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Holy Gender! Promoting Free Exercise of Gender by Discernment Without Establishing Binary Sex or Compulsory Fluidity

José Gabilondo¹

Let me start by thanking Frank Valdes for setting up this roundtable on sexual minorities in the legal academy. Of late, straight society has reduced its *de jure* discrimination against many sexual minorities. The same is not true for gender minorities, for whom equal rights and dignity often remain a dream deferred. Yet some things are changing for the better.²

The current trend is to let individuals self-declare their gender after a process of discernment, unconstrained by any somatic realities of their sexed body or the expectation that one's gender will be permanent. This notion of gender departs from that set forth by the high priestess of performativity Judith Butler, a prominent feminist theorist whose 1990 book *Gender Trouble* helped usher in contemporary approaches to gender studies.³ Butler emphasized gender as a constraint rather than a decision.⁴ However, emphasizing choice in gender risks making it seem an

¹ Professor of Law, College of Law, Florida International University, gabilond@fiu.edu. For their helpful comments on earlier drafts, I want to thank Ila Klion, Howard Wasserman, and Shannon Gilreath. All errors are my own.

² Early attempts to secure a federal statute banning employment discrimination against sexual minorities floundered in part due to disputes about whether to pursue rights for trans individuals. In the 1980s, legal challenges in connection with HIV and AIDs temporarily displaced the movement's other political objectives. Then same-sex marriage became the dominant legal goal sought. MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 87-95 (Harvard, 1999). Meanwhile, trans individuals waited for their claims to become mainstream priorities of the sexual minority movement.

³ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (Routledge, 1990).

⁴ She notes:

accessory, like a new iPhone cover. Nevertheless, the rise of gender through discernment and self-declaration seems to represent more freedom for more people. For example, this notion of gender validates male-to-female and female-to-male transsexuals, transvestites, and others whose gender identities still refer to a male-female sex binary.

Importantly, gender by discernment also creates space for those who disclaim the male-female sex binary by opting for nonbinary, fluctuating, or indeterminate gender, such as those who are *gender queer*, *pangender*, or *agender*.⁵ Those who present themselves as nonbinary consciously reject any fixed association with male or female identities. Instead, they assert the existence of what is, in effect, an unsexed and ungendered space, in which behaviors, dress, and desire cannot be fit into any of the usual sex-based patterns. Some transgendered individuals (most notably those who change their biological sex) reject their sex of origin but do, nonetheless, affirm the male-female sex binary because they opt for an alternative sex. Only nonbinary gender, however, breaks clearly with the prescriptive classifications of the sex binary. Indeed, now that marriage, churchgoing, reproduction, and military service—all forms of assimilation into mainstream society—dominate the political agenda for sexual minorities, it

For if I were to argue that genders are performative, that could mean that I thought that one woke in the morning, perused the closet or some more open space for the gender of choice, donned that gender for the day, and then restored the garment to its place at night. Such a willful and instrumental subject, one who decides *on* its gender, is clearly not its gender from the start and fails to realize that its existence is already decided *by* gender.

JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” (1993).

⁵ See Rachel Reichard, *Why We Say Latinx: Trans & Gender Non-Conforming People Explain*, LATINA, (Aug. 29, 2015), <http://www.latina.com/lifestyle/our-issues/why-we-say-latinx-trans-gender-non-conforming-people-explain> [<https://perma.cc/6RCV-K7PF>] (for example, in a recent article on the growing use of *Latinx*, the interviewees declared a variety of different categories including the following: *Trans*gressive genderqueer Latinx*; *gender neutral*; *nonbinary transgender*; *Queer*, *Hard Femme Latinx*; “in between” a boy and a girl; and *gender fluid*).

may be that nonbinary gender is the only viable remnant of liberationist goals.⁶ Many in the gay community have embraced it, as evidenced on its favorite mating site—Grindr.⁷ The question field for *gender* in its user profile now has two menus—one for binary choices and another for non-binary choices.⁸ *Vive la différence*.

Understandably, accommodating gender by self-declaration is raising hackles. A student group at Mt. Holyoke canceled productions of “The Vagina Monologues” because “women without vaginas” felt excluded from the show’s thematic structure.⁹ Delusional trans activists have endorsed violence against women who question whether the political projects of trans women undermine other forms of feminism, thereby inventing a new epithet—“trans exclusionary radical feminists” (TERF).¹⁰ Toronto University Professor Jordan Peterson has faced academic discipline for his

⁶ The Harvard Gay and Lesbian Review featured a useful debate among several gay intellectuals and activists about conflicts between liberationist and assimilationist approaches to gay rights. THE BEST OF THE HARVARD GAY & LESBIAN REVIEW 250–319 (Richard Scheider ed., Temple 1997).

⁷ See John Paul Brammer, *Gay men’s lives have changed for the better, and Grindr is part of that*, THE GUARDIAN (June 5, 2016), <https://www.theguardian.com/commentisfree/2016/jun/05/grindr-gay-men-hookup-apps-social-lives> [<https://perma.cc/XG74-UWMW>].

⁸ The male binary includes several options (*Man, Cis Man, Trans Man, Custom Man, or No Response*), as does the female binary (*Woman, Cis Woman, Trans Woman, Custom Woman, or No Response*). Nonbinary users also have several options: *Non-Binary, Non-Conforming, Queer, Cross-Dresser*, and *Custom Non-Binary*. The custom options in both the binary and nonbinary menus let the user describe their gender using their own words.

⁹ Kaitlin Mulhere, *Inclusive Dialogues*, INSIDE HIGHER EDUC. (Jan. 21, 2015), <https://www.insidehighered.com/news/2015/01/21/womens-college-cancels-play-saying-it-excludes-transgender-experiences> [<https://perma.cc/9JAL-AM2P>] (examining the cancellation of the show at Mount Holyoke).

¹⁰ Meghan Murphy, ‘TERF’ isn’t just a slur, it’s hate speech, FEMINIST CURRENT (Sep. 21, 2017), <http://www.feministcurrent.com/2017/09/21/terf-isnt-slur-hate-speech/> [<https://perma.cc/8ZJN-6VZT>]. See also Meghan Murphy, *If trans activists truly cared about feminism, they would respect women’s spaces*, FEMINIST CURRENT (Nov. 23, 2017), <http://www.feministcurrent.com/2017/11/23/trans-activists-truly-cared-feminism-respect-womens-spaces/> [<https://perma.cc/XG37-L3SH>].

refusal to use the ungendered pronouns requested by his trans students.¹¹ In 2016, Planned Parenthood stunned many supporters with social media communications referring to women as “menstruators,” a category meant to include trans males who still experienced the flow of menses.¹²

The conflict common to these four incidents is how to give effect to the legitimate demands for recognition by transgender individuals without unduly infringing on others who see gender differently. Despite welcoming gender by discernment, I propose some limits on how far one can compel others to acquiesce in one’s gender preferences or one’s theory about how gender arises. After examining how gender through discernment plays out, I examine the conflict between this theory of gender and alternative approaches. I conclude by arguing that one’s understanding about one’s gender should be treated the same as religious faith.¹³ Beliefs about faith and beliefs about one’s gender are both subjective, constitutive of the person, and subject to no test of truth, coherence, or consistency. With few limits, I am free to practice my faith, yet I cannot compel others to believe as I do. The same freedom of exercise with containment to protect others can help us to negotiate this tricky phase on the path to gender equality.

I. GENDER BY DISCERNMENT

Current practices of gender by discernment and self-declaration depart from previous notions in important ways. As I argue below, *trans* morphed from prefix to noun and, along the way, the meanings of *trans* and *gender* both became fuzzier. Progressives seem to celebrate this fuzziness and

¹¹ See Jessica Murphy, *Toronto professor Jordan Peterson takes on gender-neutral pronouns*, BBC NEWS (Nov. 4, 2016) <http://www.bbc.com/news/world-us-canada-37875695> [<https://perma.cc/8DZB-M4E3>].

¹² Meghan Murphy, *Are we women or are we menstruators?*, FEMINIST CURRENT (Sep. 7, 2016), <http://www.feministcurrent.com/2016/09/07/are-we-women-or-are-we-menstruators/> [<https://perma.cc/U88B-RCMP>].

¹³ David Cruz made a form of this argument at an earlier LatCrit symposium. See David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002).

many well-meaning bystanders hesitate to object, but I think that these language problems may not serve the worthwhile political and educational goals advanced by transgender advocates.

Even before the notion of *transgendered* first emerged, it was clear that some people did not easily fit into the male-female sex binary. These early gender refugees were transsexuals and tranvestites, with intersexed individuals sometimes included.¹⁴ During this phase, *sex*, *sexual orientation*, and *gender* were separate ideas yoked together.¹⁵ Sex referred to an observable somatic status, influenced by genes, chromosomes, and environmental factors and subject to change through medical intervention. As a category, sex was a closed universe: the vast majority of individuals would be male or female, a small number would be intersexed, and another small number would display variation based on chromosomal differences.¹⁶ Hence, the male-female binary became the dominant way to think about sex (and gender too). Sexual orientation referred to the sex of the object of one's affection.¹⁷

Alfred Kinsey emphasized that many, perhaps most, individuals experienced both mixed sexual attractions, with only a minority identifying as exclusively heterosexual or homosexual.¹⁸ So one could plot sexual

¹⁴ Transsexuals were those whose physical characteristics did not match their psychosexual sense of self and who sought alignment between their body and their identity through physical interventions, such as surgery or hormone replacement therapy. Tranvestites referred most commonly to heterosexual men who sometimes dressed as females. The intersexed and hermaphrodites were those born with plausible genitals of both sexes. Some intersexed individuals were assigned a sex by their parents and doctors by conforming their body to the assigned sex.

¹⁵ Frank Valdes analyzed how these three ideas worked in law. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 4 (1995).

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ See *Historical Report: Diversity of Sexual Orientation*, KINSEY INST. <https://kinseyinstitute.org/research/publications/historical-report-diversity-of-sexual-orientation.php> [<https://perma.cc/2MTG-UPWA>].

orientation on a spectrum, although any individual's particular place on the spectrum was relatively stable. Kinsey is no prophet of sexual fluidity.

In this scheme of ordered meaning, gender referred to one's internal experience, independent of but with respect to the sexed features of one's body. Gender was subjective in that you had to look inside to see what you were and make your own determination. The sex binary framed how gender was imagined because the internal experience of most people matched their sex. Hence, gender also seemed to have a shadow binary, but with more positions between the two endpoints than with sex. There might be others with your gender, but each one would have gone through that process of discernment. Despite the sex binary, gender looked more like a scatter plot because particular felt experiences of gender did not necessarily line up along observable lines.¹⁹

A. The Disruption of Gender by Transgenderism

During the past 20 years or so, some trends have disrupted this scheme. First, the word *gender* has come to supplant *sex* when what is meant is one's somatic state.²⁰ So, when someone refers to their *gender* today, they refer ambiguously to one or both of two different qualities: (i) whether their somatic state is male, female, or something else (the old *sex*), and (ii) whether they feel in alignment with that somatic state (the old *gender*). Second, for some, gender seems more determinative of their identity than does sexual orientation, whose perceived fluidity makes it a contextual and

¹⁹ As do many social media sites, Facebook now offers its users dozens of gender options. Debby Herbenick and Aleta Baldwin, *What Each of Facebook's 51 New Gender Options Means*, DAILY BEAST (Feb. 15, 2014), <https://www.thedailybeast.com/what-each-of-facebooks-51-new-gender-options-means> [<https://perma.cc/87QY-5E59>].

²⁰ One theory about why this has happened in law is that the equal protection jurisprudence of the U.S. Supreme Court popularized this thanks to the editorial preferences of Ruth Bader Ginsburg in submitting early briefs in support of protection from sex discrimination. See Catherine Crocker, *Ginsburg Explains Origin of Sex, Gender*, LA TIMES (Nov. 21, 1993), http://articles.latimes.com/1993-11-21/news/mn-59217_1_supreme-court [<https://perma.cc/XJ9Z-CAVZ>].

seemingly contingent aspect of the self. Third, some have turned away from the male-female binary in order to identify as nonbinary transgender, a trend that I consider positive because it demonstrates how superfluous most uses of gendered categories are. Finally, some now view gender as unstable over time.²¹

In my opinion, transgender advocacy groups have encouraged these trends, including the conflation of gender with sex and sexual orientation, perhaps confusing verbal ambiguity with existential freedom. For example, according to the National Center for Transgender Equality, whether or not a transgender person undertakes surgery or hormone therapy to conform their sex to their gender, all transgender persons should be treated the same. In other words, self-declaration alone determines one's gender, regardless of the presence or lack of corroborating somatic facts indicative of sex.²² And once made, that declaration should determine how other people address the transgender person. This seems to be true even if the declarant is a young child, although the World Professional Association for Transgendered

²¹ See *Frequently Asked Questions About Transgender People*, NAT'L CTR FOR TRANSGENDER EQUALITY (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people> [<https://perma.cc/7523-S8BE>] (response to "What does it mean to have a gender that's not male or female?"). See also *Understanding Nonbinary People[:] How to Be Respectful and Supportive*, NAT'L CTR FOR TRANSGENDER EQUALITY, https://transequality.org/sites/default/files/docs/resources/Understanding-Non-Binary-July-2016_1.pdf [<https://perma.cc/3RCR-4Y53>].

²² In effect, this definition treats transsexuals (pre-, post-, or non-operative) the same as other transgender persons:

To treat a transgender person with respect, you treat them according to their gender identity, not their sex at birth. . . . And some people undergo hormone therapy or other medical procedures to change their physical characteristics and make their body match the gender they know themselves to be. All transgender people are entitled to the same dignity and respect, regardless of whether or not they have been able to take any legal or medical steps.

Understanding Transgender People: The Basics, NAT'L CTR FOR TRANSGENDER EQUALITY, <https://transequality.org/issues/resources/understanding-transgender-people-the-basics> [<https://perma.cc/STK8-CSPU>].

Health recommends that no irreversible interventions be performed on someone until the age of legal majority.²³

An educational video distributed by the National Center for Transgender Equality illustrates this approach.²⁴ Most of the young transgender people interviewed identify primarily with one sex, which would seem to validate some notion of a sex binary, if only as a metaphor. Some of these cases seem to be either male-to-female or female-to-male transsexuals, i.e., individuals who changed their biological sex to align with their subjective gender. In other cases, including a young girl, it seems that the transgender person has not yet undertaken any corrective somatic steps. Other interviewees report nonbinary gender. With very few exceptions, neither the binary nor the nonbinary transgendered individuals seemed to be planning to adjust their sex. Instead, their gender was an overlay to their sex, with no mention made of sexual orientation.

Mainstream educational institutions are also beginning to embrace gender by discernment, as exemplified by the way that Mount Holyoke College (a women's college), defines "woman" for purposes of admission.²⁵ The following excerpt from its admissions guidelines identifies who can apply for admission as a female:

The following academically qualified students can apply for admission consideration:

1. Biologically born female; identifies as a woman

²³ *Standards of Care for the Health of Transexual, Transgender, and Gender Nonconforming People*, WORLD PROFESSIONAL ASS'N FOR TRANSGENDERED HEALTH 21 (2011), http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351 [<https://perma.cc/F23Q-W5KS>].

²⁴ *An Introduction to Transgender Individuals*, NAT'L CTR FOR TRANSGENDER EQUALITY, <https://www.facebook.com/TransEqualityNow/videos/vb.40078161989/10153582088701990/> (last visited Dec. 22, 2017) [<https://perma.cc/5PAV-3CP4>].

²⁵ See *Admission of Transgender Students*, MT. HOLYOKE C., <https://www.mtholyoke.edu/policies/admission-transgender-students> [<https://perma.cc/NRQ4-DR6R>].

2. Biologically born female; identifies as a man
3. Biologically born female; identifies as other/they/ze
4. Biologically born female; does not identify as either woman or man
5. Biologically born male; identifies as woman
6. Biologically born male; identifies as other/they/ze and when “other/they” identity includes woman
7. Biologically born with both male and female anatomy (Intersex); identifies as a woman

The following academically qualified students cannot apply for admission consideration:

8. Biologically born male; identifies as man.²⁶

The first four situations are vestigial remnants of *sex* because they refer to one’s sex or origin. The next three situations reject determination by somatic facts and, instead, depend on discernment of gender, with situations 5 and 6 involving no corroborating physical characteristics.²⁷

II. YOUR GENDER OR MINE?

I celebrate gender by discernment, not as a well-meaning bystander but as a refugee from the straight sex binary who has long chafed under its shackles.²⁸ Monique Wittig noted that lesbians were not women because that category was necessarily embedded in compulsory heterosexuality.²⁹ At times, I have felt that way about being a man, so I welcome the new space

²⁶ *Id.* (numbers added for clarity).

²⁷ *See id.* It is not clear from the overall classification whether a hermaphrodite who identify as male could apply for admission to Mount Holyoke.

²⁸ MARTINE ROTHBLATT, *THE APARTHEID OF SEX: MANIFESTO ON THE FREEDOM OF GENDER* 12 (Crown Publishers 1995).

²⁹ “[I]t would be incorrect to say that lesbians associate, make love, live with women, for ‘woman’ has meaning only in heterosexual systems of thought and heterosexual economic systems. Lesbians are not women.” MONIQUE WITTIG, *The Straight Mind, in THE STRAIGHT MIND AND OTHER ESSAYS* 32 (1992).

for gender.³⁰ In a world without sexism and heterosexism, nothing much should flow from one's gender. It might be a basis for affinity to some (as it is on Grindr), but to most it would be a matter of welcome indifference.

In this world, though, gender's devouring of sex (and, to a lesser extent, sexual orientation) may undermine the case for transgender equality. Now, either *sex* or *gender* refer to one's somatic characteristics. However, *gender* can also refer to the subjective meaning that one makes about her body. Given the linguistic ambiguity of *gender* as a signifier (quite apart from the indeterminacy of what the word points to), *sex* does a better job to indicate a somatic reality that still matters.³¹ It seems that it was progressives who started using *gender* when they meant *sex*, but today the substitution is universal and unfortunate because the resulting ambiguity can be used by those opposed to transgenderism. When it is suggested that the sexual orientation of all people is (or, worse still, should be) fluid, I bristle at this compulsory fluidity.³² Perhaps the case for transgender equality could be made more clearly and understood better if *gender* continued to mean only one's self-awareness and self-interpretation of one's sexed characteristics.

III. A TRUCE BASED ON RELIGION AS AN ANALOGY

As noted before, claims about one's gender, like claims about one's faith, are subjective, deeply constitutive, and neither true nor false in any objective sense. I cannot prove that Mary was conceived immaculately, nor

³⁰ Understanding the toxicity of straight supremacy did not protect me from harassment as a gay teenager, discrimination in adult life, and the ambient hostility of homophobic authorities, but this conceptual clarity did serve as a platform for knowledge. See José Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, 21 WIS. WOMEN'S L.J. 1 (2006).

³¹ Take this idea: "a transsexual changes her sex to align it with her gender." It would make no sense to say "a transsexual changes her gender to conform it to her gender" or "a transgendered person changes her gender to conform it to her gender."

³² This is a not-so-subtle reference to Adrienne Rich's naming of compulsory heterosexuality. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS J. WOMEN IN CULTURE 631 (1980).

can I prove that she was not. Faced with these sectarian differences, Christian sects earlier sought to convert or liquidate those with different views.³³ The truce adopted in the United States is to refrain from these religious conflicts by ensuring that within certain limits (that are, unfortunately, now under attack by believers), individuals can exercise their faith without interference by others or the state.³⁴ We do not attempt to reconcile Calvinist notions of predestination with Martin Luther's emphasis on the importance of individual faith. Adherents of these sects may wish to convert others, but their proselytizing is limited to protect the exercise of faith by others. Our truce on religion generally lets me avoid having to wrangle with your most heartfelt and constitutive beliefs about God.³⁵

The same approach could accommodate rival declarations about gender because I should be able to enjoy the same freedom to avoid entanglement with your gender declarations. As with statements about religious faith, each person's gender declarations—whether of binary sex, compulsory fluidity, agender, or something else—should be taken at face value, with no attempt to conform to any particular theory of how gender arises or to any particular expression of gender identity. Statements about one's gender need no external corroboration because they provide their own (self-contained) ground for validity. Seeing gender this way would promote freedom of gender for all, without establishing an official theory of gender. The role of the state should protect the free exercise of gender while avoiding endorsing any particular idea about what gender is or how it arises.

³³ Often this persecution took the form of punishing people for blasphemy. LEONARD LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* (Univ. of North Carolina, 1995).

³⁴ Frederick Gedicks & Michael McConnell, *The Free Exercise Clause*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretations/the-free-exercise-clause> [<https://perma.cc/LD48-7Q68>] (last visited July 27, 2018).

³⁵ As my colleague Howard Wasserman has pointed out, this is not the case if you want to buy contraceptives from the only pharmacist in town or ask the town's only baker to bake something for a same-sex marriage.

If, though born with male genitalia, you identify as a female, should you be forced to hold yourself out to society as a male, dress as a male, use male bathrooms, and be designated as male on official documents? Of course not, because each of those would violate your gender identity. Present yourself as you please and opt out of any social or state processes that target males. That said, can you compel others to see and treat you as female, even if their definition of female includes only birth females who retain that identity? Probably not, because so compelling them would subordinate others to your definition of female, violating the exercise of their gender identity. Consider how this approach would apply to two areas of current conflict—whether to compel the use of unsexed pronouns and how to determine access to public bathrooms.

A. The Question of Pronouns

Trans students and their supporters sometimes ask to be addressed using ungendered pronouns, yet no consensus about usage of these pronouns yet exists.³⁶ The most common alternatives (listed by nominative, possessive, direct object, possessive pronoun, and reflexive form) are the following: *ne, nir, nem, nirs, nemself; ve, vis, ver, vis, verself; ze, hir, hir, hirs, hirsself; ze, zir, zir, zirs, zirself; and xe, xyr, xem, xyrs, xemself*. Should administrators and faculty have to master all of these variations? No. Assume that you prefer a customized pronoun to these alternatives pronouns. Should you be able to compel me to use your favorite pronoun? No. Again, religious liberty might provide an analogy. If Pope Francis registers for my corporate finance course, I do not have to address him as “His Holiness” or “Pope,” because doing so would impinge on my freedom to avoid religion. I can call him “Jorge” or “Mr. Bergoglio.”

³⁶ See *The Need for a Gender-Neutral Pronoun*, GENDER NEUTRAL PRONOUN BLOG, <https://genderneutralpronoun.wordpress.com/> [<https://perma.cc/U25W-Z56C>] (last visited Dec. 24, 2017).

That said, some kind of accommodation is in order. To be addressed as male when you do not see yourself as one is at least a slight and, in some cases, an offense.³⁷ It seems easy enough to change administrative forms to let students opt out of the male-female sex binary. I question how serious a problem it is in the classroom, though, because most exchanges are in the first and second person (neither of which is gendered), rather than in the third person. Until some kind of consensus develops about pronoun usage, we should use soft norms to signal social approval for ungendered language.³⁸ Those of us who think it is better to empower the use of ungendered pronouns should do so, but punishing those who do not seems like a bad idea.

C. Ending the Bathroom Wars

The same balance of respect for individual preferences should apply in the case of managing access to public bathrooms. Consider a recent challenge by a Virginia high school junior to his school's policy on bathrooms. Born female, Mr. Grimm identified as male and had begun to transition to a male body, hence he sought to use the boys' bathroom.³⁹ Initially, the school district refused, giving him the option of using a private single stall. Rejecting this accommodation, he sued his school district in

³⁷ Proponents of ungendered pronouns seem to confuse the linguistic gender of the signifier (the pronouns themselves) with the empirical gender of the signifieds, i.e., the lived realities of the actual people to whom the pronouns refer. Another solution would be to simply declare that gendered pronouns like *he* and *she* are henceforth neutered, such that either one can refer to any type of human being, without regard to that person's actual sex or gender.

³⁸ Some U.S. universities have adopted policies encouraging the use of ungendered pronouns. See, e.g., *Designated Pronouns*, U. MICH., <https://spectrumcenter.umich.edu/article/designated-pronouns-university-michigan> [<https://perma.cc/DV26-34EW>] (last visited July 27, 2018).

³⁹ See *Court sides with Virginia transgender teen, allows bathroom case to proceed*, PRESS HERALD (Apr. 19, 2016), <http://www.pressherald.com/2016/04/19/court-sides-with-virginia-transgender-teen-allows-bathroom-case-to-proceed/> [<https://perma.cc/4SNK-HEFP>].

federal court. After a complicated procedural history, the case may be moot because Mr. Grimm has already graduated.⁴⁰

This controversy pits two rival theories of sex and its relationship to gender. Mr. Grimm asserts that he has the last word on both his sex and his gender, that his sex is male, and that, consequently, he wants to use the boys' bathroom. Forcing him to use the girl's bathroom violates his gender identity.⁴¹ Those who oppose Mr. Grimm believe that one's sex is the product of suprahuman causes such as God, nature, or biology.⁴² In this determinist view, entry to the boy's bathroom should be limited to boys determined as such (and not by self-declaration) to be boys.⁴³ Allowing someone who is male by declaration (with or without somatic adjustments) to use the boys' bathroom violates the gender preferences of the determinists.

⁴⁰ See *Case of Virginia transgender teen Gavin Grimm put off by appeals court*, WASH. POST (Aug. 8, 2017), https://www.washingtonpost.com/local/public-safety/case-of-virginia-transgender-teen-gavin-grimm-put-off-by-appeals-court/2017/08/02/4d49a254-77ad-11e7-8839-ec48ec4cae25_story.html?utm_term=.22ae1fe9a2b9 [perma.cc/9C37-X5CK]. To avoid dismissal for mootness, the ACLU now argues that the school's policy remains a justiciable issue because he requests nominal damages for a past injury and because Mr. Grimm would be subject to the same harm when as a graduate he returns to the school, which would, presumably, require him to conform to their current bathroom policy of restricting access to those with original sex characteristics. *Id.*

⁴¹ See *id.* He has not made the argument that his sex is as God-given as that of binary sex, but he could and it would not be dispositive just as it should not be dispositive when one side of the debate invokes faith to buttress its arguments.

⁴² See, e.g., *Created Male and Female: An Open Letter From Religious Leaders*, U.S. CONF. OF CATHOLIC BISHOPS (Dec. 15, 2017), available at <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/created-male-and-female.cfm> [https://perma.cc/N2EL-V7NR] (last visited Dec. 25, 2017) ("We come together to join our voices on a more fundamental precept of our shared existence, namely, that human beings are male or female and that the socio-cultural reality of gender cannot be separated from one's sex as male or female.").

⁴³ Those who oppose Mr. Grimm's efforts also argue that allowing individuals to choose their bathroom will expose young people to health and safety risks, but these arguments have been addressed elsewhere.

Framed in these terms, this is a zero-sum norm contest in which the winner takes all and the losing party must adapt.⁴⁴ Granting Gavin Grimm the right to use the boys' room would subject those with a deterministic view of gender to the views of a constructionist. Subordinating a majority to the preferences of a minority is different than the traditional subordination of a minority, but both involve harms. Is there an alternative to changing deck chairs on the Titanic? Yes. The answer is analogizing protection for freedom of gender to how the state protects religious exercise without establishing religion.

First, to appreciate the determinist objection to this claim, you must understand the always already flawed logic behind sex segregation in locker rooms and bathrooms. I can imagine only one possible legitimate goal of sex segregation in these spaces—to further a privacy interest in the nature of an individual's right not to be checked out in a sexual manner. The problem is that sex segregation implements this privacy interest based on the faulty premise that everyone is heterosexual. Were universal heterosexuality in fact the case, separating males from females in settings conducive to nudity would make sense as a way of creating social spaces free of sexual stimuli. The existence of homosexuals, however, ruins this scheme.

As gay visibility has made it impossible to deny the presence of homosexuals in these same-sex environments, new rules of engagement have developed to preserve this privacy interest in the face of the locker room's sexual pluralism. I noticed a "modesty code" at my university gym discouraging any nudity, except in private changing stalls. Some facilities now ban nudity in sex-segregated lockers.⁴⁵ What motivates these new anti-

⁴⁴ Both the determinist and the declarative approaches share some elements, but they disagree about the ultimate authority to determine one's gender. Determinists locate this authority outside of the individual, while declarativists assign that authority to the self.

⁴⁵ Sidhartha Banerjee, *Montreal-area suburb bans nudity in pool locker rooms following complaints*, THE STAR (Nov. 13, 2017),

nudity norms—I assert—is the unstated anxiety of males now cognizant of the likely presence of gay men in their midst.

I favor respecting the right not to be checked out, so I am sympathetic to these concerns. If you agree, it becomes easier to understand the objections of those who do not want trans males in the male locker room (or trans females in the female locker room). A straight cis male that does not see a trans male as a true male can view the trans male's presence in the locker room the same way that the presence of a female (or a gay male) would be viewed—as violative of the space's intended sex-free zoning. To force that straight cis male to share that space privileges the gender preferences of the trans male.

What is to be done? First, immediately desist from forcing individuals to use any particular bathroom. Forcing anyone who identifies as female to use a male bathroom violates her gender identity. Both those with deterministic and constructionist views about gender must be accommodated, however. The easiest solution to this conflict would be to have two kinds of unsexed public bathrooms—a collective “Anything Goes” bathroom and stand-alone private stalls. Those entering the Anything Goes bathroom would give up any expectations about sex-based or gender privacy, because that bathroom would be open to all—straight, gay, male, female, nonbinary, transgendered, transvestite, intersexed, etc.⁴⁶ It would include private stalls (like those in current sex-segregated bathrooms), but other physical structures, e.g., baby changing stations, menstrual couches, would not necessarily be foreclosed. To honor the privacy interest putatively honored through sex segregation, stand-alone private stalls would be available elsewhere to let users avoid what might be the carnivalesque atmosphere of

<https://www.thestar.com/news/canada/2017/11/13/montreal-area-suburb-bans-nudity-in-pool-locker-rooms-following-complaints.html> [<https://perma.cc/2GRM-7JG7>].

⁴⁶ Gender neutral bathrooms already exist, including temporary ones set up at conferences that designate some of a facility's gendered bathrooms as neutral and leave other gendered bathrooms for those who prefer them.

the collective bathroom. Having both group and individual unsexed bathrooms means that no one would be forced to compromise their gender values by using the bathroom with someone whose values were dissonant.

The social engineering that I propose involves the wide-scale restructuring of attitudes and institutions in terms of gender. Most noteworthy advances in civil rights involve social engineering because they respond to a radically new understanding about justice that necessarily disrupts the preexisting order. So we should not shrink from social engineering—despite its creative destruction of the existing social order—if it is the right thing to do, a judgment that can sometimes be made only in hindsight.

That said, please let me note some obstacles to the implementation of my proposal. My proposal lacks the political will needed for implementation. At present, no Constitutional right to gender exercise seems to have been recognized, so at this point my proposal is a concept alone. Moreover, no popular support exists for bearing the financial costs needed to conform buildings and other physical structures by creating unsexed bathrooms. It would be easier as a first step to implement unsexed bathrooms only in public buildings, that way avoiding the increased resistance that would come from requiring privately owned places of public accommodation to have unsexed bathrooms. Starting only with public buildings would also bypass the objections to unsexed bathrooms based on religious freedom that would likely come from some private business owners.

Today transgendered individuals correctly complain about a power abuse that is within our ability to reduce. Posterity will be on their side. Nevertheless, the future can be unsettling when it arrives, as would attest the horrified Paris audience at the 1913 debut of Igor Stravinsky's now acclaimed *The Rite of Spring*.⁴⁷ Here, I have tried to support transgender

⁴⁷ Posterity is kinder to the new:

equality while sounding a cautionary note about the rights of others. Some of my points deserve more systematic exposition. I am open to being educated on this issue and expect the same from others with a dog in this race.

The music itself was angular, dissonant and totally unpredictable. In the introduction, Stravinsky called for a bassoon to play higher in its range than anyone else had ever done. In fact, the instrument was virtually unrecognizable as a bassoon. When the curtain rose and the dancing began, there appeared a musical theme without a melody, only a loud, pulsating, dissonant chord with jarring, irregular accents. The audience responded to the ballet with such a din of hisses and catcalls that the performers could barely hear each other. . . . Despite its inauspicious debut, Stravinsky's score for "The Rite of Spring" today stands as a magnificent musical masterpiece of the twentieth century.

Thomas Kelly, *Igor Stravinsky's The Rite of Spring*, NAT'L PUB. RADIO, <https://www.npr.org/programs/specials/milestones/991110.motm.riteofspring.html> [<https://perma.cc/5WWV-PX25>].