

The Limits of Medical X-pertise: Gender Markers in a Pandemic

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The world changed drastically in 2020. The pandemic has far reaching consequences, and so too do the current civil rights movements and the struggle for gender justice and liberation.

This Article seeks to describe a moment in time, a moment of doubt of how one’s gender and race will predict one’s ability to survive the pandemic—not simply COVID-19, but the pandemic writ-large and all the wrenches it has thrown into the health-care machine. How do those of us standing at the edge of a gender revolution navigate these waters? Will our health be the price we pay for our self-determination? Or will we be forced to lose our self-determination to preserve our health?

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INTRODUCTION

“If it’s not on your real identification, it’s not real.”¹

Despite a growing minority of states offering a gender-neutral marker on some form of state identification,² fewer than 10,000 people have taken advantage of the laws to update their own documents.³

Now, a pandemic has gripped the world and torn through the United States, exhausting meager financial safety nets—both personal and governmental—and forcing each of us to make unprecedented calculations about the relative risks of routine and acute medical care. This paper documents this time of uncertainty. While state systems are allowing nonbinary people to have access to documents that might for the first time better reflect their gender identity, they are forced to truly confront the weaknesses of those systems.

In four parts, this paper will discuss the legal landscape of nonbinary gender markers through the lived experiences of those who *would* access them, if not for current circumstances. Part I is an overview of the availability and administration of nonbinary gender markers at the state and local level, followed by an examination of how medical records software can either simplify or make the process of asserting a nonbinary identity harder. Part II highlights the various risks and rewards of accessing a nonbinary gender marker. Part III uses personal interviews to examine, in detail, how accessing (or not accessing) a nonbinary gender marker can affect one’s desire to access medical care—and ultimately, the care itself. Finally, Part IV explores the future of nonbinary gender markers and nonbinary gender writ large.

It is the authors’ hope that this paper can serve as a record of a

¹ Telephone Interview with Remy Green (May 18, 2020).
² *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws [<https://perma.cc/CKP3-X2LG>] (showing that as of publication, twenty-two states offered residents the ability to change their gender marker to X on their driver’s license, birth certificate, or both).
³ Kristin Lam, *More than 7,000 Americans have gender X IDs, a victory for transgender rights. Is it a safety risk, too?*, USA TODAY (Aug. 8, 2019), <https://www.usatoday.com/story/news/nation/2019/08/08/nonbinary-gender-ids-momentum-intersex-state-driver-licenses/1802059001/> [<https://perma.cc/5A82-VF7E>] (“At least 7,251 gender X IDs and driver’s licenses have been issued in nine states plus Washington D.C., according to records obtained by USA Today from state departments.”).

place in time—a liminal space marked by explorations of health and explorations of gender. While these explorations are hampered both by massive structural failures of governmental entities and by widespread political malice, it is our hope that a broad slate of advocacy led by nonbinary people will usher in a healthier, more complex future.

The authors acknowledge the role that whiteness plays in their own lives as nonbinary people, along with the role that they play in perpetuating white supremacy—the same system that eradicated indigenous nonbinary genders in the cultures and civilizations that were trampled to create Western empires.

Treva Ellison writes about white coverage of Black queer bodies in the 1950s—coverage that is easily located in the mainstream publications of the twenty-first century.⁴ Ellison traces the pathologizing of Black bodies and Black queerness across time, highlighting how Black queerness was used to criminalize Blackness and queerness. Ellison discusses how “[t]he appearance of Black gender and sexual deviance in Black print culture venues should draw our attention to how the active collaboration between police officers, judges, and doctors scripted gendered and sexual norms through criminalization and punishment.”⁵

I. THE LANDSCAPE OF X-MARKERS

“How do I advocate for myself and my gender while under the grip of the virus? I feel confident to advocate for myself regularly, but none of us are at our best right now, either advocating for ourselves or hearing those advocating for themselves. ‘Oh please, can you refer to me as they / them as you’re in your thirty-second hour of tour shift.’”⁶

Nonbinary identities have always been present in human civilization,⁷ though white settler colonialism has both erased non-white nonbinary identities through settler colonialism⁸ and re-discovered them through the process of white academic validation.⁹ As Vincent and

⁴ Treva Ellison, *Black Femme Praxis and the Promise of Black Gender*, 49 J. BLACK STUD. & RES. 6 (2019).

⁵ *Id.* at 11.

⁶ Telephone Interview with Ev Evnen (May 19, 2020).

⁷ See generally, JOANNE BARKER, CRITICALLY SOVEREIGN: INDIGENOUS GENDER, SEXUALITY, AND FEMINIST STUDIES (2017); QUEER INDIGENOUS STUDIES: CRITICAL INTERVENTIONS IN THEORY, POLITICS, AND LITERATURE (Qwo Li Driskill et al. eds., 2011).

⁸ See Soutik Biswas, *How Britain tried to ‘erase’ India’s third gender*, BBC NEWS (May 31, 2019), <https://www.bbc.com/news/world-asia-india-48442934> [<https://perma.cc/T6HH-MN4D>] (“The short-term aim of the law included cultural elimination of the eunuchs through erasure of their public presence. The explicit, long-term ambition was limiting, and thus finally extinguishing, the number of eunuchs.”); Chidera Iherjirka, *Fuck your gender norms: how Western colonisation brought unwanted binaries to Igbo culture*, GAL-DEM (Feb. 19, 2020), <https://gal-dem.com/colonialism-nigeria-gender-norms-lgbtq-igbo/> [<https://perma.cc/PRA5-BXB3>].

⁹ Ben Vincent & Ana Manzano, *History and Cultural Diversity*, in GENDERQUEER AND NON-

Manzano point out, Western re-discovery of nonbinary identities has served to validate the activism of nonbinary people for validation, recognition, and protection.¹⁰ And that activism has experienced a surge in the twenty-first century, although Western writers and activists like June Jordan,¹¹ Audre Lorde,¹² Bell Hooks,¹³ Leslie Feinberg,¹⁴ and Kate Bornstein¹⁵ have long talked about the essential nature of life and experience outside of the gender binary. In their chapter in *Genderqueer and Non-Binary Genders*, S. Bear Bergman details the last twenty-five years of U.S. nonbinary activism, beginning with their advocacy around nonbinary pronouns (e.g. ‘they’ and ‘ze’).¹⁶ Charlie McNabb points out in their book that conceptualizing the history of nonbinary identity and advocacy itself is problematic, requiring one to ascribe modern terms onto ancient identities.¹⁷

In 2015, veteran Dana Zzyym sued the U.S. State Department for not offering Zzyym the option of a passport with a nonbinary gender designation.¹⁸ Zzyym has since accessed a nonbinary state ID in Colorado.¹⁹ Their case against the State Department has been ongoing since 2015, and, as of writing, the U.S. Court of Appeals for the Tenth Circuit vacated the lower court’s order prohibiting the State Department from relying on a binary-only gender marker policy and remanded for further proceedings.²⁰

There is currently no uniform administration of nonbinary gender markers at the federal level in the United States. In 2016, Oregon was the first state to issue identification with nonbinary sex designation.²¹ Today, a minority of states provide the opportunity for residents to choose an option other than M or F on their driver’s license, birth certificate, or both.²²

In February 2020, Representative Ro Khanna (D-CA) introduced the Gender Inclusive Passport Act, which requires the State Department

BINARY GENDERS 11, 12-13 (Christina Richards et al. eds., 2017).

¹⁰ *Id.*

¹¹ JUNE JORDAN, *CIVIL WARS* (1981).

¹² AUDRE LORDE, *ZAMI: A NEW SPELLING OF MY NAME* (1982).

¹³ BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* (1984).

¹⁴ LESLIE FEINBERG, *STONE BUTCH BLUES* (1993).

¹⁵ KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* (1994).

¹⁶ *Id.* at 31-51. S. Bear Bergman & Meg-John Barker, *Non-binary Activism*, in *GENDERQUEER AND NON-BINARY GENDERS*, *supra* note 9, at 31.

¹⁷ CHARLIE MCNABB, *NONBINARY GENDER IDENTITIES: HISTORY, CULTURE, RESOURCES* 13 (2017).

¹⁸ *Zzyym v. Pompeo*, 958 F.3d 1014, 1019 (10th Cir. 2019).

¹⁹ *Lambda Legal Continues Fight for Dana Zzyym’s Non-Binary Passport!*, INTERSEX CAMPAIGN FOR EQUALITY (May 9, 2019), <https://www.intersexequality.com/lambda-legal-continues-fight-for-dana-zzyyms-non-binary-passport/> [<https://perma.cc/V8SP-FU5A>]. See *infra* Part II for more information on the Zzyym case.

²⁰ *Zzyym*, 958 F.3d at 1034-35.

²¹ See e.g., David Cary Hart, *Jamie Shupe creates his own problems*, *THE SLOWLY BOILED FROG* (Mar. 11, 2019), <https://slowlyboiledfrog.com/index.php/2019/03/11/jamie-shupe-creates-his-own-problems/> [<https://perma.cc/EHT2-5TX6>].

²² See *infra* Parts I.A. and I.B. and accompanying notes.

to offer a gender-neutral designation on passports, passport cards, and Consular Reports of Birth Abroad.²³

A. State law

Upon writing, nineteen states and the District of Columbia allow residents to select M, F, or X as their gender marker on their driver's license.²⁴ Twelve states and the District of Columbia allow residents to do the same on their birth certificates.²⁵

B. Local law

New York City (which operates independently from New York State in issuing driver's licenses, city identification, and birth certificates) offers residents the option to choose M, F, or X on their city ID²⁶ and to amend their city birth certificates to show X.²⁷

C. Medical records

The face of a patient's medical needs and history, electronic medical records and electronic health records provide crucial information for health providers before, during, and after a patient's in-person visit. Yet electronic medical records and electronic health records have been slow to provide a systematic way to indicate a patient's transgender status, much less a nonbinary gender identity. Transgender health organization World Professional Association for Transgender Health has issued recommendations on best practices for recording transgender patients' gender identity and sex recorded at birth.²⁸ But like the patchwork of

²³ Gender Inclusive Passport Act of 2020, H.R. 5962, 116th Cong. (2020).

²⁴ Those states are Arkansas, California, Colorado, Connecticut, Hawai'i, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, and Washington State. *See Identity Document Laws and Policies*, *supra* note 2.

²⁵ Those states are California, Colorado, Connecticut, Illinois, Maine, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Utah, and Washington State. *Id.*

²⁶ IDNYC Application, THE CITY OF N.Y., <https://www1.nyc.gov/assets/idnyc/downloads/2016-pdfs/englishapp16.pdf> [<https://perma.cc/88CZ-W4LN>].

²⁷ *Notice of Adoption of Amendment to Article 207 of the New York City Health Code*, N.Y.C. DEP'T OF HEALTH AND MENTAL HYGIENE: BD. OF HEALTH (2018), <https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2018/noa-amend-article207-section207-05.pdf> [<https://perma.cc/QRJ4-ZBEC>].

²⁸ Madeline B. Deutsch et al., *Electronic medical records and the transgender patient: recommendations from the World Professional Association for Transgender Health EMR Working*

statutes, executive orders, and administrative opinions across the country, accurate medical recordkeeping of nonbinary gender identities is not standardized at any level, leaving patients' affirmation to the vagaries of their individual provider or provider network.

As Burgess et al. point out, incorrect medical records may be harmful to patients, triggering requests for tests that are not applicable, or indicating incorrect dosages.²⁹ Obviously, the medical needs of the group of individuals who, due to nonbinary, or intersex identity, or for any other reason, would be most accurately described by an X gender marker are not unified. However, neither can the needs of individuals who are most accurately described by an M or F gender marker; this speaks more to the limits of the efficacy of generalizing care by gender at all than to the value of the formal implementation of a nonbinary paradigm.

II. GETTING THE X: RISKS AND REWARDS

There are several areas of gender marker advocacy where the experiences and needs of binary-identified and nonbinary-identified people (including binary-identified and nonbinary-identified transgender people) differ. Access to accurate identity documents, for binary-identified transgender men and women, is both access to state validation of their gender and a safety measure. Congruence between the gender markers listed on one's various documents, one's legal name, and one's appearance smooths interactions with gatekeepers, medical providers, the state, and other institutions that tend to categorize humans by gender.

For nonbinary trans people, the relationship between affirmation and safety in cis-normative institutions is different. Rather than the smoothing of institutional contact that comes with congruent gender markers, an affirming identity document showing a nonbinary marker, such as X, has the potential to disrupt those interactions. While presenting an ID with a gender marker congruent with a binary gender identity and presentation (i.e. 'F' or 'M') functions to allow the holder to decide themselves whether and when to share their trans status; presenting an ID with an X gender marker may do the opposite, outing the holder automatically in every situation, without an alternative or choice in the matter. In a time when the risk of sudden hospitalization is

Group, 20(4) J. AM. MED. INFORM. ASSOC. 700 (2013); see also Madeline B. Deutsch & David Buchholz, *Electronic Health Records and Transgender Patients—Practical Recommendations for the Collection of Gender Identity Data*, 30(6) J. GEN. INTERN. MED., 843 (2015)

²⁹ Claire Burgess et al., *Evolving Sex and Gender in Electronic Health Records*, 36(6) FED. PRACTITIONER 271 at 2 (2019) ("Health screenings and laboratory results in sophisticated EHRs ([i.e.]ie, EHRs that might autodetermine normative values) may populate incorrect treatment recommendations, such as sex-based medication dosages. Furthermore, laboratory test results could be incorrectly paired with a different assumed hormonal history, potentially putting the patient at risk.").

at the forefront of everyone's thoughts, and in a political climate where individuals and corporations are increasingly seeking the right to deny service and care on religious pretext, it is imperative to consider the interplay between identity documents and medical care.

Dana Zzyym is one of the people at the forefront of this question. Their Colorado state ID is accurate to their nonbinary gender, but the U.S. State Department has refused to issue them a passport as a result.³⁰ Zzyym's legal case against the State Department is ongoing, but to date no institution of the federal government has issued any document recognizing a nonbinary gender.³¹ This makes it impossible for a person with a nonbinary gender marker, such as X, on their state identification to have congruent state and federal identity documents.

Because Zzyym's case about X gender markers on federally issued identification is currently pending, the effect and meaning is not settled law. Until a final ruling comes down, the question "If my driver's license says X, can I get a passport?" (and, consequently, "Can I leave the country?") remains unanswered. Attorneys at Lambda Legal theorize that a person with an X on their driver's license or birth certificate may be able to get a passport if they list their sex assigned at birth on their application, although the passport application is a sworn statement and listing inaccurate information on it may constitute perjury.³² Mismatched gender markers on different forms of ID can cause heightened scrutiny by police and, at borders, etc., as well as concerns about fraud.³³

Similarly, no guidance exists with regard to immigration documents or social security, and advocates warn that when parents select "X" as the gender marker on a newborn's birth certificate, the child may be unable to receive a social security number.³⁴

According to the 2015 U.S. Trans Survey, 25% of respondents had been verbally harassed showing an ID that was found to be "incongruent" with their perceived gender, while 16% had been denied services or benefits.³⁵ It is likely that this risk can be extrapolated to the experience

³⁰ *Lambda Legal Continues Fight for Dana Zzyym's Non-Binary Passport!*, *supra* note 19.

³¹ Valeriya Safronova, Passports May Soon Include a New Option for Gender Identity, *NY TIMES* (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/style/gender-neutral-x-passport-ids.html> [<https://perma.cc/94LQ-4J6U>].

³² Tim Fitzsimons, *Court orders State Department to reconsider intersex passport application*, *NBC NEWS* (May 13, 2020), <https://www.nbcnews.com/feature/nbc-out/court-orders-state-department-reconsider-intersex-passport-application-n1206441> [<https://perma.cc/8KAK-4TV9>] ("[T]he court is essentially resetting the case by giving the State Department yet another chance to process the passport application without essentially forcing Zzyym to commit perjury with a factually inaccurate declaration.").

³³ OPEN SOCIETY FOUNDATIONS, *LICENSE TO BE YOURSELF: RESPONDING TO NATIONAL SECURITY AND IDENTIFY FRAUD ARGUMENTS 3* (2016); MOVEMENT ADVANCEMENT PROJECT, *LGBT POLICY SPOTLIGHT: IDENTITY DOCUMENTS LAWS AND POLICIES 5* (2015); LOURDES ASHLEY HUNTER ET AL., *INTERSECTING INJUSTICE: A NATIONAL CALL TO ACTION 42* (2018).

³⁴ Laura Newberry, *These L.A. parents don't want to assign a gender to their baby, so the government did it for them*, *LOS ANGELES TIMES* (Sept. 25, 2019) <https://www.latimes.com/california/story/2019-09-24/gender-neutral-non-binary-baby> [<https://perma.cc/Q383-C9ML>].

³⁵ SANDY JAMES ET AL., *NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015*

of a person with an X gender marker as well.

In the long term, policies may be put forward or at least conventions will coalesce, but at this point, X gender markers are an experiment whose site is the bodies and experiences of the individuals opting into it.

Identity document gender markers are part of gender expression, which renders individuals either more or less legible to the institutions and systems that govern them. Illegibility tends to magnify existing risk. Trans people, who are already at risk of state-sanctioned violence, like arrests for walking while trans, are at a higher risk of being assaulted or improperly housed while in custody, denied services, and held up at borders.³⁶ Where confinement facilities, like jails, prisons, detention centers, and inpatient psychiatric centers, are segregated according to gender, those who cannot be easily sorted are often placed in solitary confinement or other harsh conditions.³⁷

According to the National Center for Transgender Equality, “legally speaking, it is not a problem to have records and IDs with different gender markers.”³⁸ However, as anyone who engages in on-the-ground advocacy knows well, “legally speaking, not a problem” does not mean much for the lived experiences of marginalized people when subjected to the authority of individuals with power and privilege. Currently, transgender and gender non-conforming people are experiencing an increased wave of the discrimination, violence, and legislative erasure that make up the growing pains of our society’s engagement with gender.³⁹ Rendering one’s identity document is a form of activism that amounts to voluntarily experiencing these growing pains, where one may otherwise be protected. This is a courageous and impactful choice, and one that cannot be made lightly.

Since Section 1557 of the Affordable Care Act was revised in June 2020, the Act’s nondiscrimination provision no longer extends to cover

U.S. TRANSGENDER SURVEY 89 (2016),
<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>
[\[https://perma.cc/L5EG-4UR3\]](https://perma.cc/L5EG-4UR3).

³⁶ See e.g., Kavish Harjai, *Monica Jones and the Problem of “Walking While Trans,”* INNOCENCE PROJECT (June 30, 2016), <https://innocenceproject.org/monica-jones-walking-while-trans/> [<https://perma.cc/JEF3-EDKP>]; Vaidya Gullapalli, *A Chance to Repeal A ‘Walking While Trans’ Bill*, THE APPEAL (Feb. 5, 2020), <https://theappeal.org/a-chance-to-repeal-a-walking-while-trans-ban/> [<https://perma.cc/9P4G-ASAZ>]; Karina Piser, *The Walking While Trans Ban Is ‘Stop and Frisk 2.0.’* THE NATION (Feb. 19, 2020), <https://www.thenation.com/article/activism/walking-while-trans-repeal/> [<https://perma.cc/B4XS-J4KK>]; TS Candii & Carlina Rivera, *Nix the ‘walking while trans’ law*, N.Y. DAILY NEWS (Jul. 29, 2020), <https://www.nydailynews.com/opinion/ny-oped-nix-the-walking-while-trans-law-20200729-hampm3yvarfjdegsgj5xzizae-story.html> [<https://perma.cc/XVU8-ULDP>].

³⁷ Jessica Szuminski, Note, *Behind the Binary Bars: A Critique of Prison Placement Policies for Transgender, Non-Binary, and Gender Non-Conforming Prisoners*, 105 MINN. L. REV. 477, 479–80 (2020).

³⁸ *FAQ on Gender-Neutral IDs*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/sites/default/files/docs/resources/FAQGenderNeutralIDsJune2017.docx> [<https://perma.cc/5KLW-HGTC>].

³⁹ See Erin Donaghue, “*Horrific Spike*” in fatal violence against transgender community, CBS NEWS (July 14, 2020.), <https://www.cbsnews.com/news/transgender-community-fatal-violence-spike/> [<https://perma.cc/UFW7-VK8C>].

gender discrimination other than under “the plain meaning of the word ‘sex’ as male or female and as determined by biology.”⁴⁰ As a result, there is no federal protection against discrimination in healthcare on the basis of an X gender marker on a patient’s identity. A hospital could display a sign on its’ entrance that states “We Do Not Treat X Gender Markers Here” without running afoul of federal policy. This revision was enacted at a time when one-third of U.S. Trans Survey respondents indicated that they had seen a health care provider in the past year and had at least one negative experience related to being transgender, such as verbal harassment, refusal of treatment, or having to educate a provider to receive appropriate care.⁴¹

Further, the Religious Freedom Restoration Act (“RFRA”) and related lines of legal reasoning, which are being methodically implemented both in case law and state statutes, further guts what non-discrimination protections remain.⁴² In his opinion for the Court in the recent decision *Bostock v. Clayton County* decision, Justice Gorsuch refers to the original 1993 RFRA statute as “prohibit[ing] the federal government from substantially burdening a person’s exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws.”⁴³ Gorsuch seems to be signaling that he would welcome an RFRA challenge to those protections—the same type of challenge that has already been successfully used in other areas of politicized healthcare. Under an expanded “conscience rule” announced by the Trump administration, hospitals can evade even local nondiscrimination protections by claiming that being forced to treat transgender patients is an unconstitutional infringement on their religious freedom.⁴⁴

As of 2020, the federal administration was actively working to

⁴⁰ U.S. DEP’T OF HEALTH & HUMAN SERV., *HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs* (June 12, 2020) <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html> [<https://perma.cc/FW4C-SF9T>], (referring to 85 F.R. 37160).

⁴¹ SANDY JAMES ET AL., *supra* note 35, at 93.

⁴² See Frederick Clarkson, “Project Blitz” Seeks to Do for Christian Nationalism What ALEC Does for Big Business, RELIGION DISPATCHES (Apr. 27, 2018), <https://religiondispatches.org/project-blitz-seeks-to-do-for-christian-nationalism-what-alec-does-for-big-business/> [<https://perma.cc/NN38-9LJA>] (“The bills are seemingly unrelated and range widely in content—from requiring public schools to display the national motto, ‘In God We Trust’ (IGWT); to legalizing discrimination against LGBTQ people; to religious exemptions regarding women’s reproductive health.”); Amy Littlefield, *A Christian Nationalist Group Is Quietly Shaping Bills for State Legislatures*, SLUDGE (Jan. 22, 2020), <https://readsludge.com/2020/01/22/a-christian-nationalist-group-is-quietly-shaping-bills-for-state-legislatures/> [<https://perma.cc/NTZ2-9HQ2>]

⁴³ *Bostock v. Clayton County*, 140 S.Ct. 1731, 1754 (2020) (internal citations omitted).

⁴⁴ See Margot Sanger-Katz, *Trump Administration Strengthens ‘Conscience Rule’ for Health Care Workers*, NEW YORK TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/upshot/conscience-rule-trump-religious-exemption-health-care.html> [<https://perma.cc/C8BU-EABD>].

enable hospitals to refuse to treat transgender patients.⁴⁵ Evan Minton testified before Congress that his surgery was cancelled by his Catholic hospital (Mercy Medical Center in San Juan, California) because it related to his gender transition.⁴⁶ The federal administration continues to fight in open court cases about its “Refusal of Care Rule,”⁴⁷ a policy that permits any healthcare worker to put their personal beliefs ahead of the needs and safety of a patient, even in emergencies.⁴⁸

In a political landscape where many anti-discrimination interests are superseded by pretextual “religious freedom arguments” and healthcare providers, in particular, are explicitly federally permitted to discriminate on the basis of transgender identity, a driver’s license that inescapably signals non-conforming gender identity carries significant risks.

This is not an argument against the existence of nonbinary gender markers on identity documents. Rather, anyone considering changing their gender marker to X should go into the process with the understanding that many unanswered questions remain about its implementation, and that many of the answers that do exist are chilling.

For the holder, identity documents serve two primary functions, and an analysis of the impact of affirming identity documents both personally and relationally must disentangle those functions. First, they are a part of a person’s personal expression in the world, as with every other feature of their gender.⁴⁹ An ID that does not accurately reflect who they are may feel like being misgendered, like being called an old name, like having to wear the wrong-gendered clothing.⁵⁰ For nonbinary people, the possibility of having an affirming identity document—one that does not feel inherently misgendering—would have been unimaginable just a few years ago. When validation of one’s existence is so scarce, it makes sense to want to take advantage of every opportunity.

The second function of identity documents is that they facilitate

⁴⁵ Selena Simmons-Duffin, *Transgender Health Protections Reversed By Trump Administration*, NPR (June 12, 2020), <https://www.npr.org/sections/health-shots/2020/06/12/868073068/transgender-health-protections-reversed-by-trump-administration> [https://perma.cc/2T2X-F22P].

⁴⁶ *The Administration’s Religious Liberty Assault on LGBTQ Rights: Hearing Before the H. Comm. on Oversight & Reform*, 116 Cong. (2020) (statement of Evan Minton).

⁴⁷ *State of New York v. U.S. Dept. of Health and Human Services*, CONSTITUTIONAL ACCOUNTABILITY CENTER, <https://www.theusconstitution.org/litigation/state-of-new-york-v-department-of-health-and-human-services/> [https://perma.cc/TY9M-MMJZ].

⁴⁸ Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 45 C.F.R. § 88.1 (2020).

⁴⁹ See Andrew Cray & Jack Harrison, *ID Accurately Reflecting One’s Gender Identity Is a Human Right*, CENTER FOR AMERICAN PROGRESS (Dec. 18, 2012), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2012/12/18/48367/id-accurately-reflecting-ones-gender-identity-is-a-human-right/> [https://perma.cc/CA2S-DMTS] (“One way in which transgender people have struggled is in accessing identity documents that provide legal recognition of their gender identities. The failure of governments to acknowledge the gender identities of all people represents a rejection of the fundamental rights of self-determination, dignity, and freedom.”)

⁵⁰ *Id.*; see also SANDY JAMES ET AL., *supra* note 35, at 90 (“[R]esults suggest that respondents who presented IDs that did not correspond with the gender they presented in were put at risk of harassment, assault, and other forms of negative treatment.”).

interactions with institutions, authority figures, and the state. Identity documents are part of passing through borders, entering bars, receiving mail, visiting loved ones in hospitals, checking books out of libraries, getting speeding tickets, and countless other parts of public life. These are often moments when one is subject to authority; the identity document is being used to seek entry or permission to something that could be denied.⁵¹ In this function, identity documents serve either to smooth the interaction, or as an obstacle to it.

While a slowly increasing population of politicians and other individuals in positions of power are beginning to address the issue of gender markers in their policy proposals, this should not be mistaken for a shift in the larger political landscape, nor for a lessening of the risks that are inherent in politicized medical care.⁵²

III. ACCESSING MEDICAL CARE AS A NONBINARY PERSON

Heron Greensmith interviewed eleven nonbinary people in May of 2020 about their experiences accessing health care during (and before) the COVID-19 pandemic. A majority of the interviewees, seven, have been interested in and able to change their gender marker on at least one form of identification to X, while the remaining five had not changed their gender marker to X on any documents for various reasons. These interviews and the associated quotes are not intended to represent all nonbinary people. They are intended to record a moment in time.

As white people, the authors acknowledge that nonbinary identities existed in many Black and indigenous cultures before settler colonialism imposed binary gender as a form of fertility control and genocide.⁵³ The majority of the interviewees were white (eight out of eleven, or 73%), a product of the authors' own whiteness and white supremacy and of the method by which Greensmith recruited interviewees: their own social network.

Interviewees described a wide and deep variety of personal

⁵¹ See, e.g., *Identification*, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/travel/security-screening/identification> [<https://perma.cc/6LZK-5KAB>]; *P.O. Box Help*, UNITED STATES POSTAL SERVICE, <https://www.usps.com/manage/po-box-help-popup.htm> [<https://perma.cc/D4W9-NCDQ>]; *Visitor Badges*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/johns-hopkins-childrens-center/patients-and-families/your-visit/visitor-badges.html> [<https://perma.cc/F64Q-RGD2>]

⁵² Kate Sosin, *Biden administration suggests it will add "X" gender markers to federal documents*, THE 19TH, <https://19thnews.org/2021/02/biden-administration-suggests-it-will-add-x-gender-markers-to-federal-documents/> [<https://perma.cc/A596-4HNV>]; Molly Sprayregen, *New York Governor Signs Law Making It Easier to Correct Gender Markers*, THEM, <https://www.them.us/story/new-york-state-passes-gender-marker-correction-bill> [<https://perma.cc/PQ8M-GXDD>]; Amanda Becker, *Democratic lawmakers urge Biden to act on gender-neutral federal IDs*, THE 19TH, <https://19thnews.org/2021/05/democratic-lawmakers-urge-biden-to-act-on-nonbinary-federal-ids/> [<https://perma.cc/V3DG-25AV>].

⁵³ *Supra* Part I.

experiences. A snapshot: five interviewees reported having a disability, three interviewees were parents, the average age of interviewees was 32 (the youngest being 21 and the oldest 51), and interviewees hailed from nearly every area of the country (including Massachusetts, New York, Virginia, Michigan, Minnesota, Colorado, Oregon, and Washington state).

A. Congruence and incongruence

Remy Green, a white, Jewish, 32-year-old trans, nonbinary attorney with chronic pain in New York, pointed out that all of their identification is already incongruent; it cannot be congruent, because it is the identification of someone who is not the sex they were assigned at birth.⁵⁴

Charlie Arrowood is a nonbinary parent and attorney who provides transition-related legal services such as name/gender marker changes and insurance assistance to transgender clients in New York State.⁵⁵ Arrowood shared that due to administrative necessities, their documents are nearly all incongruent in gender and name: birth certificate, driver's license, passport, home deed and title all indicate variously truthful versions of Arrowood's identity.⁵⁶ They were clear that their privilege as a white person, a lawyer, and someone who presents in a way that U.S. society sees as sufficiently male to avoid scrutiny insulates them from the scrutiny and harm others in a similar position would face.⁵⁷ Arrowood also pointed out that incongruence *requires* someone to out themselves: "It's compelled speech. It opens people up to unnecessary discrimination."⁵⁸

Arli Christian is a queer, white policy advocate at the American Civil Liberties Union; they do not have strong feelings about what pronouns you use to refer to them but have strong feelings about everyone's right to determine what gender marker is safest and most appropriate on our identification.⁵⁹ Christian likes their X marker because it allows them to move away from the state knowing one's gender: "X is not simply a *third gender*," Christian told Greenesmith.⁶⁰ "It's a designation that gives you additional privacy. Gender is a spectrum. The state doesn't need to be up in our business."⁶¹

Ev Evnen is a 32-year-old white, Ashkenazi person with a mental

⁵⁴ Telephone Interview with Remy Green, *supra* note 1.

⁵⁵ Telephone Interview with Charlie Arrowood (May 19, 2020).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Telephone Interview with Arli Christian (May 19, 2020).

⁶⁰ *Id.*

⁶¹ *Id.*

illness living in Denver.⁶² Evnen shared that they feel safer with an M marker on their passport, despite the incongruence with their driver's license, because it feels safer to have at least one document that matches people's expectations of their gender: "No one is looking at a white dude with a beard's gender."⁶³

B. Accessing care *with* an X

Jullien Keter is a 29-year-old agender student of social sciences from Oregon.⁶⁴ They changed the gender marker on their Oregon license in 2017, as soon as it became available.⁶⁵ Since that time, they have accessed significant medical care, including gender-affirming care: "It feels like I don't get taken seriously. When I access gynecological care, the receptionist constantly gives me a look. It sucks because [going to the gynecologist] is already a difficult thing to do, so I have to just suck it up. It took me a really long time to get care for my endometriosis."⁶⁶

Stephanie Fantastic, a 32-year-old Mexican, genderfluid parent who deals with chronic fatigue, also changed her gender marker in Oregon.⁶⁷ "I felt gender euphoria," she told Greenesmith.⁶⁸ Fantastic hasn't faced problems accessing health care with her X marker but did run into administrative hurdles upon the birth of her first child: "Both me and my ex-partner have X's and we demanded a parent-parent birth certificate, but the nurses pushed back and said they should use the mother-father one. It was like they were saying, 'I know you better than you know you.' Why would I ask for something if I didn't want it?"⁶⁹

Ryley Copans is a 26-year-old white, nonbinary, queer, intersectional activist and advocate who has mental health diagnoses and chronic pain.⁷⁰ Before moving away from Massachusetts in mid-2020, Copans was instrumental in pushing for X markers in the Bay State.⁷¹ In their interview with Greenesmith, Copans stressed the need for cultural competence training. "I recently tried to access chiropractic care and I don't think they ever looked at my ID. I got misgendered a lot there. When things are chaotic, like they are now, providers might not even be looking at IDs, and if they are, they might not know what an X means."⁷²

April Anderson is a 51-year-old white, agender, nonbinary parent

⁶² Telephone Interview with Ev Evnen, *supra* note 6.

⁶³ *Id.*

⁶⁴ Telephone Interview with Jullien Keter (May 19, 2020).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Telephone Interview with Stephanie Fantastic (May 28, 2020).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Telephone Interview with Ryley Copans (May 26, 2020).

⁷¹ *Id.*

⁷² *Id.*

of two amazing human beings.⁷³ They have a master’s degree in library science and a PhD in community college administration and policy.⁷⁴ Anderson changed their gender marker to X on their Minnesota license as a 50th birthday present to their self.⁷⁵ But when they suffered a traumatic brain injury and were transferred to a concussion clinic for rehabilitation, one nurse uncomfortable with Anderson’s X marker made Anderson’s recuperation incredibly difficult.⁷⁶ “Paperwork sent to wrong place, I was almost fired because the paperwork from the clinic incorrectly stated that the “medical opinion [was] that [I was] unable to work. I went a whole month without my weekly disability payments!”⁷⁷

C. Accessing care *without* an X

Green shared that they have put off getting their X marker because of COVID.⁷⁸ When asked if they have delayed or denied themselves care due to their gender identity, Green told Greenesmith no—that they are “resigned to being misgendered and misnamed.”⁷⁹

Lydia Gibson is a 21-year-old student from Redding, California.⁸⁰ The main hospital in Redding is Mercy Medical Center, part of the Dignity Health system, a conglomerate of over 39 hospitals, 24 of which, including Mercy Medical, are Catholic.⁸¹ At least two Dignity Health hospitals have been the subject of suits due to refused care. Mercy Medical San Juan is the hospital that denied Evan Minton medical care because he was transgender.⁸² In 2015, the American Civil Liberties Union sued Dignity Health after Mercy Medical Center prohibited a doctor from performing a tubal ligation on a mother newly given birth.⁸³ Small wonder, then, that Gibson has not changed their gender marker, despite having the ability to do so in California. “I’m very private. I’m nervous about sharing my pronouns and I like to have the option of going stealth⁸⁴ if I need to. If I got sent to the emergency room at [Mercy

⁷³ Telephone Interview with April Anderson (Apr. 12, 2020).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Telephone Interview with Remy Green, *supra* note 1.

⁷⁹ *Id.*

⁸⁰ Telephone Interview with Lydia Gibson (May 22, 2020).

⁸¹ *Our History: Rooted in Kindness*, DIGNITY HEALTH, <https://www.dignityhealth.org/about-us/our-organization/mission-vision-and-values> [<https://perma.cc/L6WU-RA88>].

⁸² *Minton v. Dignity Health*, 39 Cal. App. 5th 1155, 1163 (2020); *Hearings*, *supra* note 41 (statement of Evan Minton).

⁸³ Complaint, *Rebecca Chamorro & Physicians for Reproductive Health v. Dignity Health*, No. CGC-15-549626 (Cal. Super. Ct. 2015).

⁸⁴ “Going stealth” refers to the practice of not revealing one’s gender identity to a specific person or entity. Safety, as in Gibson’s case, is a primary reason for going stealth.

Medical] with an X marker, I would be turned away.”⁸⁵

Killian Bain is a 25-year-old agender, Afro-Latinx Virginian who is on disability benefits.⁸⁶ “Being on SSI [Social Security Insurance] and Medicaid—having your paperwork not match is a huge problem.”⁸⁷ Bain also raised the issue of personal capacity: “I’m fairly disabled and I’m used to compartmentalizing the amount of energy before I let something go. So, I am ready to dedicate a certain amount of energy to saying ‘here’s all my stuff, and I know it doesn’t all match, but I hope you understand that.’ If it doesn’t interfere with my SSI check and my SNAP benefits, there is a certain degree at which I’m not gonna care about it.”⁸⁸

D. Role of race

Alex Montgomery is a 30-year-old Black queer transmasculine PhD student in sociology at Purdue University.⁸⁹

[There is a] numbness to everything when you add racism to it. Within community you’re compromised in a lot of ways. When I interact with families, I understand that I am the model by which they form their understandings of my other communities. I feel pressure to be exceptional. To be the beacon for several communities that oftentimes erase the racism or ignore the nuances. Those of us who sit at nonbinary intersections, we complicate a *lot* for people who sit at a singular axis. It enlightens a privilege that they may not have known they had.⁹⁰

Green put it succinctly: “My multi-various place in society makes me more comfortable being annoying . . . it is important for people like us to be out there and visible and jamming up the gears so that it is not a novel thing when people who are less privileged also jam up the gears.”⁹¹

Anderson agreed: “Before the traumatic brain injury, I was always a tank and a fighter. I’m a white, female-bodied [sic]⁹² human being. That affords me some privilege to say fuck you and say ‘you need to listen to this.’ Because I’ve been put in the space of being an elder, I feel like it’s my responsibility to step up and say ‘we are here too.’ Because I have the privilege to step up, I feel like I would be dishonoring others

⁸⁵ Telephone Interview with Lydia Gibson, *supra* note 72.

⁸⁶ Telephone Interview with Killian Bain (May 28, 2020).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Telephone Interview with Alex Montgomery (May 28, 2020).

⁹⁰ *Id.*

⁹¹ Telephone Interview with Remy Green, *supra* note 1.

⁹² The authors do not agree that there are male bodies or female bodies. Some bodies are assigned the sex “female” at birth. The authors assume that this is the meaning that Anderson intends as well.

if I didn't."⁹³

IV. THE FUTURES OF LIMINALITY

In their continual pursuit against justice and equality for transgender, nonbinary, and gender non-conforming people, the media networks, organizations, and leaders of the anti-LGBT Right have taken to leveraging the weaknesses of neoliberal and pro-LGBT forces, particularly the difficulty in articulating how progressive platforms can support gender and sexual fluidity. When pro-LGBT movements lack clear, articulated support for a community, they allow opponents to dominate the discourse and, to some extent, dictate the future political gains of that community.

For example, Family Research Council's Peter Sprigg has argued that the presence of sexual fluidity debunks the "myth of immutability."⁹⁴ To Sprigg and the Family Research Council sexual fluidity justifies the continued use of conversion therapy and the opposition to laws that prohibit discrimination on the basis of sexual orientation and gender identity.⁹⁵ "The concept of "sexual orientation" is multi-faceted, involving a combination of attractions, behaviors, and personal identity."⁹⁶ Changes in any of these elements (sometimes called "sexual fluidity"), and a lack of "stability" or "exclusivity" in or among them, represents evidence that sexual orientation can change."⁹⁷

Of course, queer scholars like Lisa Diamond and Clifford Rosky, whose work Sprigg cites as proof that the immutability framework should be abandoned, are themselves asking pro-LGBT movements to move away from the rights-driven framework that necessitates immutability as a requirement and move towards a justice-driven analysis that acknowledges the validity and worth of all sexual orientations.⁹⁸ As Diamond and Rosky argue, courts have not consistently relied on the immutability of sexual orientation to consider sexual minorities a suspect class worthy of protection.⁹⁹ In fact, Diamond and Rosky propose that the immutability framework itself is unjust, "implying that these individuals are somehow less deserving of legal protection than sexual minorities who experience their sexuality as fixed, exclusive, and

⁹³ Telephone Interview with April Anderson, *supra* note 73.

⁹⁴ PETER SPRIGG, FAMILY RESEARCH COUNCIL, EVIDENCE SHOWS SEXUAL ORIENTATION CAN CHANGE: DEBUNKING THE MYTH OF "IMMUTABILITY" 17 (2019), <https://downloads.frc.org/EF/EF19C38.pdf> [<https://perma.cc/7R6L-HLMK>].

⁹⁵ *Id.* at 3.

⁹⁶ *Id.* at 1.

⁹⁷ *Id.*

⁹⁸ Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities*, 53 J. SEX RES. 363 (2016).

⁹⁹ *Id.* at 364, 376.

essential.”¹⁰⁰

Diamond and Rosky’s analysis can be applied easily to gender identity. In fact, in *Schroer v. Billington*, Judge James Robertson expressly holds that Title VII’s prohibition of employment discrimination on the basis of sex includes discrimination on the basis of a change of sex, likening it to the statute’s prohibition of employment discrimination on the basis of religion, including a change of religion.¹⁰¹

Title VII is now explicitly understood to prohibit discrimination on the basis of sexual orientation and gender identity,¹⁰² but even in explaining its landmark decision the Supreme Court relied on binary understandings of sex.¹⁰³ This leaves the law’s application to bisexual, nonbinary, and fluid identities up to the strength of future arguments in court.¹⁰⁴

So, what does the future hold for nonbinary identities?

CONCLUSION

*“The psychological impact is just exhaustion.”*¹⁰⁵

*“We must be working toward the overthrow of the world, thinking and living in excess of our present condition because the radical knows, and must believe, quite sincerely, that things are not wholly contingent upon the context in which they were sired.”*¹⁰⁶

And, indeed, what will the global and the U.S. societies learn from the pandemic? Will we prepare emergency plans and adhere to them?

¹⁰⁰ *Id.* at 380.

¹⁰¹ *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008) (“Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a change of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that “transsexuality” is unprotected by Title VII. In other words, courts have allowed their focus on the label “transsexual” to blind them to the statutory language itself.”)

¹⁰² *Bostock*, 140 S.Ct. at 1746.

¹⁰³ *Id.* at 1734 (“Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.”)

¹⁰⁴ Heron Greensmith, *Supreme Court LGBTQ Protections Cover Bisexual and Pansexual Workers, Too*, TEENVOGUE, June 18, 2020 (arguing that *Bostock* explicitly covers bisexual and other non-monosexual identities, but that that judicial rights-based interpretations do not always translate to justice for sexual minorities on the ground).

¹⁰⁵ Telephone Interview with Alex Montgomery, *supra* note 89.

¹⁰⁶ Marquis Bey, *Black Fugitivity Un/Gendered*, 49 J. OF BLACK STUDIES & RESEARCH, 55 (2019).

Will we train health care providers to respond to the needs of minority communities *before* a global health crisis takes up all of their time?

The alternative is exhaustion.