AN ANALYSIS OF NON-DICHOTOMOUS LAWS

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ABSTRACT

An Analysis of Non-Dichotomous Laws

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The US legal system relies on its ability to categorize cases presented to present verdicts in an orderly and timely manner. However, as individual identities become more multifaceted, our legal system fails to encompass all gender and racial identities for which protections exist. The acceptance of queer, nonbinary, trans, and intersex individuals has unveiled issues with the protections given to the traditional male/female dichotomy. These protections for males/females stood as the foundation for civil protections since the founding of our legal system. The Civil Rights Act of 1964 allowed for equal opportunity for all people on the "basis of sex". This laid the foundation for the continuation of the LGBTQ movement, and lead to equal protections for those who do not fall into the traditional male/female dichotomy.

The Civil Rights Act of 1964 is a non-dichotomous law – it gives protections to individuals without requiring them to self-identify. However, since its ratification, other statues that extended on the Civil Rights Act of 1964 required identification. The Education Amendments of 1972 dictated that all schools must be equal in stature and allowed for the

creation of single-sex schools as long as they were all equally funded. It did not dictate how trans, nonbinary, or anyone who does not fit into a male/female dichotomy, fit into this mold.

The existence of the Civil Rights Act of 1964 as a non-dichotomous law grants equal opportunity without requiring self-identification. Through the scope of a traditional feminist philosophical viewpoint, I will analyze what makes the Civil Rights Act non-dichotomous, and whether this framework can be applied to future laws, or if the absence of dichotomies requires further statues to clarify its protections.

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1. INTRODUCTION

Our legal system relies on logic and dichotomies to function. The sorting of people into groups is fundamental in granting protections to specific groups. All laws require arbitrators to go through an if/then syllogism, to determine if laws have been broken or impeded on. Tort laws require the categorization of people, whether it be through sex, race, nationality, to operate. However, this sorting of people leads to simplification of their identities, exclusion of some individual's identities, or simply the erasure of identities that fail to meet these traditionally upheld dichotomies. To adequately represent and prevent discriminatory action against individuals, we need to write laws that prevent the requirement to group people into categories, and instead grant protections for all people, regardless of identity. A perfectly non-dichotomous law should offer protections without requiring identification, since requiring self-identification only leads to debate over how to categorize individuals.

Take for instance US Court of Appeals case, *Whitaker v. Kenosha Unified School District*[1]. Ash Whitaker is a trans male, who used the male restroom. The school denied Ash access to the male restroom, surveilled him, and threatened disciplinary action if he were to do it again. Teachers and administrators refused to call Ash by his identified name, and instead used his birth name and pronouns. On school trips, he was separated entirely from the other students. A school board proposal was even pushed to identify transgender and nonbinary students with bright green wristbands so that administration could monitor restroom use. Ash and his mother

[1] Ashton Whitaker V. Kenosha Unified School District, 16-3522 (7th Cir. 2017)

went on to sue the school district for the isolation and punishment inflicted on Ash, simply because of his pronouns. They sued on the basis of Title IX and the Civil Rights Act, that Ash faced segregation and unfair treatment on the basis of sex. Ash won.

All these issues derived from the common issue of Ash's sex - Ash does not follow the school traditional male/female dichotomies. The issue of male/female restrooms, male/female sleeping arrangements, and male/female roles in the social sphere led to legal problems with the identification of trans, intersex, and non-binary people, and where they fit in this structure. Ash's case is a small scope on the greater legal issue that lies beneath the surface. If we can't agree on what bathrooms and pronouns people use in our schools, how to do we equally distribute money between male and female NCAA teams under Title IX? How to do we address trans people going to male-only or female-only schools, as protected by Title XX? The issue of sticking people in male/female categories creates problems when we try to ensure equality between these two groups, because sex isn't as simple as two groups.

To amend this, we need to create a law that offers protections, without requiring self-identification, and thus upholding a system of dichotomies. Offering protections for specific groups of people fails to reach those who fall between these definitions or exist in some other group entirely. An example of one such law is the Civil Rights Act of 1964. The Civil Rights Act banned "discrimination because of race, color, religion, sex or national origin"[2]. This does not require us to identify as any one sex, but still grants anti-discriminatory protections on the basis of sex. Through elimination of the inherit stereotypes that come with categories that we use to

[2] Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

define people and cases; we can hope to write laws that better include those who are not fully represented through our current dichotomous system.

Previous research in this field has assessed how categorizing people creates more issues than it solves. Many feminist philosophers have advocated towards a more inclusive, spectrum-based approach towards defining people. In her paper, *Desiring the Impossible: Dichotomous Sex, Desire, and the Legal Subject in Feminist Legal Theory*[3], Sara Matambanadzo addresses some surface-level legal issues that derive from the act of defining people under sexual dichotomies, specifically, how intersex people fit into this equation, and how queer marriages deviate from legal norms of husband/wife. In her piece *Gender Identity: Developments in the Law and Human Rights Protections*[4], Brenda Picard reviews the history of the birth certificate and why our need to identify as male/female is futile. There's a consensus that these dichotomies fail to reach people, but how to break these legal dichotomies remains unanswered.

Maria Lugones offers a window in how to break these dichotomies without removing our identity. In her piece, Structure*/Antistructure and Agency Under Oppression*[5], she describes how

[3] Sara Matambanadzo, "Desiring the Impossible: Dichotomous Sex, Desire, and the Legal Subject in Feminist Legal Theory," Feminist and Queer Legal Theory: Convergences and Departures - An Uncomfortable Conversation. Atlanta, Emory University.

[4] Brenda Picard, "Gender Identity: Developments in the Law and Human Rights Protections," University of New Brunswick Law Journal 69 (2018): 126-159

[5] Maria Lugones, "Antistructure/Structure and Agency Under Oppression". The Journal of Philosophy , Oct., 1990, Vol. 87, No. 10, Eighty-Seventh Annual Meeting American Philosophical Association, Eastern Division (Oct., 1990), pp. 500-507

oppression results from subjecting people to singular definitions of themselves. She uses the example of a slave – a person born a slave is only a slave, they lose their place as a parent, maybe a musician, or a creative, and rather get simplified down to their minimal states. This is oppression. Lugone's details how to escape this oppression, through understanding the complexities of individuals.

Applying a non-dichotomous law to these situations would allow people to exercise their own civil liberties, without the need for identification or simplification. By removing situations, we can also remove the inherent stereotypes that come with breaking people into categories. It also allows us to grant protections even for groups that are hard to categorize, such as multiracial populations and queer populations. Through the scope of these feminist philosophers who questioned our traditionally logistical system, I hope to apply this concept of structures and antistructures to laws. With this in mind, I will be analyzing the Civil Rights Act through a non-dichotomous viewpoint and assess how to write laws that grant civil liberties without dichotomies.

2. DICHOTOMIES IN THE LAW

Dichotomies, in our current system, are required for the legal system to work. Dichotomies refer to the categories in which legal verdicts get classified into. To reach a verdict, or a dichotomy, one must follow a logistical syllogism, common to the practices of law. Dichotomies assume that there is a sense of essentialism in a ruling of a case. This essentialism leaves out those who fall in between our system of dichotomies.

Across the legal sphere, there doesn't seem to be a common definition for dichotomies. Some legal philosophers will refer to dichotomies as a matrix of categories, others will refer to them as binary categories. However, what remains true in each definition of dichotomies, is the inability to move between these categories, and the inability for fall into multiple categories.

To reach one of these binary categories you first need to pass through a logistical syllogism. Logistical syllogisms are like coding, or a flowchart of questions. To reach a verdict you must pass a system of if/then to determine whether your case is categorized as a specific type of case. Take for instance murder. Murder cases can fall into one of four categories: murder, capital murder, manslaughter, and criminal negligence. To first reach a verdict within one of these categories you need to pass an assessment test to see whether you fit in a specific category. So, if I were to act lash out in self-defense, we would first need to see you would first need to test persons intent, then you need to see how it happened, then you would need to see whether or not it was justified. Attached below is a flow chart that explains how we come to verdicts when it comes to murder. This entire flow chart of reasoning is representative of a logistical syllogism in the legal space.

Logististical syllogisms fail to work with cases that contain a large amount of ambiguity, meaning that we have a hard time categorizing people – much like the Ash Whitaker case. Since these logistical syllogisms turn into dichotomy's, we can conclude that if a logistical syllogism doesn't deal with ambiguity, then neither does the dichotomy. Dichotomies work if there's no confusion over where the verdict lays.

If there is any confusion over where a case lays, or if our case rests in multiple dichotomies, this is when we start to see cases get pushed up to the supreme court. This is known as multiplicity. Multiplicity refers to a singular entity that exists in multiple dichotomies. Maria Lugones, a Latina lesbian philosopher well known for her papers on escaping social dichotomies, defines multiplicity as the ability to exist in separate categories[6]. In the US legal system, multiplicitious cases would be those that fail to meet the criteria for any one category. I have already pointed out multiplicities within criminal law, and criminal cases are significantly easier to categorize than civil cases, since the heart of a civil case has to do with the identity of the plaintiff. So, how do we you apply these logistical syllogisms to cases determining the civil rights of human beings?

When it comes to civil and tort law, Legal syllogism become more complicated. As we refer to people, we have to find a way to fit each of their own unique identities into our logistical syllogism. So, at the heart of their troubles, we need to find something that groups each person's conflict and each person's existence into a single dichotomy. As legal system works now, there is

[6] Maria Lugones, "Antistructure/Structure and Agency Under Oppression". The Journal of Philosophy , Oct., 1990, Vol. 87, No. 10, Eighty-Seventh Annual Meeting American Philosophical Association, Eastern Division (Oct., 1990), pp. 500-507

this inherent belief that some people fall into categories, and you can just classify people, and that everyone in that group has an inherit truth that bind them together. We use this assumption of this inherent truth to rule on civil cases, offering protections to specific groups of individuals with the assumption that everyone in this group has a fundamental stimulatory to them. Our highly logistical dichotomies leave out the fluidity of individual identity. Our current logistical syllogism for tort law and civil cases relies on the idea that there is some type of common theme between groups of people. This is the idea behind essentialism.

Ben Glassman wrote about essentialism in these dichotomy's as they're referred to in civil cases. He said,

> *Essentialism is the idea that some true essence underlies the category at hand that the category and its boundaries are somehow natural. Thus, an essentialist feminist might claim that, independent of culture and society, women really are different than men. Another essentialist position would be the argument that there is a unitary example of the race that defines one's identity.*[7]

Essentialism remains a tricky debate for those working to expand civil rights for minorities. throughout the history of the LGBTQ community, essentialism has caused issues for those trying to expand the marriage rights of homosexual and queer marriages. Marie Amelie

[7] Ben Glassman, "Foreword: Categorical Exclusivity," Harvard Blackletter Law Journal 15 (1999): 29-40

George's paper, *Framing Trans Rights*[8], she refers to the history of homosexual relations and explains how they left out the rights of trans people. If LGBTQ communities were to expand their rights to marriage, then they had to appeal to the traditional heteronormative ways of society. At this time, since all marriage laws were put up to public vote, homosexual couples had to somehow persuade the public into allowing them into their current dichotomies of marriage. Traditional dichotomous marriage was seen to be between a male and a female; each person had their own role to play in this union, based on their sex. So, for gay and lesbian relationships to be allowed into the sphere, they had to somehow appeal to the traditional male/female dichotomy. This left out those who could not conform their relationships to that male/female dichotomy. In adverts, when LGBTQ groups were trying to expand their rights, they would show a man and a man living in the house following the traditional roles of a husband and wife. It worked for some states, however, it failed to include trans and nonbinary and intersex people. This is important, since this appeal to the essentialism of marriage conducted by these homosexual relationships does not include those who cannot fit a male/female dichotomy. Those who flow between their sexes are not included in this essentialist ideal either. And thus, we can see that the economies in the tort law historically have begun to leave out people who flow between categories.

When referring to race, dichotomy's leave out those who don't add here to the traditional norms we see his race. US census data[9] requires a minimum of 5 races to collect data over:

[8] Marie-Amelie George, "Framing Trans Rights," Northwestern University Law Review 114, no. 3 (2019): 555-632

[9] Bureau, US Census. "About the Topic of Race." Census.gov. United States Census Bureau, March 1, 2022..

White, black, Native American, Asian, and Hawaiian/Pacific Islander. By collecting data over a minimum of 5 population groups, we are assuming that of these 5 groups, there is a truth about their race that binds everyone in that group together. These five groups simplify racial issues to 5 distinct categories, omitted the experience of multiracial individuals and the intersection of other identities.

Dichotomies in tort law treat people as static. That, a single person can fit within matrices of race and sex categories and nationality, and that somehow there is a syllogism that can help us understand a person's existence through the categories that they best fit in. However, as we have seen through the growth of the LGBTQ movement to include trans and queer people, we can begin to understand that this essentialist approach to law fails to see people as multiplicitious and dynamic.

3. QUEER AND MULTIRACIAL

I have referenced both members of the LGBTQ community and multiracial individuals alike throughout the duration of this paper. I focus on these groups specifically due to their ambiguity within the law. Although both LGBTQ and multiracial individuals are protected under the Civil Rights Act of 1964, the actual application of the protections defined by this act vary. Each group faces their own unique form of simplification under the law. I will be referring to intersex, nonbinary, trans, queer, and multiracial individuals throughout this paper, but the issues faced by these groups vary.

Intersex refers to individuals born with physical attributes of both male and female bodies. Intersex is a wide-encompassing term, referring to any variety of mixed physical attributes. Some individuals have XXY chromosomes. Others have genital of both sexes. Some people have genital that aligns with their genome, but glands that differ. Today, somewhere between 0.05% - 1.7% of the world is intersex, of some type, according to the United Nations for LGBT Equality[10]. Intersex individuals face the problem of self-identifying. Currently, 21 states allow for individuals to mark their gender with an X on their driver's license, and 15 states allow for a gender X on a birth certificate[11].

X as a gender marker on legal documents is not only important for intersex groups, but non-binary groups as well. Non-binary refers to those who do not identify with either male or

[10] United Nations for LGBT Equality. "Fact Sheet Intersex." *Free and Equal*, n.d.

[11] Movement Advancement Process. "Identity Document Laws and Policies: Driver's License." *lgbtmap.org*, November 22, 2021.

female gender norms. Non-binary is a diverse term and differs depending on who you ask. Some non-binary individuals feel that they are something between a male or female, some feel that they are a sex outside of the traditional spectrum, and some simply cannot define their gender identity[12]. Both intersex and non-binary individuals face the problem of ambiguity when it comes to legal dichotomies. Even though some states do allow for a gender X, this does not extend to federal protections between males and females. Title 9, for instance, requires equal funding between male and female sports teams. This of course leaves out those who are neither male nor female. So, we must ask ourselves, how do we determine funding for these teams when they fall outside the male/female dichotomy?

Another term that will be important to this paper is transgender. transgender refers to those who have identify with the gender opposite of their genome. For instance, if someone has female genitalia but identifies as a male, he would be transmale. This identification is independent of whether an individual has had any sort of transitional procedures, ranging from hormonal injections to sex reassignment surgery (SRS). Today, there are three states that do not allow for an individual to change their sex on their birth certificate – Tennessee, Oklahoma, and West Virginia. Fourteen states require proof of SRS, or a court order. Nine states have vague or

[12] "Understanding Non-Binary People: How to Be Respectful and Supportive." National Center for Transgender Equality, October 4, 2018. https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive.

unclear laws regarding changing gender markers on birth certificates[13]. Plenty of transexual civil cases have been tried in the supreme court within the past 20 years as the LGBTQ movement grew in its acceptance of a wider spectrum of sexual identifications and orientations. Even more so, legislation has been written to either include or exclude transexual citizens. In the United States District Court for the Middle District of North Carolina, Governor Patrick L. McCrory was sued for his paradoxical bill, HB2, that extended on antidiscrimination laws in North Carolina, but also forced transgender individuals to use the bathroom that corresponded with their biological gender. This was a major step back for the LGBT movement in North Carolina. Requiring people to go to the bathroom based on their biology erases the identities of trans Americans and puts these people in an uncomfortable position. In the end, this nondescript law was overturned, and was required to be revised[14].

Sex remains a difficult identifier under the law because of the ambiguities in sexual identification. As a result of the increased visibility of the LGBTQ community, our definition of sex has expanded to include a spectrum of identities. Laws that rely on a male/female dichotomy fail to include other identities that fall within this spectrum of sex.

We also see this with racial identities. Depending on how you racially identify within the law determines things like financial aide and affirmative action when applying to schools. Statistics based on racial distributions is foundational to how we draw voting districts within states. These laws rely on the essentialist idea that everyone within a specific race or sex has

[13] Movement Advancement Process. "Identity Document Laws and Policies: Driver's License." *lgbtmap.org*, November 22, 2021.

[14] Carcano v. McCroy: United States District Court for the Middle District of North Carolina

some sort of binding truth that relates them. But just like every woman or man's experience differs from the next, so does racial identity.

Self-identification can become more complicated if an individual identifies falls under multiple racial identities. Racial identity can be defined in two ways – by one's internal racial identity, and by ones external racial identity. In David Harris and Joseph Jeremiah's piece *Who is Multiracial? Assessing the Complexity of Lived Race*[15], race includes both one's internal and external racial identity. Internal racial identity is how one identifies themselves. Internal racial identity is defined as "what an individual believes about his or her own race…", and external racial identity is "observer's beliefs about an individual". In the overlap between the two of these, there is expressed racial identity: "words and actions that convey beliefs about an individual's race".

Racial identity is a blend of one's intrapersonal and interpersonal persona, and their interaction with the world. Race does not assume some inherit truth about individuals, but instead measures how the world looks at them, and how they interact with the world. This definition allows for the complexity of multiracial individuals, those who's racial identities do not fit into an easy definition of race. There are a couple ways to experience one's multiracial identity. Some define their identity through how their ancestors would define themselves. Others use their day-to-day culture as a definition of their identity. Some let others define them and use their visual representations of race as their identity.

[15] Harris, David R., and Jeremiah Joseph Sim. "Who Is Multiracial? Assessing the Complexity of Lived Race." *American Sociological Review* 67, no. 4 (2002): 614–27.

All these ways of identifying race and ethnicity hold no legal precedent. When asked to self-identify, multiple boxes can be ticked to be used to identify race. But how does one determine which boxes to tick? Is it from our external identity – do we determine which boxes we tick by asking ourselves what someone else would tick for us? Or is it from our internal identity – how we chose to identify ourselves, even if it's not obvious to the passive perceiver. Racial identity is vast and multifaceted, which an infinite array of various racial identities that one can identify by. These are determined by a combination of how we identity ourselves, how others identify us, and how our actions and speech would identify us.

Requiring people to identify race for the sake of legal protection and statistics is the same as asking people to identify their sex – both lead to an infinite number of identities that can be returned. This doesn't work with a dichotomous legal system, which requires at least a finite number of categories to put individuals in. This "matrix of oppression" as defined by Ben Glassman[16] falls short when people identify themselves in ways that do not work with traditional essentialist views.

[16] Ben Glassman, "Foreword: Categorical Exclusivity," Harvard Blackletter Law Journal 15 (1999): 29-40

4. ANTI-STRUCTURE/ANTI-OPPRESSION MODEL

In Maria Lugone's piece, *Structure/Antistructure and Agency Under Oppression*[17], she composes a five-part syllogism to break out of oppression from structure:

> *"If we use the concept of structure and antistructure, and understand structure as construing real persons and not just the masks of persons, and we acknowledge that there is more than one structure in which the in-some-sense the same person lives, and we acknowledge that people can go in-between structures, and that it is possible to be without structure and thus without structural construction, then we do not have to appeal to the ahistorical, acultural, asexual, without race or gender, without a system of production within which her productive activity has meaning transcendental ego, in order to understand liberation from oppression."*

According to this structure, to break oppression, we need five things: acknowledge that there are structures, that structures refer to real people, people can exist in multiple structures, people can move between structures, and people can be without structure. This model, which was originally made as a syllogism to break oppression through societal norms and expectations, can also be applied to our legal definition of dichotomies.

[17] Maria Lugones, "Antistructure/Structure and Agency Under Oppression". The Journal of Philosophy , Oct., 1990, Vol. 87, No. 10, Eighty-Seventh Annual Meeting American Philosophical Association, Eastern Division (Oct., 1990), pp. 500-507

The first part of our syllogism acknowledges that structures are real. For the rest of this paper, structures will refer to dichotomies that were defined in the previous portion. We understand that dichotomies are essential to our legal system because the system relies on the essentialized approach to identifying cases. Dichotomies are a result of logistical syllogisms, which is our process for classifying cases.

The second part of Lugone's model states that structures refer to real people. When working with legal dichotomies this will exclude cases where the importance of the individual is unnecessary to the case. This will mostly refer to criminal cases, where the plaintiff is the state and not an individual who has experienced any type of harm. With this discrepancy in place, we understand that this anti structure and anti-dichotomy model will refer to tort cases, more specifically, civil cases. In these cases, the identity of the plaintiff is essential to the ruling of the case, and therefore we can understand that these dichotomies will refer to the individuals experience. Dichotomies in civil and tort cases must refer to real people.

The third part of Lugone's model states that people can exist in multiple structures. In previous portions of this paper, I defined identities that have difficulty defining within the law. Those who are multiracial, or nonbinary or transsexual all exist within their own overlaps of identities. These overlapping and multifaceted identities would be defined as existing within different dichotomies within the law. This does not refer to how people identify themselves, instead, how the law would look at a person. Take for instance transsexual individuals; although a transsexual individual would define themselves as a single sex when treated in the law, they would be split between their own self-identity and their own genomic sex. The same goes for multiracial individuals; although once identity might be seen as something that's unique to them,

our current legal system requires people to identify as some type of race, even if that means they must take a couple boxes on the census.

The fourth part of Lugone's model states that people can move between structures. At birth, people are defined as male or female. There was not a system built in that allowed people to change their identity throughout life. But today, we see people changing their identities as time moves on, as they move through life and begin to understand their own sexual identity more. As such, these people are moving between legal structures. By discovering your own identity throughout life, this requires a change in birth certificates and licenses, something that wasn't possible until about 20 years ago[18]. Perhaps an intersex person spends their life trying to find their own sexual identity and chooses to change their paperwork as they go through life. This would be an example of moving between structures. Perhaps people can experience different facets of their culture more in different portions of their life, which would cause people to exist in different racial identities throughout their life. Either way, the law needs to be able to allow for changes in dichotomies throughout a person's life.

The final part of Lugone's model refers to people who are without structure. When it comes to our idea of dichotomies, this doesn't mean somebody exists without any sex or any race. This refers to the essentialism idea; that by putting people in dichotomies we understand some sort of essentialist truth between all of them. Now, how would you define a person whose identity is so unique that there's no one else in their dichotomy? This person's own dichotomy would only consist of them. Since there is no other individual within this dichotomy, we can't

[18] Ann E. Tweedy, "Opening up the Law to Accommodate Non-Binary Genders," Jotwell: The Journal of Things We Like (Lots) 2019 (2019): 1-2

derive an essentialist truth, and the idea of a dichotomy falls short unless there is more than one person to define. So, to be without structure, you just must exist in a dichotomy that only consists of you.

5. THE CIVIL RIGHTS ACT AS A NON-DICHOTOMOUS LAW

With Lugones' model in mind, we can begin to apply these five logistical syllogisms to begin to understand what a non-dichotomous law looks like. Since the problem with dichotomies relates to how we categorize people under the law, thus restricting us to civil law. In addition to this, we need a law that grants civil liberties, without requiring self-identification Because of this, the Civil Rights Act of 1964 perfectly encapsulates a non-dichotomous law.

> *"It shall be unlawful…to discriminate against, any individual because of his race, color, religion, sex, or national origin"*[19]

Civil Rights Act of 1964 knowledge is all five parts of Lugone's model. It acknowledges that there are structures, that structures refer to real people, that people can exist in multiple structures, the people can go between structures, and that people can be without structures. Civil Rights Act in 1964 wrote the precedent for a plethora of groundbreaking anti-discrimination cases, all because of its variety of ability and its capabilities to grant protections without requiring self-identification.

The Civil Rights Act of 1964 acknowledges structures and they're existence by banning discrimination. By banning discrimination, there is an acknowledgment that discrimination exists because of these presidencies. If you acknowledge discrimination, you acknowledge the separation into dichotomies that led to this discrimination. For instance, if we acknowledge that discrimination against the LGBTQ population exists, then we are acknowledging the existence of the LGBTQ community, therefore acknowledging the structures that these people exist in. So, by

[19] Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

banning discrimination, we acknowledge that there are structures, both social and legal, that people can fall in.

We also understand that the Civil Rights Act refers to real people. This part of Lugone's structure restricts our structure to civil cases. Since civil cases bring forth problems relating to a person's identity, this makes the individual in these cases the forefront of the issue. Because of this, our anti-dichotomy model cannot refer to case where a breach of contract, or a bad action, is the heart of the case. Criminal law cannot fall under this structure since the precedent of these cases has to do with the action that the person committed, and not the person's identity. Same goes with contract law – these laws must remain dichotomous since they do not have to do with the individual, but instead the breach of contract committed by an individual. Because of this, our anti-dichotomous model can only refer to civil laws.

The Civil Rights Act allows for people to exist in multiple structures. The Civil Rights Act ban discrimination on the basis of race, sex, national origin, etc. The Civil Rights Act did not ban discrimination against men or women necessarily – instead, it banned discrimination on the basis of sex. Protections were offered based on spectrums of identities, not individual identities. This allows for more fluid definitions of identity since no self-identification is required when we ban discrimination throughout an entire spectrum. An individual is not required to have a sexual identity, and they'll still be granted protections as long as cases have to do with your sexual identity. Because of this, you can exist in multiple identities along this spectrum.

This also allows for people to move between structures. Since the Civil Rights Act bans discrimination on the basis of spectrums, there's nothing saying that you can't change your identity throughout your life. Perhaps how you define your race or your sex or your national origin changes as you go through your life and your identity becomes more complicated, but this

doesn't mean you'll lose protections because you changed your identity. Since the Civil Rights Act doesn't require self-identification, and bans discrimination throughout an entire spectrum of identities, it allows individuals to move along these spectrums.

This spectrum-based approach allows for individuals to also be without identity. This refers to the idea of essentialism. For essentialism to work, there must be multiple people within one dichotomy. This allows us to assume a universal truth between all the individuals within this dichotomy. However, this falls short if you're the only person within your own identity. Perhaps you're the only person with a specific racial identity at your school, or you're the only one of your friends with a specific sexual orientation. These people are without dichotomy. The idea behind essentialism falls short when there's only one person being categorized. You can't assume a universal truth behind a singular individual. Given this, we can assume that the Civil Rights Act grants protections without requiring someone to fall within a category at all.

The Civil Rights Act fits within all of Lugone's syllogism. It acknowledges that structures are real, and acknowledges that people fall within structures, and offers protections for those with identities that fall on any given spectrum, without requiring self-identification. The Civil Rights Act grants protections without categorizing us, therefore making it non dichotomous.

Lugone's syllogism is heavily restricted to just the Civil Rights Act. the second clause of our syllogism restricts us to civil cases, and the third and fourth restrict us to a spectrum-based laws. Plenty of antidiscriminatory and civil rights laws have been passed since the ratification of the Civil Rights Act that have either specified or extended upon the Civil Rights Act, but none of these laws fit all five clauses of our syllogism.

6. THE PROBLEMS WITH NON-DICHOTOMOUS LAWS

If the Civil Rights Act in 1964 is our only example of a non-dichotomous law, we can use it as a model to analyze the efficacy of non-dichotomous laws. There's no real contention over the creation of the Civil Rights Act, however there are a lot of cases involving clarification of the Civil Rights Act, and laws that came out following the Civil Rights Act meant to clarify it.

Almost every case since the 60s pertaining to civil rights has referred to the Civil Rights Act in some sort of fashion. Cases like Bostock v. Clayton County[20] for example: Gerald Bostock is a gay man who was fired from his job with Clayton County after joining a gay recreational softball team. This case ruled in favor of Bostock, referring to the Civil Rights Act, and its protections against discrimination on the basis of sex.

Gavin Grim V Gloucester County School Board[21] is similar to this case. Gavin Grim was a trans-male student at a public high school who was prohibited from using the men's restroom. Following Grim coming out as trans, the school created a rule restricting those with "gender identity issues" from using the restroom that their identity aligned with. The courts ruled in favor of Grim.

Both cases referred to the Civil Rights Act of 1964 in their decisions. Both cases are wins for the LGBTQ+ movement. However, when it comes to non-dichotomous protections, these

[20] "Bostock v. Clayton County." Oyez. Accessed April 4, 2022. https://www.oyez.org/cases/2019/17-1618.

[21] Grimm v. Gloucester County School Board, No. 19-1952 (4th Cir. 2020)

cases both added specifications onto the Civil Rights Act. These cases ruled to offer job protection for homosexual individuals, and bathroom protections in public spaces for transexual/transgender individuals. By creating these protections, these ruling required identification. Both rulings for these cases refer to the identities of the individual, requiring that protections be offered to Bostock due to his homosexuality, and to Grim due to his transgender identity, thus requiring some type of identification.

The requirement to identify comes in conflict with the anti-dichotomous model. By requiring identification, individuals are unable to move between identities, be without identity, or exist in multiple dichotomies. For instance, rights granted to transgender individuals would have to be retried in court if a person was to change their identity throughout life. When it comes to bathroom protections, by ruling that transgender individuals can use their respective bathrooms, little clarity is granted for those who flow between their identities, or perhaps do not fit within the male/female dichotomy, as is the case with nonbinary and intersex individuals. The rulings for these cases only uphold the dichotomies that we already have in place. The rigid definitions created under civil laws leads to more cases, requiring more clarity on a law that should grant protections, regardless of identity.

We have seen this occur with racial identities as well. At the time I am writing this paper, the Students for Fair Admissions v President and Fellows of Harvard[22] remains to be ruled upon. The case argues that affirmative action directly defies the Civil Rights Act by creating a disadvantage for Asian American students applying to more competitive schools that receive

[22] "Students for Fair Admissions v. President and Fellows of Harvard College." Oyez. Accessed April 4, 2022

many Asian American students, like Harvard. This case, in juxtaposition with Fisher v. University of Texas[23], was brought forth by a group of Asian American students, who are traditionally a minority group within the United States. This case has yet to be ruled on. Regardless of ruling, however, protections based on race require racial identity. More specifically, protections for minority groups tend to be based on external racial identity, since more competitive schools will include some form of interview in the application process.

When laws offer protections for singular racial groups, how protections should be offered to those who blend between groups can remain ambiguous. In the case of Harvard lowering Asian American admittance, what makes someone Asian American? If a child has a Japanese parent and a white parent, do they put on their applications that they're white or that they're Japanese? On Harvard's application, it might be advantageous to hide your Japanese background, whereas at other schools it would work in your favor. This fluidity of identification is different from the fluidity that Marina Lugones talked about. This fluidity is a direct result of legal dichotomies. Instead of offering protections for those in minority or mixed groups, it instead requires someone to rank their own mix of race, and choice which identity benefits them most in that moment. Ben Glassman's concept of essentialism remains true, that if we are breaking people into categories, we are only doing it to rank them. This requirement for identification instead leans into the problems with intersectionality.

Protections granted on race and sex require more identification under the civil rights act than less. Ideally, as a non-dichotomous law, protections should be granted without a

[23] "Fisher v. University of Texas." Oyez. Accessed April 4, 2022. https://www.oyez.org/cases/2015/14-981.

requirement for identification. However, as we have seen through the rulings of multiple cases, even though the Civil Rights Act exists as a non-dichotomous law, the lived experience of this law has led to rulings from judges that end up putting in their own forms of dichotomies.

Laws have been implemented following the Civil Rights Act that upheld traditional social dichotomies, that were not referenced in the Civil Rights Act. Title VI of the Education Amendments of 1972 is probably the most famous. Title IV required that protections and funding for male and female programs be equal in stature. It states that:

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.

On the surface, this appears as a non-dichotomous law – it's protections "on the basis of sex" allow for a fluid definition of sex. However, Title IX was created to "overcome effects of discrimination," meaning that it leans into its dichotomies to offer protections to individuals on the basis of sex. Title IX allows for male/female only teams, such as the NCAA. It allows for male/female groups, as long as they are equal in stature and funding, if they receive federal funding. This paved the way for Greek life groups, the YMCA, the Girl Scouts of American, etc. All these groups are allowed to segregate on the basis of sex, as long as federal funding does not favor any particular group. This creates a strict male/female dichotomy in higher education, which has led to confusion over trans students, nonbinary, and intersex students. Title IX, which was made to extend the rights of the Civil Rights Act to higher education, only created ambiguity when it comes to categorizing people that do not perfectly fit a male/female dichotomy or that fall outside of the male/female dichotomy.

Both Affirmative Action and Title IX were created to address injustices that arise from discrimination, both past and present. By doing this, both laws require self-identification, and both laws fail to encapsulate the complexities of identity, and the intersection of these identities. Both extended on the Civil Rights Act with their protections, which means for all cases pertaining to Title IX and Affirmative Action, the Civil Rights Act will also be cited for its protections. However, what these laws fail at that the Civil Rights Act succeeds in, is allowing for multitudinal and fluid identities.

7. CONCLUSION

Maria Lugone's anti-oppression model, originally written in the context of social oppression, dictates a 5-part syllogism that translates easily into our legal system. For us to write a non-dichotomous law, we first need to acknowledge that structures exist. For Lugones, this means acknowledging the social structures that we exist in. For our legal system, this means acknowledging the societal dichotomies that have crept into our legal system, creating their own legal dichotomies. The second part of our syllogism states that structures refer to real people, not masks of people. This excludes social media personas from our system, and when we are referring to the law, restricts this non-dichotomous system to civil cases, where the injustice of the case depends solely on the identity of the party seeking remedy. The next three clauses refer to the nature of an individual's identity: individuals can exist in multiple dichotomies, they can move between these dichotomies, and they can exist without dichotomies. The Civil Rights Act allows for all three, by detailing protections based on spectrums of identity, instead of offering protections for specific populations.

The issue with non-dichotomous laws, however, is not in the format of their writing, or the instance of their protections, but instead on their lived experience. The Civil Rights Act requires no identification, however, in cases and laws that extend on the Civil Rights Act, lawmakers and judges have created and upheld dichotomous systems that should originally exist separate from this law. Cases that offer protections for trans individuals leaves out nonbinary and intersex individuals. Laws that grant protections for minority groups give little clarity for what to do with multiracial individuals. In addition to this, these protections are based on an individual's

external identity, meaning how society sees them, and not on their own intrapersonal identification.

Continuation of this research is needed to amend these issues. This research was intended to outline how to write a non-dichotomous law, and to act as a how-to guide for future law makers in creating laws that require no identification. Non-dichotomous laws are eternal in their phrasing, allowing for future changes in identity and social justices to be included in its wording. The only problem that remains rests on the shoulders of the lawmakers and judges who possess the ability to uphold societal dichotomies through rulings and statutes.

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