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## COMMENT

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### OUR ANTITOTALITARIAN CONSTITUTION AND THE RIGHT TO IDENTITY

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*Underlying the United States Constitution is an antitotalitarian principle—i.e., the government cannot define, regulate, or compel aspects of life that are fundamental to identity and personhood. Prohibitions of compulsory childbirth, flag salutes, ideological education, and racial separation most clearly evince this bulwark against totalitarianism.*

*Nonetheless, from birth, the government enforces legal gender, restricts the availability of legal gender reclassification, and prevents individuals from removing themselves from the legal gender system. The government thus affirmatively produces and compels identity on an individual level. Moreover, for trans\* people, these laws cause expressive and dignitary harm, increase exposure to violence, and diminish life opportunities. Although these gender identity laws constitute a totalitarian occupation of individual lives, they have evaded constitutional scrutiny.*

*This Comment (1) evaluates the right to identity situated in the midst of the Constitution's proscription of totalitarianism and (2) investigates constitutional arguments supporting trans\* people's right to self-determine their gender identity. Specifically, this context illuminates the right to identity and how the government engages in compulsory, affirmative identity formation. Ultimately, this Comment demonstrates that for trans\* people and our Constitution alike, we must eliminate totalitarian gender identity laws and totalitarianism in all forms.*

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## INTRODUCTION

Our Constitution proscribes totalitarian government. Under the letter and spirit of the Constitution, the United States government cannot define, regulate, or compel aspects of life that are fundamental to identity and personhood. It cannot occupy our lives or enforce conformity and subservience to the State in the way a totalitarian government would.

Certain freedoms serve as a bulwark against government-compelled identity and conformity. Those freedoms protect us from government attempts to submerge the individual beneath the State. For example, the government cannot force women to bear children and take on motherhood,<sup>1</sup> compel children to salute

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<sup>1</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); see also Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 782, 788-90 (1989) (suggesting that women may abort their pregnancies “so that they may *avoid being forced into an identity*” and explaining that anti-abortion laws impermissibly “exert power productively over a woman’s body and . . . forcefully reshape and redirect her life”).

the flag,<sup>2</sup> or compel veterans to swear allegiance to the government.<sup>3</sup> It cannot prevent adults from marrying individuals of the opposite race or same gender.<sup>4</sup>

The seminal 1923 case *Meyer v. Nebraska* evinces this proscription against totalitarianism. Under the Fourteenth Amendment's guarantee of liberty, the Supreme Court struck down a Nebraska law prohibiting the teaching of modern languages like German, French, Spanish, and Italian in schools prior to the completion of eighth grade,<sup>5</sup> even though the Fourteenth Amendment does not address a right to language or schooling.<sup>6</sup> Rather, the dispositive liberty interest in *Meyer* was freedom from totalitarian government. While "Sparta assembled the males at [age] seven into barracks and intrusted their subsequent education and training to official guardians" to "submerge the individual and develop ideal citizens," and Plato envisioned the State communally raising the children of the guardians, our Constitution would not allow such institutions.<sup>7</sup> As Justice McReynolds wrote,

Although [the] measures [of Sparta and Plato] have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both [the] letter and spirit of the Constitution.<sup>8</sup>

The *Meyer* Court did not focus on what the Nebraska law prohibited. Rather, the Court focused on the law's affirmative work—its attempt to produce and compel uniformity of thought and identity. Thus, to determine whether governmental action violates the Constitution's proscription against totalitarianism, courts must evaluate not "what is being *prohibited*, but what is

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<sup>2</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that compulsory flag salutes "transcend[] constitutional limitations on [government] power and invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

<sup>3</sup> See *Speiser v. Randall*, 357 U.S. 513, 514-15, 529 (1958) (barring the government from conditioning veterans' tax exemptions on swearing allegiance to the United States).

<sup>4</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that the Fourteenth Amendment "requires that the freedom of choice to marry not be restricted by invidious racial discriminations" and that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

<sup>5</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399-401, 403 (1923).

<sup>6</sup> See U.S. CONST. amend. XIV, § 1 (neglecting to provide an explicit right to schooling, an explicit right to learn a particular language, and an explicit right to preserve one's native language).

<sup>7</sup> *Meyer*, 262 U.S. at 401-02.

<sup>8</sup> *Id.* at 402.

being *produced*” and “the real effects that conformity with the law produces at the level of everyday lives and social practices.”<sup>9</sup> The proscription against totalitarianism prohibits restrictions on liberty that produce conformity with respect to individual lives. Essentially, any law that produces a relation between the individual and the State that evinces impermissible government control over individuals is totalitarian and does violence to the letter and spirit of the Constitution.

The proscription against totalitarianism prohibits government occupation of individual lives. It does not, of course, bar all government restrictions on liberty. The government may forbid or circumscribe some acts and liberties, such as murder or drug use.<sup>10</sup> The antitotalitarian principle respects “the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”<sup>11</sup> Accordingly, even in an antitotalitarian regime, laws may interject some norms and practices that affirmatively shape our lives and help sustain order. There is not an unlimited, unburdened right to define oneself. Rather, the antitotalitarian principle “prevent[s] the state from taking over, or taking undue advantage of, those processes by which individuals are defined.”<sup>12</sup>

One way the government affirmatively produces identity and conformity is by documenting and enforcing legal gender. When a baby is born, the baby is assigned “male” or “female” identity based on genital appearance. This “male” or “female” identity is recorded on a birth certificate, becomes the baby’s legal gender, and helps structure the individual’s life. This identity affects how the individual navigates sex-segregated facilities, legal documentation, gendered expectations, and interactions with state and nonstate entities.<sup>13</sup>

For most people, this assigned legal gender will raise little to no concern because most people identify with their assigned legal gender. Nevertheless, “[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”<sup>14</sup> In the context

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<sup>9</sup> Rubinfeld, *supra* note 1, at 783.

<sup>10</sup> *Cf. id.* at 784 (differentiating laws that “take over the lives of the persons involved” from those that remove a single act or liberty).

<sup>11</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

<sup>12</sup> Rubinfeld, *supra* note 1, at 794.

<sup>13</sup> See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 737, 752-53 (2008) (describing how legal gender affects trans\* people’s interactions with sex-segregated facilities like homeless shelters and increases their exposure to discrimination in contexts where one must present identification, such as interactions with police or during the employment application process).

<sup>14</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992); see also *id.* (stating that although legislation requiring spousal notification before obtaining an abortion may only negatively restrict one percent of women who obtain abortions, “[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects”).

of legal gender, trans\*<sup>15</sup> people are the ones who find themselves most encumbered. Specifically, trans\* people who do not identify with their legal gender experience intense expressive and dignitary harm and are often subjected to violence, harassment, and assault when they present incongruent legal documents.<sup>16</sup> For those who wish to reclassify their legal gender, a complex legal matrix awaits.<sup>17</sup> Therefore, trans\* people are the proper focus of the constitutional inquiry regarding legal gender identity.

The imposition of gender identity on trans\* people inverts the typical relationship between the individual and the State. Typically, the Constitution allows individuals to self-regulate and self-govern regarding matters of personhood and identity; the government restricts certain liberties to promote ordered liberty and justice,<sup>18</sup> but does not impose identity. Ultimately, the Constitution proscribes the government's totalitarian enforcement of gender identity on trans\* people. Therefore, for both trans\* people and the Constitution, we must eliminate these totalitarian gender identity laws.

Thus, this Comment seeks to (1) evaluate the constitutional right to identity situated in the Constitution's proscription against totalitarianism and (2) investigate constitutional arguments for the right of trans\* people to self-determine their gender identity. This context illuminates the right to identity and how the government engages in compulsory, affirmative identity formation.

Part I of this Comment addresses (1) legal gender and how it is documented, (2) how trans\* people are (or are not) afforded the opportunity to self-define their legal gender, and (3) how the government impermissibly appropriates trans\* people's gender identities to buttress normative conceptions of sex and gender. Part II analyzes the Constitution's proscription against totalitarianism and the constitutional right to identity in both substantive due process and First Amendment jurisprudence. Part III evaluates how trans\* people can situate gender identity claims within a constitutional framework of antitotalitarianism and

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15 The term *trans\** (with an asterisk) refers to a diverse group of individuals who may identify as transgender, genderqueer, genderfluid, nonbinary, genderf\*ck, genderless, third gender, two-spirit, bigender, or gender nonconforming. The use of *trans\** underscores that this analysis includes all individuals who have a self-determined identity in conflict with the traditional, cisgendered male-female binary. See Hugh Ryan, *What Does Trans\* Mean, and Where Did It Come From?*, SLATE: OUTWARD (Jan. 10, 2014, 12:37 PM), [http://www.slate.com/blogs/outward/2014/01/10/trans\\_what\\_does\\_it\\_mean\\_and\\_where\\_did\\_it\\_come\\_from.html](http://www.slate.com/blogs/outward/2014/01/10/trans_what_does_it_mean_and_where_did_it_come_from.html) [<https://perma.cc/BJL4-F2MT>] (“[T]he \* is used metaphorically to capture all the identities—from drag queen to genderqueer—that fall outside traditional gender norms.”). When “trans,” “transgender,” or another label is used in this Comment, it is generally due to a cited author's use of the term or an individual's self-identification. This distinction is complicated by the fact that many authors use a definition of “trans” or “transgender” that includes most trans\* people.

16 See *infra* note 24 and accompanying text.

17 See *infra* notes 31–39 and accompanying text.

18 See *infra* note 73 and accompanying text.

the right to identity. Finally, Part IV evaluates how the government can eliminate unconstitutional violations of trans\* people's rights.

## I. TRANS\* PEOPLE AND GENDER IDENTITY

### A. *Legal Gender and Legal Gender Documentation*

Although legal gender is ubiquitous in the United States, people whose gender identity matches their legal gender may be unaware of the insidious ways that legal gender affects trans\* people.<sup>19</sup> Gender is at the core of identity and helps shape interactions with the world.<sup>20</sup> Considering the countless ways in which names, pronouns, facilities, toys, and clothing are gendered, it is impossible to navigate everyday interactions without regard for gender.

People interact with others on the basis of previously or contemporaneously observed signifiers such as clothing, voice, body shape, hairstyle, makeup, affectations, etc., that are inextricably tied to normative conceptions of gender.<sup>21</sup> Since people generally interact with men and women differently,<sup>22</sup> these gender signals are often indispensable to normal social interactions. Thus, trans\* people frequently attempt to shape how others perceive them (while also expressing their own self-conception) by presenting external signals such as hairstyle and clothing. A minority of trans\* people also undergo surgeries to help them express their gender identity.<sup>23</sup>

But legal gender can vitiate the ability of trans\* people to present their gender and can be used to justify denying trans\* people the right to self-identification. The government imposes gender identity, thereby permitting others to assert control over trans\* people's identities. This engenders expressive harm, causes

<sup>19</sup> See Spade, *supra* note 13, at 734 (refuting the mistaken belief that trans people can easily change their legal gender by simply presenting evidence to a government agency); cf. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* 1, 4 (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988) (viewing "white privilege as an invisible package of unearned assets" that benefit white people, often without their knowledge or awareness).

<sup>20</sup> Cf. Peter Weinreich, *The Operationalisation of Identity Theory in Racial and Ethnic Relations* ("[Identity is] the totality of one's self-construal, in which how one construes oneself in the present expresses the continuity between how one construes oneself as one was in the past and how one construes oneself as one aspires to be in the future."), in *THEORIES OF RACE AND ETHNIC RELATIONS* 299, 317 (John Rex. & David Mason eds., 1986).

<sup>21</sup> See generally ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1958) (describing the ways in which an individual presents information about herself through visible or observable "sign vehicles" and how others use this information to help shape their interactions with her).

<sup>22</sup> As a basic example, people typically refer to others with gendered pronouns like "he" or "she."

<sup>23</sup> See Spade, *supra* note 13, at 754 (describing how trans people express gendered characteristics through both noninvasive approaches and gender-confirming surgeries).

dignitary harm, and enhances exposure to discrimination and assault.<sup>24</sup> Legal gender thus operates as a mechanism of control and oppression.

Consider the experience of Alexandra Glover, a twenty-one-year-old transgender woman who went to the Louisiana Office of Motor Vehicles (OMV) to update her driver's license photo.<sup>25</sup> She did not attempt to change her legal gender, which, in Louisiana, requires proof of surgery.<sup>26</sup> The OMV employee looked at Alexandra, who identifies as a woman and presents as female, and declared that Alexandra had to present herself as a man in her driver's license photo: "You can't present as a woman if you're listed as a man . . . . If you have makeup on or anything like that you're supposed to take all that off, *because you are actually a man.*"<sup>27</sup> At the time, Louisiana's OMV photo policy stated, "At no time will an applicant be photographed when it is obvious he/she is misrepresenting his/her gender and/or purposely alternating his/her appearance in an effort which would 'misguide/misrepresent' his/her identity."<sup>28</sup>

By saying "*you are actually a man,*" the OMV employee used legal gender, and the state's photo policy, to assert a claim over Alexandra Glover's gender. Moreover, the State—through the employee—attempted to control Alexandra's gender presentation, including her use of makeup. The State compelled Alexandra to present an outward identity in conformance with the government's normative conceptions of sex and gender. This was a totalitarian attempt to appropriate a transgender woman's body to buttress traditional gender norms.

To make matters worse, since trans\* people disproportionately experience homelessness, unemployment, and poverty,<sup>29</sup> they are disproportionately

<sup>24</sup> See JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 152-55 (2011) (detailing how trans people with identity documents that do not match their gender identity face an increased risk of discrimination, harassment, and assault).

<sup>25</sup> See Maya Lau, *Transgender Driver Told She Can't 'Misrepresent' Self as a Woman in License Photo, Setting Off Review of Louisiana Policy*, ADVOCATE (Sept. 11, 2015, 12:09 PM), <http://theadvocate.com/news/13403039-123/louisiana-office-of-motor-vehicles> [<https://perma.cc/D3NH-C4QX>].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (emphasis added) (internal quotation marks omitted).

<sup>28</sup> *Id.* (internal quotation marks omitted) (quoting *Photographing Policy*, LA. DEP'T PUB. SAFETY: OFFICE MOTOR VEHICLES, <http://dpsweb.dps.louisiana.gov/omv1.nsf/58c968bd569b099986256cdco00806eb/d2c15655fbb79e72862564ae005331dc?OpenDocument> [<https://perma.cc/2A92-PW9X>] (last updated March 12, 2009)). In response to negative public attention, the Office of Motor Vehicles revised their photography policy to allow an individual to be photographed wearing makeup, clothing, and accessories "not matching the traditional expectations of an applicant's gender." *Photographing an Applicant Policy*, LA. DEP'T PUB. SAFETY: OFFICE MOTOR VEHICLES, <http://dpsweb.dps.louisiana.gov/omv1.nsf/58c968bd569b099986256cdco00806eb/d2c15655fbb79e72862564ae005331dc?OpenDocument> [<https://perma.cc/VK93-6DF6>] (last updated Aug. 11, 2016).

<sup>29</sup> See GRANT ET AL., *supra* note 24, at 2-4 (reporting that almost 20% of trans people have experienced homelessness and that trans people are twice as likely as the general population to experience unemployment and four times as likely to suffer extreme poverty—i.e., a household income of less than \$10,000 per year).

subjected to government-supervised facilities. These facilities—including foster homes, homeless shelters, jails, and prisons—segregate based on sex. Therefore, trans\* people are more likely to be in positions where legal gender, and the concomitant government control, is imposed. For example, while discontinuing her long-term estrogen treatment, a prison doctor told Ann Sweeney, a trans woman who had been placed in a male prison facility, “You were born a boy, and you’re going to stay a boy.”<sup>30</sup> By enforcing legal gender, the State—acting through the prison doctor—repudiated Ann Sweeney’s female identity by calling her a “boy” who will always be a “boy” and placing her in a male prison facility; moreover, the State vitiated her ability to present her body as female by discontinuing her feminizing hormone treatments. Thus, the State used Ann Sweeney’s legal gender to occupy and control her identity and body.

### B. *Reclassifying One’s Gender*

Trans\* people are prohibited from opting out of the legal gender system. They cannot remove gender markers from their documents or eliminate government records of legal gender. Instead, legal gender is marked on documents that are ubiquitous and necessary to engage in ordinary activities like purchasing alcohol, applying for employment, or traveling. Trans\* people who attempt to reclassify their gender confront a “rule matrix [of] hundreds of formal and informal policies at the federal, state, and local levels.”<sup>31</sup>

Gender reclassification schemes exist on a spectrum. Various entities and government agencies have different rules regarding gender that determine whether trans\* people may reclassify and self-define their gender. On one end, some entities accept trans\* people’s gender identity based on self-identification alone. For instance, as of late 2016, homeless shelters that receive federal funding must allow trans\* people to self-determine their gender and access sex-segregated housing according to their gender identity.<sup>32</sup> Likewise, Argentina and Ireland allow people to change their legal gender based solely on self-identification;<sup>33</sup> there is no

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30 Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 500-01 (2000) (internal quotation marks omitted).

31 Spade, *supra* note 13, at 733.

32 Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763, 64,782 (Sept. 21, 2016) (to be codified at 24 C.F.R. pt. 5).

33 See Gender Recognition Act 2015 (Act No. 25/2015) (Ir.), <http://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/pdf> [<https://perma.cc/FW9W-9SAQ>] (“A person who applies for a gender recognition certificate . . . shall furnish . . . a statutory declaration declaring that he or she . . . has a settled and solemn intention of living in the preferred gender for the rest of his or her life . . .”); Emily Schmall, *Transgender Advocates Hail Law Easing Rules in Argentina*, N.Y. TIMES (May 24, 2012), [http://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html?\\_r=0](http://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html?_r=0) [<https://perma.cc/MKH4-QJGM>] (“Argentina has put in place some of the most liberal

need for psychiatric diagnosis, medical certification, or surgery. On the other end, certain jurisdictions never allow gender reclassification. In Ohio and Tennessee, for example, the legal gender printed on a birth certificate can never be changed.<sup>34</sup> Many prisons similarly refuse to recognize a trans\* person's self-identification.<sup>35</sup>

Most jurisdictions in the United States have gender reclassification schemes that fall in between the two ends of this spectrum. These jurisdictions require various degrees of permission from the medical community or proof of surgery. New York, for instance, will change legal gender on a driver's license based on a doctor's letter certifying trans\* identity.<sup>36</sup> Until recently,<sup>37</sup> New York City's birth certificate policy required a candidate for gender reclassification to undergo either phalloplasty or vaginoplasty (i.e., creation of a penis or vagina, respectively).<sup>38</sup> Federal agencies, such as the Social Security Administration and the State Department, have their own gender reclassification schemes.<sup>39</sup>

This matrix often prevents trans\* people from establishing a consistent legal gender across overlapping jurisdictions.<sup>40</sup> A trans\* woman may be

rules on changing gender in the world, allowing people to alter their gender on official documents without first having to receive a psychiatric diagnosis or surgery.”).

<sup>34</sup> See TENN. CODE ANN. § 68-3-203(d) (2016) (“The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.”); *In re Ladrach*, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987) (finding that a surgical gender transformation procedure was insufficient to change petitioner's sex from male to female under Ohio's correction of birth record statute); see also *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations> [<https://perma.cc/7FSM-VCUP>] (last updated Feb. 3, 2015) [hereinafter *Changing Birth Certificate Sex*] (noting that Tennessee and Ohio do not permit gender reclassification on birth certificates).

<sup>35</sup> See Rosenblum, *supra* note 30, at 522-29 (noting that many prisons categorize trans\* people according to their genitalia, which results in harm and abuse to trans\* people who have not yet undergone genital surgery or do not wish to have this surgery).

<sup>36</sup> See *Change of Sex or Gender on a DMV Driver License, Permit or Non-Driver ID Card*, N.Y. ST. DEP'T MOTOR VEHICLES, [http://nysdmv.custhelp.com/app/answers/detail/a\\_id/405/kw/gender/session/L3RpbWUvMTQ3MTIzMDgzMy9zaWQveUJsdFE1WWo%3D](http://nysdmv.custhelp.com/app/answers/detail/a_id/405/kw/gender/session/L3RpbWUvMTQ3MTIzMDgzMy9zaWQveUJsdFE1WWo%3D) [<https://perma.cc/M9PG-F58R>] (last updated Aug. 5, 2015, 4:19 PM) (“Proof of a sex change is a written statement from a physician, a psychologist, or a psychiatrist that is printed on letterhead. The statement must certify that one gender is your main gender . . . .” (emphasis omitted)).

<sup>37</sup> New York City recently eliminated the surgery requirement. See *infra* note 69.

<sup>38</sup> Spade, *supra* note 13, at 769.

<sup>39</sup> See *Know Your Rights: Passports*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <http://www.transequality.org/know-your-rights/passports> [<https://perma.cc/Z8JU-AY5T>] (“[A] transgender person can obtain a passport reflecting his or her current gender by submitting a certification from a physician confirming that he or she has had appropriate clinical treatment for gender transition.”); *Know Your Rights: Social Security*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <http://www.transequality.org/know-your-rights/social-security> [<https://perma.cc/BYA8-ZYAH>] (“[A] transgender person can change their gender on their Social Security records by submitting either government-issued documentation reflecting a change, or a certification from a physician confirming that they have had appropriate clinical treatment for gender transition.”).

<sup>40</sup> See Spade, *supra* note 13, at 735 fig.1, app. at 822-41 (highlighting the wide discrepancies among states regarding policies for changing one's legal gender); *Changing Birth Certificate Sex*, *supra* note 34 (same).

recognized as female by homeless shelters and the DMV while her birth certificate lists her as male. Regardless, if she is arrested, she is likely to be placed in a single-sex, male facility (assuming she has not had genital surgery). These discrepancies produce tangible effects. Prior to being estopped by a federal judge, the Department of Homeland Security ordered employers to fire employees who could not resolve discrepancies between their Social Security Administration (SSA) records and their employer's identity records.<sup>41</sup> Until recently, the SSA required proof of genital surgery before changing legal gender on SSA documents<sup>42</sup> while some states had no surgery requirements.<sup>43</sup> Therefore, trans\* people who successfully altered their legal gender based on state rules, but had not undergone genital surgery to satisfy the SSA's regulations, would have lost their jobs under the Department of Homeland Security's order.

It is a common misunderstanding that all trans\* people want or need genital surgery,<sup>44</sup> commonly referred to as "sex reassignment surgery."<sup>45</sup> This misconception perpetuates the notion that genital surgery should be a requirement for legal gender reclassification. In reality, trans\* people have different "aims and desires for their bodies," and they express their gender identity accordingly.<sup>46</sup> For many trans\* people, changing external gender signals such as hairstyle, clothing, and accessories is sufficient; for others, masculinizing or feminizing hormone therapy to change secondary sex characteristics like voice, facial hair, breast tissue, and muscle mass is most appropriate.<sup>47</sup>

External markers of gender are the most important signals for shaping how others observe gender. The fact that only a few people ever know about another person's genitals underscores the extent to which genital surgery requirements are unreasonably intrusive. Nearly all people interact with friends, strangers, colleagues, classmates, and family members without

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41 Spade, *supra* note 13, at 732 & n.8 (citing *Am. Fed'n of Labor v. Chertoff*, 552 F. Supp. 2d 999 (N.D. Cal. 2007)).

42 See Sunnivie Brydum, *Social Security Removes Surgical Requirement for Gender Marker Change*, ADVOCATE (June 14, 2013, 2:17 PM), <http://www.advocate.com/politics/transgender/2013/06/14/social-security-removes-surgical-requirement-gender-marker-change> [<https://perma.cc/QG9U-9J7D>]; ("The SSA removed its requirement that transgender people wanting to amend their gender on a Social Security card provide proof of gender reassignment surgery.")

43 See Spade, *supra* note 13, at 736 (noting that Colorado, New York and the District of Columbia do not require surgery to change one's legal gender on a driver's license).

44 *Id.* at 754-55.

45 *E.g.*, Lenny Bernstein, *Here's How Sex Reassignment Surgery Works*, WASH. POST (Feb. 9, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/02/09/heres-how-sex-reassignment-surgery-works/> [<https://perma.cc/9NJD-AMV5>].

46 Spade, *supra* note 13, at 754.

47 *Id.* at 754-55.

genitalia becoming relevant. As genitalia is largely irrelevant to daily interactions, trans\* people's genital status should be irrelevant to the State.<sup>48</sup>

Legal gender reclassification policies show that while trans\* people may try to present their gender on their own accord, their identity and expression are still constrained by legal gender. Although people tend to think of themselves as “authors of [their] own lives,” trans\* people, in many respects, have little authority over their own official recorded identities.<sup>49</sup> Instead, legal documentation evinces “the power dynamics between the individual and the state about the authorship of identity.”<sup>50</sup> The rules governing gender identity “appropriat[e] individual autonomy to define the self” and attempt to create and maintain identity, often without the assent of the individual.<sup>51</sup>

Government rejection of trans\* people's gender identity causes expressive and dignitary harm. The State causes expressive harm by meaningfully repudiating trans\* people's identities.<sup>52</sup> It simultaneously engages in dignitary harm through privacy invasion and the infliction of emotional distress.<sup>53</sup> This expressive and dignitary harm, while abhorrent on its own, is also fundamentally linked to violence against the trans\* community. The rejection of trans\* people's self-defined gender identity is often a triggering point for violence against trans\* individuals—such as when a state official asks for identification, finds that the trans\* individual's gender marker does not match their outward appearance, and then proceeds to assault or harass them.<sup>54</sup>

Moreover, the consequences produced by the government's repudiation of trans\* people's identity correlates with and likely contributes to high rates of depression and suicide—i.e., violence against oneself.<sup>55</sup> A staggering 41% of

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48 Some courts have disagreed with this logic. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220-21 (10th Cir. 2007) (finding that Title VII's prohibition of sex-based discrimination was not triggered when an employer asked about a trans woman's genitals and then fired her because her answer did not match her gender expression).

49 *See* Annette R. Appell, *Certifying Identity*, 42 *CAP. U. L. REV.* 361, 361, 388-90 (2014) (summarizing how birth certificates complicate transgender people's ability to control their lives and identities).

50 *Id.* at 362.

51 *Id.* at 372.

52 *Cf.* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 *U. PA. L. REV.* 1363, 1385-86 (2000) (describing how expressivists view the actions of legal officials as “meaningful” and capable of “express[ing] condemnation” and illustrating the point by discussing how state-sanctioned segregation labeled black Americans as inferior).

53 For an overview of dignitary torts generally—as well as defamation, invasion of privacy, and intentional infliction of emotional distress, specifically—see Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 *BROOK. L. REV.* 65, 65-67, 70 (2012).

54 Trans\* people living with incongruent identification are often exposed to harassment, assault, and police brutality. GRANT ET AL., *supra* note 24, at 154, 158.

55 *See id.* at 2 (noting that 41% of respondents in a transgender survey reported having contemplated suicide and that the rate was higher for victims of assault and harassment). In one survey, suicide attempts were reported by 63-78% of trans\* people subjected to physical or sexual violence at school, 57-61% of those harassed by law enforcement, 60-70% of those who have suffered physical or sexual violence by law

trans\* people have attempted suicide, and this rate elevates when state officials such as teachers reject a trans\* person's identity.<sup>56</sup> Notably, this statistic cannot capture the emotional distress and harm that accompanies a suicide attempt, or the lives of trans\* people who have died by suicide. This statistic does not record the lives of people like Leelah Alcorn who are not alive to take a survey, but must still be remembered and counted.<sup>57</sup> The human toll of oppression is underrepresented and not fully expressed, even by such horrifying statistics. The expressive and dignitary harm, and exposure to discrimination, harassment, and violence that accompany legal gender classification, are of the utmost concern for trans\* people and those concerned with human rights.

### C. *The Government's Impermissible Appropriation of Identity*

Defining one's own identity is one of the most personal and individual practices one can engage in; it is central to autonomy.<sup>58</sup> But for trans\* people, this identity-defining process has been impermissibly appropriated by the State. The State elevates "political or communal self-definition" above individual self-definition.<sup>59</sup> This "republican vision" rejects the liberal conception of *individual* self-government.<sup>60</sup> Instead, the "self" in self-government is the political community.<sup>61</sup>

Justice Scalia exhibited this republican vision in his *Obergefell* dissent. By declining to join the majority's decision, which held that states must recognize same-sex marriages,<sup>62</sup> Scalia rejected the ability of individuals to

enforcement, and 69% of those who have experienced homelessness. ANN P. HAAS ET AL., AM. FOUND. FOR SUICIDE PREVENTION & THE WILLIAMS INST., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS: FINDINGS OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2014).

<sup>56</sup> See GRANT ET AL., *supra* note 24, at 45 ("[S]uicide attempt rates rose dramatically when teachers were the reported perpetrators [of harassment and assault].").

<sup>57</sup> See J. Bryan Lowder, *Listen to Leelah Alcorn's Final Words*, SLATE: OUTWARD (Dec. 31, 2014, 4:13 PM), [http://www.slate.com/blogs/outward/2014/12/31/leelah\\_alcorn\\_transgender\\_teen\\_from\\_ohio\\_should\\_be\\_honored\\_in\\_death.html](http://www.slate.com/blogs/outward/2014/12/31/leelah_alcorn_transgender_teen_from_ohio_should_be_honored_in_death.html) [<https://perma.cc/W4M7-BMTR>] (publishing Alcorn's suicide note, which stated, "My death needs to mean something. My death needs to be counted in the number of transgender people who commit suicide this year. I want someone to look at that number and say 'that's fucked up' and fix it."); see also Jennifer Finney Boylan, Opinion, *How to Save Your Life: A Response to Leelah Alcorn's Suicide Note*, N.Y. TIMES (Jan. 6, 2015), <http://www.nytimes.com/2015/01/07/opinion/a-response-to-leelah-alcorns-suicide-note.html> [<https://perma.cc/Y2DG-CK8G>] (reacting to the death of Leelah Alcorn and her suicide note).

<sup>58</sup> See Appell, *supra* note 49, at 388-89 ("Those who are transgender face an original birth certificate that documents their birth sex, but not their gender identity. It is difficult to imagine anything much more personal and autonomous than defining one's own identity." (footnote omitted)).

<sup>59</sup> See Rubinfeld, *supra* note 1, at 761 (describing the "[r]epublican [c]ritique" of individualism).

<sup>60</sup> *Id.* (internal quotation marks omitted). By republican and liberal, Rubinfeld refers to modes of political thought, as opposed to American political parties.

<sup>61</sup> *Id.*

<sup>62</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

define their own identity through marital relations with individuals of the same gender. For Justice Scalia, the decision “robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”<sup>63</sup> He minimized the right to individual identity and elevated the community’s right to control individuals; he submerged individual identity beneath the will of the communal polity.<sup>64</sup>

For republicanism, individual identity is viewed as an assault on the communal identity. Justice Alito’s *Obergefell* dissent argues that the legalization of same-sex marriage will be used to vilify opponents of same-sex marriage and vitiate their “rights of conscience.”<sup>65</sup> According to Alito, “I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”<sup>66</sup> Thus, those who “cling to old beliefs” must have the power to compel how individuals in same-sex relationships self-identify in order to bolster those “old beliefs.”

For liberal individualism, the legalization of same-sex marriage allows gays, lesbians, and bisexual people to define their identities through marriage (and have their identities recognized by the State) while others can still partake in different self-definition practices, like opposite-sex marriage or remaining single. However, for republicanism, allowing states to define marriage provides “a way for people with different beliefs to live together in a single nation.”<sup>67</sup> Instead of allowing individual self-government for matters of individual identity, political communities (i.e., states) should engage in communal rulemaking that narrows individual agency.

Similarly, rules regarding legal gender identity allow the State to appropriate trans\* people’s right to engage in individual self-determination. Jurisdictions that deny or restrict trans\* people’s right to define their legal

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<sup>63</sup> *Id.* at 2627 (Scalia, J., dissenting); *see also id.* at 2642 (Alito, J., dissenting) (“Today’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage.”).

<sup>64</sup> Justice Scalia also exhibited this vision in *Lawrence v. Texas*, where he wrote, “[T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.” 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

<sup>65</sup> *Obergefell*, 135 S. Ct. at 2642-43 (Alito, J., dissenting).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2643.

gender (or opt out of legal gender) limit trans\* people's identity-making autonomy in favor of communal definitions of gender and sex.

For example, a trans\* woman born in Tennessee will always have a birth certificate that labels her as "male," regardless of the fact that she is a woman.<sup>68</sup> Until recently,<sup>69</sup> a trans\* woman born in New York City would have a birth certificate that says "male" unless and until she underwent vaginoplasty (i.e., creation of a vagina) regardless of whether she wanted this surgery or could afford it.<sup>70</sup> Even if she dressed in a feminine way, underwent hormone therapy, and had other surgeries, her outward presentation as a female or self-defined gender identity would not matter for legal gender purposes. This is so despite the fact that almost everyone who would see her legal documentation, such as police officers and liquor store cashiers, would not interact with her genitalia.

For both of these women, the rules about whether she can change her legal gender evince a communal and political conception about what it means to be "male" or "female." In Tennessee, being female means being born with a vagina; until recently, in New York City, being female meant being born with a vagina or having a vagina constructed through surgery. Either way, being a woman is inextricably linked to having a vagina. This communal definition of "woman" thus proscribes individual actors from defining themselves on their own accord.

Since the same trans\* woman would qualify for a "female" driver's license in California, but be forced to retain a "male" license in Tennessee,<sup>71</sup> gender is not a universal or stable category. Although "male" and "female" identities do not stand on their own—in the way that medieval cathedral walls do not stand independently—these gender identity laws *buttress* normative sex and gender conceptions. But trans\* people and their bodies should not be used as "symbolic-cultural site[s] upon which human societies inscript their moral order";<sup>72</sup> rather, we should have more faith that trans\* people can renegotiate and define their own identities.

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<sup>68</sup> See *supra* note 34 and accompanying text.

<sup>69</sup> New York City now allows trans\* people to change their legal gender without proof of surgery. Curtis M. Wong, *New York's Transgender Residents Will Now Be Able to Change Birth Certificate Sex Designation Without Surgery*, HUFFINGTON POST (Feb. 2, 2016), [http://www.huffingtonpost.com/2014/12/08/new-york-transgender-birt\\_n\\_6290590.html](http://www.huffingtonpost.com/2014/12/08/new-york-transgender-birt_n_6290590.html) [<https://perma.cc/9ADJ-28LS>].

<sup>70</sup> Spade, *supra* note 13, at 769. The old rules specifically required vaginoplasty or phalloplasty and were notable for delineating the specific surgeries that were required. See *id.* at 736 (distinguishing New York City's formerly strict policies for changing legal gender on a birth certificate from California's requirement that an applicant show "he or she has undergone any of a variety of gender confirmation surgeries").

<sup>71</sup> *Id.* at app. 822-28.

<sup>72</sup> Cf. SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 84, 104 (2002) (positing that "societies inscript their moral order" upon women and their bodies by regulating sexual reproduction and gendered presentation and arguing that we should

However, individuals cannot engage in unbridled self-identification since many types of identities cause harm to third parties or are legitimately undesirable. For example, society has a legitimate desire to not protect the identity of “murderers.”<sup>73</sup> Society may not want to recognize an unrestricted identity of “gun owner” that would prevent background checks or assault rifles bans. Nonetheless, society must also prevent the majoritarian will from denying people the right to identity.<sup>74</sup> Unrestrained individualism and republicanism thus present a choice between Scylla and Charybdis. But this dichotomous choice is not inevitable, and the antitotalitarian principle underlying the Constitution sails between the two: while the government can restrict certain liberties, it cannot submerge the individual and affirmatively compel individual identity and conformity.

## II. CONSTITUTIONAL PROSCRIPTIONS AGAINST TOTALITARIANISM

### A. *The Constitution’s Antitotalitarian Principle in Substantive Due Process*

In *Washington v. Glucksberg*, the Court posited that substantive due process rights are those “‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”<sup>75</sup> However, this formulation has hardly been uniformly applied. In *Lawrence*, the Court held that same-sex intimacy is a liberty protected by the Fourteenth Amendment,<sup>76</sup> and in *Obergefell*, the Court held that the ability to choose a partner in marriage is a fundamental right that cannot be restricted by

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have “more faith in the capacity of ordinary political actors to renegotiate their own narratives of identity and difference through multicultural encounters in a democratic civil society”).

<sup>73</sup> Although laws compelling us to be “non-murderer[s]” do standardize us, operate on our bodies, and impinge physical acts, they do not compel “a defined role or identity with substantial, affirmative, institutionalized functions. And although a person can refrain from murder only by refraining from certain physical actions, his body is in no affirmative way taken over or put to use. Laws against murder foreclose an avenue; they do not harness us to a given seat and direct us down a single, regulated road.” Rubinfeld, *supra* note 1, at 793 (internal quotation marks omitted).

<sup>74</sup> See Richard A. Posner & Eric J. Segall, Opinion, *Justice Scalia’s Majoritarian Theocracy*, N.Y. TIMES (Dec. 2, 2015), <http://www.nytimes.com/2015/12/03/opinion/justice-scalias-majoritarian-theocracy.html> [<https://perma.cc/FZ8K-WWHC>] (arguing that Justice Scalia’s dissents in the Supreme Court’s four major gay rights cases evince a “political idea [that] verges on a majoritarian theocracy”).

<sup>75</sup> 521 U.S. 702, 720-21 (1997) (citations omitted) (first quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); then quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

<sup>76</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention by the government.”).

gender,<sup>77</sup> even though homosexuality was criminalized at the country's founding and gays have been oppressed throughout American history.<sup>78</sup>

*Lawrence* noted that “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>79</sup> *Obergefell* declared that rights are not solely defined “by who exercised them in the past”; otherwise, “new groups could not invoke rights once denied.”<sup>80</sup> Rights “come not from ancient sources alone,” but “rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”<sup>81</sup> Oftentimes, commentators focus on what is being denied—e.g., the denial of abortion, same-sex marriage, or contraception.<sup>82</sup> But focusing on what the law prohibits does not reveal the underlying principles of substantive due process.

When applying substantive due process rights, the Court has focused on the *affirmative* or *productive* consequences of the law in question.<sup>83</sup> In doing so, the Court invalidates laws that allow the State to submerge the individual, appropriate the individual's means of identity-making, and affirmatively shape the individual's life.<sup>84</sup> Substantive due process “is not the freedom to do certain, particular acts determined to be fundamental through some ever-progressing normative lens. It is the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state.”<sup>85</sup> The antitotalitarian principle is thus invoked to protect these fundamental rights.

Substantive due process rights, such as the freedom to not bear children, protect against laws that have extensive affirmative effects on individual lives:

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<sup>77</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) (“The Court now holds that same-sex couples may exercise the fundamental right to marry.”).

<sup>78</sup> See *Lawrence*, 539 U.S. at 594-98 (Scalia, J., dissenting) (describing the nation's history and tradition of imposing criminal sanctions on “sodomy”).

<sup>79</sup> *Id.* at 572 (internal quotation marks omitted).

<sup>80</sup> *Obergefell*, 135 S. Ct. at 2602.

<sup>81</sup> *Id.* at 2602; see also *Lawrence*, 539 U.S. at 579 (“[The drafters and ratifiers of the Fourteenth Amendment] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (describing substantive due process and the balance between liberty and the demands of organized society as “having regard to what history teaches are the traditions from which [the country] developed as well as the traditions from which it broke” (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

<sup>82</sup> See Rubinfeld, *supra* note 1, at 783 (acknowledging that the “universal” method of privacy analysis begins by asking what is being prohibited, but suggesting that we should focus not on “what is being prohibited, but [on] what is being produced”).

<sup>83</sup> *Id.* at 784.

<sup>84</sup> *Id.*; see also *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (discussing the limits upon the State's ability to achieve desirable ends that affect the public).

<sup>85</sup> Rubinfeld, *supra* note 1, at 784.

At the simplest, most quotidian level, such laws tend to *take over* the lives of the persons involved: they occupy and preoccupy. They affirmatively and very substantially shape a person's life; they direct a life's development along a particular avenue. These laws do not simply proscribe one act or remove one liberty; they inform the totality of a person's life.<sup>86</sup>

Thus, the Constitution prohibits certain government actions that affirmatively compel lives toward a government-determined end.

*Roe v. Wade's* holding that the Constitution's right to liberty encompasses a woman's decision of whether to terminate her pregnancy<sup>87</sup> rejects the affirmative effects of anti-abortion laws. Immediately after announcing its holding, the Court explained that the "[t]he detriment that the State would impose upon the pregnant woman by denying this choice," including medically diagnosable harm, the psychological and physical taxation of pregnancy, labor, and child-rearing, the distress associated with an unwanted child, and the problem of bringing a child into a family that is unable to care for it.<sup>88</sup> Thus, *Roe's* rationale did not focus on the denial of the right to abortion inasmuch as it emphasized that anti-abortion laws affirmatively compel the lives of women toward the path of "mother" and "caretaker."

Anti-abortion laws had transformed the lives and identities of women in far-reaching, consequential ways: they shaped their day-to-day actions, radically altered financial statuses, changed occupations, career trajectories, and preoccupations, and engendered—for many—the identity of "mother."<sup>89</sup> Therefore, "the decision whether to have a child [is protected] because parenthood alters so dramatically an individual's self-definition."<sup>90</sup> Anti-abortion laws "drafted" women into the service of the State to produce a population through compulsory pregnancy, labor, and, in most circumstances, childcare.<sup>91</sup> Rubinfeld explains, "The exertion of power over the body is in this respect comparable to the exertion of power over a child's mind: its effect can be *formative*, shaping identity at a point where intellectual resistance cannot meet it."<sup>92</sup>

In *Pierce v. Society of Sisters*, the Court affirmed a preliminary injunction enjoining Oregon from requiring all children between the ages of eight and

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

<sup>87</sup> See 410 U.S. 113, 153 (1973) ("The right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

<sup>88</sup> *Id.*

<sup>89</sup> See Rubinfeld, *supra* note 1, at 788-91 (describing the many ways in which "anti-abortion laws exert power productively over a woman's body" and "forcefully reshape and redirect her life").

<sup>90</sup> *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>91</sup> Rubinfeld, *supra* note 1, at 791.

<sup>92</sup> *Id.* at 789.

sixteen to attend public school through the eighth grade.<sup>93</sup> By virtue of the antitotalitarian principle recognized in *Meyer*, the State could not “standardize its children by forcing them to accept instruction from public teachers only.”<sup>94</sup> Moreover, the Court expressed concern about children being conscripted into the State’s service, noting that “[t]he child is not the mere creature of the State” and that she has “additional obligations.”<sup>95</sup> Together, *Meyer* and *Pierce* show that the government cannot affirmatively compel citizens to conform to its own desires.

The *Lawrence* Court evinced a realization that anti-sodomy laws affirmatively fashioned gay people as criminals. *Lawrence* protected the liberty of “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct” “from unwarranted government intrusions.”<sup>96</sup> The laws involved in *Lawrence* prohibited more than just a particular sexual act: they sought to control personal relationships.<sup>97</sup> Moreover, the criminalization of same-sex intimacy—and, therefore, the criminalization of gay people who engage in sexual intimacy—“‘legally sanction[ed] discrimination against [homosexuals] in a variety of ways unrelated to the criminal law,’ including in the areas of ‘employment, family issues, and housing.’”<sup>98</sup>

The Court has also invoked antitotalitarianism to protect an individual’s right to choose a spouse of his or her choice. In *Loving v. Virginia*,<sup>99</sup> the Court discarded interracial marriage bans instituted to segregate racial communities, delegitimize relations among racial groups, and—from an abhorrent eugenics perspective—produce “untainted”<sup>100</sup> blood. The right to choose a spouse “resides with the individual and cannot be infringed by the State.”<sup>101</sup> Therefore, the State may not restrict a person’s choice of spouse to enforce racism, segregation, and eugenics.

Likewise, *Obergefell* reflected a similar concern regarding the affirmative effects of restrictions on marriage. The Court’s opinion opens by proclaiming that “[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to

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<sup>93</sup> 268 U.S. 510, 536 (1925).

<sup>94</sup> *Id.* at 534-35 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

<sup>95</sup> *Id.* at 535.

<sup>96</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>97</sup> *See id.* at 567 (“The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”).

<sup>98</sup> *Id.* at 581-82 (O’Connor, J., concurring) (alteration in original) (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992), *rev’d*, 869 S.W.2d 941 (Tex. 1994)).

<sup>99</sup> 388 U.S. 1, 12 (1967).

<sup>100</sup> *Rubinfeld*, *supra* note 1, at 791-92.

<sup>101</sup> *Loving*, 388 U.S. at 12.

*define and express their identity.*<sup>102</sup> The Court went on to observe that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>103</sup> Thus, “the decision whether and whom to marry is among life’s momentous acts of self-definition.”<sup>104</sup> Writing for the Court, Justice Kennedy expressed concern for individuals excluded from the right to marry because of their partner’s gender: “Marriage responds to the universal fear that a lonely person might call out only to find no one there.”<sup>105</sup> Marriage safeguards children and families by conferring legal recognition and structure, over a thousand marital benefits, and respect.<sup>106</sup> Ultimately, *Obergefell* expressed concern with how the State’s marriage restrictions appropriated the means of self-definition and the resultant production of loneliness, harm to children and families of same-sex couples, and exposure of same-sex families to undue legal, medical, economic, and personal risk.

#### B. *The Constitution’s Antitotalitarianism in First Amendment Jurisprudence*

The core of the First Amendment is “the right not to be compelled to make a false affirmation of one’s identity, ideas or beliefs,”<sup>107</sup> and this core evinces the Constitution’s proscription against totalitarianism. The First Amendment protects individuals from affirmative, government-compelled speech that vitiates their ability to speak, believe, and think independently.

The seminal First Amendment case *West Virginia State Board of Education v. Barnette* struck down compulsory flag salutes and pledges in schools.<sup>108</sup> The Court held that where the freedom asserted does not “colli[de] with rights asserted by any other individual,”<sup>109</sup> “censorship or suppression of expression is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.”<sup>110</sup> The First Amendment’s paramount concern is the freedom of identity, ideas, and beliefs, and only a “clear and present danger” can override this concern.<sup>111</sup> *Barnette* explained that these antitotalitarian principles developed on the same soil that produced a laissez-faire “philosophy that the

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<sup>102</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (emphasis added).

<sup>103</sup> *Id.* at 2599.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2600.

<sup>106</sup> *Id.* at 2600-01.

<sup>107</sup> Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military’s Don’t Ask, Don’t Tell Policy*, 63 BROOK. L. REV. 1141, 1143 (1997).

<sup>108</sup> 319 U.S. 624, 642 (1943).

<sup>109</sup> *Id.* at 630. In situations where the freedom asserted collides with the rights asserted by another, the State may determine where the rights of one end and another begin. *Id.*

<sup>110</sup> *Id.* at 633.

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

individual was the center of society, that his liberty was attainable through the absence of governmental restraints.”<sup>112</sup> Today, given the increasing integration of society and expanded government, the First Amendment needs to proscribe affirmative government compulsion, even regarding extreme dissent or disagreement:

[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>113</sup>

Thus, even ideas, identities, or beliefs that strike at the core of the existing order are protected by our antitotalitarian Constitution.

*Wooley v. Maynard*<sup>114</sup> reiterated *Barnette*'s proscription against compelled speech and totalitarian government. Mr. and Mrs. Maynard were Jehovah's Witnesses who viewed New Hampshire's "Live Free or Die" motto, which was embossed on all license plates, as repugnant to their moral, religious, and political beliefs.<sup>115</sup> New Hampshire compelled Mr. and Mrs. Maynard to display a "mobile billboard" that affronted their identity.<sup>116</sup> By refusing to allow them to cover the motto, the State infringed upon the Maynards's "right to refrain from speaking" that, along with "the right to speak," is part of the "broader concept of 'individual freedom of mind.'"<sup>117</sup> The Court explained, "The First Amendment protects the rights of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."<sup>118</sup>

Ultimately, the First Amendment prevents the State from assuming control of individual identity, ideas, and beliefs—including the offensive, different, or contrarian: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>119</sup> The Constitution does not exist to reify and ossify the current order; rather,

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<sup>112</sup> *Id.* at 639.

<sup>113</sup> *Id.* at 642.

<sup>114</sup> *Wooley v. Maynard*, 430 U.S. 705 (1977).

<sup>115</sup> *Id.* at 707.

<sup>116</sup> *Id.* at 715 (internal quotation marks omitted).

<sup>117</sup> *Id.* at 714 (quoting *Barnette*, 319 U.S. at 637).

<sup>118</sup> *Id.* at 715.

<sup>119</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The Court ultimately held that Texas may not criminally prosecute a flag-burning protester despite the state's interest in preserving the flag as a symbol of national unity. *Id.* at 420.

it affords citizens the right to define themselves with respect to matters of personhood and identity.

### III. UNCONSTITUTIONAL TOTALITARIANISM DIRECTED AT TRANS\* PEOPLE

#### A. *Compulsory Gender Identity Is Impermissible Totalitarianism*

The Constitution's protection of the rights to privacy, identity, speech, belief, and life-determining decisions serves as a bulwark against a totalitarian attempt to submerge the individual beneath the State. Therefore, "[t]he danger . . . is a particular kind of creeping totalitarianism, an unarmed *occupation* of individuals' lives . . . [:] a society standardized and normalized, in which lives are too substantially or too rigidly directed."<sup>120</sup> This fear of state power has led to substantive due process rights regarding child-rearing, bodily autonomy regarding abortions, choice in marriage and sexual intimacy, and First Amendment proscriptions on compelled speech. This antitotalitarian principle must also extend to the right to self-define one's gender identity.

#### 1. Compulsory Gender Identity Impermissibly Appropriates Individual Identity, Autonomy, and Self-Definition

The danger of a totalitarianism that appropriates individual autonomy and affirmatively compels people along particular avenues is realized when the State controls trans\* people's identity. As *Meyer*<sup>121</sup> and *Pierce*<sup>122</sup> indicate, the State cannot affirmatively shape citizens to fit its own normative desires. Trans\* people are not "creature[s] of the State";<sup>123</sup> they are individuals with a right to identity.

Just as the criminalization of same-sex intimacy in *Lawrence* sanctioned discrimination against gay people in both government and nongovernment settings,<sup>124</sup> the State's denial of gender identity sanctions the oppression of trans\* people. With incongruent legal documents, trans\* people are at an increased risk of unemployment, harassment, violence,<sup>125</sup> and placement in inappropriate

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<sup>120</sup> Rubinfeld, *supra* note 1, at 784.

<sup>121</sup> See *supra* notes 5–8 and accompanying text.

<sup>122</sup> See *supra* notes 93–95 and accompanying text.

<sup>123</sup> Cf. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (noting that a child is not a "mere creature of the State").

<sup>124</sup> See *supra* note 98 and accompanying text.

<sup>125</sup> GRANT ET AL., *supra* note 24, at 153–155; see also *supra* note 55 and accompanying text.

sex-segregated facilities. Through administrative gender documentation, these laws affirmatively shape the opportunities and security of trans\* people.<sup>126</sup>

Moreover, state restrictions on gender reclassification deny individual autonomy and self-definition. Like choosing one's spouse, which *Obergefell* describes as an identity-defining act,<sup>127</sup> representing one's gender is inherently identity-defining. Gender defines and shapes our interactions: gender affects the pronouns we use to refer to individuals and the way in which we treat them. Thus, gender, even more so than marital status, is a central point around which identity and interpersonal interactions are ordered. Compulsory gender identity thus "do[es] not simply proscribe one act or remove one liberty; [it] inform[s] the totality of a person's life."<sup>128</sup>

## 2. Compulsory Gender Identity Violates the First Amendment Right to Freedom From Compelled Speech

Compelling trans\* people to identify themselves by their assigned legal gender is repugnant to the First Amendment. Together, *Barnette*<sup>129</sup> and *Wooley*<sup>130</sup> delineate two axes by which to evaluate the burden imposed by compelled affirmation: "[1] the degree of linkage (or attenuation) that exists between the message and the speaker; and [2] the opportunity available to the speaker to make clear to others her disagreement with the message she is forced to propound."<sup>131</sup> In *Barnette*, the compelled flag salute was immediate, personal, and required verbal action and a physical salute; however, the students could note their involuntary participation to classmates and teachers.<sup>132</sup> Thus, the weight of the burden in *Barnette* fell on the degree of linkage axis.<sup>133</sup> In *Wooley*, the link between the Maynards and the compelled affirmation on their license plate was less personal and more attenuated: the Maynards were not required to speak the state's motto but were required to display it on their

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<sup>126</sup> See Spade, *supra* note 13, at 747 ("The ubiquity of the assumption that gender classification is a proper category of administrative governance, combined with the economic and political impairment that results from being improperly classified, allows us to analyze disparities in life chances across administratively constructed populations. This provides a way of thinking about inequality and oppression outside of individualizing discrimination frameworks and instead through a biopolitical understanding of the management of populations and the distribution of life chances.").

<sup>127</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597, 2599 (2015) (finding that marriage is a fundamental right and noting that that the "liberties [protected by the Constitution] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs").

<sup>128</sup> Cf. Rubinfeld, *supra* note 1, at 784 (discussing totalitarianism in the anti-abortion and "anti-miscegenation" law context).

<sup>129</sup> See *supra* notes 108–13 and accompanying text.

<sup>130</sup> See *supra* notes 114–18 and accompanying text.

<sup>131</sup> Wolff, *supra* note 107, at 1200.

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

<sup>133</sup> *Id.* at 1200-01.

property.<sup>134</sup> However, the Maynards did not have an ample opportunity to communicate their disagreement with fellow motorists or pedestrians who viewed their license plate; thus, the weight of the burden fell on the latter axis.<sup>135</sup>

Trans\* people are burdened by both axes: they are compelled to affirm a message that is inherently opposed to their identity, and their ability to communicate their disagreement with that compelled affirmation is vitiated by legal gender. When Alexandra Glover attempted to change her driver's license photo and the OMV employee asked what gender she was listed as, Alexandra was effectively compelled to say "male" because of her legal gender.<sup>136</sup> When trans\* people are not allowed to record their true identities on legal documents (or opt out of legal gender altogether), they are compelled to affirmatively identify with a gender that is contrary to their core identity.

Moreover, the government's imposition and maintenance of legal gender supersedes trans\* people's ability to effectively communicate their disagreement with this policy. Although trans\* people can change how others view and understand them through hairstyle, makeup, hormone treatment, surgeries, and outward gender presentation, state actors and private actors can use legal gender to abrogate these efforts.<sup>137</sup> The Louisiana OMV employee denied Alexandra Glover's ability to express her disagreement with her legal gender by saying, "You can't present as a woman if you're listed as a man . . . . If you have makeup on or anything like that you're supposed to take all that off, *because you are actually a man.*"<sup>138</sup> Similarly, Ann Sweeney's prison doctor told her, "You were born a boy, and you're going to stay a boy" before discontinuing her hormone treatments.<sup>139</sup>

The very existence of legal gender provided these state actors with ammunition to vitiate trans\* people's ability to communicate their own gender and express disagreement with gender identity policies. Thus, legal gender implicates both axes of the *Barnette–Wooley* compelled affirmation jurisprudence.

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The government occupies the lives of trans\* people by defining gender without their consent. While not as visibly affirmative as Sparta's communal

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<sup>134</sup> *Id.* at 1201.

<sup>135</sup> *Id.* at 1202.

<sup>136</sup> See *supra* notes 25–28 and accompanying text.

<sup>137</sup> By refusing to recognize trans\* people's gender identities, the State enables ordinary citizens and government officials to reject their identities. As "law can have a causal effect on the development, enforcement, internalization, and reinforcement of norms," FREDERICK SCHAUER, *THE FORCE OF LAW* 145 (2015), requirements that trans\* people are labeled as their assigned birth sex reinforce a misunderstanding that trans\* people cannot self-identify their gender.

<sup>138</sup> Lau, *supra* note 25 (emphasis added) (internal quotation marks omitted).

<sup>139</sup> Rosenblum, *supra* note 30 at 500-01 (internal quotation marks omitted).

child-rearing indoctrination program,<sup>140</sup> the State's legal gender system seeks to compel trans\* people to maintain their legal gender identity or, in some jurisdictions, conform to the "opposite sex" entirely through invasive genital surgery requirements.<sup>141</sup> The State, in many ways, seeks to compel homogeneity among "men" and among "women" without allowing for much variation in how trans\* people express themselves as male, female, genderqueer,<sup>142</sup> gender X,<sup>143</sup> etc. The State uses trans\* bodies to buttress normative conceptions of sex and submerges trans\* people beneath the State for this purpose.

B. *Affording Trans\* People Limited Agency Within a Restrictive Legal Gender Matrix Does Not Eliminate Unconstitutional Totalitarianism*

Merely allowing some trans\* people to reclassify their gender—and restricting such opportunities through onerous requirements—does not ameliorate the government's unconstitutional actions. These schemes still impose gender identity and evince totalitarian control over trans\* people's lives. Moreover, the Constitution forbids coercive conditions on exercising constitutional rights.

First, the government does not allow trans\* people to opt out of the gender system. No jurisdiction in the United States allows individuals to officially identify as "genderqueer" or "Gender X"; one cannot have a driver's license or birth certificate without a gender marker of "male" or "female." Thus, Michel Foucault's view that laws can "interject[] us in a network of norms" aptly captures the experience of trans\* people in the United States today.<sup>144</sup> Both trans\* people and nontrans\* people cannot escape this network.

Second, the government's very act of imposing gender is totalitarianism. Imposing identity is not a legitimate domain of governance. The government does not, for instance, label babies born to Catholics as "Catholic" and wed them to that identity unless they undergo financially burdensome, time-consuming, and potentially unwanted, painful procedures. The government does record some information relevant to identity, like political party affiliation and marital status, but this kind of information is directly related to government practices like

<sup>140</sup> See *supra* text accompanying note 7.

<sup>141</sup> See *supra* notes 26, 38, and accompanying text.

<sup>142</sup> See, e.g., Julie Scelfo, *A University Recognizes a Third Gender: Neutral*, N.Y. TIMES (Feb. 3, 2015), [http://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?\\_r=0](http://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?_r=0) [https://perma.cc/8FL2-D4PJ] (reporting on the University of Vermont's recognition of the genderqueer identity as a third gender, distinct from both male and female).

<sup>143</sup> See Matt Dathan, *Gender Neutral Passports Move a Step Closer to Reality After Labour Backing*, INDEPENDENT (Mar. 20, 2015), <http://www.independent.co.uk/news/uk/politics/gender-neutral-passports-move-a-step-closer-to-reality-10123734.html> [https://perma.cc/3CBM-3YJB] (explaining that the United Kingdom is considering introducing "Gender X" passports for people who identify as neither male nor female (internal quotation marks omitted)).

<sup>144</sup> Rubinfeld, *supra* note 1, at 783.

voting in primary elections and determining tax benefits, and these identities can be changed if and when individuals desire to do so.

Third, the government cannot impose impermissible, coercive conditions that affect access to constitutional rights. The “unconstitutional conditions doctrine . . . guards against a characteristic form of government overreaching and thus serves a state-checking function.”<sup>145</sup> It preserves “spheres of private ordering from government domination” and ensures that citizens receive equal treatment from the government,<sup>146</sup> bolstering the Constitution’s proscription against totalitarianism. Examples of “unconstitutional conditions” include requiring veterans to swear loyalty to the government before receiving a veterans’ property-tax exemption<sup>147</sup> and denying state unemployment benefits to a religious woman who remained unemployed because she would not work on the Sabbath.<sup>148</sup>

Forcing citizens to choose between accepting government benefits (or escaping harm) and exercising constitutional rights equates to a denial of those rights. Thus, in *Sherbert*, the Court found that a state may not condition the receipt of unemployment benefits on a willingness to accept employment that conflicts with one’s religious practices:

[T]he pressure upon [the claimant] to forego [her religious] practice is unmistakable. The ruling [below] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.<sup>149</sup>

Thus, the government does not need to directly target constitutional rights to violate them; restricting access to constitutional rights with unacceptable conditions is also a violation of those rights.

The unconstitutional conditions doctrine highlights the Constitution’s proscription against totalitarianism. These kinds of conditions alter the balance of power between the government and individuals and diminish the individual’s ability to maintain self-governing autonomy.<sup>150</sup> They also “skew the distribution of constitutional rights *among* rightholders”;<sup>151</sup> those who comply with the

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<sup>145</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1506 (1989).

<sup>146</sup> *Id.*

<sup>147</sup> See *Speiser v. Randall*, 357 U.S. 513, 519 (1958) (noting that “the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech,” thereby violating their free speech rights).

<sup>148</sup> *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963).

<sup>149</sup> *Id.* at 404.

<sup>150</sup> Sullivan, *supra* note 145, at 1490.

<sup>151</sup> *Id.*

unconstitutional condition have greater rights than those who do not. Additionally, when these conditions affect those who depend on government assistance or benefits, they “create an undesirable caste hierarchy in the enjoyment of constitutional rights.”<sup>152</sup> Those who depend on government assistance like food stamps and veteran’s benefits are disproportionately affected and thus retain fewer rights than those free from such coercion.

The gender rule matrix<sup>153</sup> constitutes an unconstitutional condition. It forces trans\* people to choose between their bodily autonomy (i.e., avoiding unwanted surgeries or medical interventions) and their right to identity (i.e., self-defining their legal gender). One’s constitutional right to identity cannot be subject to such an egregious condition, nor can one’s right to bodily autonomy. This forced choice is particularly important because the ability to define one’s legal gender—and obtain appropriate legal documents—is fundamental to basic tasks such as obtaining employment, securing housing, and traveling.

Moreover, similar to many other unconstitutional conditions, the gender rule matrix skews rights among the population. It restricts trans\* people’s ability to define their own identity based on a myriad of federal, state, and administrative rules—and thus distributes more rights to those who live in more progressive jurisdictions with more permissive gender identity laws and those who want and can afford gender-confirmation surgery. Additionally, restrictive gender classification rules particularly affect low-income trans\* people who disproportionately rely on government services, interact with the police, are incarcerated, and are less likely to have employment options with nondiscriminatory employers.

By preventing trans\* people from self-defining their gender or opting out of the gender system, the government affirmatively produces identity. The State compels “male” or “female” identity when doing so is contrary to the person’s self-conception. The right to identity resides with the individual; the State cannot conscript people’s bodies into its service by placing them in Spartan barracks,<sup>154</sup> forcing them to bear children,<sup>155</sup> compelling affirmations,<sup>156</sup> criminalizing their sexual identity<sup>157</sup>—or by conditioning privileges on renouncing one’s freedom from such coercion.<sup>158</sup> The Constitution’s antitotalitarian principle prohibits state interjection into identity-formation. Forcing trans\* people to be marked as their assigned gender is totalitarianism. Defining gender is at the

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<sup>152</sup> *Id.*

<sup>153</sup> *See supra* notes 31–39 and accompanying text.

<sup>154</sup> *See supra* notes 7–8 and accompanying text.

<sup>155</sup> *See supra* notes 87–88 and accompanying text.

<sup>156</sup> *See supra* note 147 and accompanying text.

<sup>157</sup> *See supra* notes 96–98 and accompanying text.

<sup>158</sup> *See supra* notes 145–52 and accompanying text.

core of autonomy: individuals must be able to choose their identity or opt out of the gender system. Otherwise, they are submerged beneath the State.

#### IV. OPPORTUNITIES TO ELIMINATE CONSTITUTIONAL VIOLATIONS

##### A. *The Government Must Eliminate or Limit the Use of Legal Gender*

The government may desire some system of legal gender. However, several considerations caution against the overuse of gender markers and government imposition of gender. First, one's assigned gender at birth may not be an appropriate label. For example, the Centers for Disease Control (CDC) identify trans\* women as "men who have sex with men."<sup>159</sup> But a trans\* woman is not a man and she may or may not have sex with men. As a result of this misclassification, there is no nationwide information about the HIV rate within this community, which is likely to be extraordinarily high.<sup>160</sup> The CDC's definition, which uses one's gender assigned at birth, is fundamentally problematic and impedes research on the HIV epidemic within the trans\* community.

Second, legal gender on documents may not be very useful for personal identification. One's outward expression, documented on a photograph, is more effective than an "M" or "F" gender marker. Consider that while some states once included race on driver's licenses, this is no longer considered necessary for identification purposes.<sup>161</sup> Moreover, the government can accurately identify people without gender markers. The Social Security Administration, for instance, effectively documents the lives, disability status, marital status, and employment status of Americans with a nine-digit number that does not reflect gender.<sup>162</sup> Thus, whenever the government considers using gender markers, it should consider whether doing so is necessary, useful or efficient.

Moreover, the government should not impose gender identity at birth. All people—trans\* and nontrans\*—should identify or record their gender at a later time. Germany, for instance, allows parents of intersex children (i.e., children born with physically indeterminate gender characteristics) to record "X" instead

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<sup>159</sup> Spade, *supra* note 13, at 814 (internal quotation marks omitted) (quoting Email from Carrie Davis, Coordinator, Gender Identity Project, to Dean Spade (June 11, 2007)).

<sup>160</sup> *Id.*; see also GRANT ET AL., *supra* note 24, at 80-81 (noting that 2.64% of trans respondents reported HIV infection, over four times the national average of 0.6%, and that 24.90% of black trans respondents reported HIV infection, over forty-one times the national average).

<sup>161</sup> Spade, *supra* note 13, at 805.

<sup>162</sup> The Social Security Administration documents gender. It does not, however, mark legal gender through the Social Security number or on the Social Security card. Social Security numbers are generated without respect to gender; merely viewing a Social Security number alone does not reveal gender. *Social Security Number Randomization*, SOC. SECURITY, <https://www.ssa.gov/employer/randomization.html> [<https://perma.cc/NPV4-84KY>].

of “male” or “female” on birth certificates.<sup>163</sup> These children are not expected to remain “Gender X” forever but are expected to choose the “male” or “female” identity at some point in the future.<sup>164</sup> Our government could allow all children to select a gender when they are ready or even permit them to remain “Gender X.” For trans\* people, imposing an incorrect gender identity will increase the long-term risk of depression, ostracism, intense discrimination, and suicide.<sup>165</sup> Therefore, the convenience of marking all children as “male” or “female” at birth is simply not worth the disproportionate and devastating consequences imposed on the approximately one million trans\* people in the United States.<sup>166</sup>

Moreover, there are few circumstances in which the government actually needs to know one’s gender.<sup>167</sup> Gender is irrelevant to the provision of most government services. Sex-segregated prison facilities<sup>168</sup> and the Selective Service System<sup>169</sup> are among the few areas where the government posits that it cannot relate to individuals on a gender-neutral basis.<sup>170</sup> And if the government must keep these systems strictly organized by gender, it could adopt a rule for them that does not vitiate the agency of trans\* people.

<sup>163</sup> Jacinta Nandi, Opinion, *Germany Got It Right by Offering a Third Gender Option on Birth Certificates*, GUARDIAN (Nov. 10, 2013, 6:30 PM), <http://www.theguardian.com/commentisfree/2013/nov/10/germany-third-gender-birth-certificate> [<https://perma.cc/M8Y9-ASVR>].

<sup>164</sup> *Id.*

<sup>165</sup> See *supra* notes 24, 55–56 and accompanying text.

<sup>166</sup> See Claire Cain Miller, *The Search for the Best Estimate of the Transgender Population*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/upshot/the-search-for-the-best-estimate-of-the-transgender-population.html> [<https://perma.cc/2X3X-YVXZ>] (reporting that approximately 700,000 American adults identify as trans (citing GARY J. GATES, THE WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 6 (2011))). The actual number of trans\* people in the United States is likely higher since many children are trans\*. See Christin Scarlett Milloy, *Don’t Let the Doctor Do This to Your Newborn*, SLATE: OUTWARD (June 26, 2014, 11:44 AM), [http://www.slate.com/blogs/outward/2014/06/26/infant\\_gender\\_assignment\\_unnecssary\\_and\\_potentially\\_harmful.html](http://www.slate.com/blogs/outward/2014/06/26/infant_gender_assignment_unnecssary_and_potentially_harmful.html) [<https://perma.cc/796B-PH82>] (explaining that imposing legal gender on an infant entails a 1-2% risk of harming the child since 1-2% of infants will ultimately identify as trans).

<sup>167</sup> See Spade, *supra* note 13, at 814-16 (suggesting that gender tracking might be helpful on the institutional level with respect to initiatives like maintaining public health data and information about affirmative action programs).

<sup>168</sup> See *supra* note 35 and accompanying text.

<sup>169</sup> The Selective Service System requires all men ages eighteen to twenty-five to register for the draft. *Who Must Register*, SELECTIVE SERV. SYS., <https://www.sss.gov/Registration-Info/Who-Registration> [<https://perma.cc/7NWM-PE27>] [hereinafter *Who Must Register*]. Congress has yet to require women to register with the Selective Service. *Women and the Draft*, SELECTIVE SERV. SYS., <https://www.sss.gov/Registration/Women-And-Draft> [<https://perma.cc/7SFB-5Y8K>]. With regard to trans\* people, the Selective Service System requires transgender women to register for the draft, but does not require transgender men to register. *Who Must Register, supra*.

<sup>170</sup> Issues concerning exclusive use of sex-segregated prison facilities and the male-only draft are beyond the scope of this Comment.

B. *The Government Must Respect Self-Determined and Self-Expressed Identity*

Regardless, even if the government documents gender, the right of trans\* people to self-define their gender identity is protected by the Constitution. First, self-identification is already an appropriate means of defining individual identity, even when government recognition is involved. For example, an individual's response to the race question on the United States Census is entirely self-determined.<sup>171</sup> A return to nineteenth century "racial determination trials"—that determined whether individuals were black or white for the purpose of determining whether they were slaves—would be impermissible.<sup>172</sup> The government recognizes that affirmatively producing racial identity is not a legitimate act.

The government also does not rigidly define sexual orientation. *Obergefell* permits gays and lesbians to marry same-sex partners because their "immutable nature dictates that same-sex marriage is their only real path to this profound commitment."<sup>173</sup> But the Court does not require individuals to be only same-sex oriented before they can marry same-sex partners.<sup>174</sup> A bisexual man can marry a man. In fact, a straight man can marry a man. The Court thus allows people to self-define through marriage, but does not impose intrusive requirements regarding sexual orientation.<sup>175</sup>

States already recognize certain identity-based claims, like adverse possession and common law marriage, based on self-declaration and outward presentation (i.e., a "performance" of identity).<sup>176</sup> To adversely possess property, one must live on land in a manner that courts presume an owner would.<sup>177</sup> The acts cannot be "isolated or infrequent—continual, ritualized repetition is required."<sup>178</sup> Similarly, some states recognize common law marriages when individuals hold themselves out as married. Rhode Island, for example, recognizes common law marriages when the parties seriously intended to enter into a marital relationship and their conduct leads the community to

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<sup>171</sup> *Race*, U.S. CENSUS BUREAU, <http://www.census.gov/topics/population/race/about.html> [<https://perma.cc/BXZ6-HH5H>] (last updated July 8, 2013).

<sup>172</sup> See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 900-01 (2002) (discussing racial determination trials).

<sup>173</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

<sup>174</sup> See *supra* note 77 and accompanying text.

<sup>175</sup> Many individuals are neither exclusively opposite-sex nor same-sex oriented. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 380-81 (2000) (discussing the Kinsey scale, which conceptualizes sexual orientation as a continuum).

<sup>176</sup> Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 613-16 (2005).

<sup>177</sup> *Id.* at 614.

<sup>178</sup> *Id.*

view them as married.<sup>179</sup> The intent and belief elements “are demonstrated by ‘inference from cohabitation, declarations, reputation [among the community], and other competent circumstantial evidence.’”<sup>180</sup>

If the government must, in compelling circumstances, interact with a citizen based on gender, it could determine gender through proclaimed identity and the “adverse possession” of gender.<sup>181</sup> For instance, if the individual presents as female in regular, everyday life, she should be regarded as female. This would eliminate any risk that a male might claim to be a woman merely to avoid the draft or placement in a male prison facility. Of course, this determination should defer to the individual’s identity, recognize the multiplicity of gender identities, and should not be used to produce and ossify male or female gender norms.

In these frameworks of identity, individuals claim a status by personal declaration and “hold[ing] her or himself out to the community” as an owner or spouse.<sup>182</sup> After all, “these labels are fundamentally about communication to the public at large.”<sup>183</sup> Gender identity is another identity characteristic, like owner or spouse, which can be determined by individual proclamation and public presentation. This analogy does not propose that trans\* people should have to wait years to obtain “adverse possession” or “common law” identity. Rather, the comparison to common law marriages and adverse possession proves that there are legal avenues to control one’s own identity and status—and obtain government recognition—without navigating intrusive and demeaning legal requirements.

Moreover, the government’s respect for self-proclaimed religious beliefs, although not entirely analogous given First Amendment religious protections, is still informative here. When a claimant for religious liberty comes before a court, the government defers to and respects her religious identity. Under the Establishment Clause and the Free Exercise Clause of the First Amendment,<sup>184</sup> a factfinder can evaluate whether a religious practice is sincere, but may not

<sup>179</sup> *Smith v. Smith*, 966 A.2d 109, 114 (R.I. 2009) (citing *Sardonis v. Sardonis*, 261 A.2d 22, 24 (R.I. 1970)); see also *Lewis v. Anderson*, 173 S.W.3d 556, 559 (Tex. App. 2005) (describing Texas’s requirements for recognizing a common law marriage).

<sup>180</sup> *Smith*, 966 A.2d at 114 (citing *Sardonis*, 261 A.2d at 24).

<sup>181</sup> See *Clarke*, *supra* note 176, at 592 (“[O]ne could imagine a doctor determining sex based on . . . whether the claimant held out a consistent gendered image to the community on a continuous basis, whether or not the community accepted that image, and whether or not the claimant executed the legal formalities deemed appropriate to his or her purported sex.”).

<sup>182</sup> *Id.* at 614.

<sup>183</sup> *Id.*

<sup>184</sup> See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

inquire into the truthfulness of religious beliefs.<sup>185</sup> The First Amendment both “forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship” and “safeguards the free exercise of the chosen form of religion”—even those that are “rank heresy to followers of the orthodox faiths.”<sup>186</sup> Additionally, since an inquiry into the sincerity of a person’s religious beliefs is “purely a subjective question”<sup>187</sup> and inherently speculative, such inquiries are “handled with a light touch, or ‘judicial shyness.’”<sup>188</sup> In practice, “[s]incerity is generally presumed or easily established” based on the words or actions of the claimant.<sup>189</sup> The government should defer to people’s sincerely held gender identities—and not investigate or govern them—in the same way that it defers to the truthfulness or reasonableness of sincerely held religious beliefs.

Furthermore, courts afford religious claimants protection for their sincerely held beliefs despite inconsistent behavior<sup>190</sup> and even if “a person does not adhere steadfastly to every tenet of his faith.”<sup>191</sup> Thus, the government should not impose gender markers upon individuals and deny them the ability to reclassify their gender or opt out of gender altogether. Similarly, the government should not require complete adherence to the normative biological traits of another gender as a condition for gender reclassification. The government does not require the religious beliefs of claimants to adhere to strict orthodoxy or catechism; trans\* people should similarly be able to define their identity consistent with their own understanding of gender, not a normative prescription of gender.

Finally, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court accepted the legitimacy of the petitioners’ claimed religious objection to an insurance mandate

<sup>185</sup> See *United States v. Ballard*, 322 U.S. 78, 86 (1944) (“[W]e do not agree that the truth or verity of respondents’ religious doctrines or beliefs should have been submitted to the jury.”).

<sup>186</sup> *Id.* at 86 (internal quotation marks omitted) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

<sup>187</sup> *Witmer v. United States*, 348 U.S. 375, 381 (1955).

<sup>188</sup> *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013) (internal quotation marks omitted) (quoting *Moussazadeh v. Tex. Dept. of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012)); see also Andrew Karp, “A Sincerely Held Sexual Belief”: *What LGBT Refugee and Asylum Law Can Learn From Free Exercise Claims and Post-DOMA Immigration Benefits for Same-Sex Couples*, 14 *DUKEMINIER AWARDS: BEST SEXUAL ORIENTATION & GENDER IDENTITY L. REV. ARTICLES*, 2015, at 1, 16-18 (“Insofar as sexuality and religion are highly subjective concepts, difficult to prove by way of objective evidence, it also makes sense that courts analyze similarly whether an individual’s sexual identity or religious beliefs are entitled to legal protection.”).

<sup>189</sup> *Moussazadeh*, 703 F.3d at 791.

<sup>190</sup> Karp, *supra* note 188, at 17 (“A finding of sincerity does not require perfect adherence to [an individual’s] beliefs . . . , and even the most sincere practitioner may stray from time to time. [A] sincere religious believer doesn’t forfeit his religious rights because he is not scrupulous in his observance . . . .” (alteration in original) (internal quotation marks omitted) (quoting *Moussazadeh*, 703 F.3d at 791-92)).

<sup>191</sup> *Id.* at 17 n.122 (quoting *Reed v. Faulker*, 842 F.2d 960, 963 (7th Cir. 1988)).

that required companies to provide employees with coverage for contraceptives: “[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction.’”<sup>192</sup> Trans\* people could also benefit from a rule under which sincerely held gender identities of “honest conviction” are recognized by the government, regardless of whether government officials believe those gender identities are “correct.” Ultimately, gender identity, like religious identity, must remain with the individual to define and express.

The deference to religious claimants stands in stark contrast to the lack of deference shown to trans\* claimants. For example, trans woman Janet Heilig Wright was denied the right to change her legal gender despite letters from her social worker and doctor affirming her female identity, hormone treatment regimen, and hormonal castration.<sup>193</sup> The court was unsatisfied with Janet’s claim and referred to this “factual evidence” as “rather skimpy.”<sup>194</sup> The State would not change her legal gender unless she underwent irreversible genital surgery.<sup>195</sup> Moreover, the court continued to use masculine pronouns to refer to Janet, explaining, “We do so not to disparage petitioner’s *undoubtedly sincere belief* that his transition is, indeed, complete, but simply to be consistent with our conclusion that he has yet to offer sufficient evidence to warrant that determination as a legal manner.”<sup>196</sup>

The judicial branch also disparaged the gender identity of trans woman Ashley Diamond, who was placed in a male prison facility only to be denied medical treatment and repeatedly sexually assaulted.<sup>197</sup> In the first line of the opinion dismissing the defendants’ motions to dismiss her claims, the court noted, “Plaintiff Ashley Diamond alleges she is a transgender woman.”<sup>198</sup> Thus, Ashley’s gender identity was apparently only “allege[d].” Moreover, in a footnote accompanying “she,” the court explained, “All parties refer to Diamond with feminine pronouns. Consequently, the Court does the same. This should suggest nothing other than consistency.”<sup>199</sup> In doing so, the judge vitiated Ashley’s right to identity despite the clear support in the record that Ashley had “strongly identified” as female since childhood, expressed herself

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<sup>192</sup> 134 S. Ct. 2751, 2779 (2014) (alteration in original) (quoting *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981)).

<sup>193</sup> *In re Heilig*, 816 A.2d 68, 70-71 (Md. 2003).

<sup>194</sup> *Id.* at 70.

<sup>195</sup> *See id.* at 87 (noting that—on remand—Janet had the burden to present sufficient evidence of having “completed a permanent and irreversible change from male to female”).

<sup>196</sup> *Id.* at 70-71 n.1 (emphasis added).

<sup>197</sup> *Diamond v. Owens*, 131 F. Supp. 3d 1346, 1353-58 (M.D. Ga. 2015).

<sup>198</sup> *Id.* at 1353 (footnote omitted).

<sup>199</sup> *Id.* at 1353 n.1.

as female for years, and received feminizing hormone treatment for over seventeen years.<sup>200</sup>

Finally, the Supreme Court's description of George and Maxine Maynard in *Wooley v. Maynard*<sup>201</sup> evinces the disparity between judicial deference to religious identity and judicial scrutiny of gender identity. The first time the Maynards are mentioned, Chief Justice Berger, writing for the Court, noted, "Appellees George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith."<sup>202</sup> They did not merely *allege* to be Jehovah's Witnesses. Similarly, the Court did not refer to them as Jehovah's Witnesses only to maintain consistency with the parties' opinions of the Maynards's faith. Instead, the Court accepted their sincerely held religious identity as proclaimed. Likewise, courts must accept the sincerely held gender identities proclaimed by trans\* people.

As a start, maybe trans\* people should cover the gender on their legal documents with tape like George and Maxine Maynard covered "Live Free or Die" on their license plate.<sup>203</sup> If the United States Constitution forbids the government from forcing George and Maxine to display a state motto that conflicts with their sincerely held beliefs, then it should forbid the government from forcing trans\* people to display gender markers on their driver's licenses that conflict with their sincerely held beliefs.

#### CONCLUSION

The government should not impose gender markers on legal documents, inspect the veracity of trans\* people's gender identity, or condition changes of legal identity on invasive surgery requirements. These acts impermissibly occupy the lives of trans\* people and compel identity. Restrictions or bans on gender reclassification do not simply constrain one liberty or remove one freedom; instead, they place unconstitutional conditions on the right to identity, affirmatively affect trans\* people's life chances, use trans\* people's bodies to buttress normative gender conceptions, and deny trans\* people's sincerely held identities.

The imposition of gender identity inverts the typical constitutional relationship between the individual and the State. Under the Constitution, the individual self-regulates and self-governs regarding matters of personhood and identity, and the State restricts or regulates particular liberties to promote ordered liberty and justice. But the imposition of gender identity posits the State as having full control over the individual's body, life, and identity. The government

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<sup>200</sup> *Id.* at 1355 (internal quotation marks omitted).

<sup>201</sup> *See supra* notes 114–18 and accompanying text.

<sup>202</sup> *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

<sup>203</sup> *Id.* at 707-08 & n.4.

and its rule matrix do not provide ordered liberty or justice for trans\* people; the government actually denies trans\* people their constitutional right to identity.

Ultimately, the Constitution proscribes totalitarianism. The State cannot enforce or compel identity, appropriate or conscript people into the service of the State's normative, ideological goals, or restrict one's ability to engage in essential, self-defining acts. Any such restriction "do[es] violence to both letter and spirit of the Constitution."<sup>204</sup> For trans\* people and the Constitution alike, we must eliminate totalitarian gender identity laws.

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<sup>204</sup> *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).