facilities as some of the main barriers to fertility preservation). *See also* Clark, *supra* note 44.

164. S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022). These statutes universally ignore the possibility of gamete preservation. They also typically inflate the evidence of the risk that puberty blockers and cross-hormone therapies pose to fertility. *See* Stolk et al., *supra* note 163; Cheng et al., *supra* note 163.

A different yet related set of issues illuminates the interaction of regret, natalism, and gender roles. Consider the contrast between individuals who are childless by choice and those who have children and later come to regret it. The former are presumed to live with deep regrets and are often warned: "[D]o not make this decision [childlessness], you will come to regret it."[165] The latter are presumed to affirm parenthood. Their regret stories often lack a platform or an audience. Although studies suggest that those who are childless by choice report similar levels of satisfaction to those who are not, they are often perceived to be less fulfilled.[166] Parenting is the presumed preferable path,[167] and motherhood, the "ultimate femininity."[168]

The narrative of regret in the context of childlessness, especially for those assigned female at birth, serves as a disciplining tool, threatening those who deviate from the norm of natalism. Those who choose not to have children often become subjects of "moral outrage."[169] As sociologist Orna Donath

165. Orna Donath, Regretting Motherhood: A Study 58 (2017) (observing that "regret is used as a threat to push women who do not wish to be mothers into motherhood"); Kate Greasley, *Abortion and Regret*, 38 J. Med. Ethics 705, 710 (2012) (arguing that this type of reasoning is persuasive when it "derives from the belief that the regret will reflect justification. What is really meant by 'don't go out in the rain, you'll regret it,' is 'you will regret it *because* it is imprudent'"). Brittany Wong, *If You're Afraid You'll Regret Not Having Kids, Read This*, HuffPost (Oct. 31, 2023, 5:49 PM), https://www.huffpost.com/entry/unsure-if-you-want-to-have-kids-read-this_l_65402c65e4b0a78a26a470f4 [https://perma.cc/HS46-S997] (quoting a psychotherapist who reports regularly hearing fear of future regret from patients considering the possibility of not having children); Elmo Keep, *I Am So Sick of Being Asked If I Regret Not Having Children*, The Guardian (Feb. 9, 2021), https://www.theguardian.com/commentisfree/2021/feb/09/i-am-so-sick-of-being-asked-if-i-regret-not-having-children [https://perma.cc/QB7D-56P9]. *See*, *e.g.*, Barton Goldsmith, *Why I Regret Not Having Children*, Psych. Today (July 28, 2021), https://www.psychologytoday.com/us/blog/emotional-fitness/202107/why-i-regret-not-having-children [https://perma.cc/J8HV-VZQT]; *Child-Free People over 40 Are Sharing Whether or Not They Regret Not Having Kids, and It's Super Insightful*, BuzzFeed (Aug. 30, 2023), https://www.buzzfeed.com/victoriavouloumanos/older-people-who-are-childfree-share-how-life-is-now [https://perma.cc/GL7M-REQQ] ("We do not have kids by choice and certainly don't have regrets. I can tell you firsthand the problem is not that you personally regret the decision; it's dealing with parents . . . ." (quoting a Reddit user)).

166. *See* Leslie Ashburn-Nardo, *Parenthood as Moral Imperative? Moral Outrage and the Stigmatization of Voluntarily Childfree Women and Men*, 76 Sex Roles 393, 398 (2017).

167. *See* Donath, *supra* note 165, at 10 ("The American feminist philosopher Diana Tietjens Meyers refers to this as the colonization of our imagination, whereby we absorb the notion that motherhood is the only path to the point that we cannot conceive of other available options, making the only decision that can be imagined appear to have come from a 'pure space.'").

168. Donath, *supra* note 165, at 103; Rebecca Harrington, *Childless*, 29 Psychoanalytic Dialogues 35, 48 (2019) (describing how she and her patient both experienced themselves as outsiders for failing to become mothers and observing that "male gender identity does not seem to be nearly as tied to fatherhood as female gender identity is to motherhood");

169. Ashburn-Nardo, *supra* note 166, at 398 (finding that participants in the study responded to childless by choice adults with "anger, disgust, and disapproval"); *see also* Donath, *supra* note 165, at 9 (quoting Pope Francis, who claimed, in 2015, that choosing not to have children was "selfish"). Discussing societal denigration of women who remain

observed, "Regretting having behaved otherwise than socially expected wins respect, and thus regret can be utilized to maintain society's values. From this angle, regret becomes hegemony's watchdog, a normalizing mechanism aimed to restore each of us to the good graces of society."[170]

Prospective warnings of anticipated regret are notably absent for a larger group of individuals—those who become mothers.[171] A large percentage of mothers who participated in a 2023 study claimed to find parenting to be a source of joy and fulfillment.[172] Many reported, however, that mothering is harder, more stressful, and more tiring than expected.[173] Although data is limited, preliminary research suggests that around seven percent of parents regret the choice and would not have children again if they could do things over.[174]

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childless by choice, psychoanalyst Katie Gentile observes that "Women without children, unlike men in the same position, are considered selfish, emotionally unavailable, aggressive, or just sublimating their 'natural' 'maternal instincts' into their jobs, animals ('furbabies'), or other activities that automatically lose their legitimacy when seen in this light." Katie Gentile, *"Dying for a Baby" and Other "Confusions of Tongues": A Discussion of "Childless*,*"* 29 Psychoanalytic Dialogues 51, 54 (2019).

170. Donath, *supra* note 165, at 57.

171. Today over 86% of women in the United States give birth to a child before they are 49. Pew Rsch. Ctr., They're Waiting Longer, but U.S. Women Today More Likely to Have Children than a Decade Ago 3 (Jan. 18, 2018), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2018/01/Pew-Motherhood-report-FINAL.pdf [https://perma.cc/3GNM-KG8Y]. This suggests that the total percentage of women who become mothers is higher than 86% because the statistic includes only those who have given birth thus excluding those who become mothers via adoption or stepparenting. *Id.* at 2 (noting that about 6% of children in the U.S. live with either an adoptive parent or a stepparent). By contrast, one recent study of Michigan adults found that 21.35% were childless by choice (as opposed to undecided or childless due to infertility issues or life circumstances). Jennifer Watling Neal & Zachary P. Neal, *Prevalence, Age of Decision, and Interpersonal Warmth Judgments of Childfree Adults: Replication and Extensions*, 18 PLOS ONE at 6, 9 (2023) (noting that one shortcoming of the data is that it is a snapshot in time and thus cannot account for the possibility that some people will change their minds, but finding that the percentage of adults identifying as childfree by choice is about the same among those over forty as under); James L. McQuivey, *To Have Kids or Not: Which Decision Do Americans Regret More?*, Inst. for Fam. Stud. Blog (June 10, 2021), https://ifstudies.org/blog/to-have-kids-or-not-which-decision-do-americans-regret-more [https://perma.cc/25MX-YTNF] (including statistics from the US Adult Sexual Behaviors and Attitudes study from 2021 finding that 19% of Americans do not have and do not want children and 10% have children and wish they had fewer or none).

172. Katherine Schaeffer & Carolina Aragão, *Key Facts About Moms in the U.S.*, Pew Rsch. Ctr. (May 9, 2023), https://www.pewresearch.org/short-reads/2023/05/09/facts-about-u-s-mothers/ [https://perma.cc/JS7L-TSPW] (reporting survey results finding that 83% of moms say that being a parent is "enjoyable for them most (56%) or all of the time (27%)" and 80% say it is "rewarding most or all of the time").

173. *Id.* (reporting survey results finding that 66% of mothers say "being a parent is a lot or somewhat harder than they thought it would be," 47% of mothers reporting that being a parent is tiring all or most of the time, and 33% of mothers saying that is stressful all or most of the time).

174. Konrad Piotroswki, *How Many Parents Regret Having Children and How It Is Linked to Their Personality and Health: Two Studies with National Samples in Poland*, 16 PLOS One at 2–3 (2021) (citing data from a 2013 Gallup poll, not distinguishing participants

Until recently, however, public dialogue about regretting motherhood was scarce.[175] In a groundbreaking book, *Regretting Motherhood: A Study*, Donath argued that "we fail to recognize the possibility of regretting motherhood."[176] She interviewed mothers who self-identified as regretting having children and found that while they all claimed to love their children, they viewed the decision to have a child as a mistake.[177] For many, it was traumatic.[178] Many women in the study reported experiencing coercion, suggesting that while they consented to have children, they never wanted them.[179] In the years since Donath's study, the topic has received more attention.[180]

One factor explaining the dearth of public dialogue on regretting motherhood is the children themselves. Philosopher R. Jay Wallace argues that many mothers do not have access to what he calls "all-in regret" because they form attachments to their children, so even if they continue to believe that the choice

by gender, in which 7% of respondents with children said that if they had it do over again they would have zero children). *See also* Eir Nolsoe, *One in Twelve Parents Say They Regret Having Children*, YouGov (June 24, 2021, 2:53 AM), https://yougov.co.uk/society/articles/36590-one-twelve-parents-say-they-regret-having-children [https://perma.cc/9CL5–9E92] (finding, based on a YouGov survey, that 8% of parents expressed regret at the time of the study and another 6% said that they had previously experienced regret but no longer did); Anne Kingston, *'I Regret Having Children': In Pushing the Boundaries of Accepted Maternal Response, Women Are Challenging an Explosive Taboo—and Reframing Motherhood in the Process*, Maclean's, https://macleans.ca/regretful-mothers/ [https://perma.cc/RE9D-R77M] (describing a 1975 poll by advice columnist Ann Landers in which 70% of respondents said they would not have children if they had it to do over again).

175. *See* Hillary Grill, *What Women Want: A Discussion of "Childless*,*"* 29 Psychoanalytic Dialogues 59 (2019) (observing that widespread pronatalist assumptions prevent serious inquiry into what individual women actually want, arguing that "[t]he conflation of feminine, woman, and motherhood serve to negate female subjectivity").

176. Donath, *supra* note 165, at 48.

177. *See id.* at 71–76 (distinguishing between regretting motherhood and regretting the children).

178. *See id.* at 106–10.

179. *See id.* at 21–27. *See also* Raymond Shih Ray Ku, *Free Speech & Abortion: The First Amendment Case Against Compelled Motherhood*, 43 Cardozo L. Rev. 2105, 2138 (2022) (characterizing abortion bans as a form of compelled motherhood that force the identity of mother and the expressions of pregnancy onto individuals who would otherwise seek abortions); Katharine Silbaugh, *Family Needs, Family Leave in 2023*, 53 Seton Hall L. Rev. 1609, 1610, 1613–18 (2023) (also characterizing post-*Dobbs* abortion restrictions as forced parenthood). On reproductive coercion more generally, see Jessica E. Moulton, Martha Isela Vazquez Corona, Cathy Vaughan, & Meghan A Bohren, *Women's Perceptions and Experiences of Reproductive Coercion and Abuse: A Qualitative Evidence Synthesis*, 16 PLOS One (2021); A. Rachel Camp, *Coercing Pregnancy*, 21 Wm. & Mary J. Women & L. 275 (2015).

180. Kingston, *supra* note 174 (identifying a number of recent books and articles on the topic); Valerie Heffernan & Katherine Stone, *International Responses to Regretting Motherhood*, *in* Women's Lived Experiences of the Gender Gap: Gender Inequalities from Multiple Global Perspectives 121 (Angela Fitzgerald ed., 2021) (crediting Donath's study with "open[ing] conversation about regret," and concluding based on a study of responses to the book that the conversation is "perceived as a further step toward destabilizing traditional attitudes towards gender roles").

to have a child was the wrong choice, they may nevertheless affirm it.[181] Thus for women who may in fact have preferred not to become mothers, the language of regret is unavailable. This hypothesis is consistent with the findings of Donath's interviews, in which many of the respondents emphasized that they did not regret "the existence of their children in the world," but rather they regretted "becoming their mothers and being responsible for their [children's] lives."[182] This confirms that these mothers were not experiencing "all-in" regret, which by definition, includes comprehensive regret of everything flowing from the initial decision.[183]

Contrasting the data about regretting motherhood with data about those who regret having received GAC (around one percent)[184] and those who regret receiving abortions (under three percent)[185] reveals much about the politics and ideology of regret narratives.[186] Post-2020s abortion and GAC bans hinge on intertwined ideologies of natalism and rigid gender roles, particularly those defining women as mothers and caregivers. Warnings about future regret are also directed at those who choose to remain childfree. Ironically, political and legislative focus bypasses the most common regret: motherhood.

2. The Male-Female Binary

The rise of transgender visibility since the 2000s, and the increasing numbers of transgender and non-binary identifying youth and adults have generated a new dread for conservatives: *sex is mutable*! An increasing number of men in America were assigned female at birth, and an increasing number of women were assigned male at birth. In addition, more young Americans are identifying as non-binary.[187] Younger generations are apparently less bound by traditional convictions about sex as binary and immutable. This new reality has generated anxiety, violence, and a national moral panic, all of which are reflected in legislative campaigns against transgender children and youth.

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181. Wallace, *supra* note 21, at 98. Wallace himself imagines only the possibility that the mistake was to have children too early and not that the mistake was to have children at all. *Id.* at 118–31.

182. Donath, *supra* note 165, at 75. For another narrative describing a personal experience with this phenomenon, see Merritt Tierce, *The Abortion I Didn't Have*, N.Y. Times (Dec. 2, 2021), https://www.nytimes.com/2021/12/02/magazine/abortion-parent-mother-child.html [https://perma.cc/7WU5–546U].

183. Wallace, *supra* note 21, at 98.

184. *See*, *e.g.*, Valeria Bustos, Samyd Bustos, Andres Mascaro, Gabriel Del Corral, Antonio Forte, Pedro Cuidad, Esther Kim, Howard Langstein, & Oscar Manrique, *Regret After Gender-Affirmation Surgery: A Systematic Review and Meta-Analysis of Prevalence*, J. Am. Soc. Plastic Surgeons 1 (2021).

185. *See supra* note 64 and accompanying text.

186. Imagine advocating bans on parenting based on these levels of future regret!

187. Anna Brown, About 5% of Young Adults in the U.S. Say Their Gender Is Different from Their Sex Assigned at Birth, Pew Rsch. Ctr. (June 7, 2022), https://www.pewresearch.org/short-reads/2022/06/07/about-5-of-young-adults-in-the-u-s-say-their-gender-is-different-from-their-sex-assigned-at-birth/ [https://perma.cc/722A-9L92].

Conservative *New York Times* opinion columnist Ross Douthat has expressed this moral panic, calling it a *New LGBTQ Culture War*.[188] Douthat reported with alarm that "[c]omparing the Generation Z to the baby boom generation, the percentage of people identifying as transgender, in particular, has risen twentyfold."[189] He warned, "we have been running an experiment on trans-identifying youth without good or certain evidence, *inspired by ideological motive* rather than scientific rigor, in a way that future generations will regard as a grave medical-political scandal."[190] Douthat predicted that liberals will regret this moment in which they supported the trans-identified youth in gender transitions, arguing "if you are a liberal who believes [that there is no evidence to support gender-affirming care for youth] but you don't feel comfortable saying it, *your silence will eventually become your regret*."[191]

This anxiety fuels GAC bans for minors, which are designed to *preserve the male-female binary* (as assigned at birth) and are justified as regret-preventative. The bans contain two features to this end. First, they typically define sex strictly as "biological sex,"[192] while excluding or ignoring *gender identity* as a core characteristic of sex.[193] This is a striking feature that unites these laws. This definition explicitly and intentionally contradicts many current legal rules and most leading sex, medical, psychiatric and pediatric guidelines that view gender identity (an internal sense of being male, female, or non-binary) as a key factor in determining an individual's sex.[194] For instance, the Diagnostic and Statistical Manual of Mental Disorders

188. Ross Douthat, Opinion, *How to Make Sense of the New L.G.B.T.Q. Culture War*, N.Y. Times (Apr. 13, 2022), https://www.nytimes.com/2022/04 /13/opinion/transgender-culture-war.html [https://perma.cc/T9TC-57PC] ("Almost twenty-one percent of Generation Z—meaning, for the purposes of the survey, young adults born between 1997 and 2003—identifies as L.G.B.T., as against about 10 percent of the millennial generation, just over 4 percent of my own Generation X and less than 3 percent of baby boomers . . . .").

189. *Id.*

190. *Id.* (emphasis added).

191. *Id.* (emphasis added).

192. *See*, *e.g.*, S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022) § 2(1) ("the sex of a person is the biological state of being male or female, based on sex organs, chromosomes, endogenous hormone profiles, and is genetically encoded into a person at the moment of conception, and it cannot be changed"); H.B. 1570, 2022 Leg., Reg. Sess. (Ark. 2021) ("'Biological Sex' means the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual's psychological, chosen, or subjective experience of gender.").

193. This reverses a trend in medical literature and in courts to define sex by reference to gender identity. *See* Ben-Asher, *Transforming Legal Sex*, *supra* note 7 (identifying a backlash against the increasing legal acceptance of the concept of "gender identity").

194. *See*, *e.g.*, GLAAD, GLAAD Media Reference Guide (10th ed. 2016), https://publicwebuploads.uwec.edu/documents/GLAAD_Media_Reference_Guide.pdf [https://perma.cc/N9L3-F52G] ("Gender Identity: A person's internal, deeply held sense of their gender. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices . . . .").

("DSM-5") of the American Psychiatric Association ("APA") includes a diagnosis of "gender dysphoria," a condition defined as a "distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender."[195]

Second, bans on gender-affirming care include an exception for provision of care to a child born with intersex conditions, sometimes known as DSD.[196] According to DSM-5, "Disorders of sex development (DSD) refers to a group of medical conditions (e.g., XXY/Klinefelter Syndrome, 45XO/Turner Syndrome, or Androgen Insensitivity Syndrome) in which anatomical, chromosomal, or gonadal sex varies in some way from what would be typically considered male or female."[197] Current exceptions in the GAC bans allow for surgery and hormone treatment when a child is diagnosed with a DSD condition. They allow doctors to assign a child a sex, and for parents to consent to medical procedures that would conform the assignment with the child's body. Despite vast literature on the actual and real regret of intersex individuals who undergo sex assignment surgery as children or infants, current GAC bans allow for such surgeries and medical care to continue.[198] Only an ideology of preserving the male-female binary as it is traditionally understood explains why these bans would *deny* gender affirming care to those who seek it (transgender teens and youth) and *allow* it to be imposed on those who do not (intersex infants and children).

C. *The Perils of Using Regret in Political Projects*

After *Carhart*, legal scholar Chris Guthrie warned that legislatures might follow *Carhart*'s logic to use presumed future regret to justify constraints on autonomy.[199] Part I, *supra*, suggests that there is good reason to

195. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013); *see also* Jack Turban, *What Is Gender Dysphoria?*, Am. Psychiatric Ass'n (Aug. 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-genderdysphoria [https://perma.cc/FP5P-XY5V] (defining dysphoria as "clinically significant distress or impairment in social, occupational, or other important areas of functioning").

196. *See Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions*, KFF (last updated Jan. 31, 2024), https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker/ [https://perma.cc/5AVM-MKXU] (finding that twenty-three of twenty-three statutes "permit[] Rx and Surgical Care Used in GAC for Other (non-GAC) Medical Purposes"). *See* S.B. 14, 2022 Leg., Reg. Sess. (Tex. 2022).

197. *Gender Dysphoria Diagnosis*, Am. Psychiatric Ass'n (Nov. 2017), https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-non

conforming-patients/gender-dysphoria-diagnosis [https://perma.cc/62ER-JQLM] ("Some individuals with such conditions prefer the term 'intersex'").

198. *See*, *e.g.*, Suzanne J. Kessler, Lessons from the Intersexed 4–7 (1998); Sharon Preves, Intersex and Identity: The Contested Self 32–36 (2003); Katrina Karkazis, Fixing Sex: Intersex, Medical Authority, and Lived Experience 49–62 (2008). *See also* Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 Harv. J.L. & Gender 51, 55 (2006) (arguing for liberty of intersex infants and children from unnecessary medical intervention, and for a positive liberty of transgender individuals to pursue gender identity and gender affirming care).

199. Guthrie, *supra* note 73, at 880–81 (observing that "as an analytical matter, if the

take this warning seriously—legislatures have relied in part on regret to constrain the autonomy of children seeking GAC and their parents. In addition, two phenomena suggest that regret is a permanent fixture in the legal landscape. First, as discussed in Part III.B, *supra*, regret often serves as proxy for traditional morality, and morality plays an increasingly important role in contemporary courts and legislatures. Second, rapid developments of science and technology open up new realms for self-realization and exploration. More choices. More to regret.

When, if at all, is preventing regret a legitimate state interest? Two interventions may help clarify and streamline policy debates around regret. First, policymakers should not treat regret as a monolith (as did the lawmakers in Parts I and II). Political debates around regret often conflate a variety of emotional states: trauma, disappointment, repentance.[200] As Jeannie Suk Gersen observed, stories of regret are often, in fact, stories of trauma.[201] Whereas regret is an emotional experience—usually defined simply as the preference that something in the past had gone differently—trauma is both an emotional and physical experience.[202] To the extent regret is a stand in for trauma, preventative legislation is a fraught endeavor. Any medical procedure including abortion, childbirth, mastectomy, or rhinoplasty, can cause trauma. But denial of medical treatment can also cause trauma.

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state is deemed to have a legitimate interest in protecting citizens from experiencing regret associated with the exercise of one right, the state should also have an interest in protecting citizens from experiencing regret associated with the exercise of other rights").

200. In the GAC context, commentators often also conflate regret with the choice to cease care. A recent study of youth that discontinued gender-affirming care offers a more complex understanding of detransition and regret. *See* Annie Pullen Sansfaçon, Ello Gravel, Morgane Gelly, Tommy Planchat, August Paradis & Denise Medico, *A Retrospective Analysis of the Gender Trajectories of Youth Who Have Discontinued a Transition*, Intl. J. of Transgender Health (2023). The authors observe that

> The idea of detransition is often conflated with experiences of regret after a gender transition . . . . However, negative transition experiences may only be a subcategory within experiences of detransition . . . . Although regret may accompany a detransition, other feelings can be presenting such positive one or ambivalence and can evolve over time.

Id. The researchers of this study, which included twenty youth participants (most of them assigned female at birth) who discontinued transition ("YDT") concluded that

> YDT undergo diverse gender journeys and changes in various aspects of their experiences . . . . [O]ur study revealed nuances and evolving perspectives in youth, challenging previous research that simplified discontinuation as a single set of factors outcome. This insight encourages providers to critically assess narratives as presented in the media and refine their practice to better support youth, regardless of their gender journey direction.

Id.

201. *See* Suk, *supra* note 69.

202. Greasley, *supra* note 165, at 710 (distinguishing between psychological trauma and regret); Ben-Asher, *Trauma-Centered Social Justice*, *supra* note 100 (defining trauma and exploring how it is used in social justice movements); Wallace, *supra* note 21, at 6 (defining regret).

Trauma-prevention is, unquestionably, a legitimate state interest, but the difficulty of distinguishing, ex ante, between medical treatment that will cause trauma and that which will not, complicates potential legislation and counsels in favor of caution. Standard medical malpractice law navigates this quagmire through the doctrine of informed consent—seeking to ensure that patients choose whether or not to receive medical care on the basis of accurate and sufficiently thorough information about risks, including psychological risks, and effectiveness of treatment. In the cases of abortion and GAC—where reported rates of trauma are quite low—potential regret does not provide adequate justification for legislative action.

Alternative versions of regret—regret as disappointment and regret as moral judgment—further undermine the legitimacy of regret as the basis for state action. Stories of regret can often be stories of disappointment. The decision did not generate the desired result. This is particularly true in the context of GAC, where regret can follow from medical care that does not successfully allow a trans person to "pass."[203] In such cases, a person may lament the current state of things, the consequences of seeking care, but might nevertheless not do anything differently if they could make the decision again knowing what they know now. Regret might also be a "retrospective *judgment* about the wrongness of the . . . decision."[204] Anti-abortion advocacy groups highlight, and perhaps encourage, this variation of regret through post-abortion counseling services that emphasize "forgiveness" and "redemption."[205]

These alternative permutations of regret point to a second critical consideration for lawmakers. Drawing on the philosophical literature unpacking the meaning and experience of regret, it may be helpful to understand "regret" in relation to "affirmation," and to contextualize both. Neither regret nor affirmation follow inevitably from a particular decision. Instead, according to philosopher R. Jay Wallace, whether an individual eventually comes to regret or affirm a decision depends, in large part, on the attachments that they form

203. *See* Marci L. Bowers, *What Decades of Providing Trans Health Care Have Taught Me*, N.Y. Times (Apr. 1, 2023), https://www.nytimes.com/2023/04/01/opinion/trans-healthcare-law.html [https://perma.cc/7ULU-7NZ4] (disentangling the many different reasons that people who sought GAC might experience some kind of regret).

204. Greasley, *supra* note 165, at 706.

205. *See Post Abortive Recovery Services*, Focus on the Fam. (last visited Feb. 27, 2024), https://www.focusonthefamily.com/get-help/post-abortive-recovery-resources/ [https://perma.cc/57FJ-G3NF]; *see also Post Abortion Support*, Life Clinic: Cmty. Resources (last visited Feb. 27, 2024), https://lifeclinic.org/trauma-services/post-abortion-support/ [https://perma.cc/57FJ-G3NF] (describing emotional effects of abortion including "mild to severe grief, anger, and shame"); *Hope and Healing*, Sisters of Life, https://sistersoflife.org/healing-after-abortion/ [https://perma.cc/LQ6M-GPWF] (last visited Feb. 27, 2024) (describing the feelings of "deep guilt, shame, pain, anxiety, depression, fear, and feelings of isolation from God and others" that can follow abortion); Greasley, *supra* note 165, at 706 (arguing that what these anti-abortion services are doing is treating all regret as "regret that, once pregnant, she decided to end the life of the fetus" and ignoring the wide variety of other aspects of the abortion that a woman might regret, such as regret that she got pregnant in the first place, or regret that the abortion was necessary).

(or fail to form) as a result of that decision.[206] Wallace reasons from this observation that it is necessary to consider regret independently from the normative desirability of the initial decision.[207]

Legal scholar Kate Greasley draws on this literature to debunk what she calls the "moral justification thesis" in anti-abortion advocacy. The core (false) premise, she explains, is that "postabortion regret renders abortion morally unjustified."[208] Applying Wallace's theory of regret to abortion regrets, she concludes that just as the absence of regret in having a child does not tell us that having the child was the morally desirable choice, the "*presence* of regret in the abortion scenario does not therefore take on justificatory significance simply because, had she kept the pregnancy, she would eventually have to affirm her decision."[209] In other words, the normative assessment of a reproductive choice (was it morally desirable or not?) in hindsight cannot be assessed through the lens of regret or affirmation because those are determined by later attachments (or their absence).

Similarly, a person who receives gender-affirming care and loses (or fails to gain) access to a school, a job, a close relationship with a parent, sibling, partner, or friend, may regret receiving gender-affirming care. In this hypothetical, the regret flows from the *traumatic loss* of (or an inability to form) a desired attachment. Thus, the regret in this hypothetical does *not* indicate that the decision to receive gender-affirming care was normatively or morally undesirable.

Disentangling regret from normative assessment helps illuminate the ways in which regret can be socially and politically constructed.[210] If, as Wallace posits, whether a person come to regret a choice depends on how that choice affects their attachments, then, to understand potential for regret, lawmakers must evaluate what those effects might be. But such analysis is contingent on unpredictable future events. For instance, a study in the 1970s of post-sterilization regret found that one of the populations most likely to regret the decision were those who ultimately separated from their current partners and entered a new relationship in which they desired to "bear children to a new partner."[211] These effects are also subject to manipulation. In the abortion context, laws requiring an ultrasound prior to abortion can hasten regret by causing a pregnant person to develop an attachment to a fetus that they may not otherwise have had.[212] Social influence is also an important

206. *See* Paul J. Griffiths, Regret: A Theology 24–27 (2021) (offering a Christian theological account differentiating mistakes).

207. *See* Wallace, *supra* note 21, at 6–7.

208. Greasley, *supra* note 165, at 707–08.

209. *Id.* at 710.

210. Appleton, *supra* note 72, at 316–17 (identifying a variety of ways in which public policy might generate regret of adoption and abortion decisions).

211. Brian Alderman, *Women Who Regret Sterilization*, 2 Brit. Med. J. 766, 766 (1977).

212. Appleton, *supra* note 72, at 316–17; *see also* Katrina Kimport, *(Mis) Understanding Abortion Regret*, 35 Symbolic Interaction 105, 106 (2012) (identifying "seeing an ultrasound" as one of many experiences that can increase a person's attachment

factor. For instance, the widespread availability of post-abortion counseling provides individuals with a vocabulary and a framework through which to understand a broad range of complicated feelings that they may have after an abortion.[213]

Policymakers and courts should be skeptical of regret-prevention as a state interest, and instead strive to deconstruct the normativities driving regret in the first place. Removing regret from the conversation forces a more honest reckoning with what is at stake in these decisions—bodily autonomy, religious freedom, and the rights to self-identification and expression.

Conclusion

Regret is a fundamental part of the human experience, and it can be generative, even "transformative."[214] In a provocative piece entitled, *My New Vagina Won't Make Me Happy: And It Shouldn't Have To*, transgender activist and public intellectual, Andrea Long Chu, reflected on her own gender dysphoria and transition. She wrote,

> I'm telling you now: I still want this, all of it. I want the tears; I want the pain. Transition doesn't have to make me happy for me to want it . . . . Desire and happiness are independent agents . . . . Nothing, not even surgery, will grant me the mute simplicity of having always been a woman. I will live with this, or I won't. That's fine. The negative passions—grief, self-loathing, shame, regret—are as much a human right as universal health care, or food. There are no good outcomes in transition. There are only people, begging to be taken seriously.[215]

Many states have restricted access to abortion and gender-affirming care, ostensibly to protect individuals from decisions they may later regret. But the well-being of these individuals is not, and never was, the motivation behind this legislation. Rather, these laws are emblematic of a conservative agenda seeking to regress the nation to an era when women and LGBTQ+ people had no rights. Conservative lawmakers cite anecdotal cases of people discontinuing gender-affirming care or regretting abortions to justify denying these medical services broadly. Yet, available research suggests regret is extremely

to pregnancy).

213. Greasley, *supra* note 165, at 706–07 (observing that "women who do undergo abortions may be culturally conditioned or required to fit their subsequent reflections into a certain expressive framework, typically packaged in the language of regret"); Kimport, *supra* note 212, at 110–12 (identifying social disapproval of friends and family as an important factor in shaping post-abortion emotional experiences).

214. Brian Price, A Theory of Regret 134 (2017) (arguing that "turmoil, anxiety, and disarray are not only devastating . . . but also productive of thought itself, which rarely happens, when it happens, with immediate clarity, ease and indications of self-assurance"); Guthrie, *supra* note 73, at 898–902 (describing the way that regret can function as a learning tool that improves decision-making going forward).

215. Andrea Long Chu, *My New Vagina Won't Make Me Happy: And It Shouldn't Have To*, NY Times (Nov. 24, 2018), https://www.nytimes.com/2018/11/24/opinion/Sunday/vaginoplasty-transgender-medicine.html [https://perma.cc/LD47–6NJQ].

uncommon for transgender youth receiving gender-affirming care, and the vast majority affirm their decision to have an abortion. The general public should be skeptical of these regret stories. Judges, likewise, should scrutinize regret-prevention rationales and treat them as what they are: foot soldiers in the ongoing battle over the "soul of America."

BENDING GENDER:
Disability Justice, Abolitionist Queer Theory, and ADA Claims For Gender Dysphoria

D Dangaran*

The trans rights movement is engaged in an internal debate over whether trans people diagnosed with gender dysphoria should bring claims under the Americans with Disabilities Act (ADA). Some have argued the ADA is a good vehicle for those with gender dysphoria to access medical needs, while others contend that because gender identity should not be pathologized and the state should not be the arbiter for who can access care, trans plaintiffs should not raise ADA claims.

This Essay defends the ADA as a viable path for trans plaintiffs in prison to seek accommodations based on gender dysphoria, applying a critical autoethnographic lens. First, it presents survey data of the views of trans people incarcerated in Massachusetts on bringing ADA claims for gender dysphoria. Second, it summarizes the history of gender dysphoria in the Diagnostic and Statistical Manual (DSM) and its recent legal interpretation under the ADA. Third, applying the lenses of queer and Crip theory, the Essay argues that trans people should raise ADA claims as necessary to fulfill their medical needs under our current regime as striving toward a Disability Justice future. Finally, it considers counterarguments raised by trans movement litigators and scholars.

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Introduction

A. *Overview*

The Fourth Circuit's recent ruling in *Williams v. Kincaid*[1] affirmed that trans[2] people who experience gender dysphoria (GD) are protected under the Americans with Disabilities Act[3] (ADA).[4] Trans people can now bring ADA claims based on our GD diagnoses. This prompts the question for trans litigants and their advocates: Should we?[5] Are there any downsides to bringing

1. 45 F.4th 759 (4th Cir. 2022).

2. I use the term "trans" to capture transgender, transsexual, gender nonconforming, gender nonbinary, and other non-cisgender individuals. *Cf.* Julia Serano, Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity 350–51 (2d ed. 2016) ("The word[] 'transgender' . . . came into vogue during [the early 1990s] as [an] umbrella term[]: . . . 'transgender' was used to promote a coalition of distinct groups . . . not based on a presumed shared biology or set of beliefs, but on the fact that [they] faced similar forms of discrimination."). According to the American Psychiatric Association, "[t]ransgender refers to the broad spectrum of individuals whose gender identity is different from their birth-assigned gender." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 511 (5th ed., text rev. 2022) [hereinafter DSM-5-TR] (emphasis omitted).

3. Pub. L. No. 101–336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 and 47 U.S.C. § 225).

4. *See Williams*, 45 F.4th at 766–74.

5. *See* Dean Spade, Commentary, *Resisting Medicine, Re/modeling Gender*, 18

an ADA claim on behalf of trans people with GD? How should we approach that question as trans movement lawyers?

I invoke the first person because I consider myself part of the cadre of trans rights advocates who face these questions, which pose real dilemmas as we strive to capture the nuances of gender in our work, knowing that the courts may never fully grasp our identities. Indeed, "queering" gender and sexuality would directly refuse any such capture.[6]

Nevertheless, I argue in favor of bringing ADA claims for incarcerated trans people with GD.[7] I specify this group to narrow the scope of this Essay and because my work has focused on supporting trans people seeking gender-affirming care while incarcerated. The Essay is centered on trans people on the inside because the stakes are so high for them. "A shocking 47% of Black transgender people, and more than one in five (21%) transgender women of all ethnicities, are incarcerated during their lifetimes."[8] Further, centering an incarcerated trans person's experience can and should provide important insights for the free world.[9] And disability law is particularly relevant in the prison context, where "people with disabilities . . . face a heightened risk of violence and harassment."[10]

Berkeley Women's L.J. 15, 36 (2003) ("I think it is important that trans people be a part of conversations about how legal claims are pursued by attorneys, and that attorneys working on such claims understand themselves to be determining not just the rights of a single plaintiff, but impacting a broad set of gender transgressive people who may differ from the plaintiff in question in essential ways.").

6. *See* Zaria El-Fil, *Claiming Alterity: Black, Gender, and Queer Resistance to Classification* ("[Q]ueerness *is* a rebellion refusing enclosure."), *in* Surviving the Future: Abolitionist Queer Strategies 42, 44 (Scott Branson et al. eds., 2023) [hereinafter Surviving the Future]; *see also id.* ("'[Q]ueer' . . . is not necessarily synonymous with 'LGBTQIA+' as an identity; rather, it is a zone of instability, a 'doing for and toward the future.' It is a refusal of the present with an aim toward futurity." (quoting José Esteban Muñoz, Cruising Utopia: The Then and There of Queer Futurity 1 (2009))); *id.* at 45 ("[Q]ueer isn't another identity to be placed into neat social categories but, rather, an opposition to the manageable limits of identity. It is the 'total rejection of the regime of the Normal.'" (quoting Mary Nardini Gang, Toward the Queerest Insurrection 3 (2014), https://theanarchistlibrary.org/library/mary-nardini-gang-toward-the-queerest-insurrection.pdf [https://perma.cc/X8SJ-KUYG])).

7. This legal theory was first successful in an employment case; then its premise was extended to prisons' obligations. *See, e.g.*, Kevin Barry & Jennifer Levi, Blatt v. Cabela's Retail, Inc. *and a New Path for Transgender Rights*, 127 Yale L.J.F. 373, 390–91 (2017).

8. Somjen Frazer et al., Lambda Legal & Black & Pink Nat'l, Protected and Served? 2022 Community Survey of LGBTQ+ People and People Living with HIV's Experiences with the Criminal Legal System 47 (2022) (citation omitted).

9. *See* D Dangaran, *Abolition as Lodestar: Rethinking Prison Reform from a Trans Perspective*, 44 Harv. J.L. & Gender 161, 214 (2021) ("By centering trans people who are policed on a regular basis and who exist in and out of the prison system, and by letting them set the agenda, the LGBTQ rights movement will be able to shift toward a transformative justice model over time." (footnote omitted)); Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 Chicano-Latino L. Rev. 503, 516 (1998) ("This technique of 'looking to the bottom' to inform anti-subordination theory makes sense because 'the bottom' is where subordination is most harshly inflicted and most acutely felt.").

10. Jamelia N. Morgan, *Reflections on Representing Incarcerated People with*

B. *Doctrinal Incentive*

An ADA claim requires plaintiffs to satisfy a lower legal standard than the Eighth Amendment. Title II of the ADA requires plaintiffs to show that they were subject to discrimination "by reason of" their disability.[11] A claim can be premised on intentional discrimination, the failure to make a reasonable accommodation, or disparate impact.[12] Liability for failure to provide a reasonable accommodation does not require a showing of intentional discrimination.[13] This is an easier pleading standard to meet, by far, compared to the Eighth Amendment deliberate indifference standard, which requires plaintiffs to show that prison officials knew of and disregarded an excessive risk to the health or safety of the plaintiff.[14] Even when deliberate indifference is a factor for pursuing compensatory damages under the ADA, the ADA standard is easier to meet than that of the Eighth Amendment.[15] Litigators therefore have strong reasons to pursue ADA claims if possible.

GD is marked by "clinically significant distress or impairment in social, occupational, or other important areas of functioning" that arises from the "marked incongruence" between a transgender person's sex assigned at birth and their gender identity or gender expression.[16] Some reasonable accommodations a person with GD might pursue include hygiene items, laser hair removal, clothing and undergarments, access to equal programs and services, separate shower time, proper pronoun and name usage, strip searches by guards of a preferred gender, and housing transfer.[17] These accommodations can be life-saving for people who are misgendered and harassed daily, living in a facility segregated based on sex parts rather than gender identity.

C. *Positionality Statement / Autoethnographic Method*

I aim to foster a dialogue among abolitionist trans rights lawyers and advocates. Trans people working as lawyers on this issue have a personal stake in the claims. In light of that truth, I take an autoethnographic approach in this Essay,[18] highlighting my experience engaging with the history of trans pathologization.

Disabilities: Ableism in Prison Reform Litigation, 96 Denver L. Rev. 973, 978 (2019) (footnote omitted).

11. 42 U.S.C. § 12132.

12. *See, e.g.*, Sosa v. Mass. Dep't of Corr., 80 F.4th 15, 30–31 (1st Cir. 2023).

13. *See id.* at 31.

14. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994).

15. *See* Durham v. Kelley, 82 F.4th 217, 229 (3d Cir. 2023) (comparing the deliberate indifference standards under the Eighth Amendment and the ADA).

16. DSM-5-TR, *supra* note 2, at 513.

17. *See, e.g.*, Doe v. Mass. Dep't of Corr., Civil Action No. 17–12255, 2018 WL 2994403, at *1, *4–8 (D. Mass. June 14, 2018) (determining plaintiff's requested gender-affirming items were reasonable accommodations under the ADA).

18. *See generally* Senthorun Raj, *Legally Affective: Mapping the Emotional Grammar of LGBT Rights in Law School*, 31 Feminist Legal Stud. 191, 199–203 (2023) (providing examples of autoethnography in LGBT legal studies); Leon Anderson, *Analytic Autoethnography*, 35 J. Contemp. Ethnography 373, 383–85 (2006) (describing the impact of having a "highly visible social actor within the written text," *id.* at 384).

The self should not be hidden away; feigning authorial neutrality does a disservice to the addition of my lived experience to a rigorous analysis of these issues.

I have written about the importance of social location before.[19] Here, I acknowledge that while I am trans, I have not been diagnosed with GD, nor have I sought forms of care that would require such a diagnosis. I do experience dysphoria regarding my facial hair, leg hair, chest, and sex parts. Similarly, up to this point in my life I have not identified as a person with a disability, though I have felt comfortable saying that I'm neurodivergent, having been told by my therapist (a social worker) that she believes some diagnoses that might match my experiences include anxiety, post-traumatic stress disorder (PTSD), and mild attention-deficit/hyperactivity disorder (ADHD).[20]

I think it is morally incumbent upon lawyers to contend with our positionality. Like it or not, we lawyers pose a risk to the rest of the trans community: we may participate in the boundary setting of trans people's rights just as much as the courts and medical professionals do. By playing with "the master's tools," though we do not seek to uphold cissexism or ableism, we might inadvertently lose sight of the larger vision: "[T]o bring about genuine change."[21]

D. *Summary of Argument*

This Essay covers a lot of ground, contributing in two main ways to a discussion that has taken place for over thirty years.

In Part I, I present the results of a survey conducted by Black and Pink Massachusetts, a grassroots organization that supports incarcerated LGBTQ people.[22] Thirty-seven trans, transgender, nonbinary, genderqueer, or intersex people in Massachusetts prisons responded to three questions regarding ADA claims for trans people with GD.[23] The results inform Massachusetts lawyers and advocates of the preferences of the local incarcerated trans community and provide insights for those in other jurisdictions, as well.

Part II summarizes the history of the Diagnostic and Statistical Manual of Mental Disorders (DSM) and provides an autoethnographic reflection on my experience reading the DSM. I detail the legislative history that led to the

19. *See* Dangaran, *supra* note 9, at 167–68.

20. *See Neurodivergent*, Cleveland Clinic (June 2, 2022), https://my.clevelandclinic.org/health/symptoms/23154-neurodivergent [https://perma.cc/CG8T-U69D]. *But cf.* Katie Eyer, *Claiming Disability*, 101 B.U. L. Rev. 547, 551–54, 564–68 (2021) (troubling the common act of refusing to self-identify as disabled despite having conditions that would qualify one as disabled).

21. Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* Sister Outsider: Essays and Speeches 110, 112 (Crossing Press rev. ed. 2007) (1984).

22. *See infra* Part I.

23. The questions were: (1) Under the ADA, a disability is "a physical or mental impairment that substantially limits one or more major life activities." Do you consider gender dysphoria to be a disability? (2) Do you think there is any stigma attached to gender dysphoria when it is considered a disability? (3) If you needed to and had the option, would you bring a disability legal claim for your gender dysphoria? Survey Questions, Black & Pink Mass. [hereinafter Survey Questions] (quoting Americans with Disabilities Act, 42 U.S.C. § 12102(1)(A)) (on file with the Harvard Law School Library).

exclusion of gender identity disorders from the ADA's protection.[24] Finally, I provide the legal basis for the ADA to cover GD.

In Part III, I make a normative argument that a Disability Justice framework could embrace trans people with GD as disabled in a way that would benefit all of society.[25] And in Part IV, I contend with counterarguments raised by prison litigator A.D. Lewis during a panel discussion on this issue.[26] Scholars have explored the normative pros and cons of bringing the claim, after establishing its legal viability.[27] This Essay contributes to that discussion using abolitionist queer theory,[28] Crip theory,[29] and the instructive approaches of movement lawyering.[30]

I. Surveying the Incarcerated Trans Community

In December 2022, Black and Pink Massachusetts and Rights Behind Bars jointly administered via mail a survey to 176 inside members of Black and Pink Massachusetts.[31] Thirty-seven respondents identified as trans, transgender, nonbinary, genderqueer, or intersex.[32] The group of thirty-seven was asked to answer a set of questions specific to them.[33] I included three open-ended questions regarding the ADA to inform our movement's legal strategy.[34] These

24. *See infra* Part II, pp. 247–58.

25. *See infra* Part III, pp. 258–62.

26. *See infra* Part IV, pp. 262–70.

27. *See, e.g.*, Ali Szemanski, *When Trans Rights Are Disability Rights: The Promises and Perils of Seeking Gender Dysphoria Coverage Under the Americans with Disabilities Act*, 43 Harv. J.L. & Gender 137, 159–68 (2020); Namrata Verghese, *The Promise of Disability Rights Protections for Trans Prisoners*, 21 Dukeminier Awards J. Sexual Orientation & Gender Identity L. 291, 315–39 (2022); *cf.* Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 Yale Hum. Rts. & Dev. L.J. 1, 35–49 (2013).

28. I use the term "abolitionist queer theory" to juxtapose the history of "abolition" with that of "queer," as have other writers before me. *Cf.* Angela Y. Davis et al., Abolition. Feminism. Now. 2 (2022).

29. "[C]rip theory is more contestatory than disability studies, more willing to explore the potential risks and exclusions of identity politics while simultaneously and 'perhaps paradoxically' recognizing 'the generative role identity has played in the disability rights movement.'" Alison Kafer, Feminist, Queer, Crip 15 (2013) (quoting Robert McRuer, Crip Theory: Cultural Signs of Queerness and Disability 35 (2006)) (citing Carrie Sandahl, *Queering the Crip or Crippling the Queer: Intersections of Queer and Crip Identities in Solo Autobiographical Performance*, 9 GLQ: J. Lesbian & Gay Stud. 25, 53 n.1 (2003)).

30. I use the terms "abolition," "queer," "Crip," and "movement lawyering" as "words to help forge a politics." *See* Kafer, supra note 29, at 15 (quoting Eli Clare, Exile and Pride: Disability, Queerness, and Liberation 70 (1999)).

31. *See* Survey Questions, *supra* note 23.

32. *See* Survey Results, Black & Pink Mass. [hereinafter Survey Results] (on file with the Harvard Law School Library).

33. *See* Survey Questions, *supra* note 23.

34. *Id.*; *see* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 Stan. L. Rev. 87, 121–22 (2022) (discussing the significance of allowing plaintiffs in a class action to join in deciding on claims); *see also* Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 Seattle J. Soc. Just. 579, 611–19 (2010) (articulating a vision for the role lawyers

questions are represented in the table below. Black and Pink Massachusetts volunteers coded the responses into "yes," "no," and "other." I have also represented in Table 2 a subgroup of twenty respondents who had been diagnosed with GD.

Table 1: Survey Results for All Trans and Intersex Respondents (n=37)

Question	Yes	No	Other	No Reply
Q1. Under the ADA, a disability is "a physical or mental impairment that substantially limits one or more major life activities." Do you consider gender dysphoria to be a disability?	21	4	6	6
Q2. Do you think there is any stigma attached to gender dysphoria when it is considered a disability?	21	3	6	7
Q3. If you needed to and had the option, would you bring a disability legal claim for your gender dysphoria?	26	1	3	7

Table 2: Survey Results for Respondents Diagnosed with GD (n=20)

Question	Yes	No	Other	No Reply
Q1. Under the ADA, a disability is "a physical or mental impairment that substantially limits one or more major life activities." Do you consider gender dysphoria to be a disability?	13	3	3	1
Q2. Do you think there is any stigma attached to gender dysphoria when it is considered a disability?	15	3	2	0
Q3. If you needed to and had the option, would you bring a disability legal claim for your gender dysphoria?	17	1	2	0

The key takeaway from this survey is that many incarcerated trans people are ready to move forward with ADA claims. Advocates therefore need to seriously engage with the claims.

A. *Do You Consider Gender Dysphoria to Be a Disability?*

In response to this question, 57% of the trans and intersex respondents, 68% of those trans and intersex respondents who answered this question, and 65% of respondents with GD diagnoses answered yes[35]:

> "We live in a constant distress with our own identity and our born sex."
> "Gender dysphoria affects you mentally and the way you see and identify yourself. It affects your mood on a daily basis. It is a serious condition that must be treated."
> "Yes, [GD] is a disability. It put me at a disadvantage with other people."
> "[GD] limits what a person can do physically in a society that is still very trans[phobic] and homophobic as well as the impact that takes place mentally and emotionally because until a gender dysphoric person[']s body

might play in movements).

35. *See* Survey Results, *supra* note 32.

> physically matches what their brain is telling the[m] it should be[,] distress and turmoil will be a constant in that person[']s life."
> "Yes! [B]ecause [I] can't get gender affirming bottom surgery while in here. I can't get make up [or] earring[s, or] dress as I could on the streets. I don't feel comfortable in my skin/body."
> "[B]ased on societ[y's] long denial of acceptance [of trans people], the psychological effect of coming out or exposure, harassment, and embarrassment prevents us from expression (first and foremost), which is a life function. Without it, we become depressed or in my case severely anxious causing us to not be able to function at work/school or publicly. Even causes other issues such as high blood pressure, migraines, and other physical medical problems."[36]

In short, these responses show that trans people are experts on their own experiences and that they can tie GD to various impairments to their lives on the inside.

B. *Do You Think There Is Any Stigma Attached to Gender Dysphoria When It Is Considered a Disability?*[37]

In response to this question, 57% of trans and intersex respondents, 70% of those trans and intersex people who answered the question, and 75% of respondents with GD answered yes.[38]

Some responses focused on the additional stigma that might come from GD being classified as a disability:

> "I believe it is like any other disability and there will always be a stigma attached because people [will] either covet or ridicule what they don't live with or understand."
> "Yes, most clinicians and providers mostly agree gender dysphoria is not a disability."[39]
> "Yes. It was hard for me to get diagnosed by a [Bureau of Prisons] psychologist and I had to ask to be evaluated multiple times."
> "Certainly, as many people have said to me, 'isn't dysphoria mean you['re] crazy' or 'don't people with dysphoria cut off their balls' and other similar statements. They do not realize those are a few of the actions of some people, with or without dysphoria, and that the dysphoria is the emotional or mental state of discomfort caused from lack of social acceptance or expectations."

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36. *Id.*

37. Many respondents opined on the stigma that GD itself carries. *See id.* Qualitative interviews would be helpful for future research so that the interviewer could differentiate stigma caused by GD, stigma caused by being trans, and the additional stigma that being labeled a person with a disability might bring.

38. *See* Survey Results, *supra* note 32.

39. This respondent indicated that they *did* believe that GD is a disability (yes to question 1) and that they would want to bring an ADA claim if given the opportunity (yes to question 3). *Id.*

> "Yes, people think you're crazy and need med instead of just being who you are."[40]

Other responses discussed the stigma that the respondents faced for being trans or for having a GD diagnosis:

> "I believe people attack trans men + females for just being them so it is a disability."
> "Yes! [S]ociety claims this is a choice to be a girl/woman/female the stigma is that there is something wrong with us. [F]eeling wrong in our body when we were clearly born in male or female bodies."
> "Other people think that we are different or lower than the 'norm.' A lot of people refuse to accept me as transgender because I was born in a male body. That it is against 'God's Will' to change my body to how I see/feel it is supposed to be."
> "[Y]es I feel most people see GD as a lifestyle choice. It's not. It is a deep rooted issue that can tear an individual apart from the inside. It took me 37 years to be able to look in a mirror and start feeling good about who I am."
> "I think people do not know what a trans person goes through in a given day and yes, there is stigma attached to gender dysphoria. I have been told that if [I] am transgender I am more likely to be looked at for civil commitment because it is a mental abnormality."
> "Staff is under the[] impression that those with gender dysphoria is a game played just to get the benefits of items regular inmates are not entitled to."
> "I believe there's a stigma in any gender dysphoria but [the Massachusetts Department of Corrections] doesn't see it for us."[41]
> Someone who responded "no" provided an elaborate response:
> "No I don't believe it to be a stigma because a person doesn't choose to be trans or [gender nonconforming] and because it['s something people can['t control[.] [S]o if there is a stigma it['s on the person who feels it is to sort out their issues and figure out why they feel that way[.]"[42]

In a quip that perfectly captures the normative conundrum one respondent said simply:

> "Depends on your definition of 'stigma.'"[43]

"[P]risons routinely violate the rights of people with disabilities,"[44] so these respondents could be familiar with the harmful effects of that stigma. Of the thirty-seven trans respondents, twenty-eight indicated that they had a disability, and only one listed GD as that disability.[45] Thus, twenty-seven of the thirty-seven respondents had other disabilities.[46]

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. Morgan, *supra* note 10, at 978.
45. *See* Survey Results, *supra* note 32.
46. *See id.*

C. *If You Needed to and Had the Option, Would You Bring a Disability Legal Claim for Your Gender Dysphoria?*

In response to this question, 70% of trans and intersex respondents, 87% of those trans and intersex people who answered the question, and 85% of respondents with GD answered yes.[47]

The written responses were quite enthusiastic. One person noted that they had filed such a claim on their own, and that it was pending.[48] Others stated how an ADA claim would help their circumstances:

> "Yes! I would because we are denied access to products that other females [in] prisons are allowed and we are residents under [MA] law not prisoners being incar[]cerated not being able to live fully female is severe mental torture for me."
>
> "Yes, the Department of Correction[s] does not help us, and a lot of the other inmates make fun of us or do not want us in the given cell block, and [the Department of Corrections] doesn't look out for us if we can not live in a given cell block because inmates do not want us there."
>
> "People with gender dysphoria especially in prison are misdiagnosed and purposefully delayed in treatment, education, and health care. It takes transgender people 3 times longer to get medical needs met and even harder to be treated as a human."[49]

This type of stigma on people with GD is critical for litigators to consider, whether working in the prison context or not. Trans people's health needs do not start and stop with gender-affirming care; though accessing such care is often hindered, trans people also face health disparities in many other ways, as well.[50]

Overall, respondents are being neglected, and they are ready to bring legal action—including ADA claims—to get the care they need. This type of survey can and should be replicated in other jurisdictions. A movement-lawyering approach should seek more input than that of a single client; by including legal strategy questions in surveys like the Lambda Legal Inside Report 2022 (which did not include any such questions),[51] movement lawyers can get a sense of the community's perspective on legal strategy.

47. *See id.*

48. *See id.*

49. *Id.*

50. For instance, in the 2015 U.S. Trans Survey, "[22%] of respondents rated their health as 'fair' or 'poor,' compared with 18% of the U.S. population," and "[39%] of respondents were currently experiencing serious psychological distress, nearly eight times the rate in the U.S. population (5%)." Sandy E. James et al., Nat'l Ctr. for Transgender Equal., The Report of the 2015 U.S. Transgender Survey 103 (2016).

51. *See generally* Frazer et al., *supra* note 8.

II. The Evolving Understanding of Gender Dysphoria

> *I feel that not properly treating [GD] is a form of medical malpractice. A person should not have to prove to anyone who they are. I understand that medical/mental health professionals need to be sure about a patient but I fought to prove myself for over 8 years.*
>
> —Anonymous Survey Respondent[52]

This Part summarizes the history of the gender-related disorders in the DSM, then provides a brief autoethnographic note of my experience of reading the DSM. The American Psychiatric Association (APA) issues the DSM, a handbook used as the authoritative guide for the clinical diagnosis of mental disorders.[53] This Part then provides a brief history of the ADA and a summary of the legal interpretation of the ADA's coverage of GD.

Congress passed the ADA as "a comprehensive civil rights law that prohibits discrimination based on disability in a range of areas,"[54] including prisons.[55] Congress excluded gender identity disorders from the ADA's coverage when it passed the ADA in 1990.[56] We must understand the gatekeepers' terms in the cissexist, heteropatriarchal, and ableist society in which we are living if we are to survive and move toward thriving in a better world.

A. *The Pathologization of Trans Identities*

When the ADA was passed in 1990, it incorporated definitions of various gender identity disorders that were established in the 1987 version of the DSM.[57] This section traces how those DSM definitions have changed in meaningful ways for the ADA claim for GD.

1. DSM-III-R.—Western psychiatry has evolved its understandings of trans identities over time.[58] Though congresspeople may have been influenced by archaic conceptions of trans people, the ADA was written with reference to a particular set of definitions. In 1987, the APA issued the DSM-III-R,[59] which categorized a few diagnoses under the subclass "gender identity disorders," including "Gender Identity Disorder of Childhood,"[60] "Transsexualism,"

52. *See* Survey Results, *supra* note 32.

53. *See* DSM-5-TR, *supra* note 2, at xxiii.

54. Barry, *supra* note 27, at 7.

55. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209 (1998) ("[T]he ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt.").

56. Barry, *supra* note 27, at 9.

57. *Id.* at 11.

58. "'Transsexual' was not coined until 1949, 'transgender' not until 1971, and 'trans' . . . not until 1996." Stephen Whittle, *A Brief History of Transgender Issues*, The Guardian (June 2, 2010, 6:49 AM), https://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues [https://perma.cc/E22P-H8ZM]. For a discussion of the earlier psychological conception of "gender inversion," see Anna Lvovsky, Vice Patrol: Cops, Courts, and the Struggle Over Urban Gay Life Before Stonewall 68–71 (2021).

59. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (3d ed., rev. 1987) [hereinafter DSM-III-R].

60. Childhood GD and adult GD necessitate separate conversations. *See* Kari E.

"Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual Type (GIDAANT), and "Gender Identity Disorder Not Otherwise Specified"[61]:

> The essential feature of the disorders included in this subclass is an incongruence between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity. Gender identity is the sense of knowing to which sex one belongs, that is, the awareness that "I am a male," or "I am a female."[62]

This definition of "gender identity" reinforced the gender binary.[63] As trans scholar Julia Serano argues, this binary presents an "oppositional sexism"—"the belief that female and male are rigid, mutually exclusive categories, each possessing a unique and nonoverlapping set of attributes, aptitudes, abilities, and desires."[64] The implications of this binary become evident when analyzing the diagnoses.

(a) Transsexualism.—DSM-III-R defined "transsexualism" by its "essential features": "a persistent discomfort and sense of inappropriateness about one's assigned sex in a person who has reached puberty" and a "persistent preoccupation, for at least two years, with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex."[65] "Invariably," the APA noted, "there is the wish to live as a member of the other sex."[66] To Serano's point, "the other sex" presupposes that there are only two sexes.

The diagnostic features of transsexualism applied an "oppositional sex" view of clothing, appearance, and mannerisms.[67] The diagnoses were written from a cisgender perspective, in that they presumed the existence of only two sexes.[68]

Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 106 (2002). I do not discuss Gender Identity Disorder (GID) of Childhood because this Essay focuses on adults seeking gender-affirming care in carceral settings. For a discussion of gender-affirming care that children might pursue, see Jennifer Levi & Kevin Barry, *"Made to Feel Broken": Ending Conversion Practices and Saving Transgender Lives*, 136 HARV. L. REV. 1112, 1121–22 (2023) (book review).

61. *See* DSM-III-R, *supra* note 59, at 71–78.

62. *Id.* at 71.

63. *Cf.* J.S. Welsh, *Assimilation, Expansion, and Ambivalence: Strategic Fault Lines in the Pro-Trans Legal Movement*, 110 CALIF. L. REV. 1447, 1459 (2022) (acknowledging that there is "a broad array of people, ideas, and identifications that seek to undermine binary notions of sex and gender").

64. SERANO, *supra* note 2, at 13.

65. DSM-III-R, *supra* note 59, at 74.

66. *Id.*

67. *See id.* ("People with this disorder usually complain that they are uncomfortable wearing the clothes of their assigned sex and therefore dress in clothes of the other sex. Often they engage in activities that in our culture tend to be associated with the other sex.").

68. *See id.* ("[E]ven after sex reassignment, many people still have some physical features of their originally assigned sex that the alert observer can recognize.").

Finally, DSM-III-R included a cultural section. The APA described how "the Hijra of India and the corresponding group in Burma may have conditions that, according to this manual, would be diagnosed as male-to-female Transsexualism. The Hijra, however, traditionally undergo castration, not hormonal and surgical feminization (creation of a vagina)."[69] I will return to this example below.

(b) GIDAANT.—DSM-III-R contained another disorder that I had never heard of: Gender Identity Disorder of Adolescence or Adulthood, Nontranssexual Type (GIDAANT).[70] As I explain below, reading about this diagnosis was a dysphoric experience for me:

> The essential features of [GIDAANT] are a persistent or recurrent discomfort and sense of inappropriateness about one's assigned sex, and persistent or recurrent cross-dressing in the role of the other sex, either in fantasy or in actuality, in a person who has reached puberty. . . . [T]here is no persistent preoccupation (for at least two years) with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex.[71]

DSM-III-R hyperfixated on cross-dressing as the primary tell of this disorder, fixing the gender binary rigidly into place.[72] Once again revealing a cissexist gaze, DSM-III-R stated that "[t]he degree to which the cross-dressed person appears as a member of the other sex varies, depending on mannerisms, body habitus, and cross-dressing skill."[73] And without accounting for any form of gender expression besides clothing, DSM-III-R stated that "[w]hen not cross-dressed, the person usually appears as an unremarkable member of his or her assigned sex."[74] "Cross-dressing" was framed as a remedy to the associated mental health impairments.[75]

The APA differentiated this diagnosis from "Transvestic Fetishism," wherein an individual cross-dresses "for the purpose of sexual excitement."[76] But the APA also said that people with this disorder include "homosexuals who cross-dress" and "female impersonators."[77] Here, DSM-III-R betrayed an archaic view of homosexuals as gender inverts and deviants—female impersonators who may or may not have been sexually aroused by the clothing.[78]

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69. *Id.*
70. *See id.* at 76–77.
71. *Id.* at 76.
72. *See id.*
73. *Id.*
74. *Id.*
75. *See id.* ("Anxiety and depression are common, but are often attenuated when the person is cross-dressing.").
76. *Id.* at 77.
77. *Id.* at 76.
78. *See* Lvovsky, *supra* note 58, at 29 (discussing the post-Prohibition years as "a time when . . . liquor officials commonly conflated homosexuality and gender inversion as twin sides of the same pathology, using *fag*, *fairy*, and *female impersonator* as synonyms separated only by their varying vulgarity").

2. DSM-IV-TR.—The DSM was revised in 1994.[79] DSM-IV removed three gender-related diagnoses, including "Transsexualism," and replaced them with "Gender Identity Disorder" (GID).[80] A textual revision was issued in 2000, titled DSM-IV-TR.[81]

DSM-IV-TR stated that "Gender Identity Disorders are characterized by strong and persistent cross-gender identification accompanied by persistent discomfort with one's assigned sex."[82] The APA defined "gender identity" as "an individual's self-perception as male or female" and characterized the disorder by the person's "strong and persistent feelings of discomfort with one's assigned sex, the desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex."[83]

The GID definition did not focus on reproductive sex parts the way the transsexualism definition did in DSM-III-R.[84] But the driving binaristic assumption that trans people are trying to function in society *as* "the other sex" negates the individuality of each trans person's selfhood and reinforces the idea that trans people's gender is less "real" than that of cisgender people.

DSM-IV-TR stated that "[d]istress or disability in individuals with [GID] is manifested differently across the life cycle."[85] Though the definition mentioned distress, trans identity itself is the aberrance.

3. DSM-5-TR.—The APA revised the DSM in 2013, creating the DSM-5.[86] DSM-5 removed GID and replaced it with a new, significantly modified GD diagnosis.[87] The APA issued a text revision, the DSM-5-TR, in 2022, which states that "[GD] as a general descriptive term refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender."[88]

At the outset, this definition does important work in bifurcating "distress" from the "incongruence" trans people feel, and pathologizing only the former. DSM-5-TR states that the "distress . . . *may* accompany"[89] that incongruence, and explains that while "not all individuals will experience distress from incongruence, many are distressed if the desired physical interventions

79. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) [hereinafter DSM-IV].

80. *Id.* at 785; *see also* Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 Touro L. Rev. 25, 37 n.57 (2019) (explaining the history of "transsexualism" in the DSM).

81. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

82. *Id.* at 535 (emphasis omitted).

83. *Id.* (emphasis omitted).

84. *Compare id.*, *with* DSM-III-R, *supra* note 59, at 74.

85. DSM-IV-TR, *supra* note 81, at 577.

86. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).

87. *See id.* at 814–15.

88. DSM-5-TR, *supra* note 2, at 511.

89. *Id.* (emphasis added).

using hormones and/or surgery are not available."[90] DSM-5-TR "focuses on dysphoria as the clinical problem, not identity per se."[91] This significant shift accomplished many trans activists' goals, removing the pathologization of trans gender identity from the DSM altogether. Gone, too, is the omnipresent sex binary found throughout previous versions.[92]

Critically, the language of causation has been removed entirely. Where DSM-IV-TR said GID is a "disturbance [that] *causes* clinically significant distress or impairment,"[93] DSM-5-TR states that GD is a "condition [that] *is associated with* clinically significant distress or impairment."[94] Similarly, DSM-5-TR states that "[GD] manifests itself differently in different age groups."[95] The equivalent sentence in DSM-IV-TR said: "Distress or disability in individuals with Gender Identity Disorder is manifested differently across the life cycle."[96] This shift in language, though subtle, shows that the distress—which is GD—occurs *in* individuals *with* GID as conceptualized by DSM-IV-TR, but, by comparison, GD is *both* the diagnosis and the manifestation in DSM-5-TR. This difference is of the utmost importance for the legal interpretation of DSM-5-TR under the ADA. In short, with GD the distress *is* the disability, whereas GID considered anyone whose gender identity did not match their sex assigned at birth as inherently ill.

Despite these positive changes, DSM-5-TR still upholds the sex binary in other places. In the only diagnostic criterion that compares the current sex parts of a trans person with their desired sex parts, DSM-5-TR reveals its authors' assumption that sex parts *belong* to a specific sex assigned at birth.[97] This forced sex/gender distinction—allowing gender to include non-binary representation but not granting the same fluidity to sex—ignores that "[t]hroughout history, great women have had penises and great men have had vaginas."[98] Some trans women have penises and never wish to change that. So a trans woman with GD who decides to surgically remove her penis *does not necessarily* desire the "primary and/or secondary sex characteristics" of a woman, unless "woman" can only mean "cis woman."[99] The category "woman" does

90. *Id.* at 512.

91. *Id.*

92. *But cf.* Shannon Minter & Martine Rothblatt, Report from the Workshop, Health and Insurance Law (July 6, 1996), *in* Proc. from the Fifth Int'l Conf. on Transgender L. & Emp. Pol'y 69, 71–73 (1996) https://www.digitaltransgenderarchive.net/files/h702q650b [https://perma.cc/VV36–7A9B] (calling for a complete end to diagnosing any part of trans identity in the realm of mental health and suggesting a shift to the medical model); Spade, *supra* note 5, at 30–32 (arguing for complete "de-medicalization").

93. DSM-IV-TR, *supra* note 81, at 581 (emphasis added).

94. DSM-5-TR, *supra* note 2, at 513 (emphasis added).

95. *Id.*

96. DSM-IV-TR, *supra* note 81, at 577.

97. *See* DSM-5-TR, *supra* note 2, at 513 (noting "[a] strong desire for the primary and/or secondary sex characteristics of the other gender" as a manifestation of GD).

98. Minter & Rothblatt, *supra* note 92, at 73.

99. *See* Serano, *supra* note 2, at 11 ("No qualifications should be placed on the term 'trans woman' based on a person's ability to 'pass' as female, her hormone levels, or the state

not belong to cisgender women, and the category "man" does not belong to cisgender men.[100]

Recall that DSM-III-R said quite conclusively that Hijra identity in India "would be diagnosed as male-to-female Transsexualism."[101] DSM-5-TR differs, stating that "[t]he equivalent of gender dysphoria has . . . been reported in [other] cultural contexts" that have gender identity categories beyond the sex binary, though "[i]t is unclear . . . whether the diagnostic criteria for gender dysphoria would be met with these individuals."[102] This update is an important lesson to those who subject third-gender individuals to scrutiny under Western biomedical standards.[103] We should not forget that these diagnostic terms, which lawyers ask courts to wrestle with, are borne of "gendered settler norms and restrictions."[104] Such norms "of the outside world are reproduced inside jails and prisons."[105]

B. *My Visceral Experience of the DSM*

It was disorienting and dysphoric to read these diagnostic criteria. As I read sections of the GIDAANT diagnosis, specifically, I stood up and paced around my office, washed my hands, stretched, and felt near tears. I have never before read something approximating my gender identity through such a pathologizing frame. The experience is difficult to put into words. For years in high school and college, I had read texts and watched films that made me consider whether I was, to use the terms of DSM-III-R, "transsexual." I concluded I was not because I did not feel the need to remove my sex parts. As an assigned male at birth person, I do not wear women's clothing because of "transvestic fetishism," but because the clothing is aesthetically pleasing and helps people to avoid gendering me as a man, including by not clinging around my groin. I could see myself in every part of the diagnostic criteria of GIDAANT. And as doing so, I could feel myself coping with the anxiety of seeing some partial truths of my gender framed as a clinical disorder. Professor Dean Spade puts it plainly: "[T]rans people do not want to be seen as 'disabled.'"[106]

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of her genitals—after all, it is downright sexist to reduce any woman (trans or otherwise) down to her mere body parts or to require her to live up to certain societally dictated ideals regarding appearance.").

100. *Cf.* Welsh, *supra* note 63, at 1461 ("Many activists in [the queer expansionist] current reject the binary model of trans identity and the conceptual coherence of sex, gender, and genitals. Others aim to destabilize the notion of switching sex or gender within a binary system . . . ." (footnote omitted)).

101. DSM-III-R, *supra* note 59, at 74.

102. DSM-5-TR, *supra* note 2, at 518.

103. *See* E Ornelas, *Telling "Our Stories": Black and Indigenous Abolitionists (De) Narrativizing the Carceral State*, *in* SURVIVING THE FUTURE, *supra* note 6, at 20, 28 ("[J]ails and prisons . . . subject Native individuals who identify as queer, trans, gender nonconforming, and/or Two Spirit to the cisheteropatriarchal whims of non-Native police, corrections officers, wardens, doctors, counselors, etc."); El-Fil, *supra* note 6, at 47.

104. Ornelas, *supra* note 103, at 28.

105. *Id.*

106. Spade, *supra* note 5, at 34.

I would suggest a correction: trans people do not want to be pathologized.[107] Diagnostic labels can cause us harm in this transphobic society.[108] The social model of disability understands that the pathologization that takes place in and by society creates the disabling effect.[109] I think a major component of what I was grappling with lies in the fact that I feel and have tried to acknowledge my able-bodied privilege for much of my life. To begin to realize that how I perceive my body while living in society has some disabling effects is a disorienting paradigm shift.

I include this affective response with a nod to all the readers who were told by their professors that there is no room for emotion in the law school classroom, which, I worry, extends to the profession writ large. I strongly disagree. Emotions provide information and an opportunity for growth. My racing thoughts walked me right into the web in which I see our legal movement stuck right now. In my heightened state, I thought: "My gender could not be in the DSM. My identity and core parts of my gender expression—what made me *me*—couldn't possibly be a disability."

Given my dysphoric reaction to the GIDAANT diagnostic criteria and the advocacy to remove transsexualism from the DSM, I can really feel the stakes of the issue. It would seem far too convenient, but not at all consistent, for trans advocates to want our identities and experiences to be covered by the ADA, *where they are legally considered disabilities*, but not pathologized by the DSM, *where they are clinically determined to be disabilities*.

But the world before DSM-5 posed a more complex ontological challenge than we face today. Today's ADA claim requires us only to view GD as disabling. I can support that approach much more readily now that my gender identity itself has been depathologized. And I urge others to, as well.

C. *The ADA's Exclusion of Gender Identity Disorders*

1. Initial Passage of the Exclusion.—The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[110] This definition is informed by the social model of disability, "which holds that it is society's negative reactions to our medical conditions—not the conditions themselves—that cause disability."[111]

Congress removed transvestism, transsexualism, and gender identity disorders not resulting from physical impairments from the protection of the ADA.[112] This exclusion was introduced by a small handful of legislators

107. Thank you, Nikk Wasserman, for this brilliant point.

108. *See* Kelsey Mumford et al., *What the Past Suggests About When a Diagnostic Label Is Oppressive*, 25 AMA J. Ethics 446, 448 (2023).

109. Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 513 (2016).

110. 42 U.S.C. § 12102(1).

111. Barry et al., *supra* note 109, at 513.

112. 42 U.S.C. § 12211(b)(1).

cherry-picking exceptions to the ADA from DSM-III-R.[113] Late-breaking amendments by Senators William Armstrong and Jesse Helms were made with statements on the record of disdain regarding "sexually deviant behavior"[114] with "a moral content to them."[115]

2. ADA Amendments Act of 2008.—Congress passed the ADA Amendments Act of 2008[116] (ADAAA) after the Supreme Court "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect."[117] Congress sought to "reinstat[e] a broad scope of protection to be available under the ADA."[118] As amended, the ADA's definition of disability "shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA."[119]

Yet Congress "ignored activists' calls to jettison the exclusion, despite other legal changes evincing an acknowledgment of the discrimination faced by the trans community, changes in medical opinion about [gender identity disorders], and increased activism for trans inclusion."[120] Activists had been calling for the removal of gender identity disorder from the ADA since at least the mid-1990s.[121] Congress ignored "a national trans[] lobby calling for an end to the exclusion" because the ADAAA was intended to "restor[e,] not expand[,] congressional intent."[122] "Congress clearly intended to exclude [gender identity disorders] []and [t]ranssexualism[] from protection when it passed the ADA in 1990," so the intended goals of the ADAAA would not apply.[123] In response, the activist movement splintered and "disability rights advocates" compromised, making "the strategic decision to leave [the issue of trans exclusion] for another day."[124]

The transphobia from Congress and disability rights advocates has since been critiqued by scholars.[125] Scholars have continued to call for Congress to remove the exclusion. For example, Associate Dean Kevin Barry argues for a "modest bill" that would remove "'gender identity disorders not resulting from physical impairments' and 'transsexualism' from the" list of the ADA's

113. *See* Barry, *supra* note 27, at 23–26; Barry et al., *supra* note 109, at 530–40.

114. 135 Cong. Rec. S19,870 (daily ed. Sept. 7, 1989) (statement of Sen. Jesse Helms).

115. *Id.* at S19,853 (statement of Sen. William Armstrong).

116. Pub. L. No. 110–325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.).

117. 42 U.S.C.A. § 12101(a)(4) (West 2009).

118. *Id.* § 12101(b)(1).

119. 29 C.F.R. § 1630.1(c)(4) (2023).

120. Szemanski, *supra* note 27, at 149.

121. *See* Minter & Rothblatt, *supra* note 92, at 71–73; *see also* Serano, *supra* note 2, at 157–160.

122. Barry, *supra* note 27, at 31 (emphasis omitted).

123. *Id.* at 31–32.

124. *Id.* at 32.

125. *See id.* at 33; Kafer, *supra* note 29, at 153 (arguing that an "expansive approach to disability politics . . . means challenging the . . . transphobia that lurk[s] within the disability rights movement").

exclusions.[126] In contrast, Professor Jeannette Cox has suggested the provisions could be removed as a part of the Equality Act.[127]

3. Legal Interpretations Since DSM-5.—A straightforward textual analysis shows that GD is a protected disability under the ADA and the definitions in DSM-5-TR.[128] Other articles have expounded on the legal viability of this claim.[129] And in January 2024, the United States Department of Justice issued a statement of interest in a case I am litigating against the Georgia Department of Corrections, stating the United States's position that "'[g]ender dysphoria' does not fall within the . . . 'gender identity disorder' or 'transsexualism'" exclusions under the ADA.[130]

As stated above, the Fourth Circuit recently held that GD has come to mean something different than the excluded gender identity disorders.[131] No other circuit court has yet to reach the issue. District courts have found GD is not excluded under two theories.[132] A court might hold that GD is not GID and thus falls outside of the ADA exclusion.[133] Or a court might find that GD is a gender identity disorder, and yet hold that "a physical etiology underlying gender dysphoria may exist to place the condition outside of the exclusion,"[134] as a gender identity disorder resulting from physical impairments.[135]

Courts have held that recent medical research demonstrates that "GD diagnoses have a physical etiology, namely, hormonal and genetic drivers contributing to the in utero development of dysphoria."[136] Even the United States "Department of Justice has agreed that this emerging research renders the inference that gender dysphoria has a physical basis sufficiently plausible to survive

126. Barry, *supra* note 27, at 33.

127. *See* Jeannette Cox, *Disability Law and Gender Identity Discrimination*, 81 U. Pitt. L. Rev. 315, 348 (2019).

128. *See, e.g.*, Kevin M. Barry, *Challenging Transition-Related Care Exclusions Through Disability Rights Law*, 23 UDC/DCSL L. Rev. 97, 107–08 (2020).

129. *See, e.g.*, Szemanski, *supra* note 27, at 144–59; Verghese, *supra* note 27, at 298–315; Barry & Levi, *supra* note 80, at 42–52.

130. Statement of Interest of the United States at 8, Doe v. Ga. Dep't of Corr., No. 23-cv-5578 (N.D. Ga. Jan. 8, 2023), ECF No. 69.

131. *See* Williams v. Kincaid, 45 F.4th 759, 766–69 (4th Cir. 2022).

132. *See* Doe v. Pa. Dep't of Corr., No. 20-cv-00023, 2021 WL 1583556, at *8–9 (W.D. Pa. Feb. 19, 2021) (summarizing the split).

133. *See, e.g.*, Doe v. Mass. Dep't of Corr., No. 17–12255, 2018 WL 2994403, at *1, *6 (D. Mass. June 14, 2018); Tay v. Dennison, No. 19-cv-00501, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020); Shorter v. Barr, No. 19cv108, 2020 WL 1942785, at *9 (N.D. Fla. Mar. 13, 2020). *But see* Parker v. Strawser Constr., Inc., 307 F. Supp. 3d 744, 753–54 (S.D. Ohio 2018).

134. Doe v. Pa. Dep't of Corr., 2021 WL 1583556, at *9. The Fourth Circuit has so held. *See Williams*, 45 F.4th at 772.

135. 42 U.S.C. § 12211(b)(1).

136. Doe v. Mass. Dep't of Corr., 2018 WL 2994403, at *6; *see also* Lauren Hare et al., *Androgen Receptor Repeat Length Polymorphism Associated with Male-to-Female Transsexualism*, 65 Biological Psychiatry 93, 95 (2009); D.F. Swaab, *Sexual Differentiation of the Human Brain: Relevance for Gender Identity, Transsexualism and Sexual Orientation*, 19 Gynecological Endocrinology 301, 303–05 (2004).

a motion to dismiss."[137] Thus, trans plaintiffs have a strong argument that GD qualifies as a disability under the ADA.[138]

Finding the "case present[ed] a question of great national importance," despite the lack of a circuit split, Justice Alito issued a dissent from the denial of certiorari in the Fourth Circuit's case.[139] Justice Alito laid out the two rationales jointly advanced by the plaintiff and adopted in the alternative by the Fourth Circuit: (1) that GD is not a gender identity disorder, as that term is now obsolete; and (2) that the plaintiff alleged her GD resulted from a physical impairment because she has a "physical need for hormonal treatment," without which she experiences physical distress.[140]

Justice Alito found GID and GD to be interchangeable, or at least that the term "gender identity disorders" as used in the ADA is a "catch-all category" that includes GD.[141] And he rejected the physical-impairment conclusion by the Fourth Circuit because the Fourth Circuit did "not meaningfully distinguish physical impairments from 'mental impairment[s],' which the ADA recognizes as a distinct category."[142]

Justice Alito cited a district court opinion that found that the "majority" of federal cases have concluded that the ADA excludes gender identity disorders that substantially limit a major life activity.[143] That district court cited only four cases in support of its proposition, three of which did not reach the precise issue.[144] The District of Arizona could not have reached the issue because it was decided before DSM-5 was published in 2013.[145] Similarly, the plaintiffs in the Middle District of Georgia and the Western District of Wisconsin were diagnosed with GID, not GD.[146] The Eastern District of Wisconsin issued the only decision of the four that supports Justice Alito's view[147]—standing against the Fourth Circuit Court of Appeals,[148] the District of Colorado,[149] the District

137. *Williams*, 45 F.4th at 771 (citing Statement of Interest of the United States of America at 1–2, Blatt v. Cabela's Retail, Inc., No. 14-cv-4822 (E.D. Pa. Nov. 16, 2015)).

138. *See id.*; *see also* Doe v. Mass. Dep't of Corr., 2018 WL 2994403, at *6.

139. Kincaid v. Williams, 143 S. Ct. 2414, 2414 (2023) (Alito, J., dissenting from the denial of certiorari). *See generally* Sup. Ct. R. 10.

140. *Kincaid*, 143 S. Ct. at 2416 (Alito, J., dissenting from the denial of certiorari).

141. *See id.* at 2417.

142. *Id.* at 2418 (quoting 42 U.S.C. §§ 12102(1)(A), 12211(b)(1) (alteration added)).

143. *See id.* at 2419 n.3 (quoting Parker v. Stawser Constr., Inc., 307 F. Supp. 3d 744, 754 (S.D. Ohio 2018)).

144. *Parker*, 307 F. Supp. 3d at 754 (citing Gulley-Fernandez v. Wis. Dep't of Corr., No. 15-cv-995, 2015 WL 7777997, at *2 (E.D. Wis. Dec. 1, 2015); Mitchell v. Wall, No. 15-cv-108, 2015 WL 10936775, at *1 (W.D. Wis. Aug. 6, 2015); Diamond v. Allen, No. 14-cv-124, 2014 WL 6461730, at *4 (M.D. Ga. Nov. 17, 2014); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. Civ.02–1531, 2004 WL 2008954, at *4 (D. Ariz. June 3, 2004)).

145. *See Kastl*, 2004 WL 2008954, at *1.

146. *See Diamond*, 2014 WL 6461730, at *4; *Mitchell*, 2015 WL 10936775, at *1.

147. And only barely. A pro se litigant was before the court on a petition to proceed in forma pauperis and the court issued its finding on the ADA exclusion with no reasoning. *Gulley-Fernandez*, 2015 WL 7777997, at *1–3.

148. Williams v. Kincaid, 45 F.4th 759, 763 (4th Cir. 2022).

149. Griffith v. El Paso County, No. 21-cv-00387, 2023 WL 2242503, at *17 (D. Colo.

of Massachusetts,[150] the Eastern District of Pennsylvania,[151] three different judges on the Southern District of Illinois,[152] the Northern District of Florida,[153] and the District of Idaho.[154] Justice Alito relied on an outdated case that did not analyze the issue properly and neglected to provide an independent tally.[155]

If the recent trend is any indication, this viable legal theory will continue to be tested across the federal courts, a circuit split will possibly emerge, and the Supreme Court might take up the issue again. I accept the claim as valid for the reasons set forth thus far, and now move to exploring the normative question: Should litigants bring ADA claims for GD?

III. "Like Any Other Disability"

> *I believe [GD] is like any other disability and there will always be a stigma attached because people [will] either covet or ridicule what they don't live with or understand.*
>
> —Anonymous Survey Respondent[156]

Is the inclusion of GD in the DSM transphobic? Is resistance to a disability framework ableist? Is there a clear answer to these questions or should we rather "[l]ive the questions now"?[157] I feel confident that our movement is asking the right questions.[158] By "living" those questions, we might shed our egoic defenses.

Feb. 27, 2023) (rejecting the reasoning of a previous case in the same district because the court found *Williams* persuasive).

150. Doe v. Mass. Dep't of Corr., No. 17–12255, 2018 WL 2994403, at *1, *6 (D. Mass. June 14, 2018).

151. Blatt v. Cabela's Retail, Inc., No. 14-cv-4822, 2017 WL 2178123, at *3 (E.D. Pa. May 18, 2017).

152. Tay v. Dennison, No. 19-cv-00501, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020); Venson v. Gregson, No. 18-cv-2185, 2021 WL 673371, at *2–3 (S.D. Ill. Feb. 22, 2021); Iglesias v. True, 403 F. Supp. 3d 680, 687–88 (S.D. Ill. 2019).

153. Shorter v. Barr, No. 19cv108, 2020 WL 1942785, at *10 (N.D. Fla. Mar. 13, 2020).

154. Edmo v. Idaho Dep't of Corr., No. 17-cv-00151, 2018 WL 2745898, at *7–8 (D. Idaho June 7, 2018).

155. I found further cases that foreclose an ADA claim for GD, but Justice Alito did not cite them. *See* Lange v. Houston County, 608 F. Supp. 3d 1340, 1360–63 (M.D. Ga. 2022); Duncan v. Jack Henry & Assocs., Inc., 617 F. Supp. 3d 1011, 1056–57 (W.D. Mo. 2022) (holding "gender identity disorders" encompasses GD, *id.* at 1057); Doe v. Northrop Grumman Sys. Corp., 418 F. Supp. 3d 921, 929–30 (N.D. Ala. 2019) (same). Even taking these cases into account, however, the vast majority of lower courts, as cited above, have sided with the viability of an ADA claim for GD.

156. *See* Survey Results, *supra* note 32; *see also supra* p. 244.

157. Rainer Maria Rilke, Letters to a Young Poet 27 (M.D. Herter Norton trans., W.W. Norton & Co., Inc. 2004) (1934) (emphasis omitted).

158. *See* Spade, *supra* note 5, at 32 ("The most pressing and controversial area in trans law bringing up these issues currently is the question of whether and when disability discrimination claims should be used to address instances of gender identity discrimination.").

I am grateful that I had such a visceral reaction to GIDAANT.[159] I will never forget feeling that dysphoric response to reading about my specific type of gender identity disorder-no-longer. For the most part, I am not barred from participating equally, and, importantly, I rarely need to navigate state-imposed barriers to my gender expression.[160] But in moments when my conditions—anxiety, PTSD, ADHD, and even occasional GD—prevent me from participating equally, I can usually ask for support from my coworkers or my peers. I can access clothing and hygiene products that affirm my gender. In these ways, I can accommodate my GD needs. I feel my heart racing and my palms getting sweaty at that realization. I am living with disabilities, and am reasonably accommodated, for the most part. That self-realization is truly all the Disability Justice movement asks us to work toward accepting.[161]

Disability is a social construct.[162] Like any construct, it can be bent and remade.[163] What might it mean for a trans person who might not meet DSM-5's criteria of GD to claim being disabled? What would it look like for them to find "brilliance and pride" in that identity, as they might their trans identity?[164]

With the ADA, disability advocates set a solid floor for disability rights. Despite the ADA's exclusions of gender identity disorders, the ADA provided me with a paradigm shift for considering what accessibility for people with GD might entail.[165] So the ADA may spark conversations for us to have in community—in loving struggle and tearful long nights and awkward pauses.

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159. *See supra* pp. 249–50.

160. Spade, *supra* note 5, at 34 ("[D]isabled people are capable of equal participation, *but are currently barred from participating equally* by artificial conditions that privilege one type of body or mind and exclude others." (emphasis added)).

161. *See What Is Disability Justice?*, Sins Invalid (June 16, 2020), https://www.sinsinvalid.org/news-1/2020/6/16/what-is-disability-justice [https://perma.cc/Y5LK-QL6V] ("A disability justice framework understands that . . . [a]ll bodies have strengths and needs that must be met.").

162. *See* Cindy LaCom, *Ableist Colonizations: Reframing Disability Studies in Multicultural Studies*, *in* American Multicultural Studies: Diversity of Race, Ethnicity, Gender and Sexuality 53, 56 (Sherrow O. Pinder ed., 2012) ("A foundational argument in disability studies is that disability is a cultural construct and that 'knowledge about disability is socially produced.'" (quoting Simi Linton, Claiming Disability: Knowledge and Identity 4 (1998))); *see also* Davis et al., supra note 28, at 68; Jannine Williams & Sharon Mavin, *Disability as Constructed Difference: A Literature Review and Research Agenda for Management and Organization Studies*, 14 Int'l J. Mgmt. Revs. 159, 167, 171, 172 (2012); Liat Ben-Moshe, *Alternatives to (Disability) Incarceration*, *in* Disability Incarcerated: Imprisonment and Disability in the United States and Canada 255, 264 (Liat Ben-Moshe et al. eds., 2014) [hereinafter Disability Incarcerated].

163. *See* Alice Wong, Disability Visibility: First-Person Stories from the Twenty-First Century xxii (2020) ("Disability is mutable and ever-evolving. . . . Disability is pain, struggle, brilliance, abundance, and joy.")

164. *See id.*; *cf.* Kafer, supra note 29, at 45 ("I think the inability to value queer lives is related to the inability to imagine disabled lives. . . . Not wanting to cultivate queerness . . . is intertwined with fears about cultivating disability."). For an enriching discussion of queer theory as applied to ADA claims for GD, see Verghese, *supra* note 27, at 315–27.

165. I thank Ido Katri for pointing this out.

For refusing to "delimit understandings of 'disability' to physical and cognitive difference" just "might constitute an act of resistance."[166]

We know our ideal world is "not yet here."[167] Nevertheless, might "we at least begin to contemplate a world in which . . . 'normalcy' exists along . . . a continuum we understand as liminal and in which we work to become comfortable with that liminality, perhaps even to celebrate it rather than attempting to regulate and 'manage' difference"?[168] How can we dismantle the institutions we're struggling to survive in while also building something beautiful and worthy of holding on to? Who has the spoons to do all of that?[169]

Some answers might lie in the urgent necessity to take care of our community members experiencing preventable harm in state and federal custody. Through my work, I have learned that in prison, people with GD are highly regulated because of their differences. They struggle to access necessary medical care, they are subject to daily forms of gender-based violence including harassment and assault, and they are housed in torturous conditions that exacerbate their mental health conditions. "Prisons are spaces where people get disabled, or more disabled."[170]

So I use all available tools—including ADA claims—on behalf of those who are currently "more disabled" because of oppressive systems.[171] As a prison litigator, I'm learning that "[t]he harshness of prison life disables people," and that "[d]isability is also a byproduct of the correctional system's obsessive infatuation with security and control."[172] My clients diagnosed with GD have experienced those disabling effects and have not shied away from ADA claims whatsoever. On the contrary, they encourage me to raise ADA claims in their demand letters and legal filings, and they file ADA administrative grievances, which are sometimes an alternative to the traditional administrative remedy procedure.

So where do we go from here? We must learn from our comrades in the Disability Justice movement.[173] They tell us that "[i]t's radical to imagine that

166. LaCom, *supra* note 162, at 62.

167. Muñoz, *supra* note 6, at 1; *see also* LaCom, *supra* note 162, at 63.

168. LaCom, *supra* note 162, at 63.

169. *See* Fortesa Latifi, *Spoon Theory: What It Is and How I Use It to Manage Chronic Illness*, Wash. Post (Jan. 14, 2023 6:00 A.M.), https://www.washingtonpost.com/wellness/2023/01/14/spoon-theory-chronic-illness-spoonie [https://perma.cc/4J5X-L96H].

170. *See* Leah Lakshmi Piepzna-Samarasinha, The Future is Disabled: Prophecies, Love Notes, and Mourning Songs 24 (2022).

171. *Id.; see* Morgan, *supra* note 10, at 989 ("Court filings are opportunities to resist ableism prevalent in carceral systems. By focusing on portraying clients as disabled not only because of medical diagnosis but also *because of* disabling prison and jails conditions, attorneys can move beyond disability discrimination and work towards challenging the more insidious, systematic ways that ableism propagates in carceral spaces.").

172. Marta Russell & Jean Stewart, *Disablement, Prison, and Historical Segregation*, *in* Capitalism & Disability: Selected Writings by Marta Russell 86, 94 (Keith Rosenthal ed., 2019).

173. *See* Natalie M. Chin, *Centering Disability Justice*, 71 Syracuse L. Rev. 683, 736–48 (2021).

the future is disabled" and that "our power is the strongest when we employ a diversity of tactics on our own terms—tactics that build our strengths, that strike where the enemy is weak or has a gap."[174] In my work, the "enemy" is the carceral state that refuses to let trans people live safely and express their gender while in state or federal custody.

Even as we fight using our disabled terms, we must remember that we are simultaneously "thinking and worlding from outside of our present governing system of meaning."[175] We must "analyze [our] commitments to traditional symbolics of Western gender,"[176] including the thought that we are not disabled. We must bend gender and break the rules.[177] We must release "gender non-binary" and reclaim our faerie,[178] embrace our bakla.[179]

I think trans people—especially trans lawyers and advocates—will need to radically change our collective self-image to embrace a Disability Justice future. This change can happen if we organize around universal accommodations, which means embracing that we are all living with disabilities in some way and that the words we ascribe to those disabilities are entirely socially constructed. In the prison context, that means people would access what they need in order to stay safe before hopefully returning to society.

There should be nothing to fear regarding our own nuanced identities; we can expand on our fully-fledged self-conceptions far away from the biomedical realm.[180] But we don our legalese medical "drag" and navigate these systems, code-switching, as we always have, when we receive the call. We follow in the footsteps of our ancestors—Black and indigenous queer and trans people, particularly—who have done this for decades.[181]

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174. Piepzna-Samarasinha, *supra* note 170, at 21, 161.

175. El-Fil, *supra* note 6, at 51.

176. *Id.*

177. *Cf.* Piepzna-Samarasinha, *supra* note 170, at 32 (describing disabled people's "unending crip majestic tradition of bending reality . . . [and] time to create crip lives that are beyond what anyone has told us was possible, all the time").

178. D Dangaran, *Faerie Gender Realization*, Medium (Apr. 2, 2020), https://ddangaran.medium.com/faerie-gender-realization-d694856fd1e3 [https://perma.cc/52E3-W9G2] (explaining how queer history archival research led me to reclaim the term "faerie" as a gender identity and exploring ways I could live out that gender on my terms).

179. Jaime Oscar M. Salazar, *How "Bakla" Explains the Struggle for Queer Identity in the Philippines*, Foreign Pol'y (July 30, 2022, 6:00 AM), https://foreignpolicy.com/2022/07/30/bakla-queer-identity-philippines [https://perma.cc/W5MX-ZAZ5] ("Variously translated as 'drag queen,' 'gay,' 'hermaphrodite,' 'homosexual,' 'queer,' 'third sex,' and 'transgender,' bakla shows how in the Philippines, as in many places around the world, gender and sexuality are imagined and lived out in connection with concepts and categories that Western lenses can't fully account for.").

180. Disability Justice teaches us that this is *necessary* because "Black genderedness [is] incompatible with white Western gender," and so a "vision of a reimagined future will need to arise from Black LGBTQIA+ individuals who break with normativity in their historical positioning and embodiment and show us how to imagine otherwise." El-Fil, *supra* note 6, at 51.

181. *See* G. Samantha Rosenthal, *Column: Gender-Affirming Care Has a Long History in the U.S., and Not Just for Transgender People*, Mich. Advance (July 7, 2023, 3:51 AM),

If we are serious about working toward a better future, then we ought to wield the ADA as a tool for trans justice. The ADA helps get us to "a world where trans people could access life-sustaining healthcare without coverage bans or discriminatory and dehumanizing providers due to legal advocacy and enforcement," such that "they would not face as many impossible choices—choices like going without healthcare at the expense of their physical and mental well-being, or seeking care by risking life, limb, and criminal sanction."[182] Until we reach that world, we need to convince the state to fulfill our rights using their rules, as we know what we need best. So let's organize and train advocates to play by those rules and, even if "temporarily . . . [,] beat [the master] at his own game."[183] Isn't that what movement lawyers are for?

IV. Considering the Counterarguments

Living in the wrong body is a worse prison than one with bars.

—Anonymous Survey Respondent[184]

A. *Lavender Law Panel*

On July 25, 2023, I spoke on a panel held at the National LGBTQ+ Bar Association's Lavender Law conference.[185] The panel, moderated and organized by U.S. Department of Justice attorney David Knight, was entitled "Overcoming Stigmas: Using ADA Litigation to Secure Transgender People's Rights."[186] The other panelists were Professor Jennifer Levi, Richard Saenz, and Brynne Madway.[187] I would estimate that around eighty lawyers and law students attended the session. In many ways, the panel and the attendees represented the modern trans rights movement.[188]

After the panelists described the issue (like this Essay did in Part II), I presented the Black and Pink Massachusetts survey results—the same data

https://michiganadvance.com/2023/07/07/gender-affirming-care-has-a-long-history-in-the-u-s-and-not-just-for-transgender-people [https://perma.cc/93D8–32GX] (describing the common narratives trans people have adopted to attain gender-affirming care since the 1960s and 1970s); *see also* C. Riley Snorton, Black on Both Sides: A Racial History of Trans Identity 24–27, 56–58, 74–84 (2017) (discussing the experiences of slaves whose bodies were surgically forced into conformity and who "cross-dressed" to escape captivity).

182. Chinyere Ezie, *Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color*, 19 Univ. St. Thomas L.J. 276, 322 (2023).

183. Lorde, *supra* note 21, at 112.

184. *See* Survey Results, *supra* note 32.

185. *See The 2023 Lavender Law Conference & Career Fair: Program Schedule*, Nat'l LGBTQ+ Bar Ass'n, https://lgbtqbar.mtiley.com/events/LavLaw23/Agenda.aspx [https://perma.cc/GY9V-Y2Z6].

186. *Id.*

187. *See id.*

188. As co-chair of the National Trans Bar Association, I have created a number of spaces for trans lawyers to convene. Those interested in this topic are all across the country and gather in rare opportunities like Lavender Law to have important dialogues. There are few other opportunities for large-scale collaborations. *Cf.* Dangaran, *supra* note 9, at 173 (discussing the LGBTQ roundtable).

shared in Part I.[189] I then seized the rare opportunity to juxtapose lawyers' views of legal strategy to those of incarcerated trans people. I asked the lawyers and law students gathered at our panel the same three questions we asked folks in the survey, reframing the third one to allow folks to consider themselves as an advocate instead of a plaintiff:

1. Under the ADA, a disability is "a physical or mental impairment that substantially limits one or more major life activities." Do you consider gender dysphoria to be a disability?
2. Do you think there is any stigma attached to gender dysphoria when it is considered a disability?
3. If you needed to and had the option, would you bring a disability legal claim for your gender dysphoria? Or, "Would you bring this claim for your client [if you are a lawyer], or if you are trans would you want to bring this claim for yourself?"

The room's responses trended in the same direction as the survey respondents, but the lawyers were more unanimous. With each question, I asked for a show of hands for yes and no. No one answered "no" on question one. On question two, nearly everyone said yes. I invited some audience members to share their comments on each of the points and got some interesting feedback. Regarding question two, one nonbinary person who is disabled said that there is a stigma that once something is a disability, it "should be cured" because the "expectation is toward able-bodiedness." Other scholars have agreed.[190] When we came to question three, again most said yes. But this time, I asked if anyone who disagreed with bringing the claim would like to share why.

Prison litigator A.D. Lewis stood up and gave a series of normative arguments against the claim. At a high level, he stated that he does not think lawyers should bring ADA claims for GD. He made a few distinct points that I've organized into four themes: (1) GD is completely controlled by doctors, the World Professional Association for Transgender Health (WPATH) is led by cis people, and "I don't trust medical providers"; (2) GD is not how a vast number of trans people identify ("GD describes what cis people make of me, not what I make of myself"); (3) GD in jails and prisons creates two systems—not trans enough to be crippled, and too trans and therefore too disabled to get coverage; (4) "I don't believe in the capacity of the courts."

Levi responded by saying that movement lawyers cannot lose sight of the history of the ADA or the DSM. Levi also pointed out that one way to expedite

189. *See supra* pp. 242–44.

190. *See, e.g.*, Jamelia Morgan, *Contesting the Carceral State with Disability Frames: Challenges and Possibilities*, 170 U. Pa. L. Rev. 1905, 1919–20 (2022) ("A Disability Justice approach recognizes that 'able-bodied supremacy has been formed in relation to intersecting systems of domination and exploitation,' and that it is impossible to 'comprehend ableism without grasping its interrelations with heteropatriarchy, white supremacy, colonialism and capitalism, each system co-creating an ideal bodymind built upon the exclusion and elimination of a subjugated "other."'" (alteration omitted) (quoting Patty Berne, *Disability Justice—A Working Draft*, Sins Invalid (June 10, 2015), https://www.sinsinvalid.org/blog/disability-justice-a-working-draft-by-patty-berne [https://perma.cc/9EHV-SEPQ])).

the release of trans people from prison is to bring a lawsuit for medical care that the facility is required to provide. Here, Levi alluded to the fact that facilities will often release trans plaintiffs seeking gender-affirming care to moot their claims.[191] In that vein, bringing medical necessity suits can be, perhaps inadvertently, an abolitionist strategy and a "de-carceral intervention," not simply a "carceral" or "non-carceral" one.[192]

In response to Lewis, I said that his points, while extremely useful, seemed to be larger critiques of the role of lawyers in this cause altogether. If lawyers—particularly movement lawyers working with incarcerated trans people—are retained to help meet a client's urgent health needs, should we really refrain from pursuing a claim that might bring that relief? What else should movement lawyers do with our skillset and position of privilege?[193]

B. *Holding the Counterarguments*

"Addressing counterarguments," through a classical law review format, does not truly capture what I intend to do with these deep and political questions.[194] So, to "hold" the counterarguments, I offer a reformulation of Lewis's arguments with texts that resonated with what he posited, and respond to those points.

1. Medical Gatekeepers.—Lewis's points formed an argumentatively dense critique of medical gatekeeping. Professor Dean Spade has also raised this critique—and others that Lewis raised.[195] Spade writes that "[t]he mostly

191. *See, e.g.*, Tim Stelloh, *Transgender Inmate Suing Ga. Prison System Granted Surprise Early Release*, NBC News (Aug. 31, 2015, 10:56 PM), https://www.nbcnews.com/news/us-news/transgender-inmate-suing-ga-prison-system-granted-early-release-n419216 [https://perma.cc/MH7D-U6Y6].

192. *Cf.* Dangaran, *supra* note 9, at 205–06 (categorizing gender-affirming care in prison as non-carceral interventions because accessing medical care did not move the person closer to being in the free world). This important point has made me rethink gender-affirming prison placements, which I had previously categorized as a carceral intervention. *See id.* at 202. Trans women seeking transfer to women's facilities have been issued parole instead. *See, e.g.*, James Factora, *For Years, Ashley Diamond Advocated from Inside a Men's Prison. She's Finally Free*, Them (Aug. 15, 2022), https://www.them.us/story/ashley-diamond-trans-prisoner-released-parole-advocacy [https://perma.cc/978C-2X6C]. Such an outcome is an abolitionist success. But of course, there is a huge risk when bringing such claims that the trans person would not be released and would instead be subjected to heightened surveillance and different forms of violence in the women's facility, which is what led me to categorize such an intervention as "carceral." Perhaps my categorization is better conceived as pertaining to outcomes rather than interventions, given the remedy is sometimes out of the advocate's control.

193. I thank Jules Welsh for pointing out that our debate maps onto that of the idealist-expansionist (Lewis) and ambivalent-utilitarian in their article. *See* Welsh, *supra* note 63, at 1459–68.

194. *Cf.* Kafer, supra note 29, at 150 ("[T]he *benefits* of coalition politics are bound up in the *difficulties* of such politics. Disagreement pushes us to recognize and acknowledge our own assumptions and the boundaries we draw around our own work; without such disagreement, and the ways it compels us to reexamine our positions, we can too easily skim over our own exclusions and their effects.").

195. *See* Spade, *supra* note 5, at 32.

unexplored territory remains in the realm of de-medicalization, where trans rights are recognized but will not hinge upon surgical status or medical evidence."[196] He acknowledges that trans attorneys and advocates are "wresting with the fact that, to some extent, the medicalization of trans identity was at one time a progressive step toward dignity and equality [because] it was preferable to total illegitimacy and criminality."[197] But "even as we rely on it to argue that trans people should be protected from discrimination and allowed to legally change our genders, we proceed with caution and work to reduce the gatekeeping powers of medical experts over us."[198] Lewis argued that even if we had the best case law, trans people would still not be getting necessary care because of the neglect of medical providers. Spade agrees.[199]

Lewis also asserted that WPATH is led by cis people. Similarly, Serano offers a helpful critique of cissexism in medical and psychiatric establishments, defining cissexism as "the tendency to hold transsexual genders to a different standard than cissexual ones," and arguing that it "runs rampant" in the general public, in universities, and in the medical and mental health professions.[200] Further, Serano argues that cis mental health professionals should "focus their energies on correcting the huge disparity that exists between cissexual and transsexual access to gender-related healthcare," condemning medical gatekeepers for the lack of insurance coverage for gender-affirming care in trans patients even when the same surgeries are covered for cissexual patients.[201] She also critiques the Harry Benjamin International Gender Dysphoria Association (HBIGDA), now known as WPATH,[202] as being "inherently cissexist, as it requires trans people to accommodate and appease the gender presumptions of individual therapists (who potentially harbor traditional sexist, oppositional sexist, and/or cissexist biases) in order to have our identified genders recognized."[203]

Although the call for trans autonomy is well taken, the WPATH Standards of Care should not be so quickly cast aside. The newest version of the WPATH Standards of Care Guidelines "w[as] developed by global professionals in medicine, psychology, law, social work, counseling, psychotherapy, family studies, sociology, anthropology, sexology, speech and voice therapy, and other related fields."[204] They address "health and wellbeing of transgender people in

196. *Id.* at 30.

197. *Id.* at 31–32.

198. *Id.* at 32.

199. *Id.* at 28–29 (explaining that forcing trans people "to produce narratives of struggle around those identities that mirror the diagnostic criteria . . . can be dehumanizing, traumatic, or impossible to complete").

200. Serano, *supra* note 2, at 156.

201. *Id.* at 157.

202. *Mission and Vision*, WPATH, https://www.wpath.org/about/mission-and-vision [https://perma.cc/NLG2–2D8V].

203. Serano, *supra* note 2, at 157–58.

204. *World Professional Association for Transgender Health, Standards of Care for Transgender and Gender Diverse People, Version 8 Frequently Asked Questions*, WPATH,

a very broad sense."[205] And because "[e]very major U.S. medical and mental health organization" supports the "access to age-appropriate, individualized gender-affirming care" outlined in the WPATH guidelines,[206] they can be very persuasive in court.[207]

Spade ends his analysis of medical gatekeepers by pointing out some inherent contradictions in the work of trans advocates: "I believe in the necessity of litigation and policy work to alleviate immediate crises in the lives of trans people, but I also know that organizing and cultural work have been central to this movement since its inception."[208] As Professor Alison Kafer summarizes, "Spade carefully maps the implications" of litigation within the medical model, "challenging ableism within trans communities while detailing the risks of disability identification."[209] In other words, Spade holds the position that trans rights should not depend on the mental health establishment's diagnosis of gender-identity disorder.[210] But pragmatically, "because 'many trans people's lives are entangled with medical establishments,' their best hope is a medical diagnosis and the recognition and access to services it entails."[211]

Litigating medical civil rights need not "threaten" trans autonomy; we'll still be organizing, looking to our queer trans horizons, and utilizing other "source[s] of support" on that journey besides the "master's [court]house."[212] Trans advocates need to ensure we embrace the autonomy of disabled people within our community who want to access civil rights laws. Denying ADA protection for GD is, in this regard, denying disabled people autonomy to make decisions for themselves.

2. Self-Identification / Informed Consent.—Lewis made two points regarding self-identification. First, Lewis said: GD is not how a vast number of trans people identify. In line with this point, Spade argues: "Despite the disclaimer in the diagnosis description that this is not to be confused with normal gender non-conformity found in tomboys and sissies, no real line is drawn between 'normal' gender non-conformity and gender non-conformity which constitutes GID."[213]

Lewis also argued: "GD describes what cis people make of me, not what I make of myself." Serano similarly posits that gatekeepers do not require cis

https://www.wpath.org/media/cms/Documents/SOC%20v8/SOC-8%20FAQs%20-%20WEBSITE2.pdf [https://perma.cc/K55L-QSKW].

205. *Id.*

206. *Id.*

207. *See, e.g.*, Edmo v. Corizon, Inc., 935 F.3d 757, 788 n.16 (9th Cir. 2019) (calling the WPATH Guidelines "the gold standard on this issue").

208. Spade, *supra* note 5, at 37.

209. KAFER, SUPRA note 29, at 125.

210. *See id.* (quoting Spade, *supra* note 5, at 35).

211. *Id.* (quoting Spade, *supra* note 5, at 35).

212. LORDE, *supra* note 21, at 112.

213. Spade, *supra* note 5, at 24.

people to be pathologized before getting body modification surgery, whereas trans people need a then-GID diagnosis.[214]

Serano makes a strong argument for self-identification as an alternative to the gatekeeper model.[215] Serano points out that medical gatekeepers "ignore the obvious fact that gender dissonance has always been a 'self-diagnosed' condition: There are no visible signs or tests for it; only the trans person can feel and describe it."[216] Psychiatrists play the role of a veracity check, asking trans individuals probing questions about childhood and sexual desire. Serano argues that calling gender variance a mental illness and giving psychiatrists this power of gatekeeping trans identities "enables cissexual and cisgender prejudice against us."[217]

Lewis, Spade, and Serano propose that another model of healthcare be applied to gender-affirming care: the informed consent model.[218] This model sidesteps the psychiatrist as gatekeeper, but, in almost every instance, replaces the psychiatrist with another state or medical-industrial complex actor. Because the healthcare needs that people demand under ADA claims are either medical or provided by the administrative state, the gatekeeper will not be entirely removed through informed consent. We have seen these issues arise, for example, in the abuse of informed consent standards for those seeking abortion.[219] So this model does not fully resolve the problems raised by the gatekeeper critique, at least in accessing medical care. Transphobic doctors will still not provide surgery to the patient asking for it, and pro-trans doctors will likely be stymied by insurance companies (or prison systems) that are anti-trans and have the ability to deny coverage.

3. Soft Policing.—Lewis made nuanced points about the ways prisons would bifurcate the trans community if a GD frame were adopted. Lewis stated that GD is a metaphor; it's not actually a disability.[220] People can be

214. Serano, *supra* note 2, at 156–57.

215. *Id.* at 158–60 ("[T]he process of socially and legally changing one's sex should be entirely uncoupled from medicine and psychiatry . . . ." *Id.* at 158.).

216. *Id.* at 159.

217. *Id.* at 160.

218. *See* Timothy Cavanaugh et al., *Informed Consent in the Medical Care of Transgender and Gender-Nonconforming Patients*, 18 AMA J. Ethics 1147, 1147 (2016) (arguing that "an informed consent approach to care [is] more patient-centered and respectful of the patient's sense of agency" than the WPATH standard model of care); Florence Ashley, *Surgical Informed Consent and Recognizing a Perioperative Duty to Disclose in Transgender Health Care*, 13 McGill J.L. & Health 73, 79–85 (2020) (explaining the informed consent models for gender-affirming care currently at use in Quebec through an autoethnographic approach); Ido Katri, *Transitions in Sex Reclassification Law*, 70 UCLA L. Rev. 636, 683–90 (2023) (detailing self-identification examples in U.S. law).

219. *See* Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violation of Medical Ethics*, 19 Mich. J. Gender & L. 1, 4–8 (2012).

220. *Cf.* Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. Pa. L. Rev. 1757, 1788, 1798–1800 (2022) (problematizing the Fourth Circuit's use of disability as a metaphor because of the perilous "consequences for the disability community," *id.* at 1788, that flow from the fact that "the court once again enshrined the connection between impairment and disability status under antidiscrimination law," *id.* at 1799).

trans enough but not disabled, or people can be too disabled to get healthcare coverage.[221]

I juxtapose this critique to the points raised by Mariame Kaba and Andrea Ritchie, who argue that "[t]he state's police power is . . . located in the social welfare and medical systems," such that medical professionals are "soft police" who can deny medical interventions.[222] Such soft policing includes "the denial of gender-affirming medical care, benefits, and access to social spaces" by medical institutions.[223] The "current goal of the 'treatment' model is to discipline people into narrow confines of 'acceptable' ways of being and acting—a police project enacted by cops, prison guards, and health professionals."[224] Thus, the medical-industrial complex "polic[es] the line between 'normal' and 'not,'" as such standards have existed since the late eighteenth century, in order to "polic[e] individuals' health in the interests of economic productivity."[225]

This critique of the medical model does not apply to the ADA, which applies the social model.[226] Looking to the survey respondents, we can see precisely why GD is better understood when viewed through the social model,[227] not purely a treatment model. Recall that respondents identified GD as a disability because it "put [them] at a disadvantage with other people," and "limits what a person can do physically in a society that is still very trans[phobic] and homophobic."[228] Another respondent said "there will always be a stigma attached because people [will] either covet or ridicule what they don't live with or understand."[229] The distress often occurs, then, at the point where individuals' characteristics clash with societal structures and attitudes. In this way, GD denotes a social ostracization that already is occurring, rather than creating a dividing line itself.

Moreover, to receive protection under the ADA, a plaintiff does not need a medical diagnosis, or the showing of medical necessity, or even a psychiatric evaluation.[230] The broad legal definition lends itself to the view that disability

221. *Cf.* Rabia Belt & Doron Dorfman, *Reweighing Medical Civil Rights*, 72 Stan. L. Rev. Online 176, 184 (2020) (arguing that uninsured and poor trans people who cannot get diagnosed are left without antidiscrimination protection).

222. Mariame Kaba & Andrea J. Ritchie, No More Police: A Case for Abolition 140–41 (2022).

223. *Id.* at 147.

224. *Id.* at 156.

225. *Id.* at 164 (footnotes omitted).

226. *See* Barry et al., *supra* note 109, at 513, 580–81.

227. *See* Rhoda Olkin, *Conceptualizing Disability: Three Models of Disability*, Am. Psychiatric Ass'n (Mar. 29, 2022), https://www.apa.org/ed/precollege/psychology-teacher-network/introductory-psychology/disability-models [https://perma.cc/R68U-S6QM].

228. Survey Responses, *supra* note 32.

229. *Id.*

230. Again, the ADA defined disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). The ADAAA "made it easier for plaintiffs to show that an impairment 'substantially limits

is a protected characteristic rather than a protected class.[231] This characteristic is so broad that everyone could be protected—particularly under the "regarded as" prong—because we all have impairments of some form or another. Anyone who would be limited but for treatment is also protected. Being covered by ADA therefore should not be seen as stigmatizing. Rather, the ADA is a big step toward the Disability Justice future that advocates are striving for.

4. The Role of the Courts.—Finally, Lewis verbalized a distrust of the role courts might play in securing the rights of trans people. For Lewis, it did not matter if the Fourth Circuit case currently supplies favorable precedent; the courts, systemically, would never be the forum wherein we would achieve true liberation, so these are small, temporary gains.

I disagree. I think the courts do have some role to play in advancing justice.[232] Spade highlights "that most of the successful legal claims for trans equality have come through strategic use of the medical model of transsexuality."[233] But Spade cautions that the legal trans rights struggle "has been dominated by judicial decisions which would not recognize gender transition at all, and would not allow gender change no matter what medical evidence was presented."[234] So Lewis and Spade would agree that putting our faith in judicial institutions is short sighted.

But I don't think the trans rights movement should stop there. Litigation is necessary for meeting the immediate medical needs of some of the most vulnerable people within our communities, including those in prison.[235] An absolutist approach that (1) casts the entire legal profession as simply not radical enough to create the *ultimate* change we are seeking in a long-term liberatory queer trans revolution and therefore (2) dismisses any intervention we can make in the meantime neglects our actual, individual wins and erases our collective power in the movement for trans liberation.[236]

The work Lewis and I do is path-dependent, and I am far from content with the current conceptualization of GD in DSM-5, even if it has greatly improved since the 1990s. But if we want to contend with the hegemony of the heterosexist and cissexist social welfare system and the extremely punitive

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one or more major life activities.'" Tesone v. Empire Mktg. Strategies, 942 F.3d 979, 994–95 (10th Cir. 2019) (quoting 42 U.S.C. § 12102(1)(A)) (citing 29 C.F.R. §§ 1630.2(j)(1)(i), (iii)).

231. *See supra* note 230 and accompanying text. I thank Seran Gee for this language and this point.

232. *See, e.g.*, Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. Rev. 477, 483–90 (2004) (arguing that activists can bring litigation for public awareness, debate, and creating social change).

233. Spade, *supra* note 5, at 30.

234. *Id.*

235. *See id.* at 37.

236. *See, e.g.*, Arkles et al., *supra* note 34, at 611 ("While agenda-setting by lawyers can lead to the replication of patterns of elitism and the reinforcement of systems of oppression, we *do* believe that legal work is a necessary and critical way to support movements for social justice. We must recognize the limitations of the legal system and learn to use that to the advantage of the oppressed.").

criminal justice system, then we cannot simply fold.[237] As I think about how we can be pragmatic about our role in supporting trans people who are suffering under state control, while facing the reality of the current legal landscape, I cannot fathom outright rejecting the ADA as a mechanism for positive change. Lawyers face an uphill battle for securing incarcerated trans people's medical needs through Eighth Amendment[238] and ADA claims alike. And when the ADA standards are easier to meet than other potential constitutional claims, refusing to raise these arguments would be to the serious detriment of our clients.[239]

Conclusion

The APA ended the pathologization of trans gender identities. The ADA has not been modernized to align with this shift, so federal courts have determined whether GD is a qualifying disability. The courts overwhelmingly say it is. Even as I hold the counterarguments raised by my colleagues in this movement, I ultimately believe people with GD ought to allow ourselves to embrace the ADA. I think this is the call of the Disability Justice movement. Trans people *already are* part of the wonderfully diverse disabled community changing and growing together, moving forward.

We are far from our Disability Justice future that embraces total self-determination for all. For that precise reason, we are far from a world in which medical and legal involvement in trans lives is unnecessary. We must make our tools work for our communities because we want to preserve our trans lives and livelihoods. I plan to continue to do that for my clients for years to come.

237. *Cf.* Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 Geo. L.J. 1419, 1425 (2016) (grappling with the tension that "[i]n some cases, . . . even short-term limited reform is better than the alternative of not disturbing the status quo" while "[a]t the same time, . . . attempts to reform the system might actually hinder the more substantial transformation American criminal justice needs"); *id.* at 1471 ("My suggestion, then, is not that the Movement for Black Lives abandon the law; rather, activists should have a coherent perspective about what the law can and cannot do in terms of achieving the movement's ultimate goals.").

238. *See generally* Dangaran, *supra* note 9, at 178–84 (outlining the fraught legal landscape for Eighth Amendment claims for gender-affirming care).

239. *See supra* p. 239.

TRANSGENDER STUDENTS AND THE FIRST AMENDMENT

Dara E. Purvis*

Abstract

Suppose a transgender child experiences teasing and harassment from their classmates, whose hostile reactions interrupt the school day. School administrators tell the transgender child that, in order to allow educational activities to continue, they must dress in more gender-neutral clothing, ideally consistent with the sex they were assigned at birth. The student's parents protest, arguing that their child's clothing is speech that expresses their gender identity. The school points to Tinker v. Des Moines*, allowing suppression of student speech where it creates a material disruption, as well as recent legislation characterizing discussion of gender identity as lewd and obscene.*

This Article is the first analysis to map out and counter both obscenity and material disruption as justifications to limit gender-identity speech. Although not all clothing choices made by students are symbolic speech, gender presentation is the type of intentional and cognizable message that is protected under the First Amendment. Comprehensive examination of student speech cases demonstrates that current attempts to define gender identity as an inappropriately sexualized topic for children are inconsistent with existing law. Finally, the Article illustrates for the first time how schools can create a heckler's veto by teaching students that the speech of transgender students is abnormal. The Article proposes an analytical revision that takes the schools' role into account, reconciles the conflict between the heckler's veto doctrine and Tinker*'s material disruption test, and strengthens protection of all controversial student speech.*

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Introduction

Imagine a child attending school facing bullying and harassment from their classmates about their hair and other aspects of their appearance. Although the child was assigned male at birth, they choose to grow their hair long, socialize near-exclusively with girls, and refuse to use the boys' restroom unless no boys are inside.[1] Other students begin to remark upon the child's hair and clothing, both inside and outside of classrooms. Teachers begin to report to school administrators that their class has been derailed by students discussing and mocking the child. Other students report to an assistant principal that one group of boys who are particularly offended by the long hair are planning to use scissors to cut the child's hair to what they believe to be an appropriate length.[2] School administrators did not initially prohibit the child from growing their hair longer, but as complaints pile up, they conclude the child's outward appearance is becoming too much of a distraction during the school day. An assistant principal calls the child to her office and tells them that they have to cut their hair above their ears and collar and wear only masculine clothing or they will face detention and suspension. The student protests that their hair length and clothing express their gender and the school should not restrict their speech. The assistant principal responds that even if she agreed that the student is communicating something, they are causing a substantial disruption to the school's educational activities, and thus the school has the right to restrict their expression in service of the school's broader goals.

Although the facts above are taken from cases in the 1960s and 1970s, one can easily imagine a similar scenario facing transgender children in public

1. *See* Ferrell v. Dall. Indep. Sch. Dist., 392 F.2d 697, 701 (5th Cir. 1968).
2. *See* Gfell v. Rickelman, 441 F.2d 444, 447 (6th Cir. 1971); Meyers v. Arcata Union High Sch. Dist., 75 Cal. Rptr. 68, 71 (Cal. Ct. App. 1969); *Ferrell*, 392 F.2d at 700.

schools today. The last two years have seen an incredible resurgence in legal restrictions affecting transgender children, be it employing state child protective systems against parents who support their children's gender identity,[3] enacting statutory exclusions of transgender girls playing competitive sports,[4] banning gender-affirming healthcare,[5] prohibiting children from using a school bathroom consistent with their gender identity,[6] or forbidding teachers from speaking about LGBTQ+ topics while at work.[7] Such legal action is spurred by inflammatory political rhetoric that characterizes any acknowledgment of gender identity in front of children as grooming, sexualizing, and predatory. As courtrooms and legislatures grapple with Florida's "Don't Say Gay" law and its imitators, protecting transgender children's gender expression under the First Amendment will likely become a central argument.

Currently, most litigation arising in the context of public schools cites Title IX of the Education Amendments Act, which forbids discrimination on the basis of sex in any educational program that receives federal funding.[8] Title IX, however, does not answer questions of equal treatment of transgender students with finality. Because the statute prohibits discrimination on the basis of sex and does not explicitly include sexual orientation and gender identity, the Department of Education's interpretation of Title IX and its applicability to gender identity has cycled according to the political leanings of the White House.[9] Although the Supreme Court has held that similar language in Title VII should be read to include discrimination on the basis of sexual orientation and gender identity,[10] it has yet to speak directly to Title IX. Moreover, both the Supreme Court and lower courts have shown willingness to exempt people and businesses from general antidiscrimination statutes if the challengers articulate a religious reason for disagreeing with the antidiscrimination principle.[11]

3. Letter from Greg Abbott, Governor of Tex., to Jaime Masters, Comm'r, Tex. Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/CT5D-RPPU] (last visited Feb. 29, 2024).

4. Michael J. Higdon, *LGBTQ Youth and the Promise of the Kennedy Quartet*, 43 Cardozo L. Rev. 2385, 2399–2400 (2022).

5. Leo Sands, *Utah Banned Gender-Affirming Care for Trans Kids. What Does That Mean?*, Wash. Post (Feb. 1, 2023, 7:04 AM), https://www.washingtonpost.com/nation/2023/02/01/utah-gender-affirming-care-ban/.

6. Public Facilities Privacy & Security Act, H.B. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016) (codified at N.C. Gen. Stat. § 115C-521.2, 143–760 (2016)), *repealed by* 2017 N.C. Sess. Laws 1, ch.4.

7. *See, e.g.*, Fla. Stat. § 1001.42(8)(c)(3) (2022).

8. 20 U.S.C. § 1681(a).

9. Arthur S. Leonard, *The Biden Administration's First Hundred Days: An LGBTQ Perspective*, U. Ill. L. Rev. Online 127, 128–29 (2021); Dara E. Purvis, *Gender Stereotypes and Gender Identity in Public Schools*, 54 U. Rich. L. Rev. 927, 927–28 (2020) [hereinafter Purvis, *Gender Stereotypes*]; Jack B. Harrison, *"To Sit or Stand": Transgender Persons, Gendered Restrooms, and the Law*, 40 U. Haw. L. Rev. 49, 90–91 (2017).

10. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (holding Title VII prohibits discrimination on basis of gender identity).

11. *See, e.g.*, 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2023) (granting certiorari to case in which artist argues antidiscrimination law violates First Amendment rights);

Alternative bases for protecting the rights of transgender students are thus prudent as a strategic matter and rigorous as a theoretical exploration of First Amendment law. Although a few scholars have proposed that the gender expression of transgender students is speech,[12] existing literature does not fully develop why the claim is viable. First, although commentators have briefly outlined how such speech might be treated under the landmark student speech case *Tinker v. Des Moines*,[13] none have addressed the alternative to *Tinker* presented by *Bethel School District v. Fraser*, in which the Supreme Court held that lewd speech does not receive *Tinker* analysis.[14] Current statutes restricting discussion of gender identity in schools define discussion of gender identity as sexual obscenity,[15] clearly teeing up an analysis of *Fraser* that is currently missing from legal scholarship.

Second, even if the gender presentation of transgender students is understood as constitutionally protected speech, courts and current literature have not resolved the question of how the heckler's veto doctrine operates in schools. *Tinker* directs that schools must allow student speech unless it invades the rights of other students or causes a material disruption in the school's educational activities.[16] The disruptive reactions of other students may thus operate as a heckler's veto to silence a student's speech. Application of *Tinker* to the gender-presentation speech of transgender students demonstrates a wrinkle with the heckler's veto that has not previously been studied: the disruptive reactions of other students may, in some circumstances, be traced back to the school itself. If a school teaches that gender is a binary and immutable category, for example, the school has itself contributed to the material disruption it then points to as justification for limiting a transgender student's speech.

This Article presents the first robust analysis of transgender students' gender presentation as speech that fully addresses both of these questions. Part I discusses why gender presentation is properly understood to be speech, demonstrating that although student clothing is not universally communicative, the gender presentation of transgender students satisfies existing doctrine identifying symbolic speech. Part II turns to student speech rights, outlining *Tinker*'s holding and application in lower courts as well as a series of carveouts from *Tinker*'s protection developed over the last few decades. Part III then undertakes the first analysis of whether *Fraser*'s carveout for lewd, vulgar, and offensive student speech applies to expression about gender identity, both outlining current characterizations of gender identity as sexualized speech and providing a comprehensive reading of cases applying *Fraser* to demonstrate

Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) (holding university Title IX office's discipline of professor for misgendering transgender student violated professor's First Amendment rights).

12. *See, e.g.*, Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. Rev. L. & Soc. Change 89, 93 (2015).

13. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

14. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

15. Fla. Stat. § 1001.42(8)(c)(3) (2022).

16. *Tinker*, 393 U.S. at 508.

that issues relating to sexuality and gender identity are not lewd or offensive. Finally, Part IV returns to *Tinker* in order to discuss the problem of the heckler's veto. First, the heckler's veto doctrine is explained, including three appellate cases acknowledging the conflict between the heckler's veto doctrine and *Tinker* but coming to different results. Second, this Part outlines how public schools currently teach about gender: that it is binary, it is an appropriate and natural method of categorizing people, and that boys and girls fit into gender stereotypes. Lastly, the Part proposes a revision to *Tinker*'s analysis that reconciles the dilemma, giving students an opportunity to show that their school has helped to create a heckler's veto.

I. Gender Presentation as Speech

A threshold question is whether clothing, hairstyles, jewelry, and other aspects of personal appearance can and should be considered speech. Not all choices about appearance are intended to convey a message, but clothing obviously *can* be symbolic speech, as in the black armbands expressing opposition to the Vietnam War at issue in *Tinker*.[17] The issue is thus whether clothing, hairstyles, and other aesthetic choices that communicate gender identity should be considered symbolic speech. It is certainly easy to understand why a transgender student might view clothing and other aspects of personal appearance as expressing their gender identity.[18] Asserting choices around clothing and appearance is one of the first ways that a child can assert control over their body.[19] It is one of the only ways children can express their gender, particularly at younger ages.[20] It is also clear that this expression is personally significant, as transgender children who are able to freely express their gender identity are happier and healthier along a number of different metrics.[21] Data is similarly clear that trans children who are subjected to efforts to undo or reverse their transgender identity face serious mental and physical harm.[22]

That said, clothing obviously does not always convey a message. If one pictures a spectrum with a T-shirt reading "Biden 2020" or "Trump 2024" on

17. *Id.* at 504.

18. Indeed, *every* student (whether transgender, cisgender, or nonbinary) likely views clothing and other aesthetic choices as expressing their gender identity.

19. *Gender Stereotypes*, *supra* note 9, at 931; Zenobia V. Harris, *Breaking the Dress Code: Protecting Transgender Students, Their Identities, and Their Rights*, 13 Scholar 149, 155–56 (2010).

20. Dara E. Purvis, *Transgender Children, Teaching Early Acceptance, and the Heckler's Veto*, *in* Studies in Law, Politics, and Society 219, 241 (Austin Sarat ed., 2017). In a guide for the families of transgender children, Stephanie Brill and Rachel Pepper write that, although there is no "right" way to come out as transgender, one common approach is to give children freedom with choices such as hair and clothing. Stephanie Brill & Rachel Pepper, The Transgender Child: A Handbook for Families and Professionals 118 (2008).

21. *Transgender Youth and Access to Gendered Spaces in Education*, 127 Harv. L. Rev. 1722, 1726 (2014).

22. Christine L. Olson, *Transgender Foster Youth: A Forced Identity*, 19 Tex. J. Women & L. 25, 30 (2009).

one end and a toddler picking the red barrette instead of the green barrette on the other end, where is the line in the middle differentiating between aesthetic or otherwise constitutionally insignificant choices and constitutionally protected free speech? The Supreme Court answered by asking whether the person claiming that they are expressing a message had an "intent to convey a particularized message" and whether the "likelihood was great" that people observing the message would understand it.[23] Choices about clothing and other personal appearance, as the Fifth Circuit put it, "may be predicated solely on considerations of style and comfort," but may also communicate a message clearly enough to be protected as speech.[24]

Although there is not a robust history of caselaw, a few courts have specifically held that the clothing and grooming choices of transgender students are expression protected by the First Amendment. In a Massachusetts case, a junior high school student who began dressing in girls' clothing was repeatedly sent home by her school's principal for violating the school dress code, which prohibited "disruptive or distractive" clothing.[25] Later that year, she was formally diagnosed with gender identity disorder, and her therapist told the school that it was medically necessary for her to dress in girls' clothing and make other choices for a feminine appearance.[26] Despite this, when she returned to school in eighth grade, the principal required that she begin each school day by coming to his office, where he would review her appearance and either allow her to go to class or send her home to change.[27] She found this process unpleasant and missed enough class that she was required to repeat eighth grade.[28] In a meeting preparing for the start of her repeated eighth grade year, the principal and another school official told her that she would not be allowed to attend if she was wearing "outfits disruptive to the educational process," which they defined as "padded bras, skirts or dresses, or wigs."[29] Later that list was expanded to forbid any girls' clothing or accessories.[30]

23. Spence v. Washington, 418 U.S. 405, 410–11 (1974); *see also* Texas v. Johnson, 491 U.S. 397, 404 (1989). The second part of the test, whether people observing the message would likely understand it, presents a significant challenge for nonbinary students. As discussed further below, several courts have had little trouble reasoning that people who observed someone presenting in feminine clothing would understand the clothing to indicate that their gender identity is female. The spectrum of gender identity encompassing people who do not identify as solely male or female, however, is arguably a less cognizable message, particularly at present when legal and social recognition of nonbinary identities is comparatively rare. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 Harv. L. Rev. 894, 896–97, 905–10 (2019).

24. Canady v. Bossier Par. Sch. Bd., 240 F.3d 437, 440 (5th Cir. 2001).

25. Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1 (Mass. Sup. Ct. Oct. 11, 2000), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at *2.

30. *Id.*

She then filed a lawsuit arguing that the school was violating her free speech rights under the Massachusetts Declaration of Rights.[31] Although her claim was brought under state constitutional law, the court noted that the Massachusetts Article in question was analyzed using federal free speech law, and the decision cites First Amendment caselaw.[32] The court found, using the Supreme Court's analysis outlined above, the girl was "likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender."[33]

A decade later, a high school junior named Constance McMillen asked her school for permission to bring her girlfriend to the prom as her date and to wear a tuxedo instead of a dress.[34] She said that she wanted to attend with her girlfriend to express her sexual orientation and to wear a tuxedo to indicate her belief that students should not be required to wear gender-conforming clothing.[35] A district court similarly found that these messages fell "squarely within the purview of the First Amendment."[36]

Although specific caselaw is sparse,[37] several decades ago, several courts evaluated whether cisgender students with gender nonconforming appearances communicated a message.[38] One characteristic brought up time and time again was male students with hair longer than existing dress codes allowed—at the time, this meant hair that reached their shirt collar.[39] School employees complained that such hair was distracting and disruptive, both because the students with long hair combed and otherwise groomed themselves when they should have been paying attention in class and because other students were distracted by the other students' long hair.[40] The negative reactions from schools, classmates, and even courts often focused on the idea that by growing out their hair, the male students began to look like girls.[41] Some of the students in question may have been exploring and expressing their gender identity through their hair

31. *Id.*
32. *Id.* at *3.
33. *Id.*
34. McMillen v. Itawamba Cnty. Sch. Dist., 702 F. Supp. 2d 699, 701 (N.D. Miss. 2010).
35. *Id.* at 702.
36. *Id.* at 705.
37. In some cases, courts assume without deciding that clothing and other aspects of personal appearance are constitutionally protected speech because the student's claims fail on other grounds. *See* Canady v. Bossier Par. Sch. Bd., 240 F.3d 437, 439–41 (5th Cir. 2001); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 285 (5th Cir. 2001); Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 428–29 (9th Cir. 2008); Bar-Navon v. Brevard Cnty. Sch. Bd., 290 F. App'x 273, 277 (11th Cir. 2008). Another court refused to dismiss a lawsuit against a high school for refusing to let a transgender girl wear a dress to prom, but the motion was at such an early stage that no factfinding had actually taken place. Logan v. Gary Cmty. Sch. Corp., No. 207-CV-431, 2008 WL 4411518, at *5 (N.D. Ind. Sept. 25, 2008).
38. Purvis, *Gender Stereotypes*, *supra* note 9, at 931.
39. *Id.* at 932.
40. Jackson v. Dorrier, 424 F.2d 213, 217 (6th Cir. 1970); Meyers v. Arcata Union High Sch. Dist., 75 Cal. Rptr. 68, 70 (Cal. Ct. App. 1969).
41. Purvis, *Gender Stereotypes*, *supra* note 9, at 934–35.

length.[42] But when asked directly, most of the students denied that their hair had any specific message, giving explanations such as "[I] just like[] it" or "I think it looks better."[43]

In such circumstances, courts will obviously not recognize the aesthetic choice as speech.[44] Courts will not supply a meaning for clothing that a teenager cannot themselves articulate.[45] A middle school student challenging her school's dress code who said there was no specific message she wished to convey through her clothes, but rather she wanted to wear things that looked nice and that she felt good in, did not have cognizable protected speech in the opinion of the Sixth Circuit.[46] Courts also will not credit expression that is unlikely to be understood by others. For example, a student who said that he wore his pants sagging below his waist to express his identity as a Black person was not successful in claiming his style was expression, as the court said that it was unlikely that other people would understand sagging pants to express cultural pride.[47]

But courts will not typically ignore a reasonably clear message conveyed through clothing.[48] One easy example is the use of black armbands to protest controversial actions taken by authority figures, be it the Vietnam War[49] or students protesting a school uniform policy.[50] Another court found that a Native American child wearing his hair in two long braids intended to communicate a message of pride in his heritage that school and community members were likely to understand.[51] A high school senior who wanted to wear traditional Lakota clothing instead of a cap and gown at his graduation ceremony[52] similarly succeeded in convincing a court that he intended to convey a message of

42. *Id.* (citing Ferrell v. Dall. Indep. Sch. Dist., 392 F.2d 697, 701 (5th Cir. 1968)).

43. Purvis, *Gender Stereotypes*, *supra* note 9, at 935.

44. *Id.* (observing how easily courts "dismiss the First Amendment as inapplicable" in those cases).

45. *Id.* at 937.

46. Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 386, 389–90 (6th Cir. 2005).

47. Bivens *ex rel* Green v. Albuquerque Pub. Schs., 899 F. Supp. 556 (D.N.M. 1995).

48. Exceptions obviously exist. One such example occurred when a group of gifted and talented eighth grade students protested what they saw as a rigged election to select a class T-shirt by wearing their losing design of choice in protest. The Seventh Circuit found that the school did not violate the students' First Amendment rights by temporarily punishing students for wearing the protest shirts, although the court reasoned the students had no right to protest the school's lack of explanation about the T-shirt election process. *See* Brandt v. Bd. of Educ. of City of Chi., 480 F.3d 460, 466 (7th Cir. 2007).

49. *See* discussion *infra* Section II.B.

50. Lowry *ex rel.* Crow v. Watson Chapel Sch. Dist., 540 F.3d 752, 760 (8th Cir. 2008).

51. A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 701 F. Supp. 2d 863, 882–83 (S.D. Tex. 2009), *aff'd* 611 F.3d 248 (5th Cir. 2010). The Fifth Circuit affirmed the decision but rooted the case in the Texas Religious Freedom Restoration Act instead of deciding it as a free exercise or free speech constitutional analysis. A.A. *ex rel.* Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 258 (5th Cir. 2010).

52. Bear v. Fleming, 714 F. Supp. 2d 972, 975 (D.S.D. 2010).

pride in his heritage that would be understood by those viewing his clothing,[53] although he ultimately lost his case for other reasons.[54]

A few transgender adults have successfully argued that their clothing expresses their gender identity.[55] One trans woman who worked at the DMV experienced harassment in the workplace after she began dressing in feminine clothing at work.[56] In the context of a lawsuit she filed alleging a First Amendment retaliation claim,[57] a federal court found that her clothing and other styling choices were constitutionally protected expression.[58] Similarly, a transgender woman who was civilly committed in a psychiatric facility successfully brought a retaliation claim, arguing that a supervisor retaliated against her expression of her gender identity through wearing feminine undergarments.[59] A third trial court found that a transgender woman had adequately argued that her gender expression through "wearing women's apparel, styling herself in a feminine manner, undergoing cosmetic surgeries to feminize her appearance, and maintaining feminine mannerisms"[60] was protected under the First Amendment, although her retaliation claim failed to show a sufficient link between that expression and the claimed retaliatory actions.[61]

Additionally, several courts assessing the speech value of aesthetic choices use the hypothetical example of a transgender person's clothing as an illustration of a clothing or hairstyle choice that would be understood as speech. In the case of the high school senior wishing to wear his traditional Lakota clothing to graduation, the court wrote that his message was specific and cognizable enough, as it was "akin to . . . the wearing of female clothing as an expression of a student's gender identity."[62] Another court facing an argument from a cisgender female bus driver that she should be allowed to wear a skirt instead of the uniform pants required of all bus drivers found "no particularized communication can be divined simply from a [cisgender] woman wearing a skirt."[63] By contrast, a transgender girl or woman wearing feminine clothing

53. *Id.* at 984.

54. The court found that a public graduation ceremony was a school-sponsored activity, and thus the appropriate analysis followed *Hazelwood v. Kuhlmeier* rather than *Tinker*. *Id.* at 989.

55. One case even found that a transgender woman's appearance and choice of bathroom at work was protected speech. Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. CIV.02–1531, 2004 WL 2008954, at *9 (D. Ariz. June 3, 2004).

56. Monegain v. Commonwealth of Va. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 128–29 (E.D. Va. 2020).

57. *Id.* at 134.

58. *Id.* at 135–37.

59. Brown v. Kroll, No. 8:17CV294, 2017 WL 4535923, at *7 (D. Neb. Oct. 10, 2017).

60. Vuz v. DCSS III, Inc., No. 3:20-CV-00246, 2020 WL 7240369, at *5 (S.D. Cal. Dec. 9, 2020).

61. *Id.* at *7.

62. Bear v. Fleming, 714 F. Supp. 2d 972, 984 (D.S.D. 2010).

63. Zalewska v. Cnty. of Sullivan, 316 F.3d 314, 320 (2d Cir. 2003).

"sent a clear and particular message" that was "a sufficient proxy for speech to enjoy full constitutional protection."[64]

Finally, it is relevant to acknowledge the broader history of the movement for LGBTQ+ equality, which has long understood both the strength of free speech claims and the political and expressive value of identifying one's sexual orientation or gender. As Nan Hunter explained in 1993:

> To be openly gay, when the closet is an option, is to function as an advocate as well as a symbol. The centrality of viewpoint to gay identity explains the logic behind what has become the primary strategy of anti-gay forces: the attempted penalization of those who "profess" homosexuality, in a series of "no promo homo" campaigns.[65]

Just as LGB people were once pressured to remain in the closet, suppressing the gender expression of transgender people is a political act. For this reason, arguments about whether speech self-identifying a person as LGBTQ+ was constitutionally protected were some of the earliest and most successful court battles in the equality movement.[66] The idea that trans students' clothing choices could be protected as speech appeared in legal scholarship thirty years ago, before constitutional or statutory equality-based claims gained any meaningful ground.[67]

There is arguably a risk to over-applying First Amendment claims to contexts where the real harm could be more directly addressed. Frederick Schauer has famously criticized broad use of speech claims as "First Amendment opportunism."[68] Erica Goldberg extended this discussion, identifying the "First Amendment cynicism" that has developed as ideologically opposed groups accuse one another of using the Constitution disingenuously for purely political goals.[69] In this context, the argument against using speech claims would be that, at heart, treatment of transgender children is an equality issue, and if any constitutional argument is made it should rest in the Equal Protection Clause

64. *Id.* (referencing Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Sup. Ct. Oct. 11, 2000)).

65. Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695, 1696 (1993).

66. *Id.*; *see also* Carlos A. Ball, The First Amendment and LGBT Equality: A Contentious History 4–5 (2017); Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 Wis. L. Rev. 75, 79 (2006). This is also true specifically about student coming-out speech. Stuart Biegel, The Right To Be Out: Sexual Orientation and Gender Identity in America's Public Schools 23–36 (2010).

67. Boaz I. Green, *Discussion and Expression of Gender and Sexuality in Schools*, 5 Geo. J. Gender & L. 329, 331 (2004); *see also* Timothy Zick, *Restroom Use, Civil Rights, and Free Speech "Opportunism,"* 78 Ohio St. L.J. 963, 981–84 (2017) (describing history of civil rights claims framed as free speech).

68. Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 Wm. & Mary L. Rev. 1613, 1627 (2015).

69. Erica Goldberg, *First Amendment Cynicism and Redemption*, 88 U. Cin. L. Rev. 959, 961 (2020) (describing accusations of "disingenuous application or non-application of the First Amendment to further political ends unrelated to freedom of expression").

of the Fourteenth Amendment rather than cloaking an equality demand in the guise of the First Amendment.

Applying speech protections to expression of sexual orientation and gender identity, however, is thus not a novel or opportunistic technique—rather, it continues an existing line of doctrine begun in the earliest days of LGBTQ+ rights.[70] Transgender students may *also* have equality-based claims against a school that discriminates against them, but existing caselaw and the basic test for symbolic expression make it obvious that a message such as "I am presenting my gender as female to express the message that I am female" satisfies the expressive conduct test as both a specific intended message and a message that classmates, teachers, and other observers are likely to understand.[71] Clothing and other choices around personal appearance intended by transgender students to express their gender identity are thus likely to be recognized as speech protected by the First Amendment. This protection, however, is far from absolute. Student speech rights may be restricted for a variety of reasons particular to the context of minors speaking in the school context. The next Part turns to the multiple lines of doctrine laying out when student speech must be allowed versus when a school may constitutionally prohibit or punish student speech.

II. Speech Rights in Schools

The place and treatment of student speech within a school environment has long been contested—in his landmark book *The Schoolhouse Gate*, Justin Driver argues that "the public school has served as the single most significant site of constitutional interpretation within the nation's history."[72] A first key question goes to the purpose of public education itself: Is it to foster a free-thinking citizenry, or is part of the school curriculum assimilation into a future populace that agrees about core values? If public schools are meant to help develop students into critical thinkers ready to joust in the marketplace of ideas, the value of student speech within the school environment should be weighted more heavily than if a school's primary purpose is to educate all students into at least some universal agreement.

70. Scott Skinner-Thompson has written persuasively about the "emancipatory potential" of the expressive dimensions of gender identity. Scott Skinner-Thompson, *Identity by Committee*, 57 Harv. C.R.-C.L. L. Rev. 657, 694 (2022) [hereinafter Skinner-Thompson, *Identity by Committee*]; *see also* Scott Skinner-Thompson, *The First Queer Right*, 116 Mich. L. Rev. 881, 885 (2018) (proposing "renewed attention on the First Amendment as a means of advancing LGBTQ rights").

71. Holly V. Franson, *The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias To Enact and Enforce Nondiscriminatory Dress Code Policies*, 84 U. Colo. L. Rev. 497, 520 (2013); *see also* Weatherby, *supra* note 12, at 93 (arguing such expression should also include student's choice of restroom). A more nuanced and accurate understanding of gender would also include expressions of masculinity and femininity in addition to expressing one's gender identity. *See* Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 Wm. & Mary J. Women & L. 187, 199–200 (2013).

72. Justin Driver, The Schoolhouse Gate 9 (2018).

A. *Early Student Speech: Assimilation Versus Diversity*

Both of these understandings of public education have held sway at different times.[73] In the mid-nineteenth century, Horace Mann advocated for public education as assimilationist, forging agreement on core values.[74] In the early twentieth century, John Dewey described schools as forging "community awareness,"[75] and education scholar Ellwood P. Cubberley extolled the value of public education for assimilating and Americanizing recent immigrants.[76] By contrast, others view the value of public education as teaching students how to engage with the marketplace of ideas.

Several early twentieth-century cases wrestled directly with the question of how strongly the state could direct an assimilationist bent in public school curricula. In *Meyer v. Nebraska*, the state of Nebraska outlawed teaching in foreign languages, which the Supreme Court found to be unconstitutional.[77] Nebraska justified this ban by saying it simply wished to "promote civic development" by preventing the education of children "in foreign tongues and ideals before they could learn English and acquire American ideals."[78] Failing to adequately acquire American ideals, in the state's view, would prevent them from becoming useful citizens as well as endanger public safety.[79] The Supreme Court rejected this argument, finding that it was "arbitrary and without reasonable relation to any end within the competency of the state."[80] In both *Meyer* and *Pierce v. Society of Sisters*, which evaluated a statute requiring public school attendance as a way to prevent education in Catholic schools,[81] the Court rejected the proposed state goal of inculcating American values as too deeply intruding on the fundamental rights of parents to decide how to raise their children.[82] Decades later, the Court similarly rejected Wisconsin's desire to educate children with a standardized set of values in *Wisconsin v. Yoder*, there assessing Wisconsin's compulsory school attendance law against the claims of Amish families who wished to withdraw their children after junior high school.[83] Although the Court recognized Wisconsin's "interest in universal education," it concluded that such an interest failed when balanced against fundamental rights such as free exercise and parental rights.[84]

73. *See* Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 Ohio St. L.J. 663, 666 (1987).

74. Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 Yale L. & Pol'y Rev. 169, 174 (1996).

75. *Id.* at 178.

76. Driver, *supra* note 72, at 44.

77. 262 U.S. 390, 397 (1923).

78. *Id.* at 401.

79. *Id.*

80. *Id.* at 403.

81. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 530 (1925).

82. *Id.* at 534–35.

83. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

84. *Id.* at 214.

Between *Meyer*/*Pierce* and *Yoder*, however, a pair of cases resolving the same question two ways demonstrated that the issue of whether public schools were meant to inculcate values or foster individual freedom was highly contested and unsettled law. The two cases, only three years apart, dealt with students who belonged to the Jehovah's Witness church. Because of their religious beliefs, the students refused to salute the flag in the classroom and were punished by their school. Both cases arose during World War II, a particularly patriotic (and xenophobic) time during which actions perceived as un-American were especially unpopular, which undoubtedly contributed to the treatment of the students in question. In the first case, *Minersville School District v. Gobitis*,[85] the Supreme Court held that the school district's disciplinary action was constitutional, citing the importance of universal values: "The ultimate foundation of a free society is the binding tie of cohesive sentiment."[86] The Court refused to, as it described the students' petition, "exercise censorship" over state legislatures and school officials who wanted to promote "an attachment to the institutions of their country."[87]

The decision was an unpopular one,[88] and only three years later the Court heard a case with almost identical facts. In the wake of *Gobitis*, West Virginia enacted a law requiring public schools to include various subjects "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism."[89] The state Board of Education also adopted a requirement that all teachers and students salute the flag daily.[90] If a student refused, that student would be expelled, and both the student and his or her parents could be prosecuted for truant delinquency.[91] As in *Gobitis*, several families belonging to the Jehovah's Witness faith sued.[92] This time, however, the Court took a different view of the requirement. In *West Virginia Board of Education v. Barnette*, the Court stressed that the requirement to salute the flag was not purely educational, as it crossed the line into requiring students to affirm a specific belief.[93] As Justice Jackson famously wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[94] Justin Driver argued that this recognized not only that students in public schools still held at

85. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
86. *Id.* at 596.
87. *Id.* at 599.
88. Driver, *supra* note 72, at 63.
89. *Barnette*, 319 U.S. at 625.
90. *Id.* at 626.
91. *Id.* at 629.
92. *Id.*
93. *Id.* at 631, 633.
94. *Id.* at 642.

least some constitutional rights, but that the broader societal consequences of violating those rights would be "disastrous."[95]

B. *Modern Student Speech:* Tinker

The modern foundation of student speech rights was laid in a series of cases in the middle of the twentieth century. The most famous student speech case is *Tinker v. Des Moines School District*.[96] The case arose because three students wore black armbands to school in protest of the Vietnam War.[97] All three were suspended and subsequently sought an injunction to prevent further school discipline.[98] Justice Abe Fortas, writing for the Court, began his opinion by acknowledging that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[99] That said, he also noted that the speech of students could "collide" with the legitimate authority of school officials.[100]

Given the circumstances of the protest in question, however, Fortas said that in the absence of any evidence that the students' protest actually disrupted the school's activities, the case simply did not involve such a collision.[101] A few other students "made hostile remarks" to the protesting students, but such remarks were made outside of the classroom, and no disruptions occurred in the school itself.[102]

The Court thus drew a line between "undifferentiated fear or apprehension of disturbance" and evidence of a material and substantial interference with the operation of the school.[103] If school officials could present actual evidence of such substantial interferences, such as widespread or violent reactions among other students, the school could constitutionally restrict the speech that triggered such interference.[104] If the school was merely *worried* about such a disturbance, however, that was not enough: the school "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[105]

Notably, the Court explained this test with reference to the educational activities that take place at school outside of the classroom.[106] Justice Fortas discussed students expressing their personal opinions as "an important part of

95. Driver, *supra* note 72, at 67.
96. 393 U.S. 503, 503 (1969).
97. *Id.* at 504.
98. *Id.*
99. *Id.* at 506.
100. *Id.* at 507.
101. *Id.* at 508.
102. *Id.*
103. *Id.* at 508–09.
104. *Id.* at 509.
105. *Id.*
106. *Id.* at 512 ("The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom.").

the educational process,"[107] and explicitly rejected the idea that students attend school only to receive messages that the state and school board have decided they should be given.[108] The Court thus pushed back against the idea that a goal of public school is to indoctrinate students with common values.

Justice Fortas's opinion may have oversimplified the broader societal context in which the students protested. Justin Driver has argued that the backlash to the armbands was significant enough that *Tinker* should have failed its own test.[109] Moreover, commentators both at the time and in later decades pointed out that by hinging the protection of speech on the reaction of listeners, one student's speech rights could be controlled by hostile listeners, or hecklers.[110]

Nonetheless, the *Tinker* disruption test has been used over and over in the decades since the case to evaluate speech-limiting actions by school officials, in the context of a variety of controversial issues. Multiple modern cases triggering such analysis involved the display of Confederate flags. A typical version of this case occurs in a school that has experienced recent tensions and even violence sparked by racist incidents. In the wake of such tension, the school administration places restrictions on displaying images that the school believes will reignite the debate, including the Confederate flag. A student who wishes to wear clothing emblazoned with the Confederate flag is told they cannot, and files a lawsuit arguing that the school is infringing on their speech rights. In such a context, courts have been likely to find that the speech had caused enough disruption of educational activities to support the school's actions. In one South Carolina case from 1997, the school pointed to multiple "incidents of racial tension" from the last several years sparked by students wearing clothing that displayed Confederate flags, including incidents that rose to the level of threatened violence.[111] After a student was suspended for wearing a jacket with a Confederate flag on it,[112] a court found that the school had a reasonable basis to believe that the jacket would cause similar incidents of tension and possibly violence.[113] Around the same time, a Kansas school district instituted a "Racial Harassment and Intimidation" policy prohibiting clothing and written materials "that [are] racially divisive or create[] ill will or hatred."[114] After a seventh-grade student was suspended for drawing a Confederate flag during math class and sued the school district,[115] the Tenth Circuit held that the multiple disruptive incidents that led to the creation of

107. *Id.* at 512.

108. *Id.* at 511.

109. Driver, *supra* note 72, at 87.

110. *Id.* at 88; *see also* Melissa Murray, *Sex and the Schoolhouse*, 132 Harv. L. Rev. 1445, 1454 (2019) (reviewing Justin Driver, The Schoolhouse Gate (2018)).

111. Phillips v. Anderson Cnty. Sch. Dist. Five, 987 F. Supp. 488, 490 (D.S.C. 1997).

112. *Id.* at 491.

113. *Id.* at 493.

114. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1361 (10th Cir. 2000).

115. *Id.*

the policy justified the school's application of the policy.[116] A few years later, the Eleventh Circuit similarly held that school testimony about multiple fights that had arisen out of racial tension in the months before two students were suspended for displaying Confederate flags justified the school's actions.[117] The court added, "[O]ne only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke."[118]

Not all examples of a disruption satisfying *Tinker* occur in the context of racism, of course. For an example of a markedly different context, one Pennsylvania case arose out of an elementary school student's protest against animal cruelty at the circus.[119] The student in question wished to circulate a petition to her fellow students protesting a school field trip to a circus, but the school told her that she could not circulate the petition without submitting it for prior administrative approval.[120] The court pointed out that there was evidence that students spent time during class talking about her petition rather than working, constituting a disruption of the educational process, and that the school did not actually punish the student in any way and allowed her to hand out stickers and literature protesting the circus.[121]

Many applications of *Tinker* rule against the school and find that the school's prohibition or punishment of speech was not adequately justified by a disruption of the educational activities. For example, in Minnesota, a student's "Straight Pride" T-shirt sparked a number of incidents: one student approached the first to say she was offended, an argument broke out in a Christian student group about Christianity and sexual orientation, and a car belonging to a student who others believed was gay was keyed and urinated on.[122] The school's concern was magnified because only a couple of weeks before the Straight Pride shirt was worn, another item of clothing indirectly caused a serious injury.[123] A different student had worn a Confederate flag bandana to school, which angered a Black student who spat on the student wearing the bandana.[124] The two students then got into a physical fight, during which the Black student fell,

116. *Id.* at 1366; *see also* Barr v. Lafon, 538 F.3d 554, 566 (6th Cir. 2008) (finding that recent incidents including altercations and racist graffiti using racial slurs, Confederate flag, and violent threats against Black students supported school's conclusion that Confederate flag on clothing would lead to material disruptions).

117. Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1247, 1249 (11th Cir. 2003).

118. *Id.* at 1249.

119. Walker-Serrano *ex rel* Walker v. Leonard, 168 F. Supp. 2d 332, 335 (M.D. Pa. 2001), *aff'd*, 325 F.3d 412, 414 (3d Cir. 2003) (noting student prepared handwritten petition stating that she did not want to go on field trip to circus because "they hurt animals").

120. *Id.* at 336 (explaining plaintiff was not allowed to circulate her petition without first submitting it to a school district representative for prior review).

121. *Id.* at 344.

122. Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1069–70 (D. Minn. 2001).

123. *Id.* at 1070.

124. *Id.* ("Upon seeing the [Confederate flag] bandana, an African-American student spat upon the white student, and a physical fight ensued.").

hit his head, had a severe epileptic seizure, and had to be hospitalized.[125] The court acknowledged that "[s]uch an incident undoubtedly impacts a school community dramatically, potentially making school staff and administration intensely sensitive to a seemingly volatile school environment," but ultimately concluded that there was not enough of a link between the fight instigated by the Confederate bandana and the Straight Pride T-shirt, and the other incidents were not disruptive enough to justify the school's actions.[126]

Assessing what level of disruption is enough to justify school action under *Tinker* has not been precisely calibrated by the Supreme Court, permitting courts motivated to protect particular student speech to minimize events that another court might find more significant. For example, a West Virginia case arose from a high school student who had a wardrobe consisting almost entirely of Confederate flag apparel—all but two of his shirts had the flag on them.[127] The court stated that he wore this clothing "in observance of his roots."[128] The court even said "[t]here is no basis in the record for concluding that plaintiff, who has African-American friends, is a racist."[129] That sentence is footnoted to acknowledge that the student admitted calling Black students on an opposing football team "the N word."[130] The court also discussed another incident that happened a couple of months before the school asked the student to stop wearing Confederate flag clothing, in which one of the school's fourteen Black students (out of just over 1,000 total students) left a notebook unattended.[131] When he returned, his notebook had been defaced by racist words and a drawing of a Confederate flag.[132] The court described the flag as "simply incidental to, and overshadowed by, the heinously offensive messages that accompanied it."[133] But earlier in the decision, a footnote describing the drawing notes that the flag was labeled with the word "rebel" above the flag and "n***** hater" below it, linking the flag with the racial slurs.[134]

The discretion inherent in *Tinker*'s standard is magnified by the wide variety of topics and student conduct to which it has been applied. One court found that although a long history of disruption sparked by the Confederate flag justified a school's racial harassment policy as applied to the Confederate flag,[135] a T-shirt with language about Jeff Foxworthy's "you might be a

125. *Id.*

126. *Id.* at 1072.

127. Bragg v. Swanson, 371 F. Supp. 2d 814, 819 (S.D.W. Va. 2005).

128. *Id.* at 820.

129. *Id.*

130. *Id.* at 820 n.6 (internal quotation omitted).

131. *Id.* at 816–17 (noting that only fourteen of the school's 1,004 students were Black and discussing how one Black student once left his spiral notebook in classroom).

132. *Id.* at 817, 817 n.1.

133. *Id.* at 827.

134. *Id.* at 817 n.1.

135. Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254 (3d Cir. 2002) (noting substantial evidence of past disruption related to Confederate flag). It is worth noting that the racist incidents at the school were at a fever pitch: after a white student wore a Halloween costume consisting of blackface and a noose, a group of students began wearing

Redneck" joke was not sufficiently similar to the Confederate flag to support applying the racial harassment policy to ban it.[136] Student speech about abortion sparked at least two courts finding that schools had overreacted by trying to restrict student expression without sufficient evidence that a substantial disruption might take place. One found that a handful of student complaints in response to a student wearing a shirt that said "ABORTION IS HOMICIDE" once a week was insufficient to show the level of disruption called for under *Tinker*.[137] Another court found that a student taking part in a "Pro-Life Day of Silent Solidarity" protest generated only a "general fear of disruption."[138] Other cases present a grab bag of potentially controversial topics: a button expressing opposition to a proposed mandatory school uniform policy by comparing the proposed policy to Nazis in a depiction of Hitler Youth,[139] two different T-shirts depicting George W. Bush as a drunk driver and drug addict[140] or labeled as an "international terrorist,"[141] and even students wearing rosaries as necklaces,[142] which a gang liaison police officer classified as gang-related apparel.[143]

C. *Alternatives to* Tinker

Disruption, however, is not the only reason that a school might restrict student speech. In the decades since *Tinker*, the Supreme Court has created several carveouts that allow schools more flexibility in prohibiting or punishing student speech.

One such carveout is for speech that is sponsored or broadcast by the school. The landmark case for school-sponsored speech, *Hazelwood School District v. Kuhlmeier*, arose in 1988 after students who wrote and edited a student newspaper drafted stories about the impact of divorce and teen pregnancy on their classmates.[144] After the school principal instructed student editors to remove both stories, the students sued, arguing that the censorship violated their First Amendment rights.[145] Although the stories were student speech in the sense that they were written by students, the Supreme Court saw a clear

clothing with the Confederate flag on what they called "White Power Wednesdays." Todd A. DeMitchell & Mark A. Paige, *School Uniforms in the Public Schools: Symbol or Substance? A Law & Policy Analysis*, 250 Educ. L. Rep. 847, 858 (2010).

136. *Sypniewski*, 307 F.3d at 257.

137. K.D. *ex rel.* Dibble v. Fillmore Cent. Sch. Dist., No. 05-CV-0336, 2005 WL 2175166, at *1, *6 (W.D.N.Y. Sept. 6, 2005).

138. C.H. v. Bridgeton Bd. of Educ., No. CIV09–5815, 2010 WL 1644612, at *1, *8 (D.N.J. Apr. 22, 2010).

139. DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 636, 646 (D.N.J. 2007).

140. Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 322, 330 (2d Cir. 2006).

141. Barber *ex rel.* Barber v. Dearborn Pub. Schs., 286 F. Supp. 2d 847, 849, 856 (E.D. Mich. 2003).

142. Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 663 (S.D. Tex. 1997).

143. *Id.* at 664.

144. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263 (1988) ("One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.").

145. *Id.* at 264.

distinction between the *Tinker* children's armbands and a student newspaper published under the auspices of the school, describing the difference as tolerating independent student speech versus affirmatively promoting specific student speech.[146]

A second carveout is by subject matter, reasoning that harmful speech presents a danger to students or is in direct conflict with the educational role of schools. The first example of such a subject-specific carveout arose in the mid-1980s, when a student named Matthew Fraser gave a speech at a high school assembly nominating another student for a position in student government.[147] There were about six hundred students in attendance ranging from ninth to twelfth grade, who were given the choice between attending the assembly or attending study hall.[148]

Fraser, who had been named the top high school debater in the state of Washington twice,[149] delivered a speech characterized by high school humor. The speech was basically entirely sexual innuendo—Chief Justice Warren Burger's opinion for the Court merely described it, but Justice William Brennan's concurrence reprinted the text of the speech in its entirety:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.[150]

Fraser acknowledged afterwards that his speech was "sophomoric," but insisted that it was a deliberate choice to appeal to his fellow students in line with popular media at the time such as the television show Three's Company.[151] His judgment on this point appears to have been correct, as the student he nominated won with about 90% of the vote.[152]

The school officials watching his speech, however, were not impressed. He was suspended for three days and his name was stricken from the ballot to elect student speakers for graduation under a rule that prohibited obscene language, stating that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[153] He unsuccessfully challenged his suspension through the school district, then sued, alleging that his free speech rights had

146. *Id.* at 270–71.
147. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).
148. *Id.*
149. Driver, *supra* note 72, at 91.
150. *Bethel*, 478 U.S. at 687 (Brennan, J., concurring).
151. Driver, *supra* note 72, at 92.
152. *Id.*
153. *Id.* at 92–93.

been violated.[154] The district court found in his favor, and in the meantime he had been elected graduation speaker by his classmates writing in his name, so he did speak at his graduation ceremony after all.[155] The Ninth Circuit agreed with the district court, finding that his speech was "indistinguishable" from the challenged antiwar expression in *Tinker*.[156]

The Supreme Court disagreed and focused on the content of the speech. Where everyone understood the *Tinker* armband to be political speech protesting the Vietnam War, Fraser's nominating speech was only sexual innuendo in the eyes of the Court, even though it took place in the context of student government activities.[157]

In the course of justifying why this distinction was relevant, Chief Justice Burger's opinion for the Court explained what he saw as the purpose of public education: to "inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation"[158] and to ensure the "inculcation of fundamental values necessary to maintenance of a democratic political system."[159] Although he nodded to *Tinker*'s emphasis of the educational value of free speech, that value could not stand alone as an unmitigated good:

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.[160]

The value of any student's speech, as reflected in his opinion for the Court, can only be evaluated in the context of whether it promoted or undermined the shared values that the school was also teaching.[161] This was why, for example, a young adult's right to express himself using obscenities was very different than a teenager's right to express himself using innuendo.[162] While adults were presumably mature enough to hear innuendo or obscenities without being harmed, such innuendo "could well be seriously damaging" to the less mature audience Fraser addressed.[163] Burger stressed that the assembly included students as young as fourteen years old,[164] who were "bewildered" by both the speech itself and the actions of some of the older students, "graphically

154. *Bethel*, 478 U.S. at 678–79.
155. *Id.* at 679.
156. *Id.*
157. *Bethel*, 478 U.S. at 680.
158. *Id.* at 681 (quoting Charles A. Beard & Mary R. Beard, New Basic History of the United States 228 (William Beard rev. 1968)).
159. *Id.* (brackets omitted) (quoting Ambach v. Norwick, 441 U.S. 68, 76–77 (1979)).
160. *Id.*
161. *Id.* at 683.
162. *Id.* at 682 (citing Cohen v. California, 403 U.S. 15 (1971)).
163. *Id.* at 683.
164. *Id.*

simulat[ing] the sexual activities pointedly alluded to."[165] By this point the Court had already approved other restrictions on sexual speech that could reach minors,[166] including a statute banning the sale of sexual material to minors, a school's authority to remove vulgar books from a school library,[167] and restrictions on vulgar language broadcast over public airwaves that children might inadvertently stumble upon.[168] Burger concluded that school officials could reasonably and constitutionally decide that allowing vulgar language, particularly in official contexts such as a school assembly, would undermine the educational activities and goals of the school.[169]

This judgment of sexual speech as inherently harmful created an alternative analysis to *Tinker*. This exception was quite explicit; Justice Brennan's concurrence[170] and Justice Thurgood Marshall's dissent[171] would both have performed the *Tinker* material disturbance analysis, with Justice Brennan finding that a sufficient disturbance took place and Justice Marshall disagreeing. The majority's approach, however, rejected that framework entirely and created a second track of analysis: that if speech were harmful or dangerous for the student audience, the school could constitutionally restrict or punish the speech without needing to show any actual interference with the educational work of the school.[172]

This principle was extended to another subject—illegal drug use—in 2007. The most robust articulation of this principle was sparked by a controversy in Alaska, when a high school senior displayed a large banner reading "Bong Hits 4 Jesus" as the Olympic torch was carried by.[173] The student, Joseph Frederick, was suspended for ten days and later sued to challenge his suspension.[174] Although the banner received some attention, it did not result in widespread disruptions or other interference with educational activities.[175]

Chief Justice Roberts, writing for the Court, did not think this mattered. He summarized two important holdings from *Fraser*: first, the speech rights of students in public school are not the same as the speech rights of adults in public; and second, *Tinker* need not be applied in every case involving speech in a public school.[176] Instead, just as the danger of sexual innuendo removed *Fraser*'s speech from the *Tinker* framework, the danger of illegal drug use was

165. *Id.* at 678.

166. *Id.* at 684 (citing Ginsberg v. New York, 390 U.S. 629 (1968) (upholding ban against material which would be appropriate for adults, but not when sold to minors)).

167. *Id.* (citing Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion) (noting otherwise divided Court agreed that a "school board has the authority to remove books that are vulgar")).

168. *Id.* at 684–85 (citing FCC v. Pacifica Found., 438 U.S. 726 (1978)).

169. *Id.* at 685–86.

170. *Id.* at 687 (Brennan, J., concurring).

171. *Id.* at 690 (Marshall, J., dissenting).

172. *Id.* at 683.

173. Morse v. Frederick, 551 U.S. 393, 397 (2007).

174. *Id.* at 398.

175. *Id.*

176. *Id.* at 404–05.

sufficient that the *Tinker* test need not apply to Frederick's sign.[177] Although the message of "Bong Hits 4 Jesus" was not entirely clear, the school principal believed that it promoted drug use, and that interpretation was "plainly a reasonable one" in Roberts's eyes.[178] Once the banner was understood to promote drug use, the school could punish that speech as inherently dangerous.[179]

Most recently, the Court declined to expand these exceptions to the expression of vulgar off-campus speech. A high school student, upset that she was not selected for the varsity cheerleading team, posted images on Snapchat with the text, "Fuck school fuck softball fuck cheer fuck everything."[180] After other students showed the images to school administrators, the school suspended her from the junior varsity team for the rest of the school year.[181] The school justified its actions by arguing that using profanity in relation to a school extracurricular impeded the school's attempts to teach good manners, prevent disruption in school activities under *Tinker*, and maintain team morale.[182] The Court rejected these arguments, although not in a blanket rule. The Court acknowledged that student speech that takes place off of school grounds could in some circumstances be constitutionally punished by the school, because the concerns of the school do not disappear outside of the school gates.[183] The case at hand, however, was relatively easy in the eyes of the Court because the school had presented no evidence that the Snapchats actually led to a substantial disruption or harm to the rights of other students. The Court thus declined to give direction about where the line is between sanctionable and protected off-campus speech.[184] Instead, the Court simply said that in this context the school's interests were weak, whereas the student's speech rights were strong.[185]

One other line of cases is relevant to expression through students' choice of clothing: challenges to school dress codes and uniform requirements. A number of appellate courts have consistently held that generalized restrictions on student clothing do not impermissibly restrict student speech rights.[186] The Fifth Circuit's decision in *Canady v. Bossier Parish School Board*[187] provides a clear blueprint of such analysis: the court reasoned that although a student's

177. Emily Waldman has written about a worry from religious organizations that the case might result in simply broadening *Fraser* to support restricting any student speech that did not support a school's educational work. Emily Gold Waldman, *A Post*-Morse *Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & Educ. 463, 488 (2008).

178. *Morse*, 551 U.S. at 401.

179. *Id.* at 403, 409.

180. Mahanoy Area Sch. Dist. v. B. L. *ex rel* Levy, 141 S. Ct. 2038, 2043 (2021).

181. *Id.*

182. *Id.* at 2047.

183. *Id.* at 2044–45.

184. *Id.* at 2045.

185. *Id.* at 2047–48.

186. *See, e.g.*, Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 435 (9th Cir. 2008); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 391 (6th Cir. 2005); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 286 (5th Cir. 2001).

187. 240 F.3d 437 (5th Cir. 2001).

choice of clothing can implicate the First Amendment,[188] the uniform policy in question was viewpoint neutral, in contrast to *Tinker*'s focus on school actions directed at specific student speech.[189] As a result, the court used traditional time, place, and manner analysis directing that the uniform policy passed constitutional review "if it furthers an important or substantial governmental interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest."[190] The court then found that the goal of uniform policies was to improve education and that the policy did not target or unduly affect student expression.[191]

Transgender students wishing to wear clothing that expresses their gender identity, however, do not challenge dress codes or uniform policies in the abstract. They wish to wear clothing, hairstyles, and other markers of appearance that are compliant with the school's clothing requirements, but that the dress code or uniform policy identifies as associated with a gender other than the sex the student was assigned at birth. Any school action restricting such clothing is thus directed at specific student expression and would be analyzed under the *Tinker* line of cases.

A Seventh Circuit opinion provides a concise example of the above doctrines, as well as some of the policy concerns around student speech, in the context of disagreements about sexual orientation. After a number of high school students participated in activities commemorating the National Day of Silence, protesting bullying and harassment of LGBTQ+ students, a few other students responded with various expressions of disagreement.[192] One student, who wore a T-shirt that said "Be Happy, Not Gay," was told that his shirt violated a school prohibition of derogatory comments insulting characteristics that included sexual orientation.[193]

After the student challenged the school's actions, arguing they violated his free speech rights, Judge Richard Posner wrote that where the school tried to balance the competing interests of free speech and "ordered learning," the student pointed to the relatively narrow exceptions of speech that would cause a disturbance under *Tinker*, were lewd under *Fraser*, or advocated illegal drug use under *Morse* as the only contexts in which the school's interests outweighed his own speech rights.[194] But Posner read the latter two cases in a more abstract way than some other courts, inferring that "if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an

188. *Id.* at 440.
189. *Id.* at 442.
190. *Id.* at 443.
191. *Id.* at 445.
192. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 670 (7th Cir. 2008).
193. *Id.*
194. *Id.* at 672.

upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech."[195]

Posner further pointed out another conflict in the school's role, that of promoting free speech versus protecting students from bullying:

> [H]igh-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students. Because of that relationship and responsibility, we are concerned that if the rule is invalidated the school will be placed on a razor's edge, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students from offensive comments by other students it is sued for violating laws against harassment.[196]

Posner ultimately denied the student's request for a preliminary injunction against the school's derogatory comments policy generally, but granted it as to the specific "Be Happy, Not Gay" slogan, describing it as only "tepidly negative" and "highly speculative" that it either could cause substantial disruption or was patently offensive.[197]

The speech rights of students are thus protected in the abstract[198] but can be assessed along two paths. Should a court be presented with a student challenging school restrictions upon their speech, it will first ask whether the speech fits into one of the carveouts that give the school more authority: Was the speech sponsored by the school, did it promote illegal drug use, or was it patently offensive?[199] If the speech does not fit into one of those categories, then the court will apply *Tinker* to say the speech should be allowed unless it caused a substantial disruption that interfered with the educational work of the school. The next Part turns to the first inquiry, whether the speech of transgender students fits into a carveout.

III. Gender Identity as Lewd Speech

Student speech expressing gender identity is obviously not sponsored by the school, nor does it promote illegal drug use. It has, however, been described

195. *Id.* at 674.

196. *Id.* at 674–75.

197. *Id.* at 676.

198. Alexander Tsesis argues the Supreme Court's line of student speech cases has indicated student speech is "low-value" speech. Alexander Tsesis, *Categorizing Student Speech*, 102 Minn. L. Rev. 1147, 1162–63 (2018).

199. Many commentators object to the line of carveouts. For example, Deborah Ahrens and Andrew Siegel argue that the line of cases creating the carveouts "re-empowered schools to limit and punish student speech based on vague and conclusory concerns about decorum or paternalistic assumptions about students' ability to process complicated issues or handle crude language." Deborah M. Ahrens & Andrew M. Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 Harv. C.R.-C.L. L. Rev. 49, 82 (2019).

as sexualized speech, particularly in recent years as part of attempts to forbid discussion of topics relating to LGBTQ+ people in public schools. The next Section outlines how legislators and other activists in the political sphere have attempted to characterize speech about LGBTQ+ issues, and transgender people in particular, as sexualized and even as sexually predatory.

A. *Characterizing Gender Identity as Lewd*

LGBTQ+ people, particularly gay men, have historically been characterized by homophobic prejudice as sexual predators who hope to turn children gay by molesting them. Clifford Rosky has traced the historical evolution of such fears and weaponized stereotypes, explaining that this "seduction fear" was one of the central reasons behind American anti-LGBTQ+ legislation.[200] Rosky's article *Fear of the Queer Child* follows the modern incarnation of such faux terrors from Anita Bryant's "Save Our Children" campaign of the late 1970s through modern anti-LGBTQ+ policies ranging from adoption statutes to Boy Scout membership policies.[201]

Rosky also discusses a slight twist on this boogeyman: the fear of gender variance in children. In the 1990s, this manifested as discussions in custody disputes, for instance when it was asked whether a boy raised by two lesbian women would have sufficient masculine role models, or be unable to appropriately form his gender identity.[202] Although Rosky's 2013 article describes such role modeling arguments as having waned in custody and visitation cases,[203] he also notes how opposition to the 2008 Employment Non-Discrimination Act, which would have prohibited discrimination based on sexual orientation and gender identity in federal employment, focused on the specter of transgender teachers who supposedly forced young children "to learn about bizarre sexual fetishes."[204]

This rhetoric has come roaring back into popular discourse in recent years. The pejorative term "groomer" has become "omnipresent in right-wing media" and is used to equate any LGBTQ+ person or LGBTQ+ topic as preparing children for sexual victimization.[205] The television commentator Tucker Carlson insinuated that teachers in California were grooming seven year old children by "talking . . . about their sex lives."[206] Drag queen story hours, public events often held at libraries in which a drag queen reads a book to children, have drawn particularly violent protests with members of the far-right

200. Clifford J. Rosky, *Fear of the Queer Child*, 61 Buff. L. Rev. 607, 620 (2013).

201. *Id.* at 639–55.

202. *Id.* at 659.

203. *Id.* at 661.

204. *Id.* at 663.

205. Jessica Winter, *What Should a Children's Book Do?*, New Yorker (July 11, 2022), https://www.newyorker.com/news/annals-of-education/lgbt-books-kids-ban.

206. Melissa Block, *Accusations of 'Grooming' Are the Latest Political Attack—with Homophobic Origins*, npr (May 11, 2022, 5:27 AM), https://www.npr.org/2022/05/11/1096623939/accusations-grooming-political-attack-homophobic-origins [https://perma.cc/J9UR-7KCL].

neofascist Proud Boys interrupting the event while wearing T-shirts reading "Kill Your Local Pedophile."[207] After one such event, a Florida state representative tweeted, "I will be proposing Legislation to charge w/ a Felony & terminate the parental rights of any adult who brings a child to these perverted sex shows aimed at FL kids."[208]

Much of the current rhetoric has come out of Florida, which recently passed a statute known as the "Don't Say Gay" law. The law prohibits classroom instruction about sexual orientation and gender identity in kindergarten through third grade "in a manner that is not age-appropriate or developmentally appropriate," and makes a similar limitation for only age-appropriate or developmentally appropriate instruction past those grades.[209] Supporters of the law such as Florida Governor Ron DeSantis, however, use broad rhetoric that makes clear their position that any discussion of sexual orientation or gender identity is inappropriate at any age. When Governor DeSantis signed the bill into law, he said that opponents of the law "support sexualizing kids in kindergarten."[210] Governor DeSantis's press secretary, Christina Pushaw, tweeted of the statute, "The bill that liberals inaccurately call 'Don't Say Gay' would be more accurately described as an Anti-Grooming Bill" and "[i]f you're against the Anti-Grooming Bill, you are probably a groomer or at least you don't denounce the grooming of 4–8 year old children."[211] Republican National Committee Chair Ronna McDaniel wrote that children were "being indoctrinated with anti-American and sexually-explicit propaganda" in school.[212] After a number of groups and Florida parents filed a lawsuit arguing that the Don't Say Gay law was unconstitutional, a spokesperson for Governor DeSantis said that his administration would "defend the legality of parents to protect their young children from sexual content in Florida public schools."[213]

Florida is not the only state attempting to restrict any acknowledgment of LGBTQ+ people by describing them as sexualizing children, of course. The Attorney General of Texas, Ken Paxton, sent a letter to the Austin school district after learning of planned activities acknowledging Pride Week, which he

207. Brandon Tensley, *Proud Boys Crashed a Drag Queen Story Hour at a Local Library. It Was Part of a Wider Movement*, CNN (July 21, 2022, 5:03 PM), https://www.cnn.com/ 2022/07/21/us/drag-lgbtq-rights-race-deconstructed-newsletter-reaj/index.html [https://perma.cc/D2FR-BS7F].

208. *Id.*

209. Fla. Stat. § 1001.42(8)(c)(3) (2022).

210. Winter, *supra* note 205.

211. Brooke Midgon, *Gov. DesSantis Spokesperson Says 'Don't Say Gay' Opponents Are 'Groomers*,*'* Hill (Mar. 7, 2022), https://thehill.com/changing-america/respect/equality/597215-gov-desantis-spokesperson-says-dont-say-gay-opponents-are/ [https://perma.cc/E4JK-6J93].

212. Ronna McDaniel, Opinion, *Parental Rights Bill: Teach Kindergartners the ABCs, Not S-E-X*, Fox News (Apr. 4, 2022, 7:00 AM), https://www.foxnews.com/opinion/parental-rights-bill-teach-abcs-not-sex-ronna-mcdaniel [https://perma.cc/DJ98-K8KL].

213. Brendan Pierson, *Fla. Parents Bring First Challenge to Bill Opponents Dub 'Don't Say Gay*,*'* Reuters (Mar. 31, 2022, 3:28 PM), https://www.reuters.com/legal/litigation/florida-parents-sue-first-challenge-dont-say-gay-bill-2022–03–31.

criticized as "unmistakably. . . 'human sexuality instruction.'"[214] He posted the letter on Twitter, with a caption claiming that by attempting to prevent the activities, he was "hold[ing] deceptive sexual propagandists and predators accountable."[215] Representative, and now House Speaker, Mike Johnson of Louisiana introduced a federal bill cosponsored by thirty-two other Republicans in October 2022 called the Stop the Sexualization of Children Act.[216] The bill would prohibit the use of federal funds to "develop, implement, facilitate, or fund any sexually oriented program, event, or literature for children under the age of 10."[217] On his own website, Johnson wrote that "[t]he Democrat Party and their cultural allies are on a misguided crusade to immerse young children in sexual imagery and radical gender ideology."[218]

Much of this rhetoric and legislative action focuses on transgender people specifically. Governor DeSantis has done so while speaking about the Don't Say Gay law, asking "[H]ow many parents want their kids to have transgenderism or something injected into classroom instruction? . . . I think clearly right now, we see a focus on transgenderism, telling kids they may be able to pick genders and all of that."[219] He has also falsely claimed that gender-affirming health care means "literally chopping off the private parts of young kids."[220] Governor DeSantis's news release marking enactment of the law quoted Florida Speaker Chris Sprowls as saying that "[o]nly fanatics think the classroom curriculum from kindergarten through 3rd grade should include teaching little children about gender identity."[221] A former Lieutenant Governor of New York writing in the *New York Post* directly argued that acknowledging or accepting transgender people is a form of sexual predation, stating that "instructing young kids that it's normal for boys to become girls and vice versa is going too far. Parents rightly fear their kids are being 'groomed.'"[222]

214. Ken Paxton (@KenPaxtonTX), X (Mar. 22, 2022, 8:18 PM), https://twitter.com/kenpaxtontx/status/1506425186219929608 [https://perma.cc/8J68-E32R].

215. *Id.*

216. H.R. 9197, 117th Cong. (2d Sess. 2022) (introducing bill).

217. *Id.* at 1.

218. Press Release, Rep. Mike Johnson, House Republicans Introduce Legislation To Ensure Taxpayer Dollars Cannot Fund Sexually Explicit Material for Children (Oct. 18, 2022), https://mikejohnson.house.gov/news/documentsingle.aspx?DocumentID=1206 [https://perma.cc/RSM8-KPUN].

219. *DeSantis Defends 'Don't Say Gay' Bill, Warns of Transgender Issues 'Injected' into Classroom Instruction*, CBS Miami (Mar. 4, 2022, 11:00 PM), https://www.cbsnews.com/ miami/news/desantis-defends-dont-say-gay-bill-warns-of-transgender-issues-injected-into-classroom-instruction/ [https://perma.cc/XR8T-X5G3].

220. Dawn Ennis, *DeSantis Wages War of Words To Oppose Abortion and Transgender Healthcare*, Forbes (Aug. 5, 2022, 7:39 PM), https://www.forbes.com/sites/dawnstaceyennis/2022/08/05/war-of-words-this-is-the-way-florida-fights-reproductive-and-transgender-healthcare/.

221. News Release, Governor Ron DeSantis Signs Historic Bill To Protect Parental Rights in Education (Mar. 28, 2022), https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/ [https://perma.cc/B2V3-JD2L].

222. Betsy McCaughey, Opinion, *Science Shows Transgender Education Doesn't Belong in Schools*, N.Y. Post (Apr. 20, 2022, 6:49 PM), https://nypost.com/2022/04/20/

This focus on transgender people stretches into the federal government as well. Representative Lauren Boebert, discussing a proposed Equality Act that would have banned discrimination based on sexual orientation and gender identity in public accommodations,[223] again accused transgender women of being sexual predators, asking, "Where is the equity in this legislation for the young girls across America who will have to look behind their backs as they change in their school locker rooms, just to make sure there isn't a confused man trying to catch a peek?"[224] The proposed "Stop the Sexualization of Children Act" mentioned above would define prohibited sexually-oriented material as "any depiction, description, or simulation of sexual activity, any lewd or lascivious depiction or description of human genitals, or any topic involving gender identity, gender dysphoria, transgenderism, sexual orientation, or related subjects."[225] In the eyes of over thirty Representatives, in other words, any acknowledgment of transgender people is as inappropriate for children as a depiction of sexual activity.

The rhetoric has also begun shifting toward a First Amendment framing. A spokesperson for Governor DeSantis argued, "There is no First Amendment right for anyone to incorporate gender theory or sexually explicit material into classroom instruction . . . . Sexual content does not belong in the K-3rd grade classroom."[226] It seems likely that the rhetoric characterizing transgender people as inherently sexualized is planting the seeds of a legal strategy which argues that statutes such as Florida's Don't Say Gay law do not violate the First Amendment because they simply prohibit speech that the Supreme Court has already held can be prohibited by schools. If that argument were to be successful in challenges to curriculum-based laws, it would similarly apply to the speech rights of individual students. The next Section thus turns to whether this legal framing of gender identity as lewd is correct, and what *Fraser* has meant in application by lower courts.

B. *A Doctrinal Definition of Lewd*

Although cases applying *Fraser* to specific speech vary, the opinion creates a stringent test under which only the worst speech is deemed harmful enough that schools may simply prohibit it without any *Tinker* analysis. The Supreme Court's opinion in *Fraser* uses the words "vulgar and offensive," [227]

science-shows-transgender-education-doesnt-belong-in-schools/ [https://perma.cc/66DD-BCBB].

223. H.R. 5, 117th Cong. (2021).

224. Floor Remarks, Rep. Lauren Boebert, C-SPAN (Feb. 23, 2021), https://www.c-span.org/video/?c4948721/user-clip-bobert-floor-remarks02232021 [https://perma.cc/WJ6T-VNNG].

225. H.R. 9197, 117th Cong. (2022).

226. Eli Yokley, *Parents Are Split on 'Don't Say Gay' Policy, but Americans Are Becoming More Comfortable with Queerness*, Morning Consult Pro (May 23, 2022, 5:00 AM), https://morningconsult.com/2022/05/23/lgbtq-classroom-politics/.

227. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

"offensively lewd and indecent speech,"[228] and "vulgar and lewd"[229] to explain what speech may be prohibited by a school.[230] Lower courts applying the decision often simply repeat those words, but a few have attempted to expand the definition, such as the Second Circuit's focus on "sexual innuendo and profanity."[231] Five years later, called upon to again apply *Fraser*, the Second Circuit described the issue as one of form rather than content:

> *Fraser* and its progeny of cases all deal with speech that is offensive because of the manner in which it is conveyed. Examples are speech containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder. Rather than being concerned with the actual content of what is being conveyed, the *Fraser* justification for regulating speech is more concerned with the plainly offensive manner in which it is conveyed.[232]

Reviewing cases in which *Fraser* is applied by lower courts reveals some clear patterns. Importantly, no cases treat discussion of sexual orientation or gender identity as inherently lewd, and some courts specifically reject the idea that LGBTQ+ topics are sexual.[233]

Explicitly sexualized jokes, images, and language are particularly likely to be found vulgar and lewd under *Fraser*. Some examples are obvious and extreme: a student cartoon of eight drawings of stick figures in sexual positions,[234] using "profane" terms to accuse one teacher of having sex with another teacher,[235] an unofficial student paper with the lead (fictional) story claiming that the school principal had been arrested for public masturbation,[236] and a video surreptitiously zooming in on a teacher's buttocks set to an explicit song called "Ms. New Booty."[237] As students and schools became more conversant with the internet, it opened new possibilities for lewd speech, such as a sixth-grade student who played a sexually explicit computer game called "Sexy

228. *Id.* at 685.

229. *Id.*

230. Scholars such as Mark Strasser have criticized the Court for not offering further guidance beyond *Fraser*'s text. *See* Mark Strasser, Tinker *Remorse: On Threats, Boobies, Bullying, and Parodies*, 15 First Amend. L. Rev. 1, 41 (2016) ("[T]he Court has been utterly unhelpful with respect to how or when to differentiate among the kinds of speech that pose genuine dangers to students and school personnel versus sophomoric speech that, while inappropriate, poses no dangers to anyone.").

231. Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 328 (2d Cir. 2006).

232. Nixon v. N. Loc. Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005).

233. *See infra* notes 293-295 and accompanying discussion.

234. R.O. *ex rel.* Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533, 541 (2d Cir. 2011).

235. J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Penn. 2002) (acknowledging complication that speech in question was on website rather than expressed on campus).

236. Snell v. Prince George's Cnty. Bd. of Educ., No. CIV. AW-93–1184, 1995 WL 907869, at *2 (D. Md. Aug. 11, 1995), *aff'd sub nom.* Snell *ex rel.* Snell v. Buffington, 105 F.3d 648 (4th Cir. 1997).

237. Requa v. Kent Sch. Dist. No. 415, 492 F. Supp. 2d 1272, 1279 (W.D. Wash. 2007).

Dress-Up" at school.[238] The Fourth Circuit applied *Fraser* to a MySpace page targeting another student by claiming that she had STDs.[239]

Social standards around sexualized speech have obviously changed over the past few decades, demonstrated by older cases reacting with shock to words that are seen as more anodyne today. For example, in 1992, a student T-shirt picturing the band New Kids on the Block with the message "Drugs Suck" was deemed vulgar.[240] The court's logic that the word "suck" had inescapable sexual connotations, however, may not hold true thirty years later, as the court asserted that "suck . . . in today's vernacular is more offensive than 'damn.'"[241] Similarly, the case involving a T-shirt about a "Coed Naked Band" viewed a T-shirt reading "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick" as vulgar due to the word "dick."[242] A Michigan court also found the word "dick" vulgar a few years later, although it was used in the context of calling an assistant principal by that term.[243] In Texas, another T-shirt pun was also deemed vulgar, this time with the slogan "Somebody Went to HOOVER DAM And All I Got Was This 'DAM' Shirt."[244]

Perhaps surprisingly, relatively few cases involve the vulgar language of actual obscenities. Examples can be found—a student loudly repeating the phrase "white ass fucking bitch,"[245] another unofficial student newspaper described only as containing "sophomoric humor with a strong bent toward the vulgar and profane"[246]—but perhaps most lawyers advise that obscenities would more likely fall under *Fraser*'s ambit and thus such incidents are not litigated. Similarly, applying *Fraser* to threats is rare.[247] One example was quite straightforward; a student wrote an article for (yet another) unofficial student publication proposing various terrible things he hoped would happen to teachers and school administrators, including bomb threats, property damage, and

238. Smith v. Detroit Indep. Sch. Dist., No. 5:06-CV-262, 2009 WL 10708891, at *8 (E.D. Tex. Mar. 31, 2009).

239. Kowalski v. Berkeley Cnty. Pub. Schs., No. 3:07-CV-147, 2009 WL 10675108, at *1, *7 (N.D.W. Va. Dec. 22, 2009), *aff'd*, 652 F.3d 565 (4th Cir. 2011).

240. Broussard *ex rel.* Lord v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1528, 1537 (E.D. Va. 1992).

241. *Id.* at 1536.

242. Pyle *ex rel.* Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 170 (D. Mass. 1994) ("In sum, on the question of when the pungency of sexual foolery becomes unacceptable, the school board of South Hadley is in the best position to weigh the strengths and vulnerabilities of the town's 785 high school students.").

243. Posthumus v. Bd. of Educ. of Mona Shores Pub. Sch., 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005).

244. Mercer v. Harr, No. CIV.A. H-04–3454, 2005 WL 1828581, at *1, *5, *7 (S.D. Tex. Aug. 2, 2005).

245. Heller v. Hodgin, 928 F. Supp. 789, 792 (S.D. Ind. 1996).

246. Bystrom *ex rel.* Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1389–90 (D. Minn. 1987), *aff'd sub nom.* Bystrom v. Fridley High, 855 F.2d 855 (8th Cir. 1988).

247. For example, the Third Circuit cited *Fraser*'s focus on the harm speech can cause a younger audience to find no First Amendment violation when a five-year-old was suspended for telling classmates "I'm going to shoot you" during a "game of cops and robbers." S.G. *ex rel.* A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 419, 423 (3d Cir. 2003).

that someone would sneak harmful substances into their food and prank them by publishing pornographic advertisements with teachers' phone numbers.[248] Another case was slightly more attenuated, as the speech in question was a T-shirt that read "Volunteer Homeland Security" next to a picture of a gun on the front, and on the back over a larger picture of a gun had the text "Special Issue—Resident—Lifetime License, United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner—No Bag Limit."[249] The court's opinion spent two pages explaining why the shirt's language seemingly endorsed illegal vigilante violence rather than the student's explanation that it expressed support for the U.S. military and fight against terrorism, and thus why it crossed the line into "a message of use of force, violence and violation of law."[250]

A few appellate courts have highlighted the overlap between *Fraser*'s concern for the wellbeing of other students and *Tinker*'s concern for disruption to the educational process. For example, in 2003 the Eleventh Circuit resolved a challenge involving the Confederate flag by finding that both cases justified the school's actions.[251] The court approvingly quoted the district judge's opinion, which did not focus on *Fraser*'s references to lewd or vulgar speech, but rather the job of schools to "inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government."[252] The court also referenced another of its own recent decisions, similarly holding that a school official was not personally liable for suspending a student over his refusal to put away a Confederate flag.[253] In its analysis of the assistant principal's liability, the court quoted a Seventh Circuit case's reading of *Fraser* that "[r]acist and other hateful views can be expressed in a public forum. But an elementary school under its custodial responsibilities may restrict such speech that could crush [a] child's sense of self-worth."[254]

Cases in which courts declined to apply *Fraser* illustrate a wide range of speech that is protected even if it is controversial, demonstrating that courts

248. Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 286–87 (Or. Ct. App. 2000).

249. Miller *ex rel.* Miller v. Penn Manor Sch. Dist., 588 F. Supp. 2d 606, 611 (E.D. Pa. 2008).

250. *Id.* at 624–25.

251. Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1249 (11th Cir. 2003).

252. *Id.* at 1248.

253. The court's description of the incident, while written in an anodyne descriptive manner, can be read to imply that more disciplinary issues were going on than merely refusing to put away a Confederate flag. The student in question, who regularly participated in Civil War reenactments and living histories, responded to the assistant principal's request by "tr[ying] to explain the historical significance of the flag" to the administrator, then when taken to the administrative office, "urged" another student wearing a T-shirt with a Confederate flag on it "to adhere to his principles and not submit to the alleged violation of his First Amendment rights." Denno v. Sch. Bd. of Volusia Cnty., 218 F.3d 1267, 1270–71 (11th Cir. 2000).

254. *Id.* at 1272–73 (quoting Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996)) (holding that school's prohibition of elementary school student's distribution to entire class of invitations to religious meetings did not violate student's First Amendment rights).

have been reluctant to identify broad categories of lewd or offensive speech that schools are free to restrict. Obscene language has been deemed to not fall under *Fraser* when it was used in the context of reciting a poem with swear words.[255] Students who criticize teachers with sexualized jokes or with untrue assertions that they have engaged in illegal or inappropriate behavior have been deemed to have engaged in offensive speech,[256] but straightforward criticism of teachers, such as creating a Facebook group calling one educator "the worst teacher I've ever met" has been found to not be offensive.[257] Statements that can be interpreted as violent threats may be problematic, but not all references to violence are. For example, the Ninth Circuit held that a school was wrong to have put negative information in a student's permanent record after the student wrote a poem from the perspective of a school shooter.[258]

Controversial political topics are also generally outside of *Fraser*'s ambit, further bolstering the proposition that discussion of sexual orientation and gender identity, even in current political debate, is not lewd or offensive. Multiple courts have ruled that displaying the Confederate flag is not patently offensive.[259] More than one court held that T-shirts with the statement "homosexuality is a sin" were not offensive.[260] In a case involving a seventh grade student wearing a T-shirt describing then-President George W. Bush as a "Cocaine Addict" and "Lying Drunk Driver" alongside images of drugs and alcohol, the district court found that the images were clearly offensive under *Fraser*.[261] On appeal, the Second Circuit reasoned that although the images were "insulting or in poor taste," they were not "as plainly offensive as the sexually charged speech considered in *Fraser* nor are they as offensive as profanity used to make a political point."[262] The court's focus upon the political value of

255. Behymer-Smith *ex rel.* Behymer v. Coral Acad. of Sci., 427 F. Supp. 2d 969, 971–73 (D. Nev. 2006) (holding student's recitation of poem by W.H. Auden with words "hell" and "damn" did not constitute "vulgar, lewd, obscene, or offensive" speech where it did not disrupt or divert from educational curriculum).

256. Gano v. Sch. Dist. No. 411 of Twin Falls Cnty., 674 F. Supp. 796, 797–99 (D. Idaho 1987) (holding student's T-shirt printed with caricatures of three school administrators looking drunk and holding alcoholic drinks was not protected speech because T-shirt falsely accused administrators of committing misdemeanor of drinking on school property).

257. Evans v. Bayer, 684 F. Supp. 2d 1365, 1367, 1374 (S.D. Fla. 2010).

258. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 983–84, 992 (9th Cir. 2001).

259. Bragg v. Swanson, 371 F. Supp. 2d 814, 823 (S.D.W. Va. 2005) ("Regarding *Fraser*, and despite defendants' arguments to the contrary, the display of the flag is not *per se* and patently offensive."); *see also* Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324, 332 (6th Cir. 2010).

260. B.A.P. v. Overton Cnty. Bd. of Educ., 600 F. Supp. 3d 839, 843, 845 n.1, 846 (M.D. Tenn. 2022) (analyzing t-shirt with "homosexuality is a sin - 1 Corinthians 6:9–10"); Nixon v. N. Loc. Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 967, 974 (S.D. Ohio 2005) (holding plaintiff wearing T-shirt with "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" is protected speech).

261. Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 322–23 (2d Cir. 2006).

262. *Id.* at 329. Notably, the case was decided shortly before *Morse v. Frederick*, which would have provided a slightly different and clearer justification for restricting the speech if depictions of drugs were understood to potentially promote illegal drug use.

the speech is characteristic, as controversial and arguably offensive messages that convey a political point have often been found not to fall under *Fraser*, including pro-gun messages,[263] kneeling during the national anthem,[264] a T-shirt with a photograph of then-President George W. Bush labeled "International Terrorist,"[265] and buttons referring to "Scabs" worn during a teacher's strike.[266]

Even student speech about sexual behavior or sexual attraction does not fall under *Fraser* if the speech itself is not sexualized. The First Circuit found that a post-it with the text "THERE'S A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS" stuck on a bathroom wall "contained no speech that could be viewed as 'offensively lewd' or 'indecent.'"[267] A student who created a bracket for his friends to rank sixty-four female classmates by attractiveness was also not held to have engaged in lewd or offensive speech.[268]

Sexualized speech is more likely to lead to application of *Fraser*. For example, although virtually everyone would be offended if they were compared to Nazis, such comparisons have only been found patently offensive under *Fraser* where the comparison was also accompanied by sexual remarks. In a New Jersey school district, two elementary school students wore buttons with a picture of Hitler Youth and a slogan against a mandatory uniform policy.[269] The photo did not have swastikas or other explicit depictions of Nazis, and perhaps elementary school students are some of the least likely people to recognize and understand a photo of Hitler Youth, but the students did not deny that the photo indeed showed Hitler Youth.[270] The New Jersey court described the image as offensive, but explained in some detail why it was not so offensive as to implicate *Fraser*:

> [T]he image here is not profane, nor does it contain sexual innuendo. It is, in fact, a rather innocuous photograph—rows and rows of young men, all facing the same direction and wearing the same outfit (with no identifying marks or patches). The photograph contains no visible swastikas, and the young men are not giving the infamous "sieg heil" salute. As noted by Plaintiffs' counsel at oral argument, the young men might easily be mistaken for a historical photograph of the Boy Scouts. The image may be

263. N.J. *ex rel.* Jacob v. Sonnabend, 37 F.4th 412, 424 (7th Cir. 2022) (noting speech in question "isn't like the lewd sexual speech" in *Fraser*).

264. V.A. v. San Pasqual Valley Unified Sch. Dist., No. 17-cv-02471, 2017 WL 6541447, at *1, *5 (S.D. Cal. Dec. 21, 2017).

265. Barber *ex rel.* Barber v. Dearborn Pub. Sch., 286 F. Supp. 2d 847, 849, 856 (E.D. Mich. 2003) ("*Fraser* is inapplicable as Barber's shirt did not refer to alcohol, drugs, or sex. Furthermore, it was neither obscene, lewd, nor vulgar . . . .").

266. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 526, 530 (9th Cir. 1992).

267. Norris *ex rel.* A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 14, 24 (1st Cir. 2020).

268. Wang v. Bethlehem Cent. Sch. Dist., No. 1:21-CV-1023, 2022 WL 3154142, at *1, *18 (N.D.N.Y. Aug. 8, 2022).

269. DePinto v. Bayonne Bd. of Educ., 514 F. Supp. 2d 633, 636 (D.N.J. 2007).

270. *Id.*

> interpreted as insulting or thought to be in poor taste, but it is not "lewd," "vulgar," "indecent," or "plainly offensive" as set forth in *Fraser*.[271]

An ambiguous image of Hitler Youth, in other words, was not so clearly a Nazi reference that the historical reference alone was patently offensive. Because it lacked sexual innuendo and was not lewd, vulgar, or indecent, the court reasoned that the school's actions were properly evaluated under *Tinker*'s substantial disruption analysis. Last year, a court in California summarized existing precedents by stating "[n]one of the cases, even in the K-12 context, have allowed schools to broadly exclude all 'offensive' conduct. In *Fraser*, for example, the student speech was not merely offensive, but also 'sexually explicit, indecent, or lewd.'"[272]

This is not to say that no close questions exist. Some particularly provocative statements have been viewed as vulgar or patently offensive, even though they are not sexualized and have a cognizable political message.[273] For example, an Ohio student wore a T-shirt with Marilyn Manson's name, an image of a three-faced Jesus, and the text "See No Truth. Hear No Truth. Speak No Truth." on the front. The back of the shirt said "BELIEVE," with the letters "LIE" highlighted.[274] The Sixth Circuit found that the shirt fell under *Fraser*'s definition of vulgar and offensive speech.[275] The court linked the message of the shirt itself to broader messages in Marilyn Manson's music, arguing the symbols and words promoted values that were "patently contrary to the school's educational mission" and that the shirt and singer promoted drug use and suicide, although neither drugs nor suicide were referenced by the shirt.[276] This reaction to Manson may be explained by contemporaneous controversy over Manson in the wake of the Columbine school shooting of April 1999. After the tragedy, the media reported (incorrectly) that the two shooters wore Marilyn Manson T-shirts during the violence and were fans of the singer. As a result, Manson's concerts were cancelled, some schools banned all Marilyn Manson-branded clothing, and Manson himself was blamed for the deaths of the students.[277] Although the student in the Sixth Circuit case wore the shirt in 1997, two years before Columbine, the appellate court heard and decided the case in 2000, when characterization of Manson as a threat likely influenced the court's evaluation of what a Marilyn Manson T-shirt meant when worn to school.

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271. *Id.* at 645.

272. Flores v. Bennett, 635 F. Supp. 3d 1020, 1041 (E.D. Cal. 2022).

273. Hardwick *ex rel.* Hardwick v. Heyward, No. 4:06-cv-1042, 2012 WL 761249, at *10 (D.S.C. Mar. 8, 2012), *aff'd*, 711 F.3d 426 (4th Cir. 2013) (finding shirt with American flag and text "Old Glory flew over legalized slavery for 90 years!" plainly offensive, potentially viewed as glorifying or endorsing slavery).

274. Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 467 (6th Cir. 2000).

275. *Id.* at 469.

276. *Id.* at 470.

277. *See, e.g.*, Christopher O'Connor, *Colorado Tragedy Continues to Spark Manson Bashing*, MTV (Apr. 26, 1999, 10:33 PM), https://www.mtv.com/news/2yvlra/colorado-tragedy-continues-to-spark-manson-bashing [https://perma.cc/B48U-G8TH].

Courts have also wrestled with sexualized expression in service of a laudable and nonsexual message. Multiple cases were sparked by students wearing bracelets created as a nation-wide awareness campaign about breast cancer that read "I ♥ boobies! (KEEP A BREAST)."[278] The motivation was almost identical to Matthew Fraser's: grab attention about a serious subject with "light-hearted" and even provocative language.[279] One of the student plaintiffs who wore such a bracelet said that "no one really notices" more staid symbols for breast cancer awareness, such as the famous pink ribbon.[280] The problem, of course, is that the word "boobies" sounds more like Matthew Fraser than Susan G. Komen.[281] Some courts thus found that the bracelets were vulgar[282] and sexual innuendo, notwithstanding the motive.[283]

A school district in Pennsylvania took the same stance against the bracelets, banning them throughout schools in the district.[284] The Third Circuit, sitting en banc, held that to do so violated the First Amendment rights of students, and offered a specific reading of *Fraser* that is more speech-protective and clearer than most decisions applying the case. To begin with, the court read *Fraser* to apply only in limited circumstances, stating that the case "is not a blank check to categorically restrict any speech that touches on sex or any speech that has the potential to offend."[285] Instead, student speech could be limited under *Fraser* in only two circumstances. First, if speech were "plainly lewd," it could be prohibited by the school.[286] Second, if speech were more ambiguous, however—"speech that a reasonable observer could interpret as lewd, vulgar, profane, or offensive"—it could be restricted only if the speech could not be plausibly interpreted to comment on a political or social issue.[287] Given the recent political controversies over LGBTQ people and specifically transgender children, this reading of *Fraser* would very clearly protect even ambiguously lewd or vulgar speech that expressed a student's gender identity.

The court's application of this analysis to the bracelets gave even more guidance about what "plainly lewd" meant. Describing the bracelets as "an open-and-shut case," the court pointed to examples of plainly lewd speech: "Fraser's 'pervasive sexual innuendo' that was 'plainly offensive'"[288] and the

278. B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 297–98 (3d Cir. 2013).

279. *Id.* at 298.

280. *Id.* at 299.

281. *See* Sandy M. Fernandez, *Pretty in Pink*, Breast Cancer Action, https://www.bcaction.org/about-think-before-you-pink/resources/history-of-the-pink-ribbon/ [https://perma.cc/UA23-N8KU] (last visited Feb. 29, 2024).

282. J.A. v. Fort Wayne Cmty. Schs., No. 1:12-CV-155, 2013 WL 4479229, at *7 (N.D. Ind. Aug. 20, 2013) (finding bracelet's message was "ambiguously lewd," so school could ban it under *Fraser*).

283. K.J. *ex rel.* Braun v. Sauk Prairie Sch. Dist., No. 11-cv-622, 2012 WL 13055058, at *7 (W.D. Wis. Feb. 6, 2012).

284. B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 300 (3d Cir. 2013).

285. *Id.* at 309.

286. *Id.* at 298.

287. *Id.* at 308.

288. *Id.* at 320 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

"seven words that are considered obscene to minors on broadcast television."[289] By contrast, the fact that teachers and administrators did not ban the bracelets the moment they became aware of them, and their repetition of the word "boobies" in announcements to students that the bracelets were prohibited, indicated that the word was not offensive enough to be viewed as vulgar and plainly lewd.[290]

Although not all courts have adopted the Third Circuit's specific reading, no court has held that reference to sexual orientation is itself sufficient to categorize the speech as lewd. The Third Circuit approvingly cited an essay by Eugene Volokh discussing a case in which a student wore a T-shirt saying "Jesus Is Not a Homophobe" in which he said "*Fraser* . . . hardly suggested that all speech on political and religious questions related to sexuality and sexual orientation could be banned from public high schools."[291] A Florida court held so explicitly, describing rainbows, pink triangles, and slogans including "Gay? Fine By Me," "Gay Pride," "I Support Gays," "God Loves Me Just the Way I Am," "Pro-Gay Marriage," and "Sexual Orientation is Not a Choice. Religion, However, Is" as "clearly not sexual in nature."[292]

An analogous issue arose in the context of student groups organized to support LGBTQ+ rights. For example, students sued their school in Texas after the school refused to allow them to post fliers and make announcements using the school P.A. system about a new club called the "Gay and Proud Youth Group."[293] Although the students' claim was analyzed as a question of whether the school appropriately restricted speech by content rather than viewpoint within the limited public forum of the school,[294] the school's explanation for its actions focused on the potential harm from sexualized topics.[295] The facts were complicated, however, by the student group's website. The site provided links to other online resources about sexuality, including www.gay.com.[296] That website had stories on sexually explicit topics, with headlines like "First Time with Anal Sex" and "How Safe are Rimming and Fingering?"[297] Although the students later removed this link from their website, the school principal reviewed their website when the link was active.[298] The court therefore described the

289. *Id.* (citing FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978)).

290. *Id.*

291. *Id.* at 309 (citing Eugene Volokh, *May "Jesus Is Not a Homophobe" T-Shirt Be Banned from Public High School as "Indecent" and "Sexual"?*, Volokh Conspiracy (Apr. 4, 2012, 3:36 PM), http://www.volokh.com/2012/04/04/may-jesus-was-not-a-homophobe-T-shirt-be-banned-from-public-high-school-as-indecent-and-sexual/ [https://perma.cc/5XU3-KEM9].

292. Gillman *ex rel.* Gillman v. Sch. Bd. for Holmes Cnty., 567 F. Supp. 2d 1359, 1362, 1374 (N.D. Fla. 2008).

293. Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 556 (N.D. Tex. 2004).

294. *Id.* at 560.

295. *Id.* at 563.

296. *Id.* at 557.

297. *Id.*

298. *Id.* at 558.

case as "involving the issue of exposure of minors to material of a sexual subject matter."[299] Additionally, in between the events in the school and the court's decision, the Supreme Court had decided *Lawrence v. Texas*,[300] meaning that at the time of the school's censorship, same-sex sexual activity was illegal in Texas.[301] The court viewed the student group as promoting sexualized speech, but that conclusion was undoubtedly bolstered by the legal bias against LGBTQ+ people and the potential access to explicit sexual materials.[302]

Other courts, however, answered similar questions of recognition and access for student groups supporting LGBTQ+ students very differently. One court in Florida refused to apply *Fraser*[303] and stated explicitly that "this Court is unable to discern how a club whose stated purpose is to promote tolerance towards non-heterosexuals within the student body promotes the premature sexualization of students."[304] Although the history of schools and courts resisting recognition of LGBTQ+ student groups is rhetorically relevant to characterizations of LGBTQ+ topics as sexual, such cases generally do not raise *Fraser*[305] or find that a different test is more appropriate.[306] The applicability of such cases in determining whether an individual student's speech is lewd or vulgar is therefore not strong.

By contrast, the clearest implication from cases applying *Fraser* to individual student speech is that the case establishes a high bar. *Fraser* does not apply to speech that a school administrator disagrees with, nor to speech that is "inconsistent with [their] sensibilities"—as the Second Circuit put it, the case applies only "to 'plainly offensive speech' [and] must be understood in light of the vulgar, lewd, and sexually explicit language that was at issue in that case."[307] Matthew Fraser's language was viewed as plainly offensive "to any

299. *Id.* at 562. Notably, in a more straightforward application of *Fraser*, another court rejected the idea that merely linking to another website made students responsible for that website's speech. It was likely significant that in applying *Fraser*, courts have typically treated speech uttered within the school and speech outside of the school differently. *See* Bowler v. Town of Hudson, 514 F. Supp. 2d 168, 171, 179 (D. Mass. 2007), *on reconsideration in part*, No. CV 05–11007, 2007 WL 9797643 (D. Mass. Dec. 18, 2007) (finding school's prohibition of posters advertising Conservative Club violated student speech rights, even though they listed website for national organization that linked to another site with "graphic video footage" of hostages in Iraq and Afghanistan being beheaded).

300. 539 U.S. 558 (2003).

301. *Caudillo*, 311 F. Supp. 2d at 558.

302. *See id.* at 563 ("[T]his Court finds that the material on GAP Youth/LGSA's website and the group's goal of discussing sex both fall within the purview of speech of an indecent nature . . . .").

303. Gonzalez *ex rel.* Gonzalez v. Sch. Bd. of Okeechobee Cnty., 571 F. Supp. 2d 1257, 1268–69 (S.D. Fla. 2008).

304. *Id.* at 1266–67.

305. *See, e.g.*, Gay-Straight All. of Yulee High Sch. v. Sch. Bd. of Nassau Cnty., 602 F. Supp. 2d 1233, 1235 (M.D. Fla. 2009).

306. Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cnty., 2 F. Supp. 3d 1277, 1290 (M.D. Fla. 2014) (finding *Hazelwood v. Kuhlmeier*, and not *Fraser*, is appropriate standard for school's denial of official student group recognition).

307. Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008).

mature person," and should not be compared even to "speech that a reasonable observer could interpret as either lewd or non-lewd."[308] One district court found that *Fraser* cannot be applied to topics or subject matter of speech at all, but restricts only "the manner in which that view may be expressed."[309] Moreover, speech with a political or social message is particularly unlikely to be constitutionally restricted under *Fraser*.[310]

With this robust understanding of *Fraser*'s precedent established, it is difficult to imagine a viable argument that an individual student's expression of their gender identity could possibly be viewed as the type of lewd, vulgar, patently offensive expression that the case encompasses. There is nothing about the categories of gendered clothing, hairstyles, makeup, or other personal style choices that is inherently lewd. For all of the politicized rhetoric around LGBTQ+ people and topics as inappropriately sexualizing children, actually attempting to frame such an argument around the gender presentation of students demonstrates that the rhetoric falls apart as a legal matter. *Fraser* is simply inapplicable to the expression of transgender students, and therefore their expression should be analyzed under the broader frame of *Tinker*. The next Part turns to that analysis.

IV. *Tinker*, Heckler's Veto, and Distractions

Under *Tinker*, student speech should not be prohibited unless the speech causes a material disruption in the school's educational activities or school administrators have specific justification for believing that the speech would do so. This creates the possibility of a heckler's veto, meaning that the negative reactions of other students might justify silencing the transgender student.[311] If no other students react to a trans student's gender presentation, then the speech does not interfere materially and substantially with the school's operation. If, on the other hand, students object to the trans student, or even bully and harass that student, school authorities have a much stronger justification to argue that they must restrict the student's speech in order to prevent disruption of the school's educational activities. Such negative reactions are likely in many (if not most) schools, given data about bullying and harassment of transgender students. For example, one survey found that ninety percent of transgender students had heard derogatory statements about sexual orientation and gender.[312] In another

308. B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 306 (3d Cir. 2013).

309. E. High Gay/Straight All. v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1193 (D. Utah 1999).

310. *See Hawk*, 725 F.3d at 306 ("By concluding that Fraser's speech met the obscenity-to-minors standard, the Court necessarily implied that his speech could not be interpreted as having 'serious' political value."); Mercer v. Harr, No. CIV.A. H-04–3454, 2005 WL 1828581, at *6 (S.D. Tex. Aug. 2, 2005) ("The cases in which courts did find First Amendment violations involved clothing expressing specific and clear political messages . . . .").

311. R. George Wright, *The Heckler's Veto Today*, 68 Case W. Res. L. Rev. 159, 175 (2017).

312. Emily A. Greytak, Joseph G. Kosciw & Elizabeth M. Diaz, Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools 10, (2009).

survey of transgender adults, three quarters of the adults said that they had been harassed in school because of their gender identity.[313] This concept of the heckler's veto also exists as the heckler's veto doctrine in general First Amendment law, but *Tinker* arguably modifies that doctrine in the school setting.

A. *The Heckler's Veto Doctrine and Schools*

Under general First Amendment principles, almost all speech is constitutionally protected. Narrow exceptions exist, such as fighting words,[314] speech that attempts to incite imminent lawless action and is likely to do so,[315] obscenity,[316] child pornography,[317] and true threats.[318] Speech that sparks a negative response from listeners, however, does not fit into such an exception—there is no *Tinker*-esque material disruption test applied to adults. Moreover, the Supreme Court specifically rejected the idea of suppressing speech due to the reactions of people who hear it in what is now known as the heckler's veto doctrine. An early articulation of the concept occurred after Arthur Terminiello gave a controversial speech to a crowd of eight hundred in a Chicago auditorium, with another thousand people part of an "angry and turbulent" protest outside.[319] Terminiello was later convicted for disorderly conduct under a statute that defined a breach of the peace as speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[320] The Supreme Court held that the statute was unconstitutional, as "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[321]

The Court repeatedly reinforced this logic during cases that arose during the civil rights movement. In a series of cases, civil rights activists were convicted of breaching the peace because they held a peaceful demonstration that some members of the public may have disagreed with.[322] The Court held that it was unconstitutional "to make criminal the peaceful expression of unpopular views."[323] Two years later it held that "[m]aintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy."[324]

313. Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, National Center for Transgender Equality 33 (2011).

314. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

315. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

316. Miller v. California, 413 U.S. 15, 15 (1973).

317. New York v. Ferber, 458 U.S. 747, 763 (1982).

318. Watts v. United States, 394 U.S. 705, 706 (1969).

319. Terminiello v. Chicago, 337 U.S. 1, 2–3 (1949).

320. *Id.* at 4.

321. *Id.*

322. Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Fields v. South Carolina, 375 U.S. 44 (1963).

323. *Edwards*, 372 U.S. at 237.

324. *Cox*, 379 U.S. at 552.

In 1966, betraying a certain frustration, Justice Fortas wrote that "[t]his is the fourth time in little more than four years that this Court has reviewed convictions by the Louisiana courts for alleged violations, in a civil rights context, of that State's breach of the peace statute."[325] The case arose when five Black men engaged in a peaceful protest in a public library and were later charged with intent to provoke a breach of the peace.[326] Fortas first noted that the peaceful protest, which took place inside an almost empty library, did not actually cause any disturbance of any kind.[327] But it was not enough to quibble with the facts of the supposed offense—Fortas then wrote that "another and sharper answer . . . is called for" and held that the statute was unconstitutional, as it was applied deliberately to punish the right to protest.[328]

A footnote was even more direct, stating that "[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."[329] The Court cited legal scholar Harry Kalven, who coined the term "heckler's veto" to describe the phenomenon of a hostile audience using the law to silence speakers they disagreed with.[330] As a general rule, therefore, the heckler's veto doctrine means that speech cannot be suppressed or punished solely because listeners react in negative or even violent ways.

Obviously, this principle seems to conflict with the material disruption analysis of *Tinker*.[331] Courts have disagreed with whether the heckler's veto doctrine can be applied in the school setting, creating what some commentators have described as a split between three circuits.[332] The earliest case arose in the Eleventh Circuit, when a high school student stood along with his classmates for the daily recitation of the Pledge of Allegiance over the school intercom, but put his hands in his pockets instead of over his heart and did not recite the pledge aloud.[333] After his teacher reported him to the school principal, the principal ordered the student to apologize. The principal later visited a second class and said anyone who refused to recite the pledge would be punished.[334] Angered by the principal's order, a second student named Michael Holloman

325. Brown v. Louisiana, 383 U.S. 131, 133 (1966).

326. *Id.* at 136–38.

327. *Id.* at 138–40.

328. *Id.* at 141.

329. *Id.* at 133 n.1.

330. *Id.* (citing Harry Kalven, The Negro and the First Amendment 140 (1965)).

331. *See* Fricke v. Lynch, 491 F. Supp. 381, 387 (D.R.I. 1980) (applying *Tinker* and finding that allowing school to justify prohibiting male student bringing another male student as his date to prom based on negative reactions of other students would be heckler's veto and create "mob rule by unruly school children"); *see also* Driver, *supra* note 72, at 125–27.

332. Katherine M. Portner, Tinker*'s Timeless Teaching: Why the Heckler's Veto Should Not Be Allowed in Public High Schools*, 86 Miss. L.J. 409, 428 (2017); Julien M. Armstrong, Note, *Discarding* Dariano*: The Heckler's Veto and a New School Speech Doctrine*, 26 Cornell J.L. & Pub. Pol'y 389, 409 (2016).

333. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1260 (11th Cir. 2004).

334. *Id.*

stood with one fist raised in the air and refused to recite the pledge.[335] The teacher similarly reported Holloman to the principal, who offered him the choice between detention (which would prevent him from walking in his high school graduation ceremony) and being paddled.[336]

Hearing an appeal from a district court's grant of summary judgment to the teacher, principal, and school board, the Eleventh Circuit rejected the idea that any distraction of Holloman's fellow students during his protest meant that the school's actions were constitutional. As the court wrote, "student expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption."[337] The teacher testified that several students approached her after class to complain about Holloman's protest, but the court held that such disagreement was irrelevant for purposes of constitutional analysis.[338] The court wrote at length about the harm of the heckler's veto:

> Allowing a school to curtail a student's freedom of expression based on such factors turns reason on its head. If certain bullies are likely to act violently when a student wears long hair, it is unquestionably easy for a principal to preclude the outburst by preventing the student from wearing long hair. To do so, however, is to sacrifice freedom upon the alter of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob. If bullies disrupted classes and beat up a student who refused to join the football team, the proper solution would not be to force the student to join the football team, but to protect the student and punish the bullies. If bullies disrupted classes and beat up a student because he wasn't wearing fancy enough clothes, the proper solution would not be to force the student to wear Abercrombie & Fitch or J. Crew attire, but to protect the student and punish the bullies. The same analysis applies to a student with long hair, who is doing nothing that the reasonable person would conclude is objectively wrong or directly offensive to anyone. The fact that other students might take such a hairstyle as an incitement to violence is an indictment of those other students, not long hair.[339]

The court did not, however, see this principle as conflicting with *Tinker*. Rather, the court focused on the level of disruption caused by Holloman's protest and found that the school had punished him because it disagreed with his protest, not because any material or substantial disruption had actually taken place.[340]

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335. *Id.* at 1261.

336. *Id.*

337. *Id.* at 1271.

338. *Id.* at 1274–75 (noting that restriction of expression requires more than "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969))).

339. *Id.* at 1275.

340. *Id.* at 1272–73, 1281.

The second case in the trio, *Zamecnik v. Indian Prairie School District #204*, arose when a few high school students in Illinois wished to wear T-shirts reading "Be Happy, Not Gay" in response to the Day of Silence in support of LGBTQ+ students.[341] Appealing from a permanent injunction that allowed students to wear the slogan on their clothing, the school argued (among other things) that one of the student plaintiffs wearing the slogan on their clothing had sparked disturbances in the form of harassment and other negative reactions from other students.[342]

In applying *Tinker* to assess whether the school reasonably anticipated a material disruption, the Seventh Circuit described the evidence as falling within three categories: harassment of gay students, harassment of the T-shirt-wearing plaintiff, and an expert report talking about the impact of the message.[343] The court described the second category of evidence as "barred by the doctrine . . . of the 'heckler's veto.'"[344] Any harassment of the plaintiff because other students disagreed with her shirt's message could not be relied upon to suppress her speech. The court reads *Tinker* as endorsing the heckler's veto doctrine, presumably because it requires a *substantial* disruption before a school may limit a student's speech.[345] But the opinion also somewhat sidesteps the potential conflict between the heckler's veto doctrine and *Tinker* by finding that the potentially disruptive reactions were to the student filing a lawsuit rather than wearing the T-shirt.[346]

The final case arose at a high school in northern California with a history of violent incidents sparked by gangs and racial tension.[347] One specific trigger for a near-altercation occurred on Cinco de Mayo in 2009, when a group of mostly white students hung up an American flag and began chanting "USA." The next year, a group of white students wore clothing with American flags on Cinco de Mayo. Several of the students were confronted by other students early in the school day, and during a break between classes, two students sought out an assistant principal to alert him that there might be physical violence in response to the flag clothing.[348] The assistant principal asked the students to turn their clothing with the American flag inside out so that the flags were not visible, but the students refused.[349] He then told them that he was worried that other students might react with violence, and the flag-wearing students apparently agreed that they might be physically attacked.[350] The assistant principal ultimately decided that two students whose clothing had less "prominent"

341. Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 875 (7th Cir. 2011).

342. *Id.* at 879 (noting school's presentation of evidence of harassment of gay students, as well as plaintiff and expert report concluding slogan was "particularly insidious").

343. *Id.*

344. *Id.* (quoting Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966)).

345. *Id.*

346. *Id.* at 880.

347. Dariano v. Morgan Hill Unified Sch. Dist., 745 F.3d 354, 356 (9th Cir. 2014).

348. *Id.* at 357.

349. *Id.*

350. *Id.*

flags could return to their classes without changing, and offered the rest the choice between turning their clothing inside out or going home with excused absences.[351] The school did not impose any other punishment on the students.[352] Although this prevented any violence at school, the students who wore the flag clothing were threatened in the days following the incident.[353]

The students later sued the school district and school administrators, arguing that their free speech rights had been violated.[354] The Ninth Circuit's decision applied *Tinker*'s material disruption test and found that the school employees had "evidence of nascent and escalating violence" to justify their actions.[355] The court noted as well that the school had limited student expression as little as possible, focusing solely on preventing violence and keeping the students in question safe.[356] Those students were not punished for engaging in their speech, nor was the speech they engaged in prohibited across the board, as the assistant principal treated individual students wearing flags differently according to how likely he thought it was that their clothing would spark potentially violent confrontations. [357]

The Ninth Circuit's panel decision did not mention the heckler's veto doctrine in this analysis. A judge not on the panel, however, wrote a dissent from a denial of rehearing en banc stressing what he saw as a stark conflict between the "bedrock principle" of the heckler's veto and the panel decision "condoning the suppression of free speech by some students because *other students* might have reacted violently."[358] His dissent argued that the court's decision turned the "rule of the mob" and "demands of bullies" into school policy.[359]

It is certainly accurate to say that different courts view the interaction of the heckler's veto doctrine and *Tinker*'s material disruption test differently: the *Zamecnik* and *Holloman* courts were concerned with the prospect of students effectively silencing one another by reacting to speech in an unruly manner, whereas the *Dariano* panel did not mention the potential conflict. But all three cases at least claimed to apply *Tinker*, with the first two courts finding no material disruption and the last finding it. While the cases do not create a true circuit split, therefore, they demonstrate the clear dilemma presented by the practical effect that *Tinker*'s material disruption test can give to a heckler's veto. Obviously, the context of the school and the school's educational activities justifies different treatment of students' free speech rights, but *Tinker* may not

351. *Id.* at 357–58.
352. *Id.* at 358.
353. *Id.*
354. *Id.* at 356.
355. *Id.* at 359.
356. *Id.* at 359–60.
357. *Id.* at 360.
358. Dariano v. Morgan Hill Unified Sch. Dist., 767 F.3d 764, 766 (9th Cir. 2014) (O'Scannlain, J., dissenting) (asserting importance of protecting unpopular speech).
359. *Id.* at 771.

fully account for how the school's educational activities affect how students react to unpopular speech. The next Section turns to this question.

B. *Teaching the Gender Binary*

Giving constitutional weight to reactions to speech under *Tinker* obviously operationalizes the heckler's veto, at least where those reactions are significant enough to materially disrupt the educational work of a school. The educational work of a school, however, trains students in how they react to unpopular speech, including substantive normative judgments about what kinds of opinions and speech are valuable or normal and what kinds of speech are offensive.

Some of this teaching is in the relatively abstract realm of shared values and community norms. Justice Hugo Black, dissenting from *Tinker*, wrote "[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens."[360] Even Justice Brennan, writing to vindicate the right of students to challenge their school's removal of "objectionable" books from the school library, acknowledged that one purpose of a school curriculum is to transmit community values.[361]

Instruction in these community values is sometimes explicit. For example, in the Eleventh Circuit's case involving a student's refusal to recite the Pledge of Allegiance, the Alabama state legislature had passed a law requiring schools to spend at least ten minutes of instruction per day developing "the following character traits: courage, patriotism, citizenship, honesty, fairness, respect for others, kindness, cooperation, self-respect, self-control, courtesy, compassion, tolerance, diligence, generosity, punctuality, cleanliness, cheerfulness, school pride, respect for the environment, patience, creativity, sportsmanship, loyalty, and perseverance."[362] The law also required schools to hold a recitation of the Pledge of Allegiance to the flag every day.[363] At the time of Holloman's protest, Alabama schools thus explicitly taught patriotism as expressed in reciting the Pledge of Allegiance to the American flag every morning. This education contributed to the objections that some students expressed in response to Holloman's protest: he was engaged in speech that they had been taught to consider unpatriotic.

Such instruction can take place implicitly as well, and be described as communicating what kinds of speech, behavior, or appearance might distract classmates by falling outside the bounds of socially acceptable behavior. Dress codes and restrictions on student behavior and expression are routinely justified as reducing distractions that would divert classmates' attention from their studies. One judge explained the perceived danger of distraction in plain terms,

360. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

361. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982).

362. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1261–62 (11th Cir. 2004).

363. *Id.* at 1262.

in the context of a male elementary school student who had been told by his school to remove an earring:

> The evidence presented in this matter clearly shows that a male student wearing an earring can disrupt an elementary classroom. It is not a common occurrence for boys in elementary school grades to wear earrings, and the presence of one will surely cause a distraction in the classroom. As such, we find it reasonable for a school, or principal, to ensure the avoidance of distractions in the classroom through the implementation of a consistent dress code.[364]

School officials and the judge thus agreed that a particular expression—here, a boy with an earring—was so unusual that other students simply could not be expected not to be fascinated or disturbed by it.

But where is the line between an aesthetic choice that is so unusual that other students will be distracted and one that is different but unremarkable? That line is a moving target that changes from year to year. In the 1970s, female students wearing pants were deemed so likely to cause a disturbance that dress codes needed to forbid it.[365] In the 1980s, football and basketball players were told that they needed to have sideburns no longer than their earlobes in order to present the school in the best light.[366] In 2001, one school specified that blue jeans would distract other students, but black or wheat-colored jeans would not.[367]

As the preceding paragraphs make obvious, "distracting" clothing and style choices are often tied to gendered expectations. Indeed, public schools have taught students about sexual orientation and gender identity—and that heterosexuality and cisgender identities are "normal" and better—for decades.[368] Clifford Rosky has comprehensively chronicled such messaging, focusing on the lesson that heterosexuality is superior.[369] Rosky traced an evolution in how public schools addressed sexual orientation: initially characterizing homosexuality as offensive, then restricting any speech about sexual orientation on the logic that to do otherwise would be to promote the crime of sodomy, then justifying prohibition of speech advocating for LGB equality as trigger-

364. Jones *ex rel.* Cooper v. W.T. Henning Elementary Sch. Principal, 721 So. 2d 530, 532 (La. Ct. App. 1998).

365. Johnson v. Joint Sch. Dist. No. 60, 508 P.2d 547, 547 (1973). The Missouri State House of Representatives recently drew headlines after it revised its dress code to specify that female representatives had to wear jackets, eventually amended to specify that "jacket" included blazers and cardigans. Eduardo Medina, *Missouri State Lawmakers Revise Their Dress Code for Women*, N.Y. Times (Jan. 15, 2023), https://www.nytimes.com/2023/01/15/us/missouri-dress-code-women.html.

366. Davenport v. Randolph Cnty. Bd. of Educ., 730 F.2d 1395, 1396–97 (11th Cir. 1984).

367. Byars v. City of Waterbury, 795 A.2d 630, 639 (Conn. Sup. Ct. 2001).

368. *See* Brill & Pepper, *supra* note 20, at 179 (arguing that schools could choose not to "reinforc[e] the accepted cultural training of gender").

369. Clifford J. Rosky, *No Promo Hetero: Children's Right To Be Queer*, 35 Cardozo L. Rev. 425, 479–80 (2013).

ing bullying from other students that would disrupt the school's educational activities.[370] The communications from schools have also included the belief or assertion that gender is binary.[371] The messaging is not always explicit, but is nonetheless powerful—Melissa Murray described the phenomenon as schools "inculcat[ing] values of sexual citizenship."[372] Writing about the power of socialization in general, Holning Lau noted that while socialization of students can be innocuous and even positive—such as requiring students to raise their hands to speak in class—it can also demand that children who are members of historically excluded groups assimilate to prevailing norms and silence their own identities.[373]

Schools thus communicate a variety of messages to students that range from fact-based instructions of academic subjects to normative, value-laden expressions of what is societally acceptable. The latter category of messaging implicitly teaches students what expression is so abnormal that it is shocking, even worth objecting to in a disruptive manner. Most relevantly for transgender students, schools regularly and consistently teach that gender is binary, that someone's gender is a stable (likely permanent) characteristic, and that it is appropriate to organize students by their gender. All of this messaging lays a foundation against which transgender students are seen as shocking or even disturbing, creating the perfect context for the heckler's veto to develop.

One of the clearest examples of schools modeling the gender binary is through the use of sex-segregated bathrooms. Bathroom access for trans people has become, in the words of Tobias Barrington Wolff, the "alpha and omega of opposition to gender-identity protections."[374] States have legislated access to bathrooms for public school children explicitly to prevent trans students from accessing bathrooms consistent with their gender identity,[375] and other state statutes mandate sex-segregated bathrooms at a variety of locations including schools.[376] Even schools that are not legally required to provide sex-segregated bathrooms often choose to do so.[377]

The effects of sex-segregated bathrooms upon trans students are direct and significant. In one national survey, over half of transgender students said that their school required them to use the bathroom or locker room of their

370. *Id.*

371. *Id.* at 487–97.

372. Murray, *supra* note 110, at 1446.

373. Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 Harv. C.R.-C.L. L. Rev. 317, 319, 324 (2007).

374. Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol'y Rev. 201, 205 (2012).

375. Elise Holtzman, *"I Am Cait," but It's None of Your Business: The Problem of Invasive Transgender Policies and a Fourth Amendment Solution*, 68 Fla. L. Rev. 1943, 1971 (2016).

376. David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 Colum. J. Gender & L. 51, 82 (2011) [hereinafter Cohen, *Stubborn*].

377. *Id.* at 86.

sex assigned at birth.[378] Students in such a position often try to avoid using the bathroom at school, resulting in significant discomfort, distraction, and even medical issues.[379] School policies singling out transgender students turn their normal bodily needs into a disruptive and isolating experience and can deprive them of educational opportunities. As one example, a young transgender girl did not face issues with bathroom access in her kindergarten classroom because each class had a single-user bathroom.[380] On a class field trip to the zoo, however, she was told that if the zoo did not have a single-user bathroom she would have to use the men's room.[381] Perhaps acknowledging the clear issues with sending a kindergarten girl into a men's bathroom, the school specified that she could only use the bathroom once school chaperones emptied it and then stood watch at the entrance to prevent anyone else from entering, making an already troubling experience immensely disruptive to the entire field trip.[382] When initially pressed on the question of bathrooms before a field trip the next year, the school told the girl's mother that she would be allowed to use the women's bathroom, but only if the mother attended as a chaperone, placing a demand on the mother to perform childcare during her workday.[383]

Sex-segregated bathrooms do not only affect trans and nonbinary people who aren't sure which to go into, however. Having bathrooms available in a space signifies what kind of people are expected and welcome in that space.[384] Sometimes this means whether a women's bathroom is available at all—notoriously, the Supreme Court did not have a women's bathroom until 1981, and the U.S. Capitol did not have a women's bathroom off of the Senate floor until 1992.[385] Such landmarks were the product of the history of public bathrooms, which only became common in the nineteenth century and were initially only for men.[386] Terry Kogan's historical research has shown that public bathrooms were extended to women when legislators "began to regulate public architectural spaces as a means of fostering social values" and started segregating women-only spaces away from men, including bathrooms.[387] This segregation

378. Suzanne E. Eckes & Colleen E. Chesnut, *Transgender Students and Access to Facilities*, 321 Educ. L. Rep. 1, 2 (2015).

379. *Transgender Youth and Access to Gendered Spaces in Education*, *supra* note 21, at 1729.

380. A.H. *ex rel.* Handling v. Minersville Area Sch. Dist., 408 F. Supp. 3d 536, 544 (M.D. Pa. 2019).

381. *Id.*

382. *Id.*

383. *Id.* at 546.

384. It also signifies who was on the team that designed a space. Kathryn H. Anthony & Meghan Dufresne, *Potty Privileging in Perspective: Gender and Family Issues in Toilet Design*, *in* Ladies and Gents: Public Toilets and Gender 48, 48 (Olga Gershenson & Barbara Penner eds., 2009).

385. Wickliffe Shreve, *Stall Wars: Sex and Civil Rights in the Public Bathroom*, 85 L. & Contemp. Probs. 127, 136 (2022).

386. Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 Yale J.L. & Feminism 465, 472–73 (2018).

387. Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and*

was imposed even when the bathroom only accommodated one person at a time.[388] Factories in the nineteenth century installed single-user bathrooms a considerable distance from each other and limited their usage to one sex based on the belief that women were physically and emotionally vulnerable and needed a secluded space in which to retreat from the workplace when it became too much for them.[389] Sex-segregated bathrooms developed as an extension of the nineteenth-century idea of separate spheres for men and women that "protected" women from the workforce and civil life.[390]

As Laura Portuondo has written, this means that although sex-segregated bathrooms are widely accepted as normal, it does not make them innocuous or neutral.[391] For example, caregiving parents out in public with a child of a different gender than their own regularly face difficulties supervising a child seen as too old to go into the "wrong" bathroom, but too young to manage going to the bathroom alone.[392]

Modern sex-segregated bathrooms continue to communicate normative messages about sex and gender. Most obviously, the existence of bathrooms labeled men/women or boys/girls teaches children that categorizing people by sex is appropriate and easy to do.[393] It denies the very existence of transgender, nonbinary, and intersex children.[394] Defenses of sex-segregated bathrooms as necessary to protect girls or women also perpetuate rape culture by implying that boys or men in a "private" space will be unable to resist inflicting sexual harm. This myth is particularly harmful when deployed against transgender women, characterizing trans women as male sexual predators who are using gender identity to demand access to potential victims.[395]

Gender, 14 Mich. J. Gender & L. 1, 6 (2007) [hereinafter Kogan, *Sex-Separation*]. Notably, the segregation in public spaces simultaneously incorporated racism, xenophobia, and other biases in choosing only some (white) women to segregate away. *Id.* at 18.

388. Terry S. Kogan, *Public Restrooms and the Distorting of Transgender Identity*, 95 N.C. L. Rev. 1205, 1217 (2017) (noting single-user sex-segregated bathrooms were norm until at least mid-1900s).

389. *Id.* at 1219.

390. *See* Kogan, *Sex-Separation*, *supra* note 387, at 41–51.

391. Portuondo, *supra* note 386, at 471.

392. Holning Lau, *Shaping Expectations About Dads as Caregivers: Toward an Ecological Approach*, 45 Hofstra L. Rev. 183, 189 (2016); *see also* Susan Etta Keller, *Gender-Inclusive Bathrooms: How Pandemic-Inspired Design Imperatives and the Reasoning of Recent Federal Court Decisions Make Rejecting Sex-Separated Facilities More Possible*, 23 Geo. J. Gender & L. 35, 44 (2021); Timothy J. Graves, *Breaking the Binary: Desegregation of Bathrooms*, 36 Ga. St. U. L. Rev. 381, 394, 405 (2020); Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 Ohio St. L.J. 145, 175 (2017). The author's family faced a similar problem when her husband, a stay-at-home father, took their oldest daughter to swimming lessons at the local YMCA and discovered that the only entrances to the pool were through the sex-segregated locker rooms.

393. David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 Harv. J.L. & Gender 509, 511 (2010) [hereinafter Cohen, *Keeping*].

394. *Id.* at 538.

395. Susan Hazeldean, *Privacy as Pretext*, 104 Cornell L. Rev. 1719, 1774 (2019).

Where sex-segregated bathrooms merely imply a gender binary and rape culture, abstinence-only sexual education programs yell it out loud. Thirty-one states require sexual education to stress abstinence, teaching that the only way to prevent pregnancy and STIs is to refrain from premarital sexual activity.[396] The federal government has specifically funded abstinence-only sexual education since 1981.[397] There was an attempt to eliminate federal funding under President Barack Obama, but states that wished to teach abstinence-only simply declined federal money while their representatives lobbied to renew the support, which was ultimately successful, and included five years of funding for abstinence-only sex ed in the Affordable Care Act.[398] In recent years the grants in question have been rebranded, from "Abstinence Only Until Marriage" to "Sexual Risk Avoidance Education,"[399] and using terms like "poverty prevention" and "youth empowerment," but the messaging remains the same.[400]

Such sexual education has explicitly moral dimensions that send very clear messages about gender. Abstinence-only curriculums continue to deliver antigay messaging, emphasizing that sexual activity should only take place within a different-sex marriage.[401] They also teach reductive gender stereotypes that cast women as sexual gatekeepers, responsible for restraining men and boys who are helpless against their biological urges.[402] One curriculum describes young men as having strong sexual desires due to testosterone, while any women or girls who have sexual fantasies do so because they were "culturally conditioned."[403] Girls are asked to "put the brakes on first to help the boy[s]," who cannot control (and do not hold responsibility for) their sexual desires.[404]

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396. Samantha Y. Sneen, *The Current State of Sex Education and Its Perpetuation of Rape Culture*, 49 Cal. W. Int'l L.J. 463, 472 (2019).

397. *Id.* at 469; Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 Yale J.L. & Feminism 495, 510–11 (2008).

398. *See* Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. Pa. J. Const. L. 587, 595 (2011). Federal funding for abstinence-only education even increased significantly in the late 2010s. *Fact Sheet: Federally Funded Abstinence-Only Programs: Harmful and Ineffective*, Guttmacher Inst. (May 2021), https://www.guttmacher.org/fact-sheet/abstinence-only-programs [https://perma.cc/ZRB5–38QR%5D].

399. Olivia S. Lanctot, *Title IX & Disparate Impact: The Harmful Effects of Abstinence-Centric Education*, 28 Wm. & Mary J. Race, Gender & Soc. Just. 765, 769–71 (2022).

400. Jesseca Boyer, *New Name, Same Harm: Rebranding of Federal Abstinence-Only Programs*, 21 Guttmacher Pol'y Rev. 11, 12 (2018).

401. Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 Colum. L. Rev. 1461, 1466 (2017).

402. Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 Emory L.J. 941, 953 (2007) ("Abstinence-only curricula implicitly and explicitly perpetuate the stereotyped double standards of virility versus chastity, homemaker versus breadwinner, subject versus object of desire.").

403. *Id.*

404. *Id.* at 953–54.

Children are thus explicitly taught some of the central principles of rape culture: that sexual assault is the product of uncontrollable sexual desires and that it is the responsibility of girls and women to prevent sexual assault.[405] Jennifer S. Hendricks and Dawn Marie Howerton chronicled a particularly appalling example of such a lesson, in which sixth-grade students learning about date rape were asked, "How do some people say NO with their words, but YES with their actions or clothing?"[406]

Abstinence-only sexual education curriculums also teach broader gender stereotypes about differences between men and women. Representative Henry Waxman issued a report about how abstinence-only programs often described women as needing financial support and successful relationships, whereas men need admiration and accomplishments.[407] A leading curriculum describes young women as caring "less about achievement and their futures" than young men do.[408] A colorful example uses a fairy tale to teach a normative lesson about how girls should interact with boys:

> Deep inside every man is a knight in shining armor, ready to rescue a maiden and slay a dragon. When a man feels trusted, he is free to be the strong, protecting man he longs to be.
>
> Imagine a knight traveling through the countryside. He hears a princess in distress and rushes gallantly to slay the dragon. The princess calls out, "I think this noose will work better!" and throws him a rope. As she tells him how to use the noose, the knight obliges her and kills the dragon. Everyone is happy, except the knight, who doesn't feel like a hero. He is depressed and feels unsure of himself. He would have preferred to use his own sword.
>
> The knight goes on another trip. The princess reminds him to take the noose. The knight hears another maiden in distress. He remembers how he used to feel before he met the princess; with a surge of confidence, he slays the dragon with his sword. All the townspeople rejoice, and the knight is a hero. He never returned to the princess. Instead, he lived happily ever after in the village, and eventually married the maiden—but only after making sure she knew nothing about nooses.
>
> Moral of the story: occasional assistance may be all right, but too much will lessen a man's confidence or even turn him away from his princess.[409]

Federally funded programs teach young students a rigid and outdated version of the gender binary: girls and boys are fundamentally different, not merely in their anatomy but also in their desires. Boys want to achieve, want to become breadwinners, and should always desire sex with girls or women.

405. Sneen, *supra* note 396, at 472–73.

406. Hendricks & Howerton, *supra* note 398, at 599.

407. Henry A. Waxman, *Politics and Science: Reproductive Health*, 16 HEALTH MATRIX 5, 6–8 (2006).

408. Pillard, *supra* note 402, at 954.

409. Hendricks & Howerton, *supra* note 398, at 589.

By contrast, girls should grow up to be mothers, they should not care about achievements, and they should not feel sexual desire. They are responsible for boys' sexuality and protecting themselves from it, but they should also not be assertive or give good advice to boys, and if they do not shrink themselves into damsels in distress they will be abandoned by the people they care about.

Other aspects of school activities rigidly impose categorization into a gender binary. One example of this is in sports: although most physical education classes are co-educational, competitive sports are almost exclusively segregated by sex. This is despite the fact that Title IX, the famous statutory directive for equality in education, should be read to address inequality in sports.[410] The law does so in order to begin to break the stereotype that women and girls are not athletic and cannot (or should not) be physically active and competitive, and Title IX has been very successful in increasing girls' participation in sports.[411] Title IX still allows for sex-segregated competitive sports teams, however.[412] It even allows schools to completely exclude one sex in some circumstances: if a school only has one competitive team, members of the opposite sex can try out for that team, unless the sport is a contact sport, in which case one sex simply does not have that sport available to them at all.[413]

One obvious consequence of the acceptance of sex-segregated teams in competitive sports is to deny opportunities to transgender and nonbinary athletes.[414] Dividing sports into girls' and boys' teams also underscores the gender binary, believing that all children can and should be categorized accordingly.[415] In her excellent article, *Against Women's Sports*, Nancy Leong persuasively argues that the assumption underlying sex segregation—that doing so is necessary to "enforce a level playing field"—is incorrect, and that "[a]s a result, the same system that supposedly guarantees a space for women to compete simultaneously communicates women's 'competitive inferiority.'"[416] For example, when children have not reached puberty, there is little difference in size, weight, or athletic ability to justify not letting girls and boys play on the same teams and against each other. Rigidly sex-segregating sports even at young ages thus communicates that categorizing people by sex is more important or more natural than more substantive and relevant divisions.[417] Erin Buzuvis similarly argues that sex-segregated sports imply that women need to be separated into a less competitive division, because presumably they would never be competitive

410. *See* 20 U.S.C. § 1681 (prohibiting discrimination in education on basis of sex); *see also* 34 C.F.R. § 106.41 (2020) (regulating antidiscrimination of sex in athletics in education).

411. Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 Yale L.J. 78, 129 (2019).

412. Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 Wis. J.L. Gender & Soc'y 271, 274 (2013).

413. Cohen, *Stubborn*, *supra* note 376, at 90.

414. Kimberly A. Yuracko, *The Culture War over Girls' Sports: Understanding the Argument for Transgender Girls' Inclusion*, 67 Vill. L. Rev. 717, 719 (2022).

415. Nancy Leong, *Against Women's Sports*, 95 Wash. U. L. Rev. 1249, 1262–63 (2018).

416. *Id.* at 1264.

417. Cohen, *Keeping*, *supra* note 393, at 539.

playing the same sport against men or boys.[418] Leong argues that the default should be sex integration, and that rather than using sex as a "crude proxy" for more specific characteristics, sports should, where possible, use characteristics such as height, weight, or hormone levels to create divisions.[419] The status quo simply underscores perceptions that girls are incapable of being as strong or as fast as boys and that sex is an unobjectionable organizing principle that both encompasses everyone and provides a meaningful distinction. Additionally, spaces coded as only for boys or men, such as sex-segregated sports teams, have been shown to increase negative attitudes about girls and women, even among children young enough to play on Little League baseball teams.[420] A sadly ironic example of such attitudes took place after a thirteen-year-old girl named Mo'Ne Davis became the first girl to ever pitch a shutout game in the Little League World Series.[421] The next year, after Disney announced plans to film a movie based on her life, a college baseball player was kicked off of his school team after he tweeted calling her a "slut."[422]

Another gendered aspect of schooling is dress codes. Most schools have significant restrictions on what students can wear: about 25% of public schools require school uniforms, and 60% have strict dress code policies.[423] Although many students challenged the imposition of dress codes and uniform policies as they were implemented,[424] modern challenges and news coverage have centered on gendered requirements that have different restrictions for boys and girls.[425] For example, a high school in Kentucky drew criticism in 2015 after a female student was sent home because her collarbone was visible.[426]

Dress codes communicate gender and gender stereotypes in multiple ways. Most straightforwardly, a majority of dress codes give specific restrictions by category, giving different directions to male and female students. For example, in a study of twenty-five dress codes taken from New Hampshire

418. Erin E. Buzuvis, Attorney General v. MIAA *at Forty Years: A Critical Examination of Gender Segregation in High School Athletics in Massachusetts*, 25 Tex. J. on C.L. & C.R. 1, 16 (2019).

419. Leong, *supra* note 415, at 1284.

420. Cohen, *Keeping*, *supra* note 393, at 548.

421. Alex Hampl, *Mo'Ne Davis Becomes First Girl To Throw a Shutout in LLWS*, SI (Aug. 15, 2014), https://www.si.com/more-sports/2014/08/15/mone-davis-shutout-little-league-world-series.

422. Cindy Boren, *How Mo'Ne Davis Silenced the Bloomsburg Baseball Player Who Called Her a Slut*, Wash. Post (Mar. 24, 2015, 9:29 AM), https://www.washingtonpost.com/ news/early-lead/wp/2015/03/24/how-mone-davis-silenced-the-twitter-troll-who-called-her-a-slut/.

423. Shawn E. Fields, *Institutionalizing Consent Myths in Grade School*, 73 Okla. L. Rev. 173, 183 (2020).

424. School dress codes are a relatively recent phenomenon, as most schools did not have dress codes at all until the 1960s. *See* Ahrens & Siegel, *supra* note 199, at 55.

425. Jillian R. Friedmann, *A Girl's Right to Bare Arms: An Equal Protection Analysis of Public-School Dress Codes*, 60 B.C. L. Rev. 2547, 2563–64 (2019).

426. Fields, *supra* note 423, at 174.

schools, sixteen of the twenty-five contained explicitly gendered restrictions.[427] There were significantly more rules directed to girls than to boys.[428] Dress code provisions applying only to girls often focus upon covering specific body parts such as collarbones or shoulders, forbidding types of clothing typically worn by girls that do not give sufficient coverage, such as tank tops with spaghetti straps, or are too formfitting, such as leggings.[429] Facially neutral rules may also be enforced in a gendered manner, such as one school that performed a spot check on the length of girls' shorts, announcing that if ten girls failed to pass the check (by wearing shorts that were shorter than the dress code allowed), all girls would not be allowed to wear shorts for one day as punishment.[430]

One key reason for dress codes is to minimize distractions during the school day, but the implementation of gendered restrictions in service of minimizing distraction operationalizes the gender stereotype that girls are responsible for boys' sexual interest in them.[431] Meredith Johnson Harbach found that schools often enact gendered dress codes on the theory that girls in inappropriate clothing would not only distract male students, but also male teachers.[432] One high school student told a reporter that her principal "constantly says that the main reason for [the dress code] is to create a 'distraction-free learning zone' for our male counterparts."[433] The idea that girls must protect boys from themselves and their own inability to focus on their studies sparked the hashtag "IAmMoreThanADistraction" in protest.[434]

Shawn E. Fields has powerfully demonstrated how such dress code policies sexualize students. He uses an example from 2015 when a five-year-old kindergarten student was sent home for violating the dress code because her dress had spaghetti straps.[435] As Fields wrote, "it defies common sense" to describe the shoulders of a five-year-old child as distracting her fellow five-year-old classmates from their work.[436] He continues to point out that enforcement of the dress code "required an adult administrator . . . to sexualize a five-year-old girl," then forced the girls' parents to decide whether to explain to their daughter that she was sent home from school in an "honest yet premature conversation about sex and objectification of womens' bodies."[437]

427. Todd A. DeMitchell, Christine Rienstra Kiracofe, Richard Fossey & Nathan E. Fellman, *Genderdized Dress Codes in K-12 Schools: A Mixed Methods Analysis of Law & Policy*, 376 Educ. L. Rep. 421, 442–45 (2020).

428. *Id.* at 444.

429. *Id.* at 445–46; Fields, *supra* note 423, at 176–77.

430. Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. Rich. L. Rev. 1039, 1039 (2016).

431. As Ruthann Robson points out, this justification also rests on the assumption that male students are heterosexual. *See* Ruthann Robson, Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes 73 (2013).

432. Harbach, *supra* note 430, at 1044.

433. Fields, *supra* note 423, at 188.

434. DeMitchell et al., *supra* note 427, at 433.

435. Fields, *supra* note 423, at 186.

436. *Id.*

437. *Id.* at 186–87.

Dress code enforcement can also lead school employees to sexualize students in more explicit ways. At one Florida high school, students reported that multiple girls were found to be in violation of the dress code even though their top layer—zip-up jackets zipped all the way up—was compliant. Instead, at least one girl reported that a male school employee forced her to unzip her jacket, then reported her for a dress code violation because she was only wearing a sports bra under the jacket.[438] There is no indication in news coverage of the incident that she ever took her jacket off at school or even unzipped the jacket, so it appears that she was effectively forced to disrobe in a hallway.[439] As another student described, "[g]irls were being told to unzip their jackets to see what was underneath to see if it was appropriate. But the thing is, if it's zipped up, it should be fine."[440]

The irony is magnified when school dress codes are set against another context in which schools and students have disagreed about clothing: yearbook photos. In recent years, several students have challenged requirements for senior photos that specify that male students wear suits, but female students wear a velvet drape placed across their shoulders that Ruthann Robson describes as "if not sexually revealing, . . . certainly sexually suggestive."[441] A few teenage girls have expressed discomfort with the velvet drape and asked to wear a suit, following the requirement for male students.[442] The school's dress code for such photos thus *imposes* sexualization upon girls who ask to wear more modest clothing. As Robson writes, "whether the regulation of girls' dress is intended to prevent girls from appearing too sexual or insufficiently sexual, it attempts to place girls in sexualized and gendered hierarchies."[443]

Such hierarchies are occasionally revealed outright by uncommonly direct school administrators. Last year, the Fourth Circuit sat en banc to hear a case challenging the dress code of a public charter school that required all female students to wear skirts. The founder of the school described the dress code as expressing a determination on the part of the school "to preserve chivalry . . . . For example, young men were to hold the door open for the young ladies."[444] He defined chivalry as "a code of conduct where women are treated, they're regarded as a fragile vessel that men are supposed to take care of and honor," and that the goal was to treat girls "courteously and more gently than boys."[445] The Fourth Circuit was direct in its reaction: "It is diffi-

438. Zachery Lashway & Brie Isom, *Bartram Trail High Students Felt Uncomfortable While Being Accused of Dress Code Violations*, News4Jax (Mar. 29, 2021, 11:24 PM), https://www.news4jax.com/news/local/2021/03/29/bartram-trail-high-students-felt-uncomfortable-while-being-accused-of-dress-code-violations/ [https://perma.cc/8BZX-F3DQ].

439. *See id.*

440. *Id.*

441. Robson, *supra* note 431, at 73.

442. *See, e.g.*, Sturgis v. Copiah Cnty. Sch. Dist., No. 3:10-CV-455, 2011 WL 4351355, at *1 (S.D. Miss. Sept. 15, 2011).

443. Robson, *supra* note 431, at 73.

444. Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 113 (4th Cir. 2022).

445. *Id.*

cult to imagine a clearer example of a rationale based on impermissible gender stereotypes."[446] These gender stereotypes, the court went on to say, have "potentially devastating consequences for young girls."[447]

Dress codes are typically not as strict as prohibiting female students from wearing pants, but the gendered nature and enforcement of dress codes have similarly negative consequences. Most directly, dress codes are often enforced by sending the student in the "offending" clothing home to change. The concern for the potential distraction of male students, even to the point of physically removing a female student from the class, makes clear that the education of the male student is more important than the education of the female student.[448] As such, enforcements happen repeatedly—one study found a single high school imposing over one hundred dress code-based disciplinary actions per month, with over ninety percent against female students[449]—students repeatedly see girls removed from class so that boys can better learn. Female students are distracted from their own studies by the attention they have to expend toward "policing their own appearance."[450] Female students may also be distracted by physical discomfort due to the dress code—one junior high school student wrote a public letter to her school requesting that the dress code requirement that shorts be longer than a student's fingertips be altered to permit shorter hemlines.[451] Although virtually all boys' shorts meet that requirement due to prevailing styles in boys' clothing, few girls' shorts do, meaning that girls had to go to multiple stores to find sufficiently long shorts, which the student reported cost more than other girls' shorts.[452] Some students were unable to find shorts that were long enough, meaning that in order to avoid a dress code violation, they wore leggings or pants even on uncomfortably hot days.[453]

Dress codes thus send students several clear messages. Most obviously, most dress codes explicitly draw a distinction between regulations for boys' and girls' clothing, reinforcing a binary definition of gender as well as the belief that suitable clothing is different depending on the gender of the child wearing it.[454] Even facially neutral dress codes are enforced in gendered ways, as demonstrated by a male high school student who wore a shirt that clearly violated the dress code—it was both off the shoulder and cropped to show his midriff—yet was not disciplined, despite wearing it for an entire school day.[455]

446. *Id.* at 125–26.

447. *Id.* at 126.

448. Stephan Wah, *"Boys Will Be Boys, and Girls Will Get Raped": How Public School Dress Codes Foster Modern Day Rape Culture*, 23 Cardozo J.L. & Gender 245, 247 (2016).

449. Fields, *supra* note 423, at 192.

450. *Id.*

451. DeMitchell et al., *supra* note 427, at 432.

452. *Id.*

453. *Id.*

454. Deanna J. Glickman, *Fashioning Children: Gender Restrictive Dress Codes as an Entry Point for the Trans* School to Prison Pipeline*, 24 Am. U. J. Gender Soc. Pol'y & L. 263, 273 (2015).

455. Maggie Parker, *Teen Boy Wears Crop Top To Make a Point About Sexist School*

This shows students that the motivation behind dress codes is not professional dress in the abstract, but making girls responsible for the actions of their male classmates. Girls told that their clothing will distract their classmates by being sexually attractive are taught rape culture, the idea that victims of sexual assault did something to cause (or at least failed to prevent) the bad actions of others.[456] School officials sometimes say this outright, such as the Chicago high school principal who was recorded in a school council meeting explaining the dress code by saying "there have been sexual abuse cases throughout the city of Chicago . . . . These things are put in place to, why, why should we allow students to dress provocatively?"[457] As Shawn Fields writes, "[s]chool dress codes tell girls that their permission to enter public school is conditioned on an adult's determination that those around her can control themselves. And this entire narrative reinforces scripts and assumptions about gender and sexuality that misplace responsibility for sexual violence on its victims."[458]

This discussion has only scratched the surface of some of the most common ways that schools teach gender. Other examples abound, from the gender essentialism of publicly funded sex-segregated schools[459] to language addressing students as "boys and girls" both verbally[460] and in physical labels inside the classroom.[461] One essay by a former teacher's aide described a teacher directing a young boy to put down a doll in order to play with a truck instead, explaining to the aide that she was teaching "appropriate" play with toys.[462] Alongside the formal curriculum of their day, students are immersed in

Dress Codes, Yahoo!Life (Nov. 7, 2017), https://www.yahoo.com/lifestyle/teen-boy-wears-crop-top-make-point-sexist-school-dress-codes-173544910.html [https://perma.cc/AM2A-JTLS].

456. Wah, *supra* note 448, at 262.

457. Elise Solé, *High School Principal Under Fire for Suggesting That Dress Codes Prevent Sexual Abuse: 'Why Should We Allow Students To Dress Provocatively?,'* Yahoo!Life (Aug. 24, 2018), https://www.yahoo.com/lifestyle/high-school-principal-fire-suggesting-dress-codes-prevent-sexual-abuse-allow-students-dress-provocatively-201804744.html [https://perma.cc/GVA5–69D6].

458. Fields, *supra* note 423, at 190.

459. *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, 341 (2014) ("We argue that sex-segregated education promotes an essentialized view of what it means to be a boy or girl, something the Court has consistently cautioned against in its warnings about 'outmoded stereotypes.'"); Cohen, *Stubborn*, *supra* note 376, at 64–65; David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 Ind. L.J. 135, 138 (2009); Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, U. Ill. L. Rev. 455, 473 (2005).

460. Barrie Thorne, Gender Play: Girls and Boys in School 34 (1993).

461. Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 Geo. Wash. L. Rev. 451, 451 (1999) (noting sex-segregated coat racks for several classes in school attended by author's child).

462. Jesse Holzman, Opinion, *Moving Beyond the Gender Binary in Education*, Teach for Am. (June 24, 2021), https://www.teachforamerica.org/one-day/opinion/moving-beyond-the-gender-binary-in-education [https://perma.cc/3GYT-AKS4%5D].

messages both explicit and implicit that gender is a binary and the categories of boy/girl or male/female are distinct in innumerable ways. It is no wonder, given this messaging, that some students react to transgender students with surprise, attention, and even protest. The next Section turns to how (and whether) a school can restrict the speech of one student based upon the reactions of others consistent with the First Amendment.

C. *Accounting for Teaching the Heckler's Veto*

Current application of *Tinker* allows for the implementation of a heckler's veto, as the Seventh and Eleventh Circuits have acknowledged. Scholars have also criticized *Tinker*, in some cases calling to modify[463] or replace the ruling altogether.[464] This criticism has not fully acknowledged one of the unique aspects of student speech: the fact that it takes place in an environment where all of the student audience for speech receive the same instruction that contributes to their understanding of that speech. When assessing what kind of speech is distracting enough to materially disturb the educational work of the school, current analysis fails to ask whether the school itself contributes to the distraction by telling students what is strange enough to be distracted by.

A fuller accounting of how to reconcile *Tinker* and the heckler's veto doctrine must take the school's role into account. This should not be a superficial inquiry that allows any school instruction or implied messaging to excuse away material disruptions—only consistent and reasonably clear messaging by the school should potentially shift the *Tinker* analysis. The burden of proof should lie with a student challenging the school's restriction of their speech to show that the school has engaged in consistent and clear messaging that is in clear opposition to the student's speech before the student engaged in that speech or expressive conduct. Moreover, not all of a school's messaging should shift the balance in favor of allowing disruptive student speech, if the school's messaging is fact-based instruction that is part of the curriculum. For example, a student who wishes to insist that the Earth is actually flat or deny that the Holocaust happened cannot point to instruction in science and history classes to demand greater protection for their speech.

If, however, the student can show that the disruption caused by their speech is effectively a heckler's veto stoked by the school, then the school should only restrict the student speech where school officials had reasonable justification to forecast physically violent confrontations between students,

463. Tryphena Liu's student note flags these cases in discussing the heckler's veto, although Liu's solution is quite different. Liu proposes courts should only permit schools to apply *Tinker*'s substantial disruption test if the court finds that the student reaction is genuine rather than manufactured outrage. Tryphena Liu, Note, *Untangling* Tinker *and Defining the Scope of the Heckler's Veto Doctrine's Protection of Students' Free Speech Rights*, 9 U.C. Irvine L. Rev. 829, 845 (2019); *see also* Sara Nau, *"Small Town Values" and "The Gay Problem:" How Do We Apply* Tinker *and Its Progeny to LGBTQA Speech in Schools?*, 22 Tex. J. Women & L. 131, 152 (2013) (proposing balancing test weighing long-term effects of suppressing speech against short-term effects of disruption).

464. Noah C. Chauvin, *Replacing* Tinker, 56 U. Rich. L. Rev. 1135, 1150 (2022).

or where such violent incidents actually took place in reaction to the speech. The school should have to show either that school administrators reasonably believed there was an imminent threat of violent reaction or that they took action to prevent potentially violent student reactions, and such efforts were not successful, before silencing the student speech in question. Schools still have an obligation to protect students, and that interest in their safety outweighs speech rights where there is not time to take more speech-protective measures. This reasonable justification should not be understood as requiring that a student speaker engage in fighting words—rather, the concern is for what student listeners are likely to do, either because of clear indications and warnings that the situation is threatening violence or recent examples of other physical confrontations. If the only disruption, however, is disruption of the educational activities of the school, then the school must discipline the reactions to the speech, and not the speaker. This is consistent with the educational setting: where a school reasonably fears for the physical safety of students, some limits on speech are justified. Where the school fosters student reaction to unpopular speech, however, the responsibility remains with the school to allow that speech and focus its actions on teaching students to tolerate differences of strong opinions without becoming disruptive.

A concise outline of the proposed modification is that if a student's speech is restricted because the school claims the speech is likely to or actually did cause a material disruption under *Tinker*, the student can respond by showing that the school clearly and consistently delivers a message to students in direct conflict with the student speech. If the school can show that its message is fact-based instruction that is part of the school curriculum, the *Tinker* analysis remains unchanged. If the school can show that the material disruption consisted of imminent or actual physical violence, the *Tinker* analysis also proceeds unchanged. But if the school's counter-messaging is not a fact-based portion of the curriculum and the material disruption was merely to the school's educational activities, then the school cannot restrict the student speech.

An example of how this changed analysis might play out can be provided with a slight adjustment to the facts of *Holloman v. Harland*, the Eleventh Circuit case discussed above. Michael Holloman stood silently with a fist raised in the air rather than recite the Pledge of Allegiance alongside his classmates.[465] Although Holloman's teacher said that students privately complained to her after class about Holloman's actions, the court found that the isolated and calm complaints did not create a material disruption.[466] Imagine, however, that Holloman's classmates reacted more dramatically to his protest, interrupting the planned class by demanding to know why he refused to say the pledge alongside them, and refusing to end the argument and resume their studies. Under current *Tinker* analysis, such a disruption would likely have justified

465. Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1261 (11th Cir. 2004).
466. *Id.* at 1274–75.

the school telling Holloman that he could not engage in ongoing protest during the pledge.

Holloman would have been able to prove that his school was engaged in consistent and clear messaging that patriotism, as expressed by reciting the Pledge of Allegiance, was the morally correct stance and refusing to say the pledge was not. He could have pointed to an Alabama statute requiring school districts to develop a "character education program" that spent at least ten minutes per day developing traits including patriotism. The character education program was required to include daily recitation of the Pledge of Allegiance.[467] This instruction is not a fact-based portion of the curriculum, but rather an explicit effort to teach students specific normative beliefs. The analysis would thus shift from allowing the school to restrict Holloman's speech to requiring the school to address the disruption by disciplining disorderly students and incorporating more instruction on the traits of respect for others, kindness, self-control, and tolerance—all traits also promoted by the statute requiring the pledge.[468]

Many cases applying *Tinker* would remain unchanged by this adjustment. For example, a Tenth Circuit case involved a number of high school students who were members of a religious group that wished to hand out 2,500 small rubber dolls with cards stating that they were the same size as twelve-week fetuses.[469] When they attempted the distribution, however, it swiftly went awry:

> Both schools experienced doll-related disruptions that day. Many students pulled the dolls apart, tearing the heads off and using them as rubber balls or sticking them on pencil tops. Others threw dolls and doll parts at the "popcorn" ceilings so they became stuck. Dolls were used to plug toilets. Several students covered the dolls in hand sanitizer and lit them on fire. One or more male students removed the dolls' heads, inverted the bodies to make them resemble penises, and hung them on the outside of their pants' zippers.
>
> Teachers at both schools complained that students' preoccupation with the dolls disrupted classroom instruction. While teachers were trying to instruct, students threw dolls and doll heads across classrooms, at one another, and into wastebaskets. Some teachers said the disruptions took eight to 10 minutes each class period, and others said their teaching plans were derailed entirely. An honors freshman English class canceled a scheduled test because students had become engaged in name calling and insults over the topic of abortion. A Roswell security officer described the day as "a disaster" because of the dolls.[470]

467. *Id.* at 1261–62.
468. *Id.* at 1261.
469. Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 30 (10th Cir. 2013).
470. *Id.* at 31.

The Tenth Circuit acknowledged that the distribution was obviously speech by the distributing students,[471] but school administrators were justified in stopping attempts to continue distributing the dolls, as the distribution clearly caused a substantial disruption.[472] The proposed modification to prevent some heckler's vetoes would not change this conclusion: there is no indication that the school clearly and consistently promoted prochoice positions or any other message that contributed to the mostly juvenile pranks sparked by the dolls.

Similarly, the threatened physical violence in response to a few students wearing clothing featuring American flags on Cinco de Mayo discussed by the Ninth Circuit in *Dariano* means that the Ninth Circuit's analysis would not change.[473] Even if one altered the facts to imagine the school clearly and consistently messaged that American patriotism was inappropriate,[474] the threat of imminent violence would allow school administrators to restrain student speech.

There are also examples that could push against the distinction between fact-based instruction and other messaging by the school. A student who sparks a disruption in biology because she repeatedly objects and says the teacher's lesson goes against the Bible, for example, would likely argue that the school's instruction is not fact-based and is a normative expression denying her religious beliefs, but it seems unlikely that courts would have much difficulty concluding that the lesson is fact based. A harder question could arise where a student objects to a framing or inclusion of elements of lessons—for example, if a school in Florida were to show a PragerU video describing feminism as a "mean-spirited, small minded and oppressive philosophy," does that become plausibly a fact-based portion of the curriculum?[475] It seems unlikely, but courts could be called upon to distinguish fact-based instruction from value-laden messaging.

Another obvious question about this changed analysis is whether it would apply to any unpopular student speech: Could students wearing Confederate flags,[476] for example, point to Title IX and a school's antiracist efforts to say that the school had to allow their speech, even though students reacted in disruptive ways to their shirts?

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471. *Id.* at 35.

472. *Id.* at 36–37.

473. *See* Dariono *ex rel* M.D. v. Morgan Hill Unified Sch. Dist., 745 F.3d 354, 362 (9th Cir. 2014).

474. To be clear, there is no indication or implication that celebrating the holidays of a variety of countries, religions, cultures, and so on conveys such a message.

475. *See* Ayana Archie, *A Lot is Happening in Florida Education. These Are Some of the Changes Kids Will See*, NPR (Aug. 14, 2023, 5:07 AM), https://www.npr.org/2023/08/14/1193557432/florida-education-private-schools-prageru-desantis [https://perma.cc/9Y6A-XCDJ].

476. Given the number of *Tinker*-based cases involving students wearing or otherwise displaying Confederate flags, it is the obvious example of controversial student speech. Use of the flag as an example of *Tinker* analysis sidesteps the strong argument that the Confederate flag should be considered patently offensive under *Fraser*.

First, not all unpopular student speech would receive increased protection. Again, the student speakers must be able to point to consistent and clear messaging from the school that directly conflicts with the student's speech—this would likely be impossible for a wide variety of politically controversial speech. For example, several of the cases involving antigay speech were sparked by *student* speech, such as students organizing around the National Day of Silence, rather than the school's programming.[477]

It is at least a viable question, however, whether some schools clearly and consistently communicate a message that racism, sexism, homophobia, transphobia, and other types of prejudice are wrong. In theory, therefore, this analysis could result in more protection for speech expressing such bias under *Tinker*'s material disruption analysis. That does not mean, however, that such speech must constitutionally be allowed. *Tinker* also held that schools may restrict student speech that collides with or invades the rights of others.[478] In 2006, the Ninth Circuit applied this prong of *Tinker* to hold that a school could constitutionally require a student to remove shirts upon which he had written antigay slogans in response to the National Day of Silence.[479] The court wrote that the shirts collided "with the rights of other students in the most fundamental way. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses."[480] The court drew a distinction between political debate, even heated debate, and "demeaning statements" that "assault[ed]" other students.[481]

The Ninth Circuit's decision was the first to apply the "invasion of rights" language from *Tinker*,[482] and has drawn criticism from some scholars.[483] Its reasoning has been applied, however, in several other Ninth Circuit and California

477. *See* Steven J. Macias, *Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in the Public Schools*, 49 San Diego L. Rev. 791, 817 (2012) ("The increasing activism of gay students and their allies on school campuses has led to a backlash from antigay students claiming for themselves the right to espouse messages expressing their dissatisfaction with their fellow students' outspokenness.").

478. 393 U.S. 503, 513 (1969).

479. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006), *cert. granted, judgment vacated sub nom.* Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007).

480. *Id.* at 1178 (quotation marks and citation omitted).

481. *Id.* at 1181.

482. Waldman, *supra* note 177, at 467; *see also* Kellam Conover, Note, *Protecting the Children: When Can Schools Restrict Harmful Student Speech?*, 26 Stan. L. & Pol'y Rev. 349, 377–84 (2015) (drawing distinction between speech that creates hostile environment or is personally directed at individual students and speech that is political commentary or voluntary civil discussion among students).

483. *See, e.g.*, John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. Rev. 569, 577 (2009) ("[O]n my view, [] *Tinker* allows schools to enact facially viewpoint-based speech rules or to enforce facially viewpoint-neutral rules with viewpoint-discriminatory effects . . . ." (citation omitted)); Abby Marie Mollen, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 Nw. U. L. Rev. 1501, 1517 (2008) (stating *Tinker* ruling is opaque).

decisions. One such example arose when a high school sophomore made a series of posts on his MySpace page threatening to shoot and assault fellow students, targeting both groups of students, such as Black and gay students, as well as some individual students by name.[484] Several of his friends, increasingly worried by his posts, went to a trusted football coach who alerted the school principal, who began proceedings that expelled the student for ninety days.[485] The court found that speech that raised "the specter of a school shooting" justified the school's actions under either prong of *Tinker*,[486] noting specifically that threatening and targeting students "represent[ed] the quintessential harm to the rights of other students to be secure."[487] Similarly, in another case the court held that sexual harassment "implicates the rights of students to be secure," justifying school discipline for a seventh-grade student who harassed two younger students.[488]

Two cases from the past year further develop the analysis. One arose in Clovis, California, when a graduating high school senior posted a photo of a Black classmate on his personal Twitter, captioning the picture with a racial slur.[489] He posted the photo from the school campus, during school hours, on the very day of his graduation, so after the principal was alerted to the photo, she called the student and his parents to her office, gave him his diploma, and told him that he was not allowed to walk at the graduation ceremony.[490] After the student sued, arguing that the punishment violated his free speech rights, the court concluded that his post did not easily fit into any of the doctrinal exceptions to *Tinker*'s analysis,[491] and, due in part to how quickly the facts developed, there was no evidence of a threat of disruption.[492] The court found, however, that his post denigrated the student in the picture and invaded the rights of the other students who saw the post.[493]

Finally, in yet another case sparked by problematic social media posts, a high school student created a private Instagram account targeting fellow students and school employees with racist and other derogatory language.[494] Although the account was kept private with a limited number of followers, one student with access to it showed the account to other students, and news quickly spread around school and caused what the court found was a serious

484. Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1065–66 (9th Cir. 2013).
485. *Id.* at 1066 (describing how student claimed his violent statements were jokes).
486. *Id.* at 1070.
487. *Id.* at 1072.
488. C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1146–47, 1152 (9th Cir. 2016).
489. Castro v. Clovis Unified Sch. Dist., 604 F. Supp. 3d 944, 946 (E.D. Cal. 2022).
490. *Id.*
491. *Id.* at 949.
492. *Id.* at 950.
493. *Id.*
494. Shen v. Albany Unified Sch. Dist., No. 3:17-CV-02478, 2017 WL 5890089, at *2 (N.D. Cal. Nov. 29, 2017), *aff'd sub nom*. Chen *ex rel* Chen v. Albany Unified Sch. Dist., 56 F.4th 708 (9th Cir. 2022).

disruption under *Tinker*.[495] The trial court went on to state that the posts "clearly interfered with 'the rights of other students to be secure and to be let alone.'"[496] The demeaning language crossed a line from merely offensive language, in the judgment of the court, to impermissible interference with other students' rights. The court explained that just as sexual harassment threatens a person's sense of security, "the racist and derogatory comments plaintiffs made here about their peers . . . 'positions the target as a[n] . . . object rather than a person' and thereby violates the targeted student's right to be secure."[497] The Ninth Circuit affirmed the decision in December 2022, holding that even without any disturbance, "[h]ad these posts been printed on flyers that were distributed furtively by students on school grounds but then discovered by school authorities, the 'collision with the rights of [the targeted] students to be secure and to be let alone' would be obvious."[498]

The precise bounds of this prong of *Tinker*'s analysis have yet to be delineated. A Third Circuit decision by then-Judge Samuel Alito provides an example of what is not far enough to invade the rights of other students. Two students who wanted to express their religious beliefs that being gay was wrong sued over their school district's antiharassment policy, which defined harassment as "verbal or physical conduct" based on personal characteristics "which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."[499] The court held that speech that was "merely offensive to some listener" did not invade the rights of other students, and thus the policy prohibited speech that was constitutionally protected expression.[500]

Even with an alternative line of analysis to restrict some particularly harmful student speech, the proposed modification to *Tinker*'s material disruption prong will undoubtedly protect and allow more student speech. The result of interrogating the role of schools in creating a heckler's veto is to treat students as people learning to engage in a marketplace of ideas. This is consistent with the goals of public education—as Richard Posner wrote, "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."[501] It also begins to address the current discussion around the concept of cancel culture on college campuses. Amanda Harmon Cooley has offered the provocative thesis that college students protesting controversial speakers with the goal of

495. *Id.* at *2–3, *8 ("[T]he record firmly establishes that C.E. caused a substantial disruption at AHS. That is enough under *Tinker* to support defendants' disciplinary measures, and consideration of whether C.E. also invaded the rights of others is not necessary.").

496. *Id.* at *9.

497. *Id.*

498. *Chen*, 56 F.4th at 718.

499. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 202–04 (3rd Cir. 2001).

500. *Id.* at 217.

501. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

preventing their speech are the natural and predictable consequence of "speech-suppressive pedagogy" in public schools.[502] Professor Cooley argues that:

> The transformation of students from suppressed to suppressors is a direct consequence of the state's distorted speech-inculcative model that students have been exposed to for the lion's share of their educational experience; that model, introduced by the *Fraser* Court, equates suppression of student speech with notions of "democratic" values of civility.[503]

The intervention proposed in this Section directly addresses the problem that Professor Cooley identifies, that "young people are being taught . . . that student speech that is inappropriate or objectionable should be suppressed and that such suppression is a social good."[504] The expectation is that schools cannot teach orthodoxy and then use a resulting heckler's veto to suppress student speech: rather, schools should be expected to teach students how to disagree respectfully.

Returning to the ultimate topic of transgender students, as outlined above, few trans students would have difficulty pointing to clear and consistent messaging provided by their schools about the gender binary and what the categories "boys" and "girls" mean. In the absence of imminent violence, even heated student reactions to trans students' expression of their gender identity through clothing and other choices about their appearance could not justify their schools prohibiting their gender presentation.

Conclusion

The current political climate is such that protecting the speech rights of transgender students will not address every threat to their legal equality. Making clear that their gender presentation is protected by the First Amendment, however, would be a significant change that would be durable and impactful in their daily lives. Strengthening the speech rights of transgender students as analyzed above provides an additional avenue for litigation alongside Title IX and equality-based arguments, which are particularly important when both statutory and constitutional rights have been in flux.

Although "Don't Say Gay" laws are styled as curriculum restrictions, they obviously implicate the speech rights of everyone in a school, including students. The infamy of Florida's statute is currently inspiring other

502. Amanda Harmon Cooley, *Inculcating Suppression*, 107 Geo. L.J. 365, 369 (2019) ("This Article posits that the increase in student suppression of speech at colleges and universities is a product of the distorted democratic-values inculcation to which students have been exposed via state disciplinary censorship and student speech-suppressive pedagogy in primary and secondary schools, resulting from the devolution of the Supreme Court's student speech jurisprudence. Although the Court has consistently identified democratic-values inculcation as a core mission of public schools, its current student speech jurisprudence twists the true meaning of this inculcation by identifying student speech suppression as a democratic value.").

503. *Id.* at 400.

504. *Id.* at 395.

conservative legislators to propose similar bills restricting classroom instruction and to expand attempts to equate gender identity as sexualized speech. A clear rebuttal grounded in existing precedent responds to such legislation directly, making clear that both societal opinions and courts have rejected and moved past the idea that awareness of transgender people harms children.

Additionally, this Article strengthens broader application of speech rights that frames other aspects of school and public life as related to expression. For example, some scholars have argued that the choice of bathroom is expressive, as a person literally chooses between the labels "Men" and "Women." Scott Skinner-Thompson recently argued that restricting bathroom access could therefore be understood as compelled speech.[505] Acknowledging the expressive work of gender presentation starts down a path that could have application far beyond the context of student speech.

This Article focuses on transgender students, but the concepts apply with equal force to nonbinary[506] and gender nonconforming students. A fuller understanding of gender presentation as speech expands acceptance of all genders and offers a more universal framework than an equality-based argument that depends on identifying discrimination by sex, discrimination because of sex stereotyping, and discrimination on the basis of sexual orientation or gender identity as related but potentially distinct actions.

Finally, the implications for student speech generally are significant. Recognizing gender presentation as speech invigorates analysis of dress codes and uniform requirements, not by arguing that clothing restrictions are impermissible, but by highlighting that the restrictions should not be gendered. The proposed revisions to *Tinker* protect more student speech than current understandings and invite a more public and direct assessment of what implicit messages schools teach students. This assessment also nudges schools to more explicitly teach tolerance of ideas with which people disagree, treating students as participants in the marketplace of ideas instead of vulnerable people who must be sheltered from it.

505. Scott Skinner-Thompson, *Identity by Committee*, *supra* note 70, at 706–07.
506. *See* Clarke, *supra* note 23, at 963.

GENDER DATA IN THE AUTOMATED ADMINISTRATIVE STATE

Ari Ezra Waldman*

In myriad areas of public life—from voting to professional licensure—the state collects, shares, and uses sex and gender data in complex algorithmic systems that mete out benefits, verify identity, and secure spaces. But in doing so, the state often erases transgender, nonbinary, and gender-nonconforming individuals, subjecting them to the harms of exclusion. These harms are not simply features of technology design, as others have ably written. This erasure and discrimination are the products of law.

This Article demonstrates how the law, both on the books and on the ground, mandates, incentivizes, and fosters a particular kind of automated administrative state that binarizes gender data and harms gender-nonconforming individuals as a result. It traces the law's critical role in creating pathways for binary gender data, from legal mandates to official forms, through their sharing via intergovernmental agreements, and finally to their use in automated systems procured by agencies and legitimized by procedural privacy law compliance. At each point, the law mandates and fosters

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automated governance that prioritizes efficiency rather than inclusivity, thereby erasing gender-diverse populations and causing dignitary, expressive, and practical harms.

In making this argument, the Article challenges the conventional account in the legal literature of automated governance as devoid of discretion, as reliant on technical expertise, and as the result of law stepping out of the way. It concludes with principles for reforming the state's approach to sex and gender data from the ground up, focusing on privacy law principles of necessity, inclusivity, and antisubordination.

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Introduction

Sasha Costanza-Chock triggered the alarm when they walked through the full-body scanner at the Detroit Metro Airport.[1] They knew it would happen because it happens to transgender, nonbinary, and gender-nonconforming people all the time.[2] The machine deemed Sasha "risky" because their body, datafied into machine-readable code, differed from the pictures of bodies that trained the machine's algorithm.[3] Their breasts were too pronounced relative to data associated with "male," and their groin area deviated from data associated with "female."[4] Pulled out of the line for a physical body search, Sasha found themself in an awkward, humiliating, and potentially dangerous situation.

Toby P., a transgender man living in Colorado, was singled out by a different kind of automated administrative technology.[5] After Toby sustained a debilitating injury at work, his employer completed the required workers' compensation First Report of Injury Form by checking the box next to "Female," a designation that matched Toby's assigned sex at birth and the information in his human resources file.[6] The state's automated fraud-detection system, which compares this claim form with information pooled from state databases, denied Toby's claim. The "system," Toby told me, "saw 'female' here and 'male' [everywhere else] . . . and figured something didn't match."[7] Seven months,

1. Sasha Costanza-Chock, Design Justice, A.I., and Escape From the Matrix of Domination, J. Design & Sci. (July 16, 2018), https://doi.org/10.21428/96c8d426 [https://perma.cc/E2M3-WGW5] [hereinafter Costanza-Chock, Design Justice]; see also About, Sasha Costanza-Chock, Ph.D., https://www.schock.cc/?page_id=13 [https://perma.cc/JEQ3-JELT] (last visited Aug. 21, 2023).

2. See, e.g., Deema B. Abini, Traveling Transgender: How Airport Screening Procedures Threaten the Right to Informational Privacy, 87 S. Cal. L. Rev. Postscript 120, 135 (2014); Paisley Currah & Tara Mulqueen, Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport, 78 Soc. Rsch. 557, 562–66 (2011); Dawn Ennis, Her Tweets Tell One Trans Woman's TSA Horror Story, Advocate (Sept. 22, 2015), https://www.advocate.com/transgender/2015/9/22/one-trans-womans-tsa-horror-story [https://perma.cc/5FZS-6NKV]. For detailed definitions of "transgender," "nonbinary," "gender-nonconforming," and related terms, please see Jessica A. Clarke, They, Them, and Theirs, 132 Harv. L. Rev. 894, 897–99 (2019); Glossary of Terms: LGBTQ, GLAAD, https://www.glaad.org/reference/terms [https://perma.cc/7BHP-6Y2T] (last visited Aug. 21, 2023). In brief, transgender individuals are those whose sense of self or expression of their gender differs from their assigned sex at birth. Nonbinary individuals are those whose identities cannot be restricted to just "male" or "female." "Gender-nonconforming" is an umbrella term that can include nonbinary individuals, but it is used in this Article to refer to those who are genderqueer (those who challenge norms concerning sex, gender, and sexuality), genderfluid (those whose gender expressions or identities may change over time), or agender (those who do not adopt a traditional gender category and may describe their gender as the lack of one).

3. Costanza-Chock, Design Justice, *supra* note 1.

4. *Id.*

5. Toby's name has been changed to protect his anonymity as he and his lawyers determine how to proceed with a potential claim against the state.

6. Telephone Interview with Toby P. (May 22, 2022) (notes on file with the *Columbia Law Review*); Colo. Dep't of Lab., WC 1, Employer's First Report of Injury (2006), https://codwc.app.box.com/v/wc1-first-report-injury (on file with the *Columbia Law Review*).

7. Telephone Interview with Toby P., *supra* note 6.

twenty-five phone calls, sixteen refiled forms, and two demand letters later, Toby is still hurt and still without the compensation to which he is entitled. He is "basically bankrupt."[8]

Sasha and Toby fell through the cracks of the automated administrative state.[9] As government agencies turn to algorithms and artificial intelligence (AI) to administer benefits programs, detect fraud, and secure spaces, transgender, nonbinary, and gender-nonconforming individuals are put in situations where they can't win. They become "anomalies" or "deviants" in systems designed for efficiency.[10]

Technologies "have politics."[11] Just like race and gender hierarchies can be embedded into technological systems,[12] in this case it is cisnormativity—the

8. *Id.*

9. This Article uses the phrase "automated decisionmaking system" or "algorithmic decisionmaking system" to refer to the overall process in which a computational mechanism uses data inputs to make probabilistic, predictive conclusions or implements policy by software. See Ryan Calo, Artificial Intelligence Policy: A Primer and Roadmap, 51 U.C. Davis L. Rev. 399, 404–05 (2017) (noting that there is no one "consensus definition of artificial intelligence" but clarifying ways of understanding what scholars and industry mean by AI). This simplification is intentional: The Article focuses on the law's responsibility for trends in automation rather than the technical distinctions between different types of automated technologies. See AI Now Inst., Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force 7 (Rashida Richardson ed., 2019), https://ainowinstitute.org/publication/confronting-black-boxes-a-shadow-report-of-the-new-york-city-automated [https://perma.cc/2K5X-GB3A] (defining algorithmic or automated decisionmaking systems as "data-driven technologies used to automate human-centered procedures, practices, or policies for the purpose of predicting, identifying, surveilling, detecting, and targeting individuals or communities").

10. See Toby Beauchamp, Going Stealth: Transgender Politics and U.S. Surveillance Practices 35–37 (2019); Sonia K. Katyal & Jessica Y. Jung, The Gender Panopticon: AI, Gender, and Design Justice, 68 UCLA L. Rev. 692, 710–11 (2021) (explaining that identity detection as a form of biometric surveillance treats some individuals as "anomalies" or outliers when they do not conform to gender binaries).

11. Langdon Winner, Do Artifacts Have Politics?, Dædalus, Winter 1980, at 121, 121 (explaining that technology embodies forms of power and authority).

12. There is a vast literature in this space. See, e.g., Safiya Umoja Noble, Algorithms of Oppression: How Search Engines Reinforce Racism (2018) (explaining how digital decisions made through systemic algorithms reinforce oppressive social relationships); Sarah Myers West, Meredith Whittaker & Kate Crawford, Discriminating Systems: Gender, Race, and Power in AI 8–9 (2019), https://ainowinstitute.org/wp-content/uploads/2023/04/discriminatingsystems.pdf [https://perma.cc/A4YD-UPPG] (outlining research findings that the AI sector has a lack of diversity among its professionals, which has led to discriminatory outcomes); Solon Barocas & Andrew D. Selbst, Big Data's Disparate Impact, 104 Calif. L. Rev. 671, 674–77 (2016) [hereinafter Barocas & Selbst, Big Data's Disparate Impact] (outlining various reports that have suggested "big data" has unintended discriminatory effects); Joy Buolamwini & Timnit Gebru, Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, 81 Proc. Mach. Learning Rsch. 1, 10–11 (2018), https://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf [https://perma.cc/Q5VD-EF9F] (detailing how machine-learning technology can produce disastrous results in high-stakes circumstances, specifically when used in criminal matters); Pauline T. Kim, Data-Driven Discrimination at Work, 58 Wm. & Mary L. Rev. 857, 874–90 (2017) (describing how "training data," or data used to inform machines running algorithms, are

assumption that everyone's gender identity and presentation *accord* with their assigned sex at birth—that is designed into the automated systems that singled out Sasha and Toby. The underlying data that train machines to recognize males and females, the algorithms that identify anomalies in a person's body relative to that database, the forms inconsistently designed to collect sex and gender data in the first place, and the systems' restriction to only male/female options all reflect assumptions of gender as binary. Anyone who deviates from a normative, binary body is "risky" and singled out, potentially exposing them to harm. Those gender-nonconforming individuals who are also religious minorities, immigrants, people of color, or people with disabilities, and people who hold more than one minoritized identity, are multiply burdened.[13]

But this Article is not simply about the biases replicated and entrenched by AI and algorithmic technologies, a story deftly told by others and summarized in Part I. Nor is it just about gender as a tool of classification, a story as old as the nation.[14] This is a story about law. Specifically, this Article argues that the law has mandated, influenced, and guided the state to automate in a way that binarizes gender data, thereby erasing and harming transgender, nonbinary, and gender-nonconforming individuals.

The law's active role in the creation of this kind of automated state has been overlooked because the two dominant strands in legal scholarship on algorithmic technologies are focused elsewhere. One of those strands sees automation and its harms flourishing in a regulatory void. Scholarship in this vein rightly argues that automated systems used by private, for-profit technology companies cause harm because "the law has offered insufficient protection."[15] Other scholars suggest that algorithmic technologies are built amidst "lawlessness," or the lack of regulation.[16]

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often unknowingly infected with bias, creating discriminatory results that are especially harmful in the workplace). In a recent article, Professor Sonia Katyal and healthcare industry lawyer Jessica Jung focus almost entirely on the gender and racial biases of algorithmic technologies used by private, for-profit companies. Katyal & Jung, *supra* note 10. This Article adds to this literature with a different narrative, focusing on government uses of automated technology and the mostly underappreciated laws that are responsible for collecting and entrenching binary gender in government systems.

13. See, e.g., Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 221–38 (1990) (describing how minoritized populations experience oppression and domination on multiple levels); Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1250–52 (1991) (outlining how all intersections of race and gender affect the social construct of identity).

14. See Gérard Noiriel, The Identification of the Citizen: The Birth of Republican Civil Status in France, *in* Documenting Individual Identity 28, 30–42 (Jane Caplan & John Torpey eds., 2001).

15. See Katyal & Jung, *supra* note 10, at 704 ("[G]ender panopticism has been facilitated by absences within privacy law, in that the law has offered insufficient protection to gender self-determination and informational privacy."); see also *id.* at 723, 760–61 (outlining forms of biometric surveillance technology that render nonbinary individuals outliers).

16. Shoshana Zuboff, The Age of Surveillance Capitalism 127–28 (2019). But *see, e.g.*, Julie Cohen, Between Truth and Power 3 (2019) [hereinafter Cohen, Between Truth and

A second important strand of law and technology scholarship focuses on how law can address automation's harms. This research explores how the technologies work, where they go wrong, and how we might use law to regulate them, fix them, and restore the status quo ex ante by holding technologies and those that use them accountable for discrimination, bias, and harm.[17] Few scholars have focused on how the law *creates* the automated administrative state,[18] and fewer still have focused on how the law constructs gender data in the automated state.[19] This Article fills that gap: Sasha's and Toby's stories are

Power] (arguing that informational capitalism itself is a construct of opportunistic economic actors using law to control the means of informational production); Amy Kapczynski, The Law of Informational Capitalism, 129 Yale L.J. 1460, 1465 (2020) (reviewing both texts); see also Bridget Fahey, Data Federalism, 135 Harv. L. Rev. 1007, 1013–14, 1036–39 (2022) [hereinafter Fahey, Data Federalism] (highlighting the "absence" of "major federal legislation" as one reason for rampant, unregulated data sharing among state agencies but noting the role of interagency agreements and other more informal legal instruments).

17. *E.g.*, Dillon Reisman, Jason Schultz, Kate Crawford & Meredith Whittaker, Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability (2018), https://openresearch.amsterdam/image/2018/6/12/aiareport2018.pdf [https://perma.cc/Y3YY-BSTG]; Barocas & Selbst, Big Data's Disparate Impact, *supra* note 12; Danielle Keats Citron & Frank Pasquale, The Scored Society: Due Process for Automated Predictions, 89 Wash. L. Rev. 1 (2014); Danielle Keats Citron, Technological Due Process, 85 Wash. U. L. Rev. 1249 (2008) [hereinafter Citron, Technological Due Process]; Ignacio N. Cofone, Algorithmic Discrimination Is an Information Problem, 70 Hastings L.J. 1389 (2019); Kate Crawford & Jason Schultz, Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms, 55 B.C. L. Rev. 93 (2014); A. Michael Froomkin, Ian Kerr & Joelle Pineau, When AIs Outperform Doctors: Confronting the Challenges of a Tort-Induced Over-Reliance on Machine Learning, 61 Ariz. L. Rev. 33 (2019); James Grimmelmann & Daniel Westreich, Incomprehensible Discrimination, 7 Calif. L. Rev. Online 164 (2017), https://lawcat.berkeley.edu/record/1128018/files/GrimmelmannWestreich.final_.pdf [https://perma.cc/7QMW-AEDQ]; Meg Leta Jones, The Right to a Human in the Loop: Political Constructions of Computer Automation and Personhood, 47 Soc. Stud. Sci. 216 (2017); Margot E. Kaminski, Binary Governance: Lessons From the GDPR's Approach to Algorithmic Accountability, 92 S. Cal. L. Rev. 1529 (2019); Sonia K. Katyal, Private Accountability in the Age of Artificial Intelligence, 66 UCLA L. Rev. 54 (2019) [hereinafter Katyal, Private Accountability]; W. Nicholson Price II, Regulating Black-Box Medicine, 116 Mich. L. Rev. 421 (2017); Andrew D. Selbst & Solon Barocas, The Intuitive Appeal of Explainable Machines, 87 Fordham L. Rev. 1085 (2018); Alicia Solow-Niederman, Administering Artificial Intelligence, 93 S. Cal. L. Rev. 633 (2020).

18. But see Cohen, Between Truth and Power, *supra* note 16, at 48–74 (exploring the ways law, actively leveraged by interested economic actors, has created a "zone of legal privilege" around the activities of data-driven technologies); Alicia Solow-Niederman, YooJung Choi & Guy Van den Broeck, The Institutional Life of Algorithmic Risk Assessment, 34 Berkeley Tech. L.J. 705, 705–08 (2019) (arguing that risk assessment statutes create frameworks that constrain and empower policymakers and technical actors when it comes to the design and implementation of a particular instrument).

19. Of course, there has been scholarship on gender as a tool of administrative governance. See, e.g., Dean Spade, Normal Life: Administrative Violence, Critical Trans Politics, & The Limits of Law 73–93 (2015) [hereinafter Spade, Normal Life]. But this scholarship has not extended to consider the effects of algorithms and automation in the administrative state.

actively and indelibly framed, constructed, and sustained by law every step of the way.

The process begins at the source, where statutes mandate the collection of sex and gender data. As Part II describes, the law of gender data collection relies on assumptions of static gender, taps into uninformed perceptions of the gender binary as "common sense," and creates the conditions for civil servants to design forms with primarily binary gender questions. This creates binary gender data streams. Part III shows how interstate compacts and interagency contracts, all of which I collected from public records requests, require states to share datasets that include sex and gender. The law of gender data sharing looks outward and inward to privilege the gender binary: It has expressive effects that normalize the gender binary, conflationary effects that confuse the social aspects of gender with the biological aspects of sex, and interoperability effects that force the gender binary onto any agency that wants to realize the benefits of participating in shared data systems. Part IV demonstrates how automation mandates, agency policymaking by procurement, trade secrecy law, and privacy and data protection law actively encourage automation to improve efficiencies while preventing anyone from interrogating the underlying assumptions of the algorithms that use sex and gender data. This web of legal rules guides automation to exclude those outside the norm and erects barriers around automated tools that protect the gender binary from change.[20] In other words, the law forces an oversimplified legibility on its subjects, leaving those most marginalized at risk.[21]

This rich account of how law collects, shares, and uses sex and gender data in state-run automated systems offers several insights about automation and the automated state in general that challenge or add nuance to the conventional wisdom in the legal literature. Part V discusses four of those lessons.

The automated state is *discretionary*.[22] Scholars have argued that automation erodes traditional agency discretion, a pillar of the administrative state.[23] But this Article shows that civil servants have discretion to guide automation in ways that binarize gender data. The discretion may be buried, but its fingerprints are everywhere—in the design of data-collection forms, in the terms of data-sharing agreements, in the procurement of technologies, and in the design and completion of privacy impact assessments (PIAs).[24] Relatedly, the

20. See Cohen, Between Truth and Power, *supra* note 16, at 49 (referring to how the law creates "zone[s] of legal privilege" around information-driven business models).

21. For how governments force this legibility on their subjects, see generally James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (1998) [hereinafter Scott, Seeing Like a State] ("[T]he legibility of a society provides the capacity for large-scale social engineering, high-modernist ideology provides the desire, the authoritarian state provides the determination to act on that desire, and an incapacitated civil society provides the leveled social terrain on which to build.").

22. See *infra* section V.A.

23. See, e.g., Ryan Calo & Danielle Keats Citron, The Automated Administrative State: A Crisis of Legitimacy, 70 Emory L.J. 797, 804 (2021).

24. Impact assessments in the law and technology space document development

automated state is also driven by *stereotypes*.[25] Rather than merely shifting expertise from civil servants hired for their substantive knowledge to engineers with technological knowledge about how algorithms work, the automated state relies on both civil servants' and engineers' supposedly commonsense perceptions of sex and gender.[26] Because most people have traditionally presumed that sex and gender are the same and static, automated systems designed by engineers and used by the government reflect those stereotypes.

The automated state is also *managerial*.[27] Far from a product of the law stepping out of the way, the state's use of algorithmic decisionmaking processes represents the synthesis of the logics (and pathologies) of data-driven governance, risk assessment, public–private partnerships, and procedural compliance, leveraging the power of law and the state to achieve efficiency goals. By orienting algorithmic tools toward the neoliberal goal of targeted governance through risk assessments that are supposed to cover most people most of the time, the law singles out those outside the norm for disproportionate harm. Finally, and again, relatedly, the automated state is structurally *subordinating*.[28] Law infuses the government's data ecosystem with sex and gender information in a way that is both over- and underinclusive: It is overinclusive because it collects sex and gender data too often when not necessary; it is underinclusive because its reliance on the gender binary excludes transgender, nonbinary, and gender-nonconforming individuals from any of the benefits that could come from data's capacity to create insight.

This kind of automated state harms gender-diverse populations. But the reification of the gender binary in the automated state is not a niche concern; it harms anyone constrained by strict gender expectations.[29] Plus, those most dependent on government resources and thereby subject to the state's informational demands will bear the greatest burdens of the state's automated use of binary gender data streams.[30] This poses a particular problem for mem-

rationales for new technologies and are supposed to keep certain values like privacy and fairness front of mind for those developing and using the technologies. See Andrew D. Selbst, An Institutional View of Algorithmic Impact Assessments, 35 Harv. J.L. & Tech. 117, 122 (2021). But see Ari Ezra Waldman, Industry Unbound 132–33 (2021) [hereinafter Waldman, Industry Unbound] (describing how impact assessments can be reduced to mere checkbox compliance).

25. See *infra* section V.B.

26. See *infra* section V.B.

27. See *infra* section V.C.

28. See *infra* section V.D.

29. Feminist scholars have long argued that discrimination on the basis of gender nonconformity should be redressable. 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, 2–4 (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).

30. Cf. Khiara M. Bridges, The Poverty of Privacy Rights 9 (2017) [hereinafter Bridges, Poverty] ("[P]oor mothers have *traded* [their privacy] for a welfare benefit.").

bers of the LGBTQ+ community, approximately one million of whom are on Medicaid.[31] Nearly half of LGBT people of color live in low-income households.[32] Transgender people are nearly two and a half times more likely than non-transgender people to face food insecurity.[33] LGBT people have higher rates of unemployment than the general population.[34]

For some scholars and advocates, the solution to these problems is for the state to stop collecting sex and gender data.[35] But as various scholars have shown, legibility comes with benefits as well as risks.[36] I don't know whether

31. See Kerith J. Conron & Shoshana Goldberg, Over Half a Million LGBT Adults Face Uncertainty About Health Insurance Coverage Due to HHS Guidance on Medicaid Requirements 1 (2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Medicaid-Coverage-US-Jan-2018.pdf [https://perma.cc/H7Q3-JS7X].

32. Bianca D.M. Wilson, Lauren Bouton & Christy Mallory, Racial Differences Among LGBT Adults in the US 2 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Race-Comparison-Jan-2022.pdf [https://perma.cc/3RYL-4XK7].

33. Kerith J. Conron & Kathryn K. O'Neill, Food Insufficiency Among Transgender Adults During the COVID-19 Pandemic 5 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Update-Apr-2022.pdf [https://perma.cc/G5HE-RSYV].

34. Richard J. Martino, Kristen D. Krause, Marybec Griffin, Caleb LoSchiavo, Camilla Comer-Carruthers & Perry N. Halkitis, Employment Loss as a Result of COVID-19: A Nationwide Survey at the Onset of COVID-19 in US LGBTQ+ Populations, 19 Sexuality Rsch. & Soc. Pol'y 1855, 1860 (2022).

35. See, e.g., Lila Braunschweig, Abolishing Gender Registration: A Feminist Defence, 1 Int'l J. Gender Sexuality & L. 76, 86 (2020); Davina Cooper & Flora Renz, If the State Decertified Gender, What Might Happen to Its Meaning and Value?, 43 J.L. & Soc'y 483, 484 (2016); Ido Katri, Transitions in Sex Reclassification Law, 70 UCLA L. Rev. 636, 641 (2023); Anna James (AJ) Neuman Wipfler, Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents, 39 Harv. J.L. & Gender 491, 543 (2016).

36. See Clarke, *supra* note 2, at 990 (noting the contextual need for the state to recognize gender diversity in some circumstances); Dean Spade, Documenting Gender, 59 Hastings L.J. 731, 814–15 (2008) [hereinafter Spade, Documenting Gender] (suggesting that the state should continue to collect gender data in the public health context). In the context of racial data, *see, e.g.*, Melissa Nobles, Shades of Citizenship: Race and the Census in Modern Politics, at xi (2000) (arguing that racial data and racial enumeration by censuses advance concepts of race); Clara E. Rodríguez, Changing Race: Latinos, the Census, and the History of Ethnicity in the United States, at xiii (2000) (discussing the need for governmental race data to address past discrimination as balanced against the effect race data have on reification and racial identity); Cassius Adair, Licensing Citizenship: Anti-Blackness, Identification Documents, and Transgender Studies, 71 Am. Q. 569, 570 (2019) (discussing race markers on identification documents in American history and the movement to abolish their use); Nancy Leong, Judicial Erasure of Mixed-Race Discrimination, 59 Am. U. L. Rev. 469, 491–92 (2010) (describing activism in support of adding a multiracial category to the census); Naomi Mezey, Erasure and Recognition: The Census, Race and the National Imagination, 97 Nw. U. L. Rev. 1701, 1713–22 (2003) (evaluating the paradoxical nature of racial classification in the census given the tension between the government's power to recognize and its power to discipline); Nathaniel Persily, Color by Numbers: Race, Redistricting, and the 2000 Census, 85 Minn. L. Rev. 899, 903 (2001) (discussing the importance of census racial data accuracy for minority electoral representation); Naomi Zack, American Mixed Race: The U.S. 2000 Census and Related Issues, 17 Harv. BlackLetter L.J. 33, 35–37 (2001) (discussing

there is a way to get it right, to find the "Goldilocks Zone" for gender, data, and power, especially given the state's historic commitment to queer oppression and the historical aims of what James C. Scott might call top-down legibility.[37] But I would like to try. This Article offers a way to navigate the legibility dilemmas triggered by state gender data collection.

The Article's lessons about the automated state—its persistent reliance on civil servant discretion, its use of stereotypes and perceptions of common sense, its orientation toward efficiency, and its subordinating capacities—suggest that scholars and advocates ignore the liminal space between the law on the books and the law on the ground to our peril.[38] For sure, we can pass new laws that guarantee an "X" gender marker option; we can also litigate in court when state gender designations discriminate against those outside the gender binary. But "new categories are not enough."[39] Nor will a statute "deprogram" a gender binary so embedded in our culture and in the technologies of private and state surveillance.[40] To protect transgender, nonbinary, and gender-nonconforming individuals from automation-based harms on a more systematic level, we can also develop the state's "gender competence."[41] That is, in addition to changing the law on the books, scholars and advocates can also help change how civil servants understand gender data and its value, limits, and powers.

These are the goals of Part VI, which wrestles with the live and pressing questions of the proper role of the state: Should the state ever collect and use gender data? If not, why? If so, how can the state do so in a way that serves the interests of gender-diverse populations rather than its own disciplinary interests? Resolving these questions is beyond the scope of this Article, but in a world in which the state does collect and use gender data, its role should be particularly narrow. Part VI offers three principles, familiar to privacy scholars, for building a future in which government uses of gender data and algorithmic technology foster rather than erode antisubordination goals. A *necessity* principle urges the state to ask whether it actually needs sex or gender data to achieve its goals and, if it does, to determine which one it needs. An *antisubordination*

the importance of the introduction of mixed-race identification in the 2000 Census but also identifying continuing problems with governmental classification).

37. See Scott, Seeing Like a State, *supra* note 21, at 65–73. On the state's orientation toward queer oppression, see generally George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890–1940 (1994); Jonathan Ned Katz, The Invention of Heterosexuality (2007). On legibility, see Scott, Seeing Like a State, *supra* note 21, at 65–73.

38. This is known as "gap studies" in the sociolegal literature, and this Article is situated in that intellectual tradition. See Jon B. Gould & Scott Barclay, Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship, 8 Ann. Rev. L. & Soc. Sci. 323, 324 (2012).

39. Laurel Westbrook & Aliya Saperstein, New Categories Are Not Enough: Rethinking the Measurement of Sex and Gender in Social Surveys, 29 Gender & Soc'y 534, 535–36 (2015).

40. See Rena Bivens, The Gender Binary Will Not Be Deprogrammed: Ten Years of Coding Gender on Facebook, 19 New Media & Soc'y 880, 895 (2017).

41. Kevin Guyan, Queer Data: Using Gender, Sex and Sexuality Data for Action 155 (2022).

principle would limit sex and gender data collection to only those uses that benefit and support greater inclusion of gender-diverse populations. And an *inclusivity* principle would ensure that once the state decides to collect sex or gender data for emancipatory ends, it does so sensitively and in a contextually inclusive way.

Luckily, privacy law principles of data minimization—that one should only collect as much personal data as is necessary to achieve a stated purpose—and antisubordination—that law should disrupt traditional hierarchies of power enjoyed by data collectors—are capable of doing just that.[42] Part VI concludes with this Article's ultimate recommendation: The law on the books and the law on the ground should take gender diversity into account. The state should be able to collect, share, and use sex and gender data only when necessary to support a gender-inclusive antisubordination agenda: to combat discrimination, to provide adequate healthcare, to guarantee benefits that have been traditionally denied, and to enable self-determination for gender-diverse populations.

To date, the law's role in creating an automated state that binarizes gender data has been mostly hidden from view. It is a puzzle of statutes, rules, interstate compacts, intergovernmental cooperation, procurement, street-level bureaucracy, and managerial policymaking, all of which is summarized in Table 1. This Article pieces that puzzle together. It relies on a mix of primary source materials, including a computationally derived novel dataset of more than 12,000 government forms scraped from state agency websites, documents obtained through public record requests, and first-person interviews with lawyers and government officials.

Table 1. Law and the Binarization of Gender Data, Summary

Law of Data Collection (examples)[43]	*Data binarized by . . .*
Statutes requiring sex/gender data collection (e.g., security, identity verification, distribution of benefits). Information primarily gathered through forms created by street-level bureaucrats.	*Mediation* by the state, which creates the data. *Perceptions* of "common sense" about sex/gender, which govern form design. *Path dependencies*, which ensure that forms remain the same over time. *Assumption* that gender is a static/secure identifier, which implies gender binary only.
Law of Data Sharing[44]	*Data binarized by . . .*

42. Scott Skinner-Thompson, Privacy at the Margins 6 (2021) (noting that an antisubordination agenda requires consciousness of classifications and using them to "level up" those disadvantaged by traditional hierarchies of power); Spiros Simitis, Reviewing Privacy in an Information Society, 135 U. Pa. L. Rev. 707, 740 (1987) ("Personal information should only be processed for unequivocally specified purposes. Both government and private institutions should abstain from collecting and retrieving data merely for possible future uses for still unknown purposes.").

43. See *infra* Part II.

44. See *infra* Part III.

Data sharing required to realize security and efficiency benefits. Data sharing permitted at discretion of state agency leadership. Interagency agreements. Interstate compacts.	*Normalization* of the binary by dissemination. *Conflation* of sex and gender. *Interoperability*, which requires all data look to the same.

Law of Data Use[45]	*Data binarized by . . .*
Automation mandates. Efficiency mandates. Innovation, chief innovation offices. Procurement. Trade secrecy. Privacy law compliance (privacy impact assessments).	*Efficiency* mandates, which mean binary design. *Managerialization* via innovation offices, which ensures narrow cost–benefit analysis. *No interrogation* of design via procurement process. *Symbolic compliance*, which weaponizes PIAs to serve automation rather than privacy.

I. Automated Administrative Technology and Its Harms

In today's automated administrative state, algorithmic technologies offer governments new opportunities for gender-based classifications. Professor Sonia Katyal and healthcare industry lawyer Jessica Jung argue in the context of private, for-profit uses of algorithms and AI, anti-transgender bias and erasure are designed into these tools.[46] That is in line with the conventional account in much of the legal literature on algorithmic discrimination, which focuses primarily on technology's capacity to entrench historical racial and gender biases.[47] This Part briefly recounts that conventional account, focusing on how the design of algorithmic technologies used by the automated administrative state erases and causes harm to gender-diverse populations.

A. *Technologies in the Automated State*

Automated systems will sometimes use gender to apply rules in practice, like meting out benefits.[48] Other technologies use gender as data points in data-matching systems and as training data for data-mining systems. Data-matching systems compare two sets of data—for example, demographic data provided on an application for unemployment benefits and a database with the applicant's motor vehicle records, voter registration, and information from private brokers—to determine if both datasets represent the same person.[49] If one or more data points do not match, the system flags the applicant as risky or fraudulent. This is what happened to nearly 50,000 people who applied for unemployment insurance in Michigan, which introduced an automated fraud-detection system in 2013.[50] The problem was that few of them actually

45. See *infra* Part IV.

46. Katyal & Jung, *supra* note 10, at 700–01 (arguing that "invisibility" is the result of how AI and algorithmic technologies are built and function).

47. See *supra* note 17.

48. See Citron, Technological Due Process, *supra* note 17, at 1268.

49. *Id.* at 1260.

50. See Cahoo v. SAS Analytics Inc., 912 F.3d 887, 892 (6th Cir. 2019) (describing

committed fraud.[51] When the comparison data is incorrect or outdated, as was the case in Michigan, data-matching systems flag fraud where there is none.[52] In Michigan, the error caused profound harm. The state garnished wages and withdrew money from people's bank accounts, money that many victims are still trying to get back.[53]

Toby was harmed by a data-matching system. Fraud-detection software compared data on the employer's forms with data about Toby in state databases. Because those data did not match, Toby was accused of fraud. Sasha, on the other hand, was the victim of another cluster of algorithmic decisionmaking tools that use gender data—namely, data-mining systems.[54]

Data mining uses gender information as training data to "teach" an algorithm to find patterns and correlations in large datasets.[55] The algorithm then makes probabilistic predictions about the future.[56] For example, in the private commercial space, Amazon's recommendation algorithm mines our prior purchases, browser history, and latent characteristics to predict what we might buy next.[57] Google's search algorithm combines internet-wide data with information about our interests and prior searches to autocomplete our queries and arrange search results.[58]

Data mining enhances the state's power to leverage gender data to make decisions about people's lives.[59] Sex and gender have become data points in

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the faulty data-matching algorithm that caused the false determinations of fraud).

51. See Calo & Citron, *supra* note 23, at 827–29; Robert N. Charette, Michigan's MiDAS Unemployment System: Algorithm Alchemy Created Lead, Not Gold, IEEE Spectrum (Jan. 24, 2018), https://spectrum.ieee.org/riskfactor/computing/software/michigans-midas-unemployment-system-algorithm-alchemy-that-created-lead-not-gold (on file with the *Columbia Law Review*).

52. Charette, *supra* note 51.

53. Calo & Citron, *supra* note 23, at 828–29.

54. See Citron, Technological Due Process, *supra* note 17, at 1260.

55. Solow-Niederman, *supra* note 17, at 639.

56. Morgan Klaus Scheuerman, Jacob M. Paul & Jed R. Brubaker, How Computers See Gender: An Evaluation of Gender Classification in Commercial Facial Analysis and Image Labeling Services, 3 Proc. ACM on Hum.-Comput. Interaction, no. CSCW, art. 144, at 144:1, 144:2 (2019).

57. Allison J.B. Chaney, Brandon M. Stewart & Barbara E. Engelhardt, How Algorithmic Confounding in Recommendation Systems Increases Homogeneity and Decreases Utility, 12 Proc. ACM Conf. on Recommender Sys. 224, 224 (2018).

58. See How Google Autocomplete Predictions Work, Google, https://support. google.com/websearch/answer/7368877?hl=en [https://perma.cc/BSV8–6BTL] (last visited Aug. 24, 2023).

59. Although this section is exclusively about the state's use of advanced technology to make policy decisions, there is a vast literature on how private companies use these kinds of automated systems to make decisions about credit, loan risks, housing, and much more. See, e.g., Frank Pasquale, Black Box Society: The Secret Algorithms that Control Money and Information 102 (2015) [hereinafter Pasquale, Black Box Society]; Citron & Pasquale, *supra* note 17, at 4 (describing algorithm use to score credit card applicants and rank job candidates' talent, among other uses); Katyal, Private Accountability, *supra* note 17, at 56 (describing algorithmic housing and hiring discrimination); Joshua A. Kroll, Joanna Huey, Solon Barocas, Edward W. Felten, Joel R. Reidenberg, David G. Robinson & Harlan

complex algorithms that try to predict recidivism in sentencing: "Female" is associated with lower rates of recidivism; "male" with higher.[60] The now-infamous Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) system, which assesses risk for use in parole decisions, also uses gender data in the same way.[61] Public and private employers use algorithms to assess job applicants.[62] An increasing number of jurisdictions use binary gender data to train complex algorithms meant to identify children who are at risk of committing future violence.[63] And law enforcement uses binary gender data in facial recognition tools to help identify persons of interest in criminal investigations.[64]

Data-matching and data-mining programs have several things in common that make them appear attractive for government agencies. Both automated systems use large datasets to identify patterns that might be illegible to humans but that are relevant to government agencies: fraud, eligibility, and risk assessment. Importantly, both systems are designed and marketed to reduce costs

Yu, Accountable Algorithms, 165 U. Pa. L. Rev. 633, 636 (2017) (describing algorithmic decisionmaking for loan and credit card applications). There is also a related literature about how algorithms exacerbate inequality and should trigger equal protection concerns. See, e.g., Virginia Eubanks, Automating Inequality 180–88 (2018); Barocas & Selbst, Big Data's Disparate Impact, *supra* note 12, at 673–74; Deborah Hellman, Sex, Causation, and Algorithms: Equal Protection in the Age of Machine Learning, 98 Wash. U. L. Rev. 481, 484 (2020) [hereinafter Hellman, Causation].

60. See State v. Loomis, 881 N.W.2d 749, 765 (Wis. 2016); see also Brian J. Ostrom, Matthew Kleiman, Fred Cheesman II, Randall M. Hansen & Neal B. Kauder, Nat'l Ctr. for State Cts. & Va. Crim. Sent'g Comm'n, Offender Risk Assessment in Virginia 74–76 (2002), http://www.vcsc.virginia.gov/risk_off_rpt.pdf [https://perma.cc/TAD4–7SLF] (providing calculations that demonstrate that their "results suggest that men had a higher probability of recidivating than women").

61. See Julia Dressel & Hany Farid, The Accuracy, Fairness, and Limits of Predicting Recidivism, Sci. Advances, no. eaao5580, Jan. 2018, at 1, 1; see also *Loomis*, 881 N.W.2d at 754–57; Sam Corbett-Davies, Emma Pierson, Avi Feller & Sharad Goel, A Computer Program Used for Bail and Sentencing Decisions Was Labeled Biased Against Blacks. It's Actually Not that Clear, Wash. Post (Oct. 17, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/17/can-an-algorithm-be-racist-our-analysis-is-more-cautious-than-propublicas/ [https://perma.cc/WH6P-3YQE]; Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, Machine Bias, ProPublica (May 23, 2016), https://www.propublica. org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/V6CV-QJG8].

62. Kim, *supra* note 12, at 874–90 (emphasizing that employers' use of data analytic tools to identify employees' skills also disadvantages certain groups).

63. See, e.g., Nicole M. Muir, Jodi L. Viljoen, Melissa R. Jonnson, Dana M. Cochrane & Billie Joe Rogers, Predictive Validity of the Structured Assessment of Violence Risk in Youth (SAVRY) With Indigenous and Caucasian Female and Male Adolescents on Probation, 32 Psych. Assessment 594, 597 (2020).

64. See, e.g., Lynch v. State, 260 So. 3d 1166, 1169 (Fla. Dist. Ct. App. 2018) ("[T]he crime analyst testified [that] . . . [she] [t]urn[ed] to law-enforcement databases, . . . looked up those who had been previously arrested at the address . . . [and] then used a facial-recognition program that compared the photo officers took against photos in law-enforcement databases.").

and increase efficiency.[65] As a result, automation taps into persistent norms that efficient government is "good" government that can do more with less.[66]

B. *Effects on Gender-Diverse Populations*

Data-matching systems pose unique problems for transgender and nonbinary people. Many have inconsistent identity documents because gender reclassification rules are labyrinthine and inconsistent.[67] Individuals may lack the money or time to meet onerous medical or surgical standards for updating birth certificates or driver licenses in certain jurisdictions.[68] Granted, transgender people could purposely answer questions to match their information on official documents. But lying on government forms is a crime.[69] Identifying yourself as something you're not resurrects gender dysphoria.[70] Plus, intentional self-misidentification on one form fails to solve the problem created by data-matching and data-mining algorithms: The vast reach of data-matching databases and data inputs creates the risk that any inconsistency on any form completed at any time could trigger an accusation of fraud.[71]

Transgender, nonbinary, and gender-nonconforming individuals also face increased risk from automated systems designed to turn the body into code in the most efficient way possible.[72] Machines designed for efficiency make

65. See, e.g., Charette, *supra* note 51.

66. See Brooke D. Coleman, The Efficiency Norm, 56 B.C. L. Rev. 1777, 1786–95 (2015) (describing and critiquing the tendency to associate efficiency and cost cutting with good government).

67. See Paisley Currah, Sex Is as Sex Does: Governing Transgender Identity 76–98 (2022) ("Individuals whose gender identity differs from what is traditionally associated with the sex assigned to them at birth may be included or excluded from systems of sex classification."); Katri, *supra* note 35, at 656–95 (examining American sex reclassification law); Spade, Documenting Gender, *supra* note 36, at 733–34 (same).

68. Many lack the financial means to access appropriate healthcare. But the socioeconomic marginalization of transgender people and, in particular, trans people of color exacerbates the problem. Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, The Report of the 2015 U.S. Transgender Survey 5 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/KVV9-AQ8E]; see also Transgender L. Ctr., Transgender Health and the Law: Identifying and Fighting Health Care Discrimination (2004), http://transgenderlawcenter.org/wp-content/uploads/2012/07/99737410-Health-Law-Fact.pdf [https://perma.cc/V4K8-BTJM].

69. See, e.g., IRS, U.S. Department of Treasury, U.S. Individual Income Tax Return Form 1040 (2022), https://www.irs.gov/pub/irs-pdf/f1040.pdf [https://perma.cc/WD72-EM6Z] ("Under penalties of perjury, I declare that . . . to the best of my knowledge and belief, [the information I provided is] true, correct, and complete.").

70. "Gender dysphoria" refers to clinical distress associated with one's sex assigned at birth. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 455–56 (5th ed. 2013).

71. Currah & Mulqueen, *supra* note 2, at 559 (stating that providing inconsistent information during the air travel process may create false security risk alerts).

72. Kathryn Conrad, Surveillance, Gender, and the Virtual Body in the Information Age, 6 Surveillance & Soc'y 380, 382–85 (2009) (referring to tools like iris scanners, digital fingerprinting, and facial recognition as the "informatization of the body" by the state

conclusions that cover most people most of the time. They "stylize reality";[73] models make assumptions about the world to make data more legible and easier to manipulate.[74] As a result, they have trouble correctly identifying people who do not meet social expectations associated with their assigned gender at birth.[75] If training data is binary or based on cisnormative expectations of how males and females are supposed to look,[76] as was the case with the full-body scanner that flagged Sasha as a security risk, those who exist outside the gender binary are treated as outliers.[77] Similar harms can affect people of color, especially when AI is trained on mostly white faces and expected to make predictions about how Black or Asian individuals should look. That is how facial recognition technology classifies the eyes of Asian faces as "closed" or misidentifies Black women at higher rates than white women.[78]

Plus, data-mining systems need training data, all of which come from a time (even in the very recent past) when transgender, nonbinary, and gender-nonconforming people were barely recognized in the public consciousness.[79] This "increase[s] the influence of the past"—one dominated by the gender binary (as well as white supremacy and homophobia, among other exclusionary ideologies)—on the future.[80] The process is also iterative and self-reinforcing: Data inputs reflect the gender binary; algorithmic technologies output new data that reflect the gender binary; those data are then added back to better train the automated system, thereby amplifying and replicating the gender assumptions built into the algorithm itself.[81]

The exclusion of gender diversity also stems from the social contexts in which algorithmic technologies are designed. The people who design automated decisionmaking systems and the corporate organizations in which they

(internal quotation marks omitted) (quoting Irma van der Ploeg, Genetics, Biometrics and the Informatization of the Body, 43 Ann Ist Super Sanità 44, 44 (2007) (It.))).

73. Mar Hicks, Hacking the Cis-tem: Transgender Citizens and the Early Digital State, 41 IEEE Annals Hist. Computing, no. 1, 2019, at 20, 29.

74. George E.P. Box & Norman R. Draper, Empirical Model-Building and Response Surfaces 74 (1987).

75. See Scheuerman et al., *supra* note 56, at 144:14–144:15.

76. See *id.* at 144:17.

77. See Kendra Albert & Maggie Delano, Algorithmic Exclusion, *in* Handbook of Critical Studies of Artificial Intelligence 538, 540 (Simon Lindgren ed., 2023) ("[M]ethods [used] to remove outliers from particular datasets may result in indirect exclusion of particular groups of people . . . .").

78. See Buolamwini & Gebru, *supra* note 12, at 10–11; Selina Cheng, An Algorithm Rejected an Asian Man's Passport Photo for Having "Closed Eyes", Quartz (Dec. 7, 2016), https://qz.com/857122/an-algorithm-rejected-an-asian-mans-passport-photo-for-having-closed-eyes/ [https://perma.cc/YBZ8-G3FX].

79. Indeed, as the sociotechnical scholar Os Keyes found in a review of hundreds of published studies at the intersection of AI and gender, every single one reified the gender binary. Os Keyes, The Misgendering Machines: Trans/HCI Implications of Automatic Gender Recognition, 2 Proc. ACM on Hum.-Comput. Interaction, no. CSCW, art. 88, at 88:1, 88:2 (2018).

80. Hellman, Causation, *supra* note 59, at 487.

81. Katyal & Jung, *supra* note 10, at 710.

do their work are notoriously unrepresentative; they skew cisgender, heterosexual, and white.[82] The lived experiences of that limited slice of the population are more likely than others to make their way into the political, distributional, and technical decisions in design.[83]

C. *Harms of Erasure*

Automated decisionmaking systems harm marginalized populations in at least four related ways. The first two are practical. First, algorithmic tools create repeated moments of vulnerability for transgender and nonbinary individuals with inconsistent identity documents. Every airport or doctor's visit, every job or benefits application, every background check, every vote, every interaction with the police, every plan to start a business, and every identity verification demand triggers a larger system of technological surveillance designed, from the ground up, to erase or misgender anyone outside the norm.[84] Second, and relatedly, the pervasive danger of vulnerability causes chilling effects. To avoid situations likely to include misgendering, many transgender individuals choose to avoid those situations entirely, opting themselves out of daily life, government benefits, and opportunity.[85] Interviews with transgender individuals describe a "continuous assault upon our existence, well-being, opportunity, and potential" and a "process of cisgendering reality" whereby "only cisgender people may move freely without punishment, shock, and stigmatization coming from others," among other similar expressions of harm.[86] This may be one reason why transgender, nonbinary, and gender-nonconforming individuals report higher rates of depression, suicidal ideation, loneliness, and underemployment than the general population.[87]

Third, exclusion comes with dignitary harms as well. Institutional erasure tells gender-nonconforming individuals that they do not count, that their identities do not matter, and that their humanity does not exist. This exclusion is then broadcast throughout the data ecosystem, affecting the views of everyone who encounters binary gender data.[88]

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82. Kate Crawford, Opinion, Artificial Intelligence's White Guy Problem, N.Y. Times (June 25, 2016), https://www.nytimes.com/2016/06/26/opinion/sunday/artificial-intelligences-white-guy-problem.html (on file with the *Columbia Law Review*).

83. *Id.*

84. Chan Tov McNamarah, Misgendering, 109 Calif. L. Rev. 2227, 2234–35 (2021) (arguing that misgendering and misrecognition are part of a pattern of subordination that denigrates the personhood of transgender and nonbinary people).

85. Currah & Mulqueen, *supra* note 2, at 560.

86. J.E. Sumerau & Lain A.B. Mathers, America Through Transgender Eyes 3–4 (2019).

87. James et al., *supra* note 68, at 5–6.

88. See Taylor Flynn, Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms, 18 Temp. Pol. & C.R.L. Rev. 465, 466 (2009). For more on expressive effects of law on gender, see *infra* section III.D. For a more general account of expressive effects of the law, see Danielle Keats Citron, Law's Expressive Value in Combating Cyber Gender Harassment, 108 Mich. L. Rev. 373, 404–14 (2009) [hereinafter Citron, Expressive Value]; Cass R. Sunstein, On the Expressive Function of Law, 144 U.

Fourth, and finally, algorithms and automated systems more generally amplify these harms, creating powerful expressive effects. Because they rely on data inputs to make predictive policy decisions about the future, algorithms replicate and entrench old biases.[89] Popular trust in computers as infallible make those predictions harder to challenge.[90] Beyond merely amplifying old harms, automation privileges decisionmaking based exclusively on quantifiable variables, ignoring value-based, qualitative, and human rights considerations that defy neat clustering into numerical values. In other words, whereas inconsistencies in documents could have once been resolved through civil servant discretion, machines programmed to see only ones and zeros transform data input errors or inconsistencies into grounds for benefit denials, fraud accusations, and discrimination.

To most scholars, technology is the root cause of these harms; law seems absent from this story of automation and discrimination. Legal scholars who see law as a means of holding states and technology companies accountable for harms caused by automated decisionmaking systems tend to gloss over the things that created the conditions necessary for automation in the first place. Indeed, because it focuses on legal redress after algorithmic harm, much of the algorithmic accountability literature skips right to descriptions of legal responses to harm.[91] Some scholars merely note that algorithmic policymaking is becoming "more common."[92] Others acknowledge that the rise of automation stems from austerity.[93] Although tight budgets are undoubtedly the products of law, this legal narrative of the rise of the automated administrative state is thin.

Automated systems that apply rules, match identities, and mine for patterns need data to function; states need to find or purchase those data from somewhere. System designers also need instructions about what categories of data to include in the system. They need principles, values, directions, goals, and budgets with which to build automated tools for the state to use. In particular, the state must decide whether, when, and how to collect gender data; whether, when, and how to share it; and whether, when, and how to use it.

Pa. L. Rev. 2021, 2022–24 (1996); Matthew Tokson & Ari Ezra Waldman, Social Norms in Fourth Amendment Law, 120 Mich. L. Rev. 265, 279–84 (2021).

89. *E.g.*, Cathy O'Neil, Weapons of Math Destruction 3, 7–8 (2016); Pasquale, Black Box Society, *supra* note 59, at 14–15; Katyal, Private Accountability, *supra* note 17, at 69.

90. Scholars call this "automation bias." See Ryan Calo, Modeling Through, 71 Duke L.J. 1391, 1417 (2022) [hereinafter Calo, Modeling]; Citron, Technological Due Process, *supra* note 17, at 1271–72.

91. See *supra* note 17; see also Frank Pasquale, The Second Wave of Algorithmic Accountability, LPE Project (Nov. 25, 2019), https://lpeproject.org/blog/the-second-wave-of-algorithmic-accountability/ [https://perma.cc/P68K-K87D] (referring to this scholarship as the "first wave," following similar terminology used in the feminist movement).

92. Hellman, Causation, *supra* note 59, at 484.

93. *E.g.*, Calo & Citron, *supra* note 23, at 800; Citron, Technological Due Process, *supra* note 17, at 1259; see also Robert Brauneis & Ellen P. Goodman, Algorithmic Transparency for the Smart City, 20 Yale J.L. & Tech. 103, 114 (2018) (discussing how tight budgets impel municipalities to use private technology companies for their automation needs).

At each stage—collection, sharing, and automated use—binary gender data's pathway is laid, brick by brick, by law and, more specifically, by a legal regime designed primarily for efficiency. The next three Parts describe this pathway and how it erases gender-diverse populations and causes the above harms.

II. Law and the Collection of Binary Gender Data

Gender data's path begins with laws that require states to collect gender data. It is difficult to estimate how many state laws require individuals to provide their sex or gender to engage in daily life; even targeted searches return thousands of hits. The examples discussed below are paradigmatic of the law's role in triggering many gender data streams. After describing some of these laws, this Part then shows that even though the law rarely states *how* the information should be collected, the law's underlying assumptions and practical implementation act as a filter that makes binary gender data streams most likely.

A. *Statutory Gender Data-Collection Mandates*

Almost all states use individuals' sex and gender data in several administrative areas.[94] Thirty-seven states require driver license or identification card applicants to provide their sex.[95] Eight states ask for gender.[96] Ten states have

94. This Part recites some of the ways sex and gender data are used. It does not support their use. Indeed, using sex or gender to classify populations has been deftly criticized in the sociolegal literature. See, e.g., Heath Fogg Davis, Beyond Trans: Does Gender Matter? 17 (2017); Wipfler, *supra* note 35, at 493.

95. See Alaska Stat. § 28.15.061(b)(1) (2023); Ariz. Rev. Stat. Ann. §§ 28–3158(C), - 3165(F) (2023); Ark. Code Ann. § 27–16–701(b)(1) (2023); Colo. Rev. Stat. § 42–2-107(2)(a)(I) (2023); Del. Code tit. 21, § 2711(b) (2023); Ga. Code Ann. § 40–5-25(c) (2023); Idaho Code § 49–306(3) (2023); 625 Ill. Comp. Stat. Ann. 5/6–106(b) (West 2023); Iowa Code § 321.182.1.a (2023); Ky. Rev. Stat. Ann. § 281A.140(1)(b) (West 2023); La. Stat. Ann. § 32:410.A(3)(a)(viii) (2023); Md. Code Ann., Transp. § 16–106(b)(1) (West 2023); Mass. Gen. Laws Ann. ch. 90F, § 8(3) (West 2023); Mich. Comp. Laws Ann. § 257.307(1)(a) (West 2023); Minn. Stat. § 171.06.3(1) (2023); Miss. Code Ann. § 63–1-19(1)(a) (2023); Mo. Ann. Stat. § 302.171(1) (West 2023); Mont. Code Ann. § 61–5-107(2) (West 2023); Nev. Rev. Stat. Ann. § 483–290.1(d) (West 2023); N.M. Stat. Ann. § 66–5-9(C) (2023); N.Y. Veh. & Traf. Law § 502.1 (McKinney 2023); N.C. Gen. Stat. § 20–7(b1)(3) (2023); N.D. Cent. Code § 39–06–07.2 (2023); Ohio Rev. Code Ann. § 4506.07(A)(1) (2023); Okla. Stat. tit. 47, § 6–106.B.3 (2023); Or. Rev. Stat. § 807.050(1) (West 2023); 31 R.I. Gen. Laws § 31–10.3–18(b) (2023); S.C. Code Ann. § 56–1-80(A)(3) (2023); S.D. Codified Laws § 32–12–3 (2023); Tenn. Code Ann. § 55–50–321(c)(1)(A) (2023); Tex. Transp. Code Ann. § 521.142(c)(1) (West 2023); Utah Code § 53–3-205(8)(a)(i)(C) (2023); Va. Code Ann. § 46.2–323(B) (2023); Wash. Rev. Code Ann. § 46.20.091(1)(c) (West 2023); W. Va. Code Ann. § 17B-2–6(c) (LexisNexis 2023); Wis. Stat. & Ann. § 343.14(2)(b) (2023); Wyo. Stat. Ann. § 31–7-111(b)(ii) (2023).

96. See Cal. Veh. Code § 12800(a)(1) (2023); Conn. Gen. Stat. Ann. § 14–36h(a) (West 2023); Fla. Stat. Ann. § 322.14(1)(a) (West 2023); Haw. Rev. Stat. Ann. § 286–111(d) (West 2023); Ind. Code Ann. § 9–24–9-2(a)(3) (West 2023); Kan. Stat. Ann. § 8–240(c) (West 2023); Neb. Rev. Stat. § 60–484(3) (2021); N.H. Rev. Stat. Ann. § 263:5(II)(b) (2023). The remaining state laws are silent. For a brief discussion of the differences yet entanglements between sex and gender, please see *infra* notes 222–225 and accompanying text.

statutes requiring sex data on voter registration applications;[97] three collect gender data.[98] All states require applicants to present a form of identification in order to register to vote, and all driver licenses and state identification cards must include sex designations under federal law.[99] Statutes governing birth and death certificates all mandate the inclusion of sex data.[100] And five states still require parties to disclose their sex on marriage license applications.[101]

Sex and gender data are also statutorily required in more targeted areas of social and professional life. Firearm licenses require sex or gender.[102] Prospective state employees, licensed professionals, and foster parents, among others, have to provide their sex for background checks.[103] Licensure for for-hire and private carrier vehicle drivers,[104] chiropractors,[105] private detectives,[106] medical cannabis caregivers,[107] commercial fishers,[108] home solicitation salespersons,[109]

97. See Ala. Code § 17–4-36(a) (2023); Alaska Stat. § 15.07.060(a)(1) (2023); Fla. Stat. Ann. § 97.052(2)(i) (West 2023); Ga. Code Ann. § 21–2-417(1)(c)(5) (2023); Idaho Code § 34–411(1)(a) (2023); 10 Ill. Comp. Stat. Ann. 5/5–7 (West 2023); Iowa Code § 48A.11(1)(g) (2023); Kan. Stat. Ann. § 25–2309(b)(4) (West 2023); La. Stat. Ann. § 18:104(B)(1) (2023); S.C. Code Ann. § 7–5-170(2) (2023); see also James et al., *supra* note 68, at 233–35 ("[Transgender] respondents reported not being registered to vote because they wanted to avoid anti-transgender harassment by election officials . . . and because they thought their state's voter identification law would stop them from voting . . . .").

98. See N.M. Stat. Ann. § 1–5-19(B) (2023); Va. Code Ann. § 24.2–418(A) (2023); W. Va. Code Ann. § 3–2-5(d)(8) (LexisNexis 2023).

99. See Adair, *supra* note 36, at 587–88 (explaining how sex markers are universally mandated by the federal 2005 Real ID Act).

100. See Lisa 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, 381–83 (2013).

101. See Colo. Rev. Stat. § 14–2-105(1)(a) (2023); Del. Code tit. 13, § 122(a) (2023); 750 Ill. Comp. Stat. Ann. 5/202(a)(1) (West 2023); Minn. Stat. § 517.08(1a)(1) (2022); Or. Rev. Stat. § 106.041(2)(b) (West 2023).

102. Examples of laws requiring sex data in order to carry a firearm include Ark. Code Ann. § 5–73–310(1) (2023); Haw. Rev. Stat. Ann. § 134–2 (West 2023); 430 Ill. Comp. Stat. Ann. 65/6(a) (West 2023); Ind. Code Ann. 35–47–2-3(e) (West 2023); Iowa Code §§ 724.10, .17 (2023); Mass. Gen. Laws Ann. ch. 140, § 123 (West 2023); N.J. Stat. Ann. § 2c:58–3(e) (West 2023); S.C. Code Ann. § 23–31–215(E)(3) (2023); Wis. Stat. & Ann. § 175.60(5) (2021–2022). Those requiring gender data include, for example, Cal. Penal Code §§ 30900(b)(3), (c)(3), 33850(a)(1) (2020); Ky. Rev. Stat. Ann. § 237.110(20)(b)(2) (West 2023); Mo. Ann. Stat. § 571.205(4)(1) (West 2023); N.M. Stat. Ann. § 29–19–5(A)(1) (2005); N.Y. Penal Law § 400.00(5) (McKinney 2023); Va. Code Ann. § 18.2–308.04(E) (2023); Wash. Rev. Code Ann. § 9.41.070(4) (West 2022).

103. *E.g.*, Ala. Code § 34–25B-13(a)(1) (2023); Del. Code tit. 24, §§ 1205, 1313, 5507 (2023); Haw. Rev. Stat. Ann. §§ 421I-12, 514B-133(a) (West 2023); 70 Ill. Comp. Stat. Ann. 1205/8–23(a), 3605/28b (West 2023); 18 Pa. Stat. and Cons. Stat. Ann. § 6111(b)(1.1)(iii) (West 2023); Tenn. Code Ann. § 62–26–208(a)(1)(B) (2023).

104. 70 Ill. Comp. Stat. Ann. 3605/28b.

105. Mo. Ann. Stat. § 331.030(2) (West 2023); Tenn. Code Ann. § 63–4-109(b) (2023).

106. Minn. Stat. § 326.3382(a)(1) (2022).

107. Utah Code § 26B-4–214(5)(b) (2023).

108. Cal. Fish & Game Code § 7851 (2023).

109. Fla. Stat. Ann. § 501.022(2)(c) (West 2023).

anyone "engaged in the business of collecting secondhand building materials for resale,"[110] and precious metals dealers all require sex data in some states.[111] Organ donors must be issued identification cards that list their sex.[112] Anyone in Illinois and Missouri whose job requires them to work with explosives has to provide their sex to obtain a license.[113] Collection agents in Arkansas and bail enforcement agents in Delaware can be licensed only if they provide their sex.[114] If minors want to work in the District of Columbia or Puerto Rico, their permit or certificate must have, among other things, their sex.[115] This section could go on and on.[116]

B. *Mandating the Gender Binary at Data Collection*

Although these laws mandate sex and gender data collection, it is rare for a law to explicitly detail how to collect the data, what answer options to provide, how to phrase the question, or whether forms should explain why the information is required. Therefore, it is at least theoretically possible that these laws could catalyze gender data streams that respect diverse gender identities. To be sure, some laws do.[117] But three features of statutory gender data

110. Va. Code Ann. § 59.1–118 (2023).

111. Va. Code Ann. § 54.1–4108(B) (2023).

112. Md. Code Ann., Transp. § 12–301(g)(2)(iii) (West 2023).

113. 225 Ill. Comp. Stat. Ann. 210/2002 (West 2023); Mo. Ann. Stat. § 319.306(1)(4) (West 2023).

114. Ark. Code Ann. § 17–24–302(a)(2) (2023); Del. Code tit. 24, § 5507(c) (2023).

115. D.C. Code § 32–208 (2023); P.R. Laws Ann. tit. 29, § 436 (2012).

116. Other areas where state law requires the collection of sex and gender data include public-facing reports and applications for scholarships, loan forgiveness, and appointed government positions. *E.g.*, Cal. Gov't Code § 12011.5(n)(1)(A)–(B) (2023) (requiring release of gender data of all applicants to state judicial positions); Cal. Welf. & Inst. Code § 11024(a) (2023) (breaking down Medi-Cal enrollees by gender); Conn. Gen. Stat. Ann. § 10–95k(a) (West 2023) (requiring the board of technical colleges to deliver biennial reports to the state's General Assembly Committee on Education, including "the number accepted and the number enrolled reported by race and sex"); Fla. Stat. Ann. Sup. Ct. Jud. Nominating Comm'n Rules Proc. § II (West 2023) (applicants for state judicial appointments); 20 Ill. Comp. Stat. Ann. 2610/11.5(b) (West 2023) (requiring the Illinois State Police Merit Board to have a gender breakdown for individuals promoted in their reports); 110 Ill. Comp. Stat. Ann. § 932/20(f) (West 2023) (loan repayment and scholarships for healthcare workers); N.J. Stat. Ann. § 44:15–2(b) (West 2023) (requiring report of low-income elderly residents to break down population by gender); *id.* § 52:17B-4.11(a)(1)–(5) (requiring breakdown of police forces by gender); 40 R.I. Gen. Laws § 8.7–9(c)(2) (2023) (requiring Rhode Island's health department to report on the sex breakdown of individuals with disabilities on Medicaid); Tex. Gov't Code Ann. § 411.193 (West 2023) (making reports of gun licenses issued the previous month, broken down by gender, available to the public); Va. Code Ann. § 30–394(A) (2023) (requiring gender data to apply to be a citizen commissioner on the Virginia Redistricting Commission).

117. For example, in 2018, New York City's health department added the nonbinary gender category "X" to birth certificates, so the department built a new form to reflect the new option. See Certificate Corrections, N.Y.C. Health, https://www.nyc.gov/site/doh/services/certificate-corrections.page [https://perma.cc/HHP7-UHWA] (last visited Aug. 24, 2023). California law states that residents "shall choose their gender category of female, male, or nonbinary" on a driver license application. Cal. Veh. Code § 12800(a)(2) (2023). Therefore,

mandates tend to binarize whatever data are collected: the source of the data, the assumption that gender data are a useful securitizing tool, and the law's practical implementation. The first two concerns are discussed here; the third is detailed in the next section.

The first feature of state gender data-collection mandates that tilts the data toward the gender binary is that much of the data is created by the state in the first place. It is commonly presumed that sex and gender data are raw materials in what Professor Julie Cohen calls the "biopolitical public domain," or a "source of raw materials about people framed as inputs into productive, informationalized activity."[118] These data are biopolitical because they are information about people used for classification and, therefore, have political and distributive consequences; they are also presumed to be in the public domain—namely, there for the taking within a legal construct of privilege, or "conduct as to which no one has a right to object."[119] The biopolitical public domain is a foundational premise of the information economy and the automated state. It asserts that certain data are raw, that no previous claims to those data exist, and that they can be collected, used, and mixed with labor and turned into something productive.[120]

But gender designations are not raw. They are mediated by the state before and after birth: at Medicaid recipients' prenatal appointments with healthcare providers, during which physicians designate the fetus's sex; at birth, when physicians or bureaucrats complete birth certificates and Live Birth Worksheets; and at schools, where nurses designate sex or gender on immunization and health forms. By the time Sasha walked through the full-body scanner and Toby submitted his workers' compensation claim, they had both been designated by the state as male or female.[121] The presumed power of official documents to verify identity derives precisely from "the authority of the institution that issued it," not from the documents' inherent accuracy or the law's respect for self-identification.[122] In other words, state laws that require gender data collection are relying on the state's determinations of a person's gender, which historically have been binary.[123]

In addition to assuming that sex and gender data are raw and accurate, a regime that uses sex and gender data to verify identity, assess risk, and maintain security also assumes that sex and gender are effective at achieving these

that gender data stream will, by statute, include data on nonbinary individuals. See Cal. Dep't Motor Vehicles, Form DL 329S, Gender Category Request (Jan. 2019), https://www.dmv.ca.gov/portal/uploads/2020/03/dl329S.pdf [https://perma.cc/3PNP-S7C7].

118. Cohen, Between Truth and Power, *supra* note 16, at 48.

119. *Id.* at 49.

120. *Id.* at 50–52.

121. Spade, Normal Life, *supra* note 19, at 14.

122. Irma van der Ploeg, Written on the Body: Biometrics and Identity, 29 Comput. & Soc'y, no. 1, 1999, at 37, 38.

123. Jane Caplan, "This or That Particular Person": Protocols of Identification in Nineteenth-Century Europe, *in* Documenting Individual Identity 49, 52 (Jane Caplan & John Torpey eds., 2001).

goals. But the only way these data could be effective is if they were unchanging descriptions of individuals. If they weren't, gender data would do a poor job at ensuring that the people applying for jobs or benefits or licenses are who they say they are. Security systems use retinal scans instead of, say, hair color for the same reason: The former relies on data that rarely, if ever, change; the latter can change on a whim. One is a more permanent marker of identity than the other.[124] Of course, sex and gender designations can change. Therefore, the only people for whom gender data can help predict whether a given person is committing fraud are cisgender people. In this way, the state's mere use of sex and gender data as securitizing, identification-verifying tools necessarily implies cisnormativity.

C. *Entrenching the Gender Binary Through Form Design*

This leads to the third feature of statutes' capacity to binarize gender data—namely, their implementation in practice through official government forms. We fill out forms to obtain identification cards, purchase license plates, practice licensed professions, record vaccinations for schoolchildren, and obtain government-sponsored healthcare, among myriad other aspects of everyday life. Forms were supposed to give Toby access to compensation after being injured on the job. Forms' ubiquity means that they have an outsized effect on how we perceive and understand the law.[125]

Forms are also where the state collects data to classify people by race, gender, ethnicity, disability, and myriad other demographic characteristics. The design of those forms determines what the state's gender data will look like. That is a type of power exercised by what political scientist Michael Lipsky called "street-level bureaucrats."[126] Street-level bureaucrats are frontline civil servants with the least formal authority but the most discretion to determine

124. Not that we should rush to use retinal scans and other biometric data. See, e.g., Danielle Keats Citron, Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age, 80 S. Cal. L. Rev. 241, 250–53, 255 (2007) (noting that "[t]he release of biometric information from a database will engender serious harm as criminals can use such data to impersonate individuals").

125. See Patricia Ewick & Susan S. Silbey, The Common Place of Law: Stories From Everyday Life 30–34 (1998) (introducing the concept of "legal consciousness").

126. Michael Lipsky, Street-Level Bureaucracy 3 (2d ed. 2010). Granted, traditional street-level bureaucrats have often been defined by their face-to-face interactions with the public. *Id.* at 3–4. But their choices affect the practical implementation of the law. Mark Bovens & Stavros Zouridis, From Street-Level to System-Level Bureaucracies: How Information and Communication Technology Is Transforming Administrative Discretion and Constitutional Control, 62 Pub. Admin. Rev. 174, 181 (2002). Form designers have at least three characteristics in common with street-level bureaucrats: They exercise discretion, they shape policy through their discretionary acts, and they sit in social and organizational contexts that may affect their work. They exercise discretion because even when formal law requires an agency to collect sex or gender data, the law rarely says anything about *how* the agency should collect it. See Evelyn Z. Brodkin, Reflections on Street-Level Bureaucracy: Past, Present, and Future, 72 Pub. Admin. Rev. 940, 943 (2012) (reviewing Lipsky, *supra*) (noting that policy is "indeterminate").

how the law is implemented.[127] For example, in Professor Lipsky's canonical account, street-level bureaucrats decide how to achieve the best interests of children in foster care, flexibly apply rules to send lifesaving benefits to those in need, and evaluate patient medical needs to secure care.[128] Frontline workers also determine precisely how to begin the large, free-flowing system of gender data among government agencies at the local, state, and federal levels.[129] The law of sex and gender "remains an abstraction" until these frontline workers carry it out and apply it in real life,[130] communicating with the public through the gender questions and answer options they create.[131] When they exercise this discretion to collect sex and gender information in certain ways, gender-box designers are effectively "making law" in the most practical sense.

Gender questions on most government forms are limited to male/female answer options.[132] This is because form designers work in organizational contexts in which a combination of social forces incentivizes inertia.[133] These include complex decisionmaking processes that make change difficult, social networks of colleagues that help civil servants "learn the ropes" and maintain the status quo, the perception that expertise is irrelevant to gender question design, and intergovernmental dependencies that constrain design options.[134] These pressures, combined with norms against politicization of the

127. Steven Maynard-Moody & Michael Musheno, State Agent or Citizen Agent: Two Narratives of Discretion, 10 J. Pub. Admin. Rsch. & Theory 329, 333 (2000). Such discretion is inevitable because it is inherent to both street-level work specifically and "all acts of administration" generally. *Id.* at 338–39.

128. See Lipsky, *supra* note 126, at 3 (providing examples of roles street-level bureaucrats inhabit in public service agencies).

129. See Fahey, Data Federalism, *supra* note 16, at 1078–79 (documenting the ways mid- to line-level bureaucrats are part of a larger system of data exchange between agencies).

130. See Bernardo Zacka, When the State Meets the Street: Public Service and Moral Agency 16 (2017).

131. Koen P.R. Bartels, Public Encounters: The History and Future of Face-to-Face Contact Between Public Professionals and Citizens, 91 Pub. Admin. 469, 476–77 (2013) (describing the performative nature of interactions between public officials and citizens).

132. Ari Ezra Waldman, The Gender Box: Heterogeneity and Inclusivity in State Collection of Sex and Gender Data 20 (n.d.) (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Waldman, The Gender Box] (empirically measuring the extent to which sex and gender questions on government forms permit answers beyond the gender binary).

133. Ari Ezra Waldman, Opening the Gender Box: Legibility Dilemmas and Gender Data Collection on U.S. State Government Forms, 49 Law & Soc. Inquiry (forthcoming 2023) (manuscript at 14) (on file with the *Columbia Law Review*) [hereinafter Waldman, Opening].

134. See, e.g., Deneen M. Hatmaker, Hyun Hee Park & R. Karl Rethemeyer, Learning the Ropes: Communities of Practice and Social Networks in the Public Sector, 14 Int'l Pub. Mgmt. J. 395, 396 (2011) (explaining how an organization's "socialization tactics" function to inculcate organizational values in newcomers); Rebecca Ingber, The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power, 110 Am. J. Int'l L. 680, 696–98 (2016) (describing how deliberative bodies that operate on a "consensus model" can stifle dissent); Gillian E. Metzger, Administrative Constitutionalism, 91 Tex. L. Rev. 1897, 1900, 1929–30 (2013) (describing how federal agencies' complex web of interactions with

bureaucracy,[135] status quo biases and path dependencies,[136] the urge to simplify information for superiors, and decades-long trends toward digitization and automation,[137] all encourage form designers to restrict sex and gender questions to male/female answer options.[138]

As a result, even if state laws simply require an agency to collect sex and gender data generally, the forms the agency uses to collect that data will most often reflect the gender binary. Consider, for example, how state boards of elections and secretaries of state implement voter registration laws. Of the seventeen states that explicitly require or request that citizens designate their sex or gender when registering to vote, fourteen use forms with only male/female options.[139] And of the remaining thirty-four jurisdictions (including the

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the public and other governmental bodies helps construct constitutional meaning); Nadine Raaphorst & Kim Loyens, From Poker Games to Kitchen Tables: How Social Dynamics Affect Frontline Decision Making, 52 Admin. & Soc'y 31, 32–34 (2020) (arguing that the complexity of multiprofessional social interactions directly affects frontline decisionmaking); Gerald E. Caiden, Excessive Bureaucratization: The J-Curve Theory of Bureaucracy and Max Weber Through the Looking Glass, Dialogue, Summer 1985, at 21, 31–32 (explaining how careerism in bureaucratic organizations can result in "self-perpetuating" systems where "mediocrity predominates").

135. See Ingber, *supra* note 134, at 687; Jon D. Michaels, An Enduring, Evolving Separation of Powers, 115 Colum. L. Rev. 515, 541–44 (2015).

136. See Graham Allison & Philip Zelikow, Essence of Decision: Explaining the Cuban Missile Crisis 148–49 (Longman 2d ed. 1999) (1971) (defining path dependency in the context of government decisions); William Samuelson & Richard Zeckhauser, Status Quo Bias in Decision Making, 1 J. Risk & Uncertainty 7, 8 (1988) (finding that "decision makers exhibit a significant status quo bias"); Philip J. Weiser, Entrepreneurial Administration, 97 B.U. L. Rev. 2011, 2028–29 (2017) (describing path dependency as a barrier to entrepreneurial approaches to agency work). There are related path dependencies in the formal law, as well. See Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 Iowa L. Rev. 101, 104–05 (2001) (applying path dependence theory to the common law doctrine of stare decisis).

137. See Paul Schwartz, Data Processing and Government Administration: The Failure of the American Legal Response to the Computer, 43 Hastings L.J. 1321, 1322–25 (1992) (proposing principles of data protection law to counter the rise of the digitization of personal data by the government).

138. This does not exclude the reality that transphobia pervades social and legal institutions. See Gayle S. Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, *in* Culture, Society and Sexuality, A Reader 150, 158 (Richard Parker & Peter Aggleton eds., 2d ed. 2007) (identifying "transsexuals" as one of the "most despised sexual castes"); see also Riki Anne Wilchins, Read My Lips: Sexual Subversion and the End of Gender 230 (1997) (defining transphobia as the "fear and hatred of changing sexual characteristics").

139. Compare Ala. Code § 17–4-36(a) (2022) (requiring the reporting of registered voters' sex to the Secretary of State), with Ala. Sec'y of State, State of Alabama Voter Registration Form (July 5, 2022), https://www.sos.alabama.gov/sites/default/files/voter-pdfs/nvra-2.pdf [https://perma.cc/Q74K-NKFP] (providing only male/female options under sex). Compare Alaska Stat. § 15.07.060(a)(1) (2023) (requiring reporting of the applicant's sex during voter registration), with Alaska Div. of Elections, State of Alaska Voter Registration Application, https://www.elections.alaska.gov/doc/forms/C03-Fill-In.pdf [https://perma.cc/5PZ6-A6M3] (last updated May 12, 2021) (listing only "Male" and "Female" as options under "Gender"). Compare Fla. Stat. Ann. § 97.052(2)(i) (West 2023) (mandating the voter

District of Columbia) where the law is silent on whether sex or gender data are

registration application to include a question on the applicant's sex), with Fla. Dep't of State, Florida Voter Registration Application (Oct. 2013), https://files.floridados.gov/media/704795/dsde39-english-pre-7066–20200914.pdf [https:// perma.cc/XQS8-BEJD] ("Gender: M, F"). Compare Ga. Code Ann. § 21–2-417(1)(c)(5) (2023) (requiring the voter identification card to list voters' sex), with Ga. Sec'y of State, State of Georgia Application for Voter Registration, https://sos.ga.gov/sites/default/files/forms/GA_VR_APP_2019.pdf [https://perma.cc/3SVQ-B89C] (last visited Aug. 24, 2023) ("Gender: Male, Female"). Compare Idaho Code § 34–411(1)(a) (2023) (requiring individuals wanting to register to vote to provide proof of identity, including their sex), with Idaho Sec'y of State, Idaho Voter Registration Form (2022), https://sos.idaho.gov/elections/forms/voter_registration.pdf [https://perma.cc/M7VW-D8PB] ("Male/Female"). Compare 10 Ill. Comp. Stat. Ann. 5/5–7 (West 2023) (necessitating that applicants provide information about their sex to determine their identification for registering to vote), with Ill. State Bd. of Elections, Illinois Voter Registration Application (Oct. 2022), https://elections.il.gov/electionoperations/votingregistrationforms.aspx [https://perma.cc/6DJG-8YA7] ("Sex: M, F, X"). Compare Iowa Code § 48A.11(1)(g) (2023) (asserting that voter registration forms in Iowa must have an option for voter registration applicants to provide their sex), with Iowa Sec'y of State, State of Iowa Official Voter Registration Form, https://sos.iowa.gov/elections/pdf/voteapp.pdf [https://perma. cc/5Y5U-VHCE] (last updated Dec. 28, 2022) ("Sex: Male, Female"). Compare Kan. Stat. Ann. § 25–2309(b)(4) (West 2023) (enabling the collection of information about applicants' sex to register them as voters and prevent voter fraud), with Kan. Sec'y of State, Kansas Voter Registration Application, https://www.kssos.org/forms/elections/voterregistration.pdf [https://perma.cc/VCV9-H85N] (last updated Oct. 8, 2020) ("Male/Female"). Compare La. Stat. Ann. § 18:104(B)(1) (2023) (allowing applicants to provide information about their sex either of their own volition or after being prompted for additional information), with La. Sec'y of State, Louisiana Voter Registration Application, https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ApplicationToRegisterToVote.pdf [https:// perma.cc/R9WP-46N2] (last updated June 2019) ("Sex: M, F"). Compare N.M. Stat. Ann. § 1–12–7.3(A)(2) (2023) (requiring that the voter registration checklist include the voter's gender), with N.M. Sec'y of State, Register to Vote (2015), https://portal.sos.state. nm.us/ovr/VRForms/VRFormEnglishFinal.pdf [https://perma.cc/UV4J-34M4] ("Gender: ___"). Compare N.C. Gen. Stat. § 163–82.4(a)(6) (2023) (mandating the inclusion of gender in North Carolina's voter registration form), with N.C. State Bd. of Elections, North Carolina Voter Registration Application (Apr. 2023), https://dl.ncsbe.gov/Voter_Registration/NCVoterRegForm_06W.pdf [https://perma.cc/9NZC-KHTT] ("[O]ptional[:] Gender: Male, Female"). Compare S.C. Code Ann. §§ 7–5-170, -185 (2023) (instructing applicants to provide their sex in their application prior to officially becoming registered to vote), with S.C. Election Comm'n, South Carolina Voter Registration, https://scvotes.gov/wp-content/uploads/2023/08/SEC-FRM-1301–202305-VR-by-Mail-web-1.pdf [https://perma.cc/7TJT-YVKG] (last visited Oct. 7, 2023) ("Sex: Male, Female"). Compare Tenn. Code Ann. § 2–2-116 (2023) (maintaining that each applicant must provide their sex prior to being registered to vote), with Tenn. Sec'y of State, Tennessee Mail-In Application for Voter Registration, https://sos-tn-gov-files.s3.amazonaws.com/forms/ss-3010.pdf [https://perma.cc/RA4N-9SF2] (last updated Sept. 2020) ("Sex: M, F"). Compare Tex. Elec. Code Ann. § 13.122(a)(6) (West 2023) (necessitating space in the voter registration application form for applicants to fill out their sex), with Tex. Sec'y of State, Texas Voter Registration Application, https://www.sos.state.tx.us/elections/forms/vr-with-receipt.pdf [https://perma.cc/9LH9–47ZM] (last visited Aug. 24, 2023) ("Gender (Optional): Male, Female"). Compare Va. Code Ann. § 24.2–418(A) (2023) (mandating that voter registration applicants in Virginia provide their gender information), with Virginia Voter Registration Application (July 2020), https://www.elections.virginia.gov/media/formswarehouse/veris-voter-registration/applications/VA-NVRA-1-Voter-Registration-Application-rev-4_1-(1).pdf [https://perma.cc/2AMZ-G2A3] ("Gender: ___"). Compare W. Va. Code Ann. § 3–2-5(d)

required to register to vote, five nevertheless have binary male/female options on their forms,[140] three ask registrants to select gendered salutations,[141] and only five include the option to select "Unspecified/Other" in response to a question about gender.[142] Civil servants made these forms, and the result of their work

(8) (LexisNexis 2023) (allowing West Virginia voter registration applications to ask about gender but clarifying that applicants may not be rejected for choosing not to provide this information), with W. Va. Sec'y of State, West Virginia Voter Registration Application (June 2023), https://sos.wv.gov/FormSearch/Elections/Voter/mail%20in%20voter%20registration%20application.pdf [https://perma.cc/K9RF-B83G] (listing "gender" as an optional field and providing only "M, F" options). Compare Wyo. Stat. Ann. § 22–3-108(b)(viii) (2023) (allowing, but not mandating, applicants to provide their gender when registering to vote in the state of Wyoming), with Wyo. Sec'y of State, Wyoming Voter Registration Application and Change Form (Mar. 2020), https://sos.wyo.gov/Forms/Elections/General/VoterRegistrationForm.pdf [https://perma.cc/4MTK-8U4G] ("[O]ptional[:] Male, Female").

140. See Conn. Sec'y of State, State of Connecticut Mail-In Voter Registration, https://portal.ct.gov/-/media/SOTS/ElectionServices/ElectForms/electforms/ED-671-En-8x10-No-code.pdf [https://perma.cc/7HVS-JHLA] (last updated Sept. 2015) ("Gender: Male, Female"); Ind. Sec'y of State, Indiana Voter Registration Application (Mar. 2023), https://forms.in.gov/Download.aspx?id=9341 [https://perma.cc/R5PP-A5N4] ("Gender: Female, Male"); Ky. State Bd. of Elections, Commonwealth of Kentucky Mail-In Voter Registration Form, https://elect.ky.gov/registertovote/Documents/SBE%2001%20406%20Mail%20In%20Voter%20Registration%20Application.pdf [https://perma.cc/AE87-CPF5] (last updated Mar. 2020) ("Female, Male"); Mo. Sec'y of State, Missouri Voter Registration Application, https://s1.sos.mo.gov/cmsimages/ElectionGoVoteMissouri/register2vote/Adair.pdf [https://perma.cc/835P-RDLJ] (last updated Nov. 2022) ("Male, Female"); N.J. Div. of Elections, New Jersey Voter Registration Application, https://www.state.nj.us/state/elections/assets/pdf/forms-voter-registration/68-voter-registration-english.pdf [https://perma.cc/J7XY-HYNS] (last updated Jan. 9, 2020) ("Gender (Optional): Female, Male").

141. See Ark. Sec'y of State, Arkansas Voter Registration Application, https://www.sos.arkansas.gov/uploads/elections/ArkansasVoterRegistrationApplication.pdf [https://perma.cc/SKP9-HNH9] (last updated Jan. 24, 2019); Cal. Sec'y of State, Classification—Voter Registration Application, https://covr.sos.ca.gov/ [https://perma.cc/E7D8-PHES] (last visited Nov. 5, 2023) ("[Optional] Prefix: Mr., Mrs., Ms. Ms."); State of Connecticut Mail-In Voter Registration, *supra* note 140.

142. See Md. State Bd. of Elections, Maryland Voter Registration Application, https://elections.maryland.gov/voter_registration/documents/English_Internet_VRA.pdf [https://perma.cc/39CA-AKKA] (last updated Mar. 2023) ("Gender: Male, Female, Unspecified or Other"); Mich. Sec'y of State, State of Michigan Voter Registration Application, https://www.michigan.gov/sos/- /media/Project/Websites/sos/Elections/Election-Forms/Voter-Registration-FormEnglish.pdf [https://perma.cc/H6E8–28DS] (last updated July 2023) ("Female (f), Male (m), Non-binary (x)"); N.Y. Bd. of Elections, New York State Voter Registration Form, https://www.elections.ny.gov/NYSBOE/download/voting/voteregform-eng-fillable.pdf (on file with the *Columbia Law Review*) (last visited Nov. 5, 2023) ("[O]ptional . . . Gender: ____"); Pa. Dep't of State, Pennsylvania Voter Registration Application & Mail-in Ballot Request, https:// www.vote.pa.gov/Resources/Documents/Voter_Registration_Application_English.pdf [https://perma.cc/RE44-QQDF] (last visited Aug. 24, 2023) ("Gender[:] Female (F), Male (M), Non-Binary/Other (X)"); Wash. Sec'y of State, Washington State Voter Registration Form, https://www.sos.wa.gov/sites/default/files/2023–07/VRF_English.pdf?uid=6546b07c67589 [https://perma.cc/M7FJ-MHDW] (last updated Mar. 2023) ("[G]ender: ____").

means that—as broad-based empirical studies have shown—the gender binary is for the most part entrenched at the implementation level.[143]

Of course, governments do not collect all this information on their own. They also buy it from the private sector.[144] Gender data purchased on the open market are also likely to reflect the gender binary. Despite high-profile examples of digital platforms adding multiple checkboxes to answer gender questions,[145] those same platforms only allow advertisers to target users based on binary gender categories (male, female, or all).[146] They recode nonbinary individuals within the gender binary on the back end.[147] The private sector also packages clusters of users into categories based on gender.[148] We know little about the secretive data broker industry, so we can only surmise that it is likely that data brokers follow the gender binary as well.

Even if it were possible to systematically make gender data collection more inclusive (for many reasons discussed below, doing so is not the answer to the harms caused by gender data collection by the state[149]), the law is not done binarizing gender data streams after mandating collection. As the next Part describes, the law also determines how that data will be shared in the automated state, privileging the gender binary along the way.

III. Law and the Sharing of Binary Gender Data

Data from official government forms replicate and spread throughout the automated administrative state. As Professor Bridget Fahey notes, data are nonrivalrous and complementary: The same data can be used by multiple agencies without interfering with anyone's access, and datasets increase in value as they increase in size by giving the state the means to learn more about the people

143. Waldman, The Gender Box, *supra* note 132, at 5 (discussing how civil servants play a role in pre-determining the options on administrative forms).

144. See Julie E. Cohen, The Inverse Relationship Between Secrecy and Privacy, 77 Soc. Rsch. 883, 885 (2010) (discussing how the federal government acquires data from private entities); Joel Reidenberg, The Transparent Citizen, 47 Loy. U. Chi. L.J. 437, 452 (2015) (same); Sara Morrison, A Surprising Number of Government Agencies Buy Cell Phone Location Data. Lawmakers Want to Know Why, Vox (Dec. 2, 2020), https://www.vox.com/recode/22038383/dhs-cbp-investigation-cellphone-data-brokers-venntel [https://perma.cc/23BD-7AB3] (same).

145. Rhiannon Williams, Facebook's *71* Gender *Options Come to UK Users*, Telegraph (June 27, 2014), http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html [https://perma.cc/79S3-FBRT] (discussing the seventy-one gender options available to Facebook users).

146. Facebook EEOC Complaints: Charge of Discrimination, ACLU (Sept. 18, 2018), https://www.aclu.org/legal-document/facebook-eeoc-complaint-charge-discrimination [https://perma.cc/LU59–6FQ7] (explaining that Facebook offers the gender categories of "All," "Male," and "Female").

147. Bivens, *supra* note 40, at 891–93 (explaining Facebook's invisible gender-recoding process).

148. Bruce Schneier, Data and Goliath 63 (2015).

149. See *infra* notes 355–374 and accompanying text.

it surveils.[150] Large datasets are now cheap to store and easy to copy. They are even easier to use now that sophisticated AI systems are just a procurement contract away.[151] Gender data are no different.

But the replication of binary gender data across state agencies and across states is not merely a feature of modern technology. It is also a product of the law. In addition to requiring the collection of gender data, state law often requires agencies to share the data with other departments, spreading the gender binary across government bureaucracies. State agencies agree to share gender data with each other under memorandums of understanding (MOUs).[152] There are also interstate compacts and federal funding rules that require states to share data with other states, coordinated bureaucracies, and the federal government. These data-sharing mandates, agreements, and MOUs include gender information that has already been binarized at the front end by perceptions of common sense and frontline civil servants. By sharing those data, the law entrenches and normalizes the gender binary, conflates sex and gender, and creates data-driven systems that function only on binary gender data.

A. *Laws and Rules Requiring Gender Data Sharing*

On the premise that larger and more detailed datasets are more valuable than smaller ones,[153] many state laws either require interagency data sharing about individuals or permit agencies to enter into data sharing agreements in order to achieve administrative goals. Many of these laws focus on children and families. For instance, Pennsylvania requires agencies to share the "contents of county agency, juvenile probation department, drug and alcohol, mental health and education records" about any child in protective services "to enhance the coordination of case management" and "disposition."[154] This dataset includes demographic information about the child.[155] Louisiana law envisions the creation of data-sharing agreements among state agencies "involved in the assessment, diagnosis, treatment, care, or rehabilitation of children."[156] Those health records include sex data.[157] So too would any data shared among state and federal agencies to implement health exchanges under the Affordable Care Act.[158]

150. Fahey, Data Federalism, *supra* note 16, at 1072–73.

151. See *infra* section IV.B.

152. Arkansas, Delaware, Kentucky, Tennessee, and Virginia allow only residents of those states to submit public records requests or receive documents. See Ark. Code Ann. § 25–19–105(a)(1)(A) (2023); Ky. Rev. Stat. Ann. § 61.872(1)–(3) (West 2021); Tenn. Code Ann. § 10–7-503(a)(2)(A) (2023); Va. Code Ann. §§ 2.2–3700, -3701 (2023); Op. Att'y Gen. No. 96-IB01, at 2 (Del. Jan. 2, 1996), 1996 WL 40922 (interpreting Del. Code Ann. tit. 29, §§ 10001, 10003 (1995) to apply "only to Delaware citizens").

153. See Fahey, Data Federalism, *supra* note 16, at 1073.

154. 42 Pa. Stat. and Cons. Stat. Ann. § 6352.2 (West 2023).

155. *Id.*

156. La. Child. Code Ann. art. 545 (2023).

157. *Id.*

158. See, e.g., Colo. Rev. Stat. Ann. § 10–22–106(2) (2023); Ind. Code Ann. §§ 27–19–1-4(3), -3–3(e)(2) (West 2023); Md. Code Ann., Ins. § 31–106 (West 2023); Va. Code Ann.

Criminal justice laws frequently include gender data-sharing mandates. California's Monthly Arrest and Citation Register includes binary gender in its "personal characteristics."[159] The state's Juvenile Court and Probation Statistical System tracks the binary sex of everyone passing through the state juvenile criminal justice system.[160] And the California Youth Authority's Offender-Based Information Tracking System extracts the binary sex of juvenile offenders across all California jurisdictions from the state's Automated Criminal History System.[161]

California also has many statutorily created education- and health-related data-sharing programs that limit gender data to the binary. The state's Longitudinal Pupil Achievement Data System collects discipline and achievement data on all students in both general and special education programs.[162] Its demographic dataset includes gender.[163] And the state's Cradle to Career Data System Act authorized the creation of a system-wide database that uses gender, among other data points, to help students and families successfully transition from California K–12 schools to college and the workforce.[164] Notably, California includes a nonbinary gender option in annual reports about students who graduate from the state's public schools and meet state university entry requirements.[165]

Then there are laws that require regulatory agencies to use data-sharing agreements to enforce the law and to verify identity. The Louisiana Gaming Control Board is authorized by state law to enter into agreements that would,

§ 38.2–6512 (2023).

159. See Letter from Danielle Brousseau, Staff Servs. Manager I, Cal. Just. Info. Servs. Div., to author (Sept. 26, 2022) (on file with the *Columbia Law Review*) [hereinafter Brousseau Letter] (noting that categories of gender data collected are "male and female" only); Data Portal, Open Just., https://openjustice.doj.ca.gov/data [https://perma.cc/867D-ET7J] (last visited Aug. 24, 2023) (select "Arrests - CSV" under "Criminal Justice Data"); see also John L. Worrall & Pamela Schram, Sch. Behav. & Soc. Scis., Cal. State Univ., San Bernardino, Evaluation of California's State-Level Data Systems for Incarcerated Youth 20 (2000), https://sor.senate.ca.gov/sites/sor.senate.ca.gov/files/ctools/%7B3F3F9617–9598–4DD5-AA4F-E5DCFD8A8A67%7D.PDF [https://perma.cc/WW33-VYTP].

160. Worrall & Schram, *supra* note 159, at 21; Brousseau Letter, *supra* note 159.

161. Worrall & Schram, *supra* note 159, at 21; Brousseau Letter, *supra* note 159.

162. California Longitudinal Pupil Achievement Data System (CALPADS), Cal. Dep't of Educ., http://www.cde.ca.gov/ds/sp/cl/ [https://perma.cc/P25B-M5HJ] (last visited Aug. 24, 2023).

163. See CALPADS Background/History, Cal. Dep't of Educ., https://www.cde.ca.gov/ds/sp/cl/background.asp [https://perma.cc/5BKG-XSCG] (last visited Aug. 24, 2023); Data Reports by Topic, Cal. Dep't of Educ., https://www.cde.ca.gov/ds/ad/accessdatasub.asp [https://perma.cc/LN56–2RYP] (last visited Aug. 24, 2023) (providing information "disaggregated by race/ethnicity, gender, and program subgroup").

164. Cal. Educ. Code §§ 10850–10874 (2022); see also California Cradle-to-Career Data System, State of Cal., https://c2c.ca.gov/ [https://perma.cc/97UW-E5PF] (last visited Aug. 24, 2023).

165. Data Rep. Off., Cal. Dep't of Educ., 2020–21 Four-Year Adjusted Cohort Graduation Rate: Statewide Report, DataQuest, https://dq.cde.ca.gov/dataquest/dqcensus/CohRate.aspx?cds=00&agglevel=state%20&year=2020–21 [https://perma.cc/VM39-VSL2] (last visited Aug. 24, 2023) (allowing filter by "male," "female," "nonbinary," or "missing").

among other things, share information from workers' "personal history forms" to ensure they are who they say they are.[166] Those forms only allow workers to enter "M" or "F" in response to a question about sex.[167] And Montana requires its chief elections official to enter into data-sharing agreements with the state's department of motor vehicles to "verify voter registration information."[168] Both departments collect only binary sex data.[169] In Oklahoma, leaders at several state agencies have arranged to share gender data with the State Election Board, including the Department of Health (death records), court clerks (lists of convicted felons), and the Department of Public Safety (voter registration).[170]

These data-sharing laws create what Professor Fahey calls "data pools": aggregations of information collected for a variety of purposes by other agents of the state.[171] Data pools "aggregate power and diffuse access" by allowing more state agencies to more intensively track, surveil, and verify identities.[172] When the laws sweep in sex and gender data, they do not always specify what that data should look like; rather, that depends on how the state agency decided to collect the data in the first place and how technical systems are programmed to use the data in the end. As we have seen, because the vast majority of that data is collected along binary lines, data-sharing mandates replicate the gender binary throughout the government's larger data ecosystem.

B. *Interagency Agreements*

Interagency data-sharing agreements supplement statutory data-sharing mandates, replicating binary gender in the same way. Although many statutes permit data-sharing agreements involving the transfer of personal data,[173]

166. La. Stat. Ann. § 27:45(A), (C) (2023).

167. See Email from Margot Lassit, La. Gaming Control Bd., to author (July 14, 2022) (on file with the *Columbia Law Review*) (confirming that only male/female options are accepted); see also La. Gaming Control Bd., Multijurisdictional Personal History Disclosure Form, https://dpsweb.dps.louisiana.gov/gamingforms.nsf/fdcf9e5f850b2bc78625731b006934c6/7cf5e544b362ce49862575830062fd2b/$FILE/Multi%20Jurisdictional%20Personal%20History%20Diclosure%20Form.pdf [https://perma.cc/9ZG6-N4L5] (last visited Aug. 24, 2023).

168. Mont. Code Ann. § 13–2-107(3)(a) (West 2023).

169. See Motor Vehicle Div., State of Montana Application for Class D Driver License or Identification Card, https://dojmt.gov/wp-content/uploads/11–1400-Application-for-Class-D-Driver-License-and-Application-for-Identification-Card-0723v2-Fillable.pdf [https://perma.cc/K29C-J6YV] (last visited Aug. 24, 2023).

170. Okla. Stat. tit. 26, § 4–109.3A (2023) (voter registration); *Id.* § 4–120.3A (death records); *Id.* § 4–120.4A (felons).

171. Fahey, Data Federalism, *supra* note 16, at 1012.

172. *Id.*

173. *E.g.*, Conn. Gen. Stat. Ann. § 9–50c(a) (West 2023) ("The Secretary of the State may enter into an agreement to share information or data with any other state . . . ."); 105 Ill. Comp. Stat. Ann. 13/25(b) (West 2023) (providing that "[a]ny State agency, board, authority, or commission may enter into a data sharing arrangement" as part of implementing the Longitudinal Education Data System Act); Wash. Rev. Code Ann. § 50A.25.070(1) (West 2022) ("The department may enter into data-sharing contracts and may disclose records and information deemed confidential to state or local government agencies . . . .").

engaging with other departments and other states is often up to the agencies themselves. This type of lawmaking is more informal but no less binding on agency behavior. And many of these agreements include gender data to be used for a variety of purposes—identifying individuals and detecting fraud, conducting research, or implementing the law—or, in some cases, for no stated purpose at all.[174] In almost all cases, the agreements are broad and traffic in binary gender data.

Many state agencies share binary gender data with the goal of detecting fraud and verifying identity.[175] Departments of motor vehicles (DMVs) and those in charge of elections and voter registration share data frequently to verify identity for benefits programs.[176] DMVs share data with boards of elections to assist with voter registration.[177] To verify identities, DMVs distribute binary gender data to fishing and hunting licensure divisions,[178] organ donor registries,[179] departments of veterans' affairs,[180] police departments,[181]

174. This section is based on the results of public records requests sent to three departments—the chief election division, the motor vehicle division, and the division that administers professional licensure—in forty-five states and the District of Columbia. Arkansas, Delaware, Kentucky, Tennessee, and Virginia only allow residents of those states to submit public records requests and receive documents, see *supra* note 152; therefore, those states were excluded. Additional research could cover additional divisions of state government.

175. See, e.g., Driver License Data Verification System Jurisdiction Service Agreement Between Vt. Dep't of Motor Vehicles and Am. Ass'n of Motor Vehicle Adm'rs cls. 1 & 3(B) (xii) (Aug. 23, 2018) (on file with the *Columbia Law Review*) (sharing driver license data, including gender, with the American Association of Motor Vehicle Administrators (AAMVA), a nonprofit that provides participating states with a nationwide database against which to verify the identities of those seeking licenses); Data Licensing Agreement for Driver Record Information Between [Wash.] Dep't of Licensing and [Wash.] Emp. Sec. Dep't 12 (Mar. 19, 2019) (on file with the *Columbia Law Review*) [hereinafter Wash. Driver Record Agreement] (sharing license data, including gender, "for the purposes of fraud investigations").

176. *E.g.*, Memorandum of Understanding Between Iowa Dep't of Transp., Motor Vehicle Div., and Iowa Dep't of Hum. Servs. 1 (July 19, 2022) (on file with the *Columbia Law Review*); Memorandum of Understanding Between R.I. Dep't of State and R.I. Div. of Motor Vehicles 1 (June 13, 2016) (on file with the *Columbia Law Review*) [hereinafter R.I. DMV Agreement]; Wash. Driver Record Agreement, *supra* note 175, at 12.

177. *E.g.*, R.I. DMV Agreement, *supra* note 176, at 1; Data Sharing Memorandum of Understanding Between Vt. Dep't of Motor Vehicles and Vt. Sec'y of State 1 (Sept. 8, 2021) (on file with the *Columbia Law Review*).

178. *E.g.*, Memorandum of Understanding Between Iowa Dep't of Transp., Motor Vehicle Div., and Iowa Dep't of Nat. Res. 4 (Oct. 1, 2021) (on file with the *Columbia Law Review*) [hereinafter Iowa DNR MOU].

179. *E.g.*, Contract for Acquisition of Records in Bulk for Permissible Purposes Between Idaho Transp. Dep't and DonorConnect 2 (Oct. 12, 2021) (on file with the *Columbia Law Review*) [hereinafter Idaho DonorConnect Contract].

180. *E.g.*, Memorandum of Agreement Between the Idaho Transp. Dep't and the Idaho Div. of Veteran Servs. 1 (Sept. 17, 2020) (on file with the *Columbia Law Review*).

181. *E.g.*, Memorandum of Agreement for Use of Records Among N.C. Dep't of Transp., Div. of Motor Vehicles, Dep't of N.C. Pub. Safety, State Highway Patrol, and Interplat Solutions, Inc. 11 (Sept. 5, 2022) (on file with the *Columbia Law Review*); Wash. State Dep't of Licensing, DSC-425–009, Moxee Police Dep't, Driver and Plate Search

municipal courts dealing with traffic violations,[182] and departments of social services.[183] And all of these agreements include gender data.

States that share borders with Canada or Mexico exchange all data on Enhanced Driver's Licenses with the Department of Homeland Security for border security purposes.[184] DMVs also share gender data with departments, like those responsible for enforcing child support orders, that can order driver's license suspensions for people who fail to meet their obligations.[185] When the departments originating the data collect only binary sex and gender information, only male/female data can be shared.

A second cluster of interagency agreements that share gender data focuses on research. Rhode Island shares voter registration data, including the identification information provided at registration, with Brown University's Rhode Island Innovative Policy Lab for research into how voter identification requirements impact registration and turnout rates.[186] Iowa shares binary sex and gender data with the University of Northern Iowa to "assist in identifying any health disparities . . . for those seeking treatment for problem gambling and/or substance abuse disorders."[187] In both cases, sex and gender data are exclusively binary.

State agencies also share sex and gender data with divisions of criminal justice, schools, and health to, among other things, "carry[] out . . . investigations [and] prosecutions of criminal offenses."[188] In Washington State, for example, the automobile licensing division shares gender data with all "authorized criminal justice authorities throughout the state" for general use.[189] North Carolina's FAST Program, which facilitates the state department of health's

(DAPS) and Driver Information and Internet Query System (IHPS) Agency Access Request 3 (Oct. 5, 2016) (on file with the *Columbia Law Review*). Public records requests resulted in more than 217 identical or similar agreements with different police departments and federal investigative units.

182. *E.g.*, Interagency Data Sharing Agreement Between [Wash.] Dep't of Licensing and Wash. State Admin. Off. of the Cts. 13 (July 9, 2019) (on file with the *Columbia Law Review*).

183. *E.g.*, Memorandum of Agreement for Secure Online Access to Information Between Mo. State Emps.' Ret. Sys. (MOSERS) and Mo. Dep't of Revenue 1 (Mar. 12, 2014) (on file with the *Columbia Law Review*).

184. *E.g.*, Addendum to the Memorandum of Agreement Between State of Vt. and DHS 1 (Mar. 15, 2017) (on file with the *Columbia Law Review*).

185. *E.g.*, Memorandum of Agreement Between Idaho Transp. Dep't and Idaho Dep't of Health & Welfare l–2 (n.d.) (on file with the *Columbia Law Review*).

186. Cooperation and Data Sharing Agreement Between R.I. Innovative Pol'y Lab at Brown Univ. and R.I. Dep't of State 6 (May 30, 2018) (on file with the *Columbia Law Review*).

187. Monitoring and Evaluation Contract, Special Conditions for Contract #5882BH11 Between Iowa Dep't of Pub. Health and Univ. of N. Iowa 3–4 (Sept. 27, 2021) (on file with the *Columbia Law Review*).

188. Data Sharing Agreement Between Wash. Dep't of Licensing and Wash. Att'y Gen.'s Off. 15 (Mar. 9, 2020) (on file with the *Columbia Law Review*).

189. Contract Between Wash. State Dep't of Licensing and State of Wash. Admin. Off. of the Cts. 5 (Sept. 30, 2017) (on file with the *Columbia Law Review*).

provision of social services to families, has collected gender data from the state's DMV since 2013.[190]

These are just a handful of examples available through public record requests. But data-sharing agreements are common arrangements among a variety of agencies. Including agreements signed between 2016 and 2022, the Florida Department of Highway Safety and Motor Vehicles is currently a party to at least 1,172 active data-sharing agreements with state agencies, agencies in other states, the federal government, or private entities.[191] The Washington Department of Licensing has data-sharing agreements for driver data—which include gender—with at least 349 other agencies.[192]

C. *Interstate Compacts and Data Federalism*

There are also explicit intergovernmental dependencies that spread sex and gender data throughout the government data ecosystem.[193] For instance, state agencies have agreed to share binary sex and gender data with other departments and the federal government to determine eligibility for public benefits programs, including the Tenant Rental Assistance Certification System (TRACS) and the Supplemental Nutrition Assistance Program (SNAP).[194] Federal funding for state agencies involved in coordinating foster care programs is also tied to a long-running data-sharing agreement in which states must report children's sex as either "male" or "female."[195]

190. Memorandum of Understanding Between N.C. Div. of Motor Vehicles and N.C. Dep't of Health & Hum. Servs. attachs. 1, 2 (Sept. 25, 2013) (on file with the *Columbia Law Review*).

191. See Fla. Dep't of Highway Safety & Motor Vehicles, Florida Data-Listing Unit MOUs (Aug. 9, 2022) (on file with the *Columbia Law Review*) (listing 1,172 active agreements with contract effective dates between 2016 and 2022).

192. See Washington Dep't of Licensing, DIAS Account List (n.d.) (on file with the *Columbia Law Review*) (listing 349 accounts).

193. Professor Fahey chronicled many of these but did not focus on whether—or how—they shared gender data. See Fahey, Data Federalism, *supra* note 16, at 1016–29.

194. See Computer Matching Agreement Among HHS, Admin. for Child. & Fams., Off. of Child Support Enf't, and State Agency Administering the Supplemental Nutrition Assistance Program 7 (Aug. 16, 2021), https://www.hhs.gov/sites/default/files/acf-snap-cma-2111.pdf [https://perma.cc/3RSW-CXBC] (noting that "sources of records used" in the matching program include "information collected by the state agency in its administration of SNAP"); Off. of Hous., HUD, Tenant Rental Assistance Certification System (TRACS): Privacy Impact Assessment 8 (2009), https://www.hud.gov/sites/documents/TRACS.PDF [https://perma.cc/6PRM-3GZR] (noting that "Gender/sex" is collected by the TRACS systems) [hereinafter TRACS PIA]. SNAP applications collect sex data with only male/female answer options. See, e.g., N.Y. State Off. of Temp. & Disability Assistance, SNAP Application/Recertification 3 https://otda.ny.gov/programs/applications/4826.pdf [https://perma.cc/X83C-M3D7] (last visited Aug. 24, 2023) (noting that applicants and members of their household should designate their sex only as "M" or "F"); Tex. Health & Hum. Servs., Your Texas Benefits: Getting Started 3–5 (June 22, 2022), https://yourtexasbenefits.com/GeneratePDF/StaticPdfs/en_US/H1010_June_22_FINAL.pdf [https://perma.cc/8DQA-V6JP] (asking applicants to select either "male" or "female").

195. See About AFCARS, HHS, https://www.a*cf*.hhs.gov/cb/resource/about-afcars [https://perma.cc/ED6N-BXEX] (last visited Aug. 24, 2023) (describing the Adoption and

All states participate in the CDC's National Notifiable Disease Surveillance System (NNDSS), a "passive surveillance system" that collects data from state health departments on incidents or outbreaks of more than 120 diseases.[196] The NNDSS collects gender data chaotically: Each division within the CDC designs sample forms for the reportable diseases in its portfolio. Its Adult and Pediatric HIV/AIDS Confidential Case Report Forms, which are used in at least eleven states, asks for individuals' "sex assigned at birth" with "male," "female," and "unknown" answer options, as well as "gender identity" with a variety of inclusive options.[197] Many of the CDC's other disease surveillance forms ask for "sex" with just three answer options,[198] and its Multisystem Inflammatory Syndrome Associated With COVID-19 Form asks for "sex" but provides only "male" and "female" answer options.[199]

Twenty-five states and the District of Columbia are part of the Electronic Registration Information Center (ERIC), a nonprofit corporation that helps states improve voter roll accuracy and increase access to voter registration.[200]

Foster Care Analysis and Reporting System (AFCARS)); see also 45 C.F.R. § 1355.44(b)(2) (2020) ("Child's sex. Indicate whether the child is 'male' or 'female.'").

196. Sandra Roush, Enhancing Surveillance, *in* Manual for the Surveillance of Vaccine-Preventable Diseases ch. 19–1 (5th ed. 2011); see also Lawrence Gostin, Public Health Law: Power, Duty, Restraint 296 (2d ed. 2008); National Notifiable Diseases Surveillance System (NNDSS), CDC, https://www.cdc.gov/nndss/ [https://perma.cc/GZK6-SN7B] (last visited Aug. 24, 2023).

197. See CDC, Adult HIV Confidential Case Report Form (Nov. 2019), https://www.cdc.gov/hiv/pdf/guidelines/cdc-hiv-adult-confidential-case-report-form-2019. pdf [https://perma.cc/5YDV-5224]; CDC, Pediatric HIV Confidential Case Report Form (Nov. 2019), https://www.cdc.gov/hiv/pdf/guidelines/cdc-hiv-pediatric-confidential-case-report-form-2019.pdf [https://perma.cc/AXR4-B7XL]. West Virginia uses the CDC's Pediatric and Adult HIV Report Forms. W. Va. Dep't of Health & Hum. Res. Bureau for Pub. Health, Adult HIV Confidential Case Report Form (Nov. 2019), https://oeps.wv.gov/hiv-aids/Documents/lhd/adultHIVcaseReport_fillable.pdf [https://perma.cc/FPW3-RM2E]; W. Va. Dep't of Health & Hum. Res. Bureau for Pub. Health, Pediatric HIV Confidential Case Report Form (Nov. 2019), https://oeps.wv.gov/hiv-aids/Documents/lhd/pediatricHIVcaseReport_Fillable.pdf [https://perma.cc/4UPA-J5JA].

198. Under federal vocabulary standards for electronic health information set by the HHS Secretary, "[b]irth sex must be . . . attributed as follows: (i) Male. M, (ii) Female. F, (iii) Unknown . . . . UNK . . . ." 45 C.F.R. § 170.207(n) (2022) (emphasis omitted). For examples of CDC disease surveillance forms that follow this standard, see CDC, OMB No. 0920–0728, Babesiosis Case Report Form (2016), https://www.cdc.gov/parasites/babesiosis/resources/50.153.pdf [https://perma.cc/3WX8–3NJ8]; CDC, OMB No. 0920–0728, Brucellosis Case Report Form (2021), https://www.cdc.gov/brucellosis/pdf/case-report-form.pdf [https://perma.cc/3CBM-72EG]; CDC, Meningococcal Disease Surveillance Worksheet (2021), https://www.cdc.gov/ncird/surveillance/downloads/Meningococcal-Worksheet-2021-annot-508.pdf [https://perma.cc/8W39-XUJ8]; CDC, OMB No. 0920–0728, Tularemia Case Investigation Report (2016), https://www.cdc.gov/tularemia/resources/TularemiaCaseReportForm.pdf [https://perma.cc/ZV39–6W9S].

199. CDC, Multisystem Inflammatory Syndrome Associated With SARS-CoV-2 Infection Case Report (2022), https://www.cdc.gov/mis/pdfs/MIS-C_case-report-form.pdf [https:// perma.cc/6NUA-SN6X].

200. Who We Are, Elec. Registration Info. Ctr., https://ericstates.org/who-we-are/ [https://perma.cc/SBS4-LQL3] (last visited Sept. 12, 2023).

Twenty of the current twenty-six ERIC members explicitly collect sex or gender data during the voter registration process, and all of them collect it when individuals apply for driver licenses.[201] Only two of those states allow gender designations other than "male" or "female".[202]

The National Crime Information Center (NCIC), which "anchors the intergovernmental exchange of information for day-to-day policing,"[203] allows law enforcement to cross-check information on license plates and identifications with various law enforcement databases. Within the NCIC system, the Interstate Identification Index (III) includes, among other things, a person's "sex" with male, female, and unknown coding options.[204] Similarly, the National Instant Criminal Background Check System, which allows federal or state agents to run background checks on individuals before firearm purchases, leverages only binary sex information for identity verification purposes.[205] And the National Adult Mistreatment Reporting System gathers information about perpetrators of elder abuse, including the genders of victims. This data is reported annually, broken down by "men" and "women."[206]

Several interstate compacts include gender data and privilege the gender binary.[207] For instance, all fifty states and the District of Columbia are part of the Interstate Compact on Juveniles, a contract that has been adopted as law regulating the interstate movement of minors under court supervision or who have run away to another state.[208] The Compact requires those staffing its administrative body, the Interstate Commission for Juveniles, to "establish a

201. See *supra* notes 95–98 and accompanying text.

202. See *supra* notes 95–98 and accompanying text.

203. Fahey, Data Federalism, *supra* note 16, at 1022.

204. Nat'l Crime Info. Ctr. (NCIC), FBI, DOJ, https://irp.fas.org/agency/doj/fbi/is/ncic.htm [https://perma.cc/39S4-KSZP] (last updated June 2, 2008) (describing the National Instant Criminal Background Check System, which allows federal or state agents to run background checks on individuals before firearm purchases, taps into the NCIC and III, and leverages sex information for identify verification purposes); see also FBI, DOJ, Interstate Identification Index/National Fingerprint File Operational Technical Manual, ch. 2, at 1, 7–9 (2005) (coding only for "male," "female," and "unknown").

205. See FBI, DOJ, National Instant Criminal Background Check System Operational Report 2020–2021, at 6 (2022), https://www.fbi.gov/file-repository/nics-2020–2021-operations-report.pdf/view [https://perma.cc/86PB-WNXW].

206. Nat'l Adult Maltreatment Reporting Sys., Adult Maltreatment Report 2020, at 22 (2020), https://acl.gov/sites/default/files/programs/2021–10/2020_NAMRS_Report_ADA-Final%20%281%29.pdf [https://perma.cc/M5M6-AH7U].

207. Interstate compacts are binding agreements between states. Bridget A. Fahey, Federalism by Contract, 129 Yale L.J. 2326, 2351 (2020). They are both statutes and contracts: statutes in each jurisdiction; contracts between them. Frederick L. Zimmermann & Mitchell Wendell, The Law and Use of Interstate Compacts 1 (1961). The Supreme Court has long held that interstate compacts are interpreted according to contract law principles but remain "law[s] of the United States." Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 627 n.8 (2013) (internal quotation marks omitted) (quoting Virginia v. Maryland, 540 U.S. 56, 66 (2003)).

208. Christopher Holloway, DOJ, Interstate Compact on Juveniles 1 (2000), https://www.ojp.gov/pdffiles1/ojjdp/fs200012.pdf [https://perma.cc/7CGG-8EUA].

system of uniform data collection on information pertaining to juveniles."[209] Therefore, the Commission, not individual states, dictates how the data should be gathered.[210] Six of the Compact's ten approved forms ask for sex, with "male," "female," and "unknown" answer options.[211] All participating jurisdictions must follow that protocol.

D. *Entrenching the Gender Binary at Data Sharing*

Just like the law of data collection, data-sharing mandates and more informal interagency agreements entrench the gender binary by making similar assumptions about gender data as static, secure identifiers. But the law of data sharing goes further. It solidifies the gender binary throughout the government's data ecosystem in three ways: Data-sharing agreements have expressive, conflationary, and interoperability effects.

As it spreads gender data, data-sharing law generates expressive and normalizing effects, framing how anyone who sees and uses the data understands sex and gender.[212] As many scholars have argued, law is an instrument of norm production that influences people's behavior indirectly by signaling what society thinks is right or wrong.[213] In other words, law has an "expressive function"[214] that creates "cultural consequences."[215] Professor Dan Kahan has argued that "gentle nudge[s]" can incrementally change existing social norms by encouraging individuals to "revise upward" or downward "their judgment of the degree of condemnation warranted by the conduct in question."[216] Data streams created and maintained by law are no different. The more binary gender data spreads, the more people will encounter it, and the more power it will have to reify sex and gender as binary and static. In this way, laws that spread binary gender data normalize it as true and correct; they facilitate elision

209. Interstate Compact for Juveniles art. I, cl. J (2014), https:// juvenilecompact.org/sites/default/files/ICJRevisedLanguage.pdf [https://perma.cc/QZB3-2F8G]; see also *id.* art. III, cl. K; *id.* art. IV, cl. 19.

210. See Approved Forms, Interstate Comm'n for Juvs., https://www. juvenilecompact.org/forms [https://perma.cc/E7YP-698M] (last visited Aug. 24, 2023) (detailing that states must use Commission-approved information systems when collecting data pursuant to the Interstate Compact for Juveniles).

211. *Id.* (listing Commission-approved forms, including six that require sex data: Forms I, II, III, IV, and VII).

212. Flynn, *supra* note 88, at 466.

213. See, e.g., Citron, Expressive Value, *supra* note 88, at 377; Sunstein, *supra* note 88, at 2022–24.

214. Sunstein, *supra* note 88, at 2024; see also Deborah Hellman, The Expressive Dimension of Equal Protection, 85 Minn. L. Rev. 1, 39–40 (2000) (arguing that "to treat people with equal concern, government must attend to the expressive dimension of its actions").

215. Richard H. Pildes, The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium, 89 Mich. L. Rev. 936, 938 (1991); see also Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 1901, 1902–03 (2000); Tokson & Waldman, *supra* note 88, at 281.

216. Dan M. Kahan, Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. Chi. L. Rev. 607, 610–11 (2000).

between frequency and propriety, nudging us to think that the things we see often—male/female-only categories—are the normal, commonsense ways to conceptualize and classify by sex and gender.[217]

Many of these agreements also conflate sex and gender. For instance, although the Iowa DMV collects sex data only from applicants for licenses and identification cards,[218] its data-sharing agreement with the state's Department of Natural Resources refers to sharing gender data.[219] Idaho makes the same mistake in its MOU with the state's organ donor registry.[220] More than half of the relevant interagency agreements provided under public records requests conflate sex and gender.[221]

Doing so helps reify the gender binary. Sex is primarily a matter of chromosomes or genital anatomy; gender is primarily a matter of social expectations and performance.[222] Sex and gender are undoubtedly entangled; each influences the other.[223] But smashing them together without a second thought "forcibly homogenize[s] human personalities" and "validates hetero-patriarchy" by associating gender with the biological definition of sex.[224] Conflating the two concepts can deny the existence of masculine or androgynous women and feminine or androgynous men.[225]

217. Normalization is cognitive slippage from statistical frequency to moral propriety; it is a process through which common things come to be understood as acceptable, ordinary, and, ultimately, good. See Adam Bear & Joshua Knobe, Normality: Part Descriptive, Part Prescriptive, 167 Cognition 25, 25 (2017) [hereinafter Bear & Knobe, Normality]. Political scandals are good examples of this phenomenon. As psychologists Adam Bear and Joshua Knobe have written, when a politician "continues to do things that once would have been regarded as outlandish, [their] actions are not simply coming to be regarded as more typical; they are coming to be seen as more normal[,] . . . as less bad and hence less worthy of outrage." Adam Bear & Joshua Knobe, Opinion, The Normalization Trap, N.Y. Times (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/opinion/sunday/the-normalization-trap.html (on file with the *Columbia Law Review*); see also Diane Vaughan, The Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA 77–195 (1996) (demonstrating how routinized decisions that violated rules and norms came to be normalized as part of engineering and testing work).

218. Iowa Code § 321.182 (2023).

219. Iowa DNR MOU, *supra* note 178, at sched. A.

220. Compare Idaho Code § 49–306 (2023), with Idaho DonorConnect Contract, *supra* note 179, at 2. It could be argued that this change from sex to gender reflects bureaucratic discretion or an agency exercising its delegated power to implement the law through its unique expertise. See Edward H. Stiglitz, Delegating for Trust, 166 U. Pa. L. Rev. 633, 635 (2018) (noting that the primary justification for the administrative state is agency expertise).

221. See *supra* section III.B.

222. See Glossary of Terms: Transgender, GLAAD, https://glaad.org/reference/trans-terms/ [https://perma.cc/RAB5-GFZ4] (last visited Aug. 24, 2023).

223. Kristen W. Springer, Jeanne Mager Stellman & Rebecca M. Jordan-Young, Beyond a Catalogue of Differences: A Theoretical Frame and Good Practice Guidelines for Researching Sex/Gender in Human Health, 74 Soc. Sci. & Med. 1817, 1818–19 (2012).

224. 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, 7, 8 (1995).

225. See Dylan Vade, Expanding Gender and Expanding the Law: Toward a Social and

Data-sharing law also creates interoperability effects. In computer science and engineering, interoperability refers to the capacity of technical systems to interact, connect, and function together.[226] Interoperability can be an anticompetitive barrier to information flow: App Store mobile apps will only run on Apple's operating system, giving the company significant influence over individuals' downstream technology purchases;[227] Facebook made Instagram interoperable with itself but not with Twitter.[228] But from the government's perspective, interoperability is a key driver in law enforcement data sharing.[229] When disparate technologies in a federal system are integrated, authorities have more data to use, more surveillance capacity, and seamless, efficient access to information. Indeed, interoperability in law enforcement intelligence data systems is actually federal law.[230]

But because the benefits of interoperability hinge on system integration, any state wishing to participate in data-sharing systems must conform its data-collection practices to the designs of interagency databases. For instance, if they want to participate in the National Driver Register (NDR) Problem Driver Pointer System (PDPS), a database of information about those whose driving privileges have been revoked, suspended, or canceled,[231] states can collect and share only binary sex information from DMV records because the PDPS is designed with only "male" and "female" options for sex.[232] Therefore,

Legal Conceptualization of Gender that Is More Inclusive of Transgender People, 11 Mich. J. Gender & L. 253, 265 (2005).

226. See, e.g., John Palfrey & Urs Gasser, Interop: The Promise and Perils of Highly Interconnected Systems 1–18 (2012) (defining "interoperability" as a "normative theory identifying" the "optimal level of interconnectedness").

227. Jonathan Todd, Real Reasons Behind Apple's Strong Opposition to Interoperability Confirmed, Interoperability News (Apr. 16, 2021), https:// interoperability.news/2021/04/real-reasons-behind-apples-strong-opposition-to-interoperability-confirmed [https://perma.cc/757V-LUFJ] (explaining that Apple's "opposition to interoperability" stemmed from the company's desire to "keep users of Apple's services locked in to its own 'walled garden' of iOS devices").

228. Leena Rao, Instagram Photos Will No Longer Appear in Twitter Streams at All, TechCrunch (Dec. 9, 2012), https://techcrunch.com/2012/12/09/it-appears-that-instagram-photos-arent-showing-up-in-twitter-streams-at-all [https://perma.cc/7P4S-3LUQ] (explaining that Facebook made Instagram inoperable with Twitter to "drive more traffic to the web experience for Instagram").

229. See DOJ & DHS, Fusion Center Guidelines: Developing and Sharing Information in a New Era 37–38, 65 (2023), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/fusion_center_guidelines0.pdf [https://perma.cc/2FX5–32TC] (lamenting the lack of interoperability across law enforcement capabilities and signaling the role of fusion centers in creating interoperability).

230. See 8 U.S.C. § 1722(a)(2) (2018) ("[T]he President shall develop and implement an interoperable electronic data system to provide current and immediate access to information in databases of Federal law enforcement agencies and the intelligence community . . . .").

231. See The National Driver Register (NDR) and Problem Driver Pointer System (PDPS), Nat'l Highway Traffic Safety Admin., DOT, https://www.nhtsa.gov/research-data/national-driver-register-ndr [https://perma.cc/U8ZT-L9WT] (last visited Aug. 24, 2023).

232. See, e.g., Nat'l Highway Traffic Safety Admin., DOT, National Driver Register Frequently Asked Questions 1 (2020), https://www.nhtsa.gov/sites/nhtsa.gov/files/

regardless of how state agencies might decide to collect gender data within a vague statutory mandate, data-sharing agreements force those agencies to follow the designed-in limits of the databases and technological systems that use gender data. What is more, decades-old systems are difficult to change. Inclusivity at the data-sharing stage would require not only more nuanced agreements that might dictate inclusive data collection but also wholesale refactoring of the underlying databases to accept that inclusive data. That is a tall order.

IV. Law and the Use of Binary Gender Data

Having collected and pooled gender data, street-level bureaucrats in state agencies then exercise their discretion to use those data. Indeed, sex and gender have long but checkered histories as classification tools.[233] Even automated processing of gender data by the state is not new.[234] But AI-driven automation makes things qualitatively different today.[235]

This Part tells the legal story behind how and why automated technologies in the administrative state tend to rely on and reify the gender binary. With the growth of what Professor Aziz Huq called the "allocative state," state agencies that have to distribute benefits are incentivized to use AI to determine

documents/national_driver_register_faq_081920_v2_tag.pdf [https://perma.cc/QFD8-G9X3] ("The records submitted to the NDR consist of the following identifying information: name, date of birth, sex, driver license number, and reporting State."); S.C. Dep't of Motor Vehicles, DL-107A, Request for National Driver Register Information on a Current or Prospective Employee (Oct. 2020), https://www.scdmvonline.com/-/media/Forms/DL-107A.ashx [https://perma.cc/9KJG-UWFW] (including "Sex: [Blank]"); Dep't of Motor Vehicles, State of Vt. Agency of Transp., Request for National Driver Register File Check on Current or Prospective Employee, https://dmv. vermont.gov/sites/dmv/files/documents/VN-191-National_Driver_Register_File_Check. pdf [https://perma.cc/7KGM-YKXV] (last visited Aug. 24, 2023) (same). But see Va. Dep't of Motor Vehicles, DL-56, National Driver Register File Check, Individual Request (July 1, 2020), https://www.dmv.virginia.gov/webdoc/pdf/dl56.pdf [https://perma.cc/7EPR-B28G] (including "Sex: Male, Female, Non-Binary").

233. Courts have a history of using gender (and race) data to calculate injured persons' future lost earning capacities. Martha Chamallas, Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss, 38 Loy. L.A. L. Rev. 1435, 1438–39 (2005). Many areas of family law still expect spouses to conform to social expectations associated with their sex assigned at birth. See Clare Huntington, Staging the Family, 88 N.Y.U. L. Rev. 589, 628–29 (2013). States use gender data to separate people in homeless shelters, drug treatment facilities, foster homes, domestic violence shelters, and prisons. See Spade, Documenting Gender, *supra* note 36, at 735–36, 752–53; see also Lisa Mottet & John M. Ohle, Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People 1–6 (2003).

234. During what technology historian Mar Hicks calls the "prehistory of algorithmic bias," room-sized computing systems allocated welfare-state resources along gender lines. Hicks, *supra* note 73, at 27–30.

235. David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies 9 (2020) (noting the importance of AI in making governance more effective); Kroll et al., *supra* note 59, at 636 ("[T]he accountability mechanisms and legal standards that govern decision processes have not kept pace with technology.").

eligibility, detect fraud, and calculate entitlements.[236] Enforcement obligations and backlogs have pushed agencies to use AI to predict violations of the law.[237] These developments in law coincide with trends in the political economy of the state: Statutorily imposed austerity, budgetary constraints, and the significant increase in state data collection and sharing have pressured state and local governments to automate.[238]

But the law does more than restrict budgets and get out of the way of innovation.[239] The reality is that the law actively binarizes gender data at use by directly mandating and indirectly incentivizing agencies to automate their administrative functions to improve efficiency and to rely on more and more data as the basis for effective governance.

A. *Mandating Automation: The Law on the Books*

For decades, states have explicitly required agencies to automate their work to increase efficiency. In 1979, Virginia established an automation fund to "fully automate[]" the entire system of vital statistics.[240] California required all counties and its department of health to automate the process "that accepts and screens applications for benefits under the Medi-Cal program" to streamline identity verification and eligibility determinations.[241] The state also made new county grant-reporting requirements contingent on implementing the "necessary automation to implement" the law efficiently[242] and required the Student Aid Commission to "develop an automated system to verify a student's status as a foster youth to aid in the processing of applications for federal financial aid."[243] The Colorado Public Assistance Act incentivized counties to use

236. Aziz Z. Huq, Constitutional Rights in the Machine-Learning State, 105 Cornell L. Rev. 1875, 1894–99 (2020); see also, e.g., Cahoo v. SAS Analytics Inc., 912 F.3d 887, 892, 895 (6th Cir. 2019) (challenging the erroneous termination of unemployment benefits by AI); K.W. v. Armstrong, 180 F. Supp. 3d 703, 708 (D. Idaho 2016) (challenging state use of an algorithm to determine in-home care benefits); Ark. Dep't of Hum. Servs. v. Ledgerwood, 530 S.W.3d 336, 339 (Ark. 2017) (challenging an algorithm used to assess disability care).

237. See Engstrom et al., *supra* note 235, at 22 (describing AI tools used by the SEC to identify potential securities law violations).

238. Citron, Technological Due Process, *supra* note 17, at 1259 (referring to budget shortfalls as motivating the government to automate).

239. See, e.g., Anupam Chander, How Law Made Silicon Valley, 63 Emory L.J. 639, 647–69 (2014) (arguing that immunity from liability, copyright safe harbors, and weak privacy law allowed technology companies to thrive in the United States); Mihailis E. Diamantis, The Extended Corporate Mind: When Corporations Use AI to Break the Law, 98 N.C. L. Rev. 893, 899–900 (2020) (noting that the "lack[] [of] a theory of liability" and the "legal loophole left by respondeat superior" allow corporations to use AI to violate the law); Katyal & Jung, *supra* note 10, at 760–63 (arguing that automated surveillance tools that discriminate arose in a void left by privacy law). Nor is it clear that deregulation spurs innovation or that regulation stifles it. See, e.g., Yafit Lev-Aretz & Katherine J. Strandburg, Privacy Regulation and Innovation Policy, 22 Yale J.L. & Tech. 256, 275–76 (2020).

240. Va. Code Ann. § 32.1–273.1 (2023).

241. Cal. Welf. & Inst. Code § 14011.9(a) (2023).

242. *Id.* § 11265.1(c)(3)(B)(ii).

243. Cal. Educ. Code § 69516 (2023).

the state's automated case management and child support systems rather than spending additional funds on their own.[244] Arizona and West Virginia, among many other states, require their agencies in charge of enforcing child support orders to use "automated administrative enforcement" to respond to requests "promptly."[245] California law also tasks the director of Child Support Services with "implementing and managing all aspects of a single statewide automated child support system" that carries out state child support obligations promptly and efficiently.[246]

If these and countless other statutes mandate the automation of specific state functions, general declarations of the efficiency benefits of automation have established automation as official state policy. When enacting campaign disclosure laws, the Kentucky General Assembly found that "computer automation is a necessary and effective means" of processing "vast amounts of data."[247] California has declared that statewide-automated systems are "essential."[248] The federal government has also connected automation with increased efficiency in several administrative spaces, including family support.[249]

Many states have also created chief data, information, or innovation offices (CIOs) with the explicit goal of automating state decisionmaking systems to increase efficiency.[250] Vermont created an Agency of Digital Services to provide technological solutions to all parts of state government and avoid costs or save money "as a result of technology optimization."[251] Ohio recently created an Office of Human Services Innovation in its Department of Jobs and Family Services, in part to make statewide policy recommendations for "[s]tandardizing and automating eligibility determination policies and processes for public assistance programs."[252] When creating its CIO position, Puerto Rico stated that the systems the CIO would create "must contribute to a more efficient use" of government resources.[253] In Utah, the state's CIO will approve

244. Colo. Rev. Stat. § 26–2-108(b)(II)(A)–(B) (2023).

245. Ariz. Rev. Stat. Ann. § 25–525(A)–(B) (2023); W. Va. Code Ann. § 48–14–602 (LexisNexis 2023).

246. Cal. Fam. Code § 17308 (2023).

247. Ky. Rev. Stat. Ann. § 121.005(1)(c) (West 2023).

248. Cal. Child Support Automated Sys. Act, Cal. Welf. & Inst. Code § 10080(a)(2) (1999) (repealed 2017).

249. See Computerized Support Enforcement Systems, 63 Fed. Reg. 44795, 44795 (Aug. 21, 1998) (to be codified at 45 C.F.R. pts. 302, 304, 307) ("Full and complete automation is pivotal to improving the performance of the nation's child support program.").

250. See, e.g., Haw. Rev. Stat. Ann. § 27–44 (West 2023) ("The chief data officer shall use the state information assets and analytics to research and recommend processes and tools to improve inter-departmental and intra-departmental decision making and reporting."); Or. Rev. Stat. § 276A.353 (West 2023) ("The Chief Data Officer shall . . . [i]dentify ways to use and share existing data for business intelligence and predictive analytic opportunities.").

251. Vt. Stat. Ann. tit. 3, § 3303 (2023); see also *id.* at §§ 3301–3305 ("The Agency of Digital Services is created to provide information technology services and solutions in State government.").

252. Ohio Rev. Code Ann. § 5101.061(B)(3) (2023).

253. P.R. Laws Ann. tit. 3, § 9866(f) (2023).

new funding for automation only if it "will result in greater efficiency in a government process."[254] This is a pattern. Nearly 200 state laws associate automation, CIO missions, and efficiency.[255]

In addition to formalizing automation as a government goal, laws on the books also establish efficiency as government policy, guiding the terms on which agencies use automated tools. At the federal level, the Office of Management and Budget (OMB) and one of its subdivisions, the Office of Information and Regulatory Affairs (OIRA), use technical review and approval processes to implement efficiency mandates like budget controls and narrow versions of cost–benefit analyses over a host of agency actions.[256] As Professor Julie Cohen has demonstrated, OMB/OIRA involvement prioritizes efficiency over other values.[257] In particular, OMB/OIRA's integration into the administrative state brings accountants and other professionals focused on "efficient management" to the forefront of agency decisionmaking even when those agencies' missions center public health, equity, or welfare.[258] Those professionals use the logics of accounting and management to make normative decisions about a program's value seem like detached, neutral appraisals of dollars and cents.[259]

This creates a fertile ground for automation. Efficiency mandates to do necessary government work with less funding decouple agency missions from experts trained in the agency's goals and shift power to number crunchers focused on one thing—efficiency—that takes primacy over other agency goals.[260] And automated technologies are universally touted as enhancing administrative efficiency.[261] More specifically, cost–benefit appraisal methods are inherently utilitarian and, therefore, assume that even serious harm, especially to a small minority of the population, could be outweighed by higher levels of economic benefits for others. As a result, cost–benefit analysis implements efficiency mandates in ways that make realizing those benefits through automation more likely.[262]

254. Utah Code § 63A-16–903(2)(a)(ii) (2023).

255. Based on a Westlaw advanced search that resulted in 203 hits. State Statute Search Results, Westlaw Precision, https://1.next.westlaw.com/ (select content type "Statutes & Court Rules"; select Advanced Search; select "All States" for jurisdiction; use query: chief +4 data information innovation +4 officer; refine by: efficien! OR reduc! lower cut +4 cost!) (on file with the *Columbia Law Review*) (last visited Sept. 12, 2023).

256. See Cohen, Between Truth and Power, *supra* note 16, at 194; Eloise Pasachoff, The President's Budget as a Source of Agency Policy Control, 125 Yale L.J. 2182, 2213–23 (2016).

257. Cohen, Between Truth and Power, *supra* note 16, at 195.

258. *Id.* at 194.

259. *Id.*

260. *Id.* at 194–95.

261. See, e.g., Citron, Technological Due Process, *supra* note 17, at 1259.

262. Many state laws explicitly link automation with efficiency mandates. For instance, Texas implemented an automated system to make healthcare eligibility determinations only after a cost–benefit analysis focused almost exclusively on cost savings from automation. Tex. Gov't Code Ann. § 531.191(d) (West 2023). Mississippi's automated child welfare unit

B. *Efficiency and the Gender Binary*

What do efficiency mandates have to do with binary gender? In addition to falling prey to the same problems as the law of gender data collection and sharing, gender data law privileges the gender binary because it creates a certain type of regulatory automation—namely, one guided by values of efficiency and risk management. This system erases transgender and gender-nonconforming individuals in three ways: The resulting technologies model probabilities that exclude minorities, reflect managerial interests that ignore inclusion, and incorporate coding language that binarizes data inputs.

As we have seen, the law of gender data use mandates and incentivizes automation primarily to verify identity, prevent fraud, and achieve security. In that way, the law envisions automation as a form of governmentality aimed at risk management.[263] Algorithmic technologies like the ones experienced by Sasha and Toby are forms of "targeted governance" in which the logics of information, surveillance, and prediction are carried out through data-driven assessment of systemic threats.[264] But assessing risk requires modeling threats,[265] and statistical modeling "depend[s] on assumptions about variables and parameters that are open to contestation."[266] This kind of quantification has been shown to accelerate predictable injustice.[267]

But the problem runs deeper. Modeling for risk requires technologies to rely on probabilities; even systemic threats are potential future harms that may or may not occur.[268] So when technological systems are assessing whether Sasha is a terror threat or Toby is a fraud threat, they are using gender data in a complex probabilistic equation. Policy by probabilities is ostensibly efficient: It captures the realities of most people most of the time. As applied to any given individual, however, what that probability predicts could be off the mark or incorrect. Because transgender and nonbinary individuals make up less than 0.8% of the U.S. population and usually far less in surveys,[269] statistical models

can only operate in the most "cost efficient manner" based on a cost–benefit analysis. Miss. Code Ann. § 43–19–31(k) (2023).

263. Cohen, Between Truth and Power, *supra* note 16, at 140–57; Currah & Mulqueen, *supra* note 2, at 576.

264. Mariana Valverde & Michael Mopas, Insecurity and the Dream of Targeted Governance, *in* Global Governmentality: Governing International Spaces 233, 239 (Wendy Larner & William Walters eds., 2004).

265. Calo, Modeling, *supra* note 90, at 1395.

266. Cohen, Between Truth and Power, *supra* note 16, at 182.

267. Frank Ackerman & Lisa Heinzerling, Pricing the Priceless: Cost–Benefit Analysis of Environmental Protection, 150 U. Pa. L. Rev. 1553, 1578–79 (2002).

268. Cohen, Between Truth and Power, *supra* note 16, at 183; see also Calo, Modeling, *supra* note 90, at 1398–405; Scheuerman et al., *supra* note 56, at 144:6.

269. See Jody L. Herman, Andrew R. Flores & Kathryn K. O'Neill, How Many Adults and Youth Identify as Transgender in the United States? 1 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf [https://perma.cc/7H4Y-SMTD] (finding that 1.6 million youth and adults in America identify as transgender); Bianca D.M. Wilson & Ilan H. Meyer, Nonbinary LGBTQ Adults in the United States 2 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.

designed for efficiency are likely to fail when applied to them, excluding them as "noise."[270] Gender-diverse populations are certainly not the only marginalized groups victimized by technical tools that are trained on data about the general population norm; queer people of color and those at the intersection of several matrices of domination fare worse.[271] But as Os Keyes, a scholar of human-centered design and engineering, has argued, when "an error rate . . . disproportionately falls on one population[,] [it] is not just an error rate: it is discrimination."[272]

Sex and gender data use in the automated state is also decidedly managerial. Managerialism is an ideology and set of practices closely associated with neoliberal governmentality in which values like efficiency, innovation, and data-driven policy take primacy over social values.[273] Efficiency is by no means a bad thing, but a managerial approach to governance relies on narrow, financialized conceptions of costs and benefits to determine efficiencies.[274] That leaves little room for social welfare and gender inclusivity.

For instance, even though scholars talk about interagency MOUs and data-sharing agreements as if they are between governments or government departments, they are really agreements between those departments' *managers*.[275] As noted above, the law of sex and gender data sharing is often not the product of statutory permission but civil servant discretion. Therefore, interagency agreements reflect the goals and orientations of departmental managers or what their departments need to fulfill the jobs of governance. Those goals can undoubtedly overlap with other values, like equity and antisubordination, democracy, or the general welfare. But the extent to which those values are realized through agency action depends on whether they align with managers' goals.[276] And if keeping costs down is state law, efficiency will take center stage in those goals.

The managerial automated state is one that judges its automation on cases closed and dollars saved.[277] Those metrics are designed to elide even significant

pdf [https://perma.cc/25KS-BDBX] (estimating that 1.2 million adults in America identify as nonbinary). Because the 1.2 million estimate of nonbinary American adults includes transgender nonbinary individuals, and approximately 40% of nonbinary adults identify as transgender, see Wilson & Meyer, *supra*, at 2–3 & fig.1, the total number of transgender and nonbinary individuals in the United States is likely far less than 2.8 million.

270. Beauchamp, *supra* note 10, at 2.

271. See Buolamwini & Gebru, *supra* note 12, at 10 (concluding that, based on an "intersectional demographic and phenotypic analysis, . . . all algorithms perform worse on female and darker subjects when compared to their counterpart male and lighter subjects").

272. Keyes, *supra* note 79, at 88:13.

273. Cohen, Between Truth and Power, *supra* note 16, at 171–72.

274. *Id.*

275. Willard F. Enteman, Managerialism: The Emergence of a New Ideology 154 (1993) (identifying managers of organizations and negotiations among managers as the key instruments of authority in managerialist societies).

276. *Id.* at 184.

277. Cohen, Between Truth and Power, *supra* note 16, at 194.

harm to small populations.[278] That means consigning transgender and gender-nonconforming individuals to repeated moments of everyday vulnerability even as the automated tools responsible for that vulnerability are legitimized as effective, "intelligent," and efficient risk-management policymaking.[279]

A third way that the efficiency-focused law of gender data use entrenches the male/female binary centers on database design, coding, and function. If the state wants to put its sex and gender data into databases so the data can be used by data-matching and data-mining systems in the most efficient way possible, coders will choose "Boolean variables" to describe gender instead of a box for an open-ended answer.[280] A Boolean variable is a binary variable with only two options: 0 and 1. As critical information studies scholar Meredith Broussard notes, if the state designs code "for maximum speed and efficiency using a minimum of memory space, you try to give users as few opportunities as possible to screw up the program with bad data entry. A Boolean for gender, rather than a free text entry field, gives you an incremental gain in efficiency."[281] Coding for gender as a Boolean or binary variable is also deeply ingrained in computer science and programming education[282] as well as governments' long history of digitization and automation.[283] At the same time, the practice excludes those who do not identify as either male or female.

C. *Guiding Automation: The Law on the Ground*

While the laws on the books mandate or foster automation to realize efficiency benefits, the law on the ground—including public-sector procurement and the applications of trade secrecy and procedural privacy law in

278. *Id.* at 190–91, 195.

279. Valverde & Mopas, *supra* note 264, at 239. The problem of regulatory managerialism also explains the insufficiency of the procedural due process proposals in the algorithmic accountability literature. These proposals include audit trails, impact assessments, and humans in the loop of automated decisionmaking systems. See, e.g., Reisman et al., *supra* note 17, at 3–6 (recommending impact assessments); Citron, Technological Due Process, *supra* note 17, at 1258, 1305 (fairness standards and audit trails); Froomkin et al., *supra* note 17, at 38 (requiring humans in the loop); Jones, *supra* note 17, at 217 (audit trails and requiring humans in the loop); Kaminski, *supra* note 17, at 1535 (audit trails); Selbst, *supra* note 24, at 123–25 (impact assessments). Imbued with management values and implemented by compliance professionals, these tools are easily subject to capture. Ari Ezra Waldman, Privacy Law's False Promise, 97 Wash. U. L. Rev. 773, 776 (2020) [hereinafter Waldman, False Promise] (noting that compliance professionals define privacy law's implementation, leading to compliance measures promoting efficiency and risk management rather than the law's stated goals).

280. Meredith Broussard, When Binary Code Won't Accommodate Nonbinary People, Slate (Oct. 23, 2019), https://slate.com/technology/2019/10/gender-binary-nonbinary-code-databases-values.html [https://perma.cc/LB4Q-8KF5].

281. *Id.*

282. See Natalie Kiesler & Benedikt Pfülb, The Boolean Dilemma: Representing Gender as Data Type, 21 Proc. Koli Calling Int'l Conf. on Computing Educ. Rsch., no. 30, Nov. 2021, at 1, 1.

283. See Hicks, *supra* note 73, at 29.

practice—further facilitates the kind of automation that tends to flatten gender data into binary male/female options. Procurement, as Professors Deirdre Mulligan and Kenneth Bamberger argue, is both a process and a mindset.[284] As a process, procurement is a pathway through which government agencies send out requests for proposals (RFPs) for new technologies, evaluate them based on a series of defined metrics, and acquire technologies by entering into contracts with for-profit, third-party vendors.[285] It is governed by detailed regulations that promote certain values: low costs, fair bidding, innovation, and healthy competition.[286] As a mindset, procurement positions AI and machine learning as "'the next logical step'" in administrative automation and as "machinery used to support some well-defined function" instead of an exercise in the distribution of power.[287]

Both the process and mindset of technology procurement make it more likely that the technology purchased by the state will embed the gender binary. They do this by immunizing algorithmic technologies from the interrogation necessary to disrupt the status quo—which almost always relies on the gender binary—in three related ways.

First, the process and mindset conceptualize AI and algorithmic technologies as neutral processes that simply help fulfill agencies' missions.[288] In theory, that is why procurement can be done through the neutral language and process of RFPs rather than the political language and process of policy.[289] RFPs are not supposed to make policy; they solicit bids for technologies to implement policy.[290] Under this logic, the technology does what the agency has always done, only more quickly, more cheaply, and supposedly with fewer mistakes. This was precisely the position of the Department of Homeland Security when federal law authorized the creation of new "fusion centers" that pooled national security data.[291] The Department's privacy impact assessment (PIA) stated that

284. Deirdre K. Mulligan & Kenneth A. Bamberger, Procurement as Policy: Administrative Process for Machine Learning, 34 Berkeley Tech. L.J. 773, 779–80 (2019) (noting that the process of procurement embodies certain bureaucratic values that collectively define a mindset that fails to account for other public values).

285. *Id.*

286. *Id.* at 779–80 (citing Steven L. Schooner, Desiderata: Objectives for a System of Government Contract Law, 11 Pub. Procurement L. Rev. 103 (2002)).

287. *Id.* at 779 (quoting HHS, Solicitation No. 19–233-SOL-00098_BASE 9 (2019), https://sam.gov/api/prod/opps/v3/opportunities/resources/files/39d0a0ce8bfe09391b9fee07833274de/download?&status=archived&token= [https://perma.cc/89H6-YKVS]).

288. *Id.* at 789.

289. Traditional agency policymaking, at least at the federal level, is governed by the Administrative Procedure Act, which provides two pathways for agency policymaking: rulemaking, which includes a public notice and comment period during which members of the public can provide feedback, and adjudication, in which the agency applies its rules to the entities it regulates. See 5 U.S.C. §§ 551–559 (2018).

290. See Mulligan & Bamberger, *supra* note 284, at 779–80.

291. Fahey, Data Federalism, *supra* note 16, at 1024–26 (explaining how fusion centers facilitate information exchange between government law enforcement agencies by collocating government personnel and sharing access to information in each other's possession).

fusion centers, which used advanced technology to collect, share, and process large amounts of data related to law enforcement, national security, and terrorism, were simply replicating "many of the interactions the Department was already undertaking."[292] And if technology simply does what an agency has always done, then there is no need to evaluate its underlying assumptions, normative choices, and design. This means that any existing state practice that uses binary sex and gender data will simply be integrated and encoded into a new system without interrogation.

Second, the procurement process and mindset situate agency expertise as dependent on and subordinate to technological expertise, privileging the latter over the former. If agency staff have few technical skills and conceptualize their role as simply using a complex tool that a private-sector expert built, they often assume they are incapable of interrogating the technology even if they wanted to. This presumed ignorance has taken center stage in litigation. In *State v. Loomis*, a due process challenge to Wisconsin's use of an algorithm that took gender into account when determining likelihood of recidivism,[293] no one from the state (even the judges deciding the case) knew how the algorithm worked.[294] The same thing happened in *Estate of Jacobs v. Gillespie*, a challenge to Arkansas's use of an automated system to determine disability benefits.[295] No one from the state saw it as their responsibility to understand how a critical system actually functioned.[296] Without public willingness or desire to interrogate the normative, political, and distributive choices made by algorithmic design, private-sector engineers and managers make those choices. The values and norms of their sociotechnical environment get embedded into automated decisionmaking systems.[297] Therefore, even if an engineer could capture legally relevant variables in design, the technology might still not capture the law's normative goals.[298] It will, instead, reflect the engineers and their managers' traditional goals: efficiency, technical function, and profit.[299] Inclusive and respectful gender data is not one of those goals.

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292. DHS, Privacy Impact Assessment for the Department of Homeland Security State, Local, and Regional Fusion Center Initiative 4 (2008), https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ia_slrfci.pdf [https://perma.cc/B4W7-EPJY].

293. 881 N.W.2d 749, 753 (Wis. 2016).

294. Mulligan & Bamberger, *supra* note 284, at 777.

295. First Amended Complaint at 16–17, Est. of Jacobs v. Gillespie, No. 3:16-cv-00119-DPM (E.D. Ark. Nov. 1, 2016).

296. Calo & Citron, *supra* note 23, at 799 (describing that agency officials "did not know how the system worked").

297. See Bear & Knobe, Normality, *supra* note 217, at 25.

298. See Noëmi Manders-Huits, What Values in Design? The Challenge of Incorporating Moral Values Into Design, 17 Sci. & Eng'g Ethics 271, 279 (2011) (arguing that integrating empirical methods in Value-Sensitive Design is challenging because the values are often abstract and difficult to interpret); Frank Pasquale, Professional Judgment in an Era of Artificial Intelligence and Machine Learning, boundary 2, Feb. 2019, at 73, 74 (arguing that "substituting AI for education and health-care professionals" requires a "corrosive reductionism").

299. Paul Ohm & Jonathan Frankle, Desirable Inefficiency, 70 Fla. L. Rev. 777, 778–79

Third, the procurement process and mindset defer to private companies' demands for maximalist intellectual property and trade secrecy protections. To obtain technologies they find both necessary and complex, governments often use procurement contracts that protect the trade secrets of their vendors. For instance, the Alaska Procurement Policies and Procedures Manual requires agencies to treat as confidential anything designated as a trade secret by a third-party vendor in a procurement contract.[300] The Freedom of Information Act and its state equivalents exempt trade secrets, allowing vendors to provide necessary information in response to RFPs without fear of any of it being released to the public.[301] And, as the law and technology scholar Rebecca Wexler has shown, vendors have routinely used trade secrecy claims to protect their sentencing, recidivism, and parole algorithms from being interrogated in court.[302] At present, at least twenty-one states have codified trade secrecy privileges in their evidence rules, further insulating automated technologies from public interrogation.[303] By privileging private technology over the public interest, the procurement process and mindset shield automated technologies from the kind of deep public review that could uncover transgender and nonbinary erasure.

D. *Immunizing Automation: Information Law in Action*

Alongside the procurement process and mindset, agencies and the technology companies that build algorithmic decisionmaking systems leverage information law to foster automation that binarizes gender. Specifically, both the state and technology vendors weaponize privacy impact assessments (PIAs) to prevent anyone from interrogating how algorithmic technologies use gender while prioritizing efficiency and the utilitarianism of cost–benefit analysis.

At the federal level, the E-Government Act of 2002 requires agencies to conduct PIAs for any electronic information system or program that collects information about citizens.[304] Several state laws also require agencies to develop rules for conducting or completing PIAs for any use of technology involving citizen data.[305] PIAs are supposed to describe the information to be

(2018).

300. Alaska Administrative Manual 81: Procurement 81.195 (2018), http://doa.alaska.gov/dof/manuals/aam/resource/81.pdf [https://perma.cc/R7FY-KADK].

301. Citron, Technological Due Process, *supra* note 17, at 1293.

302. Rebecca Wexler, Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System, 70 Stan. L. Rev. 1343, 1353–54 (2018).

303. *Id.* at 1352.

304. E-Government Act of 2002, Pub. L. No. 107–347, § 208(b), 116 Stat. 2899, 2922.

305. See, e.g., W. Va. Code Ann. §§ 5A-6B-2, -3(b)(10) (LexisNexis 2023) (defining a PIA as "a procedure or tool for identifying and assessing privacy risks throughout the development life cycle of a program or system"); see also Ga. Code Ann. § 20–2-663(a)(4) (2023); Ohio Rev. Code Ann. § 1347.15(b)(8) (2023). PIAs are also now part of what I have previously called the "second wave" of privacy laws that apply to for-profit, private companies. Ari Ezra Waldman, The New Privacy Law, 55 U.C. Davis L. Rev. Online 19, 21 (2021), https://lawreview.law.ucdavis.edu/online/55/files/55-online-Waldman.pdf [https://perma.cc/TR3C-EFQA]. PIAs are required by the General Data Protection Regulation (GDPR) in the European Union, see Council Regulation 2016/679, art. 5, 2016 O.J. (L 119)

collected, its purpose and use, how the information will be secured, when individuals will have opportunities to deny or grant consent, and to what extent the technological system will impact individual privacy.[306] Their goal is to legitimize the use of data-driven technologies by passing them through a form of informal due process, checking them against values like security and privacy.[307] But in reality, both in their design and their application, PIAs do not consider transgender and nonbinary erasure.

Consider, for example, the PIA used by the executive branch of West Virginia.[308] In a "threshold analysis," agencies designate whether the technology being reviewed is major, minor, a support system, or something else.[309] They then have to acknowledge if personally identifiable information (PII) is involved in the system. Gender is included in the list of PII, but there is no opportunity to describe how the technology collects or uses gender data or if those uses are in any way problematic.[310] West Virginia's Data Classification Policy considers gender data "sensitive" but not "restricted,"[311] which means that no additional work or special restrictions are necessary to protect it.[312] For instance, if the technology uses only "sensitive" data, the vendor can have free access to those data and store them in jurisdictions with weak privacy laws.[313] The PIA then asks if there is statutory authorization to collect and use citizen data, how it will be used, where the information will be stored, and whether the data can be shared electronically or on paper.[314] Finally, it accounts for controls, asking: "Are there controls in place to ensure that access to PII is restricted to only those individuals who need the PII to perform their official duties?"[315] There are three answer options: "yes," "no," and "NA." "Are there

1, 35–36, and the proposed American Data Protection and Privacy Act, see American Data Privacy and Protection Act, H.R. 8152, 117th Cong., § 301(d) (2022).

306. Memorandum from Joshua B. Bolten, Dir., OMB, to Heads of Exec. Dep'ts and Agencies, M-03–18, Implementation Guidance for the E-Government Act of 2002 (Sept. 26, 2003), https://obamawhitehouse.archives.gov/omb/memoranda_m03–22/ [https:// perma.cc/7GQZ-7BU9].

307. Selbst, *supra* note 24, at 123–35 (arguing that for algorithmic impact assessments to be successful, they must take into account the way regulation is filtered through institutional logic).

308. W. Va. Exec. Branch, Privacy Impact Assessment (PIA) Instructions, https://privacy.wv.gov/privacyimpactassessment/Documents/Privacy%20Impact%20Assessment%20v.060523.pdf [https://perma.cc/Y2YF-Z79Z] [hereinafter W. Va. PIA Instructions] (last modified Aug. 25, 2022).

309. *Id.* at 5.

310. *Id.* at 5–6.

311. State of W. Va. Off. of Tech., Policy: Data Classification 2–3 (Jan. 6, 2010), https://drive.google.com/file/d/1NNqhRmfaK-SEa0PBuurIrIQGGvMYvvJc/view [https://perma.cc/NX59-JLWF] [hereinafter W. Va., Data Classification Policy] (last updated Oct. 21, 2021) (classifying datasets including gender, such as driver history records and personnel records, as sensitive).

312. *Id.* at 3.

313. *Id.*

314. W. Va. PIA Instructions, *supra* note 308, at 8–9.

315. *Id.* at 10.

physical controls in place to ensure the files are backed up?"[316] Again, "yes," "no," and "NA" are the only possible—and only required—answers.[317] The PIA concludes by asking whether the agency has an incident response plan and requesting a simple dropdown yes/no answer for whether "additional risk mitigation [is] needed."[318]

The TRACS PIA completed by HUD's Office of Housing follows the same pattern. It notes that the genders of those receiving federal housing assistance will be collected and processed, but there is no space in the PIA design to consider the impacts on diverse gender identities.[319] With PII in the system, the PIA asks for "security control" and provides a check box to indicate that such controls exist.[320] It asks for remote work policies and rules about downloading information, which the Office of Housing answered by listing rules from the Department's handbook.[321] The PIA concludes with questions about security protocols.[322]

This is how PIAs function in the information industry as well. Reduced to checkbox compliance and simple questions, PIAs tend to focus on procedure and security.[323] The capacity of PIAs to have any substantive impact on underlying technologies is also a matter of PIA design. That is, if PIAs do not ask about the scope of gender data, whether the data include transgender, nonbinary, and gender-nonconforming individuals, or how the technology might cause gender erasure, those questions will not be considered. PIAs interrogate only those aspects of technology captured by their questions; civil servants can answer only with the options they are provided.

Asking more probing questions on PIAs will not solve the problem. PIAs are necessarily cursory. They are often reduced to simple charts with "yes" or "no" answer options so they can be completed by nonexperts.[324] As a result, they become tools for legitimizing otherwise data-extractive technologies without any deep interrogation of their impact on even those facets of technology design covered by the PIA.[325] For government agencies that have already decided they want to purchase a particular automated technology, PIAs like the ones used by HUD or West Virginia become window-dressing procedures, a form of performative compliance, that offer the gloss and patina of accountability without any of the work. They are, in short, formalities. And yet, they retain power backed by the formal law; a PIA is a necessary precondition of using new automated systems. Just like their corporate counterparts, state providers of PIAs legitimize quests for automation.

316. *Id.* at 11.
317. *Id.*
318. *Id.* at 11.
319. TRACS PIA, *supra* note 194, at 8.
320. *Id.* at 9.
321. *Id.* at 11.
322. *Id.* at 15–16.
323. Waldman, Industry Unbound, *supra* note 24, at 132–33.
324. *Id.* at 133.
325. Waldman, False Promise, *supra* note 279, at 785.

V. Lessons for the Automated State

Law plays a critical role in creating an automated state that prioritizes efficiency and, therefore, binarizes sex and gender data. This conclusion reinforces the notion, now well established in the law and political economy literature, that economic and distributional systems are creatures of law.[326] In addition to buttressing some of what we already know about the law, this Article's case study of sex and gender data offers several additional insights into the automated administrative state in general, insights that challenge and add nuance to the conventional wisdom about the state's use of algorithmic tools. This Part explores four of those lessons.

First, despite the popular view that automation erodes discretion, this Article demonstrates discretion's persistence. Second, contrary to the conventional account about the primacy of engineering expertise in the automated state, this Article shows how much the state and engineers rely on stereotypes and perceptions of common sense when designing technology and doing their jobs. Third, challenging the view that automation occurs in a regulatory void, this Article shows how automation is a product of neoliberal approaches to law. Finally, contributing to scholarship focusing on technology's subordinating capacities, this Article shows how the law of automation creates a state that is simultaneously awash in gender data but devoid of gender-diverse data, subjecting transgender, nonbinary, and gender-nonconforming individuals to all the harms of the data-driven state without any of the benefits. With these lessons, this Part concludes by returning to privacy law principles of data minimization and antisubordination for a new framework to govern sex and gender data: The state should collect, share, and use only as much gender data as is necessary to contribute to the liberation of gender-diverse populations.

A. *Persistent Discretion*

Many law and technology scholars have argued that automating state apparatuses takes away opportunities for civil servants to exercise discretion, a key rationale for the administrative state in the first place and a critical tool for individualized care for those in need of government assistance.[327] Although discretion in the administrative state looks different today than it once did, the law of sex and gender data collection, sharing, and use demonstrates the continued strength and persistence of street-level bureaucratic discretion in the automated state.

Automated decisionmaking does disrupt some of the traditional functions of street-level bureaucrats. For instance, instead of having a social worker visit disabled residents in person to determine how much in-home care they needed,

326. Regarding the law and political economy literature, see Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 Yale L.J. 1784, 1791–94 (2020).

327. See Lipsky, *supra* note 126, at 10–22; Calo & Citron, *supra* note 23, at 799; Metzger, *supra* note 134, at 1900; Mulligan & Bamberger, *supra* note 284, at 778.

Arkansas turned to an algorithm (with disastrous results).[328] But frontline worker discretion is critical to data pathways in the automated state. Required by law to collect sex and gender data, civil servants decide how to collect it. And they sometimes change the law while doing so: Whether out of ignorance or intent, frontline workers sometimes decide to ask for gender on voter registration forms even though the law requires sex.[329] In addition, because some state laws merely permit rather than explicitly require interagency data sharing, street-level bureaucrats also decide how, when, with whom, and under what terms to share sex and gender data. Within frameworks constructed by law, civil servants also have significant discretion when procuring new technologies from third-party vendors. And civil servants squeeze and stretch the formal procedural requirement of PIAs to push their procurement decisions over the finish line. There appears to be far more discretion in the automated state than scholars have realized.

Much scholarship elides street-level bureaucrats' persistent and significant discretion in the automated state because it is focused elsewhere—namely, on the algorithmic system itself.[330] That focus yields essential insight. Expanding the scope of scholarly attention to the prerequisite stages of automation can yield even more.[331] Algorithms need data, and those data can effectively train algorithmic systems only when aggregated and pooled in large quantities. Sometimes, states purchase data from brokers.[332] Large amounts of sex and gender data are collected through forms and aggregated through interagency agreements and interstate compacts, all of which are drafted and negotiated by street-level bureaucrats. Civil servants even have some discretion to affect the designs of the technologies they buy from private, for-profit companies depending on the nature of the procurement contracts. At the automation stage, civil servants exercise their power and discretion to immunize algorithmic technologies from public interrogation. Automation may muddle our traditional conceptions of agency expertise, but it does so while adding new opportunities for frontline workers to exercise power, discretion, and knowledge.

History shows that the persistence of such discretion poses risks for transgender, nonbinary, and gender-nonconforming individuals. Dean Spade has written extensively about the administrative state's hostility to transgender

328. Ark. Dep't of Hum. Servs. v. Ledgerwood, 530 S.W.3d 336, 339–40 (Ark. 2017); see also Leslie Newell Peacock, Legal Aid Sues DHS Again Over Algorithm Denial of Benefits to Disabled: Update With DHS Comment, Ark. Times (Jan. 27, 2017), https://arktimes.com/arkansas-blog/2017/01/27/legal-aid-sues-dhs-again-over-algorithm-denial-of-benefits-to-disabled-update-with-dhs-comment [https://perma.cc/U2U7-UHDW].

329. See *supra* note 139.

330. See *supra* note 17.

331. See David Lehr & Paul Ohm, Playing With the Data: What Legal Scholars Should Learn About Machine Learning, 51 U.C. Davis L. Rev. 653, 655–58 (2017) (making a similar recommendation, but focusing only on machine learning rather than the law's role in mandating, fostering, and incentivizing data collection, sharing, and use).

332. See *supra* note 144.

people.[333] Political scientist Paisley Currah points to state agencies' inconsistent and irrational practices for changing gender designations on official documents as evidence of systemic transphobia in government.[334] And technology historian Mar Hicks has shown how bureaucrats took advantage of newly computerized welfare allocation systems in post–World War II Britain to erase transgender identities: They used their discretion to deny gender designation change requests while programming transgender citizens' files into the computer as "aberrant" instead of simply changing M to F or F to M.[335] This history is reason enough for gender-diverse communities to doubt the promises of an automated state, whether infused with discretion or not.

B. *Persistent Stereotypes*

In addition to showing that discretion persists, this Article's case study of the state's use of sex and gender data complicates the extant narrative about agency expertise in the information age. Scholars argue that automation shifts expertise in state agencies from frontline workers hired because of their substantive knowledge of agency work to engineers and programmers who design the algorithms that make policy.[336] That is undoubtedly true to an extent, but the reality is more complicated. When it comes to the collection, sharing, and use of sex and gender data, expertise takes a back seat to stereotypes and perceptions of common sense.

Popular understandings of sex and gender affect data pathways from the beginning. Statutes, sharing agreements, and procurement contracts capturing sex and gender data are often imprecise; they refer only to "sex" or "gender" without specifying how that information should be collected or used. This could be explained by the limits of language, the need to build majorities and coalitions when passing laws, or the inherent complexity in governing the modern state.[337] But interviews with civil servants responsible for designing forms and negotiating data-sharing and procurement contracts make clear that many civil servants simply presume that sex and gender are obvious and matters of common sense.[338] Vague statutes are also often interpreted according

333. See Spade, Normal Life, *supra* note 19, at 9–11; Spade, Documenting Gender, *supra* note 36, at 737–39.

334. Currah, *supra* note 67, at 7–9, 28.

335. Hicks, *supra* note 73, at 27.

336. Citron, Technological Due Process, *supra* note 17, at 1296–98.

337. See, e.g., Calo & Citron, *supra* note 23, at 813–14; Joseph A. Grundfest & A.C. Pritchard, Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation, 54 Stan. L. Rev. 627, 640–41 (2002) (describing several reasons for ambiguity, including language, politics, and discretion delegated to administrative agencies and courts); Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 594–96 (2002) (documenting "deliberate ambiguity" in statutes).

338. Waldman, Opening, *supra* note 133 (manuscript at 21) (demonstrating the salient role of supposedly "common-sense" assumptions about sex and gender in how civil servants involved in form design do their work).

to common sense or ordinary meaning.[339] Unfortunately, although views are changing, most people think that sex and gender are binary and static.[340]

When they conceptualize sex and gender as "common sense" categories, the laws on the books and on the ground codify, rely on, and entrench stereotypes. For instance, as legal historian Anna Lvovsky demonstrates, anti-vice police and state liquor board agents claimed they could use "common sense" to identify gay people and, thereby, shut down bars for "'becom[ing] disorderly'" or knowingly "'permitt[ing] . . . degenerates and undesirable people to congregate.'"[341] To do so, they relied on queer stereotypes and then arrested any man who did not meet police expectations of masculinity.[342] This same idea, that sex categorizations are common sense and that individuals obviously fit into one or the other, is still being used by those seeking to restrict the rights of transgender people to use public restrooms that *accord* with their gender identities.[343] Therefore, statutes and agreements that leave the words "sex" and "gender" unspecified allow supposedly "commonsense" perceptions—namely, stereotypes—to dominate how the law is implemented in practice.

C. *Persistent Legal Intervention*

Some scholars have suggested that automation and its harms have arisen in a regulatory or legal void.[344] But, as this Article shows, the law has not been hands-off. This Article's case study of sex and gender data pathways suggests that the law creates a particular kind of neoliberal state—namely, one premised on the pathologies of risk-based governance and data maximalism. This puts gender-diverse populations at risk.

The neoliberal state is thoroughly infused with market-oriented thinking: a belief that the market is the best way to advance social welfare and that only market-based options are workable.[345] Unlike the classical liberal state, neolib-

339. Smith v. United States, 508 U.S. 223, 241–44 (1993) (Scalia, J., dissenting).

340. Kim Parker, Juliana Menasce Horowitz & Anna Brown, Pew Rsch. Ctr., Americans' Complex Views on Gender Identity and Transgender Issues 4 (2022), https://www. pewresearch.org/social-trends/wp-content/uploads/sites/3/2022/06/PSDT_06.28.22_GenderID_fullreport.pdf [https://perma.cc/6DM8-FREQ].

341. Anna Lvovsky, Vice Patrol 29–41 (2021) (first quoting N.Y. Alcohol & Bev. Law § 106(6) (McKinney 2021); then quoting Record on Review at 7, Gloria Bar & Grill v. Bruckman, 259 A.D. 706 (N.Y. App. Div. 1940)); see also, e.g., Nan Alamilla Boyd, Wide Open Town 109–11 (2003); Chauncey, *supra* note 37, at 8–9; John D'Emilio, Sexual Politics, Sexual Communities 14–15 (1983); Lillian Faderman & Stuart Timmons, Gay L.A. 28–30 (2006).

342. See Lvovsky, *supra* note 341, at 42 (noting that agents built their cases on the confidence "that they could spot queer men, immediately and infallibly, on the basis of the telltale mannerisms of the fairy"). For a more robust discussion of queer stereotypes that law enforcement officers and investigators relied on, see generally *id.* at 36–41.

343. See, e.g., Petition for a Writ of Certiorari at 14, Gloucester Cnty. Sch. Bd. v. Grimm, No. 20–1163 (U.S. filed Feb. 19, 2021), 2021 WL 723101 (suggesting that a public school should be free to make "commonsense" distinctions between male and female use of public bathrooms).

344. Calo & Citron, *supra* note 23.

345. David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism,

eral governance can be interventionist, leveraging law to enhance efficiency in institutions, minimize transaction costs, make decisions based on cost–benefit analysis, and use ever-growing information databases to deliver so-called "smart" forms of governance.[346] This type of governance relies on mass quantification, datafying as much about a population as possible and using those data to model potential future outcomes about who or what poses risks.[347]

That poses two problems for gender-diverse populations. First, the technologies used to model risk are not neutral; rather, their "assumptions about variables and parameters are open to contestation."[348] So, too, are the decisions to weigh a particular problem as more or less of a threat and to accept a certain amount of harm as too small enough or too unlikely to require remediation.[349] If—and that is a big *if*—they account for small populations like transgender, nonbinary, and gender-nonconforming individuals, these models may accept even extreme and likely harm as insufficiently weighty.

Second, data maximalism is uniquely dangerous to those whose data are not always consistent. Under the logics of neoliberal governance, more is better because more data means better trained algorithms, better predictions, and better security at a fraction of the cost of overinclusive or "dumb" surveillance.[350] Data maximalism means "a utopian governance dream—a 'smart', specific, side-effects-free, information-driven utopia."[351] In other words, more data are supposed to allow the government to use the resources of the neoliberal state—concerned not with social welfare but with risk management—in as efficient, targeted a manner as possible.

Sex and gender data are used by the state in automated forms of "targeted governance" that identify and evaluate the presence and magnitude of risk factors in people, spaces, and activities.[352] More information is supposed to help the state do that better.[353] For example, more data are supposed to help the state distinguish between two or more people with similar names.[354] Sex and

77 Law & Contemp. Probs. 1, 13–14 (2014); see also Jamie Peck & Adam Tickell, Conceptualizing Neoliberalism, Thinking Thatcherism, *in* Contesting Neoliberalism: Urban Frontiers 26, 33 (Helga Leitner, Jamie Peck & Eric S. Sheppard eds., 2007).

346. See Britton-Purdy et al., *supra* note 326, at 1796–800 ("Planning was essential if politics was to serve the goal of efficiency.").

347. See Cohen, Between Truth and Power, *supra* note 16, at 183; K. Sabeel Rahman & Hollie Russon Gilman, Civic Power 124 (2019).

348. Cohen, Between Truth and Power, *supra* note 16, at 182.

349. *Id.*

350. Paul Ohm & Nathaniel Kim, Legacy Switches: A Proposal to Protect Privacy, Security, Competition, and the Environment From the Internet of Things, 84 Ohio St. L.J. 101, 144–45 (2023) (proposing a designed-in capacity for users to switch from "smart" technologies, which extract data, to "dumb" technologies, which are not targeted or algorithmically determined).

351. Valverde & Mopas, *supra* note 264, at 239.

352. *Id.* at 245.

353. *Id.* at 246 (explaining how believers in "targeted governance" are "highly optimistic" that continuing to collect good data will increase efficiency).

354. Citron, Technological Due Process, *supra* note 17, at 1274–75 (discussing how

gender are not the only types of data that can do that. But that doesn't matter. Once the state commits to the neoliberal goal of targeted or smart governance, surveillance and data collection become pathologies. Collecting more data is always better.

But the state's use of gender data poses difficult-to-resolve data dilemmas for transgender, nonbinary, and gender-nonconforming individuals such that more is not always better. On the one hand, traditional approaches to collecting sexual-orientation and gender-identity (SOGI) data erase the identities of millions of people, harming nonbinary people, LGBTQ+ elders, bisexuals, and many other marginalized groups within the queer community.[355] Therefore, more and more accurate data could improve LGBTQ+ access to healthcare,[356] help identify discrimination,[357] and highlight injustice,[358] thereby informing

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the No Fly List system erroneously captures innocent people with names similar to those of people the government is actually seeking to prevent from flying).

355. See, e.g., Sonia K. Katyal, The Numerus Clausus of Sex, 84 U. Chi. L. Rev. 389, 406 (2017); Nancy J. Knauer, "Gen Silent": Advocating for LGBT Elders, 19 Elder L.J. 289, 342 (2012); Nancy C. Marcus, Bridging Bisexual Erasure in LGBT-Rights Discourse and Litigation, 22 Mich. J. Gender & L. 291, 295 (2015); Cara E. Trombadore, Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color, 32 Harv. J. Racial & Ethnic Just. 153, 168 (2016); Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 Stan. L. Rev. 353, 459 (2000).

356. See, e.g., Kellan E. Baker, Carl G. Streed, Jr. & Laura E. Durso, Ensuring that LGBTQI+ People Count—Collecting Data on Sexual Orientation, Gender Identity, and Intersex Status, 384 New Eng. J. Med. 1184, 1186 (2021); Alex S. Keuroghlian, Electronic Health Records as an Equity Tool for LGBTQIA+ People, 27 Nature Med. 2071, 2071 (2021); Carl G. Streed, Jr., Chris Grasso, Sari L. Reisner & Kenneth H. Mayer, Sexual Orientation and Gender Identity Data Collection: Clinical and Public Health Importance, 110 Am. J. Pub. Health 991, 991 (2020); Shaun Turney, Murillo M. Carvalho, Maya E. Sousa, Caroline Birrer, Tábata E.F. Cordeiro, Luisa M. Diele-Viegas, Juliana Hipólito, Lilian P. Sales, Rejane Santos-Silva & Lucy Souza, Support Transgender Scientists Post–COVID-19, 369 Science 1171, 1172 (2020).

357. See, e.g., Gender Identity in U.S. Surveillance Grp., Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys, at xiv (Jody L. Herman ed. 2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Survey-Measures-Trans-GenIUSS-Sep-2014.pdf [https://perma.cc/Q6AT-RAAJ]; Madeline B. Deutsch, JoAnne Keatley, Jae Sevelius & Starley B. Shade, Collection of Gender Identity Data Using Electronic Medical Records: Survey of Current End-User Practices, 25 J. Assoc. Nurses AIDS Care 657, 662 (2014); Sari L. Reisner, Kerith J. Conron, Scout, Kellan Baker, Jody L. Herman, Emilia Lombardi, Emily A. Greytak, Allison M. Gill & Alicia K. Matthews, "Counting" Transgender and Gender-Nonconforming Adults in Health Research: Recommendations from the Gender Identity in US Surveillance Group, 2 Transgender Stud. Q. 34, 37–38 (2015); Charlotte Chuck Tate, Cris P. Youssef & Jay N. Bettergarcia, Integrating the Study of Transgender Spectrum and Cisgender Experiences of Self-Categorization From a Personality Perspective, 18 Rev. Gen. Psych. 302, 303 (2014).

358. See, e.g., Leonore F. Carpenter & R. Barrett Marshall, Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof, 24 Wm. & Mary J. Women & L. 5, 23–30 (2017) (arguing that more accurate data would assist in proving patterns and practices of systemic profiling); Jordan Blair Woods, LGBT Identity and Crime, 105 Calif. L. Rev. 667, 675–76, 710, 724 (2017) (stating that the lack of available data makes it difficult to identify LGBT inequalities in the criminal system).

needed policy changes. Still, data are power, and the state has a long history of weaponizing demographic data in service of white supremacy, cisnormativity, and heteropatriarchy.[359] There is virtue in the state sometimes knowing less.[360] This is why many transgender and nonbinary individuals refuse to disclose or are uncomfortable disclosing gender identity data, even in trans-specific studies, out of concern for their privacy.[361] And because gendered classifications cannot be extricated from racial ones, transgender and nonbinary persons of color feel these harms most acutely.[362]

Scholars and advocates have long debated how to navigate this dilemma with respect to racial categories on the U.S. census and SOGI data in government surveys and in healthcare contexts.[363] Some think the state should get out of the business of collecting and using SOGI data altogether.[364] Indeed, despite how technology companies frame their algorithms' strengths, many algorithms do not need that much data to achieve their results. Several algorithmic systems that claim to make accurate predictions because they use hundreds or thousands of data inputs fare no better than standard linear regressions that use two or four.[365]

Banning certain types of data collection, sharing, and use has been central to some social movements. For instance, the movement to "ban the box"

359. See, e.g., Ruha Benjamin, Race After Technology: Abolitionist Tools for the New Jim Code 36 (2019) (arguing that race-neutral technologies, laws, and policies perpetrate white supremacy); Catherine D'Ignazio & Lauren F. Klein, Data Feminism 14–17 (2020) (arguing that data historically have been used by those in power to consolidate their control); María Lugones, Heterosexualism and the Colonial / Modern Gender System, Hypatia, Winter 2007, at 186, 196 (arguing that gender differentials were a tool of colonization); Lauren E. Bridges, Digital Failure: Unbecoming the "Good" Data Subject Through Entropic, Fugitive, and Queer Data, Big Data & Soc'y, Feb. 11, 2021, at 1, 14 (arguing that society has historically used data to compare others to the white, heterosexual male).

360. Daniel J. Solove, The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure, 53 Duke L.J. 967, 988–98 (2003).

361. See, e.g., Hale M. Thompson, Patient Perspectives on Gender Identity Data Collection in Electronic Health Records: An Analysis of Disclosure, Privacy, and Access to Care, 1 Transgender Health 205, 210 (2016).

362. Currah, *supra* note 67, at 18, 21 (noting that the gender binary is inherently a function of race and colonization).

363. Several of the many excellent explorations of the U.S. Census's collection of data on race include the sources cited *supra* note 36. For a discussion of how the Census undercounts members of the LGBTQ+ community, see Kyle C. Velte, Straightwashing the Census, 61 B.C. L. Rev. 69, 72–73 (2020).

364. See, e.g., Clarke, *supra* note 2, at 942; Katri, *supra* note 35, at 644, 712–14; Wipfler, *supra* note 35, at 529–30.

365. See, e.g., Dressel & Farid, *supra* note 61, at 2–3 (finding that the COMPAS risk assessment software, which incorporates 137 different data points, performed no better than a linear regression relying on two independent variables); Matthew Salganik, Ian Lundberg, Alexander T. Kindel & Sara McLanahan, Measuring the Predictability of Life Outcomes With a Scientific Mass Collaboration, 117 Proc. Nat'l Acad. Scis. 8398, 8400 (2020) (demonstrating that machine-learning methods using thousands of data points poorly predicted life outcomes and were only somewhat better than regressions using four predictor variables).

seeks, at a minimum, to remove the box to check on employment application forms if job applicants have been convicted of felonies.[366] The policy intends to stop discrimination at its source by eliminating, or at least delaying, a data point that allows employers to screen out candidates without looking at their credentials.[367] To achieve their goal, advocates built a movement with formerly incarcerated persons and successfully lobbied city and state governments across the country to remove the criminal history box from public employment forms.[368] Similarly, some advocates have called for eliminating gender designations on birth certificates, passports, and other official documents.[369] They argue that the risks are too high and that alternative technologies exist to verify identities.[370]

But these abolitionist responses may not achieve their goals and could have unintended effects. Even if algorithms exclude certain datapoints, machine learning may still be able to identify patterns by proxy.[371] Furthermore, at least a couple of studies suggest that the current iteration of "ban the box" laws have unintended consequences; employers may be discriminating even more on the basis of race.[372] And, as Professor Jessica Clarke has shown, the relevance of sex, gender, assigned gender at birth, and gender identity varies.[373] There are powerful reasons to want "each context of sex or gender regulation [to] consider[] 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."[374]

366. See Johnathan J. Smith, Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks, 49 Harv. C.R.-C.L. L. Rev. 197, 200 (2014).

367. See Michelle Natividad Rodriguez & Anastasia Christman, Nat'l Emp. L. Proj., Fair Chance—Ban the Box Toolkit: Opening Job Opportunities for People With Records 4 (2015), https://s27147.pcdn.co/wp-content/uploads/NELP-Fair-Chance-Ban-the-Box-Toolkit.pdf [https://perma.cc/5983-UDR2]; see also Jessica S. Henry & James B. Jacobs, Ban the Box to Promote Ex-Offender Employment, 6 Criminology & Pub. Pol'y 755, 757 (2007) (describing how, "in addition to promoting employment discrimination against ex-offenders, the question deters ex-offenders from even applying for city jobs").

368. See Smith, *supra* note 366, at 211–15.

369. See, e.g., Clarke, *supra* note 2, at 947 (passports); Katri, *supra* note 35, at 644, 710–14 (birth certificates and other official documentation); Wipfler, *supra* note 35, at 529–30 (birth certificates).

370. See, e.g., Clarke, *supra* note 2, at 981–83; Katri, *supra* note 35, at 644, 710–14; Wipfler, *supra* note 35, at 529–30.

371. See, e.g., Talia Gillis, The Input Fallacy, 106 Minn. L. Rev. 1175, 1180–81 (2022).

372. See Stephen Raphael, The Intended and Unintended Consequences of Ban the Box, 4 Ann. Rev. Criminology 191, 205 (2021); see also Angela Hanks, Ctr. for Am. Progress, Ban the Box and Beyond 14 (2017), https://www.americanprogress.org/wp-content/uploads/sites/2/2017/07/FairChanceHiring-report.pdf [https://perma.cc/9S32–94VR] (arguing that "ban the box" should be "just one element of a multi-pronged strategy to remove barriers to employment that people with criminal records face").

373. See Clarke, *supra* note 2, at 990.

374. *Id.*

D. *Persistent Subordination*

The automated administrative state's approach to sex and gender data is both over- and underinclusive, harming gender-diverse populations from both sides. On the one hand, the state collects sex and gender data in a myriad of contexts. As a result, many transgender people who hold inconsistent gender designations on official documents avoid participating in daily life, from obtaining healthcare and practicing licensed professions to traveling and attending school.[375] Transgender and nonbinary people vote at lower rates than the broader LGBTQ+ community and the population at large in part because strict voter identification laws transform the voting booth into gender dysphoric triggers.[376] Knowing that the state uses sex and gender data to determine identity and maintain security, many gender-diverse populations are forced to the margins of society as they avoid the risk of harm.

On the other hand, the law, civil servants, and technology designers make decisions that exclude those who do not fit neatly in binary gender categories.[377] The law of gender data collection triggers a form design process riddled with incentives to maintain the status quo and integrates biased perceptions that sex and gender are matters of common sense, elevating the gender binary.[378] The law of gender data sharing normalizes the gender binary, conflates sex and gender, and makes all state agencies dependent on databases that look the same.[379] The law of gender data use prioritizes efficiency and immunizes algorithmic systems from interrogation, which leaves the gender binary intact.[380] To be sure, some transgender individuals can respond honestly to questions with binary answer options. But without any way of identifying who among those who check "male" are transgender men and who among those who check "female" are transgender women, transgender individuals remain hidden within the data, unable to benefit from granular insights.[381]

Some argue that substantive due process and equal protection law can effectively solve these problems. Substantive due process is supposed to

375. See, e.g., Judson Adams, Halle Edwards, Rachel Guy, Maya Springhawk Robnett, Rachel Scholz-Bright & Breanna Weber, Transgender Rights and Issues, 21 Geo. J. Gender & L. 479, 532 (2020); Currah & Mulqueen, *supra* note 2, at 565.

376. See How Voter ID Laws Disenfranchise Transgender Americans, Democracy Docket (June 29, 2021), https://www.democracydocket.com/analysis/how-voter-id-laws-disenfranchise-transgender-americans/ [https://perma.cc/AF38-HLC2] ("27% [of transgender eligible voters] live in states with voter ID laws, but lack qualifying identification that reflects their name and gender." (citing Kathryn O'Neill & Jody L. Herman, The Potential Impact of Voter Identification Laws on Transgender Voters in the 2020 General Election 2 (2020), https://www.democracydocket.com/wp-content/uploads/2021/06/Trans-Voter-ID-Feb-2020.pdf [https://perma.cc/SD6Q-UB44])).

377. Albert & Delano, *supra* note 77, at 539–40.

378. See *supra* section II.C.

379. See *supra* section III.D.

380. See *supra* section IV.B–.D.

381. Albert & Delano, *supra* note 77, at 540–41 (referring to this phenomenon as "category-based erasure").

guarantee fundamental rights essential to a democratic society;[382] equal protection requires that similarly situated individuals be treated similarly unless there is a valid justification otherwise.[383] Legal scholar Margaret Hu has argued that the use of data-matching systems and AI to classify certain individuals as risks of fraud, terrorism, or general criminality may constitute a violation of the presumption of innocence.[384] Several scholars argue that a state violates the equal protection clause when its algorithmic decisionmaking systems disproportionately harm certain marginalized populations.[385]

But antidiscrimination protections are hanging on by mere threads. Courts have chipped away at their efficacy in general.[386] It is particularly difficult to demonstrate discriminatory intent in the design and use of automated systems, when algorithms often operate as black boxes and when using proxy variables closely associated with protected identities can achieve discriminatory goals just as well.[387] Besides, our goal should be to do what we can to stop these problems from happening in the first place.

VI. Privacy Law Principles and Non-Reformist Reforms

So far, this Article has demonstrated how law creates an automated state aimed at efficiency and, as a result, binarizes gender and erases and harms gender-diverse populations. This Part considers the normative question of the role of the state: Given the law's role in transgender and nonbinary erasure, should the state ever collect, share, and use gender data at all? If so, can the state to do so in a way that serves the interests of gender-diverse populations in an automated state rather than the disciplinary and surveillant goals of the government? I confess to being uncertain. State power has long been used to force legibility on state subjects. Even state-sponsored schemes to improve the human condition through legibility often fail inside a structure designed to do

382. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015) (holding that "[t]he identification and protection of fundamental rights" is part of the Court's constitutional duties); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that withholding contraceptives from unmarried individuals "conflicts with fundamental human rights"); Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

383. See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." (quoting U.S. Const. amend. XIV, § 1) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982))).

384. Margaret Hu, Big Data Blacklisting, 67 Fla. L. Rev. 1735, 1759, 1776 (2015).

385. *E.g.*, Barocas & Selbst, Big Data's Disparate Impact, *supra* note 12, at 673–76.

386. See, e.g., Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, Disparate Limbo: How Administrative Law Erased Antidiscrimination, 131 Yale L.J. 370, 375–84 (2021) ("When agencies act in ways that have significantly different effects along racial or ethnic lines, a claim to that effect is cognizable under neither administrative law nor antidiscrimination law.").

387. See, e.g., Pasquale, Black Box Society, *supra* note 59, at 40–41; Barocas & Selbst, Big Data's Disparate Impact, *supra* note 12, at 712–13.

the opposite.[388] And yet, some legibility seems necessary to provide effective healthcare, enforce antidiscrimination law, and consciously account for historic marginalization and erasure. Therefore, this Part offers a tentative middle ground based on privacy principles: As advocates strive for the abolition of gender data as a classificatory, securitizing, and identification tool, we can also engage with policymakers and local, state, and federal street-level bureaucracy to find a better balance between legibility and privacy in an age of automation.

A. *Which Kind of Privacy*

Legal philosopher Anita Allen argues that historically, "Women have had too much of the wrong kinds of privacy."[389] Patriarchal forces pretextually leverage privacy to entrench traditional gender roles; "enforce isolation" in the home to cut off opportunities for growth, education, and flourishing;[390] and, in one not-uncommon but extreme case, permit a husband to abuse his wife behind the "curtain [of] domestic privacy."[391]

Gender-diverse populations suffer the same imbalance. This Article has shown that transgender, nonbinary, and gender-nonconforming individuals are erased or hidden from much public health surveillance. In these cases, they have too much of the wrong kind of privacy. At the same time, they are made legible as potential fraudsters by automated systems created by laws focusing on security, classification, categorization, and identification. Here, gender-diverse populations have too little of the right kind of privacy.

Managing state gender-data collection means reversing this imbalance. Gender-diverse populations deserve legibility or privacy when each serves human flourishing, equity, and full democratic participation. Finding that balance is precisely what queer data scientist Kevin Guyan seeks to do with his call for advocates, scholars, and representatives of affected communities to help build the state's "gender competence."[392] In other words, policymakers, street-level bureaucrats, and coders building algorithmic technologies for the state do not understand the power, limits, history, and dangers of collecting, sharing, and using gender data. They write and implement laws that collect sex and gender data without knowing why and assuming that doing so is uncon-

388. Scott, Seeing Like a State, *supra* note 21, at 309–10 ("Any large social process or event will inevitably be far more complex than the schemata we can devise, prospectively or retrospectively, to map it."); see also Eric A. Stanley, Atmospheres of Violence 118 (2021) (arguing that state efforts toward LGBTQ+ inclusion and recognition are forms of harm and that queer communities should resist state legibility generally in favor of abolitionist approaches to human flourishing).

389. Anita Allen, Uneasy Access: Privacy for Women in a Free Society 37 (1988).

390. *Id.* at 52. For more on the use of privacy as pretext to enforce traditional gender and heteronormative dynamics, see generally Ruth Colker, Public Restrooms: Flipping the Default Rules, 78 Ohio St. L.J. 145, 164 (2017) ("The privacy justification is actually a pretext for the articulation of gender stereotypes about the inappropriateness of men being exposed to women's private, bodily functions."); Susan Hazeldean, Privacy as Pretext, 104 Cornell L. Rev. 1719 (2019).

391. State v. Rhodes, 61 N.C. 453, 459 (1868).

392. Guyan, *supra* note 41, at 155.

troversial common sense. They disseminate sex and gender data as if they are fungible with other pieces of information. And they use that data in algorithmic systems as if doing so has no special consequences. Our job is to teach them otherwise, growing popular consciousness along the way. Engaging with these civil servants and policymakers requires advocates to embrace the nitty-gritty of government work, but it offers opportunities for direct impact.

Those responsible for the law on the books and on the ground must have an "understanding that historical and social factors mean that equality of opportunity is a fiction, an awareness of power differences between and within LGBTQ communities, and attention to the intersection of LGBTQ identities with other identity characteristics."[393] They need to be willing "to assume a contrarian role in data discussions" that decenter traditional pathways and hierarchies of power.[394]

B. *Principles for Gender Legibility*

To achieve that goal, this Article suggests three principles, derived from privacy scholarship, to govern state gender-data practices: necessity, antisubordination, and inclusivity. A necessity principle asks whether sex or gender data are necessary to achieve a government goal, and if so, which goal. For example, as argued above, gender is an ineffective metric for security and identification; genders (and sexes) can change. Only cisgender people retain the sexes and genders they are assigned at birth; everyone else is at risk when gender is presumed static. Plus, there are so many other effective means of verifying identity, from using static traits to personal histories. Therefore, using sex or gender data simply to ensure applicants for government assistance or voters or licensed professionals are who they say they are violates the necessity principle.

That said, the state has often argued that sex or gender data are necessary for some purpose it considers legitimate. Before marriage equality, for instance, sex was considered necessary for determining the validity of marriages.[395] Therefore, we need an antisubordination principle to clarify which government goals merit the use of sex or gender data—namely, those goals, like antidiscrimination and health equity, that disrupt traditional hierarchies of power and benefit gender-diverse populations. Transgender and nonbinary scholars have long argued that deficits in gender-affirming healthcare stem from, among other things, the marginalization of gender diversity in health studies, the subsequent erasure of populations not identifying as men or women from public reports and policymaking, and the ultimate neglect of gender diversity in medical and public health degree-granting programs.[396] In these contexts, taking gender into account may improve the lives of people traditionally erased.

393. *Id.* at 156.

394. *Id.*

395. See, e.g., Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (voiding a marriage between a woman who was assigned male at birth and a cisgender man as a same-sex marriage); see also Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (holding unconstitutional a federal law that required different qualification criteria for male and female military spousal dependency).

396. See *supra* notes 356–357.

And an inclusivity principle will ensure that when the state does need to collect, share, and use sex or gender data, it does so in ways that respect gender-nonconforming individuals. Here, transgender and nonbinary scholars have provided recommendations for how to ask for gender data in certain contexts, including providing two-step questions (asking for assigned sex at birth and gender, for example), opportunities to opt out, and spaces to self-identify.[397] This is not simply a matter of adding more boxes to gender questions on forms;[398] as we have seen, gender binaries can be entrenched in data-sharing agreements, interstate compacts, and automation mandates. Inclusivity also means writing gender diversity into law, redesigning algorithms and technologies procured from private vendors, updating legacy computer systems, and rethinking the role of gender data in the automated state from the ground up.

Although ambitious, this framework is well within the tools available under current legal discourse on privacy. Privacy law and theory are important places for inspiration here because privacy law is supposed to allow individuals to disclose certain information in certain contexts and withhold that information in other contexts.[399] Privacy scholars are also used to dealing with data dilemmas such as data in exchange for access and disclosure in exchange for seamless commerce.

One way privacy law tries to navigate these dilemmas while fostering prosocial behavior is through the principle of data minimization. Data minimization is the principle that organizations should collect only as much data as is absolutely necessary to achieve a stated purpose.[400] It is at the core of modern approaches to consumer privacy law, both in the United States and in the European Union.[401] In the context of an information economy in which data is used to manipulate consumers, data minimization could, if enforced effectively, starve data-extractive organizations of dangerous weapons.[402] Therefore, the principle of data minimization (or necessity) seems like a perfect antidote to the automated state's pathology of gender data maximalism.

That said, data minimization is half a loaf. It may try to stanch the flow of data, but it permits unrestricted data collection if its purpose is clearly defined, previously disclosed, and legitimate. States could easily meet that requirement, justifying gender data as necessary for verifying identity or securing spaces. Instead of relying on data minimization alone, policymakers and civil servants

397. See *supra* notes 354–355.

398. See Bivens, *supra* note 40, at 893.

399. Ari Ezra Waldman, Privacy as Trust 69 (2018) [hereinafter Waldman, Trust] (discussing the privacy interests that relate to the disclosure of information); Julie Cohen, What Privacy Is For, 126 Harv. L. Rev. 1904, 1910–12 (2013) (discussing the role of privacy in society and for self-making).

400. Woodrow Hartzog & Neil Richards, Legislating Data Loyalty, 97 Notre Dame L. Rev. Reflection 356, 365 (2022), https://ndlawreview.org/wp-content/uploads/2022/07/Hartzog-and-Richards_97-Notre-Dame-L.-Rev.-Reflection-356-C.pdf [https://perma.cc/HEQ2-HH2H] [hereinafter Hartzog & Richards, Legislating].

401. *Id.* at 365–66; see also Regulation 2016/679, *supra* note 305, at art. 5(1)(c).

402. See Hartzog & Richards, Legislating, *supra* note 400, at 365–66.

should also approach data collection, sharing, and use through an antisubordination lens. Privacy values do that, as well.

Over the last fifty years, much privacy scholarship has shifted from an individualistic conception of privacy to one that recognizes the inextricable connection between data, privacy, and hierarchies of power.[403] Specifically, critical privacy scholars see privacy as an antidote to manipulation and domination. Civil rights scholar Khiara Bridges noted this link early on; she recognized that privacy is a right of the privileged because those dependent on government services, like low-income pregnant persons of color, have no choice but to disclose personal information, accept surveillance, and submit to invasive inspections in exchange for critical medical, financial, and social support.[404]

Many other scholars have followed Professor Bridges's lead. Because of the centrality of privacy for sexually minoritized populations—including women, transgender people, and gay people, among others—law and technology scholar Danielle Citron has argued that the law should provide special protection for sexual privacy.[405] Multifaceted rules from criminal law to tort law would ensure that intimate information available to others could only be used to benefit, rather than harm, the most vulnerable.[406] In other words, Professor Citron wants privacy law to take sex into account. Professor Scott Skinner-Thompson has called for privacy law to take account of intersectional identity and provide additional protections for those subordinated by institutional marginalization.[407] Similarly, privacy law scholars Neil Richards and Woodrow Hartzog have argued that technology companies that collect and process data should not be allowed to benefit from that data if it means harming their users.[408] Like fiduciaries who are entrusted with their clients' personal

403. Compare Alan F. Westin, Privacy and Freedom 7 (1967) (defining privacy with respect to autonomy and choice), with Neil Richards, Why Privacy Matters 39 (2022) ("'Privacy' is fundamentally about *power* . . . . Struggles over 'privacy' are in reality struggles over the *rules* that constrain the power that *human information* confers."); see also Julie E. Cohen, Turning Privacy Inside Out, 20 Theoretical Inquiries L. 1, 22 (2019) ("[C]ommon relationships in contemporary commercial and civic life . . . are about power, and privacy theory should acknowledge that fact . . . ."); Daniel J. Solove, Privacy and Power: Computer Databases and Metaphors for Information Privacy, 53 Stan. L. Rev. 1393, 1398 (2001) (arguing that the problem with information databases is that they make "people feel powerless and vulnerable, without any meaningful form of participation in the collection and use of their information").

404. Bridges, Poverty, *supra* note 30, at 8–10.

405. Danielle Keats Citron, The Fight for Privacy: Protecting Dignity, Identity, and Love in the Digital Age, at xvii, xviii (2022); Danielle Keats Citron, Sexual Privacy, 128 Yale L.J. 1870, 1881–82 (2019) [hereinafter Citron, Sexual Privacy].

406. Citron, Sexual Privacy, *supra* note 405, at 1928–35.

407. Skinner-Thompson, *supra* note 42, at 6.

408. See Neil Richards & Woodrow Hartzog, A Duty of Loyalty for Privacy Law, 99 Wash. U. L. Rev. 961, 964–65 (2021) [hereinafter Richards & Hartzog, Loyalty]. This argument has a history. See, e.g., Daniel Solove, The Digital Person 103 (2004) (positing that businesses that are collecting personal information from users should "stand in a fiduciary relationship" with those users); Waldman, Trust, *supra* note 399, at 79–92; Jack M. Balkin, Information Fiduciaries and the First Amendment, 49 U.C. Davis L. Rev. 1183, 1186 (2016)

information to pursue their clients' interests, state automation could be similarly informed by fiduciary values that ensure that data-driven tools will only help, not hurt, the most marginalized.[409]

These same principles can guide political and bureaucratic approaches to sex and gender data. The automated state collects, shares, and uses gender data in service of a commitment to efficient targeted governance that covers most people most of the time. That commitment takes us down a dangerous path: one in which the state collects a lot of sex and gender data while saddling transgender, nonbinary, and gender-nonconforming individuals with all the dangers but none of the benefits of data-driven governance. This Article seeks a new path: one in which the state collects, shares, and uses only so much inclusive sex and gender data as is necessary to benefit, protect, and support gender-diverse populations. Achieving these goals will not be easy. Nor will they be realized tomorrow. But we can start tomorrow.

Conclusion

This Article begins a critical conversation about how law creates, fosters, and incentivizes a particular kind of automated governance that excludes and harms transgender, nonbinary, and gender-nonconforming individuals. The law both on the books and on the ground tends to binarize sex and gender data from collection to use. This not only harms those who exist outside of the gender binary the most but also endangers anyone subordinated by the reification of strict gender norms.

This narrative has been obscured because it is more than just statutes and court cases that are responsible for binary gender data in algorithmic systems. The on-the-ground policymaking of street-level bureaucrats, binding data contracts between state agencies, efficiency mandates, policy by procurement, and data protection compliance are all part of a larger puzzle that reveals institutionalized hostility to anyone outside the gender binary. Gender data in the automated state is, therefore, a case study in the risks posed by law: how it allocates power, how it forces legibility, and how it excludes.

But we are not without hope. In revealing the full picture of the law's role in creating an automated state that excludes gender minorities, this Article gives space for experts and members of affected communities who have long recommended inclusive approaches to gender data collection and those who argue that gender data collection is unnecessary in certain contexts. Their work, cited throughout this Article, can bring data minimization and antisubordination principles into practice. The automated state is not going away; together, we can guide it on a new, more inclusive path.

("[M]any online service providers and cloud companies who collect, analyze, use, sell, and distribute personal information should be seen as information fiduciaries toward their customers and end-users."); Neil Richards & Woodrow Hartzog, Taking Trust Seriously in Privacy Law, 19 Stan. Tech. L. Rev. 431, 457 (2016).

409. See Richards & Hartzog, Loyalty, *supra* note 408, at 966–67.

QUEER OUTRAGE:
Why the Legal Vindication of LGBTQ Feelings Can Transform Dignitary Tort Law

Gabriel L. Klapholz

Abstract

This Note unearths the history of how LGBTQ people used the tort of intentional infliction of emotional distress (IIED) to vindicate their rights and protect their basic dignity, from the height of the AIDS epidemic until today. In so doing, the Note challenges the common view that IIED is a purely majoritarian tort that enforces prevailing communal norms of right and wrong. Instead, the history of LGBTQ IIED shows that the tort can serve as a tool for responding to majoritarian domination and protecting those most vulnerable to hatred and abuse. The Note provides a path forward to reconcile the recent clash between IIED and the First Amendment, showing that—in light of IIED's ability to bring more people to the expressive table—the two can be friends rather than foes. In this respect, LGBTQ law and experience can provide insight for the future of dignitary tort law more broadly.

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Introduction

On June 28, 1987, Rod Miller entered Beebe Medical Center in Lewes, Delaware with a lacerated tendon in his foot.[1] The emergency doctor told him he needed immediate surgery, or else he might never be able to walk again.[2] However, when the surgeon, Dr. Spicer, entered the room, he insisted that Miller be airlifted to a different hospital by helicopter.[3] Spicer had gotten word from hospital staff that Miller was gay, and thus assumed Miller had HIV.[4] The surgeon refused to operate on him based on a medically unfounded fear of exposure to the virus.[5] Miller waited for the helicopter for two hours and was mistakenly transferred to the wrong hospital.[6] By the time he arrived

1. Miller v. Spicer, 822 F. Supp. 158, 160 (D. Del. 1993); *About Us*, Beebe Healthcare, https://www.beebehealthcare.org/about-us [https://perma.cc/DPU2-NLSB] (noting that Beebe Medical Center is located in Lewes, Delaware).

2. *Id.*

3. *Id.* at 160–61.

4. *Id.*

5. *Id.* at 161; *see Statement on the Surgeon and HIV Infection*, Am. College of Surgeons (May 1, 2004), https://www.facs.org/about-acs/statements/surgeon-and-hiv-infection [https://perma.cc/68F6-U6Q6] (explaining the lack of evidence about the frequency of HIV transmission between surgeons and patients, and warning that action should only be taken "based solely on documented scientific data and not on unfounded hysteria" because "[s]urgeons have the same ethical obligations to render care to HIV-infected patients as they have to care for other patients").

6. *Miller*, 822 F. Supp. at 161.

at the proper facility, his foot was too swollen to examine, let alone operate on.[7] Miller ultimately received his surgery eight days later.[8]

Miller sued Spicer and the hospital for intentional infliction of emotional distress (IIED).[9] Born through a series of scholarly articles published in the late 1930s, IIED grew into a full-fledged tort in the immediate postwar era as advances in psychology "verified the significance of emotional harm."[10] According to the *Restatement (Second) of Torts*, IIED—also called the tort of outrage—occurs when one "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress."[11] Applying this standard to Spicer's actions, federal Judge Murray Schwartz issued a ruling for Miller in 1993.[12] The court denied the doctor's motion for summary judgment, as a reasonable jury could find that his refusal to treat Miller "for unacceptable discriminatory reasons" was "beyond all possible bounds of decency" and thus could constitute sufficiently "outrageous conduct" for IIED.[13]

Miller's suit did not survive because of Spicer's malpractice (a claim Miller did not file) nor because of Spicer's breach of contract (a claim the court dismissed).[14] It survived because Spicer's bigotry hurt Miller's feelings. At a time in the United States when gay sex was criminal[15] and AIDS diagnoses were nearing an all-time high,[16] a federal judge recognized that homophobia itself could be tortious conduct.

Judge Schwartz was not the only one to do so. In a largely untold history during the 1990s and early 2000s, lesbian, gay, bisexual, transgender, and queer (LGBTQ) plaintiffs began to prevail in court against homophobic and transphobic language and behavior based on the pure emotional harm it inflicted on them.[17] A federal judge allowed a suit to proceed against a boss for making homophobic comments at work.[18] A transgender man's mother prevailed in arguing that a police officer's invasive, transphobic questioning of her son was

7. *Id.*
8. *Id.*
9. *Id.* at 160.
10. Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 Ga. L. Rev. 107, 132–33 (2010).
11. Restatement (Second) of Torts § 46 (Am. L. Inst. 1965).
12. *Miller*, 822 F. Supp. at 160, 168, 174.
13. *Id.* at 168–70.
14. *Id.* at 158.
15. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding, infamously, a Georgia anti-sodomy statute).
16. Lucia Torian, Mi Chen & Irene Hall, *HIV Surveillance—United States, 1980–2008*, 60 Morbidity & Mortality Wkly. Rep. 689, 691 (2011), https://www.cdc.gov/mmwr/pdf/wk/mm6021.pdf [https://perma.cc/PM75-BVU9].
17. *See* Geoffrey Christopher Rapp, *LGBTQ+ Rights, Anti-Homophobia and Tort Law Five Years After* Obergefell, 2022 Univ. Ill. L. Rev. 1103, 1121–22 (2021) (identifying some of the central cases that signified this transformation).
18. Forbes v. Merrill Lynch, Fenner & Smith, Inc., 957 F. Supp. 450, 456–57 (S.D.N.Y. 1997).

outrageous conduct.[19] A lesbian woman's neighbors were held legally responsible for circulating bigoted and threatening letters to the local community.[20] Shell Oil Company paid $2 million in punitive damages for a homophobic firing.[21] Of course, this was not unbridled success. Some courts continued to hold that homophobia and transphobia were not "beyond all possible bounds of decency" and thus insufficiently outrageous for IIED recovery.[22] Still, a clear shift from earlier case law had occurred.

This Note shows that LGBTQ plaintiffs found considerable success defending their basic human dignity through the tort of IIED in the 1990s and early 2000s. This understudied moment of legal creativity and self-empowerment meant that LGBTQ plaintiffs began to achieve vindication of their feelings as a matter of law.

An intuitive reason behind this wave of successful LGBTQ IIED claims is that as hostility toward LGBTQ people declined in straight society,[23] courts increasingly found acts leveled against them to fall beyond the bounds of communal decency and thus actionable in tort. This story coheres with scholars' traditional view that tort law develops in response to "majoritarian sensibilities" rather than through attention to the "subjugation of minority group members."[24] As LGBTQ people joined the body politic, they became harder to exclude from the communitarian baseline of outrageous conduct.

This intuitive narrative is certainly part of the story: public opinion was shifting in favor of LGBTQ people throughout the 1990s.[25] Yet I argue that increased social inclusion of LGBTQ people was only one factor. A historical analysis of the case law proves that the transformation in IIED for LGBTQ people during this period also had its roots in distinctly nonmajoritarian considerations. Namely, as a doctrinal matter, there was a legal paradigm shift in which courts began to account for the inherent vulnerability that comes with LGBTQ identity. It was LGBTQ people's distinct exposure to emotional harm—their subjugation and widespread lack of acceptance—that made their IIED claims all the more convincing to courts.

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19. Brandon *ex rel.* Est. of Brandon v. Cnty. of Richardson, 624 N.W.2d 604, 620–25, 629 (Neb. 2001).

20. Simpson v. Burrows, 90 F. Supp. 2d 1108, 1131 (D. Or. 2000).

21. Collins v. Shell Oil, No. 610983–5, 1991 WL 147364, at *1 (Cal. Super. Ct. June 13, 1991)

22. *See, e.g.*, Ward v. Goldman Sachs, No. 94 Civ. 6904, 1996 WL 3930, at *1 (S.D.N.Y. Jan. 3, 1996).

23. *See* Paul R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. Pol. 1208, 1208–09 (2003) (describing how hostility toward gay people declined during this period).

24. Rapp, *supra* note 17, at 1105; Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths*," 34 Wm. & Mary L. Rev. 579, 586 (1993) (describing tort law as developing based on "communitarian notions of right and wrong," which in turn risks subordinating minority rights and beliefs).

25. *See infra* Section I.b.iv.; Brewer, *supra* note 23, at 1208–09.

Scholars have criticized IIED as a tort that tends to serve the majority through its vague standard of "outrageous" conduct.[26] There is, of course, much truth to this. In an infamously tautological description of IIED, the *Restatement* describes the tort of outrage as arising when "recitation of the facts to an average member of the community would . . . lead him to exclaim, 'Outrageous!'"[27] Tort scholar Paul Hayden convincingly warns that "[o]ne could scarcely imagine a tort element more tied to ill-defined communitarian norms of conduct than this."[28]

My analysis complicates this view of IIED. This Note provides an alternative story of the tort as doing far more than bending to "ill-defined" majoritarian conceptions of what is "utterly intolerable in a civilized community."[29] In particular, I frame IIED as a tort that doctrinally recognizes, and has historically targeted, the very power relations enabling one party to humiliate and denigrate another. In this respect, IIED incorporates two, seemingly conflicting forces: it appeals to majoritarian sensibilities while explicitly accounting for minority interests and vulnerabilities. The *Restatement* captures this dynamic, dictating that the "relation" between parties is relevant in evaluating IIED, as well as an "actor's knowledge that [another] is *peculiarly susceptible* to emotional distress."[30] Indeed, a prerequisite of emotional injury is the capacity—the power—to inflict that injury. For this reason, IIED has long been "knee-deep in issues relating to gender, sexuality," and race,[31] explicitly accounting for the "authority" of the alleged tortfeasor over the plaintiff.[32] As such, the tort played a major role in the Civil Rights Era and its aftermath, particularly to combat racial hate speech.[33]

My characterization of IIED provides a pathway to navigate the challenges facing IIED doctrine today. In the last twenty years, LGBTQ IIED claims have collided with important First Amendment values, forcing courts to

26. Restatement (Second) of Torts § 46(1) (Am. L. Inst. 1965); *see, e.g.*, Hayden, *supra* note 24, at 586.

27. Restatement (Second) of Torts § 46 cmt. d. (Am. L. Inst. 1965).

28. Hayden, *supra* note 24, at 589.

29. *Id.*; § 46 cmt. d.

30. § 46 cmt. e. & f (emphasis added).

31. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 Wm. & Mary L. Rev. 2115, 2121 (2007); *see* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133, 152–54 (1982).

32. Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 Vand. L. Rev. 983, 991 (2008).

33. Hafsa S. Mansoor, Note, *Modern Racism But Old-Fashioned IIED: How Incongruous Injury Standards Deny "Thick Skin" Plaintiffs Redress for Racism and Ethnoviolence,* 50 Seton Hall L. Rev. 881, 886–87 (2019); *see also* Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 220 (Cal. 1970) (overruling the lower court's dismissal of an IIED suit arising from a white defendant hurling racial epithets at his Black employee); Ruiz v. Bertolotti, 236 N.Y.S.2d 854, 855 (N.Y. Sup. Ct. 1962) (denying the defendant's motion to dismiss in a case where the defendant leveled racist threats of violence against Puerto Rican plaintiffs, who therefore "suffered distress, humiliation, and emotional shock").

reconcile the constitutional right to use anti-LGBTQ speech and the tort rights of queer[34] people to be protected from that speech. Prime examples include the Court's *Snyder v. Phelps* opinion in 2011, as well as state-court decisions on religious freedom.[35] In these cases, LGBTQ IIED claims were cast as antithetical to the First Amendment and thus roundly defeated.

Clashes between the First Amendment and IIED are difficult to resolve. Yet lacking from the Court's jurisprudence is a recognition that the First Amendment and IIED may be less in conflict than they seem. I argue this to be the case in two respects, each stemming from my historical account of IIED as protective of LGBTQ minority interests.

First, under a purely majoritarian view of IIED, it is easy to view the tort as hostile to the First Amendment's vigorous protection of an individual's offensive or unpopular expression. Nonetheless, to the extent that IIED is a tool for vulnerable plaintiffs to protect themselves against powerful majorities and even dislodge communitarian norms, the tort can serve—and has served—the same values as the First Amendment. If IIED is a tool for getting minorities a seat at society's table, it can facilitate speech rather than suppress it. Subjecting minority groups to hate speech may discourage or even prevent those groups from participating in free expression.[36] In an apparent conflict between IIED and the First Amendment, then, I argue that the First Amendment needs to be evaluated on both sides of the equation. This is because, in the context of hate speech, both an IIED plaintiff and defendant have a First Amendment interest at stake. This account thus challenges the prevailing "stock story"[37] in the Supreme Court that LGBTQ equality undermines First Amendment values.[38]

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34. In this Note, I use the word "queer" broadly to refer to all people within the LGBTQ community. I thus use "LGBTQ" and "queer" interchangeably, though in fact they are not so historically: activists in the AIDS crisis reclaimed the word queer as a political identity in the late 1980s and early 1990s, whereas "LGBTQ" is a more recent term without this same political history. *See infra* note 49; Meredith G. F. Worthen, *Queer Identities in the 21st Century: Reclamation and Stigma*, Current Opinion Psych., Feb. 2023, at 1, 1 ("Currently, many recognize queer identity as offering a space . . . for those who want to challenge the status quo and hierarchies. . . . [But], people who self-identify as queer can have different reasons for doing so and even among individuals, 'queer' can have multiple and evolving meanings."); Katy Steinmetz, *Why 'LGBTQ' Will Replace 'LGBT'*, Time (Oct. 26, 2016), https://time.com/4544704/why-lgbtq-will-replace-lgbt [https://perma.cc/ZF9B-B9EN] (explaining that "LGBTQ" is a more recent term than the word "queer").

35. *See, e.g.*, Gunn v. Mariners Church, Inc., 167 Cal. App. 4th 206, 217–18 (2008).

36. *See* Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 Vill. L. Rev. 787, 792 (1992) ("Hate speech frequently silences its victims, who, more often than not, are those are already heard from least.").

37. Gerald P. López, *Lay Lawyering*, 32 UCLA L. Rev. 1, 3, 15–16 (1984) (coining the term "stock stories" and defining them as heuristics, often damaging ones, that "help us interpret the everyday world with limited information").

38. Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 Ariz. L. Rev. 341, 344 (2021) (explaining that "the Supreme Court has gradually grown more receptive to First Amendment principles as possible mechanisms to blunt the effects of LGBT equality").

Second, if IIED is about protecting vulnerable groups, the speech that the tort targets becomes a stronger contender for First Amendment doctrines that actively carve out certain categories of particularly low-value, even dangerous, speech from the Amendment's protection. These include the true threats, incitement, and captive audience doctrines.

This Note proceeds in three parts. Part I outlines the transitional moment in which LGBTQ plaintiffs first started to prevail on IIED claims in courts in the 1990s and early 2000s, as well as the legal paradigm shift that enabled this success. Part II examines the fraught nature of LGBTQ IIED claims in the last twenty years and their collision with the First Amendment. Part III proposes ways to reconcile First Amendment doctrine and IIED in light of their potentially shared goals, including by adopting a balancing test in speech-tort cases that considers the First Amendment interests on both sides of the constitutional equation.

This Note fills a gap in the scholarship on IIED, which largely ignores the ways in which LGBTQ plaintiffs have utilized and shaped the tort. My research captures how LGBTQ law is not a circumscribed, niche category of law, but an area that can inform broader legal questions, including the ongoing conflict between dignitary torts and free expression.

I. A Paradigm Shift in LGBTQ IIED

In the last fifteen years of the 20th century, courts went from ignoring LGBTQ identity altogether in their analyses of LGBTQ IIED claims to actively accounting for the particular vulnerabilities of queer people. Thus, common-law IIED claims started to provide LGBTQ people with powerful protections against discrimination and harassment decades before federal statutes, such as Title VII, could do so.[39] Ultimately, in California, courts would go so far as finding that discrimination and harassment on the basis of sexual orientation was per se outrageous conduct. This was a radical transformation in LGBTQ IIED.

A. *The Pre-1990s Period*

In the 1980s, plaintiffs filed few IIED claims responding to homophobic and transphobic conduct,[40] and when they did, they usually did not prevail. Part of the problem was that courts did not acknowledge the meaning of anti-LGBTQ epithets, which were viewed as mere "insults" rather than as badges of inferiority. In *Moye v. Gary* in 1984, defendant Clyde Gary

39. David L. Johnson, Kenneth L. Wagner & Denise K. Drake, *Supreme Court Speaks: Title VII Forbids Workplace Discrimination Based on Sexual Orientation and Transgender Status*, Am. Bar Ass'n (June 16, 2020), https://www.americanbar.org/groups/labor_law/publications/flash_archive/issue-june-2020/supreme-court-speaks [https://perma.cc/5GPN-KK4C] (describing the *Bostock* opinion and how it reshaped LGBTQ antidiscrimination law under Title VII).

40. *See* Rapp, *supra* note 17, at 1121 (noting that the first major LGBTQ IIED victory occurred in 1991).

berated his employee Dorothy Moye, a clerical worker for the Social Security Administration, calling her a "fag" in front of her daughter.[41] Moye sought damages for the "mental anguish" she suffered as a result of the encounter, but the Southern District of New York dismissed the suit and denied recovery for IIED.[42] The court not only failed to mention whether Moye herself was queer—and thus determine if the word would have had a particularly stinging effect on her—but also whether the word on its own, regardless of Moye's identity, should have had any bearing on the case.[43] Eschewing the fact that Gary used a homophobic epithet, the court instead cited another 1984 case from New York, in which the court held that mere "criticism of job performance" was insufficient to state an IIED claim.[44]

Courts during this period viewed the absence of federal protections for LGBTQ people as reason to ignore power imbalances in LGBTQ IIED suits. For example, in *Doe v. U.S. Postal Service* in 1985, the District Court for the District of Columbia dismissed the IIED claim of a transgender woman whose employment offer to be a Senior Clerk Typist at the U.S. Postal Service was rescinded as soon as she informed her superiors of her intention to have gender-affirming surgery.[45] Citing persuasive federal case law such as *Ulane v. Eastern Airlines Inc*.,[46] the district court looked to the fact that the plain language of Title VII does not "cover discrimination against transsexuals" to dismiss the plaintiff's employment-discrimination claim, which in turn left the court unpersuaded that the plaintiff had a leg to stand on in tort law.[47]

A 1985 Alabama IIED case, *Logan v. Sears, Roebuck & Co.*, illustrates the fundamental doctrinal flaw in how courts approached the tort in this period. Robert Logan operated a beauty salon in Birmingham, and on May 11, 1982, an employee of Sears phoned Logan to inquire about a monthly charge that he owed.[48] While on the phone, the employee told someone on her end of the line that Logan was "as queer as a three-dollar bill" because he was a man "who owns a beauty salon."[49] There were many reasonable, doctrinally grounded

41. 595 F. Supp. 738, 739 (S.D.N.Y. 1984).

42. *Id.* at 738–40.

43. *Id.*

44. *Id.* at 740 (citing Belanoff v. Grayson, 471 N.Y.S.2d 91, 94 (App. Div. 1984)).

45. No. 84–3296, 1985 WL 9446, at *1 (D.D.C. June 12, 1985).

46. 742 F.2d 1081 (7th Cir. 1984). This was a case in which a transgender woman sued her employer under Title VII for sex discrimination, but where the court held that "Title VII is not so expansive in scope as to prohibit discrimination against transsexuals." *See id.* at 1082–83, 1087.

47. *U.S. Postal Service*, 1985 WL 9446, at *2, *5 (relying on Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984)).

48. Logan v. Sears, Roebuck & Co., 466 So. 2d 121, 122 (Ala. 1985).

49. *Id.* During the 1980s, the word "queer" was widely considered a slur, and LGBTQ people only began to reclaim the term at the end of the decade. Merrill Perlman, *How the Word 'Queer' Was Adopted by the LGBTQ Community*, Colum. Journalism Rev. (Jan. 22, 2019), https://www.cjr.org/language_corner/queer.php [https://perma.cc/F65J-WQ78]. AIDS activists, particularly members of organizations such as Queer Nation, were instrumental in transforming the meaning of the term into a source of LGBTQ pride and affirmation. *Id.*

challenges the court could have posed regarding Logan's IIED suit, chief among them whether the comment satisfied IIED's intent element requiring at least recklessness or whether Logan's alleged anguish satisfied the tort's severe emotional distress element. Neither of these questions arose.[50]

Instead, the court rejected Logan's suit because it was "unwilling to say that the use of the word 'queer' to describe a homosexual is atrocious and intolerable in civilized society."[51] The judge reasoned that the word "queer," while offensive to the "homosexual community," was frequently used "by those outside that community."[52] To be sufficiently outrageous, "conduct must be such that would cause mental suffering . . . to a person of ordinary sensibilities, not conduct which would be considered unacceptable merely by homosexuals."[53]

In *Logan*, the court used an objective standard abstracted from the facts of the case for determining what constitutes outrage. The *Logan* court conceptualized this element of the tort based on how conduct would affect, rather than be perceived by, the average member of the community.[54] This is a crucial distinction. If "outrage" is about the impact of conduct on the reasonable person,[55] then the tort does not account for the identity of the plaintiff. On the other hand, if "outrage" is anchored in, as the *Restatement* put it, how the "recitation of the facts to an average member of the community" would lead them to respond,[56] then a queer person's identity becomes central. The first formulation results in courts asking the nonsensical question: would a straight person be hurt by homophobic conduct? The second requires them to ask: would a straight person find a queer person's experience of homophobic conduct outrageous? Adopting the former analysis, the Alabama court unsurprisingly rejected the IIED claim.[57]

B. *The Turning Point*

In the early 1990s, LGBTQ IIED jurisprudence began to change. The key development was that courts started accounting for the LGBTQ identity of plaintiffs suing under the tort. A plaintiff's status as gay or transgender made injurious conduct toward them outrageous and beyond the bounds of communal decency. IIED thus emerged as not only a tort that reified evolving majoritarian sensibilities toward LGBTQ people in the 1990s, but also one that explicitly penalized wielding majoritarian power against them.

50. *Logan*, 466 So. 2d at 122–24.
51. *Id.* at 124.
52. *Id.* at 123–24.
53. *Id.* at 124.
54. *Id.* at 123 ("[I]n order to be actionable, the intrusion must be such as would outrage a person of ordinary sensibilities or cause such a person mental suffering, shame, or humiliation." (citing Phillips v. Smalley Maint. Servs., Inc., 435 So. 2d 705, 708–09 (Ala. 1983)).
55. *Id.*
56. Restatement (Second) of Torts § 46 cmt. d. (Am. L. Inst. 1965).
57. *Logan*, 466 So. 2d at 124.

1. Taking LGBTQ Status Seriously

The 1991 *Collins v. Shell Oil* decision was the first step. Shell Oil Company terminated executive Jeffrey Collins "for private homosexual conduct" after his secretary discovered Collins' printed announcement inviting other men to a sex party.[58] The outing and firing of Collins led to a "lasting schism" between the plaintiff and his father, a longtime employee of Shell.[59] The California court found it critical that Shell's opposition to Collins' homosexuality was the "only reason defendant fired plaintiff," and thus allowed recovery for the emotional harm caused to Collins as a gay man.[60] The court granted the plaintiff $2 million in punitive damages for their IIED claim—on top of $5.8 million in compensatory damages for breach of contract and wrongful termination.[61]

The role of queer identity in IIED analysis became even more explicit in the Delaware federal district court's 1993 decision of *Miller v. Spicer*, described in the Introduction. Dr. Spicer's patently homophobic behavior, denying surgical care to a patient based on pure animus and forcing that patient to languish in pain for eight days as a result, was key to the court's IIED analysis.[62] The judge determined that a reasonable jury could find Spicer's conduct outrageous based on evidence that he refused to treat Miller for "unacceptable discriminatory reasons," based his behavior on "derogatory comments" from the Beebe Medical Center's staff, and acted on an unreasonable belief that Miller "might . . . be infected with the AIDS virus."[63] For the judge, summary judgment was also not in order for the hospital.[64] A reasonable jury could find the hospital staff's "labeling of plaintiff as homosexual in a derogatory way" and "participation in the transfer of plaintiff for a discriminatory, non-medical reason" to be "extreme and outrageous" acts.[65]

2. Outrage Per Se

The *Miller* court was willing to take blatant discrimination against LGBTQ people into account when determining outrageous conduct, but California courts in the latter half of the 1990s went a step further. These courts began to recognize discrimination on the basis of LGBTQ status as per se outrageous conduct, giving rise to a prima facie case of IIED.

In *Leibert v. Transworld Systems* in 1995, a California appellate court faced an IIED claim from a plaintiff fired from his job after his employer learned that he was gay.[66] Leibert's superiors and coworkers taunted him

58. No. 610983–5, 1991 WL 147364, at *1–3 (Cal. Super. Ct. June 13, 1991).
59. *Id.* at *2.
60. *Id.* at *4–5.
61. *Id.* at *1.
62. Miller v. Spicer, 822 F. Supp. 158, 169–70 (D. Del. 1993).
63. *Id.*
64. *Id.* at 171.
65. *Id.*
66. Leibert v. Transworld Sys., 39 Cal. Rptr. 2d 65, 66–67 (Ct. App. 1995).

for his "effeminate manner" and called him a "fag."[67] The court ruled that employment discrimination, "whether based upon sex, race, religious, or sexual orientation, is invidious and violates a fundamental public policy of the state" and that because the IIED claim "is premised upon the same alleged actions" as the discrimination claim, it likewise would be violative of public policy and should therefore survive a motion to dismiss.[68]

Just three years later, another appellate decision in California, *Kovatch v. California Casualty Management Co.*, went in favor of a gay IIED plaintiff.[69] Daniel Kovatch was fired from his job after his boss told him, "You're a faggot, and there is no place for faggots in this company."[70] The court detailed a pattern of intimidation and harassment on the basis of sexual orientation, which entitled Kovatch to relief.[71] The court went on to expand a previous California court's holding, asserting that harassment on the basis of sexual orientation, just as sexual harassment, "will constitute the outrageous behavior element of a cause of action for intentional infliction of emotional distress."[72]

3. The Multiple Layers of Power Imbalance

LGBTQ IIED claims were not universally successful, and there were notable exceptions to the trend.[73] Still, there was clearly growing attention throughout this period to the power dynamics at play in IIED suits. Indeed, LGBTQ plaintiffs were even more likely to prevail when alleging abuse by straight defendants if additional power imbalances were layered on top of the underlying homophobic or transphobic conduct.[74] As we have already seen, special authority-based relationships can compound discriminatory behavior—as between a doctor and a patient in *Miller* or between employers and employees in *Collins*, *Leibert*, and *Kovatch*.

67. *Id.*

68. *Id.* at 73.

69. Kovatch v. Cal. Cas. Mgmt. Co., 77 Cal. Rptr. 2d 217, 220 (Ct. App. 1998).

70. *Id.* at 221.

71. *Id.* at 221–23, 225–26.

72. *Id.* at 231 (quoting Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 858 (Ct. App. 1989)). Under the logic of *Kovatch*, the California courts would view sexual harassment as per se outrageous, separate from the question of whether a litigant's LGBTQ identity was mentioned or invoked. *Id.* This maps onto the Supreme Court's approach to Title VII in cases like *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), where the Court held that same-sex sexual harassment was violative of Title VII even where there was no mention of the victim's sexuality. *See Oncale*, 523 U.S. at 79–80.

73. *See, e.g.*, Ward v. Goldman Sachs & Co., No. 94 Civ. 6904, 1996 WL 3930, at *1 (S.D.N.Y. Jan. 3, 1996) (finding that there was "homophobia on the part of [the plaintiff's] coworkers" but rejecting an IIED claim because such conduct was not "so outrageous in character and extreme in degree as to go beyond all possible bounds of decency").

74. The fact that LGBTQ identity increasingly factored into courts' analysis of IIED in this period raises the question of how courts would handle potential IIED claims advanced *among* LGBTQ litigants, that is, homophobic or transphobic statements made between queer people. This is an important question in light of the shift in LGBTQ IIED that I track throughout this Note, but I leave a more extensive treatment of this phenomenon to future scholarship.

After the infamous rape and murder of transgender man Brandon Teena—later the subject of the 1999 film *Boys Don't Cry*—the Nebraska Supreme Court found in favor of Teena's estate in the case *Brandon ex rel. Estate of Brandon v. County of Richardson*.[75] JoAnn Brandon, Teena's mother, sued the county for the local police's mishandling of the case and its intentional infliction of emotional distress on her son.[76] The officer asked the rape survivor retraumatizing and dehumanizing questions about his genitals and the specifics of how the two men penetrated him, all while accusing him of pretending to be a man.[77] Furthermore, despite clear evidence that the rapists also planned to murder Teena, the police made no arrests.[78] The Nebraska Supreme Court found the "abuse of a position of power" essential to its holding that there was extreme and outrageous conduct: the officer not only bullied Teena based on his "gender identity disorder," but also did so in the officer's capacity as a law-enforcement official at a time when Teena was "particularly vulnerable," having been raped just earlier that day.[79]

4. Reasons for the New LGBTQ IIED

The question remains as to why the 1990s in particular saw such a swift change in LGBTQ IIED jurisprudence. Growing public acceptance of LGBTQ people likely played a role. In 1992, seventy-one percent of Americans believed that homosexual sex was "always wrong," but this figure fell to sixty-three percent in 1994, and fifty-four percent in 1998.[80] This was a major decline, as public opinion on homosexual sex had been relatively stable since the early 1970s.[81] If public acceptance of LGBTQ people was rising, as a doctrinal matter we would expect courts to find language and behavior leveled against queer people to be more outrageous than before. Because the definition of outrage is doctrinally anchored in what an "average member of the community" would find outrageous,[82] as that average person's notion of outrage evolves, the doctrine is designed to evolve in tandem.

The 1990s were not only a time of increasing public support for LGBTQ life, but also of increasing attention to the vulnerability of LGBTQ people in American society. The ravages of HIV/AIDS created a "nationwide epidemic of fear" in the 1980s, fueling stigma towards and the marginalization of the LGBTQ people who faced the worst of the disease.[83] In the 1990s, that stigma began to decline.[84] One survey indicated that the likelihood someone

75. 624 N.W.2d 604, 629 (Neb. 2001).
76. *Id.* at 610–11.
77. *Id.* at 612–13.
78. *Id.* at 614.
79. *Id.* at 621–22.
80. Brewer, *supra* note 23, at 1208–09.
81. *Id.* at 1208.
82. Restatement (Second) of Torts § 46 cmt. d. (Am. L. Inst. 1965).
83. Christopher Capozzola, *A Very American Epidemic: Memory Politics and Identity Politics in the AIDS Memorial Quilt, 1985–1993*, 82 Radical Hist. Rev. 91, 93 (2002).
84. Gregory M. Herek, John P. Capitanio & Keith F. Widaman, *HIV-Related Stigma*

harbored negative feelings toward people with AIDS fell eight-to-ten percent annually each year between 1991 and 1999.[85] Mass mobilization and AIDS activism raised awareness of the real damage the disease was causing—and the importance of providing care to the most affected communities.[86] Numerous queer people came out of the closet in the face of what felt like an inescapable scourge.[87] While only about twenty-six percent of Americans stated that they had a gay friend or acquaintance in the mid-1980s, that figure jumped to forty-seven percent in 1994 and sixty percent by the end of the decade.[88]

These two trends—greater LGBTQ acceptance and greater attention to LGBTQ vulnerability—provide a potential explanation for not only why LGBTQ IIED doctrine evolved, but also why it evolved in the particular way that it did. Courts were wary of excluding LGBTQ people from the gamut of outrage because LGBTQ people were increasingly seen as entitled to the same treatment as straight people. Yet perhaps more importantly, the case law also demonstrates increased judicial recognition that LGBTQ people were at risk of many harms that straight people were not—and that tort law needed to account for this difference if it sought to properly vindicate LGBTQ rights. Indeed, as *Miller* and other cases from the period establish,[89] IIED became one of the most effective legal channels available for LGBTQ people to challenge the particular stigma associated with AIDS.

C. *Lagging Transgender Rights*

Although cisgender gay and lesbian plaintiffs began to have their emotions vindicated in court throughout the 1990s and early 2000s, the fate of transgender plaintiffs lagged far behind. A case like *Brandon* was significant insofar as it signaled a broader evolution in LGBTQ IIED, but most transgender litigants did not benefit from this shift. Instead, courts remained reluctant to render transphobic conduct as per se outrageous, let alone actionable at all.

In *Underwood v. Archer Management Services*[90] in 1994, the District Court for the District of Columbia dismissed the complaint of Patricia Underwood, a transgender woman who was fired from her job as a receptionist at Archer Management Services, Inc. despite—she alleged—being

and Knowledge in the United States: Prevalence and Trends, 1991–1999, 92 Am. J. Pub. Health 371, 374 (2002), https://pmc.ncbi.nlm.nih.gov/articles/PMC1447082 [https://perma.cc/9CFA-PA2D].

85. *Id.*

86. *See* Raquel Fernández, Sahar Parsa & Martina Viarengo, *Coming Out in America: AIDS, Politics, and Cultural Change* 7–8 (Nat'l Bureau Econ. Rsch., Working Paper No. 25697, 2019), https://www.nber.org/system/files/working_papers/w25697/w25697.pdf [https://perma.cc/YQU3-M97L].

87. *Id.*

88. *Id.*

89. *See, e.g.*, Forbes v. Merrill Lynch, Fenner & Smith, Inc., 957 F. Supp. 450, 456 (S.D.N.Y. 1997) (ruling in favor of a plaintiff who filed an IIED claim to combat workplace harassment from his supervisor after he disclosed he had AIDS).

90. 857 F. Supp. 96 (D.D.C. 1994).

an "exemplary employee" and "execut[ing] her duties in a stellar fashion."[91] Parroting the same narrative it had advanced in *Doe v. U.S. Postal Service* almost a decade earlier, the D.C. court cited to Title VII case law, including the same case of *Ulane v. Eastern Airlines*, when denying recovery to Underwood.[92] "In construing Title VII, district courts have ruled the discrimination on the basis of transsexuality is outside of Title VII's protection," explained the court.[93] Title VII's limited reach persuaded the court that "[n]othing pleaded in the Complaint approaches [the] standard of outrageous conduct," as pure non-discriminatory termination from one's job was itself "insufficient" to support an IIED claim.[94] A state superior court used the same *Ulane* Title VII logic in a similar transphobic firing case in North Carolina called *Arledge v. Peoples Services, Inc*. The court reasoned that "where Congress . . . [has] expressly found such conduct to be permissible," that is, under federal employment law, "employment actions on the basis of transsexualism cannot be considered 'atrocious and utterly intolerable in a civilized community.'"[95]

Judicial aversion toward IIED suits by transgender plaintiffs continued even after courts started applying Title VII to transgender plaintiffs by way of the landmark Supreme Court case *Price Waterhouse v. Hopkins*,[96] which made sex-stereotyping claims actionable under Title VII. In *Doe v. United Consumer Financial Services*,[97] the District Court for the Northern District of Ohio threw out a transgender woman's IIED suit, in which she alleged that her employer, United Consumer Financial Services, fired her from a temp position when human resources discovered through an abnormally aggressive background investigation that she was transgender.[98] But allegations of a hostile inquiry from company executives and clear reports that coworkers were calling Doe "Mrs. Doubtfire" behind her back led the court to allow a *Hopkins* claim to proceed even though *Ulane* remained "viable" precedent.[99] The plaintiff argued that "United Consumer either viewed her as a man who dressed and behaved like a woman, or it considered her a woman who was insufficiently feminine."[100] Either way, the employer acted on the basis of sex stereotypes.[101] The court found the argument sufficiently persuasive to deny the defendant's motion to dismiss Doe's Title VII claim.[102] Remarkably, even though the Title VII claim lived on, the court *still* rejected the transgender plaintiff's IIED

91. *Id.* at 97.
92. *Id.* at 98.
93. *Id.*
94. *Id.* at 99.
95. Arledge v. Peoples Servs., Inc., No. 02 CVS 1569, 2002 WL 1591690, at *3 (N.C. Super. Ct. Apr. 18, 2002).
96. 490 U.S. 228 (1989).
97. No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).
98. *Id.* at *1, *9.
99. *Id.* at *4.
100. *Id.* at *3.
101. *Id.*
102. *Id.* at *9.

claim, asserting an "average member of the community" would not find the facts of the case outrageous.[103]

As late as 2015, the Northern District of Ohio retained its stubborn dismissal of IIED claims by transgender plaintiffs. In *Cummings v. Greater Cleveland Regional Transit Authority (RTA)*,[104] the court considered an IIED claim from a Black transgender woman denied promotion to the position of Acting Director in the Operations Division of the RTA despite having the requisite qualifications.[105] Upholding many of the plaintiff's ten claims—including violations of Ohio's Equal Pay Act and racial and gender discrimination laws—the court still dismissed the attendant IIED claim.[106] In light of cases like *Leibert* and *Kovatch*, which held that sexuality discrimination was outrageous per se almost twenty years earlier, the contrast is stark: the Ohio court argued that the plausible discrimination alleged by the plaintiff was "by itself . . . insufficient to support an [IIED] claim."[107]

D. *The Power of LGBTQ IIED Today*

The *RTA* court has not had the last word. In more recent years, LGBTQ victories, including for transgender plaintiffs, prove the crucial role IIED plays in vindicating LGBTQ dignity and rendering phobic language and behavior actionable in tort. While contemporary success remains far from universal,[108] LGBTQ plaintiffs continue to feel the positive effects of the 1990s turning point, taking advantage of IIED's attentiveness to the power imbalance between plaintiff and defendant in order to challenge a wide range of conduct: outing,[109] denial of medical care,[110] and degrading acts in the workplace[111] and in receipt of services.[112]

In 2020, the District Court for the Northern District of Illinois upheld an IIED claim from a transgender medical technician at the Cook County jail who was outed by his supervisor amidst a culture of transphobia at the prison, in which employees consistently denigrated him as well as the prison's

103. *Id.* at *8.

104. 88 F. Supp. 3d 812 (N.D. Ohio 2015).

105. *Id.* at 815.

106. *Id.* at 821.

107. *Id.* (quoting Fuelling v. New Vision Med. Labs., 284 Fed. App'x 247, 261 (6th Cir. 2008)).

108. *See, e.g.*, Chandler v. Pye Auto., No. 4:17-CV-00086, 2018 WL 4844380, at *12 (N.D. Ga. Aug. 31, 2018) (granting defendants' motion for partial summary judgment with respect to an IIED claim against a woman subjected to sexual harassment and biphobic comments in the workplace); Jordan v. Kimpton Hotel & Rest. Grp., 890 S.E.2d 417, 425–26 (Ga. Ct. App. 2023) (ruling against an IIED claim from a gay hotel guest who was harassed, mocked, stripped nude, and slurred at by police and hotel staff).

109. *See, e.g.*, Grimes v. Cnty. of Cook, 455 F. Supp. 3d 630, 643 (N.D. Ill. 2020).

110. *See, e.g.*, Clark v. Quiros, 693 F. Supp. 3d 254, 269–79 (D. Conn. 2023).

111. *See, e.g.*, Kwiatkowski v. Merrill Lynch, No. L-1031–04, 2008 WL 3875417, at *16–18 (N.J. Super. Ct. App. Div. Aug. 13, 2008).

112. *See, e.g.*, Mayorga v. Benton, 875 S.E.2d 908, 913–16 (Ga. Ct. App. 2022).

transgender inmates.[113] Later, in 2023, the ACLU of Connecticut won a landmark IIED victory on behalf of a transgender plaintiff serving effectively a life sentence in state prison that denied her gender-affirming care.[114] The prison refused to provide the plaintiff, Veronica-May Clark, proper hormone therapy despite her attempting to remove her own genitals.[115] The court focused on the fact that the case was about "defendants in a position of power and authority over a vulnerable victim"—correctional-facility officials and physicians refusing care to a transgender woman desperate for life-saving medical assistance.[116]

The willingness of contemporary courts to uphold LGBTQ IIED claims for conduct far less severe than that faced by Clark—such as whispering a slur under one's breath[117] or writing a mocking comment on a draft death certificate accidentally sent to bereaved gay parents[118]—proves the broad and flexible role IIED can play in advancing LGBTQ dignity today. This success has led one scholar to conclude that the tort is the "best option" for queer plaintiffs in fighting the scourge of cyberbullying that afflicts LGBTQ youth.[119] One example of the potential of IIED to combat homophobic cyberbullying is the tragic October 2024 case, *Amspacher v. Red Lion Area School District*.[120] The case involved the suicide of a gay ninth-grade boy, Zachary Amspacher, after a group of classmates bullied him over text, on social media, and in person.[121] The group of boys hounded him with homophobic slurs and encouraged him to kill himself, leading the court to find a prima facie case of IIED and reject two of the defendants' motions to dismiss.[122]

II. IIED's Apparent Collision with the First Amendment

As successful as IIED has been in advancing LGBTQ rights, the most significant recent challenge to the tort— particularly in the context of combatting homophobia and transphobia, has been the First Amendment. Some scholars contend that the Court's recent expansion of the First Amendment's

113. *Grimes*, 455 F. Supp. 3d at 637, 641.

114. *Clark*, 693 F. Supp. 3d at 266, 299–301.

115. *Id.* at 266.

116. *Id.* at 300.

117. Kwiatkowski v. Merrill Lynch, No. L-1031–04, 2008 WL 3875417, *17–18 (N.J. Super. Ct. App. Div. Aug. 13, 2008) (upholding an IIED claim against a work supervisor who called an employee a "stupid fag" under her breath).

118. Mayorga v. Benton, 875 S.E.2d 908, 912–14, 916 (Ga. Ct. App. 2022) (overturning dismissal of an IIED claim for a mocking comment on a teenage girl's death certificate directed at her two grieving dads who have the same last name).

119. Juan M. Acevedo García, *Intentional Infliction of Emotional Distress Torts as the Best Legal Option for Victims: When Cyberbullying Conduct Falls Through the Cracks of the U.S. Criminal Law System*, 1 Revista Jurídica U. P.R. 85, 129, 160 (2016) (arguing that IIED is the "most promising option for victims to find redress from the perpetrators of cyberbullying attacks").

120. No. 1:23-CV-00286, 2024 WL 4631815 (M.D. Pa. Oct. 30, 2024)

121. *Id.* at *1, *8.

122. *Id.* at *8.

reach renders IIED a dead letter.[123] This Part examines how we arrived at this impasse in three Sections. Section II.a. delineates the First Amendment's tense relationship with dignitary torts more broadly and how it emerged from an anxiety about protecting unpopular expression that society would normally find offensive. Section II.b. examines this particular dynamic in the context of IIED. And Section II.c. outlines the apparent war between the First Amendment and LGBTQ IIED in particular, analyzing recent case law such as *Snyder*. I do not argue in this Part that the potential tensions between the First Amendment and IIED are imagined or manufactured. On the contrary, this Part aims to identify the real judicial and scholarly anxieties about the impact of the tort on free expression. Doing so will enable a more careful attempt in Part III to begin to alleviate some of those concerns.

A. *A Fraught Relationship: Dignitary Torts and the First Amendment*

To examine the IIED-First Amendment collision alone would be to ignore a much broader story about the fraught relationship between free expression and dignitary torts. Often considered to include assault, battery, false imprisonment, defamation, invasion of privacy, and IIED, dignitary torts encompass a diverse set of conduct and thus each protect "different dimensions of individual dignity."[124] Kenneth S. Abraham and George Edward White argue that there is no "unitary dignitary tort"—despite there being interest in creating one in the 1960s—because each tort protects a different kind of dignity.[125] For example, while IIED protects against "embarrassment, humiliation, and disrespect," torts such as battery and invasion of privacy primarily address "liberty and autonomy."[126]

But another major reason why no unitary dignitary tort developed, argue Abraham and White, was the "unprecedented constitutional intervention into state tort law" in the twentieth century.[127] This process of "constitutionalizing . . . dignitary torts" began with the landmark case *New York Times v. Sullivan* (1964), in which the Court established an "actual malice" standard for defamation claims against public figures.[128] Before *Sullivan*, tort law was considered purely private law and thus outside the scope of the state-action requirement for raising First and Fourteenth Amendment concerns.[129] By

123. García, *supra* note 119, at 162 ("[I]t has been argued that the Court's recent decision in *Snyder v. Phelps*, has made IIED claims 'all but obsolete.'" (quoting Elizabeth M. Jaffe, *Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of* Snyder v. Phelps, 57 Wayne L. Rev. 473, 475 (2011))).

124. John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, Tort Law: Responsibilities and Redress 778 (5th ed. 2021); Kenneth S. Abraham & George Edward White, *The Puzzle of the Dignitary Torts*, 104 Cornell L. Rev. 319, 322 (2019).

125. Abraham & White, *supra* note 124, at 341, 359.

126. *Id.* at 359.

127. *Id.* at 322.

128. *Id.* at 361–362, 364.

129. *Id.* at 363.

unambiguously holding that even common-law torts could run afoul of the First Amendment, the *Sullivan* Court began a "Constitutional Tidal Wave," in which First Amendment considerations would fundamentally reshape dignitary tort law.[130]

Crucially, animating the Court's concern in *Sullivan* was an impression that dignitary tort liability—anchored in majoritarian notions of right and wrong, of "correct" and "incorrect" expression—would undermine the independent thought that the First Amendment aims to protect.[131] The Court quoted Justice Brandeis, who stated, "Recognizing the occasional tyrannies of governing majorities, [the Founders] amended the Constitution so that free speech and assembly should be guaranteed."[132]

The Court soon moved from defamation to invasion of privacy, holding first in 1967 in *Time, Inc. v. Hill*[133] that, for "matters of public interest," there needed to be "actual malice" for one to sustain a claim of false light.[134] Shortly thereafter in 1975, the Court ruled in *Cox Broadcasting Corp. v. Cohn*[135] that a state could not extend the invasion of privacy tort to the publication of true information available in public records.[136] In the following decade, the constitutional tidal wave finally caught up with IIED.

B. *IIED as a Threat to Speech*

In 1983, televangelist and self-described leader of the "moral majority" Jerry Falwell sued Hustler Magazine for IIED regarding a parody advertisement on the inside front cover of their November issue portraying the pastor losing his virginity to his mother in an outhouse.[137] The Court reasoned in *Hustler Magazine, Inc. v. Falwell* in 1988 that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[138] For this reason, the Court imported the "actual malice" standard from *Sullivan* to apply to public figures in the context of IIED: they must prove that the defendant made a statement or publication "with knowledge that the statement was false or with reckless disregard as to whether or not it was true."[139]

130. *Id.* at 363–364.

131. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

132. *Id.* (quoting Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

133. 385 U.S. 374 (1967).

134. *Id.* at 387–88 ("[T]he constitutional protections for speech and press preclude the application of [a New York right-of-privacy statute] to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.").

135. 420 U.S. 469 (1975).

136. *Id.* at 495–96 (dictating that "[t]he publication of truthful information available on the public record" is protected by the First Amendment).

137. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 48 (1988).

138. *Id.* at 50.

139. *Id.* at 56.

However, the Court went further in *Falwell*, sharing a deeper anxiety about the communitarian nature of IIED and how its indeterminacy and broadness could lead to liability for unpopular speech. "'Outrageousness,' in the area of political and social discourse," wrote Justice Rehnquist, "has an inherent subjectiveness about it" that can allow jurors to impose liability "on the basis of their dislike of a particular expression."[140] The tort as applied to public discourse could "run[ ] afoul" of longstanding First Amendment doctrine, which specifically protects speech that "society may find . . . offensive."[141]

While the Court only formally enunciated this worry about IIED in 1988, concerns about IIED's impact on free expression are as old as the tort itself. In the 1939 law review article credited with helping to establish the tort, famed tort scholar William L. Prosser wrote that IIED needed to remain compatible with the "freedom to express an unflattering opinion."[142] It thus makes sense that, over time, the Court's keenness to protect offensive, unpopular expression[143] would come into conflict IIED. As IIED is a tort designed to protect people from speech that crosses the line from unpopular to outrageous, courts might understandably struggle in finding where that line lies.

Taking up where Rehnquist left off, some scholars have warned that IIED may impose a "chilling effect" on First Amendment expression[144] and have advocated for significantly restricting the tort.[145] One of the strongest critics has been Paul Hayden, who warned that IIED "may allow majoritarianism to ride roughshod over unpopular or minority rights and beliefs," particularly in the context of religious liberty.[146]

Robert C. Post cogently articulates the First Amendment's tension with IIED, describing how the tort is about "penaliz[ing] those defendants who breach civility rules," whose speech is more than simply "unpleasant or disagreeable" but rather "inconsistent with common canons of decency."[147] The

140. *Id.* at 55.

141. *Id.* (quoting FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978)).

142. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 887 (1939).

143. *See, e.g.*, Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

144. Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 Wake Forest L. Rev. 1197, 1203 (2009).

145. David Crump, *Rethinking Intentional Infliction of Emotional Distress*, 25 Geo. Mason L. Rev. 287, 299 (2018) (advocating for states to restrict the outrage tort to only those instances in which a companion tort claim does not "substantially duplicate[ ]" the facts of the IIED claim); Hayden, *supra* note 24, at 675 (1993) ("The tort has resisted doctrinal reform due to its very indeterminacy, and it seems entirely appropriate to limit its application—killing it, if necessary, in the process—when experience tells us it sweeps too broadly.").

146. *Id.* at 586.

147. Robert C. Post, *The Constitutional Concept of Public Disclosure: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 601, 624–625 (1990).

problem, then, is that First Amendment doctrine is decidedly agnostic to any given community's rules of decency, resting instead on the "possibility of using speech to create new identities" and shake fundamental norms.[148] The threat of IIED is that it would "enable a single community to use the authority of the state to confine speech within its own notions of propriety."[149]

C. *The First Amendment Comes for LGBTQ IIED*

The First Amendment has a direct impact on LGBTQ IIED in particular, both by way of the so-called "matters of public concern" doctrine[150] and religious freedom. In *Snyder v. Phelps* in 2009,[151] the Fourth Circuit considered an IIED suit against the Westboro Baptist Church for a provocative protest against the acceptance of gay people in the military during the funeral of Matthew Snyder, a marine killed in Iraq.[152] Snyder's father filed suit for IIED (as well as defamation and intrusion on seclusion), arguing that the Church's protest—which included signs stating "Fag Troops," "God Hates Fags," and "Thank God for Dead Soldiers"—inflicted severe emotional distress on him when he saw news of the protest on television later that day.[153]

The Fourth Circuit found that because the Church was speaking about a "matter of public concern," that is, the "issue of homosexuals in the military" and "the political and moral conduct of the United States and its citizens," its First Amendment defense categorically defeated the prima facie case of IIED.[154] The Supreme Court soon affirmed the Fourth Circuit on appeal, agreeing that imposing a jury verdict on the defendants for IIED would penalize Westboro for expressing its views on a "matter of public concern."[155]

The Court's opinion rested in part on the same view in *Falwell* that imposition of tort liability would subject unpopular speakers to prevailing majoritarian sensibilities. Quoting the famous flag-burning case, *Texas v. Johnson*, the Court stated, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[156]

In an analogous strand of case law, courts have looked to First Amendment religious freedom as categorically overriding LGBTQ IIED. In *Gunn v. Mariners Church* in 2008, a California appeals court dismissed an IIED claim resulting from a homophobic firing under the "ministerial exception," which provides special protection to religious organizations from

148. *Id.* at 630–31.

149. *Id.* at 632.

150. *See generally* Mark Strasser, *What's It to You: The First Amendment and Matters of Public Concern*, 77 Mo. L. Rev. 1083 (2012) (tracking the development of the "matters of public concern" doctrine over time).

151. 580 F.3d 206 (4th Cir. 2009).

152. *Id.* at 210–11.

153. *Id.* at 212, 222–23.

154. *Id.* at 222–24.

155. Snyder v. Phelps, 562 U.S. 443, 458 (2011).

156. *Id.* at 458 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

antidiscrimination suits in employing ministers.[157] The Supreme Court later solidified the ministerial exception as an affirmative defense to liability for employment decisions in the 2012 case *Hosanna-Tabor v. EEOC*, holding that it extended even to religious teachers in private religious schools.[158]

III. The Future of IIED

In this Part, I argue that the Court's current approach to the IIED-First Amendment collision is overly simplistic, failing to account for the special role IIED can play in protecting minorities from majoritarian attack. This simplicity manifests in two ways.

First, if IIED accounts for LGBTQ people's unique vulnerability, protecting the community from majoritarian degradation, then the tort is not necessarily in tension with First Amendment values. In fact, IIED can also encapsulate the same values as the First Amendment, protecting unpopular minorities against egregious, subordinating speech that could render those groups silent in the public sphere. In this respect, when IIED and the First Amendment appear to clash, courts should account for the potential harm to First Amendment expression on both sides of that equation. To illustrate this point, if someone calls me a "fag" on the street, my IIED claim amplifies my ability to speak as a queer person as much as it silences my bully. That does not yield an answer to our clash, but it does reorient the analysis, preserving one of the fundamental functions of IIED and ensuring that courts account for all of the First Amendment interests at stake. The core of my contention is that IIED is not just about civility rules. The tort of outrage accomplishes much more than that, as it protects one's dignity and one's ability to speak. As a result, analyzing IIED as though it were solely about "civil discourse" may lead courts to the wrong result.

Second, my understanding of IIED suggests that the kind of speech that the tort penalizes might fall within the scope of doctrines that provide exceptions to the First Amendment's coverage, especially the true-threats, incitement, and captive-audience doctrines. These doctrines dictate, respectively, that the First Amendment does not cover speech intended to intimidate and instill fear, speech that incites imminent lawless conduct, and unwanted speech foisted on listeners who cannot avoid it. I argue that these three doctrines further enable courts to reconcile the apparent collision between IIED and the First Amendment.

A. *IIED and the First Amendment: Friends, Not Just Foes*

This Note does not contend that the *Snyder* Court came to the wrong result. There were many reasons for the Court to side with the Westboro Baptist Church. The Church protested on a public sidewalk a thousand feet

157. Gunn v. Mariners Church, Inc., 167 Cal. App. 4th 206, 217 (2008).
158. Hosanna-Tabor v. EEOC, 565 U.S. 171, 196 (2012).

from the funeral, adhering to police guidance.[159] Moreover, Matthew Snyder's father Albert did not see what was written on the protestors' signs until he turned on the television that night, thus reducing the immediate emotional harm their speech had on him.[160]

And yet, the Court's analysis was incomplete. Not once did the Court consider the particular First Amendment effects of the Westboro Baptist Church's hateful speech—namely, its use of homophobic slurs—nor did it consider the seemingly crucial questions of whether the late Matthew was gay, which he was not,[161] or whether his grieving father Albert was gay, which he was.[162] Because Albert was gay, one would expect the Church's speech to inflict a kind of emotional harm on him that courts would be especially sensitive to. Seen in this light, the case morphs from a deeply offensive display into a more particularized denigration, which is the kind of harm we saw courts keen to protect against in Part I.[163]

Writing in response to the Fourth Circuit opinion, before the Supreme Court weighed in the following year, Deana Pollard Sacks argued that the problem in *Snyder* was the Court's failure to balance countervailing constitutional interests.[164] The Court failed to account for the fact that the "ultimate social effect" of the decision "may be to drive [LGBTQ] Americans into seclusion to avoid being targeted for hateful harassment, thereby limiting their First Amendment . . . freedoms."[165] In fact, in ruling for the Church, courts emboldened the defendants' exercise of "heterosexual majoritarian privilege."[166] Due to this particular "clash of interests," Sacks concluded that "any way the Court decides the case, someone's First Amendment ox will be gored."[167]

Scholars have highlighted the recurring worry that the First Amendment can erode the very expressive environment it seeks to protect. This was Owen

159. *Snyder*, 562 U.S. at 449, 457.

160. *Id.* at 449.

161. Robert Barnes, *Supreme Court Rules First Amendment Protects Church's Right to Picket Funerals*, Wash. Post (Mar. 2, 2011), https://www.washingtonpost.com/politics/supreme-court-rules-first-amendment-protects-churchs-right-to-picket-funerals/2011/03/02/ABDzbrM_story.html [https://perma.cc/PU7S-BX4J] (stating that "[t]he church chose Matthew Snyder's funeral somewhat by chance; he was not gay").

162. Michael Smerconish, *He Looked Hate in the Eye*, Politico Mag. (Mar. 7, 2014), https://www.politico.com/magazine/story/2014/03/al-snyder-westboro-baptist-church-104353 [https://perma.cc/AV24-LBLR] (describing how Albert Snyder had come out as gay even before his late son Matthew enlisted in the army).

163. *See, e.g.*, Kwiatkowski v. Merrill Lynch, No. L-1031–04, 2008 WL 3875417, at *17–18 (N.J. Super. Ct. App. Div. Aug. 13, 2008); Mayorga v. Benton, 875 S.E.2d 908, 912–14 (Ga. Ct. App. 2022).

164. Deana Pollard Sacks, Snyder v. Phelps*, the Supreme Court's Speech-Tort Jurisprudence, and Normative Considerations*, 120 Yale L.J. F. 193 (2010), http://yalelawjournal.org/forum/snyder-v-phelps-the-supreme-courts-speech-tort-jurisprudence-and-normative-considerations [https://perma.cc/3Y7F-7MU8].

165. *Id.*

166. *Id.*

167. *Id.*

Fiss's central concern in the wake of *R.A.V. v. St. Paul* in 1992,[168] in which the Court struck down a city ordinance targeting speech that "disfavored subjects of 'race, color, creed, religion or gender'" after it was applied against a group of teenagers who burned a cross in a Black family's yard.[169] Fiss maintained that "cross-burning does not merely insult [B]lacks and interfere with their right to choose where they wish to live": such a gravely dehumanizing and intimidating action "interferes with their speech rights" by "discourag[ing] them from participating in the deliberative activities of society."[170] For Fiss, the state's failure to sanction such egregious speech meant that Black people were "silenced as effectively as if the state had intervened to silence them."[171]

Post put the problem in similar terms, claiming that inherent in First Amendment doctrine is a tension between "critical interaction"—the sharing of vehemently different views—and "rational deliberation"—the ability of each speaker to come to the table in the first place.[172] Post came to a parallel conclusion as Fiss, arguing that "the paradox of public discourse requires that critical interaction must at some point be bounded," as critical interaction, when taken to its extreme, has the ability to overturn rational deliberation altogether.[173] Crucially, neither Fiss nor Post hoped for some "overarching reconciliation" to the paradox.[174] Instead, they both called for a more delicate balancing act by courts, one that recognizes the doctrinal complexity that hate speech generates.[175]

Indeed, when it comes to the particular kinds of speech that IIED has so frequently tried to cover—racial and homophobic epithets and other bias-motivated harassment—the traditional First Amendment concept of a "free marketplace" of ideas no longer holds.[176] Not only do the communities on the other side of that speech come to the table as unequal partners in public discourse, but also lack the words to respond to that speech. Richard Delgado and Jean Stefancic famously noted that "there is no correlate—no analog—for hate speech directed toward whites. Nor is there any countering message that

168. Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 Cap. U. L. Rev. 281, 287–288 (1995).

169. R.A.V. v. St. Paul, 505 U.S. 377, 378–79 (1992). The Court was particularly concerned about viewpoint discrimination, arguing that "in its practical operation the ordinance goes beyond mere content, to actual viewpoint, discrimination." *Id.*

170. Fiss, *supra* note 168, at 287.

171. *Id.*

172. Post, *supra* note 147, at 642.

173. *Id.* at 682.

174. *Id.* at 683.

175. For example, Fiss looked to the "delicate balance" between "preserving the state's neutrality in public debate" and "enabling the state to fulfill its police power function." *See* Fiss, *supra* note 168, at 286. Post similarly stated that "[d]octrinal formulation should assist courts in the evaluation of these considerations [i.e., those underlying the paradox], rather than masking them under wooden phrases and tests." *See* Post, *supra* note 147, at 683.

176. Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes Toward Racist Speech*, 56 Harv. C.R.-C.L. L. Rev. 115, 141–42 (2021).

could cancel out the harm of '[N]——. . . .'"[177] Slurs by their nature are thus conversation-enders, leaving those receiving them without any reply.

Finally, in the LGBTQ context, there is a special importance to the First Amendment. William N. Eskridge writes that LGBTQ life is inherently expressive because "[s]exual conduct—from hand-holding to kissing to intercourse—is expressive."[178] Under this view of what Eskridge calls the "sexualized [F]irst [A]mendment," hate speech is particularly restrictive of First Amendment expression in the LGBTQ context, forcing queer people to pack their expressive bags and return to the silence of the closet.[179]

B. *The Dangers of a One-Sided Approach*

Accounting only for the defendant's First Amendment interests for an IIED claim that targets anti-LGBTQ (and other derogatory) hate speech can lead to incongruous results. Without considering the First Amendment interests on both sides of such a case, courts risk factoring in the LGBTQ identity of the plaintiff solely to negate rather than bolster the IIED claim. For example, in a case like *Snyder*, the fact that the Westboro Baptist Church was targeting *queer people* specifically further entitled the Church to the "matters of public concern" doctrine.[180] It was their speech on "homosexuality in the military" that convinced the Court to situate the Church's expression on the "highest rung of the hierarchy of First Amendment values."[181]

Imagine a slightly different case: someone yells at a queer-presenting student on the sidewalk, "You fags are taking over everything—our military, our schools, and now our streets." If the Court were to follow *Snyder*'s approach, looking only to the First Amendment interests on one side of the case, the queerness of the plaintiff would only work against them. This would contravene the historical and doctrinal role of queer identity in LGBTQ IIED claims that I tracked throughout Part I.

This is not an abstract scenario. In 2015, the Sixth Circuit considered the IIED claim of a college student, Christopher Armstrong, and wrote an opinion that reads like a direct response to *Snyder*. Armstrong was the first openly gay student council president of the University of Michigan[182] and fell victim to an

177. Richard Delgado & Jean Stefancic, Must We Defend Nazis? Why The First Amendment Should Not Protect Hate Speech and White Supremacy 95 (2d ed. 2018).

178. William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 177 (1999).

179. *Id.* at 178.

180. Snyder v. Phelps, 562 U.S. 443, 454 (2011).

181. *Id.* at 452 (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)). A similar argument can be made for religious-liberty cases like *Gunn*, where the very fact of the plaintiff's queerness solely gives rise to a religious-liberty claim that weakens the IIED claim. Where the Court fails to consider the plaintiff's countervailing First Amendment interests, the plaintiff's queer identity functions only to hobble, not strengthen, the IIED claim. *See* Gunn v. Mariners Church, Inc., 167 Cal. App. 4th 206 (2008).

182. Chris Armstrong, *What It Meant to Me*, Univ. Mich. (July 15, 2020), https://giving.umich.edu/um/w/what-it-meant-to-me-chris-armstrong [https://perma.cc/5U8D-QW5E] (describing Armstrong as the school's first openly gay student-body president).

online campaign of homophobic harassment from the state's former Assistant Attorney General Andrew Shirvell.[183] Shirvell wrote on his Facebook page that Armstrong was "dangerous," a "radical homosexual activist," and a "major-league fanatic."[184] Soon after, Shirvell set up a Facebook group and blog to persistently harass Armstrong, placed the student's face next to an image of a swastika, and made an appearance on Comedy Central's *The Daily Show*, where he stated that Armstrong was "acting like a gay Nazi."[185] As part of his "protest[]," Shirvell also showed up outside of multiple parties that Armstrong attended.[186] Armstrong sued Shirvell for a host of dignitary torts—defamation, false light, intrusion, and IIED, among others—and received a $4.5 million jury award.[187]

On appeal, the Sixth Circuit declined to take the *Snyder* approach: it actively considered the vulnerability of Armstrong, factoring in Armstrong's unique susceptibility to emotional harm in the same way courts have tried to do since the 1990s.[188] The court highlighted that Shirvell's actions were "motivated largely by discrimination" and that, for this reason, among others, a "reasonable person could certainly find this conduct extreme and outrageous."[189]

The Sixth Circuit's attention to the vulnerability of Armstrong in evaluating his IIED claim is a departure from *Snyder*'s reasoning. While there are important differences between the cases, the fact that the appellate court ensured that it was factoring Armstrong's queer identity into its calculus to bolster, rather than just call into question, the strength of the outrage claim remains deeply consequential for future LGBTQ IIED.

But the Sixth Circuit went even further than this. It questioned whether the simple fact of Armstrong's queerness made the speech a matter of public concern at all. In this respect, the *Armstrong* court rooted its holding in the fact that Shirvell's speech was disentitled to First Amendment protection because it was predominantly about Armstrong's "private" life, not matters of public concern.[190] While Shirvell claimed that Armstrong would "discriminate against Christian, pro-life, and pro-family people" and expressed his opposition to the student leader's position on gender-neutral housing on campus, this was only a "small amount" of Shirvell's overall message.[191] The same could not be said for the Westboro Baptist Church's speech in *Snyder*, noted the court.[192]

This is a crucial distinction between the two cases. In *Snyder*, the Church was primarily targeting queerness as a social and political phenomenon. For this reason, the First Amendment should have been operating in the two

183. Armstrong v. Shirvell, 596 Fed. App'x 433, 437 (6th Cir. 2015).
184. *Id.* at 437.
185. *Id.* at 437–39.
186. *Id.* at 439–40.
187. *Id.* at 440–41.
188. *Id.* at 452.
189. *Id.*
190. *Id.* at 445–46.
191. *Id.* at 439, 445–46, 452–53.
192. *Id.* at 452–53.

directions described above. In *Armstrong*, however, Shirvell's main message was that he hated Armstrong as an individual because Armstrong was gay. In cases like *Armstrong*, where the hate speech falls short of "public concern" by focusing predominantly on the private life of the queer victim, the First Amendment exists on only *one* side of the IIED case: it exclusively assists the plaintiff. The Sixth Circuit may not have cited Fiss, Post, and Eskridge on the antisubordinating role of the First Amendment, but by relying on IIED's special role in combatting discriminatory speech, the opinion implicitly recognized that a plaintiff's IIED claim can serve the same values as the First Amendment.

C. *First Amendment Carveouts for IIED*

This Part so far has focused on the ways the First Amendment and IIED can be friends in addition to foes. This Section calls into question whether the two have to be in conflict at all. I argue in this Section that, according to the theory of IIED as a tool for protecting vulnerable minorities against majoritarian attack, the types of hate speech that the tort targets become stronger candidates for exceptions to the First Amendment as so-called "low-value,"[193] or "proscribable"[194] speech.

First Amendment expression is of course not an unbounded right,[195] and landmark Supreme Court cases like *Chaplinsky v. New Hampshire*[196] in 1942 have carved out of the First Amendment's reach certain categories of speech, such as obscenity, libel, and so-called "fighting words," those that are "plainly likely to cause a breach of the peace by the addressee."[197] In *Chaplinsky*, the Court stated that these categories of speech all play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[198]

One critical caveat to my argument in this Section is that I do not seek for courts to provide special, across-the-board solicitude to LGBTQ people in deciding whether homophobic or transphobic speech falls into one of the proscribable-speech categories. This could well be inconsistent with the First Amendment prohibition on content discrimination and the even more suspect subcategory of viewpoint discrimination.[199] The Court held in *R.A.V. v. St.*

193. *See generally* Jeffrey Shaman, *The Theory of Low-Value Speech*, 48 SMU L. Rev. 297 (1995) (describing the development of the doctrinal concept of "low-value speech").

194. R.A.V. v. St. Paul, 505 U.S. 377, 383–84 (1992).

195. Heath Hooper, *Sticks and Stones: IIED and Speech After* Snyder v. Phelps, 76 Mo. L. Rev. 1217, 1224 (2011) (explaining that the Court "has carved out very narrow exceptions regarding speech limitations, striking a delicate balance between the need to protect speech and the need to protect individuals from injury").

196. 315 U.S. 568 (1942).

197. *Id.* at 573.

198. *Id.* at 572.

199. Content-neutral regulations of speech are generally subject to intermediate constitutional scrutiny, whereas content-based and viewpoint-based regulations are generally subject to strict scrutiny. R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 Ind. L. Rev. 355, 356, 428 (2019).

Paul that "[t]he First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects."[200] This principle applies even to a "content-defined subclass of proscribable speech."[201] In other words, the government can run afoul of the First Amendment even when it disallows—based on content—some but not other speech within an otherwise proscribable category.[202] I thus do not advocate that courts fashion a hard rule granting less First Amendment protection to homophobic or transphobic speech on the basis of that speech's content. This, I believe, might raise other constitutional questions.

Instead, I advocate in this Section for judicial attention to the fact that LGBTQ plaintiffs bringing IIED claims are often strong *candidates* for applying "proscribable" speech doctrines. That is, because queer IIED plaintiffs are especially vulnerable, the speech that they challenge often falls under the true-threats, incitement, and captive-audience doctrines. On a case-by-case basis, then, courts should account for these doctrines before they categorically override LGBTQ IIED claims that seemingly clash with the First Amendment.

Another caveat is that not all of proscribable-speech doctrines are ready-made for the average LGBTQ IIED plaintiff. For example, the Court has over time severely limited the fighting-words doctrine in cases such as *Cohen v. California* (1971), in which the Court held that the exception was only for language that provokes a "violent reaction" from the addressee.[203] This effectively restricted the doctrine to "personally abusive epithets directed at one-on-one unambiguous invitations to a brawl."[204] This makes the fighting-words doctrine of little use in the context of hate speech, as it "assumes an encounter between two persons of relatively equal power acculturated to respond to face-to-face insults with violence," not an attack on the most vulnerable sectors of society.[205]

1. True Threats

Bloody brawls notwithstanding, the Court has recognized other areas of speech that lie outside of the First Amendment's reach. For the purposes of IIED, the most important among them is the category of true threats. True threats occur when "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[206] In *Virginia v. Black* in 2003, the Court addressed the constitutionality of Virginia's anti-cross-burning statute, distinguishing the case from *R.A.V. v. St. Paul* because the Virginia statute's basis "consists entirely of the very reason its . . . class of speech is proscribable."[207] In other words, while

200. R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992).

201. *Id.* at 389.

202. *Id.* at 387.

203. 403 U.S. 15, 20 (1971).

204. Rosalie Berger Levinson, *Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided* Snyder, 46 Suffolk U. L. Rev. 45, 55 (2013).

205. *Id.* at 55–56.

206. Virginia v. Black, 538 U.S. 343, 344 (2003).

207. *Id.* at 361–362 (quoting R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992)).

the St. Paul ordinance in *R.A.V.* focused on prohibiting certain types of political speech against certain groups, and thus constituted impermissible content discrimination under the First Amendment, Virginia's law targeted the true-threats category the Court had already disallowed.[208] The statute was therefore constitutional on this account.[209]

As I have shown, IIED often penalizes the same speech as is included in the Court's true-threats doctrine. When someone shouts a slur at a queer or Black person on the street, the immediate response is a fear of attack.[210] Especially if IIED is used to protect vulnerable minorities against bigoted or discriminatory speech, the tort becomes a mechanism for dignifying plaintiffs in the face of an acute "fear of violence," and the most egregious IIED defendants from this vantage point may be disentitled to First Amendment protection.[211]

Prosser himself recognized in his trailblazing article on IIED that it was nonsensical that tort law—by way of assault—protected only physically induced but not verbally induced fear of violence.[212] He criticized how tort law "permitted recovery for the movement of a hand that might frighten the plaintiff for a moment, and denied it for coldly menacing words that kept him in terror of his life for a month."[213]

Courts have applied the true-threats doctrine to an LGBTQ IIED claim in the context of a potential clash with the First Amendment. In *Simpson v. Burrows*[214] in 2000, the District Court for the District of Oregon held in favor of a lesbian woman, V. Jo Anne Simpson, who was tormented by a straight couple, Howard and Jean Burrows, through a series of at least twelve hostile letters circulated around their town of Christmas Valley.[215] The letters called Simpson an "immoral abomination" who was converting the town into a "mecca for Queers, Lesbians, Perverts & other degenerates."[216] The letters soon turned violent, stating that Simpson should leave the town "head first or feet first."[217] Simpson testified that she felt her life was in danger, had trouble sleeping, and

208. *Id.*

209. The Court held the statute unconstitutional on other grounds. *Id.* at 365. Writing for herself and three other Justices, Justice O'Connor argued that the statute's provision making cross burning in public view a prima facie case of intent to intimidate was overbroad. *Id.*

210. *See* Hum. Rts. Watch, "Like Walking Through a Hailstorm:" Discrimination Against LGBT Youth in U.S. Schools 24 (2016), https://www.hrw.org/report/2016/12/07/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools [https://perma.cc/EQ68-X5SC (arguing that slurs lobbed at LGBTQ students in U.S. schools produce immediate fear of violence and hostility).

211. Levinson, *supra* note 204, at 57.

212. Prosser, *supra* note 142, at 880.

213. *Id.*

214. 90 F. Supp. 2d 1108 (D. Or. 2000).

215. *Id.* at 1112–14.

216. *Id.* at 1114.

217. *Id.*

ultimately had to move out of town because she was so scared.[218] The Court held that because the letters constituted "true threats," they were outside the pale of both the First Amendment and of Oregon's state constitutional protection of free speech, and Simpson's IIED claim prevailed.[219]

2. Incitement

A close cousin to the true-threats doctrine is incitement. In *Brandenburg v. Ohio*,[220] the Court held that speech which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" is outside the scope of the First Amendment.[221] The standard for incitement is decidedly high, requiring more than the "mere tendency of speech to encourage unlawful conduct."[222] For example, the Court in *Brandenburg* struck down Ohio's Criminal Syndicalism Act, a criminal statute punishing those who "'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform.'"[223] The speech instead needs to lead to "imminent lawless action."[224]

While some scholars have argued that *Brandenburg* sets the standard "so high as to be almost insurmountable,"[225] others have argued that it could be directly applicable to IIED speech-tort cases.[226] Specifically, incitement is doctrinally distinct from fighting words in the sense that it is about instigating lawless action rather than inviting the addressee to a brawl. It therefore could be more relevant to emotionally harmful speech leveled against vulnerable groups, who—while less likely to punch someone screaming a slur at them—are more likely to face mob attack or other pile-on harassment, whether it be in a school lunchroom or from Shirvell's Facebook campaign.[227]

3. Captive Audience

Finally, the captive-audience doctrine—allowing for the regulation of offensive speech when an audience cannot avoid that speech[228]—is also highly relevant to LGBTQ IIED cases. The Court correctly rejected this argument in

218. *Id.* at 1121.

219. *Id.* at 1129–30.

220. 395 U.S. 444 (1969).

221. *Id.* at 447.

222. Levinson, *supra* note 204, at 57–58.

223. *Brandenburg*, 395 U.S. at 448.

224. *Id.* at 449.

225. Lyrissa Lidsky, Brandenburg *and the United States War on Incitement Abroad: Defending a Double Standard*, 37 Wake Forest L. Rev. 1009, 1010 (2002).

226. *See, e.g.*, Levinson, *supra* note 204, at 58–60; García, *supra* note 119, at 151.

227. García, *supra* note 119, at 151 (arguing that "incitement could apply in cases where the cyberbully might be able to remotely incite people who are in physical proximity to the victim to cause a direct threat of imminent lawless action with a high probability such action would promptly ensue").

228. Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech.").

Snyder because the plaintiff "could see no more than the tops of the picketers' signs."[229] However, in cases in which LGBTQ people are being subjected to emotional harm, an audience could quickly become captive, perhaps out of fear that an attempt to flee would inflame the situation. The Court has required that "speech physically or aurally invade a zone of privacy" in order to trigger the captive-audience doctrine.[230] This might apply to many of the LGBTQ IIED cases we have already seen, such as *Armstrong*, in which potential tortfeasors physically disrupt the private life of the plaintiff.

Some scholars have argued that the modern era of cyberbullying and online hate speech requires expanding the bounds of the captive-audience doctrine.[231] Alexander Brown, for example, claims that it is often impossible to avoid "unwelcome messages and content" that hate speakers bombard at others over the phone and the Internet.[232] This departs from courts' traditional understanding of the doctrine, which historically extends only to speech that an audience cannot avoid by "averting their eyes."[233] Brown points out that because modern technologies not only make it easier to spread hate, but also are a prerequisite for participation in everyday life, it might be unreasonable to expect someone to avert their eyes from their own email or text messages.[234] With increasing rollbacks of social-media companies' content-moderation policies,[235] this argument gains additional bite: unfiltered, targeted, and persistent online hate speech can inundate an individual's phone or feed, rendering them captive to bigoted speakers.

D. *Doctrinal Implications*

This Part has demonstrated that the First Amendment and IIED are less in opposition than the *Snyder* Court acknowledged. There are two core implications of my analysis. First, courts should adopt a balancing test as they evaluate apparent collisions between IIED and the First Amendment: IIED plaintiffs

229. Snyder v. Phelps, 562 U.S. 443, 460 (2011).

230. Christina Wells, *Regulating Offensiveness:* Snyder v. Phelps, *Emotion, and the First Amendment*, 1 Cal. L. Rev. Cir. 71, 77 (2010); *see also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (permitting a restriction on loud protests near a medical clinic); Grayned v. City of Rockford, 408 U.S. 104 (1972) (permitting a restriction on disruptive protests near schools).

231. Alexander Brown, *Averting Your Eyes in the Information Age: Online Hate Speech and the Captive Audience Doctrine*, 12 Charleston L. Rev. 1, 2–3 (2017).

232. *Id.* at 32.

233. Cohen v. California, 403 U.S. 15, 21 (1971) (holding that someone wearing a shirt that read "F-—the Draft" in a courthouse was not subject to the captive-audience doctrine because people could "effectively avoid further bombardment of their sensibilities by averting their eyes"); *see also* Spence v. Washington, 418 U.S. 405, 412 (1974) (holding that a flag hanging from the second floor of a building did not fall under the captive-audience doctrine because pedestrians could simply look away from the display).

234. Brown, *supra* note 231, at 33, 46.

235. *See, e.g.*, Robert Booth, *Meta's Content Moderation Changes 'Hugely Concerning', Says Molly Rose Foundation*, Guardian (Jan. 27, 2025, 7:01 PM EST), https://www.theguardian.com/technology/2025/jan/28/metas-content-moderation-changes-hugely-concerning-says-molly-rose-foundation [https://perma.cc/WAK4-RBGA].

may themselves possess First Amendment constitutional interests. Second, courts should pay attention to power imbalances as they consider whether the First Amendment provides the speech of IIED defendants any coverage in the first place, looking specifically to the carveout doctrines I described above.

My position supports the view of scholars like Sacks, who argues for a broader balancing test in speech-tort cases.[236] Sacks' proposed standard contains three considerations: (1) the plaintiff's level of vulnerability, (2) the nature of the speech as public or private, and (3) the nature of the injury, including whether there was also harm to one's person or property.[237] I would add countervailing First Amendment interests as its own consideration. Furthermore, I argue that before even arriving at the balancing test, courts should more carefully consider whether the potentially sharp inequality between the plaintiff and defendant means that the First Amendment does not cover the emotionally injurious speech to begin with.

To be sure, this approach would constitute a substantial reshaping of the Court's current view of the IIED-First Amendment clash. The Court would first need to account for potential carveouts to First Amendment protection, such as the true-threats, incitement, and captive-audience doctrines, in light of the power imbalances at play. This is where the LGBTQ status of the plaintiff, something that the Court in *Snyder* ignored, becomes crucial. Hate speech is more likely to be a "true threat" if it is directed at the person it is about—and if that person is part of a group that has historically faced violence in the wake of hearing that language. Moreover, if such language is leveled at a queer person, we might worry that the speech is highly susceptible to incite violence by others and thus further disentitled to First Amendment protection. Finally, that hate speech is leveled at a queer person might indicate a greater likelihood that the victim is captive due to fear of escalated attack if they attempt to escape.

If none of the above doctrines apply, the court would then proceed to balance the constitutional interests at stake. Under the first prong, it would again be attentive to the identity and position of the victims, and whether that in turn makes them especially vulnerable to the allegedly tortious speech. Crucially, beyond considering the nature of the speech as public or private, as well as whether the injury also caused harm to one's person or property, the court would take into account the First Amendment interests of the plaintiff in addition to the defendant. The court would need to ask itself: when student council president Armstrong is cyberbullied and verbally harassed because of his sexuality, what happens to his voice and the voice of his community in the face of that vitriol? Will the next student president fear speaking about their sexuality? Will future LGBTQ students refuse to run in the first place? Even in a case like *Armstrong*, in which the plaintiff prevailed and the court accounted for the homophobic nature of the defendant's speech, the court still never considered these questions.[238] The judges in that case failed to acknowledge that

236. Sacks, *supra* note 165.
237. *Id.*
238. *See* Armstrong v. Shirvell, 596 Fed. App'x 433 (6th Cir. 2015).

hateful words—when targeted at a particular, vulnerable community—jeopardize expressive interests, thus ignoring the subordinating force that those words can play in the national marketplace of ideas.[239]

The benefit of this balancing test is that, by accounting for countervailing First Amendment interests in a speech-tort case, courts would not be penalizing speech based on its hateful content. They would instead be weighing the many First Amendment interests at stake in a given case to ensure that they arrive at the most just and speech-maximizing result even as, to borrow Sacks' metaphor, someone's First Amendment ox inevitably gets gored.

Conclusion

This Note challenges the notion that IIED is a purely majoritarian tort. Through tracking the doctrinal development and history of IIED in the context of LGBTQ rights and the fight for LGBTQ dignity, I have aimed to paint a more nuanced picture. IIED has been as much about upending power imbalances as about promoting communitarian civility rules. To view the tort solely as a way to "police" hurtful language and behavior in favor of prevailing societal norms would be to ignore not only the ways diverse, vulnerable plaintiffs have deployed the tort to protect their own dignity, but also how courts have doctrinally accounted for those plaintiffs' unique susceptibility to emotional and dignitary harm.

The latter portion of the Note engages with the most recent challenge to LGBTQ IIED: an oversimplified reading of the First Amendment that eschews the at-times conflicting values inherent in the Amendment and that, in turn, oversimplifies IIED, too. Drawing from the fact that IIED is not just a tort for the majority, I argue that IIED and the First Amendment may not be as conflicting as courts have made them out to be. In my view, the First Amendment and IIED can at times be friends rather than foes, with IIED protecting groups that would otherwise be silent from degradation and thus encouraging those groups to engage in greater First Amendment expression. In recognizing the ways that the First Amendment and IIED can work together, courts can engage in a more judicious balancing of the constitutional interests that arise on both sides of an IIED suit. Finally, I show how the unique vulnerability of IIED plaintiffs—their increased likelihood of facing true threats and incitement, as well as becoming a captive audience—means that courts should more carefully evaluate in each case whether the First Amendment covers IIED defendants at all.

Perhaps unsurprisingly, IIED has taken a very different path than what Prosser initially envisioned in 1939.[240] The inherent indeterminacy of IIED doctrine, particularly the vague notion of "outrage," has made the tort the site of successive efforts to expand and contract it within academia and the

239. *See id.*

240. *See* Cristina Carmody Tilley, *The Tort of Outrage and Some Objectivity About Subjectivity*, 12 J. Tort L. 283, 304–06 & n.117 (2019).

courts.[241] This Note is just one more voice in that long history of contestation. What comes next depends in large part on the creativity of LGBTQ IIED plaintiffs and their lawyers. At times of immense queer struggle in the past, including the depths of the AIDS crisis, IIED served as a way to vindicate queer dignity. Now as the queer community faces new existential threats from the highest levels of government[242] and technologies that make the spreading of hate far easier than ever before, IIED—and the First Amendment values that it supports—can continue to shape how LGBTQ people fight for their liberty.

241. *Id.*

242. *See e.g.*, Ayana Archie & Jaclyn Diaz, *Trump Signs an Order Restricting Gender-Affirming Care for People Under 19*, Nat'l Pub. Radio (Jan. 29, 2025, 5:00 AM EST), https://www.npr.org/2025/01/29/nx-s1–5279092/trump-executive-order-gender-affirming-care [https://perma.cc/5PMV-8SHS].