‘X’ Why? Gender Markers and Non-binary Transgender People

Florence Ashley

Abstract Jurisdictions increasingly recognize ‘X’ as a legal gender marker alongside ‘M’ and ‘F’, offering an alternative to those whose gender identity falls outside or in excess of the man/woman dichotomy. This chapter explores the justifications and limitations of ‘X’ as a gender marker, arguing that it does not place non-binary people on an equal footing to men and women since it serves as a single, catch-all option for a wide range of non-binary identities. The chapter the explores the possibility of expanding the availability of gender markers to reflect the full diversity of non-binary people but suggests that it would be rejected as absurd due to the ongoing role of gender markers in preserving cisnormativity. It concludes that abandoning gender markers may be the only fully inclusive option. For gender liberation to come within reach, we must imagine a future without gender markers.

There are many words used to refer to us. Today, we are most often called non-binary. A few years ago, genderqueer—a term which was brought into usage in the late 1990s (Bulldagger 2006; Roxie 2011)—stood as the prevailing umbrella term for all those of us whose gender identities fell outside or in excess of the categories man and woman. The choice of term is contentious. Some non-binary people argue that we should not be defining ourselves in opposition to the gender binary, whereas others point out that no one can be binary if we realise that there are more genders than men and women. In this latter logic, the gender binary is a belief system that only recognises the existence of men and women, not a reference or property of those two genders. Those who are more attached to the term “non-

Metaphorically a biorg witch with flowers in her hair. I am presently a doctoral student at the University of Toronto Faculty of Law and Joint Centre for Bioethics. I wrote this chapter while at McGill University.

F. Ashley (✉)
University of Toronto, Toronto, ON, Canada
e-mail: f.ashley@mail.utoronto.ca

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2021

I. C. Jaramillo, L. Carlson (eds.), *Trans Rights and Wrongs*, Ius Comparatum - Global Studies in Comparative Law 54,
https://doi.org/10.1007/978-3-030-68494-5_2

binary" respond that it brings attention to the pervasive nature of the gender binary and the particular difficulties faced by non-binary individuals in binary societies. Besides "genderqueer" and "non-binary", "gender non-conforming" is also commonly used as an umbrella term, though some believe that it conflates gender identity and gender expression, since gender non-conforming is frequently used to refer to people whose gender expression does not conform to prevailing gender norms despite being men or women. Intra-community discussions on terminology are complex and vary across languages and geographical locations. For instance, French does not have an equivalent for "genderqueer", whereas "non-binary" can readily be translated into "*non-binaire*". Thus, it shouldn't be assumed that my usage of these terms reflects anything more than one common way the words are used in one place and time.

Further complicating the portrait is the falseness of the non-binary/binary binary, as the messiness of gender subjectivity often transcends clear categorisation. Ambiguity and multiple consciousness are familiar features of gender subjectivity. At first glance, the notion of multiple consciousness elaborated by brilliant critical race theorists like Mari Matsuda may seem awkward to apply to gender (Matsuda 1989). Yet perspectives on gender also structure consciousness and many of us experience a form of multiple consciousness as we move through spaces and subcultures which embody different ideologies about gender (Bettcher 2012).

Although I have much affection for the term genderqueer, I will privilege the term non-binary as it is the more common term and movements for the recognition of genders other than man and woman have organised around it in recent years. Perusing Google Trends, it appears that "non-binary" and its alternative spellings ("nonbinary" and "non binary") have come to internet prominence in 2014 and took a clear lead sometime during 2015. Prior to 2014, "genderqueer" was much more common. This is consistent with survey observations. In the 2008 National Transgender Discrimination Survey, "genderqueer" was much more common than "non-binary" as a personal label whereas the 2015 U.S. Transgender Survey showed roughly equal percentages of either labels (Harrison et al. 2011, p. 20; James et al. 2016, p. 44). Based on my anecdotal estimates as a member of non-binary communities, I expect that the trend in favour of "non-binary" as an umbrella term will continue in future surveys, with "genderqueer" being increasingly relegated to the role of individual gender label akin to terms like "genderfluid" and "agender". This is a shift from its initial umbrella nature (Bulldagger 2006).

I do not have a birth certificate that indicates that I am non-binary, let alone one that labels my gender with one of the more specific terms I have used for it in recent years.[1] Would I have changed my gender marker to female had more options been

[1]The affiliation section of my first academic publication spoke of me as "[m]etaphorically, a cyborg witch with flowers in her hair" (Ashley 2018a). I keep a list of things I've called my gender over the years besides man and woman. In very rough chronological order it includes: transfeminine, demigirl, lesbian, femme, high femme, femme fatale, Patron of Evil Deceivers and Make-Believers, non-binary, Ø, queer, ¯_(ツ)_/¯, don't know don't care, aggressively don't care, no, yes, fairie, alien, alienby, tired, so damn tired, agender, a gender, biorg, witch, bitch, Empressor, The Right

available? Perhaps, though it took me a long time to garner enough confidence to assert my non-binary identity. The first label that spoke to me when I began exploring my gender was “transfeminine”, a term that highlights my experience as a person who was assigned male at birth but identifies more closely with femininity without necessarily intimating that I identify as a woman. After years of identifying as a woman, I have come full circle, labelling myself to others primarily as transfeminine.

Calling myself a woman was easier. Before I grew into a body that was consistently read as a cis woman’s in everyday life, navigating public spaces was difficult. Accessing bathrooms, in particular, can be stressful because of the deeply gendered nature of the space (Herman 2013; Seelman 2016). As I transitioned in law school, affirming myself as a woman meant being more readily welcomed into women’s spaces, spaces in which I felt more comfortable and safer. There was enough to explain about being trans without having to defend my everyday choices as a person who isn’t a woman yet finds greater fit in women’s spaces than men’s. It can be challenging to affirm a non-binary identity as a transfeminine person who needs access to spaces, an issue I now try to bring attention to with humour: “Conservatives call me a cross-dresser, but I’m non-binary... does that make me a Mx. CD?”[2]

I was also afraid that I would be denied transition-related care or that my access to it would be unduly delayed. Non-binary people often face delays or refusals of care because clinicians project ambivalence or uncertainty about transition-related care onto them (Spade 2013; Ashley and Ells 2018). Although no public statement has been released on the matter, activists have reported that Finland would no longer allow non-binary people access to transition-related interventions (Kupila 2018). Finland is known as particularly conservative among Nordic countries when it comes to trans healthcare, but their approach reveals a broader lack of recognition with respect to non-binary people. Afraid of navigating the trans healthcare world as a non-binary person, I suppressed my non-binary subjectivity until I had secured all transition-related interventions that I desired at that point in time.

If varied options were offered for birth certificates, I would take them. I am uncertain at this point whether I would prefer having an ‘X’ or no gender marker at all. Perhaps a ‘W’ for witch? Or, as I mentioned in a previous article, I would love having the “¯_(ツ)_/¯” emoji as a gender marker (Ashley 2018b). What is not acceptable is being forced into having a male or female gender marker, as I am

---

Honourable Empressor Florence Ashley, Slayer of Looks and Men, gaygender, activiste insensée, rosebud, this (while pointing at various things), that (also while pointing at various things), good girl, CLiT, *eyeroll*, themme fatale, a ball of chaotic horny energy, feminazgûl, hot, grrl, shut up, trashgender, little shit, gender malcontent, shitposting, annoying, transgenderqueer, genderqueer, dick jokes, revolutionary nonchalance, spite, rage, hurricane, thirst, *lavender smell*, flower, flore, flora, force of nature, divine, transcendent, the unadulterated essence of the sublime, cutiegender, tenderqueer, tenderness, deception, tentacles, unfathomable swirling void, abyss, horny on main, Q3, and a gender not listed here. I regularly update the list.

[2]Mx., pronounced “mix”, is a common gender-neutral alternative to Mr./Mrs. I personally favour Ind. and Ent. which are respectively short forms of “individual” and “entity”.

neither. I have previously lodged a complaint against the government with the Quebec Commission des droits de la personne et des droits de la jeunesse, the jurisdiction's human rights commission. In parallel, I was very tangentially involved in a lawsuit against the Quebec government which challenged, among other things, the lack of options for non-binary people on birth certificates (Genest 2018). Whether these efforts will effect change remains to be seen, though previous judgements and recent legislative developments across Canada give me hope (Strong 2017; Dearing 2017; Tierney 2018; The Canadian Press 2018a; Zussman 2018). The trial ended over a year and a half ago, but judgment is still under reserve. It will hopefully be released by the time the present book is published.

Gender is complicated, as this short foray into my personal history hopefully shows. Yet, whatever our gender or its story, we all deserve to have identification documents that respect it. The question then becomes: how? What do respectful gender marker schemes look like? This is the question to which we now turn.

1 The 'X' Factor

Recent years have seen the proliferation of jurisdictions that recognise 'X' as an acceptable gender marker in addition to 'M' and 'F'. Increasingly, the option is made available to all non-binary people, though it is sometimes restricted to those people who are intersex (Ghattas 2015, p. 9; OII Germany 2018). In my home country of Canada, Alberta, British Columbia, Ontario, Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Prince Edward Island, Saskatchewan, Yukon,[3] and the federal government have recognised 'X' gender markers in some shape or form (Strong 2017; Dearing 2017; Tierney 2018; Mertz 2018; Zussman 2018; The Canadian Press 2018b; Regina Leader-Post 2019; Gill 2019; McKenzie-Sutter 2019; Grabish 2019). The markers are also available to some non-binary people in Australia, Nepal, New Zealand, and the United States (Knight 2012; Collins 2012; Carpenter 2013; Thomson Reuters 2019).

This option has been a core demand of non-binary movements. Luna Ferguson, an activist, filmmaker, and alienby extraordinaire, has penned many articles explaining why they fought to have an 'X' on their Ontarian birth certificate (Ferguson 2017a, b, 2018). Non-binary activists like Gemma Hickey, Sam K. MacKinnon, Kori Doty, and myself have also fought for the recognition of more gender identities in Canada, along with countless other trans and intersex activists and community organisations (Ashley 2017a; Kassam 2017; Dearing 2017; Grabish 2018). The availability of 'X' gender markers is a step toward the recognition of non-binary identities, and signals to others in society that non-binary identities should be taken seriously.

[3]Yukon Bill No. 5 has received assent but has yet to come into force (Legislative Assembly of Yukon 2017). It will come into force at a time to be determined by the Commissioner in Executive Council.

Identity recognition plays a significant role in wellbeing. Past research has highlighted the relationship between identification documents that correspond to lived gender identity and suicidality, demonstrating that access to concordant identification documents was associated with fewer suicidal ideations and fewer suicide attempts among trans people (Bauer et al. 2015). Disrespect of non-binary people is as common as it is devastating (Ashley 2017b). From a minority stress perspective, lack of respect for gender identity can have an outsized effect on mental health (McLemore 2015, p. 52):

> Confirming one's self-views helps to make the world predictable and controllable, satisfying a psychological need for coherence, providing knowledge about the self, and allowing social interactions to proceed in an authentic and smooth manner. When self-views are not verified by others, people experience negative affect and arousal (e.g., anxiety, depression) and a sense of inauthenticity in social relationships, often disengaging from non-verifying relationships.

As my own story evidences, concealing our gender identity is one of the ways in which non-binary people avoid further invalidation (Losty and O'Connor 2018, p. 54). Expectations of rejection and invalidation are associated with poorer mental health, contributing to the high rates of anxiety and depression in non-binary communities (Rood et al. 2016). Although no study looks specifically at the mental health impact of the unavailability of inclusive gender markers, research on respect for pronouns and chosen name provides a basis for extrapolation consistent with anecdotal reports and community wisdom on the matter (McLemore 2015, 2018; Ashley 2017b; Matsuno and Budge 2017; Russell et al. 2018).

The lack of recognition for non-binary identities on government identification is a form of misgendering and generates further instances of misgendering. Not only do we regularly have to show identification when buying alcohol, entering venues, accessing public benefits and healthcare, and travelling, but the lack of inclusive options makes it harder for non-binary people to have their gender respected in everyday life. If the government doesn't respect us, why would the general population?

2 Free-Form Gender Markers

I would not be satisfied with 'X' as a gender marker. The designation is often used as an *other* or *unspecified* label. On Canadian passports, the 'X' option used to stand for 'unspecified', following the International Civil Aviation Organization standards (Immigration, Refugees and Citizenship Canada). Until 2019, individuals were required to have a gender marker of 'M' or 'F', but could add a printed observation stating: "The sex of the bearer should read as X, indicating that it is unspecified."

Unspecified, placed besides male and female options, suggests that your gender remains male or female, but that you do not wish to specify which of the two you are. Though in my case it may be accurate to say that my gender is unspecified, it is unspecified among a wide range of options beyond male and female. If there are

options I can unambivalently declare inapplicable, it is male and female. Thankfully, it is now possible to have a passport with an 'X' gender marker, and the Passport Canada website now refers to this designation as 'another gender', although it continues to mean 'unspecified' under the ICAO standards.

Beyond the specific meaning given to 'X' and the choice of letter, a greater, more fundamental challenge arises. In offering a single letter to those who are neither men nor women, 'X' gender markers place the umbrella of non-binary on the same level as the specific identities of man and woman. But non-binary operates at a different level. The antonym of non-binary is binary, not man and woman. Non-binary operates at a higher level of generality than man and woman, unlike specific non-binary identities such as agender, genderfluid, bigender, and occasionally non-binary itself.

A third gender marker option is progress, but not enough of it. By offering a single box to all non-binary people, the internal differences of non-binary communities are suppressed. Those differences, those more specific gender labels matter. In the 2008 U.S. National Transgender Discrimination Survey, 13% of respondents wrote-in a gender, for a total of 860 write-in responses (Harrison et al. 2011). Many wrote an answer other than genderqueer or non-binary.

A wide range of identities beyond the binary can be found among research participants in academic literature: Agender, Alien, Ambiguously gendered, Ambiguously sexed, Androgyne/androgynous, Anomalous, Bear, Best of Both, Bigender, Birl, Blended, Boi, Both, BRRL, Bulldagger, Butch, Butch dyke, Challenged, Cross dreamer, Dyke, Dyke fag, Dysphoric, Extra, Female boy, Female dyke with a twist, Femisexual, Flexible, Fluctuating gender, FtA, FtX, Gender ambidextrous, Gender atheist, Gender bender, Gender blur, Gender deviant, Gender enhanced, Gender euphoric, Gender fabulous, Gender gifted, Gender neutral, Gender variant, Genderfluid, Gender-free, Genderfuck, Genderless, Genderqueer, Gendertrash, Gendertreyf, Girly male, Grrly boi, Human, In-between/in-betweenie, Incomplete gendered person, Intergender, Intersex/intersexed/intersexual, Jest me, Lesbian, Me, MtA, MtX, Neither, Neutrois, Nongendered, Non-genderspecific, Non-normatively gendered, Other, OtherWise, Pangender, Person, Polygenderal, Post-transgender, Queer, Queerboy, Questioning, Radical, Rebel, Skaneelog, Stud, Third gender, Third sex, T-person, Tranfem, Trannie/Tranny, Trannydyke genderqueer wombat fantastica, Transexed, Transfag, Transfeminine, Transie, Transmasculine, Transweird, Trigender, and Twidget (Harrison et al. 2011; Green et al. 2018; Bradford et al. 2018). An online list maintained by the blog Genderfluid Support boasts 116 distinct identities, many of which differ from those in the preceding list (Genderfluid Support).

Additionally, culturally-specific identities were also reported by the previously mentioned sources (Cameron 2005). Those may or may not be used to the exclusion of man or woman depending on person: Aggressive (Black or African American), Fa'afafine (Samoa), Hijira (Indian subcontinent), Māhū/Mahuwahine (Hawaii), Travesti (South America), Two-Spirit (First Nations). As Sarah Hunt explains (Hunt 2016, p. 5):

> Dominant categories of gender, sex and sexuality have been introduced through colonial processes and institutions, along with other categories such as race. The term ‘Two-Spirit’ is popularly used by Indigenous people to identify a range of roles and identities which may span, and even complicate, distinctions between gender, sex and sexuality. Indeed, for many Two-Spirit people who identify with a gender identity distinct to their Indigenous culture, these western categories fail to capture the ontologies of gender and sexuality within their own Indigenous language and culture.

The diversity and creativity of responses given in serious surveys and studies that highlight widespread harassment, discrimination, and violence further evidences the attachment that some non-binary people have to their individual gender labels. We spend time and effort to find and develop those identities, which can be of immense psychological importance (Yeadon-Lee 2016; Losty and O’Connor 2018; Pearce and Lohman 2018), and now we can’t even have gender markers that reflect and respect that labour? Why do men and women get to have their specific identities represented but not us?

Building on the experiences and expertise of trans activists, the report License To Be Yourself argues along similar lines that “a single third sex/gender option may not sufficiently encompass the full range of gender and sex diversity, including specific regional and cultural identities,” suggesting instead an increase in “options for people to self-define their sex and gender identity” (Byrne 2014, p. 21). This argument flows from an equal recognition framework. Likes must be treated alike, and specific non-binary identities are more alike “man” and “woman” than “non-binary” is. Some jurisdictions may be beginning to open up to this line of thought. In a ground-breaking judgment, an Argentinean judge acknowledged the need to recognise individuals’ unique gender identity through a multiplicity of gender marker options, applying the Yogyakarta Additional Principle 31 (2017) and granting Lara María Bertolini’s request to have her gender recorded as ‘femineidad travesti’ (Iglesias 2019).

By limiting gender markers to ‘M’, ‘F’ and ‘X’, the law devalues non-binary identities and positions them as less-than binary identities. As D.A. Davis points out (Davis 2017a, p. 237):

> The homogenizing effects of the X marker are not only evident in the extent to which the category obscures differences among non-binary people but also in the extent to which it problematically conflates non-binary gender and intersex status, instead subsuming them within one undifferentiated category.

To overcome this unsavoury suggestion and recognise the formal equality of non-binary people, it is necessary to allow a much broader range of gender markers. At the very least, any letter should be possible given the open-ended nature of gender identities. New gender identities continuously appear. Available letters should include ‘M’ and ‘F’ since some non-binary identities begin with those letters, such as “me”, “multigender”, “femme fatale”, and “fairie”. Since some identities are represented by characters other than letters—e.g. Two-Spirit is often represented by the numeral ‘2’—including all ASCII characters would be appropriate. Nothing short of this would sufficiently validate the full diversity of gender identities.

Adventurous jurisdictions may also want to explore non-static and non-visual forms of gender markers. A scratch and sniff gender marker would be a great idea for those who identify particularly with smells—such as the lavender smell I mention in my list of gender terms. For those who are genderfluid or bigender, holographic or movable gender markers—with a little tab that can switch between various letters to represent the gender identity of the day—would be welcome additions.

3 The Absurdity of Gender Markers

I suspect that some of my readers will think I am joking. It may sound absurd, ludicrous, ridiculous. Surely, I can't seriously be suggesting scratch-and-sniff gender markers? Surely the expansive list of gender identities I gave shouldn't be taken so seriously! Even the idea of allowing any letter or ASCII character as a gender marker may seem quite out there.

The sentiment of absurdity impressed upon some by the proposal of free-form gender markers is revelatory of the function of gender markers. If we expect from gender markers nothing more than reflecting or respecting people's gender identities, then free-form gender markers, which push this logic to its extreme, are a matter of course. It is indeed how I have argued in their favour: by showing that they flow from a moral obligation to respect all gender identities equally. However, I do not believe that this is the primary function of gender markers. Rather, the gender marker is a by-product of a social imaginary that centres gender as a legitimate classificatory scheme based on the habitual attitude about gender (Ashley 2018a). Gender markers serve to legitimate and reify the habitual attitude about gender, with trans people being accommodated to the extent that the contemplated reforms don't threaten this expected function.

What is the habitual attitude about gender? Plainly put, it is a set of widespread, fundamental attitudes about gender and its determination: gender is binary, identifiable, invariable, determined by genitals, et cetera (Hale 1996; Bettcher 2007; Ashley 2018a).

That it is an *attitude* rather than a belief is relevant here, because not everyone holding the attitude would, upon reflection, report a corresponding belief. People may treat gender as determined by genitals and categorise others based on theirs in everyday life yet concede that people may not have the genitals usually associated with their gender if asked outright. Similarly, people tend to treat gender as binary as a matter of course when constructing spaces or activities—looking at you, gym class—yet they may similarly acknowledge the existence of non-binary people if asked outright whether they believe more than two genders to exist. Any apparent or actual exception is perhaps acknowledged, but deemed to be marginal (Hale 1996).

Under this attitude, the proposal for free-form gender markers is absurd. Gender is not gender identity, and though non-binary people may deserve accommodation, those accommodations should not come at the cost of undermining the function of gender markers as a binary classificatory scheme. The proliferation of gender

markers, and especially the availability of 'M' and 'F' markers for people who aren't male or female, undermines gender markers' ability to track an underlying genital-centric reality, a reality that is closely tied to sexist oppression as well as transantagonistic violence (Ashley 2018a). Compared to 'X', free-form gender markers can't as readily be swept under the rug as an exception, with 'F' and 'M' gender markers continuing to serve as stable categories around which we can legitimately organise society. Whereas 'X' can be left as a fundamentally *othering* category—one that tracks androgyny in the cisgender mind and thus doesn't challenge the visual frame of gender classifiers—the proliferation of gender markers and micro-identifies implies that identities matter beyond merely being *other*. The diversity and individuality of non-binary people is brought to the fore, undermining the conceptual dominance of 'F' and 'M'. Free-form gender markers challenge 'F' and 'M' as stable signifiers of an underlying reality which is putatively deeper than gender identity (Ashley 2020).

When gender markers reflect individual gender identities, including treating partially identifying as a man or woman—as is the case with demiboy and demigirl—separately from male and female gender markers and treating "fairie" as equally deserving of 'F' as "female", the myth of the habitual attitude is severely undermined. "Male" and "female" are no longer special and are even less special insofar as they are but two out of dozens or hundreds of options, rather than two out of three. The proliferation of gender markers threatens bionormative classificatory ideals, hence appearing ridiculous to those who hold the habitual attitude: it defeats the very purpose of gender markers than to have a gender marker scheme that primarily seeks to reflect gender identity rather than gender as understood under the habitual attitude. This, too, explains the reluctance to recognise trans men and women's gender identities or to add an 'X' gender marker. Each, in their own way and to differing degrees, threaten the habitual attitude that underpins gender markers.

4 Cisnormativity Lite

Non-binary lives, and trans lives more broadly, are accommodated so long as they remain a relatively rare exception to an overwhelmingly stable scheme of gender categorisation. Free-form gender markers take the threat posed by 'X' one step further. Because gender markers are always expected to do more than reflect self-identification, the continued existence of gender markers—even as free-form gender markers—is incompatible with a critical trans politics that opposes non-consensual gendering and gender norms more broadly.

Even free-form gender markers perpetuate weakened versions of the habitual attitude about gender and the perceived legitimacy of routine gender categorisation.[4]

[4]By routine gender categorisations, I mean to exclude gendering that arise in response to sexist oppression, such as non-mixed feminist spaces. Unlike routine gender categorisations, such

Commenting on transnormativity, Bradford, Rider, Catalpa et al. highlight how narratives of trans and non-binary identities "legitimize certain transgender experiences" and end up "inadvertently centering cisgender norms and expectations" (Bradford et al. 2018, p. 8). Free-form gender markers maintain cisnormativity lite: although it severely weakens the mapping between gender markers and the habitual attitude, remnants of the habitual attitude's invariability, identifiability, and genital-centric account of gender can be teased out. Moreover, it maintains gender as a uniquely relevant trait for social categorisation.

Firstly, free-form gender markers still require non-binary people to change their gender markers. They are assigned a gender marker at birth and must perform the appropriate dance for the benefits of their cis overlords to have their gender identity recognised. In Ontario and many other jurisdictions, a letter from a clinician attesting to the person's gender identity and the indicability of gender marker changes must be provided. This process subjects transgender people to a long-criticized medicalization of identity: gender identity doesn't stand on its own, but must be proven to an external observer viewed as legitimate by the state (Spade 2013; Vipond 2015; Ashley and Ells 2018; Bradford et al. 2018). This process is burdensome and often costly. Applications frequently cost hundreds of dollars to file, and the clinical assessment can easily cost hundreds of dollars as well. In Quebec, no assessment is typically required for adults but those, who like me have already changed their gender marker once prior to inclusive gender markers options being made available, would have to obtain a similar assessment. By contrast, cis people get to have the gender marker they desire without any cost or any lengthy, and at times dehumanizing, performance of gender variance.

Secondly, free-form gender markers mandate the identification of a unique gender label for each person, which is undesirable. Gender markers require people to identify a single specific gender label, to be kept indefinitely. This dictates that gender can't be identified differently in different contexts for pragmatic reasons and assumes that gender is relatively stable and clear. Yet, non-binary people frequently wish their gender to be identified differently in different spaces, and frequently do not have a stable or clear gender identity.

Non-binary people frequently vary how they communicate and express their gender depending on the space in which they find themselves (James et al. 2016, p. 49). Being identified as trans or queer comes with risks of harassment, discrimination, and violence. These risks vary in shape and magnitude across time and space. Non-binary people must constantly balance safety and recognition, and the balance we wish to strike isn't static. Although I would opt for a unique gender marker on my birth certificate if offered the option, I do not want an 'X' in my passport given the dangers gender variant people face in many countries. Recently, my dear friend and amazing genderbunny Nic Rider travelled to Dubai and shared with me the steps they had to undertake to be read as a gender-conforming cis

categorisations are typically not predicated on a view that gender is a natural category and would not retain their *raison d'être* in a fully egalitarian society.

woman instead of their usual glorious masc self. In Dubai, where same-sex behaviours are criminalised and heavily stigmatised, gender variance is a great risk. Having gender markers at all undermines these kinds of pragmatic, context-sensitive choices and pressures non-binary people into either misgendering themselves for safety reasons or assuming risks which they may not otherwise have assumed.

For many of us, gender is messy, plural, dynamic, and in constant evolution. Some, like me, refuse to figure out their gender and are comfortable with blurriness. Having to commit to a single gender marker stifles my uniquely non-binary creativity. Do I want to be ¯_(ツ)_/¯ or a witch or an alienby? Why do I have to pick? The pressure of having to “figure out” gender is identified in research as a point of tension and anxiety for non-binary people, and free-form gender markers contribute to that (Yeadon-Lee 2016, pp. 25–26; Losty and O’Connor 2018, p. 49; Pearce and Lohman 2018, p. 8). As D.A. Davis points out, adding gender markers “functions to erase much that is disruptive about gender non-conformity, being its multiplicity and incoherence, by imposing norms of essentialism and stability” (Davis 2017a, p. 237). Instead, we should adopt a genderfuck politics and reject “the call to neatly locate ourselves within gender categories” (Ashley 2018b).

Lastly, free-form gender markers retain a strong association between gender and genitals at birth. Though non-binary people may be granted recognition, the standard and presumed normal is that gender is identified by genitals and assigned at birth without the child’s assent (Katri 2019). Children’s sense of gender does not develop until roughly 3 years old, and yet their gender is noted in their birth certificate shortly after birth. Gender markers remain ciscentric: everyone is assumed to be cisgender until proven otherwise. To the extent that gender markers encode cisnormative associations between gender and genitals, they are antithetical to trans emancipation. The genital-centric account of gender has the consequence of constructing gender as a natural category, facilitating bioessentialist justifications for sexism. The focus on genitalia has dire consequences for intersex people (Starks 2018, p. 220). In Canada, surgeries are routinely practised on intersex newborns, a horrific violation of intersex people’s right to bodily integrity which relies on an explicit exception to the Criminal Code provisions on excision and genital mutilation (*Criminal Code*, R.S. C 1985, c C-46, s. 268(3)). These surgeries are legitimated by the state’s requirement to clearly identify sex as male or female at birth and are decried by intersex associations, as expressed in the Malta Declaration (2013). Perhaps a solution would be to delay registration of gender until it can be self-declared—Robert Kouri had already pointed to this possibility in the ‘70s, although he unfortunately dismissed it offhandedly (1975, p. 139). However, a simpler and wiser solution given all I have said up to this point would be to abandon gender markers altogether.

5 Conclusion

A critical trans politics (Spade 2015), which is opposed to all forms of gender oppression, requires the downfall of gender markers. It is unsurprising, then, that critical literature on gender markers has suggested abandoning them instead of expanding the options on offer (Spade 2007, 2015; Needham 2011; Neuman Wipfler 2016; Davis 2017a, b). A proposal for abandoning of gender markers has also been formulated by community organisations (Comité trans du Conseil québécois LGBT 2017). By considering the limitations of both 'X' and free-form gender markers and highlighting how even free-form gender markers reproduce and legitimate cisnormative and sexist social imaginaries, I am adding my voice to theirs.

As Heath Fogg Davis cogently puts it (Davis 2017b, p. 52):

> Eradicating sex markers from our birth certificates, passports, driver's licenses, and state identity cards will not completely uproot sex-identity discrimination and oppression. However, it is an important step that would have profound ripple effects across a wide range of administrative policy venues where these documents are requested and demanded.

Membership in gender categories, and especially legal gender designations, should not routinely be used to distribute rights and privileges. The few legitimate gendered programs and spaces that exist—affirmative action programs and non-mixed feminist spaces, for instance—need only rely on self-identification at the point of entry, and should be understood as compensatory mechanisms in a deeply sexist society which, among other things, thinks so highly of gender that it puts it on birth certificates and identification documents when blood type—a much more medically relevant fact—isn't.

In thinking about civil status, we must not only think about how *doing* civil status can be more or less oppressive, but also discuss how the institution of civil status in and of itself legitimates and maintains oppressive social imaginaries such as gender. Birth certificates and identification documents are minimalistic. Very little information is contained on them, and yet gender is. By listing gender and little more, birth certificates and identification documents suggest that gender is one of the most central characteristics for routine social categorisation. If gender is on birth certificates, then gender must be relevant (Barker 2014). And so long as gender is of routine relevance, gender liberation will remain out of reach. There are no good gender markers, because gender markers will always be tainted by their cisnormative past. If we are committed to material equality, we must imagine a future without them.

Acknowledgements I would like to thank Avery Everhart for calling me a ball of chaotic horny energy; Nic Rider for their emotional support; and Ido Katri, Zev Miller, River Shannon, and Isabel Cristina Jaramillo Sierra for their feedback and editorial help.

References

Ashley F (2017a) Projet de loi du Parti Québécois : vers l'inclusion des personnes non-binaires? Ricochet

Ashley F (2017b) Qui est-ille ? Le respect langagier des élèves non-binaires, aux limites du droit. Service Soc 63:35–50. https://doi.org/10.7202/1046498ar. Accessed 2 July 2020

Ashley F (2018a) Don't be so hateful: the insufficiency of anti-discrimination and hate crime laws in improving trans well-being. Univ Toronto Law J 68:1–36. https://doi.org/10.3138/utlj.2017-0057. Accessed 2 July 2020

Ashley F (2018b) Genderfucking non-disclosure: sexual fraud, transgender bodies, and messy identities. Dalhousie Law J 41:339–377

Ashley F (2020) L'In/visibilité constitutive du sujet trans : l'exemple du droit québécois. Can J Law Soc 35(2):317–340

Ashley F, Ells C (2018) In favor of covering ethically important cosmetic surgeries: facial feminization surgery for transgender people. Am J Bioethics 18:23–25. https://doi.org/10.1080/15265161.2018.1531162. Accessed 2 July 2020

Barker MJ (2014) 57 genders and none for me? Reflections on the new facebook gender categories. In Rewriting the Rules. https://www.rewriting-the-rules.com/2014/02/15/57-genders-and-none-for-me-reflections-on-the-new-facebook-gender-categories/. Accessed 2 July 2020

Bauer GR, Scheim AI, Pyne J et al (2015) Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, Canada. BMC Public Health 15:525. https://doi.org/10.1186/s12889-015-1867-2. Accessed 2 July 2020

Bettcher TM (2007) Evil deceivers and make-believers: on transphobic violence and the politics of illusion. Hypatia 22:43–65

Bettcher TM (2012) Trans women and the meaning of "Woman." In: Power N, Halwani R, Soble A (eds) The philosophy of sex: contemporary readings, 6th edn. Rowman & Littlefield Publishers, New York, pp 233–250

Bradford NJ, Rider GN, Catalpa JM et al (2018) Creating gender: a thematic analysis of genderqueer narratives. Int J Transgenderism 20:155–168. https://doi.org/10.1080/15532739.2018.1474516. 1–14. Accessed 2 July 2020

Bulldagger R (2006) The end of genderqueer. In: Mattilda AKA, Sycamore MB (eds) Nobody passes: rejecting the rules of gender and conformity. Seal Press, Emeryville, pp 137–148

Byrne J (2014) License to be yourself: laws and advocacy for legal gender recognition of trans people. The Open Society Foundations, New York

Cameron M (2005) Two-spirited aboriginal people: continuing cultural appropriation by non-aboriginal society. Can Woman Stud 24:123–127

Carpenter M (2013) Ten years of 'X' passports, and no protection from discrimination. In *Intersex Human Rights Australia*. https://ihra.org.au/21597/. Accessed 2 July 2020

Collins S (2012) X marks the spot on passport for transgender travellers. New Zealand Herald

Comité trans du Conseil québécois LGBT (2017) Politiques transversales: revendications pour un Québec trans-inclusif. Conseil québécois LGBT, Montréal

Davis DA (2017a) The normativity of recognition: non-binary gender markers in Australian law and policy. In: Demos V, Segal MT (eds) Advances in gender research. Emerald Publishing Limited, Bingley, pp 227–250

Davis HF (2017b) Beyond trans: does gender matter? New York University Press, New York

Dearing R (2017) X marks the spot: Gemma Hickey breaks new ground with gender-neutral birth certificate. CBC News

Ferguson JM (2017a) Why I'm applying for a non-binary sex designation on my Canadian birth certificate. Out Magazine

Ferguson JM (2017b) I'll keep fighting until I'm legally recognized as a non-binary Canadian. Huffington Post Canada

Ferguson JM (2018) My non-binary birth certificate a victory for trans community. The Star

Genderfluid Support Gender Master List. In Genderfluid Support Tumblr. http://genderfluidsupport.tumblr.com/gender. Accessed 27 Dec 2018
Genest E (2018) Quebec to be taken to superior court for alleged discrimination against the trans community. The Link
Ghattas DC (2015) Standing up for the human rights of intersex people - how can you help? ILGA-Europe & OII Europe
Gill J (2019) New Brunswick announces third gender marker for birth certificates. CBC News
Grabish A (2018) "I feel like I'm showing a lie": Time for X gender option on Manitoba ID, says non-binary advocate. CBC Manitoba
Grabish A (2019) Manitoba must allow non-binary sex designation on birth certificates: adjudicator. CBC Manitoba
Green J, Denny D, Cromwell J (2018) "What do you want us to call you?" Respectful Language. Transgender Stud Q 5:100–110. https://doi.org/10.1215/23289252-4291812. Accessed 2 July 2020
Hale J (1996) Are lesbians women? Hypatia 11:94–121
Harrison J, Grant J, Herman JL (2011) A gender not listed here: genderqueers, gender rebels, and otherwise in the national transgender discrimination survey. LGBTQ Policy J Harv Kennedy School 2:13–24
Herman JL (2013) Gendered restrooms and minority stress: the public regulation of gender and its impact on transgender people's lives. J Public Manag Soc Policy 19:65–80
Hunt S (2016) An introduction to the health of two-spirit people: historical, contemporary and emergent issues. National Collaborating Centre for Aboriginal Health, Prince George, B.C.
Iglesias M (2019) Ni femenino ni masculino: su documento dirá "femineidad travesti." Clarín
Immigration, Refugees and Citizenship Canada Change the sex on your passport or travel document. In: Government of Canada. https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html. Accessed 27 Dec 2018
James SE, Herman JL, Keisling M et al (2016) The report of the 2015 U.S. transgender survey. National Center for Transgender Equality, Washington, DC
Kassam A (2017) "The system's violating everyone": the Canadian trans parent fighting to keep gender markers off cards. The Guardian
Katri I (2019) Sex reclassification for gender variant people: from the medicalized body to the privatized self. In: Haider-Markel D (ed) The Oxford encyclopedia of LGBT politics and policy. Oxford University Press, Oxford
Knight K (2012) Nepal's third gender and the recognition of gender identity. Huffington Post
Kouri RP (1975) Certain legal aspects of modern medicine. Sex reassignment and sterilization. Doctorat en droit comparé. Université McGill, Montreal
Kupila S (2018) In Twitter. https://twitter.com/sakriskupila/status/1029442676003930112. Accessed 2 July 2020
Legislative Assembly of Yukon (2017) Bill No. 5: act to amend the human rights act and the vital statistics act
Losty M, O'Connor J (2018) Falling outside of the 'nice little binary box': a psychoanalytic exploration of the non-binary gender identity. Psychoanalytic Psychother 32:40–60. https://doi.org/10.1080/02668734.2017.1384933. Accessed 2 July 2020
Matsuda MJ (1989) When the first quail calls: multiple consciousness as jurisprudential method. Women's Rights Law Rep 11:7–10
Matsuno E, Budge SL (2017) Non-binary/genderqueer identities: a critical review of the literature. Curr Sexual Health Rep 9:116–120. https://doi.org/10.1007/s11930-017-0111-8. Accessed 2 July 2020
McKenzie-Sutter H (2019) People can choose "X" or opt out of including gender on N.S. IDs. *CBC News*
McLemore KA (2015) Experiences with misgendering: identity misclassification of transgender spectrum individuals. Self Identity 14:51–74. https://doi.org/10.1080/15298868.2014.950691. Accessed 2 July 2020

McLemore KA (2018) A minority stress perspective on transgender individuals' experiences with misgendering. Stigma Health 3:53–64. https://doi.org/10.1037/sah0000070. Accessed 2 July 2020

Mertz E (2018) Albertans can now choose "X" gender marker on ID cards, documents. Global News

Needham D (2011) A categorical imperative? Questioning the need for sexual classification in québec. Les Cahiers de Droit 52:71–106. https://doi.org/10.7202/1005512ar. Accessed 2 July 2020

Neuman Wipfler AJ (2016) Identity crisis: the limitations of expanding government recognition of gender identity and the possibility of genderless identity documents. Harv J Law Gender 39:491–554

OII Germany (2018) Geschlechtseintrag „Weiteres" Ist Kontraproduktiv. In: OII Germany. https://oiigermany.org/geschlechtseintrag-weiteres-ist-kontraproduktiv/. Accessed 2 July 2020

Pearce R, Lohman K (2018) De/constructing DIY identities in a trans music scene. Sexualities 22 (1–2):97–113. https://doi.org/10.1177/1363460717740276. 136346071774027. Accessed 2 July 2020

Regina Leader-Post (2019) Marking X for sex designation now an option on Sask. driver's licence. Regina Leader-Post

Rood BA, Reisner SL, Surace FI et al (2016) Expecting rejection: understanding the minority stress experiences of transgender and gender-nonconforming individuals. Transgender Health 1:151–164. https://doi.org/10.1089/trgh.2016.0012. Accessed 2 July 2020

Roxie M (2011) Genderqueer history. In Genderqueer and non-binary identities. http://genderqueerid.com/gqhistory. Accessed 26 Dec 2018

Russell ST, Pollitt AM, Li G, Grossman AH (2018) Chosen name use is linked to reduced depressive symptoms, suicidal ideation, and suicidal behavior among transgender youth. J Adolescent Health 63:503–505. https://doi.org/10.1016/j.jadohealth.2018.02.003. Accessed 2 July 2020

Seelman KL (2016) Transgender adults' access to college bathrooms and housing and the relationship to suicidality. J Homosexuality 63:1378–1399. https://doi.org/10.1080/00918369.2016.1157998. Accessed 2 July 2020

Spade D (2007) Documenting gender. Hastings Law J 59:731–842

Spade D (2013) Mutilating gender. In: Stryker S, Whittle S (eds) The transgender studies reader. Taylor and Francis, Hoboken, pp 315–332

Spade D (2015) Normal life: administrative violence, critical trans politics, and the limits of law, rev edn. Duke University Press, Durham

Starks K (2018) Gender markers on Government-issued identification in Saskatchewan: rights, reform, and jurisdiction in shifting legal landscape. Saskatchewan Law Rev 81:213–426

Strong W (2017) Transgender N.W.T., residents can now change birth certificates to reflect gender. *CBC North*

The Canadian Press (2018a) Saskatchewan to allow people to remove gender designation from birth certificates. *The Globe and Mail*

The Canadian Press (2018b) P.E.I. becomes first province to offer blank space for gender on driver's licences. *CTV News*

Thomson Reuters (2019) These 11 US states are now issuing third gender IDs. *World Economic Forum*

Tierney A (2018) This person just received Ontario's first non-binary birth certificate. *Vice*

Vipond E (2015) Resisting transnormativity: challenging the medicalization and regulation of trans bodies. Theory Action 8:21–44. https://doi.org/10.3798/tia.1937-0237.15008. Accessed 2 July 2020

Yeadon-Lee T (2016) What's the story?: Exploring online narratives of non-binary gender identities. Int J Interdisciplinary Soc Community Stud 11:19–34

Zussman R (2013) Malta Declaration. In: OII Europe. https://oiieurope.org/malta-declaration/. Accessed 2 July 2020
Zussman R (2017) The Yogyakarta Principles plus 10: additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles
Zussman R (2018) B.C. now recognizes 'X' gender marker on driver's licence, birth certificate. Global News