2022

Adjudicating Identity

Laura Lane-Steele
University of South Carolina School of Law, lanestel@mailbox.sc.edu

ADJUDICATING IDENTITY

*by: Laura Lane-Steele**

ABSTRACT

Legal actors examine identity claims with varying degrees of intensity. For instance, to be considered "female" for the U.S. Census, self-identification alone is sufficient, and no additional evidence is necessary. To change a sex marker on a birth certificate to "female," however, self-identification is not enough; some states require people to show that they do not have a penis to be considered "female." Similar examples of discrepancies in the type and amount of evidence considered for identity claims abound across identities and areas of law. Yet legal actors rarely acknowledge that they are adjudicating identity in the first place, much less explain or justify the varying levels of scrutiny exacted upon identity claims. This Article attempts to make sense of identity adjudication by providing a taxonomy that explains why some identity claims are interrogated more than others. Taking a broad view of identity adjudication, it examines three types of laws (data-collection, anti-discrimination, and benefit laws) as well as four identity categories (religion, sexual orientation, sex, and race) and concludes that both the type of law at issue and the identity category affect how an identity claim is adjudicated. It then argues that across identities and types of laws, legal actors are often adjudicating identity without proper attention to the particular legal context and examining the wrong type of identity evidence in light of the specific law at issue. This context-detached approach to identity adjudication produces inconsistent and incoherent results; it can also impinge on privacy interests and reinforce problematic stereotypes. This Article calls for a context-informed approach to identity adjudication, where the question of identity is linked to the function of the specific law rather than treated as an independent and stable "truth" about an individual.

https://doi.org/10.37419/LR.V9.I2.1

* Forrester Fellow, Tulane Law School. For helpful discussions, I am grateful to Noa Ben-Asher, Meghan Boone, Jessica Clarke, Onnig Dombalagian, Elizabeth Emens, Adam Feibelman, D. Wendy Greene, Jancy Hoeffel, Sonia Katyal, Holning Lau, Ann Lipton, Kenneth Mack, Saru Matambanadzo, Angela Morrison, Emily Prifogle, Stacy Seicshnaydre, Meili Steele, Emily Stolzenberg, and Mary Yanik. Additional thanks to the participants of the Intellectual Life Speaker Series at Tulane Law School, the 2021 Summer Feminist Legal Theory Series, the Law & Society Annual Conference, the Law & Society Early Career Workshop, and the Michigan Law Junior Scholars conference. I thank Katie McCarty and Meredith Clement for excellent research assistance and Spencer Lockwood, Tayler Berlin, Nhu-Thinh Nguyen, Madison Feyrer-Melk, and the other editors at the *Texas A&M Law Review* for their outstanding comments and edits.

TABLE OF CONTENTS

I. INTRODUCTION

Identity has been adjudicated in the court of public opinion with increasing frequency over the past decade. Rachel Dolezal's claim to a biracial identity was generally accepted in her community because of her appearance, but when her ancestry came to light, most people rejected her racial self-identification and deemed her to be white.[1] Professor Andrea Smith self-identifies as Native American, but because she has been unable to show that neither she nor any of her relatives

1. *See* ROGERS BRUBAKER, TRANS: GENDER AND RACE IN AN AGE OF UNSETTLED IDENTITIES 1–3 (2016).

are citizens of a tribe, her identity claim has been largely rejected.[2] Sex is also publicly adjudicated. In 2015, Caitlyn Jenner came out as a transgender woman,[3] and Demi Lovato recently disclosed that they identify as non-binary.[4] Most people treat these changes in sex self-identification as legitimate, and failing to accept these individuals' sex identities is viewed as discriminatory in many circles.[5] Whether an individual's identity claim is accepted by society can have tremendous effects on that individual's life—Dolezal has become a social pariah and lost her jobs as the chapter president for the Spokane NAACP and as an instructor of Africana Studies at Eastern Washington University. Jenner, on the other hand, ran for governor of California.[6]

Identity adjudication is also happening in the mundane moments of our everyday lives. Problems can arise when others adjudicate our identities improperly, unnecessarily, or in ways that conflict with our self-identification. Two examples from my life follow. On multiple occasions, when I have entered the women's restroom, employees of the establishment or other patrons have adjudicated my sex to be male based on my appearance. They then followed me into the restroom to inform me that I was in the wrong restroom. At the airport security checkpoint, the full body scanner machines require the TSA agents to indicate whether the subject being scanned is male or female. TSA agents frequently adjudicate my sex as male, which causes the machine to alert and sometimes results in me going through additional screening.

---

2. *See* Sarah Viren, *The Native Scholar Who Wasn't*, N.Y. TIMES, https://www.nytimes.com/2021/05/25/magazine/cherokee-native-american-andrea-smith.html (May 28, 2021) [https://perma.cc/TW7Q-JB3F]. Other examples of racial self-identifications being adjudicated include the controversies over Natasha Bannan and Jessica Krug. *See* Raul A. Reyes, *Who's Really Latina? A Recent Controversy Draws Outrage Over Identity, Appropriation*, NBC NEWS (Feb. 28, 2021, 5:00 AM), https://www.nbcnews.com/news/latino/who-s-really-latina-recent-controversy-draws-outrage-over-identity-n1258141 [https://perma.cc/E35F-Q5RW] (discussing Natasha Bannan, who identified as Latina, despite not having Latin American ancestry and Jessica Krug, who previously identified as Black but then revealed that she had mispresented her ancestry).

3. Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR (June 25, 2015), https://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz [https://perma.cc/JW72-HAW7].

4. *Demi Lovato Is Non-Binary and Is Changing Pronouns to They/Them, Singer Announces*, BBC NEWS (May 19, 2021), https://www.bbc.com/news/newsbeat-57169541 [https://perma.cc/U69Z-W2PF].

5. *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS NEWSHOUR (Apr. 16, 2021, 5:00 AM), https://www.pbs.org/newshour/politics/new-poll-shows-americans-overwhelmingly-oppose-anti-transgender-laws [https://perma.cc/645S-ZUCC].

6. *See* BRUBAKER, *supra* note 1, at 3–4 (contrasting negative reaction to Dolezal with positive reactions to Jenner); Jennifer Medina & Maggie Haberman, *Caitlyn Jenner Announces Run for California Governor*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/2021/04/23/us/politics/caitlyn-jenner-california-governor.html (Apr. 26, 2021) [https://perma.cc/BHV4-4ZMK].

As these examples show, identity adjudication is both ubiquitous and consequential. Sometimes less obviously, but at least as frequently, identity is formally adjudicated in law. In some contexts, people are taken at their word that they are a particular identity, and other times, they have to put forth more evidence to prove their identity claim. For example, self-identification is enough for the Census; you check a box indicating your race, sex, marital status, etc., and you don't need to provide any other evidence.[7] But if you seek asylum in the United States based on your sexual orientation, self-identification would not be sufficient; you would need to provide additional evidence, like proof of prior same-sex relationships, corroborating testimony from friends and family, or evidence that you faced homophobic harassment.[8] Some identity claims are closely scrutinized while other are not.[9] Yet legal actors do not usually acknowledge that they are adjudicating identity in this way, much less explain why some identity claims are examined more closely than others.

This Article seeks to systematically understand and make visible identity adjudication in the law. It brings to the surface the implicit, unidentified, and unconscious factors legal actors use to adjudicate identity and provides a taxonomy of identity adjudication. Specifically, it develops this taxonomy by examining three types of laws—(1) data-collection laws (like the Census), (2) anti-discrimination laws (like Title VII), and (3) "benefit" laws, which involve individuals asking or petitioning a state actor to affirmatively do something on their behalf[10]—and four identity categories: (1) race, (2) sex, (3) sexual orientation, and (4) religion.

Two patterns emerge that tend to affect how identity claims are adjudicated. The first pattern goes to the type of law at issue. For data-collection laws, the evidentiary burden for identity claims is low, and self-identification alone is generally sufficient.[11] This burden increases with anti-discrimination laws and is at its highest with benefit laws.[12] For example, self-identification is typically sufficient to prove racial identity in the context of a data-collection law;[13] for a benefit law, however, legal actors require more, such as ancestral evidence or prior consistent racial self-identifications.[14] The second pattern goes to the type of identity at issue. Identities the law treats as immutable (race and sex) are more intensely scrutinized than the identities the law

7. *E.g.*, *About Race*, U.S. CENSUS BUREAU, https://www.census.gov/topics/population/race/about.html (Dec. 3, 2021) [https://perma.cc/E6UZ-PZJ9].

8. *See generally infra* Part III(C)(1).

9. *See generally infra* Part III(C)(1).

10. This Article's definition of "benefit" law is explained more fully infra in Part III(C).

11. *See infra* Part III(A).

12. *See generally infra* Part III.

13. *E.g.*, About Race, *supra* note 7.

14. *See infra* Part III(C).

treats as more mutable (sexual orientation and religion). For example, sex adjudication for a benefit law generally requires proof of certain biological traits.[15] But religious identity for a benefit law is usually accepted if the individual can provide some corroborating evidence of their identity claim.[16] Thus, (1) the immutability of the identity category and (2) the type of law both affect the way legal actors treat identity claims.

Making explicit this taxonomy of identity adjudication reveals a problematic pattern across identities and areas of law—namely, that legal actors tend to adjudicate identity in what I call a "context-detached," rather than a "context-informed," manner. A context-detached approach neither examines why the particular law asks about the identity in the first place nor considers how the purpose or function of the law may influence how identity should be adjudicated. Context-detached identity adjudication is not disciplined or regulated by the applicable law; rather, it is guided by whatever legal actors think they "know" about particular identities. Subjective and unarticulated definitions of identity—formed by the particular legal actor's social, cultural, and political positionalities—dominate the context-detached approach to identity adjudication. For example, a legal actor who adopts this approach may define a "woman" as someone with breasts who ascriptively appears to be a woman (at least to that legal actor) and then applies that definition across different areas of law, regardless of whether breasts or ascriptive factors matter to the law.

A context-detached approach to identity adjudication is problematic for at least two reasons. First, and most obviously, it can produce results that are doctrinally inconsistent or at odds with the purpose of the law. Consider an example from anti-discrimination law. In racial discrimination cases, some courts adjudicate the plaintiff's "actual" race.[17] In these cases, courts may examine the plaintiff's accent, skin color, or ancestry to determine her racial identity for themselves.[18] Or they may dismiss a claim from a plaintiff who was mistreated based on a misperceived racial identity.[19] But when a plaintiff brings a claim for sexual orientation discrimination, courts are not typically concerned with determining whether the plaintiff is "actually" gay or not; they don't care whether the plaintiff self-identifies as gay, is in a same-sex relationship, or conforms to stereotypes associated with gay people.[20]

15. *See infra* Part III(C)(4).

16. *See infra* Part III(C)(2); *see also* Davis v. Fort Bend Cnty., 765 F.3d 480, 487 (5th Cir. 2014) (example of a court accepting a party's religious identity based solely on their testimony).

17. D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 90 (2013).

18. *See infra* Part III(B)(3).

19. *See infra* Part III(B)(3).

20. *See infra* Part III(B)(1).

Instead, courts focus on the content of the discrimination or perception of the discriminator and ask whether the discriminatory conduct was motivated by sexual orientation.[21] Thus, a plaintiff who self-identifies as straight but who was misperceived as gay by his discriminator could probably sustain a claim, but a Hispanic plaintiff misperceived as Black may have her claim dismissed based on her identity.

There is no doctrinal reason to treat these claims differently; the same statute and the same analytical framework apply to both race discrimination claims and sexual orientation discrimination claims.[22] As explained further in Part IV, the applicable anti-discrimination laws do not require courts to determine the plaintiff's "true" identity—rather, the discriminator's perception of the plaintiff's identity or the cause of the discriminatory behavior should guide the identity inquiry. Therefore, when courts attempt to determine the "actual" race of a plaintiff, they are engaging in context-detached identity adjudication. Such an approach creates doctrinal inconsistency within anti-discrimination law because some courts, like those addressing sexual orientation claims, are not concerned with the "actual" identity of the plaintiff. Moreover, this approach can harm individual plaintiffs and undercut the purposes of anti-discrimination law on the whole. Anti-discrimination laws are meant to provide remedies to plaintiffs who were mistreated based on a protected category.[23] When courts deny these plaintiffs' claims based in whole or in part on the court's adjudication of the plaintiff's "true" identity, the goals of anti-discrimination law are not served.

The second problem with a context-detached approach is that it can result in the over-interrogation of identity by requiring too much identity evidence to fulfill the function of the law. I fully explore the consequences of over-interrogation in other work,[24] but I summarize two primary harms here. First, making identity claims dependent on unnecessary identity evidence may infringe upon individuals' privacy and dignity interests. Consider some examples of highly sensitive identity evidence legal actors either require or examine when adjudicating identity: ancestral background from services like 23andMe, the makeup of someone's primary or secondary sex characteristics, past sexual and romantic history, and the hormone treatments someone is receiving or has received. Using this identity evidence to adjudicate identity, when this evidence is not necessary considering the law at issue, needlessly impinges on privacy and dignity interests.

21. *See infra* Part III(B)(1).

22. Kindall James, Thomas McGoey, II & Courtney Harper Turkington, *U.S. Supreme Court Rules That Federal Anti-Discrimination Law Protects Gay and Transgender Workers*, JDSUPRA (June 16, 2020), https://www.jdsupra.com/legalnews/u-s-supreme-court-rules-that-federal-94054/ [https://perma.cc/5EEZ-RZGU].

23. *See infra* Part IV(B)(2).

24. *See* Laura Lane-Steele (manuscript in progress) (on file with author) [hereinafter Working Manuscript].

Second, over-interrogation of identity can reinforce problematic definitions of identity that unnecessarily essentialize identity. For example, when a court concludes that someone is a particular race based on the way they look and speak, that court is using the power of the law to declare that certain ways of looking and speaking are essential qualities of a particular race.[25] Similarly, a legal actor who denies someone's claim that she is a lesbian based on her prior marriage to a man is helping construct an overly rigid and false definition what it means to be a lesbian.[26]

This Article calls for a context-informed approach to identity adjudication. Unlike a context-detached approach, a context-informed approach understands the identity question to depend on why that particular law is asking the identity question in the first place. It begins the identity inquiry by locating the function or purpose of the applicable law. It then asks whether identity adjudication is necessary at all, and if so, what definition of identity would best serve those purposes.

Other work has identified how law determines identity claims and has critiqued specific flaws in how legal actors determine identity, but the scholarship tends to focus on one area of law, one identity, and/or one model of identity adjudication.[27] This Article expands on this

25. *See infra* Part III(B)(3).

26. *See infra* notes 169–78 and accompanying text. My future work examines this problem of over-interrogation in more depth and explores how identity adjudication does not merely describe or identify pre-existing identity categories—but that it is helping produce the categories and the cultural meanings associated with those categories. *See* Working Manuscript, *supra* note 24. Other scholars have explored how legal classifications of race, sex, and sexual orientation construct those identities. *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 7 (1996); LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 54, 63 (2007) (analyzing how law defined racial categories in the nineteenth century); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 747 (2008) (arguing that legal rules that govern sex classifications "do not simply discover and describe maleness and femaleness but instead *produce* two populations marked with maleness and femaleness"); Stefan Vogler, *Legally Queer: The Construction of Sexuality in LGBQ Asylum Claims*, 50 L. & SOC'Y REV. 856, 884 (2016) (arguing that legal process by which people seek asylum based on sexual orientation "is both regulatory and generative of sexual identities and that the law plays a powerful role in shaping sexual identity"); *see also* GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES (1999).

27. *See, e.g.*, Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 471 (2010) [hereinafter *Judicial Erasure*] ("[A]ntidiscrimination jurisprudence [is] inhospitable to claims brought by individuals who allege that they were discriminated against because they were perceived as multiracial."); D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 129 (2013) (arguing that courts' rejection of misperception claims in Title VII cases "is categorically wrong"); Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 104, 132 (2017) [hereinafter *Protected Class*] (critiquing courts' refusal "to consider discrimination claims by plaintiffs who have not proven membership in a protected class" in anti-discrimination law); Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM.

scholarship by examining legal identity adjudication across areas of law and identity categories and by extracting patterns that exist outside of any one doctrinal or identity silo. It also expands on the scholarship's critiques of identity adjudication and demonstrates how context-detached identity adjudication is a systemic problem in law rather than a problem limited by category of law or identity.[28]

This Article is both broad and narrow. The broad scope allows me to build the taxonomy of identity adjudication and identify the problem of context-detached identity adjudication. But the taxonomy also raises many issues about identity adjudication that I do not address in this Article.[29] For instance, the taxonomy sheds light on dominant societal discourses regarding identity and how those discourses are implemented through law. It can also elucidate how legal identity adjudication enforces identity-based hierarchies.[30] This Article lays the groundwork for, but does not take on, these questions. Also, this Article does not claim to be an exhaustive examination of all types of identity adjudication in the law. It does not address, for example, disability, citizenship, or familial identity categories or the related laws that adjudicate those identities.[31] Future work can build on, and im-

---

BUS. L.J. 789, 791 (2015) (discussing how courts struggle to adjudicate fluid race and sex identity claims in the context of anti-discrimination law); Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 750 (2015) [hereinafter *Identity and Form*] (discussing formal identity in the content of race, sex, family, and citizenship); Sonia K. Kayal & Jessica Y. Jung, *The Gender Panopticon: AI, Gender, and Design Justice*, 68 UCLA L. REV. 692, 692 (2021) (documenting how legal and non-legal actors employ AI technologies to determine sex identity); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1309 (2011) (explaining how jail officials determine the sexuality and transgender status of inmates).

28. Other scholars have argued that legal definitions of identity, and whether the law should use identity in the first place, depend on the context, i.e., the function of the law and how identity serves that purpose. *See, e.g.*, Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 902 (2019) (suggesting a "contextual approach to debates over sex and gender regulation" within the context of non-binary gender and providing three potential models that regulate sex differently depending on the context); Lauren Sudeall, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1609–11 (2015) (arguing that equal protection doctrine should abandon identity as determinative of the level of scrutiny courts apply in favor of an approach that better serves the purposes and values of equal protection law). This Article begins the work of expanding these arguments across identities and legal areas, work that I am continuing in my works in progress.

29. This Article is the first in a series of articles about identity adjudication. In my future work, I plan to address many questions this Article leaves unanswered.

30. Other work has identified how the law's creation and maintenance of certain categories has been crucial in maintaining inequality. *See, e.g.*, LÓPEZ, *supra* note 26, at 139 (showing how legal adjudication of whiteness served to uphold white supremacy); Dean Spade, *Mutilating Gender*, *in* THE TRANSGENDER STUDIES READER 315, 320 (Susan Stryker & Stephen Whittle eds., 2006) (arguing that law's reliance on the bio-medical model of sex identity privileges cisgender identity as natural and transgender identity as illness that needs to be cured).

31. Regarding disability, scholars have argued that legal actors over-interrogate disability claims. That is, legal actors require more identity evidence than necessary in

prove upon, this taxonomy by including additional laws and identity categories. Finally, this Article argues for a context-informed approach to identity adjudication, where identity inquiries are informed by the function or purpose of the law at issue; however, it does not take a normative stance on what the proper function or purpose of a law should be. These debates are too expansive and complex for this Article to tackle. This Article makes an argument about the proper *process* of identity adjudication—i.e., a context-informed approach.

The remainder of the Article is structured as follows. Part II defines the types of identity evidence used to prove an identity claim and provides background on immutable versus mutable identities. Part III details the taxonomy of identity adjudication that I have introduced here. Specifically, it examines identity claims in the context of data-collection laws and explains how self-identification is almost always sufficient for these laws. Next, it addresses anti-discrimination laws and provides a descriptive account of how courts adjudicate identity in the context of these laws. It then addresses benefit laws and highlights how identity claims are typically the most highly scrutinized, particularly with race and sex. Lastly, it offers possible explanations for why the type of law and the mutability of identity affect how closely an identity is examined. Part IV turns to the normative critique of the taxonomy and argues that identity is often adjudicated without proper attention to the purpose or function of the particular law at issue. The Article ends with a brief conclusion.

II. Definitions and Mutability

A. *Types of Identity Evidence*

To make the following discussions of identity adjudication more coherent and efficient, this Article uses the following terms to refer to certain categories of identity evidence. By "identity evidence," I mean the documents, traits, or information legal actors use to determine someone's identity.

1. *Ascriptive evidence.* Ascriptive evidence refers to both physical appearance and the performative aspects of identity. Based on one or both of these, individuals are involuntarily assigned or ascribed an identity by third parties. For instance, a third party may assign someone a racial identity when she "interprets another person's visible, physical features to correlate with a set of features she identifies with a certain race or ethnic group."[32]

light of the purpose of the ADA. *See, e.g.*, Katherine Macfarlane, *Disability Without Documentation*, 90 Fordham L. Rev. 59 (2021) (arguing that requiring employees to provide medical documentation of their disability before receiving an accommodation conflicts with the ADA's purpose).

32. Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. Rev. 1134, 1145 (2004) [hereinafter *Performing Racial and Ethnic Identity*].

Her racial assignment also may take into account certain "dialects, aesthetics, and mannerisms" that she associates with a certain race.[33] Sex, sexual orientation, and religion[34] may also be ascribed based on some combination of physical appearance and behavior.[35]

2. *Documentary evidence.* Documentary evidence refers to prior articulations of someone's identity, typically, but not exclusively, in written form. This category includes an individual's prior self-identification on a form, like an employment application or insurance form, and recordings by third parties of an individual's ascriptive identity, like a birth certificate designating someone's race.[36]
3. *Ancestral evidence.* Ancestral evidence focuses on evidence of familial lineage and includes things like DNA evidence, ancestry, and genealogies.
4. *Biological evidence.* Biological evidence refers to traits like chromosomes, primary and secondary sex characteristics, and other things tied to the body that are not encompassed under ascriptive evidence.

---

33. *Id.* at 1158. This brief discussion does not capture the complexity of identity performance or ascriptive identity, which has been widely discussed in the scholarship. DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA 1 (1st ed. 2013) (discussing how racial judgments are often based on the extent to which a person conforms their behavior to that which is stereotypically associated with a certain race); John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441, 1450 (1997) ("Even dark-skinned, nappy-headed African Americans like me can pass sociologically and culturally if we have the right history of socialization, the right credentials, a respectable job, an affluent income, and a proper street address or zip code."); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1289 (2000); RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 62 (2005) (explaining how a third party often performs the subject's identity back to the subject; for instance when a white department store clerk follows a Black man around the store, she is performing his identity back to him).

34. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 779–80, 929 (2002).

35. Some scholars have included individuals' biological and ancestral makeups in their definitions of ascriptive identity. *See Identity and Form*, *supra* note 27, at 757. For this Article, I have found it more useful to create separate categories for those aspects of identity. Biology and ancestry often affect physical appearance, but the two do not always correlate. For instance, an ascriptive model of identity (as I have defined it) may result in a transgender person's sex being adjudicated as female, while under a biological one, it may not be. And multi-racial individuals are often not perceived to be of the racial category that matches their ancestral makeup. *See infra* Part (III)(B).

36. Jessica Clarke has discussed a closely related model of identity, called formal identity, which she defines as an identity that "comes into being through the execution of a formality by the parties laying claim to a particular identity." *Identity and Form*, *supra* note 27, at 770. Her article focuses on "formalities that constitute identity statuses for legal purposes, rather than those thought to merely reflect a status." *Id.* This Article understands both as documentary evidence—for example, an individual's sex marker on their birth certificate can reflect their sex, and when an individual changes that sex marker under state law, they become that sex under that state's law.

5. *Self-identification.* Self-identification refers to the identity to which the individual has laid claim to at the time of the litigation, controversy, point of data-collection, or other event in question. This category does not include a person's prior representations of their identity, unless otherwise noted.

These forms of identity evidence are not mutually exclusive, and in some cases, they may completely overlap. For example, a family genealogy can be considered both ancestral evidence and documentary evidence. A birth certificate can be considered either documentary evidence or ascriptive evidence because it represents the sex a third party assigned to the individual at birth. Moreover, not all types of evidence apply to all categories of identity. For example, biological and ancestral evidence are not relevant to the adjudication of sexual orientation and most types of religious identity claims. Finally, I am not committed to these definitions of identity evidence; these definitions are not the point of this Article. Nor am I arguing that any of these types of identity evidence are normatively constitutive of any particular identity. In other words, having XY chromosomes does not make someone "male" as a normative matter. Indeed, claiming that certain types of identity evidence are definitional qualities of an identity would be antithetical to a project that advocates for a context-informed approach to defining identity. Rather, I find that these terms promote efficiency and consistency when discussing identity adjudication in such a broad manner.

B. *Mutability*

Because the taxonomy introduced in this Article finds that "immutable" identities (race and sex) tend to receive closer scrutiny than more "mutable" identities (sexual orientation and religion), a brief explanation of what I mean by immutability is in order. Mutability of identity in this Article means the degree to which an individual can chose, or validly change, their identity in the eyes of the law.[37] There are different tiers of immutability, and identities are not simply immutable or mutable. Identities that are perceived to be rooted in nature or biology are generally deemed strictly immutable, i.e., the identity cannot be changed.[38] Race and ethnicity fall into this category of immutability.[39] For many decades, sex was also strictly immutable;[40]

37. This Article focuses on mutability of identity in law as opposed to societal perceptions of immutability. Societal and legal understandings of immutability no doubt inform each other, but societal definitions are too context-dependent, unstable, and contested to conduct this cross-identity, cross-law analysis.

38. *See* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 14–15 (2015). However, immutable identities or traits do not have to be connected to biology or ancestry. For example, the law considers illegitimacy to be an immutable trait. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972).

39. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in part and dissenting in part) ("[R]ace, like gender and illegitimacy . . . is

however, this has started to change with the gradual judicial and legislative recognition that an individual can change their sex,[41] usually by changing their primary or secondary sex characteristics.[42]

The next tier of immutability, which some call the "new immutability," includes identities or traits that the law understands as capable of being changed but that law should not require or incentivize people to change.[43] These traits "are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."[44] Courts have placed sexual orientation in this category of immutability.[45] Religion also falls in this category. People can, and often do, change their religion, but the law does not require or incentivize changing one's religion.[46]

This discussion of the varying degrees of mutability of identity is not an endorsement of their legitimacy. Many scholars have convincingly critiqued the stability of the immutable/mutable distinction and its relevance to equality law.[47] Rather, this immutable/mutable distinction in the law is relevant because of its role in explaining the taxonomy for identity adjudication.

III. A Taxonomy of Identity Adjudication

This Part develops the taxonomy of identity adjudication identified in the Introduction and reveals how both the type of law and the iden-

---

an immutable characteristic which its possessors are powerless to escape or set aside." (citation omitted)).

40. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).

41. *See* Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 Mich. J. Gender & L. 373, 376 (2013).

42. The mutability of sex is limited, though, in the sense that it is generally only able to be changed once in order to align the body with the mind or soul. In the eyes of law, the "actual" sex of the individual resides in the mind or soul and is still understood to be immutable. *See* Yoshino, *supra* note 34, at 922–23 (2002); Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, *in* Transgender Rights 3, 4 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006).

43. Clarke, *supra* note 38, at 4–5.

44. Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

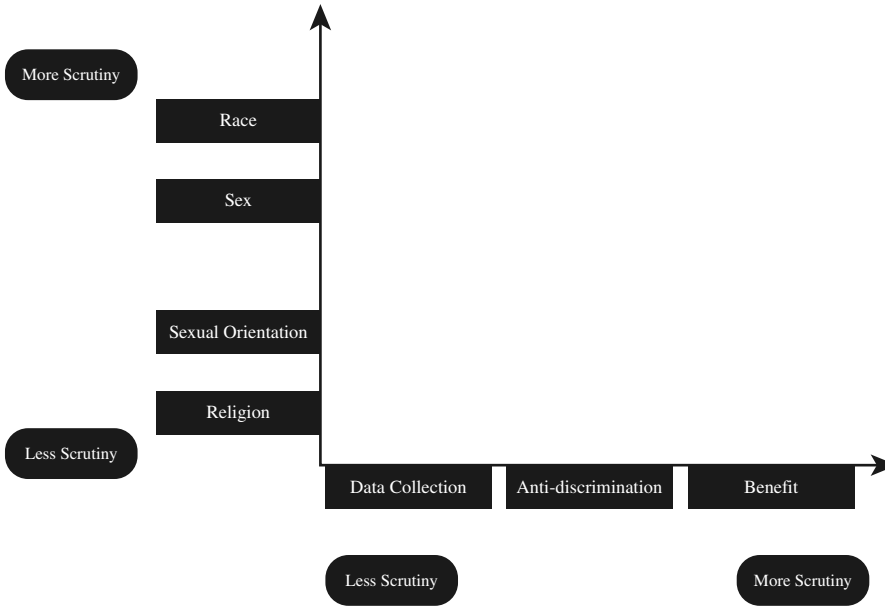
45. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 436–39 (Conn. 2008) (holding that sexual orientation is immutable because of its centrality to a person's identity and can be "altered[,] [if at all,] only at the expense of significant damage to the individual's sense of self" (alteration in original) (citation omitted)).

46. Indeed, the First Amendment prevents the government from punishing or incentivizing changing religions. *See, e.g.*, Larson v. Valente, 456 U.S. 228, 244 (1982).

47. *See, e.g.*, Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 Yale L.J. 485, 487 (1998); Clarke, *supra* note 38, at 10; Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 Stan. L. Rev. 503, 519–21 (1994).

tity category affect how an identity claim is examined. First, it addresses data-collection laws and demonstrates how, currently, they almost exclusively rely on self-identification. For race, one of the more immutable identities, there are some exceptions. Specifically, a third party's ascriptive assessment of someone's race can trump self-identification, but it is not clear how often this happens in practice, or if it happens at all. Then, this Part turns to identity adjudication in anti-discrimination cases. It illustrates how courts are more likely to focus on a plaintiff's "actual" identity in cases involving race and sex. Finally, it turns to benefit laws and shows how legal scrutiny of identity claims is highest in this category of laws and also how the proof requirements for immutable identities (race and sex) are particularly onerous. The following is a visual representation of how identity category and type of law affect identity interrogation.[48]

48. As currently constituted, this taxonomy does not completely account for how other intersecting identities affect how an identity claim is adjudicated—i.e., how scrutiny of one identity (identity A) is affected by occupation of another privileged or marginalized identity (identity B). For instance, the current version of this taxonym does not fully address how race might affect sex identity or religious identity determinations or how sex and race might affect sexuality determinations. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1 U. CHI. LEGAL F. 139, 139–40 (1989) (arguing that different identities intersect to produce different experiences and forms of discrimination). Other scholars have discussed how intersecting identities affect identity determinations in discrete legal contexts. *E.g.*, HEATH FOGG DAVIS, BEYOND TRANS: DOES GENDER MATTER? 112–13 (2017) (discussing how women of color are more likely to have their sex identity questioned than white women in the context of sex-segregated sports); Adeel Mohammadi, Note, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L. J. 1836, 1841–42 (showing how courts tend to require more than just "religious sincerity" when Muslims seek religious accommodations in prison, even though the First Amendment technically bars more searching inquires); *see also* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 157, 163–66 (1998) (showing how performative evidence of white identity took different forms depending on sex—for men, for example, acting white meant exercising rights like voting). I am still studying how intersecting identities affect identity determinations in a systemic way. In my current work in progress specifically, I am exploring how occupation of one or more marginalized identities can exacerbate the harm caused by the context-detached approach to identity adjudication.



A. *Data-Collection Laws*

"Data-collection" laws are just that: mechanisms that govern or conduct the collection of data. The primary goal of data-collection laws is to collect data, but they all have secondary functions, depending on how the identity information is used. Census data, for example, is used for many purposes, including determining how a wide variety of federal resources are allocated and tracking patterns of race and sex discrimination.[49] The Equal Employment Opportunity Commission ("EEOC") also collects data on race and sex to identify workplace discrimination.[50] But no matter the purpose for which the identity data is used, identity is determined almost exclusively by self-identification. For instance, the Census gathers information on racial, ethnic, and sex identity based on self-identification alone.[51] Sexual ori-

49. U.S. DEP'T COM., QUESTIONS PLANNED FOR THE 2020 CENSUS AND AMERICAN COMMUNITY SURVEY, U.S. CENSUS BUREAU 11, 41, 71 (2018), https://www2.census.gov/library/publications/decennial/2020/operations/planned-questions-2020-acs.pdf [https://perma.cc/EN2Z-SMYM].

50. U.S. EQUAL EMP. OPPORTUNITY COMM'N, 2019 AND 2020 EEO-1 COMPONENT 1 DATA COLLECTION INSTRUCTION BOOKLET, EEOCDATA.ORG 10–12 (2019), https://eeocdata.org/pdfs/EEO-1%20Component%201%20Instruction%20Booklet.pdf [https://perma.cc/V4LC-WUBV].

51. *Id.* at 11–15. The Census treats Native American status as a racial category and allows participants to write the name of their enrolled or principal tribe. *Id.* at 11. The Census Bureau does not cross-reference these responses against tribes' official enrollment lists. *See id.*; U.S. DEP'T OF COM., TRIBAL CONSULTATION HANDBOOK, U.S. CENSUS BUREAU 24 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/dec/2020_tribal_consultation_handbook.pdf [https://perma.cc/9CSK-VGGC].

entation data is also captured via self-identification in both the Census[52] and the Centers for Disease Control and Prevention ("CDC")'s telephone survey.[53]

Religious identity is also determined through self-identification. The Census does not currently ask about religious affiliation, but when it used to, respondents checked the box corresponding to their religious identities.[54] Other countries' censuses collect data on religious practices based on self-identification.[55] In the United States, think-tanks and other non-governmental research organizations collect this information, and self-identification is always sufficient.[56]

This is not to say that data-collection mechanisms permit unrestrained freedom of identity self-determination. Many of these mechanisms limit the options within each identity category. The Census, for example, has only two options for sex: male or female.[57] People who

52. The 2020 Census did not ask respondents to check a box corresponding to their sexual orientation; it asked respondents to define their relationship with their cohabiting partner as an opposite sex husband/wife/spouse, opposite sex unmarried partner, same-sex husband/wife/spouse, or same-sex unmarried partner. U.S. DEP'T OF COM., TEST QUESTIONNAIRE FOR 2020 CENSUS, U.S. CENSUS BUREAU 1, 3 (2018), https://www.documentcloud.org/documents/4425959x-Test-Questionnaire-for-2020-Census.html#document/p3/a414347 [https://perma.cc/FG8S-FMMR].

53. *Behavioral Risk Factor Surveillance Systems (BRFSS): Years Survey Included Sexual and Gender Minority (SGM)-Related Questions 2014 - Present*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/About-CMS/Agency-Information/OMH/resource-center/hcps-and-researchers/data-tools/sgm-clearinghouse/brfss (Dec. 1, 2021, 7:02 PM) [https://perma.cc/RXD9-9HPV].

54. Congress passed a statute in 1976 that prohibited the Census Bureau from requiring disclosures of religious affiliation. 13 U.S.C. § 221(c). Although the Bureau could ask people an optional question about their religious affiliations, it has chosen not to due to separation of church and state concerns. Anne Farris Rosen, *A Brief History of Religion and the U.S. Census*, PEW RSCH. CTR. (Jan. 26, 2010), https://www.pewforum.org/2010/01/26/a-brief-history-of-religion-and-the-u-s-census/ [https://perma.cc/3NEA-ED22] (quoting a former Census Bureau director who stated that "[t]he decision not to add this question is based essentially on the fact that asking such a question in the decennial census, in which replies are mandatory, would appear to infringe upon the traditional separation of church and [s]tate").

55. *See, e.g.*, TOM EVANS & MIKE WELSBY, OFF. FOR NAT'L STAT., RELIGION, EDUCATION AND WORK IN ENGLAND AND WALES 21 (2020), https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/religion/articles/religioneducationandworkinenglandandwales/february2020 [https://perma.cc/VQX2-M7EP] (discussing the United Kingdom's census).

56. For instance, the Pew Research Center's Religious Landscape Study asked participants: "What is your present religion, if any? Are you Protestant, Roman Catholic, Mormon, Orthodox such as Greek or Russian Orthodox, Jewish, Muslim, Buddhist, Hindu, atheist, agnostic, something else, or nothing in particular?" PEW RSCH. CTR., 2014 RELIGIOUS LANDSCAPE STUDY: MAIN SURVEY OF NATIONALLY REPRESENTATIVE SAMPLE OF ADULTS FINAL QUESTIONNAIRE 7 (2014), https://assets.pewresearch.org/wp-content/uploads/sites/11/2016/10/25142557/RLS-II-Questionnaire-for-5th-release.pdf [https://perma.cc/9DD9-EE7K].

57. U.S. DEP'T OF COM., 2010 CENSUS QUESTIONNAIRE, U.S. CENSUS BUREAU 1 (2010), https://www.census.gov/content/dam/Census/programs-surveys/decennial/technical-documentation/questionnaires/2010questionnaire.pdf [https://perma.cc/ZC9T-4XBN].

do not fit neatly into either category cannot accurately claim their identity.[58] Additionally, until 2000, the Census instructions limited respondents to one racial category, so individuals who identified as multiracial could not select more than one race.[59] Thus, data-collection laws do not allow people to identify however they want, but within the options these laws create, identity claims are generally not questioned.

However, data-collection laws have not always relied predominately on self-identification, especially for racial identity. When the Census Bureau began collecting information on racial identity, Census administrators would designate a respondent's race based on their appearance.[60] In other words, ascriptive evidence, not self-identification, determined racial identity. Similarly, before 2006, the EEOC instructed employers to assign their employees a racial category based on employees' visual appearance.[61] Even today, there are some exceptions to the general rule that racial self-identification is sufficient for data-collection laws. For instance, although self-identification is the EEOC's preferred method of collecting identity data, the agency permits "the person attempting to secure information regarding race, sex, or ethnic affiliation" to reclassify an employee's identity "where the declaration by the applicant or employee is patently false."[62] How-

58. *See* Sonia K. Katyal, *The* Numerus Clausus *of Sex*, 84 U. CHI. L. REV. 389, 400–01 (2017) (describing how law limits the options for sex designations to only two categories (male and female) and comparing this to the *numerus clauses* principle in property that limits the categories of property).

59. Alaina R. Walker, *Choosing To Be Multiracial in America: The Sociopolitical Implications of the "Check All That Apply" Approach to Race Adopted in the 2000 U.S. Census*, 21 BERKELEY LA RAZA L.J. 61, 64–66 (2011).

60. *Id.* at 64.

61. *See* Joseph Z. Fleming, *I Believe There Is Something Out There Watching Us; Unfortunately, It's the Government: An Analysis of the EEOC's "EEO-1" and OFCCP Reporting Requirements*, ALI-ABA COURSE OF STUDY: ADVANCED EMPLOYMENT LAW AND LITIGATION, Nov. 30–Dec. 2, 2006, at *1225, SM027 ALI-ABA 1209. Camille Gear Rich has discussed this relatively recent shift in the law's preference for self-identification over ascriptive evidence for racial identity determinations. *See* Camille Gear Rich*, Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1505 (2014) [hereinafter *Elective Race*].

62. U.S. EQUAL EMP. OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 632.3(b)(2)(iii) (2006), 2006 WL 4672862. The EEOC does not explain how an employer should go about deciding when an employee's declaration is "patently false," but considering that the EEOC's pre-2006 policy used ascriptive race, it is reasonable to assume that employers can reclassify employees when employers' perception of their employees' identity does not match the employees' self-identification. EEOC guidance also instructs employers to use "observer identification" "if an employee declines to self-identify his or her race and/or ethnicity." U.S. EQUAL EMP. OPPORTUNITY COMM'N, 2019 AND 2020 EEO-1 COMPONENT 1 DATA COLLECTION INSTRUCTION BOOKLET, EEOCDATA.ORG 11 (2019–2020), https://eeocdata.org/pdfs/EEO-1%20Component%201%20Instruction%20Booklet.pdf [https://perma.cc/V4LC-WUBV]. In this latter example, it is not that self-identification is insufficient to prove an identity claim, but rather that the person failed to self-identify. *See also* Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59266, 59268 (Oct. 19, 2007) (calling for "ob-

ever, there does not appear to be any information on how often this identity reassignment occurs in practice or if it occurs at all.

Both the modern-day and historical exceptions to the general rule that self-identification is sufficient for data-collection laws involve immutable identities, and race in particular. This is in line with the general pattern that immutable identities tend to be more closely interrogated than mutable ones. But for the most part, self-identification is currently sufficient to establish an identity claim for a data-collection law for both mutable and immutable identities. This is true regardless of why the data is being used—whether it's used to track discrimination, allocate resources, or for some other purpose.

However, self-identification may not always be the best type of identity evidence, depending on why the data is being collected. For instance, if the identity data is being collected to track patterns of discrimination, asking someone how they racially self-identify may not actually track patterns of racial discrimination. This is because there are many instances where someone's racial self-identification does not align with the race are assigned by someone who discriminates against them. Said differently, if a multiracial or racially ambiguous individual self-identifies as "white" on a data-collection form but is perceived as Black and discriminated against on that basis, the data will not reflect this instance of discrimination since the racial identity data does not track the basis upon which they were discriminated. The same logic applies for other identities, not just race. A gay person who is not out to their employer or community may self-identify as gay on the data-collection form. But if no one knows they are gay, they are unlikely to be discriminated against on that basis. Thus, depending on why the data is being collected, identity adjudication may need to take other forms of identity evidence into account, beyond just self-identification.[63]

server identification" of the race and ethnicity of elementary and secondary school students when neither the student nor the parent has elected a racial/ethnic identity).

63. Some legal scholars have made a similar point about data collection, self-identification, and measuring discrimination, noting that racial discrimination and hierarchies are more often produced by the racialized individual's involuntary ascription to a racial group rather than that person's self-identification. *See, e,g*., FORD, *supra* note 33, at 8 (describing "physical appearance as the primary marker of racial difference"); Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U.L. REV. 1701, 1753 (2003) (arguing that in the context of Census data-collection efforts, racial self-identification makes it more difficult to accurately measure racial discrimination); Lauren Sudeall, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1291–92 (2014) (arguing that internal understandings of identity are not effective when the purpose of a data-collection law to is address racial hierarchies, which are based on ascribed racial identity).

B. *Anti-Discrimination Laws*

On the whole, identity is adjudicated more intensely in anti-discrimination law as compared to data-collection laws. Some courts focus on discovering a plaintiff's "actual" identity and require more than just self-identification to prove an identity claim. This search for a plaintiff's "true" identity tends to manifest in two ways. First, some judges attempt to adjudicate the plaintiff's identity for themselves based on whatever the judge deems "objective" evidence of a particular identity. For instance, a judge may determine a plaintiff's racial identity based on her skin color, accent, and facial features. Second, judges sometimes impose on plaintiffs what legal scholar D. Wendy Greene calls an "actuality requirement."[64] The actuality requirement mandates alignment between the plaintiff's self-identification and the identity their discriminator perceived them to be.[65] For instance, if a Black man's employer misperceived him as Hispanic and subjected him to harassment based on that misperception, he would not be able to bring a claim if a court imposed an actuality requirement. These are also often called "misperception" cases.

On the other hand, some courts do not interrogate the plaintiff's "actual" identity at all. The relevant inquiry for these courts is not the plaintiff's identity per se; rather, they ask whether the alleged discrimination was based on race, sex, religion, or sexual orientation. For example, courts in this category do not care whether a plaintiff who alleges sexual orientation discrimination is gay or not; what matters is whether they were mistreated because of sexual orientation, whether actual, perceived, or otherwise.

Whether a court is likely to adjudicate a plaintiff's identity, or look to the employer's perception of the plaintiff's identity, appears to be highly dependent on the identity involved. Courts addressing claims that involve more immutable identities (race and sex) are more likely to adjudicate the "actual" identity of the plaintiff, and cases involving more mutable identities (sexual orientation and religion) generally do not.[66]

1. Sexual Orientation

Courts addressing sexual orientation discrimination claims generally do not closely interrogate the plaintiff's identity, if they do at all. The relevant question in these cases is not what the plaintiff's sexual orientation actually is, but instead, whether the discrimination was based on sexual orientation. This means that straight plaintiffs who are misperceived as gay can typically bring claims even though their

64. Greene, *supra* note 17, at 90–91.

65. *Id.*

66. This Subsection focuses primarily on the adjudication of identity in disparate treatment cases versus disparate impact cases.

sexual orientation does not align with the sexuality upon which they are basing their discrimination claim. Indeed, many states' anti-discrimination statutes protect actual or perceived sexual orientation,[67] meaning that plaintiffs whose sexuality is misperceived can bring claims. For example, in a suit brought under a statute that protects both actual and perceived sexual orientation, the plaintiff—who identified as heterosexual and was married to a woman—alleged that he was subjected to anti-gay bullying because his coworkers thought he was gay.[68] The plaintiff's heterosexuality was irrelevant to the ultimate adjudication of his claim, and after a trial, a jury awarded him millions in damages.[69]

Statutes like these, however, do not apply to all instances of anti-gay discrimination. When straight plaintiffs bring claims based on homophobic bullying, they lose when their harassers know that they are straight. For example, one court dismissed a plaintiff's harassment claim because his coworkers testified that they did not think he was gay, even though they teased him for liking "gay boy music" and referred to him as a "dick smoker."[70] Thus, when state law protects both actual and perceived sexual orientation, the plaintiff's identity is not relevant in the sense that a plaintiff of any sexual orientation can bring a discrimination claim based on anti-gay bias. The plaintiff's identity only becomes relevant when it informs the discriminator's perception or knowledge of the plaintiff's sexual orientation. When the discriminator becomes aware of the plaintiff's sexual orientation, the plaintiff can only bring a claim based on that specific sexuality.

Federal law mirrors state law on this question. Sexual orientation was not protected under Title VII in some jurisdictions until the Supreme Court's *Bostock v. Clayton County* decision,[71] but the jurisdic-

67. *See, e.g.*, CAL. GOV'T CODE § 12926(o) (West 2021) ("[S]exual orientation . . . includes a perception that the person has . . . [that] characteristic[ ] . . . .").

68. Pearl v. City of Los Angeles, 248 Cal. Rptr. 3d 508, 511–12 (Ct. App. 2019).

69. *See id.* at 510; *see also* Matt Hamilton, *L.A. Sanitation Worker Taunted Over Perceived Homosexuality Wins $17.4-Million Verdict*, L.A. TIMES (June 15, 2017, 9:30 PM), https://www.latimes.com/local/lanow/la-me-ln-city-discrimination-verdict-20170615-story.html [https://perma.cc/P967-KZJK] (noting that a heterosexual L.A. sanitation worker was awarded $17.4 million after he endured repeated harassment by his supervisors who perceived him as gay); 1212 Rest. Grp., LLC v. Alexander, 959 N.E.2d 155, 158 (Ill. App. Ct. 2011) (upholding the trial court's finding that the plaintiff's harassers perceived the plaintiff to be gay based on their anti-gay insults and their statements to coworkers that they thought the plaintiff was gay).

70. Glinski v. Radioshack, No. 03-CV-93OS, 2006 WL 2827870, at *12 (W.D.N.Y. Sept. 29, 2006). In a similar case, the plaintiff's coworkers "called him names such as 'gay,' 'homosexual,' 'sissy,' and 'woman'" and subjected him to "unwanted touching, sexual jokes and comments." The court held that the plaintiff was not protected under California's anti-discrimination statute because his "coworkers knew he had been married and had a child" and testified "that they did not perceive him to be gay." Akoidu v. Greyhound Lines, Inc., No. B147046, 2002 WL 399476, at *5 (Cal. Ct. App. Mar. 15, 2002).

71. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737–38 (2020).

tions that did include sexual orientation under Title VII's protections pre-*Bostock* allowed misperception claims. In a Southern District of New York case, for instance, the defendant argued that the plaintiff's claims failed because he didn't allege that he was "not heterosexual," but the court rejected this argument and reasoned that heterosexual plaintiffs can bring claims based on their misperceived sexual orientation.[72] Other courts have followed suit.[73] Whether this same principle will be applied in other jurisdictions post-*Bostock* is not certain at this point, but as of right now, there is little reason to think other courts would apply a different principle in adjudicating sexual orientation.

2. Religion

Like sexual orientation, religious identity claims are also not closely scrutinized in discrimination cases. Courts generally take plaintiffs at their word that they are members of particular religions or that their religious beliefs require them to do something. Moreover, plaintiffs can usually sustain religious misperception claims, and one recent Supreme Court case suggests any inquiry into individuals' actual religious beliefs is not necessary.[74] However, some courts do reject misperception cases, though these appear to be in the minority.

Cases in which a plaintiff's self-identification is sufficient to prove their religious identity abound. In one paradigmatic case out of the Fifth Circuit, *Davis v. Fort Bend County*, the plaintiff was fired for attending a religious service rather than reporting to her job, so she brought suit alleging religious discrimination.[75] The court held that the plaintiff sincerely believed her attendance was compelled by her faith.[76] To support its holding, the court relied exclusively on the plaintiff's own testimony and did not require any additional evidence—such as testimony from church leaders or other congregation members—to prove her religious identity.[77]

---

72. Sanderson v. Leg Apparel LLC, No. 1:19-cv-08423, 2020 WL 3100256, at *9 (S.D.N.Y. June 11, 2020).

73. *See* Johnson v. City of New York, No. 18-CV-9600, 2020 WL 2036708, at *4 (S.D.N.Y. Apr. 28, 2020) (holding that allegations of mistreatment based on perceived sexual orientation sufficient to state a claim under Title VII); *see also* Jamiel v. Maison Kayser@USA.com, No. 1:19-cv-01389, 2019 WL 9362541, at *4 n.7 (S.D.N.Y. Dec. 19, 2019) (same).

74. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 773 (2015).

75. Davis v. Fort Bend Cnty., 765 F.3d 480, 483–84 (5th Cir. 2014).

76. *Id.* at 487.

77. *Id.* Under similar circumstances, the Seventh Circuit concluded that the plaintiff's attendance at his father's funeral was required under his sincerely held religious beliefs based only on the plaintiff's testimony. *See* Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 452 (7th Cir. 2013) (looking to plaintiff's deposition and declarations). Other courts have followed suit. *E.g.*, Fox v. Hoenigsberg & Duevel Corp., No. 1:18-CV-265, 2019 WL 10960442, at *4 (E.D. Tenn. Aug. 8, 2019) (relying solely on the plaintiff's testimony to determine that her religious belief was sincere); EEOC v. Consol. Energy, Inc., 860 F.3d 131, 142–143 (4th Cir. 2017) (same); Baker v. Home

Davis and similar cases only require self-identification, but a 2015 Supreme Court case suggests that any inquiry into the plaintiff's religious beliefs, including self-identification, may not be necessary. In this case, *EEOC v. Abercrombie & Fitch*, Abercrombie & Fitch refused to hire Samantha Elauf because the headscarf she wore violated Abercrombie's dress code.[78] Although Elauf had not disclosed her religion to Abercrombie, Abercrombie believed that she wore the headscarf in connection with her Muslim faith.[79] When Elauf sued, Abercrombie argued that she could not show disparate treatment because she had never disclosed her religion to Abercrombie or explained that she wore the headscarf for religious reasons.[80] The Court rejected this argument and held that the employer need not have actual knowledge of someone's religion to violate Title VII.[81] Rather, an "employer who acts with the *motive* of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."[82] Elauf did identify as Muslim, but the Court's reasoning applies regardless of her actual religious identity.[83] The employer used ascriptive evidence (her headscarf) to assign a particular religious identity to Elauf and then discriminated against her based on that ascription.[84] Elauf's "actual" religious identity was irrelevant to the Court.[85] Like the sexual orientation cases, it was the employer's perception that mattered.

Relatedly, courts are also generally willing to accept misperception claims, focusing not on whether the plaintiff is in fact a member of a particular religion but whether she was treated worse because of religion. In *Smith v. Specialty Pool Contractors*, for instance, the court denied the defendant's motion for summary judgment when a Catholic plaintiff claimed that his employer thought he was Jewish and discriminated against him on that basis.[86]

Depot, 445 F.3d 541, 547 (2d Cir. 2006) (same); Jiglov v. Hotel Peabody, G.P., 719 F. Supp. 2d 918, 927 (W.D. Tenn. 2010) (same).

78. *Abercrombie*, 575 U.S. at 770.

79. *Id.*

80. *Id.* at 772.

81. *Id.*

82. *Id.* at 773 (emphasis added).

83. *Id.*

84. *Id.*

85. *See id.*; *see also* Cole v. Cobb Cnty. Sch. Dist., No. 1:17-cv-01378, 2017 WL 9477374, at *7 (N.D. Ga. Dec. 6, 2017) (applying *Abercrombie* to religious misperception claim and holding that Title VII applies when an "employer's adverse decision is based on 'unsubstantiated suspicion,'" even when that unsubstantiated suspicion is incorrect (citation omitted)).

86. Smith v. Specialty Pool Contractors, No. 02:07cv1464, 2008 WL 4410163, at *5–6 (W.D. Pa. Sept. 24, 2008). In a related context, the Third Circuit approved of religious misperception claims, stating that an "employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim." Fogleman v. Mercy Hosp., Inc., 283 F.3d 561, 571 (3d Cir. 2002). What matters, the court explained, "is that the applicant, whether Muslim or not, was treated worse than

However, some courts do not follow this pattern and have rejected misperception religious discrimination claims. For example, one federal district court dismissed the plaintiff's discrimination claim in part because his allegations were not based on his actual religion (Universalist) but rather on the misperception that he was Muslim.[87] The court reasoned that "Congress has not enacted laws that would make adverse employment actions based on someone being *perceived* as having a religious affiliation, be it Catholic, Muslim, or any other religion, actionable under Title VII."[88]

3. Race

Many courts exact a more demanding burden on plaintiffs' racial identity claims than with sexual orientation or religion. First, unlike religion or sexual orientation, some courts attempt to determine for themselves the plaintiff's racial identity based on what they call "objective" indicators. These indicators are predominantly ascriptive factors, specifically appearance and identity performance. For instance, in *Bennun v. Rutgers State University*, the court determined that the plaintiff was Hispanic based on its own observations of the plaintiff's appearance, his speech and mannerisms, his "immersion in Spanish ways of life," and "that he speaks Spanish in the home."[89] In other words, the court adjudicated the plaintiff's identity to be Hispanic not because he said he was (which he did) but based on how he looked, spoke, and lived.[90] As additional support for its finding, the court relied on ancestral evidence, citing the fact that the plaintiff was born in Argentina and that his father traced his ancestry to Spain.[91] Although the court recognized that discrimination is generally triggered by how the alleged discriminator perceives the plaintiff, it did not determine the plaintiff's race using the discriminator's perception; instead, the court relied on its own assessment of the plaintiff's race.[92]

---

he otherwise would have been for reasons prohibited by the statute." *Id.*; *see also* Kallabat v. Mich. Bell Tel. Co., No. 12-CV-15470, 2015 WL 5358093, at *4 (E.D. Mich. June 18, 2015) (allowing claim to proceed based on coworkers' perception that plaintiff was Muslim).

87. El v. Max Daetwyler Corp., No. 3:09cv415, 2011 WL 1769805, at *6 (W.D.N.C. May 9, 2011), *aff'd*, 451 F. App'x 257 (4th Cir. 2011).

88. *Id.*; *see also* Le v. N.Y. State, Off. of State Comptroller, No. 1:16-CV-1517, 2017 WL 3084414, at *6 (N.D.N.Y. July 18, 2017) (rejecting misperception claim); Lewis v. N. Gen. Hosp., 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) (rejecting misperception claim but stating that misperception was not dispositive). The *Max Daetwyler* court also held that plaintiff's claim failed because he did not establish that his coworkers thought he was Muslim. *Max Daetwyler*, 2011 WL 1769805, at *6–7.

89. Bennun v. Rutgers, 941 F.2d 154, 173 (3d Cir. 1991).

90. *Id.* at 172–73.

91. *Id.*

92. *Id.*

Similarly, in *Perkins v. Lake County Department of Utilities*,[93] the court determined whether the plaintiff was Native American[94] based on its own assessment of the plaintiff's "physical appearance [as] an Indian" and the plaintiff's self-identification.[95] The court also referenced the plaintiff's potential Native American ancestry, noting "he may have some Native American blood, albeit less than 1/16th."[96] However, the court also made an alternative holding that focused on the discriminator's perception of the plaintiff. The court reasoned that "[s]o long as there is some objective evidence reflective of a basis" for the plaintiff's employer to think that he was Native American, the court did not need to "resolve whether the employee is one percent Native American or one hundred percent Native American."[97] This "objective basis," according to the court, included ascriptive evidence such as the plaintiff's "physical appearance, language, cultural activities, or associations" that "lead the employer to believe that a given employee is a member of that protected class, and to deal with him/her on that basis."[98]

Although this alternative holding shifts the focus to the employer's perception of the plaintiff's identity and away from the court's assessment of the plaintiff's identity, the employer's perception is still subject to an "objectivity" test based on the court's understanding of racial characteristics.[99] Like *Bennun* and *Perkins*, other courts have used ascriptive evidence such as linguistic characteristics,[100] "charac-

93. Perkins v. Lake Cnty. Dep't of Utils., 860 F. Supp. 1262, 1276 (N.D. Ohio 1994).

94. "Native American" status is considered a racialized identity and/or a political category, depending on the context. *See* Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CALIF. L. REV. CIR. 23, 33, 25–26 (2013). This Article's discussion of anti-discrimination laws includes Native American under the umbrella of "race" because courts treat claims alleging discrimination on the basis of Native American status as race or national origin claims. *See, e.g.*, *Perkins*, 860 F. Supp. at 1272–74 (discussing the lack of coherent distinction between race and national original discrimination claims). In different contexts, "Native American" is not treated as a racial category. *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (holding that the Bureau of Indian Affairs' preference for hiring Native Americans was not racial discrimination because it applies to "members of 'federally recognized' tribes" and not a racial group).

95. *Perkins*, 860 F. Supp. at 1276.

96. *Id.*

97. *Id.* at 1278.

98. *Id.*

99. *Id.*; *see also* Greene v. Swain Cnty. P'ship for Health, 342 F. Supp. 2d 442, 451 (W.D.N.C. 2004) (following *Perkins* and holding that the plaintiff could prove "she was a member of a protected class" by showing her employer "had a basis to *reasonably believe*" that she was Native American (emphasis added)).

100. *See* Harel v. Rutgers, State Univ., 5 F. Supp. 2d 246, 269 (D.N.J. 1998) ("Harel's objective appearance likely might lead the reasonable employer to deduce that he was Israeli: he was raised in Israel; he speaks Hebrew, his first language, at home; he speaks English with a discernible accent; he remains an Israeli citizen; and he clearly identifies with his Israeli culture.").

teristics common to Jamaican[-]born persons,"[101] and skin color[102] to adjudicate plaintiffs' racial identities.[103] And in one case involving anti-Native American discrimination, the court required ancestral evidence to prove Native American identity.[104]

At least one court has rejected a plaintiff's race discrimination claims because he did not meet the court's "objective" indicators of racial identity. In *Nieves v. Metropolitan Dade County*, the court questioned the plaintiff's Hispanic self-identification based on the court's own observations about the plaintiff, stating that "neither from observing the Plaintiff nor from listening to his speech patterns, mannerisms and pronunciation of the English language was it apparent that Plaintiff was Hispanic."[105] Because these ascriptive indicators of the plaintiff's racial background did not align with what the court thought Hispanic people looked or sounded like, the plaintiff's identity was not adjudicated to be Hispanic, and his claim failed.[106]

These so-called "objective" indicators of racial identity are generally pulled from thin air. Courts are typically not relying on any legal authority, much less anything in Title VII itself, to justify their reliance on these forms of identity evidence. Nor do they explain why these indicators are "objective" as opposed to the judge's own subjective thoughts about the constitutive elements of a particular racial identity.

In addition to this "objective" indicators of race inquiry, the second way courts' increased scrutiny on racial identity claims manifests is in the more frequent rejection of misperception claims as compared with other identity claims. For example, in *Lopez–Galvan v. Mens Wearhouse*, the plaintiff identified as Latino and brought a discrimination claim on the ground that his employer misperceived him to be Black and mistreated him based on that misperception.[107] The court

101. Holness v. Penn State Univ., No. 98–2484, 1999 WL 270388, at *6 (E.D. Pa. May 5, 1999).

102. *See, e.g.*, *id.*

103. *See also* Perry v. Autozoners, LLC, 948 F. Supp. 2d 778, 787 (W.D. Ky. 2013) (finding that mixed-race individuals belong to a protected class as long as they "visually appear[ ]" to belong in that class).

104. Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *13 (C.D. Ill. Apr. 11, 2007). On summary judgment, the court rejected the defendants' invitation to impose an actuality requirement on the plaintiffs and held the discriminator's belief that the plaintiffs were Native American was sufficient. *Id.* However, the court also explained that at trial, the plaintiffs would need to provide proof of their Native American ancestry. *Id.* Based on the court's descriptions of the plaintiffs, many of them would not be able to meet this standard. *Id.* at *2. All the plaintiffs self-identified as Native American, but only one of the plaintiffs was, according to the court, a "card-carrying" Native American because he was able to produce his father's tribal enrollment card. *Id.*

105. Nieves v. Metro. Dade Cnty., 598 F. Supp. 955, 961 (S.D. Fla. 1984).

106. *Id.*

107. *See, e.g.*, Lopez–Galvan v. Mens Wearhouse, No. 3:06cv537, 2008 WL 2705604, at *7–8 (W.D.N.C. July 10, 2008) (the exact allegation was that he was misperceived as "Negroid").

held that his claim was not viable because Title VII does not explicitly include people who are perceived to be a particular race.[108] So, because the plaintiff was not Black, he could not bring a claim.[109] Numerous other courts have come to the same conclusion regarding misperception claims in the context of race.[110]

At least one court has required the discriminatory conduct itself—in addition to the discriminator's perception—to align with the plaintiff's self-identification.[111] Said differently, the plaintiff's self-identification, ascribed identity, and the racial identity that is the target of the harassment must align. In this case, *Burrage v. FedEx Freight, Inc.*, the plaintiff's co-workers initially misperceived him as Mexican and harassed him on that basis.[112] Once he clarified that he self-identified as biracial (half Black and half white), his co-workers still harassed him using derogatory comments about Mexicans.[113] The court dismissed Burrage's claim and reasoned that he did not "maintain that his supervisors and co-workers began to use any terms that were . . . related to his status as an African-American, upon learning of his true race."[114] Under the court's reasoning, Burrage could only sustain a claim if he were in fact Mexican or if the derogatory comments were about biracial or Black people.[115]

To be sure, many other cases do not impose this requirement on plaintiffs and have openly critiqued the rationale behind the actuality requirement.[116] According to one district court, the actuality requirement "is as offensive as it is incorrect."[117] For these courts, the plaintiff's identity is of little importance, and these courts focus on how the

108. *Id.*

109. *Id.* at *9.

110. *See, e.g.*, Sears v. Jo-Ann Stores, Inc., No. 3:12-1322, 2014 WL 1665048, at *7–8 (M.D. Tenn. Apr. 25, 2014) (rejecting discrimination-based misperception that the plaintiff was Black); Yousif v. Landers McClarty Olathe KS, LLC, No. 12-2788, 2013 WL 5819703, at *5 (D. Kan. Oct. 29, 2013); Guthrey v. Cal. Dep't of Corr. & Rehab., No. 1:10-cv-02177, 2012 WL 2499938, at *15 (E.D. Cal. June 27, 2012); Adler v. Evanston Nw. Healthcare Corp., No. 07 C 4203, 2008 WL 5272455, at *4 (N.D. Ill. Dec. 16, 2008); Uddin v. Universal Avionics Sys. Corp., No. 1:05-CV-1115, 2006 WL 1835291, at *6 (N.D. Ga. June 30, 2006); Butler v. Potter, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004).

111. Burrage v. FedEx Freight, Inc., No. 4:10CV2755, 2012 WL 1068794, at *8 (N.D. Ohio Mar. 29, 2012).

112. *Id.* at *1.

113. *Id.*

114. *Id.* at *8 n.8.

115. Greene, *supra* note 17, at 110 (making a similar observation about *Burrage*).

116. *See* EEOC v. MVM, Inc., No. TDC-17-2864, 2018 WL 2197727, at *10 (D. Md. May 14, 2018) ("Discrimination where the employer is mistaken in his belief that an employee is of a particular national origin is just as insidious as discrimination where the employer is correct."); Arsham v. Mayor & City Council of Balt., 85 F. Supp. 3d 841, 845 (D. Md. 2015); Henao v. Wyndham Vacations Resorts, Inc., 927 F. Supp. 2d 978, 987 (D. Haw. 2013).

117. Boutros v. Avis Rent A Car Sys., LLC, No. 10 C 8196, 2013 WL 3834405, at *7 (N.D. Ill. July 24, 2013).

discriminator perceived the plaintiff's identity. For instance, in *Wood v. Freeman Decorating Services, Inc.*, the employer's perception of the plaintiff's Native American identity was sufficient even though the plaintiff had no documentary evidence that he was Native American.[118] Rather, both the plaintiff's birth certificate and his prior employment records identified him as white/Hispanic.[119] However, his employer thought he was Native American, the slurs directed at him were about Native Americans,[120] and Wood stated that he self-identified as Native American.[121]

In summary, courts interrogate race (an immutable identity) more closely than religion and sexual orientation (more mutable identities), which manifests in two ways: first, by determining whether the plaintiff's claimed racial identity meets some "objective" standard adopted by the court; and second, by rejecting misperception claims. Courts addressing discrimination claims based on sexual orientation and religion, for the most part, did neither.

4. Sex[122]

Courts adjudicating sex in anti-discrimination cases also focus on the plaintiff's "actual" sex. For most courts, a plaintiff's "actual" sex is

118. Wood v. Freeman Decorating Servs., Inc., No. 3:08–CV–00375, 2010 WL 653764, at *4 (D. Nev. Feb. 19, 2010).

119. *Id.*

120. Wood alleged that he was called things like a "fuck'n injun," "prairie ni****," "injun," and "wagon burner." *Id.* at *3. He also stated that he was "forced [ ] to use a desk that had a poster attached to it depicting a wagon on fire and with the words 'Wagon Burner'" and that his co-workers "introduced him to clients as 'one of our wagon burners' or 'stupid injun.'" *Id.*

121. *Id.* at *5 ("The alleged discrimination is 'no less malevolent because it may have been based on an erroneous assumption.'" (alterations incorporated)); *see also* Estate of Amos *ex rel.* Amos v. City of Page, 257 F.3d 1086, 1094 (9th Cir. 2001) (mistaken belief that individual was Native American was sufficient to maintain equal protection claim); Eriksen v. Allied Waste Sys., Inc., No. 06-13549, 2007 WL 1003851, at *6 (E.D. Mich. Apr. 2, 2007) (same). For these courts, perceived race can be powerful enough to rebut other identity evidence, such as self-identification and ancestral evidence. Chaib v. GEO Group, Inc., 92 F. Supp. 3d 829, 837 (S.D. Ind. 2015) (dismissing claim brought by a plaintiff who self-identified as African American and was of Algerian descent because she was not perceived as African American by her employer or co-workers), *aff'd*, 819 F.3d 337 (7th Cir. 2016).

122. This Article does not differentiate between "sex" and "gender." Recognizing that the definitions of these two terms have sparked much debate, this Article does not engage with that debate. Formulating universal definitions of sex and gender for this Article is at odds with one of its primary arguments—namely, that the definitions of identity are highly dependent on context. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 1–34 (Linda A. Nicholson ed., 1990) [hereinafter GENDER TROUBLE]; JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 8–12 (1993) [hereinafter BODIES THAT MATTER]; *see also* Clarke, *supra* note 28, at 933–34 (resisting universal definitions for sex and gender for similar reasons and explaining that "[a]ttempts to settle metaphysical debates about what sex and gender *are* distract from the question of how these concepts *should be* defined in particular legal contexts, if at all"). What is typically referred to as "sex" (chromosomes, hormones, secondary sex characteristics) this

based on biological evidence, including their sex assigned at birth, chromosomes, sex characteristics, or hormones. Documentary evidence (like birth certificates), ascriptive sex, and self-identification are also relevant in certain cases, but biological evidence is of primary importance.

Most sex discrimination cases involve cisgender plaintiffs, and in these cases, the plaintiff's sex is not explicitly adjudicated. Typically, a cisgender plaintiff's sex is not questioned by the court or the parties because they assume they know the "true" sex identity of the plaintiff. That is, if the plaintiff says she is a woman, she ascriptively appears to be a woman, and there is no evidence to think otherwise, the parties and the court will assume that she has other traits associated with womanhood (XX chromosomes, a uterus, etc.).[123] However, as explained further below, even though her sex was not explicitly adjudicated, her claims still depend on her "actual" sex. Thus, although sex adjudication is most visible when it comes to transgender plaintiffs, the same focus on "actual" biological sex applies to cis and trans plaintiffs.

Until fairly recently, discrimination on the basis of transgender identity was not covered under anti-discrimination laws' prohibition against sex discrimination. Now, and particularly after *Bostock v. Clayton County*, the opposite is true. Yet courts have adjudicated sex in similar ways regardless of whether discrimination against transgender plaintiffs is covered. Specifically, sex adjudication has depended on biological evidence. In older cases, courts denied transgender plaintiffs' claims because biological evidence of their sex did not align with their self-identification or their ascriptive sex.[124] In more recent cases, courts still rely on biological evidence but generally allow transgender plaintiffs to bring claims under anti-discrimination statutes.[125]

Older cases interpreted anti-discrimination statutes' prohibition of sex discrimination as prohibiting discrimination against "women because they are women and against men because they are men."[126] These courts understood Title VII and related statutes to apply when people who were assigned female at birth are discriminated against because of their identification as a woman and/or their performance of their womanhood. A trans woman, under this reasoning, is born male but is discriminated against based on her identification as a wo-

Article calls biological evidence of sex. And the common understanding of "gender" (masculinity, femininity) is encompassed in what this Article calls ascriptive evidence of sex.

123. Genitals ascribed to someone based on more visible sex cues (appearance, mannerisms, etc.) have been referred to as "cultural genitals." *See* SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 153 (Univ. of Chi. Press ed., 1978).

124. *See, e.g.* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).

125. *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

126. *Ulane*, 742 F.2d at 1085.

man (or as a transgender woman) and performance of her womanhood; accordingly, Title VII did not apply because the discrimination is against a biological man because she is a "woman"—not against a "man" because he is a "man."

One of the most oft-cited cases following this line of reasoning is a 1984 case from the Seventh Circuit, *Ulane v. East Airlines*. This case involved a plaintiff who transitioned from male to female on the job and was subsequently terminated.[127] The court recognized that the plaintiff self-identified as a woman and ascriptively appeared to be a woman, noting that Ulane took hormones, developed breasts, had sex reassignment surgery, and changed the sex marker on her birth certificate.[128] Yet, the court still found that Ulane was a "biological male" because she did not "have a uterus and ovaries," could not "bear babies," and still had XY chromosomes.[129] According to the court, Ulane was someone with a "male body who believes himself to be female."[130] Because Ulane was a "biological man" who failed to allege discrimination based on her "manhood," she could not bring a claim on this basis under Title VII.[131] In other words, the biological evidence of her sex did not match the ascriptive evidence of her sex or her self-identification.

The Tenth Circuit echoed this reasoning over 20 years later in *Etsitty v. Utah Transit Authority*.[132] The court relied on *Ulane*'s holding that Title VII's "prohibition on sex discrimination means only that it is 'unlawful to discriminate against women because they are women and men because they are men.'"[133] Thus, according to the court, Title VII did not recognize a claim based on a plaintiff's "status as a transsexual."[134] It explained that Title VII "extends to transsexual employees only if they are discriminated against because they are male or because they are female."[135] Because the plaintiff was alleging discrimination based on the incongruity between her sex assigned at birth (male) and her chosen sex (female or "transsexual"), she could not state a claim.[136]

More recent cases allow transgender plaintiffs to get relief under Title VII, but courts' adjudication of sex still mostly relies on plain-

127. *Id.* at 1082.
128. *Id*. at 1083.
129. *Id.* at 1083, 1087.
130. *Id.* at 1085.
131. *Id.* at 1087.
132. Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007).
133. *Id.* at 1221 (quoting *Ulane*, 742 F.2d at 1085).
134. *Id.* at 1221.
135. *Id.* at 1222; *see also* Oiler v. Winn–Dixie La., Inc., No. 00-3114, 2002 WL 31098541, at *3 (E.D. La. Sept. 16, 2002) (holding that Title VII does not recognize claims by "a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be male" (quoting *Ulane*, 742 F.2d at 1085)).
136. *Etsitty*, 502 F.3d at 1221.

tiffs' biological traits, and these biological traits still determine the plaintiff's "actual" sex. The only difference is that rather than requiring plaintiffs' biological traits to align with their ascriptive sex and self-identification, it is the mismatch between these types of identity evidence that allows them to state a claim.

This line of cases relies on a sex-stereotyping theory of sex discrimination—that requiring conformity between biological sex and ascriptive sex/self-identification constitutes sex discrimination. Sex-stereotyping finds its origins in *Price Waterhouse v. Hopkins*, a case about a cisgender woman's gender nonconformity.[137] In *Price Waterhouse*, Ann Hopkins, a senior manager at a top accounting firm, sued under Title VII, alleging that she had been denied a promotion to partner because her "aggressive" demeanor did not align with the partners' understanding of femininity.[138] The Supreme Court held that discrimination based on sex included discrimination based on a failure to conform to sex stereotypes—i.e., an employer cannot fire a cisgender woman because she fails to perform her femininity in accordance with societal expectations of womanhood.[139]

Using this analytical framework, courts have extended the *Price Waterhouse* rationale to include discrimination claims from transgender plaintiffs, reasoning that the discrimination stemmed from a mismatch between the plaintiff's "actual" sex (based on biological traits) and the plaintiff's sex presentation and performance (i.e., their ascriptive sex). Two examples follow.

First, in *Smith v. City of Salem*, the Sixth Circuit held that a transgender plaintiff could bring a discrimination claim under Title VII,[140] reasoning that if "an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination," then so are "employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely."[141] Thus, the court adjudicated the plaintiff's "actual" sex to be "male" because she was assigned male at birth.[142] Because her "actual" sex did not align with her ascriptive sex, the court applied *Price Waterhouse*.[143]

137. Price Waterhouse v. Hopkins, 490 U.S. 228, 233–36 (1989).

138. *Id.*

139. *Id.* at 252; *see also* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 113 (2d Cir. 2004) (holding that employer could not fire an employee based on the stereotype that mothers cannot devote sufficient time to their jobs).

140. Smith v. City of Salem, 378 F.3d 566, 568, 572 (6th Cir. 2004).

141. *Id.* at 574; *see also* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (applying the mismatch theory to an equal protection claim brought by a transgender plaintiff and stating that "[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior").

142. *Smith*, 378 F.3d 566.

143. *Id.* at 574–75.

About 15 years later, the Sixth Circuit again held that an employer who discriminated against a transgender woman violated Title VII because the discrimination stemmed from a mismatch between the plaintiff's biological traits and her self-identification/ascriptive sex.[144] And again, the court's holding was based on a determination that the plaintiff's "actual" sex was "male" and biologically based.[145] Specially, the court reasoned that "discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex" because "an employer cannot discriminate against an employee for being transgender without considering that employee's *biological* sex."[146]

These cases suggest that transgender plaintiffs' "real" sex is the one they were assigned at birth and ascriptive evidence of their sex merely does not align with that sex. Because these courts fit these cases into the *Price Waterhouse* rationale, they treat transgender plaintiffs as simply more "gender nonconforming" than the cisgender plaintiff in *Price Waterhouse*—a difference in degree rather than in type.[147]

The recent Supreme Court decision *Bostock v. Clayton County*—which held that Title VII's prohibition on the basis of sex includes "transgender status"—does not rely on *Price Waterhouse* or sex-stereotyping theory specifically. Yet the Court's rationale still rests on identifying biological evidence of sex, and specifically a plaintiff's sex assigned at birth. First, the Court adopts a definition of "sex" that refers "only to biological distinctions between male and female."[148] Then, it reasons that to discriminate against someone for being transgender, the discriminator must take the "sex" of the individual into account.[149] The Court explained that if an employer fires someone "who was identified as a male at birth but who now identifies as a female" but "retains an otherwise identical employee who was identi-

144. EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574–75 (6th Cir. 2018).

145. *Id.* at 578 (reasoning that "discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be"). Schoenbaum calls this shift to "the view that transgender persons are 'inherently' gender non-conforming, and thus that being transgender is, by definition, gender nonconformity to sex" the "per se" approach. Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 854 (2020).

146. *Harris*, 884 F.3d at 578 (emphasis added).

147. As other commentators have pointed out, this reasoning "effectively erases transgenderism as an identity," because "in order to avail herself of the gender-stereotyping theory[,] [the transgender woman] had to take on a *male* identity, namely, as a man who wanted to participate in the workplace dressing and looking like a woman." Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 916 (2014) (emphasis added); *see also* ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD 86 (2008) ("Transsexuals or transgender people per se do not really exist in the *Smith* opinion; there just happen to be some men out there who want to wear dresses.").

148. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).

149. *Id.* at 1741.

fied as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."[150] Thus, *Bostock* still relies on biological traits to determine the "actual" sex of a plaintiff.[151]

Although this Subsection has focused on transgender plaintiffs, this same focus on biological evidence of sex applies to cisgender plaintiffs—the difference is that the plaintiff's "actual" sex is not contested. Said differently, a cisgender plaintiff's biological traits still dictate her "sex," but the composition of those biological traits is assumed. Ann Hopkins did not have to prove that she had a vagina, a uterus, and XX chromosomes because she was presumed to have them. But those biological traits were still constitutive of her "actual" sex and formed the basis of the Court's sex-stereotyping holding.[152]

Legal scholar Naomi Schoenbaum's analysis of *Price Waterhouse* elucidates the role "actual," biological-based sex plays in sex stereotyping cases involving cisgender people. She argues that courts employ a three-step analysis when applying the *Price Waterhouse* sex-stereotyping doctrine.[153] The very first step is determining the plaintiff's "actual" sex (i.e., Ann Hopkins is a woman).[154] Then, courts evaluate how the employer perceived the plaintiff's gender (i.e., "the employer viewed Hopkins as 'masculine'").[155] Last, courts "compar[e] the expected gender performance based on the plaintiff's sex with her perceived gender performance: [I]f the employer acted because these do not 'match,' the employer has engaged in unlawful sex stereotyping."[156] Adjudicating the plaintiff's "actual" sex, therefore, is foundational to courts' analyses.

Sex is the identity most rigorously scrutinized in anti-discrimination law for two reasons. First, "actual" sex appears to be key to most discrimination cases. For racial identity, only some courts adjudicate the "actual" identity of the plaintiff, and very few do so in the context of sexual orientation and religion. Second, courts rely more heavily on biological evidence in sex adjudication than any other identity, and biological evidence of sex is either impossible to change (like chromosomes) or difficult to change (like having surgery to change sex characteristics). No other identity category analyzed in this Article is adjudicated with as heavy of a reliance on biological evidence as sex.

150. *Id.*

151. Not all courts define sex according to sex assigned at birth, or other biological traits, like *Bostock*. *See, e.g.*, *Harris*, 884 F.3d at 578; Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (rejecting a biologically based, binary definition of sex).

152. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

153. Schoenbaum, *supra* note 145, at 842.

154. *Id.*

155. *Id.*

156. *Id.* at 842–43.

****

This cross-identity examination of identity adjudication in anti-discrimination law has revealed a large degree of inconsistency. For instance, some courts accept racial misperception claims while others don't; courts are more likely to reject racial misperception claims as compared with sexual orientation and religious misperception claims; a plaintiff's "actual" race and sex are more likely to matter than a plaintiff's "actual" sexual orientation or religion. Additionally, legal actors sometimes adjudicate plaintiffs' racial identity claims themselves based on "objective" standards. Yet with sexual orientation and religion, courts do not require plaintiffs' identity claims to meet some supposedly "objective" criteria. They do not, for instance, require plaintiffs bringing a sexual orientation discrimination claim to be in a same-sex relationship, be a member of an LGBT organization, "look" gay, or even self-identify as gay. For religious identity, requiring someone's religious beliefs to meet some "objective" standard would likely violate the First Amendment.[157]

But there are no doctrinal justifications for why courts are adjudicating these identity claims differently. The applicable anti-discrimination statutes and case law instruct courts to apply the same analytical framework regardless of the specific type of discrimination alleged. Moreover, courts themselves are not explaining why certain identity claims receive different treatment—indeed, they may not even be aware of this differential treatment. Thus, not only is there inconsistent identity adjudication in anti-discrimination law, this inconsistency is not made visible or explained.

C. *Benefit Laws*

Generally speaking, benefit laws involve forward-facing state action and may involve individuals asking a state actor to affirmatively do something on their behalf—like deem them eligible for something, grant them a certain status, or classify them in a particular way. Some examples include: qualifying for government contracting programs targeting businesses owned by racial minorities; meeting legal requirements to have the state change sex markers on government documents; and being eligible for immigration relief based on a fear of identity-based persecution. To be sure, this definition is fairly broad. But to conduct a coherent cross-identity analysis of identity adjudication, the definition of "benefit" law needs to be broad. Unlike anti-discrimination laws, which apply to all of the identity categories discussed in this Article, identity adjudication in other legal contexts is not as doctrinally confined.

157. *See infra* note 185 and accompanying discussion of the religious question doctrine.

In spite of the relative capaciousness of this category, identity adjudication tends to operate somewhat similarly within this category. Specifically, benefit laws tend to adjudicate identity more intensely across identity categories than anti-discrimination laws and data-collection laws. Self-identification alone is insufficient across the board to prove identity, and various combinations of ancestral, biological, documentary, and/or ascriptive evidence of identity are necessary, depending on the identity.

This increased identity interrogation for benefit laws is exhibited not only through the amount of identity evidence required but also, at times, through "identity estoppel."[158] Identity estoppel occurs when the identity an individual is currently claiming is different from one that they have previously claimed, and this prior inconsistent self-identification estops them from claiming their current identity. For example, if an individual previously identified as X on a form and now make a claim as Y, identity estoppel would prevent them from claiming to be Y. Like with anti-discrimination laws, race and sex, the more immutable identities, tend to be more closely interrogated than religion or sexual orientation, and identity estoppel is more frequent in race and sex identity claims than with other identities.

1. Sexual Orientation

One area of law that provides a benefit based on sexual orientation is asylum law. Individuals are eligible for asylum if they can establish that they have either experienced past persecution or have a "well-founded fear of persecution" based on, among other things, "membership of a particular social group," which has been construed to include sexual orientation.[159] In other words, asylum functions to prevent people from being harmed in their home country based on sexual orientation. Petitioners first bring their asylum claims before an immigration judge ("IJ") and then may appeal to the Board of Immigration Appeals ("BIA") if they lose. They are then permitted to appeal to the United States Courts of Appeal. The Courts of Appeal may reverse the BIA's decision, but reversal is rare due to the deferential standard under which the courts review these decisions.[160] Thus, they often affirm IJ's/BIA's adjudication of sexual orientation.

In order for petitioners to prove their sexual orientation in this context, they cannot rely on mere self-identification and generally need to

158. *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1258–59 (1994) (discussing this concept of identity estoppel in the context of race adjudication).

159. *See In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

160. 8 U.S.C. § 1252(b)(4)(B) (requiring the reviewing court to yield unless "any reasonable adjudicator would be compelled to conclude" that the IJ (or the Board) erred); *see also* Tawuo v. Lynch, 799 F.3d 725, 727 (7th Cir. 2015) (explaining this highly deferential standard).

put forth some sort of documentary evidence to support their identity claim. Ascriptive evidence is also important—courts have looked to the petitioner's appearance and mannerisms, the sex of their romantic and sexual partners, and whether they are a member of an LGBT organization in their home country.

Courts' focus on romantic and sexual relationships as proof of sexual orientation played out in *Fuller v. Lynch*.[161] In this case, the IJ and the BIA found that the asylum petitioner was not bisexual, as he claimed to be.[162] They decisions relied on the fact that he was married to a woman, had fathered children with a woman, was previously convicted of sexual assault on a woman, and lacked any corroborating evidence from his former boyfriends.[163] They also pointed to inconsistencies in his testimony related to his sexual orientation,[164] as well as testimony unrelated to his claim to bisexuality.[165] On appeal, the Seventh Circuit affirmed the IJ's determination that the petitioner was not bisexual.[166]

As the dissenting opinion noted, IJ and the BIA ignored additional evidence that supported Fuller's claim that he was bisexual, including his in-depth testimony "about his being bisexual and having had numerous sexual relationships with both men and women" and about the repeated physical and verbal abuse he endured because of his sexuality.[167] The dissent also critiqued the IJ's reliance on inconsistencies in Fuller's testimony that had nothing to do with his bisexuality and the IJ's "refus[al] to believe the seven letters from Fuller's children and friends attesting to his bisexuality."[168]

For these legal actors, the fact that Fuller had sexual and romantic relationships with women trumped all this other evidence indicating that he was bisexual. In other words, his heterosexual relationships estopped him from making a claim to bisexuality—even though his relationship with a woman did not contradict his claim that he was bisexual. As the dissent noted in its critique of the IJ's rationale, "Ap-

161. Fuller v. Lynch, 833 F.3d 866, 869–72 (7th Cir. 2016).

162. *Id.* at 871–72.

163. *Id.* at 869–70.

164. Inconsistencies in testimony that he was shot by an "anti-gay mob" when he was at a party with his then boyfriend. *Id.* at 868, 870.

165. These inconsistences included "confus[ing] his sisters' names, mix[ing] up a sister with his mother, and g[iving] different figures for the number of sisters that he had." *Id.* at 869.

166. *Id.* at 871.

167. *Id.* at 872 (Posner, J., dissenting). The dissent stated:

> He testified that in college he was stoned by other students on several occasions and a few years later taunted as gay by a group of men who sliced his face with a knife. On another occasion he was robbed at gunpoint by a man who called him a "batty man," which is a Jamaican slur for a homosexual.

Id.

168. *Id.* at 873.

parently, the immigration judge does not know the meaning of *bi*sexual."[169]

A similar example involving a lesbian identity claim comes from the Eleventh Circuit. In this case, Ingrida Mockeviciene sought asylum based on her sexuality.[170] She submitted substantial evidence that she had been persecuted in her home country because she was a lesbian, including evidence that she was assaulted by the police, evicted from her house, and beaten and raped by her husband while his friends held her down.[171] She also submitted letters from her friends stating that they knew she was a lesbian and that the police harmed her because of her orientation.[172] Her daughter's testimony also corroborated her allegations.[173]

However, the IJ found that Mockeviciene's claim that she was a lesbian was not credible.[174] He based his finding primarily on the fact that she never had a same-sex partner and was "[a]t best . . . a non-practicing lesbian."[175] He also noted that she had "not joined any groups while being here in the United States for four years that involve[d] lesbian activities" and had no documents supporting her allegations regarding the police violence she endured.[176] The BIA did not explicitly adopt the IJ's reasoning, but it affirmed the decision based on Mockeviciene's marriage to a man because the marriage undercut her lesbian identity claim.[177] The Eleventh Circuit was "skeptical" about the IJ's reasoning but held that "[g]iven Mockeviciene's recent marriage, the evidence does not *compel* reversal of the BIA's credibility determination."[178] Just like in *Fuller*, Mockeviciene's marriage to a man negated the other evidence supporting her lesbian identity claim, i.e., it estopped her from claiming a lesbian identity.[179]

These two cases show courts' heavy, and sometimes illogical, reliance on prior sexual relationships as a proxy for sexual orientation. Even though Fuller and Mockeviciene had been in relationships with people of a different sex, they put forth other evidence showing that

169. *Id.* at 874 (emphasis in original).
170. Mockeviciene v. U.S. Att'y Gen., 237 Fed. App'x 569, 570 (11th Cir. 2007).
171. *Id.* at 570–71.
172. *Id.* at 571.
173. *Id.*
174. *Id.* at 572.
175. *Id.*
176. *Id.*
177. *Id.* at 573.
178. *Id.* at 574 (emphasis added).
179. *Id.*; *see also* Eke v. Mukasey, 512 F.3d 372 (7th Cir. 2008). In *Eke*, the court held that the BIA and IJ did not err by determining that Eke was not gay because he did not provide any "documentation indicating his sexual preferences, such as letters, affidavits, photographs, or other forms of corroborative evidence," or his sexual orientation; the courts reached this conclusion even though Eke testified that he was in a long term relationship with a man, was harassed due to his sexual orientation, and was pressured to marry a woman who, after discovering that he was gay, ended the relationship. *Eke*, 512 F.3d at 375–76, 381.

they would face persecution in their home country based on their sexual orientation. These courts, however, seemed to care more about whether they were "really" the sexuality they claimed to be, as opposed to than the legally relevant question about likelihood of persecution based on sexual orientation.[180]

Other courts take a different approach and adjudicate sexual orientation by looking to the petitioner's perceived sexual orientation in their home country. This approach is not focused on determining the petitioner's actual sexual orientation but rather, examines how the petitioner's potential persecutors will understand or perceive their sexuality—which is similar to the anti-discrimination cases that focus on how the alleged discriminator perceived the plaintiff's identity. The Third Circuit took this approach in *Amanfi v. Ashcroft*.[181] In *Amanfi*, the petitioner had sex with another man to avoid being ritually sacrificed, but after he was spared, he was harassed because people believed he was gay.[182] The court held that this constituted imputed membership in the LGBT community and remanded the case for further proceedings.[183] Other courts of appeal have also held that perceived sexuality can be grounds for immigration relief under similar reasoning.[184]

2. Religion

Religious identity adjudication in the context of benefit laws has constitutional limits, unlike other identity claims.[185] Under the "relig-

180. While courts treat the sex of someone's sexual partners as highly probative of sexual orientation in this context, courts generally do not permit IJs to consider appearance and mannerisms (i.e. ascriptive evidence) when adjudicating sexual orientation. *See* Shahinaj v. Gonzales, 481 F.3d 1027, 1029 (8th Cir. 2007) (reversing the IJ's finding that Shahinaj was not gay based on the IJ's "personal and improper opinion Shahinaj did not dress or speak like or exhibit the mannerisms of a homosexual" and "Shahinaj's lack of membership in any Albanian homosexual organizations"); Razkane v. Holder, 562 F.3d 1283, 1288 (10th Cir. 2009) (rejecting IJ's determination that the petitioner was not gay based on the fact that the petitioner did not "dress in an effeminate manner or affect any effeminate mannerisms" and reasoning that the IJ's reliance on his own views of the appearance, dress, and affect of a homosexual "elevate[d] stereotypical assumptions," which could "lead to unpredictable, inconsistent, and unreviewable results").

181. Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).

182. *Id.* at 722–23.

183. *Id.* at 730.

184. *See, e.g.*, Velasquez-Banegas v. Lynch, 846 F.3d 258, 259–60, 264 (7th Cir. 2017) (holding that petitioner was likely to be regarded as gay in his home country because he was HIV positive and had never married and vacating BIA's denial of his withholding of removal); Pozos v. Gonzales, 141 F. App'x 629, 632–33 (9th Cir. 2005) (holding that the petitioner had a well-founded fear of persecution based on his perceived sexual orientation, even though he claimed that he was not actually gay).

185. This doctrine can also come up in anti-discrimination laws, or any laws, not just benefit laws. But because religious identity claims are not very rigorously interrogated in other contexts, and are more intensely examined in benefit laws, this doctrine is most relevant in the benefit law analysis.

ious question doctrine," the First Amendment prevents courts from evaluating the *accuracy* of someone's religious beliefs; however, courts may adjudicate the *sincerity* of those beliefs.[186] In other words, courts cannot determine whether someone is Catholic based on their belief in or adherence to some set of "objective" Catholic tenants—someone can be wrong about what it means to be Catholic and still be Catholic. But courts can determine whether someone sincerely identifies with Catholicism and whether they actually believe that their faith mandates a particular belief or action. This doctrine prevents religious identity from being as closely interrogated as other identity claims because individuals do not need to meet a certain set of predetermined criteria to prove their identity. Despite the religious question doctrine, the law requires religious identity adjudication for benefit laws in a number of legal contexts.[187] This Article focuses on asylum to limit this Article's scope and to have some doctrinal consistency in this section.

Asylum seekers can generally prove their religious identity by submitting documentary evidence and testifying about their beliefs. For instance, one petitioner sought asylum on the grounds that he had converted from Islam to Christianity.[188] He submitted documentary evidence of his conversion, including a letter from his current pastors confirming his faith and baptism, and a certificate of his baptism.[189] This evidence was sufficient to assure both the BIA and the Ninth Circuit that this was "not a case that presents any palpable risk of admitting any fraudulent claims on the basis of a phony religious conversion."[190] Similar cases abound.[191]

186. United States v. Ballard, 322 U.S. 78, 86–88 (1944); *see also* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1187–88 (2017); Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59, 59–60 (2014) ("There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity.").

187. *See, e.g.*, Ballard, 322 U.S. at 86–87 (1944) (criminal law); Witmer v. United States, 348 U.S. 375, 378–82 (1955) (conscientious objector to war); Andreola v. Glass, No. 04-C-282, 2006 WL 2645186, at *2 (E.D. Wis. Sept. 13, 2006) (prisoner's rights); Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. 1963) (relief from criminal conviction); Ideal Life Church of Lake Elmo v. Cnty. of Washington, 304 N.W.2d 308, 310–13 (Minn. 1981) (tax exemptions for churches).

188. *See* Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1345 (11th Cir. 2009).

189. *Id.* at 1346.

190. *Id.* at 1356.

191. *See* Rizal v. Gonzales, 442 F.3d 84, 89–93 (2d Cir. 2006) (holding that the petitioner sufficiently proved that he converted to Christianity when he submitted his certificate of baptism, an unsworn affidavit from a priest, a letter from his congregation confirming his membership, and a letter from his sister about his conversion); Jiang v. Gonzales, 485 F.3d 992, 995, 997–98 (7th Cir. 2007) (reversing IJ's decision that petitioner was not a "real Christian" based on his limited knowledge of Christianity); Cosa v. Mukasey, 543 F.3d 1066, 1070–71 (9th Cir. 2008) (reversing IJ's determination that petitioner was not a Millenist when petitioner submitted declarations from the leader of her Millenist group and fellow Millenists and IJ's finding was based on

Like with sexual orientation, some courts focus on whether the petitioner will be persecuted based on an imputed/perceived religious belief or identity rather than whether the petitioner's religious claim is sincere. These courts examine how the petitioner's identity would be understood by those likely to persecute them and are "not as concerned with the heart of the convert."[192] For example, in *Bastanipour v. I.N.S.*, the BIA found that the petitioner had not presented sufficient evidence that he had converted to Christianity from Islam in part because he was never baptized, was not a member of a church, and had requested a pork-free diet in prison.[193] The Seventh Circuit reversed and reasoned that the BIA's focus should not have been on whether BIA itself thought the petitioner had converted to Christianity, but on whether the petitioner had converted to Christianity in the eyes of those set to punish him for his conversion if he returned to his home country.[194]

The petitioner's actual religion was not important in this case. Rather, even if he was lying about his religious beliefs, under the court's reasoning, he could still be eligible for immigration relief as long as he would be persecuted based on his claimed religious belief.[195] Under this approach, both a petitioner who actually subscribes to her asserted religious belief and one who is faking religious conversion for opportunist reasons are treated the same way for purposes of asylum and similar forms of religion-based immigration relief.

3. Race

Many scholars have examined the history of racial adjudication in the context of what this Article defines as benefit laws. This important work elucidates law's significant role in drawing and enforcing strict boundaries around whiteness, which, in turn, ensured that individuals who the courts did not understand to be white did not gain access to the benefits reserved for those who were "actually" white.[196]

---

petitioner's doctrinal knowledge of the religion). There are cases where petitioners' religious claims are rejected even when they provide documentary evidence to support their identities; the documentary evidence in these cases, however, appears weak. *See* Mendoza v. I.N.S., 28 F. App'x 586, 587 (8th Cir. 2002) (The documentary evidence was a statement from the mayor of petitioner's former town, and the petitioner testified that he did not know the mayor.); Mejia-Paiz v. I.N.S., 111 F.3d 720, 724 (9th Cir. 1997) (affidavit from the petitioner's brother did not provide any basis for his knowledge that petitioner was a Jehovah's Witness).

192. Najafi v. I.N.S., 104 F.3d 943, 949 (7th Cir. 1997).

193. Bastanipour v. I.N.S., 980 F.2d 1129, 1132–33 (7th Cir. 1992).

194. *Id.* at 1133.

195. *Id.* at 1132–33. The court was open to the argument that "a nonbelieving Christian is not really a Christian and thus does not fall within the scope of the asylum statute." *Id.* But the BIA did not deny the asylum application on those grounds, so the court did not determine the validity of that argument. *Id.*

196. Until fairly recently, many laws explicitly required individuals to either be white or to not be a disfavored racial minority to gain access to a variety of legal benefits. Racial identity determined individuals' eligibility to enter the United States

This Article, on the other hand, focuses on modern race adjudication in the context of benefit laws.[197] The benefit laws discussed in this Subsection include judicial adjudication of eligibility for government-ordered affirmative action programs, programs for contracting with businesses owned by racial minorities, and the distribution of settlement funds from a race discrimination lawsuit to racial minorities. This Subsection only focuses on affirmative action in the context of an adversarial proceeding, where a court or other adjudicative body determines someone's eligibility for a particular program. It does not include affirmative action in contexts like university admissions, where a court is not adjudicating race through an adversarial process.[198]

Modern racial adjudication interrogates claims of racial identity very closely, particularly when an individual's racial identity claim does not align with how others typically perceive their racial identity. Legal actors consider ancestral and documentary evidence of race, as well as proof that people in the individual's community perceive them as their claimed racial identity. Identity estoppel is another common thread through these cases, and courts look to prior inconsistent racial self-identification as evidence that the current racial identity claim is false.

---

and be naturalized as United States citizens, whom they could marry, whether they could vote, and whether they could be legally enslaved. LÓPEZ, *supra* note 26, at 11–13; *see also* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 120–23 (1998) (examining the racial determination cases in the nineteenth century).

197. The goals of the modern benefit laws are markedly different than the ones at issue in older race-litigation cases. While the latter were intended to maintain strict racial boundaries in service of white supremacy, the former, at least on their face, are generally about remediation for prior discrimination or racial diversity.

198. Racial adjudication in university admissions and similar contexts is often not very transparent and therefore difficult to evaluate. Decisionmakers likely consider some combination of self-identification, membership in affinity groups, physical appearance (through an Internet search or a personal interview), and evidence in the personal essay. However, there is usually no formal racial adjudication in this context, and the weight decisionmakers give to these various forms of evidence is not clear. Additionally, as scholars have noted, universities and employers who are interested in having racial diversity at their institutions have little incentive to adjudicate race. The broader their racial definitions and the less they scrutinize racial identity claims, the better their chances of claiming more diversity. *See* Camille Gear Rich, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 GEO. L.J. 179, 196 (2013) [hereinafter *Racial Commodification and the Promise of the New Functionalism*] ("The institution or employer is incentivized to accept even the most weak racial-identity claims as it will get the benefit of an employee it can categorize as a minority worker for diversity-reporting purposes without having to do the work necessary to reach out to more acutely subordinated workers from heavily racialized minority communities."); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2156 (2013) (explaining how employers commodify their employees' race to their advantage).

One of the most frequently discussed cases in the context of a race-conscious hiring program is *Malone v. Civil Service Commission*.[199] In *Malone*, two brothers applied to the Boston fire department and self-identified as white on their applications.[200] They were not hired because their scores on the entrance exam were too low.[201] The brothers applied a second time but, this time, identified themselves as Black on their applications.[202] Under the fire department's court-ordered affirmative action program, the passing score on the entrance exam for Black applicants was lower than for white applicants.[203] The Malone brothers were subsequently hired.[204] About ten years later, the commissioner of the fire department suspected that the brothers had lied about their race on their applications, and a hearing officer was appointed to determine whether the commissioner's suspicions were correct.[205]

After a two-day evidentiary hearing, the officer concluded that the brothers were not Black and were not eligible for the affirmative action program.[206] There was no pre-existing test to determine racial identity, so the officer developed the following three-part test herself: "(i) visual observation of physical features; (ii) documentary evidence establishing black ancestry, such as birth certificates; and (iii) evidence that the Malones or their families held themselves out to be black and are considered black in the community."[207] Or in the terms of this Article, (1) ascriptive race as determined by the adjudicator, (2) ancestral evidence, and (3) ascriptive race as determined by third parties.[208]

As to the first factor, the officer found that the Malones did not appear to be Black to her because they had "fair skin, fair hair coloring, and Caucasian facial features."[209] For the second factor, the brothers submitted a picture of a woman who they claimed was their Black great-grandmother.[210] However, the officer discounted this evidence because they could not prove that the woman in the picture was Black.[211] The officer instead relied on other evidence indicating that

199. Malone v. Civ. Serv. Comm'n, 646 N.E.2d 150 (Mass. App. Ct. 1995).
200. *Id.* at 151 n.3.
201. *Id.*
202. *Id.*
203. *See id.*
204. *Id.*
205. *Id.* at 151.
206. *Id.*
207. *Id.* at 151, 151 n.4.
208. *Racial Commodification and the Promise of the New Functionalism*, *supra* note 198, at 199 (citing Malone v. Haley, No. 88-339, slip op. at 16 (Mass. Sup. Jud. Ct. Suffolk Cnty. July 25, 1989)). If the Malone brothers could not satisfy these criteria, they could still prevail if they genuinely believed they were Black. *See id.* at 205.
209. *Id.*
210. *Malone*, 646 N.E.2d at 152 n.5.
211. *Racial Commodification and the Promise of the New Functionalism*, *supra* note 198, at 206.

they were not Black, including (1) the brothers' and their family members' birth certificates stating that they were all white, and (2) the brothers' self-identifications as white in their first job applications and a subsequent application for a promotion to lieutenant.[212] Finally, the officer found that the brothers were not considered part of the Black community, pointing out that they had not joined the African-American firefighters group and that they did not hold themselves out to be Black.[213]

Compared to sexual orientation and religion adjudication, the level of scrutiny exacted on the brothers' racial identity claims was high. Over a two-day hearing, the officer took into account ascriptive evidence, multiple forms of documentary evidence, and ancestral evidence.[214] She evaluated their physical appearances, various birth certificates, and how they represented their race to others.[215] Identity estoppel also played a role in this case—the hearing officer considered their previous identifications as white as an indication that their Black racial identity claim was false.[216] The Malone brothers' claims that they were Black, which may have been supported by some documentary evidence, could not overcome their prior and subsequent inconsistent self-identifications, conflicting documentary evidence, and their physical appearances.[217]

More than 20 years after *Malone*, another racial identity claim was interrogated with similar intensity. This case, *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises,* involved the Small Business Administration's 8(a) program. This program provides government contracting opportunities to small businesses that are "owned and controlled by socially and economically disadvantaged individuals," also known as Disadvantaged Business Enterprises ("DBE").[218] "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias" within American society "because of their identity as member of a group without regard to their individual identity."[219] The relevant regulation provides that most racial minorities are presumptively "socially disadvantaged individuals."[220]

212. *Id.* at 206–07.

213. *Id.* at 208–09.

214. *Malone*, 646 N.E.2d at 151.

215. *Id.* at 151–52.

216. *Racial Commodification and the Promise of the New Functionalism*, *supra* note 198, at 207.

217. *Id.* at 205–10.

218. Orion Ins. Grp. v. Wash. State Off. of Minority & Women's Bus. Enters., No. 16-5582, 2017 WL 3387344, at *1 (W.D. Wash. Aug. 7, 2017), *aff'd sub nom*. Orion Ins. Grp. v. Wash.'s Off. of Minority & Women's Bus. Enters., 754 F. App'x 556 (9th Cir. 2018); 15 U.S.C. § 637(a)(1)(A)–(D).

219. 15 § 637(a)(5); *see also* 49 C.F.R. § 26, App. E (2020).

220. 49 C.F.R. § 26.67(a) (2020).

Ralph Taylor sought a DBE designation for his company on the basis that he was presumptively socially disadvantaged because he was Black and Native American.[221] In his initial application, Taylor submitted the following evidence to support his asserted identity claims: (1) a genetic ancestry test stating that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African; (2) a copy of his driver's license with his picture on it; (3) his birth certificate stating that his parents are "Caucasian" but not providing his race; (4) a letter from his father asking that his birth certificate be changed to reflect that he is "Caucasian, African, and American Indian;" (5) his father's genetic results, estimating that he was 44% European, 44% Sub-Saharan African, and 12% East Asian; and (6) a death certificate from a Virginia woman who was presumably related to Taylor identifying her as a "Negro."[222] The law does not require DNA or other ancestral evidence to show membership in an identity category. Taylor presumably provided this evidence because he looked white in his photograph.[223]

The relevant regulation permits the agency to ask for additional evidence of an identity claim if the agency has a "well[-]founded reason to question the individual's claim of membership in that group."[224] Based on Taylor's appearance and his DNA test results, the agency asked for additional evidence that Taylor was Black and/or Native American.[225] In response, Taylor submitted the following: (1) evidence connecting the Virginia woman to his mother's side of the family; (2) a birth certificate from a relative, born in 1914, whose father's race is listed as "white?"; (3) a statement that he "considered himself to be Black based on his DNA test results, that he joined the NAACP, subscribed to Ebony magazine, and has 'taken a great interest in Black social causes;' " and (4) letters from individuals stating that they considered him a person of "mixed race" or "mixed heritage."[226]

When considering this additional evidence, the agency "must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community."[227] The agency may also "require the applicant to produce appropriate documentation of group membership."[228] The agency found that he was not Black because none of the evidence he

221. *Orion Ins. Grp.*, 2017 WL 3387344, at *2.

222. *Id.*

223. Ex. Selection of Admin. Rec. at 1–2, Orion Ins. Grp. v. Wash. State Off. of Minority & Women's Bus. Enters., No. 16-5582, 2017 WL 3387344 (W.D. Wash. Aug. 7, 2017) (No. 16-5581), 2017 WL 3387344 [hereinafter Ex. Selection of Admin.].

224. 49 C.F.R. § 26.63(a)(1) (2020).

225. *Orion Ins. Grp.*, 2017 WL 3387344, at *3.

226. *Id.* at *10–11.

227. 49 C.F.R. § 26.63(b) (2020).

228. *Id.*

produced showed that he "ever held himself out to be Black, that he ever was perceived in the business community as Black, or that he ever suffered any adverse consequences because people with whom he wished to engage in business refused to do business with him because they perceived him as Black."[229]

Taylor appealed, and the district court affirmed, holding that the agency did not act arbitrarily or capriciously when it found that Taylor provided insufficient evidence that he was either Black or Native American.[230] Interestingly, Taylor also applied for the state version of the federal DBE program.[231] Washington State initially denied his application, but after he appealed, the state voluntarily reversed its decision and classified Taylor's business as a Minority Business Enterprise ("MBE").[232]

Compared to the Malone brothers, Taylor provided more evidence of his claim to Blackness, including ancestral evidence and evidence that at least some individuals regarded him as multiracial.[233] But like the Malone brothers, he did not ascriptively appear to be Black to the adjudicator.[234] Also like the Malone brothers, he had previously identified as white (before receiving his DNA test results),[235] and in both cases, the adjudicators took these prior inconsistent racial identifications as evidence that they were not Black.[236] That is, Taylor and the Malone brothers were estopped from claiming a Black identity based on prior inconsistent self-identifications.

Courts have invoked identity estoppel in other benefit cases involving racial identity claims. For instance, the United States settled a lawsuit against an employer based on the employer's discrimination against certain racial minorities, and the benefits of the settlement were reserved for the racial minorities that the employer had discriminated against.[237] Membership in a racial minority for the purpose of

229. Ex. Selection of Admin., *supra* note 223, at 3–4.

230. *Orion Ins. Grp.*, 2017 WL 3387344, at *8.

231. *Id.* at *2.

232. *Id.*

233. *Compare id.* at *3, *with supra* discussion accompanying notes 209–13 (describing the evidence presented by the Malone brothers).

234. *Compare Orion Ins. Grp.*, 2017 WL 3387344, at *10, *with supra* discussion accompanying note 209–13 (describing the adjudicator's findings regarding the Malone brothers' ascriptive appearances). The agency stated that Taylor appeared to be white according to his driver's license picture. Ex. Selection of Admin., *supra* note 223, at 1.

235. *Id.*; *Orion Ins. Grp.*, 2017 WL 3387344, at *2 (stating that Taylor received his DNA results on August 25, 2010, and subsequently applied for his company's certification as an MBE under Washington State law on April 19, 2013); *see also Racial Commodification and the Promise of the New Functionalism*, *supra* note 198, at 207.

236. *Orion Ins. Grp.*, 2017 WL 3387344, at *8; Malone v. Civ. Serv. Comm'n, 646 N.E.2d 150, 151 (Mass. App. Ct. 1995).

237. *See* United States v. N.Y.C. Bd. of Educ., 85 F. Supp. 2d 130, 133, 135–36 (E.D.N.Y. 2000) (summarizing the central terms of the parties' Agreement, including providing "permanent civil service status to *43* identified blacks, Hispanics, Asians, and women" who had been serving as provisional employees and further providing

distributing the settlement funds was determined by how individuals had identified their race or national origin on their job applications.[238] Individuals who marked "white" on their job applications were excluded from the settlement, and some of those individuals subsequently objected to their exclusion, claiming that they were not white.[239] The employer reexamined whether these objectors were misclassified as white for purposes of the settlement and reclassified some, but not all, of them.[240] The remaining objectors sought relief from the court, but the court refused to second-guess the employer's racial classifications and held that their "self-identifications as white [were] sufficient to exclude them from the benefits of the settlement."[241]

The court appeared wary of engaging in any identity adjudication of its own, stating that it would be "unnecessary, and would be extremely unwise, for this court to . . . attempt to engage in the dubious task of defining or categorizing any person's race or national origin."[242] However, by allowing prior inconsistent racial self-identification to estop these objectors from asserting a different identity claim, the court was adjudicating identity by assuming that the racial identity asserted on the employees' application was accurate for the purposes of this settlement.

In sum, racial identity claims can be highly scrutinized in the context of a benefit law—especially when someone's self-identification does not align with other identity evidence (like appearance or prior inconsistent self-identifications). Prior inconsistent racial identification is also salient in racial adjudication and may estop individuals from making a successful racial identity claim.

4. Sex

This Subsection examines two legal contexts in which the law determines eligibility for something or access to something based on whether someone is sufficiently male or female.[243] Those contexts are (1) being able to change a sex marker on a birth certificate and (2)

"retroactive seniority, including retroactive pension relief, to *54* identified black, Hispanic, Asian, and female incumbent" employees (emphasis in original)).

238. *Id.* at 153.

239. *Id.*

240. *See id.* The filings do not explain what criteria the employer used to reclassify the employees.

241. *Id.*

242. *Id.*

243. I recognize that using the term "benefit law" in the context of sex adjudication feels like a misnomer more so than with other identities. Not allowing someone to change their sex designation because of their sex seems more like discrimination than a benefit. These laws fall under this category because, in contrast to anti-discrimination laws, these laws are not about addressing prior instances of discrimination; rather, they are forward looking and require proof of "sex" for the government to take a certain action.

participating in sex-segregated sports.[244] For someone to prove their sex in these contexts, the burden of proof is usually relatively high. Self-identification is not enough, and people generally need to show biological and/or documentary evidence of their sex. Sex adjudication in benefit laws, like with anti-discrimination laws, is most visible in cases involving transgender people because transgender people are more likely to need the state to adjudicate their sex.

Laws regulating changes to sex markers on birth certificates may seem more like data-collection laws than benefit laws, at least at first blush. Unlike data-collection laws, birth certificates are a primary legal mechanism through which the state exercises its power to assign a sex classification, and this legal sex designation is extremely consequential for individuals.[245] A birth certificate is often used to obtain most other identity documents, including driver's licenses and passports.[246] These identity documents facilitate access to a wide variety of institutions and programs, including schools, insurance, financial institutions, air travel, and much more.[247] Thus, when someone's sex marker on these documents is incorrect, their ability to access the services they need is likely to be impaired. So when the state regulates changing sex markers on birth certificates, the state is not collecting data about sex—it is adjudicating whether someone is sufficiently "male" or "female" for the state to recognize them as such and grant them access to a correct birth certificate.[248]

States regulate birth certificates, and many states require that an individual modify their anatomy in some way to amend their sex

244. Other legal contexts in which sex is adjudicated include determining who is sufficiently "male" or "female" to access a particular bathroom. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619 (4th Cir. 2020) (finding that Grimm was a "boy" and could use the boy's restroom). As discussed, addressing all laws that adjudicate identity is beyond the scope of this Article, and future work can explore these areas.

245. On a more abstract level, a sex designation is required for personhood. Someone cannot operate in current society without a legal sex classification. As Judith Butler has posited, "the moment in which an infant becomes humanized is when the question, 'is it a boy or a girl?' is answered." BODIES THAT MATTER, *supra* note 122, at 111.

246. Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 391 (2013).

247. *See id.* at 392 ("Birth certificates establish initial gender designation for other government identify documents, such as driver's licenses, passports and Social Security records. The birth certificate, as well as these other government documents, in turn breed many other identity documents, such as school records, college ID cards, work identification, and commercial licenses.").

248. *See* Katyal, *supra* note 58, at 412 (describing how "being 'sexed' or classified by the state . . . confer[s] the benefits of recognition on individuals who fit the morphological model and den[ies] certain entitlements, particularly recognition, to those who transgress or who do not fulfill the regulatory requirements for transition").

marker.[249] Lisa Mottet surveyed all 50 states in 2013, and at the time, 27 states required surgery by statute, regulation, or policy.[250] Other states do not have a codified policy that regulates sex marker changes, but in practice, individuals must submit proof of some form of sex reassignment surgery.[251] More recent 50-state surveys confirm that about half of states require some form of surgery to change sex markers on birth certificates.[252] A handful of states have broader language but still require proof of some clinical treatment.[253] Vermont, for instance, requires that the individual has "undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition."[254]

For some states that require proof of surgery, not just any surgery will do. According to Mottet's research, some agencies "have strict (generally unwritten) rules that a particular surgery must be shown."[255] And in other jurisdictions, a judge determines what type of surgery is required.[256] Individuals who have had surgeries that change their genitalia are more likely to successfully change their sex marker.[257] For instance, approximately 80% of trans men who had surgery to create a penis received a corrected birth certificate, compared with 56% who just had top surgery.[258] Similarly, 74% of trans women who had a vaginoplasty or had their scrotum and testes removed received a corrected birth certificate, whereas 32% of those who had only breast surgery received a corrected birth certificate.[259]

These statutes adjudicating sex for birth certificates can be understood as extreme examples of the law's use of identity estoppel. Prior identification as one sex (or perhaps more accurately, assignment at birth to one sex by a third party) makes it very difficult to claim a different sex.[260] If someone claiming to be a man was assigned female

249. This Article focuses on birth certificates, as opposed to other documents, because a birth certificate is required to obtain most other identity document (driver's licenses, Social Security cards, passports) or change sex markers on those identity documents. Mottet, *supra* note 245, at 391–93.

250. *Id.* at 400–01.

251. *Id.* at 401.

252. *See Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations (Sept. 17, 2018) [https://perma.cc/4U4F-6GNH] [hereinafter LAMBDA LEGAL].

253. Mottet, *supra* note 246, at 400.

254. VT. STAT. ANN. tit. 18, § 5112(b) (West, Westlaw through Acts 1 through 76 (end) & M-1 through M-6 (end) of Reg. Sess. & Act 1 (end) of Special Sess. of 2021–2022 Vt. Gen. Assemb. (2021)).

255. Mottet, *supra* note 246, at 401.

256. *Id.*

257. *See id.* at 390 nn. 63–65.

258. *Id.* at 390 n.61.

259. *Id.*

260. *See, e.g.*, Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, TRANSEQUALITY.ORG 86 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/4K8X-FRJ3] ("More than

at birth and previously identified as a girl or woman, these laws estop him from claiming a male sex identity, unless he makes substantial changes to his body. Unlike racial identification, where prior inconsistent identification was just one of many factors that adjudicators considered,[261] prior inconsistent sex identifications make claiming a different sex identity in this context very costly.[262]

The second context examined in this Subsection is the adjudication of sex for sex-segregated sports. How sex is determined for sports varies widely across the country, depending on the sport, level (youth/collegiate/professional), and jurisdiction. Thus, for scope purposes, I focus on two examples: one that is considered more inclusive of transgender athletes (the NCAA rule) and one that essentially bans transgender women and girls from participating in sex-segregated sports (an Idaho law).[263] From 2011 until the end of January 2022, the NCAA rule deemed a transgender woman sufficiently "female" to participate on a women's team if she had "complet[ed] one calendar year of testosterone suppression treatment."[264]A transgender man was able to participate on a men's team, but not a women's team, if he was taking testosterone.[265] If a transgender athlete was not taking hormones, their sex was determined based on their sex assigned at birth.[266] While the presence or absence of hormones, and testosterone in particular, was key to sex determinations for the NCAA, hormones were not the only thing at play.[267] The NCAA's policy only addressed the testosterone levels of transgender athletes—it did not require cisgender women to have their testosterone levels checked to join a wo-

two-thirds (68%) of respondents did not have any ID or record that reflected both the name and gender they preferred.").

261. *See, e.g.,* Malone v. Civ. Serv. Comm'n, 646 N.E.2d 150, 151, 155 (Mass. App. Ct. 1995).

262. *See, e.g.,* Megan Brodie Maier, *Altering Gender Markers on Government Identity Documents: Unpredictable, Burdensome, and Oppressive*, 23 U. PA. J.L. & SOC. CHANGE 203, 229 (2020) (summarizing barriers to changing documentation due to cost).

263. Unlike other identity adjudicators in this Article, the NCAA is not a state actor. Tarkanian v. NCAA, 488 U.S. 179, 196-97 (1988). Nevertheless, I chose to examine the NCAA's rule for two reasons. First, the NCAA rule applies nationwide; how state actors adjudicate sex in other contexts, like K–12 sex-segregated sports, for instance, is dependent on the particular school district and thus not applicable to as many athletes as the NCAA rule. In a forthcoming article, legal scholar Scott Skinner-Thompson provides a detailed analysis of how sex is regulated in K–12 sports in each state and each state's largest school district. *See* Scott Skinner-Thompson, Identity by Committee (manuscript in progress) (on file with author). Second, the NCAA's policy, before its recent amendment, was considered one of the most trans-inclusive policies for sex-segregated sports; therefore, the forthcoming critiques of this policy would apply with at least equal force to most other policies.

264. PAT GRIFFIN & HELEN CARROLL, NCAA, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (2011), https://www.ncaapublications.com/DownloadPublication.aspx?download=11INCL.pdf [https://perma.cc/P5TL-67FP].

265. *Id.*

266. *Id.*

267. *See id.*

men's team.[268] The only athletes who had their sex adjudicated were transgender athletes whose sex assigned at birth was different from the sex of the team they wish to play on.[269] Thus, sex adjudication in this context was dependent on two things: (1) transgender status, and (2) presence or absence of testosterone.

On January 19, 2022, the NCAA changed its rule and adopted a sport-by-sport approach to sex adjudication.[270] Specifically, "the updated NCAA policy calls for transgender participation for each sport to be determined by the policy for the national governing body [("NGB")] of that sport."[271] If there is no "NGB policy for a sport, that sport's international federation policy [is] followed," and "[i]f there is no international federation policy, previously established IOC policy criteria [are] followed."[272] Some NGBs do not currently have rules addressing requirements for participation in sex-segregated sports and will likely be adopting such policies in the coming weeks and months.[273]

Although this rule change has created much uncertainty regarding sex determinations in collegiate sports, there is reason to believe that sport-specific rules will mirror the NCAA's former rule and use testosterone levels to determine whether an athlete is sufficiently "female" to participate in women's sports. First, many NGBs that currently have applicable rules use testosterone levels to determine eligibility for women's sports.[274] Additionally, the NCAA seems to anticipate that testosterone levels will continue to play a major role; its press release stated that "[t]ransgender student-athletes will need to document sport-specific testosterone levels beginning four weeks before their sport's championship selections."[275]

While the NCAA's rule will likely continue to rely mostly on testosterone levels, the "Fairness in Women's Sports Act" Idaho recently passed imposes a far more rigorous test for sex determination in

268. *See id.*

269. *See id.* at 13, 22.

270. Press Release, NCAA Bd. of Governors, Board of Governors Updates Transgender Participation Policy (Jan. 19, 2022, 8:41 PM), https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx [https://perma.cc/RLM3-P754] [hereinafter NCAA Updated Policy].

271. *Id.*

272. *Id.*

273. For example, USA Swimming, the NGB for college swimming, released a statement after the NCAA rule change stating that although there is currently no policy on the books regarding transgender athletes, it is working with the International Swimming Federation to adopt one and expects to release it soon. Sarah Berman, *USA Swimming Releases Statement on Transgender Athlete Inclusion*, SWIMSWAM (Jan. 20, 2022), https://swimswam.com/usa-swimming-releases-statement-on-transgender-athlete-inclusion/ [https://perma.cc/28FR-CXG7].

274. *Policies by Organization*, TRANSATHLETE.COM, https://www.transathlete.com/policies-by-organization [https://perma.cc/WR24-G5ZZ] (listing rules for many NGBs and other organizations).

275. NCAA Updated Policy, *supra* note 270.

sports. The Act bars "students of the male sex" from participating in women's and girls' sports and limits participation to students whose "biological sex" is female.[276] Its scope is extremely broad and applies to all women/girl-only sports at most ages and levels, including intramural teams and teams sponsored by "primary schools."[277] The Act permits an unnamed set of individuals to "dispute" the "biological sex" of any student on an all-women's team. A student whose sex is challenged can prove their "biological sex" by providing documentation "signed by [their] personal health care provider" verifying "the student's reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels" (i.e. testosterone naturally produced by the body and not through hormone treatment).[278] That is, the Act excludes from the category of "female" any students (1) who don't have a vagina, uterus, ovaries (and other sex characteristics associated with a "female" sex), (2) whose chromosomes are not XX, and (3) whose testosterone levels are naturally below a certain level, regardless of whether they are taking testosterone-suppressing hormones.[279]

The Act essentially excludes intersex individuals and transgender women and girls from participating in girl's/women's sports. First, most transgender students do not have the "reproductive anatomy" associated with a "female sex" because they have not had genital surgery; even with surgery, transgender girls and women won't have ovaries or a uterus. Second, transgender girls and women cannot change their chromosomes. And third, by focusing on endogenously produced hormones, the Act bars transgender athletes who are taking testosterone suppressants and therefore have circulating testosterone levels like cisgender women. A federal district court has enjoined the Act on the grounds that it likely violates both transgender and cisgender women's rights under the Equal Protection Clause.[280] The case is currently pending before the Ninth Circuit.[281] Idaho is not alone in its desire to exclude transgender students from single-sex sports and to impose such strict and invasive methods for sex determinations; many other states are currently considering similar legislation.[282]

276. IDAHO CODE § 33-6203(2).
277. *Id.* § 33-6203(1).
278. *Id.* § 33-6203(3).
279. *See id.*
280. Hecox v. Little, 479 F. Supp. 3d 930, 989 (D. Idaho 2020).
281. *See* Brief for Appellees Lindsay Hecox and Jane Doe, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (Nos. 20-35813, 20-35815), 2020 WL 7634923, at *1.
282. *See, e.g.*, S.B. 1046, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (determining "sex" using the same criteria as the Idaho law); *see also Take Action!: 2022 Sports Bills*, TRANSATHLETE.COM (Jan. 27, 2022), https://www.transathlete.com/take-action [https://perma.cc/TLA3-NMNW] (listing similar bills in other states). The South Dakota legislature passed a very similar bill on February 1, 2022, and the governor could sign it into law any day. Morgan Matzen, *South Dakota House Passes Bills Limiting Transgender Students' Access to Sports, Bathrooms*, MSN (Feb. 1, 2022), https://

Thus, sex adjudication in the context of sports, like with birth certificates, is determined based on biological evidence. Some rules adjudicate "female" sex based on current hormone levels, (like the NCAA's former policy) while others involve much more searching inquires that include examination of genitals, chromosomes, and hormones, which essentially limit the category of "female" to cisgender women.

D. *Possible Explanations*

The previous discussion showed how both the type of law and the mutability of the identity category affect how closely identity claims are scrutinized. It also exposed significant inconsistency in identity adjudication both across and within different areas of law. Yet courts and other legal actors do not address or explain the principles they employ when adjudicating identity or acknowledge these inconsistencies. Indeed, legal actors may not even be self-consciously aware that they are adjudicating identity. This Section provides some possible reasons why the level of interrogation into identity claims seems to be correlated with the type of law and the mutability of the identity.

One reason legal actors interrogate identity differently based on the type of law at issue may have something to do with balancing (1) a perceived incentive to misrepresent an identity with (2) the cost to the state of getting it wrong and (3) the cost of acquiring additional evidence. This framework does a good job explaining the different levels of scrutiny in data-collection laws versus some benefit laws. For data-collection laws, individuals typically have little incentive to misrepresent their identity. For instance, someone's decision to check "Hispanic" or "non-Hispanic" on the Census does not have any direct effect on that individual.[283] While that decision may affect how resources are distributed to the community at large, the link between the individual choice and the effect on the group is attenuated.[284] As for the cost of error to the state, even if a small percentage of respondents did misstate their identity, these misstatements would not make much of a difference in the aggregate.[285] Combine this low incentive to misrepresent and the low cost of misstatements with the massive administrative burden of confirming large numbers of identity claims, and data collection's reliance on self-identification makes sense.

For many benefit laws—like asylum and affirmative action—identity adjudicators may think the incentives to "lie" about an identity

www.msn.com/en-us/news/politics/south-dakota-house-passes-bills-limiting-transgender-students-access-to-sports-bathrooms/ar-AATnlVm [https://perma.cc/EWD2-9NRT].

283. *See* Mezey, *supra* note 63, at 1745.

284. *See* NAT'L RSCH. COUNCIL, RESEARCH AND PLANS FOR COVERAGE MEASUREMENT IN THE 2010 CENSUS: INTERIM ASSESSMENT 2-2 (Robert Bell & Michael Cohen eds., 2007).

285. *Id.* at 2-3.

are high.[286] Avoiding deportation or securing a government contract are generally understood to be desirable, and unlike data-collection laws, the identity claim does have a direct, and sometimes substantial, effect on the individual.[287] The cost to the government of getting it wrong can also be higher than data-collection laws, but not always. If a limited resource is involved (like a limited number of government contracts), getting the identity claim wrong may mean that someone who should have access to that resource, will not, which undermines the benefit law's function. Moreover, the administrative burdens of adjudicating identity claims are lower than with data-collection laws because of the reduced number of identity claims involved.

But for anti-discrimination laws, incentives to misrepresent an identity, the harms of error, and/or administrative burdens fail to adequately explain why courts interrogate these identity claims more closely than data-collection identity claims. There is no apparent incentive to misstate an identity, like with benefit laws.[288] The anti-discrimination laws in this Article are symmetrical, meaning that anyone of any race, sex, religion, or sexuality can bring a claim, so plaintiffs need not misstate their identity to bring a claim. For this same reason, the cost of a court incorrectly adjudicating an identity claim is not high. And like benefit laws, the costs of additional evidence are fairly low.

Some scholars have hypothesized that legal actors (incorrectly) think that the costs of getting an identity claim wrong is high—that is, some judges may want to protect only those plaintiffs who are "actually" minorities.[289] Under this view, anti-discrimination laws are meant to protect minorities, so only those plaintiffs who are "actually" members of the group the law intended to benefit should be allowed to bring those claims. Consequently, judges with this perspective may be more likely to interrogate an identity claim closely to ensure that the law is being used to address discrimination against subordinated or minority identities. I explain in the next Section why this concern is unjustified both doctrinally and normatively, but this type of "protected class gatekeeping"[290] may explain, at least partially, why iden-

286. *See* Kazemzadeh v. U.S. Att'y Gen., 577 F.3d 1341, 1345 (11th Cir. 2009); Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 367, 387 (2006).

287. Not all benefit laws come with such incentives, like laws governing sex markers on birth certificates. *See* 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 (2009).

288. *See supra* Part III(C).

289. *See Protected Class*, *supra* note 27, at 156–57 ("It is perhaps this anti-subordination instinct, generally unstated, that motivates protected class gatekeeping, and leads progressive jurists to continue to include language inviting protected class gatekeeping in proposals to reform discrimination doctrine.").

290. I borrow this term from Jessica Clarke. *See id.* at 101.

tity is adjudicated more intensely in anti-discrimination laws than data-collection laws.

Why mutability of identity affects how closely an identity is scrutinized evades easy explanation. But the perception that immutable identities remain stable over time and are easily ascertainable based on objective traits may help explain some patterns from the taxonomy.[291] First, if legal actors understand immutable identities to be stable over time, they may be more likely to view inconsistent self-identification as an indication of fraud rather than a legitimate change in identity. In other words, if legal actors believe an identity cannot be changed, and the individual previously said they were X, and now they say they are Y, legal actors may think the individual is lying. This may explain why identity estoppel tends to be more prevalent in the context of race and sex adjudication than religion or sexual orientation. Consider the following example. Anna is a multiracial individual who converted to Judaism from Christianity after getting married. Anna marked her race as "white" when she applied for a job. Two years later, her employer starts an affirmative action program for racial minorities, and Anna applies, stating that she self-identifies as multiracial. Her employer deems her ineligible because her prior self-identification as white estops her from identifying as non-white, as race is perceived to be immutable. This time, Anna sues her employer for discriminating against her based on her Jewish identity. Her prior self-identification as a Christian is not fatal to her assertion that she is Jewish because religious identity is mutable, and therefore, her current assertion is not seen as fraudulent.

Indeed, fraud narratives about race and sex are both prevalent and historically rooted. As for race, there is increasing societal concern about college applicants identifying as minorities, even if that claim is tenuous or false,[292] or declining to indicate a racial identity,[293] in hopes of benefiting from the university's affirmative action policy. And historically, racial minorities have claimed a white identity to avoid enslavement, become a citizen, or gain access to the numerous other benefits that came with a legal declaration of whiteness.[294] As for sex, transgender individuals have long been deemed "gender frauds."[295] For example, the "transsexual panic" defense to murdering

291. *See, e.g.*, John Tehranian, *Changing Race: Fluidity, Immutability, and the Evolution of Equal-Protection Jurisprudence*, 22 U. PA. J. CONST. L. 1, 7 (2019) (showing how equal protection doctrine assumes race is immutable when, in fact, racial identity is "malleable and can change" due to a variety of factors).

292. Yang, *supra* note 286, at 369. Yang finds that this "appears to be most prevalent with respect to American Indian and Hispanic/Latino identities." *Id.*

293. *See, e.g.*, Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, S. CAL. REV. L. & SOC. JUST. 539, 540 (2009) [hereinafter *Decline to State*] (addressing law school applicants specifically).

294. *See* LÓPEZ, *supra* note 26, at 3, 27, 38, 44.

295. Currah & Moore, *supra* note 287, at 128.

a transgender woman relied on the idea that the perpetrator was defrauded into thinking the victim was a woman based on her physical appearance and then "justifiably" reacted violently when he discovered that she was "really" a man.[296] More recently, opponents of laws enabling transgender youth to participate in sex-segregated sports and to use their chosen restroom have cited a concern that "boys" might fraudulently claim that they are "girls" so that they can go into girls' bathrooms or join girls' sports teams.[297] Although some of these societal narratives around race and sex fraud are problematic, they are salient and may help explain legal actors' willingness to view inconsistent identification as fraudulent.

Second, if legal actors think immutable identities are easily ascertainable through visual observation, or other "objective" evidence, they might not be able to understand how someone could misperceive another person's identity.[298] This may explain why courts are more willing to reject discrimination claims involving racial misperception claims than sexual orientation or religious misperception claims. D. Wendy Greene has made this argument—that this fixed view of racial identity may lead legal actors to reject a misperception claim because they "may simply be unable to rationalize the proposition that a plaintiff's race was mistaken" or "might outright disbelieve that a plaintiff's race could be mistaken, based on her own preset conceptualizations of race and sex as fixed, indisputable constructs."[299]

Third, and relatedly, if immutable identities are defined by "objective" traits, legal actors may interrogate these identities more closely to ensure that an individual meets the legal actor's "objective" criteria for a particular identity. So if the law understands "objective" evidence of a "woman" or a "female" to include breasts and a vagina, people without those traits will not be able to, for example, change their sex marker on their birth certificate. This may also shed some light on why some courts adjudicate racial identity claims based on so-called "objective" criteria but don't do the same for the more mutable identities, religion and sexual orientation, because unlike race, courts may not have "objective" criteria that an individual must meet.

296. *Id.* at 120.

297. *See e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 599 (4th Cir. 2020) (noting community members' justifications for opposing a student's ability to use the restroom matching their gender identity).

298. *See Elective Race*, *supra* note 61, at 1506 ("Because we are in a period of transition, many Americans still are wedded to fairly traditional attitudes about race. For these Americans, race is still an objective, easily ascertainable fact determined by the process of involuntary racial ascription—how one's physical traits are racially categorized by third parties.").

299. Greene, *supra* note 17, at 135.

IV. Context-Detached & Context-Informed Adjudication

This Part identifies a problematic pattern across the taxonomy of identity adjudication. Specifically, it argues that legal actors tend to adjudicate identity claims without considering why the identity is relevant to the law at issue. I call this a context-detached approach to identity adjudication. A legal actor employing a context-detached approach does not adequately consider whether someone's identity matters to the law in the first place. Nor does this legal actor use the purpose of the law to inform what types of identity should be used to adjudicate identity. A context-informed approach to identity adjudication, on the other hand, understands the identity question to depend on why that particular law is asking the identity question in the first place. It identifies the function or purpose of the applicable law first. It then asks whether identity adjudication is necessary at all, and if so, what definition or model of identity would best serve those purposes.

This Part addresses each type of law in turn and shows how legal actors often fail to adjudicate identity with proper attention to the function or purpose of the law. It also discusses what a context-informed approach might look like and summarizes the harms of context-detached adjudication, which tend to fall in two categories. First, context-detached adjudication produces outcomes that are at odds with the purpose of the law and often internally inconsistent with each other. Second, context-detached adjudication can cause over-interrogation of identity, where legal actors examine more identity evidence than necessary to fulfill the purpose of the law. Over-interrogation of identity can harm individuals' privacy and dignity interests and may reinforce problematic definitions of identity through the power of the law.

A. *Data-Collection Laws*

Data-collection laws almost exclusively rely on self-identification to adjudicate identity. Yet as discussed, self-identification alone might not be the right type of identity evidence, depending on the purpose of the law at issue. If identity data is being collected to track discrimination, for instance, asking someone how they self-identify will only track discrimination if their self-identification aligns with their ascriptive identity, or how their identity is understood or perceived in the relevant community. A self-identified straight woman may be misperceived as a lesbian based on her appearance or mannerisms and then discriminated against on that basis. The data-collection mechanism would not necessarily track this type of discrimination, however, because she self-identified as straight. Thus, the current approach to adjudicating identity for data-collection mechanisms used to track discrimination fails to adequately consider the purpose of the law.

What might a context-informed approach to identity adjudication for a data-collection mechanism meant to identify discrimination look like? One option is to revert to older models where third parties assigned someone an identity based their appearance and/or identity performance. This option has the advantage of relying on ascriptive identity, which may be able to capture patterns of discrimination more reliably than self-identification. But reverting to a system where third parties assign identities to individuals does not seem like a desirable or practical solution.[300] First, this would not work for all identities—for instance, how would a Census worker assign someone a sexual orientation based on ascriptive evidence? Second, the identity would be based on one person's subjective determination, which may not reflect the identity the individuals is usually ascribed, and in turn, may not be more accurate or reliable than self-identification. Third, and most relevant to this discussion, third-party ascription does not necessarily align with the purpose of the law either. One reason federal agencies abandoned third-party ascription in favor self-identification was "[r]espect for individual dignity."[301] Dignity interests are not served when individuals are involuntarily assigned a race, sex, sexuality, or religion.

A context-informed approach to identity adjudication would need to reflect the anti-discrimination function of the law and the dignitary interests the law seeks to protect. One approach that aligns with both of these purposes is to change the substance of the questions asked to reflect ascriptive identity. Rather than (or in addition to) asking people how they identify, ask people how others identify them. That is, ask individuals how people in their community view their race, sex, sexuality, etc. The question is not "what is your sexual orientation," for example, but rather, something like "what does your boss (or coworkers or community, depending on the context) understand your sexual orientation to be."[302] This method of identity adjudication can track discrimination patterns better than self-identification while avoiding the dignity harms of involuntary identity ascription.

Data-collection mechanisms that have multiple purposes may need to ask a variety of questions about someone's identity to align with

300. *See* Mezey, *supra* note 63, at 1753 (explaining how very few racial minorities want to return to a system where Census workers collect identity data through racial ascription).

301. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,788–90 (Oct. 30, 1997). The Office of Management and Budget ("OMB") issued a directive to federal agencies stating that racial-data-collection efforts should facilitate self-identification to the greatest extent possible. *See id.*; *see also Elective Race*, *supra* note 61, at 1505–06 (discussing how institutions have increasingly valued dignity, privacy, and autonomy interests and how those interests are best served by a model that uses self-identification to collect identity data).

302. *See* DAVID A. HOLLINGER, POSTETHNIC AMERICA 179–82 (2006) (proposing similar amendments to the census in the context of racial identity); Sudeall, *supra* note 63, at 1296.

those various purposes. They could ask questions that seek information about ascriptive identity, self-identification, ancestry, or prior self-identifications, depending on the purposes for which the data is being used.

Thus, data-collection laws' exclusive reliance on self-identification reflects a context-detached approach. Self-identification is not always the best measure of identity because it doesn't always align with the identity they are generally ascribed by others. Other types of identity evidence may also conflict with their self-identification—someone's "biological" sex might not match their self-identification or their ascriptive sex, or someone's ancestry may not influence their racial self-identification or their ascriptive race. These various forms of identity evidence may be more or less useful depending on why the identity data is being collected.

B. *Anti-Discrimination Laws*

This Section argues that courts adopt a context-detached approach to identity adjudication when they focus on determining the "actual" identity of the plaintiff. Determining a plaintiff's "actual" identity is not relevant under black letter anti-discrimination law or the two prevailing theories of anti-discrimination law (anti-classification and anti-subordination). Rather, this Section argues that the focus of analysis should be the content of the discrimination and the perspective of the discriminator. First, I argue that neither black letter anti-discrimination law nor the two prevailing normative theories of anti-discrimination law call for courts to determine "actual" identity. Then, I turn to the harms of context-detached identity adjudication and show how this approach can violate privacy interests and needlessly reinforce problematic stereotypes about certain identities.

1. Identity Adjudication and Black Letter Law

Determining a plaintiff's "actual" identity is not required under the anti-discrimination laws discussed in this Article for a fairly straightforward reason—Title VII, and similar state laws, are symmetrical, meaning that they protect all races, religions, sexes, etc., not just one sex or one race.[303] So regardless of whether someone is Black or white, Muslim or Christian, or male or female, they are still protected under Title VII because they have a race, sex, or religious identity. If Title VII were asymmetrical, like the Age Discrimination in Employment Act ("ADEA"), which only applies to people over 40,[304] determining the plaintiff's true identity (age in this case) might be

303. For a fuller discussion regarding the distinction between symmetrical and asymmetrical laws, see Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69, 69 (2017) [hereinafter *Case for Symmetry*].

304. 29 U.S.C. § 631(a).

necessary. But Title VII and similar state laws apply to everyone, regardless of their specific identity. Nevertheless, some courts mistakenly construe anti-discrimination case law and statutes to require a determination of the plaintiff's identity. The following discussion sets forth different doctrinal rationales courts offer to justify their reliance on "actual" identity and then explains why they are flawed.

First, Title VII prohibits discrimination "because of *such* individual's race, color, religion, sex, or national origin," and some courts interpret this language to require a determination of the individual's identity.[305] But this language does not mean that the court needs to figure out if a plaintiff is Black or white, Muslim or Christian, or male or female. Rather, this language indicates that Title VII protects certain identity categories and is focused on the treatment of individuals, not groups. It does not require courts to engage in identity fact-finding.[306]

Another frequent justification is the first prong of the *McDonell Douglas* framework for analyzing disparate treatment cases—namely that the plaintiff must be a member in a protected class or group.[307] In the *McDonell Douglas* case itself, this meant that the plaintiff needed to show "that he belongs to a racial minority."[308] But in setting forth this framework, the Supreme Court explicitly stated that this framework was not required in all disparate treatment cases and that Title VII protected all members of identities categories.[309] Lower courts therefore misapply Supreme Court precedent when they construe this prong "as an absolute bar against misperception discrimination claims."[310] Moreover, this interpretation of *McDonell Douglas* conflicts with the symmetrical nature of Title VII.

Some courts that dismiss misperception cases base their reasoning on the fact that another anti-discrimination statute—namely, the Americans with Disabilities Act ("ADA")—protects individuals "re-

305. 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

306. Moreover, as Jessica Clarke argues, in cases where the discrimination is based on a misperceived identity, such discriminatory behavior generally still flows from "some protected trait of the plaintiff, such as skin color, or stereotypes about that trait" and is "generally inextricable from those plaintiffs' own racial, sexual, or other protected identities." *Protected Class*, *supra* note 27, at, 113. For example, when a plaintiff is discriminated against based on the mistaken belief that she is Black, that discrimination is usually based on her skin color or some other racially correlated trait. The statutory language, therefore, does not require a determination of the plaintiff's actual identity.

307. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (holding that the plaintiff, who identified himself as Black, established the initial element of a prima facie case of intentional race discrimination by demonstrating that he belonged to a "racial minority" group).

308. *Id.* at 802.

309. *Id.* at 802 n.13.

310. For other scholars who have made similar points, see Greene, *supra* note 17, at 119–120; see also *Protected Class*, *supra* note 27, at 117–19; Eisenstadt, *supra* note 27, at 807–08; *Judicial Erasure*, *supra* note 27, at 548.

garded as" disabled, not just disabled individuals.[311] Under this reasoning, because Title VII does not include the "regarded as" language, Title VII does not protect individuals who are "regarded as" (or misperceived as) a particular identity.[312] But unlike the anti-discrimination laws discussed in this Article, the ADA is asymmetrical, i.e., it is focused on remedying discrimination against individuals with disabilities—not able-bodied people.[313] The ADA therefore needs to include the "regarded as" language to protect people perceived to have a disability even if they do not actually have that disability.[314] This is not true for Title VII and related laws because they are symmetrical and protect all races, religions, etc. Thus, including the "regarded as" language in Title VII would be redundant and unnecessary.[315]

The inconsistency with which courts interrogate identity in discrimination cases only further shows that anti-discrimination law does not require identity adjudication. As the previous Section demonstrated, there is inconsistency both within and between identity categories. Some courts impose actuality requirements in race discrimination cases, while others do not;[316] same story for religious discrimination claims.[317] Moreover, courts rarely, if ever, throw out sexual orientation discrimination claims based on the plaintiff's actual sexual orientation but are much more likely to do so for race discrimination claims.[318]

Courts are coming to these inconsistent conclusions even though neither Title VII nor corresponding state laws allow courts to use different tests for different identity categories. In other words, the same anti-discrimination statutes cannot allow misperception claims in the context of religion and then reject them in the context of race—and

311. *See* 42 U.S.C. § 12101(a)(1) ("The Congress finds that . . . many people with physical or mental disabilities have been precluded from [fully participating in all aspects of society] because of discrimination; other who have a record of a disability or *are regarded as having a disability* also have been subjected to discrimination . . . ." (emphasis added)).

312. Butler v. Potter, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004) ("Congress has shown, through . . . the Americans with Disabilities Act, that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class.").

313. *See* 42 U.S.C. § 12101(b)(1) ("It is the purpose of the chapter to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.").

314. *See Protected Class*, *supra* note 27, at 115–16 (making the same point).

315. *See id.* (arguing that the addition of "regarded as" to Title VII is not only unnecessary but also would be a bad idea); *see also* Greene, *supra* note 17, at 153–162 (presenting a survey of cases and EEOC directives to show that rather than adding "regarded as" language to Title VII, "all individuals alleging categorical discrimination on the basis of Title VII's proscribed characteristics are already entitled to statutory protection and have standing to maintain a claim of discrimination regardless of whether their identity was correctly perceived").

316. *See* discussion *supra* Part III(B)(3).

317. *See* discussion *supra* Part III(B)(2).

318. *See* discussion *supra* Parts III(B)(1), III(B)(3).

the same statute cannot require a determination of a plaintiff's "actual" identity in sex discrimination cases and then not require such a determination in sexual orientation discrimination cases.[319]

To be sure, identity is relevant to an anti-discrimination claim. The discriminatory conduct must be connected to a protected identity category to fall under Title VII and related laws. But courts can conduct this inquiry under the causation prong of its analysis rather than interrogating the plaintiff's identity.[320] In other words, instead of asking what a plaintiff's identity is, they should ask what the cause of the discrimination was—rather than ask whether the plaintiff is Hispanic, gay, Muslim, etc., ask whether the alleged discriminatory conduct was motived by race, sex, religion, etc.[321] To answer this causation question, courts can and should focus on how the discriminators understood or perceived the plaintiffs' identities and their motivations behind the discrimination.[322]

Taking all of this together, identity adjudication is not doctrinally necessary. The viability of a racial discrimination claim does not depend on the "true" racial identity of the plaintiff. Determining a plaintiff's "actual" identity is not doctrinally necessary for sex discrimination cases either. Recall that the cases discussed in Part III used plaintiffs' biological traits to determine their "actual" sex,[323] but determining a plaintiff's "actual" sex, using a plaintiff's biological traits or otherwise, is not necessary to adjudicate sex discrimination claims. Said differently, courts do not need to know the makeup of plaintiffs' internal and external reproductive organs, the composition of their chromosomes, the sex that they were assigned at birth, or any other sensitive biological information to adjudicate a sex discrimination claim. Rather, just like with other identities, the relevant inquiry is the discriminator's perception of the plaintiff's sex identity.

Consider Ann Hopkins, the plaintiff in *Price Waterhouse*. The discrimination Hopkins faced was based on the fact that her *perceived* sex (not her "actual" sex) did not align with how her employer expected people of that identity to perform their identity.[324] Her em-

319. Identity interrogation is also not necessary under other anti-discrimination laws addressed here. Section 1981 is symmetrical and applies to all persons regardless of their actual races. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 286–87 (1976) (holding that § 1981 applies to all persons, including white people). State level anti-discrimination laws are generally modeled after federal laws, so the arguments from Title VII and § 1981 also applies to those laws. *See, e.g.*, DEL. CODE ANN. tit. 19, §§ 710–711 (2021); WIS. STAT. § 111.32 (2021).

320. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

321. Naomi Schoenbaum has also argued that by considering identity in the causation prong, the court's analysis focuses on the conduct of the discriminator, as opposed to the identity of the plaintiff. *Case for Symmetry*, *supra* note 303, at 138–40.

322. For more on why this approach would benefit multiracial plaintiffs in particular, see *Judicial Erasure*, *supra* note 27, at 547–50.

323. *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984).

324. Price Waterhouse v. Hopkins, 490 U.S. 228, 234–35 (1989).

ployer perceived her to be a woman and did not think women should be masculine, competitive, or aggressive.[325] Nothing about Hopkins' case or the Court's reasoning would change if Hopkins had a penis or XY chromosomes, as long as her discriminators did not know about these biological traits and/or they did not affect the discriminators' perception of her sex.[326] The relevant inquiry was not whether Hopkins had biological traits associated with a female sex identity but which sex her employer understood her to be.

The same is true if Hopkins did have penis or XY chromosomes, and her employer fired her when he found out about these biological traits. If her employer understood her sex to be male (because of these biological traits), she could win under a sex-stereotyping theory of sex discrimination by arguing that the discriminatory treatment was based on the employer's stereotype that males are not supposed to be feminine or identify as a woman. If her employer perceived her sex to be female (because of her self-identification and ascriptive factors), sex-stereotyping also applies because the discrimination stemmed from a stereotype that females are not supposed to have penises. Either way, interrogating Hopkins' "actual" sex is not necessary.[327]

In sum, courts who focus on determining the "actual" identity of plaintiffs are engaged in context-detached identity adjudication because these particular anti-discrimination laws do not require a determination of identity in the first place.

2. Identity Adjudication and Normative Theories of Anti-Discrimination Law

In addition to not being required under black letter anti-discrimination law, interrogating plaintiffs' identities does not serve the overall purposes of anti-discrimination law. The purposes of anti-discrimination laws have been widely debated,[328] but here, I address the two most prominent theories: anti-classification and anti-subordination.[329]

Under the "anti-classification," also known as "anti-differentiation," school of thought, anti-discrimination laws are meant to protect

325. *Id.* at 235.

326. Katherine Franke has also argued that sex discrimination is rarely, if ever, based on biological traits like chromosomes and that equality law should abandon its commitment to biological definitions of sex and to a truth of sexual difference. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5, 98 (1995).

327. *Bostock*'s holding would still stand under this conception of sex adjudication. The only change would be in its rationale. Rather defining "sex" as the employee's sex assigned at birth, *Bostock* could have focused on how the employer perceived the plaintiff's sex as the starting point of analysis.

328. *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005–06 (1986).

329. Jessica Clarke argues why protected-class gatekeeping is also not justified under two additional theories of anti-discrimination law—anti-essentialism and anti-balkanization. *Protected Class*, *supra* note 27, at 145–55.

individuals from mistreatment based on a protected category (sex, race, religion, etc.).[330] This position is focused on individual fairness and favors prohibiting decisionmakers from considering any protected identity category, regardless of whether that identity is privileged or subordinated in society.[331] To an anti-classificationist, it is equally harmful to discriminate against men as it is women. Litigating the plaintiff's "actual" identity isn't in line with this view because the discriminator should be punished for taking a protected category into account no matter what the plaintiff's "real" identity is. That is, regardless of whether an individual is discriminated against based on their actual or perceived identity, they were still discriminated against based on a protected identity. Thus, a discriminator violates these fairness principles of anti-discrimination law regardless of the plaintiff's "actual" identity and even when a discriminator is wrong about the plaintiff's identity.[332]

Anti-subordination theory also does not support identity adjudication for anti-discrimination laws. Under an anti-subordination approach, anti-discrimination law should seek to prevent "practices that enforce the secondary social status of historically oppressed groups."[333] Unlike anti-classification theory, which views the harms of discrimination on an individual level, anti-subordination theory focuses on systemically disadvantaged groups. Under this view, discriminatory practices may harm privileged groups—straight people, white people, men, etc.— but not in the same way that discrimination against marginalized groups "compound[s] a pattern of stigma and bias going back generations and reaching across domains of social life."[334] An anti-subordination theorist might be in favor of different liability standards for claims challenging anti-Black, anti-woman, or anti-queer discrimination compared to claims alleging anti-white, anti-male, or anti-heterosexual discrimination. It may seem that under this theory, adjudicating the plaintiff's identity is necessary to determine which legal standard should apply.

---

330. Colker, *supra* note 328, at 1005.

331. *See* Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 994–95 (2012); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 457–58 (1975); McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995).

332. Craig Robert Senn, *Perception over Reality: Extending the ADA's Concept of "Regarded As" Protection Under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 856 (2009) (arguing that "'erroneous discriminators' are—to be blunt—still discriminators").

333. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003). For some additional accounts of anti-subordination theory, see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108, 157 (1976).

334. *Protected Class*, *supra* note 27, at 156.

However, this position misses the distinction between interrogating a plaintiff's identity and what qualifies as illegal discrimination.[335] Adjudicating whether the plaintiff is white or Black, gay or straight, etc. is a separate question from whether anti-white discrimination should be cognizable under anti-discrimination law or litigated under the same standards as discrimination against racial minorities. Said differently, discrimination claims that attack anti-Black racist structures in the workplace support an anti-subordination theory of anti-discrimination law regardless of the identity of the plaintiff who brings those claims. Under anti-subordination theory, "those harmed by discriminatory dynamics such as racism, sexism, religious intolerance, and homophobia should have recourse to the law, *whatever their identities*."[336]

Another reason interrogating plaintiffs' identities does not serve anti-subordination goals is exposed through the multi-identity lens of this Article. As discussed, race discrimination claims are more likely to be dismissed based on the identity of the plaintiff than other types of discrimination claims. This applies to discrimination cases that further anti-subordination goals—i.e., cases attacking racial hierarchies—not only cases of "reverse" discrimination. On the other hand, in the sexual orientation context, discrimination cases that further anti-subordination purposes—i.e., cases disrupting heteronormativity and homophobia—are generally not dismissed based on the plaintiff's identity. So while both straight and non-straight plaintiffs are permitted to bring claims based on anti-gay harassment, in some cases, only plaintiffs of a particular race can bring claims based on racial subordination. This result is not in line with anti-subordination goals, particularly considering that the origins of the principle are rooted in addressing racial subordination.[337]

Shifting the focus away from adjudicating a plaintiff's "actual" identity allows courts to direct their attention to the discriminatory conduct the plaintiff encountered. Dismissing cases based on the plaintiff's identity, and/or determining whether a plaintiff's identity claim meets some court-adopted "objective" standard is not supported by either the black letter law of anti-discrimination law or the two dominant theories of anti-discrimination law.

335. Jessica Clarke makes this argument when explaining why protected class inquiries are not required by an anti-subordination approach to anti-discrimination law. *See id.* at 158.

336. *Id.* (emphasis added); *see also Case for Symmetry*, *supra* note 303, at 86–98 (arguing that a symmetrical approach to anti-discrimination laws serves anti-subordination goals).

337. *See* Fiss, *supra* note 315, at 157.

3. Problems Caused by Context-Detached Adjudication

The problems with context-detached identity adjudication have been raised throughout this Article, but I put a point on them here. First, courts who adopt a context-detached approach and focus on determining a plaintiff's "real" identity create inconsistency in the case law. Currently, the success or failure of plaintiffs' misperception claims does—but should not—depend on the particular judge assigned to the case or the identity category involved. This approach can also produce results that are at odds with the purpose of these anti-discrimination laws. Title VII and related statutes are intended to provide a remedy to people who were mistreated based on a protected category regardless of their "real" identity. So when plaintiffs lose claims in whole or in part based on their "real" identity, these laws are not being implemented to fidelity.

Additionally, when legal actors try to determine a plaintiff's "actual" identity, they are relying on more identity evidence than necessary to adjudicate the identity—that is, they are over-interrogating identity. I fully explore the consequences of over-interrogation in other work,[338] but I summarize two primary harms here. One, making identity claims dependent on unnecessary identity evidence may infringe upon plaintiffs' privacy. As other scholars have explained, individuals have legally protected privacy interests in their identities and should be able to exercise control over how, when, and to whom various aspects of their identities are disclosed.[339] So when courts examine things like the make-up of someone's chromosomes,[340] ancestral background,[341] and blood quantum,[342] when the law doesn't require them to do so, they may be impinging on plaintiffs' privacy. To be sure, the plaintiffs themselves disclosed this identity information to the court in the first instance, but the court then rebroadcast that information in publicly available court opinions. Moreover, if courts made clear that the identity inquiry was not about determining plaintiffs' "real" identities, plaintiffs would probably not reveal this information, or at least not as much of it, to the court in the first place. By relying on this information to determine "actual" identity and treating "actual" identity as important to the success of plaintiffs' claims, courts are encouraging disclosure.

338. *See* Working Manuscript, *supra* note 24.

339. *See* Scott Skinner-Thompson, *Outing Privacy*, 110 Nw. U. L. Rev. 159, 161–62 (2015) (arguing that information about someone's sexuality, sex, and related health and medical information have heightened constitutional importance under the Due Process Clause); *Elective Race*, *supra* note 61, at 1505–07 (arguing that individuals have a legally recognized interest in exercising control over the terms of disclosing their racial identity).

340. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).

341. *See* Bennun v. Rutgers State Univ., 941 F.2d 154, 172–73 (3d Cir. 1991).

342. *See* Leonard v. Katsinas, No. 05-1069, 2007 WL 1106136, at *2 (C.D. Ill. Apr. 11, 2007).

The other harm from over-interrogation involves the power of the law unnecessarily reifying the essential characteristics of an identity and reinforcing stereotypes about that identity.[343] For example, when the *Bennun v. Rutgers State University* court found that the plaintiff was Hispanic based on his appearance, speech, cultural affiliation with "Spanish life," and ability to speak Spanish, the court was suggesting that some of these things (all of these things?) are definitional qualities of being "Hispanic."[344] In turn, the court reinforced stereotypes about what it means to be a "real" Hispanic (someone who speaks, dresses, and looks a certain way).

Additionally, courts' reliance on "actual" sex in sex discrimination cases, and determination of "actual" sex based on biological characteristics, supports the dominant discourse that sex has innate, fixed, physical components. First, as previously argued, there is no legal need to adopt any definition of "actual" sex in this context.[345] Moreover, defining "actual" sex as sex assigned at birth, chromosomes, sex characteristics, or other biological identity evidence supports a model of sex that does not align with many people's lived experiences and can cause a myriad of harms, including: promoting nonconsensual surgery on babies born with genitals that are not clearly a penis or a vagina,[346] rendering invisible nonbinary individuals who do not subscribe to binary models of sex,[347] and stigmatizing and pathologizing transgender people,[348] to name a few.

To a certain extent, all identity adjudication runs the risk of essentializing identity—when legal actors determine whether someone is a particular race, sex, etc., whatever identity evidence is dispositive of that determination becomes linked to that identity. But as long as the identity inquiry is tied to the function of the law, no one type of identity evidence will ever be determinative of identity across all legal con-

343. *See* FORD, *supra* note 33, at 78 (arguing that when legal actors make certain traits or characteristics essential to identity, they may "underwrite destructive self-images and misguided commitments with the force of law and the intractability of precedents").

344. *See Bennun*, 941 F.2d at 172–73 (finding that the plaintiff was Hispanic due to his "birth in a Latin American country where Hispanic culture predominates, his immersion in Spanish ways of life, and the fact that he speaks Spanish in the home," as well as his "appearance, speech and mannerism" and other traits that indicate his "objective appearance to others"). In other words, the court is giving "Hispanic" a "substantive, cultural content [that] is a way of freezing the definition of that identity in place and time, or declaring that it contains universal characteristics, or certain parameters within which anyone who truly belongs must fall." Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1412 (2008).

345. *See supra* Part III(C)(4).

346. *See, e.g.*, Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—the Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 150–51 (2011).

347. *See, e.g.*, Spade, *supra* note 30, at 322.

348. *See, e.g.*, Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 25–26 (2003).

texts. Rather, identity definitions will be flexible and context-specific. For instance, some laws may require biological evidence to determine sex, but other times, ascriptive evidence or self-identification may be more appropriate. This way, no single trait becomes an essential element of sex.

C. *Benefit Laws*

Legal actors also, at times, engage in context-detached identity adjudication with benefit laws, and, in turn, examine the wrong kind of evidence to achieve the purpose of the law. Just like the analysis of anti-discrimination laws did not take a position on what the goal, purpose, or function of anti-discrimination law should be, this analysis also does not tackle what the purpose of a particular law should be; that is beyond this Article's scope. The proper normative function of any one of these laws could be and is the topic of entire law review articles. Rather, this Section uses the function of the law as stated in the case law, statutes, regulations, lawmakers, or other primary sources. This Section provides examples of context-detached adjudication and shows how, in many instances, the purpose or function of these laws can be served with a less strict, or different, standard for identity claims.

1. Sex

Recall that many states require people to have some sort of surgical procedure to change the sex marker on their birth certificate.[349] Mandating invasive and expensive surgery is burdensome and arguably more taxing than any other form of identity proof discussed in this Article.[350] These requirements do not align with the underlying goals of these laws. Here's why.

States' interests in regulating sex markers on identity documents are generally not made explicit in the governing statutes or regulations, but some courts, agencies, and legislators have cited (1) the regulation of sex-segregated spaces and (2) concerns about fraud as potential

349. LAMBDA LEGAL, *supra* note 252.

350. Vaginoplasty, for example, is a six hour surgery with a recovery time of up to 18 months. Erin Larowe, *What to Expect: Vaginoplasty at the University of Michigan Health System*, U. MICH. HEALTH SYS., http://www.med.umich.edu/pdf/Vaginoplasty.pdf (Dec. 2016) [https://perma.cc/ZPW5-YS5V]. Phalloplasty can take as long as eight hours with a similar recovery time. *What to Expect: Phalloplasty at Michigan Medicine*, MICH. MED., http://www.med.umich.edu/1libr/Surgery/PlasticSurgery/GenderConfirmationSurgery/Phalloplasty.pdf (Apr. 2019) [https://perma.cc/3GXW-4LX2]. Chest masculinization surgery, or "bilateral mastectomy," typically takes 3 to 5 hours to perform, and patients recover over a period of 6 to 12 months. Ctr. for Transgender Health, *FAQ: Chest Masculinization*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/center-transgender-health/services-appointments/faq/top-surgery [https://perma.cc/6F3L-M8EW].

state interests.[351] But neither of these interests support such an onerous proof requirement for a sex identity claim. First, any interest the state has in ensuring that sex-segregated spaces (bathrooms, locker rooms, etc.) only include people of the same sex does not support the surgical requirement for sex marker changes. When made, this argument is generally tied to a privacy or safety interest—i.e., people (and cisgender women in particular) will not be safe and/or will have their privacy interests violated in the restroom if people of another sex are permitted to enter that space.[352] One obvious reason that requiring surgery to change sex markers on identity documents does not support this interest is because these identity documents are usually not required to access sex-segregated spaces.[353]

But putting that aside, safety and privacy concerns do not support the burdensome identity proof standard for sex marker changes. First, there is little to no empirical evidence suggesting that allowing transgender people access to sex-segregated spaces raises safety concerns for cisgender people.[354] In fact, transgender individuals are more likely to experience—not commit—violence in the restroom than cisgender individuals.[355]

Moreover, it is unclear how requiring surgery to change a sex marker helps ensure privacy or safety. As for the safety concern, requiring surgery suggests that someone who has had sex-reassignment

351. *See, e.g.*, Mottet, *supra* note 246, at 413–20; *see also supra* notes 247–48 and accompanying text.

352. *See, e.g.*, Gwen Aviles, *Kentucky Bill Would Let Students Sue Over Transgender Bathroom Use*, NBC NEWS (Dec. 13, 2019, 1:21 PM), https://www.nbcnews.com/feature/nbc-out/kentucky-bill-would-let-students-sue-over-transgender-bathroom-use-n1101651 [perma.cc/76E6-8KSU] (describing a bill in Kentucky regarding bathroom use stating that "[c]hildren and young adults have natural and normal concerns about privacy while in various states of undress, and most wish for members of the opposite biological sex not to be present in those circumstances"); Aamer Madhani, *Battle Brewing Over Transgender Bathroom Laws in State Capitals*, USA TODAY, https://www.wkyc.com/article/news/battle-brewing-over-transgender-bathroom-laws-in-state-capitals/57900588 (Feb. 27, 2016, 9:14 AM) [https://perma.cc/3F38-8T7F] (finding that opponents of a nondiscrimination bill in Houston argued that transgender women are sexually perverse men who would use the ordinance to enter the women's restrooms and prey on wives, mothers, and daughters).

353. Mottet, *supra* note 246, at 419.

354. *See, e.g.*, Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, MEDIA MATTERS (Mar. 19, 2014, 4:06 PM), https://www.mediamatters.org/sexual-harassment-sexual-assault/15-experts-debunk-right-wing-transgender-bathroom-myth [https://perma.cc/UFT9-G97S] (compiling reports from law enforcement officials, government employees, and advocates for victims of sexual assault from 12 states and concluding that concerns about violence have no factual basis).

355. *See* Katy Steinmetz, *Why LGBT Advocates Say Bathroom 'Predators' Argument Is a Red Herring*, TIMES (May 2, 2016, 4:29 PM), https://time.com/4314896/transgender-bathroom-bill-male-predators-argument/ [https://perma.cc/L87D-HSNB]. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 226–27 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [perma.cc/7S34-VLUX].

surgery is less prone to violent behavior than someone who has not had sex-reassignment surgery. But a self-identified woman with a vagina is not less likely to harm someone than a self-identified woman with a penis.[356] There is simply no evidence indicating that pre-operative transgender people pose a greater safety risk than post-operative transgender people or cisgender people.[357]

As for the privacy concern, some have asserted that cisgender individuals' privacy interests are violated when transgender individuals with different genitals or secondary sex characteristics enter a sex-segregated space.[358] But as Professor Susan Hazeldean has convincingly argued, none of the six primary theoretical justifications for privacy rights support this claimed privacy violation.[359] Instead, she shows how it is *transgender individuals'* privacy rights that are at stake when they are excluded from sex-segregated spaces.[360]

Even assuming cisgender individuals' privacy interests are legitimate, these interests do not require transgender people to have surgery to access a sex-segregated space. Many sex-segregated spaces (like bathrooms and dressing rooms) provide ample privacy options such that individuals do not have to expose their body or view anyone else's body. For other spaces, like locker rooms—where privacy may be harder, but usually not impossible, to come by—the privacy interest can be addressed by adding additional private spaces, which is something that most people generally desire.[361] Additionally, by requiring surgery, the law suggests that an individual's subjective feelings of discomfort when a woman with a penis sees their exposed body (compared to their discomfort when a woman with a vagina sees them naked), is so great that the law should require people to have expensive and evasive surgery. Privacy or safety concerns, therefore, cannot justify such high standards for sex marker change laws.

A second interest often invoked in this context is fraud prevention, or the concern that people will fraudulently change their sex markers

356. *See generally* Maza & Brinker, *supra* note 354 (suggesting that because allowing transgender people access to sex-segregated spaces has not resulted in increased crimes, a transgender person is not more likely to commit a crime than a cisgender person).

357. *Id.*

358. *See, e.g.*, *Wolf Continues Its Fight for Girls' Privacy and Safety in Boyertown*, WOMEN'S LIBERATION FRONT (Jul. 12, 2018), https://www.womensliberationfront.org/news/wolf-continues-its-fight-for-girls-privacy-and-safety-in-boyertown?rq=birth%20certificate [https://perma.cc/W7MU-UNR5] (statement of Lierre Keith) ("A male person cannot become female. Male people who wish to enter the intimate spaces that are reserved for female people are invading women's spaces, which violates the human rights of women and girls.").

359. Susan Hazeldean, *Privacy as Pretext*, 104 CORNELL L. REV. 1719, 1769–70 (2019).

360. *Id.* at 1770; *see also* Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L. J. 145, 171–76 (2017) (debunking the privacy and safety justifications for sex-segregated bathrooms).

361. Clarke, *supra* note 28, at 982–83.

to avoid law enforcement or creditors or to engage in some other bad act.[362] But the extent to which changing a sex marker helps someone commit fraud is questionable. Changing other information—like name, address, financial institution, and hair color—is more helpful in facilitating fraud than changing a sex marker.[363] Yet changing this information is comparatively much easier than changing a sex marker. Moreover, making it difficult to change sex markers on identity documents can ring false alarms for fraud and divert law enforcement attention away from legitimate fraud. For instance, consider a person who ascriptively appeared to be a woman to most observers. The picture on her license is updated and matches her current appearance, but her sex marker still reads "M" because she did not meet the law's surgical requirements. Because of this mismatch between her appearance and her sex marker, she is subjected to extra security screenings at airports, additional barriers when applying for loans, and increased scrutiny when purchasing items that require proof of identification. Resources are spent chasing down suspected fraud because her sex marker raises red flags.[364]

There is no empirical evidence that less onerous standards to change sex markers are correlated with an increase in fraud.[365] But even assuming that the fraud concerns were legitimate, requiring invasive medical procedures to change a sex marker would still be too high of a burden. An individual seeking to commit fraud by changing their birth certificate can be deterred through less rigorous standards—like a statement from a doctor or other professional attesting to the veracity of their desire to change sex markers.

Some scholars have convincingly argued that the government does not have any legitimate interest in regulating sex markers on birth certificates and that sex markers should be eliminated on birth certificates.[366] But even assuming *arguendo* that there is some reason the state needs to have sex markers on birth certificates in the first place, or needs to erect any barriers to changing them, requiring biological evidence of sex, usually in the form of surgery, does not align with the

362. *See, e.g.*, Kenji Yoshino, *Sex and the City: New York City Bungles Transgender Equality*, SLATE (Dec. 11, 2006, 2:43 PM), https://slate.com/news-and-politics/2006/12/new-york-city-bungles-transgender-equality.html [https://perma.cc/F8BY-W752] (describing the concern that "[l]owering the barriers to sex reassignment increases the incentive for individuals who have no sincere desire to change their sex to do so for opportunistic reasons."); Clarke, *supra* note 28, at 947–48 (discussing this concern and other concerns in the context of non-binary gender).

363. DAVIS, *supra* note 48, at 51 (arguing that sex-identity markers are "poor proxies for personal identification" and that governments should use other techniques, such as biometrics, instead).

364. *See id.* at 2–3.

365. *See* Yoshino, *supra* note 362 (discussing the unlikeliness of sex fraud).

366. *See, e.g.*, DAVIS, *supra* note 48, at 51 ("[R]elevant [government] agencies [should] remove sex markers from the identity documents they issue.").

purported functions of these laws (even assuming these functions are legitimate).

Turning to sex-segregated sports, both the former NCAA rule (the focus of which on testosterone levels is likely to be perpetuated through its new sport-specific approach) and the Idaho law determine sex in ways that fail to align with their stated purposes, though the latter much more so than the former. As for the NCAA rule, before the rule change in January 2022, the self-proclaimed purpose behind the policy was to ensure that no one has an unfair advantage in women's sports due to high testosterone levels.[367] However, the way the NCAA adjudicates sex (requiring trans women to be on testosterone blockers for one year[368]) does not necessarily align with this purpose. To be sure, there is evidence linking higher testosterone levels to increased muscle mass, strength, and other traits that can give athletes in certain sports a competitive advantage.[369] However, if testosterone levels produce an unfair advantage, why only regulate the testosterone of transgender women? Cisgender women could have higher levels of testosterone than a transgender woman on testosterone blockers.[370] In this way, the NCAA's former policy, and NGBs that have adopted, or will adopt, a similar rule, are context-detached because they fail to account for testosterone in cisgender women. Rather than ensuring people who compete in women's sports have similar levels of testosterone, this policy singles out transgender people and their bodies as objects of regulation.

The purported purposes of Idaho's law are similar to the fairness-based goal of the NCAA rule—namely, "promoting sex equality, providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities, and by providing female athletes with opportunities to obtain college scholarship and other accolades."[371] However, the Act's approach to determining who is "female" for sex-segregated sports has very little to do with these purposes.[372] As discussed, the Act relies on "reproductive anatomy," chromosomes, and naturally occurring hormone levels. Yet these traits do not affect athletic performance. That is, whether a student was born with a vagina or a penis, or XY or XX chromosomes, in and of themselves, have nothing to do with that student's athletic capabilities. Because these traits do not affect students' bodies in ways that could improve their physical capabilities, using them to determine "sex" does nothing to

367. *See* GRIFFIN & CARROLL, *supra* note 263, at 10, 13.
368. *Id.* at 13.
369. See Hecox v. Little, 479 F. Supp. 3d 930, 982 (D. Idaho 2020).
370. *See* David J. Handelsman, Angelica L. Hirschberg & Stephane Bermon, *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 ENDOCRINE REVS. 803, 807 (2018) (showing varying levels of testosterone in cisgender women).
371. IDAHO CODE § 336202(12).
372. *Little*, 479 F. Supp. at 984.

ensure fairness in women's sports or promote sex equality. The fairness purpose of the Act would only arguably be advanced by something it excludes—circulating testosterone, the primary driver of relevant physiological differences between male and female athletic performance.[373] Instead, the Act relies on endogenous testosterone, which depending on the individual, may not reflect their current testosterone levels or their athletic capabilities. Moreover, on its face, Act does not bar transgender men who are taking testosterone from participating in women's sports as long as they have not had surgery to their genitals. In other words, a student assigned female at birth who has testosterone levels similar to those of a cisgender man are "biologically female" under the terms of the Act even though they arguably have a competitive advantage over cisgender women in some contexts.

In these ways, and in others,[374] the Act's definition of "sex" is completely context-detached because it fails to advance any of the Act's purported purposes. In its decision enjoining the Act, the district court relied on the complete lack of fit between the Act's stated goals and the means used to achieve those goals when holding that the Act likely violated the Equal Protection Clause.[375] Due to this gross lack of fit between the Act's stated goals and its means of achieving those goals, the district court held that the purported purposes of the Act were not the Act's actual goal; rather, it held that the Act's actual goal is to "exclude[e] transgender women and girls from women's sports entirely, regardless of their physiological characteristics." The Act's definition of sex is not context-detached at all if transgender exclusion is its purpose; rather, it effectively serves its goal.[376]

373. *See id*. at 984 ("[T]he Act's definition of 'biological sex' intentionally excludes the one factor that a consensus of the medical community appears to agree drives the physiological differences between male and female athletic performance.").

374. For instance, the Act also fails to make any distinctions based on age, skill level, or sport. All three of these factors affect whether sex distinctions are relevant or ensure fairness for women's sports. For instance, sex distinctions are not related to athletic performance until puberty; yet the Act applies to youth sports. *Id.* at 979 ("[B]efore puberty, boys and girls have the same levels of circulating testosterone."). Additionally, sex distinctions (post-puberty) might make a difference in sports like basketball or soccer, but for sports like long-distance running and swimming or golf, there is evidence that testosterone levels do not necessarily produce a competitive advantage. *See* Nancy Leong, *Against Women's Sports,* 95 WASH. U. L. REV. 1249, 1275–76 (2018) (compiling evidence that for many sports, sex-segregation is not justified and that testosterone levels do not give people a competitive advantage).

375. *Little*, 479 F. Supp. 3d at 979–84 ("That the Act essentially bars consideration of circulating testosterone illustrates the Legislature appeared less concerned with ensuring equality in athletics than it was with ensuring exclusion of transgender women athletes.").

376. In my future work, I expand on how context-detached identity determinations can reveal the actual purpose of a particular law, like how the context-detached nature of the Act led the district court to conclude that the Act's stated goals were not its actual goals.

2. Sexual Orientation

Context-detached adjudication of identity also occurs with sexual orientation and asylum. The function of asylum and similar forms of immigration relief is to determine whether a petitioner will be persecuted if forced to return to their home country and, for our purposes, whether that persecution is motivated by sexual orientation.[377] Accordingly, what people in the petitioner's home country know or think about the petitioner's sexuality, or will know or think about the petitioner's sexuality if they return, is crucial to this question of future persecution.[378] If those likely to persecute the petitioner think the petitioner is not straight, the petitioner will probably be persecuted.

But sometimes, this persecution-prevention purpose is not guiding the identity inquiry. As discussed, some adjudicators reject non-straight identity claims when petitioners have a history of different-sex relationships or lack a history of same-sex relationships; however, requiring alignment between petitioners' current self-identification and past sexual practices does not adequately take into account the goals of asylum for at least three reasons. First, sexuality is not rigid and stagnant; rather, it changes depending on context and over time.[379] So a petitioner's prior different-sex relationships do not necessarily shield her from future persecution because her sexuality could have changed. Second, being in a different-sex relationship does not mean that someone identifies as heterosexual. Bisexual and queer people are often in different-sex relationships and can still be persecuted based on their non-straight orientation. Third, because these petitioners come from countries where not being straight is, at best, socially stigmatized and, at worst, criminalized,[380] it is reasonable, and perhaps expected, that these petitioners would have been in different-sex relationships. For this same reason, petitioners often have difficultly solic-

377. 8 U.S.C. § 1101(a)(42); *see also* Cruz v. Sessions, 853 F.3d 122, 127 (4th Cir. 2017).

378. In this way, these laws mirror anti-discrimination laws in the sense that with both laws, the crucial identity question is how people's identities will be perceived by their discriminators/persecutors. However, unlike with anti-discrimination laws, where I argued that the "actual" identity of the plaintiff is irrelevant, the petitioner's sexual orientation may be relevant. Anti-discrimination law looks backward in time to adjudicate prior discriminatory conduct, but asylum law is forward-looking because it attempts to predict how the petitioner will be treated. If a petitioner is, in fact, not straight, they are likely to be persecuted in the future based on their non-straight identity. Thus, the petitioner's actual identity is strong evidence of how they are likely to be perceived in their home country.

379. *See* Christine E. Kaestle, *Sexual Orientation Trajectories Based on Sexual Attractions, Partners, and Identity: A Longitudinal Investigation from Adolescence Through Young Adulthood Using a U.S. Representative Sample*, 56 J. SEX RSCH. 811, 812 (2019) (describing fluidity of sexual orientation).

380. *See* IRAN ISLAMIC PENAL CODE arts. 233–40 (criminalizing same-sex relations, punishable by a range of various sentences ranging from flogging to the death penalty); TUNISIA PENAL CODE, art. 230 ("Sodomy. . . is punished by imprisonment for three years.").

iting corroborating testimony from their same-sex partners in their home country because it may subject their prior partners to persecution.

To be sure, past sexual and romantic relationships can be probative of whether petitioners will be persecuted based on their sexual orientation. But when petitioners have other identity evidence showing that their sexuality is known in their country, or will be known upon their return, allowing prior different-sex relationships to trump this evidence does not serve the purpose of the law—i.e., to prevent persecution.

For instance, recall that in *Mockeviciene*, the petitioner had evidence that people in her home country thought she was a lesbian; indeed, while in her home country, the police harassed her, and her husband beat her when he discovered her sexuality.[381] In other words, she had sufficient evidence that she would likely have been persecuted on the basis of her sexual orientation if she returned to her home country. Yet her claim for relief was denied because she had been previously married to a man and not had a same-sex partner.[382] Thus, the court failed to adjudicate her sexual orientation in a context-informed manner, guided by the persecution-preventing purpose of asylum.

The court's error was even worse in *Fuller*—where the court rejected the petitioner's claim to bisexuality because he was married to a woman, had kids with a woman, and was convicted of sexually assaulting a woman.[383] Not only does this case suffer from the same context-detached approach as *Mockeviciene*, it also makes it nearly impossible for a petitioner to convince the court that they are bisexual. If Fuller, someone who had romantic and sexual relationships with men and women, was not bisexual to the court, who would be? The rejection of Fuller's bisexuality claim may reflect a view that bisexuality is not a legitimate sexual orientation, which is a fairly common narrative, particularly as applied to men.[384] Thus, *Fuller*'s reasoning suggests that proving a bisexual identity may be more difficult than proving a gay or

381. Mockeviciene v. U.S. Att'y Gen., 237 F. App'x 569, 570–71 (11th Cir. 2007).
382. *Id.* at 574.
383. Fuller v. Lynch, 833 F.3d 866, 868 (7th Cir. 2016).
384. *See* Elissa L. Sarno et al., *Bisexual Men's Experiences with Discrimination, Internalized Binegativity, and Identity Affirmation: Differences by Partner Gender*, 49 ARCHIVES SEXUAL BEHAV. 1783, 1783–84 (2020) (discussing how bisexual individuals are stigmatized to be attention-seeking, untrustworthy, confused about their sexual orientation, or feigning to be trendy); Katherine M. Hertlein et al., *Attitudes Toward Bisexuality According to Sexual Orientation and Gender*, 16 J. BISEXUALITY 339, 341 (2016) (noting that female bisexuality is considered more socially acceptable than male bisexuality); Yoshino, *supra* note 365, at 362 (arguing that homosexuals and heterosexual share an interest in bisexual erasure).

lesbian identity, depending on the adjudicators' biases against bisexual identity.[385]

Not all courts adjudicating identity for asylum claims share this problem. Indeed, in the context of both religion and sexual orientation, some courts ask how the petitioner's identity will be understood in their home country.[386] Thus, identity adjudication in asylum is not consistent and appears dependent on the particular legal actors involved.

3. Race

Race adjudication also, at times, is insufficiently attentive to the purposes of the law at issue. The function of the laws addressed in this section have been widely debated, discussed, and litigated. Currently, the Supreme Court has limited the constitutionally permissible purposes of race-conscious benefit laws to (1) remedying past or present discrimination[387] and (2) promoting institutional diversity.[388] For the laws discussed in this Article, their purposes are primarily remedial, so this analysis will therefore focus on that function.

Supreme Court precedent has greatly limited the scope of the remedial function of these laws. Under this precedent, remedying societal discrimination at large is too broad of a function.[389] Rather, the remedial focus needs to be narrower, like remedying racial exclusion from a particular industry or job within a certain geographical area (e.g., the construction industry in Atlanta).[390] Considering this function, how then should eligibility for these programs be determined? In other words, how can the law figure out who has likely been excluded from a particular industry based on their race? One option is to ex-

385. This increased burden to prove sexual orientation may also apply to other sexuality categories that are less politically powerful and culturally salient than "gay" and "lesbian," like, for instance, asexuality. *See* Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 306, 347–48, 374 (2014) (discussing how our legal system assumes the existence of sexuality and how asexuality has not yet been included in legal understandings of sexual orientation).

386. Amanfi v. Ashcroft, 328 F.3d 719, 726 (3d Cir. 2003).

387. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in judgment).

388. Grutter v. Bollinger, 539 U.S. 306, 343 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978); Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

389. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 502 (1989); O'Donnell Const. Cor. v. Dist. of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

390. *J.A. Croson Co.*, 488 U.S. at 496–97 (1989) (citation omitted) (comparing the "the 'focused' goal of remedying 'wrongs worked by specific instances of racial discrimination'" with "the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past" and explaining that only the former is permissible). Moreover, remedial measures need to be supported by a "strong basis in evidence" of a racial disparity, which generally requires that the government show a disparity between the number of eligible racial minorities in the relevant market and the number of racial minorities in that market. *See id.* at 502.

amine how the applicant may be racialized in the context of that industry. In other words, if the law's purpose is to remedy discriminatory treatment of Black or Hispanic applicants in a certain industry, then eligible individuals should include those who are racialized as Black or Hispanic in that industry. They are the ones most likely to have been excluded under the discriminatory hiring regime.

If racialization is the most accurate way to identify who has been excluded from these industries, then adjudicators' goals should be to determine whether someone has been voluntarily or involuntarily racialized in a particular way.[391] Some aspects of racial adjudication in the *Malone* and the *Orion* cases deviate from this purpose. First, in both cases, the adjudicators examined the applicants' physical appearances and racial phenotypes to determine whether they appeared to be the race they claimed. And in both cases, the applicants appeared white to the adjudicators.

To be sure, physical appearance is highly relevant to how someone is racialized. But relying exclusively on the adjudicators' opinions of whether the applicants' physical appearances matched their self-identification may be the wrong inquiry. Whether someone appears to be a member of a particular racial group is highly dependent on the viewer—their experiences with other racial groups, their own race, etc.[392] So the race adjudicators assign to applicants based on their physical features may not be indicative of how these individuals are racialized most of the time. Moreover, if the remedial purpose is focused on the context in which the discriminatory treatment has occurred, it makes more sense for individuals within that particular context to assign race based on an applicant's physical appearance, rather than adjudicators who are not in that industry or job.

Another example of context-detached race adjudication comes from *Malone*, when the court considered whether the Black community considered the Malone brothers to be Black.[393] Here again, this inquiry does not help elucidate how the applicant was racialized within the industry the benefit law is targeting. Whether the Malone brothers were racialized as Black by the group they were claiming to be a part of (the Black community) matters less here than how they

391. This discussion evaluates race adjudication under the theory that racialization within an industry best captures eligibility based on the remedial purpose of these laws. *See Racial Commodification and the Promise of the New Functionalism*, *supra* note 198, at 210 (using racialization to determine eligibility for affirmative action programs). There may be a better mechanism to determine eligibility that is also constitutionally permissible. The subsequent evaluation of whether racial adjudication is overly onerous or not would likely change depending on the particular mechanism for determining eligibility. The larger point this Article is making, however, remains the same—that the identity evidence required for an identity claim should be informed by what is needed to fulfill the function of the law.

392. *See* Greene, *supra* note 17, at 90.

393. *See* Malone v. Civ. Serv. Comm'n, 646 N.E.2d 150, 151 (Mass. App. Ct. 1995).

were racialized by the potential discriminators within the job or industry who were not Black.[394] In contrast, in *Orion,* the analysis centered on how Taylor's race was perceived in the proper context, i.e., the business community.[395] Thus, requiring that applicants be racialized as the race they are claiming to be in contexts beyond the remedial focus of the benefit law may also be overly burdensome and not in line with the function of the law.

Another potentially problematic aspect of racial adjudication is the assumption that prior inconsistent identifications are indicative of fraud and then using those prior identifications to estop an identity claim. In *Malone*, the brothers' prior identification as white played a role in their ultimate exclusion from the affirmative action program, as did Taylor's prior self-identification as white (before he received his ancestry results) in *Orion*.[396] And in *United States v. New York City Board of Education*, employees' self-identification as white on their job applications was enough to exclude them from the settlement funds.[397]

Using prior inconsistent racial identification to bar membership in a claimed racial group does not necessarily align with the law's function and may exclude people the law intended to include. First, inconsistent identification does not necessarily indicate fraud. Multiracial individuals sometimes self-identify as monoracial, or identify with different monoracial groups, depending on the timing, the context, the form of the inquiry about their racial status, and how they think their responses will be used.[398] These same individuals may be racialized as non-white and discriminated against on that basis; thus, in light of the purpose of these laws, their prior identifications should not estop them from asserting a different identity. Second, changes in self-identification may be associated with discovering new information about one's background, like the plaintiff in *Orion*.[399] If someone reveals this new information or their new self-identification to others, it could

394. Other scholars have made related points about affirmative action and the Malone case. *Racial Commodification and the Promise of the New Functionalism*, *supra* note 198, at 208–09; *see also* Ford, *supra* note 158, at 1281–82.

395. *See* Orion Ins. Grp. v. Wash. State Off. of Minority & Women's Bus. Enters., No. 16-5582, 2017 WL 3387344, at *2–3 (W.D. Wash. Aug. 7, 2017), *aff'd sub nom.* Orion Ins. Grp. v. Wash.'s Off. of Minority & Women's Bus. Enters., 754 F. App'x 556 (9th Cir. 2018).

396. *See Malone*, 646 N.E.2d at 151; *Orion Ins. Grp.*, 2017 WL 3387344, at *2.

397. United States v. N.Y.C. Bd. of Educ., 85 F. Supp. 2d 130, 153 (E.D.N.Y. 2000).

398. *Elective Race*, *supra* note 61, at 1533–35; *see also Racial Commodification and the Promise of the New Functionalism*, *supra* note 198, at 192 (2013) (citing studies showing that factors such as "class, history of imprisonment, and other experiences of social marginalization can trigger multiracials to 'choose' to claim a minority identity"); *see also* Tehranian*, supra* note 291, at 3, 7–8 (explaining that racial identities are not stable both because the categories themselves change and because individuals' racial identities may change in relation to other aspects of their identity, such as their political affiliation).

399. *See Orion Ins. Grp.*, 2017 WL 3387344, at *2.

affect how they are racialized. Indeed, a police officer sued for racial discrimination based on the anti-Black workplace harassment he faced after sharing his Ancestry.com results, which revealed he was 18% African.[400] Thus, changes in racial self-identification are not necessarily indicative of fraud and do not mean that individuals should be deemed ineligible for benefit laws.

A final common thread in both *Orion* and *Malone* that merits discussion is their use of ancestral evidence to determine eligibility for these benefit laws. In *Malone*, the hearing officer affirmatively asked the brothers to provide this evidence, and in *Orion*, Taylor provided it on his own to support his racial claims. But these adjudicators did not appear to use this ancestral evidence to determine how these applicants were racialized. Although ancestry certainly plays a role in racialization through the inheritance of certain racialized features, like skin color, hair color, etc., neither *Malone* nor *Orion* used ancestral evidence as a proxy for physical appearance. In both cases, physical appearance and racial phenotype were considered via other forms of evidence. Ancestral evidence could also have affected these applicants' racialization if they revealed their ancestral backgrounds and were subsequently assigned a racial identity based on that information. But that's not how ancestral evidence was used in these cases either. Rather, the ancestral evidence seemed to provide these applicants with an alternative way to prove their racial claim—a path separate and apart from how they were racialized. In *Malone*, if the brothers had been able to prove that their grandmother was Black, then they might have been eligible for the affirmative action program, regardless of how they were racialized. And in *Orion*, Taylor's case may have come out differently if he was more than 4% African. Ancestral evidence could have also been treated as an additional requirement for eligibility, that is, Taylor and the Malones would need to have a certain percentage of African ancestry to qualify, regardless of other identity evidence.

If the remedial purpose of these laws was permitted to be broader and capable of addressing how the historical subordination of racial groups across education, employment, healthcare, housing, etc., has led to current racial disparities, ancestral evidence could be necessary to fulfill the purpose of these laws. If the law were able to recognize how, for example, descendants of slaves have inherited hundreds of years of systemic disadvantage, then examining whether someone may be a descendant of an enslaved person would be crucial. But as dis-

400. *See* Complaint at 5, Brown v. City of Hastings, No. 17-cv-0033 (W.D. Mich. 2018). The case was settled after the officer filed a complaint. Nicole Rojas, *White Police Officer Receives $65,000 Settlement from City in Racial Discrimination Suit*, NEWSWEEK (Aug. 1, 2018, 12:05 PM), https://www.newsweek.com/cleon-brown-hastings-police-michigan-racial-discrimination-settlement-1052977 [https://perma.cc/66SN-XDDQ].

cussed, the Supreme Court has barred broader and more historically conscious remedial functions of benefit laws. Thus, examining ancestral evidence does not necessarily align with the purposes of these laws.

4. Problems Caused by Context-Detached Adjudication

The harms from context-detached adjudication in benefit laws mirror those from anti-discrimination laws. First, a context-detached approach causes doctrinally inconsistent outcomes. For instance, the identity inquiry in asylum claims is sometimes based on how the petitioner's identity will be understood in their home country and, other times, based on whether they "really" are the identity they claim to be. Context-detached adjudication also produces results inconsistent with the purpose of asylum law—asylum law is meant to protect petitioners, like Fuller and Mockeviciene, who were likely to be perceived as not straight in their home country and persecuted on that basis. Another example of inconsistency arises with sex adjudication—whether someone is legally male or female for the purposes of a legal sex designation on a birth certificate depends on the state in which someone lives. Someone could be legally male in one state and legally female in the next. Similarly, an athlete's sex could be "female" under the NCAA sport-specific rule, and "male" under Idaho's law.

Context-detached identity adjudication also leads to over-interrogation of identity and raises concerns similar to those raised in the context of anti-discrimination laws. First, using more identity evidence than called for to adjudicate identity can raise privacy concerns. For example, if ancestral evidence for racial adjudication isn't necessary for a particular law, as suggested above, examining someone's ancestral background, via their results from service like 23andMe or otherwise, is unnecessarily intrusive. Relatedly, dignity interests may be threatened when a state actor conducts a visual inspection of an individual and then ascribes them a racial identity; if the relevant question is not how a single state actor perceives someone's race, there is no need to risk dignity harms.[401]

In the context of sex, requiring invasive and expensive surgery and/or hormone usage to change a legal sex designation on identity documents has obvious implications for people's privacy and dignity.[402]

401. *See Racial Commodification and the Promise of the New Functionalism*, *supra* note 198, at 193 (warning that census officials using third-party observations to determine a person's race may result in "racially categorizing an individual in a way that fundamentally contradicts the individual's own understanding of her race"); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part) (arguing that forcing individuals to "live under a state-mandated racial label" is "inconsistent with the dignity of individuals in our society" because it assigns labels "that an individual is powerless to change").

402. Other scholars have made similar arguments. *See, e.g.*, Holning Lau, *Gender Recognition as a Human Right in* THE CAMBRIDGE HANDBOOK ON NEW HUMAN

Rules mandating hormone therapy to play sex-segregated sports in college raise similar questions, and Idaho's definition of "female" for sports subjects individuals to particularly invasive inspections. When any student on an all girl's/women's team has their sex challenged, they must agree to pelvic examinations to "verify" their "reproductive anatomy," genetic testing to determine their chromosomes, and/or hormone testing to remain on the team.[403] This law also harms transgender students' dignity and autonomy interests by assigning them a sex identity that does not align with their self-identification and forcing them into spaces and activities that do not reflect their identity.[404]

This is not to say that privacy and dignity interests should always outweigh the interests underlying the particular law at issue. But when identity adjudication does not serve the interests of the underlying law (i.e., when identity adjudication is context-detached), these interests are being harmed for no reason.

Also, over-interrogation can lead to legal actors reinforcing problematic definitions of identity. For example, both the *Mockeviciene* and *Fuller* courts constructed factually incorrect and overly restrictive definitions of lesbian and bisexual identities—the former by holding that the petitioner was not a lesbian because she had been married to a man and hadn't been in a relationship with a woman and the latter by holding that the petitioner was not bisexual because of his relationships with women.[405] In the context of sex, requiring that someone has certain sex characteristics to change their legal sex designation or play sex-segregated sports helps construct and reinforce the dominant narrative that is sex binary, fixed, and defined by certain body parts. As discussed, this construction of legal sex has many harmful consequences for transgender and intersex people, but also for cisgender people through its role in reinforcing restrictive sex stereotypes.[406]

RIGHTS: RECOGNITION, NOVELTY, RHETORIC 194 (Andreas von Arnauld, Kerstin von der Decken & Mart Susi eds., 2020).

403. IDAHO CODE § 33-6203(3); Hecox v. Little, 479 F. Supp. 3d 930, 985–87 (D. Idaho 2020) (holding that the Act subjects students who try out for the girls' soccer team "to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex" and that "[s]uch violations are irreparable").

404. *See, e.g.*, Evancho v. Pine–Richland Sch. Dist., 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (describing how exclusion of transgender students from restrooms that matched their identity "caus[ed] them genuine distress, anxiety, discomfort[,] and humiliation").

405. *See generally* Mockeviciene v U.S. Att'y Gen., 237 F. App'x 569, 570 (11th Cir. 2007); Fuller v. Lynch, 833 F.3d 866, 872 (7th Cir. 2016); *see also* Robinson, *supra* note 27, at 1314 (making a similar argument about how jail officials' determinations regarding inmates sexuality reflect and create narrow and problematic definitions of gay identity).

406. *See supra* Subsection IV.B.3. As mentioned, I will explore these harms, and others flowing from over-interrogation of identity, in my future work.

V. Conclusion

This Article understands identity adjudication as a legal phenomenon operating across identities and areas of law and has attempted to make sense of this phenomenon by developing a taxonomy through which to understand the factors legal actors use to determine someone's identity—factors that these actors are not making explicit and/or even consciously using. Examining identity adjudication in this broad way reveals systemic problems with how legal actors understand and adjudicate identity. This Article has examined one of those problems—a context-detached approach to determining identity—and offered an alternative—a context-informed approach. Rather than approaching identity as a stable fact or characteristic about someone, legal actors should begin by asking why identity matters to the law in the first place. Perhaps a particular legal rule does not require identity adjudication at all (like anti-discrimination law). And if the legal rule does require determining someone's identity, the definition of identity and the proof requirements of an identity claim should be informed by the purpose of the specific law at hand. A context-informed approach would also bring identity adjudication to the surface and force legal actors to make the fact of, and their reasoning behind, identity adjudication explicit. Additionally, because the law would be disciplining the identity inquiry, there would be less room for legal actors' subjective or conscious ideas, biases, and stereotypes about particular identities to taint the identity determination.

This is not to say that context-informed identity adjudication will always produce just, fair, or equitable results. The normative value of context-informed identity adjudication is tied to the normative value of the law at issue. For example, a context-informed approach to adjudicating identity for a law that limits citizenship to only those individuals who qualify as "white" would produce outcomes that further entrench racial subordination. However, adopting a context-informed approach would limit the normative assessment to the purpose of the law and would eliminate many of the problems that flow from legal actors making identity determinations based on their own subjective ideas about identity rather than the particular law at issue.