

## EXPANDING LGBT

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### Abstract

In many circles, “LGBT” is an antiquated acronym that excludes many of the individuals that the movement is supposed to serve. “LGBTQ,” “LGBTQIA,” and other variations of the acronym have become ever more pervasive as nonbinary, intersex, and asexual individuals have become increasingly visible. The LGBT initials that once signaled solidarity and intersection are now appearing limited because they highlight only certain subgroups.

Although many movement organizations have adopted a more expansive formulation of LGBT, national legal rights organizations have limited their agendas to LGBT issues. Until recently, they devoted the bulk of their efforts to gay and lesbian concerns by focusing on securing marriage equality and sexual orientation-based antidiscrimination protections. Lately, their agenda has expanded to encompass transgender rights, but that work has centered around transgender individuals who are gender conforming. To pursue these goals, national organizations have used assimilationist arguments that tend to exclude the less mainstream members of the LGBT community.

This Article argues that including nonbinary, intersex, and asexual rights would require national LGBT organizations to reformulate their current goals and tactics in ways that could benefit not just nonbinary, intersex, and asexual individuals, but also more marginalized current members of the LGBT community. For that reason, what is at stake in expanding national LGBT rights groups’ agendas is as much the representation of existing members as it is that of new ones. However, such a change could have significant costs, as national organizations have pursued assimilationist goals and strategies because these are effective and efficient means of securing legal rights. Given the competing concerns undergirding movement expansion, this Article presents

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alternatives that national organizations and nonbinary, intersex, and asexual rights advocates might also consider.

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INTRODUCTION

In the past two decades, the acronym “LGBT” has become so ubiquitous that the vast majority of Americans recognize and understand

its meaning.<sup>1</sup> The same is not true, however, of “LGBTQ,” “LGBTQIA,” and the other more expansive variations that the rainbow coalition uses to identify itself.<sup>2</sup> In fact, most Americans believe that adding more letters is unnecessarily confusing.<sup>3</sup> Yet, in many circles, “LGBT” is an antiquated acronym that fails to represent many of the individuals the movement is supposed to serve.<sup>4</sup> For queer,<sup>5</sup> intersex,<sup>6</sup> asexual,<sup>7</sup> and other identity groups, the LGBT initials that once signaled solidarity and

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1. See Jamie Ballard, *Majority of Americans Think They Know What “LGBTQ” Stands For*, YouGov (June 12, 2018, 10:00 AM), <https://today.yougov.com/topics/lifestyle/articles-reports/2018/06/13/majority-americans-know-what-lgbtq-stands> [<https://perma.cc/4L9U-TRAT>].

2. In 2018, a poll showed that 80% of Americans reported knowing what the letters in “LGBT” represent; that majority dropped to 53% when the acronym expanded to “LGBTQ,” 13% when it became “LGBTQIA,” and 5% for “LGBTQIAPK.” *Id.* The initials represent lesbian, gay, bisexual, transgender, queer/questioning, intersex, asexual/ally, pansexual/polyamorous, and kink, with kink including both fetish and BDSM. See generally *LGBTQIA Resource Center Glossary*, U.C. DAVIS (Jan. 14, 2020), <https://lgbtqia.ucdavis.edu/educated/glossary> [<https://perma.cc/6CMK-4GBH>] (discussing the different identity categories). For LGBT rights groups that have expanded to become LGBTQ or LGBTQIA groups, the “Q” represents “queer” and “A” represents “asexual.” See, e.g., HRC Staff, *HRC Officially Adopts Use of “LGBTQ” to Reflect Diversity of Own Community*, HRC (June 3, 2016), <https://www.hrc.org/blog/hrc-officially-adopts-use-of-lgbtq-to-reflect-diversity-of-own-community> [<https://perma.cc/4227-VB2P>]; see also Kayley Weinberg, *NOW Updates Acronym: LGBTQIA*, NOW (Aug. 11, 2014), <https://now.org/blog/now-updates-acronym-lgbtqia/> [<https://perma.cc/BM8L-K3DA>] (providing definitions for the terms the LGBTQIA initialization represents). The “rainbow coalition” is used to denote a coalition of sexual minorities as well as the LGBT movement in particular. The rainbow has connoted diversity for many minority groups and the meaning of “rainbow coalition” has changed over time. GVGK Tang, *Reading the Rainbow: The Origins of the Pride Symbol*, NAT’L MUSEUM OF AM. HIST. (May 31, 2019), <https://americanhistory.si.edu/blog/rainbow> [<https://perma.cc/2EUF-29BK>].

3. Ballard, *supra* note 1.

4. *Cf. id.* (showing that a plurality of young and middle-aged adults think it is important for people to learn about LGBTQ identities).

5. Queer has multiple meanings; it is an expansive term that can apply to all non-heterosexual and non-cisgender individuals. T.J. Jourian, *Evolving Nature of Sexual Orientation and Gender Identity*, in *GENDER AND SEXUAL DIVERSITY IN U.S. HIGHER EDUCATION: CONTEXTS AND OPPORTUNITIES FOR LGBTQ COLLEGE STUDENTS* 17–18 (Dafina-Lazarus Stewart et al. eds., 2015). “Q” may also be used to refer to those “questioning” their sexual identity. See *What is LGBTQ?*, THE CENTER, <https://gaycenter.org/about/lgbtq/questioning> [<https://perma.cc/ZMN3-M7GB>].

6. Intersex individuals are born with variations in sex characteristics. See Jourian, *supra* note 5, at 14.

7. Asexuals generally do not experience sexual attraction, although some engage in romantic relationships. See *id.* at 21. “A” may also be used to refer to allies. Bill Daley, *As the Abbreviation Grows, What Does LGBTQIA Stand For?*, CHI. TRIB. (June 8, 2017), [https://www.chicagotribune.com/lifestyles/ct\\_lgbtqia\\_letters\\_defined-htlmstory.html](https://www.chicagotribune.com/lifestyles/ct_lgbtqia_letters_defined-htlmstory.html) [<https://perma.cc/8TPH-LX5R>]. But see Morgan Kelly, *Adding ‘Allies’ to LGBT Acronym Sparks Controversy*, IOWA STATE DAILY (Oct. 29, 2014), [https://www.iowastatedaily.com/news/article\\_50e5e8f6-5edc-11e4-a17f-f77a797314c5.html](https://www.iowastatedaily.com/news/article_50e5e8f6-5edc-11e4-a17f-f77a797314c5.html) [<https://perma.cc/EE44-QC2S>] (discussing an ongoing debate in the LGBT community over whether the initialization that represents the community should include straight, cisgender allies).

intersectionality have come to seem limiting because they only identify certain subgroups.<sup>8</sup>

Whether the expanding LGBT acronym indicates an inclusive coalition or serves as mere alphabet soup is more than a linguistic dilemma. Conflict over lexical visibility mirrors debates over legal representation. Twenty years ago, national gay and lesbian rights groups expanded their agendas and mission statements to incorporate transgender issues, thereby becoming the contemporary LGBT rights movement.<sup>9</sup> The question for national organizations today is whether and to what extent they should promote queer, intersex, or asexual rights.<sup>10</sup>

This issue is particularly salient since the movement as a whole is at an inflection point. Organizations have enjoyed immense successes in recent years, securing both marriage equality and employment-related antidiscrimination protections.<sup>11</sup> These victories provide an opportunity to tackle new legal issues, as well as deploy accumulated political and social capital to increase the movement's representation. For many of the LGBT national organizations' constituents, the groups should focus on promoting equality and inclusion for all sexual and gender minorities, and therefore organizations should address queer, intersex, and asexual rights.<sup>12</sup> Others are sympathetic to the injustices that queer, intersex, and asexual individuals suffer, but ultimately see these identity groups as categorically different.<sup>13</sup> They may also identify such inclusion as

8. See Bill Daley, *Why LGBT Initialism Keeps Growing*, CHI. TRIB. (June 2, 2017), <https://www.chicagotribune.com/lifestyles/sc-lgbtqia-letters-meaning-family-0606-20170602-story.html>; Emily Zak, *LGBPTTQQIIAA+: How We Got Here from Gay*, MS MAG. (Oct. 1, 2013), <https://msmagazine.com/2013/10/01/lgbpttqqiaa-how-we-got-here-from-gay/> [<https://perma.cc/UCL9-NGGV>]; Michael Schulman, *Generation LGBTQIA*, N.Y. TIMES (Jan. 9, 2013), <https://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html> [<https://perma.cc/3A9V-5QTM>].

9. See Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 555–58.

10. This Article highlights these three groups because QIA are the three letters most often appended to LGBT. They are of course only some of the identity categories that have sought a place within the LGBT coalition. The framework this Article puts forward may help resolve the question of how other identity categories, including pansexuality, polyamory, and kink, fit under the LGBT umbrella.

11. See generally, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (holding that Title VII's prohibitions on sex discrimination in employment extend to discrimination based on sexual orientation and gender identity); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing a constitutional right to same-sex marriage).

12. See Jonathan Rauch, *It's Time to Drop the "LGBT" From "LGBTQ,"* ATLANTIC, Jan./Feb. 2019, <https://www.theatlantic.com/magazine/archive/2019/01/dont-call-me-lgbtq/576388/> [<https://perma.cc/JR9R-7EW7>].

13. Cf. Chris Tina Bruce, *'LGBT' Transforming into Alphabet Soup?*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/lgbt-acronym\\_b\\_1159004](https://www.huffpost.com/entry/lgbt-acronym_b_1159004) [<https://perma.cc/F56L-QVGH>] (expressing disdain for expanding the LGBT initialization to include "every micro group").

strategically harmful, hampering a movement that is poised to secure additional, wide-reaching victories that could benefit many in the LGBT community.<sup>14</sup>

What it would mean for LGBT rights organizations to represent queer, intersex, or asexual interests requires defining the categories. The term queer is expansive in its meaning, applying to anyone who is not heterosexual or cisgender, including lesbians and gay men.<sup>15</sup> In addition to reclaiming a slur for the LGBT community as a whole, “queer” also serves to reinforce the place of “genderqueer” individuals—a term for someone who does not conform to traditional gender roles.<sup>16</sup> Given the panoply of individuals who self-identify as queer, this Article cannot address all dimensions of queer rights. This Article limits its discussion of queer to nonbinary issues, even though the terms are not synonymous, because nonbinary individuals form a distinct subgroup whose interests are not subsumed under the LGBT label.

Intersex and asexual are more easily definable categories, although they are no less complex. Intersex individuals are people who are born with variations in physical sex characteristics, while asexuals are those who do not experience sexual attraction.<sup>17</sup> Notably, there are variations within each of these multifaceted categories, which this Article details. Because of the many divergent experiences of nonbinary, intersex, and asexual individuals, this Article’s discussion does not encompass all who fall within the scope of Q, I, or A, but its analysis and conclusions apply to many.

Although many people recognize there is an affinity between LGBT and QIA interests,<sup>18</sup> how the categories and their legal rights relate to one another is far from clear.<sup>19</sup> Therefore, this Article provides a thorough description of these social, political, and legal causes, analyzing the

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14. See George, *supra* note 9, at 539 (discussing how strategic concerns initially impeded the formation of the LGBT movement).

15. See Zak, *supra* note 8. Cisgender refers to individuals whose gender identity conforms to their assigned sex. See *Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> [<https://perma.cc/VMG8-4BAE>].

16. Before the emergence of the term “nonbinary,” many nonbinary individuals self-identified as “genderqueer,” and some still use this term today. Evan Urquhart, *What the Heck is Genderqueer?*, SLATE (Mar. 24, 2015 10:00 AM), <https://slate.com/human-interest/2015/03/genderqueer-what-does-it-mean-and-where-does-it-come-from.html> [<https://perma.cc/NJB3-4K4E>].

17. Bruce, *supra* note 13.

18. This Article will often use “QIA” together as a shorthand for the additional categories, but this is not to imply that any one of Q, I, or A see one another as coherent groups, or in some way united against LGBT.

19. Professor Jessica Clarke has examined how nonbinary rights relate to intersexuality and Professor Noa Ben-Asher has detailed the relationship between gender conforming transgender and intersex issues. Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 928 (2019); Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 51–55 (2006).

points of convergence and fissures between groups. The irony of describing communities that often stridently resist categorization cannot be overstated. However, describing the identity groups is a necessary prerequisite for expanding the conception of who the LGBT umbrella could and should protect. This tension between cabined definitions and expansive self-representation reflects the broader problem associated with identity-based politics, which have created a tradeoff between legal protections and the recognition of intragroup differences.<sup>20</sup>

This Article argues that including nonbinary, intersex, and asexual rights would fundamentally challenge national organizations' agendas and approaches in ways that affect not just QIA interests, but also many current members of the LGBT community. In other words, what is at stake in what advocacy LGBT rights groups undertake is as much the representation of *current* movement members as it is adding *new* ones. The reason for this is that national groups have secured rights gains through two interrelated assimilationist tactics: (1) appealing to middle class norms and respectability and (2) arguing that gays and lesbians are like heterosexuals in all but the gender of their sexual partner.<sup>21</sup> Because of these assimilationist approaches, national LGBT rights groups' victories have primarily benefited a distinct minority within the LGBT community—its white, relatively affluent, and gender conforming members.<sup>22</sup> Organizations' priorities and arguments have also marginalized bisexuals, despite their prominence within the acronym.<sup>23</sup>

Some of the aims of nonbinary, intersex, and asexual rights currently align with national LGBT institutional priorities, but many are more integrated with the interests of less mainstream LGBT individuals. A more expansive legal agenda could thus produce a different vision of rights, one that would promote the interests of LGBT individuals who do not fit the assimilationist mold.<sup>24</sup> At the same time, national organizations have pursued assimilationist goals and strategies because these are

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20. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

21. See, e.g., Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2688–89 (2008); see also Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 627–29, 646–49 (2013) (arguing that for “traditional” families, the law demands only a ritual performance while insisting on a much more comprehensive emulation of traditional roles from nontraditional families).

22. See Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 587–89 (2010).

23. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

24. Of course, promoting these LGBT community members' interests does not *require* expanding to QIA, but movement expansion would press national organizations to take up the rights of more marginal members of LGBT.

effective and efficient means of securing legal rights.<sup>25</sup> Social movements are limited in their abilities to assert non-assimilationist claims, which is why movements of all kinds have adopted assimilationist strategies.<sup>26</sup> Expanding representation could therefore come at a significant price. Bound up in the question of whether national organizations should take up queer, intersex, and asexual rights is therefore a broader debate over how institutions should deploy their limited political capital, time, and money.

This Article's arguments are limited to national LGBT rights organizations, rather than the LGBT movement as a whole, since there is an essential distinction between the two. Social movements are organized groups of individuals who engage in "sustained campaigns of claim making," working to change policies, politics, and laws, typically by engaging in direct democracy efforts.<sup>27</sup> The LGBT movement is legally dominated, with lawyers from national organizations serving as the primary leaders, but there are other groups under the movement umbrella with differing priorities and goals.<sup>28</sup> Indeed, the LGBT coalition encompasses members with discordant perspectives on transgender and bisexual inclusion,<sup>29</sup> and the LGBT umbrella encompasses

25. Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 562 (2019). Assimilationist narratives are not just strategic decisions, but rather may reflect heartfelt identities.

26. See, e.g., Fanny Lauby, *Leaving the 'Perfect DREAMer' Behind? Narratives and Mobilization in Immigration Reform*, 15 SOC. MOVEMENT STUD. 374, 381 (2016) (discussing assimilationist narratives in immigration reform advocacy); Randolph Hohle, *The Body and Citizenship in Social Movement Research: Embodied Performances and the Deracialized Self in the Black Civil Rights Movement 1961–1965*, 50 SOCIO. Q. 283, 286 (2009) (identifying assimilationist approaches in the Civil Rights movement). For a discussion of legal opportunity structure, which shapes social movement development, see ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* (2005).

27. CHARLES TILLY & SIDNEY TARROW, *CONTENTIOUS POLITICS* 11 (2d ed. 2015) (emphasis omitted) (identifying factors that separate social movements from "contentious politics"); see also Donatella della Porta, *Democracy in Movement: Some Conclusions*, in *DEMOCRACY IN SOCIAL MOVEMENTS* 262, 264–67 (Donatella della Porta ed., 2009) (discussing a conception of democracy that stresses the importance of citizen involvement beyond elections).

28. See Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 678 (2012) (noting that "lawyers, to a large extent, lead the movement"); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1721–22 (2014) (contrasting the lawyer-driven push for marriage equality in the 1980s with the fact that "most LGBT activists . . . did not think of marriage equality as a top priority").

29. See, e.g., Brad Polumbo, *It's Time for 'LGB' and 'T' to Go Their Separate Ways*, QUILETTE (Oct. 26, 2019), <https://quillette.com/2019/10/26/its-time-for-lgb-and-t-to-go-their-separate-ways/> [<https://perma.cc/8B3M-JCL6>]; Samantha Allen, *Why Bisexuals Feel Ignored and Insulted at LGBT Pride*, DAILY BEAST (June 25, 2018, 1:36 PM), <https://www.thedailybeast.com/why-bisexuals-feel-ignored-and-insulted-at-lgbt-pride> [<https://perma.cc/62YR-YGXW>].

subcommunities that are often divided by race and class.<sup>30</sup> Local and regional organizations may have different priorities and take a more expansive view of their constituencies.<sup>31</sup> Given the movement's diversity, it is impossible to discuss nonbinary, intersex, or asexual inclusion in the collective movement. However, national LGBT rights groups have organized around a set of common goals and strategies, which typically exclude nonbinary, intersex, and asexual rights.<sup>32</sup> By examining the place

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30. See, e.g., Russell K. Robinson & David M. Frost, *LGBT Equality and Sexual Racism*, 86 *FORDHAM L. REV.* 2739, 2742–43, 2746–47 (2018) (discussing racial divides); Peter Drucker, *The Fracturing of LGBT Identities Under Neoliberal Capitalism*, 19 *HIST. MATERIALISM* 3, 5–7 (2011) (discussing class divides).

31. In the mid-2010s, most local, state, and regional LGBT organizations added “Q” to their mission statements, but not all national organizations have made the switch to LGBTQ, and the agendas of those that have often do not reflect nonbinary interests. See *infra* note 32 and accompanying text.

32. This Article discusses national “LGBT” rights organizations even though many of these groups are officially LGBTQ because nonbinary interests often receive little, if any, representation within national organizations, like the Human Rights Campaign, ACLU, Lambda Legal, and National LGBTQ Task Force. See, e.g., *About the ACLU Lesbian Gay Bisexual Transgender & HIV Project*, ACLU, <https://www.aclu.org/other/about-aclu-lesbian-gay-bisexual-transgender-hiv-project> [https://perma.cc/6UFH-BSHW] (discussing the project’s focus on LGBT issues); NAT’L LGBTQ TASK FORCE, *BE YOU* (2016), <https://www.thetaskforce.org/wp-content/uploads/2014/09/TF-annual-Report-2015-2016.pdf> [https://perma.cc/Q2NX-XBMS]; *Transgender*, HRC, <https://www.hrc.org/resources/transgender> [https://perma.cc/F3M7-3LTA]; *Transgender*, LAMBDA LEGAL, <https://www.lambdalegal.org/issues/transgender-rights> [https://perma.cc/8A2H-4LKG]; *LGBT Rights*, S. POVERTY L. CTR., <https://www.splcenter.org/issues/lgbt-rights> [https://perma.cc/TN9Z-9MLD]. National organizations’ transgender rights advocacy either ignores nonbinary needs or makes them less likely to come into being by focusing on those issues that reinforce gender as binary. The groups’ goals and strategies imply that individuals live as either men or women, rather than inhabit the liminal space between. Indeed, oral argument on whether Title VII encompasses sexual orientation discrimination, gender identity discrimination, or both, highlighted nonbinary individuals’ exclusion. The attorney arguing for LGBT rights dismissed nonbinary identity as people who “might be out there,” and argued that nonbinary rights were irrelevant to the U.S. Supreme Court’s decision. Transcript of Oral Argument at 68, *Bostock v. Clayton Cnty.*, 139 S. Ct. 1599 (2019) (No. 17-1618). State and regional groups are the ones that have been at the forefront of securing nonbinary gender marker designations on identification documents. See, e.g., Erin Rook, *Washington, DC Joins Oregon in Offering Third Gender Marker on Drivers’ Licenses*, LGBTQ NATION (June 22, 2017), <https://www.lgbtqnation.com/2017/06/washington-dc-joins-oregon-offering-third-gender-marker-drivers-licenses/> [https://perma.cc/AM7G-9VLL]; Philip Van Slooten, *Northam Signs Va. Non-Binary Driver’s License Bill into Law*, WASH. BLADE (Apr. 7, 2020, 9:51 PM), <https://www.washingtonblade.com/2020/04/07/northam-signs-va-non-binary-drivers-license-bill-into-law/> [https://perma.cc/8X2A-XV9U]. Some, albeit few, national LGBT rights organizations advocate for intersex rights, while asexuality has always been outside of the LGBT legal movement. See, e.g., *Discrimination: Employment*, NCLR, <http://www.nclrights.org/our-work/transgender-law/> [https://perma.cc/6NWM-CPAX]; Trudy Ring, *Expanding the Acronym: GLAAD Adds the Q to LGBT*, *ADVOCATE* (Oct. 26, 2016, 6:41 AM), <https://www.advocate.com/media/2016/10/26/expanding-acronym-glaad-adds-q-lgbt> [https://perma.cc/F3PV-ZPF7]. Lambda Legal Defense and Education Fund recently represented an intersex individual who sought a

of nonbinary identity, intersexuality, and asexuality in the national LGBT legal movement, this Article makes several contributions to legal scholarship. First, this Article augments emerging literature on nonbinary, asexual, and intersex rights. This scholarship is underdeveloped: nonbinary rights have only recently become the subject of increased academic treatment, with Professor Jessica Clarke publishing the first sustained analysis of the subject in 2019.<sup>33</sup> Likewise, asexual legal issues have received little attention since Professor Elizabeth Emens wrote *Compulsory Sexuality*, an article that focused on asexuality and antidiscrimination laws, in 2014.<sup>34</sup> As for intersex rights, scholarship flourished in the mid-2000s due to advocates' lobbying for a moratorium on infant genital normalizing surgery.<sup>35</sup> That scholarly interest waned after medical experts and leading advocates jointly issued a consensus statement that limited surgery to remedy physical impairments, as opposed to cosmetic concerns.<sup>36</sup> However, as this Article

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nonbinary designation on their U.S. passport. *See Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1250–51 (D. Colo. 2018), *vacated*, 958 F.3d 1014 (10th Cir. 2020).

33. Clarke, *supra* note 19. Some authors have addressed discrete issues concerning nonbinary rights. *See, e.g.*, Lizzie Bright, Comment, *Now You See Me: Problems and Strategies for Introducing Gender Self-Determination into the Eighth Amendment for Gender Nonconforming Prisoners*, 108 J. CRIM. L. & CRIMINOLOGY 137, 137 (2018) (focusing on prisoner issues); Shelby Hanssen, Note, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283, 298–307 (2017) (reviewing nonbinary gender documentation options).

34. Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303 (2014). For discussions of discrete issues concerning asexual rights, see Sarah Doan-Minh, Note, *Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence*, 30 HASTINGS WOMEN'S L.J. 167, 172–74 (2019) (detailing corrective rape of asexual women); Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1381–85 (2015) (discussing animus towards asexuals).

35. Julie Greenberg published the first major law review article on the subject in 1999, which also spurred legal scholarship in the topic. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 265 (1999). Greenberg's article, in turn, followed Suzanne Kessler's groundbreaking work on intersex issues. *See generally* SUZANNE J. KESSLER, *LESSONS FROM THE INTERSEXED* (1998). Numerous authors published law review articles on the topic in the mid-2000s. *See generally* Emily A. Bishop, Note, *A Child's Expertise: Establishing Statutory Protection for Intersexed Children who Reject Their Gender of Assignment*, 82 N.Y.U. L. REV. 531 (2007); Ben-Asher, *supra* note 19; Anne Tamar-Mattis, Note, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKLEY J. GENDER L. & JUST. 59 (2006); Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 CARDOZO J.L. & GENDER 99 (2005); Jessica Knouse, *Intersexuality and the Social Construction of Anatomical Sex*, 12 CARDOZO J.L. & GENDER 135 (2005); Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J.L. & MED. 41 (2004).

36. *See* I.A. Hughes et al., *Consensus Statement on Management of Intersex Disorders*, 91 ARCHIVES DISEASE CHILDHOOD 554, 557 (2006). Literature on intersex rights has recently resurged, with a fantastic piece by Maayan Sudai. *See* Maayan Sudai, *Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement's Path to De-Medicalization*, 41 HARV. J.

explains, surgical interventions have continued apace despite this development. This Article adds to existing scholarship on nonbinary, intersex, and asexual rights both by presenting new research on the identity categories' legal claims and by analyzing their relationship to other sexual and gender minorities.

This Article also contributes to scholarship on the LGBT movement's development and evolution. Professors William Eskridge, Nan Hunter, Gwendolyn Leachman, and Douglas NeJaime have detailed national organizations' litigation agendas, analyzing shifts in the groups' goals and strategies.<sup>37</sup> Others, including Professors Elizabeth Galzer and Kenji Yoshino, have critically evaluated the place of bisexuals in the LGBT movement.<sup>38</sup> In previous work, I have analyzed the LGBT legal movement's formation, as well as how organizations have prioritized gender conforming transgender rights over nonbinary interests.<sup>39</sup> This Article shifts the inquiry in a new direction by analyzing possible future formulations of the national LGBT legal movement.

This Article's analysis is as much a contribution to social movement literature as it is to scholarship on LGBT rights and legal mobilization. First, national LGBT rights groups serve as a unique lens through which to analyze how identity and strategy shape social movements' contours. Studies of social movements have emphasized that identity and strategy are the two axes that determine coalition building among organizations, with strategy including both the ultimate aims (goals) and means of achieving them (tactics).<sup>40</sup> However, this literature has not focused on whether and why a movement will integrate a broader array of identity

L. & GENDER 1 (2018). However, most literature on the subject addresses only the discrete topic of intersex athletes. *See, e.g.*, Joanna Harper, *Athletic Gender*, 80 L. & CONTEMP. PROBS. 139, 139 (2017); Ronald S. Katz & Robert W. Luckinbill, *Changing Sex/Gender Roles and Sport*, 28 STAN. L. & POL'Y REV. 215, 215 (2017); Daniel Gandert et al., *The Intersection of Women's Olympic Sport and Intersex Athletes: A Long and Winding Road*, 46 IND. L. REV. 338, 387 (2013).

37. *See generally, e.g.*, WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) (providing an analysis of legal issues of gender nonconformance in the United States); Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662 (2017) (same); Leachman, *supra* note 28 (same); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016) (same); Nejaime, *supra* note 28 (same).

38. Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. 997, 1018–19 (2012); Yoshino, *supra* note 23.

39. George, *supra* note 25; George, *supra* note 9.

40. *See, e.g.*, Scott L. Cummings, *How Lawyers Manage Intragroup Dissent*, 89 CHI.-KENT L. REV. 547, 552 (2014); DERRICK BELL, *SILENT COVENANTS* 15 (2004). Political opportunity structure and countermobilization contour both goals and strategies. Peter K. Eisinger, *The Conditions of Protest Behavior in American Cities*, 67 AM. POL. SCI. REV. 11, 11 (1973) (explaining how the political environment influences mobilization); Tah L. Mottl, *The Analysis of Countermovements*, 27 SOC. PROBS. 620, 624 (1980) (describing countermovements as the mobilization “to block institutional social change or to revert to a previous *status quo*”).

groups into its representation, in large part because the history of social movements is one of fracture, rather than expansion.<sup>41</sup> This dearth of analysis is also a function of the specialized nature of identity-based law reform movements. For the LGBT movement, “law helped define the contours of the minority group itself.”<sup>42</sup> Changing legal and social conceptions of gender and sexuality have shifted the LGBT movement’s membership base, thereby making organizations’ more expansive representation possible.<sup>43</sup>

Second, this Article raises important questions concerning representation—both what it means and how marginalized identity groups secure it.<sup>44</sup> Scholarship on law and social movements has criticized lawyers’ lack of accountability to those that they serve, assuming that legal leadership deradicalizes a movement and thereby reduces its efficacy.<sup>45</sup> The national LGBT legal movement’s past and current practices reinforce a more complicated account, whereby movement lawyers must constantly balance ideology and pragmatism, as well as inclusivity and efficiency. Thus, this Article reframes the typical dyad of radicalism versus incrementalism, identifying it as a spectrum along which movement lawyers must make difficult decisions concerning priorities and strategies.

This Article proceeds in five parts. Part I sets out social movement theory, which establishes how identity and strategy shape the formation of and collaboration across social movements. It then applies this literature to the history of the LGBT movement, demonstrating how identity and strategy have influenced its past expansion. The LGBT movement’s history illustrates that groups seeking inclusion tend to

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41. For a discussion of other movements’ shifting permutations, see *infra* Section I.A.

42. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PENN. L. REV. 419, 422 (2001).

43. See *id.* at 425–26. Identities may be fluid, flexible, and variable even when based on immutable characteristics. See Rina S. Onorato & John C. Turner, *Fluidity in the Self-Concept: The Shift from Personal to Social Identity*, 34 EUR. J. SOC. PSYCH. 257, 272–73 (2004); Jennifer Lee & Frank D. Bean, *America’s Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOCIO. 221, 234 (2004).

44. See generally William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997) (discussing the contours of representation for groups); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing how more effective remedies could be obtained if the goals of the representatives were aligned with the desires of the clients).

45. See, e.g., Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360, 368 (2018) [hereinafter Cummings, *The Social Movement*]; Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987, 1988 (2017).

compromise their goals to accommodate the movement's tactics as much as a movement changes its strategies to incorporate new members.<sup>46</sup>

Parts II, III, and IV then examine the meaning of and variation within nonbinary, intersexuality, and asexuality, respectively. Each also analyzes how the groups' identities and strategies relate to current LGBT interests—and one another. These Parts' arguments are based on extensive primary source research, including legislative history, court filings, scientific studies, organization newsletters, documentaries, medical guidelines, and newspaper articles. These Parts demonstrate that Q, I, and A each have identity-based connections to, as well as strategic tensions with, national LGBT organizations' priorities. Disaggregating these issues demonstrates how it is that Q, I, and A all fit within the LGBT umbrella, yet pose a challenge to national organizations' current priorities and strategies.

To illustrate the paradigmatic connections and contradictions between LGBT and QIA, Parts II, III, and IV explore the relationship among the identity categories in several areas of law, specifically antidiscrimination protections, sex-segregated facilities, medical regulations, identity documents, marital benefits, and functional parenthood recognition. These legal issues are not the only points where the groups' goals intersect. A survey of the field reveals manifold areas where the identity categories have related aims, but the topics presented here exemplify the intersections between LGBT and QIA advocacy and the impediments to a unified national legal movement. These subjects differ in terms of both the extent to which national LGBT organizations are currently invested in the projects, as well as what combination of LGBT and QIA rights they implicate. Additionally, some, like ensuring access to care, may not at first blush appear to be *legal* projects. However, as this Article explains, they are affected by state and local laws, which is where civil rights reform has increasingly concentrated, and are consequently an important province of lawyers and lawmakers.<sup>47</sup>

Finally, Part V discusses the theoretical possibilities for LGBT organizations' representation of nonbinary, intersex, and asexual rights in light of the categories' identity-based and strategic connections. Given the complexities of movement expansion, as well as the tensions such a move would engender, this Part identifies other options for national LGBT rights organizations and QIA advocates. Advocates could engage in more limited collaboration, as social movements often cooperate through coalition work and by providing one another with more circumscribed support. They could also elect an option on the other end of the spectrum from these alliances by reformulating the LGBT

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46. George, *supra* note 9, at 544.

47. See Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 L. & CONTEMP. PROBS. 115, 115 (2016).

movement itself. This Article does not endorse any single possibility but rather lays out the options so that advocates may make an informed choice. Thus, rather than presenting a normative claim as to how the movements ought to collaborate with one another, or prescriptive suggestions for their doing so, Part V provides the analytical framework from which advocates may answer these questions.

The relationship between LGBT and QIA is significantly more complex than the evermore prevalent LGBTQIA acronym would suggest. By mapping the terrain of QIA inclusion, this Article both fills a scholarly gap and offers insight for LGBT rights advocates, the nonbinary, intersex, and asexual movements, and legally dominated social movements more generally.

## I. SOCIAL MOVEMENT EXPANSION

Given how often the initials LGBT and QIA are strung together within the LGBT community, an expansive LGBTQIA legal movement may seem inevitable. However, the history of social movements is punctuated by dissolution, not expansion. This Part first explains how and why movements tend to reshape their membership criteria.<sup>48</sup> As Section I.A details, the evolution of any one social movement is deeply contingent, thereby making its future difficult to predict. However, changes invariably turn on the questions of identity and strategy—identity serves as a foundational principle that brings the groups together, while strategic concerns shape how the reformulated movement proceeds. Section I.B then applies social movement theory to the history of the LGBT legal movement, demonstrating how identity and strategy have contoured it specifically. This Part provides the necessary context for understanding the complicated relationships between LGBT and QIA.

### A. *Identity and Strategy*

Movement dissolution has received more scholarly attention than movement expansion. Movements often splinter due to internal debates over strategies, with more radical elements either leaving or getting pushed out. In the 1950s, for example, the National Association for the Advancement of Colored People (NAACP) attempted to purge local chapters with ties to Communism to preempt the red-baiting that hampered its work.<sup>49</sup> Similarly, the National Organization for Women (NOW) infamously characterized lesbians as a “lavender menace” that

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48. This is also true of political movements, which subdivide, as well as religious groups, which splinter over doctrinal interpretation. *See, e.g.*, JAMES C. BURKEE, *POWER, POLITICS, AND THE MISSOURI SYNOD: A CONFLICT THAT CHANGED AMERICAN CHRISTIANITY* 20 (2011); Alan I. Abramowitz, *Grand Old Tea Party: Partisan Polarization and the Rise of the Tea Party Movement*, in STEEP 195, 209 (Lawrence Rosenthal & Christine Trost eds., 2012).

49. *See* RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 220 (2007).

jeopardized its respectability in 1970.<sup>50</sup> Social movements may also redefine themselves due to “cultural and political shifts that change the terrain on which they battle their opponents.”<sup>51</sup> Thus, after abortion became a subject of legal debate, pro-life women found themselves excluded from the feminist movement.<sup>52</sup>

There is some scholarly literature on the ways in which movements extend their boundaries to include new types of members. The U.S. labor movement, for example, has seen dramatic changes over the course of its more than century-long history, expanding the types of jobs that fell within its mandate and organizing a greater diversity of people.<sup>53</sup> Where unions once focused on craft-based, skilled trades, their membership broadened to encompass semiskilled and unskilled workers.<sup>54</sup> Over time, they also began including racial minorities and women in their membership, particularly as World War II and the civil rights gains of the 1960s changed the face of the labor force.<sup>55</sup>

The labor movement’s increasing representation of men of color and women of all backgrounds in the 1970s illustrates the dual role of identity and strategy in social movement expansion.<sup>56</sup> Women and individuals of color sought union membership in this period to improve their working conditions, increase their pay, and secure greater respect,<sup>57</sup> but unions were hesitant to recruit or accept these groups as workers.<sup>58</sup> Ultimately, unions needed these new members, as weakened labor laws had reduced unions’ role as “chief negotiators for the nation’s . . . welfare,” while new civil rights statutes provided avenues to secure worker rights.<sup>59</sup> Additionally, the votes of women and employees of color made a significant difference as to whether a workplace would elect union representation in the first instance.<sup>60</sup> Unions had to resolve their internal conflicts about whether race and gender mattered to membership to take advantage of the strategic options that movement expansion offered.<sup>61</sup>

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50. Stephanie Gilmore & Elizabeth Kaminski, *A Part and Apart: Lesbian and Straight Feminist Activists Negotiate Identity in a Second-Wave Organization*, 16 J. HIST. SEXUALITY 95, 96, 102–03 (2007).

51. Kelsy Kretschmer, *Shifting Boundaries and Splintering Movements: Abortion Rights in the Feminist and New Right Movements*, 29 SOCIO. F. 893, 895–86 (2014).

52. *Id.* at 901.

53. See NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 39–45 (Princeton Univ. Press rev. & expanded ed. 2013).

54. *See id.*; KIM VOSS, *THE MAKING OF AMERICAN EXCEPTIONALISM* 174–75 (1993).

55. LICHTENSTEIN, *supra* note 53, at 74–80, 196–201.

56. *See* LANE WINDHAM, *KNOCKING ON LABOR’S DOOR* 29 (2017).

57. *See id.* at 42, 55.

58. *See id.* at 43, 55.

59. *Id.* at 25, 41–42.

60. *See id.* at 33–35.

61. *See id.* at 40, 46, 55.

Rather than altering what individuals' interests they represent, movements more typically change their priorities and focus. The Civil Rights movement, for example, emphasized the rights of agricultural laborers in the 1940s, which primarily benefited low-wage workers.<sup>62</sup> Those interests ultimately fell by the wayside, and the NAACP Legal Defense and Education Fund became best known for challenging the "separate but equal" doctrine in schools in the 1950s.<sup>63</sup> The group's educational victories promoted the interests of a different, and wealthier, set of constituents, but the rights of all African Americans remained within its ambit.<sup>64</sup> Changes in priorities are thus distinct from movement expansion, with the former more common than the latter.

Movements tend to expand their representation through some type of coalition work, rather than by extending their contours to encompass new identity groups.<sup>65</sup> Most social movement organizations cooperate in some way with other groups to increase their visibility, flexibility, and efficiency.<sup>66</sup> Through cooperation, organizations can mobilize more people, adopt diverse tactics, and appear in a wider array of forums.<sup>67</sup> Where organizations share costs, groups may be able to engage in activities they otherwise could not or conserve their resources for other work.<sup>68</sup> At the same time, cooperating with others can be a risky

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62. See GOLUBOFF, *supra* note 49, at 11. The Civil Rights movement addressed educational issues in the 1940s, but this subject did not dominate its agenda until the 1950s. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950) (holding that the University of Texas Law School violated the Equal Protection Clause of the Fourteenth Amendment by denying admission to an African American applicant because the State law school for African Americans was not substantially equal to the University of Texas Law School); *McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637, 642 (1950) (holding that the segregation of an African American postgraduate student from his white classmates at the University of Oklahoma deprived him of his right to equal protection under the law, thereby violating the Fourteenth Amendment).

63. See GOLUBOFF, *supra* note 49, at 12.

64. See Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 L. & SOC'Y REV. 275, 279, 305–06 (2019).

65. What distinguishes coalition work from movement expansion is that members of coalitions may coordinate goals, demands, and tactics, as well as jointly plan and finance actions and events, but their work is limited to specific issues or time periods. See Nella Van Dyke & Bryan Amos, *Social Movement Coalitions: Formation, Longevity, and Success*, SOCIO. COMPASS, July 3, 2017, at 1, 1–2; David Meyer & Catherine Corrigan-Brown, *Coalitions and Political Context: U.S. Movements Against Wars in Iraq*, 10 MOBILIZATION 327, 331 (2005).

66. See Meyer & Corrigan-Brown, *supra* note 65, at 330–31; Nella Van Dyke, *Crossing Movement Boundaries: Factors that Facilitate Coalition Protest by American College Students, 1930–1990*, 50 SOC. PROBS. 226, 226–27 (2003).

67. See Meyer & Corrigan-Brown, *supra* note 65, at 330–31; Van Dyke & Amos, *supra* note 65, at 1–2.

68. See Suzanne Staggenborg, *Coalition Work in the Pro-Choice Movement: Organizational and Environmental Opportunities and Obstacles*, 33 SOC. PROBS. 374, 386, 388 (1986).

endeavor. Groups represent a range of constituents and concerns, and therefore have different priorities and ideological commitments.<sup>69</sup>

The gulf between movement expansion and coalition work centers around identity. Social movements are “organized groups and individuals cooperating, to some degree, on a set of common issues.”<sup>70</sup> However, “[s]ocial movements are diverse affairs, made up of many organizations, loose networks, and individuals that do not always neatly fit together.”<sup>71</sup> What allows these varied components to merge is a collective identity that creates a cohesive movement.<sup>72</sup> Thus, collective identities form from “a shared sense of ‘one-ness’ or ‘we-ness,’”<sup>73</sup> that allows movement members to see one another as “similar in kind.”<sup>74</sup> As much as a collective identity forms around ties that bind, it is also based on recognizing a clear boundary that divides the group from outsiders.<sup>75</sup> Collective identity formation is “by nature oppositional to dominant cultural practices,” such that shared attributes and goals may be a function of how outsiders situate the group members.<sup>76</sup>

Movement members’ shared identity—and their sense of identity-based differences from others—help explain why movements working on similar issues do not unite. Racial justice groups, including African American civil rights organizations and Latinx advocates, have often engaged in related, if not identical, law reform projects.<sup>77</sup> The aims of

69. *See id.* at 387–88; Van Dyke & Amos, *supra* note 65, at 1–2. A coalition may also include more marginal groups, which may limit opportunities for advocates for two distinct reasons. First, decision makers may be unwilling to support the rights of the more unpopular coalition members, and second, opponents may generate arguments that more effectively target those on the periphery. *See* Meyer & Corrigan-Brown, *supra* note 65, at 331; Dieter Rucht, *Movement Allies, Adversaries, and Third Parties*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 197, 204–07 (David A. Snow et al. eds., 2004).

70. Meyer & Corrigan-Brown, *supra* note 65, at 329.

71. Kretschmer, *supra* note 51, at 895.

72. *See id.* A movement can, of course, have members who are allies; these individuals do not share the identity trait, but recognize it as an important organizing principle. *See* Ellen M. Broido, *The Development of Social Justice Allies During College: A Phenomenological Investigation*, 41 *J. COLL. STUDENT DEV.* 3, 3 (2000).

73. David Snow, *Collective Identity and Expressive Forms* (U.C. Irvine Ctr. for the Study of Democracy, Working Paper, 2000), <https://escholarship.org/uc/item/2zn1t7bj> [<https://perma.cc/KB8H-BZG2>]; Cristina Flesher Fominaya, *Collective Identity in Social Movements: Central Concepts and Debates*, 4 *SOCIO. COMPASS* 393, 394 (2010).

74. Nancy Whittier, *The Consequences of Social Movements for Each Other*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS*, *supra* note 69, at 531, 543.

75. *See id.* at 543; Fominaya, *supra* note 73, at 395.

76. Fominaya, *supra* note 73, at 396–97 (emphasis omitted); *see also* Adeno Addis, “*Hell Man, They Did Invent Us*”: *The Mass Media, Law, and African Americans*, 41 *BUFF. L. REV.* 523, 527 (1993) (“[T]he public identities of African Americans are constructed in their absence.”).

77. *See* BRIAN D. BEHNKEN, *FIGHTING THEIR OWN BATTLES: MEXICAN AMERICANS, AFRICAN AMERICANS, AND THE STRUGGLE FOR CIVIL RIGHTS IN TEXAS* 5–6 (2011). Some of the movements’ goals have been in tension with one another. For example, efforts to desegregate

these social movements have overlapped for decades, ranging from efforts to overturn Jim Crow laws that targeted both African Americans and Mexicans, to contemporary struggles against racial profiling by law enforcement.<sup>78</sup> However, the work of these legal movements proceeded as “two separate civil rights struggles [that] occurred simultaneously” in large part because of their different collective identities, which developed in distinct social, political, and legal contexts.<sup>79</sup> The movements’ own conceptions of their racial identities, combined with social and legal hierarchies that impose race-based differences on the groups, have substantially impeded calls for multiracial coalitions.<sup>80</sup> At the same time, the work of one has promoted the rights of the other; Equal Protection principles, for example, prohibit race-based categorizations without distinguishing among racial minorities.<sup>81</sup>

Although identity is a necessary factor for movement expansion, it is not sufficient. Choices as to goals and tactics may strain alliances by favoring a more moderate or radical approach, given that movement members fall along a wide ideological spectrum.<sup>82</sup> Thus, the fight for racial justice has seen both the Civil Rights and Black Power movements, while struggles for gender equality have taken the form of lobbying for equality, equity, and antisubordination mechanisms.<sup>83</sup> Many lesbian feminist groups broke off from the gay liberation movement in the 1970s because they sought to prioritize lesbian-specific issues.<sup>84</sup> During the AIDS crisis, these organizations banded together to combat the epidemic and have since remained a united movement.<sup>85</sup>

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schools have clashed with bilingual education advocacy. See Ming Hsu Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291, 312–13 (2014) (discussing how judicial focus on desegregating schools left many Mexican and Chinese children “functionally separate within schools that were not being monitored by courts” due to the lack of bilingual education).

78. See BEHNKEN, *supra* note 77, at 5–6; Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 354–57 (2003).

79. BEHNKEN, *supra* note 77, at 1–2.

80. See Trina Jones, Essay, *The Significance of Skin Color in Asian and Asian-American Communities: Initial Reflections*, 3 U.C. IRVINE L. REV. 1105, 1122–23 (2013); Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759, 777 (2003).

81. See Chen, *supra* note 77, at 293–94.

82. See Rucht, *supra* note 69, at 204.

83. See TIMOTHY B. TYSON, RADIO FREE DIXIE 3 (1999) (discussing the rise of Black radicalism during the Civil Rights era); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 1 (1992) (discussing feminist theories).

84. MARC STEIN, RETHINKING THE GAY AND LESBIAN MOVEMENT 93–95 (2012).

85. *Id.* at 148.

Divisions among groups that are united by identity typically occur as a result of disputes concerning strategy.<sup>86</sup> Sociologist Suzanne Staggenborg observed that “[i]deological conflicts among movement organizations are perhaps the most notorious obstacles to cooperation.”<sup>87</sup> Thus, organizations often set aside their differences in the face of an urgent threat, but groups also want to assert their distinct points of views, as maintaining their organizational identity is essential to their survival.<sup>88</sup>

Without a broader, identity-based connection to keep the groups aligned, strategic conflict can strain a coalition past its breaking point. Thus, in the nineteenth century, abolitionists and suffragists worked together to expand the right to vote, but when the Fifteenth Amendment only enfranchised African American men, the coalition fell apart.<sup>89</sup> The groups’ lack of identity-based connections led to the coalition’s dissolution.<sup>90</sup> A counterexample comes from 2014, when the Human Rights Campaign (HRC) provided extensive support—hundreds of thousands of dollars in staff time and salaries, web development, fundraising, and legal fees—to Keep Fayetteville Fair, a local campaign to maintain the Arkansas city’s sexual orientation and gender identity antidiscrimination law.<sup>91</sup> However, HRC and local activists clashed over strategy, and the next year, when the issue arose again, local groups waged the campaign on their own.<sup>92</sup> The coalition’s fracture did not rupture the larger legal movement, which is held together by its collective identity.

Identity is therefore a prerequisite to social movement formation, but strategic decisions as to goals and tactics are also essential factors. These insights from social movement theory help explain why, when, and how the LGBT movement formed, as the next section explains. It also indicates the prospects for national organizations’ expansion to include nonbinary, intersex, and asexual rights, which Parts II–IV address.

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86. See Kretschmer, *supra* note 51, at 895.

87. Staggenborg, *supra* note 68, at 382.

88. See Kretschmer, *supra* note 51, at 915.

89. See ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE* 163–64 (1999).

90. *See id.*

91. See Joel Walsh, *Civil Rights Ordinance Campaigns Report Finances*, Nw. ARK. DEMOCRAT-GAZETTE (Aug. 26, 2015, 1:52 AM), <https://www.arkansasonline.com/news/2015/aug/26/civil-rights-ordinance-campaigns-report/> [<https://perma.cc/J4AH-EGYD>]; *see also, e.g.*, KEEP FAYETTEVILLE FAIR, *BALLOT QUESTION COMMITTEE FINANCIAL REPORT* (2015) (on file with author); KEEP FAYETTEVILLE FAIR, *BALLOT QUESTION COMMITTEE FINANCIAL REPORT* (2014) (on file with author).

92. See Dominic Holden, *Why America’s Top LGBT Group Is Losing an Argument over Bathrooms*, BUZZFEED NEWS (Dec. 22, 2015, 11:55 AM), <https://www.buzzfeednews.com/article/dominicholden/hrc-bathroom-strategy> [<https://perma.cc/ZT87-7EJX>].

## B. *Becoming LGBT*

The LGBT movement has experienced both expansions and contractions, with identity and strategy playing key roles in both types of changes. “LGBT” came into being when gay and lesbian rights organizations expanded in the late 1990s and early 2000s to include transgender individuals and their concerns.<sup>93</sup> The gay and lesbian rights movement had previously tightened its once-loose boundaries when it clarified that pedophile rights activists were not part of their advocacy coalition.<sup>94</sup> The major marker of that change occurred in 1994, when the International Lesbian and Gay Association (ILGA) ousted a member organization called the North American Man/Boy Love Association (NAMBLA).<sup>95</sup> Other movement organizations resoundingly supported the ILGA’s decision, in large part because they saw the groups as distinct as a matter of identity. Strategic concerns also played a role, in that gay and lesbian rights advocates struggled to refute their opponents’ accusations of pedophilia given NAMBLA’s presence.<sup>96</sup>

The LGBT movement’s very creation is a case study in the challenges of merging disparate identity groups.<sup>97</sup> Initially, many gay and lesbian rights advocates and community leaders questioned whether they were tied to transgender individuals in terms of identity. As one commentator explained: “Many transgender people are heterosexual; most gay people have no internal conflict with their own gender. It remains important to insist that, just because so many in the gay world have been browbeaten into repeating the concept of an ‘LGBT community,’ that doesn’t mean it exists.”<sup>98</sup> Another was more explicit, asking: “What do I have in common with a guy who wants to remove his willy, grow breasts, become a woman and get married to a man? From where did this relatively new concept of ‘the LGBT community’ come?”<sup>99</sup> Some lesbian feminists additionally objected to transgender identity, claiming transgender

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93. See George, *supra* note 9, at 509–10, 541.

94. See Joshua Gamson, *Message of Exclusion: Gender, Movements, and Symbolic Boundaries*, 11 GENDER & SOC’Y 178, 178–79 (1997). These advocates did not distinguish between pedophilia as an identity category and pedophilia as an act, a distinction that contemporary groups make. See Margo Kaplan, *Taking Pedophilia Seriously*, 72 WASH. & LEE L. REV. 75, 91–92 (2015).

95. See Gamson, *supra* note 94, at 186.

96. See *id.* at 185–87; See Marie-Amélie George, *Deviant Justice: The Transformation of Gay and Lesbian Rights in America* 371–72 (May 2018) (unpublished Ph.D. dissertation, Yale University) (on file with author).

97. This is particularly important for identity-based social movements like the LGBT movement. See Eskridge, *supra* note 42, at 433–34.

98. Andrew Sullivan, *The LGBTQRSTZ “Community,”* DAILY DISH (Nov. 9, 2007), <https://www.theatlantic.com/daily-dish/archive/2007/11/the-lgbtqrstz-community/223771/> [<https://perma.cc/9VBZ-N86Z>].

99. *Id.*

individuals harmfully reinforced traditional gender roles and reduced womanhood to the performance of femininity.<sup>100</sup>

The identity-based connection that ultimately united the groups stemmed from the fact that they all violated gender norms, which was the reason for most of the discrimination they endured.<sup>101</sup> Just as transgender individuals were targeted for their gender expression, gay men were discriminated against because of their perceived effeminacy and lesbians their perceived masculinity, even when they were not open about their sexuality.<sup>102</sup> Thus, sexual orientation discrimination was more often a response to a person's self-presentation, rather than a reaction to the gender of an individual's sexual partner.

At the same time that gay and lesbian rights groups debated whether LG and T shared an identity, strategic concerns also impeded organizations' willingness to expand. Advocates feared that movement expansion might undermine their assimilationist arguments.<sup>103</sup> Gay and lesbian rights successes had depended on appeals to respectability and conformity to middle-class norms.<sup>104</sup> This assimilationist approach emphasized that LGBT individuals only differed from heterosexuals in the gender of their sexual partners.<sup>105</sup> For example, marriage equality litigation succeeded by casting same-sex couples as quintessential American heads of households, who shared carpooling, PTA, and dog-walking responsibilities like their suburban counterparts.<sup>106</sup> When selecting gay and lesbian plaintiffs, attorneys sought those that were most

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100. See, e.g., JANICE G. RAYMOND, *THE TRANSEXUAL EMPIRE* 104 (1979); see also JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* 258 (2002) (describing how some lesbian feminists in the 1970s derided transgender people as "interlopers who brought male privileges with them" or "self-hating lesbians who had given up the struggle for liberation in favor of living as men"); Aaron H. Devor & Nicholas Matte, *One Inc. and Reed Erickson: The Uneasy Collaboration of Gay and Trans Activism, 1964–2003*, 10 *GLQ: J. LESBIAN & GAY STUD.* 179, 181 (2004) ("Many lesbian-feminist organizations and individuals . . . insist on a definition of womanhood that leaves no room for women who were born male."); Gamson, *supra* note 94, at 188 (noting that "the question of who qualified as a woman . . . explode[d]" in 1991); Raewyn Connell, *Transsexual Women and Feminist Thought: Toward New Understanding and New Politics*, 37 *SIGNS* 857, 860 (2012) (describing the feminist view that transsexuality was an invasion of a woman's body).

101. See George, *supra* note 9, at 544.

102. See *id.*

103. These concerns stemmed from both legal constraints, in that legal arguments depend on analogies to established principles, as well as framing pressures, since movements orient their arguments in ways that appeal to the mainstream. See George, *supra* note 25, at 561–62.

104. See George, *supra* note 9, at 543.

105. *Id.* at 567.

106. See Mary L. Bonauto, *Goodridge in Context*, 40 *HARV. C.R.-C.L. L. REV.* 1, 32–33 (2005) (describing plaintiff selection for the Massachusetts marriage equality litigation). For a discussion of the evolution of marriage equality arguments, see George, *supra* note 25, at 566–80.

likely to remind the judges of themselves—gender normative, middle-class individuals.<sup>107</sup>

Many rights advocates believed that expanding their agendas to include transgender interests would make it more difficult, if not impossible, to advance these assimilationist arguments.<sup>108</sup> As one explained at the time, “as much as I hate to say it, there is a freak factor with transgendered individuals that sets us back as a movement.”<sup>109</sup> National LGBT rights groups resolved the strategic concern by developing an assimilationist approach to transgender rights and sublimating transgender interests.<sup>110</sup> When addressing transgender individuals and rights, national LGBT advocates have argued that transgender men are men and transgender women are women, thereby reducing differences between transgender and cisgender individuals.<sup>111</sup> This argument, which mirrors their approach to gay and lesbian rights, ignores the gender nonconformity that brought LG and T together in the first instance.<sup>112</sup>

The LGBT movement has resolved its strategic concerns, but the movement’s expansion has had costs. A prime example comes from 2007, when the U.S. House of Representatives debated the Employment Non-Discrimination Act (ENDA).<sup>113</sup> Gay and lesbian rights advocates had lobbied for federal employment protections since the 1970s, and the law was on the cusp of passing in the House when representatives balked at also providing federal protections based on gender identity.<sup>114</sup> Most LGBT rights organizations refused to support a sexual orientation-only version of the bill, which representatives were willing to enact.<sup>115</sup> In the more than a decade since, the House has never again voted on employment discrimination protections based on sexual orientation or

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107. See Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 ARIZ. L. REV. 213, 287 (2018); Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 153–54 (2015); Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, NEW YORKER (Mar. 5, 2012), <https://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick> [<https://perma.cc/S582-T24R>].

108. See George, *supra* note 9, at 539.

109. Chryss Cada, *Issue of Transgender Rights Divides Many Gay Activists*, BOS. GLOBE, Apr. 23, 2000, at A8.

110. See George, *supra* note 9, at 579–80.

111. See *id.* at 581–82.

112. See *id.* at 579–82.

113. See *id.* at 548.

114. See *id.* at 548–50.

115. See *id.* at 551.

gender identity.<sup>116</sup> This fact underscores the deep sacrifices that movements make to maintain their ideological commitments.<sup>117</sup>

To avoid situations like ENDA, national LGBT rights groups for many years prioritized the legal goals of gays and lesbians.<sup>118</sup> Their work on marriage equality, employment discrimination protections, and hate crimes legislation benefited transgender individuals, but these were not the priorities of transgender people, who were more concerned with accessing transition-related care and reducing the violence they endured.<sup>119</sup> National organizations' advocacy nevertheless promoted and instantiated transgender rights. Before marriage equality, some courts voided the unions of post-operative transgender individuals as illegal same-sex marriages.<sup>120</sup> Additionally, legislators who were hesitant to enact transgender rights protections nevertheless approved gender identity antidiscrimination laws because they were part and parcel of a larger bill that provided sexual orientation protections.<sup>121</sup> Without protections for gays and lesbians, legislatures likely would not have enacted the transgender rights provisions.

The deprioritization of transgender rights was linked to the fact that gays and lesbians are LGBT rights organizations' largest constituency, biggest donors, and most significant source of volunteer labor, giving them more authority over agenda setting.<sup>122</sup> Many within the movement saw transgender individuals as benefiting disproportionately from their

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116. In 2013, the Senate approved the Employment Non-Discrimination Act, which included protections based on sexual orientation and gender identity, but the House did not vote on the measure. Employment Non-Discrimination Act of 2013, S.815, 113th Cong. (2013).

117. In 2020, the Supreme Court ruled that Title VII of the Civil Rights Act protects employees from discrimination based on sexual orientation and gender identity, thereby mooting this issue. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

118. *See* George, *supra* note 9, at 558–61.

119. *See* SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 239 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> [<https://perma.cc/KDU5-MCPA>].

120. *See, e.g., Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) (invalidating the marriage of a man and a transgender woman who had undergone gender-affirming surgery); *In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002) (same); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (same). *But see* *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (upholding the marriage of a man and a transgender woman who had undergone gender-affirming surgery).

121. *See* Jami K. Taylor & Daniel C. Lewis, *The Advocacy Coalition Framework and Transgender Inclusion in LGBT Rights Activism*, in TRANSGENDER RIGHTS AND POLITICS 108, 122 (Jami K. Taylor & Donald P. Haider-Markel eds., 2014); *cf.* Emens, *supra* note 34, at 362–64 (discussing how New York's Sexual Orientation Non-Discrimination Act came to define sexual orientation as "heterosexuality, homosexuality, bisexuality, or asexuality" so as to convey that the law protected everyone, not just gays and lesbians).

122. *See* Taylor & Lewis, *supra* note 121, at 120. For a discussion of how financial leverage influences legal advocacy, see generally Francis, *supra* note 64.

association with gay and lesbian rights,<sup>123</sup> such that, for many organizations, transgender individuals were “not viewed as a primary constituency of LGBT rights groups.”<sup>124</sup> For more than a decade after the LGBT movement’s creation, gays’ and lesbians’ ambivalence as to transgender rights hindered organizations’ advocacy on behalf of transgender individuals.<sup>125</sup> This was particularly true at the state level, where LGBT rights groups were typically only able to promote one policy goal each legislative session.<sup>126</sup> These organizations tended to select issues that primarily affected gays and lesbians to represent the largest number of people.<sup>127</sup>

The LGBT legal movement has withstood enormous legal pressures that would breach a coalition, revealing it has moved beyond these questions of identity and strategy. Beginning in 2012, opponents of LGBT rights succeeded in repealing antidiscrimination protections based on both sexual orientation and gender identity by emphasizing the dangers that transgender individuals posed.<sup>128</sup> LGBT rights groups could have changed their legislative approach to seek only sexual orientation protections—which would have effectively undermined their opponents’ arguments—but they instead continued to pursue comprehensive laws.<sup>129</sup> Similarly, because of concerns over transgender rights, three states enacted preemption laws that prohibited municipalities from enacting any antidiscrimination provision that expanded protections beyond what the state law encompassed.<sup>130</sup> These statutes eliminated local ordinances prohibiting discrimination based on both sexual orientation and gender identity.<sup>131</sup> Although countermobilization has contoured the LGBT movement’s work, it has not led to fracture.

The expansion to LGBT demonstrates that movements can expand their collective identities, but it also highlights how strategy is an

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123. See George, *supra* note 9, at 561, 564–65.

124. Taylor & Lewis, *supra* note 121, at 120; see also Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655, 676 (explaining how LGBT groups “failed to meaningfully prioritize more marginalized movement constituencies (i.e., transgender Latino/as and Latina lesbians and bisexuals)”).

125. See Taylor & Lewis, *supra* note 121, at 120.

126. See *id.*

127. See *id.*

128. See George, *supra* note 9, at 519–26.

129. See *id.* at 518.

130. ARK. CODE ANN. § 14-1-403 (West 2015); TENN. CODE ANN. § 7-51-1802 (West 2017). North Carolina passed a similar law to Arkansas and Tennessee; however, this law was partially repealed to prohibit state agencies and other state subdivisions from regulating access to bathrooms. 2016 N.C. Sess. Laws 3, *partially repealed*, 2017 N.C. Sess. Laws 4.

131. Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015, 1017 (2016).

essential element of that shift. National LGBT organizations have avoided any radical reconfiguration of their tactics, while expanding their agenda to include transgender-specific issues. However, they have done so with strategies that have divided the transgender community, as the next Part explains. That discussion reinforces that movement expansion may require new members to acculturate to the movement as much as the movement changes to accommodate new members.

## II. QUEER

National LGBT rights groups have expanded their mandates in the past and now face the question of whether to do so again. These next three Parts therefore move from the history of the LGBT movement to debates over its future, with each taking up nonbinary, intersexuality, and asexuality, respectively. Each Part first explains the identity category before analyzing whether, when, and how these categories intersect with LGBT as a matter of identity and strategy.<sup>132</sup><sup>132</sup>The Parts then turn to paradigmatic rights issues for nonbinary, intersex, and asexual advocates to illustrate the ways in which LGBT and QIA intersect in law reform efforts.

This Part focuses on nonbinary issues, which have a clear identity-based connection to the LGBT legal movement because a substantial minority of transgender individuals identify as nonbinary. Indeed, some of national organizations' legal work on transgender rights has benefited nonbinary individuals. However, national legal groups have secured these gains through strategies that have often excluded nonbinary individuals. National groups have also largely ignored nonbinary-specific interests. The dissonance between the identity-based connections and the goals that national organizations have pursued exemplifies the organizations' long-

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132. Although this Article discusses tensions between LGBT and QIA, it is important to note that the groups overwhelmingly share core values and assumptions that shape their views as to appropriate goals and arguments. See Clarke, *supra* note 19, at 900. The categories are fundamentally aligned in their ideology, which challenges normative conceptions of sexual orientation, sex, and gender. Cf. *id.* (noting that analysis of various legal contexts shows fewer conflicts among LGBT coalition members than there appear to be at first blush). For that reason, nonbinary individuals would contest the claims of LGBT rights opponents, who cite a range of concerns: In the case of marriage equality, maintaining tradition and protecting children from inappropriate role models; for transgender rights, fraud and the practical difficulties of recognizing more than two genders. See Suzanne B. Goldberg, Essay, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2110 (2014); Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 831–38 (2017); *Zzyym v. Pompeo*, 958 F.3d 1014, 1027 (10th Cir. 2020). Thus, the strategic strain between LGBT and QIA stems primarily from disagreements as to tactics and priorities, rather than a conflict as to whether the groups are entitled to the rights they seek.

standing strategic concerns over whether and how to press for the rights of LGBT community members who do not fit the assimilationist model.

### A. *Defining Nonbinary*

Nonbinary people have a gender identity that does not fit the traditional categories of male or female.<sup>133</sup> Examples of nonbinary identity include those who combine elements of both genders, as well as those who reject gender in its entirety and thus appear unisex or gender neutral.<sup>134</sup> Nonbinary individuals may also have a fluid gender, meaning their gender is not consistently male or female, or they may identify as a third gender category, such as two-spirit (First Nations), hijra (India), and māhū (Hawaii).<sup>135</sup> The terms that nonbinary people use to self-identify vary and include genderqueer, agender, androgynous, third gender, and multigender.<sup>136</sup> Nonbinary individuals are often invisible; they typically allow others to assume they are male or female since nonbinary “is often dismissed as not being a real identity.”<sup>137</sup> The majority of nonbinary individuals also avoid asking their employers to use their preferred pronouns—often they, them, and theirs—out of fear of discrimination.<sup>138</sup>

Nonbinary may be considered a subset of transgender identity insofar as transgender individuals are people whose gender identity differs from their gender assigned at birth, although not all nonbinary individuals identify as transgender.<sup>139</sup> “Transgender” is a term that emerged in the early 1990s to denote many different types of gender variant individuals, including individuals who sought gender confirmation surgery, people who transitioned without medical interventions, and those who identified as nonbinary.<sup>140</sup> Before that time, there were three primary social identity options for gender variants: transsexuals, heterosexual transvestites, or gay female impersonators.<sup>141</sup> Transsexuals were those who sought to express their feminine gender identity through hormones and surgery, while transvestites were those whose attire subverted gender norms but

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133. See JAMES ET AL., *supra* note 119, at 40 (defining nonbinary as “people whose gender is not exclusively male or female, including those who identify as having no gender, a gender other than male or female, or more than one gender”).

134. See Clarke, *supra* note 19, at 906.

135. See *id.* at 906–07.

136. See JAMES ET AL., *supra* note 119, at 44.

137. *Id.* at 49.

138. See *id.* at 154.

139. *Id.* at 40.

140. George, *supra* note 9, at 536–38.

141. Anne Bolin, *Transcending and Transgendering: Male-to-Female Transsexuals, Dichotomy, and Diversity*, in THIRD SEX, THIRD GENDER 447, 451 (Gilbert Herdt ed., 1994); see also Dallas Denny, *Interview with Anne Bolin, Ph.D.*, CHRYSALIS Q., Fall 1993, at 15, 16–17 (discussing possible gender categories other than male and female).

who did not seek surgical options.<sup>142</sup> Since both doctors and transsexuals defined success in terms of the ability to “pass” as a member of the opposite sex,<sup>143</sup> the majority of postoperative transsexuals assimilated into mainstream society, thereby creating a strict division between those who surgically transitioned and those who did not.<sup>144</sup> In the early 1980s, transsexuals began questioning the medicalized regime’s insistence that they “blend into society and disappear,” leading transsexuals and transvestites to recognize the commonalities that united them, rather than emphasizing the differences that divided the groups.<sup>145</sup> The term “transgender” opened new identity-based possibilities by identifying gender variance as a continuum—a matter of degree, not kind—that integrated the once-segregated groups, including nonbinary individuals.

Within the transgender community, a substantial subset identifies as nonbinary.<sup>146</sup> In the most recent survey of transgender individuals in the United States, most identified as either male or female, but more than one-third identified as nonbinary.<sup>147</sup> Today, approximately 0.6% of Americans are transgender, which means that an estimated 0.2% of that population is nonbinary.<sup>148</sup> Applied to current population statistics, there are more than 700,000 nonbinary Americans—about the same as the population of Washington, D.C.<sup>149</sup> These figures are likely underestimations, since the survey likely did not capture nonbinary

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142. See Bolin, *supra* note 141, at 451–52, 459.

143. George, *supra* note 9, at 530, 536; see also Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, 39 ARCHIVES SEXUAL BEHAV. 427, 442 (2010) (noting that the early medical literature on transsexualism endorsed “postoperative assimilation, which meant living unobtrusively as a member of the other sex”).

144. See George, *supra* note 9, at 529–31.

145. Dallas Denny, *A Selective Bibliography of Transsexualism*, 6 J. GAY & LESBIAN PSYCHOTHERAPY 35, 40 (2002); see also Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in TRANSGENDER RIGHTS 171, 179–80 (Paisley Currah et al. eds., 2006) (discussing the shift away from a standard of postoperative assimilation and the formation of the transgender community).

146. See JAMES ET AL., *supra* note 119, at 45.

147. See *id.* at 45–46.

148. ANDREW R. FLORES ET AL., WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 5 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf> [<https://perma.cc/YE3T-U2DE>]; see also JAMES ET AL., *supra* note 119, at 45 (identifying 35% of transgender survey participants as nonbinary).

149. The U.S. population was 328,239,523 as of July 1, 2019. *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US#> [<https://perma.cc/BU3C-X4QA>]; *Washington, District of Columbia Population 2020*, WORLD POPULATION REV., <http://worldpopulationreview.com/us-cities/washington-dc-population/> [<https://perma.cc/WZU5-L8F3>].

individuals who did not also self-identify as transgender.<sup>150</sup> Moreover, since the rate of nonbinary identification is higher among youth, this percentage will likely increase over time.<sup>151</sup>

Despite the fact that the term transgender can apply to both gender conforming and nonbinary individuals, the groups' lived experiences are distinct. Both report disproportionately high rates of discrimination, but those who do not conform to gender norms are more likely than their gender conforming counterparts to suffer stigma, discrimination, and violence, particularly in sex-segregated spaces.<sup>152</sup> Moreover, nonbinary youth report disproportionate rates of low self-esteem, as well as high levels of anxiety and depression.<sup>153</sup> The harms that nonbinary individuals suffer indicate the extent to which gender nonconformity generates discomfort, fear, disgust, and offense, creating a social hierarchy in which gender nonconforming individuals are often rejected.<sup>154</sup>

Perhaps because of this social hierarchy, nonbinary individuals face "denied access, verbal harassment, and physical assault" when entering sex segregated facilities.<sup>155</sup> In a survey of Washington, D.C. gender nonconforming individuals, 70% reported experiencing problems accessing or using public restrooms.<sup>156</sup> Nonbinary individuals are less likely to be accepted in sex-segregated spaces than gender conforming individuals, and they are also more likely to experience harassment when they attempt to access public restrooms.<sup>157</sup> To help "pass" in restrooms,

150. See Kravitz M., *Nonbinary, But Not Transgender?*, MEDIUM (Oct. 6, 2020), <https://medium.com/an-injustice/nonbinary-but-not-transgender-cc0eb569d059> [<https://perma.cc/S5GT-AYZ3>].

151. See Mercedes Leguizamon & Brandon Griggs, *More US Teens Are Rejecting 'Boy' or 'Girl' Gender Identities, a Study Finds*, CNN (Oct. 3, 2018, 12:54 PM), <https://www.cnn.com/2018/02/06/health/teens-gender-nonconforming-study-trnd/index.html> [<https://perma.cc/7V6J-JJ66>].

152. See Lisa R. Miller & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 SOCIO. F. 809, 812, 826 (2015); Jack Harrison et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and Otherwise in the National Transgender Discrimination Survey*, 2 LGBTQ POL'Y J. HARV. KENNEDY SCH. 13, 13 (2012); Charles R. White & Dusty D. Jenkins, *College Students' Acceptance of Trans Women and Trans Men in Gendered Spaces: The Role of Physical Appearance*, 29 J. GAY & LESBIAN SOC. SERVS. 41, 56, 58–59 (2017); Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 77 (2013).

153. Nat Thorne et al., *A Comparison of Mental Health Symptomatology and Levels of Social Support in Young Treatment Seeking Transgender Individuals Who Identify as Binary and Non-Binary*, 20 INT'L J. TRANSGENDERISM 241, 246 (2018).

154. See Clarke, *supra* note 19, at 912.

155. Ellen D. B. Riggle, *Experiences of a Gender Non-Conforming Lesbian in the "Ladies' (Rest)Room,"* 22 J. LESBIAN STUD. 482, 484 (2018).

156. Herman, *supra* note 152, at 71.

157. See White & Jenkins, *supra* note 152, at 56, 58; Herman, *supra* note 152, at 77. The same does not necessarily hold true for transgender youth. JOSEPH G. KOSCIW ET AL., GAY,

nonbinary individuals resort to expressing visible cues that they belong, such as changing their walk to appear more gender conforming.<sup>158</sup> Survey data of cisgender individuals demonstrate that they are more likely to accept transgender women with more feminine physical features than those who appear more masculine.<sup>159</sup>

### B. *Connections Between Nonbinary and LGBT*

As an identity that is so integrally related to transgender, the connection between nonbinary and LGBT is immediately apparent. Yet LGBT organizations' decision to add "Q" to their names is indicative of the important distinctions between transgender and nonbinary rights. This linguistic shift is a reminder of the historical debates over whether and how LGBT rights groups would represent transgender legal issues,<sup>160</sup> in that organizations resolved the strategic tension by focusing on the gender conforming members of the transgender community.<sup>161</sup> Thus, although the national LGBT movement coalesced because all of the identity groups were discriminated against when they violated gender norms, the organizations' approach depended on minimizing this difference between the straight and queer worlds.

Were national LGBT rights groups to include nonbinary interests, they could no longer adopt the same strategy. Nonbinary individuals are inherently gender nonconforming and undermine the notion that society should organize itself according to gender. As a result, nonbinary interests would change the terms of the debates over transgender rights, which have converged over the issue of biology. Opponents have argued that there is an essential difference between individuals who have had gender confirmation surgery and those who have not.<sup>162</sup> The question therefore centers on where to draw the boundary between the sexes, rather than whether a line needs to exist at all.<sup>163</sup>

Nonbinary individuals, on the other hand, dispute that there is a meaningful distinction between sex and gender, and they question whether either is socially or legally significant.<sup>164</sup> Nonbinary identity does not require abolishing gender or making society entirely gender-

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LESBIAN, & STRAIGHT EDUCATOR NETWORK, THE 2017 NATIONAL SCHOOL CLIMATE SURVEY 96 (2018).

158. See Herman, *supra* note 152, at 76–77.

159. See White & Jenkins, *supra* note 152, at 57–58.

160. See George, *supra* note 9, at 538–40, 544.

161. See *id.*

162. See Nik DeCosta-Klipa, *How Worried Should Transgender Rights Advocates Be About This Ballot Question in Massachusetts?*, BOSTON.COM (June 11, 2018), <https://www.boston.com/news/politics/2018/06/11/transgender-law-ballot-question-massachusetts> [<https://perma.cc/5NKV-4HXA>].

163. See George, *supra* note 25, at 600.

164. See Clarke, *supra* note 19, at 934.

neutral. However, opponents have deployed the argument that nonbinary rights would result in “enforced androgyny,” which is a different claim than the one appearing in battles over rights for gender conforming transgender individuals.<sup>165</sup> Nonbinary rights advocacy may therefore give rise to new forms of countermobilization that might impede LGBT rights claims.

At the same time, because nonbinary individuals subvert gender norms, nonbinary rights advances would likely promote the rights of bisexuals, a group that national LGBT rights groups have tended to ignore. Bisexuals undermine assumptions about gender because they do not require that their partners belong to one gender or another, they may be attracted to all genders, or they may reject the notion that gender is relevant to sexual attraction.<sup>166</sup> For those reasons, arguments on behalf of bisexuals may be useful in promoting nonbinary rights and vice-versa. Notably, the LGBT movement has elided bisexual identity in its law reform efforts for the same tactical reasons that organizations have overlooked the gender nonconformists in their ranks.<sup>167</sup>

Bisexuality poses several additional strategic problems for LGBT that nonbinary identity augments, rather than resolves. Both nonbinary identity and bisexuality seem to detract from movement arguments about immutability,<sup>168</sup> a factor essential to obtain heightened scrutiny under the Equal Protection Clause.<sup>169</sup> Both bisexuality and nonbinary identity are immutable in the sense that they are fundamental expressions of identity that no one should be asked to change.<sup>170</sup> However, opponents may characterize those self-expressions as mere matters of choice, which are undeserving of legal protections.<sup>171</sup> Given that arguments about the immutability of both sexual orientation and gender identity have been central to the LGBT movement’s rights advances, detractors from these claims are particularly problematic for advocates.<sup>172</sup> Notably, immutability is now more important as a matter of public policy than

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165. *Id.* at 940.

166. *See* Yoshino, *supra* note 23, at 370–77 (providing a “taxonomy of bisexualities”). Individuals who fit this description may also identify as pansexual, with pansexuality defined as “being attracted to all genders” or “denounc[ing] gender or sex as a defining feature of sexuality.” Christopher K. Belous & Melissa L. Bauman, *What’s in a Name? Exploring Pansexuality Online*, 17 J. BISEXUALITY 58, 59–60 (2017). Not all pansexuals would self-identify as bisexual. *See id.* at 60–61.

167. *See* Yoshino, *supra* note 23, at 407.

168. *See id.* at 400–10.

169. *See* Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 57–58, 60–61 (2010).

170. *See* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 4 (2015).

171. *See* Clarke, *supra* note 19, at 926–27 (noting that some people perceive bisexuals as always having the choice of living a heterosexual lifestyle).

172. *See* Clarke, *supra* note 170, at 27; Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 101 (2002).

constitutional law, given the U.S. Supreme Court's reluctance to designate new groups as suspect classes.<sup>173</sup>

Additionally, both bisexuality and nonbinary identity conflict with the notion that sex is and should be a primary mode of social organization.<sup>174</sup> As Professor Yoshino argued, categorizing individuals by sex is essential to both opposite-sex and same-sex sexual attraction, since “[w]ithout a clear and privileged distinction between ‘man’ and ‘woman,’ there is no clear and privileged distinction between ‘straight’ and ‘gay.’”<sup>175</sup> Some forms of third-gender identity do reinforce the notion that sex and gender are important means of social classification, but many types of nonbinary gender identity explicitly or implicitly refute this view.<sup>176</sup>

Some LGBT rights advocates may theoretically agree that gender should not be a salient legal category, but they have avoided this argument because eliminating gender is a more radical claim than requests for equality.<sup>177</sup> Thus, just as strategy has created a wedge between gender conforming transgender and nonbinary, it has also marginalized bisexuals from the broader LGBT movement. Incorporating nonbinary people might consequently reinforce the place of bisexuals, as well as that of gender nonconforming gays and lesbians whose identity served as the basis for the LGBT movement in the first place.

### C. *Rights Work*

The strategic gap between LGBT and nonbinary helps explain why there are currently national LGBT rights organizations rather than LGBTQ ones. Although many movement members do not see LGBT and nonbinary as distinct, national organizations often treat nonbinary as an outside group because of strategic concerns, indicating the importance of

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173. See David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. 859, 860 (2016). LGBT rights groups once considered immutability the “holy grail” of constitutional law, as an immutable trait constitutes an essential prerequisite for suspect classification status under Equal Protection doctrine. *Id.*; see also Clarke, *supra* note 170, at 4 (identifying immutability as one common factor in equal protection analysis). Immutability now appears to have less valence, given that the Supreme Court identified same-sex sexual attraction as an immutable characteristic but did not apply heightened scrutiny in reviewing bans on same-sex marriage. See Schraub, *supra*, at 860; Clarke, *supra* note 170, at 27.

174. See Yoshino, *supra* note 23, at 413.

175. *Id.*

176. See JAMES ET AL., *supra* note 119, at 44 (showing that some survey participants self-identify as “Third gender,” “Bi-gender,” “Butch,” or other genders that indicate that sex and gender are relevant to their identities).

177. Cf. Goldberg, *supra* note 132, 114 COLUM. L. REV. 2087, 2133 (2014) (noting courts' aversion to finding sex discrimination in LGBT cases and noting that “it is almost as though there is an internalized sense . . . that if sex-based rules were not tolerated on occasion, we would all wind up in unisex tunics, having lost our sexed and gendered bearings”).

interest convergence in movement composition.<sup>178</sup> As this section explains, LGBT rights groups' work promoting antidiscrimination protections at the state and local levels has produced protections for nonbinary individuals, but through strategies that have marginalized nonbinary identity.<sup>179</sup> Additionally, there are nonbinary-specific rights goals that an LGBTQ movement would need to address, requiring organizations to expand their legal agendas.

### 1. Antidiscrimination Laws

One area that highlights the strategic gulf between LGBT and nonbinary is debates concerning antidiscrimination protections.<sup>180</sup> Political conservatives have increasingly targeted transgender rights through state and local referenda, pressing voters to repeal gender identity antidiscrimination protections by arguing the laws will allow men in women's restrooms.<sup>181</sup> To counter these efforts, national LGBT rights organizations have advanced assimilationist arguments that exclude nonbinary identity, demonstrating how political opportunity structure and countermobilization frame advocacy strategies.<sup>182</sup>

For over a decade, LGBT rights opponents have managed to repeal sexual orientation and gender identity antidiscrimination laws by arguing that transgender protections offer predators access to women's restrooms.<sup>183</sup> In 2012, rhetoric concerning transgender deviance began featuring prominently in opposition arguments.<sup>184</sup> For many years, LGBT rights groups struggled to develop a strategy that would resonate with voters.<sup>185</sup> They ultimately settled on the argument that transgender men are men and transgender women are women, a statement that is true for many transgender individuals, but not all.<sup>186</sup> The claim is that, because transgender individuals' self-presentation matched their gender identity, their appearance in any sex-segregated facility associated with their assigned gender at birth would be inappropriate.<sup>187</sup> To reinforce the

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178. See George, *supra* note 25, at 614. For a discussion of interest convergence theories, see generally Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

179. George, *supra* note 25, at 591–601.

180. See *id.*

181. See *id.*

182. See *id.* at 560–62.

183. See *id.* at 581–83.

184. See *id.* at 584, 589.

185. *Id.* at 558.

186. See *id.* at 560. In the 2015 U.S. Transgender Survey, many respondents identified as transgender women or transgender men, but just as many identified as nonbinary, genderqueer, or gender variant. JAMES ET AL., *supra* note 119, at 44.

187. See George, *supra* note 25, at 598. This is a different argument from those made in Title VII cases based on sex stereotyping theory. In those cases, attorneys argued that transgender

notion that transgender rights do not challenge gender norms, campaigns have featured extremely gender conforming transgender individuals in stereotypical roles, such as a bearded transgender man at work and a young transgender woman in a dress, high heels, and perfect makeup descending a catwalk.<sup>188</sup>

This approach has been extremely successful. LGBT rights groups won the battles over antidiscrimination repeal measures upon debuting this argument, thereby ending a half-decade losing streak.<sup>189</sup> These assimilationist arguments have thus preserved gender identity antidiscrimination laws, which benefit both gender conforming transgender and nonbinary individuals. However, these successes have also come at the cost of reifying the norms that nonbinary individuals challenge.<sup>190</sup> Given that nonbinary people are already disproportionately likely to suffer harassment and physical harm when entering public restrooms, the assimilationist approach might aggravate the difficulties that nonbinary individuals already face—and may make their rights more difficult to secure in other forums.<sup>191</sup>

Notably, debates over transgender bathroom access have resulted in gender nonconforming lesbians being policed in restrooms, highlighting the connection between nonbinary rights and advocacy on behalf of marginalized members of the LGBT community.<sup>192</sup> Ignoring nonbinary rights in this context thus also subverts the interests of gender nonconforming gays and lesbians, who are discriminated against because they do not meet traditional expectations of men and women. Part of the

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individuals were discriminated against as a result of sex stereotypes concerning how men and women should act. See Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 836 (2020). As Professor Schoenbaum has noted, this framing reifies a person's sex assigned at birth. *Id.* Under sex stereotyping theory “a transgender person designated male at birth is an effeminate man, not a woman; a transgender person designated female at birth is a masculine woman, not a man. This view of the sex of transgender persons is contrary to transgender persons' own identity.” *Id.* at 836. However, as David Cruz has demonstrated, Title VII does not require this type of argument. David B. Cruz, *Acknowledging the Gender in Anti-Transgender Discrimination*, 32 L. & INEQUALITY 257, 263 (2014). Attorneys have nevertheless pursued sex stereotyping arguments, which Schoenbaum argues “amount to a defeat for the broader cause of transgender rights,” because litigators believed these were more likely to succeed. Schoenbaum, *supra*, at 836. Notably, when the Supreme Court held that Title VII protected individuals against sexual identity discrimination, it did not do so based on sex stereotyping theory, but rather using a textualist analysis. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

188. Freedom Massachusetts, *This November, Massachusetts Will Vote YES for Fairness*, YOUTUBE (May 3, 2018), <https://www.youtube.com/watch?v=WByc2UjZYjg&feature=youtu.be> [<https://perma.cc/P7P3-2ENP>]; Human Rights Campaign, *#YesOn3: Nicole*, YOUTUBE (Sept. 13, 2018), <https://www.youtube.com/watch?v=HTNc20usaXw> [<https://perma.cc/NMH7-EJ9M>].

189. See, e.g., George, *supra* note 25, at 596.

190. See *id.* at 560, 599–601.

191. See *id.* at 610–14 (discussing various rights issues).

192. See *id.* at 607, 609–10.

reason organizations have adopted these advocacy approaches is that nonbinary rights are more difficult to present as a strategic matter, since nonbinary gender appears more disruptive to social conventions and therefore less sympathetic as both a social and legal matter.<sup>193</sup> As Professor Clarke aptly noted, “[n]on-binary people pose a direct challenge to all modes of sex segregation, unlike transgender people seeking recognition as men or women,” thereby making accommodations for nonbinary individuals appear “as a much greater ‘ask’ than requests to be integrated into male or female categories.”<sup>194</sup> LGBT rights groups likely feel that they must make a tradeoff between a campaign that educates individuals on the spectrum of transgender identity and one that secures immediate legal gains.<sup>195</sup>

Efforts to secure antidiscrimination protections demonstrate how strategic decisions and identity are linked. The choice to foreground gender conforming transgender individuals in ballot measures is a strategic decision that reveals an identity-based difference between gender conforming and nonbinary individuals: one seeks to identify as a specific gender, while the other rejects the relevance of the categories. Thus, although identity brings the groups together and strategy cleaves them apart, these two elements that contour social movement formation are not entirely distinct.

## 2. Sex-Segregated Facilities

In addition to addressing nonbinary individuals in their general work on transgender rights, incorporating nonbinary rights into national LGBT groups’ agendas would mean tackling nonbinary-specific issues. Much of gender conforming transgender rights advocacy has focused on who will determine an individual’s sex or gender, as opposed to what sex and gender options are available, which is what matters for nonbinary individuals.<sup>196</sup> In other words, whether and how a person can change their legal gender is separate from the question of whether the government recognizes nonbinary gender as an alternative to the categories of male

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193. *See id.* at 614.

194. Clarke, *supra* note 19, at 901, 923.

195. Advocates have also pressed for antidiscrimination protections in the courtroom by arguing that Title VII’s prohibition on sex discrimination encompasses gender identity, but their claims excluded nonbinary individuals entirely. *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 728, 800 n.239 (2011). This is likely because discrimination analysis requires lawyers to use opposite-sex comparators, creating a legal opportunity structure that circumscribes the claims they can put forward. *Id.* at 732, 765. *See generally* Chris Hilson, *New Social Movements: The Role of Legal Opportunity*, 9 *J. EUR. PUB. POL’Y* 238, 239, 244–45, 249 (2002) (discussing the role of litigation—as opposed to legislation—in larger social change).

196. *See* Clarke, *supra* note 19, at 922. There has been work to promote nonbinary rights, particularly efforts to secure nonbinary gender designations on identity documents. *See id.* at 947, 950.

and female.<sup>197</sup> As with antidiscrimination laws, the strategic gap in national LGBT rights groups' legal agendas is therefore integrally related to the ways in which gender conforming transgender and nonbinary identities differ from one another.

The issue of what gender designations the government—and society more generally—will recognize is vitally important, as sex-segregated facilities remain prevalent. Restrooms, store dressing rooms, and fitness club locker rooms are predominantly sex-specific, as are homeless shelters, jails, prisons, and immigration detention facilities.<sup>198</sup> This separation of men and women is both a social practice and a legal requirement, with zoning regulations mandating segregated spaces in public accommodations and police enforcing the divisions.<sup>199</sup> Youth may confront this issue more often, given that school admissions may be limited by gender,<sup>200</sup> as are living spaces in residence halls and extracurricular activities, particularly sports.<sup>201</sup>

197. *Id.* at 922.

198. *See id.* at 981–86. Some municipalities have moved to gender-neutral designations for restrooms. *See, e.g., New York City Adopts Gender-Neutral Restrooms*, CBS (June 28, 2016, 6:04 PM), <https://www.cbsnews.com/news/new-york-city-adopts-gender-neutral-bathrooms/> [<https://perma.cc/L6J9-8CAZ>]; Hailey Branson-Potts & Christopher Goffard, *No Label Required on West Hollywood's Gender-Neutral Bathrooms*, L.A. TIMES (Jan. 14, 2015, 7:26 PM), <https://www.latimes.com/local/westside/la-me-gender-neutral-restrooms-20150115-story.html> [<https://perma.cc/XT7Q-8VKQ>].

199. *See, e.g., Complaint at 2–3, Yale Univ. v. Conn. State Codes and Standards Committee*, HHB-CV-17-6038904-S (Conn. Super. Ct. 2017) (No. NNH-CV-17-6071573-S) (on file with author); Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 161 (2017); Rachel Vorona Cote, *Police Refuse to Believe Lesbian Is a Woman, Force Her Out of Bathroom*, JEZEBEL (Apr. 28, 2016, 11:00 PM), <http://jezebel.com/police-refuse-to-believe-lesbian-is-a-woman-force-her-1773733431> [[perma.cc/YV6N-LZAB](https://perma.cc/YV6N-LZAB)]; Matthew Tharrett, *Lesbian Teen Kicked Out of McDonald's for Using Women's Bathroom, Failing to "Prove" Gender*, NEWNOWNEXT (Apr. 7, 2016), <http://www.newnownext.com/lesbian-teen-kicked-out-of-mcdonalds-for-using-wrong-bathroom-failing-to-prove-gender/04/2016/> [<https://perma.cc/5YCP-TP8Y>]; *cf.* Matt DeRienzo, *Woman Mistaken for Transgender Harassed in Walmart Bathroom*, NEWSTIMES (May 16, 2016, 3:50 PM), <https://www.newstimes.com/local/article/Woman-mistaken-for-transgender-harassed-in-7471666.php#photo-10075104> [<https://perma.cc/CZJ7-4TP3>] (reporting on a cisgender woman who was mistaken for a transgender woman because of her short hair and consequently harassed in a Wal-Mart bathroom); Eric Nicholson, *Self-Appointed Bathroom Cop Catches Dallas Woman Using Women's Restroom*, DALL. OBSERVER (Apr. 29, 2016, 12:21 PM), <https://www.dallasobserver.com/news/self-appointed-bathroom-cop-catches-dallas-woman-using-womens-restroom-8259104> [<https://perma.cc/QN8X-QHER>] (reporting on a man who followed an androgynously dressed cisgender woman into the restroom, believing her to be transgender).

200. *See* Emmie Martin & Tanza Loudonback, *The 50 Most Elite Boarding Schools in America*, BUS. INSIDER (Feb. 17, 2016, 10:00 AM), <https://www.businessinsider.com/most-elite-boarding-schools-in-america-2016-2> [<https://perma.cc/37WW-EMQL>] (showing that many of the nation's most prestigious private high schools are sex-segregated).

201. Under Title IX, schools may provide separate toilet, shower, and locker rooms, so long as the facilities are comparable for students of both sexes. 34 C.F.R. § 106.33 (2019). States differ

Unlike antidiscrimination laws, which benefit both gender conforming transgender and nonbinary individuals, arguments concerning sex-segregated facilities have typically overlooked nonbinary interests. In 2010, when the federal government proposed regulations to reduce sexual assault in prisons,<sup>202</sup> LGBT rights groups highlighted the needs of transgender individuals, who are almost ten times more likely to be sexually abused while incarcerated than the general prison population.<sup>203</sup> In their twenty-nine page, single-spaced comment, the ACLU, Lambda Legal, the National Center for Lesbian Rights (NCLR), and other LGBT rights groups argued that transgender individuals should be housed according to their gender identity, but they ignored nonbinary inmates entirely.<sup>204</sup>

Similarly, national organizations have filed suit on behalf of transgender plaintiffs who were prohibited from using restrooms that corresponded with their gender identity, but they have not questioned the appropriateness of the sex segregation itself.<sup>205</sup> In the first two months of

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in how they define gender for purposes of athletic competitions, with some determining gender by birth certificate. *See* Morgan Shell, Comment, *Transgender Student-Athletes in Texas School Districts: Why Can't the UIL Give All Students Equal Playing Time?*, 48 TEX. TECH L. REV. 1043, 1045 (2016). Other states have students play according to their gender identity. *Id.* at 1045, 1065. Some states require transgender students to receive at least one year of hormone treatments before the student is eligible to play on the team of their gender identity. *Id.* at 1066. Professional associations have imposed hormonal treatment requirements for transgender and female intersex athletes. *See* INT'L ASS'N ATHLETICS FEDERATIONS, ELIGIBILITY REGULATIONS FOR THE FEMALE CLASSIFICATION 3 (2018); Media Release, Ct. of Arb. for Sport, Caster Semenya, Athletics S. Africa (ASA) and Inter'l Ass'n of Athletic Fed'ns (IAAF) (May 1, 2019) (on file with author); INT'L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM 2–3 (2015), [https://stillmed.olympic.org/Documents/Commissions\\_PDF\\_files/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDF_files/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf) [<https://perma.cc/W8B3-UHAN>].

202. *See generally* National Standards to Prevent, Detect, and Respond to Prison Rape, 75 Fed. Reg. 11077 (proposed Mar. 10, 2010) (to be codified at 28 C.F.R. pt. 115) (proposing a regulation to reduce rape in prisons).

203. NAT'L CTR. FOR TRANSGENDER EQUALITY, LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS 6 (2018), <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf> [<https://perma.cc/3GUB-N34B>]. LGBT inmates suffer sexual assault at three times the rate of other prisoners. *Id.*

204. Letter from Nat'l Ctr. for Transgender Equality et al. to Eric Holder, Jr., Att'y Gen. of the U.S. (May 10, 2010), [aclu.org/sites/default/files/field\\_document/2010-5-10-PREStandardsComments.pdf](http://aclu.org/sites/default/files/field_document/2010-5-10-PREStandardsComments.pdf) [[perma.cc/VTH5-RE9W](https://perma.cc/VTH5-RE9W)]. HRC likewise joined transgender rights groups in submitting a comment on this issue. *See* Letter from Gunner Scott, Exec. Dir., Mass. Transgender Pol. Coal., to Eric Holder, Jr., Att'y Gen. of the U.S. (May 6, 2010), [beta.regulations.gov/document/DOJ-OAG-2010-0001-0231](http://beta.regulations.gov/document/DOJ-OAG-2010-0001-0231) [[perma.cc/9ZLS-NM3H](https://perma.cc/9ZLS-NM3H)].

205. *See, e.g.*, Complaint for Declaratory and Injunctive Relief and Nominal Damages at 2, *Adams v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293 (M.D. Fla. June 28, 2017) (No. 17-cv-739); Complaint for Declaratory and Injunctive Relief at 1, *Carcaño v. McCrory*, No. 16-cv-

2016, legislators filed forty-four antitransgender bills in sixteen states; elected officials continued their efforts to limit bathroom access throughout 2017 and 2018.<sup>206</sup> Most of these bills tracked North Carolina's controversial H.B. 2, a 2016 law that instructed public agencies to "require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex."<sup>207</sup> North Carolina's law was not the first time that bathroom access had become a political flashpoint in LGBT rights, as opponents of LGBT rights had been arguing for years that gender identity protections would allow men to use women's restrooms.<sup>208</sup>

When challenging the laws, LGBT rights organizations have emphasized that transgender men are men and transgender women are women, leaving nonbinary individuals out of the conversation.<sup>209</sup> In the lawsuit against H.B. 2, the ACLU selected all-but-fully transitioned, conventionally attractive transgender men and women, including photographs of the plaintiffs in their appellate briefs to reinforce their argument that transgender individuals should be categorized according to their gender identity.<sup>210</sup> Further, in arguing against a local school board policy that required individuals to use either the bathroom of their assigned sex at birth or a private restroom, the lawyers emphasized that the requirement to use a separate space was isolating and stigmatizing.<sup>211</sup> That claim is accurate and necessary—for gender conforming transgender individuals, being able to access the restrooms associated with their gender identity is essential to their psychological and physical welfare<sup>212</sup>—but it also ignores the existence of nonbinary individuals, who may well prefer private or unisex restrooms.<sup>213</sup> Sex-segregated spaces are especially perilous for individuals who do not read as male or female, whether nonbinary or otherwise gender nonconforming, such that nonbinary individuals often feel fear and stress when accessing these

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236 (M.D. N.C. Mar. 28, 2016); Complaint at 1–2, *G.G. v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. June 11, 2015) (No. 15cv54).

206. HUM. RTS. CAMPAIGN, ANTI-TRANSGENDER LEGISLATION SPREADS NATIONWIDE, BILLS TARGETING TRANSGENDER CHILDREN SURGE 1 (2016); see also Diana Ali, *The Rise and Fall of the Bathroom Bill: State Legislation Affecting Trans & Gender Non-Binary People*, NASPA (Apr. 2, 2019), <https://www.naspa.org/rpi/posts/the-rise-and-fall-of-the-bathroom-bill-state-legislation-affecting-trans-ge> [perma.cc/RTL2-6RCS] (discussing continued efforts to exclude noncisgender people).

207. H.B. 2, 2016 Leg., 2d Extra Sess. (N.C. 2016).

208. See George, *supra* note 9, at 520–21, 523–26.

209. See *id.* at 581–82.

210. See Brief of Plaintiffs-Appellants at 1, 5, *Carcaño v. McCrory*, No. 16-cv-00236-TDS (4th Cir. 2016) (No. 16-1989).

211. See Complaint, *supra* note 205, ¶¶ 4–5.

212. See Laura J. Wernick et al., *Gender Identity Disparities in Bathroom Safety and Wellbeing Among High School Students*, 46 J. YOUTH ADOLESCENCE 917, 928 (2017).

213. See George, *supra* note 25, at 602–03, 607–08.

facilities.<sup>214</sup> Arguments that focus on gender conforming transgender individuals also reinforce conceptions of how men and women should appear, an issue that cuts to the heart of discrimination against gender nonconforming gays and lesbians.

There are several reasons why organizations have not yet tackled this issue. First, the strategic concerns that have led organizations to focus on gender conforming transgender individuals when promoting antidiscrimination laws apply with equal force in this context.<sup>215</sup> It is exponentially more challenging to question sex segregation than to make an argument concerning who fits into which sex-based category.<sup>216</sup> Second, much like antidiscrimination law battles, arguing against sex-segregated facilities could lend credence to opposition arguments, thereby hampering the ability to secure gains for gender conforming transgender individuals.<sup>217</sup> Third, advocates face important legal barriers to presenting these claims, including statutory protections for sex-differentiated facilities and legal precedent that recognizes innate differences between males and females.<sup>218</sup> In other words, the opportunity to present nonbinary inclusive arguments may be limited.<sup>219</sup> Finally, many members within the LGBT community identify and appear as either male or female.<sup>220</sup> As a result, bathroom access is less of a pressing issue than other legal matters. This lack of interest convergence between LGBT and Q may preclude a more expansive movement from taking hold.<sup>221</sup>

In their transgender law reform efforts, LGBT rights organizations have propounded arguments and solutions that have often marginalized nonbinary concerns and ignored nonbinary-specific issues.<sup>222</sup> For that

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214. It is more difficult for transgender women to pass as cisgender women, both because of their physicality and their increasing visibility in popular culture. ARLENE STEIN, *UNBOUND: TRANSGENDER MEN AND THE REMAKING OF IDENTITY* 207 (2018). Additionally, access to the technologies required to pass depends on income, which is correlated to race and ethnicity. *See id.* For that reason, transgender women of color are disproportionately the target of hate crimes. *Id.*

215. *See* George, *supra* note 25, at 560, 599–601.

216. *See* Clarke, *supra* note 19, at 901, 923.

217. *See* George, *supra* note 25, at 584, 589.

218. *See, e.g.*, 34 C.F.R. § 106.33 (2019) (permitting schools to provide separate restrooms for male and female students); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1032 (7th Cir. 1979) (permitting sex-differentiated grooming standards based on “commonly accepted social norms”).

219. For a discussion of possible arguments that organizations could make, see Laura Portuondo, Note, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 *YALE J. L. & FEMINISM* 465, 497 (2018).

220. *But see* Colker, *supra* note 199, at 165; Cote, *supra* note 199; Tharrett, *supra* note 199.

221. *See* Bell, *supra* note 178, at 523 (noting that majority groups will only accommodate minority groups when their interests converge).

222. *See, e.g.*, George, *supra* note 25, at 560, 599–601.

reason, national organizations are typically LGBT rights groups, rather than LGBTQ. Yet nonbinary has a clear identity-based connection that supports its inclusion in the movement, since gender nonconformity was what gave rise to LGBT organizations in the first place. Advocates at the movement's founding recognized the strategic tensions that movement expansion created, but they have yet to confront that issue. These strategic concerns are not limited to nonbinary individuals, but rather implicate many of the gender nonconformists who are LGBT. Nonbinary inclusion thus raises broader questions concerning whether and how national LGBT rights groups may advocate for their more marginalized members.

### III. INTERSEX

Intersexuality's connection to LGBT is less immediately obvious than nonbinary's. Intersexuality is a physical designation, rather than a sexual orientation or gender identity. However, because the non-normative nature of intersex bodies challenges the naturalness of the sexual binary, intersex, nonbinary, and transgender rights advocates have been natural allies in some of their reform efforts. At the same time, intersex and transgender rights advocates offer different—and sometimes conflicting—conceptions of the relationship between sex and gender identity, which has given rise to conflicting legal goals. Thus, intersex rights intersect with LGBT interests in multiple and inconsistent ways.

#### A. *Defining Intersex*

Intersex is an umbrella term for various conditions in which common sex indicators, such as genitals, gonads, or chromosomes, do not clearly establish an individual as male or female.<sup>223</sup> Intersex is therefore a physiological designation, not a gender identity or sexual orientation. Intersex individuals may identify their gender as male, female, or nonbinary; and their sexual orientation as heterosexual, gay, bisexual, or something else.<sup>224</sup> Thus, individuals may self-identify as any combination of L, G, B, T, Q, and intersex,<sup>225</sup> although many with intersex conditions may not identify as intersex because of the secrecy and shame associated with nonnormative physical bodies.<sup>226</sup>

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223. Sudai, *supra* note 36, at 6.

224. See *On a Third Sex*, OII INTERSEX NETWORK (Jan. 16, 2012), <https://oiiinternational.com/2614/on-third-sex/> [<https://perma.cc/5EM4-XAWJ>].

225. Gina Wilson, *Third Sex, Redux*, INTERSEX HUM. RTS. AUSTL. (June 14, 2013), <https://ihra.org.au/22663/third-sex-redux/>.

226. See Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, in *THE TRANSGENDER STUDIES READER* 300, 302, 312 (Susan Stryker & Stephen Whittle eds., 2006); see also ASTRAEA LESBIAN FOUND. FOR JUST., *WE ARE REAL: THE*

Intersexuality may manifest itself in different ways and at various points in a person's life, since several conditions are typically grouped together under the intersex category.<sup>227</sup> The effects of each condition range from producing discordant secondary sex characteristics, such as breasts and body hair, to ambiguous genitalia. For example, as a result of Klinefelter Syndrome, affected males have XXY chromosomes and produce a reduced quantity of testosterone.<sup>228</sup> The condition is often so mild that it is not diagnosed until puberty, if it is ever recognized at all.<sup>229</sup> Hyperandrogenism, a condition that produces higher-than-normal levels of androgens in females, and that has threatened Olympic gold medalist Caster Semenya's career, is likewise typically discovered in adolescence.<sup>230</sup> Congenital Adrenal Hyperplasia (CAH), on the other hand, produces masculinized genitals among chromosomally female infants as a result of their exposure to higher-than-normal levels of androgen during gestation.<sup>231</sup> A CAH infant with XX chromosomes, ovaries, and a uterus may have a large clitoris that looks like a penis, or may have labia majora joined together that resemble a scrotum.<sup>232</sup>

With the wide range of intersex conditions and their effects, the rate of intersexuality in the population is difficult to estimate.<sup>233</sup> When all chromosomal, anatomical, and hormonal exceptions to dimorphic sex are combined, the frequency of intersexuality may be as high as 1.7%.<sup>234</sup> That rate is similar to the likelihood of having red hair and makes intersexuality significantly more common than Down Syndrome or Albinism.<sup>235</sup> However, only a much smaller proportion of intersex infants

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GROWING MOVEMENT ADVANCING THE HUMAN RIGHTS OF INTERSEX PEOPLE 27 (2016) (noting that few intersex individuals identify themselves publicly for fear of stigma and harassment).

227. Typically: Turner Syndrome, Klinefelter Syndrome, Androgen Insensitivity Syndrome, 5-Alpha Reductase Deficiency, Cryptorchidism, Hypospadias, Hyperandrogenism, and Congenital Adrenal Hyperplasia (CAH). See Sudai, *supra* note 36, at 6–7; Peter A. Lee et al., *Global Disorders of Sex Development Update Since 2006: Perceptions, Approach and Care*, 85 HORMONE RSCH. PEDIATRICS 158, 168 (2016).

228. See *Klinefelter Syndrome*, NAT'L INSTS. HEALTH (Aug. 6, 2019), <https://ghr.nlm.nih.gov/condition/klinefelter-syndrome#genes> [<https://perma.cc/2WHE-EBPG>].

229. See *id.*

230. See AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, SCREENING AND MANAGEMENT OF THE HYPERANDROGENIC ADOLESCENT 107 (2019), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2019/10/screening-and-management-of-the-hyperandrogenic-adolescent> [<https://perma.cc/FH9B-8LKS>]; Media Release, Ct. of Arb. for Sport, CAS Arbitration: Caster Semenya, Athletics South Africa (ASA) and International Association of Athletic Federations (IAAF) (May 1, 2019).

231. See ALICE DREGER, GALILEO'S MIDDLE FINGER 192 (2015).

232. See *id.*

233. See Lee et al., *supra* note 227, at 159.

234. ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 51 (2000).

235. See *id.* at 53. Between 1–2% of the world population is red-headed, 0.1% has Down's Syndrome, and Albinism affects 0.005% of people. Hannah Barnes, *How Many Redheads Are*

are born with ambiguous genitalia at birth—a figure closer to 1 in 4,500.<sup>236</sup> Given that close to 4 million children are born in the United States each year, approximately 68,000 will be intersex, and of those, 889 will have ambiguous genitalia.<sup>237</sup>

The primary focus of intersex advocates has been to eliminate infant genital surgery on children born with ambiguous genitalia. From the 1950s to the 1990s, medical providers immediately intervened in these situations, surgically altering the infant's appearance to produce the best cosmetic result.<sup>238</sup> They focused on appearance, rather than functionality, in large part to help children self-identify with—and assist parents treat their child as—their assigned gender.<sup>239</sup> Doctors argued for medical interventions because they assumed that sex and gender necessarily correlated, such that surgery would promote children's gender identity development as male or female.<sup>240</sup> Thus, the surgeries reflected medical providers' beliefs regarding the interrelationship between sex and gender. In 2005, after more than a decade of lobbying by intersex rights advocates, medical professionals revised their approach to intersexuality. That year, they published the *Consensus Statement on Management of Intersex Disorders*, which set forth a new standard of care.<sup>241</sup> The statement emphasized that all individuals should be assigned a gender,

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*There in the World?*, BBC NEWS (Oct. 2, 2013), <https://www.bbc.com/news/magazine-24331615> [<https://perma.cc/J2RE-FB2B>]; Jen Thomas, *Down Syndrome: Facts, Statistics, and You*, HEALTHLINE (May 13, 2019), <https://www.healthline.com/health/down-syndrome/down-syndrome-facts#1> [<https://perma.cc/FKC5-PL73>]; *Oculocutaneous Albinism*, NAT'L INST. HEALTH, <https://ghr.nlm.nih.gov/condition/oculocutaneous-albinism#statistics> [<https://perma.cc/R5RQ-TKQX>].

236. Lee et al., *supra* note 227, at 159.

237. See 67 JOYCE A. MARTIN ET AL., NAT'L VITAL STAT. REPS., BIRTHS: FINAL DATA FOR 2017, at 12 (2018) (reporting 3,855,500 births in the United States in 2017). Since some of the conditions are genetic, the frequency of intersexuality is not uniform around the world. For example, the gene for CAH appears with higher frequency than average among the Yupik peoples of southwestern Alaska but is almost nonexistent in New Zealand. FAUSTO-STERLING, *supra* note 234, at 53 (noting that “3.5 per thousand Yupik Eskimos born had a double dose of the CAH gene,” while “only 0.005/1,000 New Zealanders express the trait”).

238. See KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* 55–57 (2008).

239. See *id.* at 56.

240. Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of “Cultural Practices,”* 40 HARV. C.R.-C.L. L. REV. 71, 129 (2005).

241. See KARKAZIS, *supra* note 238, at 237. The Academy of Pediatrics adopted the *Consensus Statement on Management of Intersex Disorders* as a policy statement. Aimee M. Rolston et al., *Disorders of Sex Development (DSD): Clinical Service Delivery in the United States*, 175 AM. J. MED. GENETICS 268, 268 (2017). It identifies the principles for care but does not constitute “practice guidelines.” *Id.* The use of the term “disorders of sex development” to refer to intersex individuals has been a source of conflict between medical professionals and intersex rights advocates. Elizabeth Reis, *Divergence or Disorder?: The Politics of Naming Intersex*, 50 PERSPS. BIOLOGY & MED. 535, 538 (2007).

surgery should be limited to cases of medical necessity, and any interventions should focus on function rather than cosmetic appearance.<sup>242</sup>

Despite the consensus statement's admonition concerning infant genital surgery, physicians have continued to perform these surgeries at the same or higher rates.<sup>243</sup> As a result, the debate around intersex rights continues to center on sex assignment surgeries for those with intersex conditions: whether to perform them and when to do so. Clinicians have changed their practices by leaving the decision to the parents, rather than making a recommendation.<sup>244</sup> However, doctors' positive portrayals of the surgeries' benefits and outcomes, as well as their inability or unwillingness to present other options, tend to convince otherwise undecided parents.<sup>245</sup> Scientists tend to ignore research demonstrating the harm of early surgical interventions and the complaints of intersex adults, dismissing both as the product of outdated surgical methods.<sup>246</sup>

Since the consensus statement, doctors' justifications for the surgery have shifted away from gender-identity formation and toward alleviating stigma. Physicians now explain that the interventions promote "psychosocial well-being" in that "normal" looking genitals will assuage the child's sense of difference.<sup>247</sup> Doctors often express concern that parents, family members, and care providers will be uncomfortable with the infant's physical difference, leading the child to suffer from the resulting isolation.<sup>248</sup> Therefore, although intersex identity is biological

242. See Hughes et al., *supra* note 36, at 557.

243. See Lina Michala et al., *Practice Changes in Childhood Surgery for Ambiguous Genitalia?*, 10 J. PEDIATRIC UROLOGY 934, 937 (2014); Sarah M. Creighton et al., *Childhood Surgery for Ambiguous Genitalia: Glimpses of Practice Changes or More of the Same?*, 5 PSYCH. & SEXUALITY 34, 38 (2014); Stefan Timmermans et al., *Does Patient-Centered Care Change Genital Surgery Decisions? The Strategic Use of Clinical Uncertainty in Disorders of Sex Development Clinics*, 59 J. HEALTH & SOC. BEHAV. 520, 521 (2018); ELLEN K. FEDER, MAKING SENSE OF INTERSEX: CHANGING ETHICAL PERSPECTIVES IN BIOMEDICINE 140 (2014); see also Rolston et al., *supra* note 241, at 276 (describing variability in clinics' conformity with informed consent and clinical management guidelines).

244. See FEDER, *supra* note 243, at 133, 148; Timmermans et al., *supra* note 243, at 521; GEORGIANN DAVIS, CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS 123 (2015).

245. See FEDER, *supra* note 243, at 149; Timmermans et al., *supra* note 243, at 521.

246. See JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL 222 (2000). There are studies of intersex adults who had early genital normalization surgery and support the practice, but scientists debate these studies' validity. See, e.g., Aurelian Binet et al., *Should We Question Early Feminizing Genitoplasty for Patients with Congenital Adrenal Hyperplasia and XX Karyotype?*, 51 J. PEDIATRIC SURGERY 465, 467 (2016); Arlene B. Baratz & Ellen K. Feder, *Misrepresentation of Evidence Favoring Early Normalizing Surgery for Atypical Sex Anatomies*, 44 ARCHIVES SEXUAL BEHAV. 1761, 1761 (2015); Sara Reardon, *Stuck in the Middle*, 533 NATURE 160, 162 (2016).

247. KARKAZIS, *supra* note 238, at 135.

248. See DAVIS, *supra* note 244, at 123; FEDER, *supra* note 243, at 141.

reality, arguments for a surgical response are based on social conceptions of how sexed bodies should appear.

### B. *Connections Between Intersex and LGBT*

Intersex normalizing surgeries are a problem specific to intersex individuals, but the motivations for these surgical interventions demonstrate the identity-based connections between LGBT, Q, and I. Intersex people generally embody the argument that sex is not neatly defined by a set of binary traits. Moreover, intersex individuals highlight that legal standards for male and female are false constructions because they demand coherence among a range of potentially inconsistent chromosomes, hormones, and phenotypes.<sup>249</sup> The immutable fact of intersex bodies thus challenges the naturalness of sex designations, which connects intersex and transgender interests.

The link between T and I is complicated, however, because intersexuality also supports the notion that gender identity, rather than physicality, is key. Most gender conforming transgender individuals concur that gender identity is essential, but many also emphasize the importance of its physical manifestation. Most transgender individuals either have had or eventually want to have some type of medical treatment so their physical bodies conform to their gender identity.<sup>250</sup> The groups' different views on the necessity of surgery thus reflects their divergent perspectives on gender identity formation.

Intersex interests overlap as much with nonbinary rights as with transgender issues. Both intersex and nonbinary rights advocates insist that dimorphic gender is unnecessary. As sociologist Georgiann Davis explained: "Intersex is a problem because it disrupts the traditional gender order. If our behaviors weren't constrained by gender, if opportunities weren't filtered through gender, and if gender weren't tied to bodies and identities, it is doubtful that intersex would be as problematic throughout the world as it is today."<sup>251</sup> Since intersex surgery explicitly relies on promoting gender norms and stereotypes, intersex rights advocates have argued that greater acceptance of nonnormative gender identities would likely reduce surgical interventions. Thus, Organization Intersex International (OII), an intersex advocacy group founded in 2003, argues that—since gender is a spectrum and the gender assignment of an infant

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249. See Clarke, *supra* note 19, at 929.

250. See JAMES ET AL., *supra* note 119, at 101–03. Many do not seek the full panoply of surgical options and therefore their bodies do not reflect the traditional categories of male and female. *Id.*

251. DAVIS, *supra* note 244, at 7–8.

is “mere conjecture”—intersex children should be able to determine their own gender identity, which may be male, female, or nonbinary.<sup>252</sup>

In addition to transgender and nonbinary, intersexuality shares important identity-based connections with LGB because a primary marker of an infant surgery’s success is the child’s later heterosexual orientation.<sup>253</sup> In other words, opposite-sex sexual desire indicates that doctors accurately predicted the child’s adult gender identity. Some doctors have taken this heterosexual imperative to an extreme. For example, a doctor at Mount Sinai treated pregnant women likely to have CAH-affected fetuses with an experimental drug—without their informed consent—all to prevent intersex girls’ “tomboyism and lesbianism.”<sup>254</sup> The doctor’s unregistered drug trial, which began in the mid-1980s and lasted for more than two decades, exposed fetuses to steroids for weeks before genetic tests could confirm that the drug would have any effect.<sup>255</sup> Because the parents were only carriers of the CAH gene, seven out of eight of the women were likely taking the medication unnecessarily.<sup>256</sup> The parents were not told of the drug’s side effects, which included developmental delays, memory problems, and stunted growth.<sup>257</sup>

That children’s heterosexuality matters so much for doctors demonstrates one of the strategic ties that binds LGB and I.<sup>258</sup> However, the more significant connection between LGBT and intersex rights stems from the fact that intersex identity disputes the naturalness of sex designations and undermines the notion that gender identity necessarily

252. *Welcome and Introduction*, OII INTERSEX NETWORK (Jan. 10, 2012), <https://oiiinternational.com/2533/welcome/> [<https://perma.cc/T6ZJ-LNTB>]; cf. *On a Third Sex*, *supra* note 224 (arguing for the right of intersex individuals to affirm their own sex without governmental interference).

253. See Sudai, *supra* note 36, at 39; Ben-Asher, *supra* note 19, at 88.

254. DREGER, *supra* note 231, at 187–88, 226, 237, 245; see also Maria I. New et al., *Prenatal Diagnosis for Congenital Adrenal Hyperplasia in 532 Pregnancies*, 86 J. CLINICAL ENDOCRINOLOGY & METABOLISM 5651, 5655–56 (2001) (discussing the effects of prenatal administration of steroids on intersex fetuses).

255. See Catherine Elton, *A Prenatal Treatment Raises Questions of Medical Ethics*, TIME (June 18, 2010), <http://content.time.com/time/printout/0,8816,1996453,00.html#> [<https://perma.cc/M3BU-FWL3>]; DREGER, *supra* note 231, at 231, 236–37.

256. See Elton, *supra* note 255.

257. See Alice Dreger, *IVF on Steroids: The Dangerous Off-Label Use of ‘Dex’ During Pregnancy*, ATLANTIC (Jan. 16, 2013), <https://www.theatlantic.com/health/archive/2013/01/ivf-on-steroids-the-dangerous-off-label-use-of-dex-during-pregnancy/267187/> [<https://perma.cc/HVJ3-7GFE>]; Tatja Hirvikoski et al., *Prenatal Dexamethasone Treatment of Children at Risk for Congenital Adrenal Hyperplasia: The Swedish Experience and Standpoint*, 97 J. CLINICAL ENDOCRINOLOGY & METABOLISM 1881, 1882 (2012).

258. Not all intersex individuals want to be incorporated into the LGBT movement. Their repudiation stems in part from not wanting to be seen as different, as well as concern that the public will conflate intersex and transgender, rather than appreciate the similarities that connect the two distinct identity groups. See DAVIS, *supra* note 244, at 138–39.

follows from sex. As a result, intersex advocacy challenges both the sexual and gender binary, much like gender nonconforming members of the LGB community, as well as transgender and nonbinary individuals. Thus, like nonbinary identity, intersexuality's connections are with the more marginalized members of the LGBT community.

### C. *Rights Work*

Although there are important connections between each of LGBT, Q, and I, intersex rights work most often overlaps with transgender and nonbinary rights issues. There, the identity groups' different perceptions of how gender identity and physicality relate has produced divergent efforts around medical regulations, even as their shared challenge of the sexual binary has led to synergies in advocating for reforms of identity document regulations. The strategic relationship between intersex and transgender is therefore multivalent, belying easy categorization.

#### 1. Medical Regulations

In their reform efforts around medical regulations, intersex and transgender rights advocates have pursued opposing goals. Intersex rights advocates have sought to limit medical interventions through legislative lobbying and litigation work, seeing some success in recent years.<sup>259</sup> In 2018, for example, California enacted a resolution calling upon the health professions to “defer[] medical or surgical intervention, as warranted, until the child is able to participate in decisionmaking.”<sup>260</sup> A resolution does not have the force of law and therefore does not prohibit the surgeries; its purpose is instead to raise awareness, foster dialogue, and convey a legislative perspective.<sup>261</sup> However, the expressive power of laws should not be understated, as they may foster new normative commitments in favor of minority groups.<sup>262</sup> For example, the conversion

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259. In 1996, the Intersex Society of North America lobbied to have intersex surgeries included in a federal statute prohibiting female genital mutilation. See Cheryl Chase, “*Cultural Practice*” or “*Reconstructive Surgery*”? *U.S. Genital Cutting, the Intersex Movement, and Medical Double Standards*, in GENITAL CUTTING AND TRANSNATIONAL SISTERHOOD 126, 141 (Stanlie M. James & Claire C. Robertson eds., 2002). However, the law's supporters ignored ISNA's appeals, and the law included an exemption for “medically necessary” operations, which was meant to permit intersex genital surgeries. See *id.*; Female Genital Mutilation, 18 U.S.C. § 116(b)(1) (1996).

260. S. Con. Res. 110, 2017–2018 Leg., Reg. Sess. (Cal. 2018); see Chris Micheli, *What Is a Resolution?*, CAL. GLOBE (Dec. 18, 2019, 8:19 AM), <https://californiaglobe.com/section-2/what-is-a-resolution/> [<https://perma.cc/HU3W-5P33>].

261. *Hearing on S. Con. Res. 110 Before the Assemb. Comm. on Judiciary*, 2017–2018 Leg., Reg. Sess. 9 (Cal. 2018).

262. See RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* 139–42, 166 (2015); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*,

therapy bans that LGBT rights groups have secured around the country are primarily expressive statements about the practice, producing awareness around and skepticism of conversion therapy.<sup>263</sup>

Legislative prohibitions on surgeries have been stalled by medical professionals' opposition, as well as divisions within the intersex community. When Connecticut considered a law on intersex rights that, among other provisions, would have created a task force to determine when intersex infant surgery was "medically necessary,"<sup>264</sup> physicians and parents of intersex individuals testified in opposition.<sup>265</sup> The committee eliminated all references to the task force in the bill it presented to the full Senate; the revised proposal simply specified that intersex-based discrimination was impermissible under state law and added an intersex gender designation option on birth certificates and driver's licenses.<sup>266</sup>

Both Nevada and California considered prohibitions on infant intersex surgeries, but these failed for similar reasons as the Connecticut proposal.<sup>267</sup> The bills would have mandated informed consent from the intersex patient, although they contained a carve-out for medically necessary procedures, defined respectively as a delay that would "endanger the life of the child"<sup>268</sup> and a situation where surgery could not be "safely deferred until the intersex minor can provide informed consent."<sup>269</sup> CAH individuals and their families opposed the bans,<sup>270</sup> arguing that performing surgery reduces stress and anxiety for children and parents, and early interventions prevent the children from

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148 U. PA. L. REV. 1503, 1504 (2000) (arguing expressivism has the capacity to change normative practices and identify where these practices should be reformed).

263. George, *supra* note 132, at 825, 827. Intersex legislative advocacy has enjoyed less success than LGBT rights groups' efforts to ban conversion therapy in large part because of the groups' different relationships with medical professions. *Id.* Conversion therapy bans limit medical providers' authority, but professional medical associations and physicians have widely supported the laws because they reject conversion therapy as unethical. *Id.* at 794–95, 809–10.

264. S.B. 388, 2019 Gen. Assemb., Reg. Sess. (Conn. 2019) (proposed bill).

265. KATHLEEN PANAZZA, S. COMM. ON PUB. HEALTH, JOINT FAVORABLE REPORT ON S.B. 388 (2019).

266. *See* Comm. B. No. 388, 2019 Gen. Assemb., Reg. Sess. (Conn. 2019) (referred to S. Comm. on Pub. Health).

267. S.B. 408, 79th Leg., Reg. Sess. (Nev. 2017); S.B. 201, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

268. Nev. S.B. 408, § 1(1)(b), (2).

269. Cal. S.B. 201, § 1(b)(2)(C). The bill specifically excluded psychological factors from its definition of medical necessity. *Id.*

270. *See Medical Procedures: Treatment or Intervention: Sex Characteristics of a Minor: Hearing on S.B. 201 Before the S. Comm. on Bus., Pros. & Econ. Dev., 2019–2020 Leg., Reg. Sess. 15–16 (Cal. 2019) (statement of Sen. Anthony Weiner, Member, S. Comm. on Bus., Pros. & Econ. Dev.).*

remembering the pain associated with the surgery.<sup>271</sup> CAH is the most common cause of ambiguous genitalia in females, and 95% of CAH individuals identify as women as adults.<sup>272</sup> For these CAH individuals, having their physical body and gender identity align is crucial. However, for intersex rights groups like interACT, CAH-based arguments ignore the needs and rights of the children who would not have consented to the surgery.<sup>273</sup> InterACT's argument stresses that gender identity is key, and physicality is a secondary issue that individuals may seek to address later, or not at all.<sup>274</sup>

Intersex rights advocates have supported their legislative lobbying with malpractice suits against doctors who perform infant surgeries.<sup>275</sup> In 2017, the adoptive parents of an intersex child sued his treating physicians, ultimately settling for more than \$400,000.<sup>276</sup> Medical malpractice cases do more than compensate intersex individuals; they may produce broader changes to medical standards of care because of their effect on insurance companies.<sup>277</sup> Insurance companies impose limitations on their policies as a result of litigation costs; as a result, they may not cover all procedures that professional medical associations endorse.<sup>278</sup> Health and liability insurers then enforce compliance with these guidelines either as a condition of coverage or by increasing insurance premiums for noncomplying physicians.<sup>279</sup> The prospect of

271. Cf. *Sex Characteristics: Hearing on S. Con. Res. 110 Before the Assemb. Comm. on Judiciary*, *supra* note 261 (noting that opponents of such bans, including some CAH patients, argue that early administration of the surgery may save children and parents stress and anxiety); Binet et al., *supra* note 246, at 468 (noting that advocates of early surgery make similar arguments); *see also* Creighton et al., *supra* note 243, at 40 (identifying some reasons given to perform the surgery early are “that surgery is technically easier than in adolescence/adulthood, with faster healing, less post-operative pain and little memory of having had the surgery”).

272. DREGER, *supra* note 231, at 192; Lee et al., *supra* note 227, at 168; Reardon, *supra* note 246, at 162.

273. *See* Reardon, *supra* note 246, at 162 (arguing that intersex groups advocate against infant surgery as they claim no studies have shown they cause “anything but harm”).

274. *Id.*

275. *See* M.C. v. Amrhein, 598 F. App'x 143, 145 (4th Cir. 2015); Order Approving Settlement on Behalf of a Minor, *Crawford v. Med. Univ. of S.C.*, No. 13-CP-40-02877 (S.C. Ct. Com. Pl., July 24, 2017) [hereinafter M.C. Settlement Agreement].

276. *See* M.C. Settlement Agreement, *supra* note 275, at 3. Doctors performed feminizing surgery on the sixteen-month-old M.C., who was born with ovarian and testicular tissue, by removing his phallus, testicle, and testicular tissue, despite concluding “there was no compelling reason that [M.C.] should be either male or female.” Complaint ¶ 1, *M.C. v. Aaronson*, No. 13-CV-01303 (D.S.C. Aug. 29, 2013), *rev'd sub nom.* *M.C. v. Amrhein*, 598 F. App'x 143 (4th Cir. 2015). M.C. was later identified as male, rendering the irreversible surgery especially catastrophic. *See id.* ¶¶ 6–8.

277. *See* Michelle M. Mello, *Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation*, 149 U. PA. L. REV. 645, 652–53 (2001).

278. *See id.* at 652.

279. *See id.* at 652–53.

litigation does not render legislative solutions unnecessary, but may foster new ideas about the relationship between sex and gender.<sup>280</sup>

While intersex advocates have lobbied for prohibitions on normalizing surgery on intersex infants, transgender rights advocates have focused on expanding access to treatments because of their views as to the interrelationship between physicality and gender identity.<sup>281</sup> Insurance companies routinely deny coverage for transition-related care, imposing significant financial hardships on those who seek treatment.<sup>282</sup> In the 2015 U.S. Transgender Survey, the vast majority of respondents wanted hormone therapy, but less than half of those surveyed had received the treatment because many could not afford the cost.<sup>283</sup> An even smaller percentage of those who wanted surgery were able to obtain it, with income and insurance serving as determining factors.<sup>284</sup> To shoulder the costs of surgery, transgender individuals take out loans, go into debt, and save for extensive periods of time; one man explained that he “couldn’t go to college until [he] was done saving for surgery.”<sup>285</sup> An estimated 23% of those referred to gender identity clinics self-prescribed and self-administered hormones they purchased online, often without information about the side effects of the drugs.<sup>286</sup>

Transgender rights advocates have consequently pressed for insurance law reform.<sup>287</sup> The Affordable Care Act (ACA) initially provided some of their hoped-for changes.<sup>288</sup> The ACA prohibits discrimination based on sex, which the Department of Health and Human Services (HHS) at first interpreted as including sexual orientation and gender identity.<sup>289</sup> After a notice and comment period in which advocates stressed the need for insurance coverage, the HHS implementing regulations identified categorical exclusions of gender transition-related services as a violation

280. *See id.* at 653–54.

281. *Cf. Sex Characteristics, supra* note 271; *Medical Procedures: Treatment or Intervention: Sex Characteristics of a Minor: Hearing on S.B. 201 Before the S. Comm. on Bus., Pros. & Econ. Dev.*, 2019–2020 Leg., Reg. Sess. 9–10 (Cal. 2019); Sudai, *supra* note 36, at 23–24; Reardon, *supra* note 246, at 162–63.

282. *See* JAMES ET AL., *supra* note 119, at 95 (showing that insurance companies denied coverage to 55% of transgender respondents who sought transition-related surgery).

283. *Id.* at 99–100.

284. *See id.* at 100.

285. Jae A. Puckett et al., *Barriers to Gender-Affirming Care for Transgender and Gender Nonconforming Individuals*, 15 *SEXUALITY RES. & SOC. POL’Y* 48, 53 (2018).

286. Antonio Metastasio et al., *Transitioning Bodies: The Case of Self-Prescribing Sexual Hormones in Gender Affirmation in Individuals Attending Psychiatric Services*, 8 *BRAIN SCIS.* 1, 2, 3–4 (2018).

287. *See, e.g.,* Samuel Rosh, Note, *Beyond Categorical Exclusions: Access to Transgender Healthcare in State Medicaid Programs*, 51 *COLUM. J.L. & SOC. PROBS.* 1, 11–13 (2017).

288. Pub. L. No. 111-148, § 1557, 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. § 18116).

289. *See* 45 C.F.R. §§ 92.1, 92.3, 92.206 (2016).

of the law.<sup>290</sup> However, eight states and three private healthcare providers challenged the HHS rule, arguing it violated doctors' religious freedom, thwarted independent medical judgment, and imposed impermissible burdens on health insurance plans.<sup>291</sup> A federal district court in Texas held the rule was invalid.<sup>292</sup> While the defendants appealed the decision, the Trump administration repealed the interpretation, describing the rule as "legislative changes that the Department lacked the authority to make."<sup>293</sup>

Thus, transgender rights advocates have supported measures to increase access to medical treatments, while intersex agendas have centered on limiting physicians' interventions. The tension between the two lies in the fact that advocates are making opposite arguments about whether surgical interventions are medically necessary or appropriate for an individual to identify as a member of one sex or another. For transgender individuals, surgery is not cosmetic but rather a central means of creating gender identity cohesion; for intersex rights advocates arguing against infant surgeries, gender identity is able to form irrespective of physicality.<sup>294</sup> The central question that shapes these debates is whether individuals' physical appearance must conform to their gender identity to promote their health and welfare, with the groups propounding different conceptions of sex and gender identity.

## 2. Identity Documents

Even as transgender and intersex rights advocates pursue different goals around medical regulations, both are attempting to wrest control over their lives from doctors.<sup>295</sup> In another legal setting—changing the

290. See 45 C.F.R. § 92.206; 81 Fed. Reg. 31,376–78 (May 18, 2016). Insurance companies could, however, apply neutral policies that ultimately denied coverage for these treatments. See *id.* at 31,429.

291. See *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 669–72 (N.D. Tex. 2016) (order granting preliminary injunction), *subsequent determination sub nom.* *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019), *appeal docketed*, No. 20-10093 (5th Cir. Jan. 24, 2020).

292. See *Franciscan All.*, 414 F. Supp. 3d at 947.

293. *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160, 37,161–62 (June 19, 2020).

294. See Ben-Asher, *supra* note 19, at 55, 60. Intersex individuals may seek to have their physical bodies align with their gender identity, but advocacy arguments are premised on the claim that surgeries are irrelevant to gender identity formation.

295. See *id.* at 90 (discussing the control medical professionals exercise over transgender and intersex individuals). Reducing medical authority has been a concern for LGB individuals and asexuals, but intersex, gender conforming transgender, and nonbinary advocates have been particularly focused on reducing the medical profession's authority over their lives. For example, one of the gay liberation movement's first targets was the American Psychiatric Association's (APA) classification of homosexuality as a mental illness in the Diagnostic and Statistical Manual (DSM), which served to justify government discrimination based on sexual orientation. See

laws around identity documents—this same focus on autonomy has made the groups close allies. Both transgender and intersex rights advocates are invested in altering the requirements for changing an individual’s gender designation on identity documents, as well as convincing states to offer a nonbinary gender option. In this area of law, the arguments of transgender and intersex advocates are not just related but mutually constitutive.

Inaccurate gender markers on legal documentation have a significant impact on transgender, nonbinary, and intersex individuals. Birth certificates are required for many important services, including determining work eligibility, registering for school, obtaining professional certifications, and accessing public benefits.<sup>296</sup> Without correct identification, individuals may be denied entitlements and accused of fraud.<sup>297</sup> Identification also determines access to binary sex-segregated spaces, as Section II.C discussed.

For decades, medicine has been a limiting factor for those seeking to amend their gender identity markers. States have allowed individuals to modify the gender on their birth certificates and driver’s licenses since the 1970s, but these early laws required gender confirmation surgery.<sup>298</sup> After decades of lobbying by transgender rights advocates, many states eliminated the surgical requirement but replaced it with proof of clinical treatment.<sup>299</sup> As a result, medical providers continue to serve as gatekeepers, a significant problem for an underinsured group.

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Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL’Y REV. 83, 110–16 (2017). More recently, the LGBT movement has sought to secure conversion therapy bans. See George, *supra* note 132, at 794, 807–10. As for aces, they similarly engaged in a DSM revision project to recast asexuality as a sexual orientation rather than a stigmatized aberration. See Lori A. Brotto et al., *Asexuality: A Mixed-Methods Approach*, 39 ARCHIVES SEXUAL BEHAV. 599, 610–11 (2010); David Jay, *DSM Fireside Chat*, YOUTUBE, at 2:20–3:40 (Dec. 23, 2008), <https://youtu.be/4z3u0DyUe6U?t=130> [<https://perma.cc/H6N7-Q537>].

296. *Hearing on Intro 954 Before the N.Y.C. Council Comm. on Health*, 3–4 (N.Y.C. 2018) (testimony of Nala Simone Toussaint).

297. See *id.* at 2.

298. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 767–69 (2008); MEYEROWITZ, *supra* note 100, at 242–53; Paisley Currah & Lisa Jean Moore, “*We Won’t Know Who You Are*”: *Contesting Sex Designations in New York City Birth Certificates*, 24 HYPATIA 113, 114–15 (2009); Nat’l Ctr. For Transgender Equal., *Breaking News: New York State Modernizes Requirements for Birth Certificate Gender Markers*, ADVANCING TRANSGENDER EQUAL. (June 5, 2014, 11:13 AM), <https://transgenderequality.wordpress.com/2014/06/05/breaking-news-new-york-state-modernizes-requirements-for-birth-certificate-gender-markers/#more-2722> [<https://perma.cc/B76H-TSFC>].

299. See MOVEMENT ADVANCEMENT PROJECT, IDENTITY DOCUMENT LAW AND POLICIES: DRIVER’S LICENSE (2020), <http://www.lgbtmap.org/img/maps/citations-id-drivers-license.pdf> [<https://perma.cc/4TGR-25AS>]; MOVEMENT ADVANCEMENT PROJECT, IDENTITY DOCUMENT LAW AND POLICIES: BIRTH CERTIFICATES (2020) [hereinafter BIRTH CERTIFICATES], <http://www.lgbtmap.org/img/maps/citations-id-birth-certificate.pdf> [<https://perma.cc/J2AQ-H6A5>].

Transgender, nonbinary, and intersex rights advocates have pressed for two types of legislative changes. First, they have lobbied for personal attestations of gender identity to serve as the sole requirement for amending the gender designation on identity documents.<sup>300</sup> In other words, they seek to cut out the medical middleman. Second, they have asked officials to offer a nonbinary gender marker alternative.<sup>301</sup> The argument for the latter change is that gender is neither dimorphic nor contingent on treatment, while the argument for the former is that many transgender individuals do not obtain medical interventions due to financial barriers and personal preferences.<sup>302</sup> The results have been steady, but not all states have embraced both prongs of the project.<sup>303</sup> As of January 2021, eighteen states and the District of Columbia have eliminated the medical attestation requirement and added nonbinary gender designation options for birth certificates and/or driver's licenses.<sup>304</sup> Four additional states offer nonbinary gender options but

300. *Hearing on Intro 954, supra* note 296, at 2 (testimony of Gretchen Van Wye, PhD Assistant Commissioner, Bureau of Vital Statistics New York City Department of Health and Mental Hygiene) [hereinafter Van Wye testimony].

301. *See id.*

302. *See Gender Identity: Female, Male, or Nonbinary: Hearing on S.B. 179 Before the S. Judiciary Comm.*, 2017–2018 Leg., Reg. Sess. 3 (Cal. 2017) [hereinafter *Gender Identity Hearing*] (statement of Sen. Hannah-Beth Jackson, Chair, S. Judiciary Comm.).

303. *See BIRTH CERTIFICATES, supra* note 299.

304. California, Colorado, Connecticut, Maine, Nevada, New Mexico, Oregon, Rhode Island, and Washington offer nonbinary options on both birth certificates and driver's licenses. Arkansas, Maryland, Massachusetts, Minnesota, Pennsylvania, Vermont, and D.C. offer nonbinary designations on driver's licenses, while Illinois, New Jersey, and New York offer nonbinary options on birth certificates. *See* S.B. 179, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (enacted); COLO. CODE REGS. § 204-32 (2018); D.C. CODE § 50-1401.1 (2018 H.B. 3534, 101st Gen. Assemb., Reg. Sess. (Ill. 2019) (enacted); S.B. 196, 2019 Leg., Reg. Sess. (Md. 2019) (enacted); N.J. STAT. ANN. § 26:8-40.12 (West 2019); WASH. ADMIN. CODE § 246-490-075 (2018); H.B. 3534, 101st Gen. Assemb., Reg. Sess. (Ill. 2019) (enacted); Teresa Boeckel, "X" Will Become an Option for Gender on Pa. Driver's Licenses, USA TODAY (July 31, 2019, 2:42 PM), <https://www.usatoday.com/story/news/2019/07/31/pennsylvania-offering-gender-neutral-drivers-licenses/1878727001> [<https://perma.cc/KXA5-CLLT>]; Jordan Fenster, *DMV to Allow Non-Binary Gender Option Starting Monday*, STAMFORD ADVOC. (Jan. 25, 2020, 6:58 PM), <https://www.stamfordadvocate.com/local/article/DMV-to-allow-non-binary-gender-option-starting-15003870.php> [<https://perma.cc/RZ5V-BLBL>]; Mary Emily O'Hara, *Oregon Becomes First State to Add Third Gender to Driver's Licenses*, NBC NEWS (June 15, 2017, 5:57 PM), <https://www.nbcnews.com/feature/nbc-out/oregon-becomes-first-state-add-third-gender-driver-s-licenses-n772891> [<https://perma.cc/B5H2-HXL4>]; Steve LeBlanc, *Massachusetts Senate OKs Bill to Allow Gender "X" Option*, ASSOCIATED PRESS (June 28, 2018), <https://www.apnews.com/d950dc3eb3a5436c888c3bf71b30cc9b> [<https://perma.cc/JXE5-4WY3>]; Cynthia Silva, *Following Trans Teen's Suit, Minors Can Now Change New York Birth Certificates*, NBC NEWS (Mar. 12, 2020, 3:22 PM), <https://www.nbcnews.com/feature/nbc-out/following-trans-teen-s-suit-minors-can-now-change-new-n1157111> [<https://perma.cc/2QJM-C4CS>]; Paul Walsh, *Minnesota Now Offers "X" for Gender Option on Driver's Licenses*, STAR TRIB. (Oct. 3, 2018, 8:34 AM), <http://www.startribune.com/minnesota-now-offers-x-for-gender-option-on-driver-s-licenses/494>

continue to require evidence from a medical provider to alter an individual's gender designation, while one state has eliminated the attestation requirement but does not offer a nonbinary gender option.<sup>305</sup>

Intersex rights advocacy has played an important role in obtaining both nonbinary gender designations and self-attestations for changes in gender on legal documents, demonstrating how the rights of the groups are integrated. In hearings, intersex individuals and their families

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909961 [https://perma.cc/DWW6-GF3Q]; WJAR Staff, *RI Will Offer Third Gender Option for Licenses, Birth Certificates*, NEWS CHANNEL 9 (Aug. 9, 2019), https://newschannel9.com/news/nation-world/ri-will-offer-third-gender-option-for-licenses-birth-certificates [https://perma.cc/5 DLT-62DA]; Curtis M. Wong, *Arkansas Has Been Offering a Nonbinary Gender Option on State IDs for Years*, HUFFINGTON POST (Oct. 17, 2018, 6:50 PM), https://www.huffingtonpost.com/entry/arkansas-gender-neutral-state-id-option\_us\_5bc79f75e4b0d38b5874a669 [https://perma .cc/4Q6X-W8QG]; Press Release, Dep't of the Sec'y of State, Maine BMV to Offer Non-binary Gender Designation on Driver's Licenses, ID CARDS (June 11, 2018), https://www.maine.gov/sos/news/2018/genderdesignationlid.html [https://perma.cc/ A6XZ-WS7S]; KRQE Staff, *New Mexico Becomes Fourth State to Allow Gender-Neutral Sex Designation on Birth Certificates*, 7NEWS (Oct. 29, 2019), https://www.wspa.com/news/national/new-mexico-to-allow-gender-neutral-sex-designation-on-birth-certificates/ [https://perma.cc/9S 82-EUWM]; Press Release, Nev. DMV, Nevada Implements Gender-Neutral IDs (Apr. 22, 2019), https://dmvnv.com/news/19001-gender-x-available.htm [https://perma.cc/YB4W-P46J]; *Self- Designated Descriptors*, VT. DEP'T MOTOR VEHICLES, https://dmv.vermont.gov/licenses/identity-documents/self-designated-descriptors [https://perma.cc/N7GH-Z32Q].

305. Hawaii, New Hampshire, and Virginia offer nonbinary gender designations on their driver's licenses, but continue to require documentation from a medical provider for gender changes. Utah offers nonbinary designations on both driver's licenses and birth certificates, but requires a medical attestation. Michigan does not have a nonbinary gender option, but has eliminated the attestation requirement. Indiana's Bureau of Motor Vehicles (BMV) attempted to introduce a nonbinary gender designation option, but the state's Attorney General determined that the policy exceeded the BMV's authority. H.B. 1165, 30th Leg., Reg. Sess. (Haw. 2019); H.B. 669, 2019 Leg., Reg. Sess. (N.H. 2019) (enacted); S.B. 247, VA CODE ANN. § 46.2-323 (2020); Nico Lang & Kate Sosin, *Utah Among Growing Number of States Issuing Gender-Neutral IDs*, NBC NEWS (Mar. 18, 2019, 12:37 PM), https://www.nbcnews.com/feature/nbc-out/utah-among-growing-number-states-issuing-gender-neutral-ids-n984326 [https://perma.cc/PRG8-LLHY]; Beth LeBlanc, *Michigan May Add Third Gender Option to Driver's License*, THE DETROIT NEWS (Jan. 6, 2020, 5:52 PM), https://www.detroitnews.com/story/news/politics/2020/01/06/michigan-sos-may-add-third-gender-option-drivers-license/2827473001/ [https://perma.cc/EMV4-QFZ6]; *WTHR.com Staff*, *Curtis Hill: BMV Doesn't Have Authority to Allow Nonbinary Gender on Licenses*, WTHR (Mar. 11, 2020), https://www.wthr.com/article/news/local/indiana/curtis-hill-bmv-doesnt-have-authority-allow-nonbinary-gender-licenses/531-a5cb3c6b-b549-479b-9874-370e80e69d9a#:~:text=INDIANAPOLIS%20(WTHR)%20%E2%80%94%20Indiana%20Attorney,female%20on%20their%20driver's%20licenses.&text=The%20BMV%20announced%20it%20was,issued%20IDs%20in%20March%202019 [https://perma.cc/PR55-29G3]. For a discussion of how different states approach gender designation changes for intersex individuals, see DaleLynn Sims, *Changing the Birth Certificate or Birth Record*, CARES FOUND, Winter 2002, at Australia offers a nonbinary designation on passports, with the first issued to an intersex citizen in 2003. Sudai, *supra* note 36, at 30. Other countries also have nonbinary, unspecified, third gender options, including Canada, India, Malta, Nepal, and New Zealand. *See id.* at 31; Anna Boyd, *Back to the Binary: How the Olympics Struggle with Separation of Male and Female*, 14 DEPAUL J. SPORTS L. 1, 8–9 (2018).

have offered physiological reasons for the laws, as intersex gender designations at birth may not reflect later physical developments or gender identity.<sup>306</sup> Char Weigel, who has an intersex daughter, stressed the laws' import to intersex individuals when testifying before the NYC Committee on Health: "A medical professional in the delivery room makes a split-second call about whether the word 'male' or 'female' works its way onto a birth certificate. One small word that does not define, but can confine, someone for the rest of their life."<sup>307</sup>

Intersex advocacy in this space is particularly important, as jurists and the public alike are more likely to respond to arguments based on innate characteristics, making intersex plaintiffs appear more sympathetic—and legitimate.<sup>308</sup> Many opponents of the legal changes express concern about dissimulation and fraud, but these objections are less potent in the intersex context.<sup>309</sup> Intersexuality also undermines opponents' arguments against the laws, as the responses to the Washington Department of Health's proposed rule to offer nonbinary options on birth certificates reveal. The Department received more than 500 public comments on the matter, with slightly more than half opposed to the change.<sup>310</sup> The reason opponents pressed most frequently was that male and female were immutable biological categories, defined by chromosomes and imprinted in DNA.<sup>311</sup> Some commentators further justified their views by emphasizing the difference between sex and gender, with one summarizing the point with the statement: "Sex is determined by genetics. Everything else is behavior."<sup>312</sup> Since birth certificates record sex, not gender, they argued, the state should not permit changes or nonbinary options.<sup>313</sup> The very

306. See Van Wye testimony, *supra* note 300, at 2 (providing statements in support of the law from various intersex individuals).

307. *Id.* at 3 (emphasis omitted).

308. See Clarke, *supra* note 19, at 928.

309. See *Gender Identity Hearing*, *supra* note 302, at 2, 7.

310. See, e.g., *Rules Comment*, WASH. STATE DEP'T HEALTH (Nov. 17, 2017, 12:27 PM), <https://fortress.wa.gov/doh/policyreview/ViewComments.aspx?ID=1178> [<https://perma.cc/FH98-VTPJ>]; *Rules Comment*, WASH. STATE DEP'T HEALTH (Dec. 4, 2017, 6:30 PM), <https://fortress.wa.gov/doh/policyreview/ViewComments.aspx?ID=1177> [<https://perma.cc/5LYY-64ZV>] [hereinafter *Rules*, Dec. 4, 2017]; *Rules Comment*, WASH. STATE DEP'T HEALTH (Nov. 17, 2017, 1:09 PM), <https://fortress.wa.gov/doh/policyreview/ViewComments.aspx?ID=1179> [<https://perma.cc/4FBT-2D7V>] [hereinafter *Rules*, Nov. 17, 2017, 1:09 PM].

311. See, e.g., *Rules*, Dec. 4, 2017, *supra* note 310; *cf.* *Rules*, Nov. 17, 2017, 1:09 PM, *supra* note 310 (arguing that only medical professionals are qualified to accurately determine a person's sex).

312. *Rules Comment*, WASH. STATE DEP'T HEALTH (Dec. 5, 2017, 2:56 PM), <https://fortress.wa.gov/doh/policyreview/ViewComments.aspx?ID=1179> [<https://perma.cc/4FBT-2D7V>].

313. See *Rules Comment*, WASH. STATE DEP'T HEALTH (Dec. 5, 2017, 2:24 PM), <https://fortress.wa.gov/doh/policyreview/ViewComments.aspx?ID=1179> [<https://perma.cc/YM8-69DZ>].

existence of intersexuality challenged these claims, as many of the law's proponents noted.<sup>314</sup>

As the discussion of identity documents and medical regulations indicates, the relationship between medical professionals and transgender, nonbinary, and intersex individuals is fraught. Because of their different histories, intersex individuals have sought to limit medical interventions, while transgender individuals have pressed for expanded access to care. Those divergent goals reflect that the groups conceptualize gender identity differently. At the same time, the identity groups are united in their efforts to change the laws around identity designations on legal documents. Just as with nonbinary rights, intersex inclusion in the LGBT umbrella creates questions around both identity and strategy.

#### IV. ASEXUAL

Unlike intersex and nonbinary, the LGBT legal movement has not undertaken any representation of asexual rights. Asexuality's status as a nonnormative sexual orientation means that asexuals share a key identity trait with lesbians, gays, and bisexuals. However, asexuality is based on a lack of sexual desire, making it categorically different from the other groups, whose sexual orientation is characterized by the gender of their sexual partners.<sup>315</sup> Moreover, discrimination that asexual individuals, or aces, endure may not be immediately clear to observers, and their lack of sexual desire seems to implicitly repudiate the sex-positivity that the LGBT movement embraces. The identity-based connection between asexuality and LGBT therefore does not align neatly, while their legal goals reveal strategic tensions. These dual challenges help explain why asexuality is the least integrated among QIA.

##### A. *Defining Asexuality*

Aces are generally not sexually attracted to others and therefore do not desire to engage in sexual activities.<sup>316</sup> This lack of sexual attraction is what distinguishes asexuality and celibacy, which implies a repressed desire. Asexuality's intrinsic nature is why aces identify it as a sexual

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314. See *Rules Comment*, WASH. STATE DEP'T HEALTH (Dec. 5, 8:41 AM), <https://fortress.wa.gov/doh/policyreview/ViewComments.aspx?ID=1179> [<https://perma.cc/MC82-GPYU>].

315. Other identity groups seeking inclusion in the LGBT movement, such as polyamory, have also rooted their arguments in their sexual orientation-based connection. See, e.g., Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1477, 1497, 1510–11 (2011).

316. See *Overview*, ASEXUAL VISIBILITY & EDUC. NETWORK, <https://www.asexuality.org/?q=overview.html> [<https://perma.cc/3RKC-WC9P>].

orientation.<sup>317</sup> Thus, aces' sexual non-desire is an immutable fact, rather than a choice that asexuals elect.<sup>318</sup>

There is a great deal of variation within the asexual community. Asexuality includes gray-asexuals, meaning individuals who identify as being in the space between sexual and asexual.<sup>319</sup> One of the major categories of gray-asexuality is demi-sexuality, which refers to individuals who only experience sexual attraction when they form a strong emotional bond with another person.<sup>320</sup> In the most recent survey of major asexual communities, 64.5% of respondents identified as asexual, 10.8% as gray-asexual, 8.6% as demi-sexual, 10.7% as questioning, and the remaining 5.5% as "none of the above."<sup>321</sup>

Sexual attraction is distinct from romantic attraction and sexual experience, which are additional factors that contour ace identity. Aces may form romantic relationships that involve physical intimacy, such as cuddling and kissing, which is often directed at a particular gender.<sup>322</sup> The "split attraction" model leads many asexuals to separate their sexual and romantic attractions, such that asexuals may also identify as lesbian, gay, bisexual, or heterosexual.<sup>323</sup> An asexual who seeks romantic relationships with members of the same-sex might thus identify as a "homoromantic" asexual.<sup>324</sup> Despite their lack of sexual interest, aces may be sexually active, often to "seem normal" or because of their partners' desires.<sup>325</sup> In a recent community survey, 30.2% of asexuals reported having had consensual sexual experiences, with most explaining that this was "to please their partner."<sup>326</sup>

317. *See id.*

318. Emens, *supra* note 34, at 316.

319. *See The Gray Area*, ASEXUAL VISIBILITY & EDUC. NETWORK, <https://www.asexuality.org/?q=grayarea> [<https://perma.cc/3BT4-CD4C>]. This includes individuals who experience sexual attraction but have a low sex drive, or whose sexual attraction and drive are not strong enough for the individual to want to act upon. *See id.*

320. *See General FAQ*, ASEXUAL VISIBILITY & EDUC. NETWORK, <https://www.asexuality.org/?q=general.html#ex4> [<https://perma.cc/M8HA-YJCB>].

321. CAROLINE BAUER ET AL., 2016 ASEXUAL COMMUNITY SURVEY SUMMARY REPORT 6 (2018), [https://asexualcensus.files.wordpress.com/2018/11/2016\\_ace\\_community\\_survey\\_report.pdf](https://asexualcensus.files.wordpress.com/2018/11/2016_ace_community_survey_report.pdf) [<https://perma.cc/H7BZ-QRXC>].

322. *See Overview*, *supra* note 316.

323. *Id.*

324. Brotto et al., *supra* note 295, at 610.

325. *Id.* at 607, 614; *see also* Nicole Prause & Cynthia A. Graham, *Asexuality: Classification and Characterization*, 36 ARCHIVES SEXUAL BEHAV. 341, 345 (2007) (noting that individuals who identified as asexual felt that they engaged in sexual activity because their partner deserved or expected sex).

326. BAUER ET AL., *supra* note 321, at 32–33.

Approximately 1% of the population is asexual,<sup>327</sup> which is significantly higher than the 0.6% that identifies as transgender.<sup>328</sup> That estimate, however, is likely *under*-representative, as it only includes individuals who have had a lifelong absence of sexual attraction to either sex.<sup>329</sup> The figure thus does not count gray-asexuals, who make up a substantial proportion of the asexual community. The difficulty in estimating the asexual population comes partly from the variations within asexuality, as well as the inability to rely upon self-identification.<sup>330</sup> Research has demonstrated that aces do not necessarily self-identify as asexual, or they may do so inconsistently; in one study, almost half of those who selected “asexual” when presented with a series of options did not write in “asexual” when previously asked to fill in a blank with their sexual orientation.<sup>331</sup> Additionally, given aces’ romantic attraction, aces may self-identify as heterosexual, gay, lesbian, or bisexual, rather than asexual.<sup>332</sup>

Beyond having overlapping identities, aces’ inconsistent self-identification may be the product of asexuality’s relatively recent emergence as an identity category. Asexual adults overwhelmingly report not having heard of the identity category before their late teens and therefore grew up asking themselves if there was “something wrong” with them.<sup>333</sup> Like LGBT, nonbinary, and intersex individuals, aces also have the experience of “coming out,” although perhaps with less institutional support available than the other identity groups. The Asexual Visibility and Education Network (AVEN), a public education organization and “safe space” for asexuals, only formed in 2001.<sup>334</sup> The

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327. Anthony F. Bogaert, *Asexuality: Prevalence and Associated Factors in a National Probability Sample*, 41 J. SEX RSCH. 279, 282 (2004). The foundational study on the rate of asexuality, by psychologist Anthony Bogaert, was based on British residents but has been replicated by other research, with some finding a higher, and others a lower, percentage. See Emens, *supra* note 34, at 312 (discussing the studies). Bogaert’s work remains prominent for relying on a large and natural sample. *Id.*

328. FLORES ET AL., *supra* note 148, at 3.

329. See Bogaert, *supra* note 327, at 281.

330. Prause & Graham, *supra* note 325, 343–44, 353 (noting that Bogaert “likely failed to identify many individuals who would . . . self-identify as asexual”).

331. *Id.* at 349; see also Brotto et al., *supra* note 295, at 606 (discussing lack of self-identification among asexuals).

332. See BAUER ET AL., *supra* note 321, at 6, 23.

333. Dominique Mosbergen, *Battling Asexual Discrimination, Sexual Violence and ‘Corrective’ Rape*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffpost.com/entry/asexual-discrimination\\_n\\_3380551?guccounter=1](https://www.huffpost.com/entry/asexual-discrimination_n_3380551?guccounter=1) [<https://perma.cc/SU5F-F6HW>]. Adolescence for aces thus seems to mirror that of LGBT minors in terms of inner turmoil and isolation, although this may change as asexuality becomes more visible.

334. *About AVEN*, ASEXUAL VISIBILITY & EDUC. NETWORK, <https://www.asexuality.org/?q=about.html> [<https://perma.cc/3QNS-BGUS>].

group's founding marked the launch of the first asexual advocacy organization.

### B. *Connections Between Asexuality and LGBT*

Although aces may be homoromantic or biromantic, as well as gender conforming transgender or nonbinary, LGBT and asexual rights organizations are distinct and separate.<sup>335</sup> Most asexuals do not participate in LGBT organizations or activities, such as frequenting queer clubs or attending pride parades.<sup>336</sup> Indeed, many aces report that LGBT spaces are not “intended for them”<sup>337</sup> because LGBT communities often center around celebrations of sexuality.<sup>338</sup> Although the LGBT movement's focus on sexual liberation receded during the AIDS crisis, with bathhouses giving way to preschools as the quintessential symbols of gay and lesbian life, sexual freedom continues to form a core part of the LGBT movement's identity.<sup>339</sup> Pride parades are known for their overt displays of sexuality, serving as a reminder that sexual attraction is a defining characteristic of LGB identity.<sup>340</sup> The identity-based tension between the asexual movement, which questions the vitality and naturalness of sexuality, and the LGBT movement, which has pressed to have its sexual expression respected, should not be overstated.<sup>341</sup>

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335. Large portions of the asexual population do not self-identify as any LGBT identity, thereby creating an identity-based rift between the groups. Mosbergen, *supra* note 333; *see also* BAUER ET AL., *supra* note 321, at 6–7 (indicating that large portions of the asexual population do not self-identify as any LGBT identity).

336. *See* Bauer et al., *supra* note 321, at 47.

337. *Id.* at 48.

338. Karli June Cerankowski & Megan Milks, *New Orientations: Asexuality and Its Implications for Theory and Practice*, 36 FEMINIST STUD. 650, 661 (2010); *see also* Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 UMKC L. REV. 675, 678–84 (2016) (discussing the Supreme Court's conspicuous avoidance of sex in the same-sex marriage cases); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239–40 (2006) (arguing that the assimilationist strategies of the gay rights movement has unsexed the LGBT community); Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1416 (2004) (framing *Lawrence v. Texas* as doing little other than setting up a landscape “that likely renders different legal treatment to those who express their sexuality in domesticated ways and those who don't”).

339. *See generally* Ralph Bolton et al., *Gay Baths Revisited: An Empirical Analysis*, 1 GLQ J. LESBIAN & GAY STUD. 255 (providing a history of bathhouses and the effect of the AIDS crisis).

340. *See* Alexander Cheves, *13 Reminders Pride Is Also About Sex*, ADVOCATE (June 7, 2018), <https://www.advocate.com/pride/2018/6/07/10-reminders-pride-also-about-sex#media-gallery-media-1> [<https://perma.cc/7YR6-RFEJ>]. T is intentionally omitted here because transgender is a gender identity, not a sexual orientation.

341. *Compare* Cerankowski & Milks, *supra* note 338, at 651, 653, 662 (defining asexuality specifically and explaining its relationship to the LGBT movement), *with* Mosbergen, *supra* note 333 (illustrating that elements of the LGBT movement are not inclusive of asexuality).

Asexuals may be repulsed at the idea of personally engaging in sex, but most are sex-positive or at least sex-neutral as a political matter.<sup>342</sup>

Asexuals suffer direct exclusion, rejection, harassment, and violence because of their sexual orientation. In a survey of aces, almost one-third reported having experienced verbal or online harassment because of their identity, and more than 45% had been told to seek help or had others attempt to cure them.<sup>343</sup> Bias against asexuality is pronounced, even though aces are a small subset of the population.<sup>344</sup> Attitudes toward asexuals are more negative than those toward gays, lesbians, or bisexuals, reflecting strong prejudice against aces.<sup>345</sup> When asked about sexual minorities, respondents are least likely to associate aces with human traits and emotions because of aces' lack of sexual desire.<sup>346</sup>

The aversion toward asexuals may be linked to two conflicting and opposite emotions: a distrust derived from lack of understanding, and animus precisely because of its familiarity.<sup>347</sup> Cultural preoccupation with sexual availability, desirability, and performance may stem not from the overabundance of sex that individuals are presumed to enjoy, but rather an intense anxiety around its absence.<sup>348</sup> Social expectations around sexuality thus foster prejudice against asexuality, which contributes to asexuals' apprehensions and concerns about their difference.

Because of their sexual orientation, aces are targeted for physical and sexual assault, which may take the form of "corrective rape."<sup>349</sup> Julie Decker, an asexual activist, was assaulted as a teenager by a friend who believed she was "in denial" about her sexuality.<sup>350</sup> Online commentators have repeatedly told her that she "just needs a 'good raping,'" thereby reinforcing her assailant's sentiment—and highlighting a particular source of danger for aces.<sup>351</sup> The violence asexuals experience is likely due to a combination of sexual orientation and gender identity, with

342. See BAUER ET AL., *supra* note 321, at 49.

343. *Id.* at 41.

344. See Cara C. MacInnis & Gordon Hodson, *Intergroup Bias Toward "Group X": Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination Against Asexuals*, 15 GRP. PROCESSES & INTERGROUP RELS. 725, 726 (2012).

345. See *id.* at 731.

346. See *id.* at 731–32, 738.

347. See Leong, *supra* note 34, at 1394.

348. See *id.* at 1396. Such a response is known as "reaction formation." Roy F. Baumeister et al., *Freudian Defense Mechanisms and Empirical Findings in Modern Social Psychology: Reaction Formation, Projection, Displacement, Undoing, Isolation, Sublimation, and Denial*, 66 J. PERSONALITY 1081, 1085 (1998).

349. Doan-Minh, *supra* note 34, at 174; Mosbergen, *supra* note 333.

350. Julie Kliegman, *When You're an Asexual Assault Survivor, It's Even Harder to Be Heard*, BUZZFEED NEWS (July 26, 2018, 2:15 PM), <https://www.buzzfeednews.com/article/jmkleigman/asexuality-sexual-assault-harassment-me-too> [<https://perma.cc/D9AC-E5W7>].

351. Doan-Minh, *supra* note 34, at 174.

several traits compounding individuals' marginalization. A disproportionate percentage of aces identify as neither male nor female, with most describing themselves as nonbinary or agender, and a significant part of the asexual community is transgender.<sup>352</sup> Asexuality is therefore a factor that exacerbates these individuals' already precarious place in society.

Despite the discrimination that aces face, many within the LGBT community have expressed skepticism that asexuals truly require protection.<sup>353</sup> When journalist and LGBT community activist Dan Savage first saw AVEN marching in the San Francisco pride parade, he dismissed the asexual rights project with the derisive comment that all aces had to do was “stay home, not do anything.”<sup>354</sup> Only one sexual orientation antidiscrimination law in the country specifically protects individuals on the basis of asexuality, and legislators only included the provision to argue the law was not a “gay rights” bill.<sup>355</sup>

The suspicion cast on asexuals mirrors the historical exclusion of bisexuals from the LGBT community, with gays, lesbians, and heterosexuals all questioning whether bisexuality existed and the validity of bisexual discrimination claims.<sup>356</sup> Insofar as the two identity categories represent the outer ranges of sexual attraction, from no genders to all genders, they are similarly nonnormative.<sup>357</sup> Indeed, asexuality's inclusion might help reconceptualize sexual orientation more broadly. Alfred Kinsey, whose work has influenced sex research since the mid-twentieth century, represented homosexuality and heterosexuality as opposite ends of a liner scale that spanned from zero to six.<sup>358</sup> However,

352. Twenty-six percent of aces in the most recent community survey identified as neither male nor female; in a separate question, 14.8% identified as transgender and 10.9% stated they were unsure whether they identified as transgender. BAUER ET AL., *supra* note 321, at 16–17.

353. Mosbergen, *supra* note 333; Dominique Mosbergen, *LGBT, Asexual Communities Clash Over Ace Inclusion*, HUFFINGTON POST (June 21, 2013, 9:21 AM), [https://www.huffpost.com/entry/lgbt-asexual\\_n\\_3385530](https://www.huffpost.com/entry/lgbt-asexual_n_3385530) [<https://perma.cc/F648-GF8P>]; David Jay, *2012 Is a Big Year for Ace/LGBTQ Inclusion*, YOUTUBE, at 2:13–3:15, 4:04–6:07 (Sept. 23, 2012), <https://www.youtube.com/watch?v=WHdhdcuHmA> [<https://perma.cc/7G94-STY3>]. This may be because much of asexual advocacy has been an effort to have the sexual orientation recognized as such, rather than focusing on legal reform.

354. (A)SEXUAL (Arts Engine & Big Mouth Films 2011).

355. See N.Y. EXEC. LAW § 292(27) (McKinney 2020); see also *The Sexual Orientation Non-Discrimination Act (“SONDA”)*, N.Y. ATT’Y GEN., <https://ag.ny.gov/civil-rights/sonda-brochure> [<https://perma.cc/G79F-S8PQ>]; Emens, *supra* note 34, at 364–65.

356. See Yoshino, *supra* note 23, at 399–400, 439–40.

357. This is true even as the stereotypes that have plagued aces and bisexuals—frigid and promiscuous, respectively—seem to set the two identity categories as opposites. *Id.* at 357 n.8, 420.

358. Kinsey's data included individuals with “no socio-sexual contacts or reactions,” which the sociologist labeled as group “X.” ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 640, 642–43, 648–49, 651–54, 656 (Ind. Univ. Press 1998); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 474, 512 (Jerome Cornfield et al., Ind. Univ. Press

sexual orientation may more accurately be presented as a circle, with asexuality, heterosexuality, bisexuality, and homosexuality as equally spaced markers along the perimeter. Thus, although asexuality's inclusion within the LGBT movement may appear to reduce the coalition's emphasis on sexual expression, it also reinforces the notion that sexuality is multidimensional, expansive, and complex. In doing so, it draws attention to bisexuality, a sexual orientation that is often excluded from conversations around LGBT rights.

### C. Rights Issues

Much like nonbinary and intersex individuals, asexuals have several goals that diverge from national LGBT rights advocacy, including the elimination sexual intimacy as a requirement of marriage, reallocation government benefits away from couples to single individuals, and recognition of functional families. National LGBT rights groups are likely to support the first, but not the second, especially in light of the marriage equality movement's hard-won victory. As for functional family recognition, this rights project has come under fire as a result of the marriage equality victory, rendering the issue fraught for national LGBT rights advocates. Asexual rights projects thus align with the interests of LGBT community members who have not benefited from marriage equality, such that asexual inclusion would reshape national organizations' rights agendas in significant ways.

#### 1. Marital Benefits

LGBT and asexual interests diverge on the subject of marriage. For aces, traditional marriage definitions fail to meet their needs because they assume sexual intimacy within the marital couple.<sup>359</sup> Additionally, the veneration of marriage reinforces the state's extension of benefits to couples, rather than individuals. As a result, asexuals may in fact prefer a regime in which marriage is no longer the central means through which the government offers benefits. Many within and beyond the LGBT community would also benefit from this type of law reform, with some preferring alternatives to marriage over a marital regime.<sup>360</sup>

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1998). Masters and Johnson appear to have grouped bisexual and asexual together under the term "ambisexual." WILLIAM H. MASTERS & VIRGINIA E. JOHNSON, *HOMOSEXUALITY IN PERSPECTIVE* (1979); see also Michael D. Storms, *Theories of Sexual Orientation*, 38 J. PERSONALITY & SOC. PSYCHOL. 783, 784 (1980) (separating asexuality from bisexuality, without discussion).

359. See, e.g., *Patel v. Patel*, 11 N.E.3d 800, 805 (Ohio Ct. App. 2014); *Rubenstein v. Rubenstein*, 46 So.2d 602, 603 (Fla. 1950); *Pretlow v. Pretlow*, 14 S.E.2d 381, 386 (Va. 1941).

360. There are a number of reasons why couples—either same-sex or opposite-sex—choose not to marry, although they generally fall into one of two categories: personal beliefs and practical consequences. Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 *FORDHAM L. REV.* 1509, 1515 (2016); see also Cara Buckley, *Gay Couples, Choosing to Say 'I Don't'*, *N.Y. TIMES* (Oct.

Marriage equality was a major success for LGBT rights advocates, secured after over more than two decades of intensive struggle. This victory eliminated a formal inequality in law and provided tangible benefits to hundreds of thousands of LGBTQ couples.<sup>361</sup> Marital status is a factor in allocating benefits in more than 1,000 federal statutes, and states also have hundreds of provisions that turn on marriage.<sup>362</sup> Some of the more significant of these rights include social security benefits, tort recovery for wrongful death, and tax deductions that reduce tax liability.<sup>363</sup> These benefits, along with court-ordered distribution of assets or financial support upon the dissolution of the relationship, are inaccessible to unmarried individuals.<sup>364</sup> The marriage equality movement thus brought significant government benefits to many more couples.

However, this incredibly important legal change has not benefited all community members, since marriage is demarcated by class, race, and education levels.<sup>365</sup> Because white, educated, and wealthier individuals are more likely to marry, a major impetus for functional family recognition is that marriage is exclusionary and a “hallmark of . . . privilege.”<sup>366</sup> In one of the only studies of LGBT community attitudes on national advocacy groups, respondents stated they wanted the movement to focus on expanding the categories of families the law would recognize, rather than marriage equality.<sup>367</sup> Indeed, an increasing number of couples (of all sexual orientations) are unmarried.<sup>368</sup>

Nonmarital couples are able to obtain some of the rights associated with marriage, although doing so is more complicated and less secure.

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25, 2013), <https://www.nytimes.com/2013/10/27/style/gay-couples-choosing-to-say-i-dont.html> [<https://perma.cc/6EQQ-JCVD>] (noting reasons such as religious beliefs, objections to the institution of marriage, and tax benefits). For some, marriage has a religious element to which they do not subscribe, while for others it is an institution laden with mainstream values they do not share. *Id.* For yet others, marriage imposes higher tax burdens while reducing eligibility for certain federal benefits. *Id.*

361. Paola Scommegna, *Existing Data Show Increase in Married Same-Sex U.S. Couples*, POP. REF. BUR. (Dec. 7, 2016), <https://www.prb.org/increase-in-married-same-sex-us-couples/> [<https://perma.cc/5YXW-VZG5>].

362. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 123 (2008).

363. See *id.* at 189–90, 194, 198, 202–03.

364. See *id.* at 176.

365. See June Carbone & Naomi Cahn, *Marriage Markets: How Inequality is Remaking the American Family* 17–19 (2014); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 445–46 (2017).

366. Carbone & Cahn, *supra* note 365, at 158.

367. See Kathleen E. Hull & Timothy A. Ortyl, *Same-Sex Marriage and Constituent Perceptions of the LGBT Rights Movement*, in *THE MARRYING KIND?* 67, 67–68, 92 (Mary Bernstein & Verta Taylor eds., 2013).

368. See Benjamin Gurrentz, *Living with an Unmarried Partner Now Common for Young Adults*, U.S. CENSUS BUREAU (Nov. 15, 2018), <https://www.census.gov/library/stories/2018/11/cohabitation-is-up-marriage-is-down-for-young-adults.html> [<https://perma.cc/A4XA-QUWM>].

Couples may create wills designating one another as beneficiaries, since they will not automatically inherit as they would under a marital regime, and they may enter into powers of attorney so as to make medical decisions for one another, an additional benefit of marriage.<sup>369</sup> However, these private arrangements require access to legal counsel, which many couples cannot afford. Many employees—though not the majority—have access to health benefits for domestic partners, whether same- or opposite-sex.<sup>370</sup> Insurance companies typically permit policyholders to designate partners as beneficiaries, although they also impose limitations on who may qualify as a domestic partner.<sup>371</sup> When those companies engage in *ex post* determinations of eligibility, evaluating whether an informal relationship qualifies under their policies, partners might not receive the benefits that would have come to them automatically had they been married.<sup>372</sup>

There are additional considerations that render marriage less salient for aces in particular. Many states recognize impotency as a ground for annulment and fault-based divorce.<sup>373</sup> Courts have applied an expansive definition of the term impotency, extending it beyond physical incapacity to incorporate psychological impediments. In the 1985 case of *Manbeck v. Manbeck*,<sup>374</sup> a Pennsylvania court held that the wife’s “psychological or emotional disorder,” which prevented her from engaging in intercourse, was a valid basis for annulling the marriage.<sup>375</sup> Other courts have since annulled unconsummated marriages, with one describing the pair as having “acted more as roommates” than a married couple.<sup>376</sup> So long as sexual intercourse is a defining characteristic of marriage, aces

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369. POLIKOFF, *supra* note 362, at 160–61, 186–87.

370. *See 40 Percent of Private Industry Workers Had Access to Health Benefits for Same-Sex Partners in 2018*, U.S. BUREAU LAB. STAT. (June 24, 2019), <https://www.bls.gov/opub/ted/2019/40-percent-of-private-industry-workers-had-access-to-health-benefits-for-same-sex-partners-in-2018.htm> [<https://perma.cc/LJ4Q-DRNM>].

371. *See, e.g.,* York v. Longlands Plantation, 818 S.E.2d 215, 217–18 (S.C. Ct. App. 2018), *reh’g denied* (S.C. Ct. App. Sept. 20, 2018), *and cert. granted* (S.C. Ct. App. Apr. 22, 2019), *rev’d*, 840 S.E.2d 544 (S.C. 2020); Safeco Ins. Co. v. Hicks, No. C16-0202-LTS, 2018 WL 1832971, at \*5–6 (N.D. Iowa Apr. 17, 2018); Engle v. Land O’Lakes, Inc., 331 F. Supp. 3d 943, 951 (W.D. Mo. 2018), *rev’d*, 936 F.3d 853 (8th Cir. 2019); Dunn v. Robinson, No. 16-CV-818-PK, 2017 WL 1364207, at \*1 (D. Or. Apr. 17, 2017).

372. *See, e.g.,* Safeco Ins., 2018 WL 1832971, at \*10.

373. Leong, *supra* note 34, at 1404–05; *see, e.g.,* CAL. FAM. CODE § 2210 (West 2019); 750 ILL. COMP. STAT. 5/301 (West 2019); MASS. GEN. LAWS ch. 208, § 1 (2018); MISS. CODE ANN. § 93-5-1 (2019); N.J. STAT. ANN. § 2A:34-1 (West 2019); N.Y. DOM. REL. LAW § 7 (McKinney 2019); TEX. FAM. CODE ANN. § 6.106 (West 2017).

374. 489 A.2d 748 (Pa. Super. Ct. 1985).

375. *Id.* at 750–52.

376. Janda v. Janda, 984 So. 2d 434, 436 (Ala. Civ. App. 2007); *see also In re Marriage of Liu*, 242 Cal. Rptr. 649, 656–57 (Cal. Ct. App. 1987) (annulling a marriage because of fraud where the court found that the wife had entered the marriage for purposes of obtaining a green card and had no intention of consummating the marriage).

may not have their unions recognized when their partners seek dissolution.<sup>377</sup> This problem may be more theoretical than actual, as aces' partners likely know their sexual orientation, yet the existence of these laws constitutes a normative claim about the centrality of intercourse in intimate relationships.<sup>378</sup>

A different problem for aces is that marriage holds couples out as the normative standard.<sup>379</sup> Aces, however, are less likely to form romantic relationships than the general population.<sup>380</sup> Of course, since singlehood is on the rise in the United States, aces are not the only ones discriminated against based on their status as singles.<sup>381</sup> However, the majority of aces have never had a significant romantic relationship and, in the most recent community survey, 75% reported being single.<sup>382</sup> Singlehood is arguably viewed more positively than it has been in the past, but researchers have documented substantial biases against unmarried individuals.<sup>383</sup> People are more likely to view single individuals negatively, describing them as immature, risky, and self-centered; as well as less responsible, caring, and sociable than their coupled counterparts.<sup>384</sup> Bias toward single individuals is often unrecognized, with most people identifying

377. Recent cases on impotency involved immigration issues, where the absence of sexual intercourse marked a fraudulent marriage. *Janda*, 984 So. 2d at 436, 438; *In re Marriage of Liu*, 242 Cal. Rptr. at 656–57. As a result, the state may have an interest in maintaining the impotency provision.

378. See Sally Goldfarb, *Divorcing Marriage from Sex: Radically Rethinking the Role of Sex in Marriage Law in the United States*, 6 ONATI SOCIO-LEGAL SERIES 1276, 1279 (2016).

379. See Joslin, *supra* note 365, at 481–82; Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 29–30 (2015); Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 294–95 (2013).

380. See BAUER ET AL., *supra* note 321, at 25.

381. Approximately half of American adults are unmarried, and the rate of Americans who have never been married is rising, although marriage rates vary considerably by race, ethnicity, and education level. Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RSCH. CTR. (Sept. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens> [<https://perma.cc/8QSA-2PRU>].

382. See BAUER ET AL., *supra* note 321, at 25.

383. See, e.g., Wendy L. Morris et al., *How Does Sexual Orientation Affect Perceptions of Single People?*, 21 PSI CHI J. PSYCH. RES. 183, 183 (2016) [hereinafter Morris et al., *How Does Sexual Orientation*]; Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCH. 474, 477 (2012); Wendy L. Morris et al., *No Shelter for Singles: The Perceived Legitimacy of Marital Status Discrimination*, 10 GRP. PROCESSES & INTERGROUP RELS. 457, 465–66 (2007); Bella M. DePaulo & Wendy L. Morris, *The Unrecognized Stereotyping and Discrimination Against Singles*, 15 CURRENT DIRECTIONS PSYCH. SCI. 251, 252 (2006).

384. Morris et al., *How Does Sexual Orientation*, *supra* note 383, at 183.

discrimination against single people as legitimate, even as they object to actions that target racial or sexual minorities.<sup>385</sup>

Discrimination against single people is legally permissible—and sometimes required. The U.S. Tax Code provides breaks to married couples, such that singles may have to pay more income tax than a couple with the same amount of income, although this varies significantly based on individual circumstances.<sup>386</sup> Adoption officials often express a preference for couples, and state laws may require them to place children with couples over single parents.<sup>387</sup> Surrogacy is sometimes also limited to couples.<sup>388</sup> More frequently, singles encounter discrimination when private parties charge couples less on a per person basis, like with employer-provided insurance plans.<sup>389</sup> As Professor Nancy Leong has argued, putting such actions “beyond the reach of the law is still a legal decision,” and one that results in singles indirectly subsidizing couples to their detriment.<sup>390</sup>

Domestic partnerships have offered an alternative to marriage, but domestic partnership requirements tend to replicate marriage rather than provide recognition for alternative household arrangements.<sup>391</sup> While requirements vary, domestic partnerships often expect couples to share a primary residence, be committed to mutual support, and evidence financial interdependence.<sup>392</sup> Indeed, given how closely domestic partnerships parallel normative ideals of coupled life, some scholars have argued that domestic partnerships allow the state “to create the ideal marriage.”<sup>393</sup> That domestic partnerships mirror marriage is not surprising, given that most domestic partner benefits were drafted in what Professor NeJaime has termed a “dialogical relationship” to marriage,

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385. See DePaulo & Morris, *supra* note 383, at 252. Gays and lesbians have exhibited negative perceptions of single individuals in the same way as heterosexuals. Morris et al., *How Does Sexual Orientation*, *supra* note 383, at 188.

386. See Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 660 (2010).

387. See Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 334–35 (2006); Benjamin C. Morgan, Comment, *Adopting Lawrence: Lawrence v. Texas and Discriminatory Adoption Laws*, 53 EMORY L.J. 1491, 1502 (2004).

388. *State-by-State Surrogacy Summary*, CTR. FOR BIOETHICS & CULTURE (2018), [http://www.cbc-network.org/wp-content/uploads/2012/08/State-by-State\\_Surrogacy\\_Sum\\_CBC.pdf](http://www.cbc-network.org/wp-content/uploads/2012/08/State-by-State_Surrogacy_Sum_CBC.pdf) [<https://perma.cc/Q78K-5WEK>].

389. See Leong, *supra* note 34, at 1409.

390. *Id.*

391. See Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 57–59 (2012).

392. See *id.* at 58.

393. *Id.* at 57, 60; Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1269 (1998).

privileging the institution by creating a parallel system, rather than a subversive and destabilizing alternative.<sup>394</sup>

There is precedent for expansive domestic partnership policies that embrace nonsexual partners, which would benefit asexuals and members of the LGBT movement who object to marriage.<sup>395</sup> When domestic partner regimes first emerged, some companies and jurisdictions endorsed these types of regimes.<sup>396</sup> Madison, Wisconsin, and the District of Columbia, for example, both defined domestic partners as two adults in a relationship characterized by mutual caring and commitment, which opened registration to different-sex couples, same-sex couples, and couples in nonconjugal relationships.<sup>397</sup>

Domestic partnership advocacy reinforces the notion that couples are the standard-bearer for American families and often replicates legal definitions of marriage. Although national LGBT rights groups generally support alternative family structures, they fought for so long to have LGBT couples recognized that they are unlikely to turn to dismantling the marital regime. That is particularly true given the challenges of convincing legislators to create an alternative system.<sup>398</sup> As a result, much like nonbinary and intersex rights advocacy, aces' goals may be inconsistent with current national LGBT rights organizations' agendas. However, aces' divergent interests may nevertheless promote the needs of LGBT movement members, many of whom have not benefited from marriage equality.

## 2. Functional Parenthood

In another context—functional parenthood recognition—asexual rights goals have an equally complicated relationship to national LGBT rights advocacy strategies. National organizations have promoted functional parenthood doctrines, but these equitable solutions have broken down as a result of the same groups' marriage equality victories. Thus, national organizations' greatest success has imposed a significant cost for asexuals and others in nonmarital relationships.

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394. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 163 (2014).

395. Notably, even where domestic partnership registries benefit nonnormative couples, there are legal impediments to developing these registries. During battles over marriage equality, twenty states enacted Super-DOMAs, or constitutional provisions that prohibit the state from recognizing any marriage-like relationships. See Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1244 (2016). Although *Obergefell* struck down same-sex marriage bans, it left the remainder of the constitutional provisions untouched. See *id.*

396. See POLIKOFF, *supra* note 362, at 50–51.

397. See William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1949 (2012).

398. See NeJaime, *supra* note 394, at 114–21 (describing early efforts to enact domestic partnership legislation).

Equitable parenthood doctrines arose in the shadow of marriage inequality, including second-parent adoption and the de facto parent doctrine, which provided custodial rights to same-sex co-parents.<sup>399</sup> Second-parent adoption permits an unmarried co-parent to adopt their partner's biological or adoptive child,<sup>400</sup> while de facto parenthood, also known as psychological or functional parenthood, protects the rights of those who, with the legal parent's consent, have assumed the role of a parent for a substantial period of time.<sup>401</sup> Through de facto parenthood, courts have recognized individuals as parents even when they lack a biological or legal relationship to their children.<sup>402</sup>

However, doctrines promoting the interests of functional families have been slowly disintegrating in the wake of marriage equality. In *Ramey v. Sutton*,<sup>403</sup> for example, the Supreme Court of Oklahoma limited de facto parenthood to those whom the state prevented from marrying.<sup>404</sup> Thus, couples who may now wed because of *Obergefell v. Hodges*<sup>405</sup> may no longer rely on functional parenthood arguments in Oklahoma. Similarly, the Oregon Court of Appeals narrowed its interpretation of the state's artificial insemination statute because of marriage equality.<sup>406</sup> In 2009, the court held that the law, which designated a wife's consenting husband as the child's legal parent, violated the state constitution's equal protection clause; it therefore extended the law's benefit to same-sex partners.<sup>407</sup> However, in 2015, the court determined the statute only applied to same-sex couples who would have elected to marry had they been permitted to do so.<sup>408</sup>

*Obergefell*'s role in eliminating functional parenthood doctrines stems from its veneration of marriage as the paramount expression of a couple's commitment and a means of safeguarding children's best interests.<sup>409</sup> Given the Court's statement that "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family," nonmarital families—almost by definition—fall

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399. See Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 61–62 (2017); Murray, *supra* note 395, at 1253–54.

400. *Adoption by LGBT Parents*, NAT'L CTR. FOR LESBIAN RTS. (2020), [http://www.nclrights.org/wp-content/uploads/2013/07/2PA\\_state\\_list.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf) [<https://perma.cc/3LCB-RWLM>].

401. See Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 L. & CONTEMP. PROBS. 29, 59 (2014).

402. See *id.* at 59–60.

403. 362 P.3d 217 (Okla. 2015).

404. See *id.* at 221.

405. 135 S. Ct. 2584 (2015).

406. See *In re Madrone*, 350 P.3d 495, 501 (Or. Ct. App. 2015).

407. See *Shineovich v. Shineovich*, 214 P.3d 29, 40 (Or. Ct. App. 2009).

408. *In re Madrone*, 350 P.3d at 501.

409. See Murray, *supra* note 395, at 1244.

short in each of these categories.<sup>410</sup> The Court was also clear that the institution's permanency and stability provided elements crucial to children's well-being.<sup>411</sup> As Professor Melissa Murray has argued, "*Obergefell*'s association of marriage with the child's best interests suggests that states need not provide same-sex couples with other methods for formalizing the parent-child relationship if marriage is available to all couples."<sup>412</sup> That *Obergefell* may have this preclusive effect is deeply ironic, given that nonmarital families were crucial to convincing courts to overturn same-sex marriage bans.<sup>413</sup>

Even as some courts have retracted functional family doctrines, others have developed new parentage rights that benefit both those in the LGBT community and aces. Some relationships and reproductive arrangements have led courts to determine that a child has more than two parents, thereby expanding traditional definitions of parentage.<sup>414</sup> Tri-parenting arrangements may be planned, in that the parents decide in advance that they will raise the child with more than two parents and seek legal recognition of all of the adults involved.<sup>415</sup> Tri-parenting may also arise by default, when the child is the result of an extraconjugal affair or where the intended parents fail to obtain releases from their egg or sperm donors.<sup>416</sup> Six states have recognized three legal parents in their common law, although the majority of those situations have involved tri-parenting by default.<sup>417</sup> Five additional states have statutes acknowledging that a child may have more than two parents,<sup>418</sup> and the Uniform Parentage Act contains a provision recognizing more than two parents.<sup>419</sup>

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410. *Obergefell*, 135 S. Ct. at 2608.

411. *Id.* at 2600.

412. Murray, *supra* note 395, at 1254.

413. See Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 363–66 (2015).

414. See Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. ACAD. MATRIM. LAWS. 175, 187–98 (2018).

415. *See id.* at 176.

416. *See id.*

417. These are Delaware, Minnesota, New Jersey, New York, North Dakota, and Pennsylvania. *Id.* at 187–88; see, e.g., *J.W.S. v. E.M.S.*, No. CS11-01557, 2013 WL 6174814, at \*3 (Del. Fam. Ct. May 29, 2013); *LaChappelle v. Mitten*, 607 N.W.2d 151, 161 (Minn. Ct. App. 2000); *D.G. v. K.S.*, 133 A.3d 703, 706 (N.J. Super. Ct. Ch. Div. 2015); *Dawn M. v. Michael M.*, 47 N.Y.S.3d 898, 902–03 (Sup. Ct. 2017); *McAllister v. McAllister*, 779 N.W.2d 652, 657 (N.D. 2010); *Jacob v. Schultz-Jacob*, 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

418. CAL. FAM. CODE §§ 3040(d), 7612(c) (West 2020); ME. STAT. tit. 19, § 1853 (2019); LA. CIVIL CODE ANN. art. 197, 198 (2019); 2018 Wash. Sess. Laws 174; 2018 Vt. Acts & Resolves Act 162. Louisiana's statutory recognition of tri-parenting is limited to dual fathers. Quinn, *supra* note 414, at 183; see LA. CIV. CODE ANN. art. 197 (2005). However, the Supreme Court of Louisiana recognized a "tripartite custody" among biological parents and a grandmother in 2010. *McCormic v. Rider*, 27 So.3d 277, 279 (La. 2010).

419. UNIF. PARENTAGE ACT § 613 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2017).

Intentional tri-parenting cases are equally important to asexuals and LGBT individuals. In the few published cases in which courts have wrestled with three intended parents, the situations involved same-sex couples and a third parent, with the child conceived through assisted reproductive technology.<sup>420</sup> Indeed, because of third-parent recognition's impact on LGBT families, the NCLR helped draft California's tri-parenting legislation.<sup>421</sup> As for aces, David Jay, an asexual advocate and AVEN's founder, entered into what was likely the first tri-parenting agreement involving an asexual in 2017.<sup>422</sup> As an ace who wanted children, he had for decades considered "form[ing] a committed relationship with a couple and help[ing] them raise one or more children"—a dream that became a possibility as a result of California's law recognizing third parents.<sup>423</sup>

Statutory reform recognizing tri-parents is a key component of functional family law reform since courts may not recognize parties' private tri-parenting agreements in the absence of state authorization. In *D.G. v. K.S.*,<sup>424</sup> a male same-sex couple and their female friend agreed to "conceive and jointly raise a child."<sup>425</sup> The fathers sued for custody after the mother sought to move across the country with the child, but the court held the nonbiological father was not a legal parent.<sup>426</sup> The court stated it was "particularly sympathetic" to the nonbiological father's claims, but that such "social policy choice[s]" should be left to the legislature.<sup>427</sup> In such a jurisdiction, David Jay's parenting agreement would be void—and would prevent him and similarly situated aces from developing the families which they desire.

As a sexual orientation, asexuality shares an identity-based connection with gays, lesbians, and bisexuals, yet aces' disinterest in sexual intimacy seems at odds with much of the LGBT movement's collective identity. Additionally, many within the LGBT community do not recognize that aces' romantic attraction and gender identity may be nonnormative. For that reason, there are identity-based dissonances that

420. See, e.g., *LaChappelle*, 607 N.W.2d at 157; *D.G.*, 133 A.3d at 706.

421. See Jeff Chiu, *Modern Family: More Courts Allowing Three Parents of One Child*, NBC NEWS (June 19, 2017, 11:37 AM), <https://www.nbcnews.com/feature/nbc-out/modern-family-more-courts-allowing-three-parents-one-child-n774031> [<https://perma.cc/4ZC9-2W7>].

422. See David Jay, *My Path to Becoming a Third Parent*, ESTABLISHMENT (Oct. 10, 2017), <https://theestablishment.co/my-path-to-becoming-a-third-parent-41b823809c14/index.html> [<https://perma.cc/3NPA-R4KU>].

423. *Why One Married Couple and Their Friend Formed a 3-Parent Family*, HERE & NOW (Nov. 6, 2017), <https://www.wbur.org/hereandnow/2017/11/06/three-parent-family> [<https://perma.cc/DN47-4U6B>]; Jay, *supra* note 422.

424. 133 A.3d 703 (N.J. Super. Ct. Ch. Div. 2015).

425. *Id.* at 706.

426. See *id.* at 726.

427. *Id.* at 727.

impede asexual inclusion into the coalition. Another element precluding solidarity is strategic, in that discrimination against aces is not intuitive, with many in the community wondering how a sexual orientation marked by absence could be the target of discrimination. Ace legal interests, however, promote the rights of many who fall within LGBT, particularly those whose interests marriage equality left behind. That asexuality's connection with LGBT has so many unifying and disjunctive elements may explain why it is the least integrated of the QIA categories.

## V. EXPANDING THE NATIONAL LGBT AGENDA

The preceding analysis on nonbinary, intersex, and asexual identities and rights, combined with social movement theory on identity and strategy, indicates that any national organization's expansion to include nonbinary, intersex, or asexual rights would press the current movement to adopt new strategies and goals that affect LGBT as much as QIA. This Part first examines the implications of expansion for the groups, beginning with QIA and then turning to LGBT. Given the challenges of movement expansion, it then presents other options that advocates may want to consider.

### A. LGBT Movement Expansion

The LGBT movement has extended its contours in recent years, yet movement expansion is a contested and ongoing process that depends as much on organizational capacity as collective identity and strategy.<sup>428</sup> National LGBT groups already struggle to represent fully the panoply of their constituents, making movement expansion to include additional identity groups a fraught endeavor.<sup>429</sup> Organizations can only prioritize so much. What is necessary to consider is therefore the costs and benefits of such a change.

#### 1. Considerations for QIA

Q, I, and A benefit in clear ways from being part of an expanded LGBT movement. As smaller communities, these identity categories would gain access to resources and increased visibility for their law reform goals that would allow them to attain their goals.<sup>430</sup> An expanded movement provides less resourced members with access to financial,

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428. See *supra* Part I.

429. For a discussion of how racial, ethnic, and class divisions have contoured the movement's goals and strategies, see *supra* notes 30, 106–07 and accompanying text.

430. See Meyer & Corrigan-Brown, *supra* note 65, at 329–30; Andrew W. Jones et al., *Coalition Form and Mobilization Effectiveness in Local Social Movements*, 21 SOCIO. SPECTRUM 207, 212 (2001).

political, and social capital that is essential to meet their needs.<sup>431</sup> In other words, by being appended to LGBT, these groups obtain both a seat at the table and the resources required to attain their goals.

As groups seeking inclusion in the LGBT movement, Q, I, and A are in similar positions as the transgender rights advocates of the 1990s who fought to join the gay and lesbian movement. One of the major reasons transgender rights advocates sought movement expansion was to increase the likelihood of attaining law reform, as gay and lesbian rights groups had more clout than the transgender community.<sup>432</sup> Before gay and lesbian rights groups expanded to LGBT, transgender individuals tried to have gender identity protections inserted to the draft ENDA, but their lack of resources stymied their efforts.<sup>433</sup> When transgender rights activists first attempted to lobby Congress members on their own, they were able to muster a limited number of participants—six in one year and twenty in another.<sup>434</sup> When gay and lesbian rights organizations became LGBT, the groups' paid lobbying staff took over, securing a new version of the bill that was transgender-inclusive.<sup>435</sup>

Just as the history of transgender inclusion offers QIA reasons to join LGBT, so too might it warn QIA away from the LGBT movement. National LGBT rights groups were transgender-inclusive in name only for many years, leading transgender-specific organizations to proliferate.<sup>436</sup> Transgender rights groups criticized their LGBT counterparts for focusing on issues that were of "minimal concern for low-income transgender communities of color."<sup>437</sup> These transgender rights organizations focused their advocacy on bathroom access, gender designations on identity documentation, and prison housing regulations—issues that national LGBT rights organizations have incorporated into their agendas after years of collaboration.<sup>438</sup>

QIA rights advocates may expect a similar problem to arise. Sociologists have shown that social movements generally provide most of their attention and resources to issues that primarily affect their privileged group members, and the LGBT legal movement is no exception.<sup>439</sup> National LGBT rights organizations have prioritized the

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431. See Meyer & Corrigan-Brown, *supra* note 65, at 329–30; Jones et al., *supra* note 430, at 212.

432. George, *supra* note 9, at 540.

433. See *id.* at 544.

434. *Id.* at 544–45.

435. *Id.* at 545, 548.

436. See Arkles et al., *supra* note 22, at 579.

437. *Id.* at 588.

438. See Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN'S RTS. L. REP. 288, 289 (2009).

439. See DARA Z. STROLOVITCH, AFFIRMATIVE ADVOCACY 8 (2007); CATHY J. COHEN, THE BOUNDARIES OF BLACKNESS 63–64 (1999).

needs of affluent gays and lesbians, as well as propounded arguments that have marginalized the less normative members of the LGBT community.<sup>440</sup> Because of rights organizations' goals and strategies, working-class and middle-class gays and lesbians are less likely to feel that national LGBT organizations represent them than their upper-class counterparts.<sup>441</sup> In one empirical study, two-thirds of respondents explained that mainstream movement organizations either did not represent them or that they had mixed feelings concerning the representation, often citing race, ethnicity, social class, or gender identity as the reason for their concerns.<sup>442</sup>

In addition to selecting legal goals that privilege certain group members, national LGBT rights groups have secured legal victories through exclusionary arguments. As scholars have noted, LGBT rights advocates have depicted sexual minorities "as White, affluent, urban dwelling, educated, and successful," a strategy that "displace[d] people of color, transgender and gender nonconforming individuals, those of lesser means, and those living in rural America from much of the discourse on sexual minority rights."<sup>443</sup> LGBT rights groups also based their arguments on comparisons between race and sexual orientation, a rhetoric that critics assail as essentializing both categories.<sup>444</sup> Advocates are constrained in the arguments they can make, as the legal system rewards claims for incremental changes. Movement expansion therefore raises significant questions as to what strategic shifts national organizations would have to undertake, as well as whether those changes would imperil their advocacy efforts.

National LGBT rights organizations may similarly adopt an assimilationist framework for nonbinary, intersex, and asexual rights that members of these identity categories may resist.<sup>445</sup> Just as national LGBT rights groups determine what issues to represent and how, nonbinary, intersex, and asexual rights advocates need to determine whether that representation meets their ultimate needs.

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440. Arkles et al., *supra* note 22, at 587–88.

441. See Hull & Ortyl, *supra* note 367, at 84.

442. *Id.* at 82.

443. Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 L. & INEQUALITY 117, 161 (2012).

444. Leachman, *supra* note 124, at 657.

445. This Article does not argue that pursuing nonbinary, intersex, or asexual rights requires groups to abandon neoliberal rights projects in favor of the radical restructuring of American society, as queer theorists encourage. For queer critiques of neoliberal rights projects, see generally LEE EDELMAN, *NO FUTURE* (Michèle Aina Barale et al. eds., 2004); MICHAEL WARNER, *THE TROUBLE WITH NORMAL* (1999).

## 2. Considerations for LGBT

The same challenges that should give Q, I, and A advocates pause are also the reasons that LGBT community members may want to press for movement expansion. Incorporating QIA could give rise to priorities and strategies that could reshape what it means to advocate for non-normative individuals. An agenda that includes Q, I, or A will likely result in national organizations prioritizing the needs of their neglected constituents, though perhaps with less success than they have recently enjoyed.

Nonbinary rights tend to intersect with the interests of gender nonconforming gays and lesbians, as well as bisexuals—subgroups that national LGBT rights organizations tend to ignore. Advocacy for nonbinary rights requires moving away from an emphasis on the sexual binary, which has been important for securing gender conforming transgender rights. An example of how national groups could pursue this work is by focusing on issues like sex-differentiated grooming codes, which courts have upheld in cases involving “[g]arden-variety gender benders,” a shorthand Professor Kimberly Yuracko adopted for “those who object to some but not all of the conventions associated with their biological sex.”<sup>446</sup> These policies reinforce gender norms in ways that harm both nonbinary individuals and gender nonconforming gays and lesbians, without impairing the interests of gender conforming transgender individuals.

Intersex advocacy likewise promotes the interests of individuals who inhabit the space between the sexes and therefore the gender nonconforming part of LGBT. The physiological basis for intersex advocacy is especially beneficial for those who challenge the claimed naturalness of the sexual binary, although this may not staunch opposition arguments, especially since conservative Christian doctrine insists on a differentiation of the sexes.<sup>447</sup> Here, national organizations could represent these interests through curricular reform efforts aimed at introducing a holistic view of sex and gender, which would benefit transgender, nonbinary, and intersex individuals.<sup>448</sup>

As for asexuality, its focus on functional family doctrines may expand the movement’s scope of work in ways that reach currently overlooked LGBT individuals. The move away from formal equality to equity would be a significant step for national LGBT groups to take, insofar as functional family doctrines would benefit many LGBT families. They

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446. KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* 6 (2016).

447. See MEGAN K. DEFRANZA, *SEX DIFFERENCE IN CHRISTIAN THEOLOGY: MALE, FEMALE, AND INTERSEX IN THE IMAGE OF GOD* 147–48 (2015).

448. See generally Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461 (2017) (discussing existing curricular reform efforts).

could complement this shift in their agendas by pressing for antidiscrimination laws that include asexuality. This latter move would promote a more comprehensive view of sexual orientation that may benefit bisexuals by making them a visible part of debates, rather than an implicit partner. Of course, aces' lack of sexual attraction may spur countermobilization that would impede advocacy. Asexuality threatens the mandate to "[b]e fruitful, and multiply,"<sup>449</sup> even as conservative Christians consider sexual thoughts and desires sinful, and for that reason may generate new opposition.<sup>450</sup>

Although LGBT movement expansion could have important benefits, it has significant drawbacks as well. There are reasons why national organizations selected particular goals and pursued assimilationist strategies: they are the ones that are most likely to be successful. Attorneys must weigh many factors, including constituents' desires, donors' preferences, institutional capacity, and the likelihood of success given the political and legal landscape.<sup>451</sup> Moreover, to the extent changing tacks provides fodder for opponents and generates increased backlash, and increased representation reduces flexibility and agility, national LGBT rights groups understandably may be unwilling or unable to change approaches.<sup>452</sup>

Importantly, the decisions regarding movement expansion are in the hands of both national LGBT rights groups and QIA rights advocates, as the LGBT movement's history demonstrates. Before the LGBT movement formed, transgender rights advocates lobbied for their inclusion by protesting the work of noninclusive organizations.<sup>453</sup> These advocates gained intramovement attention, with movement members then demanding that organizations revise their mission statements and agendas.<sup>454</sup> Similarly, the marriage equality movement unfolded despite national organizations' initial efforts to prevent courts from considering the issue.<sup>455</sup> National organizations assumed the lawsuits would lose and worried the cases would generate backlash; for that reason, they initially urged same-sex couples to refrain from litigating the issue.<sup>456</sup> Nonbinary, intersex, and asexual rights advocates may likewise be able to compel national organizations to shift their priorities and arguments, either

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449. *Genesis* 1:28 (King James).

450. DEFANZA, *supra* note 447, at 149; DIANNA E. ANDERSON, *DAMAGED GOODS* 33, 39 (2015).

451. *See* George, *supra* note 9, at 567–71.

452. *See id.* at 575–90 (discussing strategic realignment possibilities in the context of transgender rights).

453. *See id.* at 546–47.

454. *See id.*

455. *See* MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR* 55 (2013).

456. *See id.*

through publicity campaigns or by pursuing goals that implicate LGBT rights.

That community members have forced national organizations to shift their priorities is both a function of the democratizing nature of social movements and reflective of leadership within the LGBT movement. Just as social movement actors shift public discourse by critiquing contemporary politics, their perspectives may also reshape the contours of the movement institutions that represent them.<sup>457</sup> At the same time, although national LGBT rights organizations and their lawyers spearhead the movement, they are accountable to their clients and constituents, making community demands an essential part of their calculus.<sup>458</sup> Lawyers' professional responsibilities thus depend on movement demands, even if national organizations' agendas are an imperfect simulacrum of the desires of the LGBT community as a whole.

### B. *Alternatives to Expansion*

The incorporation of nonbinary, intersex, and asexual rights could produce reformulated arguments and new priorities, as well as different conceptions of what non-normativity means. However, the outcome could also be fracture, dissolution, and disaggregation because of the costs that this change would impose. Movement expansion is a debate over who national LGBT rights groups should be representing and how they should do so, but there is no clear answer to these fundamental questions. Importantly, expansion is not the only option for national LGBT organizations or nonbinary, intersex, and asexual rights advocates. There are other ways for LGBT and QIA to work together short of proceeding as an integrated movement, which advocates may prefer.

Rights organizations may engage in coalition work or collaborate with one another in more limited ways, such as by sharing information, providing advice, offering specialized knowledge, and mobilizing memberships to attend one another's events.<sup>459</sup> These forms of cooperation are beneficial insofar as they allow the groups to avoid the problems of deprioritization and strategic tension that transgender rights advocates faced.

The LGBT movement has a history of forming both inter- and intramovement coalitions. Over the past decade, regional LGBT rights groups have united with immigrant rights organizations in legislative and ballot measure campaigns, jointly addressing issues such as marriage

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457. See Herbert Kitschelt, *Social Movements, Political Parties, and Democratic Theory*, 528 ANNALS AM. ACAD. POL. & SOC. SCI. 13, 15 (1993); della Porta, *supra* note 27, at 1.

458. See Cummings, *The Social Movement*, *supra* note 45, at 387, 400.

459. See Sandra R. Levitsky, *Niche Activism: Constructing a Unified Movement Identity in a Heterogeneous Organizational Field*, 12 MOBILIZATION 271, 278–79 (2007).

equality and public assistance for undocumented persons.<sup>460</sup> LGBT rights organizations also frequently form intermovement coalitions, as LGBT rights groups often specialize in the type of work they do, from legislative lobbying to litigation to protest activities.<sup>461</sup> When a county board equivocated on Equality Illinois's proposed antidiscrimination ordinance, the group contacted Queer Nation, a protest organization.<sup>462</sup> Queer Nation disrupted a public hearing; its members threw waffles and asked the board president why he was "waffling" on the issue.<sup>463</sup> The board quickly contacted Equality Illinois to move forward on the law.<sup>464</sup>

Coalition work may permit organizations to promote shared principles rather than premise their advocacy on identity-based affinity. Several themes permeate all of the groups' work, from the opposition of discrimination to the advancement of antisubordination, bodily integrity, and sexual freedom. In fostering these doctrinal goals, coalition work may serve as a step on the path to movement integration. Thus, advocates could form an alliance of interest in any one of the areas of connections, like functional parenthood, identity documents, or sex-segregated facilities.

Collaboration could additionally serve as the basis for later movement expansion, though it would not necessarily have that result. LGBT rights groups altered their priorities after working with transgender rights advocacy organizations, but the movement had by that point already committed to being LGBT.<sup>465</sup> The collaboration did not spark a change in the movement, but rather led organizations to fulfill their prior commitments to transgender inclusivity.<sup>466</sup>

An alternative would be for the groups to engage in more circumscribed cooperation than coalition building. Here, the main benefit is that groups may differ in their priorities and strategies and therefore may assist one another without forgoing their own preferences. So long as the goals are not at cross-purposes, sporadic support carries relatively little risk for a social movement, particularly since that assistance may be withdrawn at any time.<sup>467</sup> Accepting aid for specific ventures, rather than entering a formal alliance or integrating movements, also reduces the likelihood of one partner's interests being subordinated to that of a more powerful ally.

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460. See Erin M. Adam, *Intersectional Coalitions: The Paradoxes of Rights-Based Movement Building in LGBTQ and Immigrant Communities*, 51 L. & SOC'Y REV. 132, 153–55, 159–60 (2017).

461. See Levitsky, *supra* note 459, at 274, 280.

462. See *id.* at 280.

463. *Id.*

464. See *id.*

465. Arkles at al., *supra* note 22, at 579, 588.

466. Spade, *supra* note 438, at 289–90.

467. See Meyer & Corrigan-Brown, *supra* note 65, at 329–30.

These benefits are simultaneously the main drawbacks of limited engagement rather than coalition work. Small groups might not accomplish any of their goals without a coalition partner, as limited support may simply be insufficient. Advice and endorsements are relatively cheap, and organizations may not actualize their benefits. This limitation applies equally to coalition between underresourced partners, as organizations are likely to work with one another to gain access to personnel, expertise, networks, and funds.<sup>468</sup> As a result, neither coalition work nor more limited support may serve the needs of nonbinary, intersex, or asexual rights advocates, especially since assistance may be withdrawn at any time.<sup>469</sup>

Cooperation and coalition work are not simply alternatives to one another, as organizations that enter alliances on one issue may only provide limited support on another. Thus, LGBT and asexual advocates might form a coalition to press for functional family recognition, while LGBT rights groups could provide more limited support for aces' efforts to eliminate impotency from annulment statutes, given that this subject is not particularly salient to LGBT individuals. Similarly, although LGBT rights groups have formed coalitions with intersex advocates to address gender designations on identity documents, they may decide to only provide sporadic support for intersex rights groups' efforts to restrict gender surgery on intersex infants.

At the other end of the spectrum, the LGBT movement could reformulate itself entirely.<sup>470</sup> Social movements often fracture, particularly as coalitions become unsustainable over time.<sup>471</sup> Both conservative or more racial members may prefer to work outside of mainstream rights organizations to advocate for more controversial positions. For example, in 1992, the director of the American Civil Liberties Union's (ACLU) Reproductive Rights Project left to form the comparatively more liberal Center for Reproductive Rights, which quickly became the leading pro-choice litigation group.<sup>472</sup> What this indicates is that separation is neither anomalous nor necessarily harmful for the interests that the groups represent.

Rather than combining LGBT and QIA, the groups could reorganize themselves based on sexual orientation and gender identity. Thus, the movements would become LGBA and TQI. Such a reconceptualization would turn on the identity-based connections between the categories,

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468. See Jones et al., *supra* note 430, at 212.

469. See Meyer & Corrigan-Brown, *supra* note 65, at 329–30.

470. The movement could additionally expand beyond LGBTQIA, encompassing all gender and sexual minorities, but such a possibility is beyond the scope of this Article.

471. See *supra* Section I.A.

472. See Karen O'Connor & Alixandra B. Yanus, *Where Have All the Pro-Choice Lawyers Gone? An Analysis of Post-Roe Reproductive Rights Lawyering*, 29 L. & POL'Y 368, 373 (2007).

with non-heterosexuals in one group and non-cisgender individuals in another. The two would undoubtedly work with one another where their interests overlap, but the division might create stronger bonds within the movements by clarifying the basis for their union.

The problem with such a change is that it promotes the interests of individuals who fit within one of the categories, thereby implicitly ignoring intersectional identities. The categories are all capacious and have boundaries that are often porous. Since individuals are multifaceted, they may identify across many of the categories. Additionally, circumstances may make interests more important to individuals than identity. A masculine-appearing lesbian who is required to meet feminine grooming standards at work may have a great deal in common with a transgender or nonbinary individual who cannot wear clothing appropriate to their gender identity at school.<sup>473</sup> A gender conforming gay man's experiences in prison may be similar to those of an incarcerated transgender woman.<sup>474</sup> A butch lesbian who is asked to leave a restroom because she is mistaken for a man shares more, in that moment, with a transgender or nonbinary person than a femme lesbian.<sup>475</sup> An ace who is asked about his lack of sexual partners may feel the same frustrations as an intersex individual who is asked about her biological sex. Given that the categories can be expansive, with experiences of gender and sexual nonconformity that bind everyone within the LGBT and QIA categories, disaggregation may not be the most useful shift.

Given the long struggles to create a LGBT movement in the first place, it seems unlikely that national organizations will reorganize based on sexual orientation and gender identity. The more probable option would be for national LGBT rights groups to expand to include nonbinary, intersex, and asexual rights, or to engage in other forms of more limited cooperation. The alternatives to movement expansion that this Article has presented would promote many of the goals of nonbinary, intersex, and asexual individuals, although doing so would not address the more fundamental issue of the LGBT movement's limited representation of its more marginal members. Whether and how the LGBT movement expands, or takes another form entirely, will require organizations to weigh how reframed goals and tactics will affect their ability to serve their constituents.

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473. Gender-specific grooming codes do not constitute sex discrimination. *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1113 (9th Cir. 2006).

474. Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 6 (2011).

475. Cote, *supra* note 199; see also Alison Bechdel, *Perils of a Midtown Dyke: A True and Cautionary Tale*, in *DYKES TO WATCH OUT FOR* 10 (1986).

## CONCLUSION

Members of the LGBT community often describe the movement as LGBTQIA, but this linguistic linkage does not capture the current state of national legal advocacy. National LGBT rights groups' strategies have tended to marginalize nonbinary interests, while overwhelmingly ignoring intersex and asexual rights.

The question of whether and how LGBT and QIA should work together is as much a problem of how nonbinary, intersex, and asexuality relate to LGBT as it is what interests national LGBT rights organizations should prioritize. The additional identity categories support the movement's underlying principles in important ways: nonbinary reinforces the acceptability of gender nonconformity, intersex challenges a dimorphic view of sex, and asexuality expands perspectives on nonnormative sexual orientations and relationships. That these additional groups' interests and priorities are aligned with the more marginalized members of the LGBT movement means that organizations would have to shift their goals and strategies. However, national rights groups have prioritized those issues that have the greatest likelihood of success and pursued them in ways that maximize their chance at victory. National organizations are balancing their need to represent group members and the legal reality in which they operate.

A national LGBTQIA legal movement is therefore possible, but not inevitable, as it requires organizations to balance the scales between efficiency and inclusivity, as well as capacity and ideology. These decisions as to whom national organizations represent ultimately strike at the movement's most fundamental debates over what the LGBT movement is and what it should be.