ARE YOU A BOY OR A GIRL?
SHOW ME YOUR REAL ID

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I. INTRODUCTION

In the early 90s, I attended a performance of Hidden, a Gender, in which a person appeared on stage and began talking about the internal conflict that ensues when one sees another person and cannot determine if the person is male or female. The actor’s point was that it is very difficult to stop thinking about a person’s gender until you finally make that determination. I almost missed the point entirely, for at that moment my own mind was distracted by trying to categorize the androgynous actor as either a man or a woman instead of paying attention to the play. I was caught in that tension of not being able to categorize the actor into one of two discrete categories. I was paralyzed by the ambiguity.

Similarly, our nation is paralyzed by efforts to force human beings into false binaries. Although people generally tend to prefer dichotomous choices, such as yes or no, black or white, boy or girl, not everything can be categorized that easily. Our efforts to oversimplify classification of certain human determinants like sex still work for the majority of people, but have troubling effects on people who do not fit neatly into one of the two categories of male or female, and cause complications for others who do not conform to social roles expected of them. The law may be especially unkind to people who do not fit into one of these two ill-defined variables.

An enormous body of literature reveals that gender may be, to a large degree, a social construct. The public is also becoming more comfortable with

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1 This observation is not proposed to be novel. “‘When you meet a human being,’ said Freud in his comments on ‘Femininity’ in New Introductory Lectures, ‘the first distinction you make is “male or female?” and you are accustomed to making the distinction with unhesitating certainty.’” THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 70 (1990).

the idea that gender is not truly binary, as recent popular media parades a wide range of gender diversity. Although considerable literature has been devoted to revealing that sex, sometimes called “biological sex,” is also not binary, most people, and the law, believe all humans can be labeled as either male or female under this rubric. Critics of these rigid categories and accompanying social roles have examined the impossible task of organizing human beings into discrete male/female binaries for medical and legal purposes. Many now argue that sex, like gender, may also be largely a socially constructed concept, and for certain, is not truly binary.

Throughout history, the development of more advanced scientific methods to determine the inner workings of the human body has advanced our thinking about what it means to be male or female. Working at the genetic level, scientists are now challenging assumptions that not long ago were thought to be the zenith of knowledge about the development of a person’s sex. With our increased scientific knowledge of the human body comes more informed discussion about the social, medical, and legal ramifications of rigid constructs about the rights of people based on their sex.

Authors have challenged the practice of identifying people by a static and binary gender identifier when examining the rights of people who are transgendered. The plasticity of gender is fairly well recognized, but the presence of intersex people reveals the impossibility of identification of all people into two categories of sex, spurring some authors to call for removing a gender or sex identifier on birth certificates. The intersex may be born with ambiguous genitalia, defying simple sex assignment. Requiring a sex determination on a birth certificate may also pressure parents to consent to immediate and unnecessary surgery on infants whose sex is not clearly either male or female. These chil-


Under social constructivism, what we perceive as reality is tainted by our preconceptions, such as biases, assumptions, and ideas about how the world is supposed to be. Constructivists further note that these preconceptions are determined by the symbolic and linguistic practices that we deem accepted, or acceptable, for purposes of interacting in a social setting.

Constructivists focus on the absence of a universally applicable, objective concept of “nature.” Id. at 391.

Although the words gender and sex often are used interchangeably, even in legal analyses, most people associate gender with a person’s masculinity or femininity, while sex is concerned with the physical anatomy of a person. See infra Part III.A.

See Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision between Law and Biology, 41 Ariz. L. Rev. 265, 271 n.25 (1999). See infra Part III.B (discussing the science of sex). Sex and gender are also distinguished more fully in Section III.A.


See Elizabeth Reilly, Radical Tweak—Relocating the Power to Assign Sex, 12 Cardozo J.L. & Gender 297, 299 (2005).
dren may later discover that the surgery they underwent as an infant does not coincide with the sex with which they now identify. The inclusion of sex on a birth certificate makes it virtually certain that each and every subsequent piece of identification an individual will accumulate will include the same discordant sex determination. When a sex determination is made for an intersex infant which proves to be discordant with their own sense of identity, a complex set of legal hurdles make it difficult, and in many cases impossible, to change their sex assignment on their original birth certificate or any or all of their subsequent official documents.

Although many official documents and forms of identification contain a sex or gender identifier, gender, as a category on these documents, is not very helpful in confirming a person’s identity. If the purpose of the inclusion of gender on official documents is to accurately identify an individual, technological advances have given us more accurate methods of ensuring a person’s identity. Technologies such as fingerprinting, facial recognition and retinal scans are far superior methods of determining whether a person is who they claim to be. The use of gender or sex on identification cards does little to positively identify individuals, and instead, creates problems for people who do not fall neatly into either of the two currently accepted categories of sex or gender.

As a weak identifier, gender should not appear as a category on a state issued driver’s license or official identification card, yet states no longer have the authority to decide whether to require its inclusion. The REAL ID Act of 2005 recently went into effect, establishing requirements for state issued identification cards and driver’s licenses. The REAL ID Act requires states to issue driver’s licenses and identification cards that meet certain requirements to ensure more accurate identification in the post 9/11 world. The nine minimum requirements for information that states must provide on these cards include a person’s gender.

Although critics have attacked the REAL ID Act on many grounds as an affront to civil liberties, as an unwelcome federal intrusion to a state’s police powers, or as the dreaded creation of a national identification card, I argue that the government should remove gender as a required identifier for two additional reasons. First, by barring any state from removing gender or sex from identification cards, the REAL ID Act prevents any state from removing these categories in an effort to reduce the complications of inclusion that a gender identifier inflicts on its gender variant citizens. Second, including a description of gender or sex is not an accurate method of identification, in no small part because gender and sex are not fixed and may later change, so should not

8 Id. § 202.
9 Id. § 202(b)(3).
10 See Patrick R. Thiessen, The REAL ID Act and Biometric Technology: A Nightmare for Citizens and the States That Have to Implement It, 6 J. TELECOMM. & HIGH TECH. L. 483, 489-92, 507 (2008) (noting that groups as politically diverse as the CATO Institute and the ACLU have criticized the REAL ID Act as expensive and unwelcome intrusions on states’ powers); see also infra Part IV.
11 REAL ID Act § 202.
be required under a federal law that ostensibly seeks to improve the accuracy of identity cards.

This Article first examines the limits of legal classifications that view human traits as dichotomous. Next, it reviews the medical, scientific, and legal problems created by imposing a binary of sex or gender and the resulting problems this creates for many sexual minorities. Finally, this Article examines the REAL ID Act’s requirement to include gender, critiquing its inclusion as a poor identifier in light of current identification technology, and a problematic or discriminatory identifier for certain sexual minorities.

II. HISTORICAL DEVELOPMENT OF RACE AS A FALSE BINARY IN THE LAW

Deciding whether someone is male or female is an analysis most people feel competent to perform.\textsuperscript{12} Based on current mores and commonly held understandings, perhaps confidence is warranted in the great majority of sex determinations. However, if we critically examine the limits of the terms “male” and “female,” as well as our understanding of the assumptions that support these determinations, we see that these terms are fluid and dependent on time, place, and evolving technology, with practical, social and political implications for our conclusions.\textsuperscript{13} Assuming sex is a binary creates a shaky foundation for constructing a legal framework to determine a person’s rights.

Assuming a binary choice exists simplifies decision-making. Similarly, reducing complex variables into binaries facilitates decision-making and enables bright-line legal distinctions.\textsuperscript{14} To this end, devices used to aid in com-
plex determinations, such as decision trees and computers, often reduce complex schema into a chain of binary decisions.\textsuperscript{15} History is replete with examples of forcing less than rigid categories into a tidy binary, often with unjust results, and as will be discussed below, sex and gender are false dichotomies.

Implementing more complex decision models may not promote consistency in the law, which strives to attain predictable results for similar fact patterns. Often, it is politically and/or socially convenient to avoid recognizing realities of deviance from established norms. The law is an institution that often reduces complex schema into binaries that may or may not be appropriate, arguably to legitimize a cultural hegemony.\textsuperscript{16} Not just for the male and female binary with regard to gender and sex, but also for other dichotomies, such as citizen and non-citizen, and even race.\textsuperscript{17}

Race was formerly legally constructed as a binary in the United States.\textsuperscript{18} Although discretely categorizing people by race has been challenged on social and scientific grounds, there were certainly more than two recognized “races” when United States law determined rights based upon two racial classifications.\textsuperscript{19} The problem of reducing the complex issue of race to a binary was made fairly simple: people were either white or non-white.\textsuperscript{20} Although this appears to be a concrete distinction, issues arose as to how to categorize people who were not one hundred percent white or non-white. Various approaches were developed to determine how much non-white blood in an otherwise “white person” would shift their identity to non-white. At the extreme was the post civil war “one drop” rule: any amount of non-white blood would render a person non-white.\textsuperscript{21} Other jurisdictions used a fractional approach, where

\textsuperscript{15} VICTOR H. VROOM & PHILIP W. YETTON, LEADERSHIP AND DECISION MAKING 41-42 (1973).
\textsuperscript{16} Other legal binaries are discussed infra Part II. See Ariela Gross, Essay, Beyond Black and White: Cultural Approaches to Race and Slavery, 101 COLUM. L. REV. 640, 654 (2001) (discussing academic debates concerning race, slavery, and resistance to cultural hegemony).
\textsuperscript{17} Race is also considered by many scholars to be a social construct. See Ian F. Haney López, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 61 (1994).
\textsuperscript{18} This topic is more fully examined in other works. See, e.g., Greenberg, supra note 5, at 923-27.
\textsuperscript{19} See Ozawa v. United States, 260 U.S. 178, 195-97 (1922) (discussing the “African” race, the “yellow race,” as well as American Indians and “white persons”).
\textsuperscript{20} Id.
\textsuperscript{22} Application of the one-drop rule had the effect of a racial binary with further consequences. For example, Virginia adopted an apology resolution, discussing, \textit{inter alia}, [The Racial Integrity Act of 1924 which institutionalized the “one drop rule,”] required racial description of every person to be recorded at birth and banned interracial marriages, effectively rendering Native Americans with African ancestry extinct, and these policies have destroyed the ability of many of Virginia’s indigenous people to prove continuous existence in order to gain federal recognition and the benefits such recognition confers.
one-fourth, one-eighth, or one-sixteenth of a person’s lineage from a non-white predecessor would render a person non-white. 23 It is interesting to note that although earlier laws for determining a person’s status as a slave or free person was often made according to the person’s visible appearance, the ultimate determination was a different binary; a person born of a mother who was a slave would also be a slave. 24


23 In a footnote to his article, Professor Troutt reviews the diversity of such laws through a fairly descriptive account of various sources. See David D. Troutt, Katrina’s Window: Localism, Resegregation, and Equitable Regionalism, 55 BUFF. L. REV. 1109, 1124 n.60 (2008). The footnote provides as follows:

See Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (“It is true that the question of the proportion of colored blood necessary to constitute a colored person . . . is one upon which there is a difference of opinion in the different states . . . . But these are questions to be determined under the laws of each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.”); Lee v. New Orleans Great N. R.R. Co., 51 So. 182 ([La.] 1910) (suggesting that “persons of color” included persons with as little as one-sixteenth African ancestry); see also Ted Gioia, The History of Jazz 34 (1997) (“The most decisive turning point was the passage of the Louisiana Legislative Code of 1894 that designated that anyone of African ancestry was a Negro.”); Charles A. Loghren, The Plessy Case: A Legal-Historical Interpretation 153-54 (1987) (“Determination of race was wholly impossible to be made . . . by any tribunal, much less by the conductor of a train . . . . In addition, neither federal nor Louisiana law had defined the limits of race [and] . . . under the Louisiana separate car law the determination depended on the conductor’s arbitrary judgment.”); Christine B. Hickman, The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census, 95 MICH. L. REV. 1161, 1178 n.72 (1997) (“Louisiana did not statutorily define Blackness [but] did adopt via its Supreme Court an ‘appreciable mixture of negro blood’ standard.”); Orville Lee, Legal Weapons for the Weak? Democratizing the Force of Words in an Uncivil Society, 26 L.J.[A]W] & SOC. INQUIRY 847, 8[84] (2001) (citing Virginia R. Dominguez, White By Definition: Social Classification in Creole Louisiana 2 (1986)) (referring to “a 1970 Louisiana statute that made 1/32 ‘Negro blood’ the dividing line between white and black”); Daniel J. Sharfstein, [Essay,] The Secret History of Race in the United States, 112 YALE L.J. 1473, 1507 (2003) (“After the Louisiana Supreme Court ruled that anyone of traceable African origin was ‘colored,’ that state’s Bureau of Vital Statistics assumed an equally powerful role in maintaining the racial order.”).

Id. 24 For example, the rule in Kentucky was that a person visibly appearing to be white, or a person of less than a fourth of African blood, was presumed free. The presumption, however, could be rebutted “by some evidence showing or legitimately tending to show, that, notwithstanding her apparently white skin, she had some African taint, and was, de jure, a slave.” White skin thus was “but prima facie” evidence of freedom, which could be defeated with proof that a person “descended from a mother who was a slave.”

Gillmer, supra note 21, at 610-11 (footnotes omitted). Gillmer noted that the rules for determining a person of mixed blood status as slave or non-slave were not static and evolved as the political climate changed, discussing, as an example, a Virginia law related to the “rule that the children would follow the condition of the mother”:

“Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free [sic]. Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shall be free only according to the condition of the mother.”

Id. at 560 n.145 (quoting II Henning’s Statutes at Large: Being a Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1615, at
After emancipation formally outlawed slavery, Jim Crow laws maintained legal distinctions based on a person’s skin color to discriminate on the basis of whether a person was white or non-white. Despite social and scientific advances that should have led the law to abolish legal distinctions, the law lagged significantly behind the social and scientific recognition of the equality of human beings. Laws still in effect in the 1950s in Arkansas and Louisiana required labeling of all blood donated to ensure that no white person received the wrong color blood.

Other legal efforts to keep whites distinct from non-whites included anti-miscegenation laws. Until 1967, laws making it a criminal offense for people to marry a partner of another “race” were still in effect in some states. Such laws were deemed unconstitutional in the landmark case of Loving v. Virginia. Virginia’s laws prohibited whites from marrying persons who were not white, resulting in a true dichotomy of race for the purpose of anti-miscegenation. To accomplish this goal of maintaining the race binary, Virginia law collapsed two diverse racial groups, “colored persons and Indians,” into a single class.

Other areas of the law have forced race into a binary with some tortured use of language. For example, United States citizenship laws at one time...

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26 (William Waller Hening ed., 1823)). For an interesting analysis comparing people of mixed African and white ancestry pre-civil war and the contemporary issue of who is a man (or a woman) for intersexual persons, see Marie-Amélie George, The Modern Mulatto: A Comparative Analysis of the Social and Legal Positions of Mulattoes in the Antebellum South and the Intersex in Contemporary America, 15 COLUM. J. GENDER & L. 665 (2006).


20 Joe Conason & Gene Lyons, The Hunting of the President: The Ten-Year Campaign to Destroy Bill and Hillary Clinton 69 (2000). There was concern that white people receiving blood from non-whites would render them also non-white. This is actually a generous recitation of their concerns. See Polsky, supra note 21, at 178.

23 See Loving v. Virginia, 388 U.S. 1, 4 (1967) (“Section 20-59 [of the Virginia Code], which defines the penalty for miscegenation, provides: ‘Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.’”) (quoting VA. CODE ANN. § 20-59 (1960 Repl. Vol.) (repealed 1968)).

28 In Loving, the Court noted:

The Lovings were convicted of violating § 20-58 of the Virginia Code:

“Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State.”

Id. at 4 (quoting VA. CODE ANN. § 20-58 (1960 Repl. Vol.) (repealed 1968)).

29 Id.

30 Id. at 4-5 (“Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between ‘a white person and a colored person’ without any judicial proceeding, and §§ 20-54 and 1-14 which, respectively, define ‘white persons’ and ‘colored persons and Indians’ for purposes of the statutory prohibitions.”) (footnotes omitted).
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required a person seeking naturalization be “white.” 31 This, again, was an effort to distinguish people by skin color into dichotomous variables of white and non-white. 32 Challenges to efforts to limit immigration based on skin color are most striking in two Supreme Court cases, decided one year apart in the early twentieth century. In Ozawa v. United States, 33 a Japanese man seeking naturalization challenged his denial of citizenship based on the fact that he was not “white,” as required by statute. 34

Ozawa argued his skin color was whiter than many European immigrants who were eligible for naturalization. 35 The United States Supreme Court noted that, although the immigration statutes indeed used the term “white,” the clear intent of Congress was to include people of the Caucasian “race.” 36 Mr. Ozawa was denied citizenship because he was deemed “non-Caucasian,” and therefore, non-white. 37 The immigration statutes permitted naturalization of “free white persons,” a term the Court conceded was likely intended to differentiate African and (American) Indians, without contemplating the rights of the “brown or yellow races of Asia.” 38 The Court found that Congress had likely intended not to exclude other races of people, but had only intended to include white people in the class of people eligible for naturalization, keeping the binary of race intact. 39

About a year later, in United States v. Thind, 40 the Court ruled on a case in which the Naturalization Examiner for the United States sought to revoke the naturalization of a previously naturalized citizen, based upon his skin color. 41 Thind relied heavily on the Ozawa ruling that the term “Caucasian” was synonymous with “white.” 42 As a man from India, he was included in the “race” of

31 Section 2169 of the Revised Statutes, 8 U.S.C.A. § 359, provided that the provisions of “this title” applied to aliens who were “free white persons.” See Ozawa v. United States, 260 U.S. 178, 192 (1922). In Ozawa, the Supreme Court explained:

"Exactly the same words are used to introduce the similar provisions contained in § 2165 of the Revised Statutes. In 1790 the first Naturalization Act provided that, “Any alien, being a free white person, may be admitted to become a citizen.” C. 3, 1 Stat. 103. This was subsequently enlarged to include aliens of African nativity and persons of African descent. These provisions were restated in the Revised Statutes, so that § 2165 included only the procedural portion, while the substantive parts were carried into a separate section (2169) and the words “An alien” substituted for the words “Any alien.”"

Id.

32 This topic is more deeply examined in other works. See, e.g., Greenberg, supra note 5, at 923-27.

33 Ozawa, 260 U.S. 178.

34 Id. at 192.


36 Ozawa, 260 U.S. at 195.

37 Id. at 198.

38 Id. at 195.

39 Id. at 195-96.

40 United States v. Thind, 261 U.S. 204 (1923).

41 Id. at 207.

42 Id. at 208.
people known as Caucasian,43 but presented with a fairly deep brown skin color.44 The Court referred to its prior decision in Ozawa, but noted, “the conclusion that the phrase ‘white persons’ and the word ‘Caucasian’ are synonymous does not end the matter.”45 Although there was discussion of whether Mr. Thind was truly a member of the Caucasian race, the Court returned to Congress’ intent when writing the statute, backtracking a bit on the narrowing of the term “white” as meaning “Caucasian.”46 The Court found that Congress’ likely meaning of the word “white” excluded Mr. Thind from citizenship.47

Although state and federal agencies collect data on a person’s race, laws that restricted a person’s rights based on race have largely disappeared. The laws were designed to discriminate based on a person’s race, but defining race made their application difficult and contentious. People did not fit neatly into two categories, so some people were able to avoid the harsh, exclusionary effect of the laws by “passing” as white. Recognizing that people should all be treated equally under the law, regardless of the color of their skin, seems obvious today, but integration of schools and public accommodations brought violent opposition in the 1950s and 1960s. Race never was a binary, but reliance on outdated “scientific” concepts of race supported protection of the white hegemony.

Similar to race, the limitations of binary distinctions dependent upon a person’s gender or sex are evident when examining the rights and duties of people who do not neatly fall into categories of either male or female.48 Although it is widely accepted that gender is a social construct,49 the rigid categorization of people into two sexes has not been constant historically, and recent developments in medicine and science support the argument that sex is also socially constructed.50 The law has relied upon these terms as binary in their application, resulting in unfair, and sometimes inconsistent, results. Adopting a more modern understanding of the concepts of gender and sex

43 Arguably, at least as the Court distinguished between “scientific” and popular meanings of the word “Caucasian.” Id. at 208-09.
44 Id. at 212 n.4.
45 Id. at 208.
46 The Court distinguishes between a layperson’s likely interpretation of the word “Caucasian,” as opposed to that of an ethnologist. Id. at 214-15.
47 This is a bit of editorializing on my part, because, as noted above, the Court did not think of the law as exclusionary:

[T]he provision is not that any particular class of persons shall be excluded, but it is, in effect, that only white persons shall be included within the privilege of the statute. “The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.”

Id. at 207 (quoting Ozawa v. United States, 260 U.S. 178, 195 (1922)). The distinction is largely lost on this author.
48 Perhaps not just our laws, but to avoid the collapse of society. “[T]he possession of a [single] sex [as male or female] is a necessity of our social order, for hermaphrodites as well as for normal subjects.” Alice Domurat Dreger, A History of Intersexuality: From the Age of Gonads to the Age of Consent, 9 J. CLINICAL ETHICS 345, 346 (1998).
49 See supra note 2.
50 See infra Part III.E.
would make future legislation and court determinations more reflective of the needs of all citizens, including those of sexual minorities.

III. CHALLENGING THE BINARY OF SEX

Transsexuals, who live, or seek to live, their lives as the opposite sex to which they were assigned at birth, directly challenge the male-female gender distinction as both binary, and as immutable.51 Others who are also transgender may similarly challenge gender norms, but may not have the same problems in proving their identities for myriad purposes, such as obtaining driver’s licenses and receiving public aid, as they may be living alternatively as either gender, with documentation that does not conflict with their public presentation.52 In addition, intersex persons may not present clearly as either gender.53 Although in some legal analyses it proves unimportant, as many people make no distinction between the terms in practice, and others use them synonymously, an examination of the differences between the terms “gender” and “sex” is still appropriate.

A. Gender as Compared to Sex

The great diversity in gender expression has been examined in many contexts, culminating in recent scholarship that views gender as a social construct.54 What it means to be male or female is fluid, and is affected by geographic and temporal contexts.55 Although we often use the terms sex and gender synonymously, “sex” is often distinguished as designating a person as either male or female, based upon sexual anatomy and physical determinations,

51 Elaine Craig, Trans-Phobia and the Relational Production of Gender, 18 Hastings Women’s L.J. 137, 139–40 (2007).
52 The terms “transgender” and “transsexual” are defined differently in various sources. I am adopting a fairly common definition by implementing the term “transgender” to include many different groups of people who do not necessarily conform with gender norms, such as transvestites, drag kings and queens, and transsexuals. However, transsexuals may consider themselves not as people desiring to change their gender, but people who are actually conforming or seeking to conform with the gender identity they believe is correct for them, though not assigned to them at birth. The San Francisco Human Rights Commission used a similar definition:

[T]he term ‘transgender’ is used as an umbrella term that includes male and female cross dressers, transvestites, female and male impersonators, pre-operative and post-operative transsexuals, and transsexuals who choose not to have genital reconstruction, and all persons whose perceived gender or anatomic sex may conflict with their gender expression, such as masculine-appearing women and feminine-appearing men.

53 The intersex are sometimes considered transgendered. See supra Part I.
54 See Carolyn E. Coffey, Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures, 7 N.Y. City L. Rev. 161, 162 (2004).
55 Male and female “roles” vary in geographic and temporal contexts. Think of the role of women in Victorian England as compared to women in present day United States. Dreger, supra note 13, at 9.
and considered to be an immutable determination, as opposed to “gender,” which is seen as more malleable and socially constructed. 56

What society deems culturally “feminine” and culturally “masculine” is therefore premised on a “stereotype,” a social determination regarding which gender preferences or characteristics are conventionally associated with biological males and females. These culturally assigned characteristics and preferences encompass everything from “physical appearance to clothing and self-presentation, to personality and attitude, . . . to patterns of speech and behavior.” 57

Along with other scholars, I argue that efforts to divide all people into one of two genders or sexes result in forced and artificial categories. This is especially true when we recognize advances in our understanding of scientific concepts that have far outpaced the law’s evolution. 58 Not only technological advances, but definitions of what is male or female also vary as society adopts different mores, evolving in response to those technological advances and exposure to other cultures. Consider the practice of associating certain colors for girls or boys; as late as the turn of the nineteenth century, pink was associated with boys, and blue for girls. 59 The formerly masculine


57 Monica Diggs Mange, The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons, 16 Colum. J. Gender & L. 1, 3 (2007) (citing to, inter alia, Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminine Jurisprudence, 105 Yale L.J. 1, 20 (1995)) (footnotes omitted). Mange further quotes Professor Case as follows:

Gender in our culture is marked by differences in voice (femininity is associated with high-pitched voices, at best soft-spoken, at worst shrill; masculine voices are louder and deeper); gesture (femininity is associated with grace, gentleness, tentativeness, and deference; masculinity is physically more bold, aggressive, and decisive; it takes up more space in a room); clothing and personal appearance (femininity is associated with pastel or bright colors, above all with shades of pink, with frills, ruffles, and soft fabrics, with skirts and dresses. Masculinity is more drab and practical: its paradigm may still be the gray flannel suit; it generally is free of ornaments such as jewelry, makeup, and long or elaborate hairstyles).

Id. at 3-4 (quoting Case, supra, at 20-21).

58 Note, for example, Professor Greenberg’s comment that because many of the biological determinants of sex can now be changed through hormonal therapy or surgery, sex is now socially constructed, while sexual identity remains fixed. Greenberg, supra note 4, at 271 n.25. More on this topic, infra Part III.D.

59 Professor Jennifer Nye offers the following insight:

Despite the idea that gender is fixed, we are continually creating and recreating our gender through our words, actions, dress, and relationships. Femininity and masculinity are not fixed concepts; the conceptual boundaries of femininity and masculinity shift as society shifts. The concept of gender changes from one historical period to another. A feature considered feminine in one time period or culture may not be considered feminine in a later time period or different culture. For example, at the turn of the century, boys wore pink and girls wore blue. Today, pink is the “girl” color and blue is the “boy” color. While what is considered masculine and feminine may change, the idea that they are two polar, mutually exclusive categories remains constant.

color pink is now undeniably associated as feminine in the United States.\footnote{In a former life, I built and managed a small nightclub. Although I would now characterize it as a social experiment, for entertainment purposes, I painted the men’s bathroom pink, and the women’s bathroom blue. Men would dash out quickly after seeing the pink color, and recheck the signage. Employees would assure them that it was the men’s bathroom, often having to point out that the room was equipped with a urinal.}

The word “gender” is often used synonymously with “sex” in the law. Notably, Justice Ruth Bader Ginsburg used the terms interchangeably in her briefs to the Supreme Court and in her practice before and on the Court.\footnote{See Case, supra note 57, at 9-10.} In her arguments in sex discrimination cases, Justice Ginsburg’s secretary suggested that she use the word gender in the place of the word sex because the word sex made her appear too harsh.\footnote{See id. at 10 (“‘For impressionable minds the word “sex” may conjure up improper images’ of what occurs in porno theaters.”) (quoting Ruth Bader Ginsburg, Gender in the Supreme Court: The 1973 and 1974 Terms, 1975 SUP. CT. REV. 1, 1 n.1). Professor Case goes on to discuss Ginsburg’s work as follows: Therefore, she stopped talking about sex discrimination years ago. . . . [S]he explained that a secretary once told her, “I’m typing all these briefs and articles for you and the word sex, sex, sex, is on every page. Don’t you know those nine men [on the Supreme Court], they hear that word and their first association is not the way you want them to be thinking? Why don’t you use the word ‘gender’? It is a grammatical term and it will ward off distracting associations.” Id. (quoting Ernie Freda, Washington in Brief: Clinton’s Old Underwear Full of Tax Holes, ATLANTA J. & CONST., Dec. 29, 1993, at A8).}

However, in \textit{J.E.B. v. Alabama ex rel. T.B.},\footnote{J.E.B. v. Alabama, 511 U.S. 127 (1994).} Justice Scalia made an effort to distinguish the terms, recognizing the cultural underpinnings and fluidity of the word gender.\footnote{Justice Scalia, in a dissenting opinion, noted: Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word “gender” has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution’s peremptories). The case involves, therefore, sex discrimination plain and simple. \textit{Id.} at 157 n.1 (Scalia, J., dissenting).}

Although the concepts of gender and sex are not truly interchangeable, for many sexual minorities, the legal results do not usually change, regardless of the term used in analyzing their rights. Gender’s fluidity has become better understood by people in general, as the popular media has been increasingly willing to display, with diminishing derision, women who are more masculine and men who are more feminine (than what has been considered “typical”).\footnote{Susan Frelich Appleton, Contesting Gender in Popular Culture and Family Law: Middlesex and Other Transgender Tales, 80 IND. L.J. 391, 393-95 (2005).} Transsexuals, transvestites, drag queens and drag kings have also stepped out of the shadows in mainstream movies and television.

Although much of the public may have accepted the fact that gender is fairly fluid, the public still largely believes sex to be a dichotomous and immu-
This expression of male or female is considered determinative and fixed, whether or not corresponding with a person’s presenting gender. People who are intersex or transgender likely have difficulties in the law under this assumption. Although the great majority of people appear to fall fairly neatly into one “sex,” and usually the corresponding “gender,” the exceptions demand reexamination of the societal function of the binary categorization of people.

Intersex people are concrete, physical proof of the fallacy of binary sex distinctions, and recognizing them and other less well-known variations in expression in the human physical form show the failure of our laws that enforce rigid dichotomies of people by sex. Neither medicine nor the law provides a consistent or workable definition of what it means to be male or female.

B. Medically Determining Sex

Medical science does not have a single definition of sex, causing confusion in situations when a person’s sex is not obvious. Scientific discoveries have helped to shape our concept of our place in the world, our place in the animal kingdom, and, as we have unlocked many former secrets of the human body, what it means to be male or female. Although scientific evidence may be considered the last word on proof of a person’s sex, the science of sex has been divided into two categories: male and female. The science of sex is complicated and constantly evolving. The following discussion focuses heavily on the groundbreaking work of Professor Julie Greenberg who introduced these scientific concepts to legal literature in Defining Male and Female: Intersexuality and the Collision Between Law and Biology. Greenberg, supra note 4, at 279-80. I have included some recent discoveries, but cannot improve on Professor Greenberg’s thorough examination.

For example, since germ theory was embraced, we no longer believe that many maladies are the result of humor imbalances, excessive blood, bad morals or demonic possession. Kelli K. Garcia, The Fat Fight: The Risks and Consequences of the Federal Government’s Failing Public Health Campaign, 112 PENN ST. L. REV. 529, 552 (2007). In a 1909 listing of causes of death, one category included “visitation of God.” Andrew Pollack, Redefining Disease, Genes and All, N.Y. TIMES, May 6, 2008, at F1.
not been static, but rather, constantly evolves, and does not always provide a definitive answer.  In medicine, technological advances shape our concepts of disease and expand our knowledge of the workings of the human body. For example, in the nineteenth century, the invention of the stethoscope made it possible to link symptoms of coughing up blood, shortness of breath, as well as fifteen other symptoms, with a single disease, tuberculosis. The science of classifying disease, known as nosology, continues to evolve with today’s advances at the genetic level, unlocking former mysteries of the human body.

No longer a mystery, but not widely known, an embryo of either a typical male or female is formed with bi-potentiality for expression as either sex. An embryo develops as a typical male, or female, depending upon the presence or absence of certain genes, enzymes, and hormones. At about the eighth week of development, sex differentiation begins to occur. With a phenotypic XY assignment, an embryo typically begins to develop as a boy; with a phenotypic XX assignment, a girl. In the absence of certain hormones, an embryo will develop into a typical female. In the presence of masculinizing genes and hormones, the embryo would likely become a typical male. Usually, these events occur in alignment with the chromosomes, but some XX males have an X chromosome containing the gene that triggers the masculinizing process and release of hormones, resulting in a masculine appearing child. Similarly, there are apparent females who have an XY chromosomal assignment.

Other chromosomal assignment variations also occur, such as X without an accompanying X or Y, known as “X0,” as well as XXX, XXY, XXXY, XYY, XYYY. Some of these variations may result in the creation of typical males or females, but some will not. Most people “know” that a person with an XX chromosome assignment is a female, and a person with an XY chromosome assignment is a male; however, chromosomal assignment is but one of the factors that medicine uses to determine a person’s sex. Accord-

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70 See infra discussion of sex Part III.E.
71 “The advent of the stethoscope made it possible to unify tuberculosis.” Pollack, supra note 69.
73 Greenberg, supra note 4, at 279-80.
74 Id.
75 Id. at 279.
76 Id. at 279-80.
77 Id.
78 Id.
79 Although this is a great oversimplification of the process, and much is still not known of the process. Interview with Eric Vilain, MD, PhD, Assistant Professor of Human Genetics, Rediscovering Biology, Unit 11: Biology of Sex and Gender, Expert Interview Transcripts, www.learner.org/channel/courses/biology/units/gender/experts/vilain.html (last visited Feb. 16, 2009) [hereinafter Interview with Eric Vilain].
80 Greenberg, supra note 4, at 281 (citing ROBERT POOL, EVE’S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES [EVE’S RIB: THE BIOLOGICAL ROOTS OF SEX DIFFERENCES] 70-71 (1994)).
81 Id.
82 See infra Part III.C (discussing intersex).
ing to Dr. David R. Brown, a Minneapolis-based pediatric endocrinologist who specializes in growth and intersex disorders,

Biology is not as definitive as we like to believe. And neither is gender. There is not 100 percent continuity for any of us. For example, if you were to remove one of my gonads and subject it to microscopic analysis, you would find ovarian elements. And every single cell in my body may not be XY. I could have some XX, a few XXY. 83

Previously, it was believed that an embryo would default to becoming a female if the mechanisms involved to virilize the embryo did not occur. 84 Recent discoveries reveal there are also genes that trigger the development of a typical female, challenging the former male-centric view of sex development. 85

So, contrary to what we may have learned in high school, chromosomes are not the end of the discussion in determining the sex of an individual. Although most people's chromosomal assignments align with their appearance and gender self-identification, diversity occurs in the physical appearance of people within either an XX or XY chromosomal assignment. 86 There are eight or nine well recognized medical determinants of sex: genetic (or chromosomal) sex; gonadal sex (reproductive sex glands - testes and ovaries); internal morphologic sex (seminal vesicles, prostate, vagina, uterus, fallopian tubes); external morphologic sex (genitalia); hormonal sex; phenotypic sex (secondary sexual features such as facial hair or breasts); assigned sex and gender of rearing; and, gender identity. 87 The ninth factor often considered is the set of neurobiological determinants, sometimes referred to as "brain sex," that may play a role in determining a person's sex. 88 Recently, many researchers assert that, in spite of all the other biological factors, the brain itself may be predisposed to typical male or female gender tendencies. 89 This predisposition could be due to a physical structuring of the brain, perhaps due to the effect of masculinizing hormones on the brain, although scientists have not yet proven this theory. 90 Some gender variance may be thought of as a matter of personal choice, but recognition of hormonal differences in the brain creates questions of neurobiology, not just psychology, or a matter of the division of "mind and body." 91

84 Id.
85 Id.
86 Greenberg, supra note 4, at 281-84.
87 Id.
88 Technological advances in techniques in PET scans and MRIs permit scientists to film differences occurring while a subject thinks and processes information, revealing differences in typical male and female brains. Linda Marsa, He Thinks, She Thinks, DISCOVER, July 5, 2007, http://discovermagazine.com/2007/brain/she-thinks. Dr. Vilain examines "masculinized" or "feminized" brain differences, while noting that these terms are based on societal stereotypes of expected behavior for males and females. See Interview with Eric Vilain, supra note 79.
89 See Interview with Eric Vilain, supra note 79.
90 Id.
91 In no way do I mean to diminish the importance of the psychological factors involved, but this is further evidence, in my mind, of the fallacy of the mind/body distinction. See Noa Ben-Asher, Paradoxes of Health and Equality: When a Boy Becomes a Girl, 16 YALE J.L.
When all of these factors in determining sex do not all align in the usual manner, the result may be the development of bodies that are not easily termed male or female.\textsuperscript{92} People whose bodies are made up of a mixture of typical male and female determinants may be labeled intersex, depending on the expression of the differences, and the definition of intersex.

C. Intersex

1. What is Intersex?

People who are born with indeterminate genitalia, and others with sex characteristics that are not all congruous, may be labeled “intersex.”\textsuperscript{93} Formerly called “hermaphrodites” (and often still labeled as such),\textsuperscript{94} intersexual persons defy dichotomous assignment of sex in many varied expressions of the human body. Some of the more common expressions of intersex include congenital adrenal hyperplasia, androgen insensitivity syndrome, Turner’s syndrome, Kleinfelter’s syndrome, gonadal dysgenesis, and hypospadias.\textsuperscript{95} Below is a brief description of these common forms of intersex, revealing the seemingly limitless possibilities for variation of the human physical form.

- Congenital adrenal hyperplasia (CAH) is one of the most common forms of intersex in children with an XX chromosome assignment.\textsuperscript{96} Although these children may be virilized, and may appear to be male, many of them have the potential to be a fertile female as an adult.\textsuperscript{97} CAH is not a discrete condition, as many different forms of CAH are caused by malfunctioning enzymes involved in producing steroid hormones.\textsuperscript{98} Some forms of CAH may be life threatening and require treatment to save the life of the infant.\textsuperscript{99}

\textsuperscript{92} The question of how rare is controversial, and is discussed infra Part III.C.2.

\textsuperscript{93} As Dr. Brown proposes, The most common occurrence is a baby born with a phallic structure that is larger and longer than a clitoris, but not quite a fully developed penis, with a urethra that runs along its base. But along with that you may have minimal or no fusion of the labial-scrotal folds—in other words, a typical ‘female’ vagina. This can look very alarming.

\textsuperscript{94} Hermaphrodites are mythical beings, possessing the reproductive traits of both males and females. The term was used to describe intersexual persons in medicine, distinguishing pseudo hermaphrodites from “true hermaphrodites,” those who had gonads of both sexes. Dreger, supra note 13, at 29-31.

\textsuperscript{95} Fausto-Sterling, supra note 67, at 51-53. Others claim that conditions such as Klinefelter’s Syndrome, Turner Syndrome, and late-onset congenital adrenal hyperplasia are not conditions of intersex. See, e.g., Teresa A. Zakaria, Note, By Any Other Name: Defining Male and Female in Marriage Statutes, 3 Ave Maria L. Rev. 349, 358 (2005) (citing Leonard Sax, How Common is Intersex? A Response to Anne Fausto-Sterling, 39 J. Sex. Res. 174, 175-77 (2002)).

\textsuperscript{96} Fausto-Sterling, supra note 67, at 59.

\textsuperscript{97} Id.

\textsuperscript{98} Id. at 58.

\textsuperscript{99} Id. at 52. As set forth by Erin Lloyd, “the only intersex condition known to require immediate medical attention is the ‘salt-wasting’ or ‘salt-losing’ category of congenital adre-
Androgen insensitivity syndrome is a condition that affects children with an XY chromosome assignment. These children are born with feminized genitalia due to their cells’ inability to bind to testosterone. As a result, the virilizing process does not take place as it does with typical XY infants. Children with androgen insensitivity develop a feminine body shape, with a narrow waist, little or no body hair and developed breasts. These children present as typical females, so physicians may not diagnose the condition until puberty when their patients fail to menstruate. Children with partial androgen insensitivity syndrome may also present with varying degrees of typical male or female genitalia, often ambiguous, depending on the degree of the child’s ability to utilize the masculinizing hormones.

Turner’s syndrome is caused by the lack of a second chromosome in an infant, resulting in an X0 (an X with no other) chromosome assignment. Although they do not have an XX chromosome assignment, persons with Turner’s syndrome appear similar to be typical females. However, their ovaries do not develop, they are likely to be physically short, and they do not usually develop secondary sex characteristics. Their gonads are also unformed, with no complete testes or ovaries, indicating that in-utero, there was insignificant exposure to male or female hormones to aid in their development.

Klinefelter’s syndrome results from a person with an XY chromosome assignment having an extra X chromosome, resulting in an XXY chromosome assignment. Klinefelter’s syndrome causes infertility in otherwise male appearing children, who often experience breast enlargement after puberty. As a result, physicians do not usually diagnose this condition until puberty. Also, the testes, and sometimes the penis of these persons, are smaller that typical males.

Intragenital hyperplasia (CAH). Indeed, genital surgery is not a response to the dangerous medical concerns—which are treated with hormones—but a cosmetic response to atypical genitalia.” Erin Lloyd, From the Hospital to the Courtroom: A Statutory Proposal for Recognizing and Protecting the Legal Rights of Intersex Children, 12 CARDOZO J.L. & GENDER 155, 173 (2005).

100 FAUSTO-Sterling, supra note 67, at 52.
101 Id.
102 Greenberg, supra note 4, at 286.
103 FAUSTO-Sterling, supra note 67, at 52. Consider the case of Mary Patiño, an athlete with CAH who was denied a chance to compete at the 1968 Olympics. Id. at 1-2. See infra Part III.E.2.
104 Greenberg, supra note 4, at 286.
105 Id. at 287.
106 FAUSTO-Sterling, supra note 67, at 52.
107 Greenberg, supra note 4, at 284.
108 FAUSTO-Sterling, supra note 67, at 52.
109 Greenberg, supra note 4, at 284.
110 FAUSTO-Sterling, supra note 67, at 52.
111 Id.
112 Greenberg, supra note 4, at 283.
113 Id.
ARE YOU A BOY OR A GIRL?

- Other types of intersexuality include gonadal dysgenesis,\(^{114}\) considered a kind of “catch all” term used for genetic irregularities that produce gonads that do not develop properly.\(^{115}\) Children with gonadal dysgenesis often have an XY chromosome assignment but lack the masculinizing hormones that produce typical male development.\(^{116}\)

- Hypospadias is a condition in which the urethra does not run to the tip of the penis.\(^{117}\) This condition is not likely to be considered an intersex condition, except in its more extreme forms.\(^{118}\) Hypospadias may be very mild, with the urethral opening just below the tip of the penis, a somewhat common form,\(^{119}\) or it may open along the shaft, with the most severe cases resulting in an opening at the base.\(^{120}\)

There are many other scientific possibilities for human beings to develop in a form that does not adhere to a sex binary. New examples are being discovered in large part due to technological advances enabling exploration at the genetic level. A recent discovery of twins, who shared one hundred percent of their mother’s genetic material, would appear to indicate that they were monozygotic, or identical twins.\(^{121}\) However, the two infants received separate genetic contributions from their father.\(^{122}\) This could have occurred from a division of the ovum after fertilization by two separate spermatozoa, or by an ovum splitting into two and being fertilized after that split.\(^{123}\) The single cell with two separate genetic contributions in this case resulted in two children: a phenotypical male, and another child born with ambiguous genitalia, who the physicians labeled a “true hermaphrodite.”\(^{124}\) The proportion of XX to XY cells within the twins varied between them in general, and also within the type of tissue examined,\(^{125}\) resulting in the decision to raise the twin with ambiguous genitalia as a girl.\(^{126}\)

There are other variations which may or may not be labeled intersex that challenge the sex binary, and some conditions may change during a child’s lifetime. For example, there are a significant number of children born in villages in the Dominican Republic who are chromosomally XY, with embryonic

\(^{114}\) Fausto-Sterling, supra note 67, at 52.

\(^{115}\) Id.

\(^{116}\) Greenberg, supra note 4, at 284. In this form, the condition is known as Swyer Syndrome. Id.

\(^{117}\) Fausto-Sterling, supra note 67, at 52.

\(^{118}\) See id. at 57-58.

\(^{119}\) Id. at 52. Not considered a form of intersex, as compared to the “ideal penis” in a study of non-intersex men, about forty-five percent of men had a mild form of hypospadias. Id. at 57.

\(^{120}\) Id. at 52.

\(^{121}\) See Vivian Souter, et al., A Case of True Hermaphroditism Reveals an Unusual Mechanism of Twinning, 121 HUM. GENETICS 179, 179 (2006).

\(^{122}\) Id. at 182.

\(^{123}\) Id. at 183-84. The less precise language used is mine to avoid making this article even less readable.

\(^{124}\) Id. at 179.

\(^{125}\) Id. at 181-83.

\(^{126}\) Anne Casselman, Semi-Identical Twins Discovered, DISCOVER, Jan. 2008, at 64.
testes, yet possess external female genitalia at birth. These children are raised as females until puberty, when their voices change as their testes descend and their clitorises become penises. After this transformation, they live as males.

People with any of the above conditions of intersex may appear as what we would consider typical males or females, while others will have an appearance difficult to categorize. Although a small number of people have sexual determinants that are not in alignment, it is clear that medical sex is not truly a binary. The wide variety of expression of intersex also makes it difficult to reach consensus on the incidence of intersex individuals.

2. Incidence of Intersex

Incidence of intersexual persons is dependent upon the definition of intersex. Noting this difficulty, the Intersex Society of North America answers the frequently asked question on its website,

If you ask experts at medical centers how often a child is born so noticeably atypical in terms of genitalia that a specialist in sex differentiation is called in, the number comes out to about 1 in 1500 to 1 in 2000 births. But a lot more people than that are born with subtler forms of sex anatomy variations, some of which won’t show up until later in life. Some experts estimate as high as four percent of the population are intersex, “while others would fix it as low as one half of one percent.”

Professor Anne Fausto-Sterling, a biologist, estimates that if intersex is defined as “an individual who deviates from the Platonic ideal of physical dimorphism at the chromosomal, genital, or hormonal levels,” approximately 1.7 percent of the population would be defined as intersex. Professor Francisco Valdes claims, “genital anomalies occur in [two] or [three] of every [one-hundred] births, and approximately four million Americans ‘have genitalia that are neither or both male or female, but are sex assigned either male or female.’” More conservative incidence estimations omitting Turner’s and

127 Greenberg, supra note 4, at 276.
128 Id.
129 Id.
130 Intersex Soc’y of N. Am., How Common is Intersex?, http://www.isna.org/faq/frequency (last visited Feb. 16, 2009). The website then reprints Anne Fausto-Sterling’s table of a comprehensive list of conditions that would result in a much higher incidence rate, noted below. Id.
131 Greenberg, supra note 5, at 927.
133 FAUSTO-SterLING, supra note 67, at 51-53.
Klinefelter’s syndromes and other conditions as intersex would result in a decrease to nearly one-one hundredth of Sterling’s estimate.\textsuperscript{135}

Other variables include geographic concentrations, such as the villages in the Dominican Republic, discussed above.\textsuperscript{136} The actual number is unimportant because the point is to highlight the incredible variety of physical expression of the traits considered to be either male or female. Authors defending the strict binaries prefer to report the incidence as low as possible, labeling intersex as aberrations to the “normal” ordering.\textsuperscript{137}

3. Historic Medical Treatment of Intersexual Persons

The medical treatment of intersex persons has evolved as the genesis of these conditions are discovered. Social changes eventually follow, and the law may follow, or lead, societal movements.\textsuperscript{138} Although current clinical practice appears to favor the size of phallus as determinative of a person’s sex,\textsuperscript{139} this has not always been the case. The sciences of medicine and anatomy continue to evolve as knowledge of the body increases and technology enhances to unlock the secrets of the human body.

Twelfth-century theological and medical writings characterized sex as continuous, as opposed to binary.\textsuperscript{140} Early scientific consensus on the nature of the human body found there to be only one sex, expressed in a perfect form, the male body, and in a less perfect inverted form as a female.\textsuperscript{141} “Scientific” support for this early belief appeared at its zenith with the publication of anatomy texts of the fifteenth through eighteenth centuries.\textsuperscript{142} The vagina was described as a hollow and inverted penis,\textsuperscript{143} the ovaries as the female inverted expression of testicles.\textsuperscript{144} Females were considered to possess the same repro-

\textsuperscript{135} Sax, supra note 95, at 177, cited in Karen Gurney, Sex and The Surgeon’s Knife: The Family Court’s Dilemma . . . Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics, 33 AM. J.L. & MED. 625, 629 n.31 (2007).

\textsuperscript{136} See supra notes 127-29 and accompanying text.

\textsuperscript{137} Normal being defined as “‘that which functions in accordance with its design.’” Kenneth J. Zucker, Intersexuality and Gender Identity Differentiation, 10 ANN. REV. SEX. RES. 1, n.1 (1999), quoted in Zakaria, supra note 95, at 359 n.44. These arguments appear to merely reinforce the current normative paradigm. Labeling differences pejoratively assumes that the person who is different is damaged and the “normal” person is not, legitimizes the desire to try to make the different person conform. Sharon E. Preves, Sexing the Intersexed: An Analysis of Sociocultural Responses to Intersexuality, 27 SIGNS: J. WOMEN IN CULTURE & SOCI’Y 523, 525 (2002).

\textsuperscript{138} Often the law lags significantly behind social changes, such as the end of the anti-sodomy laws by and through the Supreme Court’s decision in Lawrence v. Texas. See generally Lawrence v. Texas, 539 U.S. 558 (2003). At the time, there was almost no routine prosecution of sodomy laws. Id. at 569. At other times, the law pushes the boundaries of society, such as with the abolition of slavery, or the outlawing of separate but equal treatment of people based on their skin color. See generally Brown v. Bd. of Educ., 347 U.S. 483 (1954).

\textsuperscript{139} Discussed infra text accompanying notes 164-67.

\textsuperscript{140} Preves, supra note 137, at 535.

\textsuperscript{141} Laqueur, supra note 1, at 124.

\textsuperscript{142} Laqueur tracks the development of medicine and anatomic science during this period. See generally id. chs. 3-5.

\textsuperscript{143} Id. at 79.

\textsuperscript{144} Id. at 80-81.
ductive system as males, yet "turned inside out" to form that of a female, resulting in one sex, expressed in two genders.\footnote{Id. at 134-35.}

As scientists have continued to unlock the mysteries of the human body, scientific efforts to categorize intersexual persons into one sex or the other have taken many different approaches. A former standard for determining the sex of a person was to base it upon their reproductive organs, or "gonads," considered at one time to be the essence of one's gender.\footnote{Referred to by Dreger and others as the “Age of Gonads,” between c. 1870-1915. Dreger, supra note 13, at 29.} The presence of ovaries confirmed a girl; testes, a boy.\footnote{Id.} This level of sophistication was only possible after science had unlocked the differences in these tissue types. Later, discovery of mixed organs, "ovotestes," further confused the issue of binary identification using gonads as the primary identifier.\footnote{Ovotestis, “a sex gland containing both ovarian and testicular tissue,” were discovered in the early twentieth century. Id. at 73.}

It is difficult to unpack the normative understanding of sex, so the presence of typical “male” or “female” genitalia is still largely the ultimate standard used in determining the sex of a person. An example of this bias is evident in a study at the Massachusetts Institute of Technology in 1987, in which Dr. David Page was attempting to establish the discovery of “the master gene,” a specific sequence on the Y chromosome.\footnote{Butler, Gender Trouble, supra note 2, at 136.} Dr. Page hypothesized that he had located the gene responsible for the development of all sexual characteristics.\footnote{Id.} Dr. Page examined a pool of individuals that included what he termed to be XX “males” and XY “females.”\footnote{Id. at 136-38.} Although trying to obviate a definition based on genitalia, he apparently based the genetic determination as male or female on their external genital appearance.\footnote{Interview with Eric Vilain, supra note 79.} It is difficult to discuss the variety of expression without referring to these commonly accepted terms.

Dr. Eric Vilain, a noted expert on intersex, suggests that when discussing “brain sex,” we avoid using terms such as "masculinized brain," as it is “what society perceives as masculinized vs. feminized.”\footnote{Id. at 136-38.} “There are a number of behaviors that are stereotypic for males and some others [that are] stereotypic for females, which we call ‘gender role behavior.’”\footnote{Id.}

Treatment of intersexual persons has varied historically depending not only upon current scientific knowledge, but also on prevailing social and political norms. For example, in the sixteenth and seventeenth centuries in France, there were many varying written opinions and interpretations of the nature of hermaphroditism, which later researchers believed were fueled by concerns over "transvestitism, sodomy (especially between women), and the possible transgression of other social sex roles.”\footnote{Dreger, supra note 13, at 33.}
An early societal concern about intersexual persons was that they would marry a person of the same sex, resulting in a homosexual marriage. People who grew up as a female might later be discovered to be a male, or vice versa, after puberty had changed the appearance of their genitals. Sometimes these discoveries occurred well into adulthood, and after many years of marriage, People previously believed to be males sometimes began menstruating later in life; others considered females, experienced their testes descending. In addition to the usual religious and normative arguments still used in the present day to justify intolerance toward same sex marriage, earlier arguments included concern over the slowing of the birth rate and maintaining a sufficient population base.

At the end of the nineteenth century, persons of indeterminate sex may have appeared as troubling aberrations to the proper ordering of society, challenging established sex-roles by failing to conform to the binary of sex. Many of the rights of people in a social, political and legal context were dependent upon a person’s sex, treating women as second-class (or worse) citizens. One reason for an unwillingness to recognize gender variance was to support subjugation of women. Alice Domurat Dreger noted it would be disruptive to setting the proper role for women in society if it were impossible to define exactly what a woman was. Two French physicians writing on the subject of hermaphrodites in 1911 noted, “the possession of a [single] sex is a necessity of our social order, for hermaphrodites as well as for normal subjects.”

It is still the rule to attempt to categorize every infant born as either male or female. In common modern clinical practice for intersex, for “genetic males” (XY), determinations of their sex are largely based upon the adequacy of their penis; in “genetic females” (XX), intervention is largely based upon preservation of reproductive capacity. Although no single accepted definition of male or female exists, sex is generally assigned at birth based upon the appearance of an infant’s genitals, as determined by the birth attendant. That immediate determination of sex is then noted on the infant’s birth certificate.

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156 Id. at 119.
157 See generally id. ch. 4 (“Hermaphrodites in Love”).
158 Id.
159 Id. at 119.
160 See infra Part III.E.1.
162 Id.
163 Id. at 30 (citing Th. Tuffier & A. Lapointe, “L’Hermaphrodisme. Ses varietés et ses conséquences pour la pratique médicale (d’après un cas personnel),” 17 REVUE DE GYNECOLOGIE ET DE CHIRURGIE ABDOMINALE 256 (1911)). Note too that the ISNA recommends assigning a child of indeterminate sex a gender for rearing.
164 See infra Part IV.A-B (discussing birth certificates).
166 Greenberg, supra note 4, at 271.
167 Id.
D. Surgical Treatment to Change or Define Sex

One troubling question for a child born with unusual genitalia is whether their phallus is a large clitoris or a small penis (often termed micro-penis). The average size of a typical newborn typical female's clitoris is 0.345 centimeters, with a range of about 0.2 to 0.85 centimeters.\textsuperscript{168} A typical newborn male’s penis ranges between 2.9 and 4.5 centimeters in length.\textsuperscript{169} Phalluses that fall between the maximum “acceptable” clitoris size and below the minimum “acceptable” penis size may make an infant a candidate for surgery to conform to certain societal expectations for the use of a penis.\textsuperscript{170}

In determining the adequacy of an infant’s penis, criteria include the appearance of the genitals, the potential ability of a male to urinate while standing, and the potential for sexual penetration with the penis.\textsuperscript{171} It has been noted the phallus size of a baby at birth has not been reliably correlated with the size and function of the phallus at the age of puberty.\textsuperscript{172} Surgery to “correct” these “unacceptably sized” phalluses is likely to result in surgical assignment as a female, based upon the difficulty in recreating the male genitalia.\textsuperscript{173} One surgeon was quoted as joking, “you can make a hole but you can’t build a pole.”\textsuperscript{174} Early surgical efforts in “normalizing surgery,” surgery that would turn a baby with a micro-penis into a girl, or reduce an oversized clitoris, did not attempt to preserve clitoral sensitivity.\textsuperscript{175} Since the 1960s, however, surgical procedures have developed to make preservation of sensitivity more likely.\textsuperscript{176} Additional surgery beyond the reduction of the phallus may be needed to complete the sex assignment, depending on the child’s anatomy.\textsuperscript{177}

Noa Ben-Asher traced the intertwined histories of intersex and transsexual surgeries in the United States as “connected to the concept of a gendered inner-self that appeared in the second half of the twentieth century to explain sex behavior through a theory of immutable gender identity.”\textsuperscript{178} From this, people assumed that an adult’s psychological “sex” was fixed, unlike the bodies of transsexuals, which could be altered surgically, beginning after World War II.\textsuperscript{179} Securing surgery to alter their bodies can be a difficult process for transsexual persons. Surgery for infants with ambiguous genitalia is now controversial, as many of these children may later regret irreversible decisions made for them without their input. A more modern, patient-based approach is to delay surgery on their genitalia until the child can participate in any surgical decisions.\textsuperscript{180}

\textsuperscript{168} Fausto-Sterling, \textit{supra} note 67, at 60.
\textsuperscript{169} \textit{Id.} at 57.
\textsuperscript{170} \textit{Id.} at 57-60.
\textsuperscript{171} \textit{Id.} at 57.
\textsuperscript{172} \textit{Id.} at 58.
\textsuperscript{173} \textit{Id.} at 58-59.
\textsuperscript{174} \textit{Id.} at 59.
\textsuperscript{175} Following the connection of clitoral stimulation with female orgasm. \textit{Id.} at 61.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} Including creation of labia, etc. \textit{Id.}
\textsuperscript{178} Ben-Asher, \textit{supra} note 165, at 78.
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} See \textit{infra} notes 209-14 and accompanying text.
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Transsexual persons seeking sexual reassignment surgery learn early that there are rules they must comply with to make themselves eligible for the surgery they desire. To be eligible for sexual reassignment surgery, they usually must follow the Benjamin Standards of Care Protocol, which include seeking counseling, obtaining psychiatric approval for the surgery, and living for one year in the intended gender before surgery. Professor Dean Spade, an openly transsexual law professor, recalled his frustration attempting to prove to counselors that he was a “real” transsexual when seeking the treatment he desired. He described having to meet certain expectations that he knew his counselor would require him to exhibit to prove that he was a real transsexual. “What if it means I’m not “real”?” Even though I don’t believe in real, it matters if other people see me as real. If not, I’m a mutilator, an imitator, and worst of all, I can’t access surgery.” The counselor Professor Spade referred to eventually decided that he was not “real” enough to recommend for sexual reassignment surgery. At support groups, Professor Spade learned that, often, people seeking treatment learn “what it means to lie and cheat their way through the medical roadblocks to get the opportunity to occupy their bodies in the way they want.” People seeking treatment need to “perform a desire for gender normativity,” at least feign adherence to a sex binary, and admit that they have a mental disorder, in order to qualify for medical assistance in getting the treatment they desire.

The difficulty for transsexuals in securing the treatment they desire is strikingly similar to earlier instances of people seeking to be recognized as the sex that they knew was their own. In the late nineteenth century, before the...
development of sexual reassignment surgeries, people seeking to live their lives in their desired sex had to convince gatekeepers that they were indeed already that sex.\textsuperscript{189} These gatekeepers could be physicians or courts attempting to categorize a person of ambiguous sex.\textsuperscript{190} While assessing a patient with “doubtful sex,” a French physician cautioned his students about placing too much emphasis on patient testimony about their behaviors, noting that:

\begin{quote}
\hspace{1cm}every individual who wishes to be declared a man tells me . . . that he has a very pronounced taste for all the exercises of the body, gymnastics, arms, horse-riding, that he has a very broad intelligence and above all special aptitude for math—I ask myself if this is peculiar to hermaphrodites!—In a word, the statements are so exaggerated that I dare not take them completely into account. . . .\textsuperscript{191}
\end{quote}

Unlike the difficulty for many transsexuals to secure the surgery they desire, intersexual infants are often surgically altered before they are of an age to consent.\textsuperscript{192} Many adults who have undergone surgery as a child to “correct” conditions of intersex have later been unhappy with their surgical reassignments and advocate for personal control over their bodies, and for infants who may be subject to such surgeries.\textsuperscript{193} Although gender is malleable, there appears to be biological determinants of the extent of its elasticity. In the 1950s, clinicians developed recommendations for surgery and hormonal treatment of intersex infants that remained unchallenged for decades.\textsuperscript{194}

One of the most famous experts of the era, Dr. John Money, and his colleagues postulated that biological factors were not the sole factors of gender development, and that gender socialization of an intersex infant with a definitive physical sex assignment before the child reaches eighteen months of age, coupled with unambiguous child rearing, would result in “normal” gender identity development.\textsuperscript{195} In a famous case testing his theory, Dr. Money attempted to change the sex of a child who was not in any way considered intersex.\textsuperscript{196} One child of a set of identical twins had lost his penis when he was eight months old “when a doctor used an electrocautery needle, instead of a scalpel, to excise his foreskin during a routine circumcision, burning off his entire penis. . . .”\textsuperscript{197} Not surprisingly, his parents immediately canceled his brother’s operation.\textsuperscript{198} The injured twin, David Reimer, who was raised until that time as a boy, was a chromosomally and hormonally typical boy.\textsuperscript{199} Dr. Money

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\textsuperscript{189} DREGER, supra note 13, at 90-91 (citing Brouardel, “Hermaphrodisme; impuissance; type infantile,” 60 GAZETE DES HÔPITAUX CIVILS ET MILITAIRES 57 (1887)).
\textsuperscript{190} See infra Part III.E (concerning historic legal determinations of sex or gender).
\textsuperscript{191} See supra note 13, at 90-91.
\textsuperscript{192} See, e.g., Ben-Asher, supra note 165, at 61-62.
\textsuperscript{193} Id.
\textsuperscript{194} Preves, supra note 137, at 527 (2002) (citing John Money et al., Hermaphroditism: Recommendations concerning Assignment of Sex, Change of Sex, and Psychological Management, 97 BULL. OF THE JOHNS HOPKINS HOSPITAL 284-300 (1955)).
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 527-28. Often dubbed the “Joan/John case.” Id.
\textsuperscript{198} Preves, supra note 137, at 527.
\textsuperscript{199} Id.
\end{flushleft}
advised David’s parents that he be “reassigned” as a female, because without a
penis, he would to be unable to develop as a normal male.200

David’s case was widely cited in medical and social science literature as
proof that gender was indeed socially malleable.201 Both the medical and pop-
ular media hailed the transformation as a complete success.202 Later, it was
revealed that David was never satisfied being female, and rebelled against his
assigned gender role almost from the beginning.203 He began the process of
male reassignment at the age of fourteen, when he learned of his early medical
history.204 He underwent a double mastectomy and a phalloplasty as part of his
transformation back to a physical male.205 His later doctors postulated that
David’s case was evidence of at least some degree of biological determinism,
which supports modern theories of the effects of gender specific hormones on
the brain.206 Although David eventually married and adopted the children of
his wife, his life was never a very happy one, and he eventually committed
suicide.207

Many persons born intersex never knew; others knew, but thought they
were unique. When Professor Anna Fausto-Sterling began publishing articles
in The Sciences and The New York Times, more people became aware of the
existence of intersex. The Intersex Society of North America (ISNA) was
founded as a support group, but later became an educational and activist group
for the rights of intersex persons.208 ISNA opposes early surgical intervention
for intersex infants, both advocating and litigating to curb the practice, relying
on the rights of autonomy and self-determination found in international human
rights law, as well as the tort of battery.209

The Convention on the Rights of the Child is a principal legal source for
opponents to early genital surgeries.210 Almost all nations have ratified the
Convention, with the exception of the United States and Somalia.211 There is
now significant legal and social opposition to the practice of “corrective” sur-
gery on intersex infants in the United States. Among other reasons, early geni-
tal surgeries occur without the intersex person’s informed consent, which

200 Id. at 527-28.
201 Sharon E. Preves, Out of the O.R. and into the Streets: Exploring the Impact of Intersex
202 Id.
203 Id. at 274.
204 Preves, supra note 137, at 528.
205 Id.
206 Id.
207 See Colapinto, supra note 197.
208 See Intersex Soc’y of N. Am., What’s the History Behind the Intersex Rights Move-
209 Ben-Asher, supra note 165, at 62 (citing Convention of the Rights of the Child, G.A.
210 Id. Professor Hazel Beh, a law professor, and Milton Diamond, a physician, also
explore the ethical concerns about surgery on the intersex as infants. See Hazel Glenn Beh
& Milton Diamond, An Emerging Ethical and Medical Dilemma: Should Physicians Per-
form Sex Assignment Surgery on Infants with Ambiguous Genitalia?, 7 MICH. J. GENDER &
211 Ben-Asher, supra note 165, at 63.
cannot occur while he or she is still an infant. Performing surgery before the child can have a voice in the decision is seen as unnecessary to protect the interests of the child. Activists against these early surgeries have noted that there are not many occasions where a child will have to prove their sex until puberty, at which point they may have to prove it for issuance of a driver’s license. The modern approach is to raise an intersex child as one gender, but forego surgery until the child is of an age to help determine his or her “true” sex.

E. Evolution of Rules for Determining Sex

Historically, determining a person with ambiguous genitalia’s sex was left to the legal system. Until the early nineteenth century, lawyers and judges usually decided intersexual persons’ statuses, sometimes with medical consultation. Early in the twentieth century, the task of determining one’s sex more often fell to physicians. In the United States, a number of standards are used to determine a person’s legal sex, varying by jurisdiction and for differing legal purposes, ranging from the procreative (a man must be able to fertilize ovum and beget offspring, while a woman must be able to produce ova and bear offspring), to the religious ([sex or] gender is immutably fixed by our Creator at birth), to the scientific ([sex or] gender itself is a fact that may be established by medical and other evidence).

1. English Common Law Approaches to Determining Sex

Although the current approach to determining sex enforces a sex binary, this concept has not been constant through history. English law previously divided people into three sexes: male, female, and hermaphrodites. Hermaphrodites were then further subdivided into male or female, depending

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212 Unless, of course the surgery is needed to protect the physical well being of the child. As Jo Bird proposes,

The law determines which bodies are allowed to exist without surgical intervention and legitimizes the alteration of the hormonal, anatomical and endocrinological features of those whose bodies are designated to be abnormal. The intersex body is deemed to be biologically anomalous at the same time it is deemed to be legally anomalous. There is no such thing as the purely biological body unmediated by law. Such profound physical alterations to children’s bodies under any other circumstance would be regarded as discriminatory treatment—contrary to the rights of the child—or as violent criminal assaults.


213 Reilly, supra note 6, at 316.


215 FAUSTO-Sterling, supra note 67, at 40.

216 Id.


upon the “predominance of their sexual organs.”

219 Under the common law, hermaphrodites were considered both female and male. 220 This did not mean that they were free to choose to vacillate between the sexes, but rather, were expected to choose one sex and live in that role permanently. 221 So, even though recognized as different, an intersexual person’s rights were determined by whether their genitalia was more like that of a typical man or woman. 222

Distinguishing men from women has had differing legal functions at various times in history. Women were denied the right to own property, conduct business, enter into contracts, to sue, to receive equal pay for employment, to equal access to public education, to various employment opportunities, to vote, 223 and even to the right to speak in public. 224 In many cases, the determination of an intersexual person as either male or female might have also decided the passage of one’s fortune through the laws of intestacy. 225

2. Determining Legal Sex in the United States

In 1843, an election in Salisbury, Connecticut, came down to one vote to determine the winner. 226 Levi Suydam, a person of indeterminate sex, petitioned the town selectmen for the right to vote, a right that, at the time, was available to men only. 227 The selectmen subjected Levi to an examination by a physician who pronounced him male. 228 Apparently, the physician based his examination on the appearance of Levi’s genitals, as it was later discovered that Levi also menstruated regularly and possessed a vaginal opening. 229 Physical inspection of genitalia was likely the extent of the law’s ability to distinguish sex in 1847 Connecticut.

219 Id.
220 Greenberg, supra note 4, at 277-78.
221 Matambanadzo, supra note 13, at 240.
222 Professor Greenberg notes:

In the 16th century, Lord Coke, the renowned jurist, writing about the laws of succession to hereditary wealth and title in England declared, “Every heire is either a male, or female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called Androgyanus) shall be heire, either as male or female, according to that kind of the sexe which doth prevale.”

Greenberg, supra note 4, at 277-78.
224 FAUSTO-Sterling, supra note 67, at 39.
225 Under the law of intestate succession in the seventeenth-century New England colonies, each child received an equal portion of the family’s real estate, with the exception of the eldest son, who received a double portion. “In contemporary England the principle of primogeniture guided intestate succession of land, and so the eldest son inherited all of a family’s real property.” Richard Cole, Authentic Democracy: Endowing Citizens with a Human Right in Their Genetic Information, 33 Hofstra L. Rev. 1241, 1296 n.228 (2005) (citing LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985)).
227 Id.
228 Id.
229 Id.
More recently in the United States, determining a person’s legal sex has been based on a person’s physical appearance, chromosomes, self-identification, or perhaps a combination of one or more of these factors.230

Determining the legal sex of a person has often been critical in assessing the rights of transsexuals in marriage, where the decision will affect the validity of the union and resulting property claims. Currently in the United States, a female transsexual is legally a woman in about half of the states, and a man in the other half.231 In 1999, the Texas Court of Appeals decided in Littleton v. Prang232 that the marriage between a man and Christie, a female transsexual who had undergone sexual reassignment surgery, was void, as she was still a man, and Texas law does not permit same-sex marriages.233 Based on this determination, the law would not recognize Christie as a surviving spouse in a wrongful-death suit.234 The court asked, “[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?”235 The court considered medical testimony and other court rulings and decided, “[t]here are some things we cannot will into being. They just are.”236 The court speculated that Christie was born with an XY chromosome assignment, and that, despite her surgical and hormonal treatments, that fact was not going to change, nor would her legal sex.237 In Texas, Christie was still a man, and the marriage was void.

In M.T. v. J.T.,238 a New Jersey case with the opposite result, the court ruled that the biology of sex is not permanently determined at birth.239 The
court took note of the decision in the English case of Corbett v. Corbett,\textsuperscript{240} in which a transsexual was determined not to have changed her sex, despite having undergone sexual reassignment surgery.\textsuperscript{241} In Corbett, the court developed a test that required congruence of the chromosomal, gonadal, and genital sex characteristics.\textsuperscript{242} The court in M.T. refused to follow Corbett's reasoning, noting that appearance of the genitalia is an accepted proof of sex in certain sports, service in the military, and for certain employment.\textsuperscript{243} The M.T. court noted that, under Corbett, sex is fixed at birth, but recognized the great disharmony in a preoperative transsexual's physical appearance and gender identity.\textsuperscript{244} Following surgery for sex reassignment, the M.T. court ruled that, when “gender and genitalia are no longer discordant,” a court may consider a transsexual his or her reassigned sex for purposes of marriage.\textsuperscript{245}

Another legal issue for transgender and transsexual persons includes laws concerning separate bathrooms for each sex in the workplace.\textsuperscript{246} Professor Terry Kogan argues that requiring separate toilet facilities in the workplace was part of an effort by Victorian regulators to continue to separate women and reinstate the morals and ideology of the nineteenth century.\textsuperscript{247} Professor Kogan notes, if otherwise unable to force women back into the home, “the law would mandate that spaces in the dangerous public realm be set aside . . . as protective havens for women, as surrogate ‘homes away from home.’”\textsuperscript{248} Laws separating the sexes in bathrooms are problematic for transgender and transsexual persons. People whose gender appearance is somewhat variant might be perceived as using the wrong bathroom, resulting in social and legal complications.\textsuperscript{249}

3. Determining Sex for Participation in the Olympics

Although not a legal determination, in the world of professional sports, the standard for determining who is male or female has changed over the years, though in a different manner. Appearance of an athlete’s external genitalia was formerly the standard for establishing a person’s sex for participating in sporting events, such as the Olympics.\textsuperscript{250} Although the International Olympic Committee (IOC) rules require proof of a female’s sex,\textsuperscript{251} there has only been one known case of a man competing as a woman in the Olympics. In 1936, Her-

\textsuperscript{240} Corbett v. Corbett, 2 W.L.R. 1306 (P.D.A. 1970).
\textsuperscript{241} M.T., 355 A.2d at 208 (citing Corbett, 2 W.L.R. at 1323).
\textsuperscript{242} See id. (citing Corbett, 2 W.L.R. at 1325).
\textsuperscript{243} Id. at 208-09.
\textsuperscript{244} Id.
\textsuperscript{245} Id. at 211.
\textsuperscript{246} Terry S. Kogan, Sex-Separation in Public Restrooms: Law, Architecture, and Gender, 14 MICH. J. GENDER & L. 1, 7 (2007).
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Spade, supra note 67, at 17 & n.5. Spade recalls his own horrific experience of being arrested and jailed for nearly a day for using a toilet in Grand Central Station. Id. at 17 n.5.
\textsuperscript{250} Ostensibly, to ensure fair play and equality. See Haley K. Olsen-Acre, The Use of Drug Testing to Police Sex and Gender in the Olympic Games, 13 MICH. J. GENDER & L. 207, 216-17 (2006).
\textsuperscript{251} Athletes competing as males are not tested to ensure that they are not females. See id. at 212.
mann Ratjen of Germany “bound up his genitals and took part in the women’s high jump competition,” finishing fourth behind three women. More recently, athletic organizations have been using a chromosomal test instead, though it has not proved to be a more definitive test.

Consider the case of Mary Patiño, a professional hurdler who arrived to compete in the 1988 Olympics without the requisite proof from a physician that she was female. The IOC was prepared for this occurrence and told her to report to an on-site clinic for a simple buccal mucosa (inside the cheek) scrape test. Her first test determined that she was not a woman. A second test confirmed the first troubling result, finding that she possessed not only XY chromosomes, but also testes within her body, though no uterus or ovaries. The committee decided that, based on these findings, she was not a woman, and therefore, was ineligible to compete. Her prior sports awards were taken from her by the respective sports’ committees that had originally awarded her prizes and titles. After a two and a half year legal challenge, she was reinstated in a professional athletics federation, and rejoined the Spanish Olympic squad after she proved herself “feminine enough to compete.”

The buccal mucosa scrape test was used by the IOC until 1992, when it was replaced by another test utilizing a DNA polymerase chain reaction. To accommodate all athletes, many experts advocate further changes to professional sports rules to accommodate our greater understanding of sex and gender.

IV. IDENTIFICATION

A. The REAL ID Act

The REAL ID Act of 2005 was a part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and the Tsunami Relief Act, all part of Congress’ efforts to protect the United States from terrorist attacks. The REAL ID Act requires states to issue driver’s licenses and official identification cards containing, at a minimum, nine features to help ensure accurate identification:

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252 Id. at 211-12.
253 Greenberg, supra note 4, at 273.
254 FAUSTO-Sterling, supra note 67, at 1.
255 Id.
256 Id. The test actually determines the presence of a Y chromosome, as opposed to confirming an XX chromosome assignment. See id.
257 Id. at 1-2.
258 Id. at 1.
259 Id.
260 Id. at 2.
261 See Olsen-Acre, supra note 250, at 217.
262 For a detailed discussion, see generally Jill Pilgrim et al., Far from the Finish Line: Transsexualism and Athletic Competition, 13 FORDHAM INT’L. PROP., MEDIA & ENT. L.J. 495 (2003).
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(1) the person’s full legal name. (2) the person’s date of birth. (3) the person’s gender. (4) the person’s driver’s license or identification card number. (5) a digital photograph of the person. (6) the person’s address of principle residence. (7) the person’s signature. (8) physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes. (9) a common machine-readable technology, with defined minimum data elements.264

The REAL ID Act also established minimum requirements for documentation for issuing an identification card, as well as mandates for states to create databases of personal information for sharing information between states.265

Note that the REAL ID Act requires inclusion of a person’s “gender” and not “sex.” It will be up to the states to decide how gender is determined, as they do now, with the result that gender will be considered synonymous with sex, and difficult to change on an identification card.266

States can continue to issue non-REAL ID qualifying identification, but non-complying documents issued after December 31, 2009,267 must be of an alternative design, and must explicitly state that they cannot be accepted for any federal identification purpose, such as for entry to federal buildings, or even for boarding a plane.268 States that have not complied with the new law by December 31, 2009, may seek a second waiver indicating that they want more time to comply with the legislation.269 The deadline is an effort to increase states’ compliance with the REAL ID program.270 Citizens born after December 1, 1964, have until December 1, 2014, to get a new driver’s

264 Id. § 202(b).
265 Id. § 202(c), (d). These documentation requirements will require more work for people transitioning from one sex to another than this already onerous task requires. See Allen, supra note 56, at 186.
266 “DHS will leave the determination of gender up to the States since different States have different requirements concerning when, and under what circumstances, a transsexual individual should be identified as another gender.” Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272, 5301 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37).
267 See id. at 5272. See also Dep’t of Homeland Sec., REAL ID: States Granted Extensions, http://www.dhs.gov/xprevprot/programs/gc_1204567770971.shtm (last visited Feb. 8, 2009) (noting that every state has been granted an initial extension).
268 See REAL ID Act § 202(d)(11); Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. at 5274. “[A] Federal agency may not accept, for any official purpose, a driver’s license or identification card issued by a State to any person unless the State is meeting the requirements . . . .” REAL ID Act § 202(a)(1). Homeland Security Secretary Michael Chertoff was quoted as saying,

If a particular state were to say, ‘We opt out, we’re not going to participate at all,’ then the law is very clear . . . After May of this year, that state’s drivers’ licenses will no longer be acceptable as a form of federal identification for getting on an airplane or getting into a federal building.

Jay Levine, Real ID Act: Showdown between Feds, State, CBS2CHICAGO, Jan. 11, 2008, http://cbs2chicago.com/local/Real.ID.act.2.628190.html. Note that the individual identification cards of its citizens do not have to be REAL ID Act-compliant by December 31, 2008, but the state must be in compliance with the Act on that date, or its citizens will not be able to access federal buildings and airports. Id.
270 See id.
license. Americans born before December 1, 1964, have until December 1, 2017. Residents of states not complying with the REAL ID Act have to use a passport or another type of federal border-crossing card, or submit themselves to a rigorous secondary screening at airport security to comply with federal identification purposes.

Diverse groups across the political spectrum oppose the REAL ID Act. Some see it as an attempt to establish a national identification card, historically a politically unpopular concept with Congress. Since the creation of the individual social security number in 1936, there have been many efforts to make one’s social security number a unique identifier, and the basis of a national identification card, a concept adopted by many other countries. Those who support state sovereignty oppose the adoption of a national identification card, criticizing its implementation as eroding states’ rights, expensive, and ineffective.

Although the city of San Francisco has recognized the benefits to some sexual minorities of having gender- or sex-neutral identification cards, no state has yet to adopt a gender-neutral driver’s license or identification card. The REAL ID Act precludes any state’s efforts to do so. At least one municipality has recognized the benefits to some sexual minorities of having gender- or sex-neutral identification cards. States that may desire to create gender-neutral driver’s licenses because of the problems they can cause for people who are not easily categorized by gender, or who identify with a different gender or sex than the one assigned at birth are precluded from doing so by the REAL ID Act. Advocates for transgender persons’ rights are also concerned about the requirements of the Act to prove identity that will cause people transitioning, or who have transitioned from one sex to another, to face new hurdles in acquiring congruence among their various official identification cards and documents.

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271 Id.
272 Id. See also Justin Vellucci, REAL ID Shapes Up to Be a Real Headache, PITTSBURGH TRIB.-REV., Jan. 14, 2008, available at http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_547350.html (discussing the difficulties states are experiencing implementing the REAL ID Act).
274 See, e.g., Thiessen, supra note 10, at 507.
275 For a history of these efforts, see Debra Milberg, The National Identification Debate: “Real ID” and Voter Identification, 3 I/S: J.L. & POL’Y FOR INFO. SOC’Y 443, 446-48 (2008).
276 Among other criticisms of the Act. Id. at 449-56.
278 See infra note 306 and accompanying text.
279 For example, as set forth by the organization for Parent and Friends of Lesbians and Gays (PFLAG): The Real ID Act will increase discrimination and violence against our transgender loved ones. Transgender people need an ID that accurately reflects their current and updated name and gender and, for safety reasons, information about a gender change must be kept private. The
Some documents that are problematic include social security cards, as well as utility bills and photos which may be kept on file for up to a decade, further complicating transitions from one sex or gender to another.280

Gender or sex appears on many identifying documents, such as driver’s licenses, birth certificates, passports, etc. Birth certificates are often used to identify a person’s date of birth,281 but the sex category required on birth certificates can be problematic for some sexual minorities, and the processes for changing one’s sex on a birth certificate are non-uniform.282 A sex determination on a birth certificate that does not correspond with a person’s chosen sex or gender can cause a multitude of problems, as a birth certificate is the first and foundational document in establishing one’s identity.

B. Birth Certificates

Birth Certificates must usually be filled out within ten days after the birth of a child.283 The medical attendant determines an infant’s sex at birth.284 Professor Elizabeth Reilly’s well argued solution for the problem with gender determination on birth certificates for intersexual persons, and for persons who later choose to change their sex, along with myriad other related problems for sexual minorities285 is unequivocal: “[w]e must cease using the Birth Certificate to assign sex to a child.” 286 Professor Reilly notes that birth certificates are more likely to be used to prove a person’s age rather than their gender.287

Real ID Act puts up additional barriers to acquiring an ID that reflects a person’s new name and it makes information about a person’s former name easier to discover, potentially outing transgender people to whomever scans their ID. When transgender people do not have updated information on their ID, or when information about a gender change is made known, transgender people are vulnerable to increased discrimination and even violence. PFLAG: Parents, Families, & Friends of Lesbians and Gays, Advocacy & Issues: Real ID Act, http://community.pflag.org/NETCOMMUNITY/Page.aspx?pid=753&srcid=210 (last visited Feb. 16, 2009) (emphasis omitted).

280 See Allen, supra note 56, at 186.

281 For example, a birth certificate is one of many documents the State of Illinois will accept in proving a person’s identity in their application for a driver’s license. See Cyber Drive Ill., Acceptable Identification, http://www.cyberdriveillinois.com/departments/drivers/drivers_license/acceptable_id.html (last visited Feb. 16, 2009). A number of documents, including the birth certificate, are acceptable for proving one’s date of birth, while other documents may be used to prove one’s residency, their signature, and their Social Security Number. Id. Nowhere on the list, however, is a person required to prove their gender. See id.

282 See infra Part IV.B.

283 See Reilly, supra note 6, at 311.

284 The “[p]refered [s]ource” of the information listed in the CDC specification is from the ”[d]elivery record,” or the “[i]nfant’s medical record.” Dep’t of Health & Human Servs., Ctrs. for Disease Control and Prevention, Nat’l Ctr. for Health Statistics, Birth Edit Specifications for the 2003 Revision of the U.S. Standard Certificate of Birth, Item 3, at 1 (2004), available at http://www.cdc.gov/nchs/data/dvs/FinalBirthSpecs3-24-2003.pdf. The determination of male or female, or ”not yet determined,” is possible. Id. It is made by a physician, hospital administrator or midwife, or, if no medical attendant, another respondent. Reilly, supra note 6, at 299 n.8.

285 Of course, not having a record of the sex of a person at birth would likely frighten many people who may fear that two persons marrying may have been born the same sex. See supra notes 231-45 and accompanying text (discussing Littleton v. Prang and M.T. v. J.T.).

286 Reilly, supra note 6, at 308.

287 Id. at 298 n.5.
By not having a sex identifier on this foundational document, there would be no earlier record of sex to correct.\textsuperscript{288} The standard birth certificate form has a blank for “not yet determined” under “sex,” meant to be a temporary placeholder, but it must be changed to male or female while the child is an infant.\textsuperscript{289} Note that this insistence on completion is so rigid that a determination of male or female must be made even if the child dies.\textsuperscript{290} By comparison, Professor Reilly notes that race is not “assigned” at birth, and is a critical concept of self-identity, to be determined by the individual.\textsuperscript{291}

Changing the sex on your birth certificate is an onerous task, if it is at all possible. Although there have been attempts to make birth certificates uniform, there is not much uniformity among the states on changes made to birth certificates. Professor Spade notes that many states require proof of gender changing surgery,\textsuperscript{292} though other states do not specifically require surgery.\textsuperscript{293} Three states do not have any mechanism to change a birth certificate, including Tennessee, which actually has a statute forbidding a change of sex on a birth certificate.\textsuperscript{294} The requirement for surgery in many states also requires someone seeking the change to first undergo a psychological evaluation to even qualify for surgery.\textsuperscript{295}

Birth certificates have not always been uniform in content, and, until relatively recently, were not required in most states. In 1902, Congress established the Bureau of the Census as a permanent federal agency with the authority to develop a uniform system for the registration of births.\textsuperscript{296} The Bureau’s objective was to develop and maintain a registration system that was uniform in law, forms, procedures and statistical methodology.\textsuperscript{297} Although the first national birth registration legislation was proposed as early as 1850, the Census Bureau produced the first standard birth certificates in 1900.\textsuperscript{298} The Bureau also pro-

\textsuperscript{288} Professor Reilly is aware of the need for collecting vital statistics data, noting that other information is collected at the time of birth that does not appear on the actual birth certificate, and argues that sex should be treated similarly. Id. at 318 & n.85. For example, information about an infant having certain diseases at birth is collected, but does not appear on the child’s birth certificate. Id.

\textsuperscript{289} See id. at 322.

\textsuperscript{290} See id.


\textsuperscript{292} See Spade, supra note 67, at 16 n.3 (listing a number of state statutes requiring proof of surgical procedures undergone for an individual to change sex).

\textsuperscript{293} See supra note 284.

\textsuperscript{294} See, e.g., TENN. CODE ANN. § 68-3-203(d) (2006) (“The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.”).

\textsuperscript{295} See Spade, supra note 67, at 23-24.


\textsuperscript{298} Id. at 1.
duced a Standard Certificate of Death, as well as a Report of Fetal Death (formerly Stillbirth), a Standard Certificate of Marriage and Divorce or Annulment, and a Standard Report of Induced Termination of Pregnancy.\textsuperscript{299} By 1933, all forty-eight states and the District of Columbia participated in the birth registration system.\textsuperscript{300} Currently, the system is implemented in all fifty states, the District of Columbia, the independent registration area of New York City, Puerto Rico, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.\textsuperscript{301} Dropping a gender or sex identifier would not go against centuries of tradition, but would go a long way toward reducing problems for some sexual minorities.

In addition to creating problems for certain sexual minorities, inclusion of sex or gender on birth certificates does not help with accurate identification. As people often rely upon their birth certificate for obtaining other official documents, the inability to change a birth certificate may hamper efforts to change other legal documents to make them consistent in gender or sex indicators. The difficulty of changing a birth certificate creates problems for someone transitioning from one sex to another, both from a practical and legal standpoint.\textsuperscript{302}

C. Identification Technologies

Identification technology has advanced significantly since driver’s licenses first required photographs.\textsuperscript{303} Personal identifiers that qualify as biometrics, albeit primitive ones, include: skin, hair and eye color, physical markings, gender, and facial hair.\textsuperscript{304} Of these attributes, only gender is required to be included under the REAL ID Act. What these attributes all have in common is the ability to easily change or disguise them. Although some of these biometrics, such as height and weight, appear on state issued driver’s licenses, the REAL ID Act does not require them on complying identification cards. As any of the above biometrics are subject to change or disguise, they should not be a part of a law designed to improve the accuracy of identification cards. Contact lenses can instantly change your eye color. People can add or lose weight, or lie about it at the outset, as this requirement is usually self-reported. Note that race or skin color is not required under the REAL ID Act, ostensibly because legal determinations should not be made based on those criteria. Although it is also a poor identifier, skin color could be considered superior to gender as an

\textsuperscript{299} See id.


\textsuperscript{301} “[T]he National Center for Health Statistics (NCHS) is required to produce national vital statistics by compiling data from the central vital records office in all of the 57 registration areas.” Report of the Panel, supra note 297, at 1.

\textsuperscript{302} In applying for certain governmental benefits, there might even be issues of fraud.


\textsuperscript{304} See, e.g., Daniel J. Steinbock, National Identity Cards: Fourth and Fifth Amendment Issues, 56 Fla. L. Rev. 697, 704-05 (2004). Biometrics are human physical characteristics that can be used to verify identification. See, e.g., Bridget Mallon, “Every Breath You Take, Every Move You Make, I’ll Be Watching You”: The Use of Face Recognition Technology, 48 Vill. L. Rev. 955, 957 (2003).
identifier, as it is more difficult to change or disguise, but this would be politically unworkable, and rightfully so.

Gender and sex, as we have seen, can be changed, or even simply disguised. In practice, we rely on self-reported gender, and seldom do we need verification. Gender is a poor biometric identifier, and requiring it under the REAL ID Act serves only to preserve the normative view of sex to the detriment of anyone who is gender variant. A state could still decide to include gender if it were dropped from the Act, just as many states still require height and weight determinations, even though not forced to include them by the Act. Although no state as of yet has dropped gender or sex from their driver’s licenses and official identification cards, at least one jurisdiction has attempted to issue an identification card that is gender neutral.

More accurate biometrics includes fingerprints, retinal scans and DNA, which are not contemplated by the REAL ID Act. If the purpose of the Act is to ensure identity, these might be better alternatives. The Act does require a digital photograph, which may not be as helpful as might be expected in confirming a person’s identity. When attempting to lessen the incidence of credit card fraud, some companies began using credit cards that had a photo of the card-holder. In a controlled study, it was discovered that people could not make adequate identification determinations based upon the photos, neglected to check, or were reticent to challenge the holder, even when the person knew that they were being tested on compliance.

However, that same digital photograph required by the REAL ID Act, coupled with facial recognitions software, could be used to affirm identity accurately. This technology has been used to scan large crowds in stadiums to identify criminals, most notably at the Super Bowl in 2001. Although these programs are usually accurate, their success has little or nothing to do

305 See Reilly, supra note 6, at 315. People transitioning must be careful, however to achieve congruence among all their official documents to avoid the appearance of fraud. Fraud is often considered when transgender persons apply for a legal name change, although it is not usually clarified what kind of fraud is suspected. See In re Eck, 584 A.2d 859, 860 (N.J. Super. Ct. App. Div. 1991).

306 San Francisco purposely did not require a gender or sex requirement in their identification cards available for undocumented immigrants. See supra note 277.

307 See Steinbock, supra note 304, at 705.


309 See id. at 11/2 to /3.

310 Bridget Mallon offers the following, brief discussion of face recognition software:

Face recognition technology works by creating a “map” of the face from a photograph that a surveillance camera takes. Each face has eighty distinctive points that are recorded from the photograph. Once these distinctive points are mapped, they are translated into a unique set of numbers, using a sophisticated algorithm, from which a face map is created. Once this map is created, it is scanned through a database of stored face maps. Only fourteen to twenty-two points need to line up in order to make a match. If the computer program signals a match, the original photograph and the photograph it was matched with are displayed side by side on a screen. Then, whoever is monitoring the screens, either police or security, decides whether or not the faces are actually a match. Mallon, supra note 304, at 958-59 (footnotes omitted).

311 Id. at 963.
with gender or sex. Facial recognition systems are designed to adjust for changes of a person’s age, facial hair or weight.\textsuperscript{312}

Other available technologies that are more accurate than primitive biometrics include radio frequency identification technology (RFID),\textsuperscript{313} which can identify objects at a distance based on RFID tags embedded in identification form.\textsuperscript{314} Proposals have been made to include RFID tags in all passports and driver’s licenses.\textsuperscript{315} The short range of the technology requires that the RFID tags be read in close proximity, for readers or scanners may allay some privacy concerns, though they have potential to be linked with long range tracking technologies like global positioning systems (GPS).\textsuperscript{316} This potential makes RFID unlikely to be very popular with people concerned with their privacy, as access to their identity information could occur involuntarily.\textsuperscript{317}

With the availability of all of these other methods for ensuring the accuracy of identification, requiring gender is out of place with the new enhanced security identification cards required under the Act. Gender is of limited, if any, value as an identifier, but can cause significant mischief to sexual minorities, and therefore, has no place in identification cards’ federal minimal requirements to ensure accuracy. Congress should delete gender from the REAL ID Act’s minimal requirements for a federally compliant identification card.

V. Conclusion

Determining a person’s gender or sex can be a difficult calculus when all the medical determinants of sex do not align in a person. Although intersex persons are thought to be a small fraction of our population, thanks to examination at increasingly technologically advanced levels, it is apparent that a true binary does not exist between the sexes. Intersexual, transsexual, and other transgender people have incongruence of the medically understood sex identifiers, and possibly, many other people who have had no reason to examine their DNA (at least not yet).

What is undeniable is that gender and sex are not truly binaries, and laws treating them as such are antiquated. Social and legal conventions have followed our medical discoveries in the past, and must continue to evolve to reflect the world as we better understand it. Knowing the fallacy of sex and gender binaries, requiring a gender identifier as a matter of federal law on all state issued identification cards is hardly a rational approach to ensuring the accurate identification of people in an effort to thwart future terrorist threats. The requirement that gender be an identifier on identification cards should be eliminated from the REAL ID Act to allow states the freedom to delete this inaccurate and problematic biometric from their official identification cards.

\textsuperscript{312} Id. at 961.
\textsuperscript{314} See, e.g., id.
\textsuperscript{315} See, e.g., id. at 489.
\textsuperscript{316} See, e.g., id. at 489-90.
\textsuperscript{317} See, e.g., id. at 495.
This reform would be meaningless if states do not also amend their identification card requirements to delete a gender identifier from their official identification cards. States should make genderless identification cards available to citizens now to avoid most of the harsh effects of inclusion of a gender identifier on certain sexual minorities. These identification cards would be valid for most uses, except for federal purposes (such as entry to federal property and airports). Repeal or amendment of the REAL ID Act would make those genderless identification cards as “real” as any other official identification card.