THE MODERN MULATTO: A COMPARATIVE ANALYSIS OF THE SOCIAL AND LEGAL POSITIONS OF MULATTOES IN THE ANTEBELLUM SOUTH AND THE INTERSEX IN CONTEMPORARY AMERICA

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"This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes."[1] With this opening statement, Judge Harberger, writing the majority opinion in *Littleton v. Prange*, quickly goes on to demonstrate that this most basic of questions can be more difficult to answer than appears at first glance. The case at issue, which required the court to determine the legal sex of a post-operative transsexual, questioned the basic notion that male and female are fixed, immutable, and oppositional categories. The very premise of the case is an assault on the foundational assumption that sex is a binary and biological phenomenon, which has been overwhelming accepted in contemporary thought. Importantly, these two concepts once underpinned race theory, but were subsequently rejected by both the academic and legal worlds.[2] The same,

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[1] Littleton v. Prange, 9 S.W.3d 223, 223 (Tex. App. 1999) (finding that a transsexual female, i.e., a man who had transitioned into a woman, was for legal purposes male, and thus her marriage to the decedent male was invalid; she consequently could not file a medical malpractice suit as a surviving spouse under the state wrongful death statute).

[2] The social realm has, unfortunately, been slow to follow the example of academia and legal doctrine. Racism continues to be pervasive in American society, indicating that individuals continue to hold onto the notion that race is a natural phenomenon, onto which otherness may be ascribed. Such thought is demonstrated by the success of works such as *The Bell Curve*, which argues that genetic differences between races explain members' intellectual capacities, and uses this information to outline an intellectual hierarchy of different ethnic groups. RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 269-340 (1996).

while examined and critiqued at length in feminist and sexuality theory,[3] has thus far failed to occur in the realm of legal doctrine and social consciousness.

This Article seeks to add to the scholarship that illustrates the way in which sex can be conceptualized in much the same way as race, and may thus be divested of the presumptions of dichotomy and physiology, by comparing the regulation of race in the antebellum period[4] and sex in the modern day. In doing so, it also aims to undermine objections that sex and race are not in fact parallel socio-physiological categories.[5] Specifically, this Article examines the manner in which antebellum mulattoes, whose mixed race challenged the bases for racial hierarchy, were socially and legally made black so as to be folded within the binary on which slavery depended. It then follows this analysis with a consideration of the ways in which the intersex, who are persons with ambiguously sexed genitals, chromosomes, or phenotypes, are physically forced into one sex or the other so as not to cast doubt on the sexual binary necessary to sustain a patriarchal political and social system. Using this comparison as a framework from which to extend its deconstruction of social categories, this Article then turns to an examination of the role of the law in regulating

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[3] *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 167 (1987); Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89 (1994); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 963-66 (1984); Kenneth L. Karst, *The Supreme Court 1976 Term Forward: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 23-26 (1977). For a discussion of the limits of analogizing race and sexual orientation discrimination, see Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65 (1997).

One of the reasons why race may be accepted as constructed, while sex continues to be seen as fixed, is that racial fluidity is more visible. Variations in skin color and tone are readily perceptible, while ambiguities in genitalia are easily hidden. This helps explain why sexual binaries have not been questioned until recently, while racial categories have been suspect for decades.

[4] The "antebellum period" refers to the time in American history between the colonial era and the Civil War.

[5] A common objection to analogizing sex and race is that sex is "real" in a way that race is not; i.e., there is a biological basis to sex, which takes the form of reproductive capability, that has concrete and crucial ramifications for society and social ordering. This Article seeks to demonstrate, however, that sex is not the biological phenomenon that many consider it to be, but rather is a strictly political category. Consequently, sex and race are equivalent, and should be perceived as such for legal purposes.

sexual identity, noting how the law has the potential to be used to create sex in much the same way as it was employed to craft race during the antebellum period.

The importance of this analogy is evident in the implications that flow from it. If sex is as much a construction as is race, the laws and statutes which rely on sexual demarcations, such as whether an individual is protected by Title VII, what penal laws may be applied to a person, in which athletic competitions an individual is permitted to participate, whether a person is subject to a military draft, and who an individual may marry, among others, lose their foundational support, as the premises on which they rely do not exist.[6] The social impact is potentially much greater, as the law is but a shallow reflection of the deep sex-based differences on which society is based. Whether a legal recognition that sex is a construction will have a substantial effect on social norms is unclear, though the possibility does exist.[7] With these ideas in mind, Part I of this Article begins by focusing on race in the American antebellum South, detailing both the cultural factors that resulted in mulattoes joining the disfavored racial category and the legal means by which a binary racial hierarchy was established. This section discusses the attempts at combating miscegenation, as well as the regulations that delineated blackness and established mulattoes' place as blacks in terms of status, condition, and physicality. In Part II, the analysis turns to theoretical perspectives on sex as a social creation so as to provide a framework from which to develop a better understanding of the ways in which the intersex, as the physical intermediaries between the two established sexes, violate the political and social order. Part III examines the social and legal position of intersex individuals in contemporary American society, drawing attention to the parallels and divergences between the legal status of the intersex today and mulattoes of the antebellum world. It then highlights the ways in which this serves to undermine the basis for different judicial standards of review for race and sex based discrimination. Part IV concludes the Article, evaluating the likelihood for potential change in the law's treatment of sex as a biological phenomenon.

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[6] For a discussion of these legal issues, see Section III.B, *infra*.

[7] The legal recognition of the social construction of race has not eliminated racism, though the law has certainly had an impact on how race is interpreted and considered in the social realm. For example, court-ordered desegregation, by fostering closer interactions of people of diverse races, has ostensibly impacted perceptions of racial difference. The same could be said for legal prohibitions on race-based employment decisions, which have forced integration in fields that were previously monoracial.

I. SOCIAL AND LEGAL REGULATION OF MULATTOES IN THE ANTEBELLUM SOUTH

The constructed nature of race is clearly illustrated by the social perspectives on and the legal regulation of miscegenation in the antebellum South. Interracial sexual relationships, while accepted as standard in some parts of the South during the colonial era, were by the antebellum period uniformly perceived as extremely dangerous to white supremacy. This was due in large part to the mulatto offspring they produced, as mixed-race children blurred the line between the races, thereby upsetting the clear racial hierarchy on which slavery depended. Slavery was defended on the notion that racial stratification was part of a natural order, one in which whites dominated blacks due to their superior physical, mental, and behavioral traits.[8] Racial dilution not only led to a deterioration of these attributes, but also demonstrated immorality and cultural degeneracy.[9] Mulattoes, as evidence of interracial sex, were also "a visible reproach to the white man's failure to live up to basic moral and social precepts."[10] Consequently, hybridism was described as "heinous," and mulattoes became a "spurious" issue requiring legal regulation.[11]

Mulattoes threatened a vision of the natural order as being one of clear, defined categories to one of gradations, a theory upon which the institution of slavery could not stand, as "[s]lavery rest[ed] on the fundamental distinction between human labor and those who own[ed] it, and the total relations between master and slave generate[d] the idea that all relationships . . . should [have] be[en] total."[12] Plantation economies required whites to control the labor force in its entirety, a proposition that would have been impossible were it not for the strict bounds of the racial hierarchy. By relegating mulattoes to the status of their pure black

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[8] F. JAMES DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION 25 (1991).

[9] *Id.*; JOHN G. MENCKE, MULATTOES AND RACE MIXTURE: AMERICAN ATTITUDES AND IMAGES, 1865-1918, at 7-8 (1979).

[10] MENCKE, *supra* note 9, at 7.

[11] *Id.*; A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 2005 (1989) [hereinafter *Racial Purity*]; 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, 558 (2004).

[12] MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST 157 (1981).

contemporaries, the sharpness of racial distinctions would be maintained, and the power relationships that relied on racial purity could be sustained.[13] Such a clear racial divide also provided Southern lawmakers with a means of preventing interracial alliances between white servants and blacks, as giving value to whiteness granted the servant class privileges that they would seek to preserve.[14] Consequently, the white underclass would identify its interests as protected by racial division, as opposed to developing a class-based ideology, which could have undermined the system on which the Southern economy was based.

Given the threats they produced, interracial sexual liaisons had to be deterred and the mixed-race progeny regulated so as not to disturb the political and economic systems that fostered white privilege. Before turning to the legal measures adopted to accomplish these goals, however, it is first instructive to examine the ways in which colonial attitudes on amalgamation formed and developed, as such information will assist in understanding the timing and purpose of the legal regulations.

A. Social Perspectives of Mulattoes in the Colonial Era

The colonial South was not unified in terms of racial divides, attitudes, and mixing, but rather was a bifurcated region with respect to the status of blacks and mulattoes.[15] The upper South, comprised of Delaware, Virginia, Maryland, Kentucky, Tennessee, North Carolina, Missouri, and the District of Columbia, contained a relatively large mulatto population.[16] Often the offspring of white indentured servants and both free and enslaved blacks, a considerable portion were free, but overwhelmingly

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[13] *Racial Purity*, *supra* note 11, at 2005; MENCKE, *supra* note 9, at 7.

[14] The attempt by white servants to join forces with the black slave so concerned legislators that, in South Carolina, "a servant who ran away in the company of slaves . . . was declared a felon and was to suffer death without the benefit of clergy." A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 158 (1978) [hereinafter IN THE MATTER OF COLOR]. For a discussion of the value of whiteness, see DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1999).

[15] MENCKE, *supra* note 9, at 10; KATHLEEN ODELL KORGEN, FROM BLACK TO BIRACIAL: TRANSFORMING RACIAL IDENTITY AMONG AMERICANS 13 (1998); JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 14 (1995).

[16] MENCKE, *supra* note 9, at 10; KORGEN, *supra* note 15, at 13.

impoverished.[17] The economically depressed circumstances into which they were born, along with the low status of their parents and their residence in rural, rather than urban, areas, guaranteed mulattoes a place in the social underclass. Mulattoes did tend to rank in the upper echelons of free black society, but this did not alter the ways in which white citizens viewed mixed-race persons.[18] Indeed, whites equated mulattoes with blacks, making few distinctions as to hue or ancestry amongst persons of color. Mulattoes were thus just as socially, economically, and legally marginalized as their fully black brethren.

The lower South, consisting of South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas,[19] had a contrastingly generous view of free mulattoes, and afforded these individuals a status superior to that of blacks, thereby creating a third, intermediate class between black and white.[20] The impetus for this was based on practical as well as cultural influences, many of which were linked to the settlement pattern that emerged in the lower South. Unlike the upper South, many early immigrants to the lower South were from the West Indies, where the pattern of race relations resulted in a multi-tiered racial hierarchy, with mulattoes serving as a variable intermediate class.[21] Further, settlement in the lower South was characterized by a small number of white plantation owners and overseers and a large population of black slaves.[22] The scarcity of white women encouraged amalgamation, both because it increased a sense of sexual license and because it prevented settlers from reestablishing European patterns of domestic life, with its ideal of a monogamous heterosexual couple at its center.[23] Consequently, mulatto children were

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[17] KERRY ANN ROCKQUEMORE & DAVID L. BRUNSMA, BEYOND BLACK: BIRACIAL IDENTITY IN AMERICA 4 (2002); DAVIS, *supra* note 8, at 33; MENCKE, *supra* note 9, at 3-4; Gillmer, *supra* note 11, at 550-51.

[18] MENCKE, *supra* note 9, at 18.

[19] KORGEN, *supra* note 15, at 13.

[20] Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1506-08 (2000); KORGEN, *supra* note 15, at 13-14.

[21] MENCKE, *supra* note 9, at 10-11, 19-20; DAVIS, *supra* note 8, at 35; WILLIAMSON, *supra* note 15, at 15.

[22] WILLIAMSON, *supra* note 15, at 15.

[23] KORGEN, *supra* note 15, at 14; G. REGINALD DANIEL, MORE THAN BLACK?: MULTIRACIAL IDENTITY AND THE NEW RACIAL ORDER 36-37 (2002). Importantly, as "white sex and white families grew, the pressure for interracial sex and mulatto families diminished." WILLIAMSON, *supra* note 15, at 17. In South Carolina, white men who

often the progeny of prosperous fathers and slave women.[24] While the plantation economy discouraged fathers from manumitting their mixed-race children, those who were granted freedom joined the upper strata of society, due in large part to the recognition and largess of their white fathers.[25] The topmost few lived nearly on par with their white neighbors, and mulattoes as a whole dominated the free black community.[26] Avoiding interaction with unmixed blacks, many mulattoes adopted the attitudes of whites toward the lower castes, and took advantage of the social and economic opportunities that their lighter skin afforded.[27] These privileges provided incentives for free mulattoes to support the status quo in the lower South, and thus for mulattoes to ally themselves with the white dominating class. With a high ratio of blacks to whites in the plantation communities of the lower South, whites valued the buffer that the intermediate mulatto category provided.[28]

The three-tier class structure of the lower South disintegrated in the face of increased anxiety and tension due to abolitionist attacks on slavery.[29] Whites were fueled to defend the institution, a difficult endeavor when the line drawn between the two races, a line supposedly signifying a natural distinction between ruler and ruled,[30] was blurred by a significant mulatto population. A movement for society to be divided into two groups, black and white, gained momentum, and the white population of the lower South became less tolerant of miscegenation and the preferential treatment

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impregnated black women were forced into servitude for seven years, and the child was bound for eighteen to twenty-one years, depending on its sex. *Id.*

[24] KORGEN, *supra* note 15, at 13; MENCKE, *supra* note 9, at 10-11.

[25] DAVIS, *supra* note 8, at 35.

[26] KORGEN, *supra* note 15, at 13-14; WILLIAMSON, *supra* note 15, at 14-15; Jones, *supra* note 20, at 1506-07.

[27] PAUL R. SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 250 (1989); EDWARD BYRON REUTER, THE MULATTO IN THE UNITED STATES: INCLUDING A STUDY OF THE RÔLE OF MIXED-BLOOD RACES THROUGHOUT THE WORLD 177-78, 340 (1918).

[28] Jones, *supra* note 20, at 1508-09.; KORGEN, *supra* note 15, at 13-14.

[29] Jones, *supra* note 20, at 1510; KORGAN, *supra* note 15, at 15; A. Leon Higginbotham, Jr. & Greer C. Bosworth, *Rather Than Free: Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 24 (1991) [hereinafter *Rather Than Free*].

[30] DAVIS, *supra* note 8, at 25.

of mulattoes.[31] The potential for insurrection also served to lessen whites' support for a free class of blacks, regardless of the hue of the individuals at issue.[32] As a result, by the antebellum period, the lower South had become a two-class society like its Northern counterpart.

B. Legal Regulation

While the attitudes concerning mixed-race individuals originally differed in the colonial South, by the antebellum period all of the states had imposed stringent regulations on miscegenation and had relegated mulattoes to the same status as "pure" blacks. These statutes addressed interracial marriage and fornication, so as to deter the production of mulatto children, and also worked to disarm the potential power of a mixed-race class by legislating blackness onto mulattoes.

1. Marriage and Fornication

In order to protect its economic system, as well as the social and political institutions that accompanied slavery, Southern lawmakers attempted to eradicate interracial liaisons by imposing legal sanctions on interracial marriage and fornication. In the early seventeenth century, Virginia began lashing out at miscegenation, declaring sexual intercourse with blacks to be equivalent to bestiality.[33] Courts imposed severe punishments on those found guilty of this trespass; in 1630, Virginian Hugh Davis "was sentenced 'to be soundly whipped, before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians, by defiling his body in lying with a Negro, which fault he is to acknowledge next Sabbath day.'"[34] The penalties became less corporeal in subsequent years, and in 1662, the legislature mandated that "'if any christian shall commit ffornication with a negro man or woman, hee or shee soe offending shall pay double'" the previously imposed fine.[35] This provision, while reducing the punishment from physical to fiscal, was

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[31] MENCKE, *supra* note 9, at 16-18.

[32] *Id.*

[33] KORGEN, *supra* note 15, at 11.

[34] WILLIAMSON, *supra* note 15, at 7 (internal quotation not cited in original).

[35] Gillmer, *supra* note 11, at 556 (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 1619, 1660-1682, at 170 (William Walter Hening ed., 1823)).

nevertheless important because it was a marked change from the colony's precedent, which punished all violators, regardless of the sexual makeup of the fornicating couple, equally.[36]

Other colonies imposed even more stringent consequences on the participants of interracial relationships. South Carolina, a colony originally known for its widespread acceptance of interracial unions, punished interracial bastardy by binding out white men and women and free black men as indentured servants for seven years; the child of any such union was forced to serve until adulthood.[37] Maryland's 1664 anti-miscegenation law provided punishments similar to those imposed in South Carolina. White women who married male slaves were compelled to serve their husbands' masters for the lifetimes of their husbands, and any children born to the couple were required to labor for the parish for thirty-one years.[38] In 1692, the Maryland Assembly amended the statute by requiring free blacks who married white women to be forced into a lifetime of bondage.[39] Pennsylvania had the same provision, and also permitted courts to impose a sentence of seven years in bondage to all free persons convicted of interracial fornication.[40] Virginia diverged from its contemporaries by choosing banishment from the colony as its foremost penalty for interracial marriage. In 1691, Virginia passed a law prohibiting marriage between blacks and whites, "ordering that any white person marrying a black person be 'banished and removed from this dominion forever.'"[41] This punishment was changed to six months in jail in 1705; the same edict also imposed a fine of up to 10,000 pounds of tobacco against the minister performing the ceremony.[42] Virginia did not punish the black members of the union,

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[36] CHARLES FRANK ROBINSON II, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH 2-3 (2003). The 1662 provision altered the common law in another, quite significant way: it required the children of interracial relationships to follow the condition of their mothers. *Id.* at 3.

[37] Karen Woods Weierman, *"For the Better Government of Servants and Slaves": The Law of Slavery and Miscegenation*, 24 LEGAL STUD. F. 133, 143 (2000); IN THE MATTER OF COLOR, *supra* note 14, at 158-59.

[38] ROBINSON, *supra* note 36, at 4.

[39] *Id.*

[40] *Id.*

[41] Gillmer, *supra* note 11, at 556-57 (quoting III HENING'S STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, 1684-1710, at 86-87 (William Walter Hening ed., 1823)).

[42] *Id.* at 557.

presumably because most blacks were slaves, and thus any penalties against these individuals would have deprived masters of their slaves' labor.[43]

By the time of the Civil War, twenty-one out of thirty-four states had some sort of legislation proscribing and punishing interracial sexual relationships.[44] While these laws diverged in identifying the violators, the specific proscribed offenses, and the punishments meted out for violations, the provisions generally tended to target white female offenders.[45] Indeed, the Maryland legislature, abhorrent of white women's sexual exploits with black men, described marriages between white women and black men as "always to the Satisfaccon of theire Lascivious & Lustfull desires, & to the disgrace not only of the English butt also of many other Christian Nations."[46] Virginia, similarly concerned, enacted a bill aimed at addressing miscegenation that provided for banishment within three months of the mixed child's birth. However, it further declared that any white woman "who gave birth to 'a bastard child by any Negro or mulatto' would be heavily fined or subject to five years of servitude and that the child would be bound into servitude until it reached age thirty."[47] While this regulation may have been enacted due to a concern over the number of mixed-race children born to white women, there were other reasons for colonialists to target white women's sexuality and regulate it heavily.[48] Bastard children were a problem regardless of color, as the community was then pressured to provide for those children.[49] Furthermore, given the demographic realities of the time, with white men outnumbering white women well into the

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[43] ROBINSON, *supra* note 36, at 4.

[44] *Id.* at 9. Massachusetts, Delaware, Pennsylvania, Virginia, North Carolina, and South Carolina all had anti-miscegenation laws by 1725. KORGEN, *supra* note 15, at 11.

[45] The two exceptions to this are Georgia and Florida, whose laws only punished white males. ROBINSON, *supra* note 36, at 8-10.

[46] An Act Concerning Negroes and Slaves (Md. 1681), *available at* http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000007/html/am7—204.html.

[47] Jones, *supra* note 20, at 1504; WILLIAMSON, *supra* note 15, at 8; DAVIS, *supra* note 8, at 33.

[48] It is important to note that white women's sexuality was regulated not only legally, but also socially. *See* Catherine Clinton, *"Southern Dishonor": Flesh, Blood, Race, and Bondage*, *in* IN JOY AND IN SORROW 60 (Carol Bleser ed., 1991).

[49] Of course, the children would not be bastards were it not for the laws prohibiting interracial marriage.

1750s, providing disincentives for interracial relationships encouraged intra-racial procreation, thereby ensuring the perpetuation of a racially pure, white dominating class. Also important were the negative perceptions of white female morality, in that white women were seen as being of frail moral character; this was linked to the desire to maintain a paternalistic social order. Finally, this regulation was a way of addressing the fact that mulatto progeny blurred the lines of freedom. "Since the law defined freedom according to the status of mothers, it became imperative for white men to specifically delineate severe punishments for those white women who crossed the sexual color line."[50]

Importantly, the fact that the mother's status of slave or free determined whether or not the child would be enslaved was a marked shift from the English common law, whereby children followed the status of the father.[51] However, due to the large numbers of mixed race children born to slave mothers and white fathers, colonies enacted statutes mandating a "status of the mother" rule. As Charles Robinson notes, "most interracial sexual relations involved intercourse between white masters and slave women . . . . Colonial authorities had real concerns that English common law might in fact undermine the institution of slavery by allowing biracial children to claim freedom on the basis of their paternal heritage."[52] Under such circumstances, there would have been a large free mulatto population, which could have shifted the balance of power away from the white ruling class. This legal rule thus emerged so as to prevent mulatto freedom, and did not derive from a "natural" identity. In short, social needs trumped what were considered biological realities under the law.

Forcing mulatto children into servitude had the desired effect of propelling mixed race persons as close to slave status as possible:

> By the time these men and women reached their freedom, they often were past the age of being able to learn a valuable skill or achieve any measure of wealth. As Ira Berlin writes, 'Broken by a lifetime of labor for masters who cared little about their fate after age thirty-one,' the mulatto children of white servant women 'often found freedom a cruel reward for their long years of service. Many were barely able to support themselves in a society dominated by vigorous young white men.' Once they set out in the world on their own, these children of mixed-race

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[50] ROBINSON, *supra* note 36, at 6.

[51] WILLIAMSON, *supra* note 15, at 8.

[52] ROBINSON, *supra* note 36, at 3.

> heritage were often shuttled to the bottom of Southern society, burdened by both color and class.[53]

Thus, while the majority of mulatto children, who were offspring of slave women and white fathers, would be born into legal slavery, the rest would be raised as de facto slaves, never rising above the social or economic condition of servitude they had technically escaped. While these children never officially lost their freedom, legislatures did act to gradually revoke their rights, rendering their legal status equivalent to those of enslaved blacks.[54] The relevant legal divide, therefore, became between white and not, rather than between free and enslaved.[55]

2. Defining Black and White

The separation between the races was that of black and white, and only those two categories.[56] Consequently, the law forced mixed-race individuals into the category of black by burdening mulattoes with the same abrogation of rights it delineated for unmixed blacks. Over the course of the seventeenth and eighteenth centuries, free mulattoes and blacks were forged into the same legal category,[57] one that was prohibited from exercising many of the fundamental rights of citizenship, including the right to vote, hold office, possess firearms, convene meetings, and be protected from unlawful searches and seizure.[58] The Virginia legislature limited free blacks' movement by requiring them to register with the local clerk of the town in which they resided and by permitting free blacks entering the colony to be forcibly removed.[59] By 1860, every southern state had passed a

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[53] Gillmer, *supra* note 11, at 563-64 (quoting IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 7 (1974)).

[54] KORGEN, *supra* note 15, at 12.

[55] *Racial Purity*, *supra* note 11, at 1976-77.

[56] It should be noted that a third category also existed, that of "red." This was strictly reserved for American Indians and for legal purposes paralleled that of "white." "Red" was predominantly an issue of social class and was largely irrelevant with regard to black-white relations. Consequently, black and white served as a binary, even despite this outside, third category.

[57] Therefore, when statutes refer to "free blacks," this designation included free mulattoes.

[58] *Rather Than Free*, *supra* note 29, at 25-27, 33.

[59] *Id.* at 29-31; Gillmer, *supra* note 11, at 580-81.

similar provision prohibiting the immigration of free blacks. Arkansas not only denied free persons of color entry into the state, but also required "that all free blacks living in the state migrate elsewhere or be enslaved."[60] Also, some states taxed free mulatto women discriminatorily, prohibited mulattoes from being witnesses in cases at law, and proscribed free blacks' ownership of slaves, which were an economically and socially valuable form of property at the time.[61] By denying these basic rights to free mulattoes, colonies were able to make mulattoes black. Erasing any legal distinctions between mulattoes and blacks allowed antebellum society to deny that there was any actual difference between the two, and therefore could continue to maintain a slave system dependent on the existence of only two races: black and white.[62]

Mulattoes' light skin did, however, provide one legal advantage: racial appearance determined who bore the burden of proof in freedom suits. An evidently white individual was assumed free,[63] and any party claiming that person was a slave had the burden of demonstrating otherwise—generally, by proving that the individual was black, as black racial status raised a presumption of slavery.[64] Cases of racial determination arose in other contexts, including the applicability of criminal statutes, qualifications for inheritance, suits for slander, and litigation over the transportation of runaway slaves.[65] Interestingly, these suits often highlighted the ways in which race, despite the law and society's efforts to the contrary, did not fit into binary categories. Witnesses testified to physical attributes, arguing that hair color and texture, as well as facial features and limb formation, demonstrated that an individual was of one race or another.[66] Ancestry, on which statutory definitions were based, was

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[60] Paul Finkelman, *Criminal Law, Criminal Justice, and Race: The Crime of Color*, 67 TUL. L. REV. 2063, 2099-2100 (1993).

[61] WILLIAMSON, *supra* note 15, at 10; *Rather Than Free*, *supra* note 29, at 36.

[62] MENCKE, *supra* note 9, at 20-21.

[63] Hudgins v. Wrights, 11 Va. 134, 139, 141 (1806); Weierman, *supra* note 37, at 140.

[64] TUSHNET, *supra* note 12, at 142, 146.

[65] Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 118-21 (1998) [hereinafter *Litigating Whiteness*].

[66] *Id.* at 137-38.

also addressed, though jury instructions often did not specify a definition of black or white. Rather, the jury was frequently asked to make one determination if they found the individual at issue to be white, and another if the person was black.[67] A major element of these cases was whether members of the white community had accepted the individual as one of their own.[68] This invoked the idea "that there was ineffable quality making someone white that any Southerner could discern—and, likewise, that a drop of African blood would make itself known."[69] Behavior and reputation, or acting and being perceived as white by other whites, could endow the individual with white skin. That this factor had such a strong effect is remarkable, as white antebellum culture was steeped in a fear of "invisible blacks," or light-skinned mulattoes passing as white.[70] That racial purity could be feigned was an attack on the racial division on which slavery was premised, and consequently, "the most disturbing deceit was . . . to pretend to be a white man."[71]

Such trespasses had to be prevented, and one way of doing so was to eliminate manumissions.[72] Manumissions were targeted because multiracial individuals were disproportionately represented among free blacks; "[i]n South Carolina, for instance, one-third of all recorded colonial manumissions were mulatto children."[73] Free mulattoes, with light skin, had

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[67] *Id.* at 117-18.

[68] *Id.* at 111; DAVIS, *supra* note 8, at 35.

[69] *Litigating Whiteness*, *supra* note 65, at 126. This seems absurd given the advertisements for fugitive slaves, which read:

[The slave] had a 'complexion so nearly white that a stranger would suppose there was no negro blood in him.' Another runaway was said to be 'a very bright mulatto, would be taken for a white boy if not closely examined; his hair is black and straight.' Still another [was] described as having 'light sandy hair, blue eyes, ruddy complexion; he is so white as to easily pass for a white man.'

Gillmer, *supra* note 11, at 598 (quoting JAMES HUGO JOHNSTON, RACE RELATIONS IN VIRGINIA & MISCEGENATION IN THE SOUTH 1776-1860, at 192 (1970)).

[70] KORGEN, *supra* note 15, at 40. For a detailed look at "passing," see Robert Westley, *First-Time Encounters: 'Passing' Revisited and Demystification As a Critical Practice*, 18 YALE L. & POL'Y REV. 297 (2000).

[71] ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 67 (2000).

[72] TUSHNET, *supra* note 12, at 154-55.

[73] MENCKE, *supra* note 9, at 9; DANIEL, *supra* note 23, at 56.

greater opportunity to pass,[74] and thus were a danger to which legislators directed their attention.[75] As a result, statutes requiring freed slaves to leave the colony were enacted,[76] in hopes that the fear of never again seeing their children would reduce white fathers' desires to manumit their offspring.[77] Legislators were willing to abrogate these white men's rights because the alternative would have allowed a free mulatto population to go unfettered. This was an impossible proposition, as the potential threat to whiteness and racial hierarchy could have been devastating.

II. INTERSEXUALITY IN CONTEMPORARY AMERICAN SOCIETY

Just as mulattoes' race was a legal fiction created to sustain a particular mode of economic, social, and political organization, so is sex a social phenomenon established and maintained for the benefit of a heteronormative patriarchal order. Without the polar categories of male and female, heterosexuality, the institutionalization of which underpins patriarchy, is threatened. Thus, like mulattoes, whose existence questioned the racial hierarchy on which the plantation economy of the antebellum South relied, the intersex have the potential to undermine an important political, economic, and social system. Like in the context of race, the construction of sex, and the social stakes in maintaining its fiction, is illustrated by the way in which society responds to the individuals who blur the boundaries of the binary. Similar to mulattoes, the intersex are not accepted as a third or variant category, but rather are altered so as to fit within preconceived notions of what sex is and should be. Unlike mixed-raced persons in the antebellum South, however, for the intersex, being forced into one of two categories is not as much legal as it is physical. Legal regulations certainly play a significant role in the process, but the transformation is unique in that it requires bodily mutilation so as to satisfy

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[74] SPICKARD, *supra* note 27, at 251.

[75] Gillmer, *supra* note 11, at 580-81.

[76] DAVIS, *supra* note 8, at 34. These restrictions were aimed at the few white fathers who would have sought to manumit their children; many sold their progeny as slaves with little regard to the reputation of the bidder, considering only the offered price. SPICKARD, *supra* note 27, at 249.

[77] SPICKARD, *supra* note 27, at 249; TUSHNET, *supra* note 12, at 154-55.

the demands of society.[78] As perceptions change, however, and the intersex are no longer subjected to surgeries so as to physically alter their sex, the law may take on a corresponding role to the one it once donned when regulating the legal color of mulattoes.[79]

Importantly, the intersex are disproportionately sexed female,[80] and thus, like mixed-race persons in the antebellum period, are forced into the lower strata of society. The assignment of both the intersex and the mulatto to the subordinate group, however, is not and never was a natural or inevitable outcome. The social status of racial and sexual hybrids can and has differed. Either could have been relegated to a status lower than that of the traditional racial and sexual groups,[81] higher than that of either group,[82]

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[78] *See* Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 71 (2005) (comparing sex assignment surgeries to which the intersex are subjected with female genital mutilation practices).

[79] The law may force intersexed individuals into the artificial categories of male and female so as to preserve the sexual binary on which it relies. *See* Section III.B, *infra*.

[80] SHARON E. PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF 55-56 (2003). This comparison may seem imperfect at first, until one considers that the rule of hypodescent was not imposed until after the Civil War. Thus, just as not all intersex are made female, not all mulattoes were made black—those with 1/16 or less black blood were legally considered white in many states. The vast majority of both groups, however, were relegated to the lower social status.

[81] E.g., mulattoes among the Ganda peoples of Uganda, the Métis in Canada, Anglo-Indians in India, Korean-Americans in Korea, or Vietnamese-Americans in Vietnam. DAVIS, *supra* note 8, at 82-87. An example of this in the context of sex is the "gender-liminal" person in Polynesia. As Niko Besnier describes, "[t]he gender-liminal individual is viewed as potential sexual 'fair game' in a much broader sense than women are . . . . In stratified Polynesian contexts, low-ranking liminals are most vulnerable to violence, while high-ranking gender-liminal persons are somewhat shielded, but not completely protected." Niko Besnier, *Polynesian Gender Liminality Through Time and Space*, *in* THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 301 (Gilbert Herdt ed., 1994).

[82] E.g., mulattoes in Haiti after the 1791 rebellion and mestizos in Mexico after the overthrow of the Spanish. Davis, *supra* note 8 at 87-90. A corollary of this in the treatment of sexually variant people is that of *berdaches*. Though not always given a higher status, the perception that *berdaches* were endowed with supernatural powers led to a certain reverence for these individuals. Will Roscoe, *How to Become a Berdache: Toward a Unified Analysis of Gender Diversity*, *in* THIRD SEX, *supra* note 81, at 332, 355. *See also* discussion, *infra* Section II.A.2. Aside from the *berdache*, it is unclear whether gender variant people have been given a higher status than either men or women in any documented society. The fact that this has not yet occurred, however, does not mean that it is not a possibility in the future.

or have been given a variable[83] or in-between status.[84] Alternatively, all races and sexes could be given equal social standing.[85] The fact that these models were not adopted has a great deal to do with the social, political, and economic circumstances surrounding racial and sexual discourse in America. Before addressing those, however, it is first necessary to examine the theory of sexual deconstruction, as it will help explain why it is that the intersex could have occupied such a different array of social statuses, and how it is that they threaten the current political order.

A. Deconstructing Sex

The intersex could have been and could presently be perceived much differently than they are, as sex, like race, has no natural, fixed, and inherent meaning.[86] Consequently, instead of insisting that sex is a rigid binary, sex could be assigned a pliable meaning and role, or none at all. This does not mean denying the body's material reality; however, the importance of the body is not as great as would initially appear. Though scientists have identified biological criteria that distinguish men and women, it is important to note that few of these characteristics are considered when making a gender attribution.[87] In day to day interactions,

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[83] For race, see, e.g., mulattoes in Latin America. DAVIS, *supra* note 8, at 99-105; DANIEL, *supra* note 23, at 34-35; MENCKE, *supra* note 9, at 4-5; Julissa Reynoso, Note, *Race, Census, and Attempts at Racial Democracy*, 39 COLUM. J. TRANSNAT'L L. 533, 539, 545 (2001). For sex, see, e.g., hermaphrodites amongst the Sambia. Gilbert Hert, *Mistaken Sex: Culture, Biology and the Third Sex in New Guinea*, *in* THIRD SEX, *supra* note 81, at 437-42.

[84] E.g., Coloureds in apartheid South Africa. DAVIS, *supra* note 8, at 90-98.

[85] E.g., the racially mixed in Hawaii. *Id.* at 109-13. In some contexts, this was how the *berdache* of American Indian tribes were treated. 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, 212 (1995).

[86] It is important to recognize the literature that expresses concern with using the example of transsexuality, transgenderism, and intersexuality to serve as evidence of the false nature of the sexual binary, as limiting the discussion in this way does not address the reality of everyday life for these individuals. *See, e.g.*, *Making the Lives of Transsexual People Visible: Interview with Viviane Namaste*, 39 NEW SOCIALIST (2002-2003), http://newsocialist.org/magazine/39/article04.html. This Article unfortunately also only examines intersexuality in terms of how it undermines judicial constructs of sex, but the author hopes that in doing so, it will propel change that will have tangible benefits for intersexed individuals.

[87] SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 76 (1985).

chromosomes, hormones, internal reproductive organs, and genitals are not the indicators that individuals use to identify and classify others; rather, cultural signs such as dress, name, manner of walking, grooming, or speech patterns demark a person's "sex." Thus, it is not the body parts that are important so much as the signifiers and their inscribed meaning. This demonstrates that physical sex is inseparable from social gender, and it is gender, not sex, that is determinative.[88] The following explores the theoretical, historical, and anthropological bases for this argument.

1. Theory

Like skin color, genitalia and reproductive organs do not naturally have a meaning, as individuals could be differentiated on the basis of numerous other physical features. As Sharon McGowan notes,

> [t]he very fact that certain body parts are named and that significance is attached to specific particular biological variations demonstrate the extent to which societal norms rely on the presumption of heterosexuality and female reproductivity. Once these normative assumptions are revealed, it becomes clear that sex should be understood as a political category rather than the mere catch-all phrase by which "natural" or biological differences are merely recognized.[89]

The biological categories we have developed are political constructs and, as McGowan argues, the impetus of hetero- and repro-normativity leads to a classification of male or female.[90] It is thus because of the emphasis on heterosexuality, and heterosexual reproduction, that reproductive organs take on the markers by which individuals are differentiated and

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[88] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 10-11 (2d ed. 1999) [hereinafter GENDER TROUBLE] ("If the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all.").

This is the same as race; while skin colors may differ, they have no meaning aside from what is socially ascribed to them.

[89] Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77, 102 (2003).

[90] *Id.* at 103.

categorized.[91] Were social and political hierarchies based on eye color, for example, reproductive organs would lose their specialized meaning, as individuals would search the face for indicators of social status, rather than evaluating a person's body, posture, speech, etc. to determine the individual's sex and consequent social position.[92] Judith Butler therefore argues that, "[w]hen the doctor or nurse declares 'It's a girl/boy!', they are not simply reporting on what they see . . . they are actually assigning a sex and a gender to a body that can have no existence outside discourse."[93] The act of naming constitutes the body and inscribes it with meaning, as the declaration has no role outside of what society has assigned it.[94] Were the social order not organized according to male or female, stating "it's a girl/boy" would have no purpose, as the declaration would not resonate with or be of any importance to those present. This illustrates Foucault's argument that the ways in which we interpret factors such as reproductive organs is not a reflection of an already ordered reality, but rather are the ways in which reality becomes ordered.[95]

2. History and Anthropology

This theoretical point is reinforced by accounts from both history and anthropology. The body, and its division into two sexes, is a temporal and cultural phenomenon. Thomas Laqueur argues that sex as we now know it was invented during the eighteenth century.[96] It was only then that

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[91] Consequently, while it is clear that men and women have different reproductive roles, it is the meaning that is placed on reproduction that creates the categories of male and female.

[92] SARA SALIH, JUDITH BUTLER 80 (2002); RACHEL ALSOP ET AL., THEORIZING GENDER 37-38 (2002).

[93] SALIH, *supra* note 92, at 89.

[94] *Id.* at 84.

[95] ALSOP ET AL., *supra* note 92, at 82 ("Discourses present themselves as knowledges of an independent reality, but are rather productive of the way that reality becomes viewed by us. To use one of [Foucault's] most famous examples, it is through our discourses of sexuality that the distinction between heterosexual and homosexual people is made. Foucault suggests that the category of 'homosexual' did not emerge as a category of person until about the seventeenth century. There were at different times a variety of sexual practices but practicing them did not mark categories of people.").

[96] THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 149 (1990).

"[t]he reproductive organs went from being paradigmatic sites for displaying hierarchy, resonant throughout the cosmos, to being the foundation of incommensurable difference."[97] In ancient Greece, thinkers conceptualized bodies as variations on one sex, with differences in body temperature accounting for the distinctions in reproductive organs.[98] Consequently, "sex existed along a sort of continuum from the extreme male to the extreme female and . . . the hermaphrodite therefore was s/he who lay in the middle."[99] Human variation, in short, was not limited to two sexes, or even three (with the hermaphrodite as an intermediate sex),[100] but rather existed without division into discrete categories.[101]

This theory of the sexes did not, however, guarantee equality for all individuals on the continuum. It was by virtue of one's superiority or inferiority that one's place was identified on the spectrum. Therefore,

> Aristotle did not need the facts of sexual difference to support the claim that woman was a lesser being than man; it followed from the *a priori* truth that the material cause is inferior to the efficient cause. Of course males and females were in daily life identified by their corporeal characteristics, but the assertion that in generation the male was the efficient and the female the material cause, was in principle, not physically demonstrable; it was itself a restatement of what it *meant* to be male or female. The specific nature of the ovaries or the uterus was thus only incidental to defining sexual difference.[102]

It was recognized that individuals had inherent abilities and limitations, and persons were socially categorized accordingly. This organization, in turn, became the sexual hierarchy we know today. Sex, in sum, did not cause

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[97] *Id.*

[98] PREVES, *supra* note 80, at 33-34.

[99] ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 32 (1998); Julia Epstein, *Either/Or—Neither/Both: Sexual Ambiguity and the Ideology of Gender*, 7 GENDERS 100, 124 (1990).

[100] PREVES, *supra* note 80, at 33-34.

[101] ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 33 (2000).

[102] LAQUEUR, *supra* note 96, at 151-52.

difference and discrimination, but rather was a means of social ordering according to natural strengths and weaknesses.[103]

This concept and perspective on sex has not been limited to ancient Western tradition; analogous ideas that physical attributes are irrelevant have been identified in cultures throughout the globe. In some of these societies, it is gender, not sex, which is determinative. Navajo Indians, for example, did not group women and men according to genitalia, but rather according to the role that the individual performed.[104] Consequently, "the Navaho Indians of the nineteenth century were addressed by male or female kinship terms according to the type of clothing they wore," which did not necessarily correlate to their genitals.[105] Similarly, as a person in the Zuni community embraced the tasks performed by one sex or the other, or a combination thereof, s/he became that gender, rendering genital anatomy immaterial.[106] The gender focus, therefore, "was on the unfolding and coalescing of the *internal* self rather than on the correctness of *external* manifestations."[107] Such a perspective explains the American Indian *berdache*, a third gender category that was neither male nor female.[108] *Berdachism* was widespread, with *berdache* existence documented in over 130 tribal societies.[109] The gender variant *berdaches*, who were accepted and integrated members of their tribes, specialized in labor typically performed by members of the "opposite" sex.[110] These individuals were not

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[103] Despite this perspective on sex and the evolution of biological difference, hermaphroditic individuals were not necessarily accepted in daily life. Some intersex individuals were put to death in Roman and medieval times for being "monstrous." Epstein, *supra* note 99, at 107; FAUSTO-STERLING, *supra* note 101, at 33.

[104] KESSLER & MCKENNA, *supra* note 87, at 38.

[105] *Id.*

[106] Valdes, *supra* note 85, at 217.

[107] *Id.* at 220 (emphasis added).

[108] *Id.* at 223-27; Roscoe, *supra* note 82, at 346-47. Note that *berdaches* were in existence primarily in the nineteenth century. KESSLER & MCKENNA, *supra* note 87, at 30. Francisco Valdes argues that European's virulent antipathy for the *berdache* prompted American Indians to become reticent about the existence of *berdaches*, and that conversion to Christianity by some tribes led to active antipathy towards *berdaches* within the community. The combination of external and internal hostile forces served to eventually eliminate *berdachism*. Valdes, *supra* note 85, at 241-42.

[109] Valdes, *supra* note 85, at 224. These societies include the Aleut, Apache, Arapaho, Cheyenne, Crow, Hopi, Mojave, Navajo, and Zuni. *Id.*

[110] Roscoe, *supra* note 82, at 332, 335-36.

seen as crossing genders so much as fluctuating between male and female forms, thereby constituting a separate category.[111]

It is also possible for neither sex nor gender to be conclusive. In Hinduism, for example,

> the complementary opposition of male and female, man and woman, represents the most important sex and gender roles in society but by no means the only ones. The interchange of male and female qualities, transformations of sex and gender and alternative sex and gender roles, both among deities and humans, are meaningful and positive themes in Hindu mythology, ritual and art.[112]

The practical manifestation of this cultural influence is best understood by examining the *hijra*, individuals in India who consider themselves neither man nor woman.[113] *Hijras* are devotees of the Mother Goddess, and are called on by Buhuchara Mata to undergo emasculation, as well as to dress and act like women.[114] The *hijra* thus transcends masculinity and femininity in both physical and psychological senses, operating in flux between the two poles.

As these examples demonstrate, biological traits have no prescribed meaning outside the social significances we give them, and thus gender does not have to follow biology in any set way. As Judith Butler writes,

> [a]ssuming for a moment the stability of binary sex, it does not follow that the construction of "men" will accrue exclusively to the bodies of males or that "women" will interpret only female bodies. . . . When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free-floating artifice, with the consequence that *man* and *masculine* might just as easily signify a female body as a male one, and *woman* and *feminine* a male body as easily as a female one.[115]

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[111] *Id.* at 356.

[112] Serena Nanda, *Hijras: An Alternative Sex and Gender Role in India*, *in* THIRD SEX, THIRD GENDER, *supra* note 81, at 375.

[113] *Id.* at 373, 381; Marianne Bray, *A eunuch's tale from the slums: A glimpse into their secretive world*, CNN.COM, Oct. 6, 2005, www.cnn.com/2005/WORLD/asiapcf/09/07/india.eye.eunuch/index.html.

[114] Nanda, *supra* note 112, at 373.

[115] GENDER TROUBLE, *supra* note 88, at 10.

If becoming male or female is a social process,[116] with both sex and gender as constructs, then there is also no reason for sex or gender to follow any sort of binary.[117] The *berdache* illustrates this point, in that it can serve as a third gender, thereby demonstrating that a two-pronged vision of gender is a culturally relative perspective. The *hijra*, who undergoes castration in order to have a body that is neither male nor female, also challenges the idea that sex must fall into one of two categories. Indeed, the body does not need to be one or the other, but can be both, or neither.[118]

B. The Sexual Binary and Heteronormativity

The reliance on a binary vision of sex, despite social, cultural, and historic indications that no such natural division exists, appears peculiar until one considers the larger role of the sexual binary in maintaining the heterosexual norm on which patriarchal society is based. "[T]raditional conceptual categories of sexual identity don't make sense if ambiguously sexed bodies aren't originally part of a gender binary."[119] Heterosexuality depends on there being two discrete sexes, with desire reflected in the opposition.[120] Once the sexes begin to elide, heterosexuality cannot continue, as it is defined by sexual interaction between two poles. Everything in between the extremes belongs to pan-, bi-, and homo-sexuality.[121] These sexual identities challenge the "competitive dynamic [to] patriarchal heterosexuality [that] brings men together and promotes feelings

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[116] Simone de Beauvoir's statement that "one is not born a woman, but rather, becomes one" is based on the premise that one is born female, and becomes a woman through socialization. SIMONE DE BEAUVOIR, THE SECOND SEX 295 (H.M. Parshley ed. & trans., Vintage Classics 1997) (1949). Here, the argument is that one is also not born female, but rather becomes so due to discourse through which the body is interpreted.

[117] GENDER TROUBLE, *supra* note 88, at 10.

[118] While in this context sex is seen as variant, it could also be perceived as fluid. *See supra* note 88 and accompanying text.

[119] PREVES, *supra* note 80, at 57-58; *See also* ALSOP ET AL., *supra* note 92, at 97; Stevi Jackson, *Sexuality, Heterosexuality and Gender Hierarchy: Getting Our Priorities Straight*, *in* THINKING STRAIGHT: THE POWER, THE PROMISE, AND THE PARADOX OF HETEROSEXUALITY 21 (Chrys Ingraham ed., 2005).

[120] GENDER TROUBLE, *supra* note 88, at 29-30.

[121] Homosexuality differs from heterosexuality in that it does not required opposed sexes, but rather clearly defined sexual groups. Therefore, under homosexuality, there could theoretically be an infinite number of different sexes, so long as each remained insular.

of solidarity by acting out the values of control and male domination."[122] This domination is one of male over female; such a rigid binary opposition does not exist within pan-, bi-, and homo-sexuality, as each of these sexualities is based on a divergent view of proper interactions between men and women. Consequently, without a strict heterosexual relationship, these patriarchal roles cannot be disseminated. Since these forms of sexual interaction undermine the heterosexual relations on which patriarchal power dynamics are based, these types of sexuality are denigrated by being termed "deviant." The reaction to sexual "deviants" is therefore, in essence, a reaction against a perceived assault on male heterosexual privilege, and thus often takes the form of fear, rage, and betrayal.[123]

Heterosexuality, and specifically the institution of marriage in which it is enshrined, is a means of perpetuating patriarchy,[124] as the opposition of male and female sexual roles enables men to subordinate women more fully.[125] In this sense, heterosexuality is not as much a sexual orientation as a normative device used to control women.[126] Indeed, some "feminists argue that [heterosexuality] is the most important base of

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[122] ALLAN G. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 60 (2nd ed., 2005).

[123] *Id.* at 94, 148. This extends beyond the individual, expanding towards a sense of heterosexual nationhood. As Carl Stychin notes, "when the nation state perceives a threat to its existence, that danger is frequently translated into sexualized terms. Same sex sexuality is deployed as the alien other, linked to conspiracy, recruitment, opposition to the nation, and ultimately a threat to civilization." CARL F. STYCHIN, A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS AND THE DISCOURSE OF RIGHTS 9 (1998).

[124] While this Article discusses the roles of the binary sex system and heterosexuality in maintaining patriarchy, it is important to recognize that these factors are also present in matriarchal societies, as both political structures base their hierarchical structures on sexual differentiation. However, since this Article addresses sex and race in American society, which has always been patriarchal, the discussion will be limited to an examination of these elements in sustaining a patriarchal power structure.

[125] SYLVIA WALBY, THEORIZING PATRIARCHY 119 (1990) ("Sexuality is the terrain or medium through which men dominate women.").

[126] This is not to say that individuals do not possess heterosexual orientations. However, as Judith Butler argues, homosexual desire is socially preempted, with homosexual love objects and aims foreclosed from infanthood, and therefore not a viable possibility for most. *See* Judith Butler, *Melancholy Gender/Refused Identification*, *in* CONSTRUCTING MASCULINITY 27 (Maurice Berger et al. eds., 1995); GENDER TROUBLE, *supra* note 88, at 88-89.

patriarchy."[127] This is because heterosexuality, historically and in its current form, is "male dominated, male identified, male centered and organized around an obsession with control."[128] As a result, heterosexuality's significance extends beyond physical sexual interactions, serving as a general model for male dominance and aggression and ordering wider gender relations, thereby influencing nonsexual elements in society.[129] As Adrienne Rich notes, the way male power manifests itself in the sexual domination of women is manifold, and includes denying women their own sexuality, forcing male sexuality upon women, commanding and exploiting women's labor, controlling women's reproductive capacity, and confining and preventing women's movement.[130] It is through heterosexuality, and heteronormative marriage, that men have historically been able to accomplish these acts.[131] Heteronormativity is therefore a means of channeling male power over women, and as such provides a crucial basis for patriarchal social ordering.[132] The social and political investment in

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[127] WALBY, *supra* note 125, at 120 (noting that "[w]ithin heterosexual relations, women, emotionally and materially, as well as sexually, service men") (internal citation omitted); LEEDS REVOLUTIONARY FEMINISTS, LOVE YOUR ENEMY? THE DEBATE BETWEEN HETEROSEXUAL FEMINISM AND POLITICAL LESBIANISM 5 (1981).

[128] JOHNSON, *supra* note 122, at 149. There is, of course, the possibility that, with true equality of the sexes, heterosexuality will not serve as a means of male subordination of women.

[129] *Id.*; Jackson, *supra* note 119, at 18.

[130] Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 638-40, 647 (1980).

[131] JOHNSON, *supra* note 122, at 127.

[132] CATHARINE A. MACKINNON, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, *in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 185 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991). The radical response to such an understanding of heterosexuality has come in the form of political lesbianism, with groups such as the British Leeds Revolutionary Feminists concluding that by engaging "in any form of sexual activity with a man [a woman] is reinforcing [a man's] class power," and that "[h]eterosexual women are collaborators with the enemy." LEEDS REVOLUTIONARY FEMINISTS, *supra* note 127, at 7. Writers such as Monique Wittig, who has described heterosexuality as "a political regime which rests on the submission and the appropriation of women," came to describe lesbianism as the only way to escape patriarchal domination. MONIQUE WITTIG, THE STRAIGHT MIND AND OTHER ESSAYS xiii (1992). However, this raises the question of whether lesbians are truly able to separate themselves from patriarchal oppression, as well as whether political lesbianism is necessary given the advances in women's rights that have occurred in the past century without a rejection of heterosexuality. Whether women must necessarily reject natural, if inevitably socialized, sexual inclinations they may have in order to deconstruct the power of the heterosexual-based patriarchal state is

heterosexuality is thus as important to sustaining patriarchy as the racial division was to maintaining the plantation economy of the antebellum South. There is, therefore, a similar need to preserve the boundaries of the socially constructed category of sex as there was for race.

C. Physical Regulation of the Intersex

As a result of the heterosexual system on which a patriarchal hierarchy relies, and its dependency on there being two sexes to differentiate, bodies that cast doubt on the categories of male and female undermine the foundation of contemporary society, and therefore cannot be acknowledged or allowed to exist. The same was true, of course, for race, and for identical reasons. "Sexual ambiguity is disruptive precisely *because* of the emphasis we place on gender. If gender classification were socially less important, or if criteria for membership in one gender category or another were more flexible, variation in sexual anatomy would be much less of a concern."[133] In terms of race, had it not been so foundational for the ordering of antebellum society, or if there had not been a fixed division between black and white, the existence of mulattoes would not have been as threatening.

There is such an emphasis on sexual division in contemporary society that children are able to identify themselves as male or female by the age of three, and by the time they reach their fifth year, children adhere closely to the gender-typed behavior they have been taught.[134] The inability to distinguish another's sex causes intense discomfort, as the ability to identify and claim such a distinction is central to an individual's sense of identity.[135] The concentrated focus on gender means that, in the current social construct, there cannot be a person who is neither or both sexes. Like mulattoes whose potentially intermediating race had to be placed into one of the accepted categories of black or white, so are the intersex forced to become either male or female. This allows the explosiveness of the intersex

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not an issue that needs to be addressed in this Article. Nevertheless, it is crucial to recognize the role that heterosexuality plays in maintaining male power and in supporting the patriarchal state. Since heterosexuality is dependent on there being two distinct sexes, by extension, patriarchy also necessitates a sexual binary.

[133] PREVES, *supra* note 80, at 18.

[134] *Id.* at 16.

[135] Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 342 (1999).

child's existence, which is an inherent challenge to the bifurcated system, to be defused. However, unlike mulattoes, the intersex are not subjected to legal, but rather to corporeal, regulations so as to fit their bodies into the rigid binary on which heteronormative patriarchy relies. Before the medical solution to intersexuality was developed, parents gendered their children by social means, through naming, dress, etc.[136] Today, however, intersex infants are subjected to physically altering treatments, including chromosome therapy and genital reconstruction[137] surgery.[138] It is estimated that every day five children undergo medical procedures designed to alter the appearance of their genitalia.[139]

The type of surgery to which an intersex infant is subjected depends on the cause of the intersexuality, which can include ambiguity in chromosomes,[140] gonads,[141] external sexual appearance,[142] internal sexual

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[136] PREVES, *supra* note 80, at 43. This raises the question of what treatments mulattoes would have endured had racially altering technology been available at the time.

[137] While "reconstruction" is the term generally used to describe the procedure, it is important to recognize that the surgery is a matter of construction. Reconstruction implies that there is a deficiency that needs to be fixed; however, were there not a sex binary, the intersexed genitals would not be thought abnormal, and thus would not require alteration. As Suzanne Kessler writes:

> Although the deformity of intersexed genitals would be immutable were it not for medical interference, physicians do not consider it natural. Instead they think of, and speak of, the surgical/hormonal alteration of such deformities as natural because such intervention returns the body to what it "ought to have been" if events had taken their typical course. The nonnormative is converted into the normative, and the normative state is considered natural. The genital ambiguity is remedied to conform to a "natural," that is, culturally indisputable, gender dichotomy.

Suzanne J. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, 16 SIGNS 1, 24 (1990) [hereinafter *Medical Construction*].

[138] Importantly, any deviation from the genital norm is subject to medical intervention. Thus, though a girl child with a larger-than-average clitoris unequivocally falls into the female category, she is still subjected to a medical procedure so as to reduce the size of her clitoris. This occurs despite the potential loss of sexual sensation, since function is not considered as important as form. Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 934 (2002) [hereinafter *Deconstructing*].

[139] Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 LAW & SEXUALITY 123, 163 (2001).

[140] Individuals may have a variety of chromosome patterns that differ from the typical ones of XX or XY. Combinations identified include XXX, XXY, XXXY, XYY, XYYY, XYYYY, and XO. Persons with two or more X chromosomes may be affected by

appearance,[143] hormonal sex,[144] and/or phenotypic sex.[145] While experts disagree as to the frequency of intersexuality, it is often placed at 1.7% of the population,[146] though this number is not uniform across nationalities and

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Klienfelter Syndrome, while those with an XO chromosomal pattern typically have Turner Syndrome. Julie A. Greenberg, *Therapeutic Jurisprudence, Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 282-84 (1999) [hereinafter *Defining Male and Female*].

[141] Instead of having typical ovaries or testes, individuals may have gonads that do not function as either organ or are a combination of both ("ovotestes"). Others may have one of each type of organ.

[142] External genitalia may not be clearly male or female; in such instances, the individual is usually referred to as a "hermaphrodite." These persons are generally classified into three categories: true hermaphrodites, who have one or more ovotestes; female pseudohermaphrodites, who have ovaries and an XX chromosomal basis, but whose external genitalia look "masculinized" due to fetal exposure to high levels of androgens; or male pseudohermaphrodites, who have testes and an XY chromosomal pattern. There are two major types of male pseuodhermaphrodites, those with androgen insensitivity syndrome, which causes genitals to appear feminine, with labia, a clitoris, and usually a short vagina, and those with 5-alpha-reductase (5-AR) deficiency, which results in what appears to be a female-to-male transformation at puberty. Individuals with 5-AR deficiency are born with a labia, a clitoris, and a short vagina, but at puberty experience a descent of the testes into the labia and a growth of the clitoris into what looks and acts like a penis. DREGER, *supra* note 99, at 37-39.

[143] The internal sexual organs are either incomplete or absent, though some persons are also born with a combination of male and female internal organs. One cause of ambiguous internal sexual organs is Persistent Mullerian Duct Syndrome, which causes a fetus to develop internal male organs as well as fallopian tubes and a uterus. The external appearance of infants with Persistent Mullerian Duct Syndrome is, however, male. *Defining Male and Female*, *supra* note 140, at 282, 285.

[144] While both "male" and "female" hormones are shared by both sexes, men and women have different levels of androgens (male), estrogen (female), and progesterone (female). Disorders affecting the levels of these hormones inside an individual's body can cause an intersex condition. For example, children with Androgen Insensitivity Syndrome develop as females because of an inability to process androgens. DREGER, *supra* note 99, at 38-39.

[145] Phenotypic characteristics include facial hair, breast development, and hip shape. A combination of incongruent phenotypic characteristics leads to an individual with both typically male and female traits. Kristine J. Namkung, *The Defense of Marriage Act: Sex and the Citizen*, 24 U. HAW. L. REV. 279, 297 (2001).

[146] FAUSTO-STERLING, *supra* note 101, at 51; Namkung, *supra* note 145, at 282; DREGER, *supra* note 99, at 42.

ethnic groups.[147] The condition of intersexuality appears as frequently as cystic fibrosis[148] and Down syndrome,[149] and much more frequently than albinism.[150] Importantly, this statistic translates into approximately 5,074,292 current American residents with an intersexed condition.[151]

While it is likely that many are unaware of their intersexed status,[152] those whose sexual ambiguity is detected at birth are subjected to surgeries so as to physically alter and "correct" their genital appearance. The way in which they will be sexed depends not only on the cause of their intersexuality; rather, sexing decisions are generally based on the size and capacity of the child's phallus. If the phallus constitutes a socially adequate penis, in that it is large enough (at least one inch long), allows the child to urinate from its tip while standing, and is capable of penetration, then the child will be sexed male.[153] All others will be sexed female.[154] This emphasis on the male phallus above all else is such that an XY infant, who is a genetic male but who has an "inadequate" penis, will be surgically transformed into a female, regardless of whether this will destroy the

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[147] For example, the frequency of the gene for congenital adrenal hyperplasia, which, when homozygous in an individual, causes XX females to be born with external genitalia that appear male, varies between ethic groups from 0.005 out of one thousand in New Zealanders, 3.5 per thousand among Yupik Eskimos, three in one thousand among Italians, and thirty-seven in one thousand in Ashkenazic Jews. FAUSTO-STERLING, *supra* note 101, at 53-54.

[148] Cystic fibrosis appears in approximately one in two thousand Caucasian births. DREGER, *supra* note 99, at 44.

[149] Down syndrome occurs in roughly one in eight hundred children. *Id.* at 43.

[150] Albinism occurs in only about one in 20,000 births. FAUSTO-STERLING, *supra* note 101, at 53.

[151] As of April 10, 2006, the U.S. population totaled 298,487,760. *See* Population Clocks, www.census.gov (last visited April 10, 2006). The number of persons defying the idea of sex as a fixed characteristic is larger if one also includes transsexuals in the calculation. "It has been reported that at least 25,000 Americans have undergone sex reassignment surgery, 60,000 consider themselves candidates for such surgery, and the doctors who perform it have long waiting lists." WEISS, *supra* note 139, at 126.

[152] The exact number is unknown. It is probable, however, that those delivered in rural areas or in clinics without physicians trained in the causes and symptoms of intersexuality may not become aware of their intersexed status.

[153] PREVES, *supra* note 80, at 55-56.

[154] *Id.*; *Medical Construction*, *supra* note 137, at 13.

infant's future reproductive capacity.[155] Indeed, a majority of intersex infants are made into females precisely because there are no such aesthetic or performance criteria for female genitals; the only requirement, and the sole clinical measure of success, is that "the vagina be able to receive a penis."[156] There is no attempt to ensure that the femaled intersex child will be able to reproduce, or that she will derive any sort of sexual pleasure from intercourse.[157] The single question posed is whether she can be penetrated by a male phallus. The emphasis on the infant's ability to penetrate/be penetrated is premised on the assumption that the child will later engage in heterosexual intercourse, and that the capacity for such intercourse will determine the individual's acceptance into society. When examined in light of the costs associated with transforming a child's body into one that is capable of engaging in heterosexual sex, this focus demonstrates the powerful force of heteronormativity.

The infant is subjected to this medical intervention early in its life, as physicians "feel an urgent need to provide an immediate assignment,"[158] despite the fact that the tests and procedures required to make a diagnosis can take several months.[159] This anxiety does not stem from any sort of concern for an untroubled development of the child post-surgery. Early gender identity theory indicated that gender reassignment can occur until the child is between eighteen months and two years old, and contemporary views are that this window of time can be extended until puberty.[160] Rather, the stress that physicians face comes from the parents, who feel an intense need to identify the sex of their child, both to satisfy the questions of inquisitive friends, acquaintances, and family members, as well as to facilitate their own ability to relate to the infant. The interactions that a parent will have with a child depend on resolving the genital ambiguity, as "when parents 'change a diaper and see genitalia that don't mean much in terms of gender assignment . . . it prolongs the negative response to the baby.'"[161] A parent's inability to relate to his/her child as a result of the

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[155] *Defining Male and Female*, *supra* note 140, at 272.

[156] *Medical Construction*, *supra* note 137, at 20; PREVES, *supra* note 80, at 56.

[157] PREVES, *supra* note 80, at 55; *Medical Construction*, *supra* note 137, at 20; ALSOP ET AL., *supra* note 92, at 31.

[158] *Medical Construction*, *supra* note 137, at 13.

[159] *Id.* at 12.

[160] *Id.* at 9.

[161] *Id.*

infant's physical "deformity" is indicative of a larger social condemnation of individuals who do not fit clearly into one of the two sexes. Consequently, parents go to great lengths to hide their child's sexual ambiguity, including refusing to file birth certificates until the infant's sex has been determined, or fabricating stories to sidestep the situation.[162] There exists a rumor of one such invention by parents of an intersex child who announced that the mother had given birth to twins, one of each sex. When the sex of the child was finally determined, the parents informed their relatives and friends that the other infant had died.[163]

III. LEGAL REGULATION OF THE INTERSEX

While the intersex are currently forced into one sex or another by means of physical mutilation, it is likely that such practices will cease, hopefully in the near future. Activist groups, such as the Intersex Society of North America,[164] the Intersex Initiative,[165] and the United Kingdom Intersex Association,[166] have been vocal opponents of genital reconstruction

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[162] *Id.* at 14.

[163] *Id.* Whether this story is true or fabricated is not as important as the fact that it continues to be circulated, indicating that the actions are plausible.

[164] "The Intersex Society of North America (ISNA) is devoted to systemic change to end shame, secrecy, and unwanted genital surgeries for people born with an anatomy that someone decided is not standard for male or female." Mission of the Intersex Society of North America, http://www.isna.org (last visited Feb. 9, 2006).

[165] The Intersex Initiative describes itself as a group

working to replace the current model of intersex treatment based on concealment with a patient-centered alternative. We are not saying that intersex babies are better off left alone; we want there to be social and psychological support for both the parents and intersex children so that they can deal with social difficulties resulting from being different than others. In the long-term, we hope to remove those social barriers through education and raising awareness.

Intersex FAQs, http://www.intersexinitiative.org/articles/intersex-faq.html (last visited Feb. 7, 2006).

[166] The United Kingdom Intersex Association aims

to educate, inform and campaign in order to remove the shame, secrecy, social prejudice, ignorance and stigmatization which surround intersexed conditions; to campaign against the use of surgery and other medical treatments for coercing intersexed people to physically conform to cultural definitions of "normal"; to campaign against the widespread practise of witholding information from intersexed people regarding their conditions.

surgery on intersex infants. Comprised of intersex persons who had such physical interventions performed at an early age and their allies, these groups reach out to physicians, parents, and politicians to educate them as to the detrimental physical and psychological consequences of genital surgery. These organizations also provide a forum for the intersex to speak about their experiences. The stories often tell of pain, frustration, and resentment towards the genital reassignment surgeries to which the speakers were subjected.[167] By providing spaces for individuals to share their experiences, the organizations are able to demonstrate the powerful trauma associated with genital surgery. Armed with this and scientific data,[168] the societies aim at demonstrating that other, preferable options are available.[169]

Compounding the effect of the groups' lobbying have been recent scientific and sociological studies in gender assignment and intersex children. Researcher Milton Diamond, in his article titled *Sexual Identity and Sexual Orientation in Children with Traumatized or Ambiguous Genitalia*, demonstrates the difficulty, if not impossibility, of accurately assigning a sex at birth. He details the experiences of two individuals, with the same original diagnoses, who came to live very different adult lifestyles—one now lives as a man, while the other identifies as a woman.[170] Importantly, Diamond's research has also demonstrated the flaws in John Money's initial case studies, on which the notion that gender is malleable

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Homepage of the United Kingdom Intersex Association, http://www.ukia.co.uk/ (last visited Mar. 31, 2006).

[167] *See, e.g.*, Caitlin's Story, http://www.bodieslikeours.org (follow "lives and stories" hyperlink under "Self and Health") (last visited Mar. 31, 2006) (describing the trauma of being diagnosed and the attempts at "correcting" her body). Bodies Like Ours's website features contributions from intersex persons, many of which detail their experiences with reassignment surgeries, consultation with physicians, and life as an intersexed individual. Other recent publications have detailed the personal aspect of intersexuality. *See, e.g.*, JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL 199-271 (2001); JEFFREY EUGENIDES, MIDDLESEX (2002).

[168] *See* discussion *infra* note 171 and accompanying text.

[169] For example, the Intersex Society of North America recommends that "newborns with intersex should be given a gender assignment as boy or girl, depending on which of those genders the child is more likely to feel as she or he grows up. Note that gender assignment does *not* involve surgery; it involves assigning a label as boy or girl to a child." What does ISNA recommend for children with intersex?, http://www.isna.org/faq/patient-centered (last visited Mar. 31, 2006).

[170] Milton Diamond, *Sexual Identity and Sexual Orientation in Children with Traumatized or Ambiguous Genitalia*, 34 J. SEX RES. 199, 200-03 (1997).

and therefore assignable is based.[171] As a result of these studies, physicians may be less likely to support genital reconstruction surgery, given the potential for inaccuracy and harm. Perhaps surgeons will even be legally prevented from performing these procedures; the San Francisco Human Rights Commission recently issued a report declaring that practicing genital reassignment surgeries on intersex infants constituted an "inherent human rights abuse[]," indicating that governmental agencies may become involved in eradicating surgical interventions.[172]

If intersex children are not physically forced into the male and female categories at birth, however, this would create a substantial problem in terms of legal doctrine. The law, as a tool of heteronormative patriarchal thought, follows and reinforces the gender binary by applying statutes that differentiate between individuals on the basis of sex. Like race in the antebellum South, the socially constructed category of sex is crucial in delineating privileges and responsibilities.[173] Historically, whether a person could vote, own property, or have a presumption of custody applied depended on the sex of the person. Today, whether a person is subject to the military draft, to which prison an individual will be assigned,[174] in which athletic competitions a person may enter,[175] whether an individual is

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[171] John Money first developed this theory in 1972, with the documentation of a case that occurred when an infant boy's penis was ablated during a surgery. Believing that the child could not develop a normal male gender identity without a penis, the physicians reassigned the boy to the female gender. Money reported that the child had developed a female identity, and concluded that socialization trumped biology. Milton Diamond later located the child's family, only to discover that the child had never accepted the female gender label, and that at fourteen years old had undergone hormone treatment and surgery to convert back to the male gender. SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 6 (1998).

[172] HUMAN RIGHTS COMMISSION, CITY AND COUNTY OF SAN FRANCISCO, A HUMAN RIGHTS INVESTIGATION INTO THE MEDICAL "NORMALIZATION" OF INTERSEX PEOPLE 17 (2005) [hereinafter HUMAN RIGHTS INVESTIGATION], *available at* http://www.isna.org/files/SFHRC_Intersex_Report.pdf.

[173] Unlike the racially biased laws of the past, these statutes do not define sex, despite the fact that many rights turn on whether one falls into one category or another. *See, e.g.*, the Defense of Marriage Act, Pub. L. 104-199; 110 Stat. 2419 (1996).

[174] The problem of how to categorize intersexed individuals for purposes of correctional incarceration has, in one case, resulted in the inmate's confinement in a maximum security prison so as to ensure that the individual would not come into contact with other prisoners. DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183, 1193-94 (2004).

[175] Important for those wishing to participate in an athletic competition is the standard used for determining sex. For instance, Maria Patino, a Spanish hurdler, was

protected by employment discrimination provisions,[176] what penal laws may be applied,[177] and who an individual may marry are all dependent on the person's sex designation.[178]

A. Matrimonial Law

The last of these issues, matrimonial rights, is the one that is most frequently reviewed by courts, and is the issue that is most useful in terms of comparing the position of mulattoes in the antebellum South with the intersex today.[179] Like with interracial marriage, in which the legal race of

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prevented from competing in the 1985 World University Games because her sex verification test revealed that she had Androgen Insensitivity Syndrome (AIS), a condition she had been unaware of, and therefore had the chromosomal pattern of a male. Her external sexual organs, phenotypes, and self-identification, however, were female. Thus, if the athletic organization had continued to use the appearance of external genitalia to determine whether she had a right to participate as a woman (as all did before 1968), Ms. Patino would have been permitted to compete. Ironically, while the sex chromatin test is aimed at preventing unfair competition, AIS may have put Ms. Patino at a competitive disadvantage to typical XX female athletes. *Defining Male and Female*, *supra* note 140, at 273. *See also* Richards v. United States Tennis Assoc., 93 Misc. 2d 713 (1977) (holding that chromosomal structure should not be the sole criterion when circumstances warrant consideration of other factors).

[176] While both men and women are protected by Title VII, individuals who do not fit into the categories of male and female may not be. In *Wood v. C.G. Studios*, 660 F. Supp. 176, 177 (E.D. Pa. 1987), the court ruled that the term "sex" in the Pennsylvania employment discrimination statute "encompass[ed] discrimination against women because of their status as females and discrimination against males because of their status as males." It consequently did not protect hermaphrodites against discrimination because of their intersexed status.

[177] Michael M. v. Super. Ct., 450 U.S. 464 (1981) (upholding a California statutory rape law statute that only applied to men).

[178] *In re* Heilig, 816 A.2d 68, 85 n.9 (Md. 2003).

[179] This discussion is extremely different from that of same-sex marriage. While the debate surrounding same-sex marriage is one that attempts to identify *who* a person may marry, the ultimate question posed by the intersex marriage cases is that of *whether* a person is allowed to marry. Consequently, the analogy of intersex marriage to that of mixed-race marriage is not entirely accurate, though race and sex do parallel one another in the sense of how the courts perceive the claimants. For a discussion of the parallels between same-sex and mixed-race marriage, which may help illustrate the divergences between intersex and mixed-race marriage analogies, as well as same-sex and mixed-race marriage comparisons, see Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61 (2000); David Orgon Coolidge, *Playing the Loving Card: Same-sex Marriage and the Politics of Analogy*, 12 B.Y.U. J. PUB. L. 201 (1998).

the parties was at issue,[180] the focus of the opinions is on determining whether a person is legally defined as male or female so as to decide whether that individual may marry her/his partner or whether the marriage the individual has already entered into is valid.[181] There is a strong parallel between the legal treatment of race and sex in terms of matrimony, in that, while the laws against same-sex and cross-race marriages are quite clear, it is a similarly difficult task to apply the statutes to racial and sexual categories, which are not coherent in the ways the law assumes. The stakes are equally high in the two contexts; in one, sustaining a racially bound economy was dependent on prohibiting interracial marriages, and in the other, preventing same-sex marriage is a question of maintaining heterosexual norms on which patriarchal society relies.

The cases addressing the legal definition of sex with regard to marriage have thus far been limited to transsexuals. The following discussion will be based on these cases because their legal reasoning strongly applies to issues surrounding the intersex; with regard to the law, the two divergent categories overlap in many ways. Nevertheless, it is crucial to recognize that transsexualism should not and cannot be conflated with intersexuality, and that this section draws on transsexual case law solely due to the sparse number of cases in which an intersex person's sex has been at issue. The lack of litigation with regard to the legal determination of a person's sex is due in part because it is easier for intersexuals to "pass" as the biological sex that they have been assigned.[182]

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[180] *See, e.g.*, State v. Watters, 25 N.C. 455 (1843) (in response to a defense to a charge of fornication and adultery that parties were married, the State alleged that the defendant was a man of color, and that the woman was white, so that the marriage was void); Jones v. Commonwealth, 79 Va. 213, 217 (1884) (overturning the conviction of a black man for feloniously intermarrying with a white woman, as "the proof as to the identity and color of the woman is vague and uncertain"); McPherson v. Commonwealth, 69 Va. 939, 940 (1877) (appeal by black woman, who was convicted of illegally marrying a white man, on the basis that she was white).

[181] While race was defined by statute, and sex today is not, the legal standard was often not applied. *See* discussion *supra* Section I.B.2. Therefore, courts were determining the legal race of individuals in much the same way as courts today have been attempting to resolve transsexuals' legal sex.

[182] Intersexual marriage cases have been reviewed in other countries, including the United Kingdom and Australia. *See* W v. W, (2000) 2 W.L.R. 674 (Fam. Div.) (U.K.); Bellinger v. Bellinger, (2003) 2 A.C. 467 (H.L) (U.K.); *Re* Kevin (2001) 28 Fam. L.R. 158 (Austl.); In Marriage of C and D (falsely called C) (1979) 28 A.L.R. 524 (Fam. Ct.) (Austl.). For a detailed discussion of these and other cases, see generally Michael L. Rosin, *Intersexuality and Universal Marriage*, 14 LAW & SEXUALITY 51 (2005); Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371 (2004).

The intersexual does not have a history of being raised as one sex and then switching to another, so there is no past to investigate and reveal, and thus sex is rarely questioned. Few are willing to disclose their intersexed status, given a cultural climate that is hostile towards sexual ambiguity, and therefore the information is not often volunteered.[183] Consequently, the cases that raise the issue of what "sex" means for the purposes of a statute are often attempting to determine what sex a transsexual should be considered. The focus is often on whether one can actually change one's sex, as opposed to how to address situations in which a person has biological characteristics of both sexes. These cases are nevertheless insightful because they illustrate courts' struggles to apply legal provisions that are based on an assumption that sex exists as a fact, rather than as a social construction. The challenges by individuals on the margins indicate the ways in which this system fails and exposes the fallacies of the established binary system.

The enforcement of the sexual binary is incorporated into all of the transsexual marriage cases. As Suzanne Kessler has observed, the notion of sex is based on eight premises:[184]

1. There are only two sexes;
2. Sex is invariant;
3. Genitals are the essential markers of sex;
4. Any exceptions to the two sexes can be dismissed;
5. No transfer may be made from one sex to the other, except ceremonially;
6. Everyone must be classified as one sex or the other;
7. The male/female divide is natural;
8. Membership in one sex or the other is natural.[185]

All of these concepts are present in the matrimonial law discussions aimed at determining an individual's sex. In analyzing whether a transsexual is male or female, courts do not entertain the possibility that an individual could be neither or both sexes, and presumably would not do so

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[183] Namkung, *supra* note 145, at 297. Another significant factor is that an individual may not know his/her intersexed status. For a fictional account of such a situation, see EUGENIDES, *supra* note 167.

[184] Note that these notions can easily be applied to social perceptions of race in the antebellum period.

[185] KESSLER & MCKENNA, *supra* note 87, at 113-14.

in cases dealing with intersexed individuals (1, 6, 7, 8).[186] Courts also often make their determination based on the transsexual's anatomic, genital, and chromosomal state at birth, indicating that sex cannot be altered (2, 5).[187] The focus is on the internal and external reproductive organs, i.e., whether or not the individual has a functioning phallus, so as to be able to penetrate/be penetrated, and whether or not the person has the capacity for reproduction (3).[188] As a New York court remarked, in deciding that a male-to-female transsexual was legally male, "surgery has not reached that point that can provide a man with something resembling a normal female sexual organ, transplanting ovaries or a womb."[189] However, courts have not established a standard for determining an individual's sex, and the individual discussions do not provide a coherent analysis explaining the court's ruling. The only clear, universal guideline is that sexual identity and self-perception are not the factors on which legal sex may be determined.[190] Given the fact that the ruling must be made on a biological basis, when physical indicia conflict, it is unclear how a court will make its decision.

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[186] Also, in cases in which courts have reviewed an individual's petition to change the sex designation on the person's official documents, such as passports, birth certificates, and driver's licenses, none have questioned the relevance of the sex classification itself. *See, e.g.*, Darnell v. Lloyd, 395 F. Supp. 1210 (D. Conn. 1975); *In re* Heilig, 816 A.2d 68 (2003).

Ironically, transsexuals, in undergoing surgery to have their physical body match their gender identity, are supporting the binary view of sex. They are not questioning that one is male or female, but rather asserting that the sexed body does not always match the gendered mind. In seeking a physical transformation to rectify this disconnect, transsexuals are reinforcing the notion that sex and gender should correspond, and should be consistent with one sex or another.

[187] Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) (concurring with the Kansas, Ohio, and Texas courts that have interpreted the statutory meaning of male and female to be "immutable traits determined at birth"); *In re* Gardiner, 273 Kan. 191, 209 (2002) (basing its decision on the transsexual's chromosomal pattern).

[188] B. v. B., 78 Misc. 2d 112 (1974).

[189] *Id.*

[190] *But see In re* Anonymous, 57 Misc. 2d 813, 816 (N.Y. Civ. Ct. 1968). According to this court,

Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual.

57 Misc. 2d at 816.

While these cases address the status of individuals who are challenging the physical firmness of sex, neither the courts nor the litigants question the sexual binary (4), which limits the applicability of these cases to a discussion of the intersex.[191] Instead, it is assumed that the individual is one sex or another, and that the court must determine which sex the person is for legal purposes. It is the very act of selecting a legal sex, however, which demonstrates the construction of the category. Having to choose which factors, male or female, predominate indicates the way in which categories gain coherence according to social and legal dictates, rather than natural ones.

The fact that this issue arises most often in marriage cases is significant because of the heterosexist nature of matrimonial law.[192] The sex of the individual at issue is crucial because, were it wrongly decided, it could result in a state-sanctioned same-sex marriage, thereby undermining the heterosexual norm. Courts have reacted to this potential with great alarm, signifying that the prospect of legal same-sex marriages is as disturbing to the current system as mixed-race marriages once were to the antebellum South and its slave-based political and economic systems. Ohio expressed its fear of same-sex marriage quite clearly in its most recent transsexual marriage decision, *In re Nash*.[193] In this case, the Ohio Supreme Court denied the application for a marriage license for Jacob Nash and his genetic female partner because Mr. Nash was a female-to-male transsexual. The court reasoned that, "in permitting this marriage to proceed, we would be placing our 'stamp of state approval' on an actual marriage that is directly contrary to Ohio's public policy on same-sex marriages."[194] Kansas, in the case of *In re Gardiner*, also focused on the possibility that recognizing the marriage between a man and a post-operative male-to-

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[191] *But see* In re *Gardiner*, 273 Kan. at 213. The Kansas Supreme Court noted that a reliance on chromosomal patterns to determine sex ignores those individuals with chromosomal sex disorders, who have neither XX nor XY chromosome pairs. It did not, however, incorporate this idea into its determination that a post-operation male-to-female transsexual was, for legal purposes, male.

[192] Marriage provides couples benefits in a host of legal spheres, including "housing, estate administration, bankruptcy, taxation, immigration, workers and unemployment compensation, insurance policies, tort liability, and Social Security benefits." Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Rethinking the "Beneficial Family" and Marriage-Centric Corporate Benefit Programs*, 14.2 COLUM. J. GEN. & L. 1, 42 (2005).

[193] *In re* Nash, 2003 Ohio 7221 (2003).

[194] *Id.* at ¶ 33.

female transsexual would be tantamount to permitting same-sex marriages.[195] This same issue was raised in *Littleton v. Prange*, a case reviewed by the Texas Court of Appeals, although the court stated that the determination as to a transsexual's post-operative sex would be determined irrespective of "[p]ublic antipathy toward same-sex marriages."[196] Despite this assertion, the court began its discussion with an exploration of legal opposition to same-sex marriage, indicating that the court was perhaps not being forthright in asserting that public policy concerns were not determining factors.

These decisions do not necessarily demonstrate how a court will respond to an intersex person's petition for a marriage license or a claim that a marriage was fraudulent because of the intersex partner's genital condition.[197] Presumably, an intersexed individual who had been subjected to genital reconstruction surgery as an infant would, for legal purposes, be the same sex as that which the physician assigned. Given the difficulty in determining what sex a child "is" or "should be," and the biases towards sexing children as female so as to ensure that the child can engage in heterosexual intercourse, there is no reason to believe that the infant's sex correlates to the individual's gender identity. This also does not match the legal discourse on the subject as it relates to transsexuals, in that there was never an original alignment of chromosomes, gonads, genitalia, etc.

Even with such a resolution, this does not address how the law should regard an intersexed person who has not been surgically altered. Would a court require medical experts to opine on what the individual's "true" sex is, and how they would have treated the infant at birth? Or would a court rely on the sexual identity the person developed during her/his lifetime?[198] Both approaches seem highly problematic: the first is not only

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[195] In re *Gardiner*, 273 Kan. at 215 ("The legislature has declared that the public policy of this state is to recognize only the traditional marriage between 'two parties who are of the opposite sex,' and all other marriages are against public policy and void.").

[196] 9 S.W.3d 223, 226 (Tex. Ct. App. 1999).

[197] This issue has only been reviewed once and, because the couple had been married for thirteen years before one of the partners sought a divorce, the court dismissed the claim. Peipho v. Peipho, 88 Ill. 438 (1878). The decision's analysis is somewhat surprising, because there is not usually a concept of equitable estoppel in marriage.

[198] Another issue is which of the conflicting elements of the intersexual's physical and psychological identity a court will mark as decisive. It is possible that contemporary decision-makers will choose to emulate their antebellum predecessors by identifying a single factor to create a presumption that the individual is a particular sex. Unlike mulattoes, however, this will most likely not be based on appearance or the successful performance of one sex. Like in the antebellum period, the threat of passing is too great to allow such an

invasive, but also undermines the intersexual's identity by questioning the reality of her/his past existence and her/his self-perception,[199] and the second gives weight only to identity, which challenges legal precedent.[200] More importantly, both carry notions of there being a real, intrinsic, natural sex. They therefore do not question the notion that laws can incorporate diverse responsibilities and rights based on sex. They are premised on the idea that an intersexed person should identify as male or female, despite the fact that some intersex persons clearly identify as intersexed, and not as a woman or a man.[201] Whether or not intersexed individuals necessarily view, or should view, themselves as male, female, or other is a subject of debate,[202] but as it stands they legally do not have the option of being neither male nor female, or both man and woman.

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intangible standard to be conclusive. Passing is disturbing in its potential to create legally sanctioned same-sex marriages, which could serve to undermine the heterosexual norm on which the current patriarchal structure is based. *See supra* notes 70-71 and accompanying text.

[199] It is unlikely that science will abdicate its role with regard to sex differentials in law; however, medical opinion should have less weight when an individual has lived either as male, female, or intersex all of her/his life. In such a circumstance, the fact that a scientist is assigning, rather than uncovering, the person's sex becomes quite obvious—the normative nature of the act is evidenced much more clearly in this situation than in the context of sex designation at birth.

[200] It should be noted that there is a difference between identity and self-definition. For example, a court may be willing to accept as male someone who had lived and been treated as a man his entire life, but may refuse to allow an individual who has lived as a man but now self-identifies as a woman to be considered legally female.

[201] James Costich, *Claiming Intersex Sexuality*, THE EMPTY CLOSET, Dec. 2002, http://www.bodieslikeours.org ("Suddenly, it was so easy to be me, and I hadn't done anything except tell myself, and others that I am what I am and what I am isn't quite male or female, is both and neither. For the first time, I was just me. Just intersexed."); HUMAN RIGHTS INVESTIGATION, *supra* note 172, at 23 ("Although many intersex people identify as either male or female, some do not.").

[202] *See* Defining One XY Man–One XX Woman, http://www.bodieslikeours.org/content/view/214/103/ (last visited Mar. 31, 2006) (stating that "most intersex people clearly identify as male or female"); Claudia Kolker, *The Cutting Edge: Why Some Doctors are Moving Away From Performing Surgery on Babies of Indeterminate Gender*, THE SLATE, June 8, 2004, http://www.slate.com/id/2102006 (noting that "even the most vociferous antisurgery activists say gender labels are necessary to exist in our culture"); Joyce Brothers, Quiz Topic: The Intersexed Child, SEATTLE POST-INTELLIGENCER, Apr. 20, 2005, *available at* http://seattlepi.nwsource.com/brothers/217988_joyce20.html ("Psychologically, it is better to pick a sex that the child might eventually reject than to treat the child as neither female nor male."). *Contra* Diamond, *supra* note 170, at 206 (describing intersex individuals as "conflicted" in their sexual identity); *supra* note 201 and accompanying text.

B. The Future of Sex Differentials in Law

The continued definition of marriage as the union between one man and one woman means that courts must force the intersexed into a specific category, male or female. There is a substantial investment in limiting marriage to a heterosexual institution, and threats of eroding the opposite-sex foundation of marriage have been met with substantial backlash.[203] It is unlikely, therefore, that the requirement that marriage participants be male or female will disappear in the near future. Given that physicians may stop physically altering infants so as to fit them into the two-sex model before such a change happens, the law will have to address the fact that individuals may not actually be male or female as the law supposes.[204] Since marriage is a fundamental right, albeit a limited one,[205] and an individual is required to be either male or female to enter into the institution, courts will be required to assign legal sexes to intersexuals. The law's presumption of a sexual binary, therefore, has and will continue to force courts to create a legal identity that has little to no connection to a biological reality. As litigation concerning the legal sex of intersexed persons emerges, the intersex will become the modern-day version of antebellum mulattoes.

Like the law's transformation of the mixed-race to blacks in the antebellum period, the law today may become a force converting intersexuals' bodies into male or female. It is for this reason that the comparison to mulattoes in the antebellum South is instructive. Just like mulattoes, the existence of intersexuals undermines a fixed binary on which an important political, social, and economic order is built, as they demonstrate that the categories are not natural or inherent. The threat posed by the intersex thus far has been dealt with by denying the intersex's

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[203] In November 2004, referenda initiatives to ban same-sex marriage were approved in all eleven states in which they were proposed. These were largely responses to the Massachusetts's Supreme Judicial Court decision approving same-sex marriages in that state. Elizabeth Mehren, *11 States Vote to Approve Bans on Same-Sex Marriage; Strong majorities in Georgia and Ohio also opt to deny benefits to all domestic partners*, L.A. TIMES, Nov. 3, 2004, at A21. The federal Defense of Marriage Act was also a reaction to the Hawaii court's determining that same-sex marriages were legal under the Hawaii state constitution.

[204] As discussed in Part III, *supra*, this cessation will likely result not simply from lobbyist pressures, but also from emerging studies demonstrating the psychological dangers associated with subjecting infants to genital reconstruction surgery.

[205] *See* Smelt v. Orange, 374 F. Supp. 2d 861, 877 (C.D. Cal. 2005) ("It is undisputed there is a fundamental right to marry."); Lewis v. Harris, 875 A.2d 259, 272 (N.J. Super. Ct. App. Div. 2005).

existence, which parents and physicians do by surgically mutilating intersexed infants. However, if this no longer continues, and intersexuality must be addressed, then there remains the question of how courts will apply legal standards to these individuals. The intersex could follow the path of their antecedents, the mulattoes of the antebellum South, and be legally regulated into one of the two accepted sexes. As the experiences of interracial individuals of the antebellum period demonstrate, this would have profound negative effects not only for the intersex, but for society generally. Mulattoes suffered in that they were denied freedom, legal benefits, and social, political, and economic opportunities. The general social focus on a biracial system allowed slavery to be perpetuated, leading not only to great suffering for enslaved persons, but also to a devastating civil war. For intersexed individuals, the effect of following the mulattoes' history is that they would be assigned a legal identity that is not necessarily congruent with how they view themselves. Their true selves, as intersexuals, would continue to be denied by the law, which would perpetuate the social unacceptability of their sexual status. The more general effect would be to preserve a system based on the notion that there are two sexes, which allows for both law and society to differentiate between men and women. This has served to subordinate women throughout history, and continues to justify the different legal and social treatment of men and women today.

The other option would be to diverge from the past and recognize that there is no real, apolitical basis for sex. Should legislatures and courts accept that the law is not merely reflecting, but rather constructing, sex, this will strongly impact a great deal of existing legal doctrine. The inability and unwillingness to recognize the constructed nature of sex has led courts to develop a theory of sex discrimination that differs strongly from that of race discrimination because the law considers sex to be real in ways that race is not.[206] Since race is accepted as a social creation, [207] it is subject to a more stringent standard of review under the Equal Protection Clause than sex. As a result, "[w]hereas virtually every classification based upon skin color or

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[206] Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 29 (1995); *Deconstructing*, *supra* note 138, at 921-22. *See* Michael M. v. Super. Ct., 450 U.S. 464, 469 (1981) (noting that sex classifications may "realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances"); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (stating that "[t]here are both real and fictional differences between women and men").

[207] *Deconstructing*, *supra* note 138, at 925-26.

race is rendered invalid when filtered through the heightened scrutiny standard, only the grossest sexual stereotypes and archaic notions are filtered out by the larger holes in the intermediate screen."[208] A different standard of review for sex-based classifications could lead to the invalidation of certain immigration policies,[209] military practices,[210] penal code provisions,[211] employment decisions,[212] athletic programs,[213] and reproductive rights regulations.[214] This would engender a profound shift in

[208] Franke, *supra* note 206, at 11.

[209] Nguyen v. Immigration and Naturalization Serv., 533 U.S. 53 (2001) (allowing different immigration standards to apply to children born of United States citizen mothers, as opposed to citizen fathers). The court specifically stated that:

In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth . . . . The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father.

Id. at 67.

[210] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding the Military Selective Service Act, which required men, but not women, to register for the draft).

[211] *See Michael M.*, 450 U.S. at 464 (upholding a California statutory rape law that applied only to men).

[212] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (upholding Alabama's refusal to hire a female prison guard for a male penitentiary). As the court noted, "[a] woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood." *Id.* at 335.

[213] School sports programs are overwhelmingly segregated according to sex, based on the assumption that men's biological attributes render them more competitive in athletics. *See* Franke, *supra* note 206, at 37 (noting that "biological dimorphism remains unquestioned in the context of athletic sexual segregation on the assumption that it would not be fair for women to compete with men, most of whom are thought to be much stronger than women"); Virginia P. Croudace & Steven A. Desmarais, Note, *Where the Boys Are: Can Separate Be Equal In School Sports?*, 58 S. CAL. L. REV. 1425, 1427 (1985).

[214] Planned Parenthood v. Casey, 505 U.S. 833 (1992) (determining that state waiting periods and parental consent requirements for minors are acceptable burdens to place on women seeking abortions). While the Supreme Court, in the much maligned *Geduldig v. Aiello*, stated that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification," arguments to the contrary can and have been made. 417 U.S. 484, 496 n.20 (1974). Indeed, Congress indicated its differing opinion in the Pregnancy Discrimination Act, 42 U.S.C.S § 2000e(k) (2005), which establishes that discrimination on the basis of pregnancy is discrimination on the basis of sex.

the ways that sex is understood and addressed, and not only in the legal realm. Since the way sex is conceptualized touches upon such a variety of legal issues, a wide range of individuals and industries will be affected by this shift in perception. More importantly, this could serve as a catalyst for change in the ways that individuals interact and perceive one another. By acknowledging the invented nature of sex, and eliminating the argument that there are biological differences between men and women, the bases for sexism would disappear. This does not necessarily mean that sexism in its entirety would be dismantled; the law currently accepts the social construction of race, but society is not free of racism. Nevertheless, it could certainly serve to reduce sexism, as it would undermine the notion that sexual differentiation has a basis in something natural, real, and stable.

IV. CONCLUSION

All of the possibilities discussed are, of course, entirely hypothetical. It was a struggle for courts and members of society to accept the socially constructed nature of race, and the idea of a biologically rooted racial hierarchy had only come into existence a few hundred years prior to the Civil Rights movement.[215] Patriarchy and heteronormativity, on the other hand, have been entrenched elements of Judeo-Christian society for over two millennia, and thus may be more difficult to challenge. The binary on which both institutions stand, however, is coming under assault daily with the evolution of modern technology. While the divide was never clear, as intersexuals have always existed, the rapid growth of transsexual sex

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If courts accept the notion that sex is a political category, this does not mean that legislation like the Pregnancy Discrimination Act will be considered unconstitutional. Rather, statutes making sex-based classifications would be subject to strict scrutiny, which would result in fewer laws based on sex stereotypes that pass as real sex differences.

[215] It was not until 1735 that Carolus Linnaeus published his book titled *Systema Naturae*, which divided and classified humans into six types based on skin color and physical attributes. This categorization, while originally non-hierarchical, came to be seen as a progression of development, as per the Enlightenment concept of the "Great Chain of Being." The highest human type was of course the European male, and the lowest the African Hottentot. Derek W. St. Pierre, Note, *The Transition From Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 HASTINGS WOMEN'S L.J. 255, 263 (1998); William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1733-34 (1996). Scientific racism soon followed with craniological studies aimed at providing proof to sustain this theory of a natural racial hierarchy. STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1996). Such thinking continued well into the twentieth century, until the Nazi regime's vast eugenics project led to a widespread discrediting of such "scientific" practices.

changes will perhaps provide the critical mass necessary to alter the ways in which sex as a biological reality is considered.[216] The emergence of extremely vocal organizations, such as the Intersex Society of North America, which advocate strongly against subjecting intersexed infants to genital reconstruction surgery, and the development of new scientific studies on gender assignment, may also provide the impetus for a legal and social rethinking of sex as a natural category. As many legal categories rely on sex differentials in allocating burdens and benefits, this issue will become increasingly pressing, and will become a major focus of courts.

The question that remains is whether these powerful forces pushing the boundaries of traditional notions of sex will prompt a judicial response that acknowledges the social construction of sex, or whether it will spur a return to a legal system aimed at upholding the binary at all costs. In other words, will the intersex become the modern mulatto? As the regulation of race in the antebellum period demonstrates, dominant classes are willing to go to great lengths to preserve their political and economic privileges. However, history also shows that social perceptions change, and that what is accepted in one era may be rejected in the next. Just as the concept of a biological basis to race was rejected, so too may the notion that sex is a natural divide disintegrate.

[216] It is ironic that it is transsexual sex changes that will render visible the constructed nature of biological sex, given that, as discussed *supra* note 186, transsexuals actually do not wish to deconstruct the sexual divide, but rather seek to more appropriately belong within the binary by using surgery to match their physical and psychological sexes.