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TITLE IX'S SUBSTANTIVE EQUITY MANDATE FOR TRANSGENDER PERSONS IN AMERICAN LAW SCHOOLS: A CALL FOR DISAGGREGATED SOGI DATA

ABSTRACT

Federal agencies, states, and municipalities have collected disaggregated SOGI (sexual orientation and gender identity) data for several years. Yet, the legal academy makes little effort to quantify the LGBTQI(A) presence at law schools. The lack of information about these marginalized populations invites Title IX complaints and litigation. Given Title IX's substantive equity mandate, which protects transgender persons, SOGI data must be collected and disaggregated so that law schools can develop efficient policies to help transgender students and faculty realize formal equality and substantive equity and also prepare cisgender and heterosexual students for diverse client pools.

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***400 I.**

INTRODUCTION

> Transgender people, drag queens, blacks and Hispanics played outsized roles during many of the earliest milestones of the gay rights movement. Today, however, these same groups have been denied many of the benefits of the revolution they sparked. They led the riots at Stonewall in New York in 1969, Compton's Cafeteria in San Francisco in 1966, and Cooper Do-nuts in Los Angeles in 1959. After Stonewall, the tactics of many in the gay rights movement eventually shifted from rebellion to seeking acceptance. It's predicated on being a man or woman like other men and women. The trans question kicks that foundation out from ***401** under the main thrust of the gay and lesbian movement from the early 1970s forward. [1]

The legal academy has made great strides for race, sexual orientation, and feminist equity over the last half-century. Women now outnumber men in law schools--at least on the students' side of the lectern. [2] Though some scholars have predicted rapid growth of numbers of women in the profession, obstacles to moving beyond sex desegregation remain. [3] This is especially true for transgender women.

Title IX promises more than mere formal equality. As courts have noted, it requires substantive equity, or meaningful access and participation. Schools invite Title IX liability when they disregard diverse genders and sexualities in their policy development. Without disaggregated data about sexual orientation and gender identity (SOGI), schools lack enough information to create policies and procedures that yield substantive equity. A seat in the classroom, or formal equality, is only a first step to compliance. Ultimately, Title IX is concerned with how schools and colleagues treat students and teachers after they arrive. Whether voluntarily or compelled by statute, regulation, or the American Bar Association, law schools must recognize the need for exact student and faculty body demographics. If the academy is to meet Title IX's substantive equity mandate, its work must begin with transgender men and women. This is particularly true considering the absence of academic research on transgender individuals in the legal profession. While all ***402** persons have similar interests in the quest for substantive equity, transgender persons have unique needs that schools should address.

Meanwhile, none of the various professional associations or even LGBTQI(A) [4] rights organizations have studied transgender presence in the legal industry. [5] Worse, there are trans-exclusionary radical feminist scholars who decry protections for transgender women because they fear that they detract from the plight of cisgender women and other minority groups, [6] or believe that inclusion diminishes the collective cause of all women, including transgender women. [7] How, then, does a law school ensure fair treatment of transgender faculty and staff, in a way that reassures transgender students that they, too, will be treated fairly--first in academia and then in law practice? How are law schools to help heteronor-mative law students and faculty understand and develop empathy for transgender people so that the practice can arrive at substantive equity? Policy solutions and risk management begin with strong data.

This Article explains why law schools should disaggregate SOGI data from the LGBTQI(A) umbrella label, and it addresses the need for a precise census of transgender individuals in the academy. Without disaggregated minority group ***403** data, we know less than we think we know about diversity. [8] The legal profession is behind other fields--such as health care, law enforcement, and social services--in collecting disaggregated SOGI data. [9] Many municipalities and states follow the federal government's guidance on these issues, in surveys like federally mandated studies. [10]

Though voluntary disclosures in the law school application and hiring process have become the norm, [11] thanks to fears of litigation and EEOC mandates, ABA Standard 509, *Required Disclosures*, [12] does not require law schools to disclose to the public the number of persons who identify as belonging to a minority group, [13] and there are significant differences in how law schools offer diversity statistics to potential students. [14] The ABA does not require schools to collect data that is specific to the LGBTQI(A) umbrella, much less any of its diverse subgroups. Even the law schools that prioritize diversity do not include

faculty and staff among their reported demographics. The academy and legal profession have thus far failed to properly identify sexual and gender minority groups (SGMs).

Finally, this Article provides policy development examples. It offers a four-pronged approach to policy development: (1) engaging in organizational self- ***404** evaluation, (2) developing neutral policies, (3) implementing those policies, and (4) monitoring outcomes. This approach is sensitive to the risks of and hurdles to data collection for vulnerable groups. The time is nigh to create a diverse legal profession by better understanding the needs of transgender and gender-nonconforming students, faculty, and lawyers.

II.

BACKGROUND

Like the LGBTQI(A) label, the SOGI and SGM acronyms stand for subgroups with variable characteristics, needs, and talents. However, in the context of data measurement, institutions may use these terms with a goal to disaggregate and better understand the subgroups.

Historically, law schools have been in good company in their failure to identify transgender colleagues and students, separate and apart from the broader LGBTQI(A) label. Only in the last decade have policy think tanks,[15] municipal and state governments,[16] and federal agencies realized the need for accurate SOGI data about SGMs.[17] For example, in 2015, the Federal Committee on Statistical Methodologies created an interagency task force to develop methods that measure SOGI data.[18] In 2018, Senator Kamala Harris, alongside 21 co-sponsors, introduced the Census Equality Act, the first bill to require the collection of SOGI-specific data in the 2030 census,[19] though it died in the Senate Committee on ***405** Homeland Security and Governmental Affairs.[20] New York City has been a municipal leader. It adopted several mandates in 2016--predating even San Francisco, the perennial city of open arms--in the adoption of SOGI data measures.[21] Law schools must not be left further behind. They can and should fuel further progress to help Americans, and the world, to better understand the legal profession's impact on transgender individuals and their contributions to the academy. Ignorance and apathy could eventually lead to Title IX liability, as well as reputational damage.

A. What is SOGI Data?

Though researchers and the general public categorize transgender individuals with other sexual minority groups under the LGBTQI(A) umbrella,[22] gender identity has no connection to sexual activity or orientation.[23] While the umbrella label captures a common experience of exclusion and shared solidarity,[24] it is inaccurate and offensive to equate gender identity with sexual orientation. Such an approach further marginalizes transgender and gender-nonconforming individuals.[25] This ***406** basic misperception leads to disorganized SOGI data collection. As explained by the National Center for Education Statistics:

> There are several dimensions of gender that can be measured: gender identity, gender expression, and gender dysphoria. Some surveys might aim to measure gender identity, or an individual's self-identified sense of gender. Others might be more interested in measuring gender expression, or an individual's external manifestation of gender. A survey may also aim to identify all individuals who experience gender dysphoria, the experience of a marked difference between self-identified gender and assigned gender for a period of at least six months associated with clinically significant distress caused by this incongruence.[26]

There are several types of SOGI data relevant to an institution's diversity initiatives. These broadly fall within four categories: sexual activity, identity/expression, status, and names/pronouns (Table 1).

TABLE 1: TYPES OF SOGI DATA

Sexual Activity	Identity/Expression	Status	Names/Pronouns
Sexual orientation identity	Gender identity	Transgender status	Preferred name
Sexual behavior	Sex assigned at birth	Relationship status	Gender pronoun preferences
Sexual attraction	Gender Expression		

Each of these may or may not be relevant to a transgender individual's identity. For example, to say that a transgender person's gender expression projects that ze is gay or lesbian is not necessarily true and can be an offensive assumption; a transgender woman who is attracted to cis- or transgender men is heterosexual, a transgender woman attracted to cis- or transgender women is a lesbian. [27] ***407** Nevertheless, issues among law school faculty and students should never revolve around sexual behavior, lest various fraternization policies and ethical boundaries be breached. Rather, the focus should be on identity and expression of that identity. Actual sexual activity has no relevance to the workplace, except when a colleague seeks to invade privacy for the sake of discrimination or harassment. [28]

Disaggregated SOGI data are critical informers of the current problems that LGBTQI(A) people experience--such as mental health and substance abuse challenges and barriers to health insurance coverage, health care treatment, and employment. Without precise demographic data that identifies the transgender population within the legal academy, it is not possible to develop effective policies and programs that solve such problems, much less facilitate the full, substantive participation of trans individuals in the law school setting and, eventually, the law office. [29] Precise data will help the profession ensure that formal equality evolves to substantive equity.

B. Federal SOGI Data Collection Successes

Under the Obama administration, the Office of Budget Management created an interagency taskforce that developed SOGI data methods. [30] The interagency task force made enormous advancements that helped federal agencies identify goals, objectives, and methodologies so that they could develop social surveys that elicit disaggregated SOGI data. [31] Several federal demographic, health, law enforcement, and risk surveys now document LGBTQI(A) [32] persons served by various agencies, including disaggregation into the subgroups: lesbian, gay, bisexual, transgender, queer, and intersex. Questions target disaggregation so that government may better tailor services for specific populations. [33] However, the response/non-response rate remains unclear.

There are 11 federal surveys and one federal study that collect SOGI data. Though each survey concerns a different context with various end-purposes, each ***408** collects SOGI data in three broad categories: [34] gender identity (sometimes referenced as “sexual identity”), sexual orientation, and sexual behavior. The 11 surveys are:

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TABLE 2: FEDERAL SURVEYS THAT ELICIT DISAGGREGATED SOGI DATA

SURVEY	AGENCY	SOGI DATA MEASURED
Health Center Patient Survey (HCPS) [35]	Health Resources and & Services Administration (HRSA)	Gender Identity Sexual Orientation* *(adults only)
National Adult Tobacco Survey (NATS) [36]	Centers for Disease Control and Prevention (CDC) Centers for Medicare and Medicaid Services (CMMS)	Gender Identity Sexual Orientation
National Health and Nutrition Examination Survey (NHANES) [37]	CDC	Sexual Behavior
National Health Interview Survey (NHIS) [38]	CDC	Sexual Behavior Gender Identity Sexual Orientation
National Inmate Survey (NIS) [39]	Bureau of Justice Statistics (BJS)	Sexual Behavior Gender Identity Sexual Orientation
National Crime Victimization Survey (NCVS) [40]	BJS	Gender Identity
National Survey of Family Growth (NSFG) [41]	CDC	Sexual Attraction Sexual Behavior
Youth Risk Behavior Surveillance System (YRBSS) [42]	CDC	Sexual Behavior Sexual Identity
National Survey on Drug Use and Health (NSDUH) [43]	Substance Abuse and Mental Health Services Administration (SAMHSA)	Sexual Attraction Sexual Identity
National Survey of Older Americans Act Participants (NSOAAP) [44]	Administration for Community Living (ACL)	Sexual Orientation
Behavior Risk Factor Surveillance System (BRFSS) [45]	CDC	Sexual Orientation Gender Identity
Population Assessment of Tobacco and Health (PATH). [46]	Food and Drug Administration (FDA) National Institutes of Health (NIH)	Sexual Attraction Gender Identity

***410** These federal efforts, emulated by some states, [47] provide government agencies, such as schools, and private sector entities with excellent examples. As discussed later in this Article, only those survey questions that elicit gender identity or sexual orientation identity responses are relevant for comparison, as the academy should not be concerned with the actual sexual activity of its staff or students, [48] assuming other school policies are respected and enforced, such as prohibitions against intra-faculty or intra-student/faculty dating and prohibitions against sexual orientation and gender discrimination. Collection of

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sexual orientation identity data may risk solicitation of information about student, faculty, and staff sexual activities. As such, schools must cautiously manage their data to provide more precise services without exposing private information

C. Law School Organizations Fail to Collect SOGI Data

The American Bar Association (ABA) and the National Association of Law Placement (NALP)[49] both operate diversity research initiatives.[50] However, these organizations do not measure gender identity data. For example, in the 2018 *Report on Diversity*,[51] NALP considered women as a distinct category, and collected information about LGBT-identifying individuals. Yet, NALP did not disaggregate the data. This approach does a disservice to transgender people because it lumps ***411** data about transgender individuals together with data about cisgender gay, lesbian, and bisexual people. This also does a disservice to lesbians, gay men, and bisexual respondents, as they each have unique needs and concerns within the profession, distinct from the heterosexual majority and diverse from each other. The study's shortcomings also make it impossible to know how many of the women attorneys are lesbian, bisexual, a-sexual, or transgender.[52]

Meanwhile, the ABA only supplies the Household Data Annual Averages from the Bureau of Labor Statistics (BLS).[53] BLS does not track labor statistics for LGBT individuals. The minority categories are limited to race, sex, and Hispanic/Latino.[54] Nevertheless, the 2018 statistics from BLS make clear that diversity initiatives are failing, at least for the few broad minority categories included in the study.[55] Despite an increase in employed minorities within the legal profession, the presence of minorities in the workforce generally lacks the same growth rate as that of majority populations.[56]

The ABA Diversity and Inclusion Center's numerous committees include the Commission on Sexual Orientation and Gender Identity (SOGI Commission), which "promote[s] collaboration, coordination, and communication to advance ABA Goal III - to eliminate bias and enhance diversity and inclusion throughout the Association, legal profession, and justice system."[57] Though much of SOGI Commission's work assists lay consumers, it has developed a thorough list of resources, offers CLEs, and was instrumental in the development of Model Rule of Professional Responsibility 8.4,[58] the broadest prohibition against discrimination ***412** to descend from the ABA.[59] Despite these noteworthy and admirable efforts, the Commission relies on other sources of demographic data and has never measured the various SOGI groups within the profession.

In addition to rules that govern the profession, the ABA promulgates standards for accredited law schools.[60] ABA Standards 205 and 206[61] implicate SOGI data collection. Standard 205, *Non-Discrimination and Equality of Opportunity*, includes sexual orientation and gender as protected classes.[62] Standard 205 expresses a formal equality mandate, with a limited exception for religiously affiliated schools. Such exceptions must comply with Standard 405(b),[63] which requires schools to have a policy on academic freedom. Though the ABA has an example of an academic freedom policy, it is just that: an example. Religious schools are not required to accommodate academic viewpoints that are favorable to inclusive diversity. That exception to the exception makes 205 inapplicable to approximately a quarter of America's law schools. Standard 206, *Diversity and Inclusion*, does not include an exception for religiously affiliated schools, and the comment explains:

> In addition to providing full opportunities for the study of law and the entry into the legal profession by members of underrepresented groups, the enrollment of a diverse student body promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds.[64]

***413** Standard 206 also creates uncertainty, rather than substantive equity, because it does not include sexual orientation or gender identity as protected classes. The debate over Standards 205 and 206 has been ongoing, and the religiously affiliated schools' lobbying efforts have prevailed. Standard 509, which governs law school data reporting, foregoes minority data

disaggregation. Law schools certainly cannot follow the spirit of Standard 206's substantive equity mandate if they do not collect disaggregated minority data, including SOGI data.

As they review statistics about law schools, prospective law students or job-searching professors find a variety of approaches in the way schools report minority statistics. The ABA diversity initiative website does not include school-specific diversity data; instead, one must look to the ABA Required Disclosures page, [65] though prospective students might be hard pressed to find the webpage with the data. [66] The 509 form requires data collection of ten minority groups, but it does not include LGBT individuals, even as an aggregated category. Further, Standard 509 does not require that law schools report diversity information to students; the only mandate is that the information be provided to the ABA. [67] Law schools that voluntarily offer diversity data on their websites are left to their own methods, which vary. [68] For example, Florida Agricultural and Mechanical University College of Law (FAMU) and the University of Florida Fred G. Levin College of Law (UF), separated only by a short drive, report student demographics differently. FAMU is more specific, though it does not detail sexual orientation or gender identity. [69] The University of Florida merely uses the labels "racial and ethnic diversity," and while it does include "LGBTQ," UF does not disaggregate that umbrella. [70] LSAC offers follow-up data regarding admissions, but it does not include disaggregated SOGI data and is not covered by Standard 509. Thus, while we know how many non-cisgender persons aspire to attend law school, the academy does not know how many actually arrive, matriculate, practice law, find jobs, or go on to become professors.

Without precise numbers, the industry cannot accurately self-assess, develop effective policy, and implement change that leads to greater diversity among law school communities, which in turn negatively impacts the profession. Meanwhile, there is a strong case to be made that a school's inattention to data diminishes or ***414** prevents substantive equity for students or faculty members, in violation of Title IX.

D. Other Legal Organizations Fail to Disaggregate SOGI Data

Other organizations that have an interest in law school demographics have also missed the opportunity to examine the SGM presence in law schools. None of the following professional associations have studied gender identity in the legal profession: American Association of University Professionals; Association of Legal Writing Directors; Legal Writing Institute; Association of American Law Schools; Academy of Legal Studies in Business; International Association of Law Schools; Central States Law Schools Association; or Southeastern Association of Law Schools. [71] Nor have any LGBT organizations researched the prevalence of transgender individuals within the legal academy. The Center for American Progress (CAP) is an excellent resource for LGBT issues and has suggested the need to disaggregate SOGI data. [72] Yet, it has only made an effort to disaggregate data about persons who are bisexual. [73] CAP has not undertaken similar surveys about laws school or the legal profession. [74]

The Law School Admissions Council (LSAC) is the only law professional organization that disaggregates SOGI data, but only for gender identity. It does not collect data for sexual orientation. The LSAT gender identity disclosure options, including cisgender options, are:

***415** TABLE 3: LSAC *VOLUME SUMMARY--US ETHNICITY, SCHOOL TYPE, AND GENDER IDENTITY--2019-2020 APPLICANT CYCLE* [75]

GENDER IDENTITY	LAST YEAR TOTAL	CURRENT YEAR TOTAL
Additional gender category	5	7
Agender	10	7
Androgyne	6	*
Demigender	*	*
Genderqueer or gender fluid	26	21
Man	4,968	4,582
Non-transgender man	219	769
Non-transgender woman	247	838
Prefer not to answer	139	163
Questioning or unsure	6	7
Transgender man	9	15
Transgender woman	*	*
Woman	5,456	5,057
Total	**11,097**	**11,474**

However, LSAC's disaggregated data only supplies a picture of pre-admission efforts. The academy needs to know how many marginalized non-majority persons tried and did not find a law school seat. Without that precise data, schools cannot develop pipelines that usher into the profession members of underrepresented demographics, as required by ABA Standards 205 and 206. Title IX aside, compliance with the ambitious goals of ABA Standards 205, 206, 405, and 509 require schools to disaggregate minority data.

***416 III.**

MINORITY SELF-IDENTIFICATION AS AN OPTION

Minority status self-identification, a part of many job searches, offers one model to consider for SOGI data aggregation. Job applications often ask for voluntary disclosures, including race and ethnicity, sex, disability, and veteran status. [76] As of 2015, at least 25 states and/or territories have used SOGI-specific disclosures for employment and health monitoring surveys. [77] The EEOC had adopted regulations that added wage data to their reporting requirements for 2017 and 2018, but as of this publication, the EEOC no longer accepts such data. [78] However, mandatory reporting requirements vary by the size of the employer and whether the employer is a federal contractor. [79] Schools must also report this information, if they receive federal funds, or as

employers if they oversee more than 100 employees. [80] Assuming data collection is required, the data must be reported annually to the EEOC on form EEO-1, [81] but only if the employers are:

> (a) Subject to Title VII of the Civil Rights Act of 1964, as amended, with 100 or more employees; or
>
> (b) Subject to Title VII of the Civil Rights Act of 1964, as amended, with fewer than 100 employees if the company is owned by or corporately affiliated with another company and the entire enterprise employs a total of 100 or more employees; or
>
> ***417** (c) Federal government prime contractors or first-tier subcontractors subject to Executive Order 11246, as amended, with 50 or more employees and a prime contract or first-tier subcontract amounting to $50,000 or more. [82]

The EEOC regulations do not require disaggregated SOGI data. EEO-1 limits information on "sex," "race," and "ethnicity" to certain predefined categories. [83] These categories do not meet the needs of SOGI minorities or other marginalized groups. [84] Even with the best-intentioned efforts, the EEO-1 form's broad and static labels cannot capture complex, increasingly common forms of self-identification, such as non-binary gender identity. The form also struggles with identities that are contested within a marginalized community, as has happened within disability advocacy circles, such as autism. [85] Because EEO-1 data does not disaggregate SOGI information, it is not useful for ascertaining transgender presence among law school faculty and staff. The EEOC should collaborate with the Federal Committee on Statistical Methodologies to develop a robust EEO-1 that disaggregates SOGI data, as well as race and ethnicity.

***418** Though the EEO-1 requires collection of sex, race, ethnicity, and wage data, the solicitation of disability status [86] or veteran status [87] remains optional for employers (except that federal contractors must collect veteran status information pursuant to the Vietnam Era Veterans' Readjustment Assistance Act). [88] Nevertheless, most employment law and human resources experts advise businesses to seek such information, an early paper trail in case of future civil rights litigation. [89] The logic should carry over to the idea of disaggregated minority data.

In the law school context, SOGI data should be collected via voluntary self-identification, and the LSAC's data collection for the LSAT supplies evidence that non-cisgender persons will voluntarily disclose their gender. In the admissions cycle for the 2018-2019 academic year, 9.5% of applicants identified as something other than "man" or "woman," while only 1.34% of applicants declined to answer. [90] It is important to note that, between the 2017-2018 academic year and the 2018-2019 academic year, there was a 67.6% increase of applicants who declined to identify a gender and 2018 marked the expansion of gender options for the LSAT. [91] In the applicant cycle for the current academic year, the first year in which all applicants would have had 11 gender options, 17% of applicants identified as something other than "man" or "woman," and 1.26% declined to answer. In the 2018-2019 academic year, there were 22 transgender female applicants and 40 transgender male applicants. In the current academic year, there were 58 transgender men but only 20 transgender females. [92] Even among admitted ***419** students, there was a 33.3% increase in the number of students who declined to identify as either "man" or "woman" between the 2016-2017 academic year and the 2017-2018 academic year." [93]

It is unclear whether declining to respond indicates solidarity from cisgender students for equality or an increase in the number of non-binary students in law schools. What is clear is that if given the opportunity, people will self-report their atypical gender identity. [94] Unfortunately, without post-admission and employment disaggregated SOGI data, the academy will never understand how to welcome transgender persons and then treat them with dignity.

IV.

SOGI DATA HAS SIGNIFICANCE

Why do we need to disaggregate SOGI data into distinct subcategories, including transgender identity? According to the Federal Interagency Working Group on Measuring Sexual Orientation and Gender Identity (SOGI IWG):

> At a time when sexual and gender minority (SGM) populations are becoming more visible in social and political life, there remains a lack of data on the characteristics and well-being of these groups. In order to better understand the diverse needs of SGM populations, more representative and better quality [sic] data needs to be collected. [95]

More generally, as with any need for demographic data, precise information aids efficient policy development that guides reasoned government expenditures. [96] For this reason, other groups are also presently in debate about demographic disaggregation. Members of the "Asian" community in the United States, for instance, ***420** are engaged in dialogue on how to precisely reflect the many Asian nationalities and heritages. [97]

The healthcare industry has long been the leader in disaggregated data of similar but distinct population groups. [98] The education community knows that disaggregated student demographic data is important because:

> Disaggregated data can [ ] provide measures of the effectiveness and equity of a program or ways to view achievement measures ... disaggregated data can confirm perceptions of what is really occurring. [99]

The National Forum on Education Statistics (NFAS) publishes a guide about collecting and using disaggregated racial and ethnic data. [100] According to NFAS, minority group data disaggregation helps to improve educational outcomes because schools can offer targeted support. [101]

Gender identities are complex. While a variety of cultural constructs, reinforced by families and peers, drive most people to one of two gender identity boxes, for others, even "transgender" fails to capture their identity. Thus, it is helpful to understand some basic terminology.

"Cisgender" is a reference to those who identify as the gender that they were assigned at birth, based on anatomy. [102] One who is "transgender" has claimed the gender identity that they feel they were denied at birth, based merely on anatomy; they are *trans*itioning from one gender to another, or perhaps to neither gender or ***421** both. [103] "Gender non-conforming" means that a person does not necessarily reject their birth-assigned gender, but *ze* expresses *zir* personality in a way that is different from what society might expect for *zir* birth-assigned gender. [104] A person who is "gender fluid" identifies as either genders or neither gender, and zir gender expression is variable. [105] "Non-binary" persons do not identify as being either men or women or may identify as something not yet defined. [106] "Transsexual" [107] references someone who is transgender but who also has a desire to or has actually taken medical or other measures to change their sex, such as hormone therapy or gender confirmation surgeries. [108] "Transvestite" [109] is a term irrelevant to this discussion, as it references sexual activity, preferences, and fetishes--pleasure from dressing or behaving as the opposite gender--but does not necessarily refer to transgender persons. [110] Many people will be enlightened by this simple paragraph because, for decades, all of these terms have been used interchangeably (with the exception of emerging terms such as gender-non-conforming and non-binary). Often, people use "transgender" erroneously as an umbrella term for all of these ***422** alternative identities. Blanket nomenclature is short-sighted and insulting. Why all

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these "new" gender identities? Even despite past cultural recognition of gender fluidity, [111] as Nancy K. Knauer explained about current trends:

> Contemporary transgender narratives provide a first-hand account of gender as it is lived and experienced by some individuals at the beginning of the twenty-first century. The fact that these narratives may ultimately have a different trajectory than our own gender narratives simply makes them different, not invalid. We all have stories of navigating the gender system. Being gendered, either by self or others, is an experience we all share, and there is likely no single truth to be born of that shared experience. In this age of subjectivity, a charge of false consciousness rings of hubris and carries its own disturbing pretense of hegemony. [112]

Transgender persons are harmed when schools fail to fulfill Title IX's substantive mandate. As described by the Third Circuit Court of Appeals in *Doe v. Boyertown Area School District*, [113] a recent case about bathroom use by transgender students, forcing transgender students to use separate facilities "would very publicly brand all transgender students with a scarlet 'T', and they should not have to endure that as the price of attending their public school." Similarly, in *Parents for Privacy v. Dallas School District Number 2*, [114] the court explained that inequitable treatment of transgender students (specifically through discriminatory bathroom policies) "undoubtedly harms those students and prevents them from equally accessing educational opportunities and resources ... [and] would punish transgender students for their gender nonconformity and constitute a form of sex-stereotyping." These discriminatory policies violate the principles of both substantive and formal equality. However, they underscore the value of accurate, disaggregated SOGI data so that school administrators can identify populations, engage community members, and prioritize equitable policy development.

Fortunately, including at law schools, perceptions are evolving at a rapid, exponential pace. In a 2008 article, Professor Joan Howarth relayed a speech given by then-dean of Syracuse University School of Law, Craig Christensen, about his ***423** coming out as gay while serving as dean. [115] Upon coming out, his chances for advancement at the university disappeared, and his complaints about his mistreatment in an interview process with Syracuse University went uninvestigated. Dean Christensen shared that a senior officer at his university told him, "Surely you must understand that ultimately you will have to make a choice. You cannot possibly be both dean of a law school and openly gay." [116] Comparing his experience, as relayed at the 1990 Association of American Law Schools Convention, to experiences of openly gay or lesbian leaders today offers a testament to the progress made in the academy. At a time when mere disclosure--much less a request for formal equality or substantive equity--was a risk to one's job, transgender individuals, despite having bravely ignited the gay rights movement, would never have been considered for an academic post. [117]

Today's youth appear to be more accepting of sexual and gender minorities than earlier generations. [118] The shift of children's and young adults' views on gender identity mirrors the progress that prior generations experienced in learning to affirm women, persons of color, and persons with disabilities--first with formal equality and now the approximation of substantive equity. Formal equality for women, persons of color, or persons with disabilities, is now the norm. To be sure, young people are also capable of intolerance, and much work still lies ahead. [119] Nevertheless, precise disaggregated SOGI data can build on formal equality to make way for substantive equity, and eventually full acceptance for sexual and gender minorities. [120]

***424** In light of the "new" gender (or non-gender) labels, professionals should carefully consider the pronouns they select, especially when communicating with people they do not know and with those who use a gender-neutral name. An assumption as to pronouns can send a potentially harmful message--that people have to look (or be referred to) a certain way [121] and that they have to demonstrate the gender that they are, or are not. [122] While the usual he/she, her/him, and his/her are, of course, still available, the pronoun "ze" (pronounced zee, not zay) has reemerged. Many professionals have added a pronoun preference statement at the end of email signatures, which is most welcomed and appreciated. When in doubt, it is always appropriate to ask a person's preference, or simply use ze/hir, ze/zir, or they/them/theirs. [123] Similarly, in salutations, when in doubt, "Mx." is proper, as opposed to Mr., Ms., or Mrs. [124]

V.

THE TITLE IX SUBSTANTIVE EQUITY MANDATE AND POTENTIAL LIABILITY

Law schools need to disaggregate SOGI data so that transgender persons might achieve substantive equity in law school settings. It is well-settled that Title IX prohibits gender discrimination. [125] Women--cisgender or transgender--have achieved formal equality. This is true, even despite the Trump administration's repeal of Obama-era guidance to schools about transgender equality. [126] In ***425** collecting such data, schools must be cautious so that their efforts enhance substantive equity and do not further marginalize minority groups. Even if the population of transgender individuals is small, law school data must be measured so that policies and programs may be created to comply with Title IX's underlying mandate to assure substantive equity.

A. Title IX Primer

Congress enacted Title IX, 20 U.S.C. §1681, et seq., [127] with the Education Amendments of 1972, signed into law by President Richard Nixon. Title IX is such a significant law that jurists have, as of September 7, 2019, cited §1681 alone 18,577 times--not including this Article, working papers, or unreported cases. It states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...." [128]

There are exceptions. For example, 20 U.S.C. §1681(a)(3) exempts educational institutions if equality for women would offend the schools' religious tenets. Law schools are not exempt from Title IX unless the school refuses federal funds, such as student financial aid, or is affiliated with a religious school that treats women unfairly. Despite inclusion in Title 20, the Education Code, Title IX also reaches non-school settings that provide educational opportunities if the sponsor receives federal funds--for example, a forestry workshop sponsored by a state park that receives federal funds. [129]

Of note, 20 U.S.C. §1681(b) addresses statistical measures to prove preferential or disparate treatment between sexes. The subsection states:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential ***426** or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: **Provided, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex**. [130] [Emphasis added. [131]

Though §1681(b) precludes affirmative action based on proportional statistics, it allows plaintiffs to introduce evidence of statistical imbalances to show the absence of substantive equity. However, statistical data alone cannot support a Title IX claim. [132] Data may reveal disparities, but data alone is not certain proof of discrimination. Where there are statistical disparities, substantive equity more obviously suffers. [133] Precise data enables schools to monitor progress towards ***427** substantive equity and to develop risk management policies that help avoid and defend against Title IX litigation. [134]

Though Title IX is not an affirmative action statute, its aim is to restructure institutional systems that deprive women of substantive equity. The First Circuit Court of Appeals explained:

> Like other anti-discrimination statutory schemes, the Title IX regime **permits** affirmative action. In addition, Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination. Consistent with the school desegregation cases, the question of substantial proportionality under the Policy Interpretation's three-part test is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption, rather than an inflexible requirement.[ ]In short, the substantial proportionality test is but one aspect of the inquiry into whether an institution's athletics program complies with Title IX ... Title IX neither mandates a finding of discrimination based solely upon a gender-based statistical disparity, nor prohibits gender-conscious remedial measures. [135]

The *Zarda/Bostock* [136] case, argued at the U.S. Supreme Court on October 8, 2019 and pending a ruling, will have important implications for the treatment of transgender students under federal law. That case concerns the recognition of sexual orientation and transgender identity as protected classes within Title VII, which prohibits discrimination in employment. Title IX jurisprudence follows Title VII analysis. [137] However, a negative ruling that says Title VII does not protect transgender individuals would have little impact on the treatment of students ***428** because Title VII is inapplicable to student access to and treatment at school. [138] Students would still have protection, since the Supreme Court may be unlikely to make a broad ruling that affects statutes not before it. However, transgender teachers could be greatly impacted by a negative ruling in *Zarda*/*Bostock* because such a ruling would allow educational employment discrimination against transgender individuals, at least under Title VII. [139] The circuit courts of appeal disagree as to whether Title IX applies to educational employment, displaced by Title VII. [140] Whether Title IX applies to employment in education is not pending before the Court, nor is the status of transgender students under Title IX. [141] That being the case, though Title IX parallels Title VII, the present Title VII cases before the Court should have little impact on transgender students, as well as on the educators who experience adverse employment actions or retaliation related to their support of, or association with, transgender persons.

B. Law Schools Can Hasten Substantive Equity For Transgender Persons.

As Chan Tov McNamarah argues in *On the Basis of Sex(ual Orientation or Gender Identity): Bringing Queer Equity to School With Title IX*, Title IX has been the primary vehicle for transgender students to gain access in educational settings. [142] However, as McNamarah astutely points out, Title IX, while offering remedial solutions by way of private lawsuits or federal agency enforcement, is founded on a *substantive* premise of non-discriminatory, meaningful participation; its ultimate goal is to render remedial litigation unnecessary. [143] Transgender students and faculty should be allowed access in the first instance, per the formal prescriptions of Title IX, but schools should take affirmative steps to create substantive equity. [144] Indeed, Title IX acts as an access point to ensure that schools provide equal protection as required by the Fourteenth Amendment. [145] Formal equality or access, without more, does not rise to the level of substantive equity.

These are not new conceptions in civil rights discourse. Critical race theory and feminist theory shifted from a formal equality approach in the 1960s and 1970s ***429** to a substantive equity model. [146] This shift occurred partly in response to backlash against even formal equality, and partly in response to continuing injustice in a formal equality regime. Minority groups should not only have equal access; they should also be treated with the dignity of meaningful participation. [147] Yet women still seek substantive equity in many areas of life. Disability rights advocates have debated similar issues. [148] True substantive equity requires change beyond the academy, but schools should still consider the impact of their policies. Entities governed by Title IX should take affirmative steps to protect marginalized classes' meaningful participation in public accommodations and institutions.

Legislative history supports the substantive equity mandate, and courts agree. [149] As Justice John Paul Stevens explained in *Cannon v. University of Chicago*:

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes. [150]

Regarding substantive equity under Title IX and the Fourteenth Amendment, *Grimm v. Gloucester County School Board* is an important case that Title IX coordinators should monitor. The central issue in the case is whether the defendant school district violated Title IX by denying the plaintiff student access to a bathroom matching his gender identity. The most recent turn in this case comes after the Supreme Court granted certiorari, only to remand the case for consideration of the Title IX issue. On remand, the plaintiff filed for summary judgment. The motion was heard on July 23, 2019, and on August 9, 2019, the U.S. District Court ***430** for the Eastern District of Virginia granted the student's motion, ruling that his rights under Title IX and the Fourteenth Amendment had been violated. The court applied intermediate scrutiny. On August 16, 2019, the school district announced that it would appeal the decision. The matter has been briefed, with supplemental persuasive authority filed as recently as February 13, 2020. [151]

Substantive equity is the next challenge for LGBTQI(A) advocates. In order to move towards true equity, researchers must precisely measure the LGBTQI(A) community. The debate about formal equality and substantive equity matters because it affects whether schools must take affirmative steps to help transgender individuals achieve equality. The alternative, "[s]imply ensuring that the processes of education [and employment] are facially neutral[,] does very little to ensure equality of educational opportunity." [152]

C. Title IX Violations Carry Real Consequences

The U.S. Supreme Court has never addressed gender discrimination as a violation of Title IX, though it has addressed liability under Title VII (which prohibits employment discrimination based on race, color, religion, sex, and national origin), and courts have used Title VII analysis as a framework for assessing Title IX claims. As noted above, the U.S. Supreme Court had the chance to finally establish gender as protected under Title IX, but it granted certiorari in the *Grimm* case only to remand it for further consideration of the Title IX claim. [153] The Court has found an implied cause of action for sex discrimination, [154] as well as school liability. However, individuals have not been held liable for Title IX sex discrimination claims. [155] Congress did not address the type and scope of remedies available in ***431** Title IX cases, and so courts have "a measure of latitude to shape a sensible remedial scheme." [156]

In contrast to the prohibitions lain out in Title VI, Title IX is contractual: in exchange for federal funds, schools must not discriminate based on sex. Thus, the most obvious remedy available is the revocation of federal funding. Such an action would be disastrous for a law school, all of which are highly dependent on the federal student financial aid system, as well as many other federal subsidies. The circuit courts of appeals disagree as to whether punitive damages are available. [157] Deciding on compensatory damages is also a matter of discord between the Circuits. However, a court may assess attorney fees. [158]

VI.

POLICY DEVELOPMENT

A. Policy Development Generally

Policy development processes, including to develop population surveys, are varied, depending on, among other factors, (1) the type of private or government entity and relevant, internal corporate directives and bylaws or (2) government statutes and regulations, such as administrative procedure acts. However, generally, sound policy may be developed as follows:

***432** TABLE 4: POLICY DEVELOPMENT [159]

PRE-DRAFTING	DRAFTING	ACTION	REVIEW
Identify the problem	Write	Adopt: board vote or agency/ legislative body action	Surveys
Appoint a policy leader	Edit	Announce	Employee/ Constituent/Customer/ Leadership Interviews
Develop a process	Consult with internal leaders/elected officials/ customers/constituents	Educate employees/ customers/constituents/ other leaders and agencies	Discuss with leadership/ elected officials
Research, including consultations with experts			Adjust policy
Discuss with internal leaders/elected officials/ customers/constituents			

As for disaggregation of SOGI data, the federal government and several states have already created a policy development process and, in some cases, have even developed revised surveys; there is no need to "reinvent the wheel." The Federal Commission on Statistical Methodologies has already undertaken the effort to ***433** develop culturally appropriate and statistically valid surveys to collect SOGI data, including linguistic validation [160] and cognitive validation or debriefing. [161]

The Federal Committee on Statistical Methodology (FCSM) is an interagency committee, created by the Office of Budget Management (OMB), that works to improve the quality of federal statistics. [162] FCSM plays a key role in federal policy development and advises the OMB, as well as the Interagency Council on Statistical Policy (ICSP), about the accuracy of federal data. [163] FCSM has a working group dedicated specifically to the measurement of SOGI data, the Measuring Sexual Orientation and Gender Identity Research Group (MSOGIRG). [164]

MSOGIRG suggests that survey development include the following steps: define the purpose and objective of the survey; validate it through quantitative, qualitative, and cognitive measures; establish the context; and critique its design prior to launching the survey. It is beyond the scope of this Article to address each of these steps in a thorough fashion--particularly the issue of validation. Law school administrators must realize that survey question development to elicit disaggregated SOGI data requires significant planning by an interdisciplinary team. A law school should consult across its home university for assistance. The Interagency Working Group on SOGI Data (IWG) offers excellent insight and would be a helpful preliminary source. For example, IWG recommends a two-step question, as suggested by the Center of Excellence for Transgender Health. [165]

*434 *B. Examples of Successful SOGI Disaggregation*

Law schools have many examples from which to draw inspiration to create intake survey questions that disaggregate SOGI data. It is a feasible task, successfully undertaken by many federal agencies, states, and municipalities for more than five years. For example, the Centers for Disease Control and Prevention (CDC) developed a sexual orientation and gender identity question module that more than five states and territories used as of 2015. [166] It now uses the Behavioral Risk Factor Surveillance System (BRFSS), the largest federally supported health survey. The CDC followed recommendations of the Sexual Minority Assessment and Research Team (SMART) at the University of California Los Angeles School of Law's Williams Institute, [167] as well as guidance from the Gender Identity in U.S. Surveillance Group (GenIUSS). [168] The U.S. Department of Justice has added sexual orientation and gender identity questions to the National Crime Victimization Survey (NCVS), and the U.S. Department of Labor collects data on sexual orientation through the Family and Medical Leave Act Survey. [169] The National Alliance of State and Territorial AIDS Directors (NASTAD) and The Williams Institute also offer resources, such as NASTAD's Modernizing Programs to Collect Sexual Orientation and Gender Identity Data [170] and the Williams Institute's Best Practices for Asking About Sexual Orientation on Surveys. [171] For examples of federal survey questions that elicit SOGI data, please see Appendix B.

*435 *C. Motivators for Action*

Even if the discussion of disaggregated SOGI data yields awareness, there are many obstacles to action. For example, faculty and administrators are already overburdened and may be reluctant to add another layer of reporting, and some schools with political or religious underpinnings may be limited by boards of trustees' or donors' influence. While survey question examples are awaiting the academy's attention, there are several policy actions that could spur the discussion and lead to precise, disaggregated data. Perhaps the most obvious solution is an amendment to ABA Standard 509, *Required Disclosures*. [172] Amendments should require that law schools solicit disaggregated minority group data, including SOGI, and provide that information to the public and to prospective students and professors.

Standard 509 does not require reporting the presence of minority groups in law schools, though most schools collect and offer at least some information as an extension of EEOC requirements and institutional antidiscrimination policies. [173] Of note, the new ABA Standards were promulgated in 2014, with minor changes made in 2015. Underscoring the legal profession's tone-deaf approach to diversity and inclusion, the ABA continues to fail to address the issue of disaggregated diversity statistics. At the ABA, "transgender" is still part of the bigger rainbow umbrella, unquantified as its own group, despite having unique needs and traits. Disaggregated data could benefit the entire profession. [174]

One could view the general directive of Standard 509 as a mandate, or at least as encouragement, to measure disaggregated minority groups and make that data available to the public. In the comments to the rule, the ABA explained: "A law school may publicize or distribute information **in addition to that required** by this Standard, including, without limitation, the employment outcomes of its graduates, so long as such information complies with the requirements of subsection (a)." [175]

Further, in a Guidance Memorandum, the ABA offered:

> ***436** Standard 509 divides the information that a law school must publish on its website into two categories:
>
> (1) that for which the Council prescribes a particular form, manner and time frame of publication [Standard 509(b)]; and

> (2) that which schools must disclose in a readable and comprehensive manner [Standard 509(c)].
>
> Each of these categories is addressed below. Additionally [,] and importantly, all information reported, publicized, or distributed by a law school is **subject to the overriding mandate of Standard 509(a) that it be "complete, accurate [,] and not misleading to a reasonable law school student or applicant.**" [White space and emphasis added. [176]

It is not possible for a law school to comply with subsection (a) when several diverse classes of people are lumped into one umbrella group, as it is inherently misleading to offer partial information (e.g., "Asian" or "LGBT") based on less than a detailed analysis. The non-binding ABA Advisory Council Statement to the 2013-2014 ABA Standards for Approval of Law Schools lacks reference to a measure of diversity in law schools. [177] In addition to Standard 509 amendments, other professional associations, such as the Association of American Law Schools and teacher unions, should call on schools to make the effort. For all the aspirations and the vogue of diversity that now permeates the profession, we have done little more than placate those with valid concerns.

Perhaps the power of the purse could be the strongest influence. Federal student loan programs should require schools to disaggregate post-graduation employment rates for specific minority groups--a step that would further the goals of all the civil rights statutes. Such a financially wrangled policy would provide basic information about student populations, and it would help the profession better understand the realities of law employment for graduates of diverse backgrounds. Even if financial incentives are not invoked, law schools and the profession should prove their purported dedication to embracing diversity by voluntarily committing to conducting data analyses that disaggregate minority groups into their precise identities, thereby affirming and demonstrating respect for these identities.

*437 VII.

CONCLUSION

The legal industry takes great pride in advocating for diversity and compassion. Yet, despite the recent growth of minority group data disaggregation, law schools lack specific knowledge about their students and professors. Broad-stroke labels such as "LGBTQI(A)" and "other" send a message that a candidate's specific identity may not be acknowledged and treated with dignity. The academy and profession are late to join the SOGI data movement and disaggregation, while governments, healthcare, social services, and law enforcement lead the way. Hurdles are minimal: there are already numerous, well-functioning survey examples from which law schools could develop their own surveys. Until we understand the needs of transgender students and professors, substantive equity will remain elusive.

*438 APPENDIX A: SEXUAL ORIENTATION AND GENDER ORIENTATION DATA COLLECTION ON THE 2015 BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM [178]

FIGURE 1

Sexual orientation and gender identity data collection on the 2015 BRFSS

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*439 APPENDIX B: FEDERAL SURVEY SOGI DATA QUESTIONS [179]

MODULE 21: SEXUAL ORIENTATION AND GENDER IDENTITY (SOGI)

Question Number	Question text	Variable names	Responses	SKIP INFO/CATI Note	Interviewer Note(s)	Column(s)
			(DO NOT READ UNLESS OTHERWISE NOTED)			
M21.01a	The next two questions are about sexual orientation and gender identity.	SO MALE	1 = Gay	Ask if Sex = 1.	Read if necessary: We ask this question in order to better understand the health and health are needs of people with different sexual orientations.	589
			2 = Straight, that is, not gay			
			3 = Bisexual			
			4 = Something else			
	Which of the following best represents how you think of yourself?		7 = I don't know the answer			
					Please say the number before the text response. Respondent an answer with either the number or the text/ word.	
			9 = Refused			
M21.01b	Which of the following best represents how you think of yourself?	SO FEMALE	1 = Lesbian or Gay	Ask if Sex = 2.	Read if necessary: We ask this question in order to better understand the health and health are needs of people with different sexual orientations.	
			2 = Straight, that is, not gay			
			3 = Bisexual			
			4 = Something else			

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			7 = I don't know the answer			
					Please say the number before the text response. Respondent an answer with either the number or the text/ word.	
			9 = Refused			
M21.02	Do you consider yourself to be trans gender?	TRNSGNDR	1 Yes, Transgender, male-to-female		Read if necessary: Some people describe themselves as transgender when they experience a different gender identity from their sex at birth. Far example, a person born into a male body, but who feels female or live as a woman would be transgender. Some transgender people change their physical appearance so that it matches their internal gender identity. Some transgender people take hormones and some have surgery. A transgender person maybe of any sexual orientation-straght, gay, lesbian, or bisexual.	590
			2 Yes, Transgender, female to male			
			3 Yes, Transgender, gender nonconforming			
			4 No			
			7 Don't know/not sure			
			9 Refused			
					If asked about definition of gender non-conforming: Some people think of themselves as gender non-conforming when they do not identify only as a man or only as a woman.	

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					If yes, ask Do you consider yourself to be 1. male-to-female, 2. female-to-male, or 3. gender non-conforming?	
					Please say the number before the text response. Respondent can answer with either the number or the text/ word.	

*441 APPENDIX C: FROM THE NATIONAL CRIME VICTIMIZATION SURVEY (NCVS) [180]

83. ORIENTATION MALE			
	1 ☐ **Gay**	}	
(Asked of persons age 16 or older. Asked at 1st, 3rd, 5th, and 7th interview, or if never asked before. Asked if NCVS-500 roster SEX question = Male)	2 ☐ **Straight, that is, not gay**	}	
	3 ☐ **Bisexual**	}	SKIP to 85
	4 ☐ **Something else**	}	
Which of the following best represents how you think of yourself?	5 ☐ **I don't know the answer**	}	
	6 ☐ Refused	}	

84. ORIENTATION FEMALE	
	1 ☐ **Lesbian or gay**
(Asked of persons age 16 or older. Asked at 1st, 3rd, 5th, and 7th interview, or if never asked before. Asked if NCVS-500 roster SEX question = female or Unknown)	2 ☐ **Straight, that is, not lesbian or gay**
	3 ☐ **Bisexual**
	4 ☐ **Something else**
	5 ☐ **I don't know the answer**
Which of the following best represents how you think of yourself?	6 ☐ Refused
85. GENID_BIRTH	

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	1 ☐ Male
(Asked of persons age 16 or older. Asked at 1st, 3rd, 5th, and 7th interview, or if never asked before.)	2 ☐ Female
	3 ☐ Refused
What sex were you assigned at birth, on your original birth certificate?	4 ☐ Don't know
86. GENID_DESCRIBE	1 ☐ Male
(Asked of persons age 16 or older. Asked at 1st, 3rd, 5th, and 7th interview, or if never asked before.)	2 ☐ Female
	3 ☐ Transgender
	4 ☐ None of these
Do you currently describe yourself as male, female or transgender?	
87. GENID_CONFIRM	
(Asked of persons age 16 or older. Asked at 1st, 3rd, 5th, and 7th interview, or if never asked before. Asked if GENID_BIRTH and GENID_DESCRIBE do not match.)	
	1 ☐ Yes
Just to confirm, you were assigned (male/female) at birth and now (describe yourself as male/ describe yourself as female/ describe yourself as transgender/ do not describe yourself male, female, or transgender). Is that correct?	2 ☐ No-SKIP back to 85 and/or 86 to correct
	3 ☐ Refused
	4 ☐ Don't know
The instrument prefills the question wording based on responses to GENID_BIRTH and GENID_DESCRIBE.	

*442 APPENDIX D: HEALTH CENTER PATIENT SURVEY [181]

HEALTH CENTER PATIENT SURVEY (HCPS)

Years Survey Included Sexual and Gender Minority

(SGM)-related Questions 2017

Survey Description

The Health Center Program, administered by BPHC, supports the provision of community based preventive and primary health care services through Section 330 of the Public Health Service Act for health centers and community organizations. The survey examines how well HRSA-supported sites meet health care needs of the medically underserved and assessed how patients perceive the quality of their care. The survey is conducted in five languages and results from the HCPS help BPHC achieve its mission to improve the health of underserved communities throughout the nation.

Survey Sample Population

The sample population for this survey is all health center patients, ages 15 and older. Participants in the HCPS are derived from vulnerable populations in the U.S. such as the poor, homeless, public housing residents, migrant and seasonal farm workers, at-risk women, minorities, persons with HIV/AIDS, uninsured and underinsured, and non-English speakers. What makes the Health Center Patient Survey unique is its focus on comprehensive patient-level data that is designed to provide a nation-wide view of patients served by grantees under the Health Center Program. Participants are identified during their visit to a Health Center Program site, and those who identified themselves as Asian, American Indian/Alaska Native or Native Hawaiian/Pacific I slander are oversampled to capture a more comprehensive picture of patient experiences.

Survey Mode

The mode that is used for this survey is a computer-assisted personal interview (CAPI) software. From October 2014 through April 2015 the Health Center Patient Survey was conducted in three stages:
1. Recruited 169 grantee participants

2. Contacted 520 health care sites operating within the participating grantees

3. Completed 7,002 computer-assisted personal patient interviews with individuals representing 42 states

To participate, patients had to have visited a program site at least once in the previous 12 months. Data for the survey was collected from October 2014 through April 2015. 68 percent of the interviews were conducted in English, 28 percent in Spanish, 3 percent in Chinese, and less than one percent were conducted in Vietnamese. No interviews were conducted in Korean.

***443 SGM-Related Survey Questions**

Sexual Identity

Health centers are encouraged to collect demographic data for every patient, but collecting sexual orientation data from patients less than 18 years of age is not mandated. In the event that sexual orientation information is not available, the patient is to be reported on Table 3B as “don't know” on Line 17. The following descriptions may assist with data collection, but it is important to note that terminology is evolving and patients may change how they identify themselves over time.
Line 13 - Lesbian or Gay: A sexual orientation that describes a person who is emotionally and sexually attracted to people of their own gender.

Line 14 - Straight (not lesbian or gay): A sexual orientation that describes a person who is emotionally and sexually attracted to people of the opposite gender.

Line 15 - Bisexual: A sexual orientation that describes a person who is emotionally and

sexually attracted to people of their own gender and people of other genders.

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Line 16 - Something else: A person who is emotionally and sexually attracted to people of another sexual orientation other than the three categories described above. In addition, include in this category persons who identify themselves as queer, asexual, or pansexual.

Line 17 - Don't know: A person who self-reports that they do not know what their sexual orientation is. Also use this category to report patients where the health center does not know the patient's sexual orientation (i.e., health center did not have systems in place to routinely ask about sexual orientation).

Line 18 -Chose not to disclose: A person who chose not to disclose their sexual orientation.

Question History: This is the only version of the question that has been used.

Sexual Attraction

There are currently no questions asked in this category.

Sexual Behavior

There are currently no questions asked in this category.

Gender Identity

Health centers are to report patients according to their sex at birth. This is normally the sex reported on a birth certificate. In states that permit this to be changed, the birth certificate sex may still be used.

Health centers are encouraged to collect demographic data for every patient, but collecting gender identity data from patients less than 18 years of age is not mandated. In the event that gender identity information is not available, the patient is to be reported on Table 3B as “other” on Line 24. The following descriptions may assist with data collection, but it is important to note that terminology is evolving and patients may change how they identify themselves over time.
Line 20 - Male: A person who identifies themselves as a man/male.

Line 21 - Female: A person who identifies themselves as a woman/female.

Line 22 - Transgender Male / Female-to-Male: A transgender person whose gender identity is man/male may use these terms to describe themselves. Some may just use the term man.

***444** # Line 23 - Transgender Female / Male-to-Female: A transgender person whose gender identity is woman/female may use these terms to describe

themselves. Some may just use the term woman.

Line 24 - Other: A person who does not think that one of the four categories above adequately describes them. Include in this category persons who identify themselves as genderqueer or non-binary. Also use this category to report patients where

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tie health center does not know the patient's gender identity (i.e., health center did not have systems in place to routinely ask about gender identity).

Line 25 -Chose not to disclose: A person who chose not to disclose their gender

Question History: This is the only version of the question that has been used.

Household Relationships

There are currently no questions asked in this category.

Response Rates

From October 2014 through April 2015, 7,002 computer-assisted personal patient interviews with individuals representing 42 states were conducted.

Survey Links

Questionnaires

There are no questionnaire links currently available.

Data

There are no data links currently available.

General Information

https://www.rti.org/impact/health-center-patient-survey

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Footnotes

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1 Scott James, *Queer People of Color Led the LGBTQ Charge but Were Denied the Rewards*, N.Y. TIMES (June 22, 2019), https://www.nytimes.com/2019/06/22/us/lgbtq-minorities-trans-activists.html [https://perma.cc/5Y55-5EFW] (internal quotations omitted).

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3 *See* Sterling & Reichman, *supra* note 2 (addressing gender disparities without discussion of transgender presence in the legal profession); Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271 (2014) (providing empirical analysis that ignores LGBTQI(A) persons); *see, e.g.,* Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. L. ETHICS 1041 (2011) (discussing gender equity that ignores transgender persons).

4 Lesbian, gay, bisexual, transgender, queer, intersex, and ally. The author has placed the "A" in parentheses to acknowledge (1) that allies stand with sexual and gender minority groups, and (2) that allies, as a political influence, are not measured in any of the referenced studies or surveys. Note that other scholars have included "A" to represent asexual individuals. The author uses "(A)" to represent allies (1) because all civil rights statutes protect those who speak out for or associate with protected classes and (2) to emphasize this Article's focus on gender, rather than on sexuality.

5 The Law School Admissions Council (LSAC) captures gender identity information, but only illustrates pre-admission statistics.

6 A minority group is any population set of relatively uncommon shared characteristics and lesser political power, compared to the predominant group. Minority groups are subordinate to dominant groups. For example, LGBTQI(A) persons lack the same political force and recognition as heterosexual persons. *See Subordinate Group*, SOCIOLOGY DICTIONARY, https://sociologydictionary.org/subordinate-group/#definition_of_subordinate_group [https://perma.cc/NEM5-Z25X] (last visited May 14, 2020); *see also*DIANA KENDALL, SOCIOLOGY IN OUR TIMES 289-90 (2008).

7 *See* Eli Green, *Debating Trans Inclusion in the Feminist Movement*, 10 J. LESBIAN STUDS. 231 (2006); Sally Hines, *The Feminist Frontier: On Trans and Feminism*, 28:2 J. GENDER STUDS. 145 (2019); Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J. L. PUB. POL. 309, 335-37 (2018) (The author, Mr. Anderson, is the William E. Simon Senior Research Fellow in American Principles & Public Policy, The Heritage Foundation. His piece is a scathing view of transgender progress that relies on a Family Policy Alliance YouTube video; "remarks" to the Heritage Foundation; one Associated Press article; an expert declaration by Kenneth Lanning, who equates transgender persons with child molesters; and a complaint that was ultimately dismissed by the U.S. District Court for the Northern District of Illinois.); *see, e.g.*, Viv Smythe, *I'm Credited with having Coined the Word TERF, Here's Why*, THE GUARDIAN (Nov. 29, 2018), https://www.theguardian.com/commentisfree/2018/nov/29/im-credited-with-having-coined-the-acronym-terf-heres-how-it-happened [https://perma.cc/J5W3-62YV]; Katelyn Burns, *The Rise of Anti-Trans "Radical" Feminists, Explained*, VOX (Sept. 5, 2019) https://www.vox.com/identities/2019/9/5/20840101/terfs-radical-feminists-gender-critical [https://perma.cc/RG64-M7TY].

8 For a discussion of the fragile state of "pipeline" concepts in legal education, see Sarah E. Redfield, *The Educational Pipeline to Law School-- Too Broken and Narrow to Provide Diversity*, 8 PIERCE L. R. 347 (2010).

9 *See, e.g.*, Interagency Reports, FED. COMM. ON STAT. METHODOLOGY, https://nces.ed.gov/FCSM/interagency_reports.asp [https://perma.cc/2RQF-FPP9] (last visited Jan. 3, 2019) (listing research papers on best practices for federal surveys). Law-related organizations, on the other hand, do not collect disaggregated SOGI data, except for the Law School Data Assembly Service and its efforts with LSAT demographics. *See, e.g.,*AM. BAR ASS'N, *Section of Legal Education - ABA Required Disclosures*, http://www.abarequireddisclosures.org/Disclosure509.aspx [https://perma.cc/C8PK-9N47] (last visited Apr. 25, 2020).

10 *See, e.g.,* Data Collection: National Crime Victimization Survey, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245 [https://perma.cc/J7RA-C835] (last visited July 29, 2019); Health Center Patient Survey, HEALTH RES. AND SERV. ADMIN., https://bphc.hrsa.gov/datareporting/research/hcpsurvey/index.html [https://perma.cc/5237-ZMW] (last visited July 29, 2019).

11 *See, e.g.,* Lauren E.M. Russell, *Voluntary Self-Identification: Best Practices*, HR DAILY ADVISOR, (Nov. 1, 2018) https://hrdailyadvisor.blr.com/2018/11/01/voluntary-self-identification-best-practices/ [https://perma.cc/P2NS-WY2W].

12 AM. BAR ASS'N, MANAGING DIRECTOR'S GUIDANCE MEMO: STANDARD 509 (2016), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_standard_509_guidance_memo_final.authcheck-dam.pdf [https://perma.cc/FTJ7-WQST] [hereinafter MANAGING DIRECTOR'S GUIDANCE MEMO].

13 *Id.*

14 Two schools can display different information based on their Standard 509 reporting. *Compare* Fall 2017 Entering Class Profile, FLA. A&M C. L., https://law.famu.edu/students/prospective-students/class-profile/ [https://perma.cc/5M2D-N5KP] (last visited July 29, 2019) (providing enrollment data that does not include LGBTQ enrollment data) *with* Entering Class Profile 2021, U. FLA. FREDERICK G. LEVIN C. L., https://www.law.ufl.edu/admissions-2/apply/entering-class-profile [https://perma.cc/65R9-RRJH] (last visited July 29, 2019) (providing LGBTQ enrollment data).

15 Kellan Baker & Margaret Hughes, *Sexual Orientation and Gender Identity Data Collection in the Behavioral Risk Factor Surveillance System*, CTR. FOR AM. PROGRESS (Mar. 29, 2016, 9:04 AM), https://www.americanprogress.org/issues/lgbt/reports/2016/03/29/134182/sexual-orientation-and-gender-identity-data-collection-in-the-behavioral-risk-factor-surveillance-system [https://perma.cc/EPJ7-L2L8].

16 *See, e.g.,*N.Y. DEP'T HEALTH, BRFSS BRIEF, NUMBER 1806, SEXUAL ORIENTATION AND GENDER IDENTITY: SELECTED DEMOGRAPHICS AND HEALTH INDICATORS, NEW YORK STATE ADULTS, 2014-2016 (2017), https://www.health.ny.gov/statistics/brfss/reports/docs/1806_brfss_sogi.pdf [https://perma.cc/4GA5-2YUL].

17 This author questions the moniker "sexual and gender minority," as the reference can imply an act of sex, which is not an appropriate discussion in the workplace or in educational settings. However, as to health and crime, it could be very relevant. Sometimes, practitioners instead use the shortened phrase, "sexual minority group." *See id.*; NATIONAL INSTITUTES OF HEALTH: SEXUAL & GENDER MINORITY RESEARCH OFFICE (last visited Jan. 28, 2020), https://dpcpsi.nih.gov/sgmro [https://perma.cc/N6Y4-L54Q] (demonstrating uses of SOGI and SGM). *See also* Kenneth H. Mayer, Judith B. Bradford, Harvey Makadon, Ron Stall, Hilary Goldhammer & Stewart Landers, *Sexual and Gender Minority Health: What We Know and What Needs to Be Done*, 98:6 AM. J. PUB. HEALTH 989 (2008) (using "sexual and gender minority" and "sexual minority group" interchangeably).

18 FED. COMM. ON STAT. METHODOLOGY, MEASURING SEXUAL ORIENTATION AND GENDER IDENTITY RES. GRP., Measuring Sexual Orientation and Gender Identity Research Group Charter, https://nces.ed.gov/FCSM/pdf/SOGI_RG_Charter.pdf [https://perma.cc/L9VJ-L8AR] (last visited July 29, 2019) [hereinafter, SOGI Charter].

19 Hansi Lo Wang, *Senate Bill to Require Sexual Orientation and Gender Identity Data by 2030 Census*, NPR (July 31, 2018, 12:11 PM), https://www.npr.org/2018/07/31/634243854/senate-bill-to-require-sexual-orientation-gender-identity-data-by-2030-census [https://perma.cc/SZY7-YX95].

20 Census Equality Act, S. 3314, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/senate-bill/3314/text [https://perma.cc/3YDH-4W7B].

21 Tom Caizza, Statement: CAP's Laura E. Durso on Passage of Sexual Orientation and Gender Identity Data Bills in NYC Council, CTR. FOR AM. PROGRESS (Oct. 13, 2016), https://www.americanprogress.org/press/statement/2016/10/13/146144/statement-caps-laura-e-durso-on-passage-of-sexual-orientation-and-gender-identity-data-bills-in-nyc-council [https://perma.cc/8KUA-GWBZ]; CYNTHIA LAIRD, *SOGI Data Collection in SF is a Long Slog, but Shows Improvement*, BAY AREA REPORTER (Apr. 18, 2019), https://www.ebar.com/news/latest_news//275107 [https://perma.cc/3C4Q-DE7U].

22 *Sexual Orientation and Transgender Definitions*, HUM. RTS. CAMPAIGN https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/R3G8-DAJ7] (last visited Nov. 7, 2019). Prior to European influence in the Americas, and even today, many Native peoples respected a "two spirit" identity that modern society might consider transgender. *See* Harlan Pruden & Se-ah-dom Edmo, Two Spirit People: Sex, Gender & Sexuality in Historic and Contemporary Native America, NORTHEAST TWO-SPIRIT SOCIETY (2013), http://www.ncai.org/policy-research-center/initiatives/Pruden-Edmo_TwoSpiritPeople.pdf [https://perma.cc/E28G-VZUZ].

23 *See Sexual Orientation and Transgender Definitions*, *supra* note 22; *see also* Cydney Adams, *The Difference Between Sexual Orientation and Gender Identity*, CBS NEWS (Mar. 24, 2017) https://www.cbsnews.com/news/the-difference-between-sexual-orientation-and-gender-identity/ [https://perma.cc/R4SD-AN2B].

24 *See* Bill Dailey, *Why LGBT Initialism Keeps Growing*, CHI. TRIB. (June 2, 2017) (discussing the evolution of LGBTQI(A)); *see also* Michael Hulshof-Schmidt, *What's in an Acronym: Parsing the LGBTQQIP2SAA Community*, SOCIAL JUSTICE FOR ALL, https://hulshofschmidt.wordpress.com/2012/07/11/whats-in-an-acronym-parsing-the-lgbtqqip2saa-community/ [https://perma.cc/5DYK-SDQZ] (last visited Mar. 5, 2020).

25 *Transgender People, Gender Identity and Gender Expression*, AM. PSYCHOLOGICAL ASS'N, https://www.apa.org/topics/lgbt/transgender [https://perma.cc/22GF-WBWS] (last visited Nov. 11, 2019); Riley J. Dennis, *Misgendering Trans People is an Act of Violence*, YOUTUBE (Jan. 5, 2017), https://youtu.be/g-u5gYxXHoA; Kevin McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences With Misgendering*, 3:1 STIGMA & HEALTH 53 (2018).

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27 *See Sexual Orientation and Transgender Definitions*, *supra* note 22.

28 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 574-77 (2003); *see generally*, 20 U.S.C. § 1681 et seq. (2012) (Title IX); *see also*Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986). *Vinson* is a Title VII case in which the Supreme Court explained that sexual harassment need not include a quid pro quo or other economic element, "where 'such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"

29 Baker & Hughes, *supra* note 15.

30 The task force is now a research group within the Federal Committee on Statistical Methodology. *See generally*, SOGI Charter, *supra* note 18; *Behavioral Risk Factors Surveillance System (BRFSS)*, CTRS. FOR MEDICARE AND MEDICAID SERVICES, https://www.cms.gov/About-CMS/Agency-Information/OMH/resource-center/hcps-and-researchers/data-tools/sgm-clearinghouse/brfss [https://perma.cc/XY36-CVL5] (last visited Mar. 5, 2020).

31 SOGI Charter, *supra* note 18.

32 For examples of these surveys, see *infra* Appendices B, C, and D.

33 SOGI Charter, *supra* note 18.

34 *Current Measures of Sexual Orientation and Gender Identity in Federal Surveys*, *supra* note 26.

35 *Health Center Patient Survey*, HEALTH RESOURCES & SERVICES ADMIN. (2014), https://bphc.hrsa.gov/datareporting/research/hcpsurvey/index.html [https://perma.cc/E6A9-K47A].

36 *National Adult Tobacco Survey*, CDC, https://www.cdc.gov/tobacco/data_statistics/surveys/nats/index.html [https://perma.cc/TC2S-BY62] (last visited Nov. 8, 2019).

37 *National Health and Nutrition Examination Survey*, CDC, https://www.cdc.gov/nchs/nhanes/index.htm [https://perma.cc/QRY8-45AN] (last modified Sept. 15, 2017).

38 *National Health Interview Survey*, CDC, https://www.cdc.gov/nchs/nhis/index.htm [https://perma.cc/8HU9-GDC6] (last modified Dec. 17, 2019).

39 *National Inmate Survey*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=dcdetail&iid=278 [https://perma.cc/6AX5-ZRMF] (last visited July 29, 2019).

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41 *National Survey of Family Growth*, CDC, https://www.cdc.gov/nchs/nsfg/index.htm [https://perma.cc/WB8R-FFDK] (last visited Sept. 9, 2019).

42 *Youth Risk Behavior Surveillance System*, CDC, https://www.cdc.gov/healthyyouth/data/yrbs/index.htm [https://perma.cc/J2MZ-STNF] (last modified Aug. 22, 2019).

43 *National Survey of Drug Use and Health*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://nsduhweb.rti.org/respweb/about_nsduh.html [https://perma.cc/T9KH-LZV7] (last visited July 29, 2019).

44 *National Survey of Older Americans Act Participants*, ADMIN. FOR CMTY. LIVING, ADMIN. ON AGING, https://aoasurvey.org/default.asp [https://perma.cc/3L6A-Y6Z] (last visited July 29, 2019).

45 *Behavioral Risk Factor Surveillance System*, CDC, https://www.cdc.gov/brfss/index.html [https://perma.cc/S6CW-ZX9Q] (last modified Nov. 5, 2019).

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46 *Population Assessment of Tobacco and Health Study*, NAT'L INST. HEALTH & FDA, https://pathstudyinfo.nih.gov/UI/StudyOverviewMobile.aspx [https://perma.cc/ND8C-S8L2] (last modified Dec. 1, 2018).

47 *See infra* Appendix A.

48 That is not to diminish the plight of sexual orientation as a minority group in need of protection--the identity revelation of which is a declaration of a preference for particular sexual activity.

49 NALP is an organization that monitors graduate employment outcomes and other information about legal employment. *About NALP*, NAT'L ASS'N FOR L. PLACEMENT, https://www.nalp.org/aboutnalp [https://perma.cc/W5DT-VNMG] (last visited Sept. 7, 2019).

50 *Diversity and Inclusion Center*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/ [https://perma.cc/ET2P-LN5H] (last visited July 29, 2019); *Diversity & Demographics*, NAT'L ASS'N FOR L. PLACEMENT, https://www.nalp.org/diversity2 [https://perma.cc/DST3-4M2C] (last visited July 29, 2019).

51 NAT'L ASS'N FOR L. PLACEMENT, 2018 REPORT ON DIVERSITY IN U.S. LAW FIRMS (2018) https://www.nalp.org/uploads/2018NALPReportonDiversityinUSLawFirms_FINAL.pdf [https://perma.cc/628F-QEA4].

52 *Id.*

53 BUREAU LAB. STAT., HOUSEHOLD DATA ANNUAL AVERAGES (2008), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/cpsaat11.pdf [https://perma.cc/6AKP-BYVH]. The Household Data Annual Averages survey provides a comprehensive data set about the labor force in the United States.

54 A link on the American Bar Association webpage describing minority statistics links to a 2008 Bureau of Labor Statistics report that details demographic data for various occupations. *See* link titled "Statistics About Employed Lawyers (# lawyers, gender & race/ethnicity) - Bureau of Labor Statistics (pdf)" at *Legal Profession Statistics*, AM. BAR ASS'N (Aug. 5, 2019), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/cpsaat11.pdf [https://perma.cc/SKS8-JENJ]; *see also*BUREAU LAB. STAT., LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2018: REPORT 1082 (Oct. 2019), https://www.bls.gov/opub/reports/race-and-ethnicity/2018/pdf/home.pdf [https://perma.cc/4WAF-TE4D] [hereinafter, REPORT 1082].

55 *See*REPORT 1082, *supra* note 54. In 2018, 1,891,000 persons were employed in legal occupations and 85.7% were white. In 2008, 1,671,000 were employed in legal occupations and 83.6% were white; *see also* Interagency Reports, *supra* note 9.

56 *See*REPORT 1082, *supra* note 54.

57 Diversity and Inclusion Center, *supra* note 50.

58 *See* Skip Harsch, *Model Rule 8.4*, AM. BAR ASS'N (Nov. 1, 2017) https://www.americanbar.org/groups/diversity/sexual_orientation/publications/equalizer/2017-winter/model-rule/ [https://perma.cc/AZ9R-WLHN] (noting that the amended Rule 8.4 was sponsored by Standing Committee on Ethics and Professional Responsibility; the Section of Civil Rights and Social Justice; the Commission on Disability Rights, the Diversity & Inclusion 360 Commission; the Commission on Racial and Ethnic Diversity in the Profession; the Commission on Sexual Orientation and Gender Identity; and the Commission on Women in the Profession).

59 *See Commission on Sexual Orientation and Gender Identity*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/sexual_orientation [https://perma.cc/85ZN-3RL7] (last visited Nov. 13, 2019).

60 *See generally*, *List and Explanation of the Standards*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/standards/ [https://perma.cc/88A7-JURR] (last visited Jan. 28, 2020).

61 ABA 2019-2020 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standards 205 and 206 (AM. BAR ASS'N 2019-2020) (last visited Jan.

28, 2020) https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter2.pdf [https://perma.cc/WZ8D-KSGH].

62 *Id.* at 11-12.

63 AM. BAR ASS'N, 2019-2020 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 405 (2019-2020) https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter4.pdf [https://perma.cc/4UAF-YM2K].

64 ABA 2019-2020 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 206 (AM. BAR ASS'N 2019-2020) (last visited Jan. 28, 2020) https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter2.pdf [https://perma.cc/WZ8D-KSGH].

65 *509 Required Disclosures*, AM. BAR ASS'N, http://www.abarequireddisclosures.org/Disclosure509.aspx. (last visited Jan. 28. 2020). This page allows the public to search and access mandatory disclosure reports from each law school.

66 As of January 28, 2020, there are 13 menu links on the front page, and the data is buried five layers deep on the website.

67 *See*MANAGING DIRECTOR'S GUIDANCE MEMO, *supra* note 12.

68 *See id.*

69 *Compare*FLA. A&M C. L., *supra* note 14, *with*U. FLA. FREDERICK G. LEVIN C. L., *supra* note 14.

70 *Compare*FLA. A&M C. L., *supra* note 14, *with*U. FLA. FREDERICK G. LEVIN C. L., *supra* note 14.

71 This is not meant to be an exhaustive list, but these are the major legal education entities. This author researched each organization and could not find an example for which SOGI data is disaggregated, if even collected.

72 *See We Need to Include Gay, Lesbian, and Transgender People in Demographic Data*, CTR. FOR AM. PROGRESS (Sept. 6, 2012), https://www.americanprogress.org/issues/general/news/2012/09/06/36768/idea-of-the-day-we-need-to-include-gay-and-transgender-people-in-demographic-data/ [https://perma.cc/22D4-54KC]; *see also 25 U.S. States and Territories Adopt Model LGBT Demographic Questions in Major Health Survey*, CTR. FOR AM. PROGRESS (Mar. 29, 2016) https://www.americanprogress.org/press/release/2016/03/29/134269/release-25-u-s-states-and-territories-adopt-model-lgbt-demographic-questions-in-major-health-survey/ [https://perma.cc/P38C-B2ER].

73 Shabab Ahmed Mirza, *Disaggregating the Data for Bisexual People*, CTR. FOR AM. PROGRESS (Sept. 24, 2018), https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/09/24/458472/disaggregating-data-bisexual-people/ [https://perma.cc/7C8T-875Y].

74 *See generally LGBT*, CTR. FOR AM. PROGRESS, https://www.americanprogress.org/issues/lgbt/view [https://perma.cc/KK8D-LKXV] (last visited July 29, 2019) (laying out the Center for American Progress' coverage of LGBTQ issues).

75 *Current Volume Summaries by Region, Race/Ethnicity, Gender Identity & LSAT Score*, LAW SCH. ADMISSION COUNCIL, https://www.lsac.org/data-research/data/current-volume-summaries-region-raceethnicity-gender-identity-lsat-score [https://perma.cc/FSG7-WF36] (last visited Mar. 5, 2020).

76 Every employer with more than 100 employees must annually report certain demographic data to the Equal Employment Opportunity Commission (EEOC) via form EEO-1. *See*U.S. EQUAL EMP. OPPORTUNITY COMM'N, *EEO-1: Who Must File*, https://www.eeoc.gov/employers/eeo1survey/whomustfile.cfm [https://perma.cc/Y8MT-9UXX] (last visited Jan. 28, 2020).

77 Baker & Hughes, *supra* note 15.

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78 *See*U.S. EQUAL EMP. OPPORTUNITY COMM'N, 2019 COMPONENT 1 EEO-1 SURVEY https://www.eeoc.gov/employers/eeo1survey/index.cfm (last visited Jan. 28, 2020); *see also*Nat'l Women's Law Ctr. v. Office of Mgmt. and Budget, No. 17-cv-2458, 2019 WL 1025867 (D.D.C. Mar. 4, 2019) (vacating OMB's stay of changes to the EEO-1 survey, which would collect pay data); Women's Law Ctr. v. Office of Mgmt. and Budget, No. 17-cv-2458 (D.D.C. Feb. 10, 2020) (finding that the EEOC had completed the mandated level of EEO-1 Component 2 data collection and therefore vacating the March 4, 2019 and April 25, 2019 ordered obligations to complete such data collection).

79 *See, e.g.*, 38 U.S.C. § 4212 (2012) (detailing employee data about veterans that federal contractors must report); *see also*U.S. DEP'T. LAB., *2019 VETS-4212 Reports*, https://www.dol.gov/agencies/vets/programs/fcp/federal_contractor_program_fs [https://perma.cc/R9S4-BER6] (last visited July 29, 2019).

80 *See*U.S. DEP'T EDUC., *New Race and Ethnicity Guidance for the Collection of Federal Education Data* (Aug. 2008), https://www2.ed.gov/policy/rschstat/guid/raceethnicity/index.html [https://perma.cc/7XVV-BLMW] (last modified Dec. 23, 2010); NAT'L CTR. FOR EDUC. STAT., *Managing an Identity Crisis*, https://nces.ed.gov/pubs2008/rediguide/ch4_3.asp [https://perma.cc/6NK9-2QCH] (last visited July 29, 2019).

81 *See 2018 EEO-1 Survey*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/eeo1survey/index.cfm [https://perma.cc/VDF6-XMMP] (last visited Nov. 22, 2019).

82 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *EEO-1 Frequently Asked Questions and Answers*, https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm [https://perma.cc/2ZJB-2RGM] (last visited Nov. 22, 2019). EEO-1 does not allow for disaggregation of race or ethnic identities.

83 For an example of the EEO-1, which includes data for only male or female individuals, see U.S. EQUAL EMP. OPPORTUNITY COMM'N, EMPLOYER INFORMATION REPORT EEO-1 SAMPLE FORM, https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf [https://perma.cc/6FV6-UNKB] (last visited Jan. 28, 2020).

84 For example, just as SOGI disaggregation is in consideration, Asian populations also seek disaggregation to reflect national and ethnic origins. University of California Berkeley has disaggregated data of Asian people in its employment process, while students have been able to select more than one race/ethnicity since 2010. However, for employees, the University of California system does not disaggregate race, and an astounding 100% of employees are either male or female. *Compare Disaggregated Data*, UNIV. CAL. https://www.universityofcalifornia.edu/infocenter/disaggregated-data (last visited Jan. 28, 2020) *with Workforce Diversity*, UNIV. CAL. https://www.universityofcalifornia.edu/infocenter/uc-workforce-diversity (last modified Apr. 2019).

85 For example, some embrace the term "neurodiversity," while others reject it. *See, e.g.*, Simon Baron-Cohen, *The Concept of Neurodiversity is Dividing the Autism Community*, SCI. AM. (Apr. 30, 2019) https://blogs.scientificamerican.com/observations/the-concept-of-neurodiversity-is-dividing-the-autism-community/ [https://perma.cc/9AK5-LWVH].

86 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Informal Letter on Americans with Disabilities Act* (July 10, 2018), https://www.eeoc.gov/eeoc/foia/letters/2018/ada_amendments_act%20_7_10.html [https://perma.cc/LV6X-GM7L]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, 915.002 EEOC ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html [https://perma.cc/E2VQ-AR7Y].

87 SOC'Y FOR HUM. RESOURCES MGMT., *What are the Filing Requirements for the EEO-1 Form?* (July 9, 2019), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/new-filingrequirements.aspx [https://perma.cc/9UK3-K67Y].

88 *See*38 U.S.C. § 4212(d).

89 Stacy Patton, *Should You Check the 'Race Box'?*, CHRON. HIGHER EDUC.: CHRON. VITAE, (July 9, 2019), https://chroniclevitae.com/news/302-should-you-check-the-race-box [https://perma.cc/92PV-7JWN].

90 LSAC extended the number of gender options in 2018. Staci Zaretskey, *LSAC Now Lists 11 Different Gender Identity Options*, ABOVE THE LAW (July 13, 2018), https://abovethelaw.com/2018/07/lsac-now-lists-11-different-gender-identity-options-for-pre-law-students/ [https://perma.cc/JB44-ANEM]; LAW SCH. ADMISSION COUNCIL, VOLUME SUMMARY: U.S. SCHOOL TYPE, ETHNICITY, AND GENDER, https://report.lsac.org/VolumeSummaryOriginalFormat.aspx (last visited Mar. 4, 2020).

91 VOLUME SUMMARY: U.S. SCHOOL TYPE, ETHNICITY, AND GENDER, *supra* note 90; LAW SCH. ADMISSION COUNCIL, VOLUME SUMMARY: U.S. SEX AND LSAT SCORES (Aug. 8, 2018), https://www.lsac.org/sites/default/files/media/VolumeSummaryOriginalFormat%208-8-2018.pdf [https://perma.cc/NWY3-5MAD].

92 VOLUME SUMMARY: U.S. SCHOOL TYPE, ETHNICITY, AND GENDER, *supra* note 90.

93 *Admitted Applicants by Race/Ethnicity and Sex*, LAW SCH. ADMISSION COUNCIL, https://www.lsac.org/data-research/data/admitted-applicants-raceethnicity-sex [https://perma.cc/94EL-B4D3] (last visited Feb. 22, 2020). This data is available only through the 2017-2018 academic year.

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95 FED. INTERAGENCY WORKING GRP. ON IMPROVING MEASUREMENT SEXUAL ORIENTATION AND GENDER IDENTITY IN FED. SURVEYS, EVALUATIONS OF SEXUAL ORIENTATION AND GENDER IDENTITY SURVEY MEASURES: WHAT HAVE WE LEARNED? 3 (Sept. 23, 2016) (working paper), https://nces.ed.gov/FCSM/pdf/Evaluations_of_SOGI_Questions_20160923.pdf [https://perma.cc/GTU4-PMLW]. This group had previously operated under the Office for Budget Management but is now a formal research group within the Federal Committee on Statistical Methodology.

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99 NAT'L CTR. FOR MENTAL HEALTH PROMOTION & YOUTH VIOLENCE PREVENTION, NATIONAL CENTER BRIEF: THE IMPORTANCE OF DISAGGREGATING STUDENT DATA (Apr. 2012), http://www.educationnewyork.com/files/The%20importance%C20***o***f%20disaggregating_0.pdf [https://perma.cc/R99Q-U4UA] (internal parentheticals omitted); *see also* Mary Anne Mather, *Using Data Tip #9: Disaggregating Data Makes the Invisible Visible*, USING DATA FOR MEANINGFUL CHANGE (Mar. 15, 2012), https://usingdata.wordpress.com/2012/03/15/using-data-tip-9-disaggregating-data-makes-the-invisible-visible/ [https://perma.cc/H2GF-528R].

100 NAT'L FORUM ON EDUC. STATISTICS, FORUM GUIDE TO COLLECTING AND USING DISAGGREGATED DATA ON RACIAL/ETHNIC SUBGROUP (2016), https://nces.ed.gov/pubs2017/NFES2017017.pdf [https://perma.cc/UYV4-A3G8].

101 *Data Disaggregation of Racial/Ethnic Categories Working Group*, NAT'L FORUM ON EDUC. STATISTICS, https://nces.ed.gov/forum/data_disaggregation.asp [https://perma.cc/TZ8E-ZJW9] (last visited Feb. 14, 2020).

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104 *Gender Nonconforming*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/gender%20nonconforming [https://perma.cc/R2JK-9AA2] (last visited July 29, 2019).

105 Ritch Savin-Williams, *A Guide to Genderqueer, Non-Binary, and Genderfluid Identity*, PSYCHOLOGY TODAY (July 29, 2018), https://www.psychologytoday.com/us/blog/sex-sexuality-and-romance/201807/guide-genderqueer-non-binary-and-genderfluid-identity [https://perma.cc/MHQ3-NRFZ].

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109 *Transvestite*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/transvestite [https://perma.cc/6SW4-Y8WP] (last visited July 29, 2019).

110 For example, GLAAD Media Guide suggests that "cross-dresser" is the accepted term, replacing transvestite. However, unlike mainstream dictionaries, GLAAD does not address "transvestite" in terms of sexual or fetish pleasure. The term transvestite is generally disfavored because it once was a medical diagnosis. *See Glossary of Terms: Transgender*, GLAAD, https://www.glaad.org/reference/transgender [https://perma.cc/Z6FF-CR6B] (last visited July 29, 2019).

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112 Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L.R. 1, 18 (2007), http://scholars.unh.edu/unh_lr/vol6/iss1/3 [https://perma.cc/E6UR-HK9U].

113 Does v. Boyertown Area Sch. Dist., 897 F.3d 518, 530 (3d Cir. 2018).

114 Parents For Privacy v. Dallas Sch. Dist. No. 2, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018) (citing Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1048-50 (7th Cir. 2017)).

115 Joan W. Howarth, *Recruiting Sexual Minorities and People with Disabilities to Be Dean*, 31 SEATTLE U. L. REV. 751 (2008) https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1831&context=sulr [https://perma.cc/WUP2-6XA6].

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117 *See generally*JOYCE KAUFFMAN & JOHN WARD, *The Experience of LGBT Lawyers* in REFLECTIONS ON DIVERSITY IN THE MASSACHUSETTS LEGAL PROFESSION PAST AND PRESENT (Massachusetts CLE 2014).

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118 *See, e.g.*, Mark Stern, Karen Oehme, Nat Stern, Ember Urbach, Elena Simonsen, & Alysia Garcia, *The Judicial and Generational Dispute over Transgender Rights*, 29 STAN. L. POL'Y. REV. 1 (Oct. 2017); RAQUEL ALDANA & LETICIA SAUCEDO, LEARNING IN MULUKUKÚ: A JOURNEY OF TRANSFORMATION IN VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER (Soc'y of Am. L. Teachers and Golden Gate Univ. Sch. of L. eds., Carolina Academic Press 2011); Kelly Strader, Brietta R. Clark, Robin Ingli, Elizabeth Kransberger, Lawrence Levine, & William Perez, *An Assessment of the Law School Climate for GLBT Students*, 58 J. LEGAL EDUC. 2 (2008).

119 *See, e.g.*, Hannah Nathanson, John Woodword Cox & Perry Stein, *Trump's Words, Bullied Kids, Scarred Schools*, WASH. POST (Feb. 13, 2020), https://www.washingtonpost.com/graphics/2020/local/school-bullying-trump-words/ [https://perma.cc/WTH5-M5PW].

120 *See cf.*, *Ryan's Story*, RYAN WHITE (Sept. 8, 2019), https://ryanwhite.com/Ryans_Story.html [https://perma.cc/FY73-GKP7] (discussing the story of Ryan White, a hemophiliac boy who contracted HIV from a contaminated treatment and faced unspeakable discrimination from a community in fear; such treatment of a child with HIV today would be viewed as morally reprehensible by most).

121 It is worth noting that transantagonism exists within the LGBTQI(A) community. Transgender slang like "stealth," "fish," and "brick" can be very harmful. *See* Andrea James, *Transgender Map: Transgender Slang, Slurs, and Controversial Words*, https://www.transgendermap.com/resources/glossary-of-transgender-terms/transgender-slang-slurs-and-controversial-words/ [https://perma.cc/TE7W-FZXV] (last visited Nov. 5, 2019); *see also* Dawn Ennis, *10 Words Transgender People Want You to Know (But Not Say)*, ADVOCATE (Feb. 4, 2016), https://www.advocate.com/transgender/2016/1/19/10-words-transgender-people-want-you-know-not-say [https://perma.cc/VAQ3-K69R].

122 *"Ze" Pronouns*, MYPRONOUNS, https://www.mypronouns.org/ze-hir [https://perma.cc/QPL6-4L9F] (last visited Nov. 5, 2019) ("Often, people make assumptions about the gender of another person based on a person's appearance or name. Then, they apply those assumptions to the pronouns and forms of address used to refer to a person. Whether or not these assumptions are correct, the very act of making an assumption can send a potentially harmful message - that people have to look a certain way to demonstrate the gender that they are or are not.").

123 "Ze/hir" and "ze/zir" are pronounced as "zee," "here," and "zeer."

124 *"Ze" Pronouns*, *supra* note 122.

125 *See generally* Neumeg, *supra* note 2; Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992); *see also*A.H. v. Minersville Area School Dist., 408 F. Supp. 3d 536 (M.D. Pa. 2019) (citing Adams ex rel. Kasper v. Sch. Bd. St. John's Cnty, Fla., 318 F. Supp. 3d 1293 (M.D. Fla. July 26, 2018); Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. Of Educ., 526 U.S. 629 (1999), Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

126 For a list of blatantly discriminatory policy changes targeting transgender youth perpetrated by the Trump Administration, see *The Discrimination Administration*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://transequality.org/the-discrimination-administration [https://perma.cc/2G3F-FV39] (last visited July 29, 2019); *see also*U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIVISION, DEAR COLLEAGUE LETTER (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf [https://perma.cc/4DVJ-9H8G]; *see generally*, Parents for Privacy v. Barr, 949 F.3d 1210, 1240 (9th Cir. 2020) (holding that transgender students' use of restrooms, locker rooms, and showers consistent with their gender identity does not violate other students' right to privacy or Title IX rights); Grimm v. Gloucester, 400 F. Supp. 3d 444 (E.D. Va. 2019) (pending appeal to the 4th Circuit regarding Title IX and transgender students' use of a restroom at a high school); Adams v. Sch. Bd. St. John's Cty., Fla., 318 F. Supp. 3d 1293 (M.D. Fla. 2018) (holding that sex includes gender under Title IX; on appeal, oral arguments were held in the 11th Circuit on December 5, 2019); Doe v. Anoka-Hennepin Sch. Dist. No. 11, Consent Decree [ECF# 79], No. 11-cv-01999 (D. Minn. Mar. 1, 2012); U.S. Dep't. of Educ. v. Tehachapi Unified Sch. Dist., Resolution Agreement, OCR No. 09-11-1031, DOJ No. DJ 169-11E-38 (June. 30, 2011).

127 *See also* 45 C.F.R. pt. 86 (2019); 28 C.F.R pt. 42, Subpart D (2019); 28 C.F.R. pt. 54 (2019).

128 20 U.S.C. § 1681, et seq. (2012) (Title IX).

129 U.S. DEP'T. JUST., TITLE IX LEGAL MANUAL (2015), https://www.justice.gov/crt/titleix#I.%20Overview %C20*of*%C20Title%C20IX:%20Interplay %20with%20Title%C20VI,%C20Section%C20504,%20Title %20VII, %20and%C20the%C20Fourteenth%20Amendment [https://perma.cc/GV9H-4THB].

130 20 U.S.C. §1681(b).

131 Researchers have found that reading performance can be impacted by certain typography characteristics, such as height, body size, character and interline spacing, and shape. Shape references weight, contrast, serif or sans serif font types, italics, and bold. Specific to italics, "it's not just the angle of the letters that changes, but also the space between the letter; there is often less inter-letter space in an italic font than in a regular one." *See* Sanne M. Kuster, Marjolijn van Weerdenburg, Marjolein Gompel, & Anna Bosman, *Dyslexie Font Does Not Benefit Reading in Children With or Without Dyslexia*, 68:1 ANN. DYSLEXIA 25 (Dec. 4, 2017) (citing Michael L. Bernard, Barbara S. Chaparro, Melissa M. Mills & Charles G. Halcomb, *Examining Children's Reading Performance and Preference for Different Computer-Displayed Text*, 21 BEHAVIOUR & INFO. TECH. 87 (2002); Carmen Moret-Tatay & Manuel Perea, *Do Serifs Provide an Advantage in the Recognition of Written Words?*, 23 J. COGNITIVE PSYCH. 619 (2011); A. Wilkins, R. Cleave, Roanna Cleave, Nicola Grayson & Louise Wilson, *Typography for Children May be Inappropriately Designed*, 32 J. RES. READING 402 (2009); Rebecca J. Woods, Kristi Davis & Lauren F.V. Scharff, *Effects of Typeface and Font Size on Legibility for Children*, 1 AM. J. PSYCH. RES. 86 (2005). *See also Quick Guide to Making Your Content Accessible*, DYSLEXIC.COM, https://www.dyslexic.com/blog/quick-guide-making-content-accessible/ [https://perma.cc/GWS3-U4R2] (last visited Mar. 5, 2020). Note from the Editor: elsewhere in this Article and throughout this Article's footnotes, we have used italics for consistency with legal academia. Wherever possible, we have used bold font for emphasis.

132 *Compare*Cohen v. Brown Univ., 991 F.2d 888, 894-95 (1st Cir. 1993) (explaining in a case about the demotion of a women's volleyball team that data disparity is not the only consideration in a Title IX case), *and*Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (affirming the issue of gender-based disparity), *with*Pederson v. Louisiana State Univ., 213 F.3d 858 (5th Cir. 2000) (finding a violation of Title IX regarding denial to field women's fast-pitch softball team). *See*Z.J. v. Vanderbilt Univ., 355 F. Supp. 3d 646, 682 (M.D. Tenn. 2018)*and*Doe v. Quinnipiac Univ., No. 3:17-CV-364, 2019 WL 3003830, *12 (D. Conn. 2019) (for two cases considering claims by men, alleging mistreatment in sexual misconduct claims compared to women).

133 *See* sources cited *infra* note 135.

134 Baker & Hughes *supra* note 15.

135 *Cohen*, 101 F.3d at 171 (internal citations omitted); *see also* Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L. J. 199, 213-14 (2008).

136 In October 2019 the Supreme Court heard oral arguments for the consolidated cases Zarda v. Altitude Express, Inc., 883 F.3d 100 (8th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1623) (asking whether Title VII's prohibition against sex discrimination includes sexual orientation and ruling that sexual orientation is motivated at least in part by sex and thus should be protected under Title VII); Bostock v. Clayton Cnty. Brd. of Comm'r, 723 Fed. App'x. 964, (11th Cir. 2018)*cert. granted*, 139 S. Ct. 1599 (Apr. 22, 2019) (No. 17-1618) (aff'd ruling that Title VII does not prohibit discrimination based on sexual orientation, following 11th Circuit precedent in Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1256 (11th Cir. 2017); and Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)). *See also*EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018)*cert. granted* 884 F.3d 560 (No. 18-107) (finding that Title VII covers transgender persons based on gender stereotyping).

137 *See*Gossett v. Okla. Ex rel. Bd. Of Regents for Langston Univ., 245 F.3d 1172, 1176 (10th Cir. 2001); Weinstock v. Columbia Univ., 224 F.3d 33, 42 n.1 (2d Cir. 2000); Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992); Oona R.-S. v. McCaffrey, 143 F.3d 473, 476 (9th Cir. 1998); Torres v. Pisano, 116 F.3d 625, 630 n.3 (2d Cir. 1997).

138 42 U.S.C.A. § 2000e-2

139 *See* cases cited *supra* note 136.

140 *See, e.g.,* Menaker v. Hofstra Univ.935 F.3d 20 (2d. Cir. 2019); Doe v. Catholic Med. Ctr., 850 F.3d 545 (3d. 2017); Lakoski v. James, 66 F.3d 751 (5th Cir. 1995)/-

141 *See* cases cited *supra* note 136.

142 Chan T. McNamarah, *On the Basis of Sex(ual Orientation or Gender Identity): Bringing Queer Equity to School With Title IX*, 104 CORNELL L. REV. 745 (2019); *see also David S. Cohen, Title IX: Beyond Equal Protection*, 28 HARV. J. L. GENDER 217 (2005).

143 McNamarah, *supra* note 136, at 759.

144 *See generally*U.S. DEP'T. JUST., TITLE IX LEGAL MANUAL (2015) [https://perma.cc/GV9H-4THB].

145 *See*Cohen v. Brown Univ., 101 F.3d 155, 172 (1st Cir. 1996) (explaining that "race- and gender-conscious remedies are both appropriate and constitutionally permissible under a federal antidiscrimination regime, although such remedial measures are still subject to equal protection review."); *see generally*CATHARINE MACKINNON, SEX EQUALITY (3d ed., 2016).

146 *See*MACKINNON, *supra* note 145.

147 *See id.*; *see also Cohen*, 101 F.3d at 172. .

148 *A Brief History of the Disability Rights Movement*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/education/resources/backgrounders/disability-rights-movement [https://perma.cc/8RYQ-59N8] (last visited July 29, 2019).

149 *See*Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979) (noting that one representative considered Title IX as a "a strong and comprehensive measure ... [that is] needed if we are to provide women with solid legal protection as they seek education and training for later careers"); *see also*Grimm, 302 F. Supp. 3d at 746-48 (E.D. Va. 2018); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 289 (W.D. Pa. 2017); Highland Local Sch. Dist. v. U.S. Dep't. of Educ., 208 F. Supp. 3d 850, 865-66 (S.D. Ohio 2016) (denying preliminary injunction and finding that a transgender student was likely to succeed on the merits of her equal protection claim), *aff'd sub nom.*, Dodds v. U.S. Dep't. of Educ., 845 F.3d 217, 220-21 (6th Cir. 2016). The prima facie case for a Title IX claim: (1) sexual harassment/discrimination/retaliation occurred; (2) the plaintiff informed the school; and (3) the school acted with deliberate indifference to rectify the problem. *See*Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 638-41 (1999).

150 *Cannon*, 441 U.S. at 704.

151 Peter Dujardin, *Gloucester School Board Plans to Appeal Judge's Transgender Decision*, DAILY PRESS (Aug. 16, 2019), https://www.dailypress.com/news/gloucester/dp-nws-gavin-grimm-appeal-20190816-story.html [https://perma.cc/H2LH-QHV4]; *see also*Grimm v. Gloucester Cty. Sch. Bd., No. 4:15cv54, 2019 WL 3774118, at *1 (E.D. Va. Aug. 9, 2019); *see*Barr, No. 18-35708, Doc. 51-2 (holding that transgender students' use of restrooms, locker rooms, and showers consistent with their gender identity does not violate other students' right to privacy or Title IX rights).

152 McNamarah, *supra* note 142, at 759 (referencing De la Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978)).

153 *See*Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 369 (2016) (granting certiorari), *vacated and remanded*, 137 S. Ct. 1239 (2017).

154 *See, e.g.*, Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998) (noting Title VII's express private right of action).

155 *See*Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009); *Davis ex rel. LaShonda D.*, 5236 U.S. at 641; *Gebser* 524 U.S. 274; *Cannon* 441 U.S. 677; Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 467 (1999); Al-Rifali v. Willows Unified Sch. Dist., 469 Fed. App'x. 647, 649 (9th Cir. 2012); Sanches v. Carrollton-Farmers Branch Ind. Sch. Dist., 647 F.3d 156, 165 (5th Cir. 2011); Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860, 867 (8th Cir. 2011); Doe

v. Case Western Reserve Univ., 2015 WL 5522001, at *7 (N.D. Ohio Sept. 16, 2015); Patterson v. Hudson Area Schs., 724 F. Supp. 2d 682 (E.D. Mich. 2010).

156 *Gebser*, 524 U.S. at 284.

157 *Compare*Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467, 483 (D.N.H. 1997) (holding that punitive damages are available under Title IX in cases of "ongoing egregious violations" where the school district demonstrated "complete indifference" and finding such a situation existed), *and*Canty v. Old Rochester Reg'l Sch. Dist., 54 F. Supp. 2d 66, 69 (D. Mass. 1999) (discussing the split in the courts and adopting the standard from Doe v. Oyster), *with*Schultzen v. Woodbury Cent. Cmty. Sch. Dist., 187 F. Supp. 2d 1099, 1028 (N.D. Iowa 2002) (rejecting the standard in Doe v. Oyster and holding that "punitive damages are unavailable against local governmental entities under Title IX"), *and*E.N. v. Susquehanna Twp. Sch. Dist., No. 1:09-CV-1727, 2010 WL 4853700, at *21 (M.D. Pa. 2010) (expressing agreement with Schultzen and holding that "punitive damages are not available under Title IX"). *See generally*Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 72 (1992) ("Congress did not intend to limit remedies available in a suit brought under Title IX."); Doe ex rel. Doe v. Dallas Ind. Sch. Dist., 220 F.3d 380 (5th Cir. 2000) (echoing the Franklin holding that "monetary damages" are available in a private action under Title IX).

158 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1996); *see also*Fox v. Pittsburg State Univ., 258 F. Supp. 3d 1243, 1252 (D. Kan. 2017) ("In Title VII and Title IX cases, a district court, 'in its discretion, may allow the prevailing party ... a reasonable attorney's fee [,]' [and] [t]o obtain attorneys' fees, 'a claimant must prove two elements: (1) that the claimant was the 'prevailing party' in the proceeding; and (2) that the claimant's fee request is "reasonable."'"); *see generally*Mercer v. Duke Univ., 401 F.3d 199, 202 (4th Cir. 2005).

159 Though this particular table iteration of the policy development process was created by the author, background and source attributions include THOMAS A. BIRKLAND, AN INTRODUCTION TO THE POLICY PROCESS: THEORIES, CONCEPTS, AND MODELS OF PUBLIC POLICY MAKING (5th ed., Routledge, New York, NY 2019); CHRISTOPHER M. WEIBLE & PAUL A. SABATIER, THEORIES OF THE POLICY PROCESS (4th ed., New York, NY Routledge, 2017); *The Public Policy Development Cycle*, U.S. FIRE ADMIN. (May 31, 2017), https://www.usfa.fema.gov/training/coffee_break/053117.html [https://perma.cc/9SDL-4323]; *The Public Policy Process*, UNIV. TEXAS, http://www.laits.utexas.edu/gov310/PEP/policy/ [https://perma.cc/G5J6-NM5Y] (last visited Mar. 16, 2020).

160 "Linguistic validation is the process by which an instrument or patient questionnaire is simultaneously translated by different translators, both translations are reconciled into a single version and then that version is back-translated by other translators into the original language to evaluate the quality of the reconciled translation in comparison with the source document. However, the full version of the linguistic validation process includes preparation, translation, reconciliation, harmonization, cognitive debriefing and finalization phases." *What is Linguistic Validation*, LANGUAGE SCI., http://www.languagescientific.com/what-is-linguistic-validation/ [https://perma.cc/UA97-RYEN] (last visited Feb. 14, 2020).

161 "Cognitive debriefing is the process by which an instrument or patient questionnaire is actively tested among representatives of the target population and target language group to determine if the respondents understand the questionnaire the same as the original would be understood. Cognitive debriefing is done to test the level of comprehension or understanding of a translation by the target audience, and/or to test alternative translations. It determines if translations would be deemed inappropriate or confusing by the target population." *Cognitive Debriefing Explained*, LANGUAGE SCI., http://www.languagescientific.com/cognitive-debriefing-explained/ [https://perma.cc/4N2J-BBZM] (last visited Feb. 14, 2020).

162 *2020 FCSM Research and Policy Conference*, FED. COMM. STATISTICAL METHODOLOGY, https://nces.ed.gov/fcsm/ [https://perma.cc/68GK-L9ED] (last visited Nov. 15, 2019).

163 *Id.*

164 *Measuring Sexual Orientation and Gender Identity Research Group*, FED. COMM. STATISTICAL METHODOLOGY, https://nces.ed.gov/FCSM/SOGI.asp [https://perma.cc/K2NM-9NCL] (last visited Nov. 5, 2019).

165 *Current Measures of Sexual Orientation and Gender Identity in Federal Surveys*, *supra* note 26, at 12; Kellan Baker, Laura E. Durso & Aaron Ridings, *How to Collect Data About LGBT Communities*, CTR. FOR AM. PROGRESS (Mar. 15, 2016), https://www.americanprogress.org/issues/lgbt/reports/2016/03/15/133223/how-to-collect-data-about-lgbt-communities/ [https://perma.cc/QLJ3-LCZ7]; *see* Gender Identity in U.S. Surveillance (GenIUSS) Grp., GENERD-RELATED MEASURES OVERVIEW, THE WILLIAMS INST. 2 (Feb. 2013), https://williamsinstitute.law.ucla.edu/wp-content/uploads/GenIUSS-Gender-related-Question-Overview.pdf [https://perma.cc/2ZXF-ZXLY] (a two-step question captures the current gender and the gender assigned at birth).

166 *See infra* Appendix A.

167 THE WILLIAMS INST., UCLA, https://williamsinstitute.law.ucla.edu/ [https://perma.cc/8FH7-QK97] (last visited Nov. 5, 2019).

168 Gender Identity in U.S. Surveillance (GenIUSS) Grp., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS, THE WILLIAMS INST. (Sept. 2014), https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/geniuss-report-sept-2014/ [https://perma.cc/8FH7-QK97].

169 Kellan Baker & Laura E. Durso, *Filling in the Map: The Need for LGBT Data Collection*, CTR. FOR AM. PROGRESS (Sept. 16, 2015, 9:01 AM), https://www.americanprogress.org/issues/lgbt/news/2015/09/16/121128/filling-in-the-map-the-need-for-lgbt-data-collection/ [https://perma.cc/8G3B-UFEF].

170 NAT'L ALLIANCE OF ST. AND TERRITORIAL AIDS DIRECTORS*Modernizing Programs to Collect Sexual Orientation and Gender Identity Data*, NASTAD, https://www.nastad.org/sites/default/files/sogi.issue_.brief_.final_.pdf [https://perma.cc/8PVK-9LZV] (last visited Nov. 5, 2019).

171 Sexual Minority Assessment Research Team, BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION, THE WILLIAMS INST. (Nov. 2009), https://williamsinstitute.law.ucla.edu/wp-content/uploads/SMART-FINAL-Nov-2009.pdf [https://perma.cc/X9W9-MEY9].

172 AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019-2020, STANDARD 509, ch. 5, 33-34, (Aug. 2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter5.pdf [https://perma.cc/47RJ-RCAT].

173 *See 509 Required Disclosures*, *supra* note 65.

174 *Transgender Rights*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/sexual_orientation/resources/transgenderrights/ [https://perma.cc/Z4RD-AZRZ] (last visited Nov. 5, 2019); *see also* Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AM. BAR ASS'N (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ [https://perma.cc/ZW7T-HBLE] (contending that diversity is "good for business").

175 AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019-2020, Interpretation 509-2 34, (Aug. 2019), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf [https://perma.cc/8ZM5-JRB4] (emphasis added).

176 AM. BAR ASS'N, *supra* note 12, (breaks and emphasis added).

177 AM. BAR ASS'N, *ABA Standards for Approval of Law Schools 2013-2014, American Bar Association, Opinion Statements* 147-51 (last visited July 29, 2019), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_council_statements.pdf [https://perma.cc/UGR2-PLAJ] (last visited Nov. 6, 2019).

178 Baker & Hughes, *supra* note 15, at fig. 1.

179 Behavioral Risk Factors Surveillance System (BRFSS), *supra* note 30.

180 National Crime Victimization Survey, *supra* note 10.

181 Health Center Patient Survey, *supra* note 10.

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