

# Notes

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## Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law

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## INTRODUCTION

In the summer of 2016, the LGBTQIA community and allies celebrated an historic moment: an Oregon state judge granted a petition for nonbinary gender status on legal documents.<sup>1</sup> The ruling was the first of its kind in the United States.<sup>2</sup> Soon after the Oregon ruling, a state judge in California followed suit, granting another petition for nonbinary status.<sup>3</sup> This legal development, though in its fledgling stage, has catalyzed national conversations about gender, the state's role in regulating gender identification, and the complicated system of identification documentation in the United States.

This Note begins in Part I by discussing concepts of contemporary gender theory necessary to contextualize the Oregon nonbinary ruling. Part II offers a brief history of legal determinations of sex and gender in the United States. Part III provides a thorough explanation of the Oregon and California rulings authenticating nonbinary gender status, as well as pending federal litigation on a similar issue. Part IV explores four major approaches to gender documentation in the United States. Part V suggests two concrete steps for the modernization of gender documentation policies and practices.

## I

## BORROWING FROM GENDER THEORY: WHAT IS “NONBINARY”?

This Part draws upon terminology and concepts from contemporary gender studies to give context to the term “nonbinary.” Sex and gender are distinct terms.<sup>4</sup> To begin, “sex” is a term usually used to talk about biological aspects of males and females, such as chromosomes or genitalia.<sup>5</sup> “Gender” can be broken down into two

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<sup>1</sup> Christopher Mele, *Oregon Court Allows a Person to Choose Neither Sex*, N.Y. TIMES (June 13, 2016), <http://www.nytimes.com/2016/06/14/us/oregon-nonbinary-transgender-sex-gender.html>.

<sup>2</sup> *Id.*

<sup>3</sup> Lauren Dake, *Jamie Shupe Becomes First Legally Non-binary Person in the US*, GUARDIAN (June 16, 2016, 9:02 AM), <https://www.theguardian.com/world/2016/jun/16/jamie-shupe-first-non-binary-person-oregon>.

<sup>4</sup> Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures*, 7 N.Y. CITY L. REV. 161, 162 (2004).

<sup>5</sup> Joy L. Johnson & Robin Repta, *Sex and Gender: Beyond the Binaries*, in DESIGNING AND CONDUCTING GENDER, SEX, & HEALTH RESEARCH 17, 19–20 (John Oliffe & Lorraine J. Greaves eds., 2012); Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 498, 503–04 (2000).

basic ideas, “gender roles” and “gender identities.” Gender roles are the societal expectations assigned to gender; they are the parts or personas that males and females are expected to play in social settings.<sup>6</sup> For example, the expectation that a woman will perform more housework and childcare is a social construct, in the sense that society reinforces and reiterates those gender-based expectations.<sup>7</sup> The expectation that men should not cry or show weakness is also a social construct. The indoctrination of these gendered expectations begins at a very young age.<sup>8</sup> A common example is buying either blue or pink baby clothes for an infant. From there, a young girl may be expected to play with dolls, while her male counterpart may be encouraged to play with toy cars. At this point, it is helpful to recognize that gender roles are created by external processes or outside forces. By comparison, “gender identity” refers to internal processes associated with gender.<sup>9</sup> The term can be understood quite literally as how a person identifies in terms of gender.

The relationship between “sex” and “gender” is more complicated than these definitions suggest. Gender theorists, like Judith Butler, argue that one’s sex is not necessarily determinative of one’s gender identity.<sup>10</sup> In other words, a person’s physical anatomy is not inherently linked to behavior or gender identity.<sup>11</sup> Rather, gender is the continuous process of internal policing of actions, behaviors, even gestures, in an attempt to meet gendered expectations assigned to a certain sex.<sup>12</sup> As a result, gender is not fixed; instead, it is fluid, constantly subject to evolving notions of gender, societal expectations, and one’s own subjective identity.<sup>13</sup> For example, the expectation that men should not cry is not “by nature.” Instead, that expectation is assigned to a societal conception of masculinity. In

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<sup>6</sup> Johnson & Repta, *supra* note 5, at 19–20.

<sup>7</sup> *Id.* at 20.

<sup>8</sup> See Robin Marantz Henig, *How Science is Helping Us Understand Gender*, NAT’L GEOGRAPHIC (Jan. 2017), <http://www.nationalgeographic.com/magazine/2017/01/how-science-helps-us-understand-gender-identity/>.

<sup>9</sup> *Id.*

<sup>10</sup> See generally JUDITH BUTLER, *BODIES THAT MATTER* 5 (1993).

<sup>11</sup> Gender is “a stylized repetition of acts . . . which are internally discontinuous . . . [so that] the appearance of substance is precisely that, a constructed identity, a performative accomplishment which the mundane social audience, including the actors themselves, come to believe and to perform in the mode of belief.” JUDITH BUTLER, *GENDER TROUBLE* 192 (2011 ed. 1990).

<sup>12</sup> See *id.*

<sup>13</sup> *Id.*

turn, men are often socialized to think that crying is emasculating and may police their own behaviors to conform to gendered expectations. Oftentimes, people conflate “sex” and “gender” so as to suggest that gender roles are “natural,” rather than socially, constructed.

The idea that gender roles are “natural” stems, at least in part, from gender binarism. Gender binarism refers to the classification of all persons in a society as either male or female.<sup>14</sup> The gender binary, as a system, divides members of society into two sets of gender roles and gender identities based on one’s reproductive organs.<sup>15</sup> In a binary system, transgression of gender norms or expectations is condemned.<sup>16</sup> To continue with an earlier example, a young boy who plays with dolls may be scolded based on common gendered expectations of maleness and boyhood.

“Sex,” even in the limited sense of chromosomes or genitalia, is much more complicated than most people realize. Leading gender theorists, such as Anne Fausto-Sterling, suggest that sex goes beyond male or female.<sup>17</sup> She explains that sex is a “vast” continuum that defies the constraints of the traditional male/female binary.<sup>18</sup> In fact, one in every one hundred people has atypical sex anatomy that differs from the “standard” male or female.<sup>19</sup> With that, approximately one to two infants in 1000 births receive corrective surgery to “normalize” genital appearance.<sup>20</sup> There are at least eighteen documented sex designations,<sup>21</sup> including, for example, Klinefelter syndrome.<sup>22</sup> Klinefelter syndrome relates to the X and Y chromosomes; the syndrome results from the presence of an extra copy of the X

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<sup>14</sup> Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213, 232 (2005).

<sup>15</sup> Rosenblum, *supra* note 5, at 505–06.

<sup>16</sup> See Johnson & Repta, *supra* note 5.

<sup>17</sup> Anne Fausto-Sterling, *Five Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar.–Apr. 1993, at 20–21.

<sup>18</sup> *Id.* at 21.

<sup>19</sup> *How Common is Intersex?*, THE INTERSEX SOCIETY OF NORTH AMERICA (ISNA), <http://www.isna.org/faq/frequency> (last visited July 23, 2017). Experts disagree over the frequency of intersex conditions identified in infants; this may be due to disagreement over what conditions qualify as intersex. *Id.* Some experts say that 1 in 1500 infants is born intersex. See MARGARET SCHNEIDER ET AL., ANSWERS TO YOUR QUESTIONS ABOUT INDIVIDUALS WITH INTERSEX CONDITIONS 1 (2006), <https://www.apa.org/topics/lgbt/intersex.pdf>. Examples of sex variations include, but are not limited to, Klinefelter’s, and androgen insensitivity. *Id.*

<sup>20</sup> THE INTERSEX SOCIETY OF NORTH AMERICA, *supra* note 19.

<sup>21</sup> *Id.*

<sup>22</sup> NAT’L INST. OF HEALTH, U.S. DEP’T OF HEALTH AND HUMAN RES., KLINEFELTER SYNDROME 1 (2013), <https://ghr.nlm.nih.gov/condition/klinefelter-syndrome.pdf>.

chromosome in each cell, which may affect physical development of organs.<sup>23</sup> Another example is Swyer syndrome, which refers to individuals who have an X and Y chromosome in each cell.<sup>24</sup> Individuals with Swyer syndrome have typical female external genitalia, as well as undeveloped internal gonads.<sup>25</sup> On a theoretical level, the existence of such a varied spectrum of sex designations challenges the assumptions underlying gender binarism. In this light, limiting people to the categories of male or female is overly reductive.

Thus, based on sex or gender identity, some individuals may not fall into either category of male or female. Instead, an individual may identify as “nonbinary,” “gender nonconforming,” “genderqueer,” “trans,” “transgender,” “intersex,” or one of many other gender designations.<sup>26</sup> This paper will use the terms nonbinary, intersex, and gender nonconforming for purposes of consistency and inclusivity. Again, a person’s gender identity is based on that person’s individual, internal processes.

The term “nonbinary” describes any gender identity that does not squarely fit into the male or female binary classifications.<sup>27</sup> “Genderqueer” is often used synonymously with nonbinary, referring to a person who may identify between or beyond the male and female genders.<sup>28</sup> For example, a female-bodied person who identifies with “masculine” traits may identify as genderqueer. “Gender nonconforming” refers to a person who does not conform to societal expectations assigned to gender, especially in terms of masculinity and femininity.<sup>29</sup>

Some genderqueer or nonconforming individuals identify with the term “transgender,” while others do not. “Transgender” refers to people whose gender identity “differs from the social expectations for the physical sex they were born with.”<sup>30</sup> For example, a female-bodied person with a masculine gender identity or who identifies as a man may identify as transgender. “Trans” and “transgender” are

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<sup>23</sup> *Id.*

<sup>24</sup> NAT’L INST. OF HEALTH, U.S. DEP’T OF HEALTH AND HUMAN RES., SWYER SYNDROME 1 (2015), <https://ghr.nlm.nih.gov/condition/swyer-syndrome.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g., Definition of Terms*, BERKELEY.EDU, <http://ejce.berkeley.edu/geneq/resources/lgbtq-resources/definition-terms> (last visited July 23, 2017).

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

sometimes used as umbrella terms to encompass many non-normative identities.<sup>31</sup> However, it is a mistake to assume that all individuals identify with this term.<sup>32</sup> Furthermore, some transgender individuals opt for sexual reassignment surgery, while others may not.<sup>33</sup>

“Intersex” refers to various medical conditions that feature congenital anomaly of reproductive and sexual anatomy.<sup>34</sup> As previously mentioned, many people are born with “sex chromosomes,” external genitalia, or internal reproductive systems that are not considered “standard” for either male or female.<sup>35</sup> Such conditions are sometimes described as “intersex.” Intersex can refer to a medical reality or condition, but may also serve as a term for gender identity, depending on the person.<sup>36</sup> An intersex individual may or may not identify as nonbinary.

Nonbinary gender identity is a novel legal concept. Gender binarism and resulting “dichotomous sexual tradition” dominate the current legal landscape.<sup>37</sup> Scholars such as Saru Matambanadzo and Alice Domurat Dreger have commented on the evolution of legal and medical understandings of sex, as well as the interplay between the two.<sup>38</sup> For much of history, one’s “medical” sex determined property and voting rights.<sup>39</sup> Until recently, one’s sex determined whom one could marry.<sup>40</sup> Currently, legal determinations of sex can still affect one’s life. The current legal landscape, by and large, does not provide identity options for non-normative gender identities.<sup>41</sup> In particular, gender markers on government-issued identification documents can affect one’s everyday life, as explored in Parts III and IV.

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Matambanadzo, *supra* note 14, at 214.

<sup>38</sup> *Id.* For a discussion of the history of intersex or “hermaphrodite” individuals’ relationship with the medical field, see ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 88 (1998).

<sup>39</sup> Matambanadzo, *supra* note 14, at 214.

<sup>40</sup> *Id.*

<sup>41</sup> See *id.*; see also Mele, *supra* note 1.

## II

## A HISTORY OF DETERMINING SEX AND GENDER UNDER THE LAW

Historically, and still today, courts have taken various approaches to determining one's "legal sex." Few courts have adopted an analytical approach reflecting the variety of sex designations consistent with contemporary gender theory or statistical realities. Instead, much of Anglo-American law is informed by a conception of legal sex that is "gendered, dichotomous, easily determined and fixed."<sup>42</sup> Predominantly, courts in the United States have addressed the issue of "legal sex" in cases concerning the validity of marriage in cases where one spouse was transgender.<sup>43</sup> For years, transgender individuals fought in the court system for legal recognition of their post-transition gender in order to have their marriages recognized.<sup>44</sup> To better contextualize the standards explored in Part IV, the following examples serve to illustrate the legacy of approaches to determining legal sex.

The first rule of legal sex determination used by U.S. courts was the *Corbett* rule.<sup>45</sup> In *Corbett*, the court concluded that sex is "immutably fixed" and "cannot be altered by medical or legal intervention later in life."<sup>46</sup> There are two problematic assumptions underlying the *Corbett* rule: (1) the *Corbett* rule assumes that a person's sex can be easily and accurately determined at birth through traditional means,<sup>47</sup> and (2) the rule assumes that sex cannot be altered by medical procedures.<sup>48</sup> Regarding the first assumption, sex is not always easily determinable at birth.<sup>49</sup> With some intersex conditions, an individual's sex may not become apparent until later in life.<sup>50</sup> As to the second assumption, sexual anatomy can, in fact, be

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<sup>42</sup> Matambanadzo, *supra* note 14, at 218.

<sup>43</sup> See generally Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FL. L. REV. 745 (2000).

<sup>44</sup> *Id.* These legal disputes arose prior to the legalization of same-sex marriage.

<sup>45</sup> *Corbett v. Corbett* [1970] 2 All ER 33 (PD). The *Corbett* rule was named in reference to the first British case to address the validity of a transgender person's marriage. For further commentary on the *Corbett* rule, see Alice Newlin, *Should a Trip from Illinois to Tennessee Change a Woman into a Man?: Proposal for a Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461, 468 (2008).

<sup>46</sup> See Newlin, *supra* note 45, at 462–63.

<sup>47</sup> *Id.* at 468.

<sup>48</sup> *Id.* at 468–69.

<sup>49</sup> See generally ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000).

<sup>50</sup> Matambanadzo, *supra* note 14, at 214.

altered via medical procedure.<sup>51</sup> More importantly, however, sex and gender identity are distinct; the *Corbett* rule conflates sex with gender identity.<sup>52</sup> Today, while jurisdictions have abandoned the *Corbett* rule, the assumptions underlying the rule persist.

U.S. courts first addressed the issues surrounding post-operative transgender persons' legal sex in the early 1970s.<sup>53</sup> Typically, these cases involved the disputed validity of marriages between a post-operative transgender person and a member of his or her sex assigned at birth.<sup>54</sup> In making a determination of legal sex, many of the courts focused on sexual function and genitalia, rather than the person's gender identity.<sup>55</sup> For example, in *Anonymous v. Weiner*, a male-to-female, postoperative, transgender person asked the court to direct the New York City Board of Health ("Board") to amend her birth certificate to reflect her female name and sex.<sup>56</sup> Previously, the Board denied the request, basing its decision on a recommendation from the New York Academy of Medicine ("Academy").<sup>57</sup> The Academy recommended against changing the birth certificate because the petitioner was "chromosomally" male, though "ostensibly" female.<sup>58</sup> The Board adopted the recommendation, concluding "an individual born one sex cannot be changed" even by sexual reassignment surgery.<sup>59</sup> The court upheld the denial.<sup>60</sup>

This case reflects the confusion surrounding sex as a legal status or concept. In fact, the case involves a striking contradiction: the petitioner's "original" sex was accepted to be male because that was the sex assigned to the petitioner at birth.<sup>61</sup> That initial determination of sex was predicated on external genitalia.<sup>62</sup> At the same time, the

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<sup>51</sup> *Id.*

<sup>52</sup> Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 131 (1995). Courts at this time took different approaches to legal determinations of sex; for example, in *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), the court granted a legal change of sex, basing the decision on a change in physical anatomy alone.

<sup>53</sup> Newlin, *supra* note 45, at 469.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Anonymous v. Weiner*, 50 Misc. 2d 380, 381–82 (N.Y. Sup. Ct. 1966).

<sup>57</sup> *Id.* at 382.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 383.

<sup>60</sup> *Id.* at 385.

<sup>61</sup> Valdes, *supra* note 52, at 131.

<sup>62</sup> *Id.* at 130.



petitioner was denied a change of legal sex, despite having undergone surgical alterations to external genitalia—the basis for that original determination.<sup>63</sup> Instead, the court shifted its focus to chromosomes as the dispositive element of legal sex to deny the petitioner a change in status, while still maintaining that external genitalia would be the primary marker of legal sex.<sup>64</sup>

*Weiner* illustrates how a person's gender would not even influence a determination of sex by the courts. The plaintiff presented as female; she walked, talked, looked like, and lived as a woman.<sup>65</sup> However, the court still referred to her as only “ostensibly” female.<sup>66</sup> Ultimately, the *Weiner* decision marks the “primacy of external genitalia” and the exclusion of gender identity in determinations of legal sex.<sup>67</sup>

In 1999, the Texas Court of Appeals addressed the question of “[w]hen is a man a man, and when is a woman a woman?”<sup>68</sup> The court began its opinion as follows:

This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes. These are observations that each of us makes early in life and, in most cases, continue to have more than a passing interest in for the rest of our lives. It is one of the more pleasant mysteries.

The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth? The answer to that question has definite legal implications that present themselves in this case involving a person named Christie Lee Littleton.<sup>69</sup>

Christie Lee Littleton, the petitioner in the case, was a male-to-female, post-operative, transgender person.<sup>70</sup> She met her husband Jonathon, they were married in Kentucky, and they later moved to Texas.<sup>71</sup> During the marriage, Christie and Jonathon lived their lives

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<sup>63</sup> *Id.* at 130–31.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 130.

<sup>66</sup> *Weiner*, 50 Misc. 2d at 382.

<sup>67</sup> Valdes, *supra* note 52, at 131.

<sup>68</sup> Littleton v. Prange, 9 S.W.3d 223, 223 (Tex. App. 1999).

<sup>69</sup> *Id.* at 223–24.

<sup>70</sup> *Id.* at 224.

<sup>71</sup> *Id.* at 225.

as husband and wife;<sup>72</sup> they engaged in sexual intercourse and filed joint tax returns.<sup>73</sup> At one point, the Attorney General of Texas required Christie to fulfill Jonathon's child support obligation, as his legal spouse.<sup>74</sup> When Jonathon died, Christie brought a wrongful death claim as his surviving spouse—the crux of the quoted case.<sup>75</sup>

Throughout the opinion and from both a legal and ideological standpoint, the court's discomfort is evident.<sup>76</sup> Eventually, the court concluded that male chromosomes do not change with either hormonal treatment or sex reassignment surgery,<sup>77</sup> “[b]iologically a post-operative female transsexual is still a male.”<sup>78</sup> The court also concluded that a “transsexual male” could never authentically be a female because medical treatment does not create the internal sex organs of a woman.<sup>79</sup> Oddly enough, the court did recognize that Christie's gender identity was that of a female.<sup>80</sup> The opinion also noted that some physicians would consider Christie a female.<sup>81</sup> However, the court concluded that Christie's life, self-perception, marriage, surgical and chemical alterations, and name change did not amount to being born a female in the eyes of the law.<sup>82</sup> Based on these conclusions, the court held, as a matter of law: (1) Christie Littleton is a male, (2) Christie cannot be married to another male, (3) her marriage to Jonathon was invalid, and (4) she cannot bring a cause of action as his surviving spouse.<sup>83</sup>

The *Littleton* case shares the problematic assumptions in *Corbett* and *Weiner* despite having been decided in the late 1990s. The court largely focused on Christie's physical anatomy basing its decision on Christie's lack of functional female sex organs.<sup>84</sup> Such an analysis fails to account for the diversity of sex and gender in two ways. First,

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<sup>72</sup> *Id.*

<sup>73</sup> Newlin, *supra* note 45, at 464.

<sup>74</sup> *Id.*

<sup>75</sup> Littleton, 9 S.W.3d at 225.

<sup>76</sup> *See id.* at 225, 230 (The court both grapples with separation of powers concerns and also states “Christie is medically termed a transsexual, a term not often heard on the streets of Texas, nor in its courtrooms.”).

<sup>77</sup> *Id.* at 230.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

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

<sup>81</sup> *Id.* at 231.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

functional female sex organs cannot be a requisite of being female because not all females have reproductive capacity. Second, the court discounted Christie's gender identity and expression, again basing its decision primarily on her anatomy.

These cases all endorse the idea that sex is determined by anatomy alone. Undergirding this endorsement is gender binarism. In other words, the courts' unwillingness to accept a change in sex is spurred, in part, by the notion that there are only two sex designations; if a person is not a man, then that person is a woman and vice versa. The contention that anatomy is the dispositive factor in sex determinations persists today, as does the notion that there are only two sexes. Thus, the place for nonbinary gender identity, as well as gender identity itself, is currently in flux.

### III

#### THE NONBINARY RULINGS

On June 10, 2016, in Portland, Oregon, Multnomah County Circuit Court Judge Amy Holmes Hehn granted a petition approving nonbinary as a legal gender designation.<sup>85</sup> Jamie Shupe filed a petition on April 27, 2016, hoping to shed the designation of male or female.<sup>86</sup> As a result of Judge Holmes Hehn's ruling, Shupe became the first person in the United States to successfully petition for nonbinary gender classification.<sup>87</sup>

The nonbinary ruling was not Shupe's first legal battle with the gender binary. Now a retired United States Army sergeant, Shupe, born with male anatomy, fought the military in order to be given discharge papers that reflected the female sex, which at that time represented Shupe's gender identity.<sup>88</sup> As time progressed, Shupe no longer identified as male or female. Shupe's fight for recognition of nonbinary gender status was hard-fought and informed by a lifetime of personal battles over gender.<sup>89</sup> Shupe recalls feeling like an outcast and being admonished for acting like a "sissy," not having any role

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<sup>85</sup> Corinne Segal, *Oregon Court Rules that 'Nonbinary' is a Legal Gender*, PBS NEWSHOUR (June 11, 2016, 3:37 PM), <http://www.pbs.org/newshour/rundown/oregon-court-rules-that-nonbinary-is-a-legal-gender/>.

<sup>86</sup> *Id.*

<sup>87</sup> Mele, *supra* note 1.

<sup>88</sup> Dake, *supra* note 3.

<sup>89</sup> *Id.*

models, and struggling to articulate feelings about gender mismatch.<sup>90</sup> Then, at “age 49, retired from the military, married to a woman and raising a daughter, Shupe began to unravel.”<sup>91</sup> In an effort to alleviate this struggle, Shupe began hormone treatments in pursuit of gender transition.<sup>92</sup> Later, Shupe realized that “female” did not represent the correct gender identity either.<sup>93</sup> At that point, Shupe did not identify as male or female and sought another option. Fortunately, Shupe found an ally: Lake Perrigüey, a lawyer in Portland.<sup>94</sup>

Describing the Oregon process for name and sex changes, Perrigüey said, “I knew the law well enough to know there is no exclusion [of alternative genders], it’s not a complicated statute. It’s two lines. People change their names, [and] the process to change your sex identity is the same as changing your name.”<sup>95</sup> According to the statute, an Oregon court “may order a legal change of sex and enter a judgment indicating the change of sex of a person if the court determines that the individual has undergone surgical, hormonal or other treatment appropriate for that individual for the purpose of gender transition and that sexual reassignment has been completed.”<sup>96</sup> This statute, no longer in effect, was passed during the 2013 legislative session, in which the Oregon Legislature officially changed the requirements for a legal change of sex.<sup>97</sup> Prior to this change, a petitioner needed proof of gender reassignment surgery in order to change gender markers on official documents.<sup>98</sup>

Currently, a petitioner in Multnomah County may use preapproved forms for all pleadings in a petition for a name or sex change.<sup>99</sup> Those forms include a declaration, signed by the petitioner, stating that the specific requirements of the Oregon statute have been met.<sup>100</sup> If no one offers evidence contradicting the declaration, the petition is to be granted.<sup>101</sup> In other counties, a judge may request a doctor’s note

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

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

<sup>95</sup> *Id.*

<sup>96</sup> Laws 2013, ch. 366, § 52, 2013 Or. Laws 1, 2–4 (amended 2017).

<sup>97</sup> Beth A. Allen, *Changes to Sex Changes*, OREGON STATE BAR: LITIGATION SECTION (Dec. 2015), <http://www.osblitigation.com/judgescorner.php?articleid=21>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

regarding the petitioner's gender transition.<sup>102</sup> This approach to gender documentation is discussed further in Part IV. Traditionally, sex changes in Oregon have involved petitioners who wished to transition within the gender binary: either from male to female or from female to male.<sup>103</sup> However, the statute does not explicitly state that a petitioner must transition in that way, creating a pathway for the nonbinary ruling.<sup>104</sup>

With that very process in mind, Shupe "went to court with letters from two doctors stating that Shupe is neither male nor female."<sup>105</sup> Shupe understood that many people faced similar struggles with societal and legal limitations on gender identity and, as a result, felt compelled to take the case to court.<sup>106</sup> Shupe and Perrigey were prepared for a fight, no matter how laborious or drawn out it would be.<sup>107</sup> But instead of a drawn out legal battle in the Oregon state court system, they were granted a decision with "little fanfare."<sup>108</sup> Judge Holmes Hehn granted the petition in a two-sentence order: "[t]he sex of Jamie Shupe is hereby changed from female to non-binary. Notice of this legal change shall be posted in a public place in Multnomah County as required by law."<sup>109</sup> Based on Shupe's medical evidence and the ambiguity in the statute about available gender designations, Judge Holmes Hehn was able to grant Shupe's request. To Shupe, the decision provides "a place to exist" and allows total liberation from "the boundaries of being male or female."<sup>110</sup> To legal experts, the decision is an "historic step" toward government recognition of nonbinary individuals.<sup>111</sup> To other nonbinary individuals, the decision represents an opportunity, as was the case for California resident Sara Kelly Keenan.

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<sup>102</sup> *Id.*

<sup>103</sup> *See id.*; *see also* Mele, *supra* note 1.

<sup>104</sup> Allen, *supra* note 97.

<sup>105</sup> Mele, *supra* note 1.

<sup>106</sup> Dake, *supra* note 3.

<sup>107</sup> *Id.*

<sup>108</sup> Mele, *supra* note 1.

<sup>109</sup> *In re* Sex Change of Jamie Shupe, 16CV13991 (Or. Cir. 2016) (order granting general judgment of sex change).

<sup>110</sup> Mele, *supra* note 1.

<sup>111</sup> *Id.*

On August 5, 2016, Keenan became the second U.S. citizen to be granted a legal petition for nonbinary status.<sup>112</sup> Keenan had never considered petitioning a court for a gender change to something other than male or female until hearing Shupe's story.<sup>113</sup> Keenan identifies as intersex, both in terms of gender and in "medical reality."<sup>114</sup> Keenan uses the female pronouns "she," "her," and "hers"<sup>115</sup> and "was born intersex, with a condition known as Swyer Syndrome that prevents the body from producing certain sex hormones."<sup>116</sup> "Like most parents of infants born intersex, Keenan's mother and father chose her gender" on her behalf.<sup>117</sup> "After living her entire life as a woman, Keenan visited an endocrinologist . . . who confirmed her suspicions that she had been born intersex."<sup>118</sup> Before hearing about the Oregon ruling, Keenan thought that gender change laws were "strictly for transgender people."<sup>119</sup> Emboldened by Shupe's story and personal journey, Keenan decided to petition for nonbinary classification.<sup>120</sup> Like Shupe, Keenan came to court prepared with documentation, unsure of whether California would recognize nonbinary as a legal gender as Oregon had done.<sup>121</sup> Instead, Santa Cruz County Superior Court Judge Robert B. Atack simply granted the petition.<sup>122</sup> Keenan won and thus became the second U.S. citizen to be granted nonbinary gender status.<sup>123</sup>

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<sup>112</sup> Mary Emily O'Hara, *Californian Becomes Second US Citizen Granted 'Non-Binary' Gender Status*, NBC NEWS (Sept. 26, 2016, 4:41 PM), <http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-non-binary-gender-status-n654611>.

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

<sup>114</sup> *Id.*

<sup>115</sup> Identifying as intersex or nonbinary does not limit a person's choice to "they" pronouns. Each individual is different and may have different pronoun preferences. Asking about pronoun preferences is generally considered an acceptable social practice. See The Lesbian, Gay, Bisexual, and Transgender Resource Center, *Gender Pronouns*, UNIV. OF WISC. MILWAUKEE, <https://uwm.edu/lgbtrc/support/gender-pronouns/> (last visited July 24, 2017).

<sup>116</sup> O'Hara, *supra* note 112.

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

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*; see also Heather Cassell, *CA Court Recognizes Non-binary Gender*, THE BAY AREA REPORTER, (Nov. 3, 2016), <http://www.ebar.com/news/article.php?sec=news&article=72049>.

<sup>123</sup> Cassell, *supra* note 122.

Following these rulings, both Oregon and California have taken steps to address administrative challenges associated with gender marker changes. On May 31, 2016, Oregon Governor Kate Brown signed a bill into law eliminating the requirement that name and gender marker changes be posted publicly by the courts.<sup>124</sup> The law protects the privacy of individuals seeking changes to gender markers, particularly transgender individuals.<sup>125</sup> On June 15, 2017, the Oregon Transportation Commission voted to add nonbinary as a gender-neutral option on driver's licenses.<sup>126</sup> As part of that process, the Oregon DMV created an advisory committee with representatives from the state police, advocacy group Basic Rights Oregon, the Oregon Department of Justice, and members of the nonbinary and genderqueer community.<sup>127</sup> As a result, the nonbinary option will appear on driver's licenses as an "X," an alternative to "M" or "F."<sup>128</sup>

Similarly, California legislators have introduced a bill that would affirm nonbinary as an option for official state documents.<sup>129</sup> The bill, SB 179, would also reduce administrative burdens for gender marker changes.<sup>130</sup>

As to the progression of the nonbinary movement nationwide, in November of 2016, Shupe made another historic step for the nonbinary, and broader LGBTQ, community; the District of Columbia granted Shupe a new birth certificate that reads: "Sex: Unknown."<sup>131</sup> Soon after that, on December 1, 2016, Sara Kelly Keenan was notified that New York agreed to amend her birth certificate to read "intersex."<sup>132</sup> Both changes are unprecedented in

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<sup>124</sup> Kristena Hansen, *Oregon Governor Signs Transgender Equity Bill into Law*, KATU 2 (May 31, 2017), <http://katu.com/news/local/oregon-governor-signs-transgender-equity-bill-into-law>.

<sup>125</sup> *Id.*

<sup>126</sup> Katy Steinmetz, *M, F or X: Oregon Becomes First State to Allow Non-Binary Gender Marker on Drivers Licenses*, TIME (June 15, 2017), <http://time.com/4820930/non-binary-gender-marker-oregon-drivers-license/>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Melanie Mason, *California Democrats Propose Adding Third, Nonbinary Gender Option for Driver's Licenses and Other Official Documents*, L.A. TIMES (Jan. 26, 2017, 1:26 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-democrats-propose-adding-1485465341-htlmstory.html>.

<sup>130</sup> *Id.*

<sup>131</sup> Mary Emily O'Hara, *Movement for Third Gender Option 'Exploding' in U.S.*, NBC NEWS (Dec. 15, 2016, 2:27 PM), <http://www.nbcnews.com/feature/nbc-out/movement-third-gender-option-exploding-u-s-n696446>.

<sup>132</sup> *Id.*

the United States<sup>133</sup> and represent a movement that is steadily gaining traction. Recently, the Intersex and Genderqueer Recognition Project indicated that it has received requests for representation in nonbinary petitions from people in Colorado, New York, Washington, Florida, Minnesota, Massachusetts, and Vermont.<sup>134</sup>

At the federal level, Dana Zzyym, who identifies as intersex, is currently in a legal battle over gender markers on federal passports.<sup>135</sup> In 2015, Zzyym sued the U.S. Department of State after their application for a passport with the intersex gender marker was denied.<sup>136</sup> In November of 2016, however, a federal judge in the Tenth Circuit ruled in Zzyym's favor, leaving the Department of State with the choice to revise its policy or pursue litigation.<sup>137</sup> Thus, federal recognition of nonbinary status will continue to evolve alongside state processes, which are discussed in Part IV.

#### IV

#### FOUR CONTEMPORARY APPROACHES TO GENDER DOCUMENTATION

In the broader scheme of gender documentation, the Oregon nonbinary ruling simply adds a new dimension to an already complex system of gender documentation in the United States. In the United States, legal authority for the registration of births and other vital statistics resides individually with the states and certain cities. The constitutional provision requiring a decennial census does not mandate or establish a national registration system for vital statistics; thus, this authority is left to the states.<sup>138</sup> Agencies within the states maintain registries and issue birth, marriage, divorce, and death

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* The Intersex and Genderqueer Recognition Project (IGRP) identifies its mission and goal as “to allow non-binary adults to self-identify as something other than male or female on their driver’s license, passport, and other government issued identification.” According to IGRP, “Legal documents base identity on sex assigned at birth, or later transition, without the possibility that an individual may identify as neither male nor female, or both male and female. In the human experience there exist a spectrum of potential genders and sexes!” The Intersex & Genderqueer Recognition Project, *Intersex & Genderqueer Recognition* (2014), <http://www.intersexrecognition.org/>.

<sup>135</sup> O’Hara, *supra* note 131.

<sup>136</sup> Corinne Segal, *Judge Rules in Favor of Intersex Veteran Who Was Denied Passport*, PBS NEWSHOUR (Nov. 23, 2016, 12:33 PM), <http://www.pbs.org/newshour/rundown/intersex-dana-zzyym-passport-decision/>.

<sup>137</sup> *Id.*

<sup>138</sup> James A. Weed, *Vital Statistics in the United States: Preparing for the Next Century*, 61(4) POPULATION INDEX (SPECIAL ISSUE) 527, 528 (Winter 1995).



certificates in accordance with state law.<sup>139</sup> However, the federal government also engages in vital statistic recordkeeping. Since the 1970s, the states have provided vital statistics to the federal government under an agreement formally known as the Vital Statistics Cooperative Program (VSCP).<sup>140</sup> Under this program, the National Center for Health Statistics contracts with states to share in the costs of data collection of vital statistics.<sup>141</sup> Because states control the issuance and alteration of birth certificates, individuals seeking to change their sex or gender designation on official documents must adhere to their domiciles' registry requirements. Jurisdictions vary greatly in their approach to gender reclassification.<sup>142</sup>

Within the United States, there are fifty-seven birth certificate-issuing agencies: the fifty states, New York City, the District of Columbia, American Samoa, Guam, Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the United States Virgin Islands.<sup>143</sup> Of the fifty-seven, policies and practices vary from prohibiting changes to official documents, to allowing changes to gender markers with varying evidentiary standards, to allowing individuals to self-identify.<sup>144</sup> Figure 1 sets out some examples of the varying legal standards and processes discussed in this Part. This variation, or spectrum, represents both the complicated system of state level gender documentation in the United States and the complicated nature of gender itself, a concept constructed by culture, political attitudes, and social factors related to each specific locality.<sup>145</sup>

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<sup>139</sup> *Id.*

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

<sup>141</sup> *Id.* The Division of Vital Statistics (DVS) within the NCHS administers the VSCP. See *National Vital Statistics System*, CENTER FOR DISEASE CONTROL AND PREVENTION (June 30, 2017), <http://www.cdc.gov/nchs/nvss/>.

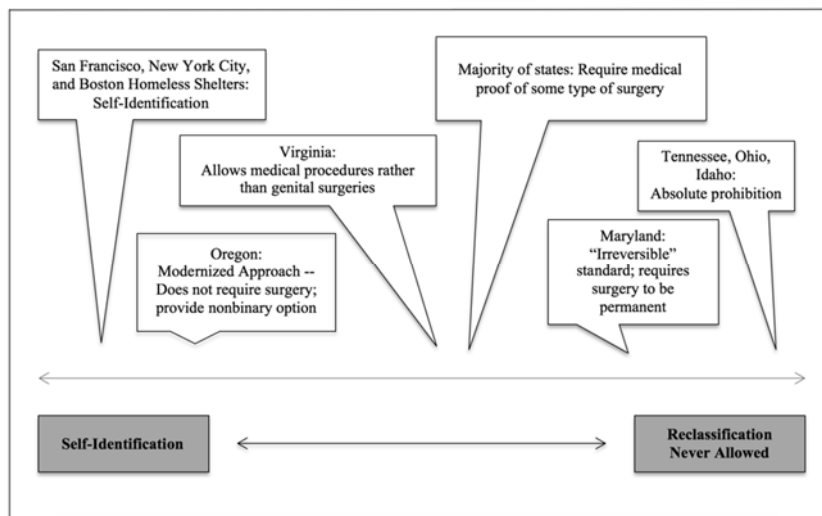
<sup>142</sup> Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 734 (2008).

<sup>143</sup> 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, 378 (2013).

<sup>144</sup> Spade, *supra* note 142, at 752.

<sup>145</sup> See *id.*

Figure 1. Examples Within the Spectrum of Sex Reassignment Policies and Procedures in the United States<sup>146</sup>



#### A. The Far-Right: Prohibiting Reclassification

At one end of the spectrum, three states, Tennessee, Idaho, and Ohio, absolutely prohibit changes to sex on birth certificates.<sup>147</sup> Tennessee’s statute explicitly forbids changes to gender markers on birth certificates.<sup>148</sup> Tennessee Code Section 68–3–203(d) provides that “[t]he sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.”<sup>149</sup> These statutes and the policies underlying them affect not only birth certificates, but also prison placements and, prior to *Obergefell v.*

<sup>146</sup> This Figure is an adapted and updated version of Figure 1 found in Dean Spade’s *Documenting Gender*. Spade, *supra* note 142, at 735.

<sup>147</sup> *Id.* at 768. Tennessee explicitly prohibits change to gender markers on official documents. TENN. CODE ANN. § 68–3–203(d) (2017). The Idaho Office of Vital Statistics does not allow amendments to gender markers on birth certificates. *See* IDAHO CODE ANN. § 39–250 (2017). The Ohio statute does not provide any guidance on updating gender markers on birth certificates. OHIO REV. CODE ANN. § 3705.09 (West 2017). Additionally, the Ohio Department of Health refuses to issue birth certificates with new gender markers. National Center for Transgender Equality (NCTE), *ID Documents Center: Ohio*, TRANSGENDER LEGAL SERVS. NETWORK, <http://www.transquality.org/documents/state/ohio> (last updated June 5, 2017).

<sup>148</sup> Spade, *supra* note 142, at 735.

<sup>149</sup> TENN. CODE ANN. § 68–3–203(d) (2017).

*Hodges*,<sup>150</sup> an individual's ability to marry or adopt.<sup>151</sup> The Office of the Attorney General for the State of Tennessee issued a report addressing the statute in 2014, concluding that under Tennessee law, a person's sex is "determined at birth" and "sex reassignment surgery would not alter the sex of a person for the purposes of marriage."<sup>152</sup> Further, court documents or records may not be altered as a result of "sex-change" surgery.<sup>153</sup> Because same-sex marriage is now legal, the marital implications [of Tennessee's law] do not require much analysis. The striking thing about the Office's analysis was this note: "'sex' refers only to the designation of an individual person as male or female as indicated on the individual's birth certificate."<sup>154</sup>

This prohibition carries serious consequences for both nonbinary and trans individuals; jurisdictions that deny or restrict an individual's right to define their legal gender limit that individual's "identity-making autonomy in favor of communal definitions of gender and sex."<sup>155</sup> For example, an individual born in Tennessee will always have a birth certificate that labels that person as "male" or "female" regardless of the person's actual personal identity or anatomy.

Other jurisdictions' legal standards have similar effects.<sup>156</sup> In the past, New York City, which has its own issuing agency, would require that a trans woman have a birth certificate that says "male" unless she underwent a vaginoplasty, regardless of the individual's wishes, the pain and recovery of surgery, or financial need.<sup>157</sup> Thus, even if that individual underwent hormone therapy, had other surgeries, outwardly presented as female, and identified as female, none of that would matter for purposes of determining that individual's legal gender.<sup>158</sup> As in Tennessee, despite any form of proof, a person is restricted to an arbitrary sex designation given at birth.

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<sup>150</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the right to marry is guaranteed to same-sex couples).

<sup>151</sup> See Spade, *supra* note 142, at 735. See generally Greenberg, *supra* note 43.

<sup>152</sup> Changing Sex Designations on Certain Gov't Records, 14 Op. Tenn. Att'y Gen. 70 (2014).

<sup>153</sup> *Id.*

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

<sup>155</sup> Brian T. Ruocco, *Our Antitotalitarian Constitution and the Right to Identify*, 165 U. PA. L. REV. 193, 205–06 (2016).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

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

*B. The Majority: Requiring Medical Intervention*

In the middle range of the spectrum, the majority of states require medical proof of sex reassignment surgery in order to request a change to a birth certificate.<sup>159</sup> All jurisdictions, not just those in the majority, require some medical documentation, though the forms of proof vary.<sup>160</sup> While these standards allow for changes to gender markers, they are still “deeply problematic.”<sup>161</sup>

These standards presuppose that all individuals seeking changes to gender markers wish to change between male and female. This assumption, based on binarism, does not account for intersex, nonbinary, or gender nonconforming individuals—those who do not identify exclusively as male or female. Furthermore, persons who may desire sexual reassignment surgery may not be able to obtain it due to financial reasons, issues of safety, or a lack of surgical options.<sup>162</sup> Ultimately, “[g]enitals as the legal standard of sex reduces maleness and femaleness down to possession of parts and ignores the reality of intersex persons’ identities, as well as those who lack those ‘essential parts’ due to accident, injury, or medical condition.”<sup>163</sup> For example, if a woman were to undergo a hysterectomy and a mastectomy for medical purposes, in theory, she may not be considered “female” under this standard. By mandating surgery, courts and legislatures condition gender identity and matching identification documents on conforming to the gender binary, thus promoting a reductive and outdated view of gender.<sup>164</sup>

With the growing availability of hormone treatments and sexual reassignment surgeries, courts have been forced to make standardized determinations of legal sex. However, the term “sex” is rarely defined in jurisdictional statutes, leaving courts without clear guidelines.<sup>165</sup> As a result, courts with surgical requirements have created their own tests for determining legal sex. Some approaches do take into account scientific features of gender, such as gonads, chromosomes, and genitalia.<sup>166</sup> Some jurisdictions even consider an individual’s gender

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<sup>159</sup> Spade, *supra* note 142, at 734.

<sup>160</sup> *See id.*

<sup>161</sup> Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex*, 9 HARV. L. POL’Y REV. 241, 268 (2015).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *See id.* at 264.

<sup>165</sup> *Id.* at 261.

<sup>166</sup> *Id.* at 252.

identity.<sup>167</sup> Other courts have used the dictionary definition of “sex” or insisted that sex assignment at birth remains despite hormone treatment or sex reassignment.<sup>168</sup> Perhaps the most extreme dismissal of contemporary gender theory comes from the *Littleton* court, which contemplated whether “sex is immutably fixed by our Creator.”<sup>169</sup>

As previously stated, surgical requirements vary from jurisdiction to jurisdiction. Some courts and legislatures make “‘irreversible’ surgical genital alteration” a requirement for change of legal sex.<sup>170</sup> In Maryland, a petitioner must “present sufficient medical evidence of both the relevant criteria for determining gender and of the fact that, applying that criteria, he has completed a permanent and irreversible change from male to female.”<sup>171</sup> In defense of the irreversible surgical standard, courts have cited unsubstantiated concerns for “accurate official records, avoiding ‘sanctioning a deception on the public,’ and the ‘comfort needs of the public.’”<sup>172</sup>

By contrast, in Virginia, surgeries other than genital surgeries can be used as proof of gender change for birth certificate gender reclassification purposes.<sup>173</sup> According to the National Center for Transgender Equality, an individual’s birth certificate can be amended “to show the change of sex and . . . a new name” upon receipt of “a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure.”<sup>174</sup> The flexibility in Virginia’s requirement resulted from a case involving denial of birth certificate gender reclassification to a transgender man who had undergone a mastectomy and hysterectomy.<sup>175</sup> “His advocates successfully argued that he should be allowed reclassification even though he had not undergone phalloplasty because he had clearly undergone permanent

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 261 (discussing *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 263 (discussing *Anonymous v. Weiner*, 50 Misc. 2d 380, 382 (N.Y. Sup. Ct. 1966)).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 264.

<sup>173</sup> Spade, *supra* note 142, at 768.

<sup>174</sup> National Center for Transgender Equality (NCTE), *ID Documents Center: Virginia*, TRANSGENDER LEGAL SERVS. NETWORK, <http://www.transequality.org/documents/state/virginia> (last updated June 5, 2017).

<sup>175</sup> Spade, *supra* note 142, at 768.

gender-related medical care.”<sup>176</sup> While that individual case created some flexibility, it remains unclear how it will be applied in other cases or what Virginia law specifically requires.<sup>177</sup>

In sum, the majority approach to legal determinations of sex is to require some form of surgery. This practice exposes already marginalized individuals to invasive questioning about their anatomy, discriminates on financial and insurance-related bases, promotes political and uninformed attitudes regarding gender identity and expression, and reinforces binary conceptions of gender.

### *C. The Modernized Standard: Requiring Medical Proof*

The next point on the spectrum in Figure 1 is the “modernized standard,” which has been adopted by the District of Columbia, New York City, and ten other states—Oregon, California, Washington, Hawaii, Minnesota, New York, Connecticut, Maryland, Vermont, and Massachusetts. This standard allows changes to documents upon provision of a notarized doctor’s note stating that the petitioner has received the treatment deemed necessary by the individual and the physician to live in a way that is consistent with the individual’s gender identity.<sup>178</sup> This approach has been called the “modernized standard” because it does not require surgery,<sup>179</sup> instead, a petitioner must only present an authorized note from a physician verifying that individual has sought treatment of some sort to the appropriate court or administrative agency.<sup>180</sup> As opposed to the surgical requirement, this standard accurately reflects contemporary medical understanding of gender identity. Statutes that use this standard “explicitly” consider that “an individual may not undergo hormonal or surgical treatment as part of their transition;”<sup>181</sup> in essence, the modernized standard rejects the “one-size-fits-all” mentality toward gender transition or gender identity.<sup>182</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Mottet, *supra* note 143, at 381.

<sup>179</sup> Janell Ross, *How Easy Is It to Change the Sex On Your Birth Certificate?*, WASH. POST (May 18, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/05/18/the-next-frontier-in-the-bathroom-law-debate-changing-birth-certificates/?utm\\_term=.0a1ec5886a6b](https://www.washingtonpost.com/news/the-fix/wp/2016/05/18/the-next-frontier-in-the-bathroom-law-debate-changing-birth-certificates/?utm_term=.0a1ec5886a6b).

<sup>180</sup> *Id.*; *see also* Mottet, *supra* note 143, at 402.

<sup>181</sup> Mottet, *supra* note 143, at 403.

<sup>182</sup> *Id.* at 405.

To illustrate, the Oregon name and gender change process mirrors the modernized standard. Effective January 1, 2018, amendments to the Oregon name and gender change statute provide that a court may order a legal change of sex if the petitioner attests to having undergone “surgical, hormonal, or other treatment appropriate for the individual for the purpose of affirming gender identity.”<sup>183</sup> In effect, a petitioner is required to submit a court order indicating a change of legal sex, sufficient documentation to allow the state registrar to identify the applicant, fees, and a signed statement that the petitioner is making the request “for the purpose of affirming the applicant’s gender identity.”<sup>184</sup>

At the time Jamie Shupe initiated their petition in April of 2016, a petitioner seeking a gender marker change in Oregon was required to obtain a court order stating that “the individual has undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition and that sexual reassignment has been completed.”<sup>185</sup> In addition to obtaining a court order, a petitioner was required to submit a vital records form, a signed statement of the change, and payment of associate fees.<sup>186</sup> Both of these standards can be considered reflective of the modernized approach, as they required some proof of gender affirmation but do not require surgery.

Out of the standards explored thus far, the modernized standard best reflects a contemporary understanding of gender. Combined with the nonbinary option in some states, this standard is likely the easiest route for individuals seeking to obtain changes to gender markers on official documents. For legislatures seeking to update their vital statistics laws, this model is least harmful to its vulnerable constituents, as it eliminates the surgical requirement and acknowledges individual processes and gender identities.

#### *D. The Far-Left: Allowing Self-Identification*

At the far-left, the spectrum encompasses a small subset of municipalities and organizations that allow for gender/sex self-

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<sup>183</sup> OR. REV. STAT. § 33.460(1) (2017).

<sup>184</sup> *Id.*

<sup>185</sup> Laws 2013, ch. 366, § 52, 2013 Or. Laws 1, 2–4 (amended 2017).

<sup>186</sup> National Center for Transgender Equality (NCTE), *ID Documents Center: Oregon*, TRANSGENDER LEGAL SERVS. NETWORK, <http://www.transequality.org/documents/state/oregon> (last updated June 5, 2017).

identification. The homeless shelter placement policies of Boston, San Francisco, New York City, and Washington, D.C. “are examples of policies that allow individuals to be recognized according to their current gender identity based solely on self-identity.”<sup>187</sup> These policies allow homeless transgender people to be placed in a shelter that matches the gender with which an individual identifies “without being required to provide any medical documentation or ID as verification of that identity.”<sup>188</sup> While most homeless shelters are segregated by gender, shelters have historically espoused policies of housing people according to their external genitals.<sup>189</sup> However, in 2003, the National Coalition for the Homeless “adopted a resolution urging shelters to house people according to their ‘self-identified gender.’”<sup>190</sup> Shelter systems that adopted self-identification policies years ago have yet to cite any resulting problems.<sup>191</sup>

Traditionally in homeless shelters, people who do not identify within the binary are generally given housing assignments based on their sex assigned at birth.<sup>192</sup> This practice creates dangerous conditions for those individuals.<sup>193</sup> According to the National Transgender Discrimination Survey, fifty-five percent of transgender people who stayed in sex-segregated shelters were harassed, twenty-five percent were physically assaulted, and twenty-two percent were sexually assaulted.<sup>194</sup> Twenty-nine percent of individuals were denied shelter outright.<sup>195</sup> Many times, individuals receive housing placements based on gender markers on identification documents, which are often based on incorrect assumptions about an individual’s gender identity.<sup>196</sup> Thus, gender markers on a person’s identification documents are especially significant in this context.<sup>197</sup>

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<sup>187</sup> Spade, *supra* note 142, at 736; Mottet, *supra* note 143, at 413.

<sup>188</sup> Spade, *supra* note 142, at 737.

<sup>189</sup> Mottet, *supra* note 143, at 413.

<sup>190</sup> *Id.* (citing LISA MOTTET & JOHN M. OHLE, *TRANSITIONING OUR SHELTERS: A GUIDE TO MAKING HOMELESS SHELTERS SAFE FOR TRANSGENDER PEOPLE* app. A (2003)).

<sup>191</sup> Mottet, *supra* note 144, at 413.

<sup>192</sup> *Id.* at 412–13.

<sup>193</sup> *Id.*

<sup>194</sup> JAMIE M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 106 (2011).

<sup>195</sup> *Id.* at 116.

<sup>196</sup> Mottet, *supra* note 143, at 395.

<sup>197</sup> *See id.*



In sum, this policy is preferable to the surgical requirement, or even the modernized standard, for several reasons. As a principle, self-identification provides an individual with autonomy or agency over their gender identity.<sup>198</sup> On a practical level, letting individuals self-identify leads to safer placements and minimizes the risk of harm to these individuals. Finally, this policy acknowledges that surgical treatment is “immaterial to whether a person should be recognized in accord with the person’s gender identity.”<sup>199</sup>

## V

### SUGGESTIONS FOR CHANGE AND POLICY CONSIDERATIONS

When considering how to update the legal standard for changes to gender markers, policymakers should consider the following policy initiatives. First, at minimum, jurisdictions should eliminate surgical requirements for changes to gender markers. Second, jurisdictions should work to provide more gender identity options for identification documents.

#### *A. Eliminating the Surgical Requirement*

Surgical requirements contradict current theoretical and medical understandings of sex and gender and assume that surgery is common, attainable, and appropriate for all individuals. As previously discussed, gender is not inherently linked to genitalia. Therefore, requiring a surgical change to one’s anatomy is extremely problematic. Moreover, not all individuals seeking a change to gender markers wish to change from “male” to “female” or vice versa; intersex and nonbinary individuals may seek alternative gender markers or have their gender markers accurately reflect their biological sex that is neither male or female.<sup>200</sup> Furthermore, the surgical requirement assumes that all persons wish to identify within the binary. This assumption perpetuates binarism and instructs trans, nonbinary, gender-nonconforming, and intersex individuals to conform to either a male or female gender identity.

Additionally, the World Professional Association for Transgender Health (WPATH) has condemned surgical requirements, stating “no surgery should be a prerequisite for identity document or record

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<sup>198</sup> See generally Ruocco, *supra* note 155.

<sup>199</sup> Mottet, *supra* note 143, at 413.

<sup>200</sup> Jamie Shupe and Sara Kelly Keenan’s stories illustrate this idea.

changes.”<sup>201</sup> From a medical standpoint, “[c]linically appropriate treatments must be determined on an individualized and contextual basis, in consultation with the patient’s medical providers.”<sup>202</sup> Thus, depending on the individual, surgery may not be medically necessary, and “[n]either genital appearance nor reconstruction is required for social gender recognition[.]”<sup>203</sup> Therefore, administrative bodies should delineate specific medical treatments from the legal recognition of gender to conform with contemporary medical understanding of gender.<sup>204</sup>

If an individual does wish to transition within the binary, the surgical requirement is still problematic in assuming that gender reassignment surgery is easily attainable. Some individuals cannot afford surgery, and a majority of health insurance plans do not cover reassignment surgery.<sup>205</sup> Additionally, not all individuals are able to undergo surgery.<sup>206</sup> Some are not candidates for surgery due to health reasons.<sup>207</sup> Some fear complications or undesirable results.<sup>208</sup> Other concerns such as reactions from family members, conflicts with religious beliefs, inability to take time off from work or school, or the desire to retain reproductive capacity also inhibit a person’s ability or desire to obtain surgery.<sup>209</sup> Even without a reason, requiring surgery is unduly invasive. Statistically speaking, only a small fraction of transgender individuals have “what are popularly understood as genital surgeries.”<sup>210</sup> And, even with surgery, not all jurisdictions allow for changes to official documents.<sup>211</sup> Accordingly, for jurisdictions seeking to update their policies, the first step should be to eliminate surgical requirements.

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<sup>201</sup> Position Statement, World Prof. Ass’n for Transgender Health (Dec. 21, 2016), [https://s3.amazonaws.com/amo\\_hub\\_content/Association140/files/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Mottet, *supra* note 143, at 407.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 408.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 409. Fewer than four percent of transgender men and only twenty-three percent of transgender women report having undergone surgery. GRANT, *supra* note 194, at 79.

<sup>211</sup> Spade, *supra* note 142, at 768.

### *B. Providing More Identity Options*

For nonbinary, gender-nonconforming, intersex, and trans people, the inability to obtain accurate identification documents can result in serious consequences. Even when there is no overt bias at play, a perceived mismatch between an individual's appearance and the information presented on an identification document can create barriers to accessing certain spaces or services.

For example, Voter ID laws create difficulty for individuals whose identification documents and gender identity do not match. According to the Williams Institute, “[s]trict photo ID states require voters to present government-issued photo identification in order to vote.”<sup>212</sup> In fact, forty-one percent of transgender citizens reported not having an accurate driver's license, seventy-four percent did not have an accurate U.S. passport, and twenty-seven percent reported that they had no identity documents or records that list their accurate gender identity.<sup>213</sup> Furthermore, when presenting identification that did not accurately reflect their gender presentation, forty-one percent of respondents reported being harassed, fifteen percent were asked to leave the venue, and three percent reported being assaulted or attacked.<sup>214</sup> Having inaccurate identification documents can create problems in other contexts as well, such as encounters with police or with the Transportation Security Administration when travelling, accessing Medicare benefits, or any time an ID is required for verification.<sup>215</sup> Thus, providing more identity options would increase safety for individuals with inaccurate gender markers, expedite verification processes, and acknowledge the spectrum of gender identity.

### CONCLUSION

This Note demonstrates the complexity of the system of gender documentation in the United States. Fifty-seven jurisdictions espouse

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<sup>212</sup> JODY L. HERMAN, THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS, THE WILLIAMS INSTITUTE 2–3 (2012).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> James Esseks, *Excuse Me, Ma'am, This Isn't Your ID*, ACLU OF ILLINOIS (July 27, 2011, 5:51 PM), <http://www.aclu-il.org/excuse-me-maam-this-isn%E2%80%99t-your-id/>; Mara Kiesling, *Trans Policy Brief: Medicare Card Gender Marker*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (May 26, 2011), <http://www.transequality.org/blog/trans-policy-brief-medicare-card-gender-marker>.

at least four different policies as to reclassifying gender markers for multiple government-issued documents, varying standards and burdens for obtaining reclassification, and different conceptions of biological sex and gender. Adding to the tangled web, the federal government has its own policies and practices for government identification documents, as do foreign jurisdictions. This complicated scheme reflects the complex nature of gender itself—something fluid and always informed by cultural, political, and individual processes.

While this web of policies and practices in the United States symbolically reflects the complex nature of gender, the legal system has yet to confront this complexity. Laws and policies regarding identification documents should be updated in order to keep up with modern medical, legal, and public policy-related developments. As a practical matter, model statutes are available that are cost-saving, based on the best science available, and rooted in constitutional principles.<sup>216</sup> Furthermore, recognition of non-normative gender identities would provide greater security and protection against discrimination for already vulnerable individuals.<sup>217</sup> In addition to these practical considerations, modifying policies and procedures would mirror contemporary gender theory and shifting cultural attitudes toward gender fluidity and create space for the nonbinary community.<sup>218</sup>

Unfortunately, despite the growing nonbinary movement, the system of gender documentation in the United States will still endorse essentialist, outdated notions of gender. Ensuing litigation over identity documents is likely to rouse contentious national conversation about sex, gender, and genitals. In light of the new presidential administration and composition of Congress, the LGBTQIA and nonbinary communities will likely be forced to utilize the court systems to make gains in terms of civil liberties. Meanwhile, identification documents such as driver's licenses, birth certificates, and passports will continue to be important to everyday life. Despite

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<sup>216</sup> See generally Mottet, *supra* note 143.

<sup>217</sup> CHRISTY MALLORY ET AL., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY 1–3 (2015).

<sup>218</sup> See, e.g., Lidia Jean Kott, *For These Millennials, Gender Norms Have Gone Out of Style*, NPR (Nov. 30, 2014, 8:55 PM), <http://www.npr.org/2014/11/30/363345372/for-these-millennials-gender-norms-have-gone-out-of-style>; Sara Marsh, *The Gender-Fluid Generation: Young People on Being Male, Female or Non-Binary*, GUARDIAN (Mar. 23, 2016, 7:18 PM), <https://www.theguardian.com/commentisfree/2016/mar/23/gender-fluid-generation-young-people-male-female-trans>.

the lack of engagement with contemporary understandings of gender, there is hope for the nonbinary movement. That hope is best encapsulated in the words of Dana Zzyym, the petitioner in the federal passport case: “This is who I am. This is how I was born. Many people are able to get their passports with their biological sex, and I should be allowed to do the same thing.”<sup>219</sup>

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<sup>219</sup> Hailey Bronson-Potts, *Intersex Person Who Was Denied A Passport Over Gender Designation Sues U.S. Government*, L.A. TIMES (July 20, 2016, 6:00 PM), <http://www.latimes.com/nation/la-na-intersex-lawsuit-20160720-snap-story.html>.

