LEGIBILITY DOUBLE BINDS

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ABSTRACT

This Article argues that the double binds created by state collection of gender data operate as forms of neoliberal governmentality that subordinate gender-nonconforming individuals while infusing the state with market logics of quantification, efficiency, and data-driven targeted interventions. The Article summarizes the seductive yet ultimately misleading benefits of legibility for gender-variant populations and then shows how the modern state's reliance on large data sets and algorithmic systems transforms the traditionally invisible power of the state into one fueled by neoliberalism's seductive choice architecture. Gender-nonconforming populations, as well as anyone burdened by rigid gender categories and norms, are seduced into participating in their own subordination at the hands of the marketized state.

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INTRODUCTION

Individuals face legibility dilemmas whenever sharing personal information. Global Entry, Clear, and TSA PreCheck save travelers time at the airport, but they require sending biometric information to the government. Tailored advertisements on Meta and Google platforms represent the exchange of data for supposedly relevant content, which comes with manipulation and downstream (mis)uses of data. Credit cards offer convenience and opportunity in commerce, but credit card companies, like almost all data collectors, sell cardmembers' purchase histories to third parties for profit. Disclosure is seductive, but it comes with risks.

Disclosing gender data is both uniquely seductive and costly for queer and gender-variant populations.[1] Should a transgender man disclose his current gender identity to his employer to file a claim about gender-based workplace harassment? If he keeps his identity hidden, he loses out on support that could stop the harassment; if he comes out, he could be fired simply for who he is.[2] Should a nonbinary person who has some identity documents that still reflect their gender assigned at birth out themselves to a registrar of voters as nonbinary? They could be denied the right to vote because of data inconsistencies;[3] or they could stay hidden, lie on a government form, and experience gender dysphoria in the voting booth or just not vote.[4] Should a transgender adolescent living in Texas seek necessary medical care knowing that the state can gain access to medical records to investigate their family for child abuse?[5]

These are not legibility dilemmas. These are *legibility double binds*: two costly, bad choices; with either choice, you are damned-if-you-do, damned-if-you-don't. Legibility binds define the relationship between gender-

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[1] "Gender-variant" and "gender non-conforming" are used by queer communities to describe those who do not conform to dominant gender norms. TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY 615 (Laura Erickson-Schroth ed., 2014). Both terms will be used interchangeably throughout this Article.

[2] *See* Bostock v. Clayton Cnty., 590 U.S. 644, 649-54 (2020) (noting one plaintiff in consolidated case, Aimee Stephens, was fired solely for being transgender).

[3] KATHRYN O'NEILL & JODY L. HERMAN, WILLIAMS INST., THE POTENTIAL IMPACT OF VOTER IDENTIFICATION LAWS ON TRANSGENDER VOTERS 2 (2020) (estimating that "260,000 voting-eligible transgender people live in the 35 states that have voter ID laws and have no IDs that correctly reflect their name and/or gender").

[4] "Gender dysphoria" refers to clinical distress associated with one's sex assigned at birth. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 455-56 (5th ed. 2013).

[5] Letter from Ken Paxton, Att'y Gen. of Texas, to the Hon. Matt Krause, Chair, House Comm. on Gen. Investigating (Feb. 18, 2022) (available at https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf); *In re* Abbott, 645 S.W.3d 276, 281 (Tex. 2022) (holding state can investigate families who provide gender-affirming care to their adolescent children but that governor could not "bind" state agencies and require them to do so).

nonconforming populations and the state.[6] When they remain illegible, they can be marginalized because they are erased; when they become legible, they can be marginalized because of the harassment and discrimination that stem from their challenge to traditional gender norms.

Scholars are accustomed to understanding these double binds as exercises in what the French sociologist and philosopher Michel Foucault called "disciplinary power," the often-invisible control and domination over individual bodies through social and institutional surveillance.[7] This Article challenges that conventional wisdom. Although elements of discipline remain, today's society is "post-panoptic": more mobile, technological, and market driven than any disciplinary society Foucault envisioned.[8] There is a better way to understand legibility binds today. In the context of the state's increasing reliance on sophisticated statistical and algorithmic systems to fulfill its responsibilities of governance,[9] gender legibility mechanisms exert control over populations as data-driven tools of neoliberal governmentality.

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[6] I am not aware of any previous use of the phrases "legibility binds" or "legibility double binds." That said, the dilemmas of gender and sexuality disclosure have been addressed in queer scholarship. *See, e.g.*, TOBY BEAUCHAMP, GOING STEALTH: TRANSGENDER POLITICS AND U.S. SURVEILLANCE PRACTICES 14-23 (2019); Stacey M. Brumbaugh-Johnson & Kathleen E. Hull, *Coming Out as Transgender: Navigating the Social Implications of a Transgender Identity*, 66 J. HOMOSEXUALITY 1148, 1148 (2018). For discussions about the risks and benefits of coming out, anonymity, and pseudonymity for gays and lesbians, see, for example, KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 50-73 (2006); Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1879-1924 (2019). *But see, e.g.*, Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 171-75 (2003); Kristin H. Griffith & Michelle R. Hebl, *The Disclosure Dilemma for Gay Men and Lesbians: "Coming Out" at Work*, 87 J. APPLIED PSYCH. 1191, 1195-96 (2002); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 356-69 (1995); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 118. Disclosure dilemmas are also addressed in public health and disability scholarship. *See, e.g.*, Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1726, 1732-36 (2021); Jasmine E. Harris, *Debating Disability Disclosure in Legal Education*, 71 J. LEGAL EDUC. 94, 99-112 (2021); Sonia M. Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 HARV. J.L. & TECH. 309, 366 (2010).

[7] MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 15-16, 35-37, 187 (Alan Sheridan trans., Vintage Books 2d ed. 1995) [hereinafter FOUCAULT, DISCIPLINE] (distinguishing invisible horizontal disciplinary power with top-down sovereign power, which is visible); MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 27 (David Macey trans., Mauro Bertani & Alessandro Fontana eds., 2003) (noting disciplinary power, through law and institutions that apply it, involves "multiple forms of domination that can be exercised in society"). For an example of scholars approaching transgender legibility through the lens of discipline, see BEAUCHAMP, *supra* note 6, at 15.

[8] *See* Roy Boyne, *Post-Panopticism*, 29 ECON. & SOC'Y 285, 285 (2000); GILLES DELEUZE, NEGOTIATIONS 178-82 (Martin Joughin trans. 1995) (describing postpanoptic "control society").

[9] For more general analysis of the automated administrative state, please see generally Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249 (2008)

Governmentality is another Foucauldian concept that refers to the techniques and strategies state apparatuses use to implement political and economic systems.[10] Neoliberal governmentality, then, refers to how government actions thoroughly infuse and inform the activities of the state with market logics and associated practices.[11] Like neoliberalism, gender data disclosure is seductive yet dangerous: they both promise freedom, but merely invite people to participate in their own subordination to either the market or the gender binary. Today, the state has managed to put these forms of control together. As a form of neoliberal governmentality, gender data collection in the algorithmic era combines hyperindividualization with the quantification and statistical analysis necessary for population-level policy and ultimately enforces a rigid gender binary.

In particular, this Article argues that while encouraging gender-variant populations to disclose their genders with promises of inclusion, validation, and the material benefits that come with both, requests for gender data establish gender as a quantifiable metric relevant to myriad areas of public and social life. This enhances state power and puts many gender-nonconforming individuals in a vice. Wherever gender questions exist, the law constructs, rather than merely reflects, gender categories. As a result, any steps toward legibility—even inclusive ones that reflect the reality of gender beyond the male-female binary— just create new forms of categorization while reifying traditional categories as the norm. This feeds the neoliberal state's drive toward quantification (a powerful tool of governmentality that reflects assumptions of market rationality), reduces human characteristics and behaviors to numbers, and makes populations better targets for governance.

With this data, new technologies used by governments, including algorithmic data-matching and data-mining tools that use gender as securitizing information, combine market-driven logics with strict gender conformity. Algorithms increase the power of the past over the present and future, making full gender redesignation difficult for gender-nonconforming individuals and maintaining the stickiness of the gender binary. They also elevate computer-driven efficiencies over human-centered discretion, a key objective of neoliberal

[hereinafter Citron, *Technological Due Process*]; Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797 (2021); and David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State*, 37 YALE J. ON REG. 800 (2020).

[10] *See* JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 6-7 (2019).

[11] *Id.* at 7. Although discussed briefly *infra*, neoliberalism merits deeper analysis. To that end, please see David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 6, 13-14 (2014) (describing how neoliberalism refers to idea of promoting capitalist imperatives over countervailing democratic ones and great extent to which neoliberalism is interwoven into legal, social, and economic life); Jamie Peck & Adam Tickell, *Conceptualizing Neoliberalism, Thinking Thatcherism*, *in* CONTESTING NEOLIBERALISM: URBAN FRONTIERS 26, 33 (Helga Leitner, Jamie Peck & Eric S. Sheppard eds., 2007).

governmentality. The result is a computerized state that treats gender-nonconforming people as outliers.

Shifting scholarly understanding of gender data collection from discipline to neoliberalism opens up new avenues for critique and, ultimately, replacement of the government's gender data project. In short, where discipline focuses attention on the outside—namely, on the structures of surveillance that operate on the body—neoliberalism operates from the inside—namely, on the design of choice architectures that facilitate the self-subjectification of the surveilled citizen. That gives reformers a lot more to work with to protect gender-variant populations from the harms of state collection and use of gender data.

I. THE SEDUCTIONS OF LEGIBILITY

Thousands of state government forms have at least one gender box, the pairing of questions about sex, gender, gender identity, and gender assigned at birth with a series of predefined answer options.[12] Most of the time, states give us only two possible answers: male and female. That should surprise no one. The gender binary is deeply entrenched in Western social institutions.[13] Many nonexperts erroneously perceive the gender binary as obvious.[14] To varying degrees, it dominates gender data collection practices in various sectors.[15] It

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[12] I analyze the gender box in a series of publications. Those published to date include: Ari Ezra Waldman, *Gender Data in the Automated Administrative State*, 123 COLUM. L. REV. 2249, 2249 (2023) [hereinafter Waldman, *Gender Data in the Automated Administrative State*] (arguing law of gender data collection, sharing, and use contributed to creation of government automation that binarizes gender data regardless of how it is collected); and Ari Ezra Waldman, *Opening the Gender Box: Legibility Dilemmas and Gender Data Collection on U.S. State Government Forms*, LAW & SOC. INQUIRY, 2024, at 1, 1-3 [hereinafter Waldman, *Opening the Gender Box*] (describing why gender boxes tend to change little over time based on interviews with form designers).

[13] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 22-23 (1990).

[14] *See* Mark Murray, *Poll Shows Sharp Divides Over Gender Identity, Pronoun Use*, NBC NEWS: MEET THE PRESS BLOG (June 8, 2013, 7:00 AM), https://www.nbcnews.com/meet-the-press/meetthepressblog/poll-shows-sharp-divides-gender-identity-pronoun-use-rcna88058 [https://perma.cc/CX72-LNEE] (reporting 65% of Americans believe there are only two gender identities).

[15] *See* Kyle C. Velte, *Straightwashing the Census*, 61 B.C. L. REV. 69, 88-89 (2020) (observing lack of comprehensive Sexual Orientation and Gender Identity ("SOGI") population data in government surveys, including in U.S. census); Laurel Westbrook & Aliya Saperstein, *New Categories Are Not Enough: Rethinking the Measurement of Sex and Gender in Social Surveys*, 29 GENDER & SOC'Y 534, 542 (2015) (examining data extracted from hundreds of social surveys to find that answer options for respondent's sex or gender are consistently "male" and "female," with no alternative sex or gender options presented); Alissa Kress et al., *Collection of Data on Sex, Sexual Orientation, and Gender Identity by U.S. Public Health Data Monitoring Systems, 2015-2018*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Nov. 20, 2021, at 1, 5 (examining Centers for Disease Control and Prevention questionnaires to find that very few collect data on sexual orientation or gender identity); Alex McDowell, Catherine Myong, Delaney Tevis & Vicki Fung, *Sexual Orientation and Gender Identity Data*

stands to reason that the gender binary would retain its privileged position throughout state government.

Traditional male-female gender boxes render illegible transgender, nonbinary, intersex, and many other gender-nonconforming populations. As the sociologist Ida Hoos noted, "what cannot be counted simply doesn't count" in a quantified system.[16] When they have more inclusive answer options, gender boxes seem to offer important benefits.

Primarily, inclusive answer options validate gender variant identities. Inclusivity allows more people to see themselves and their experiences recognized by institutions of power. After years of hiding in the cisnormative closet, legibility for gender-nonconforming populations also means living authentically. Indeed, illegibility and concealment contradict one notion of queer pride: to be out is to be proud; to be in the closet is, supposedly, to be ashamed. Options beyond male or female also contribute to social processes that validate at least some nonbinary experiences in the eyes of others.[17] As the sociologist of gender Toby Beauchamp has argued, gender-identity disclosure is also bound up with perceptions of good citizenship, especially as gender came to be used as one of many securitizing metrics at airports after the terrorist attacks on September 11, 2001.[18] When they have nothing to hide, the argument goes, good citizens step up and provide information the government supposedly needs to distinguish between good citizens and terrorists.[19]

Arguably, being legible is also a prerequisite for identifying and litigating discrimination claims. If plaintiffs want to argue that they experienced discrimination because of their gender identity, they must disclose that gender identity. Plus, some scholars and lawyers who represent transgender sex workers lament the lack of quantifiable metrics that could prove beyond doubt that police surveil and arrest transgender individuals at higher rates than they do members

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Reporting Among U.S. Health Centers, 62 AM. J. PREVENTATIVE MED. e325, e325 (2022) (finding percentage of healthcare intake forms that collect sexual orientation and gender identity data dramatically increased from 2016 to 2019).

[16] IDA R. HOOS, SYSTEMS ANALYSIS IN PUBLIC POLICY: A CRITIQUE 193 (1972). Granted, there are many transgender individuals who identify as male or female. But those individuals nevertheless experience a form of erasure because they are lost in datasets. When there are transgender people who check *male* and transgender people who check *female*, the data collector doesn't know which male respondents are trans men and which female respondents are trans women. *See* Kendra Albert & Maggie Delano, *Algorithmic Exclusion*, *in* HANDBOOK OF CRITICAL STUDIES OF ARTIFICIAL INTELLIGENCE 538, 540-41 (Simon Lindgren ed., 2023). This makes it impossible to generate knowledge or craft policy that includes the experiences of gender-nonconforming individuals even when they are technically included in the underlying data.

[17] Laurel Westbrook & Karen Schilt, *Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System*, 28 GENDER & SOC'Y 32, 33-34 (2014) (arguing in addition to performing gender in face-to-face social interactions, gender is also determined by institutional, social, and legal processes).

[18] BEAUCHAMP, *supra* note 6, at 49.

[19] *Id.* at 18.

of the general population.[20] For various reasons, arrest reports generally do not record the full complexity of the gender identities of arrestees.[21] This illegibility, some argue, forces scholars and advocates to rely on anecdotal accounts or ethnographic interviews detailing police harassment and profiling.[22] That data are valuable, but judges find them less persuasive than so-called "hard data."[23]

Disclosing gender-nonconforming status also may be helpful when seeking healthcare. Gender-variant populations face an inadequate healthcare landscape.[24] Nearly half of transgender adults report mistreatment or discrimination at the hands of a healthcare provider.[25] Many transgender patients state that a primary barrier to accessing care is the lack of providers with knowledge—let alone expertise—in transgender medicine.[26] As a result, many gender-nonconforming individuals avoid seeking essential healthcare out of fear and mistrust of medical professionals.[27] This not only creates a vicious cycle of avoidance but also contributes to the erosion of transgender healthcare services, which is only reinforced by concealment.

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[20] *See* Leonore F. Carpenter & R. Barrett Marshall, *Walking While Trans: Profiling of Transgender Women by Law Enforcement, and the Problem of Proof*, 24 Wm. & Mary J. Women & L. 5, 23-30 (2017) (arguing more accurate data would assist in proving patterns and practices of systemic profiling); Jordan Blair Woods, *LGBT Identity and Crime*, 105 Calif. L. Rev. 667, 675-76, 710, 724 (2017) (stating lack of available data makes it difficult to identify LGBT inequalities in criminal system).

[21] Carpenter & Marshall, *supra* note 20, at 30-38 (explaining "male" and "female" largely remain the only two options in police documentation).

[22] *Id.* at 12-23.

[23] *Id.* at 19.

[24] *See* Sari L. Reisner et al., *Global Health Burden and Needs of Transgender Populations: A Review*, 388 Lancet 412, 428 (2016); Asa E. Radix, *Addressing Needs of Transgender Patients: The Role of Family Physicians*, 33 J. Am. Bd. Fam. Med. 314, 317 (2020); Wyatt Koma et al., *Demographics, Insurance Coverage, and Access to Care Among Transgender Adults*, Kaiser Fam. Found. (Oct. 21, 2020), https://www.kff.org/health-reform/issue-brief/demographics-insurance-coverage-and-access-to-care-among-transgender-adults/ [https://perma.cc/P3A9-6MQN]; Linda M. Wesp, Lorraine Halinka Malcoe, Ayana Elliott & Tonia Poteat, *Intersectionality Research for Transgender Health Justice: A Theory-Driven Conceptual Framework for Structural Analysis of Transgender Health Inequities*, 4 Transgender Health 287, 290-95 (2019) (proposing novel framework to demonstrate fact that transgender people are disproportionately affected by health inequities).

[25] Caroline Medina, Thee Santos, Lindsay Mahowald & Sharita Gruberg, *Protecting and Advancing Health Care for Transgender Adult Communities*, Ctr. for Am. Progress (Aug. 18, 2021), https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/ [https://perma.cc/BB87-ALNH].

[26] Nelson F. Sanchez, John P. Sanchez & Ann Danoff, *Health Care Utilization, Barriers to Care, and Hormone Usage Among Male-to-Female Transgender Persons in New York City*, 99 Am. J. Pub. Health 713, 715 (2009) (citing data that 32% of transgender research participants reported access to provider knowledgeable about transgender health issues as barrier to care).

[27] Medina et al., *supra* note 25.

These are (some of) the apparent benefits of legibility for gender-variant populations. Gender boxes invite us to participate in our own categorization for seemingly powerful reasons, many of which are hard to resist and some of which undoubtedly benefit individual claimants, victims of discrimination, and those in need.

But gender boxes entice gender-nonconforming individuals like mythological Sirens, who lured Odysseus with promises of knowledge that he could put to good use on his journey.[28] They promise gender-variant populations all the benefits that come with being seen, understood, and known, while setting a trap.[29] That trap is more effective surveillance.[30] What is more, once categorized—and once we experience the forms of control the state can exercise over categorized populations—the systemic dangers of gender legibility become apparent. And although this is particularly true for gender-nonconforming people, it also is true for everyone under the thumb of the constellation of institutions and technologies that comprise modern surveillance.[31]

II.   THE DANGERS OF LEGIBILITY

Some argue that the trap laid by gender boxes is that even as they offer some incidental benefits, they ultimately enhance Foucauldian disciplinary power.[32] For Foucault, discipline stood in contrast to the visible, overt, top-down power of sovereigns, who made grand shows of punishment and torture to keep their subjects in line.[33] Discipline, on the other hand, acts invisibly and horizontally through surveillance. Social institutions like law, medicine, and religion train citizens and physical bodies into compliance, conformity, and behaviors that maintain structures of power.[34] A disciplinary regime "normalizes the conduct of its inhabitants, who act as if they are watched."[35] Professor Beauchamp argues that one of the ways these institutions normalize the behaviors and views of entire populations is through the collection of gender data and the subsequent surveillance and enforcement of rigid gender categories.[36]

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[28] *See* HOMER, THE ODYSSEY 32 (Barry B. Powell trans., 2015) ("The female Sirens, like perverted Muses, lead men to their deaths through the alluring promise of secret knowledge dressed in a beautiful song.").

[29] *See* FOUCAULT, DISCIPLINE, *supra* note 7, at 200 (examining benefits and drawbacks of being watched, as prisoners are by anonymous guards).

[30] BEAUCHAMP, *supra* note 6, at 16.

[31] *See* Kevin D. Haggerty & Richard V. Ericson, *The Surveillant Assemblage*, 51 BRIT. J. SOCIO. 605, 606 (2000).

[32] BEAUCHAMP, *supra* note 6, at 18 ("[G]reater recognition of transgender people from police, prisons, or biometric screening technologies exacerbates rather than mitigates harm . . . .").

[33] FOUCAULT, DISCIPLINE, *supra* note 7, at 14.

[34] *Id.* at 26, 201.

[35] Nicholas Gane, *The Governmentalities of Neoliberalism: Panopticism, Post-Panopticism and Beyond*, 60 SOCIO. REV. 611, 615 (2012).

[36] BEAUCHAMP, *supra* note 6, at 1-23.

In this Part, I disrupt this conventional wisdom by demonstrating the connection among gender data collection, algorithmic systems, and neoliberal governmentality. Neoliberal governmentality "runs from the market to the state, and . . . plays out through new practices of regulatory intervention and surveillance" that construct the state and the individual in the image of the market.[37] In other words, neoliberal governmentality refers to those actions, strategies, and policies that "bring[] market dynamics and associated managerial techniques into government,"[38] including concepts like efficiency, quantification, and risk assessment.[39] The primary goal of neoliberal governmentality is to leverage the state to "ensure that individuals are compelled to assume market-based values in *all* of their judgments and practices."[40] An ideal neoliberal citizen is the *Homo economicus*, a "free and autonomous 'atom' of self-interest who is fully responsible for navigating the social realm using rational choice" architecture.[41]

Surveillance is a common technique in disciplinary and neoliberal governance. But where disciplinary power operates invisibly on the body, the neoliberal state aims to seduce individuals into providing personal data on their own. Neoliberalism aims to create a form of "government of one's self," or what some scholars call "subjectivation," in that it creates the conditions for citizens to transform themselves into market-drive, choice-oriented subjects of a marketized state.[42] This allows the state to develop targeted, population-level policy interventions that reflect a veneration for and reliance on market mechanisms.[43] As a tool of neoliberal governmentality, then, gender data collection produces knowledge and behaviors that reinforce subjectivation.[44] More specifically, this Part argues that gender data collection feeds the neoliberal drive toward efficiency and quantification, which, in the hands of automated systems, simultaneously enhances the state's control over the population and erodes the freedom of gender-nonconforming people.

A.   *Constructing and Quantifying Gender*

Gender surveillance occurs throughout state government. If individuals want to vote, drive a car, practice a licensed profession, obtain a hunting license, send children to school, apply for vaccine exemptions, access health insurance, obtain

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[37] Gane, *supra* note 35, at 614; COHEN, *supra* note 10, at 7.

[38] COHEN, *supra* note 10, at 7.

[39] Julie E. Cohen & Ari Ezra Waldman, *Introduction: Framing Regulatory Managerialism as an Object of Study and Strategic Displacement*, 86 LAW & CONTEMP. PROBS. i, ix (2023).

[40] Trent H. Hamann, *Neoliberalism, Governmentality, and Ethics*, 6 FOUCAULT STUD. 37, 38 (2009); *see also id.* at 41-42 (referring to need for interventionist state to "encode[]" market values).

[41] *Id.* at 38.

[42] *Id.*

[43] Laurence Barry, *The Rationality of the Digital Governmentality*, 23 J. FOR CULTURAL RSCH. 365, 366 (2019).

[44] Hamann, *supra* note 40, at 42.

workers' compensation, work for the government, seek medical care, or participate in a litany of other everyday activities that involve the state, they frequently have to answer a question about their gender.[45] Though the collection and use of gender data is as old as the nation-state,[46] its use has metastasized in the security apparatus that arose after the attacks on September 11, 2001.[47]

Studies show that gender boxes remain on many forms, often for reasons unconnected to the underlying purpose of the form, including tradition, ignorance, or simply because no one ever thought about it.[48] And yet, including gender boxes on forms has the expressive effect of establishing gender as somehow relevant to the right, opportunity, or entitlement for which the form is completed.[49] Why would the form ask for it otherwise? Many scholars have argued that gender data is substantively irrelevant in many areas, with the exclusion of certain healthcare contexts.[50]

In addition to being irrelevant, gender data is also unstable; for many people, gender is fluid. Therefore, questions about identity construct, rather than reflect, identity categories. Census questions about race "have made and unmade racial

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[45] Waldman, *Gender Data in the Automated Administrative State*, *supra* note 12, at 2268-71.

[46] *See* Gérard Noiriel, *The Identification of the Citizen: The Birth of Republican Civil Status in France*, *in* DOCUMENTING INDIVIDUAL IDENTITY 28, 30-42 (Jane Caplan & John Torpey eds., 2001).

[47] *See* BEAUCHAMP, *supra* note 6, at 24, 40-41, 93-94 (explaining how Real ID Act arose in response to attacks and that major component is to create "new national database linked through federally standardized driver's licenses"); Paisley Currah & Tara Mulqueen, *Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport*, 78 SOC. RSCH. 557, 558-65 (2011).

[48] Waldman, *Opening the Gender Box*, *supra* note 12, at 10, 19, 24.

[49] On expressive effects, see generally Matthew Tokson & Ari Ezra Waldman, *Social Norms in Fourth Amendment Law*, 120 MICH. L. REV. 265, 280-81 (2021) (using example of flag burning and environmental protection law as laws with intended expressive effects); Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 407-14 (2009) (discussing how law is necessary for persuading public and cyber platforms to take seriously that cyber harassment is gender discrimination); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022, 2031 (1996) (arguing law tells people what is socially harmful and signals appropriate behavior).

[50] *See, e.g.*, Lila Braunschweig, *Abolishing Gender Registration: A Feminist Defence*, 1 INT'L J. GENDER, SEXUALITY & L. 76, 91 (2020) (stating gender-related institutional regulations are unnecessary "most of the time"); Davina Cooper & Flora Renz, *If the State Decertified Gender, What Might Happen to Its Meaning and Value?*, 43 J.L. & SOC'Y 483, 484-85 (2016) (arguing that removing decertification would still allow state to regulate gender in necessary protective ways); Ido Katri, *Transitions in Sex Reclassification Law*, 70 UCLA L. REV. 636, 641 (2023) (proposing ending practice of assigning sex at birth); Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491, 543 (2016) ("There is limited risk involved in issuing genderless birth certificates, and eliminating sex from such a foundational identity document would prevent trans and intersex people from having to correct it later in life.").

identity as the boundaries of those categories have shifted over time."[51] The Chinese Exclusion Act of 1882 used paternity and marital status to construct the category of "Chinese" and simply assigned women and children the category given to their husbands and fathers, respectively.[52] Such categorizations were used to determine if someone was in the United States legally or illegally.[53] In law, gender is also constructed from disparate sources, including chromosomes, state designations on birth certificates, medical procedures, and self-affirmance.[54] As Professor Beauchamp has argued, "surveillance is a central practice through which the category of transgender is produced, regulated, and contested."[55]

Gender's fluidity highlights the arbitrariness of determining who qualifies as what gender. Gender questions on forms define the available categories according to a finite set of other options that may not accurately or clearly reflect everyone's life experience. As a result, gender categories take on meaning from the way data collection mechanisms are constructed. For instance, if a gender box asks for *gender* and offers *male*, *female*, *transgender*, and *other* as answer options, the category meanings differ than if the question had provided only *male* and *female* answer options. In the former, a transgender male could answer *male*, *transgender*, or *other*, the last one if they do not subscribe to the gender binary but do not feel that *transgender* accurately describes who they are. In the latter, they could answer *male*. For each question, the categories have different populations within each dataset and, therefore, different meanings.

Gender-nonconforming populations face risks with legibility in this context. Even assuming the past is not prologue, contributing to the construction of *transgender* or *other* as categories of people sustains a system of oppression and subordination of women and sexual minorities. It reifies *male* and *female* as the normative answers, as well. Coming out as transgender or nonbinary on some forms, particularly ones with seductive inclusive answer options, counterintuitively makes full participation in society difficult. States have such a wide variety of rules and processes for gender redesignation that only the wealthy and perseverant are likely able to navigate.[56] Unable to change gender

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[51] Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 Nw. U. L. Rev. 1701, 1702 (2003).

[52] Beauchamp, *supra* note 6, at 26-27.

[53] *Id.* (explaining system of identification and sorting was used to determine which Chinese immigrants were in country legally or illegally).

[54] Katri, *supra* note 50, at 656-95.

[55] Beauchamp, *supra* note 6, at 2.

[56] *See* Paisley Currah, Sex Is as Sex Does: Governing Transgender Identity 76-98 (2022) (describing difficulties of rules and processes for gender redesignation, including submitting letter from surgeon or physician verifying sex-change surgery was completed); Katri, *supra* note 50, at 656-95 (discussing difficulty in achieving gender redesignation rooted in problem of assigning sex at birth); Dean Spade, *Documenting Gender*, 59 Hastings L.J. 731, 733-34 (2008) (explaining that many conflicts have arisen over differing gender classification polices even within same jurisdictions).

designations on identification documents, many gender-nonconforming individuals can be labeled as frauds if their gender designations vary from form to form, from ID to ID.[57]

Gender boxes construct gender categories and then reduce them at the population level to quantifiable metrics. Gender boxes invite individuals to participate in their own surveillance by seeming to give them the free choice to select one's gender. But that choice is limited. Not only are people's genders often determined by third parties—by physicians at birth, by bureaucrats completing birth certificates, and by school officials completing immunization forms—but gender boxes only provide a small, finite set of options as answers. This is to facilitate quantification on summary tables and in statistical analysis. State agencies then share this personal data about individuals and transform it into population-level analyses in statutorily required reports to legislatures and the public, in policymaking contexts at the state and federal levels, and with researchers, thereby influencing everything from budgets to academic scholarship. As the sociolegal scholar Sally Engle Merry has noted, quantification is itself seductive: it offers the rationality and seeming neutrality of numbers and the possibilities of statistical comparisons and predictions.[58] And yet, these seductions are tricks. Populations are made visible—or rendered invisible—not only by the design of survey questions and answers but also through the relationship between surveyors and their subjects.[59] Gender boxes, then, are both normatively burdened by the social institutions that create them and can lead to "oversimplification, homogenization, and the neglect of the surrounding social structure."[60] Therefore, gender data collection constitutes a form of power. When the state creates and administers forms with gender boxes, the resulting data can determine who gets funding and how much.[61] The data can mean the difference between intervention and neglect, freedom and control, and inclusion and erasure. As Merry noted, "[r]ather than revealing truth, [quantitative] indicators create it."[62]

Such quantification and analysis are key pieces of governmentality in the neoliberal state. Neoliberalism sees quantification as a means of evaluating

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[57] Katri, *supra* note 50, at 646 ("Those who deviate in their identity or expressions from these gender expectations are often suspected of fraud.").

[58] SALLY ENGLE MERRY, THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING 4-5 (2016) (emphasizing that quantified knowledge is perceived as "truth" and numbers are used to understand world).

[59] *See* KEVIN GUYAN, QUEER DATA: USING GENDER, SEX AND SEXUALITY DATA FOR ACTION 8-15 (2022).

[60] MERRY, *supra* note 58, at 1 ("Counting things requires making them comparable, which means that they are inevitably stripped of their context, history, and meaning.").

[61] *See, e.g.*, Waldman, *Opening the Gender Box*, *supra* note 12, at 1-2 (explaining many U.S. state government forms contain gender boxes, and that "[i]nconsistencies among gender boxes can cause denial of benefits for gender-nonconforming workers when benefits are meted out by computerized systems that translate inconsistencies as evidence of fraud").

[62] MERRY, *supra* note 58, at 5.

behavior, government, and just about everything else.[63] It valorizes the analytical outputs of quantification tools as rational, dispassionate calculations of numeric tables.[64] And quantification supports a managerial approach to governance and individual behavior, which sees numbers and cost-benefit analyses as the yardsticks by which policies and actions are determined and measured.[65] Understood in this way, the state's use of gender data for security and identification purposes as part of post-September 11 antiterrorism security was not a disciplinary step, but a data-driven neoliberal one.

Plus, unlike Foucault's panoptic surveillance, in which individuals have no choice and no way to escape being watched, gender boxes depend on the veneer of freedom and choice. As Wendy Brown has noted, that is precisely the goal of neoliberal governmentality: neoliberal subjects are free, but with a freedom entirely shaped and constrained by exogenous forces, by competition with other individuals, and by social insecurity.[66] Gender boxes are structures that produce "only a certain kind of freedom understood in terms of a specific notion of self-interest" that is entirely detached from the well-being of others and, in this case, the collective needs of gender-nonconforming populations.[67] Put another way, those completing forms with gender boxes provide gender data for any number of reasons—to obtain some benefit, to be good citizens, or simply because they are asked—but by asking individuals for gender data in atomistic ways, gender boxes deconstruct a complex ecosystem of gender surveillance into simple choices for single individuals who choose answers for their own reasons.[68]

Therefore, although the surveillance of gender undoubtedly operates within the Foucauldian disciplinary frame, as Professor Beauchamp has deftly argued, gender data collection by the state through gender boxes and the reduction of gender to simple and statistically manipulable categories facilitates the neoliberal state's goals of normalizing choosing under constraints and of knowing as much as possible about individuals to design targeted, efficient interventions that advance the market-driven neoliberal project.[69]

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[63] *See* Andrea Mennicken & Wendy Nelson Espeland, *What's New with Numbers? Sociological Approaches to the Study of Quantification*, 45 ANN. REV. SOCIO. 223, 233-34 (2019).

[64] *See id.* at 233.

[65] *See, e.g.*, Hamann, *supra* note 40, at 41-42.

[66] WENDY BROWN, EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS 43 (2005).

[67] Hamann, *supra* note 40, at 51.

[68] *Id.* at 53 ("[I]n neoliberalism, *Homo economicus* is no longer a partner in exchange but instead is fashioned as 'an entrepreneur and an entrepreneur of himself.' As such he is his *own* capital, his *own* producer, and the source of his *own* earnings." (quoting MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978-1979, at 225 (Arnold I. Davidson ed., Graham Burchell trans., New York: Palgrave Macmillan 2008) [hereinafter FOUCAULT, THE BIRTH OF BIOPOLITICS]).

[69] *See* Mariana Valverde & Michael Mopas, *Insecurity and the Dream of Targeted Governance*, *in* GLOBAL GOVERNMENTALITY: GOVERNING INTERNATIONAL SPACES 233, 239-40 (Wendy Larner & William Walters eds., 2004).

The quantification of gender in the neoliberal state also enforces the gender binary even if (or when) gender data is collected inclusively. Any regime that uses gender data to verify identity and maintain security has to assume that gender is effective at determining someone is who they say they are. But the only way that could be true is if gender were an immutable descriptor. That is, security systems must rely on unchanging data because they need permanent markers of identity to operate. If not, it would be no better than identifying someone by the clothes they are wearing at a given moment. Therefore, because gender does indeed change, the only people for whom gender data can truly be used to help establish identity are gender-conforming individuals. In this way, the state's mere use of gender data as securitizing tools necessarily implies cisnormativity.

B.   *The Effect of Algorithms*

Twenty-first century governance has taken an algorithmic turn; state agencies use automated systems to make political, distributive, and social decisions.[70] This algorithmic turn further exposes the role of gender legibility as a tool of neoliberal governmentality. Algorithmic governance arguably represents the apotheosis of the state being "marketized to its core."[71] Using machines to make governance decisions is more efficient and less costly.[72] It depends entirely on the datafication of the population into easily digestible metrics and numbers. At the structural level, this reflects the neoliberal state's enmeshment with market logics; on the ground, governments turning to automated systems reflects neoliberalism's use of quantification and cost-benefit analyses as the lodestars for government activities.[73] When gender data is collected and used by automated administrative systems today, it becomes part of the neoliberal state's exercises of power.[74]

New technologies exert power over gender-nonconforming populations in ways states could not in the past. Algorithmic tools do more than just entrench the gender binary, as scholars have rightly argued.[75] Sonia Katyal and Jessica

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[70] *See generally* Citron, *Technological Due Process*, *supra* note 9; Calo & Citron, *supra* note 9.

[71] Gane, *supra* note 35, at 627 (observing how government promotes competition which allows market to ultimately regulate society); *see also* Foucault, The Birth of Biopolitics, *supra* note 68, at 117, 133 (describing shifts toward marketization and critiques from neoliberals about governmental style).

[72] Calo & Citron, *supra* note 9, at 800.

[73] *See* Cohen & Waldman, *supra* note 39, at x (describing how governments use automated, data-driven tools to answer personal and social needs of people).

[74] *See id.* (asserting use of automated, data-driven tools ratifies distributions of power and harms marginalized populations).

[75] Sonia K. Katyal & Jessica Y. Jung, *The Gender Panopticon: AI, Gender, and Design Justice*, 68 UCLA L. Rev. 692, 700-01 (2021) ("[D]ue to a combination of structural, legal, and technical reasons, AI often fails to recognize entire populations on the basis of their gender identity.").

Yung note that "the deployment of gender classifications in [artificial intelligence] systems imposes disparate impacts on transgender and nonbinary populations, and . . . the deployment of these systems reveals the artificiality of gender categorization itself."[76] As a result, advanced technologies of data collection, processing, and surveillance "reinforce[] a world of finite, imposed categorization that we should all be cautious about adopting."[77]

With gender quantified into statistical tables, governments deploy sophisticated data-matching and data-mining tools to enhance security and verify identity.[78] Data-matching tools compare two sets of data—for instance, an answer to a gender question on an application for unemployment assistance and gender designations on official government identifications—to determine if both datasets represent the same person.[79] Although a civil servant working without a computer could compare two or three documents to verify identity, only a computer can compare one piece of data to the entire data history about a person in government databases. Data matching, then, reflects a neoliberal ideal of efficient, data-driven interventionist policies that replace "dumb" forms of security with targeted ones.[80]

Unfortunately, gender-nonconforming populations feel the costs but few of the benefits of this kind of governmentality. Many gender-variant people have inconsistent identity documents because gender reclassification rules are labyrinthine and inconsistent.[81] Individuals may lack the money or time to meet onerous medical or surgical standards for updating birth certificates or driver licenses in certain jurisdictions.[82] As a result, algorithmic systems routinely identify them as security risks and fraudsters, feeding both a long-standing insidious narrative of gender-nonconforming people as hiding something sinister and exposing them to very real prospects of humiliation and danger.[83] Data matching may work for most people most of the time, but it imposes impossible burdens and risks on gender-variant individuals who exist in a devolved and discriminatory regulatory state.

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[76] *Id.* at 703.

[77] *Id.* at 704.

[78] *See* Citron, *Technological Due Process*, *supra* note 9, at 1260 (explaining technical process of matching personal information through patterns and correlations gleaned from information stored in large databases).

[79] *See id.*

[80] *See id.* at 1286 (describing how automated systems are used to create "No Fly" databases to efficiently address national security risks).

[81] *See* sources cited *supra* note 56.

[82] *See* Spade, *supra* note 56, at 736 (listing range of gender-confirmation surgeries required in different states).

[83] *See* BEAUCHAMP, *supra* note 6, at 9; Currah & Mulqueen, *supra* note 47, at 560 (discussing how people identifying as transgender encounter trouble while navigating airport security).

Data mining uses gender information as training data so algorithmic systems can identify patterns and correlations in large datasets.[84] The algorithm then makes probabilistic predictions about the future.[85] Data mining enhances the state's power to leverage gender data to make decisions about people's lives. Algorithms use gender data to predict recidivism in sentencing.[86] The now-infamous Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") system, which assesses risk for use in parole decisions, also uses gender data.[87] Public and private employers use algorithms to assess job applicants.[88] An increasing number of jurisdictions use gender data to train algorithms meant to identify children who are at risk of committing future violence.[89] And law enforcement uses gender data in facial-recognition tools to help identify persons of interest in criminal investigations.[90] Because they promise data-driven policy interventions that can implement gender politics while engaging in a risk-management approach to security, these technologies are tools of neoliberal governmentality.

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[84] Alicia Solow-Niederman, *Administering Artificial Intelligence*, 93 S. CAL. L. REV. 633, 639 (2020).

[85] Morgan Klaus Scheuerman, Jacob M. Paul & Jed R. Brubaker, *How Computers See Gender: An Evaluation of Gender Classification in Commercial Facial Analysis and Image Labeling Services*, 3 PROC. ACM ON HUM.-COMPUT. INTERACTION, Nov. 2019, at 1, 2 (explaining computers use collected demographics such as gender for automated "facial detection and facial recognition").

[86] *See* State v. Loomis, 881 N.W.2d 749, 765 (Wis. 2016); *see also* BRIAN J. OSTROM, MATTHEW KLEIMAN, FRED CHEESMAN, II, RANDALL M. HANSEN & NEAL B. KAUDER, NAT'L CTR. FOR STATE CTS. & VA. CRIM. SENT'G COMM'N, OFFENDER RISK ASSESSMENT IN VIRGINIA 74-76 (2002) (noting gender as statistically significant risk factor when predicting recidivism).

[87] *See* Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, SCI. ADVANCES, no. eaao5580, Jan. 2018, at 1, 1; *see also Loomis*, 881 N.W.2d at 753-57 (describing COMPAS and its use of defendant's gender); Sam Corbett-Davies, Emma Pierson, Avi Feller & Sharad Goel, *A Computer Program Used for Bail and Sentencing Decisions Was Labeled Biased Against Blacks. It's Actually Not that Clear.*, WASH. POST (Oct. 17, 2016, 5:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/17/can-an-algorithm-be-racist-our-analysis-is-more-cautious-than-propublicas/ (listing sex as one factor COMPAS uses); Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing (analyzing COMPAS's effectiveness in calculating recidivism by isolating effect of race from gender).

[88] Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 874-90 (2017).

[89] *See, e.g.*, Nicole M. Muir, Jodi L. Viljoen, Melissa R. Jonnson, Dana M. Cochrane & Billie Joe Rogers, *Predictive Validity of the Structured Assessment of Violence Risk in Youth (SAVRY) with Indigenous and Caucasian Female and Male Adolescents on Probation*, 32 PSYCH. ASSESSMENT 594, 597 (2020) (noting risk assessment tool used by youth probation officers also considers sex as determining factor).

[90] *See, e.g.*, Lynch v. State, 260 So. 3d 1166, 1169 (Fla. Dist. Ct. App. 2018) (describing gender as one way to filter photos within facial-recognition search program).

Gender-nonconforming individuals face increased risk from these systems, as well, many of which transform the body into code in the most efficient way possible.[91] Machines designed for efficiency "stylize reality";[92] models make assumptions about the world to make data more legible and easier to manipulate. As a result, they have trouble correctly identifying people who do not meet social expectations associated with their assigned gender at birth even if gender data is originally collected inclusively.[93] Plus, data-mining systems need training data, all of which come from a time (even in the very recent past) when gender-nonconforming people were barely recognized in the public consciousness.[94] This "increase[s] the influence of the past"—one dominated by the gender binary (as well as white supremacy and homophobia, among other exclusionary ideologies)—on the future.[95] As a result, the gender binary remains entrenched.

C.   *Implications*

Recognizing the neoliberal footprint in gender boxes has important implications beyond simple scholarly precision. Focusing on discipline leads scholars to look at the overlapping institutions that mold and constrain society and the technologies of surveillance they bring to bear on individuals. Discipline, however, pays insufficient attention to the work of subjectivation that comes from within—namely, human responses to architectures of choice and freedom that operate as systems of control by training all individuals to see themselves as commercial agents, as communities of one competing for resources in the neoliberal world. There is no doubt that the information age retains aspects of a Foucauldian disciplinary society; feminist and queer scholars, among many others, have made that clear. But society today is more than a society of discipline; it is a society thoroughly infused with market logics. Foucault himself predicted this, stating in 1978 that "we should not see things as the replacement of a society of sovereignty by a society of discipline, and then of a society of discipline by a society, say, of government. In fact we have a triangle: sovereignty, discipline, and governmental management."[96] Gender data is arguably at the center of that triangle.

Gender boxes entice individuals to "subjectivate" themselves into ostensibly rational, choosing, autonomous selves divorced from values other than what is

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[91] Mar Hicks, *Hacking the Cis-tem: Transgender Citizens and the Early Digital State*, 41 IEEE ANNALS HIST. COMPUTING, Jan.-Mar. 2019, at 20, 29 ("The [U.K. government's] computer system was explicitly designed to reinstate and strengthen not only the idea of static, permanent, immutable gender, but also to continue to uphold strictly binary gender.").

[92] *Id.*

[93] Scheuerman et al., *supra* note 85, at 14-15.

[94] Deborah Hellman, *Sex, Causation, and Algorithms: How Equal Protection Prohibits Compounding Prior Injustice*, 98 WASH. U. L. REV. 481, 487 (2020) (discussing past data's significant influence on future decisions through machine learning).

[95] *Id.*

[96] MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977-1978, at 107 (Arnold I. Davidson ed., Graham Burchell trans., 2007).

best for them.[97] They offer individuals completing forms a legibility choice, a choice constrained by the question-answer pair provided, but a choice nonetheless. Gender boxes also collect data that ultimately is integrated into algorithmic systems aimed at efficiency and designed to make the state run more like a profit-seeking business.[98] This has three principal effects, all of which are critical to identifying the problems that accompany gender data collection and focusing on possible solutions.

First, by placing state collection, processing, and use of gender data in the neoliberal frame, this Article urges scholars of gender and queer studies to link gender, surveillance, and neoliberalism in their work. Some scholars, including, among others, Angela Harris, Lisa Duggan, and Barry Adam, have written about the effects of neoliberal discourses, market dynamics, and choice architectures on queer culture, health, and behavior.[99] Law and Political Economy ("LPE") scholars and their critical legal studies ("CLS") intellectual ancestors also recognize that enforcing gender (and racial) hierarchies has long been a central capitalist strategy for ensuring that economic advantage flows to some and not others.[100] Martha McCluskey has persuasively argued that the neoliberal frame disaggregates the harms women face from gender-based violence from the economic effects of that harm.[101] But few have explored the implications of neoliberal surveillance practices. As this Article has argued, gender surveillance through gender boxes is also bound up with neoliberal mechanisms and goals—namely, the primacy of efficiency in governance and the use of quantified demographics to develop targeted, algorithmically driven systems of authentication and control—often to the detriment of gender-variant populations. Therefore, gender surveillance in the neoliberal moment should be

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[97] Hamann, *supra* note 40, at 37.

[98] *See generally* Waldman, *Gender Data in the Automated Administrated State*, *supra* note 12.

[99] *See, e.g.*, Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 Wm. & Mary Bill Rts. J. 1539 (2006) (connecting risks to queer equality to decades of neoliberal policies); Lisa Duggan, The Twilight of Equality?: Neoliberalism, Cultural Politics, and the Attack on Democracy (2003) (arguing demonstrating neoliberalism's threat to queer equality); Barry D. Adam, *Constructing the Neoliberal Sexual Actor: Responsibility and Care of the Self in the Discourse of Barebackers*, 7 Culture, Health & Sexuality 333 (2005) (demonstrating adoption of neoliberal discourses to justify sexual behavior).

[100] *See, e.g.*, Frank Pasquale, *Division, Distraction, and Domination: Revisiting the Miner's Canary*, LPE Blog (Dec. 14, 2017), https://lpeproject.org/blog/division-distraction-and-domination-revisiting-the-miners-canary/ [https://perma.cc/E4MQ-UWMM]; Angela P. Harris, *Where Is Race in Law and Political Economy*, LPE Blog (Nov. 30, 2017), https://lpeproject.org/blog/where-is-race-in-law-and-political-economy/ [https://perma.cc/7UGG-LTA7].

[101] Martha McClusky, *Toward a Law and Political Economy of Gender Violence*, LPE Blog (Nov. 12, 2018), https://lpeproject.org/blog/toward-a-law-and-political-economy-of-gender-violence/ [https://perma.cc/M5XD-V6VA].

added to the research agenda for scholars exploring gender, sexuality, and identity.

Second, surfacing the ways in which gender boxes reflect neoliberal governmentality shifts scholars' and advocates' focus from the general to the specific when identifying problems and solutions. A disciplinary frame considers the institutional systems of surveillance that control populations, and the gender binary is certainly one of them. But seeing gender boxes as tools of neoliberal governmentality asks us to consider the hyperlocal contexts of gender questions themselves. That is, gender boxes rely on choice architecture to enlist individuals into their own domination. The problem, then, is in the asking. There may be ways to make those asks more inclusive, but the neoliberal frame reminds us that even inclusive questions and answer options can coopt individuals into their own oppression. Therefore, instead of tweaking the possible answers to make gender boxes more inclusive, perhaps we should consider eliminating the questions altogether.

Finally, thinking about gender surveillance from a neoliberal perspective surfaces how gender boxes can enroll people in the commodification of their own gender identity. In the commercial context, companies expand their data collection practices to include gender-nonconforming identities not out of respect, but to enhance the granularity of the data fed into the algorithms that target individuals with tailored advertisements. The neoliberal turn transforms all individuals into potential consumers and, therefore, transforms all metrics of individual identities into sets of population variables used to drive profits, extraction, and manipulation.[102] Seeing how gender data is a tool of neoliberal governmentality gets us closer to understanding these commercial practices, as well.

CONCLUSION

Neoliberalism seduces individuals with the marketized logics of free choice and personal liberty, but ultimately disempowers the individual in favor of the market.[103] Gender boxes do something similar. They have veneers of free choice that seduce gender-nonconforming individuals with promises of benign or even beneficial legibility,[104] only to perpetuate an oppressive system of seeing and sensemaking by the state and other organizations of power.[105] That seduction is

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[102] *See, e.g.*, Julie E. Cohen, *Platforms, Data Infrastructures, and Infrastructure Stacks*, *in* GLOBAL GOVERNANCE BY DATA: INFRASTRUCTURES OF ALGORITHMIC RULE (Fleur Johns, Gavin Sullivan & Dimitri Van Den Meerssche eds., 2024).

[103] ZYGMUNT BAUMAN, IN SEARCH OF POLITICS 28 (1999).

[104] *See generally* Susan W. Woolley, *Contesting Silence, Claiming Space: Gender and Sexuality in the Neo-liberal Public High School*, *in* NEOLIBERALISM, GENDER AND EDUCATION WORK 84 (Sarah A. Robert, Heidi K. Pitzer & Ana Luisa Muñoz García eds., 2019).

[105] *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 5 (1998).

foreign to disciplinary power, which operates invisibly to its targets.[106] Neoliberalism's exertion of power may not be as overt as top-down sovereign power, but its invitation to populations to participate in their own disempowerment is distinct from discipline.[107]

The neoliberal state uses gender to help build a targeted system of data-driven security. The more gender data the state has, the more it uses gender to separate and cluster populations and to identify one person as different from another person. Automated systems now use gender data behind the cushion of trust we tend to attribute to computers. And that should concern all of us. In this way, gender-variant populations, who experience disproportionate harm from the state's use of gender data, are the canaries in the coal mine, warning everyone about the power of gender as a tool of neoliberal governmentality.

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[106] *See* Foucault, Discipline, *supra* note 7, at 14-16.
[107] *See id.*