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

James McGrath*

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.¹ 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.² 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).

² "[W]hat gender ‘is,’ is always relative to the constructed relations in which it is determined." JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 15 (1999). See also Judith Butler, *Performative Acts and Gender Constitution: An Essay in the Phenomenology and Feminist Theory*, in *PERFORMING FEMINISMS: FEMINIST CRITICAL THEORY AND THEATRE* 270, 271, 273-74 (Sue-Ellen Case ed., 1990); David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, in *THE*

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.³ 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.⁴

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,⁵ spurring some authors to call for removing a gender or sex identifier on birth certificates.⁶ 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-

MASCULINITIES READER 146-47 (Stephen M. Whitehead & Frank J. Barrett eds., 2001). “Constructivism accepts the likelihood that social values continually evolve within the complex system of legal, social, and scientific developments, as they are taken seriously within these same disciplines.” Keith H. Hirokawa, *Dealing with Uncommon Ground: The Place of Social Constructivism in the Social Construction of Nature*, 21 VA. ENVTL. L.J. 387, 392 (2003). Hirokawa states:

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.

³ 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.

⁴ 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.

⁵ See, e.g., Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 927 (2002).

⁶ 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.⁷ 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.⁸ The nine minimum requirements for information that states must provide on these cards include a person's gender.⁹

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,¹⁰ 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.¹¹ 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

⁷ See REAL ID Act of 2005, Pub. L. No 109-13, 119 Stat. 231 (codified as amended in scattered sections of 8 and 49 U.S.C.).

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.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.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.¹⁴ To this end, devices used to aid in com-

¹² LAQUEUR, *supra* note 1, at 70. As a general rule, people are confident with their ability to determine a person's sex, but on the rare occasion that a person's sex is ambiguous, the uncertainty creates a tension that almost demands resolution. See, for example, Saturday Night Live's sketches of "Pat," the ambiguous barber, later made into a motion picture entitled *It's Pat* (Touchstone Pictures 1994). In these sketches, people who meet Pat are obsessed with determining Pat's sex, with comic effect. Julia Sweeney, who created the role, also helped co-author a book to coincide with the film's release, entitled *It's Pat!: My Life Exposed*. JULIA SWEENEY & CHRISTINE ZANDER, *IT'S PAT!: MY LIFE EXPOSED* (1992). A few rock songs also discuss the tension when identification is not possible, such as *Boy or A Girl*, by (appropriately) Imperial Drag, and *Are You a Boy or Are You a Girl*, by Jayne County & The Electric Chairs. IMPERIAL DRAG, *Boy or A Girl*, on IMPERIAL DRAG (Work 1996); JAYNE COUNTY & THE ELECTRIC CHAIRS, *Are You a Boy or Are You a Girl*, on LET YOUR BACKBONE SLIP (RPM Records 1995).

¹³ ALICE DOMURAT DREGER, *HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX* 9 (1998). Author Saru Matambanadzo discusses Dreger's work.

The dichotomous sexual tradition constructs the Anglo-American legal landscape. Historian Alice Domurat Dreger notes that many legal distinctions depend on there being two and only two sexes. In the past it determined who could own property, who could vote, and who could legally engage in sexual intimacy. Under the current legal regime, legal sex determines many other aspects of one's life including whom one can marry and whether one can be drafted for military service.

Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213, 213-14 (2005) (footnotes omitted).

¹⁴ Some more complex decisions may even be thought to be binary. "For reasons which appear to be obscure, decision-making is usually just assumed to be dichotomous." PETER EMERSON, *THE DE BORDA INSTITUTE, FORUM SUBMISSION: DECISION-MAKING IN EUROPE AND IN IRELAND*, http://www.forumoneurope.ie/getFile.asp?FC_ID=208&docID=963 (last visited February 16, 2009).

plex determinations, such as decision trees and computers, often reduce complex schema into a chain of binary decisions.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.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.¹⁷

Race was formerly legally constructed as a binary in the United States.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.¹⁹ The problem of reducing the complex issue of race to a binary was made fairly simple: people were either white or non-white.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:²¹ any amount of non-white blood would render a person non-white.²² Other jurisdictions used a fractional approach, where

¹⁵ VICTOR H. VROOM & PHILIP W. YETTON, *LEADERSHIP AND DECISION MAKING* 41-42 (1973).

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).

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).

¹⁸ This topic is more fully examined in other works. See, e.g., Greenberg, *supra* note 5, at 923-27.

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").

²⁰ *Id.*

²¹ See, e.g., Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535, 593 n.365 (2004); Allyson D. Polsky, *Blood, Race, and National Identity: Scientific and Popular Discourses*, 23 J. MED. HUMAN. 171, 178 (2002). See also RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 21 (2001) (stating that the one-drop rule "defined as black any person with traceable African ancestry").

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, *inter alia*, [T]he 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

Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 9 n.38 (2007) (quoting S.J. Res. 332, 2007 Sess. (Va. 2007)).

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) ("[T]he 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. LOFGREN, *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[AW] & 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 shalbe [sic] held bond or free only according to the condition of the mother."

Id. at 560 n.145 (quoting II HENING'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.²⁵ 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.²⁶

Other legal efforts to keep whites distinct from non-whites included anti-miscegenation laws. Until 1967, laws making it a criminal offense²⁷ 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*.²⁸ 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.²⁹ To accomplish this goal of maintaining the race binary, Virginia law collapsed two diverse racial groups, "colored persons and Indians," into a single class.³⁰

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

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).

²⁵ Reginald C. Oh, *A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class?*, 13 TEMP. POL. & CIV. RTS. L. REV. 583, 594 (2004).

²⁶ 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.

²⁷ 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).

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.” 1 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.

³⁵ *Id.* at 185. See also Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 LAW & SOC’Y REV. 587, 605 (2007) (reviewing the facts of *Ozawa*, in a discussion of the construction of an Asian identity in United States law).

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, intersexual 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.

Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 135 n.194 (2002) (quoting James D. Willets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, [990] n.1 (1997)).

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

⁵⁶ Jason Allen, *A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169, 172 (2008).

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.

Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN’S L.J. 226, 230 (1998) (footnotes omitted).

color pink is now undeniably associated as feminine in the United States.⁶⁰

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.⁶¹ 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.⁶² However, in *J.E.B. v. Alabama ex rel. T.B.*,⁶³ Justice Scalia made an effort to distinguish the terms, recognizing the cultural underpinnings and fluidity of the word gender.⁶⁴

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”).⁶⁵ 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-

⁶⁰ 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.

⁶¹ See Case, *supra* note 57, at 9-10.

⁶² 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).

⁶³ *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

⁶⁴ 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.

Id. at 157 n.1 (Scalia, J., dissenting).

⁶⁵ Susan Frelich Appleton, *Contesting Gender in Popular Culture and Family Law: Middlesex and Other Transgender Tales*, 80 IND. L.J. 391, 393-95 (2005).

table variable.⁶⁶ 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.

Intersexual 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.⁶⁷

B. *Medically Determining Sex*⁶⁸

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.⁶⁹ Although scientific evidence may be considered the last word on proof of a person's sex, the science of sex has

⁶⁶ For example, "[t]he distinction along sex rather than gender lines can be seen as imprecise and even misleading because sex is a dichotomous variable while gender is generally viewed as a continuous variable." Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 140 n.220 (2002) (citing Kay Deaux & Marianne LaFrance, *Gender*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 788, 789 (Daniel T. Gilbert et al. eds., 4th ed. 1998)).

⁶⁷ ANNE FAUSTO-STERLING, *SEXING THE BODY* 3 (2000). Many authors and activists note consistent reinforcement of the gender/sex binary with the use of male and female pronouns, he or she. *Id.* at 31. Some offer alternative pronouns, "ze" & "hir." See John M. Ohle, Note, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 239 (2004). Dean Spade prefers to use

the gender-neutral pronouns "sie" (pronounced "see") and "hir" (pronounced "here") to promote the recognition of such pronouns, which resist the need to categorize all subjects neatly into male and female categories, at the suggestion of Leslie Feinberg. [He] use[s] these pronouns when discussing a hypothetical person, but when [he is] referring to people who have articulated a self-identification in a particular gender, [he] respect[s] that choice by using pronouns which reflect it.

Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 17 n.7 (2003) (citing LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE* 1 (1998)).

⁶⁸ 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.

⁶⁹ 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.⁷⁰ 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.⁷¹ The science of classifying disease, known as nosology, continues to evolve with today's advances at the genetic level,⁷² 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.⁷³ An embryo develops as a typical male, or female, depending upon the presence or absence of certain genes, enzymes, and hormones.⁷⁴ At about the eighth week of development, sex differentiation begins to occur.⁷⁵ With a phenotypic XY assignment, an embryo typically begins to develop as a boy; with a phenotypic XX assignment, a girl.⁷⁶ In the absence of certain hormones, an embryo will develop into a typical female.⁷⁷ In the presence of masculinizing genes and hormones, the embryo would likely become a typical male.⁷⁸ 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.⁷⁹ Similarly, there are apparent females who have an XY chromosomal assignment.⁸⁰

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, XYYYY.⁸¹ Some of these variations may result in the creation of typical males or females, but some will not.⁸² 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-

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.

⁷² See, e.g., Jamie A. Grodsky, *Genetics and Environmental Law: Redefining Public Health*, 93 CAL. L. REV. 171, 174-76 (2005).

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

⁸³ Ann M. Bauer, *What is a Doctor to Do When a Parent Asks, "Is My Child a Boy or a Girl," and the Answer Lies Somewhere in Between?*, REDORBIT, June 2, 2005, http://www.redorbit.com/news/health/153258/the_second_question/.

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.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.”⁹³ Formerly called “hermaphrodites” (and often still labeled as such),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, Klinefelter’s syndrome, gonadal dysgenesis, and hypospadias.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.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.⁹⁷ CAH is not a discrete condition, as many different forms of CAH are caused by malfunctioning enzymes involved in producing steroid hormones.⁹⁸ Some forms of CAH may be life threatening and require treatment to save the life of the infant.⁹⁹

& FEMINISM 275, 290-99 (2004). Nor am I personally concerned whether gender expression is biological or chosen, but these recent developments may erode arguments that some gender behavior is simply a choice.

⁹² The question of how rare is controversial, and is discussed *infra* Part III.C.2.

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.

Bauer, *supra* note 83.

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.

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)).

⁹⁶ FAUSTO-STERLING, *supra* note 67, at 59.

⁹⁷ *Id.*

⁹⁸ *Id.* at 58.

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.¹⁰⁰ These children are born with feminized genitalia due to their cells' inability to bind to testosterone.¹⁰¹ As a result, the virilizing process does not take place as it does with typical XY infants.¹⁰² Children with androgen insensitivity develop a feminine body shape, with a narrow waist, little or no body hair and developed breasts.¹⁰³ These children present as typical females, so physicians may not diagnose the condition until puberty when their patients fail to menstruate.¹⁰⁴ 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.¹⁰⁵
- 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.¹⁰⁶ Although they do not have an XX chromosome assignment, persons with Turner's syndrome appear similar to be typical females.¹⁰⁷ However, their ovaries do not develop, they are likely to be physically short, and they do not usually develop secondary sex characteristics.¹⁰⁸ 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.¹⁰⁹
- Klinefelter's syndrome results from a person with an XY chromosome assignment having an extra X chromosome, resulting in an XXY chromosome assignment.¹¹⁰ Klinefelter's syndrome causes infertility in otherwise male appearing children, who often experience breast enlargement after puberty.¹¹¹ As a result, physicians do not usually diagnose this condition until puberty.¹¹² Also, the testes, and sometimes the penis of these persons, are smaller than typical males.¹¹³

nal 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.*

- 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.¹²⁷ These children are raised as females until puberty, when their voices change as their testes descend and their clitorises become penises.¹²⁸ After this transformation, they live as males.¹²⁹

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.¹³⁰

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."¹³¹

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,"¹³² approximately 1.7 percent of the population would be defined as intersex.¹³³ 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.'"¹³⁴ 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.

¹³² Melanie Blackless et al., *How Sexually Dimorphic are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 161 (2000), quoted in Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GENDER 31, 33 (2005).

¹³³ FAUSTO-STERLING, *supra* note 67, at 51-53.

¹³⁴ Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 20 n.46 (1995) (quoting LAUREL [] RICHARDSON, *THE DYNAMICS OF SEX AND GENDER: A SOCIOLOGICAL PERSPECTIVE* 5 (3d ed. 1988)).

Klinefelter's syndromes and other conditions as intersex would result in a decrease to nearly one-one hundredth of Sterling's estimate.¹³⁵

Other variables include geographic concentrations, such as the villages in the Dominican Republic, discussed above.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.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.¹³⁸ Although current clinical practice appears to favor the size of phallus as determinative of a person's sex,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.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.¹⁴¹ "Scientific" support for this early belief appeared at its zenith with the publication of anatomy texts of the fifteenth through eighteenth centuries.¹⁴² The vagina was described as a hollow and inverted penis,¹⁴³ the ovaries as the female inverted expression of testicles.¹⁴⁴ Females were considered to possess the same repro-

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).

¹³⁶ See *supra* notes 127-29 and accompanying text.

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 & Soc'y 523, 525 (2002).

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).

¹³⁹ Discussed *infra* text accompanying notes 164-67.

¹⁴⁰ Preves, *supra* note 137, at 535.

¹⁴¹ LAQUEUR, *supra* note 1, at 124.

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

¹⁴³ *Id.* at 79.

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.¹⁴⁵

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.¹⁴⁶ The presence of ovaries confirmed a girl; testes, a boy.¹⁴⁷ 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.¹⁴⁸

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.¹⁴⁹ Dr. Page hypothesized that he had located the gene responsible for the development of all sexual characteristics.¹⁵⁰ Dr. Page examined a pool of individuals that included what he termed to be XX “males” and XY “females.”¹⁵¹ Although trying to obviate a definition based on genitalia, he apparently based the genetic determination as male or female on their external genital appearance.¹⁵² 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.”¹⁵³ “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.’”¹⁵⁴

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.”¹⁵⁵

¹⁴⁵ *Id.* at 134-35.

¹⁴⁶ Referred to by Dreger and others as the “Age of Gonads,” between c. 1870-1915. DREGER, *supra* note 13, at 29.

¹⁴⁷ *Id.*

¹⁴⁸ Ovotestis, “a sex gland containing both ovarian and testicular tissue,” were discovered in the early twentieth century. *Id.* at 73.

¹⁴⁹ BUTLER, GENDER TROUBLE, *supra* note 2, at 136.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 136-38.

¹⁵³ Interview with Eric Vilain, *supra* note 79.

¹⁵⁴ *Id.*

¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ People previously believed to be males sometimes began menstruating later in life; others considered females, experienced their testes descending.¹⁵⁸ 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.¹⁵⁹

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.¹⁶⁰ One reason for an unwillingness to recognize gender variance was to support subjugation of women.¹⁶¹ 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.¹⁶² 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."¹⁶³

It is still the rule to attempt to categorize every infant born as either male or female.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶ That immediate determination of sex is then noted on the infant's birth certificate.¹⁶⁷

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.

¹⁶¹ DREGER, *supra* note 13, at 27-28.

¹⁶² *Id.*

¹⁶³ *Id.* at 30 (citing Th. Tuffier & A. Lapointe, "L'Hermaphrodisme. Ses variétés et ses conséquences pour la pratique médicale (d'après un cas personnel)," 17 *REVUE DE GYNÉCOLOGIE 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).

¹⁶⁵ Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 *HARV. J.L. & GENDER* 51, 61 (2006) (citing Am. Acad. of Pediatrics, *Evaluation of the Newborn with Developmental Anomalies of the External Genitalia*, 106 *PEDIATRICS* 138, 141 (2000)).

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.¹⁶⁸ A typical newborn male's penis ranges between 2.9 and 4.5 centimeters in length.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.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.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.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.¹⁷³ One surgeon was quoted as joking, "you can make a hole but you can't build a pole."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.¹⁷⁵ Since the 1960s, however, surgical procedures have developed to make preservation of sensitivity more likely.¹⁷⁶ Additional surgery beyond the reduction of the phallus may be needed to complete the sex assignment, depending on the child's anatomy.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."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.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.¹⁸⁰

¹⁶⁸ FAUSTO-STERLING, *supra* note 67, at 60.

¹⁶⁹ *Id.* at 57.

¹⁷⁰ *Id.* at 57-60.

¹⁷¹ *Id.* at 57.

¹⁷² *Id.* at 58.

¹⁷³ *Id.* at 58-59.

¹⁷⁴ *Id.* at 59.

¹⁷⁵ Following the connection of clitoral stimulation with female orgasm. *Id.* at 61.

¹⁷⁶ *Id.*

¹⁷⁷ Including creation of labia, etc. *Id.*

¹⁷⁸ Ben-Asher, *supra* note 165, at 78.

¹⁷⁹ *Id.*

¹⁸⁰ See *infra* notes 209-14 and accompanying text.

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,¹⁸¹ which include seeking counseling, obtaining psychiatric approval for the surgery, and living for one year in the intended gender before surgery.¹⁸² Professor Dean Spade, an openly transsexual law professor, recalled his frustration attempting to prove to counselors proving that he was a “real” transsexual when seeking the treatment he desired.¹⁸³ 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.¹⁸⁴ “‘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.”¹⁸⁵ The counselor Professor Spade referred to eventually decided that he was not “real” enough to recommend for sexual reassignment surgery.¹⁸⁶ 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.”¹⁸⁷ 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.¹⁸⁸

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

¹⁸¹ Although there are other standards of care, this is the predominant standard. Charles Thomas Little, Comment, *Transsexuals and the Family Medical Leave Act*, 24 J. MARSHALL J. COMPUTER & INFO. L. 315, 322-23 (2006). Harry Benjamin was a physician who worked with transsexuals, facilitating some of the first medical transitions from one sex to the other. Alvin Lee, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J. L. & GENDER 447, 452 (2007). “In 1979, physicians, therapists, and researchers who worked with transsexuals formed a professional organization called the Harry Benjamin International Gender Dysphoria Association (HBI/GDA). The members gave official standardized criteria for diagnosis and treatment.” Ben-Asher, *supra* note 165, at 79. Under the Benjamin standards of care, a transsexual who desires hormone therapy or breast surgery must be diagnosed as suffering from gender identity disorder and provide a letter of recommendation from a mental health care provider. Little, *supra*, at 323. To qualify for sexual reassignment surgery for their genitals under the Benjamin standards of care, transsexuals must be diagnosed as suffering from gender identity disorder, and provide two letters, one from a psychiatrist or clinical psychologist (PhD), the other may be from a therapist with a master’s degree. *Id.* The transsexual must also live in the role of the desired gender for at least three months before receiving hormonal therapy, and for one year if surgery is desired. *Id.*

¹⁸² Kristin R. Rowland, Note, *Amorphous Employment Discrimination Protection for Transsexuals: Doe v. Boeing*, 4 TEMP. POL. & CIV. RES. L. REV. 367, 369 (1995).

¹⁸³ Professor Spade was also the founder of the Sylvia Rivera Legal Clinic, and has written extensively on gender and transsexual issues. Spade, *supra* note 67, at 19-20.

¹⁸⁴ *Id.* at 19.

¹⁸⁵ *Id.* at 20.

¹⁸⁶ *Id.* at 22.

¹⁸⁷ *Id.* at 23.

¹⁸⁸ *Id.* at 24. See also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed. 1994) (discussing Gender Identity Disorder).

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.¹⁸⁹ These gatekeepers could be physicians or courts attempting to categorize a person of ambiguous sex.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:

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. . . .¹⁹¹

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.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.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.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.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.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. . . .”¹⁹⁷ Not surprisingly, his parents immediately canceled his brother’s operation.¹⁹⁸ The injured twin, David Reimer, who was raised until that time as a boy, was a chromosomally and hormonally typical boy.¹⁹⁹ Dr. Money

¹⁸⁹ DREGER, *supra* note 13, at 90-91 (citing Brouardel, “*Hermaphroditisme; impuissance; type infantile*,” 60 GAZETE DES HÔPITAUX CIVILS ET MILITAIRES 57 (1887)).

¹⁹⁰ See *infra* Part III.E (concerning historic legal determinations of sex or gender).

¹⁹¹ See *supra* note 13, at 90-91.

¹⁹² See, e.g., Ben-Asher, *supra* note 165, at 61-62.

¹⁹³ *Id.*

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)).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 527-28. Often dubbed the “Joan/John case.” *Id.*

¹⁹⁷ John Colapinto, *Gender Gap: What Were the Real Reasons behind David Reimer’s Suicide?*, SLATE, June 3, 2004, <http://www.slate.com/id/2101678/>. Colapinto authored a biography about David. See JOHN COLAPINTO, *AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL* (2000).

¹⁹⁸ Preves, *supra* note 137, at 527.

¹⁹⁹ *Id.*

advised David's parents that he be "reassigned" as a female, because without a penis, he would 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 popular 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" surgery on intersex infants in the United States. Among other reasons, early genital 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 Media Activism*, 12 *CARDOZO J.L. & GENDER* 247, 273-74 (2005).

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 Movement?, <http://www.isna.org/faq/history> (last visited Feb. 16, 2009).

²⁰⁹ Ben-Asher, *supra* note 165, at 62 (citing Convention of the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25 (Nov. 20, 1989)).

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 Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 *MICH. J. GENDER & L.* 1 (2000).

²¹¹ Ben-Asher, *supra* note 165, at 63.

cannot occur while he or she is still an infant.²¹² 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.²¹³ 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.²¹⁴

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.²¹⁵ Early in the twentieth century, the task of determining one's sex more often fell to physicians.²¹⁶ 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).²¹⁷

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.²¹⁸ Hermaphrodites were then further subdivided into male or female, depending

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 legitimates 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.

Jo Bird, *Outside the Law: Intersex, Medicine and the Discourse of Rights*, 12 *CARDOZO J.L. & GENDER* 65, 67-68 (2005).

²¹³ Reilly, *supra* note 6, at 316.

²¹⁴ See Beh & Diamond, *supra* note 210, at 26; Intersex Soc'y of N. Am., What does ISNA Recommend for Children with Intersex?, <http://www.isna.org/faq/patient-centered> (last visited Feb. 16, 2009). Remember, one of the determinants is self-identification. Greenberg, *supra* note 4, at 270.

²¹⁵ FAUSTO-STERLING, *supra* note 67, at 40.

²¹⁶ *Id.*

²¹⁷ Julie A. Greenberg & Marybeth Herald, *You Can't Take it With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 *WASH. L. REV.* 819, 819 (2005).

²¹⁸ Matambanadzo, *supra* note 13, at 239 (citing 2 *BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND* 31 (Samuel Thorne trans., 1968-1977), available at <http://hls15.law.harvard.edu/bracton/Unframed/English/v2/19.htm>).

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 *Androgynus*) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile.”

Greenberg, *supra* note 4, at 277-78.

²²³ Terrance R. Kelly, *Canaanites, Catholics and the Constitution: Developing Church Doctrine, Secular Law and Women Priests*, 7 *RUTGERS J.L. & RELIGION* 3, 67 (2005).

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 *HOEFTRA L. REV.* 1241, 1296 n.228 (2005) (citing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985)).

²²⁶ FAUSTO-STERLING, *supra* note 67, at 30.

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. Prang*²³² 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

²³⁰ For a review of the approaches of various states, see Julie A. Greenberg, *When is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV. 289, 292 (2005).

²³¹ Greenberg & Herald, *supra* note 217, at 823-24.

²³² *Littleton v. Prang*, 9 S.W.3d 223 (Tex. Ct. App. 1999).

²³³ *Id.* at 230-31. Interestingly, this ruling permits a different kind of same-sex marriage in Texas. Phyllis Frye and Alyson Meiselman, two transgender lawyers, discussed the aftermath of the *Littleton* decision:

As an unintended result of the Fourth Court's ruling that voided the straight-appearing, opposite-sex-appearing, heterosexual-appearing marriage of Mrs. Littleton, some same-sex-appearing marriages within the jurisdiction of the Fourth Court became legal. For example, on September 16, 2000, Ms. Jessica Wicks and Ms. Robin Manhart Wicks were legally married in San Antonio, Texas. Jessica's original birth certificate read "boy" and Robin's original birth certificate read "female." These women shared vows, exchanged rings, and were blessed by a Minister of God in a private ceremony before about fifty friends and supporters. Their marriage was similar to Christie Lee and Jonathan Mark Littleton's opposite-sex marriage, except that they were two women getting legally married. Despite what one conservative lawmaker said, this couple passed the "duck test." Less than two weeks later, two more women obtained a marriage license. Other same-sex couples have been invited to wed. Even amateur chess players should have seen these couples coming as the political result of the *Littleton* decision.

Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1033-34 (2001) (footnotes omitted).

²³⁴ *Littleton*, 9 S.W.3d at 231.

²³⁵ *Id.* at 224.

²³⁶ *Id.* at 231.

²³⁷ *Id.* at 230-31.

²³⁸ *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

²³⁹ *Id.* at 211.

court took note of the decision in the English case of *Corbett v. Corbett*,²⁴⁰ in which a transsexual was determined not to have changed her sex, despite having undergone sexual reassignment surgery.²⁴¹ In *Corbett*, the court developed a test that required congruence of the chromosomal, gonadal, and genital sex characteristics.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.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.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.²⁴⁵

Another legal issue for transgender and transsexual persons includes laws concerning separate bathrooms for each sex in the workplace.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.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.'"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.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.²⁵⁰ Although the International Olympic Committee (IOC) rules require proof of a female's sex,²⁵¹ there has only been one known case of a man competing as a woman in the Olympics. In 1936, Her-

²⁴⁰ *Corbett v. Corbett*, 2 W.L.R. 1306 (P.D.A. 1970).

²⁴¹ *M.T.*, 355 A.2d at 208 (citing *Corbett*, 2 W.L.R. at 1323).

²⁴² *See id.* (citing *Corbett*, 2 W.L.R. at 1325).

²⁴³ *Id.* at 208-09.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 211.

²⁴⁶ Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 7 (2007).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

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.

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).

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.²⁵² More recently, athletic organizations have been using a chromosomal test instead,²⁵³ 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.²⁵⁴ 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.²⁵⁵ Her first test determined that she was not a woman.²⁵⁶ 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.²⁵⁷ The committee decided that, based on these findings, she was not a woman, and therefore, was ineligible to compete.²⁵⁸ Her prior sports awards were taken from her by the respective sports’ committees that had originally awarded her prizes and titles.²⁵⁹ 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.”²⁶⁰

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.²⁶¹ To accommodate all athletes, many experts advocate further changes to professional sports rules to accommodate our greater understanding of sex and gender.²⁶²

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.²⁶³ 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:

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 INTELL. PROP. MEDIA & ENT. L.J. 495 (2003).

²⁶³ REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified as amended in scattered sections of 8 and 49 U.S.C.).

(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 transgendered 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.*

²⁶⁹ Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. at 5272.

²⁷⁰ *See id.*

license.²⁷¹ Americans born before December 1, 1964, have until December 1, 2017.²⁷² 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.²⁷³

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.²⁷⁴ 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.²⁷⁵ Those who support state sovereignty oppose the adoption of a national identification card, criticizing its implementation as eroding states' rights, expensive, and ineffective.²⁷⁶

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.²⁷⁷ At least one municipality has recognized the benefits to some sexual minorities of having gender- or sex-neutral identification cards.²⁷⁸ 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.²⁷⁹

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).

²⁷³ Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. at 5273; Levine, *supra* note 268.

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.

²⁷⁷ San Francisco, as of January 15, 2009, issues identity cards for undocumented immigrants, which contains no category for gender. See Office of The County Clerk, SF City ID Card, http://www.sfgov.org/site/countyclerk_index.asp?id=78261 (last visited Mar. 16, 2009). Legal challenges to the program formerly caused the program to be put indefinitely "on hold." Wyatt Buchanan, *Mayor Puts the City's Controversial ID Card Program On Hold*, S.F. CHRON., Sept. 4, 2008, at B1.

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 a person'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]referred [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/FinalBirthSpecs3-24-2005.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.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.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.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.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,²⁹² though other states do not specifically require surgery.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.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.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.²⁹⁶ The Bureau’s objective was to develop and maintain a registration system that was uniform in law, forms, procedures and statistical methodology.²⁹⁷ Although the first national birth registration legislation was proposed as early as 1850, the Census Bureau produced the first standard birth certificates in 1900.²⁹⁸ The Bureau also pro-

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.*

²⁸⁹ *See id.* at 322.

²⁹⁰ *See id.*

²⁹¹ *See id.* at 324-25. Taking full advantage of this freedom, Tiger Woods calls himself a “Cablasan,” a delightful blend of Caucasian, Black and Asian ancestry. Posting by G.H. Brooks to Fox Sports Blogs, http://community.foxsports.com/blogs/DrMidnight/2006/05/06/Earl_Woods_A_Father_First2 (May 6, 2006, 17:30 EST).

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).

²⁹³ *See supra* note 284.

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.”).

²⁹⁵ *See Spade, supra* note 67, at 23-24.

²⁹⁶ *See* U.S. CENSUS OFFICE, ACT OF MARCH 6, 1902: PROVIDING FOR THE ESTABLISHMENT OF A PERMANENT CENSUS OFFICE (1902), available at http://www.census.gov/history/pdf/Permanent_Census_Act_1902.pdf.

²⁹⁷ *See* DIV. OF VITAL STATISTICS, NAT’L CTR. FOR HEALTH STATISTICS, REPORT OF THE PANEL TO EVALUATE THE U.S. STANDARD CERTIFICATES 9 (2000) [hereinafter REPORT OF THE PANEL].

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.²⁹⁹ By 1933, all forty-eight states and the District of Columbia participated in the birth registration system.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.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.³⁰²

C. Identification Technologies

Identification technology has advanced significantly since driver's licenses first required photographs.³⁰³ Personal identifiers that qualify as biometrics, albeit primitive ones, include: skin, hair and eye color, physical markings, gender, and facial hair.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

²⁹⁹ See *id.*

³⁰⁰ See NAT'L CTR. FOR HEALTH STATISTICS, DEP'T OF HEALTH & HUMAN SERVS., TECHNICAL APPENDIX FROM VITAL STATISTICS OF THE UNITED STATES: NATALITY, 1997, at 1 (1999), available at <http://www.cdc.gov/nchs/data/techap97.pdf>.

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.

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

³⁰³ See generally Idaho Transp. Dep't, Idaho's Motor Vehicle History, <http://www.itd.idaho.gov/dmv/dmvhistory.htm> (last visited Feb. 16, 2009).

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.³⁰⁵ 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.³⁰⁶

More accurate biometrics includes fingerprints, retinal scans and DNA,³⁰⁷ 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.³⁰⁸ 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.³⁰⁹

However, that same digital photograph required by the REAL ID Act, coupled with facial recognitions software, could be used to affirm identity accurately.³¹⁰ This technology has been used to scan large crowds in stadiums to identify criminals, most notably at the Super Bowl in 2001.³¹¹ 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.

³⁰⁸ See Graham Pike et al., *The Psychology of Human Face Recognition*, 18 IEE COLLOQUIUM ON VISUAL BIOMETRICS 11/1, 11/1 (2000) (London).

³⁰⁹ See *id.* at 11/2 to 1/3.

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.³¹²

Other available technologies that are more accurate than primitive biometrics include radio frequency identification technology (RFID),³¹³ which can identify objects at a distance based on RFID tags embedded in identification form.³¹⁴ Proposals have been made to include RFID tags in all passports and driver's licenses.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).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.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.

³¹² *Id.* at 961.

³¹³ See, e.g., Katherine J. Strandburg & Douglas B. Burda, *The Frontiers of Privacy Law: Technology Marches On*, in SEVENTH ANNUAL INSTITUTE ON PRIVACY LAW: EVOLVING LAWS AND PRACTICES IN A SECURITY-DRIVEN WORLD (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 8966, 2006), WL 866 PLI/PAT 481, 487.

³¹⁴ See, e.g., *id.*

³¹⁵ See, e.g., *id.* at 489.

³¹⁶ See, e.g., *id.* at 489-90.

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.