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FOSTERING EQUITY AND INCLUSION ACROSS THE GENDER
SPECTRUM IN THE LAW SCHOOL CLASSROOM

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As educators strive for gender equity within the traditional binary, pedagogical efforts within the classroom necessarily must include students across the gender spectrum. The landmark Supreme Court decision on three related cases, the “Title VII Trifecta” (Trifecta),¹ is not a social upheaval but rather a recognition that societal constructions on sex and gender have evolved.² In particular, Generation Z students are overwhelmingly in support of extending legal protections to keep pace with this evolution. It is incumbent upon legal educators, especially in recognition of the potential limits of the Trifecta holding, to acknowledge the rapidly changing legal landscape when it comes to individuals beyond the binary. This Article is intended to be an introduction to the consideration of complex sex and gender dynamics in the classroom with concrete strategies to increase feelings of equity and inclusion.

I. SUPREME COURT FOCUS: DEFINITION OF “SEX” WITHIN TITLE VII

Justice Gorsuch’s majority opinion was emphatically clear: employment discrimination against “homosexual and transgender” individuals is discrimination on the “basis of sex” and violates federal law.³ The Title VII Trifecta cases are *Zarda v. Altitude Express*,⁴ *Bostock v. Clayton County*,⁵ and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity*

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1. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

2. To echo Justice Brennan in *Price Waterhouse* decades ago, “[w]e have, in short, been here before.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). Society and our courts are confronted once again with a sea-change in relation to extending legal protections to marginalized groups.

3. *Bostock*, 140 S. Ct. at 1737.

4. 883 F.3d 100 (2d Cir. 2018), *aff’d sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Title VII of the Civil Rights Act protects individuals from discrimination based on sex stereotype or gender non-conformity; however, courts disagree as to “whether these statutes forbid discrimination against transgender individuals based solely upon ‘gender identity’ or gender status.” Doug Werth, *Because of Sex: Gender Identity and Transgender Rights Under Titles VII and IX*, *ADVOCATE*, May 2017, at 32, 32; *see also* Maayan Sudai, *Toward A Functional Analysis of “Sex” in Federal Antidiscrimination Law*, 42 *HARV. J.L. & GENDER* 202, 205 (2019) (noting that federal law protects from discrimination based on “sex,” but defines “sex” in multiple, conflicting ways). The *Bostock* decision does not move the needle in resolving this conflict.

5. 894 F.3d 1335 (11th Cir. 2018), *rev’d and remanded sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

Commission.⁶ The Court consolidated two cases for oral argument, *Zarda* and *Bostock*, which were challenges by individuals who were fired because they were gay.⁷ The third case, *Harris Funeral Homes*, more intimately involved gender identity and Title VII: Respondent Aimee Stephens, a funeral director, was fired after informing her employer that she intended to transition from male to female and would represent herself and dress as a woman while at work.⁸ The Sixth Circuit ruled prior to consolidation that Title VII protected Aimee from discrimination based on “gender identity.”⁹

Leading up to the *Trifecta* decision, there was a wide disparity in the way the lower courts interpreted Title VII,¹⁰ and “fewer than half of the 50 states specifically bar[red] discrimination based on sexual orientation or gender identity.”¹¹ Adding to that complexity was inconsistent treatment from the executive branch; under the Trump presidential administration, protections gained in recent decades have been stripped away.¹² Advo-

6. 884 F.3d 560, 566 (6th Cir. 2018), *rev'd and remanded sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Plaintiffs *Zarda* and *Stephens* both passed away prior to victory.

7. “*Zarda* and *Bostock* went to federal court in New York and Georgia, respectively, where they argued that firing them because they were gay violated Title VII of the Civil Rights Act of 1964” Amy Howe, *Argument Preview: Justices to Consider Federal Employment Protection for LGBT Employees*, SCOTUSBLOG (Oct. 1, 2019, 11:15 AM), <https://www.scotusblog.com/2019/10/argument-preview-justices-to-consider-federal-employment-protection-for-lgbt-employees/> [https://perma.cc/ZW2M-L2EM].

The U.S. Court of Appeals for the 11th Circuit ruled that *Bostock*’s case could not go forward, because Title VII does not apply to discrimination based on sexual orientation. But the U.S. Court of Appeals for the 2nd Circuit reached the opposite conclusion: It reasoned that discrimination based on sexual orientation is a ‘subset of sex discrimination.’ *Bostock* asked the justices to review the 11th Circuit’s ruling, while *Altitude Express*—*Zarda*’s former employer—did the same for the 2nd Circuit’s decision.

Id.

8. *Harris Funeral Homes*, 884 F.3d at 566.

9. *See id.* at 600. This decision relied on the *Price Waterhouse* precedent of “sex stereotyping,” which many predicted would factor heavily into the majority opinion. Surprisingly, the discussion of PWH is only raised by Justice Alito. *Bostock*, 140 S. Ct. at 1763 (Alito, J., dissenting with hostility). Experts predict that the combination of *Bostock* and PWH will serve as incredibly weapons for future Title VII claims and other federal law claims where protection is extended on the basis of “sex.”

10. Erin E. Clawson, *I Now Pronoun-Ce You: A Proposal for Pronoun Protections for Transgender People*, 124 PENN. ST. L. REV. 247, 271 (2019).

11. Amy Howe, *Argument Analysis: Justices Divided on Federal Protections for LGBT Employees (UPDATED)*, SCOTUSBLOG (Oct. 8, 2019, 2:14 PM), <https://www.scotusblog.com/2019/10/argument-analysis-justices-divided-on-federal-protections-for-lgbt-employees/> [https://perma.cc/A5FN-MB5A].

12. *See* Elizabeth Kristen & David Nahmias, *The Writing on the Wall: The Future of LGBT Employment Antidiscrimination Law in the Age of Trump*, 39 BERKELEY J. EMP. & LAB. L. 89, 97–98 (2018) (describing Trump’s “generally abysmal record on LGBT issues”).

cates and supporters waited anxiously for the outcome, and many anticipated that a defeat was likely. In no small part, this was attributed to the historical adherence within American jurisprudence to the principle that assigned sex and gender identity will align, maintaining a “steadfast commitment” to the binary system.¹³

In the past few decades, courts (and society) have increasingly grappled with sex and gender terminology, labeling, and identity beyond the traditional binary.¹⁴ Many predicted that the 1964 meaning of “sex” would result in a loss for Aimee Stephens and the other plaintiffs.¹⁵ In a strategic attempt based on the likely receptiveness of the Justices and the current legal framework, Attorney David Cole argued to fit the facts into discrimination based on “sex assigned at birth based on visible anatomy or biological sex.”¹⁶ In awarding Aimee and the other plaintiffs a momentous victory, Justice Gorsuch agreed with Cole and continued to adhere to the binary system: “we proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between

13. Sonia Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 389–91 (2017) (“[T]he binary presumptions of male and female identity are largely outdated . . .”).

14. *See, e.g., Zzyym v. Kerry*, 220 F. Supp. 3d 1106 (D. Col. 2016). Plaintiff Dana Alix Zzyym is an intersex individual who does not fall within the traditional male or female binary categories. They informed the passport authorities that they were neither male nor female and requested “X” as an acceptable marker in the sex field. *Id.* at 1009. Although ruling in Dana’s favor, the court sidestepped the constitutional issue, ruling that the State Department policy needed to be reconsidered under the APA. *Id.* at 1114. Yet, years after this decision, Dana remains unable to obtain a nonbinary passport. Amanda Pampuro, *More Complicated Than XYZ: Intersex Passport Denial Reversed Again*, COURTHOUSE NEWS SERV. (May 13, 2020), <https://www.courthousenews.com/remanded-again-intersex-passport-more-complicated-than-xyz/> [<https://perma.cc/5DZD-DVR4>].

15. Lisa Keen, *A Justice-by-Justice Look at the Title VII Cases*, DALLAS VOICE (Oct. 11, 2019), <https://dallasvoice.com/a-justice-by-justice-look-at-the-title-vii-cases/> [<https://perma.cc/5CX3-ZM5V>]; *see also* Michael Berry & Stephanie Taub, *Symposium: Hiding Elephants in Mouseholes: The Original Meaning of “Discrimination on the Basis of Sex,”* SCOTUSBLOG (Sept. 4, 2019, 11:30 AM), <https://www.scotusblog.com/2019/09/symposium-hiding-elephants-in-mouseholes-the-original-meaning-of-discrimination-on-the-basis-of-sex/> [<https://perma.cc/8KQL-VNEE>]. “It would be difficult to imagine, in 1964 . . . that Congress understood those words to prohibit discrimination on the basis of gender identity or sexual orientation. At the time, the commonly understood meaning of the term ‘sex’ simply referred to male and female.” *Id.*

16. Transcript of Oral Argument at 5, 14, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107) (“Your Honor, for this—for purposes of this case, all we are arguing is that . . . Title VII’s reference to sex *at least* includes what you’re calling biological sex . . .” (emphasis added)). Cole conceded on biological sex as a path to victory, but his position was that it should be more encompassing. New York Times author Linda Greenhouse notes the “what opinion is actually textualism” debate. Linda Greenhouse, *What Does ‘Sex’ Mean? The Supreme Court Answers*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/opinion/supreme-court-sex-discrimination.html> [<https://perma.cc/MS5F-44A6>].

male and female.”¹⁷ The employers argued, and Gorsuch conceded, that the term “sex” in 1964 referred to “status as *either* male or female [as] determined by reproductive biology.”¹⁸

The outcome in favor of Aimee Stephens is consistent with a societal shift in thinking about sex and gender. The Justices took this opportunity as “the point” to step in.¹⁹ These statutory acts “were born from the desire to ensure that we treat people equally,” and Aimee Stephens and the other plaintiffs were not treated equally.²⁰ But the holding is not a panacea for all gender expansive individuals. Does an individual who identifies as neither male nor female fit into this framework? The definition itself excludes them.²¹ In his dissent, Justice Kavanaugh noted that the framework laid out by the majority would apply in the same way to claims brought “on the basis of gender identity.”²² Although likely correct, the silence of the majority to explicitly protect not just transgender individuals but those outside the binary leaves opportunity for challenge.²³ Ultimately, although the *Trifecta* continues to cling to the binary definition of sex, the functional outcome is more protective.

II. TERMINOLOGY IN THE CLASSROOM: CONSIDERATION OF INCREASING GENDER DIVERSITY

As challenges undoubtedly arise to the *Trifecta* decision, legal education should follow the expansive spirit of the Title VII *Trifecta* holding in any approach to classroom inclusivity. As a starting point, educators should first familiarize themselves with the broad array of terms a student may use in describing themselves.²⁴ The only certainty when attempting

17. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

18. *Id.* (alteration in original) (emphasis added) (internal quotation marks omitted).

19. Transcript of Oral Argument, *supra* note 16, at 57–59.

20. *Id.* at 60.

21. Rights claimed based on a nonbinary gender “require particular attention, because they are distinct from, if overlapping with, those focused on women or men who are gender-nonconforming, transgender, lesbian, gay, bisexual, or intersex.” Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 901 (2019).

22. *Bostock*, 140 S. Ct. at 1823 n.1 (Kavanaugh, J., dissenting); see Vin Gurrieri, *Questions About ‘Nonbinary’ Bias Linger After LGBT Ruling*, LAW360 (June 19, 2020, 9:06 PM), <https://www.law360.com/articles/1284955/questions-about-nonbinary-bias-linger-after-lgbt-ruling> [permalink unavailable] (“Although the U.S. Supreme Court’s landmark ruling that gay and transgender people are protected from workplace bias likely extends to people who identify as nonbinary, the justices left enough ambiguity for that issue to potentially be raised in future cases, experts say.”).

23. *Id.*

24. For educators, there are already many incredible resources that can be the starting point for acknowledgment and consideration of this terminology. See, e.g., *Making Caring Common Project- For Educators: Supporting LGBTQIA Youth Resource List*, HARV. GRAD. SCH. EDUC. (Oct. 2018), <https://mcc.gse.harvard.edu/resources-for-educators/supporting-lgbtqia-youth-resource-list> [https://perma.cc/8YJ7-

to categorize and define labels related to sex and gender is that terminology is constantly changing and necessarily fluid. The term gender is often conflated with “biological” sex, or the sex assigned at birth; however, they are overlapping yet distinct.²⁵ Despite conceding the definition of “sex” as the 1964 traditional binary definition, the Trifecta majority opinion noted that the concepts of sex and gender were inextricably linked.²⁶

The Trifecta holding clearly stated that Title VII protects “homosexual or transgender” individuals, yet this language is limiting, as is the concept of biological sex. Considerations of terminology must go beyond. The term nonbinary is commonly used to describe individuals that do not fall into the traditional male or female “check the box” binary categories.²⁷ Other terms that may apply to an individual outside the binary may include: agender, gender expansive, genderfluid, or genderqueer.²⁸

AY3Z]; Shelby Hanssen, Note, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283, 287 (2017); NAT'L LGBT BAR ASS'N & FOUND., LGBTQ+ BEST PRACTICES FOR LAW SCHOOLS: A GUIDE TO INSTITUTIONAL EQUITY (2019), <https://lgbtbar.org/wp-content/uploads/sites/6/sites/8/2019/04/Law-School-Campus-Climate-Toolkit-April-2019.pdf> [<https://perma.cc/52WV-HSSK>] [hereinafter LGBTQ+ BEST PRACTICES FOR LAW SCHOOLS].

25. Katyal, *supra* note 13, at 391 (noting “a basic presumption within law and policy that gender identity and assigned sex almost always align with one another”). There is no clear definition as to what “biological” sex actually means. A biologist recently had a viral Twitter post giving a non-scientist explanation (lesson) on the SRY gene and why XX or XY do not strictly correlate to “female” and “male,” and the general complexity of this issue. See Rebecca Helm (@RebeccaRHelm), TWITTER (Dec. 19, 2019), <https://twitter.com/rebeccarhelm/status/1207834357639139328> [permalink unavailable]. See generally Maayan Sudai, *Toward a Functional Analysis of “Sex” in Federal Antidiscrimination Law*, 42 HARV. J.L. & GENDER 421 (2019).

26. “[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” *Bostock*, 140 S. Ct. at 1741.

27. TEACHING TOLERANCE, CRITICAL PRACTICES FOR ANTI BIAS EDUCATION (2014), https://www.tolerance.org/sites/default/files/Critical%20Practicesv4_final.pdf [<https://perma.cc/D4CF-MELQ>]. Renowned scholar and law professor Julie A. Greenberg, who has been publishing in this area for decades, noted in 2012 that “the American legal system blindly clings to a binary sex and gender paradigm.” Julie A. Greenberg, *Interacting in the Workplace with Individuals Who Have an Intersex Condition*, BLOOMBERG BNA (2014), <https://ssrn.com/abstract=2569403> [permalink unavailable]. In 2019, little has changed: “federal, and most state and local, laws do not acknowledge that sex is non-binary or mandate that administrative agencies must issue documents with markers other than M or F.” Julie A. Greenberg, *Beyond the Binary: Constitutional Challenges to Male/Female Sex Classification Systems*, 41 T. JEFFERSON L. REV. 195, 200 (2019).

28. This list is not exhaustive and, like any current list, will be modified and updated over time. See PFLAG *National Glossary of Terms*, PFLAG, <https://pflag.org/glossary> [<https://perma.cc/G47P-2EWQ>] (last updated July 2019).

Nonbinary people are often said to fit under the heading “transgender”: “An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.” But not all nonbinary people identify as transgender, and many transgender people identify as men or women. Nonbinary

Nonbinary or gender expansive individuals frequently do not fit into the labels used by the Court. Understanding that the traditional binary definition “fail[s] to adequately represent the comprehensive spectrum and fluid nature of gender identity” guides an approach to terminology that should be equally flexible and fluid.²⁹

Terminology selection that is limited to the binary categories can negatively impact rapport and trust with students and hinder an inclusive environment.³⁰ Adoption of gender-neutral language is happening in many spheres, and the classroom needs to be included on that list.³¹ For example, nonbinary gender markers are increasingly available on many forms and identifications in at least eighteen jurisdictions.³² Many employers are making “meaningful efforts to be inclusive through ‘gender-neutral language in communications, training customer service employees to ask about preferred pronouns or updating dress codes or restroom facilities to accommodate people across the gender spectrum.’”³³ Consideration of

gender identity is not the same thing as intersex variation. “Intersex refers to people who are born with any of a range of sex characteristics that may not fit a doctor’s notions of binary male or female bodies.” While some nonbinary people have intersex variations, not all do, and many people with intersex variations have male or female gender identities.

Clarke, *supra* note 21, at 897–98 (footnotes omitted) (first quoting GLAAD MEDIA REFERENCE GUIDE II (10th ed. 2016), <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> [<https://perma.cc/4ZKB-XA3T>]; then quoting *Intersex Definitions*, INTERACT, <https://interactadvocates.org/intersex-definitions/> [<https://perma.cc/R9GD-NHG3>] (last visited Oct. 27, 2020)).

29. Mark Angelo Simpliciano, *Recognizing “X”: A Comparative Analysis of the California Gender Recognition Act—Identifying the Limitations and Conceptualizing Possible Solutions*, 55 CAL. W. L. REV. 315, 316 (2018). The binary approach also completely “fails to account for other factors that may contribute to define a person’s sex, such as chromosomal mutations, hormonal differences and gender identity.” Werth, *supra* note 4, at 32.

30. See Rebecca A. Copeland & Ian F. Tapu, *Cultural Competency in Hawai‘i: Affirming Gender Identity and Expression*, HAW. B.J., Oct. 2019, at 20.

31. “A richer gender vocabulary provides better details for exploring the gender landscape including other components of gender identity such as: cisgender, transgender, drag, genderqueer, genderfluid, agender/gender neutral, sex assigned at birth, and pansexual.” Adam R. Chang & Stephanie M. Wildman, *Gender In/sight: Examining Culture and Constructions of Gender*, 18 GEO. J. GENDER & L. 43, 54–55 (2017) (footnotes omitted).

32. *Title VII and Employees With Non-Binary Identity—Generally*, 3 EMP. DISCRIMINATION L. & LITIG. § 27:10, Westlaw (database updated Nov. 2019) (Arkansas, California, Colorado, Connecticut, Indiana, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, Ohio, Oregon, Utah, Washington, New York City, and D.C.); see also *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws [<https://perma.cc/4QPJ-4674>] (last visited July 7, 2020).

33. *Title VII and Employees With Non-Binary Identity—Generally*, *supra* note 32 (quoting Jena McGregor, *Leadership Analysis: How Employers Are Preparing for a Gender Non-Binary World*, WASH. POST (July 7, 2019), <https://www.washingtonpost.com/business/2019/07/02/how-employers-are-preparing-gender-non-binary-world/> [<https://perma.cc/6V9N-JNMN>]).

these policies within pedagogy will assist in preparing attorneys for the realities of a workplace.

The use of gender expansive policies and terminology can further creation of an inclusive space. “They” as a gender-neutral pronoun has been in use for centuries (despite Justice Alito’s suggestion that these pronouns are just “now” materializing)³⁴ and may be the requested pronoun for nonbinary students.³⁵ The issue of pronoun usage in the classroom has entered the courts, where some educators have been disciplined for their refusal to use students’ requested pronouns.³⁶ One repeating scenario is a nonbinary student requests to be identified outside the binary and the educator refuses, citing religious or personal beliefs.³⁷ As noted by

For example, in 2018 Accenture began offering its employees the option of listing preferred pronouns on conference name tags and in the company’s directory, and in 2019 Mastercard allows cardholders to swap out birth names that conflict with gender identity with the name they actually use, and airlines announced they will offer non-binary gender booking options.

Id.

34. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting with hostility) (“[S]everal different sets of gender-neutral pronouns have now been created”); *see also* Dennis Baron, (HE HIM HIS), WHAT’S YOUR PRONOUN 187 (2020).

35. *See Gender Pronouns, Lesbian, Gay, Bisexual, Transgender, Queer Plus (LGBTQ+) Resource Center*, UNIV. WISCONSIN-MILWAUKEE, <https://uwm.edu/lgbtrc/support/gender-pronouns/> [<https://perma.cc/5YGM-MV5U>] (last visited June 30, 2020); Katie Reilly, *This Isn’t Just About a Pronoun—Teachers and Trans Students Are Clashing Over Whose Rights Come First*, TIME (Nov. 15, 2019), <https://time.com/5721482/transgender-students-pronouns-teacher-lawsuits/> [<https://perma.cc/N236-F9GG>].

Misgendering is the act in which someone intentionally or unintentionally uses pronouns or honorifics that the person does not use. Deadnaming is when a person is called by the person’s “birth name” or “given name” with which the person no longer identifies. Misgendering and deadnaming can lead to feelings of anxiety, low self-esteem, negative body image, and isolation from family, friends, and coworkers. If someone suffers from gender dysphoria, being misgendered or deadnamed can also heighten the effects of dysphoria.

Copeland & Tapu, *supra* note 30, at 20 (footnote omitted).

36. *See, e.g., Meriwether v. Trs. of Shawnee State Univ.*, No. 1:18-CV-753, 2019 WL 2052110 (S.D. Ohio May 9, 2019). The educator in the following action is being assisted by the Alliance Defending Freedom, which has been identified as a hate group by the Southern Poverty Law Center. *See* *Vlaming v. West Point Sch. Bd.*, No. 3:19-CV-00773, 2020 WL 4816417 (E.D. Va. Aug. 19, 2020). Vlaming is also represented by the Alliance Defending Freedom, “a Christian-right powerhouse working to curtail the growth of LGBTQ rights ‘under the guise of religious freedom.’” Karen Moulding, *Know Your Opponent*, 2 SEXUAL ORIENTATION & L. § 11:31, Westlaw (database updated Dec. 2019) (quoting Sara Posner, *The Christian Legal Army Behind Masterpiece Cakeshop*, NATION (Nov. 28, 2017), <https://www.thenation.com/article/archive/the-christian-legal-army-behind-masterpiece-cakeshop/> [<https://perma.cc/4E2E-GZGW>]). In most cases researched, the educators argue that religion or religious freedom should prevent them from being forced to use a pronoun that does not coincide with their assessment of the student’s gender. *See* EMP. PRAC. GUIDE, 2020 WL 641837 ¶ 46,431 (2020).

37. *Meriwether*, 2019 WL 2052110, at *5.

Justice Alito in his dissent, and hinted at by the majority, the next battleground for Title VII will be tied to religious freedom. Although adherence to “rigid, historical biological sex categories” continues, it is unclear whether Title VII will be protective enough to withstand this challenge.³⁸

Yet, as litigation continues, educators will increasingly teach and mentor individuals outside the traditional binary. Although legal education has made strides as to equity in the classroom, it is far from achieving true equity for all students.³⁹ Of the law schools reporting data to the ABA in 2019, there were 38,283 students in all first-year classes: 45.61% of this class identified as “male” and 54.04% as “female,” the traditional binary categories.⁴⁰ The dataset also includes a category of “Other,” for which 134 students identified, less than 1%.⁴¹ In reality, the number of individuals that identify outside the binary is likely higher,⁴² yet accurate metrics are lacking for the classroom and the United States as a whole.⁴³

38. Angie Martell, *Diversity in the Law: Legal Issues Facing Transgender and Gender-Expansive Youth*, MICH. B.J., Dec. 2017, at 30, 31.

39. See *2019 Enrollment by Gender & Race/Ethnicity*, AM. B. ASS’N, https://www.americanbar.org/groups/legal_education/resources/statistics/ [https://perma.cc/6TGV-PVP6] (last visited June 30, 2020). Since 2016, students identifying as female have outnumbered those as male in law school enrollment.

40. *Id.*

The Gender Binary[:] A system of viewing gender as consisting solely of two, opposite categories, termed ‘male and female,’ in which no other possibilities for gender or anatomy are believed to exist. This system is oppressive to anyone who defies their sex assigned at birth, but particularly those who are gender-variant or do not fit neatly into one of the two standard categories.

Definitions, TRANS STUDENT EDUC. RES., <https://www.transstudent.org/definitions> [https://perma.cc/8ST2-593S] (last visited June 30, 2020).

41. *2019 Enrollment by Gender & Race/Ethnicity*, *supra* note 39. The ABA has included the “Other” category since 2014, and the number is steadily increasing—for example, in 2016, seventeen students either intentionally selected this option or left gender blank. *2016 JD Matriculants By Gender & Race/Ethnicity*, AM. B. ASS’N, https://www.americanbar.org/groups/legal_education/resources/statistics/statistics-archives/ [https://perma.cc/S6MS-HRLN] (last visited June 30, 2020). This tracks with reported demographics of the entire law school population, not limited to the first year. *Law School Rankings by Female Enrollment (2018)*, ENJURIS (Dec. 16, 2018), <https://www.enjuris.com/students/law-school-female-enrollment-2018.html> [https://perma.cc/GW2M-L9RN].

42. See, e.g., Martell, *supra* note 38, at 31 (“According to *Time* magazine, ‘[T]oday in the United States alone there are approximately one million people who—from the moment of birth—cannot be clearly defined as either male or female.’” (alteration in original) (quoting Noël Wise, *Judge: Gender Laws Are at Odds With Science*, TIME (Mar. 8, 2017, 8:00 AM), <https://time.com/4679726/judge-bio-logical-sex-laws-marriage-bathrooms/> [https://perma.cc/PPC5-84SV])).

43. See Daniel Shumer, *Health Disparities Facing Transgender and Gender Nonconforming Youth Are Not Inevitable*, PEDIATRICS (Mar. 2018), <https://pediatrics.aappublications.org/content/141/3/e20174079> [https://perma.cc/Z3MF-3SKB]. A prior study limited to Minnesota found 2.7 % of students self-identified as transgender or “gender nonconforming,” which highlighted that prior estimates had “underestimated by orders of magnitude” this population. The article notes that school administrators “will see youth with diverse gender identities and expressions in their schools.” *Id.* (emphasis added); see also Brief of the American Medical Associ-

As these numbers grow, society is experiencing a corresponding growth in acceptance of gender diversity:⁴⁴ 42% of Americans are in favor of including legal options other than “man” and “woman” for people who do not identify on the binary,⁴⁵ and majorities in every state favor non-discrimination policies for LGBTQ individuals.⁴⁶ Support for gender expansive individuals is especially strong among the younger cohort; Generation Z rejects “rigid gender identity norms” beyond the binary and makes categorizations on their own terms.⁴⁷ This support is even stronger in individuals who identify Democrat or Democratic-leaning Independent.⁴⁸

ation et al. as Amici Curiae in Support of the Employees at 5–6, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (noting the difficulties in estimating numbers). Some estimates approximate .021% of the population is nonbinary. See Marie-Amélie George, *Framing Trans Rights*, 114 Nw. U. L. REV. 555, 560 (2019).

44. See, e.g., Claire Shaffer, *Marsha P. Johnson Google Doodle Unveiled for Pride Month*, ROLLING STONE (June 30, 2020, 7:37 AM), <https://www.rollingstone.com/culture/culture-news/marsha-p-johnson-google-doodle-pride-month-1022111/> [<https://perma.cc/5YRS-WR5G>]; Janet Adamy, *For Those Who Don't Identify as Male or Female, Growing Acceptance—and Accommodation*, WALL ST. J. (Sept. 1, 2019), <https://www.wsj.com/articles/for-those-who-dont-identify-as-male-or-female-growing-acceptance-and-accommodation-11567330201> [permalink unavailable]; Sarah McBride, *More than 200 Major Businesses File Landmark Amicus Brief in Support of LGBTQ Workers*, H.R. CAMPAIGN (July 2019), <https://www.hrc.org/press-releases/more-than-200-major-businesses-file-landmark-amicus-brief-in-support-of-lgb> [<https://perma.cc/S5V6-MS33>]. The list includes a diverse group of companies from Apple to Zillow. *Id.* A multitude of other organizations also filed supporting briefs, including the American Medical Association and the American Psychological Association. See Brief of the American Psychological Association, American Psychiatric Association, American Association for Marriage and Family Therapy, Georgia Psychological Association, Michigan Psychological Association, and the New York State Psychological Association as Amici Curiae in Support of the Employees at 4, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 178-107) (“As this brief shows, the scientific literature regarding gender and sexuality supports the understanding that discrimination on the basis of sexual orientation and gender identity is discrimination because of sex. Accordingly, laws like Title VII that prohibit sex discrimination reach—and must continue to reach—discrimination against sexual and gender minorities.”).

45. Nikki Graff, *About Four-in-Ten U.S. Adults Say Forms Should Offer More Than Two Gender Options*, PEW RES. (Dec. 18, 2019), <https://www.pewresearch.org/fact-tank/2019/12/18/gender-options-on-forms-or-online-profiles/> [<https://perma.cc/R52V-GPM5>].

46. Daniel Greenberg et al., *Americans Show Broad Support for LGBT Nondiscrimination Protections*, PUB. RELIGION RES. INS., <https://www.prii.org/research/americans-support-protections-lgbt-people/> [<https://perma.cc/CA26-RA3Y>] (last visited July 7, 2020).

47. Mark Joseph Stern et al., *The Judicial and Generational Dispute over Transgender Rights*, 29 STAN. L. & POL'Y REV. 159, 160 (2018). The traditional binary terminology is too narrow to capture the “spectrum” of gender. *Id.* at 170. This “profoundly tolerant” generation is impacting older cohorts as well; half of millennials in a 2016 study agreed that gender extends beyond the binary. *Id.* at 170–71 (quoting Randi Gunther, *Rigid Gender Roles—Enemies of the New Intimacy*, HUFFINGTON POST: BLOG (Sept. 23, 2015, 3:26 PM), https://www.huffpost.com/entry/rigid-gender-roles-enemie_b_8184256 [<https://perma.cc/22RQ-G4E4>]).

48. See Graff, *supra* note 45.

Law school classrooms are increasingly filled by this archetype of a young Generation Z law student. As the demographic continues to shift, the classroom approach should take this changing dynamic into consideration.

III. ACTIONABLE STEPS TO INCREASE FEELINGS OF INCLUSION FOR GENDER EXPANSIVE STUDENTS (AND ALL STUDENTS)

The surprise outcome of the Title VII Trifecta underlines the fundamental truth that individuals across the gender spectrum are deserving of respect and inclusion.⁴⁹ For a law student, bias and stereotyping can impair the performance of and stigmatize individuals, who then in turn fail to achieve their full potential.⁵⁰ As described in painful detail in the amicus brief of PFLAG in support of Aimee and the other Title VII plaintiffs, “LGBTQ children and adults, and people perceived to be LGBTQ, are suffering discrimination because of others’ views of how they should look, act, or think based on their sex.”⁵¹ This discriminatory treatment will not be erased overnight, even with a 6–3 decision prohibiting it and growing public support.

Legal educators are well-positioned to model inclusive practices that will carry over into the legal field years beyond the classroom. The first step is an internal and honest self-assessment of teaching practices and outcomes, crucial for educators who may not have considered the inclusion of students outside traditional binary categories. This assessment should extend beyond simply adding designated pronouns to an email signature block or video conference settings to include the following: (1) exploring scholarship within this area, (2) initiating dialogue with affinity groups on campus, (3) asking for feedback from students and other trusted colleagues, and (4) exploring professional development opportu-

49. There are numerous attributes that prevent gender inclusion in the classroom environment: trickle down attitudes of administration and faculty that negatively impact female faculty, specifically in legal research and writing (“women’s work”), lack of diversity of faculty, lack of dedicated time to address issues of diversity and inclusion, and many more. See generally Joseph Cimpian, *How Our Education System Undermines Gender Equity*, BROOKINGS (Apr. 23, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/04/23/how-our-education-system-undermines-gender-equity/> [https://perma.cc/Y7P6-2KMD]. “[T]he overall picture related to gender equity is of an education system that devalues young women’s contributions and underestimates young women’s intellectual abilities more broadly.” *Id.*

50. Michela Carlana, *Implicit Stereotypes: Evidence from Teachers’ Gender Bias*, INST. LAB. ECON. (July 2018), <https://www.iza.org/publications/dp/11659/implicit-stereotypes-evidence-from-teachers-gender-bias> [https://perma.cc/32B4-LL4Q].

51. Brief of the Trevor Project, PFLAG, and Family Equality as Amici Curiae in Support of the Employees at 10, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 178-107).

nities in this area.⁵² Outside the classroom, the language of the controlling sex or gender discrimination policies at an educational institution can be explored.⁵³ The American Bar Association (ABA) and Law School Admissions Council (LSAC) have created a floor for these policies, yet consider whether or not they are being observed or could be improved upon.⁵⁴

Second, examine words and phrases used in the classroom and in teaching materials. Educators should be aware of terminology changes and take stock of classroom phrases that alienate nonbinary students; for example, law schools may still employ the method of cold-calling on students as “Mr.” or “Ms.” based on perceived assessments of sex and gender. Consider altering that method or allowing students to opt for the gender-neutral, honorific “Mx.” (or the gender-neutral “they” as discussed *infra*).⁵⁵ This may be more easily achieved if the start of the semester is accompanied by an “intake” form for your students: this can allow students to communicate the name they would like to be referred to, their chosen pronouns, and any other information a new student might not be willing to share with a class full of new colleagues.⁵⁶ Gathering this information

52. See generally LGBTQ+ BEST PRACTICES FOR LAW SCHOOLS, *supra* note 24; see also Copeland & Tapu, *supra* note 30, at 20.

53. For example, some student handbooks, in an effort to be more inclusive, replace all binary gender terms with “their” throughout. Using a policy builder, educators can easily start a discussion related to more inclusive policies. *States with Policy Guidance for Transgender and Gender Diverse Students*, GENDER INCLUSIVE SCH., <https://www.genderinclusiveschools.org/gender-inclusive-policy-builder-transgender> [https://perma.cc/YR8B-6UFJ] (last visited Oct. 8, 2020). “If a student so chooses, district personnel shall be required to address the student by a name and the pronouns consistent with the student’s gender identity, without the necessity of legal documentation or a change to the student’s official district record.” *Id.* To compare LGBT policies at law schools, see generally *LGBTQ+ & Law School*, LSAC, <https://www.lsac.org/discover-law/diversity-law-school/lgbtq-law-school> [https://perma.cc/6GRV-S5LW] (discussing the policy for the state of California) (last visited June 30, 2020).

54. Law schools are required by the ABA to expressly bar discrimination in admissions based on sexual orientation. Moreover, AALS law school members prohibit discrimination on the basis of gender identity and expression. LGBTQ+ BEST PRACTICES FOR LAW SCHOOLS, *supra* note 24.

55. *Mx*, MERRIAM WEBSTER, <https://www.merriam-webster.com/words-at-play/mx-gender-neutral-title> [https://perma.cc/D5NV-EBKT] (last visited June 30, 2020). The use of Mr. and Ms. was also raised during oral argument for Harris Funeral Homes. Mark Walsh, *A “View” From the Courtroom: Pop Culture and Protocol*, SCOTUSBLOG (Oct. 8, 2019, 7:54 PM), <https://www.scotusblog.com/2019/10/a-view-from-the-courtroom-pop-culture-and-protocol/> [https://perma.cc/B2X2-P2JN]. Ironically, the use of “Ms.” was initially met with a similar hostility as we are currently seeing with “they.” Erika Mailman, *The Title ‘Ms.’ Ignited Controversy in the ‘70s, But It Caught On. The Pronoun ‘They’ Will, Too*, LILY (Jan. 10, 2020), <https://www.thelily.com/the-title-ms-ignited-controversy-in-the-70s-but-it-caught-on-the-pronoun-they-will-too/> [https://perma.cc/7JZQ-Y4ER].

56. See Copeland & Tapu, *supra* note 30. Update any existing forms and applications “to eliminate gender identification. At minimum, include a gender . . . option for those who do not identify within the binary of male or female.” *Id.* This form could be altered for a legal writing classroom, where students can identify

will be crucial to establishing trust for all students, especially in an online learning environment.

A community agreement or contract for your classroom may also be a strong option for creating inclusion if practical given subject matter and size. This technique is frequently used in lower education and can have powerful effects at the graduate level.⁵⁷ Such an agreement fosters essential connections between professor and students and creates student discussion on ideal norms for the classroom that relate to gender discrimination.⁵⁸ A safe starting point for this agreement is the policies at the institution as a whole; or, the agreement might mirror human resources' policies from a law firm or other place of employment that law students will encounter post-graduation.⁵⁹ This practical tool can be called into action if a conflict or issue arises throughout the semester.

Third, normalize conversations and dialogue in the law school classroom regarding gender and sexual minorities by incorporating the Title VII Trifecta into the curriculum. For example, this was the first time that the two-minute protected speaking allowance was used in the Court, a teaching point that is easily linked with any student oral arguments or discussion about courtroom practices.⁶⁰ These cases also garnered record support through amicus briefs, which could be explored as a procedural tool. “[D]iscussing these differences in class normalizes them in moving students toward becoming accustomed to them being part of the conversa-

strengths or weaknesses, or a doctrinal class, where students might identify previous experience with that area of law or possible interests.

57. See, e.g., *Effective Teaching in Diverse Classrooms*, NAT'L EDUC. ASSOC., http://www.educationalimpact.com/resources/etdc/pdf/3A_CARE_Activities_Resources.pdf [<https://perma.cc/W9UQ-H7Q8>] (last visited June 30, 2020).

58. *But see* Özlem Sensoy & Robin DiAngelo, *Respect Differences? Challenging the Common Guidelines in Social Justice Education*, 22 DEMOCRACY & EDUC., no.2, 2014, at 1, 2.

59. Gayle Cinquegrani, *Legal Industry Leads in Transgender Policies for Employees*, BLOOMBERG BNA (July 19, 2017, 6:06 PM), <https://news.bloomberglaw.com/business-and-practice/legal-industry-leads-in-transgender-policies-for-employees> [<https://perma.cc/YL3C-F8GV>].

In formulating its guidelines, Baker McKenzie consulted resources provided by the Human Rights Campaign and the Transgender Law Center, Brown said. The firm's transgender guidelines—which address the use of appropriate pronouns, restroom access, and health insurance coverage—explain how managers and employees can support gender transition in the workplace.

Id. For one model policy, see TRANSGENDER LAW CTR., MODEL TRANSGENDER EMPLOYMENT POLICY (n.d.), <https://transgenderlawcenter.org/wp-content/uploads/2013/12/model-workplace-employment-policy-Updated.pdf> [<https://perma.cc/T3MJ-UQJL>].

60. *Lawyers, Uninterrupted, Adjust to Supreme Court Two-Minute Rule*, BLOOMBERG L. (Jan. 7, 2020, 4:56 AM), <https://news.bloomberglaw.com/us-law-week/lawyers-uninterrupted-adjust-to-supreme-court-two-minute-rule> [<https://perma.cc/YEG2-C5CZ>].

tion.”⁶¹ There are numerous possibilities for inclusion for these cases, or others, that place these significant issues within the lens of the law that would align with pedagogical objectives.

Growing support for gender and sexual minorities played a role in the outcome of the Trifecta, built on the creative and tireless efforts of legislators, attorneys, and activists who worked for a more equitable and inclusive space. Undoubtedly, more effort and activism will be needed in the coming years. The official recognition that a particular view is bigoted, even if there is general consensus, “emerges only after decades of conflict over the status of a marginalized group.”⁶² Yet, as society evolves and the courts slowly follow, it is incumbent upon legal educators to consider these complex issues and their impact on developing attorneys within classrooms now. With a mindset of “intentional validation” for gender expansive students,⁶³ educators can increase inclusion across the gender spectrum and prepare students for practice within a diverse society.

61. Palma Joy Strand, *We Are All on the Journey: Transforming Antagonistic Spaces in Law School Classrooms*, 67 J. LEGAL EDUC. 176, 184 (2017). Professor Strand also emphasizes the importance of “microinclusions” (as opposed to microaggressions) in the classroom: microinclusions “affirmatively create a learning environment of belonging in which historically marginalized and other students can thrive.” *Id.* at 177.

62. Douglas NeJaime, *Bigotry in Time: Race, Sexual Orientation, and Gender*, 99 B.U. L. REV. 2651, 2653 (2019).

63. Strand, *supra* note 61, at 177. “A mindset of intentional validation—as opposed to microinvalidation—offers a frame for law school pedagogy that goes beyond belonging to empowerment.” *Id.*