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Transforming Legal Sex

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TRANSFORMING LEGAL SEX*

NOA BEN-ASHER**

Legal sex in the United States is undergoing a dramatic transformation. By "legal sex" this Article refers to various instances in which legal authorities engage in defining an individual's sex, either directly or indirectly. This Article begins by charting this transformation and then draws on this history to rethink the current political moment.

Until around the mid-twentieth century, legal sex was mostly understood as immutable sexual difference between males and females that is biologically determined prior to birth. Groundbreaking scientific and medical theories in the 1950s introduced gender identity as a new way to describe an internal sense of being male or female. Since then, in slow steps, this concept has been integrated into various areas of law and policy. Today, the trend in U.S. law is toward viewing gender identity, defined as "an individual's own internal sense of whether they are a man, a woman, or nonbinary," as a central characteristic of legal sex. While there is not one coherent definition of sex across all areas of law, this Article observes that the trend across legal domains, including sex reclassification laws, antidiscrimination laws, and family laws, is clear: the legal system is shifting towards gender identity as the primary indicator of legal sex.

This Article demonstrates why it is urgent to name and evaluate this transformation. As of 2023, lawmakers have introduced and passed hundreds of bills and policies that target transgender people by undermining the incorporation of gender identity into legal sex. They call instead for narrow notions of immutable "biological sex" that is fixed at birth. This Article situates the current backlash against transgender people as an attempt to roll back laws, policies, and societal norms that view gender identity as the primary indicator of legal sex.

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The Article proposes that advocates on behalf of transgender people engage current debates about gender identity by insisting on the moral desirability of future generations of transgender people.

INTRODUCTION

An extraordinary thing is happening in American law: legal sex is changing. Across different areas of law and policy, legal sex has transformed from what it was even two decades ago. Up until the closing decades of the twentieth century, legal sex was understood by many courts and lawmakers as an immutable sexual difference, biologically determined prior to birth, and defined by gonads, hormones, or genes.[1] Today, the trend in U.S. law is toward framing legal sex as *gender identity*—defined as "[a] person's internal, deeply held sense of their gender."[2] Legal sex is now, for a growing number of legal and policy purposes, located in the gendered mind. How has this transformation happened? How has it affected the recognition and rights of transgender people?[3] The Article considers both questions.

By "legal sex" this Article refers to various instances in which legal authorities and policymakers engage in defining an individual's sex, either directly or indirectly. There are times when legal authorities must define legal sex directly in order to resolve a legal conflict, such as determining whether an individual should be legally classified as a mother or a father,[4] or whether a sex

1. *See, e.g.*, Anonymous v. Weiner, 270 N.Y.S.2d 319, 322, 324 (Sup. Ct. 1966) (endorsing a health board's definition of legal sex as chromosomal sex); Hartin v. Dir. of the Bureau of Recs. & Stat., 347 N.Y.S.2d 515, 517 (Sup. Ct. 1973) (same); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 n.4 (9th Cir. 1977); Powell v. Read's, Inc., 436 F. Supp. 369, 371 (D. Md. 1977).

2. GLAAD, GLAAD MEDIA REFERENCE GUIDE 10 (10th ed. 2016), https://publicwebuploads.uwec.edu/documents/GLAAD_Media_Reference_Guide.pdf [https://perma.cc/N9L3-F52G] ("Gender Identity: A person's internal, deeply held sense of their gender. For transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices . . . .").

3. This Article uses the term "transgender" to refer to both trans and nonbinary identifications. The term trans here describes those whose gender identity does not match their birth assigned sex. And the term nonbinary describes those who do not exclusively identify as a man or a woman. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 897–98 (2019) (observing that not all those identifying as trans are nonbinary and not all those identifying as nonbinary identify as trans).

4. Beatie v. Beatie, 333 P.3d 754, 760 (Ariz. Ct. App. 2014) (holding that a party's Hawaii-issued birth certificate must be given full faith and credit, and that denying his recognition as male would violate his constitutional rights under the Equal Protection Clause of the U.S. Constitution). For discussion of this case, see *infra* Section III.B.3.a. *See also* J.K. v. Registrar Gen. [2015] EWHC

marker on a birth certificate ought to be changed.[5] At other times, legal authorities have to define sex *indirectly* in order to decide whether a legal rule is applicable to transgender litigants, such as sex discrimination claims under Title VII of the Civil Rights Act of 1964 ("Title VII"),[6] Title IX of the Education Amendments of 1972 ("Title IX"),[7] and the Equal Protection Clause.[8] While there is not one coherent definition of sex across all areas of law,[9] this Article observes that the trend across legal areas, including sex reclassification laws, antidiscrimination laws, and family laws, is clear: the legal system is shifting towards recognizing gender identity as the primary indicator of legal sex.

As important as it is to name and evaluate this transition in legal sex, it is even more urgent to assess the virulent pushback from conservative legal and political actors. In the past several years, conservative lawmakers and politicians have proposed and passed hundreds of bills that target transgender children and adults.[10] These laws, court decisions, and policies downplay or reject altogether the centrality of gender identity as a defining component of legal sex.[11] Such laws and policies, currently in various stages of enactment, involve access to locker rooms and restrooms, sports, gender-affirming care, and antidiscrimination protections.[12] What they all have in common is that they reject the primacy of gender identity and call instead for reliance on narrow

(Admin) 990, [50(iii)], [129] (Eng.) (holding that a transgender woman must be registered as a father if she provided the sperm in the making of her child).

5. *In re* O.J.G.S., 187 N.E.3d 324, 325–27 (Ind. Ct. App.) (denying change of birth certificate to reflect female identity of seven-year-old transgender girl). For further discussion of this case, see *infra* Section III.B.3.b.

6. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to e-17); *see, e.g.*, Soule *ex rel.* Stanescu v. Conn. Ass'n of Schs., Inc., 57 F.4th 43, 55 (2d Cir. 2022).

7. Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373–74 (codified as amended at 20 U.S.C. § 1681(a)); *see, e.g.*, Parents for Priv. v. Barr, 949 F.3d 1210, 1217, 1226–29 (9th Cir. 2020).

8. U.S. CONST. amend. XIV, § 1; Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 606–09 (4th Cir. 2020); *see infra* Sections II.B.1.b, III.B.2.b (discussing gender identity protections in antidiscrimination laws).

9. *See, e.g.*, PAISLEY CURRAH, SEX IS AS SEX DOES: GOVERNING TRANSGENDER IDENTITY 111 (2022) (observing that sex is defined differently for different legal purposes).

10. For discussion of specific legislation in Alabama, Texas, Florida, and other states, see *infra* Section III.B.3.

11. While there are many legal strategies to undermine the centrality of gender identity, one recently taken by the Fifth Circuit is to present gender identity and pronouns as an area of legitimate legal and public debate. The court opined that "[i]ncreasingly, federal courts today are asked to decide cases that turn on hotly-debated issues of sex and gender identity." United States v. Varner, 948 F.3d 250, 252, 256 (5th Cir. 2020) (holding that courts are *not* obligated to respect preferred gender pronouns of litigants).

12. For tracking of anti-trans bills introduced in 2023 across the country, including legislation that seeks to block trans people from receiving basic healthcare, education, and legal recognition, see TRANS LEGIS. TRACKER, https://translegislation.com [https://perma.cc/G4MQ-2RNF].

notions of immutable "biological sex."[13] As Jessica Clarke has observed, these laws and policies generally reject the notion of "sex *assigned* at birth" that advocates on behalf of transgender litigants have used since the 1990s.[14] Instead, they promote an immutable notion of sexual difference that is biologically determined prior to birth. This backlash has received much-needed scholarly attention.[15]

This Article makes two contributions to this scholarship. First, by taking a long-term perspective, starting from the end of the nineteenth century, and examining how legal sex has changed over more than a century, this Article positions current assaults on transgender people as a response to a seismic event; they are attempts to reverse the fact that legal sex is changing. That is not to say that harmful and discriminatory laws and policies should not be taken seriously and challenged. They should. The Article argues, however, that if we look across areas of law, across different eras, we can contextualize the current backlash as an attempt to roll back laws and policies that already view gender identity as the primary indicator and best predictor of legal sex.

Second, this Article positions current legal battles about transgender rights and gender identity in broader legal, political, and social debates in the United States about sexual morals.[16] These debates, sometimes referred to as the "culture wars," have included topics such as state restrictions on reproductive rights, bodily autonomy, sodomy laws, and same-sex marriage.[17] Given that

13. Jessica A. Clarke, *Sex Assigned at Birth*, 122 COLUM. L. REV. 1821, 1823 (2022) [hereinafter Clarke, *Sex Assigned at Birth*].

14. *See id.* at 1823–84.

15. *See, e.g.*, Ido Katri, *Transitions in Sex Reclassification Law*, 70 UCLA L. REV. 636, 705–12 (2023) [hereinafter Katri, *Transitions*]; Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1406 (2023) (arguing that "contemporary transgender constitutionalism challenges many of the assumptions of constitutional law scholars"); Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1073–75 (2023); Clarke, *Sex Assigned at Birth*, *supra* note 13, at 1875–76; Shannon Price Minter, *"Déjà Vu All Over Again": The Recourse to Biology by Opponents of Transgender Equality*, 95 N.C. L. REV. 1161, 1187–90 (2017); Scott Skinner-Thompson, *Identity by Committee*, 57 HARV. C.R.-C.L. L. REV. 657, 713 (2022); Ezra Ishmael Young, *Transgender Originalism* 24–25 (Mar. 31, 2022) (unpublished manuscript) (on file with the North Carolina Law Review); Kris Franklin & Noa Ben-Asher, *How To Bring Your Kids Up Queer: Family Law Realism, Then and Now*, 55 FAM. L.Q. 311, 339 (2022) (discussing legislative assaults on transgender children and youth).

16. *See generally* ANDREW HARTMAN, A WAR FOR THE SOUL OF AMERICA (2015) (exploring historical foundations and consequences of the "culture wars").

17. In the summer of 2022, the six Supreme Court Justices who decided *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), took a stance in these debates. *Id.* at 2240. Justice Clarence Thomas's concurrence is the most explicit about this. *Id.* at 2301 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold* [contraceptives], *Lawrence* [sodomy laws], and *Obergefell* [same-sex marriage] . . . [b]ecause any substantive due process decision is 'demonstrably erroneous . . . .'"). For early critique of this position, see Reva Siegel, *The Trump Court Limited Women's Rights Using 19th-Century Standards*, WASH. POST, https://www.washingtonpost.com/outlook/2022/06/25/trump-court-limited-womens-rights-using-

these "wars" involve sexual morality or ethics, this Article raises concerns about over-reliance on medical and health experts in claims for transgender recognition and rights.[18] Debates about sexual morals cannot be fully engaged in medical-scientific terms because the former involves questions of good and evil—and the latter of health and illness. Although medical experts, since the 1950s, have advocated for transgender patients by explaining the medical approaches to gender identity and treatment protocols to lawmakers and policymakers,[19] this Article proposes that transgender advocates and allies diversify the toolkit of arguments by adding arguments based on morality. The view that it is morally desirable to limit or eliminate transgender future generations drives the current backlash against transgender children and youth.[20] Liberation from gender oppressive regimes can only occur when transgender children and youth are viewed as *desirable* social outcomes, at least as desirable as their perceived opposites.[21]

19th-century-standards/ [https://perma.cc/V7ZV-VJMU (dark archive)] (last updated June 25, 2022, 3:12 PM); Melissa Murray, *Americans Are Losing Their Right To Not Conform*, N.Y. TIMES (July 6, 2022), https://www.nytimes.com/2022/07/06/opinion/dobbs-griswold-abortion-rights-conformity.html [https://perma.cc/T6WG-SWRR (staff-uploaded, dark archive)].

18. For critical discussions of medicalization of trans identities, see, for example, Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 31–32 (2003) [hereinafter Spade, *Resisting Medicine*]; Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 1 (2003) ("[T]ranssexuals secure legal victories only through a disheartening process of medicalization, normalization, and demonstration of traditional sex and gender role adherence."); Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 55 (2006) (arguing for liberty rationales instead of reliance on medical diagnosis of gender identity disorder); Ido Katri, *Sex Reclassification for Trans and Gender-Nonconforming People: From the Medicalized Body to the Privatized Self*, *in* 3 THE OXFORD ENCYCLOPEDIA OF LGBT POLITICS & POLICY 1913, 1920–21 (Donald P. Haider-Markel ed., 2021).

19. For the development of this reliance, see *infra* Section II.A.

20. For popular representation of this sentiment, *see* Ross Douthat, Opinion, *How To Make Sense of the New L.G.B.T.Q. Culture War*, N.Y. TIMES (Apr. 13, 2022), https://www.nytimes.com/2022/04/13/opinion/transgender-culture-war.html [https://perma.cc/M2GS-YBDP (staff-uploaded, dark archive)] ("Within not too short a span of time, not only conservatives but most liberals will recognize that we have been running an experiment on trans-identifying youth without good or certain evidence, inspired by ideological motive rather than scientific rigor, in a way that future generations will regard as a grave medical-political scandal. Which means that if you are a liberal who believes as much already, but you don't feel comfortable saying it, your silence will eventually become your regret."). For further discussion of this view, *see infra* Part IV. Similarly, the view that it is morally desirable to limit or eliminate the number of abortions drove decades of backlash against *Roe v. Wade*, 410 U.S. 113 (1973). *See supra* note 17 (discussing *Dobbs v. Jackson Women's Health Org.*).

21. This idea of liberation is a current articulation of the groundbreaking work of two founders of queer theory. *See, e.g.*, Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 267–68, 294 (Carol S. Vance ed., 1984) [hereinafter Rubin, *Thinking Sex*]; Eve Kosofsky Sedgwick, *How To Bring Your Kids Up Gay: The War on Effeminate Boys*, 9 SOC. TEXT, no. 4, 1991, at 18, 20, *reprinted in* EVE KOSOFSKY SEDGWICK, TENDENCIES 154, 156–57 (Michéle Aina Barale et al. eds., 1993) [hereinafter Sedgwick, *How To Bring Your Kids Up Gay*].

This Article proceeds in four parts. Part I examines what I call the *True Biological Sex Era*, in which, from the mid-nineteenth century until around the mid-twentieth century, medical and legal authorities searched for definitions of "biological sex" or sexual difference. Historians of science have revealed two important characteristics of these years. First, up to the mid-twentieth century medical experts shifted and elaborated their theories on what "true sex" means and what causes it. As this part shows, they prioritized gonads, later hormones, and later chromosomes. Second, studies and experiments about sexual difference were heavily influenced by assumptions and stereotypes about race, gender, and sexuality. While during these years medical ideas about the biology of sexual difference dramatically shifted, an examination of laws and cases involving female husbands and cross-dressing prohibitions reveals that legal authorities in these years mostly viewed legal sex as immutable and biologically determined prior to birth.

Part II explores what this Article calls the *Mind-Body Alignment Era*, in which, from around the 1960s until around the end of the twentieth century, medical and legal authorities began to view sex as an inner psychological phenomenon. The mid-century development of the groundbreaking concepts of "gender role," "psychological sex," and later "gender identity"—and the idea that they are acquired after birth, through socialization and nurture—changed how lawmakers would view legal sex. This part shows how legal authorities from the 1960s and on, in sex classification laws, antidiscrimination laws, family law disputes, and other legal disputes, integrated the idea of gender identity as an inner sense of being male or female, and considered proper legal sex to be an *alignment* of the body with the gendered mind.

Part III calls the opening decades of the twenty-first century the *Gender Identity Era*. Political scientist Paisley Currah has observed that "[b]y the mid-1990s, most transgender advocates in the United States had largely coalesced around [the position that] the state's referent for F or M should be gender identity, not any characteristics of the body."[22] The idea is that "some people turn out to have a gender identity *not* traditionally associated with their birth sex. In that case, gender identity ought to trump the sex assigned at birth."[23] This part observes that in the twenty-first century, in a gradual process, the location of legal sex is shifting from an immutable "biological sex" to gender identity. In sex reclassification laws, antidiscrimination laws, and family laws, courts and lawmakers have gradually adopted the position that gender identity is the defining characteristic of legal sex.[24]

22. CURRAH, *supra* note 9, at 44.
23. *Id.*
24. *Id.* at 68–69.

Part IV places the current legal and political debates regarding gender identity in the broader context of the "culture wars" and urges for advocacy for transgender lives that is less reliant on medical expertise about the scientific truth of sexual difference, and more reliant on the societal value of gender diversity and the future existence of transgender children and adults.

I. THE "TRUE BIOLOGICAL SEX" ERA (MID-19TH TO MID-20TH CENTURY)

From the mid-nineteenth century until around the mid-twentieth century, medical and legal authorities understood sexual difference to be immutable and fixed at the time of birth. I call this long period the *True Biological Sex Era*. In these years, medical ideas about the biology of sexual difference dramatically shifted as medical experts became interested in understanding hermaphroditism and homosexuality.[25] This part summarizes these medical-scientific developments and examines legal cases that reflect them.

A. *A Medical-Scientific Quest for "True Sex"*

In the late nineteenth and early twentieth centuries, sex researchers and medical experts explored what constitutes "true biological sex." They began with prioritizing gonads, switched to hormones, and finally viewed genes as the true indicators of "biological sex." By the early twentieth century, they came to view sex as a combination of "genes, hormones, gonads, genitals, and secondary sex character[istics]."[26]

1. Gonads

In the late nineteenth century, medical and scientific experts in France and Britain who encountered patients with hermaphroditic conditions were

25. The term "hermaphrodite," historically used to refer to individuals whose sex was in doubt, was replaced by the term "intersex" in the twentieth century. *See, e.g.*, ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 4 (1998) [hereinafter DREGER, HERMAPHRODITES]; ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 31–32 (2000); JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 10 (2002); SARAH S. RICHARDSON, SEX ITSELF: THE SEARCH FOR MALE AND FEMALE IN THE HUMAN GENOME 24 (2013); JULIAN GILL-PETERSON, HISTORIES OF THE TRANSGENDER CHILD 9 (2018). In 2006, the medical diagnosis, "Disorders of Sex Development" ("DSD") was introduced as a new name for intersex. *See interACT Statement on Intersex Terminology*, INTERACT, https://interactadvocates.org/interact-statement-on-intersex-terminology/ [https://perma.cc/K2XA-9C7X]. While this term was meant to replace the term intersex, it was heavily criticized by intersex activists. *See id.* The term "intersex" is currently defined by intersex organizations as "the lived experience of the socio-cultural consequences of being born with a body that does not fit within the normative and female." *What Is Intersex?*, THIS IS INTERSEX (2023), https://thisisintersex.org/advanced/10-answers-to-questions-about-intersex/what-is-intersex/ [https://perma.cc/3FRK-VM9V]. Throughout this Article, I will use the term "intersex," unless referring to older texts that use the term "hermaphrodite."

26. RICHARDSON, *supra* note 25, at 8.

eager to define "true" biological sex.[27] As historian Alice D. Dreger has revealed, these experts attempted to solve the scientific mystery with a new theory, "a rather extraordinary, uniform sex classification system according to which every body's 'true' sex would be marked by one trait and one trait only, the anatomical nature of a person's gonads: the ovaries or testicles."[28] Dreger called the period (beginning around 1890) "The Age of Gonads."[29] A "true hermaphrodite" under this theory would be a person who had both ovaries and testicles. Maleness or femaleness was determined by the gonads alone.[30] One of the consequences of this gonad-centered classification was that most "true hermaphrodites" in the nineteenth century would be diagnosed only after death.[31] As historians have observed, most medical and scientific experts assumed heterosexuality to be the only natural, normal, and healthy form of desire,[32] and the eagerness to determine who is male and who is female was connected, at least in part, to an anxiety to affirm heterosexuality.[33]

The gonad-centered paradigm persisted well into the twentieth century.[34] The Brady Urological Institute of the Johns Hopkins Hospital, which opened in 1915, established treatment protocols for hermaphroditic individuals, most of whom were children, for the next four decades.[35] The Institute, headed by Dr. Hugh Hampton Young, would examine patients for external signs of "true sex," and then conduct an exploratory laparotomy.[36] The surgery "represented more or less cutting open the abdomen to look inside for a truth to sex."[37] The outcome would guide the clinic in assigning sex (male or female) to intersex (a then-new term for hermaphroditic) children.[38] Patients were treated, accordingly, with hormones or surgery.[39] Young's methods and treatment

27. DREGER, HERMAPHRODITES, *supra* note 25, at 11.

28. *Id.*

29. *Id.*

30. *Id.*; *see also* Alice Domurat Dreger, *A History of Intersexuality: From the Age of Gonads to the Age of Consent*, 9 J. CLINICAL ETHICS 345, 346 (1998).

31. *Id.* at 3.

32. *Id.* at 110–38.

33. *Id.*

34. GILL-PETERSON, *supra* note 25, at 69; Katrina Karkazis, *The Art of Medicine: The Misuses of "Biological Sex,"* 394 LANCET 1898, 1898 (2019) ("If gonads were understood as the essence of sex, women who were phenotypically female but who had testes were men. This seemed illogical, so scientists proposed yet other traits.").

35. GILL-PETERSON, *supra* note 25, at 70. One hundred and thirty-nine records of hermaphroditism were recorded from 1915 to the 1950s by the Brady Institute at Johns Hopkins. *Id.*; *see also* FAUSTO-STERLING, *supra* note 25, at 42–44 (examining the treatment of intersexuality at Johns Hopkins in the first half of the twentieth century).

36. GILL-PETERSON, *supra* note 25, at 68–69.

37. *Id.*

38. *Id.* at 59–96 (concluding that Young and his colleagues at Hopkins engaged in the medical production of binary sex in the first half of the twentieth century); FAUSTO-STERLING, *supra* note 25, at 42–44.

39. GILL-PETERSON, *supra* note 25, at 68–69, 129–32.

protocols were driven not just by scientific observation but also by his own biases. He frequently ignored a child's "dominant" sex (which we would probably call gender-identity today) if that would lead to homosexuality.[40] In addition, as historian Jules Gill-Peterson has observed, the clinic's practices also had disturbing racial components.[41] While most of the Institute's patients were white, the few Black intersex children were regarded by the staff as "more 'difficult,' combative, irrational, and ultimately disposable."[42] By the 1930s the word spread that Dr. Young could "change a patient's sex," through surgical or hormonal treatment,[43] and young transgender patients started coming to the institute for treatment.[44] From the 1930s and on, twentieth century research data and medical ideas about sexual difference were produced through treating and experimenting on intersex and transgender children.[45]

2. Hormones

Another major development in this period was the study of hormones. According to historian of science Anne Fausto-Sterling, "the discovery of 'sex hormones' is an extraordinary episode in the history of science."[46] Although evidence since 1849 showed that gonads of nonhuman animals acted via chemical secretions, it was not until the turn of the twentieth century that scientists began to consider how they affect human physiology.[47] In 1905, physiologist Ernest Henry Starling coined the term "hormone."[48] Another notable scientist, Francies H.A. Marshall, wrote *The Physiology of Reproduction* (1910), which became the founding text of this new field of reproductive

40. *Id.* at 71 (citing Alison Redick, American History XY: The Medical Treatment of Intersex, 1916–1955, at 95–96 (Sept. 2004) (Ph.D. dissertation, New York University) (on file with the North Carolina Law Review)).

41. *Id.* at 79.

42. *Id.*

43. *Id.* at 80; *see also* FAUSTO-STERLING, *supra* note 25, at 42–44 (concluding that "[i]n addition to being a thoughtful collection of case studies, Young's book [Genital Abnormalities, Hermaphroditism and Related Adrenal Diseases (1937)] is an extended treatise on the most modern methods—both surgical and hormonal—of treating those who sought help").

44. GILL-PETERSON, *supra* note 25, at 80.

45. *Id.* at 68 ("[E]xperimental research on children at the Johns Hopkins Hospital *did* translate the abstract plasticity of sex from experiments in endocrinology into clinical medical technique . . . ."); FAUSTO-STERLING, *supra* note 25, at 43–44 ("Although Dr. Young illuminated the subject of intersexuality with a great deal of wisdom and consideration for his patients, his work was part of the process that led both to a new invisibility and a harshly rigid approach to the treatment of intersexual bodies. . . . [He] nevertheless supplied the next generation of physicians with the scientific and technical bedrock on which they based their practices.").

46. FAUSTO-STERLING, *supra* note 25, at 148.

47. *See id.* at 150.

48. *Id.* Starling defined "hormones" as chemicals that "have to be carried from the organ where they are produced to the organ which they affect, by means of the blood stream." *Id.* (quoting Merriley Borell, *Organotherapy and the Emergence of Reproductive Endocrinology*, 18 J. HIST. BIOLOGY 1, 11 n.22 (1985)).

biology.[49] It showed that ovaries and testes secrete material that influences other parts of the body.[50] British gynecologist William Blair Bell consequently theorized that "femininity itself is dependent on all the internal secretions," and that it was not the gonads but the "sex hormones" that made one a man or a woman.[51] Researchers also studied how these hormones may create masculine or feminine bodies.[52]

At Johns Hopkins as well, the gonad-centric paradigm sometimes had to be ignored when children exceeded its narrow definition of sex.[53] Young and his colleagues often turned to the new science of endocrinology,[54] and hormones sometimes displaced gonads as the best indicator for "true sex."[55] Following a 1916 publication about hermaphroditic cattle, sex researchers increasingly focused on the possible role of hormones as a cause of hermaphroditism.[56] A 1917 text, published and authored by a zoologist at Yale University, states that although it is clearly gametes that cause sex differentiation, the "next problem in regard to sex is to find out what is moved by the distributing mechanism and how it brings about the differentiation of one or the other sex."[57] Medical and scientific attention focused on the hormonal model that emerged in the 1920s and was prevalent until mid-century.[58] Sex hormones, understood as responsible for sexual behavior and secondary sex characteristics, became the primary focus of scientific ideas about sex.[59]

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49. *Id.* at 155.

50. *Id.* ("Marshall massed scientific evidence [in The Physiology of Reproduction] . . . that ovaries and testes secreted 'stuff' that influenced other organs in the body.").

51. *Id.* at 157 (quoting W. Blair Bell, THE SEX COMPLEX, A STUDY OF THE RELATIONSHIPS OF THE INTERNAL SECRETIONS TO THE FEMALE CHARACTERISTICS AND FUNCTIONS IN HEALTH AND DISEASE 5 (1916)). Endocrinological literature from this period theorized that a woman's psychology, that is her desire to leave the "normal sphere of action," depended on the state of her normal secretions.

52. *See id.* at 158–63.

53. GILL-PETERSON, *supra* note 25, at 70, 73.

54. *Id.* at 70. For example, in a 1917 article by Dr. William Quinby, a physician at the institute, discusses a patient whose "dominant sex" did not follow the gonadal sex, and speculates that the "endocrine system" may be responsible. *Id.* at 73–74.

55. *Id.* This patient ended up committing suicide after, having lived his entire life as a man, and then in his thirties and seeking to marry a woman, Dr. Young still (relying on the existence of ovaries) refused to recognize him as a man. *Id.* at 74–75.

56. Frank R. Lillie, *The Theory of the Free-Martin*, 43 SCIENCE 611, 612 (1916) (suggesting that the "free martin" was a female who turned hermaphroditic because of the influence of masculine hormones in embryonic life); *see also* DREGER, HERMAPHRODITES, *supra* note 25, at 73–74 (summarizing early developments in the study of sex hormones).

57. Richard Goldschmidt, *Intersexuality and the Endocrine Aspect of Sex*, 1 ENDOCRINOLOGY 433, 434–36 (1917).

58. CHANDAK SENGOOPTA, THE MOST SECRET QUINTESSENCE OF LIFE: SEX, GLANDS, AND HORMONES, 1850–1950, at 4–5 (2006).

59. *Id.*; *see also* DREGER, HERMAPHRODITES, *supra* note 25, at 73–75; FAUSTO-STERLING, *supra* note 25, at 42–44, 67–68; REBECCA M. JORDAN-YOUNG, BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES 22, 27 (2010).

3. Genes

Another scientific discovery at the turn of the twentieth century was the genetic binary of the X and Y chromosomes. This development brought, as science historian Sarah Richardson put it, "a new and distinctive way of thinking about sex represented by the unalterable, simple, and visually compelling binary of the X and Y chromosomes."[60] Since the second half of the twentieth century, genetics have come to dominate the scientific understanding of sexual difference, and "the X and Y chromosomes, little symbols of sex dimorphism, came to anchor a conception of sex as a biologically fixed an unalterable binary . . . 'sex itself.'"[61]

The medical-scientific quest for the truth of biological sex in the human genome has been driven by gendered cultural norms. As Richardson put it: "Gender has helped to shape the questions that are asked, the theories and models proposed, the research practices employed, and the descriptive language used in the field of sex chromosome research."[62] In fact, "[t]hough often described as the 'female' and 'male' chromosomes, there is nothing essential about the X and Y in relation to femaleness and maleness."[63] That is, "[c]hromosomes are only one form of sex-determining mechanism in the natural world. Birds have sex chromosomes, but the system is the reverse of mammals. In our avian cousins, males have the duplicate larger chromosome (called ZZ), while females are heterozygous (ZW), possessing one larger and one smaller chromosome."[64] In addition, although other chromosomes may contain genes that are relevant for sexual differentiation, "for the past century, the sex chromosomes have been the principal objects of analysis of genetic sex research, and today they continue to dominate the landscape of genomic reasoning about sex and gender."[65] While advances in medical science and technology have enabled altering morphological, genital, gonadal, and hormonal sex, the sex chromosomes have "remained intact as the kernel or foundation of the biological sex concept."[66]

From mid-nineteenth century to about mid-twentieth century, as medicine and science replaced religion as the dominant modes of understanding human sex and sexuality,[67] medical and scientific experts studied human bodies

60. RICHARDSON, *supra* note 25, at 1.
61. *Id.* at 2.
62. *Id.*
63. *Id.* at 6.
64. *Id.*
65. *Id.*
66. *Id.* at 9 (adding: "Conceived as developmentally prior to hormones and culture, the X and Y chromosomes remain our closest approximation to 'sex itself.'").
67. THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 149–92 (1990). Laqueur describes two explanations, one epistemological and one political, for how the

to understand sexual difference. They used terms such as "true sex," "true hermaphrodite," and "biological sex." But these definitions often proved inaccurate in actual patients who came for medical advice, and medical experts ended up shifting their theories on what "true sex" meant and what caused it. In those years, legal authorities also had to respond to uncertainties about sex classifications. We will see that, at least in some contexts (marriage and attire), legal authorities mirrored the medical understanding of sex described here: they viewed individuals as male or female, based on their presumed sex assigned at birth.

B. *Legal Sex as "True Biological Sex"*

In two related and sometimes overlapping scenarios, legal authorities in the late nineteenth to mid-twentieth centuries had to confront the legal significance of sexual difference: female husbands and cross-dressing prohibitions. In both instances, legal authorities, upon facing an inquiry about the legal sex of an individual, associated legal sex with "true biological sex" and not with the gendered mind.

1. Female Husbands

More than a century before the appearance of the term "transsexual," individuals in the United States and Europe, who would be classified as female, married women in official marriage ceremonies, and lived as husbands.[68] They did so in a time when marriage was an institution that only men and women could enter. The press and the public called them "female husbands."[69] Press coverage of female husbands first appeared in the United States in the 1830s and peaked in the 1880s and 1890s.[70] As historian Jen Manion explains, in those years, "the issue of work and geographic mobility features prominently . . . as industrialization transformed home and work for people of all genders on both sides of the Atlantic."[71] Female husbands "became a focal point for debates over women's rights and laws regulating dress."[72]

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concept of sex was invented, and characterizing the epistemological: "[F]act comes to be more clearly distinguished from fiction, science from religion, reason from credulity. The body is the body, said a new group of self-appointed experts with ever more authority, and there are only certain things it can do." *Id.* at 151.

68. *See generally* JEN MANION, FEMALE HUSBANDS: A TRANS HISTORY (2020) (documenting the regular occurrence of people assigned female at birth who lived fully as men in the U.K. and United States from 1746 until just before World War I).

69. Jen Manion, *Female Husbands*, AEON (May 7, 2020), https://aeon.co/essays/may-we-all-be-so-brave-as-19th-century-female-husbands [https://perma.cc/NF8S-NBN9] [hereinafter Manion, AEON].

70. *Id.* at 12–13.

71. *Id.* at 12.

72. *Id.*

The social and legal status of female husbands in the nineteenth century illustrates how sex was understood in those years. Female husbands, once they were "caught" and revealed as women (although they were living and presenting as men), were mostly treated their societies by legal authorities as women.[73] The leading narrative in this reporting was that there is *a truth about sex that is revealed* when the husband is found to have a female body. Female husbands were presented as deceitful women.[74] The sensational revelation of the "true sex" of the female husband sometimes had severe legal consequences such as imprisonment pursuant to cross-dressing prohibitions.

2. Cross-Dressing

In the mid-nineteenth century, cross-dressing was a fixture of U.S. urban life.[75] From mid-nineteenth century until mid-twentieth century, cross-dressing prohibitions were "not idiosyncratic or archaic regulations but foundational city

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73. Manion, AEON, *supra* note 69 ("Early and mid-19th-century American legal authorities knew that gender could easily be changed. Gender was defined largely by one's outward expression—chiefly indicated by hairstyle, clothing, physical deportment and particular habits. Men and women were easily distinguishable by these cues—which made it rather easy for someone to visibly trans gender. So when authorities found someone assigned female who was living as a man, they didn't see it as something distinct or pathological. They didn't think it signalled cross-gender identification to realise same-sex attraction. They believed that it could be 'undone' just as easily as it was 'done' in the first place.").

74. *See, e.g.*, *A Singular Case and a Female Husband*, PENNSYLVANIAN, Aug. 16, 1836, https://www.digitaltransgenderarchive.net/files/p2676v71k [https://perma.cc/K7MZ-NUPU] ("A person, supposed to be a man, was taken up a few days since in New York for drunkenness. It proved, however, that the individual was a *woman*, and likewise a *husband*! . . . She said her real name was Jane Walker. She was examined by a surgeon, and it was found that the statement [regarding] her sex was correct."); *The Female Husband and Male Wife*, NEW REPUBLIC, Mar. 21, 1868, https://www.digitaltransgenderarchive.net/files/tq57nr12c [https://perma.cc/7LBJ-AC8T] (describing a man called Edgar Burnham: "[N]ow having doubts of her gender, [he] determined to escape the inconveniences of her former sex by donning the apparel of a male. . . . Although [Edgar's] singular story was known in his native place, he became a favorite in society, and charmed all by his good looks as well as skill in music. . . . [He] married a beautiful young girl by the name of Miss Gerta Everette, and has since lived with her as her husband."); *A Female Husband*, COOPERSTOWN COURIER, Nov. 9, 1883, https://www.digitaltransgenderarchive.net/files/hd76s028j [https://perma.cc/AZ2M-3Z8N] ("Some months ago the wife of S.J. Hudson . . . mysteriously disappeared, deserting her husband and two children. . . . [The husband's search resulted] in the extraordinary discovery that she had not only been masquerading in male attire since she fled from her home . . . , but had actually won the affections of a young woman living here, and had married her . . . [and] assumed the name of Frank Dubois. . . . Their 'wedded' life, which came to an abrupt termination when the pursuing husband suddenly presented himself [in their home], has, to all appearances, been a happy one."); *The Female Husband*, PRESS DAILY DAKOTAIAN, Nov. 9, 1883, https://www.digitaltransgenderarchive.net/files/ng451h506 [https://perma.cc/MXP7-U3XA]. Dubois told the reporter that he was now able to support his wife, "'and propose to wear pants and smoke and earn my living as a man.'" *Id.* Dubois's wife confirmed "she had married Frank Dubois, . . . and had, on the night of their marriage, discovered that her husband was of her own sex," and "[t]hey had agreed to live together and had done so. *Id.* It was an affair of their own and nobody was concerned but herself," but then "the sensational document was made that the parties were both women." *Id.*

75. CLARE SEARS, ARRESTING DRESS: CROSS-DRESSING, LAW, AND FASCINATION IN NINETEENTH-CENTURY SAN FRANCISCO 3 (2015).

codes that were central to the project of modern municipal government."[76] In the second half of the nineteenth century, thirty-four cities in the United States passed prohibitions against cross-dressing, and eleven more followed before World War I.[77] These prohibitions were part of broader regulation of public indecency. They targeted those "wearing a dress not belonging to his or her sex" or "wearing the apparel of the other sex."[78] Most of these laws were passed by local municipal governments, though California and New York also criminalized avoiding identification through "disguise" or "masquerade."[79]

In a study of cross-dressing laws in nineteenth century San Francisco, Clare Sears shows that cross-dressing laws were "part of a broader legal matrix that was centrally concerned with the boundaries of sex, race, citizenship, and city space."[80] In municipal codebooks, prostitution, cross-dressing, and the public appearance of disabled bodies appeared together in general orders banning "a dress not belonging to his or her sex," "a state of nudity," or any person appearing "deformed so as to be an unsightly or disgusting object."[81] These "problem bodies" appeared together in the local police court, "as cross-dressing offenders shared the holding cells and the police benches with Chinese laborers who violated the city's lodging house laws and city prostitutes who engaged in 'indecent' displays."[82]

As Bennett Capers has reflected, "just as the abolitionist movement, then the Civil War, and then Reconstruction were disrupting the subordinate/superordinate balance between blacks and whites . . . and just as lesbian and gay subcultures were emerging in large cities, jurisdictions began passing sumptuary legislation which had the effect of reifying sex and gender distinctions."[83] When individuals defied cross-dressing prohibitions, they could

76. *Id.* For review and analysis of these rules, see, for example, *id.* at 3–6, 62–77; SUSAN STRYKER, TRANSGENDER HISTORY: THE ROOTS OF TODAY'S REVOLUTION 45–74 (2d ed. 2017); WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 26–29 (1999); I. Bennett Capers, *Cross-Dressing and the Criminal*, 20 YALE J.L. & HUMANITIES 1, 8–9 (2008); Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 151–58 (2010).

77. SEARS, *supra* note 75, at 3 (citing ESKRIDGE, *supra* note 76, at 338–41).

78. *Id.* The cities with cross dressing prohibitions included Columbus, Ohio (1848); Chicago, Illinois (1851); Wilmington, Delaware (1856); Springfield, Illinois (1856); Newark, New Jersey (1858); and many more cities. In Chicago, for example, it became a crime to "appear in a public place in a state of nudity, or in a dress not belonging to his or her sex." *See* ESKRIDGE, *supra* note 76, at 3, 27, 338–41.

79. SEARS, *supra* note 75, at 3–4 (first citing Act of Mar. 30, 1874, ch. 614, sec. 15, § 185, 1874 Cal. Stat. 419, 426–27 (codified at CAL. PENAL CODE § 185 (2023)); and then citing An Act to Prevent Persons Appearing Disguised and Armed, ch. 3, § 6, 1845 N.Y. Laws 5, 6 (repealed)).

80. *Id.* at 10.

81. *Id.* at 11.

82. *Id.* Sears's study of San Francisco reveals that "the cultural circuits of cross-dressing laws sharpened lines between white and Chinese San Franciscans, paralleling and intersecting concurrent attempts to manage racial and national conflicts." *Id.* at 12.

83. Capers, *supra* note 76, at 8 (citing ESKRIDGE, *supra* note 76, at 3, 20).

be arrested, fined, or even deported.[84] One such example is Jeanne Bonnet, who had been arrested in the 1870s "over twenty times for 'wearing male attire.'"[85] Bonnet was fined and jailed, but still said to the judge, "You may send me to jail as often as you please but you can never make me wear women's clothing again."[86] Another defendant, Dick/Mamie Ruble, appeared in court in men's clothing, "walked with a swagger up to the witness stand," and claimed the right to wear men's clothing as a person who was "as much a man as a woman."[87] Cross-dressing laws were enforced by the police and the courts well into the 1970s.[88]

These prohibitions on cross-dressing, which were eliminated by late twentieth-century courts,[89] illustrate that while scientific-medical experts struggled to locate the ultimate marker of "true biological sex,"[90] legal authorities, at least in these contexts, viewed sex as immutable and fixed at birth. The idea of psychological sex (later, gender identity) would begin to transform legal sex later in the twentieth century.

II. THE "MIND-BODY ALIGNMENT" ERA (1960S TO EARLY 2000S)

Gender identity as it is understood in the opening decades of the twenty-first century became a distinct category of analysis in the second half of the twentieth century.[91] This part examines how the idea of psychological sex, and then "gender role" and "gender identity" gradually influenced medical, cultural, and legal understandings of sex and gender since the 1950s. It shows how legal authorities, in different areas of law, integrated the idea of gender identity in what I call the *Mind-Body Alignment Era*.

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84. SEARS, *supra* note 75, at 141.

85. *Id.* at 142.

86. *Id.*

87. *Id.*

88. *Id.* at 3. In 1977, Houston police arrested and charged fifty-three people for dressing to disguise their sex. Capers, *supra* note 76, at 9 (citing Doe v. McConn, 489 F. Supp. 76 (S.D. Tex. 1980)).

89. *See* Capers, *supra* note 76, at 10 & n.58 (summarizing cases that struck down such ordinances, including D.C. v. City of St. Louis, 795 F.2d 652 (8th Cir. 1986); City of Chicago v. Wilson, 389 N.E.2d 522 (Ill. 1978); and City of Cincinnati v. Adams, 330 N.E.2d 463 (Ohio Mun. Ct. 1974)).

90. *See supra* Section I.A.

91. In the past three decades, scholars from many disciplines have studied the origins of the concept of gender, gender role, and gender identity. *See, e.g.*, SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 4–7 (1998); FAUSTO-STERLING, *supra* note 25, at 30–32; MEYEROWITZ, *supra* note 25, at 98–129; SHARON PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF 32–36 (2003); JUDITH BUTLER, UNDOING GENDER 25–34 (2004); KATRINA KARKAZIS, FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE 49–62 (2008) [hereinafter KARKAZIS, FIXING SEX]; JENNIFER GERMON, GENDER: A GENEALOGY OF AN IDEA 1–8 (2009); David Rubin, *"An Unnamed Blank that Craved a Name": A Genealogy of Intersex as Gender*, 37 SIGNS 883 *passim* (2012) [hereinafter Rubin, *Unnamed Blank*]; Jemima Repo, *The Biopolitical Birth of Gender: Social Control, Hermaphroditism, and the New Sexual Apparatus*, 38 ALTERNATIVES 228 *passim* (2013); GILL-PETERSON, *supra* note 25, at 114–20.

A. *The Emergence of Gender Identity in the 1950s*

The concept of "gender" as distinct from "sex" entered feminist law reform in the 1970s after British sociologist Ann Oakley argued that gender "is a matter of culture: it refers to the social classification into 'masculine' and 'feminine.'"[92] This distinction between sex and gender was popularized in the 1950s by John Money, a psychologist at Johns Hopkins, who was studying intersexuality.[93] By the mid-twentieth century, medical experts had reached conflicting theories regarding the biology of sexual differentiation.[94] The science of sex was in crisis.[95] Some medical experts still relied on gonads to determine sex, while others gradually shifted attention to hormones and chromosomes as predictive tools for future sex identifications.[96] The idea of gender role, as advanced by John Money and his colleagues at Johns Hopkins University, would stabilize this crisis by offering a new component to explain sexual difference.[97] The new component was interior, invisible, and yet gradually understood as central in the differentiation between males and females. Intersex children and transgender children and adults provided initial data and support for the theories of Money and his colleagues.[98]

1. The Management of Intersexuality

John Money's work had a decisive influence on the turn of gender into a category that denotes masculinity and femininity as inner perceptions of one's being.[99] In 1955, Money and colleagues published a series of articles that revolutionized medical and social theories about sexual difference[100]: Money's

92. ANN OAKLEY, SEX, GENDER, AND SOCIETY 16 (1972).

93. *See* MEYEROWITZ, *supra* note 25, at 114; GERMON, *supra* note 91, at 2.

94. *See supra* Section I.A.

95. GILL-PETERSON, *supra* note 25, at 97; *see also* MEYEROWITZ, *supra* note 25, at 99–100; Rubin, *Unnamed Blank*, *supra* note 91, at 895.

96. But it turned out that XX and XY were also unpredictable indicators, and there were more chromosomal combinations in humans than the assumed binary. GILL-PETERSON, *supra* note 25, at 115–16.

97. *See* MEYEROWITZ, *supra* note 25, at 114–15; GERMON, *supra* note 91, at 3.

98. *See* KESSLER, *supra* note 91, at 6–7; GILL-PETERSON, *supra* note 25, at 129–61.

99. *See, e.g.*, Rubin, *Unnamed Blank*, *supra* note 91, at 887; GERMON, *supra* note 91, at 2–3; Repo, *supra* note 91, at 241.

100. *See generally* John Money, Joan G. Hampson & John L. Hampson, *Hermaphroditism: Recommendations Concerning Assignment of Sex, Change of Sex, and Psychologic Management*, 97 BULL. JOHNS HOPKINS HOSP. 284 (1955) (recommending, in the case of young infant "hermaphrodites," assigning sex based primarily on the basis of external genitals and how well they could be surgically altered to conform with assigned sex; and in the case of older "hermaphrodites," giving priority to the gender role that has already been established); John Money, Joan G. Hampson & John L. Hampson, *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, 97 BULL. JOHNS HOPKINS HOSP. 301 (1955) (studying the "gender role and orientation" of seventy-six "hermaphroditic" patients in comparison with variables including chromosomal sex, gonadal sex,

basic theory, reflected in these articles, was that "psychological sex" was acquired *after* birth through socialization and was not biologically predetermined.[101] He challenged the then-existing wisdom that psychosexual orientation was biological and innate.[102]

The term "gender role" appeared in Money's 1955 report on treatment protocols for infants with hermaphroditic (intersex) conditions.[103] He characterized the bodies of intersex babies as "ambivalent" or "defective," and reviewed existing indicators of sexual difference: "[c]hromosomal, gonadal, hormonal, and assigned sex."[104] He added that "assigned sex stands up as the best indicator" of outcome in intersex babies.[105] He then concluded that, "[a]pparently, a person's gender role as a boy or girl, man or woman, is built up cumulatively through the life experiences he encounters and through the life experiences he transacts."[106] The gendered postnatal mind, and not the sexed prenatal body, is the better indication of a person's future.[107]

As Money, writing in 1995, later explained his process, "[T]he first step [in 1955] was to abandon the unitary definition of sex as male or female, and to formulate a list of five prenatally determined variables of sex [that] could be independent of one another, namely, chromosomal sex, gonadal sex, internal

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hormonal sex, internal reproductive organs, and external genitalia, and concluding that gender role and orientation was consistent with the sex of assignment and rearing in seventy-two of the seventy-six patients) [hereinafter Money et al., *An Examination*]; John Money, *Hermaphroditism, Gender and Precocity in Hyperadrenocorticism*, 96 BULL. JOHNS HOPKINS HOSP. 253 (1955) (studying sixty "hermaphrodites" in a range of ages and conditions, and concluding that in all cases except three the sex of rearing corresponded with their subsequent gender role as boy/man or girl/woman) [hereinafter Money, *Hermaphroditism, Gender and Precocity*]; John Money, Joan G. Hampson & John L. Hampson, *Sexual Incongruities and Psychopathology: The Evidence of Human Hermaphroditism*, 98 BULL. JOHNS HOPKINS HOSP. 43 (1956) (studying the "psychological health" of ninety-four "hermaphroditic" patients, and concluding that in ninety-five percent of the cases gender orientations corresponded with the sex of assignment and rearing).

101. In his doctoral dissertation on hermaphroditism, published in 1952, Money argued that "psychosexual orientation," defined as "libidinal inclination, sexual outlook, and sexual behavior," is shaped through *social and psychological factors*. John Money, Hermaphroditism: An Inquiry into the Nature of a Human Paradox 5–6 (1952) (Ph.D. dissertation, Harvard University) (on file with the North Carolina Law Review).

102. Rubin, *Unnamed Blank*, *supra* note 91, at 894; *see also* MEYEROWITZ, *supra* note 25, at 114–15 ("Despite a few dissenters, most observers adhered to a biological determinism. The desires and practices known as masculine and feminine seemed to spring from the same biological processes that divided female and male. All came bundled together within the broad-ranging concept of 'sex.'").

103. Money, *Hermaphroditism, Gender and Precocity*, *supra* note 100, at 254.

104. *Id.* at 256–58.

105. *Id.* at 258.

106. *Id.*

107. *See* Money et al., *An Examination*, *supra* note 100, at 319 ("[G]ender role and orientation may be fully concordant with the sex of assignment and rearing, despite extreme contradiction of the other five variables of sex.").

and external morphologic sex, and hormonal sex . . . ."[108] To these variables he added "a sixth postnatal determinant, the sex of assignment and rearing . . . . The seventh place at the end of this list was an unnamed blank that craved a name."[109] That "unnamed blank that craved a name" ended up being the crux of his theory. "After several burnings of the midnight oil *I arrived at the term, gender role*, conceptualized jointly as private in imagery and ideation, and public in manifestation and expression."[110] The concept of "gender role" solved a conceptual crisis in the chaotic definitions of "sex."[111] The concept "was meant to *save* the sex binary from imminent collapse by offering a new developmental justification for coercive and normalizing medical intervention into intersex children's bodies."[112] Through the idea of gender role, and with the growing innovation of medical technologies (hormones and surgeries), Dr. Money sought to solve incoherence in sexual difference and to reinstate a binary system of male and female.

Money pursued an analogy to elucidate his theory: "Gender role may be likened to a *native language*," he wrote.[113] "Once ingrained . . . it is never entirely eradicated."[114] The idea of gender role as plastic, acquired, and malleable, played a significant role in the treatment of intersex, transgender, and gender nonconforming children. Money viewed the body as surgically malleable and the gender of infants and young children as socially plastic.[115] He reasoned that if an infant's sex and gender can be aligned, a binary system of male and female could be preserved, and heterosexuality could prevail.[116]

Money and colleagues authored treatment protocols for intersex infants and children that would be followed by pediatricians and hospitals for decades.[117] They reasoned that "the sex of assignment and rearing is consistently

108. JOHN MONEY, *Lexical History and Constructionist Ideology of Gender*, *in* GENDERMAPS: SOCIAL CONSTRUCTIONISM, FEMINISM, AND SEXOSOPHICAL HISTORY 15, 21 (1995).

109. *Id.*

110. *Id.* (emphasis added). For further analysis of this passage, see Rubin, *Unnamed Blank*, *supra* note 91, at 895–96.

111. Rubin, *Unnamed Blank*, *supra* note 91, at 895–96; *see also* GILL-PETERSON, *supra* note 25, at 97 ("Sex had become an unwieldy biological category, now composed of genotype, gonads, hormones, genitals, internal organs, secondary anatomical features, and psychology, with none of them exerting what amounted to a deterministic influence."); Repo, *supra* note 91, at 240 ("[T]he science of sex itself had become problematic: with five categories of biological sex, establishing a person's sex was increasingly difficult. Politically, socially, and medically the discourse of gender responded to a specific biopolitical urgency, that is, the difficulty of controlling sex and life in the postwar period.").

112. GILL-PETERSON, *supra* note 25, at 98–99.

113. Money, *Hermaphroditism, Gender and Precocity*, *supra* note 100, at 258 (emphasis added).

114. *Id.*

115. GILL-PETERSON, *supra* note 25, at 114–15; KESSLER, *supra* note 91, at 6.

116. *See* GILL-PETERSON, *supra* note 25, at 114–15; KESSLER, *supra* note 91, at 6; *see also* Alison Redick, American History XY: The Medical Treatment of Intersex, 1916–1955, at 183 (Sept. 2004) (Ph.D. dissertation, New York University) (on file with the North Carolina Law Review).

117. *See, e.g.*, KESSLER, *supra* note 91, at 14–15, 23.

and conspicuously a more reliable prognosticator of a hermaphrodite's gender role and orientation than is chromosomal sex, the gonadal sex, the hormonal sex, the accessory internal reproductive morphology, or the ambiguous morphology of the external genitalia."[118] Their treatment protocols therefore called for "correcting" those born with "ambiguous genitalia" as early as possible, ideally before the age of eighteen months, through surgeries, and then raising them as males or females accordingly.[119] These practices and the secrecy around them ended up causing harm and trauma to generations of intersex children and adults.[120]

2. Diagnosing and Treating "Transsexuality"

With this new theory of gender identity, transgender medicine would begin to flourish.[121] Starting around mid-century, medical experts increasingly focused on "psychological sex" and later "gender identity."[122] As historian Joanne Meyerowitz explains, "The sex of the body, they now asserted, had multiple components . . . . [Medical experts] began to emphasize the immutability of adult gender identity and to acknowledge the despair of those patients who wanted the sex of their bodies to match their unshakable sense of self."[123] Since the 1930s stories about "sex change" had appeared across American media,[124] and these stories led individuals to seek surgical assistance from doctors. But it was not until mid-century, that they had the term "transsexual" to describe their desires and identifications to medical experts from whom they sought assistance.[125]

In 1949, sexologist Dr. David Cauldwell used the term "transsexual" to describe a biologically "normal" patient who sought to change sex.[126] Harry Benjamin, a leading American endocrinologist, adopted the term and publicized it.[127] A media frenzy around Christine Jorgensen began with the 1952

118. John Money, Joan G. Hampson & John L. Hampson, *Imprinting and the Establishment of Gender Role*, 77 ARCHIVES NEUROLOGY & PSYCHIATRY 333, 333 (1957).

119. *See* Alice D. Dreger & April M. Herndon, *Progress and Politics in the Intersex Rights Movement: Feminist Theory in Action*, 15 GLQ 199, 202 (2009) (describing and criticizing the "optimal gender paradigm" in which "*all* sexually ambiguous children should—indeed *must*—be made into unambiguous-looking boys or girls to ensure unambiguous gender identities").

120. *See, e.g.*, KESSLER, *supra* note 91, at 5, 74–75; KARKAZIS, FIXING SEX, *supra* note 91, at 27, 133; GERMON, *supra* note 91, at 153–83; Rubin, *Unnamed Blank*, *supra* note 91, at 901 (internal citation omitted); Repo, *supra* note 91, at 240.

121. GILL-PETERSON, *supra* note 25, at 126.

122. MEYEROWITZ, *supra* note 25, at 6.

123. *Id.*

124. *Id.* at 5.

125. *Id.*

126. GILL-PETERSON, *supra* note 25, at 138 (citing David O. Cauldwell, *Psychopathia Transsexualis*, 16 SEXOLOGY 274, 274–80 (1949)).

127. *Id.* at 138–39; MEYEROWITZ, *supra* note 25, at 6.

announcement of her "sex change" surgery.[128] This story, according to historian Joanne Meyerowitz, "opened debate on the visibility and mutability of sex."[129] In 1953, Harry Benjamin met with Jorgensen, and "they began strategizing about what to do with the countless letters written to Jorgensen seeking support in obtaining health care and gender confirmation surgery."[130] That year, Benjamin organized a symposium on transsexuality, and consequently outlined this new diagnostic category.[131]

John Money's focus on "gender role" also led to new treatment protocols for "transsexuals" in which "the only acceptable transition was from one visibly binary sex to another, installing passing as a medical goal."[132] On November 21, 1966, the Johns Hopkins Hospital announced the opening of its Gender Identity Clinic.[133] The overseeing committee included obstetrics, gynecologists, psychiatrists, pediatrics, and plastic surgeons, including John Money.[134] At the press conference, the committee stated its goal: "to deal with the problem of the transsexual, physically normal people who are psychologically the opposite sex."[135] This announcement captures two aspects of that important moment. First, the emphasis on the distinction between the psychological sex and the "physically normal" bodies of patients signals the growing medical attention to the gendered mind. Second, this alleged discrepancy between psychological sex and the "normal body" is viewed in pathological terms, as "the problem of the transsexual." Namely, the transsexual has (or is) a problem that can be "cured" by fixing the body to match the mind. I call this the *Mind-Body Alignment Era*.

B. *Legal Sex: Towards Mind-Body Alignment*

With this new medical understanding of gender in the 1950s,[136] courts and other lawmakers in the decades that followed transformed the meaning of legal sex. The emerging concepts of "gender role," "psychological sex," and later "gender identity" gradually entered the legal sphere through disputes that included sex reclassification on official documents, marriage annulments, parental rights, workplace discrimination, medical treatment of prisoners, and Medicaid coverage for gender affirming procedures.

Overall, in the *Mind-Body Alignment Era* (1960s to early 2000s), medical experts became leading authorities in explaining to courts, lawmakers, and the

128. MEYEROWITZ, *supra* note 25, at 1.
129. *Id.*
130. GILL-PETERSON, *supra* note 25, at 138–39.
131. *Id.* at 139.
132. *Id.* at 126.
133. *Id.* at 129.
134. *Id.*
135. Statement on the Establishment of a Clinic for Transsexuals at the Johns Hopkins Medical Institutions 1 (Nov. 21, 1966) (on file with the North Carolina Law Review).
136. *See supra* Section II.A.

general public (1) the newly created medical diagnosis of "transsexuality" and, (2) the recommended course of treatment for this condition. Courts and other lawmakers relied heavily and exclusively on medical experts such as John Money, Harry Benjamin, and others.[137] A process of changing legal sex began in the 1960s and took several decades such that by the beginning of the twenty-first century, legal sex mostly reflected a mind-body harmony approach.

This section demonstrates how legal sex changed in the latter half of the twentieth century. It examines several areas of law, in which courts had to define legal sex. These cases fall into two conceptual categories. In the first (Section II.B.1), courts doubled down on the assumption that legal sex is immutable and fixed at birth.[138] They mostly grounded this position with reliance on chromosomal sex. In the second category of cases (Section II.B.2), courts took a new path. They followed medical experts to reach a new understanding of legal sex: if one's self-perception (gender) is made to correspond with their physical appearance (sex) via gender affirming procedures, then *that is the individual's new legal sex*.[139] That is, sex can change. It is mutable. These courts rejected the earlier premise that legal sex is immutable, chromosome-centered, and determined at birth.

1. The Chromosome-Centric Approach

Between the 1960s and the early 2000s, across different areas of law, some courts presumed that chromosomal sex is the *only true legal sex*, and that it cannot be changed with gender affirming procedures or identifications.

a. Sex Classification Laws

In 1966, an anonymous plaintiff, who had undergone gender affirming procedures and formally changed her name, unsuccessfully sought an order directing the New York City Department of Health ("Department") to change her sex designation on the birth certificate from male to female.[140] The court acknowledged that "[t]he syndrome of transsexualism involves 'a truly untrodden, controversial and largely unexplored field of medicine,'"[141] adding that "transsexualism has been described by a leading authority, Dr. Harry

137. *See, e.g.*, Anonymous v. Weiner, 270 N.Y.S.2d 319, 320 (Sup. Ct. 1966); Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 271–73 (Sup. Ct. 1977).

138. *See infra* Section II.B.1.

139. *See* CURRAH, *supra* note 9, at 68 ("From the first media representations of Christine Jorgensen in 1952 to still-prevalent understandings of transgender people today, the assumption is that sex changes when the body does: the addition or removal of breasts, penises, and vaginas through surgery, and feminizing or masculinizing changes to characteristics associated with sex (facial hair, musculature, voice in some cases) through hormone therapy.").

140. *Weiner*, 270 N.Y.S.2d at 320–24.

141. *Id.* at 320 (quoting Harry Benjamin, *Clinical Aspects of Transsexualism in the Male and Female*, 18 AM. J. PSYCHOTHERAPY 458, 458 (1964)).

Benjamin, as 'a striking disturbance of gender role and gender orientation . . . *a disorder of the harmony* and uniformity of the psychosexual personality (a) split between the psychological and the morphological sex.'"[142] The Committee on Public Health ("the Committee") had opposed plaintiff's request for two reasons: "1. Male-to-female transsexuals *are still chromosomally males* while ostensibly females; [and] 2. It is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help *psychologically ill persons* in their social adaptation."[143] The Board of Health agreed with the Committee, and the court approved.[144]

Similarly, in 1973, a New York court denied a plaintiff's petition challenging the Department rules regarding sex reclassification on birth certificates.[145] This court approved and reiterated the report of the Committee,[146] according to which "the male-to-female transsexual, such as here, is anatomically and chromosomally a male who is deeply disturbed in his gender orientation and role . . . . [T]his abnormal individual, advises the report, *is genetically a male as shown by chromosome and cell-chromatin* studies."[147] The court viewed "transsexuals" as fraudulent and reasoned that "the desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud."[148]

These two early decisions viewed legal sex as determined prior to birth, based on one's chromosomes.[149] They did not take gender identity into account. But they do not represent the trajectory of the decades that followed. We will later see that other courts and lawmakers in these same years began a process of changing legal sex by taking gender identity seriously and adopting the mind-body harmony approach.[150]

b. Antidiscrimination Claims

Some courts in this era relied on a chromosome-centric approach to legal sex when they dismissed employment discrimination claims brought by

142. *Id.* at 320–21 (emphasis added) (quoting Harry Benjamin, *Nature and Management of Transsexualism, with a Report on Thirty-One Operated Cases*, 72 W.J. SURGERY, OBSTETRICS, & GYNECOLOGY 105, 106 (1964) (adding: "[The transsexual] has been described by Dr. Harry Benjamin as 'among the most miserable people I have ever met.'")).

143. *Id.* at 322 (emphasis added).

144. *Id.* at 324 (holding that "judicial intervention would constitute [a] usurpation of the function of the executive branch of government").

145. Hartin v. Dir. Of the Bureau of Recs. & Stat., 347 N.Y.S.2d 515, 518 (Sup. Ct. 1973).

146. *Id.* at 517.

147. *Id.*

148. *Id.* at 518.

149. For discussion of these two decisions, see CURRAH, *supra* note 9, at 31–53.

150. *See infra* Section II.B.2.a.

"transsexual" plaintiffs.[151] These courts concluded that "transsexual" plaintiffs are not protected by Title VII.[152] In *Ulane v. Eastern Airlines, Inc*,[153] decided by the Seventh Circuit in 1984, a pilot at Eastern Airlines sued under Title VII after she was fired upon returning to work as a woman after gender affirming procedures.[154] The lower court held in her favor,[155] treating her as a woman because her mind and body were now "aligned." The court of appeals reversed.[156] The court conceded that the definition of biological sex was contested by experts,[157] but insisted that "Ulane's chromosomes, all concede, are unaffected by the hormones and surgery."[158] Therefore, "even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case."[159] The court concluded that "[i]t is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—*a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.*"[160] The Seventh Circuit did not view Ulane as a woman.

In *Sommers v. Iowa Civil Rights Commission*,[161] the Iowa Supreme Court held that discrimination against "transsexuals" is not prohibited by the state's Civil Rights Act.[162] The court characterized transsexualism as a psychiatric disorder that "is irreversible and can only be treated with surgery to remove some of the transsexual feelings of psychological distress."[163] The plaintiff was receiving gender affirming care,[164] but the court still did not view her as a

151. Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1083 nn.5–6, 1087 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 n.4 (9th Cir. 1977); Powell v. Read's, Inc., 436 F. Supp. 369, 370 (D. Md. 1977); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 284–86 (E.D. Pa. 1993); Grossman v. Bernards Twp. Bd. Of Educ., No. 74-1904, 1975 WL 302, at *4–5 (D.N.J. 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978).

152. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to e-17).

153. 742 F.2d 1081 (7th Cir. 1984).

154. *Id.* at 1084.

155. *Id.* ("The district judge based this holding on his finding that 'sex is not a cut-and-dried matter of chromosomes,' but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual." (quoting Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1984))).

156. *Id.* at 1087 ("Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female.").

157. *Id.* at 1083 n.6.

158. *Id.* at 1083.

159. *Id.* at 1087.

160. *Id.* (emphasis added).

161. 337 N.W.2d 470 (Iowa 1983).

162. *Id.* at 474.

163. *Id.* at 473.

164. *Id.*

woman. Instead, it affirmed the district court's finding that "the common usage of the word sex denotes male *or* female, but not both."[165] Her sex discrimination claims failed.[166]

c. Family Law Disputes

Marriage was another context in which courts had to determine a party's legal sex. Judicial determination of the legal sex of a transgender person would determine whether a marriage was a void same-sex marriage or a valid opposite-sex marriage. In *Corbett v. Corbett*,[167] the High Court of England and Wales held in a divorce action that a marriage between a "transsexual" woman and a man was a same-sex marriage.[168] The court led with the chromosomes-based approach to describe the wife, observing that she "has been shown to have XY chromosomes and, therefore, to be of male chromosomal sex; to have had testicles prior to the operation and, therefore, to be of male gonadal sex; to have had male external genitalia . . . therefore, to be of male genital sex."[169] After considering extensive medical testimony, the court concluded that "[i]t is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed . . . . *The respondent's operation, therefore, cannot affect her true sex*."[170] This holding and the logic that supports it is identical to that of the Committee in the sex reclassification cases above[171]: legal sex is presumed to be fixed at birth, and determined by chromosomes, gonads, and genitalia.[172] The fact that the plaintiff identified as a woman and had undergone gender affirming procedures did not change her legal status.[173] She was still a man, and her marriage to a man was void.[174] Her ex-husband owed her no spousal support or marital-related property rights.[175]

A year later, a New York court found in the case of marriage between a "transsexual" woman and a cisgender man that "the marriage ceremony itself was a nullity. No legal relationship could be created by it."[176] This decision also turned on the defendant's legal sex. The court reasoned that although "defendant's sex ha[d] been changed to female by operative procedures,"

165. *Id.*
166. *Id.* at 477.
167. Corbett v. Corbett [1970] 2 All ER 33 (Eng.).
168. *Id.* at 49.
169. *Id.* at 46–47.
170. *Id.* at 47 (emphasis added).
171. Anonymous v. Weiner, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966); Hartin v. Dir. Of the Bureau of Recs. & Stat., 347 N.Y.S.2d 515, 517–18 (Sup. Ct. 1973).
172. *Corbett*, 2 All ER at 47.
173. *Id.* at 46–49.
174. *Id.* at 49.
175. *Id.* at 51.
176. Anonymous v. Anonymous, 324 N.Y.S.2d 499, 501 (Sup. Ct. 1971).

evidence presented at trial suggests that *"mere removal of the male organs would not, in and of itself, change a person into a true female."*[177]

This same logic and outcome appeared, three years later, in a case involving a wife who brought action for annulment of marriage, claiming that her husband was female.[178] A significant portion of the court's decision includes quotations and citations to leading medical authorities on the new diagnosis of "transsexuality."[179] Utilizing the "body as trap" metaphor (the idea that "transsexuals" are trapped in the wrong body), the court concluded that "the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage. *Attempted sex reassignment by mastectomy, hysterectomy, and androgenous hormonal therapy has not achieved that result.*"[180] The outward and inward masculinizing of the husband, and his male gender identification, did not persuade the court that he was a true man. A man with no penis is no man, the court tells us.[181] Thus, "defendant cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship."[182] Notice that while "transsexual" women plaintiffs were rejected based on their perceived chromosomal sex, "transsexual" male plaintiffs were rejected for a perceived lack of penis. Both are physical conditions associated with "biological sex," and yet in the former, the obsession with chromosomes prevailed, and the in the latter, a phallus-centric approach did.

Defining legal sex also had consequences in the law of parentage. Scholars have documented discrimination against transgender parents in custody and visitation disputes.[183] These cases reveal judicial assumptions about the legal sex of transgender parents. In *Daly v. Daly*,[184] the Supreme Court of Nevada affirmed the termination of parental rights of a transgender parent on the

177. *Id.* at 500 (emphasis added).

178. B v. B, 355 N.Y.S.2d 712, 713–14 (Sup. Ct. 1974).

179. *Id.* at 714.

180. *Id.* at 717 (emphasis added).

181. *Id.* (noting that the husband "does not have male sexual organs, does not possess a normal penis, and in fact does not have a penis").

182. *Id.*; *see also* Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (holding that a male to female post-op transsexual who filed a medical malpractice suit for the death of her husband as the surviving spouse under the wrongful death statute is male and thus entered an invalid same-sex marriage).

183. *See generally* Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593 (2019) (finding, in a large number of cases, evidence of persistent bias regarding the gender identity and expression of the transgender parent); Shannon Price Minter, *Transgender Family Law*, 56 FAM. CT. REV. 410 (2018) [hereinafter Minter, *Transgender Family Law*] (examining legal issues facing transgender people who become parents).

184. 715 P.2d 56 (Nev. 1986), *overruled by In re* Termination of Parental Rts. As to N.J., 8 P.3d 126, 132 n.4 (Nev. 2000).

ground that association with a transgender parent can cause emotional harm.[185] The court snidely commented that "it was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who would never be either mother or sister to his daughter."[186] The court viewed a transgender woman who had undergone gender affirming procedures as a person who could *never* be a woman.[187] She had, by her selfish choices, given up the privilege of being a father. The court approved the termination of her parental relationship.[188]

In these family law disputes, courts either classified transgender plaintiffs according to their "biological sex" (in the marriage annulment cases); or viewed their transgender status as harmful to their children (in the custody and visitation cases). In both contexts, transgender plaintiffs lost their legal claims, and their gender identity was viewed as pathological.

d. Health Care

Medicaid coverage for a range of medical procedures requires a "medical necessity" determination.[189] From the late 1970s to the early 2000s, courts deciding Medicaid disputes accepted the medical definition of "transsexual" as a "very complex medical and psychological problem,"[190] and later as a severe form of "gender identity disorder" ("GID").[191] Courts generally adopted the psychiatric framework to explain transsexual identities. Following the same trajectory as sex reclassification laws, antidiscrimination claims, and family law, several courts in this era denied Medicaid coverage for gender affirming

185. *Id.* at 59 (adding that "such considerations are further complicated by the apparent degree of [the child's] revulsion over [the parent] and the irretrievable loss of [the parent's] former relationship with [the child] as a parent-father"). For a critical discussion of this case, see also Katyal & Turner, *supra* note 183, at 1621 (observing that "the 'best interest of the child,' so misconstrued, takes precedence over the interest of the child in maintaining relationships with existing caregivers and entirely subsumes any interests of the transgender parent, which are often absent from the analysis").

186. *Daly*, 715 P.2d at 59.

187. *Id.*

188. *Id.* at 60.

189. Medicaid, a federal-state program created by Congress in 1965, funds a health insurance scheme for lower income Americans using federal and state money; the program is administered at the state level. Social Security Amendments of 1965, Pub. L. No. 89-97, sec. 121, § 1901, 79 Stat. 1861, 1901–03 (codified as amended at 42 U.S.C. § 1396-1).

190. *See, e.g.*, Pinneke v. Preisser, 623 F.2d 546, 549 (8th Cir. 1980) (quoting Doe v. State Dep't of Pub. Welfare, 257 N.W.2d 816, 819 (Minn. 1977)); *see also* Kosilek v. Maloney, 221 F. Supp. 2d 156, 184 (D. Mass. 2002) ("It is undisputed that Kosilek has a gender identity disorder, which is a rare, medically recognized, major mental illness.").

191. Smith v. Rasmussen, 249 F.3d 755, 756 n.3 (8th Cir. 2001) (citing the diagnostic criteria for GID from AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 537–38 (4th ed. 1994)).

procedures.[192] Given the high cost of these procedures, for many Americans that meant no access at all to gender affirming health care.[193]

Courts that denied Medicaid coverage to transgender plaintiffs often equated legal sex with anatomic sex. The legal sex of the "transsexual" was typically understood by courts to be their immutable sex as assigned at birth.[194] One court, for example, describes a plaintiff's transsexualism as "a recognized psychosexual disorder whose essential feature is an incongruence between *anatomic and gender identity*. A transsexual experiences a persistent sense of discomfort and inappropriateness about *his anatomic sex* and a persistent wish to be rid of *his* genitals and to live as a member of the other sex."[195] This court viewed gender affirming procedures as "experimental" and not medically necessary.[196] Under this logic, true legal sex is the sex assigned at birth, regardless of new medical-scientific understandings of gender and transsexuality.

2. The Mind-Body Alignment Approach

Some courts, as we saw, aligned legal sex with "biological sex," but the trajectory of American law from the 1960s to the early 2000s was headed elsewhere. The development of the concept of gender identity eventually led the legal system, in fragmented, incremental steps, area-by-area of law, towards considering gender identity as an important part of legal sex and recognizing that the body *can* change. In the same four areas examined above—sex reclassification, family law disputes, antidiscrimination claims, and health care—courts moved towards a new vision of legal sex: one of harmonizing gender identity and the physical body.

192. *See, e.g.*, Rush v. Johnson, 565 F. Supp. 856, 869 (N.D. Ga. 1983) (holding that Georgia's prohibition against Medicaid reimbursement for experimental surgery, including transsexual surgery, was rationally related to a legitimate governmental interest in protecting the public health). *But see* Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 271 (Sup. Ct. 1977) ("Medical Science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism, nor has psychotherapy been successful in altering the transsexual's identification with the other sex or his desire for surgical change."). For further review of these cases, see Jerry L. Dasti, *Advocating a Broader Understanding of the Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1742–43 (2002).

193. Ben-Asher, *supra* note 18, at 55–57; Alyssa Jackson, *The High Cost of Being Transgender*, CNN, https://www.cnn.com/2015/07/31/health/transgender-costs-irpt/index.html/ [https://perma.cc/EF3U-WDP5] (last updated July 31, 2015, 11:40 AM).

194. *Rush*, 565 F. Supp. at 868.

195. *Id.* at 862 (emphasis added) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261 (3d ed. 1980)).

196. *Id.* at 869.

a. Sex Classification Laws

Some courts in this era took a dramatic turn. They included gender identity as a key factor in assessing legal sex. In 1968, a New York county court accepted a sex reclassification petition and embraced what this Article calls the "mind-body alignment approach."[197] The anonymous petitioner, who had undergone gender affirming procedures, sought to change her birth certificate to reflect her new name and sex.[198] The court observed,

> Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. *Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual* and, if such conformity requires changes of a statistical nature, then such changes should be made. Of course, such changes should be made *only in those cases where physiological orientation is complete*.[199]

Where there is alignment between psychological sex and anatomical sex, the court recognized that harmony as legal sex. In articulating this new mind-body alignment approach, the court rejected the concerns for fraud, reasoning that a "*male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact*."[200] There is no fraud concern here, the court explained. It rejected the chromosome-based approach to legal sex, explaining that "the question of a person's identity [should not] be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions."[201] The court ruled in favor of petitioner.[202]

The mind-body alignment approach is well captured in the Model Vital Statistics Act ("VSA"), published by the National Center for Health Statistics in 1978 to guide officials and legislators considering vital statistics laws.[203] It addresses sex reclassification as follows: "Upon receipt of a certified copy of an order of (a court of competent jurisdiction) indicating the sex of an individual born in this State has been changed *by surgical procedure and that such individual's*

197. *In re* Anonymous, 293 N.Y.S.2d 834, 837–38 (Civ. Ct. 1968).

198. *Id.* at 835.

199. *Id.* at 837 (emphasis added).

200. *Id.* at 838 (emphasis added).

201. *Id.*

202. *Id.* The court granted the petitioner's application for a change of name and directed the Department of Health to attach a copy of the order to the birth certificate.

203. NAT'L CTR. FOR HEALTH STAT., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, MODEL STATE VITAL STATISTICS ACT AND MODEL STATE VITAL STATISTICS REGULATIONS 1 (1978).

name has been changed, the certificate of birth of such individual shall be amended."[204] The VSA supports the approach that birth certificates ought to change when body is made to "match" the gendered mind.

b. Antidiscrimination Claims

In this era, courts also gradually began to adopt the mind-body alignment approach in discrimination claims. In 1977, tennis player Renee Richards claimed that the U.S. Tennis Association discriminated against her by refusing to let her participate in the U.S. Open tennis tournament in the women's division.[205] Richards testified, "for all intents and purposes, I became a female, *psychologically, socially and physically*, as has been attested to by my doctors."[206] Defendants required her to take a chromosomal test in order to compete,[207] claiming that it was "a reasonable way to assure fairness and equality of competition when dealing with numerous competitors from around the world."[208] Richards claimed that the test is "recognized to be insufficient, grossly unfair, inaccurate, faulty and inequitable by the medical community in the United States for purposes of excluding individuals from sports events on the basis of gender."[209] Both parties relied on medical experts to support their positions.

In this high-profile case, the court defined a "transsexual" as "an individual *anatomically of one sex* who firmly *believes he belongs to the other sex* . . . [and] is obsessed with the desire to have his body, appearance and social status altered to conform to that of his 'rightful' gender."[210] The court distinguished transsexuality from homosexuality, explaining that transsexuals "consider themselves to be members of the opposite sex cursed with the wrong sexual apparatus. They desire the removal of this apparatus and further surgical assistance in order that they may enter into *normal heterosexual relationships*."[211]

204. *Id.* at 17 (emphasis added).

205. Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 268 (Sup. Ct. 1977). Plaintiff claimed a violation of the New York State Human Rights Law and the Fourteenth Amendment, and sought a preliminary injunction against the defendants, the United States Tennis Association ("USTA"), United States Open Committee ("USOC") and the Women's Tennis Association ("WTA"). For analysis of inclusion of transgender athletes in women's sports, see generally Maayan Sudai, *The Testosterone Rule—Constructing Fairness in Professional Sport*, 4 J.L. & BIOSCIENCES 181 (2017) (reviewing the use of the testosterone rule in sports as a marker of fairness and putting forward alternative approaches for achieving fairness in sports).

206. *Richards*, 400 N.Y.S.2d at 267 (emphasis added).

207. "The sex-chromatin test was first employed by the International Olympic Committee in connection with the 1968 Olympics." *Id.* at 268. According to the court, "until August 1976, there had been no sex determination test in the 95-year history of the USTA National Championships, other than a simple phenotype test." *Id.*

208. *Id.* at 269.

209. *Id.* at 268.

210. *Id.* at 270 (emphasis added).

211. *Id.* at 271 (emphasis added).

Plaintiff's surgeon affirmed that her genital appearance and hormonal balance were those of a woman.[212] Dr. John Money played a key role in this case.[213] He stated in an affidavit that "[f]or all intents and purposes, [plaintiff] functions as a woman; that is her internal sex organs resemble those of a female who has been hysterectomized and ovariectomized . . . her external organs and appearance, as well as her psychological, social and endocrinological makeup are that of a woman."[214]

Money, consistent with his focus on gender identity, rejected the chromosome-centered test to determine sex.[215] He opined that it "would work an injustice since *by all other known indicators of sex, [Plaintiff] is a female*."[216] She should thus "be classified as female and for anyone in the medical or legal field to find otherwise is completely unjustified."[217] Adopting Money's view, the court held that "the requirement of defendants that this plaintiff pass the Barr body [chromosomal] test in order to be eligible to participate in the women's singles of the U.S. Open is grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this State."[218] The court took a then-novel view on the meaning of legal sex, holding that "[w]hen an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female."[219]

Similar mind-body alignment logic appeared in an employment discrimination lawsuit brought by a transgender man in a New York state court about two decades later.[220] The court held that "an employee who has fulfilled a sexual identity urge by changing sex and is harassed because of such fulfillment is entitled to the law's protection against employer harassment."[221] The court viewed the legal sex of this individual as male, observing that "he is now a male *based on his identity and outward anatomy*. Being a transsexual male, he may be considered part of a subgroup of men. There is no reason to permit discrimination against that subgroup under the broad anti-discrimination law

212. *Id.*

213. *Id.* at 271–72 (citing TRANSSEXUALISM AND SEX REASSIGNMENT (Richard Green & John Money eds., 1969)).

214. *Id.* at 271.

215. *Id.* at 272 ("He states that it is erroneous to assume that the test will be accurate in determining the sex of all individuals since there are human beings who do not belong to the statistical average with respect to their chromosome pattern (e.g., Klinefelter and Turner's Syndromes, Androgen Insensitivity Syndrome and Testicular Feminization).").

216. *Id.* (emphasis added).

217. *Id.*

218. *Id.* (citing N.Y. EXEC. LAW § 290).

219. *Id.*

220. Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 391, 396 (Sup. Ct. 1995).

221. *Id.* at 396.

of our City."[222] The mind-body alignment approach enabled the court here to recognize a transgender man as legally male, and to hold that discrimination against him ought to be viewed as prohibited sex discrimination.

The mind-body alignment approach also appeared in judicial scrutiny of cross-dressing ordinances.[223] In 1980, a federal court found that a cross-dressing ordinance that made it unlawful to dress with intent to "disguise [a person's] true sex as that of the opposite sex" was unconstitutional as applied to individuals in psychiatric therapy in preparation for "sex reassignment" procedures.[224] Wearing gender-affirming clothes in the pre-operative stage, the court observed, is "medically and psychologically necessary *for the true integration of the body and mind* throughout the transition period of the developing gender."[225] Policies that make it "illegal for the transsexual plaintiffs to appear in public areas in women's clothing . . . inhibit the treatment of the transsexual plaintiffs and their reassignment."[226] The logic displayed in this decision reflects the (then) new emerging logic regarding legal sex: the harmonized mind and body will indicate legal sex. For "transsexuals," this effectively meant an exemption from cross-dressing laws.

c. Family Law Disputes

Several courts also adopted the mind-body alignment approach in marriage annulment claims. For instance, in *M.T. v. J.T.*,[227] after a married woman filed a complaint for spousal support, her husband claimed that she was male and the marriage was void.[228] This court turned to medical experts to determine the "true sex" of the wife.[229] It concluded that "we must disagree with the conclusion reached in *Corbett* that for purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard."[230] The court rejected the chromosome-centered approach, offering "a fundamentally different understanding of what is meant by 'sex' for marital purposes."[231] Under the new approach,

> the dual tests of anatomy and gender are more significant . . . for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex,

222. *Id.* (emphasis added).
223. *See supra* Section I.B.2.
224. Doe v. McConn, 489 F. Supp. 76, 79, 81 (S.D. Tex. 1980).
225. *Id.* at 79 (emphasis added).
226. *Id.*
227. 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).
228. *Id.* at 205.
229. *Id.* at 206–07.
230. *Id.* at 209.
231. *Id.*

> then identity by sex must be governed by the congruence of these standards.[232]

The court emphasized the role of medical treatment of transsexuality,[233] and observed that "the transsexual's gender and genitalia are no longer discordant; *they have been harmonized through medical treatment*."[234] The marriage was valid.[235]

d. Health Care

One of the earliest cases that manifested the mind-body alignment approach in the context of healthcare was decided by the Minnesota Supreme Court in a case involving a state agency's denial of benefits for gender affirming procedures.[236] The question was whether gender affirming procedures were medically necessary (and covered by public funds). The court based its decision on harmonizing the physical body and gender identity.[237] The court elaborated the distinction between "sex" ("anatomical qualities that determine whether one is male or female") and "gender" ("behavior, feelings, and thoughts").[238] The court explained, "In cases when sex and gender do develop independently, the end product is often a transsexual person plagued by the serious problem of 'gender role disorientation, a painful cross-gender identity.'"[239] The court continued, "The adult male transsexual is an anatomical male who has irreversibly accepted a gender identification as a female. He considers himself a normal woman trapped inside a male body."[240] He thus "views his male genitals as a symbol of maleness which runs directly contrary to his gender identity as a female."[241] The court emphasized that the "immense psychological distress" of the "male transsexual" stems from the inconsistency between "sexual identity" and "gender identity."[242] The only cure for this distress, "[g]iven the fact that the roots of transsexualism are generally implanted early in life," is

232. *Id.*

233. *Id.* at 210–11.

234. *Id.* at 211 (emphasis added); *see also* CURRAH, *supra* note 9, at 105–06 ("Because M.T. had the capacity for penis-vagina intercourse . . . for the purposes of marriage M.T. was a woman.").

235. *J.T.*, 355 A.2d at 211.

236. Doe v. State Dep't of Pub. Welfare, 257 N.W.2d 816, 820 (Minn. 1977) (voiding the total exclusion of transsexual surgery from eligibility for medical assistance payments).

237. *See id.* at 819.

238. *Id.* at 818.

239. *Id.* (citing Harry Benjamin, *Should Surgery Be Performed on Transsexuals*, 25 AM. J. PSYCHOTHERAPY 74, 75 (1971)); *see also* Ira B. Pauly, *Adult Manifestations of Male Transsexualism*, *in* TRANSSEXUALISM AND SEX REASSIGNMENT 37, 37–38 (1969).

240. *State Dep't of Pub. Welfare*, 257 N.W.2d at 818–19.

241. *Id.* at 819.

242. *Id.* (first citing Robert J. Stoller, SEX AND GENDER 260 (1968); and then citing Pauly, *supra* note 239, at 58).

"the radical sex conversion surgical procedure."[243] Accordingly, "the total exclusion of transsexual surgery from eligibility for M.A. benefits . . . is void."[244] Medicaid coverage for "transsexuals" was understood here as medically necessary because it facilitated the desired mind-body harmony.

Other federal and state courts followed this logic.[245] In *Pinneke v. Preisser*,[246] for example, the Eighth Circuit opined that "radical sex conversion surgery is the only medical treatment available to relieve or solve the problems of a true transsexual."[247] The court held that "a state plan absolutely excluding the only available treatment known at this stage of the art for a particular condition [transsexualism] must be considered an arbitrary denial of benefits based solely on the 'diagnosis, type of illness, or condition.'"[248] The court found the state policy inconsistent with the Medicaid statute because an "irrebuttable presumption that the procedure of sex reassignment surgery can never be medically necessary . . . reflects inadequate solicitude for the applicant's diagnosed condition, the treatment prescribed by the applicant's physicians, and the accumulated knowledge of the medical community."[249] Namely, if the only "cure" for a mind-body mismatch is to change the body, a state policy that denies coverage of such treatment violates the federal Medicaid statute.

These cases and others like them reflect how legal sex changed during the second half of the twentieth century. With the emergence of the new category of gender identity, litigants engaged courts and other lawmakers regarding the meaning of legal sex. By the turn of the twenty-first century, courts and other lawmakers trended towards accepting the reality and significance of gender identity, and they reflected this in embracing a new approach to legal sex: *a mind-body alignment approach*. Whereas Part I demonstrated that up until the mid-twentieth century, medical and legal sex were perceived to be immutable and fixed at birth, the emergence of the concept of gender identity changed existing definitions of legal sex. Part III will demonstrate that in the past two decades, courts and lawmakers are leaning towards gender identity as the *primary indicator of legal sex*.

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243. *Id.* (first citing Harry Benjamin, *Should Surgery Be Performed on Transsexuals?*, 25 AM. J. PSYCHOTHERAPY 74, 78 (1971); and then citing Robert J. Stoller, SEX AND GENDER 249 (1968)) ("[T]he consensus of medical literature is that psychoanalysis is not a successful mode of treatment for the adult transsexual.").

244. *Id.* at 820 (adding that "[t]he medical necessity of each applicant requesting funding of transsexual surgery must be considered individually, on a case-by-case basis").

245. *See* Rush v. Parham, 440 F. Supp. 383, 390–91 (N.D. Ga. 1977), *rev'd on other grounds*, 625 F.2d 1150 (5th Cir. 1980); G.B. v. Lackner, 145 Cal. Rptr. 555, 558–59 (Ct. App. 1978); Doe v. Lackner, 145 Cal. Rptr. 570, 572 (Ct. App. 1978).

246. 623 F.2d 546 (8th Cir. 1980).

247. *Id.* at 548 (citing *State Dep't of Pub. Welfare*, 257 N.W.2d at 819).

248. *Id.* at 549 (first citing *State Dep't of Pub. Welfare*, 257 N.W.2d at 820; and then citing White v. Beal, 555 F.2d 1146, 1151–52 (3d Cir. 1977)).

249. *Id.*

III. THE "GENDER IDENTITY" ERA (2000S TO PRESENT)

The year is 1993. The setting, Falls City, Nebraska. Twenty-one-year-old Brandon Teena is interrogated by the town sheriff after he had been raped and beaten up by two former male acquaintances after they discovered that he was not a "real man":

> . . .
>
> Sheriff: "Why do you run around with girls instead of guys beings you're a girl yourself?"
>
> . . .
>
> Sheriff: "The only thing is if it goes to court, that answer, that question is going to come up in court and I'm going to want an answer for it before it goes to court. See what I'm saying?"
>
> . . .
>
> Brandon: "*I have a sexual identity crisis*"
>
> Sheriff: "Your what?"
>
> Brandon: "*I have a sexual identity crisis*"
>
> Sheriff: "You want to explain that?"
>
> Brandon: "I don't know if I can even talk about it."[250]

The sheriff released the two rapists, and they murdered Brandon shortly after, along with two other friends.[251] The message was clear, and it echoed loudly in the 1990s. If you "fake" your gender and deceive others, legal authorities may inflict legal violence against you rather than protect you.[252]

The year is 2004. The setting is the Oprah Winfrey Show. The topic is *Transgender Children and Their Parents*. Oprah introduces the public to a then-

250. Brandon v. Cnty. of Richardson, 624 N.W. 2d 604, 613–14 (Neb. 2001); *see also* Interview by Charles Laux with Brandon Teena, in Richardson Cnty., Neb. (Dec. 25, 1993) (emphasis added).

251. Stephanie Fairyington, *Two Decades After Brandon Teena's Murder, a Look Back at Falls City*, ATLANTIC (Dec. 31, 2013, 10:05 AM), https://www.theatlantic.com/national/archive/2013/12/two-decades-after-brandon-teenas-murder-a-look-back-at-falls-city/282738/ [https://perma.cc/R9WL-YZ6H (staff-uploaded, dark archive)].

252. For the negligence lawsuit brought against the Sherriff, see Brandon v. Lotter, 157 F.3d 537 (8th Cir. 1998).

new idea: some people feel trapped in the wrong body.[253] Several children and parents explain that they had always felt trapped in the wrong body.[254] Oprah urges parents to accept their children as they are and support them.[255] Oprah was manifesting an increasingly popular way of understanding gender at the turn of the twenty-first century.[256] She was calling for empathy, care, and support for transgender children.[257] Compared to the town Sherriff who bullied Brandon Teena in 1993 and led to his murder, this was progress. Gender identity was now a concept that advocates, lawmakers, policymakers, and the general population could understand and use.

In the twenty-first century, in a gradual process, the location of legal sex has shifted from immutable "biological sex" to the gendered mind. Gender identity is now at the center of this new definition of sex. Medical professionals, as Part II demonstrated, have provided the necessary expertise and language to support this new position.[258] The Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") of the American Psychiatric Association ("APA") includes a diagnosis of "gender dysphoria," a condition defined as a "distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender."[259] The transformation of legal sex from immutable "biological sex" to the gendered mind has been navigated through a medical gaze.

A. *From "Biological Sex" to "Sex Assigned at Birth"*

Gender identity and "sex assigned at birth" are now two core concepts defining transgender identities.[260] Jessica Clarke has observed that in the past

253. *The Oprah Winfrey Show: The 11-Year-Old Who Wants a Sex Change* (OWN television broadcast May 12, 2004), https://www.oprah.com/own-oprahshow/the-11-year-old-who-wanted-a-sex-change [https://perma.cc/TYN7-4BCB].

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. CURRAH, *supra* note 9, at 44–45 (citing Jo Wuest, *The Scientific Gaze in American Transgender Politics: Contesting the Meanings of Sex, Gender, and Gender Identity in the Bathroom Rights Cases*, 15 POL. & GENDER 336, 336–60 (2019)); MEYEROWITZ, *supra* note 25, at 99; *see also* GERMON, *supra* note 91, at 81–82 (summarizing the position of medical experts: "[W]here there is a mismatch between identity and morphology the body must always give way to the psyche, to identity, to gender.").

259. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013); *see also* Jack Turban, *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (Aug. 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/FP5P-XY5V] (defining dysphoria as "clinically significant distress or impairment in social, occupational, or other important areas of functioning").

260. *Glossary of Terms: Transgender*, GLAAD, https://glaad.org/reference/trans-terms/ [https://perma.cc/YQ2A-K6NX] (defining transgender as "an adjective to describe people whose gender identity differs from the sex they were assigned at birth"); *see also* Clarke, *Sex Assigned at Birth*,

two decades transgender rights advocates have introduced the concept "sex assigned at birth" to replace the problematic concept "biological sex."[261] Transgender theorists in the 1990s borrowed the terminology of "sex assigned at birth," which appeared in the 1950s to describe intersex babies.[262] Replacing "biological sex" with "sex assigned at birth," as Clarke argues, can enhance legal protection for transgender, nonbinary, and gender nonconforming people.[263] Indeed, several courts, regulators, and legislators have adopted the concept "sex assigned at birth."[264]

In several years of cultural backlash, however, many courts and other lawmakers, including the Supreme Court in *Bostock v. Clayton County*,[265] have resisted this newer terminology.[266] Federal and state courts are in an ongoing process of reviewing laws that bar or limit access to sports,[267] gender-affirming health care,[268] access to restrooms,[269] and sex reclassification on official documents.[270] The idea of "biological sex" (as opposed to "sex assigned at birth") is a key component in this legislative and political storm.[271] Those seeking to restrict transgender lives are rejecting the concept "sex assigned at birth" and favoring terms such as "biological sex" or "biological distinctions between male and female."[272]

B. *The New Legal Sex: Gender Identity*

Political and legal assaults on transgender people today reject not only the concept of "sex assigned at birth," but also the centrality of gender identity as

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supra note 13, at 1823 (citing Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1756 n.6 (2020) (Alito, J., dissenting) (quoting *A Glossary: Defining Transgender Terms*, 49 MONITOR ON PSYCH. 32 (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary [https://perma.cc/ZRY6-MQM8])) ("The Court does not define what it means by 'transgender status,' but the American Psychological Association describes 'transgender' as '[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth.'").

261. Clarke, *Sex Assigned at Birth*, *supra* note 13, at 1823.

262. *Id.* at 1832–33.

263. *Id.* at 1827.

264. *Id.* at 1824 & nn.7–11 (citing a range of examples from federal courts, the Affordable Care Act, and a proposed 2021 federal law that would bar discrimination on the basis of LGBTQ status in employment, health care, and housing).

265. 140 S. Ct. 1731 (2020).

266. *Id.* at 1739; Clarke, *Sex Assigned at Birth*, *supra* note 13, at 1824 (citation omitted).

267. Clarke, *Sex Assigned at Birth*, *supra* note 13, 1848 n.144 (citing the laws of seventeen states that now ban such access and base it on a notion of "biological sex").

268. *Id.* at 1825 & n.15 (citing legislation in Arkansas and Alabama that relies on "biological sex" at the time of birth).

269. *Id.* at 1826, 1849 n.148 (citing legislation in Alabama, Tennessee, and Oklahoma that relies on combinations of "biological sex" and sex on original birth certificates).

270. *Id.* at 1826, 1849 n.149 (citing legislation in Idaho, Montana, and Oklahoma that relies on notions of "biological sex" at birth to restrict changing essential documents).

271. *Id.* at 1825–26 nn.14–16.

272. *Id.* at 1824.

the new legal sex. This section examines how several areas of law—sex reclassification laws, antidiscrimination laws, and family laws—have adopted gender identity as the new legal sex. This legal transformation, the Article argues, is the backdrop against which we should assess the current backlash against transgender people.

1. Sex Reclassification Laws

One of the areas in which the change of legal sex is most evident is sex reclassification laws.[273] Sex designation on official documents (birth certificate, passport, etc.) is not just an administrative act; it can also be deemed as an act of violence.[274] The State uses its legal authority to label its citizens in official documentation as M or F.[275]

In a recent comprehensive study of laws, policies, juridical decisions, and litigation of sex reclassification in the United States, Ido Katri has revealed "a growing legal trend toward a recognition of an individual right to autonomous gender identity."[276] Katri divides these policies into five types.[277] The first, banning reclassification, assumes immutability of sex assigned at birth. It echoes the approach that this Article has called the *True Biological Sex* approach.[278] A small number of states currently follow this approach,[279] and laws banning reclassification have been reenacted as part of a backlash against transgender people, in several states.[280] The second type of policy requires confirmation of

273. For earlier analysis of this area of law, see Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 732–33 (2008) (analyzing gender reclassification policies in policies related to placement in gender-segregated facilities, policies related to changing gender marker on ID, and policies related to the state provision of healthcare that is prohibited based on the gender on record for the person seeking care).

274. *See, e.g.*, Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 50 (1983).

275. CURRAH, *supra* note 9, at 86.

276. Katri, *Transitions*, *supra* note 15, at 659.

277. *Id.* at 643.

278. *See supra* Part I.

279. TENN. CODE ANN. § 68-3-203(d) (LEXIS through the 2023 Reg. Sess.); MONT. ADMIN. R. 37.8.311(5)(b)(i)–(ii) (2023) ("The sex of a registrant as cited on a certificate may be corrected only if: (i) the sex of an individual was listed incorrectly on the original certificate as a result of a scrivener's error or a data entry error . . . ; or (ii) the sex of the individual was misidentified on the original certificate and the department receives a correction affidavit and supporting documents . . . ."); *see also* The Associated Press, *Montana Adopts Permanent Block on Birth Certificate Changes for Trans People*, NBC NEWS (Sept. 12, 2022, 1:58 PM), https://www.nbcnews.com/nbc-out/out-news/montana-adopts-permanent-block-birth-certificate-changes-trans-people-rcna47337 [https://perma.cc/TZP4-EVJ4]; OKLA. ADMIN. CODE § 1:2021-24 (2023) (prohibiting changes of gender on birth certificates by executive order).

280. Katri, *Transitions*, *supra* note 15, at 660; *see, e.g.*, Ray v. McCloud, 507 F. Supp. 3d 925, 934–36 (S.D. Ohio. 2020) (holding that a ban on reclassification amounts to violation of the constitutional rights to privacy and equal protection).

gender affirming surgery as a precondition for sex reclassification.[281] Many such requirements are currently undergoing challenges in federal courts,[282] and Katri observes a "general decline in the prevalence of this legal framework in U.S. jurisdictions over the past decade."[283] This approach echoes what this Article has called the *Mind-Body Alignment* approach.[284]

Most importantly, the other three types of policies *all turn on gender identity*. They reflect what this Article calls the *Gender Identity Era*. Katri observes that "[a]s of 2022, medical affirmation legal frameworks are the most commonly used across the United States for birth certificates[285] and are also widely used for state-issued IDs."[286] Most states today require proof of clinical treatment of gender nonconformity and a mental health diagnosis.[287] Other policies do not give medical experts direct authority. "Identity corroboration" involves a requirement that one who wishes to reclassify their sex in congruence with their self-identified gender "have an external party corroborate the request."[288] Under this framework, "'true sex' is reflective of subjective gender identity."[289] The last type of policy, "self-identified gender" means that individuals self-attest about their gender identity.[290] This framework, currently considered best practice for protecting the rights and recognition of trans people, has been adopted in eleven states for birth certificates.[291] Many states

281. Katri, *Transitions*, *supra* note 15, at 664 (first citing *Real ID Requirements*, GA. DEP'T DRIVER SERVS., https://dds.georgia.gov/georgia-licenseid/general-license-topics/real-id [https://perma.cc/P2L9-CRUX]; then citing *Valid Proof Documents*, KY. TRANSP. CABINET, https://drive.ky.gov/Drivers/Documents/ValidProofDocuments.pdf [https://perma.cc/GM6U-DNWV]; and then citing *ID Documents Center: Oklahoma*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://transequality.org/documents/state/oklahoma [https://perma.cc/P8T7-392A]).

282. Katri, *Transitions*, *supra* note 15, at 660 (first citing Corbitt v. Taylor, 513 F. Supp. 3d 1309, 1311–12 (M.D. Ala. 2021); and then citing Complaint for Declaratory and Injunctive Relief, Campos v. Cohen, No. 21-880 (M.D.N.C. Nov. 16, 2021)).

283. Katri, *Transitions*, *supra* note 15, at 667 (adding that there is a growing understanding that requiring surgery for the purpose of reclassification violates individual rights to autonomy, equality, and dignity).

284. *See supra* Section II.B; *see also* CURRAH, *supra* note 9, at 67.

285. Katri, *Transitions*, *supra* note 15, at 672 (citations omitted).

286. *Id.* (citations omitted).

287. *Id.* (citing Eli Coleman, Walter Bockting, Marsha Botzer, Peggy Cohen-Kettenis, Griet De Cuypere, Jamie Feldman, Lin Fraser, Jamison Green, Gail Knudson, Walter J. Meyer, Stan Monstrey, Richard K. Adler, George R. Brown, Aaron H. Devor, Randall Ehrbar, Randi Ettner, Evan Eyler, Robert Garofalo, Dan H. Karasic, Arlene Istar Lev, Gal Mayer, Heino Meyer-Bahlburg, Blaine Paxton Hall, Friedmann Pfaefflin, Katherine Rachlin, Ben Robinson, Loren S. Schechter, Vin Tangpricha, Mick van Trotsenburg, Anne Vitale, Sam Winter, Stephen Whittle, Kevan R. Wylie & Kenn Zucker, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT'L J. TRANSGENDERISM 165, 185 (2012)).

288. *Id.* at 680 (citations omitted).

289. *Id.* at 682.

290. *Id.* at 683.

291. *Id.* at 684 (citations omitted).

have adopted it for state-issued IDs.[292] Likewise, U.S. citizens are now allowed to select their own gender on U.S. passports and Consular Reports of Birth Abroad.[293] Other countries have followed this trajectory.[294] Overall, despite the backlash documented by Katri and others, this thorough study confirms that sex reclassifications laws in the United States now turn on gender identity as the primary indicator of legal sex.

2. Antidiscrimination Laws

In antidiscrimination laws as well, a dramatic shift towards gender identity as the primary indicator of legal sex has transpired in the past two decades. Transgender activists and scholars since the early 2000s have advocated for broader gender identity centered protections,[295] and courts, lawmakers, and policymakers have gradually followed.[296] In a two-decade process, gender identity—one's *internal* sense of being male or female or nonbinary—has become a prominent component in defining legal sex. This change happened in two phases.

a. Phase 1: Transgender Discrimination as Sex Stereotyping

In stark contrast with earlier caselaw in the 1990s,[297] in the first decade of the twenty-first century transgender plaintiffs began to win cases under sex stereotyping theory as articulated in *Hopkins v. Price Waterhouse*.[298] In *Hopkins*,

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292. *Id.* (citations omitted); *see also* 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, 495 (2016) (arguing for genderless IDs).

293. Press Release, Antony J. Blinken, Secretary of State, U.S. Dep't of State, Proposing Changes to the Department's Policies on Gender on U.S. Passports and Consular Reports of Birth Abroad (June 30, 2021), https://www.state.gov/proposing-changes-to-the-departments-policies-on-gender-on-u-s-passports-and-consular-reports-of-birth-abroad [https://perma.cc/MH2N-PKRB].

294. Katri, *Transitions*, *supra* note 15, at 687–88.

295. *See, e.g.*, Susannah Cohen, Note, *Redefining What It Means To Discriminate Because of Sex:* Bostock*'s Equal Protection Implications*, 127 COLUM. L. REV. 407, 407 (2022) (arguing that *Bostock* fundamentally redefined what it means to discriminate because of sex, and that the definition of sex should expand "to include discrimination based on any characteristic that is definitionally related to, and thus logically inseparable from, sex"); Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After* Bostock v. Clayton County, 69 KAN. L. REV. 409, 409 (2021) ("[T]he federal Fair Housing Act (FHA), which has identical language prohibiting discrimination in housing 'because of . . . sex,' should [after *Bostock*] be interpreted to prohibit discrimination based on sexual orientation and gender identity." (quoting 42 U.S.C. § 3604(a))); Maayan Sudai, *Toward a Functional Analysis of "Sex" in Federal Antidiscrimination Law*, 42 HARV. J.L. & GENDER 422, 456 (2019) (arguing that the search for a descriptively accurate definition of "sex" in the law, based on scientific knowledge, is futile, arguing for a functional analysis of "sex" that focuses on what "sex" does rather than what it is).

296. This has led to a political, legal, and social backlash. *See infra* Part IV.

297. *See supra* Part II.B.

298. 490 U.S. 228 (1989) (holding that discrimination on the basis of gender stereotype is sex-based discrimination).

the Supreme Court held that discriminating against a woman because she is not feminine enough is prohibited sex stereotyping under Title VII.[299] After *Hopkins*, litigants on behalf of transgender plaintiffs could argue that discrimination against transgender people should also be considered sex stereotyping. This claim is different from the later position (see "phase 2" below) that gender identity *is* a component of "sex." Under sex stereotyping theory, a transgender person is discriminated against because of stereotypes applied to them based on their sex assigned at birth. For instance, a transgender man is subjected to unlawful sex stereotyping if he is fired because he is expected—as was Ann Hopkins—to behave in a more feminine manner. Namely, he was treated by his employer as *a woman* who is not feminine enough and should therefore recover under *Hopkins*. This is different from claiming that a transgender man is discriminated against as a man and because of his male gender identity.

Around the turn of the century, several courts and the Equal Employment Opportunity Commission ("EEOC") adopted the *Hopkins* anti-stereotyping rationale. For instance, in 2004, in *Smith v. City of Salem*,[300] the Sixth Circuit held in favor of a transgender plaintiff in a Title VII claim.[301] "It is true," the court expressed, "that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on 'sex'... but not on 'gender'.... However, [this approach] has been eviscerated by *Price Waterhouse*."[302] Indeed, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, *irrespective of the cause of that behavior*; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender nonconformity."[303] The court did not consider gender identity as a component of sex; it viewed the transgender plaintiff as a man who was subjected to unlawful sex stereotyping.[304] Other federal courts followed this sex stereotyping theory to include transgender plaintiffs within the scope of Title VII.[305]

299. *Id.* at 235–37.

300. 378 F.3d 566 (6th Cir. 2004).

301. *Id.* at 567–68.

302. *Id.* at 573.

303. *Id.* at 575 (emphasis added).

304. *Id.*

305. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) ("'Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior'.... [The transgender plaintiff] established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes." (quoting *Smith*, 378 F.3d at 575)); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) ("[T]itle VII and *Price Waterhouse*... do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes... and [a] 'macho' female who... is perceived by others to be in nonconformity with traditional gender

A similar trend developed under the Equal Protection Clause. In *Glenn v. Brumby*,[306] the Eleventh Circuit decided an Equal Protection claim brought by a transgender woman who was discharged as an employee of Georgia General Assembly's Office of Legislative Counsel.[307] She filed a § 1983 action alleging that her former supervisor and state officials "discriminat[ed] against her because of her sex, *including her female gender identity* and her failure to conform to the sex stereotypes."[308] The court held that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[309] Other federal courts did the same.[310] In these decisions, the leading rationale is that sex stereotyping violates the Equal Protection Clause.[311]

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stereotypes."); Schroer v. Billington, 424 F. Supp. 2d 203, 212 (D.D.C. 2006) ("[I]t may be time to revisit [the] conclusion . . . that discrimination against transsexuals because they are transsexuals is literally discrimination because of sex.") (internal quotation marks and ellipsis omitted); Mitchell v. Axcan Scandipharm, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 21, 2006) (holding that a transgender plaintiff may state a claim for sex discrimination by "showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions"); Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. Civ.02-1531, 2004 WL 2008954, at *2–3 (D. Ariz. June 3, 2004) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait."), *aff'd*, 325 F. App'x 492 (9th Cir.2009); Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E, 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (holding transsexual plaintiff may state a claim under Title VII "based on the alleged discrimination for failing to 'act like a man'"); Finkle v. Howard Cnty., 12 F. Supp. 3d 780, 788 (D. Md. 2014) (holding that plaintiff's claim that she was discriminated against "because of her obvious transgendered status" is a cognizable claim of sex discrimination).

306. 663 F.3d 1312 (11th Cir. 2011).

307. *Id.* at 1313–14.

308. *Id.* at 1314.

309. *Id.* at 1317.

310. *See, e.g.*, M.A.B. v. Bd. of Educ., 286 F. Supp. 3d 704, 719 (D. Md. 2018) (subjecting a school locker room policy to heightened scrutiny because it "classifie[d] [the plaintiff] differently on the basis of his transgender status, and, as a result, subject[ed] him to sex stereotyping"); Doe 1 v. Trump, 275 F. Supp. 3d 167, 210, 211 (D.D.C. 2017) (subjecting military bans on transgender persons to heightened scrutiny because they "punish individuals for failing to adhere to gender stereotypes"), *vacated sub nom.* Doe 2 v. Shanahan, 755 F. App'x 19, 22 (D.C. Cir. 2019); Stone v. Trump, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (adopting *Doe 1*'s rationale); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (subjecting discrimination on the basis of transgender status to intermediate scrutiny in part under sex-stereotyping theory).

311. *See generally* Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831 (2020) (tracing how courts came to understand being transgender as a matter of gender rather than sex and thus have treated transgender plaintiffs as gender nonconformers).

b. Phase 2: Gender Identity as Legal Sex—the Inclusion Approach

In *Schroer v. Billington*,[312] a federal district court signaled the next phase in transgender antidiscrimination law.[313] It accepted plaintiff's sex stereotyping claims under Title VII and affirmed that "because *gender identity is a component of sex*, discrimination on the basis of gender identity is sex discrimination."[314] This was an early articulation of the gender identity inclusion approach (hereinafter "the inclusion approach"). It cited expert testimony that "there are nine factors that constitute a person's sex. One of these factors is gender identity, which [is] defined as one's personal sense of being male or female."[315] The Library of Congress brought a competing expert who testified that "he and his colleagues regard gender identity as a component of "sexuality" rather than 'sex.'"[316] The court held that discrimination against a transgender employee violates *Hopkins* and Title VII.[317]

In 2012, the EEOC adopted the gender identity inclusion approach in *Macy v. Holder*.[318] In this case, the EEOC originally dismissed a part of a transgender plaintiff's complaint that relied on her gender identity as the basis for a Title VII sex discrimination claim.[319] On appeal, the EEOC reversed and concluded that "a transgender person who has experienced discrimination based on his or her *gender identity* may establish a prima facie case of sex discrimination through any number of different formulations. . . . [T]hey are simply different ways of describing sex discrimination."[320] In cases like *Schroer* and *Macy*, courts and agencies began to view gender identity discrimination as discrimination because of sex *per se*. They accepted the now-prevalent medical-scientific definition of sex that includes gender identity as an important component of sex.[321]

In a parallel line of caselaw, transgender students have challenged school policies that discriminate against them based on their transgender status or gender identity. These challenges have typically proceeded under Title IX and

312. 577 F. Supp. 2d 293 (D.D.C. 2008).

313. *Id.* at 293–94 (holding that withdrawal of job offer constituted sex-stereotyping discrimination violative of Title VII and revocation of job offer constituted discrimination "because of sex" in violation of Title VII).

314. *Id.* at 306 (emphasis added).

315. *Id.*

316. *Id.*

317. *Id.* at 303–04, 308.

318. Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *1 (EEOC Apr. 20, 2012).

319. *Id.* at *3.

320. *Id.* at *10 (emphasis added).

321. *See supra* Section II.A.

the Equal Protection Clause.[322] For example, in *Whitaker v. Kenosha Unified School District*,[323] the Seventh Circuit held in favor of a transgender male student who was denied access to boys' restrooms.[324] The court clarified that "[t]his is not a case where a student has merely announced that he is a different gender. Rather, Ash has a medically diagnosed and documented condition. Since his diagnosis, he has consistently lived in accordance with his gender identity."[325] The court clarified that respecting gender identity of students will lead, not to the "demise of gender-segregated facilities" but to their greater enforcement.[326] The plaintiff won under Title IX and the Equal Protection Clause because gender identity discrimination is sex discrimination.[327]

The Fourth Circuit also embraced the gender identity inclusion approach in *Grimm v. Gloucester County School Board*.[328] In that case as well, a transgender male student challenged, under the Equal Protection Clause and Title IX, a school district policy that required students to use bathrooms based on their birth-assigned sex.[329] The court agreed with the plaintiff on both counts.[330] It clarified that "most people are cisgender, meaning that their gender identity—or their 'deeply felt, inherent sense' of their gender—aligns with their sex-assigned-at-birth."[331] But some are different, and "there have always been people who 'consistently, persistently, and insistently' express a gender that, on

322. *See, e.g.*, Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034 (7th Cir. 2017) (holding that denial of access to sex-segregated bathroom based on gender identity is unlawful sex discrimination under equal protection); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 279 (W.D. Pa. 2017) (criticizing a school's definition of "biological sex" as "the then-existing presence of a penis (boys) or a vagina (girls)," as without any basis in "medical, psychological, psychiatric," or other expert opinions); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 318 F. Supp. 3d 1293 (M.D. Fla. 2018) (ordering a final judgment to be made in a separate proceeding), *rev'd*, 57 F.4th 791, 807 (11th Cir. 2022) ("There is no evidence to suggest that [the transgender plaintiff's] identity as a boy is any less consistent, persistent and insistent than any other boy." (quoting *Adams ex rel. Kasper*, 318 F. Supp. 3d at 1317)); B.E. v. Vigo Cnty. Sch. Corp., 608 F. Supp. 3d 725 (S.D. Ind. 2022) (holding that two transgender male high school students contending that school's refusal to allow them to use male restroom and locker room violated Title IX and Equal Protection Clause were likely to succeed on merits of their claim).

323. 858 F.3d 1034 (7th Cir. 2017).

324. *Id.* at 1039.

325. *Id.* at 1050.

326. *Id.* at 1055.

327. *Id.* at 1049–54.

328. 972 F.3d 586 (4th Cir. 2020).

329. *Id.* at 593. After parents of students at the school complained about Gavin Grimm's use of boys' restrooms, the school issued a policy that prevented his use of male restrooms and locker rooms. *Id.* at 598–99. They argued that minority rights should not trump majority rights, and that transgender students, especially those assigned male at birth, can be predators. *Id.*

330. *Id.* at 593.

331. *Id.* at 594.

a binary, we would think of as opposite to their assigned sex."[332] The court discussed treatment protocols for gender dysphoria,[333] and lamented the types of abuse that transgender students face.[334]

The gender identity inclusion approach informed the *Grimm* court's doctrinal holdings. In its Equal Protection analysis, the court viewed the "biological gender" bathroom policy as a sex-based classification that required intermediate scrutiny.[335] It criticized the school board for treating the plaintiff's gender identity as a choice and disregarding the plaintiff's "medically confirmed, persistent and consistent gender identity."[336] The court's analysis of plaintiff's quasi-suspect class rested on gender identity as a core characteristic of sex.[337] The court held that "a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'"[338]

This dramatic transformation in legal sex has generated significant backlash in courts, legislators, policymakers, and parts of the general public. For example, in a case with analogous facts to those of *Whitaker* and *Grimm*, the Eleventh Circuit in *Adams v. School Board of St. Johns County*[339] rejected the gender inclusion approach.[340] Drew Adams, a transgender high school student, challenged a school policy that denied him access to the boys' restrooms.[341] The majority opinion rejected the idea that gender identity is a component of sex and insisted instead that, while Drew "identifies as male," his "biological sex—

332. *Id.* (citing expert testimony and AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2013)). The court adds that "[f]or many years, mental health practitioners attempted to convert transgender people's gender identity to conform with their sex assigned at birth, which did not alleviate dysphoria, but rather caused shame and psychological pain." *Id.* at 595.

333. *Id.* at 595–96 (citing Eli Coleman, Walter Bockting, Marsha Botzer, Peggy Cohen-Kettenis, Griet De Cuypere, Jamie Feldman, Lin Fraser, Jamison Green, Gail Knudson, Walter J. Meyer, Stan Monstrey, Richard K. Adler, George R. Brown, Aaron H. Devor, Randall Ehrbar, Randi Ettner, Evan Eyler, Robert Garofalo, Dan H. Karasic, Arlene Istar Lev, Gal Mayer, Heino Meyer-Bahlburg, Blaine Paxton Hall, Friedmann Pfaefflin, Katherine Rachlin, Ben Robinson, Loren S. Schechter, Vin Tangpricha, Mick van Trotsenburg, Anne Vitale, Sam Winter, Stephen Whittle, Kevan R. Wylie & Kenn Zucker, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT'L J. TRANSGENDERISM 165 (2012) (representing the consensus approach of the medical and mental health community)).

334. *Id.* at 597.

335. *Id.* at 609.

336. *Id.* at 610.

337. *Id.* at 612–13 ("[T]ransgender people constitute a discrete group with immutable characteristics: Recall that gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice. Rather, it is as natural and immutable as being cisgender. . . . [T]he Board's restroom policy constitutes sex-based discrimination and, independently, that transgender persons constitute a quasi-suspect class.").

338. *Id.* at 616 (citing Bostock v. Clayton County, 140 S. Ct. 1731 (2020)).

339. 57 F.4th 791 (11th Cir. 2022).

340. *Id.* at 807–08 (holding that school bathroom policy that denied plaintiff's access to the boys' room did not violate transgender student's equal protection rights and did not violate Title IX).

341. *Id.* at 798.

sex based on chromosomal structure and anatomy at birth—is female."[342] The court warned that labeling discrimination against Drew as sex discrimination "would refute the Supreme Court's longstanding recognition that 'sex, like race and national origin, is *an immutable characteristic* determined solely by the accident of birth.'"[343] The court prioritized "biological sex" over gender identity.[344] It concluded that a bathroom policy that excludes a high school student from using a bathroom that matches his gender identity does not unlawfully discriminate on the basis of "biological sex."[345]

The court similarly rejected the plaintiff's Title IX claim, observing that "[r]eputable dictionary definitions of 'sex' from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females."[346] "Sex" under Title IX, according to this decision, does not include gender identity.[347] The court expressed worry that including gender identity in the definition of "sex" under Title IX would lead to discrimination against cisgender students who would have to be subjected to the presence of transgender students in restrooms, locker rooms, and showers.[348] The court concluded that a school policy excluding transgender students from restrooms that reflect their gender identity does not violate Title IX, and that "[w]hether Title IX should be amended to equate 'gender identity' and 'transgender status' with 'sex' should be left to Congress—not the courts."[349] But *Adams* is an outlier in Title IX jurisprudence, where the trend over the last two decades has been towards integrating gender identity as a leading factor in legal sex.[350]

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342. *Id.* at 796.

343. *Id.* at 807 (emphasis added) (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).

344. *Id.* at 808 ("[T]his *is* a case about the constitutionality and legality of separating bathrooms by biological sex because it involves an individual of one sex seeking access to the bathrooms reserved for those of the opposite sex. Adams's gender identity is thus not dispositive for our adjudication of Adams's equal protection claim.").

345. Following this same logic, the court concluded that because the bathroom policy classifies based on "biological sex" (as narrowly defined by the court) and not transgender status or gender identity, it does not discriminate against transgender students. *Id.* at 808–11.

346. *Id.* at 812.

347. *Id.* at 813.

348. *Id.* at 814 ("[R]eading 'sex' to include 'gender identity,' as the district court did, would result in situations where an entity would be prohibited from installing or enforcing the otherwise permissible sex-based carve-outs when the carve-outs come into conflict with a transgender person's gender identity.").

349. *Id.* at 817.

350. *But see* D.H. *ex rel.* A.H. v. Williamson Cnty. Bd. of Educ., No. 22-CV-00570, 2022 WL 16639994, at *10–11 (M.D. Tenn. Nov. 2, 2022) (holding that transgender student who challenged a school's policy that denied her access to multi-occupancy girls' restroom failed to show she was likely to succeed on her equal protection and Title IX claims); Neese v. Becerra, No. 21-CV-163, 2022 WL 16902425, at *1, 5 (N.D. Tex. Nov. 11, 2022) (finding that the section of the Affordable Care Act ("ACA") prohibiting discrimination on any ground prohibited by Title IX did not prohibit discrimination on basis of sexual orientation or gender identity).

Gender identity is also becoming a leading indicator of legal sex in the context of school athletics programs. Several states have enacted laws or policies to reflect the gender identity inclusion approach.[351] And several courts have viewed gender identity as the appropriate indicator of sex and held in favor of transgender plaintiffs who challenged exclusionary policies in athletics programs.[352] But these changes have been met with a dramatic backlash. In the last three years, states have legislated against gender identity inclusion in athletics programs, often alluding to fairness arguments in women's sports.[353]

c. Bostock *and Its Aftermath*

In *Bostock v. Clayton County*, the Supreme Court held that Title VII prohibits discrimination on the grounds of transgender status and sexual orientation.[354] Unlike the Title IX cases discussed above, the Supreme Court

351. *See, e.g.*, CAL. EDUC. CODE § 221.5(f) (current with Chapter 1 of 2023–24 1st Ex. Sess., and urgency legislation through Chapter 785 of 2023 Reg. Sess.) ("A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."); An Act Concerning Discrimination, Pub. Act No. 11-55, 2011 Conn. Legis. Serv. 859 (2013) (codified as amended in scattered sections of 4a, 46a, 8, 10, 11, 16, 28, 31, 32, 38, 42, 52, 53, and 70 CONN. GEN. STAT.) (prohibiting discrimination on the basis of gender identity or expression in all areas and contexts in which the laws already prohibit discrimination on the basis of sex); *Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html [https://perma.cc/TT8R-53V9] (last updated Oct. 28, 2021) ("Where there are sex-segregated classes or athletic activities, including intramural and interscholastic athletics, all students must be allowed to participate in a manner consistent with their gender identity.").

352. *See, e.g.*, Hecox v. Little, 479 F. Supp. 3d 930, 975 (D. Idaho 2020) (holding that a transgender athlete was likely to succeed on merits of her equal protection claim because "the Act on its face discriminates between cisgender athletes, who may compete on athletic teams consistent with their gender identity, and transgender women athletes, who may not compete on athletic teams consistent with their gender identity"); B.P.J. v. W. Va. State Bd. of Educ., 550 F. Supp. 3d 347, 347, 357 (S.D. W. Va. 2021) ("B.P.J. will be treated worse than girls with whom she is similarly situated because she alone cannot join the team corresponding to her gender identity."); A.M. *ex rel.* v. Indianapolis Pub. Schs., 617 F. Supp. 3d 950, 966 (S.D. Ind. 2022) ("A law that prohibits an individual from playing on a sports team that does not conform to his or her gender identity 'punishes that individual for his or her gender non-conformance,' which violates the clear language of Title IX." (citation omitted)); Soule *ex rel.* Stanescu v. Conn. Ass'n of Schs., Inc., 57 F.4th 43, 47 (2d Cir. 2022) (finding that claim that maintaining race records achieved by transgender athletes affected cisgender plaintiffs' college recruitment and scholarship opportunities was rendered moot).

353. For a list of these states and their statutes, see *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJ., https://www.lgbtmap.org/equality-maps/sports_participation_bans [https://perma.cc/7GR9-ZZ5W] (these states now include Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming). *See, e.g.*, *Alabama Is Latest State To Ban Trans Girls from Female Sports Teams*, GUARDIAN (Apr. 24, 2021), https://www.theguardian.com/us-news/2021/apr/24/alabama-transgender-ban-female-sports-teams [https://perma.cc/D53X-ECGK].

354. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

did not adopt the gender identity inclusion approach. It explicitly rejected it.[355] A majority opinion by Justice Gorsuch clarifies that gender identity is not a protected category under Title VII.[356] Nonetheless, under a "straightforward application" of Title VII's "legal terms with plain and settled meanings," it is clear that an employer who discriminates "against employees for being homosexual or transgender . . . necessarily and intentionally discriminates against that individual in part because of sex."[357]

Although *Bostock* rejected the gender identity inclusion approach, several courts and lawmakers have applied *Bostock* to extend gender-identity protections under Title VII.[358] And on January 20, 2021, President Biden signed an Executive Order that clarified that "laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation."[359] Accordingly, the Department of Education ("DOE") and EEOC issued guidance documents providing such interpretation of Title IX and Title VII.[360] So although *Bostock* did not include gender identity under Title VII protections,

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355. *Id.* at 1739.

356. *Id.* ("[T]he only statutorily protected characteristic at issue in today's cases is 'sex'—and that is also the primary term in Title VII whose meaning the parties dispute . . . . [W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female.").

357. *Id.* at 1743–44. For a discussion of textualism in *Bostock*, see Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 120–29 (2021); William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1550–51 (2021) (evaluating the Supreme Court's *Bostock* definition of sex through original public meaning).

358. *See, e.g.*, Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 601 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 713 (2021) ("*Bostock* defined sex discrimination to encompass sexual orientation and gender identity discrimination. But it did not alter the meaning of discrimination itself."); Walker v. Azar, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020) ("[T]he unmistakable basis for HHS's action was a rejection of the position taken in the 2016 Rules that sex discrimination includes discrimination based on gender identity and sex stereotyping. Whether or not it is dispositive of that issue with respect to Title IX and § 1557, *Bostock* is at least 'an important aspect of the problem . . . .'" (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))). *But see* Texas v. Equal Emp. Opportunity Comm'n, 633 F. Supp. 3d 824, 846–47 (N.D. Tex. 2022) (holding that the State was entitled to declaratory judgment that guidance issued by EEOC and HHS regarding gender identity discrimination and gender affirming care were unlawful).

359. Exec. Order. No. 13988, 86 Fed. Reg. 7023, 7024 (Jan. 20, 2021). The President directed federal agencies to "fully implement statutes that prohibit sex discrimination" guided by this interpretation. *Id.* at 7023.

360. On June 22, 2021, the DOE published in the Federal Register an Interpretation of Title IX. Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637, 32637 (June 22, 2021). On June 15, 2021, the EEOC issued a "technical assistance document." *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 15, 2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender [https://perma.cc/6GUH-FSFA]. The technical assistance document "explains what the Bostock decision means for LGBTQ+ workers (and all covered workers) and for employers across the country" and "explains the [EEOC's] established legal positions on LGBTQ+-related matters." *Id.*

due to its holding in favor of transgender plaintiffs, it effectively contributed to the growing status of gender identity as the new legal sex.

3. Family Laws

Gender identity or transgender status are no longer per se grounds for marriage annulments.[361] Nor are they grounds for terminating parental rights of transgender parents.[362] As in other areas of law, gender identity has increasingly gained more recognition and protection in family law conflicts.

a. Transgender Parents

As Shannon Minter has observed, while in the past some courts have held that a decision to undergo a gender transition was a valid ground to terminate parental rights,[363] today it is increasingly unlikely that parental rights of trans parents would be terminated.[364] As in the sex reclassification and the antidiscrimination contexts discussed above,[365] "courts now generally recognize the strong contemporary scientific consensus that being transgender is a medical condition; that gender transition is medically necessary to alleviate gender dysphoria; and that being transgender does not affect a person's ability to be a caring, responsible parent."[366]

In a high-profile case in Arizona, after a transgender man gave birth, his legal identity as a man was deemed invalid by an Arizona family court.[367] The family court reasoned that by giving birth, Beatie, who had legally and socially transitioned, had waived his status as a man.[368] But the court of appeals reversed, recognized Beatie's male identity, and validated his Hawaii-issued marriage certificate.[369] The court of appeals recognized that when gender identity is

361. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (recognizing marriage equality for same-sex couples under the Due Process and Equal Protection Clauses). For annulment claims, see *supra* Section II.B.2.c.

362. *See* Minter, *Transgender Family Law*, *supra* note 183, at 413; COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 1:2 (2023).

363. Minter, *Transgender Family Law*, *supra* note 183, at 413 (citations omitted).

364. *Id.*

365. *See supra* Sections III.B.1, III.B.2.

366. Minter, *Transgender Family Law*, *supra* note 183, at 413 & n.16 (citing Christian v. Randall, 516 P.2d 132 (Colo. Ct. App. 1973) (holding that a parent's gender transition did not provide grounds for changing custody from mother to father where there was no evidence the children were adversely affected)); Tipsword v. Tipsword, No. 1 CA-CV 12-0066, 2013 WL 1320444, ¶ 9 (Ariz. Ct. App. Apr. 2, 2013) ("The bare fact that a parent is transgender is not relevant to his or her ability to parent effectively.").

367. *See* Beatie v. Beatie, 333 P.3d 754, 757–58 (Ariz. Ct. App. 2014).

368. *Id.* at 757.

369. *Id.* at 760 (holding that Beatie's Hawaii-issued birth certificate must be given full faith and credit, and that denying his recognition as male would violate his constitutional rights under the Equal Protection Clause of the U.S. Constitution).

followed by affirming procedures, it results in valid legal reclassification.[370] The court validated Beatie's male gender identity and his status as a father.[371] It followed his gender identity, not his reproductive capacity.[372] This represents a broader trend in which the gender identity of transgender parents is gaining greater legal recognition and protections.[373] Washington, D.C., has codified protection of gender identity in parental disputes.[374] Others have embraced them through court decisions.[375]

b. Transgender Children and Youth

After *Obergefell v. Hodges*,[376] a new battleground emerged. Transgender children and youth became the target of conservative political campaigns.[377] In several states, lawmakers advance a new emphasis on "biological sex," attempting to restrict or ban gender affirming care of children and youth.[378]

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370. *Id.* at 758.

371. *Id.* at 759 ("Therefore, the possibility of Thomas giving birth to children did not preclude him from legally amending his birth certificate under the plain language of the Hawaii statute. Further, there is no apparent basis in law or fact for the proposition that in the event Thomas gave birth after having modified his gender designation, it would have abrogated his 'maleness,' as reflected upon the amended birth certificate.").

372. *Id.*

373. However, as Sonia Katyal and Ilona Turner have revealed in a comprehensive study of visitation and custody disputes, many courts are still biased against transgender parents. Katyal & Turner, *supra* note 183, at 1593, 1598.

374. D.C. CODE § 16-914(a)(1)(A) (LEXIS through June 30, 2023) ("In any proceeding between parents in which the custody of a child is raised as an issue, the . . . race, color, national origin, political affiliation, sex, sexual orientation, or gender identity or expression of a party, in and of itself, shall not be a conclusive consideration.").

375. *See generally* Katyal & Turner, *supra* note 183 (discussing how transgender status plays a role in parental disputes).

376. 576 U.S. 644 (2015).

377. *See, e.g.*, *Consider This: How Anti-Trans Bills Evoke the Culture Wars of the 90s*, NPR (May 27, 2021, 5:00 PM), https://www.npr.org/2021/05/24/999902366/how-anti-trans-bills-evoke-theculture-wars-of-the-90s [https://perma.cc/7J4S-UJ7W]; Frank Bruni, *Republicans Have Found Their Cruel New Culture War: Arkansas Lawmakers' Move Against Trans People Reflects a Larger Strategy*, N.Y. TIMES (Apr. 10, 2021), https://www.nytimes.com/2021/04/10/opinion/sunday/transgender-rights-republicans-arkansas.html [https://perma.cc/W38X-L7Z6 (dark archive)]; Saeed Jones, *The Republican War Against Trans Kids*, GQ (May 5, 2021), https://www.gq.com/story/chase-strangio-on-anti-trans-laws [https://perma.cc/TR8J-2E3V].

378. *See, e.g.*, Alabama Vulnerable Child Compassion and Protection Act, ch. 26, 2022 Ala. Laws 2022-289 (codified at Ala. Code § 26-26-1 to -9) (prohibiting practices to alter or affirm minor's sexual identity or perception such as prescribing puberty blocking medication or surgeries); Act of March 30, 2022, ch. 104, 2022 Ariz. Sess. Laws 583 (codified as amended at ARIZ. REV. STAT. ANN. § 32-3230 (2023)) (prohibiting irreversible gender reassignment surgery for anyone under the age of eighteen); H.R. 454, 134th Gen. Assemb., Reg. Sess. (Ohio 2021–22) (prohibiting "certain procedures to alter a minor child's sex and to designate this act as the Save Adolescents from Experimentation ("SAFE Act")). For a survey of such initiatives see *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/QF8B-D4BJ] (last updated Sept. 5, 2023).

In late February 2022, Texas Governor Greg Abbott issued a directive that characterizes gender affirming care as child abuse that Texas Department of Family and Protective Services ("DFPS") must investigate.[379] The directive was challenged by the parents of a transgender child.[380] In Alabama, the Vulnerable Child Compassion and Protection Act[381] prohibits procedures on minors "for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's sex as defined in this [act]."[382] The legislature opined that "[m]inors, and often their parents, are unable to comprehend and fully appreciate the risk and life implications [of these treatments]."[383] This legislation was also challenged,[384] and a federal court held that "[p]arent [p]laintiffs are substantially likely to show that they have a fundamental right to treat their children with transitioning medications subject to medically accepted standards and that the Act infringes on that right."[385]

In 2020, a mother in Indiana attempted to change her seven-year-old transgender daughter's sex marker on her birth certificate.[386] The mother urged the court to recognize that the child was now a girl who was devastated when outed (as transgender), and that without the gender marker change the school intended to exclude her from the girls' locker room.[387] The mother presented

379. Letter from Greg Abbott, Governor of Tex., to Jaime Masters, Comm'r of Tex. Dep't of Fam. & Protective Servs. (Feb. 22, 2022), https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf [https://perma.cc/T4V5-YFT9] ("[I]t is already against the law to subject Texas children to a wide variety of elective procedures for gender transitioning, including reassignment surgeries that can cause sterilization, mastectomies, removals of otherwise healthy body parts, and administration of puberty-blocking drugs or supraphysiologic doses of testosterone or estrogen." (citing TEX. FAM. CODE § 261.001(1)(A)–(D) (defining "abuse"))); *see also* Azeen Ghorayshi, *Texas Governor Pushes To Investigate Medical Treatments for Trans Youth as 'Child Abuse,'* N.Y. TIMES (Feb. 23, 2022), https://www.nytimes.com/2022/02/23/science/texas-abbott-transgender-child-abuse.html [https://perma.cc/3UMG-KUA5 (dark archive)].

380. *In re* Abbott, 645 S.W.3d 276, 281 (Tex. 2022) (holding that Attorney General opinion had no binding legal effect on DFPS's statutory obligation to undertake prompt and thorough investigations of reports of child abuse or neglect).

381. ALA. CODE § 26-26-1 to -9 (Westlaw through Acts 2023-1 through 2023-3 of the 2023 First Spec. Sess.; through Acts 2023-4 through 2023-491, and Acts 2023-493 through 2023-561 of the 2023 Reg. Sess.; and Acts 2023-562 through 2023-569 of the 2023 Second Spec. Sess.).

382. *Id.* § 26-26-4. The Act defines a "minor" as anyone under the age of nineteen. *Id.* §§ 26-26-3(1), 43-8-1(18). The Act defines "sex" as "[t]he biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profiles." *Id.* § 26-26-3(3).

383. *Id.* § 26-26-2(15).

384. *See Alabama Law Banning Transgender Medication Challenged in Two Lawsuits*, CBS NEWS (Apr. 11, 2022, 10:05 PM), https://www.cbsnews.com/news/alabama-transgender-law-lawsuits/ [https://perma.cc/S792-QCC7]; Complaint at 2, 26–33, Ladinsky v. Ivey, No. 22-CV-447 (N.D. Ala. Apr. 8, 2022), ECF No. 1; Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1137–38 (M.D. Ala. 2022), *vacated by* Eknes-Tucker v. Governor of Ala., 80 F.4th 1205 (11th Cir. 2023).

385. *Eknes-Tucker*, 603 F. Supp. 3d at 1144.

386. *In re* O.J.G.S., 187 N.E.3d 324, 325–26 (Ind. Ct. App. 2022).

387. *Id.* at 326.

expert testimony that "[w]hen transgender youth desire these interventions but cannot access them, they are [at] greater risk for negative mental health outcomes, including suicide."[388] But the trial court denied the petition, and the appellate court affirmed.[389]

Some family law conflicts now involve parental conflicts about gender affirming care for children and youth.[390] But a growing number of family law conflicts today involve disputes between parents who affirm their children's gender identity, and a state or school board that does not.[391] These conflicts represent the ongoing backlash against gender identity in American law, politics, and culture. Sadly, vulnerable children and their lives are used as pawns to score political victories.

IV. THE NEW LEGAL SEX, A "PROFOUND MORAL ISSUE"[392]

As legal sex is changing, a moral metamorphosis in U.S. culture is also taking place. Medical and legal redefinitions of sex and gender reflect and affect moral attitudes about sex and gender. By this I do not mean only that individual views about sex and sexual morality have changed, but that at a societal level, where moral concepts evolve, sex has changed since the early 2000s.[393] It has changed so much that today most people in the United States know what gender identity is, and many courts and lawmakers are moving to protect it as the primary indicator of legal sex.[394]

This final part offers two insights regarding this transformation in morals. Section IV.A argues that *even when they are disguised in medical-scientific terms*, current legal and political attacks on transgender individuals reflect a moral disapproval shared by those who disagree with the mainstream general shift in attitudes about sex and gender. Therefore, Section IV.B argues that when considered in the broader context of the twenty-first century culture wars, the

388. *Id.* (second alteration in original).

389. *Id.* at 327, 330.

390. *See generally* Marie-Amélie George, *Exploring Identity*, 55 FAM. L.Q. 1 (2021) (offering a "comprehensive analysis of custody cases involving 'gender expansive children,'" and arguing that "courts should be focused on which parent is best suited to help the child with the exploratory process, rather than its outcome").

391. *See, e.g.*, Andrea Salcedo, *Missouri Dad's Testimony Against Transgender Sports Ban Goes Viral: 'Let Them Have Their Childhoods,'* WASH. POST (Mar. 18, 2021, 7:25 AM), https://www.washingtonpost.com/nation/2021/03/18/missouri-father-transgender-bill-video/ [https://perma.cc/C5PE-PHPQ (dark archive)].

392. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022) (discussing abortion debates in the United States).

393. For the foundational text on how morality evolves at a societal level, *see* FRIEDRICH NIETZSCHE, A GENEALOGY OF MORALS (1887), *reprinted in* 10 THE WORKS OF FRIEDRICH NIETZSCHE, at xxi (Alexander Tille ed., William A. Hausemann trans., Macmillan Co. 1897); *see also* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY VOLUME 1: AN INTRODUCTION 3–13 (Robert Hurley trans., Vintage Books 1990) (1976).

394. *See supra* Section III.B.

reliance of transgender advocacy and allies on medical and health experts and classifications is not enough.[395] The debate about the transformation of sexual morals has to be debated as such.

A. *A Moral/Ideological Debate over the "Soul of America"*[396]

The current moral rage against transgender children and youth must be assessed in a broader context of a moral debate in America, dating back at least to the 1960s, and involving reproductive rights, LGBTQ rights, racial equality, and women's liberation.[397] Expansion of rights in these domains, since the 1960s, has threatened and chipped away at the supremacy of "traditional family values."[398] Conservatives have often framed this as a fight for the "Soul of America."[399] These conflicts certainly have religious overtones, but they are not always framed that way.[400]

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[401] took a decisive stance in these debates about sexual morality when it held that pregnant people have no constitutional right to control their reproductive fate.[402] Writing for the majority, Justice Alito conceded that "[a]bortion presents a *profound moral issue* on which Americans hold sharply conflicting views."[403] The Court reasoned that the Due Process Clause of the Fourteenth Amendment "has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[404] Much has been written and said about the selective originalist

395. *See supra* Section III.B.

396. *See* HARTMAN, *supra* note 16, *passim*.

397. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the right to contraception for married persons); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to contraception to single persons); Lawrence v. Texas, 539 U.S. 558 (2003) (establishing the right to same-sex intimacy); Obergefell v. Hodges, 576 U.S. 644 (2015) (establishing that the rights to contraception, contraception outside of marriage, same-sex intimacy, and same-sex marriage, are fundamental rights and protected under the Constitution, respectively).

398. *See generally Griswold*, 381 U.S. 479 (establishing the right to contraception for married persons); *Eisenstadt*, 405 U.S. 438 (extending the right to contraception to single persons); *Lawrence*, 539 U.S. 558 (establishing the right to same-sex intimacy; *Obergefell*, 576 U.S. 644 (establishing the fundamental right to same-sex marriage).

399. *See generally* HARTMAN, *supra* note 16 (exploring historical foundations and consequences of the "Culture Wars").

400. Political scientist Corey Robin's definition of conservatism as a "felt experience of having power, seeing it threatened, and trying to win it back," is helpful here. COREY ROBIN, THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN 4 (2011).

401. 142 S. Ct. 2228 (2022).

402. *Id.* at 2284.

403. *Id.* at 2240 (emphasis added).

404. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). Lawmakers in Washington were quick to put a bill on the House floor to defend the right to contraceptives and

methodology of the *Dobbs* majority.[405] The Court's eagerness to embolden the conservative side of the culture wars is evident and was best captured in Justice Clarence Thomas's announcement that "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold* [contraceptives], *Lawrence* [sodomy laws], and *Obergefell* [same-sex marriage]" because "any substantive due process decision is 'demonstrably erroneous.'"[406] Despite Justice Kavanaugh's claim that "the issue before this Court . . . is not the policy or morality of abortion,"[407] after *Dobbs* it is clear how high the stakes are in twenty-first century moral and legal debates about sex, gender, and sexuality.

Medical experts and health professionals regularly testify on behalf of those seeking sexual freedom and reproductive rights. They testify about the dire consequences of inadequate access to abortion for the health of people who can get pregnant,[408] and, as Part III has shown, about the harms of discriminating against transgender children and youth.[409] But while medical experts may help secure reproductive and gender rights and recognition, the last several years have demonstrated that science and medicine alone cannot prevail in debates that are essentially about morality, not science. While both sides of current debates about reproductive and LGBTQ rights rely on health and medical experts, the legal and political results often reflect positions about sexual morality.[410]

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marriage equality, but only the marriage equality bill moved forward. Stephanie Lai, *House Moves To Protect Same-Sex Marriage from Supreme Court Reversal*, N.Y. TIMES (July 19, 2022), https://www.nytimes.com/2022/07/19/us/politics/house-gay-marriage-bill.html [https://perma.cc/P9QN-7MVY (dark archive)].

405. *See, e.g.*, Reva Siegel, *The Trump Court Limited Women's Rights Using 19th-Century Standards*, WASH. POST (June 25, 2022, 1:10 PM), https://www.washingtonpost.com/outlook/2022/06/25/trump-court-limited-womens-rights-using-19th-century-standards/ [https://perma.cc/5K9V-CPQY (dark archive)]; Murray, *supra* note 17.

406. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring)).

407. *Id.* at 2304 (Kavanaugh, J., concurring).

408. *See, e.g.*, Brief of Amici Curiae American College of Obstetricians and Gynecologists et al. Supporting Respondents at 18, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (noting higher maternal mortality rates when access to abortion is denied); Brief of Amici Curiae for Abortion Care Network Supporting Respondents at 32–33, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (noting that unregulated abortion treatments lead to higher maternal mortality rates).

409. *See supra* Section III.B.

410. *See, e.g.*, Adrian Vermeule, *How To Read Dobbs*, IUS & IUSTITIUM (June 25, 2022), https://iusetiustitium.com/how-to-read-dobbs/ [https://perma.cc/33QF-EQ55] ("*Dobbs* should, first of all, be celebrated—loudly, and without feeble misgivings about the disappointment of the supporters of abortion rights."); Adrian Vermeule, *What the Left Gets Right About Dobbs*, COMPACT (June 28, 2022), https://compactmag.com/article/what-the-left-gets-right-about-dobbs [https://perma.cc/9ADW-7XT5 (dark archive)] ("Although the constitutional right of same-sex marriage, for example, may currently seem a stable equilibrium, this may be merely a function of the limits of legal and

The moral opposition to reproductive and LGBTQ rights is not always grounded in religious faith.[411] For instance, Ross Douthat, a conservative columnist for the N.Y. Times, begins his analysis of what he calls the *New LGBTQ Culture War* with what he views as alarming statistics:

> According to Gallup, the share of younger Americans who identify as lesbian, gay, bisexual or transgender has risen precipitously in the last decade. Almost twenty-one percent of Generation Z—meaning, for the purposes of the survey, young adults born between 1997 and 2003—identifies as L.G.B.T., as against about 10 percent of the millennial generation, just over 4 percent of my own Generation X and less than 3 percent of baby boomers. Comparing the Generation Z to the baby boom generation, the percentage of people identifying as transgender, in particular, has risen twentyfold.[412]

Douthat finds the increase in LGBT identified youth disturbing, yet he does not explain what is disturbing about it. He characterizes gender affirming procedures as "an experiment on trans-identifying youth without good or certain evidence, inspired by ideological motives rather than scientific rigor, . . . that future generations will regard as a grave medical-political scandal."[413] He objects to the "ideological motives" of transgender people and allies, but fails to see *his own* contempt as ideology. To him, it is science. While conservatives have presented religious-based opposition to reproductive and LGBTQ rights, Douthat's text illustrates moral disapproval disguised as medical or health concerns.[414]

B. *The Limits of the Medical Framework in the Morality Debate*

The gradual transition towards gender identity as the new legal sex has been, since the 1950s, mediated through medical expertise and diagnosis.[415]

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political imagination, which chronically favor the status quo and underestimate the possibilities of change. At any number of points between the decisions in *Roe* in 1973 and *Dobbs* in 2022, the legal regime for abortion also seemed more or less settled."). Conservative political scientist Patrick Deneen has said in an interview that liberals have destroyed the family, and this his interest is to roll back to the 1950s on all the issues that have contributed to that, including abortion and same-sex marriage. The Ezra Klein Show, *What Does the 'Post-Liberal Right' Actually Want?*, N.Y. TIMES (May 13, 2022), https://www.nytimes.com/2022/05/13/opinion/ezra-klein-podcast-patrick-deneen.html [https://perma.cc/P72A-WF5F (dark archive)].

411. Although many times it is. *See, e.g.*, 303 Creative, LLC v. Elenis, 143 S. Ct. 2298, 2309 (2023); Fulton v. City of Phila., 141 S. Ct. 1868, 1875–76 (2021); Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018).

412. Douthat, *supra* note 20.

413. *Id.*

414. *See, e.g.*, Emily Bazelon, *The Battle over Gender Therapy*, N.Y TIMES (Mar. 17, 2023), https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html [https://perma.cc/55CX-3H79 (dark archive)].

415. *See supra* Parts I, II, III.

Medical experts have educated courts and lawmakers about the meaning of gender identity. Scholars and advocates have long critiqued the medicalization of transgender people, pointing to sex and gender essentialism,[416] pathologization of those who do not identify or present as cisgender,[417] and marginalization of those who do not fit the medical standards.[418]

Recently, legal scholars have underscored such concerns. Ido Katri, for example, has observed that "[g]ender identity is understood as determinative of 'true sex' foremost when manifested through a desire to have a different body than the one assigned a birth. That is, much like the conservative version of the wrong body, gender incongruence remains a problem to be cured through medicalized treatment."[419] Katri worries that by over-emphasizing gender identity as the true marker of the self, the trans body is perceived as wrong or a trap. The transgender or nonbinary body is perceived by courts, experts, and society at large as a body that is pathological and in need of medical intervention.[420]

Jessica Clarke has also warned about over-reliance on medical experts in current transgender rights litigation,[421] pointing out that heavy reliance on medical expertise can hurt those who do not fall within the clear medical definition and diagnosis.[422] The debate about transgender rights, Clarke writes, is also a debate about values, empathy, equality, and inclusion.[423] Clarke concludes that "[u]ltimately, arguments over the true nature of sex and gender are insufficient to achieve gender justice. In addition to deconstructing the concept of 'biological sex,' successful legal arguments have made claims in civil

416. For early critique of immutability and essentialism, see Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 504–06 (1994). For recent critique of gender essentialism, see Skinner-Thompson, *supra* note 15, at 657–58. For excellent summary of concerns about gender-identity essentialism, see Clarke, *Sex Assigned at Birth*, *supra* note 13, at 1880–87.

417. *See* Spade, *Resisting Medicine*, *supra* note 18, at 23–29; Ben-Asher, *supra* note 18, at 78–80, 95–98 (arguing for liberty rationales instead of reliance on medical diagnosis of gender identity disorder). *But see* Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1171 (2020) (arguing that legal protections that accompany medical status are more robust than those received by other vulnerable groups, and that they are invoked to liberate rather than oppress those seeking them).

418. *See* Spade, *Resisting Medicine*, *supra* note 18, at 36.

419. Katri, *Transitions*, *supra* note 15, at 679–80.

420. *See* Jo Wuest, *The Scientific Gaze in American Transgender Politics: Contesting the Meanings of Sex, Gender, and Gender Identity in the Bathroom Rights Cases*, 15 POL. & GENDER 337–38 (examining the reliance on scientific theories regarding transgender identity in both sides of current debates between conservatives and liberals, and criticizing the idea of "biodeterminism," which posits that brain structure, fetal development, and other biological factors are central to establishing transgender identity).

421. Clarke, *Sex Assigned at Birth*, *supra* note 13, at 1830–32, 1879.

422. *Id.*

423. Clarke emphasizes cases in which litigants successfully made these arguments and avoided pure reliance on medical experts. *Id.* at 1893–94.

rights registers—to autonomy, equality, privacy, and dignity."[424] Indeed, debates about transgender existence cannot be reduced to seeking scientific truth about sex and gender. But this Article argues that while liberal rights and values are necessary to address current and future attacks on transgender lives, they are not enough. The problem with limiting the attention of courts, advocates, allies, and the public, to these liberal values and rights is that even when successful, they *still leave the transgender and nonbinary* people as outsiders that depend on the dignity, empathy, equality, and inclusion of a sexual majority. The core issue is *whether cisgender is the only good and desirable social outcome for children and youth. And if so, why?*

The point is not only theoretical. It is practical and pragmatic. As Douthat's *Times* article above makes clear, a primary concern of conservative politicians and lawmakers is not that a few transgender individuals will get rights or legal recognition;[425] it is that twenty-one percent of a younger generation is now LGBTQ-identified.[426] This trend could lead to more transformations in societal approaches to gender and sexuality: LGBTQ identifications may eventually become considered socially and morally good! Such anxiety about the growing numbers of LGBTQ-identified young and future generations explains Florida's "Don't Say Gay" bill, which prohibits educators from exposing young children to issues regarding gender and sexuality, and other laws and policies like it.[427] This anxiety also generates legal conflict between public schools and parents, especially when parents oppose exposing children to (or supporting children with) transgender identifications.[428]

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424. *Id.* at 1897.

425. *See* Douthat, *supra* note 20, and related discussion.

426. Douthat, *supra* note 20.

427. Dana Goldstein, *Opponents Call It the 'Don't Say Gay' Bill. Here's What It Says.*, N.Y. TIMES (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html [https://perma.cc/L8MM-UMWP (dark archive)] ("Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards."); *see also* Tennessee v. U.S. Dep't of Educ., 615 F. Supp. 3d 807, 816–19 (E.D. Tenn. 2022) (deciding a case in which States brought action challenging the legality of guidance documents issued by DOE and EEOC in response to Exec. Order of the President declaring that "laws that prohibit sex discrimination prohibit discrimination on the basis of gender identity or sexual orientation").

428. *See, e.g.*, Tatel v. Mt. Lebanon Sch. Dist., 637 F. Supp. 3d 295, 335 (W.D. Pa. 2022) (denying a motion to dismiss because a teacher's teaching children about transgender issues without giving parents the opportunity to opt out plausibly interfered with parents' fundamental rights to control upbringing and education of their children); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 123, 130 (D. Md. 2022) (granting a motion to dismiss because parents did not have fundamental right under due process clause to be promptly informed of their child's gender identity when it differed from that usually associated with their sex assigned at birth), *vacated*, 78 F.4th 622 (4th Cir. 2023).

The alliances of advocates on behalf of transgender people with medical and health professionals in the past two decades have saved lives and made the world less daunting for LGBTQ individuals and communities. As Parts II and III have shown, since the 1950s, numerous legal protections, rights, and recognition in sex reclassification laws, antidiscrimination laws, and family laws have resulted from alliances with medical and health professionals advocating on behalf of the clients and LGBTQ communities.

As the twenty-first century has so far demonstrated, history—and in this case the history of sex and gender—is not necessarily one of linear progress.[429] By 2023, gender identity as one's core sense of being male, female, or nonbinary is prevalent in American law. The backlash of the last several years attempts to undo this. The response to these attacks has inevitably included reliance on medical experts who support gender-affirming care and other legal rights and recognition for their patients.

This is not enough. Alongside medical and health expertise, advocates, lawmakers, and politicians fighting for transgender individuals must face and openly engage debates about gender and sexual morals by asserting that LGBTQ identities and communities are not bad or undesirable social outcomes. They are as good and desirable as any other outcome. In taking such a position on gender and sexual morals, it is not enough to lean on medical diagnosis or on liberal rights and values of equality, liberty, dignity, and inclusion.

CONCLUSION

Gender identity is becoming the new legal sex. But as transgender advocacy sprinted with scientific-medical experts, theories, and diagnosis to this finish line, a vital insight of feminist and queer theory was left behind: sex, gender, and sexuality have been contested sites of power, politics, and moral debates throughout human history.[430] Modern science has provided new tools, language, questions, methods, and outcomes that have shaped the meanings of sex, gender, and sexuality. Yet the background struggles for power, politics, and moral meaning have persisted even when they assumed the authority of medical science.[431]

The underlying rationale of the current voluminous laws and policies against transgender children and youth, and more broadly against gender identity as the new legal sex, is that transgender children and adults are *not* desirable social outcomes. What is at stake today is not whether existing

429. The most recent example of this is, of course, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (overruling the constitutional right to abortion established in *Roe* and *Casey*).

430. Among early thinkers who have elaborated this insight of queer theory, consider Rubin, *Thinking Sex*, *supra* note 21, at 267–319; FOUCAULT, *supra* note 393, at 53–73; and see EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 2–3 (1990).

431. Rubin, *Thinking Sex*, *supra* note 21, at 279–80.

transgender individuals ought to be granted equality, dignity, and empathy (they should), but whether society desires the existence of future transgender children and adults. The answer should be yes. Anything less "is necessarily destined to turn into either trivializing apologetics or, much worse, a silkily camouflaged complicity in oppression."[432]

432. Sedgwick, *How To Bring Your Kids Up Gay*, *supra* note 21, at 26 ("[T]he wish for dignified treatment of already-gay people is necessarily destined to turn into either trivializing apologetics or, much worse, a silkily camouflaged complicity in oppression—in the absence of a strong, explicit, *erotically invested* affirmation of many people's felt desire or need that there be gay people in the immediate world.").