

RECOMMENDATIONS FOR INSTITUTIONAL AND GOVERNMENTAL MANAGEMENT OF GENDER INFORMATION

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ABSTRACT

Gender information management is becoming an area of increased concern and tension in recent years due to the parallel rise of trans visibility and the increase of government surveillance. With this Article, I aim to provide a structured and principled analytical framework for managing gender information in a manner that is responsive to different institutional contexts. Part I sketches the ethical considerations and principles which guide my recommendations. Whereas ethical considerations are the values which underlie my recommendations—the why—the proposed principles provide us with conceptual tools to bridge the why, when, and how of gender information management. Part II explores four different contexts in which gender information should be gathered and recorded and makes recommendations specific to each of those contexts. These four contexts are: administrative records, special programs, aggregate assessment, and research. Part III sketches how and what—when justified under the recommendations—gender information should be requested, recorded, and recounted.

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I. INTRODUCTION

In early 2018, I took part in the Canadian federal government’s LGBTQ2 Secretariat consultations with trans and two-spirit communities. The consultations were part of the government’s exploration of “new approaches to the collection, use, and display of sex and gender information in order to be more inclusive of gender diverse communities.”¹ A few participants and I later expressed disappointment with the consultation process. I noted sources of resentment on my part: the inability of participants to review the report and comment on it prior to its release, and the absence of opportunities to submit written comments and recommendations.

1. Email from Samantha McDonald, Exec. Dir., LGBTQ2 Secretariat, to author (Jan. 22, 2018, 10:37 EST) (on file with author).

However, because participants were not invited to flesh out their thoughts in written submissions, the recommendation appears somewhat unlikely to be followed. The government's resulting report, which participants did not have the opportunity to comment on prior to release, was limited in many ways and did not propose, in my eyes, a structured and thoughtful analysis of the issues posed by gender information management.² During the consultation, I recommended that the government distinguish clearly between three contexts of information gathering: administrative records, aggregate assessment, and research. Upon reflection, I would now add a fourth context of information gathering: special programs. Anecdotally, I heard many other participants share similar dissatisfaction with the consultation process, which they also felt was less than meaningful. This Article is an attempt to flesh out my recommendations for the institutional and governmental management of gender information. Although the initial motivation for the Article arose in a Canadian context, the concerns that animate the Article and provide fuel for the analysis are equally relevant to the United States, given the two countries' cultural and legal similarity.

Painting an accurate portrait of the prevailing state of affairs in Canada and the United States is challenging due to the heterogeneity of the landscape. Nevertheless, a few general observations can be made. Gender information is not highly regulated in either country, leading to a patchwork of practices across institutions. The use of gender information in administrative records is pervasive, and it is often used for identification purposes—notably at banks, where trans people are at risk of being locked out of their account due to their voice. Legal sex is frequently the sole information recorded, often under a false impression that it is legally required. Gender identity and sex assigned at birth are rarely distinguished—and, in the United States, trans people are constantly at risk of being erased from population-level surveys, with dire impacts on policymaking and funding.³

Having issued a policy direction on gender information management, the Canadian federal government's stance stands in notable contrast to the United States' patchwork approach.⁴ The policy direction requires Canadian federal departments

2. Privy Council Office, *The Collection, Use and Display of Sex and Gender Information at the Federal Level: Findings from Six Engagement Sessions with Transgender, Non-binary and Two-spirit Communities*, GOV'T OF CAN. (Jun. 2018) (Can.), <https://www.canada.ca/en/privy-council/corporate/clerk/publications/sex-gender-information-federal-level.html> [https://perma.cc/VXP9-QTU5].

3. Nico Lang, *Inside the Battle to Get LGBTQ Americans Counted in the Census*, DAILY BEAST (June 20, 2019), <https://www.thedailybeast.com/inside-the-battle-to-get-lgbtq-americans-counted-in-the-census> [https://perma.cc/7RFM-CLQC]; cf. *Collecting Sexual Orientation and Gender Identity Information*, CTR. FOR DISEASE CONTROL (Oct. 21, 2019), <https://www.cdc.gov/hiv/clinicians/transforming-health/health-care-providers/collecting-sexual-orientation.html> [https://perma.cc/PG6M-8MTU].

4. See Treasury Bd. of Can. Secretariat, *Modernizing the Government of Canada's Sex and Gender Information Practices: Summary Report*, GOV'T OF CAN. (Oct. 2018) (Can.),

and agencies to provide clear rationales for requesting, recording, and recounting gender information; to default to the use of gender identity rather than sex assigned at birth; to provide for options outside male and female; and to provide “non-intrusive” ways to change gender information.⁵ Although this policy direction might at first glance offer an appealing model for the United States to follow, it does not go far enough. Namely, by maintaining the use of gender information in administrative records for identification purposes, condoning the use of that data as a proxy for health information, allowing the collection of gender information without genuine necessity, and failing to tailor its directives to different contexts of use, the Canadian government fails to adequately protect trans communities’ rights.

As gender information management becomes an area of increasing concern and tension, a cogent and principled approach attuned to the realities of trans people is needed. How should institutions and governments approach gender information? This Article forays into the territory of gender information management to develop a flexible framework that is responsive to the needs of trans communities, built around the principles of necessity, accuracy, consensualism, and de-gendering.

In Part I, I sketch the ethical considerations and principles which guide my recommendations. Whereas ethical considerations are the values which underlie my recommendations—the *why*—the proposed principles provide us with conceptual tools to bridge the *why* to the *when* and *how* of gender information management.

In Part II, I explore four different contexts of information gathering and reporting and make recommendations specific to each of those contexts. These four contexts are: administrative records, special programs, aggregate assessment, and research. I outline *when* gender information should be gathered and recorded.

In Part III, I sketch *how* and *what*—when justified under the recommendations—gender information should be requested, recorded, and recounted.

II.

ETHICAL CONSIDERATIONS AND GUIDING PRINCIPLES

A. *Ethical considerations*

Various ethical considerations are relevant when analysing gender information management and making policy recommendations. Ethical considerations arise in areas that include: (1) privacy, (2) accounting for needs, (3) legal requirements and identity verification, (4) misgendering and discrimination, and (5)

<https://www.canada.ca/en/treasury-board-secretariat/corporate/reports/summary-modernizing-info-sex-gender.html> [<https://perma.cc/G9WS-X5GT>].

5. Treasury Bd. of Can. Secretariat, *supra* note 4.

surveillance. Some of these ethical considerations pull strongly in favour of gathering gender information while others pull against it. Often, these considerations give rise to reasons for building in constraints on how, when, and what gender information should be gathered.

Ethical considerations are the underlying values informing my selection of guiding principles, which in turn will be used to make recommendations. Ethical considerations can also serve as interpretive tools when applying guiding principles to contemplated institutional and governmental management of gender information.

1. Privacy

Many people do not want their gender or sex assigned at birth to be recorded. This is especially true for trans people, who may be concerned that their recorded gender and/or sex assigned at birth could reveal them to be trans. Non-binary individuals routinely have to opt between disclosing the fact that they identify with a gender other than the one they were assigned at birth and misreporting their gender on institutional documents—which would amount to self-misgendering. I have personally misreported my gender as “female” a variety of times to facilitate social intercourse and avoid probing inquiries into my non-binary identity. The decision was uncomfortable and distressing despite being voluntary.

Gender identities and transitude⁶ are quintessentially personal information. As Hale M. Thompson observed in a study, 93% of trans participants did not include “trans” or “genderqueer” as their gender marker on Facebook despite being open about their transitude with friends.⁷ Even in the trans-specific study, some participants were reluctant to report their sex assigned at birth.⁸ Privacy concerns were heightened vis-à-vis the reporting of sex assigned at birth on institutional intake forms because of the risks of information sharing: “Multiple instances of nondisclosure were given in every group, as were examples of involuntary disclosure.”⁹ The concerns are not limited to the recording of sex assigned at birth, however, and also arise in relation to gender identity. Reporting gender identity can disclose transitude for non-binary individuals as well as for those who may still be socially read, whether intentionally or not, as their sex assigned at birth. Because gender identity may evolve in time, having a record of it can make things more difficult for individuals whose identity has changed since the time of intake.

6. The state of being trans. Florence Ashley, *Don't Be So Hateful: The Insufficiency of Anti-Discrimination and Hate Crime Laws in Improving Trans Well-Being*, 68 U. TORONTO L.J. 1, 4 (2018).

7. Hale M. Thompson, *Patient Perspectives on Gender Identity Data Collection in Electronic Health Records: An Analysis of Disclosure, Privacy, and Access to Care*, 1 TRANSGENDER HEALTH 205, 208 (2016).

8. *Id.* at 208.

9. *Id.* at 210.

Though many trans individuals are comfortable providing their gender identity, they may not be comfortable in all contexts; nor are all of them comfortable providing such personal information.¹⁰

Gender information in institutional records is typically available to all administrative staff, and too often readily available to all other employees of the institution as well. As Thompson notes, “employers, pharmacists, and law enforcement have access to various aspects of health records as well as hospital registration staff, any of whom a patient may have to interact with repeatedly and may depend upon for essential resources.”¹¹ Such wide-ranging access to gender information appears inappropriate.¹² Beyond the fear that gender information may lead to later harassment, discrimination, and violence—a risk that will be considered more at length as a separate ethical consideration—access to gender information by others can be distressing in and of itself for trans, non-binary, and gender non-conforming individuals.

Privacy-enhancing measures can and should be considered. Such measures include “patient portals, encryption, user-defined roles, and data segmentation.”¹³ As Thompson notes:

Before introducing opportunities to expose additional sensitive information, such as specification of sex assigned at birth, providers may need to devote resources to the protection of trans patients’ sensitive personal information. Given that sensitive information is not always protected, patients may withhold sensitive information or avoid care altogether to minimize harassment, disrespect, and denial of services.¹⁴

But privacy-enhancing measures remain limited. Segmenting information, restricting who has access to that information, and adopting anonymization techniques depends on institutional willingness and access to resources.¹⁵ These techniques also have significant practical drawbacks, even for institutions that can afford them. As Paul Ohm has highlighted, institutional and research data can be and has been de-anonymized. He writes that researchers in the last fifteen years “have done more than chip away [at anonymization]; they have essentially blown it up, casting serious doubt on the power of anonymization, proving its theoretical limits and establishing what I call the easy reidentification [i.e. discovering the

10. See Madeline B. Deutsch, JoAnne Keatley, Jae Sevelius & Starley B. Shade, *Collection of Gender Identity Data Using Electronic Medical Records: Survey of Current End-user Practices*, 25 J. ASS’N NURSES AIDS CARE 657, 659–60 (2014).

11. Thompson, *supra* note 7, at 206.

12. See Deutsch, Keatley, Sevelius & Shade, *supra* note 10, at 659–60.

13. Thompson, *supra* note 7, at 214.

14. Thompson, *supra* note 7, at 213.

15. Thompson, *supra* note 7, at 207.

individual to whom the information relates] result.”¹⁶ The risks are even higher with trans populations, which are sufficiently small to allow unique identification from relatively little information; large institutional records often have more than the little information required to re-identify individuals. As Ohm explains:

Even though administrators had removed any data fields they thought might uniquely identify individuals, researchers in each of the three cases unlocked identity by discovering pockets of surprising uniqueness remaining in the data. Just as human fingerprints left at a crime scene can uniquely identify a single person and link that person with “anonymous” information, so too do data subjects generate “data fingerprints”—combinations of values of data shared by nobody else in their table.¹⁷

We must also account for accidents and unknowns. Inappropriate disclosure of gender information has been known to occur when institutions transmit data to other institutions.¹⁸ Transferring data between a system which records both sex assigned at birth—even if they restrict access to that information—and gender identity and a system which records only “sex” could plausibly lead to accidental and unintentional disclosing of trans individuals’ sex assigned at birth. Data breaches such as SQL injection and the Heartbleed bug, as well as recurring news of unauthorized access to encrypted data, show the risks associated with privacy-enhancing measures in our technology-reliant world.¹⁹

The robustness of privacy-enhancing measures also depends on authority and political power. Courts, law enforcement officers, and governmental bodies can require transmission of individual or disaggregated data in varied contexts.²⁰ In a recent legal case from Quebec, the government requested access to raw data from the TransPULSE study in Ontario.²¹ Although the judge concluded that the public interest in privacy outweighed the public interest in truth-finding for the purposes of the lawsuit, a different judge could easily have concluded otherwise. The case

16. Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1716 (2010).

17. *Id.* at 1723.

18. Thompson, *supra* note 7, at 206.

19. See Zakir Durumeric, Mathias Payer, Vern Paxson, James Kasten, David Adrian, J. Alex Halberman, Michael Bailey, Frank Li, Nicolas Weaver, Joanna Amann & Jethro Beekman, *The Matter of Heartbleed*, in PROCEEDINGS OF THE 2014 CONFERENCE ON INTERNET MEASUREMENT CONFERENCE 475 (2014) (explaining the Heartbleed bug and estimating its impact); Ohm, *supra* note 16, at 1717–22 (discussing three examples of data deanonymization and their techniques); *SQL Injection*, MICROSOFT DOCS (2012), [https://docs.microsoft.com/en-us/previous-versions/sql/sql-server-2008-r2/ms161953\(v=sql.105\)](https://docs.microsoft.com/en-us/previous-versions/sql/sql-server-2008-r2/ms161953(v=sql.105)) [<https://perma.cc/85VT-EWYF>] (introducing the concept of SQL injection).

20. Thompson, *supra* note 7, at 206.

21. Centre de Lutte Contre l’Oppression des Genres (Centre for Gender Advocacy) c. Québec (Procureure Générale), 2016 CanLII 5161 (Can. C.S.).

also reveals cross-jurisdictional dangers, as a Quebec court considered ordering disclosure of disaggregated data from a different jurisdiction. Institutional records and research data gathered in states with relatively strong privacy protections may be vulnerable to disclosure requirements under the law of other jurisdictions.

The volatility of the U.S. and Canadian political context for trans communities warrants caution. The government and courts have far-reaching powers, and information that is assumed to be private now may prove itself not to be in the future.

2. *Accounting for needs*

Gender information, however, may be needed for various reasons. Patients, communities, and institutions have various needs that can sometimes be best met by the gathering of gender information. Those needs are perhaps best separated into two categories: needs of individuals and needs of communities and institutions.

INDIVIDUAL NEEDS

Patients' needs may be highlighted by gender information. This factor has been most discussed in the healthcare context: recording both gender identity and sex assigned at birth can be used to generate automatic reminders that, say, trans women may need prostate exams at a certain age, while systems that do not record gender information or only record gender identity remain ill-equipped to provide these reminders. The inclusion of a single indicator of gender—whether gender identity or sex assigned at birth—inhibits institutions from properly accounting for individual needs.²² The U.S. Centers for Medicare and Medicaid Services and the Office of the National Coordinator for Health Information Technology now require that electronic health records be able to include gender identity information, in addition to sex assigned at birth, because of such individual healthcare needs.²³

Whether gender information is the best way to address those needs is questionable: although vaginoplasties do not typically involve removing the prostate, other transition-related procedures such as hysterectomies do alter important

22. See Madeline B. Deutsch, Jamison Green, JoAnne Keatley, Gal Mayer, Jennifer Hastings & Alexandra M. Hall, *Electronic Medical Records and the Transgender Patient: Recommendations from the World Professional Association for Transgender Health EMR Working Group*, 20 J. AM. MED. INFO. ASS'N 700, 701 (2013).

23. See Electronic Health Record Incentive Program - Stage 3 and Modifications to Meaningful Use in 2015 Through 2017, 80 Fed. Reg. 62761, 62859 (Oct. 16, 2015) (to be codified at 42 C.F.R. pt. 412 and 459); Sean R. Cahill, Kellan Baker, Madeline B. Deutsch, JoAnne Keatley & Harvey J. Makadon, *Inclusion of Sexual Orientation and Gender Identity in Stage 3 Meaningful Use Guidelines: A Huge Step Forward for LGBT Health*, 3 LGBT HEALTH 100 (2016) (commending the Stage 3 guidelines and discussing next steps for implementation).

factors of care—for example the need for cervix cancer screening.²⁴ Hormonal profile may also be insufficient in addressing medical needs, given the potential differences between endogenous and exogenous hormones.

It may be preferable for institutional records to contain surgical history and the presence of certain organs, rather than gender.²⁵ Organs should be named neutrally and records should avoid unnecessary gendering such as “male sexual organ” for a penis.²⁶ Questions regarding surgical history and organ inventory should be carefully worded to avoid presuming a single, narrow view of medical transition which does not accurately represent every trans person’s transition process—indeed some trans people do not wish to medically transition at all.²⁷ As Greta Bauer, Jessica Braimoh, Ayden Scheim, and Christoffer Dharma observe, “research shows that a substantial proportion of trans persons who indicate they have ‘completed’ a medical transition have not had any surgeries.”²⁸ Alternatively, reminders of this kind could be coded separately, with doctors or patients—using, for example, patient portals—indicating whether they want to receive those reminders when accessing the patient’s file.

COMMUNITY AND INSTITUTIONAL NEEDS

Not all needs operate at the individual level. Research can reveal the needs of communities and indirectly improve their quality of life. Institutional funding is also often dependent on the ability to measure groups and outcomes. Recording gender information may improve funding opportunities for directed initiatives and programs.

24. See Deutsch, Keatley, Sevelius & Shade, *supra* note 10, at 657; Lauren Freeman & Saray Ayala López, *Sex Categorization in Medical Contexts: A Cautionary Tale*, 28 KENNEDY INST. ETHICS J. 243, 252–53 (2018).

25. See Greta R. Bauer, Jessica Braimoh, Ayden I. Scheim & Christoffer Dharma, *Transgender-Inclusive Measures of Sex/Gender for Population Surveys: Mixed-Methods Evaluation and Recommendations*, 12 PLOS ONE, May 2017, at 19; Nicole Rosendale, Seth Goldman, Gabriel M. Ortiz & Lawrence A. Haber, *Acute Clinical Care for Transgender Patients: A Review*, 178 JAMA INTERNAL MED. 1535 (2018).

26. Tehmina Ahmad, Anthea Lafreniere & David Grynspan, *Incorporating Transition-Affirming Language into Anatomical Pathology Reporting for Gender Affirmation Surgery*, 4 TRANSGENDER HEALTH 335 (2019); D. Brienne Hagen & M. Paz Galupo, *Trans* Individuals’ Experiences of Gendered Language with Health Care Providers: Recommendations for Practitioners*, 15 INT’L J. TRANSGENDERISM 16, 19 (2014); Dean Spade, *About Purportedly Gendered Body Parts*, DEANSPADE.NET (Feb. 3, 2011), <https://www.deanspade.net/2011/02/03/about-purportedly-gendered-body-parts/> [https://perma.cc/NMX9-X3FR].

27. SANDY E. JAMES, JODIE L. HERMAN, MARA KEISLING, LISA MOTTET & MA’AYAN ANAFI, NAT’L CTR. FOR TRANSGENDER EQUAL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* (2016); Nova J. Bradford, Nic Rider, Jory M. Catalpa, Quinlyn J. Morrow, Dianne R. Berg, Katherine G. Spencer & Jenifer K. McGuire, *Creating Gender: A Thematic Analysis of Genderqueer Narratives*, INT’L J. TRANSGENDERISM 155 (2018); Evan Vipond, *Resisting Transnormativity: Challenging the Medicalization and Regulation of Trans Bodies*, 8 THEORY IN ACTION 21 (2015).

28. Bauer, Braimoh, Scheim & Dharma, *supra* note 25, at 19.

Our society is organised around gender and thus comparing outcomes and conducting gender-based analyses of data can be an immensely fruitful endeavour.²⁹ In their work, Christine Labuski and Colt M. St. Amand give a few examples of contexts where breaking down information by gender would be enlightening:

Is the research about the workplace, a site where gendered asymmetries exist for non-transgender people? Is it about bodily aesthetics or the pressure to have cosmetic surgery? Is it about sexual assault, military service, or other areas where maleness and femaleness are experienced in sometimes acutely different ways?³⁰

In Canada, the use of Gender-Based Analysis Plus from research to policy-making is recommended to highlight the different life experiences of men, women, and non-binary people—though non-binary people are unfortunately too often left out—and the different impacts which policy measures may have on each group.³¹ Thus, it is important that any recommendation for institutional and governmental management of gender information consider its importance in accounting for the needs of people of different genders.

In the context of trans communities, the World Professional Association in Transgender Health EMR Working Group warns that:

Failure to collect data on and provide systematic inclusion in health delivery systems of transgender persons has negative impacts on health; in order to receive appropriate and meaningful care, it is essential that individual populations be recognized and ‘counted.’³²

The Gender Identity in U.S. Surveillance (GenIUSS) group convened by the Williams Institute makes a similar point:

Collecting population-based data on the social, economic, and health concerns of these communities is essential if federal, state, local, and non-profit agencies are to adequately serve gender minority people and develop effective strategies for improving the

29. Sari L. Reisner, Kerith J. Conron, Scout, Kellan Baker, Jodie L. Herman, Emilia Lombardi, Emily A. Greytak, Alison M. Gill & Alicia K. Matthews, “Counting” *Transgender and Gender-Nonconforming Adults in Health Research: Recommendations from the Gender Identity in US Surveillance Group*, 2 *TRANSGENDER STUD. Q.* 34, 36 (2015).

30. Christine Labuski & Colt M. St. Amand [published as Colton Keo-Meier], *The (Mis)Measure of Trans*, 2 *TRANSGENDER STUD. Q.* 13, 23 (2015).’

31. *What is GBA+?*, STATUS OF WOMEN CANADA (Dec. 4, 2018) (Can.), <https://www.swc-cfc.gc.ca/gba-ac/index-en.html> [<https://perma.cc/9BEK-KCKH>].

32. Deutsch, Green, Keatley, Mayer, Hastings & Hall, *supra* note 22, at 700.

circumstances of transgender and other gender minority people's lives.³³

Research often fails to inquire into gender identity and gender assignment at birth, preventing subset analyses of trans respondents which may reveal different outcomes or needs than those of cis respondents.³⁴ Asking the wrong questions—for instance by categorising research participants based on their sex assigned at birth—can skew results, as gender identity is typically the more relevant metric when it comes to gender-based analysis.³⁵ Lack of standardised gender information questions in population-level surveys continues to raise concerns regarding the construct and external validity of research.³⁶

Research which does not count trans people cannot properly account for them or their needs. It is known, for instance, that trans women in the United States have an elevated prevalence of HIV/AIDS.³⁷ Surveys which only separate by gender are unlikely to adequately capture the lived situation of trans women, and especially Black trans women, when it comes to risk of sexually transmitted infections.³⁸

Here, it would be inappropriate to ask solely for one's gender identity or sex assigned at birth, because seroprevalence among transfeminine individuals is not fully captured by either metric and would risk erasing queer trans men who are also at a greater risk of seroconversion.³⁹

33. GENDER IDENTITY IN US SURVEILLANCE GROUP, BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS 1 (Jodie L. Herman ed., 2014), <https://www.lgbtagingcenter.org/resources/pdfs/geniuss-report-sep-2014.pdf> [<https://perma.cc/AVK2-QC3X>] [hereinafter GenIUSS Group].

34. Greta R. Bauer, Rebecca Hammond, Robb Travers, Matthias Kaay, Karin M. Hohenadel & Michelle Boyce, "I Don't Think This Is Theoretical; This Is Our Lives": How Erasure Impacts Health Care for Transgender People, 20 J. ASS'N NURSES AIDS CARE 348, 352 (2009).

35. Labuski & St. Amand, *supra* note 30, at 23; Charlotte Chuck Tate, Jay N. Ledbetter & Cris P. Youssef, *A Two-Question Method for Assessing Gender Categories in the Social and Medical Sciences*, 50 J. SEX RES. 767, 768 (2013).

36. Reisner, Conron, Scout, Baker, Herman, Lombardi, Greytak, Gill & Matthews *supra* note 29, at 36. *See generally* WILLIAM R. SHADISH, THOMAS D. COOK & DONALD T. CAMPBELL, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR GENERALIZED CAUSAL INFERENCE 64 (2002) (providing more background on construct validity and external validity). Construct validity is the degree to which questions in a study measure the concept it seeks to measure, whereas external validity regards whether conclusions drawn within the study can be generalized and applied to a different set of people.

37. JAMES, HERMAN, KEISLING, MOTTET & ANAFI, *supra* note 27, at 122 (the prevalence of HIV among trans women is more than eleven times that of the general population).

38. Deutsch, Keatley, Sevelius & Shade, *supra* note 10, at 658; L. A. SAUSA, M. LUNDIE, Z. MARSHALL, J. KEATLEY, J.R. INIGUEZ & M. REYES, POLICY RECOMMENDATIONS FOR INCLUSIVE DATA COLLECTION OF TRANS PEOPLE IN HIV PREVENTION, CARE & SERVICES (2009), <https://prevention.ucsf.edu/transhealth/education/data-recs-long> [<https://perma.cc/WV3T-4AS4>].

39. Data on prevalence and incidence of HIV among trans men is lacking, but the literature suggests high risks of seroconversion. *See* Sarit A. Golub, Rachel A. Fikslin, Lila Starbuck & Augustus Klein, *High Rates of PrEP Eligibility but Low Rates of PrEP Access Among a National*

Nonetheless, asking for gender identity and sex assigned at birth may be insufficient to account for the needs of trans communities. Gender expression may also be relevant, as is whether the person is known to be trans in various spheres of life. To give an example, the fact that I am typically read as a cis woman in everyday life means that I experience relatively little harassment and discrimination based on transitude from strangers but am more vulnerable to it in other spaces because of my visibility as a scholar and participant in the public sphere. Asking the right questions at the right time is essential. When designing research, it is important to keep in mind the warnings of Christine Labuski and Colt M. St. Amand and seek to avoid “well-intentioned misunderstandings that transgender [is] a stable and measurable ‘thing.’”⁴⁰ Gender is complex and since the transgender experience is predicated on an experience of gender, it too is complex.

The failure to count communities in research also impacts funding allocation.⁴¹ Funding is typically dependent on the ability to concretely identify and quantify communities’ needs. To do so effectively, it is necessary to conduct research and aggregate assessment initiatives to ascertain gender information. Hale M. Thompson’s research notes the importance of gathering gender information for funding: “Two participants who reported working in healthcare settings that prioritize trans patients noted that the use of the two-step question helps clinics report greater numbers of trans patients and increases access to related funding.”⁴² Telling a compelling narrative of need, which necessitates disclosures of gender information, can facilitate funding of initiatives aimed at improving trans lives under our current economic system.⁴³ Although such an improvement of trans lives is mediated by institutional needs and funding dynamics—and can be frustrating to those who are asked to disclose sensitive gender information—it remains an important aspect of gender information management.

3. *Legal requirements and identity verification*

No amount of good will on the part of institutions or government agencies can change the fact that sometimes gender information may be required. Although

Sample of Transmasculine Individuals, 82 J. AIDS e1 (2019); Tonia Poteat, Ayden Scheim, Jessica Xavier, Sari Reisner & Stefan Baral, *Global Epidemiology of HIV Infection and Related Syndemics Affecting Transgender People*, 72 J. AIDS S210, S216 (2016); Sari L. Reisner, Chiara S. Moore, Andrew Asquith, Dana J. Pardee, Aaron Sarvet, Gal Mayer & Kenneth H. Mayer, *High Risk and Low Uptake of Pre-Exposure Prophylaxis to Prevent HIV Acquisition in a National Online Sample of Transgender Men Who Have Sex With Men in the United States*, 22 J. INT’L AIDS SOC’Y e25391 (2019); Ayden I. Scheim, Greta R. Bauer & Robb Travers, *HIV-Related Sexual Risk Among Transgender Men Who Are Gay, Bisexual, or Have Sex With Men*, 74 J. AIDS e89 (2017).

40. Labuski & St. Amand, *supra* note 30, at 15.

41. See Deutsch, Keatley, Sevelius & Shade, *supra* note 10, at 657.

42. Thompson, *supra* note 7, at 209.

43. See GENIUSS GROUP, *supra* note 33, at 6; Thompson, *supra* note 7, at 211.

some organisations may be willing to engage in acts of civil disobedience, many will not.

Gender information can be required in regulated industries and in contexts of institutions interfacing with the government: insurance billing, diplomas, healthcare, and so forth. Madeline Deutsch and David Buchholz note that in the healthcare context, “[s]afety practices, HIPAA and the Red Flag Rule all require verification of legal identity in settings such as lab, x-ray or procedures.”⁴⁴ Even when it is not required, gender information management in other institutions may make the use of gender information unavoidable. Reimbursement requests by pharmacies sent electronically to insurance providers are typically rejected if gender information doesn’t correspond to the information they have on file, which is typically the person’s legal gender marker.⁴⁵ This problem can persist even after one’s legal gender marker is changed, depending on the insurance company’s functioning and technological set-up.⁴⁶

Because gender information is presumed to be publicly shared by visible gender presentation, it is often relied upon as a security measure, in line with the belief that “the more information surveillance apparatuses can collect about an individual, the less risk” they pose.⁴⁷ Unfortunately, many institutions presume cisgender identities and fail to account for the fact that gender information is a poor security measure and creates unnecessary challenges for trans and gender non-conforming individuals.⁴⁸ Take the example of banks that rely on voice as an indicator of gender to judge whether callers are attempting to commit fraud, which often locks trans people out of their bank account. Someone with a voice perceived as masculine could readily overcome the security measure and access the account of someone listed as female by enlisting the services of someone whose voice matches dominant gender expectations, a characteristic that roughly half of the population possesses. Adding a single security question not dependent on gender information would do much more to prevent fraud, as nearly all other information is more discriminating than gender when it comes to identity verification. As A.J. Neuman Wipfler eloquently points out:

If, for the sake of argument, one accepts the government’s interest in maintaining highly accurate identification of its citizens, sex designations provide only marginal utility in comparison to many

44. Madeline B. Deutsch & David Buchholz, *Electronic Health Records and Transgender Patients—Practical Recommendations for the Collection of Gender Identity Data*, 30 J. GEN. INTERNAL MED. 843, 844 (2015).

45. Freeman and López, *supra* note 24, at 258.

46. Thompson, *supra* note 7, at 212.

47. *Id.* at 557.

48. Paisley Currah & Tara Mulqueen, *Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport*, 78 SOC. RES. 557, 574 (2011) (discussing the challenges faced by transgender individuals when passing through airport security).

more accurate technological methods, such as biometrics like fingerprints, retinal scans, facial recognition, and DNA samples.⁴⁹

While I vehemently caution against the use of biometrics—in line with my later ethical consideration of reducing surveillance, since that information can easily be misused by institutions and governments—Neuman Wipfler does demonstrate the frailty of gender information by contrast to additional information of nearly any other kind. The only question that is arguably worse than asking for gender when verifying identity is “are you human?”⁵⁰

Institutions and governments should also be careful not to overstate legal requirements. Oftentimes, those requirements are presumed rather than established. In 2016, I criticized McGill University’s preferred name policy for failing to fully respect trans students’ names and genders.⁵¹ Although they subsequently improved the policy in response to the article, they have continued to argue that, legally, they had to continue using the person’s legal name and gender marker on diplomas. This may be true. However, my own research into statutes and jurisprudence has not allowed me to validate this claim and the university has so far declined to state the basis for its belief.⁵²

To give another example, the Red Flags Rule (mentioned by Deutsch and Buchholz) is ambiguous as to whether it requires institutions to record gender information. Red Flags are defined as “a pattern, practice, or specific activity that indicates the possible existence of identity theft.”⁵³ Financial institutions are tasked with identifying relevant Red Flags. Given that gender information is a poor security measure, it may be reasonably possible for financial institutions not to deem gender information relevant for the purposes of the Red Flags Rule.

Because it is a poor identification measure, the use of gender information for identity verification purposes is plausibly unconstitutional. In the United States, Heath Fogg Davis has argued that “the use of sex markers on government-issued identity documents fails even the lowest level of judicial scrutiny” and that the “bureaucratic use of sex certainly fails to meet the higher standard of ‘intermediate’ judicial scrutiny that courts apply to cases involving sex.”⁵⁴ Davis’ argument

49. Anna James (A.J.) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491, 505 (2016).

50. I am here presuming that aliens on Earth would be sufficiently technologically advanced to have no need for fraud or identity theft.

51. Florence Ashley, *Enforcing the Deadname*, THE MCGILL DAILY (Oct. 17, 2016), <https://www.mcgilldaily.com/2016/10/enforcing-the-deadname/> [<https://perma.cc/U4V8-MUC4>].

52. Unlike the College Education Regulations, which pertain to pre-university education, the Act Respecting Educational Institutions at the University Level does not suggest that university diplomas must bear the person’s legal name and makes no reference to the content they must have.

53. 16 C.F.R. § 681.1(b)(9) (2019) (explaining duties regarding the detection, prevention, and mitigation of identity theft).

54. HEATH FOGG DAVIS, BEYOND TRANS: DOES GENDER MATTER? 40 (2017).

relies on the observation that institutions and government agencies have a legitimate and important interest in identity verification: “sex markers are not helpful in guarding against personal identity fraud because maleness and femaleness are characteristics that we share with many other people.”⁵⁵ A similar argument could be made in Canada, which does not apply tiers of scrutiny but instead requires proof that laws limiting equality rights be rationally connected to a valid objective, impair equality rights as little as possible, and be proportionate in their effects.⁵⁶

4. *Misgendering and discrimination*

Disrespect of people’s gender causes distress and impacts access to resources. In healthcare, it is known that failing to refer to trans people by their proper name and pronouns, for instance by calling out their unchanged legal name in the waiting room,⁵⁷ impacts service satisfaction and can prevent them from returning. It also creates a risk of harassment, discrimination, and violence at the hands of those informed of their deadname and sex assigned at birth.⁵⁸ Misgendering—the act of referring to trans people by a gender other than the one which corresponds to their gender identity—perturbs social identity and is experienced as a psychological injury, contributing to anxiety and depression.⁵⁹ In the words of a respondent to the 2015 U.S. Transgender Survey: “I was consistently misnamed and misgendered throughout my hospital stay. I passed a kidney stone during that visit. On the standard 1-10 pain scale, that’s somewhere around a 9. But not having my identity respected, that hurt far more.”⁶⁰ Fear of being misgendered contributes to trans people’s avoidance of public spaces and can create a barrier to wellbeing and equal access to resources.⁶¹

55. *Id.*

56. R. v. Oakes, [1986] 1 S.C.R. 103 (Can.).

57. See Emma-Ben Lewis, Ben Vincent, Alex Brett, Sarah Gibson & Reubs J. Walsh, *I Am Your Trans Patient*, 357 BR. MED. J. 1, 1 (2017).

58. See Deutsch & Buchholz, *supra* note 44, at 843; Deutsch, Green, Keatley, Mayer, Hastings & Hall, *supra* note 22, at 701.

59. See Florence Ashley, *Qui est-ille? Le respect langagier des élèves non-binaires, aux limites du droit*, 63 SERV. SOC. 35, 37 (2017); Peter Goldblum, Rylan J. Testa, Samantha Pflum, Michael L. Hendricks, Judith Bradford & Bruce Bongar, *The Relationship Between Gender-based Victimization and Suicide Attempts in Transgender People*, 43 PROF. PSYCHOL.: RES. & PRAC. 468 (2012); Stephanie Julia Kapusta, *Misgendering and Its Moral Contestability*, 31 HYPATIA 502 (2016); Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals’ Experiences with Misgendering*, 3 STIGMA AND HEALTH 53 (2018); Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF IDENTITY 51 (2015).

60. JAMES, HERMAN, KEISLING, MOTTET & ANAFI, *supra* note 27, at 96.

61. Greta R. Bauer, Ayden I. Scheim, Madeline B. Deutsch & Carys Massarella, *Reported Emergency Department Avoidance, Use, and Experiences of Transgender Persons in Ontario, Canada: Results from a Respondent-Driven Sampling Survey*, 63 ANNALS EMERGENCY MED. 713 (2014); Rachel Giblon & Greta R. Bauer, *Health Care Availability, Quality, and Unmet Need: A Comparison of Transgender and Cisgender Residents of Ontario, Canada*, 17 BIO MED. CENT. HEALTH SERV. RES. 1, 2, 7 (2017); JAMES, HERMAN, KEISLING, MOTTET & ANAFI, *supra* note 27, at 98; Nic Rider,

Some authors have suggested that recording people's gender identities, names, and pronouns can help institutions and government employees avoid misgendering and discriminating against trans individuals.⁶² Charlotte Chuck Tate, Jay N. Ledbetter, and Cris P. Youssef have suggested that including trans people's gender identity and sex assigned at birth in institutional records can help staff determine proper pronoun use—the assumption being that trans women and men use she and he respectively, and that non-binary individuals can be identified and asked for their pronouns—thereby reducing “the number of transgender persons who avoid medical treatment based on expectations or actual experiences of prejudice and discrimination.”⁶³ The inclusion of gender identity and sex assigned at birth in institutional records can also express awareness of trans realities and normalize transitude as part of healthy human diversity.⁶⁴

The extent to which including gender information can redress misgendering and discrimination must not be overstated, however. Misgendering and discrimination is not always rooted in ignorance. Not only can staff ignore or overlook gender information on files, but that information can contribute to misgendering by identifying individuals as trans. Hostility to trans people is widespread, and though many employees of large institutions and governments are well-intentioned, many others are not. Harassment, discrimination, and violence can also flow from curiosity.⁶⁵ In a large-scale survey of trans people, 15% of respondents reported “being asked invasive or unnecessary questions about being transgender not related to the reason” for their visit to a healthcare provider.⁶⁶ Such experiences also occur outside of healthcare contexts. Access to gender information may not have as significant an impact on trans wellbeing as is often assumed. We have reasons to doubt the unspoken assumption that misgendering and discrimination arise primarily out of ignorance instead of transantagonism or curiosity.

Gender information may be unnecessary to avoid misgendering or discriminating against trans people: inclusive policies that include de-gendering interactions with strangers and offering one's pronouns upon meeting—thus implicitly

Barbara J. McMorris, Amy L. Gower, Eli Coleman & Marla E. Eisenberg, *Health and Care Utilization of Transgender and Gender Nonconforming Youth: A Population-Based Study*, 141 PEDIATRICS 1, 6 (2018); Ayden Scheim, Greta Bauer & Jake Pyne, *Avoidance of Public Spaces by Trans Ontarians: The Impact of Transphobia on Daily Life*, 4 TRANS PULSE 2 (2014).

62. Cahill, Baker, Deutsch, Keatley & Makadon, *supra* note 23; Deutsch, Green, Keatley, Mayer, Hastings & Hall, *supra* note 22, at 702; Tate, Ledbetter & Youssef, *supra* note 35, at 768.

63. Tate, Ledbetter & Youssef, *supra* note 35, at 775.

64. Thompson, *supra* note 7, at 206.

65. Philosopher Amy Marvin has explored how public curiosity is often framed, along with visibility, as a positive force, but that it plays an objectifying role which can contribute to the dehumanization of trans people. Amy Marvin, *Transsexuality, the Curio, and the Transgender Tipping Point*, in CURIOSITY STUDIES: TOWARD A NEW ECOLOGY OF KNOWLEDGE (Perry Zurn & Arjun Shankar eds., 2020); see also Perry Zurn, *Puzzle Pieces: Shapes of Trans Curiosity*, 18 APA NEWSL. LGBTQ ISSUES PHIL. 10 (2018).

66. JAMES, HERMAN, KEISLING, MOTTET & ANAFI, *supra* note 27, at 96.

inviting the person's pronouns—can have similarly beneficial effects on trans wellbeing and access to resources while avoiding some of the risks associated with recording gender information.

5. Surveillance

Information is power. Those not privy to sensitive information cannot misuse it to silence or harm others. The fear of surveillance in trans communities is bound up with the history of surveillance as a predecessor of suppression. Too often, surveillance precedes violence.⁶⁷ Two recent publications, one in the *Journal of Sexual Medicine*⁶⁸ and one in *Pediatrics*,⁶⁹ proposed the creation of a registry of trans youth for research purposes. The former, which included authors who have long been accused of practising reparative therapy,⁷⁰ was met with outrage on the part of parents of trans youth in the United Kingdom.⁷¹ In response to the *Pediatrics* publication, which suggested that “a comprehensive outcomes registry in the United States in which patient-centered outcomes are used c[ould] help guide the future of ethical, patient-centered, gender-affirming care,”⁷² I wrote that:

67. See, e.g., ROBYN MAYNARD, *POLICING BLACK LIVES: STATE VIOLENCE IN CANADA FROM SLAVERY TO THE PRESENT* 88–92, 102–07 (2017) (discussing widespread police carding facilitating anti-Black harassment, incarceration, violence, and death); VIVIANE K. NAMASTE, *INVISIBLE LIVES: THE ERASURE OF TRANSEXUAL AND TRANSGENDERED PEOPLE* 170 (2000) (retelling how police took pictures of trans sex workers for their files as a veiled threat of future harassment and violence); JACKIE WANG, *CARCERAL CAPITALISM* 247–50 (2018) (presenting a collection of crime data is increasingly used to justify further policing, which may lead to violence, through algorithmic prediction of future crimes); Alexander McClelland, Adrian Guta & Marilou Gagnon, *The Rise of Molecular HIV Surveillance: Implications on Consent and Criminalization*, *CRITICAL PUB. HEALTH* 1, at 5–6 (2019) (use of molecular HIV surveillance in HIV criminalization); United States Holocaust Memorial Museum, *Anti-Jewish Legislation in Prewar Germany*, *HOLOCAUST ENCYCLOPEDIA* (last visited May 28, 2018), <https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany> [<https://perma.cc/P8ZG-UP2N>] (highlighting mandatory registration of Jews' assets and, later, religion served as a prelude to expropriation and genocide).

68. Nastasja M. de Graaf, Polly Carmichael, Thomas D. Steensma & Kenneth J. Zucker, *Evidence for a Change in the Sex Ratio of Children Referred for Gender Dysphoria: Data from the Gender Identity Development Service in London (2000–2017)*, 15 *J. SEXUAL MED.* 1381 (2018).

69. Laura L. Kimberly, Kelly McBride Folkers, Phoebe Friesen, Darren Sultan, Gwendolyn P. Quinn, Alison Bateman-House, Brendan Parent, Craig Konnoth, Aron Janssen, Lesha D. Shah, Rachel Bluebond-Langner & Caroline Salas-Humara, *Ethical Issues in Gender-Affirming Care for Youth*, *PEDIATRICS*, Dec. 2018, at 2.

70. Simon D. Pickstone-Taylor, *Children with Gender Nonconformity*, 42 *J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY* 266 (2003).

71. See Shannon Power, *Parents Oppose ‘Chilling, Fascist’ Global Registry of Trans Kids*, *GAY SONOMA* (Nov. 5, 2018), <http://www.gaysonoma.com/2018/11/parents-oppose-chilling-fascist-global-registry-of-trans-kids/> [<https://perma.cc/6SRQ-PCA8>] (interviewing a parent of a transgender child, who criticized the registry as “chilling”).

72. Kimberly, Folkers, Friesen, Sultan, Quinn, Bateman-House, Parent, Konnoth, Janssen, Shah, Bluebond-Langner & Salas-Humara, *supra* note 69 at 2.

The establishment of registries is also a loaded political matter. The Trump administration is currently attacking trans rights from various ends. By proposing a Muslim registry in 2016, his administration has shown willingness to use data sets for ill purposes. Registries call our communities back to violent eugenicist pasts, pasts which are beginning to look like our future, too. Although I have no doubts about the good intentions of the authors, their proposal risks giving anti-trans movements ammunition and awaken our collective trauma.⁷³

Opposition to surveillance structures has a long history in trans scholarship and is prominent in Dean Spade's acclaimed book *Normal Life*. For him:

Critical trans politics requires an analysis of how . . . administrative systems in general are sites of production and implementation of racism, xenophobia, sexism, transphobia, homophobia, and ableism under the guise of neutrality Our attention to how life chances are distributed rather than simply to what the law says about marginalized groups exposes how various moments of administrative categorization have lethal consequences.⁷⁴

Aggregated gender information can enable harassment, discrimination, and violence by labelling trans bodies as such and indicating to ill-intentioned and misguided institutional and governmental actors how they may be hurt. Whereas I would have little problem accessing any women-only space with my current gender presentation,⁷⁵ the existence of gender information disclosing the fact that I was assigned male at birth may lead to my exclusion from those spaces or at the very least hostility on the part of those tasked with policing access to spaces. An experience of this kind was reported by a young Black woman participating in Hale M. Thompson's previously cited study. She explained that, though she was not otherwise identifiable as trans, a clinic worker threatened to call the police on her for using the women's restroom when he learned her legal status was 'male.'⁷⁶ More information generates more risk.

The increase in reliance on gender information as part of surveillance apparatuses—for identification in airports, for instance—has raised the stakes of

73. Florence Ashley, *The Dangers of a Trans Youth Registry*, Comment to *Ethical Issues in Gender-Affirming Care for Youth*, PEDIATRICS (Nov. 6, 2018), <https://pediatrics.aappublications.org/content/142/6/e20181537/tab-e-letters#the-dangers-of-a-trans-youth-registry> [https://perma.cc/JT53-US8M].

74. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 73–74 (rev. ed. 2015).

75. I distinguish gender presentation from gender expression. Gender presentation is the totality of features which are publicly relied upon to categorise individuals as male or female, including clothing but also visible anatomical and behavioural characteristics.

76. Thompson, *supra* note 7, at 207.

miscategorisation and misuse of information. This reality is all the starker for those seen by security forces as posing risks because of the colour of their skin or country of birth.⁷⁷ As I pointed out in the subsection on privacy, information gathered for one purpose may be shared and used for different purposes, raising concerns about our ability to compartmentalise information to preserve privacy and limit surveillance:

One major element of this new surveillance is the increased sharing and comparison of different pools of data collected by different government agencies New practices have emerged and various agencies now compare their entire data sets and seek out mismatched information. The rationale for this activity is to track down people who have obtained identity documents or work authorization using false information.⁷⁸

Even if sex assigned at birth is not recorded, differing gender information across different institutions can generate similar risks.⁷⁹ Patients of LGBT clinics report poor experiences despite inclusive policies.⁸⁰

Despite concerns that gender information can enhance risks of discrimination, previous research has shown that trans people are relatively willing to provide it.⁸¹ However, while they tend to submit to gender information management processes, trans people remain concerned about information misuse. Submission is not legitimation. One particular source of concern arises in the employment context; trans individuals have reported being terminated by their employers after health insurance information revealed their transitude.⁸² Concerns over information management are likely to be higher under transantagonistic governments.⁸³ Experiences of past discrimination are associated with reluctance in sharing gender information.⁸⁴

77. See TOBY BEAUCHAMP, *GOING STEALTH: TRANSGENDER POLITICS AND U.S. SURVEILLANCE PRACTICES* (2018); SPADE, *supra* note 74, at 80.

78. SPADE, *supra* note 74, at 84. See, e.g., Alejandra Wundram Pimentel & Mónica Leonardo Segura, *Paradoxes of Visibility*, 5 *TRANSGENDER STUD. Q.* 83 (2018) (presenting a Guatemalan perspective on the risk of gender information wherever paper trails exist).

79. Thompson, *supra* note 7, at 206–07, 211.

80. *Id.* at 211.

81. Sean Cahill & Harvey Makadon, *Sexual Orientation and Gender Identity Data Collection in Clinical Settings and in Electronic Health Records: A Key to Ending LGBT Health Disparities*, *LGBT HEALTH* 34, at 34, 37 (2014) (noting that patients seem as willing to provide gender identity information as financial information); Deutsch, Keatley, Sevelius & Shade, *supra* note 10, at 658.

82. See Thompson, *supra* note 7, at 210.

83. For instance, older gay men who experienced the government's mishandling of the HIV crisis express a greater concern for privacy than younger gay men, who tend to be less wary of disclosing their sexual orientation. Thompson, *supra* note 7, at 207.

84. See Thompson, *supra* note 7, at 213.

The context of information-gathering is also relevant to those risks. Anonymous surveys and aggregated data pose fewer unanticipated surveillance risks than do institutional records.⁸⁵ Depending on the breadth of population surveys and which information is gathered, re-identification may be nearly impossible.

Given the stakes, more information is not better, but worse.⁸⁶ It is no surprise, then, that critical scholars have cautioned against gender information management reform and expansion initiatives.⁸⁷ Although reform can reduce negative impacts of gender information management on trans lives (notably by framing gender information in an inclusive manner that accounts for trans lives), it fails to address the core problem of surveillance.⁸⁸ It also erases the history of identity management of trans lives with the recording of transitude being motivated by a desire “to protect ‘straight’ men from being duped into marrying a transsexual woman.”⁸⁹ In light of these concerns, Dean Spade calls for a more attentive and nuanced approach to the management of gender information:

If a deeper question were asked, one that addressed whether gender data was really necessary, and if so what aspect of gender data should be collected and how, more nuanced and effective policy-making might result. This is not an argument for a simplistically ‘gender-blind’ government, but rather for a shift toward a more critical view of the use of gender data in government recordkeeping. If collecting data on gender had to be justified by a close connection to institutional purposes, and false assumptions about the use of gender data to verify identity fell by the wayside, the use of this data could have less unintended negative consequences for both individuals and institutions. The confusion currently being caused by batch checking procedures aimed at immigration enforcement and terrorism prevention exposes the incoherency of gender classification, allowing us to consider putting an end to the administrative attempts to make gender a stable marker of identity verification and a logical way of dividing and managing the population when it clearly does not achieve either purpose consistently.⁹⁰

As pernicious, collecting gender information also reinforces the idea that the very categories it purports to observe are of social significance. Gender information management is not merely a material process, but also a symbolic one. By

85. *Id.*

86. See Currah & Mulqueen, *supra* note 48, at 557.

87. See, e.g., DAVIS, *supra* note 54, at 46; Currah & Mulqueen, *supra* note 48, at 557; Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 802 (2007); Wipfler, *supra* note 49.

88. Currah & Mulqueen, *supra* note 48, at 562.

89. DAVIS, *supra* note 54, at 42.

90. Spade, *supra* note 87, at 816.

gathering gender information, institutions perpetuate popular understandings that it is relevant information for social arrangement. As Dean Spade argues, “rules related to government gender classification do not simply discover and describe maleness and femaleness, but instead *produce* two populations marked with maleness and femaleness as effects and objects of governance.”⁹¹ Much like law constructs a public sense of right and wrong aligned with the dichotomy of legal-illegal, so do informational practices by institutional and governmental actors maintain a public sense of social categorisation along gender lines. By treating gender information as routine, institutions and governments signify to the public that they are justified in treating gender as routine information, implicitly inviting them to categorise individuals as male or female and to police spaces along those lines. Gender information management, inter-agency sharing, and monitoring reifies gender as something to be policed, carrying all the harm of gender policing along for the ride.

Reducing surveillance reduces the risk of harassment, discrimination, and violence because of transantagonism, but also because of other axes of oppression such as racism. Institutions and governments (re)considering their management of gender information should consider how their management of information—not just gender information—may create risks for those whose information is gathered and recorded. Even when the problematic nature of gender information management is readily apparent, institutions and the broader public’s shared and plausibly mistaken belief that gender information is necessary for everyday administration can make practices of gender information management go unchallenged.⁹²

B. Guiding principles

The following guiding principles are my attempt to distill the previous ethical considerations into a set of actionable precepts which strike an appropriate balance between them, protecting privacy and mitigating surveillance, misgendering, and discrimination as much as possible while also allowing some gender information to be requested, recorded, and recounted to meet individual, community, and institutional needs. The first three principles should be treated as mandatory and directive, whereas the fourth one is an interpretive principle.

1. Necessity:

Gender information should only be requested, recorded, or recounted when it is reasonably necessary to accomplish an acceptable purpose.

2. Accuracy:

The management of gender information should favour accuracy, opting for questions and measures more specific than gender identity and sex assigned at birth wherever possible.

91. Spade, *supra* note 87, at 747.

92. SPADE, *supra* note 74, at 76.

3. Consensuality:

Gender information management should be consensual. Consensuality in gender information management includes declaration of purpose and availability, optionality, and modularity. Though all three components of consensuality are required, clear legal requirements may force institutions and government agencies to violate the subprinciple of optionality.

4. De-gendering:

Application of the three preceding principles should be done in a spirit of de-gendering. In applying the principles to a specific context of information management, institutions and governments should err on the side of not requesting, recording, or recounting gender information.

I will now provide a brief explanation of each principle, what it entails, and how it relates to the previously delineated ethical considerations.

1. *Necessity*

The principle of necessity holds that the management of gender information must be justified by the purpose of information gathering. This justification is only found when the management of gender information is reasonably necessary to accomplish an acceptable purpose.⁹³ This principle is rooted in the insight that requesting, recording, and recounting gender information imposes a risk on those whose information is gathered insofar as it participates in institutional and governmental surveillance, and interferes with individuals' privacy. Necessity aims at ensuring that needs and legal requirements are accounted for.

When evaluating necessity, the first step will involve clearly delineating which need or purpose is served by gender identity management and how important the need or purpose is in the context under consideration. Part I set forth three acceptable contexts in which gender information management may be necessary: accounting for needs, legal requirements and identity verification, and

93. The Supreme Court of Canada's jurisprudence on reasonable accommodations influenced my chosen terminology. See *B.C. (Pub. Serv. Emp. Relations Comm'n) v. BCGSEU*, [1999] 3 S.C.R. 3 (Can.); *B.C. (Superintendent of Motor Vehicles) v. B.C. (Council of Human Rights)*, [1999] 3 S.C.R. 868 (Can.) (establishing that *prima facie* discriminatory standard set by a public or private organisation is legally justified if it is reasonably necessary to fulfil a purpose rationally connected to the job and/or organisation's function). However, I do not intend to adopt its approach to evaluating reasonable necessity. As I will set out in the present subsection, I instead find inspiration from a different approach set out by the Supreme Court of Canada. Of note, the terminology is stricter than the intermediate scrutiny standard of 'substantially related to important government interests.' See, *Craig v. Boren*, 429 U.S. 190 (1976) [insert explanatory parenthetical]. Accordingly, any policy that meets this stricter standard should be able to survive intermediate scrutiny.

curtailing misgendering and discrimination. Although this list is non-exhaustive, it should be expanded only in the clearest of cases, given the stakes of gender information management for trans people.

A specific gender information management policy will be reasonably necessary if it is proportional and minimally infringing.⁹⁴ First, the needs or purposes met by the policy must outweigh the violation of privacy and the enhancement of surveillance that it entails. Second, the policy must be carefully tailored to impact privacy and increase surveillance as little as is reasonably possible while continuing to meet the needs or purpose. We must infringe on rights as little as possible and only when a greater need justifies it. Proportionality and minimal infringement must not be considered in isolation, but rather together. A policy is not reasonably necessary if another policy or course of action would strike a significantly better balance between the purposes and risks.

Evaluating necessity is perhaps best illuminated by a hypothetical. Imagine having two policies, A and B, whose value is evaluated in degrees of wellbeing on a scale of one to five. Policy A meets its purpose, thus increasing wellbeing by five. At the same time, it decreases wellbeing by four as a result of its infringement on privacy. Policy B increases wellbeing by four in meeting the same purpose but only decreases wellbeing by one because of its relatively minor privacy infringement. Considering proportionality and minimal infringement in isolation, Policy A may appear to be reasonably necessary, as it satisfies its purpose and results in a net increase in overall wellbeing. However, evaluating proportionality and minimal infringement holistically shows Policy B to be preferable, since it increases net wellbeing by three, whereas Policy A increases net wellbeing by only one. In this case, Policy A could not be said to be reasonably necessary.

This example is overly simplistic. Wellbeing is difficult to define, measure, and predict. Further, wellbeing is not the sole determinant of ethical action—one can think of justice as another one, for instance—and those different determinants may be incommensurable.⁹⁵ Nonetheless, this simplistic example is illustrative of the way in which proportionality and minimal infringement come together when judged not in isolation, but as mutually constitutive factors.

To quickly summarize, a policy is not reasonably necessary in at least three cases. First, it is not reasonably necessary if the risk to privacy or the increase in surveillance is greater than the purpose or needs it seeks to serve. Second, it is not

94. Proportionality and minimal infringement are two of the principles used by the Supreme Court of Canada in assessing whether a *prima facie* violation of human rights is justified. See *R. v. Oakes* [1986], 1 S.C.R. 103 (Can.). The *Oakes* case bears striking similarities with the United States Supreme Court's approach in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980) and the longstanding approach of the German Constitutional Court. See Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007).

95. See Ruth Chang, *Incommensurability (and Incomparability)*, in *THE INTERNATIONAL ENCYCLOPEDIA OF ETHICS* 2591 (Hugh LaFollette ed., 2013).

reasonably necessary if the identified needs or purpose can be equally satisfied without infringing privacy or increasing surveillance as much. And third, it is not reasonably necessary if a different policy or course of action fares slightly more poorly in satisfying the identified needs or purpose but poses significantly less risk to privacy and the reduction of surveillance.

2. Accuracy

Gender information management should strive for accuracy. In many contexts, gender information is not the most relevant or accurate metric.⁹⁶ As previously noted, having a prostate or a cervix is a more accurate predictor of prevalence of prostate or cervical cancer than is gender.⁹⁷ HIV/AIDS organizations and research projects frequently make trans women, who also have a high prevalence of HIV, invisible because of the assumption that gender identity or sex assigned at birth is the primary determinant of risk rather than sexual behaviour and choice of partners.⁹⁸ Whether understood as “men who have sex with men” or lumped together with cis women, trans women’s unique needs and patterns of risk behaviour tend to be obscured, leading to poorer care. From the perspective of those interested in HIV among men who have sex with men or among women, the heterogeneity introduced by including trans women in the aggregated data without further subset analysis impedes the reliability of the results. Reliance on gender information and/or unspecific questions about medical transition impedes scientific validity and the provision of quality services to trans people.⁹⁹ The principle of accuracy helps ensure that the requested information best responds to the needs it purports to address, avoiding cis-normative assumptions about the relationship between gender, bodies, and behaviours.

Instead of relying on a convenient but inaccurate proxy such as gender, institutions and governments should examine their reasons for seeking out gender information and substitute gender questions with questions more narrowly tailored to their purpose. As Dean Spade remarks:

[A]sking whether gender data is actually a good proxy for genitalia in the way the data is currently being gathered, whether the goal of gathering data about genitalia is useful and important to the articulated administrative aims, and what assumptions about

96. See Labuski & St. Amand, *supra* note 30, at 14, 19.

97. Spade, *supra* note 87, at 814.

98. See Spade, *supra* note 87, at 814; Daphna Stroumsa, Elizabeth F.S. Roberts, Hadrian Kinnear & Lisa H. Harris, *The Power and Limits of Classification – A 32-Year-Old Man with Abdominal Pain*, 380 NEW ENG. J. MED. 1885 (2019).

99. See Freeman & López, *supra* note 24, at 251–53.

gender and genitalia underlie the collection of this data may lead to better policies.¹⁰⁰

A careful inquiry cannot be done away with by identifying trans people and asking them whether they have undertaken a medical transition. As Christine Labuski and Colt M. St. Amand explain, ‘transgender’ is a highly heterogeneous category and its categorisation schemes must compose with the reality that “a growing number of trans people explicitly resist categories that stabilize gender in any way.”¹⁰¹ The same could be said of cis people and of people who confound the cis/trans binary.¹⁰² Cis people have similar surgeries to trans people for different reasons, too: hysterectomies and mastectomies are commonly practised for oncological purposes, to give but one example.¹⁰³ Some trans and non-binary people who have undergone these interventions have done so because of cancer, too.¹⁰⁴ Assumptions about anatomy are fraught with risk for all populations.

‘Medical transition’ is no more homogeneous than ‘transgender’ as a category, invoking different procedures, chronologies, and combinations of procedures for different people, despite social norms to the contrary.¹⁰⁵ Researchers have previously highlighted that questions “on hormones and surgeries” are often “embedded within a gender binary [. . .] that assumes that trans people are moving or have moved from one gender to another.”¹⁰⁶ In past studies, “a substantial proportion of trans persons who indicate they have ‘completed’ a medical transition have not had any surgeries.”¹⁰⁷ Preserving accuracy requires us to avoid projecting cis-normative views of medical transition onto trans communities.

Christine Labuski and Colt M. St. Amand have warned against making assumptions about the relevance of certain metrics for both trans and cis communities when asking questions:

What do questions about hormone use or surgery target, for example? Do they always inform the issue at hand? Do they preclude other, potentially more relevant, dimensions of bodily experience? If, for example, libido shifts during or after transition,

100. Spade, *supra* note 87, at 814.

101. Labuski & St. Amand, *supra* note 30, at 14.

102. See, e.g., Helana Darwin, *Challenging the Cisgender/Transgender Binary: Nonbinary People and the Transgender Label*, 34 GENDER & SOC’Y 357 (2020). I coin the term ‘gender modality’ in part to create narrative space for relationships between gender identity and sex assigned at birth that do not neatly fit the cis/trans dichotomy. Florence Ashley, ‘Trans’ is My Gender Modality: A Modest Terminological Proposal, in TRANS BODIES, TRANS SELVES (Laura Erickson-Schroth ed., 2d ed. forthcoming 2021).

103. Bauer, Braimoh, Scheim & Dharma, *supra* note 25, at 19.

104. J. Horncastle, *Busting Out*, 5 TRANSGENDER STUD. Q. 251 (2018).

105. Nova J. Bradford & Moin Syed, *Transnormativity and Transgender Identity Development: A Master Narrative Approach*, 81 SEX ROLES 306, 315 (2019); Vipond, *supra* note 27.

106. Bauer, Braimoh, Scheim & Dharma, *supra* note 25, at 19.

107. *Id.*

how to best understand the various roles played by genitals, hormones, erotic attention, and the social environment? What role do we think these factors play in any person's libido, and what are our assumptions regarding differences among trans, GNC, and cis libidos? Do we imagine that exogenous hormones affect trans and cis persons in the same ways? Are we willing to expand our findings to nontransgender persons? And if not, why not?¹⁰⁸

Institutions and governments must ask themselves such questions when examining their gender information management practices. Although perfect accuracy may be out of reach, there is ample room to improve upon current practices.

3. *Consensualism*

Sharing gender information should be done consensually and be guided by an aspiration for informed consent. Concretely, this means that the purpose of asking for gender information and recipients to that information should be clearly stated (declaration of purpose and availability), that giving gender information should be optional (optionality), and that gender information should be administered in a modular manner that restricts access to those who need it to achieve the stated purpose (modularity). The principle of consensualism aims at protecting privacy, at offering a measure of individual control over risks of misgendering and discrimination, and at curtailing surveillance.

DECLARATION OF PURPOSE AND AVAILABILITY

When asking for gender information, a statement of why the information is requested and who will have access to it should be included. People need to know what they are consenting to when disclosing their gender information, as it is sensitive and private information. Vague clauses asserting that the information may be shared with third parties are insufficient, as individuals rarely have in mind the variety of uses the information may be put to. People are often unaware that information will be available to frontline staff, bears risks of reidentification, and may be shared with employers, insurers, and government agencies in a range of contexts. The declaration should be sufficiently specific to allow people to make an enlightened choice as to whether to give their information.

Statements of purpose and availability contribute to transparency and accountability. They empower communities by allowing them to judge for themselves whether necessity, accuracy, consensualism, and de-gendering are preserved, which in turn allows them to hold institutions and governments accountable. Transparency and accountability promote both quality gender information management policies and positive relationships with trans communities.

108. Labuski & St. Amand, *supra* note 30, at 19.

OPTIONALITY

Disclosing gender information should be optional in the absence of clear legal or moral requirements to the contrary.¹⁰⁹ People should not be forced to give gender information to access services and resources generally available to the public. Optionality typically takes one of two forms: by making participation to information-gathering optional, and by making gender information questions optional.

Asking for gender information within a study is optional if individuals can refuse to participate in the study and do not derive significant benefits from participation. Studies in which benefits are sufficiently large to attract the participation of people who are morally averse to sharing gender information may violate the requirement of optionality.¹¹⁰ In many cases, however, optionality is better served by making individual gender information questions optional, so long as sufficient measures are undertaken to maintain the modularity of gender information management and ensure privacy. Even in studies that are not interested in information dissociated from gender information, missing data rates may offer some insight into the (un)representativeness of the study.

Whereas the meaning of clear legal requirements should be clear, clear moral requirements may be seen as more ambiguous. This Article asserts that affirmative action programs aimed at mitigating sexism are clear moral requirements. Though they may violate the requirement of optionality because the benefits of participation for individuals can outweigh their moral aversions to disclosing gender information, the benefits of most such programs outweigh their risks.

MODULARITY

Gender information management should be modular. That is, gender information gathered for different purposes and programs should be administered independently and should generally not be shared between institutions and between various subsections of institutions. Gathering gender information for the purposes of aggregate assessment or quality improvement initiatives may be justified, but that information should not be included in the institutional records accessible to frontline staff. As Hale M. Thompson points out, “[w]hile survey data are aggregated, sensitive disclosures within an individual’s health record are often exposed to numerous parties besides the patient and clinician.”¹¹¹ This must be avoided,

109. It should be noted that the “Meaningful Use” requirements only ask that sexual orientation and gender information can be collected. It does not require actual collection. *See* Electronic Health Record Incentive Program-Stage 3 and Modifications to Meaningful Use in 2015 Through 2017, 80 Fed. Reg. 62761, 62859 (Oct. 16, 2015) (to be codified at 42 C.F.R. pt. 412, 459).

110. Ruth W. Grant & Jeremy Sugarman, *Ethics in Human Subjects Research: Do Incentives Matter?*, 29 J. MED. & PHIL. 717 (2004).

111. Thompson, *supra* note 7, at 206.

and modularity is one of the mechanisms through which inappropriate disclosure can be curtailed.

Some schools have been known to keep “shadow files” of trans students who have not changed their legal names and/or gender markers.¹¹² Those files contain the person’s legal name and gender marker and are not broadly available to teachers and staff members.¹¹³ Similar administrative schemes could be considered for the collection of demographic data. Private information—like inventories of certain anatomical features within healthcare systems—should only be available to those who need it, such as the person’s physician or the researchers aggregating the data.

Modularity addresses the ethical concerns raised in the above subparts on privacy and surveillance.¹¹⁴ Although needs can justify gender information management, gender information management structures should be carefully crafted to maximise privacy and minimize surveillance. Modularity allows for gender information to be available to as few people as possible and grant individuals control over who and when they disclose that information, making disclosure to other, unrelated people optional instead of mandatory under a broader gender information management scheme. People may want to use different gender labels in different contexts, something which is facilitated by modularity. And because institutions may differ in their approaches to gender categorisations and changes thereof, the same person may count as male for one institution and female for another, creating risks of (re)identification as trans upon transmission of information.¹¹⁵ Modularity also reduces the risk of inappropriate disclosure and misclassification by limiting access to information and, in particular, by limiting the transmission of gender information between and within institutions.¹¹⁶

4. *De-gendering*

As a general rule, wherever an uncertainty arises, it should be resolved in favour of de-gendering. Inevitably, applying the previous three guiding principles to a specific context of gender information management in light of the various relevant ethical considerations leaves much to the discretion of individual policy-makers. Given the “implied shared understanding that certain things, like gender,

112. COMMISSION SCOLAIRE DE MONTRÉAL, LIGNES DIRECTRICES RELATIVES AUX ÉLÈVES TRANSGENRES DE LA COMMISSION SCOLAIRE DE MONTRÉAL [GUIDELINES ABOUT TRANSGENDER STUDENTS OF THE MONTREAL SCHOOL BOARD] 12 (2017) (“par exemple, conserver les documents officiels révélant le nom légal de l’élève sous enveloppes scellées dans son dossier avec accès limité à la direction de l’établissement”). Some advocates and jurists call the files “shadow files.”

113. *Id.*

114. *See generally supra* Parts I.A.1. & I.A.2.

115. Thompson, *supra* note 7, at 206–07.

116. *Id.* at 206, 213.

are just necessary information for administering government programs”¹¹⁷ and the continuing trend toward the expansion of security and surveillance regimes, the principle of de-gendering serves as a counterweight to pressures to request, record, and recount gender information. Presuming that any gathered sensitive information can and will be misused at some point, de-gendering errs on the side of safety.

The principle of de-gendering also recognises that the impact of gender information management on privacy and surveillance is difficult to appreciate because of the large-scale and often indirect relationship it has with lived experience. Because breaches of privacy and increased surveillance are abstract and difficult to measure, they are prone to being undervalued or overlooked in policy analysis. De-gendering applies when gender information is requested, recorded, and recounted, as well as in evaluating how this should be done. De-gendering implies not only that necessity be strictly respected, but also that considerations of accuracy be resolved in favour of de-gendering the information. For example, an organization could request information on hormonal profile instead of gender information and preserve consensualism by favouring greater optionality and modularity where threshold levels of consensualism are met but uncertainty remains. Referring to a previous example, uncertainty as to whether a study should also make specific gender information questions optional should be resolved in favour of the affirmative answer. Doing so is more in line with de-gendering than is preserving optionality by merely requiring affirmative consent as a prerequisite of participation since it better mitigates risks of self-exclusion, outing, misgendering, and discrimination.¹¹⁸

III.

APPLICATION TO FOUR COMMON CONTEXTS OF GENDER INFORMATION MANAGEMENT

This Part applies the previously delineated guiding principles to four contexts of gender information management: administrative records, special programs, aggregate assessment, and research. In each context, gender information is used for different reasons, responding to different needs and requirements and creating different degrees and types of risks in relation to privacy, misgendering and discrimination, and surveillance. Broadly, the more the context of management is individualised, the less legitimate it is to request, record, and report gender

117. SPADE, *supra* note 74, at 76.

118. Although studies with mandatory questions relating to gender information are frequently approved, unequal access to and unequal burdens in study participation as well as disparities in access to the benefits of research are lynchpin considerations in research ethics. NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH 8, 19–20 (1978).

information. Conversely, the more the data is aggregated and anonymized, the fewer the concerns raised by gender information management.

A. *Administrative records*

Administrative records are a large range of files, often electronic, which contain the information of identified individuals. They are most commonly used in the provision of direct services and serve a wide range of non-research purposes.¹¹⁹ Gender information found in those records are most commonly used to identify individuals, account for their individual needs, and may secondarily provide accessible demographic data for aggregate assessment—a context of management which we will consider later. It is what frontline workers at institutions and government agencies access when you seek out services. Most administrative records are now electronic, although a few entities still use paper records.

Institutions and government agencies should avoid including gender information in administrative records. Gender information is neither necessary nor reliable in administrative contexts and creates significant risks of inappropriate disclosure and subsequent harassment, discrimination, and violence due to the broad availability of such records, which are often available to all staff members and can be transmitted to third parties in various situations. The privacy of service-users is best preserved by removing gender information from records altogether.

Merely recording gender identity is not an adequate substitute to de-gendering. Gender information is both psychologically and materially burdensome to change and can prevent users from accessing different spaces using different gender presentations or stated gender.

Preserving gender information even in the form of gender identity data may lead to trans people being identified as such because of discrepancies between the records and their gender presentation, and during information transmission between and within institutions and agencies, especially if the records are not standardised across all institutions and agencies. As previously mentioned, there are many reasons why people may want to have one gender in one place and another elsewhere and why asking for gender identity preserves risks associated with inappropriate disclosure. Making gender identity optional is unlikely to resolve this, as refusal to answer gender identity questions can lead to increased scrutiny. A complete removal of gender information from administrative records solves those various problems.

Given the mandate to de-gender administrative records, information typically captured through gender information should be recorded using accurate, non-gendered terminology. For instance, reminders for prostate testing can be coded

119. *Use of Administrative Data*, STATISTICS CAN. PUBLICATIONS (June 18, 2019), <https://www150.statcan.gc.ca/n1/pub/12-539-x/2009001/administrative-administratives-eng.htm> [<https://perma.cc/YE59-GB4T>].

independently or be predicated on organ inventory.¹²⁰ This information should be available only on a need-to-know-basis—granting the physician, but not office staff access, in the proposed example—following the principle of modularity. These measures will potentially require software changes to introduce well-defined user roles, depending on the institution or government agency’s current functioning.

Where a person’s legal name and/or gender information must be recorded due to clear legal requirements or practical concerns such as insurance billing, the primary record should only include the name the person elects to use, with legal name and gender information being separated from the primary record and not routinely accessible by staff.¹²¹ In the past, some organisations have relied on a “shadow file system” to preserve the privacy of trans students, with the Montreal Francophone School Board recommending keeping a second set of records for trans students which is not typically accessible to teachers and staff other than management.¹²² Governments should, where possible, allow individuals to use different names across different agencies.

While recording pronouns could have some beneficial outcomes for trans people, it poses similar risks to gender information, since pronouns are often a proxy for gender identity. Instead of listing pronouns on administrative records, institutions and governments should adopt well-advertised trans-inclusive policies which discourage staff from assuming people’s pronouns and encourages them to state their own name and pronouns when introducing themselves.¹²³ For example, I might systematically introduce myself thus: “Hi, I’m Florence Ashley. I use they/them pronouns. And you are?” In instances where this was not done or when the interlocutor opts not to give their pronouns in return, the gender-neutral pronoun “they” can be used in referring to them. This should be done systematically to avoid othering individuals that are believed to be or suspected of being trans. Using “they” only for those who are perceived to be gender non-conforming can discourage trans, non-binary, and gender non-conforming individuals from accessing institutional and governmental services.

Given the necessity of removing all gender information from administrative records and the legitimate need to gather gender information for aggregate assessment purposes, entities must maintain a watertight separation between administrative records and aggregate assessment management. One way this can be done is by requesting and recording gender information and demographics data on a separate intake form that is not tied to the individual’s administrative record and

120. Deutsch, Green, Keatley, Mayer, Hastings & Hall, *supra* note 22, at 702.

121. Deutsch & Buchholz, *supra* note 44, at 845; Thompson, *supra* note 7, at 211.

122. COMMISSION SCOLAIRE DE MONTRÉAL, *supra* note 112, at 12–13.

123. See Bauer, Hammond, Travers, Kaay, Hohenadel & Boyce, *supra* note 34, at 358 (highlighting the importance of developing inclusive and welcoming policies, as changes to records are insufficient to make spaces reasonably accessible to trans people).

which is not processed by frontline staff who may be able associate the information with the person who turned in the form.

B. Special programs

Institutions and especially government agencies often request gender information to assess eligibility for specific programs, including affirmative action programs. Gender is often a criterion of eligibility for programs, and it is not illegitimate to distribute resources and opportunities along gendered lines given the disparities in access to resources and opportunities along those same lines in society.

Eligibility for special programs should be established solely based on gender identity, not sex assigned at birth.¹²⁴ Trans-specific programs are, of course, legitimate and may rely on self-identification as transgender as an eligibility criterion. Clear definitions should be provided, though, as some people typically considered trans do not identify with the term.¹²⁵

Those who establish eligibility criteria for special programs should carefully consider who they wish to include based in part on the purpose which the program seeks to serve. In my previous involvement with a student journal originally aimed at redressing the suppression of the voices of women in law schools, eligibility was extended to all individuals who experience misogyny and transmisogyny, as we understood the suppression of voice to be a by-product of such experiences.¹²⁶ This means that, for instance, a non-binary transfeminine individual like me was a welcome contributor to the journal since I experience both misogyny and transmisogyny on a recurring basis, even though I am not a woman. A program concerned with redressing all forms of gender marginalisation might instead prefer to include everyone who is not a cisgender man, as cis women, trans women, trans men, and non-binary individuals are, as groups, direct victims of gender oppression.

Although the benefits granted by special programs may undermine the optionality of disclosing gender information—unlike research, where non-participation does not typically involve significant loss of opportunity—redressing historical injustice is a sufficiently important goal to warrant maintaining the programs despite lower degrees of optionality. However, programs should be administered

124. DAVIS, *supra* note 54, at 49.

125. JAMES, HERMAN, KEISLING, MOTTET & ANAFI, *supra* note 27, at 44; *see also* A. FINN ENKE, TRANSFEMINIST PERSPECTIVES IN AND BEYOND TRANSGENDER AND GENDER STUDIES 73 (2012).

126. I served as the 2016-2017 Head French Editor of the student journal CONTOURS – VOICES OF WOMEN IN LAW. I wrote an editor's letter that mentioned the importance of promoting non-binary voices, rather than just women's. Florence Ashley Paré, *Editor's Letter*, 5 CONTOURS – VOICES OF WOMEN IN LAW vii (2017). The journal was subsequently renamed to CONTOURS for the eighth volume in an effort to prioritize feminist voices outside the binary. Adriana Cefis & Sabrina Kholam, *Foreword*, 8 CONTOURS i (2020).

separately from institutional records to ensure maximal privacy, and selected individuals should generally be allowed to opt out of any publicity associated with the program.¹²⁷ Some programs, for instance, publicise winners. Those selected should be allowed to remain anonymous or to keep their gender information confidential.

C. Aggregate assessment

Often, institutions and governmental agencies wish to collect demographic data to assess their own satisfaction of certain standards, or to improve the quality of their work. For instance, a department may want to know what percentage of employees are women. Or a hospital may want to assess whether a new local initiative seeking to educate the public about heart attack symptoms most common among women led to better survival rates for heart attacks among women at the hospital. The line between aggregate assessment and research is not always clear but has significant consequences, since research involving human participants typically requires ethics approval, whereas aggregate assessment initiatives may not.¹²⁸ Establishing what counts as research is beyond the scope of the present Article, but drawing a distinction between aggregate assessment and research is nonetheless important because data for aggregate assessment is often routinely found in administrative records. This poses increased concerns of re-identification and lack of consensualism, as people are routinely asked for gender information as a condition of accessing care, whereas participation in research is more often than not purely optional.

Aggregate information should be administered separately from administrative records and should be optional. This can be done, for instance, by asking individuals to fill optional intake forms which do not include their name or other identifying information. Because of risks of re-identification, aggregate assessment raw data should not be made readily available. Where the information must be tied to information in the administrative record, measures should be taken to ensure that the data requested for aggregate assessment is not available to people who may interact with the individual or make decisions regarding them.

To preserve optionality and modularity, no initiatives based on chart reviews or otherwise making use of administrative records should be done without

127. I say generally because some programs have publicity as a primary or sole benefit of participation. In those cases, it would make little sense to allow individuals to participate while opting out of publicity.

128. See David Casarett, Jason H. T. Karlawish & Jeremy Sugarman, *Determining When Quality Improvement Initiatives Should Be Considered Research: Proposed Criteria and Potential Implications*, 283 J. AM. MED. ASS'N. 2275, 2275 (2000); Ruth R. Faden, Nancy E. Kass, Steven N. Goodman, Peter Pronovost, Sean Tunis & Tom L. Beauchamp, *An Ethics Framework for a Learning Health Care System: A Departure from Traditional Research Ethics and Clinical Ethics*, 43 HASTINGS CTR. REP. 16, 16 (2013); Prathibha Varkey, M. Katherine Reller & Roger K. Kesar, *Basics of Quality Improvement in Health Care*, 82 MAYO CLINIC PROC. 735, 738 (2007).

individuals' consent if they include gender information (or other sensitive information). Inappropriate disclosures should be monitored, and security protections should be put in place whenever sensitive information is included in aggregate assessment.¹²⁹

When relevant, both gender identity and sex assigned at birth should be requested as part of assessment to enable subset analyses. Categorisation as male or female should be done based on gender identity, not sex assigned at birth. Questionnaires should explicitly allow participants not to answer gender information questions while still answering other questions. High rates of refusing to answer gender information questions can be an indicator that the context isn't perceived to be sufficiently safe, or that the questions are poorly phrased.

D. Research

Of the four contexts of gender information management, research is often assumed to pose the least threat to individuals, as participation requires informed consent and is subject to rigid regulations about information security and research ethics. However, researchers should be wary of the assumption that information they gather cannot be used to harm participants, since the potential for re-identification can be high, especially with research about trans people. Canadian courts have recognised that access to raw data poses a risk to the privacy of trans people, as they may be easily identified from it.¹³⁰ However, not all jurisdictions or judges will be so disinclined to share raw data, and researchers should keep in mind the potential for misuse, whether facilitated by state authority or not.

The recent proposals for national or international registries of trans youth, which have generated significant controversy, stand as an example of worrisome gender information management in the research context.¹³¹ Large-scale registries pose great risks of re-identification, especially given their ties to clinical care and delineated clinical populations. Their necessity is questionable—many study designs are available which could be substituted for large-scale registries and provide comparable scientific evidence—and they raise significant concerns about consensualism since they would be closely tied to the clinics which the youth attend. Previous research emerging out of clinics has been criticized for failing to transparently ensure that patients could refuse to participate without any adverse impact on clinical care.¹³²

129. Faden, Kass, Goodman, Pronovost, Tunis & Beauchamp, *supra* note 128, at 21.

130. See Centre de Lutte Contre l'Oppression des Genres (Centre for Gender Advocacy) c. Québec (Procureure Générale), 2016 CanLII 5161 (Can. C.S.).

131. See Ashley, *supra* note 73; de Graaf, Carmichael, Steensma & Zucker., *supra* note 68; Kimberly, Folkers, Friesen, Sultan, Quinn, Bateman-House, Parent, Konnoth, Janssen, Shah, Bluebond-Langer & Salas-Humara, *supra* note 69; Power, *supra* note 71.

132. Julia Temple Newhook, Jake Pyne, Kelley Winters, Stephen Feder, Cindy Holmes, Jemma Tosh, Mari-Lynne Sinnoth, Ally Jamieson & Sarah Pickett, *A Critical Commentary on*

Depending on the research question, gender information could be made optional. As is the case with aggregate assessment, non-answer rates can be informative as to the scientific validity and potential biases of the study.¹³³ Whenever gender information is collected for research, trans participants should be identifiable.¹³⁴ In large-scale population research and censuses, gender information should always be asked for and always include both gender identity and sex assigned at birth, as conducting secondary subset analyses is crucial to addressing the needs of trans communities.¹³⁵ Those studies should preferably minimise risks of re-identification and thus not include people's names, addresses, or any other identifying information. Large-scale studies pose less risk of re-identification because of the sheer volume of data and sampling methodologies. Nevertheless, privacy measures should be carefully considered and implemented in all research involving gender information management.

IV.

REQUESTING, RECORDING, AND RECOUNTING GENDER

The previous Part recommends when and whether gender information should be collected in four contexts of gender information management. This Part will consider how requesting, recording, and recounting gender information should be done, when collection is legitimate.

A. *Requesting gender information*

How should institutions and government agencies ask for gender information? Whenever it is legitimate to do so, gender information should be self-reported in a setting that preserves anonymity, which has been proven to decrease anxiety, limit potential discrimination, and increase the likelihood and honesty of

Follow-Up Studies and "Desistance" Theories About Transgender and Gender-Nonconforming Children, 19 INT'L J. TRANSGENDERISM 212, 219 (2018).

133. See Jocelyn Compton, Natalie Glass & Timothy Fowler, *Evidence of Selection Bias and Non-Response Bias in Patient Satisfaction Surveys*, 39 IOWA ORTHOPEDIC J. 195 (2019) (explaining that respondents and non-respondents to patient satisfaction surveys show significant demographic differences); Asuka Koyama, Ryuta Futunaga, Yasushina Abe, Yoshitomo Nishi, Noboru Fujise & Manabu Ikeda, *Item Non-Response on Self-Reported Depression Screening Questionnaire Among Community-Dwelling Elderly*, 162 J. AFFECTIVE DISORDER 30 (2014) (discussing how item non-response in a survey correlated with higher rates of physical and mental health problems); Mark E. McGovern, David Canning & Till Bärnighausen, *Accounting for Non-Response Bias Using Participation Incentives and Survey Design: An Application Using Gift Vouchers*, 171 ECON. LETTERS 239 (2018) (presenting that known non-response rate can sometimes be used to adjust outcomes for non-response bias).

134. Bauer, Hammond, Travers, Kaay, Hohenadel & Boyce, *supra* note 34, at 357.

135. See GENIUSS GROUP, *supra* note 33, at 2; Bauer, Braimoh, Scheim & Dharma, *supra* note 25, at 21; Reisner, Conron, Scout, Baker, Herman, Lombardi, Greytak, Gill, Matthews, *supra* note 29, at 36–37.

response.¹³⁶ This can be done online, whether at home or on a computer or tablet provided on site.¹³⁷ However, alternative means should be available, since some people do not have computers and other may have difficulty filling out forms on their own due to illiteracy or disability.¹³⁸ When responses are gathered on paper or in a more public setting such as schools, sensitive information such as gender should not be asked at the very beginning, as it can make people feel more self-conscious and fear that others may look at their responses.¹³⁹

Forms asking for gender information should clearly indicate why the information is being gathered and who will have access to it. The language used on forms should be periodically reviewed to ensure that it is clear, accurate, and sensitive to trans realities.¹⁴⁰ If possible, stakeholder groups should be convened for the purpose of elaborating sensitive and appropriate processes for requesting gender information.

B. Recording gender information: 1, 2 step

Gender information should be recorded through a two-step approach which records both gender identity and sex assigned at birth. Trans individuals can be identified based on the answer they give to those two questions. Where it is unnecessary or undesirable to identify trans individuals, only gender identity should be recorded.

A one-step approach is sometimes used to identify trans participants. This approach involves asking a single question, with variants of the following options: “male, female, transgender,” or “cis male, cis female, trans male, trans female, non-binary.”¹⁴¹ Each of those options is inadequate. The first one implies that trans men and women are not respectively men and women and fails to distinguish between trans men and trans women, who may have wildly different needs and experiences.¹⁴² The second fails to distinguish between non-binary people of

136. See GENIUSS GROUP, *supra* note 33, at 20, 22; Deutsch & Buchholz, *supra* note 44, at 843; Thompson, *supra* note 7, at 211.

137. Deutsch, Keatley, Sevelius & Shade, *supra* note 10.

138. GENIUSS GROUP, *supra* note 33, at 24.

139. *Id.* at 26, 30.

140. *Id.* at 29; Walter Pierre Bouman, Amets Suess Schwend, Joz Motmans, Adam Smiley, Joshua D. Safer, Madeline B. Deutsch, Noah J. Adams & Sam Winter, *Language and Trans Health*, 18 INT’L J. TRANSGENDERISM 1 (2017); Jamison Green, Dallas Denny & Jason Cromwell, “What Do You Want Us to Call You?” *Respectful Language*, 5 TRANSGENDER STUD. Q. 100 (2018); Hagen & Galupo, *supra* note 26, at 30–32; Riki Lane, *Developing Inclusive Primary Care for Trans, Gender-Diverse and Nonbinary People*, 191 CAN. MED. ASS’N J. 61 (2019).

141. Deutsch & Buchholz, *supra* note 44, at 843–44.

142. See Andrew D. Pinto, Tatiana Aratangy, Alex Abramovich, Kim Devotta, Rosane Nisenbaum, Ri Wang & Tara Kiran, *Routine Collection of Sexual Orientation and Gender Identity Data: A Mixed-Methods Study*, 191 CAN. MED. ASS’N J. 63 (2019).

different genders assigned at birth, who may also have significantly different needs and experiences.

Research has suggested that the two-step approach is more effective at identifying trans respondents, leads to a much lower missing data rate, and remains comfortable to trans and cis respondents.¹⁴³ It is recommended by the World Professional Association for Transgender Health EMR Working Group and the GENIUSS group,¹⁴⁴ and is now widely used and recommended in trans health.¹⁴⁵

When using the two-step approach, short explanations of gender identity and sex assigned at birth should be provided, as not everyone is familiar with these notions.¹⁴⁶ Asking for sex instead of gender/sex assigned at birth can create confusion and lead to erroneous responses from both cis and trans people.¹⁴⁷ Gender assignment at birth should be optional, as many trans people are uncomfortable identifying their assigned gender and may avoid seeking services if reporting is mandatory.¹⁴⁸ Those who decline to answer on forms may prefer disclosing their gender assignment to individual service providers if it becomes relevant.

Gender identity questions can be formulated as: “Which of the following options best represents your gender identity?” Answer options should include “man,

143. See Kristin A. Broussard, Ruth H. Warner & Anna R. D. Pope, *Too Many Boxes, or Not Enough? Preferences for How We Ask About Gender in Cisgender, LGB, and Gender-Diverse Samples*, 78 *SEX ROLES* 606, 621 (2018); Deutsch, Green, Keatley, Mayer, Hastings & Hall, *supra* note 22, at 701; Deutsch, Keatley, Sevelius & Shade, *supra* note 10, at 658; Pinto, Aratangy, Abramovich, Devotta, Nisenbaum, Wang & Kiran, *supra* note 142; Jordan E. Rullo, Jilian L. Foxen, Joan M. Griffin, Jennifer R. Geske, Cesar A. Gonzalez, Stephanie S. Faubion & Michelle van Ryn, *Patient Acceptance of Sexual Orientation and Gender Identity Questions on Intake Forms in Outpatient Clinics: A Pragmatic Randomized Multisite Trial*, 53 *HEALTH SERV. RES.* 3790 (2018); Tate, Ledbetter & Youssef, *supra* note 35; Thompson, *supra* note 7, at 208.

144. GENIUSS GROUP, *supra* note 33 (finding that the group made no recommendation for adolescents regarding the two-step approach due to the need for further research); Deutsch, Green, Keatley, Mayer, Hastings, & Hall, *supra* note 22.

145. CTR. OF EXCELLENCE FOR TRANSGENDER HEALTH, UNIV. CAL. S.F., *RECOMMENDATIONS FOR INCLUSIVE DATA COLLECTION OF TRANS PEOPLE IN HIV PREVENTION, CARE & SERVICES* (2009); Bauer, Braimoh, Scheim & Dharma, *supra* note 25, at 21; Broussard, Warner & Pope, *supra* note 143, at 621; Cahill, Baker, Deutsch, Keatley & Makadon, *supra* note 23; Pinto, Aratangy, Abramovich, Devotta, Nisenbaum, Wang, & Kiran, *supra* note 142; Reisner, Conron, Scout, Baker, Herman, Lombardi, Greytak, Gill, Matthews, *supra* note 29; Sari L. Reisner, Katie Biello, Joshua G. Rosenberger, S. Bryn Austin, Sebastien Haneuse, Amaya Perez-Brumer, David S. Novak & Matthew J. Mimiaga, *Using a Two-Step Method to Measure Transgender Identity in Latin America/the Caribbean, Portugal, and Spain*, 43 *ARCHIVES SEXUAL BEHAV.* 1503, 1510 (2014); Rider, McMorris, Gower, Coleman & Eisenberg, *supra* note 61, at 3.

146. GENIUSS GROUP, *supra* note 33, at 29; Emilia Lombardi & Swagata Banik, *The Utility of the Two-Step Gender Measure Within Trans and Cis Populations*, 13 *SEXUAL RES. & SOC. POL'Y* 288, 291 (2016); Reisner, Biello, Rosenberger, Austin, Haneuse, Perez-Brumer, Novak & Mimiaga, *supra* note 145, at 1510.

147. Kerith J. Conron, Stewart J. Landers, Sari L. Reisner & Randall L. Sell, *Sex and Gender in the US Health Surveillance System: A Call to Action*, 104 *AM. J. PUB. HEALTH* 970, 971–72, 974 (2014); Rider, McMorris, Gower, Coleman & Eisenberg, *supra* note 61, at 7.

148. Thompson, *supra* note 7, at 209–10; Labuski & St. Amand, *supra* note 30, at 24.

woman, non-binary, genderqueer, gender not listed here,” with additional options representing the most common culturally-specific identities in the geographical area of the institution or government body.¹⁴⁹ For instance, U.S.- or Canadian-wide forms should allow self-reporting of two-spirit identities. The option “gender not listed here” identifies a write-in option.¹⁵⁰ If possible, individuals should be able to pick more than one identity from the list, as many people’s gender identification is complex.¹⁵¹ If it becomes necessary to identify a single identity for analytical purposes, an additional question may be used asking which category the person wants to be analysed under.¹⁵² This can be coded using a skip logic if the form is completed electronically. Multidimensional measures of gender and gender identity can be used where appropriate, depending on the purposes of aggregate assessment or research, with some authors proposing up to six questions on gender.¹⁵³ Gender expression is being increasingly recognised as a relevant metric in research on social determinants of health and discrimination.¹⁵⁴

Although write-in gender options can lead to sarcastic or absurd responses, those can typically be identified due to presence of additional mischievous answers, as individuals who intentionally misrepresent their gender for nefarious reasons are likely to answer other questions mischievously.¹⁵⁵

149. Bauer, Braimoh, Scheim & Dharma, *supra* note 25, at 19. This includes specific Indigenous terms such as *iskwêhkân*, *napêhkân* (Nehiyawewin), *asegi udanto* (Tsalagi Gawonihisdi), *niizh manidowaag* (Ojibwe), and *onón:wat* (Kanien’kéha). See CHELSEA VOWEL, *INDIGENOUS WRITES: A GUIDE TO FIRST NATIONS, MÉTIS, AND INUIT ISSUES IN CANADA* 108 (2016); Kai Pyle, *Naming and Claiming*, 5 *TRANSGENDER STUD. Q.* 574, 577 (2018); Angela Sterritt, *Indigenous Languages Recognize Gender States Not Even Named in English*, *GLOBE AND MAIL* (Mar. 10, 2016), <https://www.theglobeandmail.com/life/health-and-fitness/health/indigenous-languages-recognize-gender-states-not-even-named-in-english/article29130778/> [<https://perma.cc/9JF8-YP2U>]; Arielle Twist, *On Translating the Untranslatable*, *CANADIAN ART* (June 20, 2018), <https://canadianart.ca/features/on-translating-the-untranslatable/> [<https://perma.cc/Z4QD-L3HS>].

150. Gloria Fraser, *Evaluating Inclusive Gender Identity Measures for Use in Quantitative Psychological Research*, 9 *PSYCHOL. & SEXUALITY* 343, 346 (2018); Jack Harrison, Jaime Grant & Jody L. Herman, *A Gender Not Listed Here: Genderqueers, Gender Rebels, and Otherwise in the National Transgender Discrimination Survey*, 2 *LGBTQ PUB. POL’Y J.* 13, 13 (2012). As T. Benjamin Singer points out, these open-ended questions may reveal the ways in which people resist the assumption that gender and sexual orientations are distinct. T. Benjamin Singer, *The Profusion of Things: The “Transgender Matrix” and Demographic Imaginaries in US Public Health*, 2 *TRANSGENDER STUD. Q.* 58, 67–69 (2015).

151. Fraser, *supra* note 150, at 346; Singer, *supra* note 150, at 65, 67.

152. Bauer, Braimoh, Scheim & Dharma, *supra* note 25, at 21–22 (explaining that more questions than two may be needed to capture relevant subgroups. They note, additionally, that it is labour-intensive, possibly unethical, and sometimes impossible to re-categorize open-ended responses, resulting in data loss. Asking an additional question regarding which broader category the person wants to be analysed under (e.g. transfeminine, transmasculine, other non-binary) may offer a satisfactory solution for this difficulty.).

153. Bauer, Braimoh, Scheim, & Dharma, *supra* note 25, at 6, 25.

154. GENIUSS GROUP, *supra* note 33, at 15–16; Rider, McMorris, Gower, Coleman & Eisenberg, *supra* note 61, at 5.

155. Fraser, *supra* note 150, at 349.

Questions on sex assigned at birth should not include options beyond male and female. The inclusion of an intersex option may fail to capture all intersex people, as some do not identify with that term and instead see themselves as having an intersex trait or a “difference of sex development.”¹⁵⁶ Additionally, intersex people are routinely assigned a male or female gender, which is subsequently ratified in their birth certificate and oftentimes motivates non-consensual genital surgeries.¹⁵⁷ Instead, a separate question may be included, which asks: “Are you an intersex person? Or have you ever been diagnosed by a medical doctor with an intersex variation or a ‘difference of sex development’, or were you born with (or developed naturally in puberty) genitals, and/or chromosomal patterns that vary from the standard definitions of male or female?”¹⁵⁸ In light of the ethical considerations highlighted in this Article, including a question about intersex people will be important in many studies which collect data on both gender identity and sex assigned at birth.

C. *Recounting gender information*

Gender information should be guarded closely and ever-so-carefully disclosed. Institutions and governmental bodies should develop strong privacy and data anonymity policies in collaboration with stakeholders.

In aggregate assessment and research, only aggregated data should be reported along gender lines, with careful attention paid to the way in which data granularity may differ among trans people. Large-scale population research which includes geographical markers can make trans people uniquely identifiable, especially in rural areas. Data reporting policies should be sensitive to this issue. Gender-based analyses should be reported in a way that does not belittle or misgender trans people: terms like “biological sex” or “natal sex” are inappropriate and should be avoided in favour of “sex assigned at birth” and other similar precise terminology.¹⁵⁹

Gender-neutral language should be adopted in individual communications to avoid misgendering individuals based on the perceived gender associated with their name. Letters and emails should not include gendered honorifics such as

156. GENIUSS GROUP, *supra* note 33, at 41.

157. GENIUSS GROUP, *supra* note 33, at 42; *Malta Declaration*, OII EUROPE (Dec. 1, 2013), <https://oiiurope.org/malta-declaration/> [<https://perma.cc/B68T-CMFP>].

158. Janik Bastien-Charlebois and Martin Blais graciously shared this formulation with me. The formulation was adapted from the GenIUSS Group definition proposed for the BRAV/SWERV research project at the Université du Québec à Montréal under Martin Blais. GENIUSS GROUP, *supra* note 33, at 42.

159. Florence Ashley, *XY*, in *DICTIONNAIRE CRITIQUE DU SEXISME LINGUISTIQUE* 234 (Suzanne Zaccour & Michaël Lessard eds., 2017); Bouman, Schwend, Motmans, Smiley, Safer, Deutsch, Adams & Winter, *supra* note 140; Y Gavriel Ansara & Peter Hegarty, *Methodologies of Misgendering: Recommendations for Reducing Cisgenderism in Psychological Research*, 24 *FEMINISM & PSYCHOL.* 259, 266 (2014); Labuski & St. Amand, *supra* note 30, at 27.

“Mr.” or “Ms.”¹⁶⁰ This can be done by using the person’s full name instead of honorific and last name. Using the singular “they” or second-person singular “you” can be used to de-gender communications and avoid assuming that all recipients are either men or women.¹⁶¹ Various options for gender-neutral writing have been developed in languages which are more gendered than English, such as French.¹⁶² Usage of less common language developed by non-binary communities may be required in such cases.

V. CONCLUSION

Gender information management is becoming an area of increased concern and tension in recent years due to the parallel rise of trans visibility and the increase of government surveillance. Drawing on the principles of necessity, accuracy, consensualism, and de-gendering, it is possible to develop cogent and principled approaches to institutional and governmental management of gender information.

As the foregoing analysis revealed, the inclusion of gender information in administrative records is illegitimate and should be avoided. By contrast, it is often necessary to request, record, and recount gender information to better represent and respond to the needs of trans people in contexts ranging from special programs to aggregate assessment and research. Institutions and government bodies should develop clear and unambiguous policies for gender information management in line with the present recommendations. They should do so in collaboration with and hold themselves accountable to trans communities. In parallel, resources should be allocated to developing adequate file management systems and shifting toward electronic self-reporting of demographic information. At the legislative level, amending privacy legislation to prohibit the use of gender information for identification purposes and requiring that institutions demonstrate reasonable necessity when requesting, recording, and recounting gender information would contribute to the development of more appropriate gender information management practices.

Given the strong tension between the dangers of surveillance and the need for more information, as highlighted by trans people’s experiences, it is no longer adequate to rely on cis-normative, under-theorised, or piecemeal approaches to gender information management. Current gender information management practices must be upended.

160. Translation Bureau, *Gender-Inclusive Writing: Correspondence*, GOV’T CAN. (Oct. 15, 2015), http://www.btb.termiumplus.gc.ca/tpv2guides/guides/wrtps/index-eng.html?lang=eng&lettr=indx_catlog_g&page=9tZXuAe4oZYs.html [https://perma.cc/7T6Z-7QYY].

161. Deutsch & Buchholz, *supra* note 44, at 844.

162. See Ashley, *supra* note 59; Translation Bureau, *supra* note 160.