

12-20-2018

Recognizing "X": A Comparative Analysis of the California Gender Recognition Act--Identifying the Limitations and Conceptualizing Possible Solutions

Mark Angelo Simpliciano

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Simpliciano, Mark Angelo (2018) "Recognizing "X": A Comparative Analysis of the California Gender Recognition Act--Identifying the Limitations and Conceptualizing Possible Solutions," *California Western Law Review*: Vol. 55 : No. 1 , Article 9.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol55/iss1/9>

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

**RECOGNIZING "X": A COMPARATIVE ANALYSIS OF THE
CALIFORNIA GENDER RECOGNITION ACT—IDENTIFYING THE
LIMITATIONS AND CONCEPTUALIZING POSSIBLE SOLUTIONS**

TABLE OF CONTENTS

I. INTRODUCTION	316
II. WHY GENDER-NEUTRAL OPTIONS MATTER AND THE RIGHT TO SELF-IDENTIFY ONE’S GENDER	320
A. <i>Public Scrutiny and Harassment</i>	320
B. <i>The Due Process Right to Self-Identify</i>	321
1. <i>Lawrence v. Texas</i>	322
2. <i>Obergefell v. Hodges</i>	323
C. <i>The First Amendment’s Role in Self-Identification</i>	323
III. A COMPARATIVE APPROACH	325
A. <i>Australian Model</i>	326
B. <i>German Model</i>	330
C. <i>Indian Model</i>	332
IV. CONCEPTUALIZING POSSIBLE SOLUTIONS TO BEST SERVE AND PROTECT THE NON-BINARY COMMUNITY	334
A. <i>Abolition: De-emphasizing Gender Identity Markers</i>	335
B. <i>The U.S. Supreme Court Must Decide on One’s Right to Self-identify One’s Gender</i>	337
V. CONCLUSION.....	338

I. INTRODUCTION

Any application for a driver's license, birth certificate, or other state-issued identification document contains a "Sex" field with two boxes—one marked "M" and the other marked "F." In theory, these markers provide most people with an opportunity to accurately self-identify. What about individuals who do not identify as either male or female? Binary gender classifications fail to adequately represent the comprehensive spectrum and fluid nature of gender identity.¹ Binary gender markers reinforce the notion that identity is a simple bifurcation and fails to adequately represent a full range of identities.² Furthermore, the use of binary gender markers reinforces the notion that gender identity is a simple dichotomy that cannot divide further.³ This narrow characterization of gender and sex is detrimental to those who do not identify with one of the two institutionally created gender options.⁴ As a result, these displaced individuals are compelled to choose between the two binary genders.

1. Lauren Bishop, *Gender and Sex Designations for Identification Purposes: A Discussion on Inclusive Documentation for a Less Assimilationist Society*, 30 WIS. J. L. GENDER & SOC'Y 131, 149 (2015).

2. *See id.* (describing how the binary gender model used by governmental agencies does not account for the fluid nature of gender).

3. *Id.*

4. *See id.* at 148-49 (noting the experience of one trans individual who faces depression and stress because their appearance does not "match" the gender on their driver's license).

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 317

Individuals⁵ identify themselves as non-binary⁶ because they do not see themselves as “wholly male” nor “wholly female”⁷ but, rather, a combination of the two—or none at all.⁸ Non-binary individuals are disregarded when state governments fail to provide them the opportunity to accurately identify themselves as non-binary on essential documents like driver’s licenses and birth certificates.⁹ Fortunately, the United States and other countries have heard the many voices from non-binary advocates and are slowly progressing toward legally recognizing non-binary individuals.¹⁰

In the United States, several states recently started recognizing non-binary gender through state-issued documents.¹¹ Specifically, California has become the newest advocate for non-binary legal recognition as demonstrated by the California Gender Recognition

5. According to a 2015 online survey, the “National Center for Transgender Equality found that [nearly] 35% of the 28,000 transgender respondents identified as non-binary.” Additionally, given the estimated number of transgender adults in the U.S. is estimated to be between 700,000 to 1 million, if 35% of people in that range identified as non-binary adults that would make between 245,000 and 350,000 non-binary individuals in the U.S. See William Cummings, *When Asked Their Sex, some are Going with Option ‘X,’* USA TODAY (June 21, 2017, 6:59 PM), <https://www.usatoday.com/story/news/2017/06/21/third-gender-option-non-binary/359260001>; see also SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 43–44 (Nat’l Ctr for Transgender Equal. ed., 2016) (finding 31% of 27,715 respondents in a 2015 U.S. Transgender Survey identified as non-binary).

6. See KAREN MOULDING, SEXUAL ORIENTATION AND THE LAW § 10:1 1 (National Lawyers Guild et al. eds., 2017) (describing non-binary or genderqueer may refer to “someone who does not identify as either male or female”). While, “*gender nonconforming* may be used to describe a person whose gender expression is different from that typically associated with their gender—for example, a masculine woman or a feminine man.” *Id.*

7. Bishop, *supra* note 1, at 149.

8. JAMES ET AL., *supra* note 5, at 7. The National Center for Transgender Equality defines non-binary “to describe people whose gender is not exclusively male or female, including those who identify as no gender, as a gender other than male or female, or as more than one gender.” *Id.*

9. See Bishop, *supra* note 1, at 148-49 (discussing the limitations of offering only two gender markers on government documents).

10. See *infra* Part III.

11. See, e.g., Cummings, *supra* note 5 (observing Oregon, Washington, and Washington D.C. are the latest jurisdictions to enact similar laws recognizing non-binary individuals through state-issued documents).

Act.¹² Under this statute, California residents are able to identify as non-binary, by marking themselves as “X,” on state birth certificates, driver’s licenses, and other state-issued identity documents.¹³ This legislative measure was influenced by non-binary gender activists, including Sara Kelly Keenan.¹⁴ Keenan became the first California resident to change hir¹⁵ gender to non-binary after living the majority of hir life stuck in a gender with which zhe did not identify with. Keenan was born intersex.¹⁶ For the first three weeks zhe was classified as a boy, but was later issued a female birth certificate. Keenan’s parents and doctors kept hir intersex status a secret and told hir to take hormone replacement therapy as an adolescent because zhe was unable to produce female hormones.¹⁷ Since, Keenan was prevented from knowing the truth of hir identity, Keenan did not realize hir true self was outside the scope of the binary gender norms until zhe was in hir fifties.¹⁸ Following in Keena’s footsteps was Star Hagen-Esquerria. Hagen-Esquerria came out to hir family and friends as non-binary at age

12. 2017 Cal. Legis. Serv. Ch. 853 (S.B. 179) (West).

13. See James M. Nichols, *California Becomes First State to Legally Recognized a Third Gender*, HUFFINGTON POST (Oct. 17, 2017, 12:45 PM), https://www.huffingtonpost.com/entry/california-third-gender-option_us_59e61784e4b0ca9f483b17b9 (discussing that residents will now be able to “choose a third, non-binary gender category on California state-issued IDs, birth certificates and driver’s licenses”).

14. See Mary E. O’Hara, *Nation’s First Known Intersex Birth Certificate Issued in NYC*, NBC NEWS (Dec. 29, 2016, 8:02 AM), <https://www.nbcnews.com/feature/nbc-out/nation-s-first-known-intersex-birth-certificate-issued-nyc-n701186> (noting Keenan “made headlines when a judge allowed her to become the first California resident to change her gender to ‘non-binary’” following this decision, the state of New York issued Keenan a new birth certificate which finally said “intersex”).

15. Out of respect for non-binary individuals’ preference of using gender neutral pronouns—other than he or she—this note will use pronouns like *hir* (instead of his or her) and *zhe* (instead of he or she). See KYLA BENDER-BAIRD, *TRANSGENDER EMPLOYMENT EXPERIENCES: GENDERED PERCEPTIONS AND THE LAW* 158 n.26 (State Univ. of N.Y. Press ed., 2011) (noting Queer activists have developed an alternative language to accommodate sex and gender diversity by “offer[ing] a third [pronoun] option for those who do not fit in the gender binary”).

16. MOULDING, *supra* note 6, § 10:1 (“An *intersex* person is . . . born with physical characteristics that do not consistently fit the typical characteristics of male or female bodies.”).

17. O’Hara, *supra* note 14.

18. *Id.*

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 319

fifteen.¹⁹ Now, only seventeen years-old, Hagen-Esquerria lives in constant fear and worry as zhe begins to transition into hir early adulthood and applies for hir driver's license, and fills out hir college applications and other identification documents.²⁰

Keenan's and Hagen-Esquerria's stories, and many alike, have inspired state legislators like Toni Atkins and Scott Wiener to advocate for change.²¹ In January 2017, Atkins and Wiener addressed the issue of legal recognition for the non-binary community by introducing the California Gender Recognition Act (known at the time as SB-179).²² California Governor Jerry Brown signed the bill in October 2017. Non-binary advocates celebrated this monumental legislation by claiming it would eliminate many unnecessary challenges thousands face obtaining state-issued identification documents.²³

This comment compares California's legal recognition of non-binary individuals with other international models, and addresses whether California's implementation of a non-binary option on state-issued identification documents protects and serves the interests of the non-binary community. Part II discusses the importance of a non-binary option and the right to self-identify one's gender. Part III analyzes the approaches of various countries that have passed non-binary gender identification laws prior to California, which is essential for determining what limitations may arise under the California Gender Recognition Act. Part IV concludes that the California law does not go far enough in protecting and serving the interests of the non-binary

19. See Jessica Testa, *California is Ready to Recognize a Third Gender—Is the Rest of the Country?*, BUZZFEED NEWS (May 27, 2017, 7:04 AM), https://www.buzzfeed.com/jtes/california-non-binary-gender-identity-recognition?utm_term=.rk1BvNaEL#.px11wv3Ym (noting Hagen-Esquerria felt “almost fraudulent, writing down a name [zhe] barely recognized” when filing out government documents with hir legal name).

20. *Id.*

21. See *id.* (discussing Atkins and Wiener support of the Transgender Law Community and noting the “significance in non-binary recognition”).

22. *Id.*

23. See Mary Bowerman, *Female, Male, or Non-Binary: California Legally Recognizes a Third Gender on Identification Documents*, USA TODAY (Oct. 19, 2017, 8:48 AM), <https://www.usatoday.com/story/news/nation-now/2017/10/19/female-male-non-binary-california-legally-recognizes-third-gender-identification-documents/779188001> (discussing the positive impact the Gender Recognition Act will have on the non-binary gender community).

community, and highlights other solutions that would serve the non-binary community more effectively.

II. WHY GENDER-NEUTRAL OPTIONS MATTER AND THE RIGHT TO SELF-IDENTIFY ONE'S GENDER

To begin a comparative analysis of California's legislative efforts, it is essential to understand why having a non-binary option on government issued documents is necessary to society. This understanding will provide an in-depth analysis of the purpose of the California statute and the importance of protecting the rights and freedoms of the non-binary community.

A. Public Scrutiny and Harassment

First, non-binary legal recognition is crucial because individuals are scrutinized and face many challenges as a result of having to identify as either male or female.²⁴ As a result of the lack of identity options, individuals are forced to "assimilate or conform" to an identity other than their own.²⁵ Further, these individuals are suppressed from showing their true self-identity, and often suffer from gender dysphoria²⁶ and depression because their appearance does not "match[]" their sex or gender designation" on their documents.²⁷ Additionally, when non-binary individuals have identity documents that do not reflect their self-identity and presentation, they are

24. See Brian T. Ruocco, Comment, *Our Antitotalitarian Constitution and the Right to Identity*, 165 U. PA. L. REV. 193, 213 (2016) ("[T]he 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, [and] violence . . .").

25. Bishop, *supra* note 1, at 138.

26. *Id.* at 148. "The 'critical element' of gender dysphoria is 'the presence of clinically significant distress associated' in persons who identify as other than the gender assigned them at birth. According to the American Psychiatric Association, '[g]ender dysphoria is manifested in a variety of ways, including strong desires to be treated as the other gender or to be rid of one's sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender.'" *Id.* at 148 n.85 (citing Gender Dysphoria, AM. PSYCHIATRIC PUB. (2013), available at <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>).

27. Bishop, *supra* note 1, at 148.

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 321

scrutinized for not conforming to societal norms, which leads to discrimination, embarrassment, and other issues dealing with safety.²⁸ In a 2015 survey by the National Center for Transgender Equality, “nearly one-third (32%) of respondents who have shown an ID with a name or gender” that did not accurately align with their external gender appearance experienced disparate treatment.²⁹ This negative treatment included verbal harassment, denial of services and benefits, and even physical assault.³⁰ Furthermore, the need for non-binary state-issued IDs and documents will legally recognize non-binary individuals, removing the stigma and embarrassment that results from an ID that is inconsistent with how they self-identity.

B. The Due Process Right to Self-Identify

The right of all individuals to self-identify deserves adequate constitutional protection.³¹ The right to self-identify is recognized by the U.S. Supreme Court and protected under the U.S. Constitution.³² Therefore, the lack of a non-binary option on state-issued identification documents should be characterized as infringing on that very right.³³

28. See Corinne Segal, *The Complications of ID for Non-Binary people—and how it Could Change Soon*, PBS NEWS HOUR (Aug. 21, 2016, 1:01 PM), <https://www.pbs.org/newshour/nation/ids-nonbinary-people> (discussing the impact of non-binary identification documents and noting “having an accurate ID could mean the difference between safety and harassment”); see also JAMES ET AL., *supra* note 5, at 19 (noting the increased discrimination and vulnerability experience by the transgender community).

29. JAMES ET AL., *supra* note 5, at 9.

30. *Id.*; see also Cummings, *supra* note 5.

31. This article will not attempt to do a complete Due Process analysis of the constitutionality of the argued right to self-identity by choosing one’s gender. Rather, this article will present arguments in favor of constitutional protection of one’s right to self-identify. See, e.g., Ruocco, *supra* note 24, at 207–11 (applying a substantive due process analysis framework to the right to self-identify).

32. See Katie Reineck, *Running from the Gender Police: Reconceptualizing Gender to Ensure Protection for Non-Binary People*, 24 MICH. J. GENDER & L. 265, 306 (2017) (advocating for the Supreme Court to recognize the “right to self-identify one’s gender under the Fourteenth Amendment” and finding the Supreme Court has held the right to determine one’s “personal identity and beliefs” is protected under the Fourteenth Amendment).

33. See *id.* at 308 (discussing the Supreme Court’s decision to characterize marriage as a fundamental right and a “choice that shapes personal identity”).

The ability to define one's own identity is central to one's autonomy.³⁴ Accordingly, when state governments only allow for binary gender options, the interests and autonomy of those who wish to identify as non-binary are infringed.³⁵ Therefore, Supreme Court precedent could be interpreted as suggesting the right to self-identify one's gender be regarded as a fundamental right, protected under the Due Process Clause.³⁶

1. *Lawrence v. Texas*

In *Lawrence v. Texas*, the U.S. Supreme Court struck down a Texas law that prohibited same-sex sodomy.³⁷ The Court highlighted the importance of self-identity by establishing that "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."³⁸ In that case, the Court's notion of self-identity was centered on consenting adults and their choice of sexual conduct.³⁹ However, the Court's holding introduces a general emphasis on protecting individuals' "most intimate and personal choices a person may make in a lifetime . . . central to one's personal dignity and autonomy . . . protected by the Fourteenth Amendment."⁴⁰ It follows

34. See Ruocco, *supra* note 24, at 204 (characterizing the right the self-identify as "central to [one's] autonomy" and noting the state undermines this right by not affording non-binary gender individuals with this right); see also Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 388-89 (2014) (noting it is hard to envision anything "more personal and autonomous than defining one's own identity").

35. See Ruocco, *supra* note 24, at 204.

36. Reineck, *supra* note 32, at 306 (noting "a Due Process victory" by holding the right to self-identify gender as a fundamental right "would necessarily prevent courts from refusing protection to non-binary plaintiffs"); see, e.g., Ruocco, *supra* note 24, at 207 (discussing the Supreme Court's holding that "the ability to choose a partner in marriage is a fundamental right").

37. See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (presenting the question of the "validity of a Texas statute [which made] it a crime for two persons of the same sex to engage in certain intimate conduct").

38. *Id.*

39. *Id.*; see also Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 877 (2005) (discussing the holding in *Lawrence*).

40. *Lawrence*, 539 U.S. at 578 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 323

that a person's choice to self-identify one's gender is as intimate and personal as the choice of one's sexual partner.⁴¹

2. Obergefell v. Hodges

The significance of protecting an individual's self-autonomy was also upheld in the landmark same-sex marriage case, *Obergefell v. Hodges*.⁴² In *Obergefell*, the Court emphasized that the Due Process Clause of the Fourteenth Amendment "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."⁴³ Although the issue the Court dealt with was an individual's choice to marry another person of the same-sex, the choice of one's gender identity—even outside of the binary scale—is central to one's self-identity and should not be infringed by the state.⁴⁴ Nevertheless, the Court's idea that self-identification is a fundamental right is justified by the belief that decisions regarding the core of an individual should be left to the individual. The government should play no role in limiting an individual's right to self-identify their gender.⁴⁵

C. The First Amendment's Role in Self-Identification

Additionally, the right to self-identify gender is protected under the First Amendment.⁴⁶ The First Amendment prohibits the government

41. Greenberg, *supra* note 39, at 881.

42. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) (holding that the right to marry is a fundamental right protected under the Due Process and Equal Protection clauses of the Fourteenth Amendment, thus same-sex couples may not be deprived of the right to marry).

43. *Id.* at 2597.

44. Reineck, *supra* note 32, at 306-07 (noting the Supreme Court has a "firm belief that decisions that get at the core of who an individual is should be left to the individual alone").

45. *Id.* at 307.

46. See Ruocco, *supra* note 24, at 211 (discussing the First Amendment is rooted in the idea that one cannot be compelled to project a false portrayal personal identity or beliefs); see also 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) (finding the First Amendment protects one's "right to not be compelled to make a false affirmation of one's identity, ideas or beliefs").

from compelling individuals to speak, believe, or think a certain way.⁴⁷ Therefore, when non-binary individuals can only identify as male or female on state-issued documents they are denied the ability to self-identify as non-binary, which undermines the First Amendment's protection against compelled speech.⁴⁸ This constitutional protection against compelled speech is rooted in the U.S. Supreme Court case, *West Virginia State v. Barnette*, in which the Court struck down local regulations requiring children to salute the American flag in public schools.⁴⁹ The Court highlighted that the core of the First Amendment is the freedom of identity, ideas, and beliefs, which can only be infringed if there is "clear and present danger."⁵⁰ It is doubtful that allowing non-binary persons to be legally recognized would bring a present danger. Therefore, compelling non-binary individuals to identify themselves through only two gender options undermines the protections of the First Amendment.⁵¹ When individuals are prevented from recording their "true identities on legal identification documents (or opt out of legal gender altogether), they are compelled to affirmatively identify with a gender that is contrary to their core identity."⁵²

Today, only a handful of states have legally recognized non-binary individuals, indicating the fundamental right to self-identify one's gender has not been widely accepted nor recognized. This sad reality undermines the premise, recognized in cases like *Lawrence*, that a "[s]tate cannot condition protection under the law on an individual's conformity with how the state believes people should identify."⁵³ As stated, it is impossible and imprudent to characterize the right to one's self-identity as not including the right to self-identify gender. The

47. Ruocco, *supra* note 24, at 211.

48. *Id.* at 214 (noting state restrictions on gender identification prevent and individual from be autonomous and having their own sense of self).

49. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). In *Barnette*, the flag salute was considered a symbolic form of speech, protected under the First Amendment. *Id.*

50. *Id.* at 633.

51. Ruocco, *supra* note 19, at 214.

52. *Id.* at 215.

53. Reineck, *supra* note 32, at 321; *see Lawrence*, 539 U.S. at 577.

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 325

ability to live life in the gender one rightfully chooses is so personal and central to one's happiness and autonomy.⁵⁴

The U.S. Supreme Court has yet to decide the question of whether there is a constitutional right to self-identify one's gender. However, in 2016, this issue was presented to the District Court of Colorado when plaintiff Dana Zzyym sued the U.S. State Department after Zzyym was denied the ability to mark hir passport with an "X" (as opposed to the typical "M" or "F").⁵⁵ Zzyym, who identifies as intersex, filed suit under the Administrative Procedures Act ("APA") and the due process clause.⁵⁶ However, the Colorado District Court held there was no need to analyze Zzyym's case on constitutional grounds because the State Department's decision violated the APA.⁵⁷ However, the court found there was no indication the State Department made a rational decision "in deciding to implement its binary-only gender passport policy."⁵⁸ As a result, the case was sent back to the State Department to reconsider its policy.⁵⁹

III. A COMPARATIVE APPROACH

In light of the issues presented in Zzyym's case against the State Department,⁶⁰ it is necessary to compare the varied approaches other countries have taken in implementing non-binary designations. To grasp a better understanding of the impact these laws have on non-binary individuals, it is necessary to analyze similar laws from different countries and jurisdictions.

54. *Id.* at 322.

55. *Zzym v. Kerry*, 220 F. Supp. 3d 1106, 1108 (D. Col. 2016).

56. *Id.* at 1109.

57. *See id.* at 1114 ("Court will not address the constitutional issues unless and until it needs to.").

58. *Id.* at 1111.

59. *Id.*

60. As of today, the U.S. State Department has yet to issue a passport to Zzyym that correctly identifies hir non-binary status. Thus, Zzyym has once again filed suit to a federal court requesting that the court grant the State Department to issue hir a passport with hir correct gender identity. John Riley, *Intersex citizen asks federal court to grant them passport with correct gender marker*, METRO WEEKLY (May 29, 2018), <https://www.metroweekly.com/2018/05/intersex-citizen-asks-federal-court-to-grant-them-passport-with-correct-gender-marker/>.

A. Australian Model

Australia has some of the most notable developments in non-binary identification law.⁶¹ Beginning in 2003, Australia adopted several legislative measures that broadened legal recognition for those who identify outside of the binary gender.⁶² Alex MacFarlane, who identifies as intersex,⁶³ was the first person in Australia to obtain a passport with the “X” designated as hir sex.⁶⁴ MacFarlane was also issued a birth certificate that stated hir sex as “indeterminate” or unspecified.⁶⁵

In 2011, Australia’s recognition of a non-binary gender became even more expansive when the government decided to allow passports to be issued with “X” as a gender marker.⁶⁶ This change enabled anyone who identified as indeterminate, to use the “X” designation without requiring sex reassignment surgery or amended birth or citizenship documents.⁶⁷ However, the ability to issue gender neutral documents was limited to intersex individuals, which is tied to physical characteristics and sex.⁶⁸ Consequently, individuals with non-binary gender identities were excluded from obtaining an “X” designation because gender identity is unrelated to physical appearance and deals

61. See Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J. L. & GENDER 491, 513 (2016) (discussing Australia’s decision to “grant a non-binary person’s petition to have hir sex listed as ‘non-specific’”).

62. *Id.* at 514 n.140 (“Since 2003, it has been possible for intersex people in Australia to obtain a passport marking their sex as ‘X.’”).

63. “An *intersex* person is someone who is born with physical characteristics that do not consistently fit the typical characteristics of male or female bodies.” MOULDING, *supra* note 6, § 10:1.

64. Bishop, *supra* note 1, at 142.

65. *Id.*

66. *Id.* at 143.

67. *Id.*

68. See MOULDING, *supra* note 6, § 10:1 (explaining one’s sex is “made up of a range of factors that include reproductive organs . . . sex characteristics, [and] gender role” and “any of those factors are inconsistent with each other” in intersex or transgender individuals).

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 327

with one's internal sense of self.⁶⁹ Nevertheless, in July 2013, the Australian government released the Australian Government Guidelines on the Recognition of Sex and Gender to set new protections for discrimination based on sexual orientation, gender identity, and intersex status.⁷⁰ One of the most notable changes was a guideline that indicated, when sex and/or gender information is collected in a personal record, "individuals should be given the option to select M(male), F(female), or X (Indeterminate/Intersex/Unspecified)."⁷¹

Subsequently, in 2014, the High Court of Australia held, in *New South Wales Registrar of Births, Deaths, and Marriages v. Norrie*,⁷² the New South Wales ("NSW") Registrar has the authority to record the sex of an individual as "non-specific," rather than the traditional male or female options.⁷³ In that case, petitioner Norrie May-Welby had a sex affirmation procedure in 1989.⁷⁴ Following Norrie's surgery, she wanted her sex listed as "non-specific"⁷⁵ in the NSW's birth registry, because Norrie felt that identifying as male or female would be a misrepresentation.⁷⁶ The Registrar "denied the request" claiming "it did not have the power to provide such designation."⁷⁷ Nevertheless, the

69. See Bishop, *supra* note 1, at 142 (describing the designation as limited to individuals "documented as indeterminate sex"); see also MOULDING, *supra* note 6, at § 10:1 (explaining individuals born intersex have biological and physical characteristics that do not fit with in the binary gender model).

70. Theodore Bennett, *No Man's Land: Non-Binary Sex Identification in Australian Law and Policy*, 37 UNSW L.J. 847, 856 (2014).

71. *Id.* (quoting Australian Government, Australian Government Guidelines on the Recognition of Sex and Gender, (July 2013), [https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf](https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf)).

72. See generally (2014) 250 CLR 490 ('*NSW Registrar v. Norrie*').

73. Bennett, *supra* note 70, at 847.

74. Sex affirmation procedure is characterized as "a surgical procedure involving the alteration of a person's reproductive organs carried out: a) for the purpose of assisting a person to be considered to be a member of the opposite sex, or b) to correct or eliminate ambiguities relating to the sex of the person." *High Court Finds Non-Specific Gender Able to Be Recognised Under NSW Law*, TIME BASE (Apr. 2, 2014, 11:41 AM), <https://www.timebase.com.au/news/2014/AT175-article.html> (quoting *Births, Deaths, and Marriages Registration Act 1995* (NSW) s 32A (Austl.)).

75. Bennett, *supra* note 70, at 856.

76. Wipfler, *supra* note 60, at 513.

77. *Id.*

Court emphasized “[n]ot all human beings can be classified by sex as either male or female.”⁷⁸ The Court went on to find that because Norrie’s gender was not definite, the classification of male or female is inaccurate.⁷⁹ The High Court’s holding was monumental, because it allowed Norrie to obtain an ID that matched hir gender identity and expanded this right throughout NSW.⁸⁰

The Australian model is progressive and includes individuals who identify outside the binary gender; however, the underlying social policy is limited.⁸¹ For instance, though the *Norrie* Court allowed for an expansion of a gender-neutral option, the Court’s holding itself remains limited.⁸² The Court’s granted Norrie’s gender identity because of hir “ambiguous genital status,” as opposed to how zhe self-identified internally.⁸³ Thus, the emphasis on providing a gender-neutral option for non-binary and intersex individuals becomes centered on the traditional idea that a person’s gender solely relies on the individual’s genitals, as opposed to internal self-identity—which trans advocates promote.⁸⁴

This orthodox view of gender and physiology is problematic because it gives the government the power to limit a non-binary individual’s identity to biological anatomy undermining the goal of promoting self-identification.⁸⁵ Additionally, while many support the government’s decision allowing non-binary individuals the opportunity to self-identify as “X” on state issued documents, there is backlash that the Court’s decision merely heightens the stigma towards the non-binary community.⁸⁶ Moreover, critics, including those who identify

78. Bennett, *supra* note 70, at 847 (quoting *NSW Registrar v Norrie* (2014) 250 CLR 490, 492 [1] (Austl.)).

79. See Wipfler, *supra* note 60, at 513 (discussing the High Court’s conclusion that Norrie’s sexual classification was ambiguous and issuing Norrie an ID issued with a male or female designation would be a misclassification).

80. *Id.*

81. See *e.g.*, *id.* at 514 (asserting the Court’s holding in *Norrie* was limited because it characterized one’s gender identity by their genitals).

82. *Id.*

83. *Id.* at 514.

84. *Id.*

85. See *id.* (discussing the opinion in *Norrie* “foreclose[s] the possibility of non-binary people to access a non-specific gender designation”).

86. Bishop, *supra* note 1, at 143.

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 329

as non-binary, argue that this recognition of category “X” is limited, and further “stigmatizes an already stigmatized minority.”⁸⁷ In recognizing non-binary gender class, the government creates a new class of people, identified as a “third sex,” which is largely unrecognized by the law.⁸⁸ Furthermore, classifying individuals as a third sex emphasizes the notion that they are neither men nor women, dehumanizing them and creating an unfortunate “other[ness]” for this group.⁸⁹ Lastly, the “X” marker is not only inadequate, but confines those who fall outside of the binary gender scope into the same general umbrella.⁹⁰ As a result, the non-binary community is not receiving justice because there is a complex spectrum of gender identity, which requires more than the addition of a third gender identification option.⁹¹ Moreover, critics seem to disregard the purpose behind the fight of non-binary individuals: the opportunity to identify as neither male nor female on state-issued identification documents.⁹²

To curtail these concerns the Australian government has considered removing sex identity markers completely to protect gender diversity and remove the stigma of gender identity.⁹³ In addition to the Government Guidelines, providing the option for those to identify as “X” requires:

[a]ll departments and agencies that collect sex and/or gender information [to] closely examine whether such information is necessary to perform their specific function or for broader government statistical or administrative purposes. Where such information is not necessary, this category of information should be removed from forms or documents.⁹⁴

87. *Id.* (quoting Alex McKinnon, *Court Ruling “Stigmatises” Intersex People*, STAR OBSERVER (June 7, 2013), <http://www.starobserver.com.au/news/court-ruling-stigmatises-intersex-people/104671>).

88. *Id.*

89. Bennett, *supra* note 70, at 858–60.

90. *Id.* at 859 (noting the addition of this “third” category functions as a “catch-all . . . undermin[ing] the claims of intersex and trans people” who may not desire to be lumped into this broad category).

91. *Id.* at 859.

92. *Id.*

93. *Id.* at 862.

94. *Id.* at 865 (quoting Australian Government, *supra* note 71).

Advocates argue that the High Court's holding in *Norrie*, supported de-emphasizing gender on legal documents noting that, "sex of the individual . . . is irrelevant to legal relations[.]"⁹⁵ The Court's assertion suggests the only situation where the individual's gender is legally significant is marriage.⁹⁶ On the other hand, removing gender completely from identification documents can have an effect on other institutions, which rely on an individual's gender for health and safety measures.⁹⁷ In addition, the government uses one's gender identification to collect information for medical research, healthcare, and government planning.⁹⁸ Government Guidelines in Australia have been implemented to consider areas where one's legal sex does not have a justifiable role, and therefore removing sex would have little to no negative impact.⁹⁹ Thus, while critics argue the Australian government's recognition of the non-binary community is limited because it increases stigma towards the community, removing sex markers provides a solution which overtime may be expanded to include more identities.

B. German Model

Unlike the Australian model, which remains unclear as to whether gender neutral birth certificates may be issued to newborns labeled as intersex or non-binary at birth, the German government recently addressed this issue by providing non-binary recognition for newborns.¹⁰⁰ In November 2013, Germany became the first European

95. *Id.* at 863 (citing from *NSW Registrar v Norrie* (2014) 250 CLR 490, 500 [42] (Austl.)).

96. *Id.* However, this may not be the case now since Australia has recently legalized same-sex marriage in December 2017. Damien Cave & Jacqueline Williams, *Australia Makes Same-Sex Marriage Legal*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/world/australia/gay-marriage-same-sex.html>.

97. See Bennett, *supra* note 70 at 864 (finding these services and facilities include bathrooms, homeless shelters, insurance, employment, military services, and prisons).

98. *Id.*

99. *Id.* at 866

100. See Amanda Scherker, *Germany to Offer Third Gender Option on Birth Certificates*, HUFFINGTON POST (Feb. 2, 2016, 11:08 AM), https://www.huffingtonpost.com/2013/08/17/germany-third-gender_n_3769055.html (discussing Germany's decision to offer a "third gender" on birth certificates for newborns).

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 331

country to allow parents to register their newborns as an unspecified gender, but limited the option to children born with biological characteristics of both sexes.¹⁰¹ The law allows parents of children who are born with indeterminate physical gender markings the option to abstain from classifying their child as male or female; instead, parents may leave the gender blank.¹⁰²

Despite the country's step toward addressing gender diversity, especially at the very beginning of an individual's life, activists have criticized this German law.¹⁰³ Activists have argued that because the law is only limited to those born with intermediate physical characteristics, the law is perpetuating traditional standards of gender identification based only on genital status at birth.¹⁰⁴ Additionally, the law fails to address one's ability to self-identify as gender-neutral,¹⁰⁵ thus creating an assumption that such "ground breaking" recognition only applies to those with certain ambiguous bodies.¹⁰⁶ However, this limitation has changed in a recent decision by the German Federal Constitutional Court, requiring lawmakers to include a gender neutral category or remove gender completely from public documents by the end of 2018.¹⁰⁷ In this pivotal decision, the Court reversed a local German court's decision affirming the Registrar's denial of petitioner's request to change hir sex from female to "intersex/diverse."¹⁰⁸ The Constitutional Court overturned the decision, holding that the German Constitution guarantees the right to personal freedom by protecting sexual and gender identity, claiming "the assignment to a gender is of paramount importance for individual identity; it typically occupies a key position both in the self-image of a person and how the person is perceived by others."¹⁰⁹

101. *Id.*

102. *Id.*

103. Wipfler, *supra* note 61, at 515.

104. *Id.*

105. *Id.*

106. *Id.*

107. Melissa Eddy & Jessica Bennet, *Germany Must Allow Third Gender Category*, *Court Rules*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/world/europe/germany-third-gender-category-vanja.html>.

108. *See id.* ("The German Constitution guarantees the right to personal freedom, which protects sexual identity.").

109. *Id.*

Despite establishing a standard based on ambiguous sexual traits, Germany is now at the forefront for advancing the rights and protections of those who go beyond the binary gender.¹¹⁰ There is no telling what laws the German government will enact in response to the High Court's holding, however, the non-binary gender community has high hopes for the future.¹¹¹ Nevertheless, this model emphasizes a strong possibility the right to self-identify one's gender will be universally recognized by high courts abroad.¹¹²

C. Indian Model

India's progressive recognition and acceptance of gender diversity places it at the forefront of inclusion for the non-binary community.¹¹³ In April 2014, the Supreme Court of India recognized in *National Legal Services Authority v. Union of India* ("NLSA"), the Indian Constitution guarantees the rights of the transgender community and an individual's right to identify as neither male nor female.¹¹⁴ As a result, the Court mandated the Indian government provide transgender and non-binary individuals with the same rights and access to services as compared to others.¹¹⁵ In response to the Court's holding, the Ministry of Finance

110. See *id.* (discussing Germany's pivotal decision to provide constitutional protections to individuals who do not identify as male or female).

111. *Id.*

112. See, e.g., Scherker, *supra* note 100 ("Germany [is] not the only country navigating the legal implications of appropriately categorizing third gender identifiers. Earlier this year, Nepal began issuing "third gender" citizenship certificates. Activists lauded the progressive measure, noting its potential to simplify lives for sexual minorities.").

113. See Wipfler, *supra* note 61, at 515 (noting India is an example of a country that is expanding sex designation options "in the context of a broader historical and cultural recognition of multiple genders").

114. Nat'l Legal Servs. Auth. v. Union of India, Writ Petition No. 400 of 2012 with Writ Petition No. 604 of 2013 (Apr. 15, 2014), <http://supremecourtfindia.nic.in/outtoday/wc40012.pdf> [<https://perma.cc/T8ZS-RNWA>]; see also Wipfler, *supra* note 61, at 515.

115. See Terrence McCoy, *India Now Recognizes Transgender Citizens as 'Third Gender,'* WASH. POST (Apr. 15, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/04/15/india-now-recognizes-transgender-citizens-as-third-gender/?utm_term=.46f3122e142c ("[The] court's decision would apply to individuals who have acquired the physical characteristics of the opposite sex or present themselves in a way that does not correspond with their sex at birth.").

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 333

issued an amendment to the government's Income Tax Act of 1961, which will allow transgender individuals to be recognized as an independent category of applicants.¹¹⁶ This will give individuals in the transgender and non-binary communities the opportunity to obtain Permanent Account Numbers, which are necessary for Indian citizens to receive tax-related benefits, without having to be assigned a binary gender.¹¹⁷

More significantly, India's acceptance of the non-binary gender goes beyond the country's constitutional values and is grounded in Hindu culture.¹¹⁸ Individuals identifying as third gender are known as "hijras."¹¹⁹ Historically, hijras have been a small minority in India that identify as transgender, intersex, and non-binary.¹²⁰ Traditionally, these individuals were seen as sacred and were well-respected throughout traditional Hindu culture.¹²¹ However, due to the British colonization during the mid-nineteenth century, respect of a third gender and hijras has been diminished.¹²² Today, India's historical recognition and religious respect for the hijras has allowed an expansion in the country's acceptance of gender diversity.¹²³ However, this acceptance is overshadowed by the sad reality that many non-binary

116. Apoorva Mandhani, *Centre Amend Rules to Include Transgender Option in Pan Cards*, LIVE LAW (Apr. 10, 2018, 8:31 PM), <http://www.livelaw.in/centre-amends-rules-include-transgender-option-pan-cards-read-notification>.

117. See *id.* (finding that this amendment to India's Income Tax Act is "a win for the entire transgender community").

118. Wipfler, *supra* note 61, at 516.

119. Michael Bochenek & Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Progress*, EMORY INT'L L. REV. 11, 20 (2012). "Hijras or eunuchs are the most visible gender minority in South Asia. They are people who are born biologically male and wish to be female. They undergo castration . . . and join the Hijra community. Some are born as inter-sexed." *Id.* at 21 n.34.

120. Jeffrey Gettleman, *The Peculiar Positions of India's Third Gender*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/style/india-third-gender-hijras-transgender.html>.

121. See *id.* ("Hundreds of years ago, under traditional Hindu culture, hijras enjoyed a certain degree of respect.").

122. *Id.*

123. See Homa Khaleeli, *Hijra: India's Third Gender Claims its Place Law*, GUARDIAN (Apr. 16, 2014, 2:37 PM), <https://www.theguardian.com/society/2014/apr/16/india-third-gender-claims-place-in-law> ("[A]fter years of discrimination, the [hijra] community has finally been granted legal visibility.").

individuals still face discrimination, harassment, and sexual exploitation.¹²⁴ As a result, in places like Mumbai, the hijra community has one of the highest HIV rates, at 18%, while the rate among the general population is only 0.3%.¹²⁵ These concerning statistics should not overshadow India's potential to increase acceptance and cultural awareness of gender diversity, including legal recognition of the non-binary community.¹²⁶

IV. CONCEPTUALIZING POSSIBLE SOLUTIONS TO BEST SERVE AND PROTECT THE NON-BINARY COMMUNITY

Comparing California law to the international models outlined above, California's non-binary gender statute fails to protect the interests of the non-binary community.¹²⁷ It is unlikely the current California laws will be able to solve the stigma non-binary communities still must face—even with legal recognition.¹²⁸ Moreover, though California and other state governments have granted individuals the right to identify as non-binary, this right has not been recognized by the federal government.¹²⁹ To serve the interests of the non-binary community, the following solutions should be implemented: (1) remove gender identity from public documents whenever necessary; (2) continue to promote awareness and recognition of the non-binary

124. *Id.*

125. Khaleeli, *supra* note 123.

126. *See* Wipfler, *supra* note 61, at 516 (noting India is likely “to provide more comprehensive protection for non-binary people” in the future).

127. *See* Nichols, *supra* note 13 (“California Governor Jerry Brown sign[ing] first-of-its kind legislation . . . that enables residents of the state to choose a third, non-binary gender category on California state-issued IDs, birth certificates and driver’s licenses.”).

128. *See e.g.*, JAMES ET AL., *supra* note 5, at 4 (“[The] disturbing patterns of mistreatment and discrimination and startling disparities between transgender people in the survey and the U.S. population when it comes to the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community.”).

129. *See supra* Part II Section A.

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 335

community; and (3) the U.S. Supreme Court must decide on one's right to self-identify one's gender.¹³⁰

A. Abolition: De-emphasizing Gender Identity Markers

As discussed in the Australian model, non-binary legal recognition may increase the stigma towards an already stigmatized community.¹³¹ The addition of a third gender may not be enough to recognize an already complex gender spectrum. Therefore, a solution to this conflict is to get rid of gender identity markers on state-issued identification documents. At first glance, this may appear far-fetched, given society's long history of male and female markers, however, it is the easiest solution to implement. Abolishing gender markers will eliminate the stigma for non-binary individuals and the transgender community by removing gender stereotypes associated with selecting a male or female gender maker.¹³² Most significantly, removing gender from official documents would "provide for the formally equal distribution of rights and obligations because everyone, regardless of their sex/gender, would fall into the same category of 'person.'"¹³³ In addition, the government's knowledge of one's sex seems to no longer matter within marriage, property, and voting rights.¹³⁴ Gender-less identification documents have already been implemented by various U.S. cities.¹³⁵ For instance, in January of 2009, San Francisco began issuing photo ID cards that prove identity and residency within the city, and are required to access many city programs.¹³⁶ These types of ID cards are

130. See *supra* Part II Section B.

131. See *supra* Part III Section A.

132. Bishop, *supra* note 1, at 148.

133. Bennett, *supra* note 70, at 863.

134. *Id.*

135. See Vicky Gan, *How Municipal ID Cards Make Cities More Inclusive*, CITYLAB (June 4, 2015), <https://www.citylab.com/equity/2015/06/how-municipal-id-cards-make-cities-more-inclusive/394826/> ("Gender sensitivity is a relatively new development within the relatively new phenomenon of municipal IDs. In 2007, New Haven, Connecticut, became the first city in the U.S. to offer city IDs, followed by several cities in California (including San Francisco and Los Angeles), Washington, D.C., New York City, and a few others.").

136. *SF City ID Card*, CITY & CTY. OF S.F.: OFFICE OF THE CTY. CLERK, <http://sfgov.org/countyclerk/sf-city-id-card> (last visited Dec. 3, 2018).

revolutionary because they lack a gender designation.¹³⁷ This San Francisco initiative gained huge support from the transgender and non-binary community, making gender a “non-issue.”¹³⁸

In 2015, New York City implemented a similar program called “ID NYC.” Under the ID NYC program, it is optional for an individual to put their sex, legal status, and home address.¹³⁹ This method of identification is accepted by New York City services, employers, and other public programs.¹⁴⁰ Most significantly, the optional sex designation allowed cardholders the ability to establish their identity when questioned or challenged, while allowing cardholders to keep their gender identity optional.¹⁴¹ Opponents of these gender-less ID cards have argued governments hold a legitimate interest in recording gender.¹⁴² Critics claim there are various instances where a state may wish to grant certain protections, rights, or duties based on one’s sex or gender.¹⁴³ For instance, local governments and state-run programs gather gender statistical data, obtained by legal documents to redress public health disparities and prevent discrimination on the basis of sex.¹⁴⁴ Additionally, one’s sex holds importance for medical and health reasons, as males and females have inherently different biological needs. For instance, if governments aim to track uterine cancer rates among citizens, they would receive more accurate information by

137. Emily Bazar, *San Francisco Approves ID Cards that Exclude Gender*, USA TODAY (Apr. 4, 2011), http://usatoday30.usatoday.com/printedition/news/20071121/a_id21.art.htm.

138. *Id.*

139. Erin Durkin, *City Council Votes to Create Municipal ID Cards*, DAILY POLITICS (June 26, 2014, 4:23 PM), <http://www.nydailynews.com/blogs/dailypolitics/city-council-votes-create-municipal-id-cards-blog-entry-1.1845510> (“Applicants will get to choose whether to have the gender they self-identify with listed on the card, answering a demand from transgender advocates who say they will be able to have an ID that matches their gender identity for the first time.”).

140. *Id.*

141. *Id.*

142. See Bochenek & Knight, *supra* note 119, at 25 (discussing that “Governments and international bodies have found a legitimate interest in recording the sex of people”).

143. Bennett, *supra* note 70, at 864.

144. *Id.*

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 337

obtaining statistics from individuals who are biologically female, as opposed to those who socially identify themselves as female.¹⁴⁵

Despite these concerns, abolishing gender-required fields supports gender fluidity because gender cannot accurately be defined by two binary identities, but rather is a spectrum of identities.¹⁴⁶ The Australian government addressed the adverse impact of abolishing the gender required field by removing the requirement completely in appropriate instances.¹⁴⁷ Although there are some limitations,¹⁴⁸ Australia's model should be considered when assessing the government's need for gender identification documents.

B. The U.S. Supreme Court Must Decide on One's Right to Self-identify One's Gender

As mentioned earlier, the U.S. Supreme Court precedent supports gender self-identity as a constitutional right.¹⁴⁹ The government infringes on this right by failing to provide the opportunity to self-identify as non-binary on government-issued documents. Therefore, to protect the interest of the non-binary community, and allow for nationwide legal recognition, the U.S. Supreme Court must decide the right for non-binary recognition.¹⁵⁰ A recognized right to self-identify will benefit the non-binary and transgender community. However, it is unclear when the Supreme Court will be presented with this issue. However, with the rise in cases like *Zzym*, that aim to address the need for non-binary recognition, issues concerning gender identity are becoming more pertinent and likely to reach the Supreme Court. In fact, the U.S. District Court of Puerto Rico, in *Arroyo v. Rossello*, held

145. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 814 (2008) (describing that "perhaps more accurate information will result from tracking the rates of [uterine] cancer in people with uteruses than in people who are socially classified as 'female,' since those two categories are not identically matched").

146. See Bishop, *supra* note 1, at 149 (explaining that gender is fluid and exists on a spectrum).

147. See *supra* note 71 and accompanying text.

148. See *supra* note 81 and accompanying text.

149. See *supra* Part II Section B.

150. To be clear, I am not purposing that the Supreme Court must address this issue via an advisory opinion, but rather that the Court's decision is needed to advance non-binary legal recognition nationwide overall. See *supra* note 36 and accompanying text.

that transgender citizens are allowed to change their gender on their birth certificates based on self-identity.¹⁵¹ The plaintiffs in *Arroyo* are two transgender individuals who, as a result of the territory's Birth Certificate Policy, were denied the ability to amend the gender markers on birth certificates.¹⁵² The plaintiffs contended that the territory's policy infringed on their fundamental rights to privacy, liberty, individual dignity, and self-autonomy.¹⁵³ Transgender persons deserve the choice to live consistent with their gender identity and this choice is protected under the right to liberty and self-autonomy.¹⁵⁴ In support of their argument, Plaintiffs advocated that the right to gender self-identity is evidenced in landmark cases like *Lawrence* and *Obergefell*, on the basis of protecting of one's autonomy. Furthermore, the Court's holding supports the notion that the right to self-identify one's gender is fundamental.

V. CONCLUSION

California is among the first five states in the nation to allow for statewide legal recognition for its non-binary residents. With that said, state governments in the United States still need to address the issue of legal recognition for non-binary constituents. At the same time, individuals like California residents Hagen-Esquerria and Keenan should unite and actively lobby their respective state legislators to increase legal recognition of the non-binary community. For the non-binary community to move towards absolute legal recognition, society must alter its view of the "standard" binary-gender. The idea that there are only two genders, male or female, is ingrained into our minds from adolescence.

Unfortunately, the result is that most individuals find it difficult to accept the reality that gender is a fluid, complex spectrum. However, society must evolve from a closed mindset and learn to accept that

151. Associated Press, *US Court Grants Rights to Transgender People in Puerto Rico*, N.Y. DAILY NEWS (Apr. 4, 2018, 6:12 PM), <https://www.nydailynews.com/newswires/news/world/court-grants-rights-transgender-people-puerto-rico-article-1.3914820>.

152. Plaintiff's Motion for Summary Judgment at 12, *Gonzalez v. Nevares*, 305 F. Supp. 2d 327 (D.P.R. 2018).

153. *Id.*

154. *See Gonzalez v. Nevares*, 305 F. Supp. 2d 327, 333-34 (D.P.R. 2018).

2018] ANALYSIS OF THE CALIFORNIA GENDER RECOGNITION ACT 339

gender is not restricted to a mere bifurcation.¹⁵⁵ We must grasp the notion that gender is a spectrum of various identities nowhere near identifiable as wholly male or wholly female.¹⁵⁶ By expanding our notions of gender and sex, we will become more tolerant and accepting of the non-binary community, and make strides towards the overall concept of gender identity. Evolving our minds and our hearts allows the beginning of a world where those who identify outside the marked “M” and “F” boxes can truly live their lives boundlessly and free from stigma.

*Mark Angelo Simpliciano**

155. *See generally* Bennett, *supra* note 70, at 849–854.

156. Cummings, *supra* note 5.

* J.D. Candidate, California Western School of Law, 2019; Associate Writer, California Western Law Review, 2018-2019; B.A., San Diego State University, 2013. I would like to thank the brilliant Pamela Prescott and her editing team of the California Western Law Review for their commitment and dedication during the publication process. I would also like to thank Professor Austin for his tireless effort in guiding me and providing insight in such complex and pressing issue. I would also like to thank Cheryl Kozdrey, Jackland Hom, of California Law Review, and anyone who helped me solidify my viewpoints and provided me with input during the early stages of this article. Moreover, I could have not have completed this article without the unconditional support from my family and friends, I am forever grateful for you all. Lastly, this article is dedicated to those of the non-binary and transgender communities, and to anyone who has ever struggled with being true to yourself, I hope this article brings you hope and the courage to one day live proudly as you are.