DECONSTRUCTING THE BODY: TRANSGENDER AND INTERSEX IDENTITIES AND SEX DISCRIMINATION—THE NEED FOR STRICT SCRUTINY

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Sex is documented, administered, and adjudicated via a network of statutes, regulations, and administrative rules that is astonishing for both its inconsistencies and its complexity.[1] Courts and agencies tasked with issuing identity documents, or determining who qualifies as a spouse for the purposes of marriage licenses or same-sex marriage bans, routinely adjudicate the question of sex—employing "common sense" approaches to determine whether a person is "male" or "female."[2] For transgender persons seeking new drivers' licenses

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[1] *See generally* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008) [hereinafter Spade, *Documenting Gender*]; James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368 (2009).

[2] *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223, 223–24 (Tex. Ct. App. 1999). This Article questions the notion of binary gender. For this reason, the terms "male" and "female" appear in quotation whenever they are used or presented in a way that appears to "occupy the field." This is not to discount the everyday significance of sex, or the deeper meaning and significance of gender. Accordingly, this Article does not challenge the social materiality of sex, only its (binary) biological reality. Queer theorists and anti-essentialist feminists adopt a similar approach. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 43 (1990).

or other forms of official recognition,[3] the folkways of sex can be particularly dire because courts have naturalized both the idea of binary sex and the impossibility of sex reassignment. In refusing to recognize a transgender woman as a legal woman, a Texas appeals court exclaimed, "There are some things we cannot will into being. They just are."[4] The Kansas Supreme Court followed suit, stating: "[W]e recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, J'Noel *remains a transsexual, and a male.*"[5]

Yet, despite our collective belief in the inevitability of sex and the categories "male" and "female," sex identities evade binary categorization and neat, tidy description even at the level of biology. Every year, thousands of infants are born intersex, with bodies that fuse the chromosomes, hormones, gonads, genitals, internal sex organs, and secondary sex characteristics

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[3] *See Littleton*, 9 S.W.3d at 223–24 (action to declare marriage void brought by doctor facing wrongful death suit by the transgender spouse); *In re* Gardiner, 42 P.3d 120 (Kan. 2002) (declaratory judgment action brought by the son of a decedent seeking to deny transgender spouse a share of the estate); Hartin v. Dir. of Bureau of Records 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973) (petition to change birth certificate); *see also* Nat'l Ctr. for Lesbian Rts., Case Docket: *Kantaras v. Kantaras*, http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_kantaraskantaras (last visited May 1, 2011) (fitness to parent). These issues have also been taken up abroad. *See* Corbett v. Corbett, [1970] 2 Eng. Rep. 373, 2 W.L.R. 1306, *available at* http://www.pfc.org.uk/node/319 (annulment action brought by spouse).

[4] *Littleton*, 9 S.W.3d at 231.

[5] *Gardiner*, 42 P.3d at 137 (emphasis added).

typically thought to be defining of "male" and "female."[6] Every year, thousands of adults also seek to change their sex—resisting the notion that sex is fixed and accurately determined at birth.[7] In addition, even those who grow up secure in their identities as "male" or "female" are assigned to a sex category, not by karyotyping,[8] but by cursory inspection of their genitals at birth, so that their anxious parents can know whether to swaddle them in a pink or blue blanket.

These phenomena challenge the very foundation of sex; indeed, as one researcher has noted, "any close study of sexual anatomy results in a loss of faith that there is a simple, 'natural' sex distinction that will not break down in the face of certain

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[6] *See, e.g.*, Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278–89 (1999) (describing the array of intersex conditions, which include some that manifest at birth, and others during puberty). Though estimates differ, intersex conditions occur at a rate as high as 2 in 1,000 live births. *See* ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 51 (2000) (estimating prevalence at 1.7%).

Recently, practitioners have begun using the phrase "disorders of sexual development" and "disorders of sexual differentiation" to describe intersex conditions as part of an effort to decrease stigma in society and within the medical profession. *See, e.g.*, Alice D. Dreger, Cheryl Chase et al., *Changing the Nomenclature/Taxonomy for Intersex: A Scientific and Clinical Rationale*, 18 J. PEDIATRIC ENDOCRINOLOGY & METABOLISM 729 (2005); I.A. Hughes et al., *Consensus Statement on Management of Intersex Disorders*, 91 ARCHIVES OF DISEASE IN CHILD. 554 (2006); Elizabeth Reis, *Divergence or Disorder? The Politics of Naming Intersex*, 50 PERSPECTIVES IN BIOLOGY & MED. 535 (2007).

[7] Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 264–72 (2005) (describing the diversity of sexual identities).

[8] A karyotype is a test used to identify a person's chromosomal makeup. *See* Hughes et al., *supra* note 6, at 556.

anatomical, behavioral, or philosophical challenges."[9] Faced with the true complexity of sex identity and sex difference, binary sex classifications can only be viewed as a social construct that disciplines the body in ways that defy logic, compassion, and medical science.[10]

This Article breaks new ground by proposing a new equal protection doctrine that takes cognizance of the realities of sex, and regards sex categories as a suspect classification, not based on immutability, but on ground of sex categories' very imprecision. In arguing that sex should be accorded strict, not intermediate, scrutiny, this Article takes note of the parallels between sex discrimination and race discrimination—parallels that emerge when binary sex classification is understood to be neither innate nor natural. Viewed through this lens, demanding that people be officially classified by sex is just as invidious as maintaining registries of racial composition, a now disavowed practice.[11]

Part I of this Article explores myths and realities of sex difference and examines how binary conceptions of sex break down. Turning to transgender and intersex identities, this Part explores the way that science and medicine manage and discipline unruly bodies in an effort to deny the pluralism of sexual identities that truly exists. It also focuses on law's complicity—examining how courts and administrative agencies have naturalized the notion of "male" and "female" and perpetuated myths of innate sex difference.

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[9] *See* Alice D. Dreger, *"Ambiguous Sex"—or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CTR. REP. 24, 26 (1998) [hereinafter Dreger, *Ambiguous Sex*]. For a similar view, see generally Suzanne J. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, 16 SIGNS 3, 4 (1990) (questioning whether "female and male are biological givens compelling a culture of two genders"); *and* FAUSTO-STERLING, *supra* note 6, at 8 ("Since intersexuals quite literally embody both sexes, they weaken claims about sexual difference.").

[10] Drawing a more powerful metaphor, one scholar has likened sex to a religious belief. *See* David Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997 (2002).

[11] *See generally* Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS L. REV. 421, 425–31 (1988).

Part II urges the adoption of a new equal protection standard for sex—a constitutional doctrine that recognizes the way that the categories of male and female are socially constructed, and regards sex classifications as suspect because of their arbitrariness. Looking to equal protection case law, this Part establishes that mutability as well as immutability renders a classification suspect. In addition, it discusses how a strict scrutiny approach to sex discrimination will lead to a more robust understanding of discrimination based on gender identity and gender roles.

Part III explores the potential pitfalls of applying strict scrutiny to sex and of regarding sex classifications as presumptively invalid. Tracking the experiences of racial minorities under the Fourteenth Amendment, this Part queries whether suspect classification leads to empowerment or erasure. Does suspect classification embody an anti-subordination principle? Or is it largely symbolic—mandating a "color-blindness" and "gender-blindness" principle that prevents people from being named in the law? In Part IV, after exploring these paradoxes, this Article briefly concludes.

Throughout this Article, sex is used to refer narrowly to the terms "male" and "female" as they are used to refer to innate biological difference and a stable and coherent dichotomy. In contrast, gender is used to refer to masculinity, femininity, and social roles, as well as the terms "male" and "female," when they are voluntarily assumed as a preferred label or identity. In arguing that sex can be viewed as a social construct, this Article does not seek to deny the salience of these categories or preclude their usage for self-identification purposes any more than does the scholarship pertaining to the social construction of race. Instead, this Article questions commonplace beliefs about sex and the law's ongoing involvement in the documentation, administration and adjudication of sex identities.

Finally, it is important to note the intended reach of this Article. By urging the adoption of a strict scrutiny approach to sex, this Article advocates for transgender and intersex persons *as well as* all those presently harmed by the narrow and rigid jurisprudence on sex—a group that includes women seeking the

fundamental right to equality, including pregnant women,[12] gays, lesbians and bisexuals,[13] and all those who are *sex identity deviant*—e.g., masculine women, effeminate men, men who seek to enter female-dominated professions and women who long to work in a labor market not beholden to sex stereotyping.[14]

V. The Social Construction of Sex

A. Myths and Realities of Sex Difference: The Assignment of Sex

Losing one's faith in sex does not require much—it is sufficient to learn how bodies become designated as "male" and "female" in the first place. Although biology textbooks instruct that men and women are reliably defined by reference to chromosomes (XX, XY); hormones; gonads (testes, ovaries); internal organs (prostates, vaginas, uteruses); external sex organs (penises, scrotums, clitorises, labia); secondary sex characteristics (hair, breasts, bone structure); and sex and gender identity,[15] physicians tasked with determining sex in newborn

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[12] Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that pregnancy discrimination does not constitute sex discrimination under the Constitution).

[13] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) (arguing that sexual orientation discrimination *should* be considered sex discrimination).

[14] *See generally* Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 75–79, 87–98 (1995) [hereinafter Franke, *The Central Mistake*] (discussing hair and clothing regulations for men and the persistence of single-sex professions). For a critique suggesting that it is feminine women who are truly in need of additional protection, see Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J.L. & GENDER 99 (2006).

[15] *See* Greenberg, *supra* note 6, at 278 (1999) (citing JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES 4 (1970)).

children rely on a much cruder indication: the appearance of the infant's genitals.[16]

The process could scarcely be more arbitrary. When a child is born with a "normal" sized clitoris (less than three-eighths of an inch),[17] that infant will leave the hospital designated as a girl, irrespective of chromosomes; when a child is born with an "adequate" penis (one inch or longer and capable of penetrative sex), that infant will leave the hospital christened a boy.[18] All other infants—those with small penises, large clitorises, or internal and external morphology that conflict—will promptly

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[16] McGrath, *supra* note 1, at 389 ("Although no single accepted definition of male or female exists, sex is generally assigned at birth based upon the appearance of an infant's genitals, as determined by the birth attendant."); Sarah M. Creighton et al., *Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood*, 358 LANCET 124, 124 (2001) ("Genital appearance has been cited as a fundamental factor in childhood gender and psychosexual development, and has led to the current management of infant genital cosmetic surgery for genital ambiguity.") (internal citations omitted).

[17] *See* Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 61 (2006) ("Medical standards do not allow clitorises larger than 0.9 centimeters at birth."); Milton Diamond, *Pediatric Management of Ambiguous and Traumatized Genitalia*, 162 J. UROLOGY 1021, 1021 (1999) (describing the decision-making process for whether to surgically alter a baby's genitalia as "arbitrar[y]"); Patricia H. Donahue et al., *Clinical Management of Intersex Abnormalities*, 28 CURRENT PROBS. IN SURGERY 517 (1991) (explaining parameters).

[18] American Academy of Pediatrics, *Evaluation of the Newborn With Developmental Anomalies of the External Genitalia*, 106 PEDIATRICS 138, 141 (2000) ("The size of the phallus and its potential to develop at puberty into a sexually functional penis are of paramount importance when one is considering male sex of rearing."); B. Chertin et al., *Masculinizing Genitoplasty in Intersex Patients*, 174 J. UROLOGY 1683, 1684 (2005) (noting "the penile size has now paramount importance when one is considering male sex of rearing").

find themselves on an operating table with doctors debating which course of treatment to commence.[19]

The goal of medical treatment is a simplistic one: to ensure that intersex patients end up functioning heterosexuals. Indeed, medical interventions seeking to "normalize" intersex bodies traditionally breeze past the question of hormones or chromosomes (although these, too, can be misleading)[20] and focus instead on whether a body can penetrate or be penetrated. Thus, when an XY child appears incapable of penetrative sex due to an intersex condition, accidental castration, or penis size, that infant will typically be designated a "girl"[21] and subjected to feminizing procedures—e.g. clitoridectomy, clitoral reduction, vaginoplasty, vaginal dilation, hormonal treatments, and the removal of internal sex organs if present—without regard to

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[19] *See* FAUSTO-STERLING, *supra* note 6, at 71–73 (discussing physician's efforts to ensure that intersex infants grow up heterosexual, not homosexual); Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, GLQ: J. LESBIAN & GAY STUD., Vol 4.2, 189, 191 (1998) [hereinafter Chase, *Hermaphrodites with Attitude*] (giving an intimate account of this process of rendering a child "penetrable"). Intersex surgeries are frequently commenced within days or hours of a child's birth. For one account, see Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & The Law*, 11 ANNALS OF HEALTH L. 195, 195 (2002).

[20] *See* Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J.L. & MED. 41, 42 (2004) ("The medical community's current practice focuses solely on genital appearance, discounting the fact that chromosomes also affect individuals' gender identities and personalities."); *see also* Greenberg, *supra* note 6, at 281 (reporting that in addition to forty-six XX/XY, children have been born with chromosomes ranging from XXX, XXY, XXXY, XYY, XYYY, XYYYY to XO). Two of the most common intersex conditions, Congenital Adrenal Hyperplasia (CAH) and Androgen Insensitivity Syndrome–complete or Partial (CAIS or PAIS), are caused by increased production of, or alternatively, decreased receptivity to hormones. *Id.* at 286–88.

[21] *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, 125–26 (2005) (estimating that "Ninety percent of [genital] surgery is aimed at changing the intersex child into a girl"); *see also* FAUSTO-STERLING, *supra* note 6, at 57. However, this trend is likely to change as techniques for "masculinizing" intersex children are perfected—a burgeoning area of medical practice that Anne Fausto-Sterling has coyly described as an "obsession with penis-building." *Id.* at 63.

other indicators of sexual identity.[22] As the physician who pioneered this approach explains: "The rationale for such a program is simple: it is possible, with surgery and hormonal therapy, to habilitate a baby with a grossly defective penis more effectively as a girl than a boy. . . . Vaginoplasty permits a normal sex life, whereas phalloplasty would not."[23]

Although the practice of ensuring that newborns function sexually may seem befuddling or even prurient, queer theory helps explain the origins of such interest, as well as the fact that pediatric assignment of sex has only recently been questioned.[24] As Judith Butler remarks:

> The mark of gender appears to "qualify" bodies as human bodies; the moment in which an infant becomes humanized is when the question, "is it a boy or girl?" is answered. Those bodily figures who do not fit into either gender fall outside the human, indeed,

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[22] As one author explains: "Before assigning a gender, doctors usually determine the baby's chromosome pattern and internal reproductive organs (including the gonads, which will be the source of hormones that influence later development of secondary sex characteristics), and examine the external genitalia. However, none of these factors is determinative in assigning a gender." Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 66 (2006).

[23] John Money, *Ablatio Penis: Normal Male Infant Sex-Reassigned as a Girl*, ARCHIVES OF SEXUAL BEHAVIOR, Vol 4.1 65, at 66 (1975) [hereinafter Money, *Ablatio Penis*]; *see also* Chase, *Hermaphrodites with Attitude, supra* note 19, at 192 (noting "Members of the Johns Hopkins intersex team have justified female assignment by saying, 'You can make a hole, but you can't build a pole'") (citing Melissa Hendricks, *Is It a Boy or a Girl?*, JOHNS HOPKINS MAG., Nov. 1993, at 10–16).

[24] For recent commentary, see, e.g., Alison Redick, *What Happened at Hopkins: The Creation of the Intersex Management Protocols*, 12 CARDOZO J.L. & GENDER 289, 295 (2005) (critiquing Money's approach as a "dangerously normative conception of gender"); Jessica Knouse, *Intersexuality and the Social Construction of Anatomical Sex*, 12 CARDOZO J.L. & GENDER 135 (2005) (calling for an end to sex assignment and the recognition of a third sex category); Elizabeth Reilly, *Radical Tweak—Relocating the Power to Assign Sex*, 12 CARDOZO J. L. & GENDER 297 (2005) (calling for delayed sex assignment); Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo-American Law*, 12 CARDOZO J.L: & GENDER 213 (2005) (advocating for lived gender as a means of determining sex assignment).

> constitute the domain of the dehumanized and the abject against which the human itself is constituted.[25]

However cosmetically successful the process of engineering legible bodies—e.g. those equipped to penetrate or be penetrated—intersex surgery often leaves its targets without the ability to reproduce or experience orgasms and sexual sensation.[26] Studies of pediatric genital surgery have also shown that the results are poor, with infants requiring an average of three to five surgical procedures, or as many as twenty-two, over the course of a lifetime.[27]

In addition, genital surgeries are often performed without the consent of intersex patients. Parents often hastily agree to intersex surgeries for their children, based on a false sense of urgency created by physicians and the medical establishment. These decisions are typically made without benefit of even basic information regarding the surgical procedures, available

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[25] BUTLER, *supra* note 2, at 142. Judith Butler, Michel Foucault, and Thomas Laqueur pioneered the modern effort to queer sex categories.

[26] *See* Chase, *Hermaphrodites with Attitude, supra* note 19, at 192. Ehrenreich & Barr also make this point, noting:

> [P]hysicians take great care (and cause great suffering to the intersex children, as detailed above) to construct vaginas so that the girls they create can grow up to have penetrative sex. However, the doctors appear significantly less concerned about preserving the functionality of the clitoris—the major source of sexual gratification in women—as demonstrated by the prevalence of clitoral reduction and recession.

Ehrenreich & Barr, *supra* note 21, at 124. In addition to the ability to be penetrated, "females" have also been defined by the ability to engage in childbirth—something which has led to the recommendation that intersex children affected by Congenital Adrenal Hyperlasia, a hormonal condition that does not affect the gonads, be reared as female despite their more masculine appearance. *See* Ben-Asher, *supra* note 17, at 61 (citing American Academy of Pediatrics, *supra* note 18, at 141).

[27] *See* Ehrenreich & Barr, *supra* note 21, at 105–06 (discussing average number of procedures); *see also* FAUSTO-STERLING, *supra* note 6, at 86–87; Creighton et al., *supra* note 16 (discussing flawed cosmetic outcomes).

alternatives, or possible harms.[28] Intersex children, in turn, are often denied basic information about their medical conditions and treatment histories well into their adolescent and adult lives.[29] This policy of deceit has long enjoyed the endorsement of the medical community, with leading voices in the field recommending that intersex children never be told about their medical conditions for the sake of their psychological development and wellbeing.[30]

Today, these standards of practice are contradicted by copious amounts of evidence indicating that non-consensual, pediatric genital "normalization" surgery causes substantial harm.[31] Intersex children who undergo pediatric sex assignment procedures and repeated hospitalizations regularly grow up being told they have an obscure chronic illness—scarcely kinder

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[28] *See generally* Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 42–47 (2000) (discussing gaps in "parental" informed consent); Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GENDER 31, 37 (2005); Tamar-Mattis, *supra* note 22, at 64.

[29] For recent proposals on how to deal with these issues using a legal frame, see generally Kishka Kamari-Ford, Note, *"First, Do No Harm"—The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants*, 19 YALE L. & POL'Y REV. 469, 488 (2001) (calling for a complete moratorium on genital surgeries on infants due to the absence of informed consent); Tamar-Mattis, *supra* note 22, at 97–107, (proposing that the final decision be made by courts, not parents, using a best interests of the child analysis) ; Karen Gurney, *Sex and The Surgeon's Knife: The Family Court's Dilemma . . . Informed Consent and the Specter of Iatrogenic Harm to Children With Intersex Characteristics*, 33 AM. J.L. & MED. 625 (2007) (concluding that decisions regarding infant sexual assignment should not be vested with parents).

[30] FAUSTO-STERLING, *supra* note 6, at 64 ("Medical manuals and original research articles almost unanimously recommend that parents and children not receive a full explanation of an infant's sexual status."); Martin T. Stein et al., *A Newborn Infant With a Disorder of Sexual Differentiation*, 114 PEDIATRICS 1473, 1476 (2004) (describing Money's approach).

[31] Dreger, *Ambiguous Sex*, *supra* note 9, at 32 (stating "[c]learly, the notion that deception or selective truth-telling will protect the child, the family, or even the adult intersexual is extraordinarily paternalistic and naïve, and, while perhaps well-intentioned, it goes against the dominant trend in medical ethics as those ethics guidelines are applied to other, similar situations.").

and gentler than the truth.[32] If or when the truth is finally revealed, intersex children frequently report feeling as though they have endured assault and battery by their attending physicians.[33] In addition, normalization procedures often misfire, with intersex children growing up to desire bodies and sexual identities other than the ones they were assigned.[34] As one researcher explains, "[c]oping with this 'gender dysphoria,' as it is termed in the medical community, is very difficult for an intersexual whose genitals of the sex with which they now identify were intentionally surgically removed with their parents' consent."[35]

Yet, even where doctors successfully predict the sex that an intersex child assumes as an adult, for many, feelings of deceit,

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[32] Cheryl Chase was admitted to the hospital on pretense that she needed a hernia operation. *See* FAUSTO-STERLING, *supra* note 6, at 80. For Chase's stirring account, *see* Chase, *Hermaphrodites with Attitude, supra* note 19, at 194.

[33] *See* Chase, *Hermaphrodites with Attitude, supra* note 19, at 194–96.

[34] The movement to end non-consensual medical interventions gained momentum from the well-documented story of David Reimer, or John/Joan, an XY girl whose genital surgery was championed by John Money as a successful medical intervention. *See* Money, *Ablatio Penis, supra* note 23, at 66–71 (discussing case study). David's lifelong identification as "male" led him to transition—despite a lack of upfront disclosure about the initial sex assignment procedures he had been subjected to. *See* JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL 143–50, 212–13 (2000); Haas, *supra* note 20, at 46 (noting that David Reimer was "certain that he was not a girl, despite being deceived by his doctor and his family"). David eventually committed suicide—due in large part to the plethora of medical decisions that had been made without his consent. *See* John Colapinto, *Gender Gap: What Were the Real Reasons Behind David Reimer's Suicide?*, SLATE., June 3, 2004, http://slate.msn.com/id/2101678; Hazel Glenn Beh & Milton Diamond, *David Reimer's Legacy: Limiting Parental Discretion*, 12 CARDOZO J.L. & GENDER 5 (2005) (discussing David Reimer's suicide and encouraging an end to parental consent to surgery that "normalizes" genitalia in infancy).

[35] Kamari-Ford, *supra* note 29, at 484.

betrayal, and outrage remain.[36] For these reasons, since its founding in 1993, the Intersex Society of North America (ISNA) has urged physicians to delay genital surgeries until patients are old enough to give informed consent,[37] disputing the notion that binary sex assignment is necessary for healthy childhood development.[38]

In rejecting treatment regimes bent on "normalizing" bodies, ISNA activists have also protested against their erasure and the notion that male or female is a "presupposition of humanness."[39] As ISNA pioneer Cheryl Chase notes in her candid narrative: "I could not accept that it was just or right or good to treat any person as I had been treated—my sex changed,

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[36] *Hermaphrodites with Attitude* presents the narratives of several intersex women concerning the nonconsensual medical treatment they were subjected to. As the women testify:

> All the things my body might have grown to do, all the possibilities, went down the hall with my amputated clitoris to the pathology department. The rest of me went to the recovery room—I'm still recovering. . .
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> I am horrified by what has been done to me and by the conspiracy of silence and lies. I am filled with grief and rage, but also relief finally to believe that maybe I am not the only one.

Chase, *Hermaphrodites with Attitude*, *supra* note 19, at 197. Indeed, as one author points out, "[t]he strongest argument against genital-normalizing surgery on infants is that every intersex person who has spoken publicly on the subject has spoken against surgery." Tamar-Mattis, *supra* note 22, at 67.

[37] In 2008, the Intersex Society of North America (ISNA) shuttered its doors and ceded operations to the Accord Alliance. *See* The Intersex Society of North America, http://www.isna.org/farewell_message (last visited May 1, 2011).

[38] *See* Emily A. Bishop, Note, *A Child's Expertise: Establishing Statutory Protection for Intersexed Children Who Reject Their Gender of Assignment*, 82 N.Y.U. L. REV. 531, 537 (2007) ("Evidence of healthy psychosocial development in intersexed children who have not had surgery . . . calls into question the necessity and wisdom of the procedures.") (internal citations omitted); *see also* Benson, *supra* note 28; Reilly, *supra* note 24, at 333 (arguing that sex assignment can be delayed until puberty).

[39] Judith Butler, *Doing Justice to Someone: Sex Reassignment and Allegories of Transsexuality*, 7 GLQ: J. LESBIAN & GAY STUD. 621, 622 (2001) [hereinafter Butler, *Doing Justice to Someone*].

my genitals cut up, my experience *silenced and rendered invisible*."[40]

Indeed, because intersex surgeries are usually not motivated by medical necessity, and because they proceed without so much as the informed consent of patients, they ultimately serve a different function: disciplining the body and perpetuating the notion of binary sex for heterosexist ends. As Chase explains, "[c]utting intersex genitals becomes yet another hidden mechanism for imposing normalcy upon unruly flesh, a means of containing the potential anarchy of desires and identification."[41]

Studying the experiences of the intersex community thus reveals biological conceptions of sex to be discursive as well as generative—creating the very thing they describe. Through this lens, the terms "male" and "female" do not describe what is inherent as much as what has been *assigned*[42]—first by medicine, and then by cultural forces that inscribe meaning and hierarchies of value to a social construct, viewed instead as a social fact.[43]

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[40] Chase, *Hermaphrodites with Attitude*, *supra* note 19, at 195 (emphasis added).

[41] *Id.* at 204.

[42] As Part I.A, *supra*, explains, sex is always assigned. After inspecting a child's genitals, doctors will determine whether an infant will leave the hospital as an XY boy, an XY girl (like John/Joan); or an XX girl scheduled for a clitoridectomy. This fact has led one writer to declare sex as nothing more than "birth-assigned gender." Vade, *supra* note 7, at 291–92 ("Sex is not truth. . . . Sex is the unconsented gender assignment at birth that masks itself as objective truth.").

[43] This Article's use of the phrase "social construct" is informed by critical race theory as well as the work of Foucault and Butler. While these literatures challenge the notion that social categories are coherent and prediscursive, neither question their materiality or ongoing significance to society at large. *See generally* BUTLER, *supra* note 2, at 3–9 (deconstructing the notion of the woman); 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 154–57 (Vintage Books ed. 1990) (1976) (deconstructing sex generally); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1997) (deconstructing race).

B. Disciplining the Body: Transgender Identity and the Medical Management of Sex

While intersex persons expose the constructed character of the terms male and female, transgender persons undermine the binary gender system in a different way, by shedding light on the ways that sex and gender identity can be non-corporeal—transcending the body, or at least, the sex classifications assigned at birth. This point is captured best by the sheer multitude of transgender identities. While some individuals reject their birth-assigned sex in favor of another, others reject the binary system entirely, choosing to identify as androgynous, genderqueer, gender non-conforming, two-spirit or perhaps just trans.[44] As transgender writer Paisley Currah notes, these two identity projects are not an "either-or proposition."[45] Instead, they exist in dialogue—with activists challenging the practice of identity regulation in an effort to create a broader, libratory space while using existing legal structures to harmonize their internal senses of self.

Although transgender and intersex persons both complicate biological essentialism,[46] the relationships of both communities

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[44] Even this is an incomplete synthesis. For more, see generally Vade, *supra* note 7, at 266 (listing a number of alternative genders); John M. Ohle, Note, *Constructing the Trannie: Transgender People and the Law*, 8 J. GENDER RACE & JUST. 237, 272–73 (2004); Jennifer Rellis, *Please Write "E" in this box" Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 MICH. J. GENDER & L. 223 (2008) (discussing the hijra of India, who legally identify as a third gender). For an early exploration, see KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US (1994).

[45] Paisley Currah, *The Transgender Rights Imaginary*, 4 GEO. J. GENDER & L. 705, 705 (2003). Nor should advocating for the disestablishment of gender require abandoning the pursuit of gender appropriate identity documents or health care, through the use of discrete legal claims. *Id.* at 716–17.

[46] I use the term "biological essentialism" to refer to those theories that regard "male" and "female" as stable, concrete and legible categories, frequently defined with reference to genitalia.

to the medical establishment could hardly be more different.[47] Ironically, while intersex persons receive near-immediate medical interventions, oftentimes as a gratuity,[48] transgender persons face significant obstacles as well as steep costs when seeking gender-related care. This is not because transgender persons escape the scrutiny of medical authorities; rather, it results from the specific and invasive forms of scrutiny and regulation that occur. While intersex persons are figured to have *a disorder of the body*, transgender people are classified as

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[47] For a thoughtful exposition of these issues, see, e.g., Ben-Asher, *supra* note 17, at 90 (explaining "Intersex and transsex politics are now at odds with each other. . . . the two social movements are supported by opposing medical structures and refute each other's medically based narratives"); Butler, *Doing Justice to Someone*, *supra* note 39, at 626 ("Another paradox that emerges here is the place of sharp machines, of the technology of the knife, in debates on intersexuality and transsexuality.").

[48] As Chase explains:

> More than one ISNA member has discovered that surgeons actually operated on their genitals at no charge. The medical establishment's fascination with its own power to change sex and its drive to rescue parents from their intersex children are so strong that heroic interventions are delivered without regard to the capitalist model that ordinarily governs medical services.

Chase, *Hermaphrodites with Attitude, supra* note 19, at 203. This is ironic, of course, because sex (re)assignment surgeries (SRS) procedures here are undesired and nonconsensual. A further irony—although transgender persons have great difficulty securing legal recognition following their sex change surgeries, intersex children who involuntarily undergo SRS receive amended birth certificates, identity documents, and legal recognition from the very same courts that shutter their doors to transgender petitioners. *See* Corbett v. Corbett, [1970] 2 Eng. Rep. 373, 2 W.L.R. 1306, *available at* http://www.pfc.org.uk/node/319 (refusing to recognize petitioner as a legal woman after determining they were transgender, *not* intersexual); *see also* Littleton v. Prange, 9 S.W.3d 223, 232 (Tex. Ct. App. 1999) (Angelini, J., concurring) (finding that transgender petitioner could not truly transition into a woman but "express[ing] no opinion" about how intersex petitioners should be treated).

having *a disorder of the mind.*[49] As a result, transgender persons seeking gender-affirming healthcare treatment (e.g. hormones, surgery) are routinely forced to pathologize themselves. They are required to adopt a specific set of narratives about their bodies, their identities, and their childhoods in order to convince the therapists who serve as gatekeepers that they are "disordered" and therefore entitled to care.[50] Reflecting on his own experiences, transgender legal theorist Dean Spade writes: "In order to get authorization for body alteration, the scripted transsexual childhood narrative must be performed, and the GID diagnosis accepted, maintaining an idea of two discrete gender categories that normally contain everyone but occasionally are wrongly assigned, requiring correction to reestablish the

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[49] Gender Identity Disorder (GID) was first classified as a mental disorder by the American Psychiatric Association in 1980. In DSM-III, it appeared under the heading "Transsexualism," and today in the Fourth Edition of the manual, it remains prominently listed as a mental disorder. *See* TASK FORCE ON DSM-IV, AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, § 302.85 (4th ed. text rev. 2000). Homosexuality originally appeared as a mental disorder as well, but it was removed after the second printing. TASK FORCE ON DSM-II, AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1974). This terminology has been soundly critiqued. *See, e.g.*, GID Reform, http://www.gidreform.org/index.html (last visited May 1, 2011). Perhaps heeding the call of activists, under proposed revisions for the DSM, Gender Identity Disorder would be reclassified and termed as "*Gender Incongruence*" instead. *See* TASK FORCE ON DSM-V, AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS—PROPOSED REVISIONS (DSM-V), § 302.85, *available at* http://www.dsm5.org/ProposedRevisions/Pages/proposedrevision.aspx?rid=482.

[50] A diagnosis of GID is generally a prerequisite for accessing nearly all forms of care. Dean Spade, *Resisting Medicine, Re/modeling Gender,* 18 BERKELEY WOMEN'S L.J. 15, 19–23 (2003) [hereinafter Spade, *Resisting Medicine*] (discussing how accessing care requires successfully "passing as a transsexual"); *see* Carolyn Grose, *A Persistent Critique: Constructing Client's Stories*, 12 CLINICAL L. REV. 329, 340–43 (2006) (discussing the 1979 Harry Benjamin International Gender Dysphoria Association Standards of Care). From there, transgender persons were traditionally expected to complete a "'triadic treatment sequence' composed of hormone therapy, a real-life experience of living as a member of the opposite sex [for at least 12 months prior to SRS], and sex reassignment surgery." *Id.* at 341. In addition, patients must have support letters from multiple mental health specialists. *Id.* For current care guidelines and "eligibility criteria," see THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 7–8 (6th ed. 2001), *available at* http://www.wpath.org/Documents2/socv6.pdf.

norm."[51] Concurring, another writer explains: "Gender nonconforming people who do not articulate their experiences of gender in a manner that comports with the diagnostic criteria for GID are often refused hormone treatments, surgeries, or other gender-related health care."[52]

Disease and disability narratives have also been crucial for transgender persons seeking to defray the near-prohibitive expenses of gender-related healthcare. With the costs of hormone treatment, sex reassignment procedures and the prerequisite mental health visits frequently exceeding $100,000,[53] without healthcare coverage, all but the most wealthy transgender people would be forced to forgo treatment

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[51] Spade, *Resisting Medicine, supra* note 50, at 25–26.

[52] Franklin Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in The Law*, 36 COLUM. HUM. RTS. L. REV. 713, 732 (2005).

[53] As one author explains,

> Before SRS can even take place, the transsexual must typically undergo at least two years of preparation and extreme time-consuming and financial commitments. Three months of psychotherapy are required to obtain an evaluation for hormone therapy and one or two years spent living twenty-four hours a day as the target gender while continuing hormone therapy. The procedures and operations themselves, can add up to $50,000 and sometimes more than $100,000.

Stephanie Markowitz, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 CARDOZO J.L. & GENDER 705, 709 (2008) (internal citations omitted) (estimating costs of care for transgender women); *see also* Ben-Asher, *supra* note 17, at 56 ("The high costs of sex change surgery, which may exceed $ 100,000, turn the Medicaid program into a gatekeeper of the legal recognition of transsexuals."). For female-to-male transgender persons, costs may be lower, as surgical intervention may be limited to chest or "top" surgery. *See* Patricia A. Cain, *Stories From The Gender Garden: Transsexuals And Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321, 1334 n. 59 (1998). But compare this to Cheryl Chase's account of intersex surgery, which are often provided for free. Chase, *Hermaphrodites with Attitude, supra* note 19, at 203.

and the possibility of legal recognition it can usher in.[54] In this capacity, private insurers and Medicaid agencies act as another set of regulatory authorities, with the former rejecting claims under broad exclusion clauses,[55] and the latter rejecting the expenses of those who fail to establish that sex reassignment procedures are a "medical necessity," or "the only successful treatment" for gender identity disorder.[56]

While this may encompass the story of many transgender persons, it entrenches the discourse of "disordered minds, disordered bodies" in medicine and law without enshrining any affirmative, class-based rights—for instance, the right to self-determination and self-expression, the right to medical treatment, or the right to be free from gender identity discrimination.[57] This is no accident: rather, the gatekeeping and medicalization of transgender identity permit ongoing denial of the complexity and diversity of sex. Thus for transgender

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[54] *See* Jerry L. Dasti, Note, *Advocating a Broader Understanding of The Necessity of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738, 1742–43 (2002) ("sex reassignment surgery is a necessary (though often not sufficient) condition for legal recognition."); *see also* Spade, *Documenting Gender*, *supra* note 1, at 764–75 (discussing how proof of sex reassignment surgery is necessary to obtain identity documents at bureaus of public records, the United States Passport Agency, and the DMV).

[55] Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 92 (2002) (noting "many insurers liberally apply the SRS exclusion clauses to deny transsexuals coverage for non-transition related, medically necessary conditions . . . under the rationale that any medical care a transsexual needs is an excludable transsexual-related condition").

[56] Dasti, *supra* note 54, at 1759–63 (describing Medicaid restrictions). The notion of necessity is one that must be proven—established in part by psychiatric assessments and doctors' letters. *Id.* at 1763. It also must be shown that the proposed treatment is not "cosmetic" or "experimental." *Id.* Ironically, intersex surgeries are not denied on these grounds; instead, they are concerns that have only recently been raised by INSA activists challenging current surgical practices. *See* Ben-Asher, *supra* note 17, at 52–66 (describing the ways these terms are deployed by, or used against intersex and transgender activists).

[57] Romeo, *supra* note 52, at 739–43 (proposing broad recognition for the right to "gender self-determination"); Laura K. Langley, Note, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. C.L. & C.R. 101, 101 (2006) (asserting that "people must be able to determine gender for themselves.").

persons, living and being recognized as one's desired sex cannot be achieved by asserting sexual autonomy; it requires pathologizing oneself instead.[58]

C. The Legal Construction of Sex: Constructing and Adjudicating Sex Difference

Missing from this story thus far is law's key role in the construction of sex. Courts and administrative agencies make two demands of bodies—that they be legible as male or female, and that they be so designated and classified. These classification practices form part of an intricate, two-tiered, bureaucracy, with state agencies placing sex-designations on birth certificates, drivers' licenses, and other identity

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[58] Yet, even these strategies do little to advance the health care needs of transgender youth or transgender persons in state custody, and accessing gender-related health care can be especially dire. *See generally* Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents To Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361 (2007) (speaking of transgender youth's peculiar difficulties in seeking gender affirming healthcare); Maureen Carroll, Comment, *Transgender Youth, Adolescent Decisionmaking, and* Roper v. Simmons, 56 UCLA L. REV. 725 (2009) (discussing the difficulties of obtaining hormones); *see also* J. Lauren Turner, Note, *From The Inside Out: Calling on States to Provide Medically Necessary Care to Transgender Youth in Foster Care*, 47 FAM. CT. REV. 552 (2009).

In addition to being denied healthcare, transgender persons in prison or immigration detention face the additional hurdle of having to navigate sex-segregated facilities. For articles discussing the unique perils faced by the transgender prison population, see generally Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167 (2006); Alvin Lee, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447 (2008); Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem—A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a "Universal" Recommendation To Improve Treatment*, 15 LAW & SEX. 91 (2006); Nikko Harada, Comment, *Trans-Literacy Within Eighth Amendment Jurisprudence: De/Fusing Gender And Sex*, 36 N.M. L. REV. 627 (2006). For an article about transgender people in immigration detention, see Dana O'Day-Senior, Note, *The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453 (2008).

documents;[59] federal agencies insisting that data be collected and tabulated;[60] and both state and federal authorities using sex data to enforce same-sex marriage bans and policies of intimate discrimination,[61] select combat troops for foreign wars,[62] conduct population-level surveillance for domestic wars,[63] and administer complex and embedded regimes of state-sanctioned sex segregation.[64]

In determining which bodies are male or female, sex is adjudicated as a mixed question of fact and law, with neither self-proclaimed identity nor evidence of sex reassignment surgery wholly sufficient to confer sexual citizenship and legal

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[59] *See generally* Spade, *Documenting Gender*, *supra* note 1, at 737–91 (discussing areas of the law where gender classification is presently required).

[60] *Spade, Documenting Gender*, *supra* note 1, at 797–800 (discussing the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), a statute which requires states to display gender identity information on drivers' licenses for so-called national security purposes); *see also* McGrath, *supra* note 1, at 398–99 (same) (noting "[N]o state has yet to adopt a gender-neutral driver's license or identification card. The REAL ID Act precludes any state's efforts to do so.").

[61] Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1309 (2009) (discussing public and private discrimination based in the realms of marriage, sex, and romantic affiliation, and discussing laws' explicit and implicit role).

[62] *See, e.g.*, Elaine Donnelly, *Constructing the Co-Ed Military*, 14 DUKE J. GENDER L. & POL'Y 815, 821–22 (2007) (calling for an end to restrictions on the military service of women); Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women from Combat*, 57 ALA. L. REV. 303 (2005).

[63] *See, e.g.*, Spade, *Documenting Gender*, *supra* note 1, at 797–800.

[64] *See* David S. Cohen, *The Stubborn Persistence of Sex Segregation*, COLUM. J. GENDER & L. (forthcoming 2011) (documenting the myriad forms of sex discrimination that remain lawful) (on file with author).

personhood.[65] Instead, courts and agencies act as fact-finders, inspecting transgender bodies, scrutinizing medical records, and collecting testimonial evidence in order to reach a final conclusion concerning who and *what* they are—"male" or "female."

Yet, while courts are empowered to act as fact-finders, there is no consistency in the standards applied, suggesting a jurisprudence of desired outcomes. Some court cases have treated expert medical testimony as sacrosanct. For instance, in denying a transwoman's request to change her birth certificate, a New York court relied on the opinion of a physician's committee that the petitioner remained male, calling its deference "mandatory."[66]

However, where expedient, courts have accorded little or no weight to medical opinion. For example, in *Littleton v. Prange*,[67] the court explicitly rejected both expert testimony and medical authorities in determining that the petitioner, a transgender widow, did not have standing to bring a wrongful death action on her husband's behalf. Voiding her marriage on grounds that it was an illegal same-sex union, the court held: "Some physicians would consider Christie a female . . . . Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied."[68]

Other courts direct their inquiry to transgender petitioners' body parts, effectively placing their genitals on trial. In *Kantaras*

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[65] Sex reassignment surgery (SRS) is generally regarded as a *necessary but insufficient* condition for legal recognition. That is to say, although SRS itself is not conclusive of legal personhood, recognition is never accorded on basis of self-declared identity alone. *See In re* Heilig, 816 A.2d 68, 86–87 (Md. 2003) (according recognition to transgender persons who undergo SRS procedures that are "permanent and irreversible"). For a critique that the requirement of medical intervention unduly burdens transgender persons who are poor or genderqueer, see Romeo, *supra* note 52, at 731–36, 739 (advocating for a new approach).

[66] Anonymous v. Weiner, 270 N.Y.S.2d 319, 323 (N.Y. Sup. Ct. 1966).

[67] 9 S.W.3d 223 (Tex. Ct. App. 1999).

[68] *Id.* at 230–31 (emphasis added).

v. Kantaras, the presiding judge did precisely this—inquiring into "the appearance and function of his genitals, whether he urinated while seated or standing, and the sexual practices in which he and his wife had engaged"—when determining whether he was fit to be a custodial parent.[69] Similarly, in *M.T. v. J.T.*, a lone case upholding a transgender marriage, the court's approach was equally invasive. Before concluding that the transgender petitioner was a lawful female, the court scrutinized her vagina—determining whether it had a "good cosmetic appearance," and whether it would be "adequate for . . . traditional penile/vaginal intercourse."[70]

Still on other occasions, what courts are looking for is even more inscrutable: In *In re Ladrach*, it is nothing less than proof of changed chromosomes;[71] in another case, it is the "ability to 'produce ova and bear offspring'"—a standard which many "real" women would fail to meet.[72] The variability of standards that courts employ, coupled with the certainty that each court professes in reaching its determination,[73] reveals the extent to which definitions of "male" and "female" are constructed by, and adopted as, law. Put another way, sex is revealed to possess

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[69] *See* Romeo, *supra* note 52, at 727–28 (citing Kantaras v. Kantaras, No. 98-5375CA, at *47–51 (Fla. Cir. Ct. Feb. 21, 2003)). Although Kantaras was eventually awarded custody, the judge's final opinion was *eight hundred pages* long and presented detailed factual findings, including the finding that Michael Kantaras was legally male. *See* Nat'l Ctr. for Lesbian Rts., *supra* note 3.

[70] M. T. v. J. T., 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976). The court ultimately held that marriages of "postoperative transsexuals" would be recognized, provided that "by virtue of medical treatment, [they] thereby possessed of the full capacity to function sexually as a male or female[.]" *Id.* at 211. For a case with the same reasoning but different result, see Corbett v. Corbett, [1970] 2 Eng. Rep. 373, 2 W.L.R. 1306 (scrutinizing the length of a "so-called artificial vagina").

[71] 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987).

[72] *In re* Gardiner, 42 P.3d 120, 135 (Kan. 2002); *see also* Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371, 378 (2004) (discussing how capacity for procreation is not necessary to determining who can marry).

[73] *Littleton*, 9 S.W.3d at 223–24 (rejecting SRS, doctor's notes, and medical records as competent evidence of sex identity, and instead deeming "schoolchildren" as the proper adjudicators of sex determinations).

both an ideological and teleological quality, existing as dogma as well as evidence of the Creator's work—with the Creator being our system of laws.[74]

Yet, the repeated theme of case law—that *voluntary*[75] sex reassignment procedures do not guarantee legal personhood[76]—does more than deny transgender people the satisfaction of living as their self-declared genders. Instead, in many contexts it neuters them, robbing them of sexual identities entirely.[77] No better example exists than courts' handling of transgender civil rights claims. Whether the issue is employment discrimination, public accommodations/bathroom access or Medicaid access, courts routinely hold that discrimination against transgender persons is *not* discrimination on the basis of sex, but something else.[78]

For instance, in *In re Gardiner*,[79] the court posthumously

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[74] *See generally* Cruz, *supra* note 10, at 1003–05 (comparing sex classifications to religion and noting their ideological character). For a rhetorical slip, see *Littleton*, 9 S.W.3d at 231 ("Christie [Littleton] was created and born a male.").

[75] Here, important contrast is drawn between the experience of transgender persons and that of intersex persons who are the recipients of nonconsensual sex assignment surgery.

[76] *See Littleton*, 9 S.W.3d at 231. Although *Kantaras, Gardiner,* and *Littleton* are especially notorious, the modern administrative state polices sex in a manner that is equally insidious. *See* Spade, *Documenting Gender*, *supra* note 1, at 759.

[77] Abigail W. Lloyd, *Defining the Human: Are Transgendered People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 154 (2005) (lamenting "[n]o matter how a transgender plaintiff articulates his injury, he is likely to encounter a court that draws a line in a way that makes him a stranger to all of the laws that could protect him").

[78] Seemingly perplexed by the phenomenon, one article on transgender people begins with a question: "Why is it that our jurisprudence has developed a notion of sex, gender, and sexual orientation that completely excludes transsexual or transgendered persons? Are transsexual persons neither male nor female under the law, and thus undeserving of protections that are available for men and for women?" Cain, *supra* note 53, at 1324.

[79] 42 P.3d 120 (Kan. 2002).

voided a transgender marriage on grounds that the petitioner was a "transsexual" as opposed to an actual man or a woman. As the court stated, "The words '*sex*,' '*male*' *and* '*female*' in everyday understanding *do not encompass transsexuals*. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria."[80]

In *Underwood v. Archer Management Services, Inc.*, the court reached a similar conclusion, holding, "Ms. Underwood fails to allege any discrimination on the basis of her being a woman, in that she merely indicates that she was discriminated against *because of her status as a transsexual*."[81] Thus, in the eyes of many judges, sex reassignment surgery renders a person neither male nor female, but merely "a transsexual"—an abject status that excludes the individual from civil rights protections and, more fundamentally, from the category of the *human*.[82]

A similar line of reasoning was employed in *Ulane v. Eastern Airlines*,[83] a Title VII case brought by Karen Ulane, an airline pilot who was discharged after receiving sex reassignment surgery. Rejecting the petitioner's contention that she had been discriminated against on the basis of sex, the court wrote:

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate *against women because they are women* and *against men because they are men*.

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[80] *Id.* at 135 (emphasis added).

[81] 857 F. Supp. 96, 98 (D.D.C. 1994) (emphasis added).

[82] *Id.* at 1084, 1085; *see also* BUTLER, *supra* note 2, at 142. For two thoughtful expositions on transgender lives and judicial rhetoric, see Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 344–46 (1999) (discussing *Ulane*, *infra* note 83); and Janine M. deManda, *Our Transgressions: The Legal System's Struggle with Providing Equal Protection to Transgender and Transsexual People*, 71 UMKC L. REV. 507 (2002).

[83] 742 F.2d 1081 (7th Cir. 1984).

> The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body *who believes himself to be female*, or a person born with a female body *who believes herself to be male*[.][84]

Ulane's reasoning has been relied on in a number of subsequent cases, including *Etsitty v. Utah Transit Authority.*[85] In *Etsitty*, the Court of Appeals for the Tenth Circuit rebuffed a transgender woman's claims that her termination as a bus driver was impermissible sex discrimination. Citing *Ulane* with approval, the court ruled that transgender people did not enjoy Title VII protections, holding:

> In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.[86]

Lest any ambiguity have been created by its statement, the court proceeded to clarify that, for transgender people, discrimination on the basis of sex never occurs, holding that, "[h]owever far *Price Waterhouse* reaches," employers have a non-discriminatory justification for firing transgender employees who seek to be accommodated by company bathrooms.[87]

In the few instances where transgender plaintiffs have prevailed under Title VII, it is often a pyrrhic victory, gained at the expense of judicial affirmation of transgender identities. In

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[84] *Id.* at 1085 (emphasis added).

[85] 502 F.3d 1215 (10th Cir. 2007).

[86] *Id.* at 1222.

[87] *Id.* at 1224.

Smith v. City of Salem, Ohio,[88] a transgender woman who prevailed on her Title VII claim did so, not on grounds that she suffered discrimination as a female (based, perhaps, on her more masculine appearance), but instead on the grounds that she was discriminated against as a "gender non-conforming" man.[89] The well-intentioned court—while vociferously objecting to the *Ulane* line of cases[90]—nonetheless introduced petitioner by her birth name, "Jimmie L. Smith," and referred to her using male pronouns throughout.[91] An identical phenomenon took place in *Barnes v. City of Cincinnati*[92] when a transgender firefighter challenged her termination. Although the court found for the plaintiff, Phillip Barnes, not Philecia Barnes, was granted relief. [93]

Thus, surveying transgender rights cases demonstrates the ways in which transgender bodies remain unintelligible to the

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[88] 378 F.3d 566 (6th Cir. 2004).

[89] *Id.* at 572 (Finding prima facie discrimination under *Price Waterhouse* because petitioner "did not conform with . . . . sex stereotypes of how a man should look and behave.").

[90] Indeed, as the Court bravely held, "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." *Id.* at 575.

[91] *Id.* at 567.

[92] 401 F.3d 729, 733 (6th Cir. 2005).

[93] Analysis of successful cases also reveals the extent to which discourses on disability have become a necessity for plaintiffs. In *Smith* and *Barnes*, Appellate counsel endorsed the gender non-conformity theory and used male pronouns to describe the transgender plaintiffs, albeit grudgingly. *See Smith*, 378 F.3d at 572 (discussing gender non-conformity theory raised in the complaint); *see also* Final Brief for Plaintiff-Appellee, Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (No. 03-4110) 2004 WL 5780263, at *1 n.1 (stating "the City chose to use Phillip and male pronouns in its brief. So as not to confuse this Court, Plaintiff will follow suit"). For more discussion about the ironies of using trans-unfriendly rhetoric to advance transgender rights claims, see Spade, *Resisting Medicine*, *supra* note 50, at 33–35; *see also* Jeannie Chung, *Identity or Condition: The Theory and Practice of Applying State Disability Laws to Transgender Individuals*, COLUM. J. GENDER & L. (forthcoming 2011).

judiciary along with complex notions of sex.[94] Law's reluctance to recognize transgender persons on their own terms, as real men and real women who suffer actionable discrimination, has led their legal lives to be characterized by exclusion—exclusion from federal civil rights laws, from disabilities protection, and from the United States Constitution.[95] By designating which bodies and identities are deserving of protection, law's role in the construction of sex serves to define the concept of humanity itself.[96]

D. False Binaries: The Legal Construction of Race Throughout History

There is nothing innocuous about the way that law constructs and manages sex classifications and the sex binary. Rather, the modern adjudication of sex puts courts and agencies to work in ways that resemble the administration of an earlier set of socially constructed categories: racial classifications and the racial caste system. State technologies of administration and classification were a prerequisite to chattel slavery, the Fugitive Slave Act, post-Reconstruction Black Codes, and the more

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[94] Notable exceptions are Schroer v. Billington, 424 F. Supp.2d 203 (D.D.C. 2006), which ruled favorably on a transgender petitioner's employment discrimination claims without compromising her female identity; and O'Donnabhain v. Comm'r of Internal Revenue, 134 T.C. 34, 2010 WL 364206 (U.S. Tax Ct. Feb. 2, 2010), where a tax court used gender-appropriate pronouns when ruling that a transgender woman's SRS expenses were a taxable-deductible expense.

[95] Liberal state legislatures have been the primary protectors of transgender persons in the workplace. *See, e.g.*, Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle To Achieve Judicial And Legislative Equality For Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000) (discussing civil rights statutes that protect and exclude on grounds of gender identity); Marvin Dunson III, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 480–94 (2001) (discussing state ordinances).

[96] Given transgender people's status as legal outsiders, and outsiders to the category of "the human," *see* BUTLER, *supra* note 2, at 142, it should come as no surprise that they experience profound forms of societal marginalization. For a discussion on how unemployment and incarceration affects the lives of transgender people, *see* Part II.B, *infra*; *see also* Currah & Minter, *supra* note 95, at 39–40 (observing that law's disregard for transgender people calls into question their very humanity).

modern regime of separate but equal. What appears as a side-note in *Loving v. Virginia*—that state registrars were required to keep "certificates of racial composition" on file[97]—reveals the true depth of state involvement in the generation of racial meanings. Binary conceptions of race were constructed by, and adopted as law, kept in public records, and placed prominently on identity documents.[98] As the population of immigrants and interracial Americans increased, and the color caste became less reliable, these technologies of racial classification became even more important.[99]

Courtrooms also became sites of racial theatre. Prior to the Civil War, people regularly went to court to challenge their designation as slaves, to defend their status as free persons, or to assert clean hands when charged with aiding fugitives.[100] Race was also litigated by immigrants seeking to qualify for

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[97] 388 U.S. 1, 7 n.9 (1967) (citing VA. CODE ANN. § 20-50 (Repl. Vol. 1960)); *see also* Lombardo, *supra* note 11, at 425–31.

[98] *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (arguing that race is a social construction); HANEY LÓPEZ, *supra* note 43 (exposing law's role in racial construction); *see also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 28 (1991) (discussing the construction of race and noting, "the American racial categorization scheme is not only historically contingent, but, to some extent, legislatively determined"). For commentary on how both race and sexual orientation are socially constructed, see Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 283 (1995) (describing law's "world-making" function).

[99] See generally Marie Amelié-George, *The Modern Mulatto: A Comparative Analysis of the Social and Legal Positions of Mulattoes in the Antebellum South and the Intersex in Contemporary America*, 15 COLUM. J. GENDER & L. 665, 669–79 (2006) (discussing state regulation of so-called "mulattoes" in the lower South); Trina Jones, *Shades Of Brown: The Law Of Skin Color*, 49 DUKE L.J. 1487, 1501–06 (1995) (discussing how law ensured the survival of racial castes amidst increasing racial mixing); Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143 (1997) (exploring the social and legal construction of Mexican racial identities).

[100] *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 111, 133–37 (1998) (discussing the case of Abbey Guy, a slave who sued for her release).

citizenship[101] and, after abolition, race was litigated to claim or divest inheritance, to void marriage licenses and private contracts, to determine the school district in which a child belonged and to bring accusations of reputational injury and slander.[102]

In many respects, the adjudication of race and sex have identical hallmarks.[103] Foremost, courts tasked with making racial determinations classified relied on a binary paradigm: persons were either Black or White.[104] Second, courts adopted one of two approaches: appealing to common knowledge and folk wisdom, or appealing to racialized science.[105] In the period directly following emancipation, racial science loomed large, with states adopting the one-drop rule and theories of

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[101] HANEY LÓPEZ, *supra* note 43, 56-78 (discussing *Ozawa v. United States*, 260 U.S. 178 (1922), and *United States v. Thind*, 261 U.S. 204 (1923)).

[102] Gross, *supra* note 100, at 120–21.

[103] For excellent review essays, see Amelié-George, supra note 99; Amara S. Chaudhry, *Lessons from Jim Crow: What Those Seeking Self-Determination for Transgender Individuals Can Learn from America's History with Racial Classification Categories*, 18 TEMP. POL. & CIV. RTS. L. REV. 505 (2009); Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of The Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917 (2002).

[104] *See* HANEY LÓPEZ, *supra* note 43, at 35–67 (discussing the use of racial binaries in the racial prerequisite cases); People v. Hall, 4 Cal. 399 (1854) (concluding that Chinese people were not White, and were therefore barred from giving in-court testimony); Rice v. Gong Lum, 104 So. 105 (Miss. 1925), *aff'd* 275 U.S. 78 (1927) (concluding that Chinese persons should be sent to segregated Negro schools). Interestingly, while courts remained mired in binary conceptions of race, from an early point the federal census took a different approach. *See* Kenneth E. Payson, Comment, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CALIF. L. REV. 1233, 1252 (1996) (noting that between 1850 and 1870, Mulatto, Indian, Chinese and Japanese all appeared as boxes on the federal census). In 1920, however, the United States Census ceased counting Mulattos as a separate group—officially adopting the "one drop rule." Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1186–87 (1997).

[105] HANEY LÓPEZ, *supra* note 43, at 6–7; *see also* United States v. Thind, 261 U.S 204, 208 (1923) (defining white person as "words of common speech and not of scientific origin").

hypodescent to maintain racial subordination and racial difference.[106] However, as unruly bodies—here, immigrants—began to complicate binary conceptions of race, common knowledge approaches eventually won out, and courts wholly embraced their role as factfinder.[107] As Ian Haney López explains, this phenomenon strongly reveals the constructed character of racial classifications:

> By 1909, changes in immigration demographics and in anthropological thinking combined to create contradictions between science and common knowledge. . . . Science's inability to confirm through empirical evidence that population racial beliefs that held Syrians and Asian Indians to be non-Whites should have led the courts to question whether race was a natural phenomenon. So deeply held was this belief, however, that instead of re-examining the nature of race, the courts began to disparage science.[108]

Law also played a generative role—mandating that racial identity be performed, while simultaneously defining race through these performances. As Ariela Gross explains, "[d]oing the things a white man or woman did became the law's working definition of what it meant to be white."[109] Seen through the lens of queer theory, race and sex can be viewed as having similar footing in this respect because even in the instances where they "congeal into the most reified forms, the 'congealing' is itself an insistent and insidious practice, sustained and regulated by various social means."[110]

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[106] Hickman, *supra* note 104, at 1163, 1173–81.

[107] This is not unlike *Littleton* and *In Re* Gardiner, which rejected medical testimony. *See supra* notes 67–79, and accompanying text.

[108] HANEY LÓPEZ, *supra* note 43, at 5.

[109] Gross, *supra* note 100, at 112.

[110] BUTLER, *supra* note 2, at 43 (discussing gender in a manner that permits comparison).

Whatever the similarities between state regulation of race and sex throughout history, modern practices have diverged. Today, no one questions the impropriety of adjudicating racial identity,[111] and scarcely anyone accepts the eugenics-like logic that permeated the state's efforts at achieving a coherent system of racial classifications. Furthermore, most would balk at the notion of state agencies maintaining "certificates and registries of racial composition," or having race memorialized on birth certificates as well as drivers' licenses. Given the unconscionability of state administered racial classifications, query then—why aren't sex classifications equally suspect?

VI. Resisting Arbitrary Classifications: A New Approach to Equal Protection

In *Frontiero v. Richardson*,[112] the Supreme Court took one of its earliest forays into the realm of equal protection based on sex discrimination. Reviewing a statute that treated male and female service members differently with respect to dependent benefits, six justices found the statute unconstitutional under the Fourteenth Amendment.[113] However, Justices Brennan, Douglass, White and Marshall went one step further and addressed a then-novel question—the level of scrutiny to be applied. Highlighting the links between sex discrimination and racial subordination, including their historical character, the plurality concluded that strict scrutiny should apply to sex classifications, noting, "we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[114]

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[111] Although a 1994 study observed many instances where race continues to be administered, the past fifteen years have witnessed even further retreat. *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1258 (1994) (documenting instances where race is still administered).

[112] 411 U.S. 677 (1973).

[113] *Id.* at 688, 690–91.

[114] *Id.* at 688; *see also* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (stating that racial classifications are "constitutionally suspect and subject to the most rigid scrutiny") (internal citations omitted).

Three years later in *Craig v. Boren*,[115] for the sake of commanding a majority, Justice Brennan abandoned the argument that sex classifications should be grouped as a suspect classification alongside those based on race and ethnicity. Striking down a statute that restricted along gender lines the sale of beer, the Court held that sex classifications were effectively *quasi*-suspect and, in the process, crafted an entirely new tier of judicial review—intermediate scrutiny.[116] Since *Boren*, this distinction has proven more than semantic: whereas strict scrutiny renders laws that distinguish based on race presumptively invalid,[117] under intermediate scrutiny, laws that distinguish based on sex are valid so long as they are substantially related to an important government purpose.[118]

In practice, this standard has proven highly deferential—implicitly adopting the view that sex differences are natural and inherent, and that some degree of differential treatment is justifiable under the Constitution. Indeed, laws that discriminate on the basis of sex are upheld by courts nearly forty percent of the time.[119] In addition, strands of modern case law—for

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[115] 429 U.S. 190 (1976).

[116] *Id.* at 197 (articulating the standard for intermediate scrutiny); *id.* at 211 n.* (Powell, J., concurring) (describing it as a "middle-tier" approach); *see also* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.") (internal citations omitted).

[117] *See McLaughlin*, 379 U.S. at 192 (calling racial classifications "constitutionally suspect"); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (stating that a compelling governmental interest must be shown). For a lengthy discussion of critiques of strict scrutiny, see Part III, *infra*.

[118] *Boren*, 429 U.S. at 197–98. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), and *United States v. Virginia*, 518 U.S. 515 (1996), stronger wording was used. *See, e.g.*, *Virginia*, 518 U.S. at 531 ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."). However, the use of this rhetoric has not altered the applicable standard.

[119] Lisa Baldez et al., *Does the U.S. Constitution Need an Equal Rights Amendment?*, 35 J. LEGAL STUD. 243, 249 (2006).

instance, decisions upholding child custody laws and immigration laws that give a presumption to mothers—reveal continued jurisprudential investment in the notion that men and women inhabit separate spheres.[120]

As Katherine Franke has written, this uncritical acceptance of "real" biological sex difference "reifies as foundational fact that which is really an effect of normative gender ideology."[121] Adopting a strictly biological theory of sex has at least two harmful consequences. Foremost, it renders those with unruly and trangressive bodies—here, transgender and intersex persons —unintelligible in traditional sex equality frameworks.[122] Secondly, it overstates the extent to which "sex" and the body are responsible for discrimination targeting *cisgender*,[123] or XX, women, while understating the pernicious importance of discrimination that occurs along gender lines.[124] Here Franke quips: "When women are denied employment, for instance, it is not because the discriminator is thinking 'a Y chromosome is

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[120] Nguyen v. INS, 533 U.S. 53 (2001) (relaxing naturalization requirements for children sponsored by their mothers); *see also* Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 951–52 (2001) (discussing line of cases that awarded custody to unwed mothers but not unwed fathers); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CALIF. REV. L. & WOMEN'S STUD. 133, 168–69 (1992) (discussing the slow retreat of "tender years" doctrine, and its persistence in Florida). Sex distinctions have also been upheld in the area of statutory rape. *See* Michael M. v. Superior Ct., 450 U.S. 464 (1981).

[121] Franke, *The Central Mistake*, *supra* note 14, at 2 (emphasis removed).

[122] *Id.* at 70–74 (discussing the pre-enlightenment view that "men and women were merely variations on the same human body," and Plato's belief in three sexes) (citing THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 8–10 (1990)). Franke also cites transgender discrimination cases as evidence of the flaws in the modern approach. *Id.*

[123] "Cis" is a latin term which is the antonym to the word "trans." *See* MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/cis (last visited May 1, 2011). Used here, *cisgender* means persons who are neither transgender or intersex. *See* Demoya R. Gordon, Comment, *Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?*, 97 CALIF. L. REV. 1719, 1744 n.186 (2009) (providing context for the use of the term).

[124] Franke, *The Central Mistake*, *supra* note 14, at 40 (calling biology and genitals "false proxies").

necessary in order to perform this kind of work.'"[125] Instead, fault is properly placed on the cultural practices and legal institutions that naturalize the concept of male and female, as well as the roles and scripts they may play—a phenomenon which sexes the genitals, or "transform[s] a vagina into a *she*."[126]

A. Revisiting the Road Not Taken: Why Sex Should Be Subject to Strict Scrutiny

When the full extent of the state's involvement in the construction of sex and sex difference is revealed, it becomes clear that modern sex classifications are inherently suspect. Sex is not a natural, coherent category, whether one considers chromosomes, gonads, genitals or reproductive ability.[127] Instead, it is a category-type that ratifies, perpetuates and is fundamentally constituted by "invidious, archaic, and overbroad stereotypes"—something which the Supreme Court has recognized as a clear violation of the Equal Protection Clause time and again, irrespective of whether sex, race or ancestry is concerned.[128]

The modern application of intermediate scrutiny to sex discrimination claims is premised on the naturalness of sex and

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[125] *Id.* at 36.

[126] *Id.* at 39–40 (emphasis in original). Franke adopts the theory that sexual identities are best viewed as performed.

[127] *See* Parts I.A and I.B, *supra.*

[128] Craig v. Boren, 429 U.S. 190, 198 (1976) ("Hence, 'archaic and overbroad' generalizations . . . [cannot] justify use of a gender line in determining eligibility for certain governmental entitlements.") (internal citations omitted) (summarizing case law); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130 (1994) ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."); Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.").

the coherence of binary sex categories. As the court announced in *Michael M. v. Superior Ct.*,

> [B]ecause the Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "*things which are different in fact . . . to be treated in law as though they were the same*," this Court has consistently upheld statutes where the gender classification is not invidious, but rather *realistically reflects the fact that the sexes are not similarly situated in certain circumstances.*[129]

However, as this Article argues, sex classifications do not operate to separate apples from oranges. Instead, they are both overinclusive and underinclusive—in many instances, separating apples from apples; and in others, denying the existence of benign variety.

Deconstructing the body has two necessary consequences. First, by demonstrating the extent to which sex difference is produced by societal expectation and state ordering, it reveals that stereotypes are at play in virtually every circumstance where the dichotomies "man" or "woman" and "male" or "female" appear in the law. Thus, absent redrawing, these classifications fall under *J.E.B. v. Alabama* or any number of modern precedents.[130]

Second, the main justifications for distinguishing between race discrimination and sex discrimination disappear. These justifications have traditionally gone as follows:

> [D]etrimental racial classifications by government *always violate* the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are *always similarly* situated. By contrast, while detrimental gender

[129] 450 U.S. 464, 469 (1981) (internal citations omitted) (emphasis added).

[130] 511 U.S. at 130 (discussing equal protection standard).

> classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case, we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.[131]

Citing to news stories about the recent spate of pregnant men[132] is not even necessary to break the Court's tautology here. Instead, it is enough that, wherever sex has been distinguished from race in equal protection jurisprudence, it has been on grounds that some degree of sex difference is inherent and natural. When these presumptions fall away, and we acknowledge that the categories of "male" and "female" include XX boys and XY girls, men and women who are able to procreate and those who can't, the argument that sex

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[131] *Michael M.*, 450 U.S. at 478 (internal citations omitted) (emphasis added).

[132] While discussion is perhaps unnecessary, it certainly is fun: in the past twenty-four months there have been two well-publicized stories of pregnant men —Thomas Beatie and Scott Moore. *See* Alan B. Goldberg & Katie N. Thomson, *Exclusive: "Pregnant Man" Gives Birth to Second Child*, ABCNEWS.COM, Jun. 9, 2009, http://abcnews.go.com/2020/story?id=7795344&page=1 (last visited May 1, 2011); *World's "Second Pregnant Man" Expecting Baby Boy Next Month*, TELEGRAPH (UK), Jan 27. 2010, *available at* http://www.telegraph.co.uk/news/newstopics/howaboutthat/7079941/Worlds-second-pregnant-man-expecting-baby-boy-next-month.html. Although previous cases have gone unnoticed by the media, these are just two examples of transgender men choosing to retain their reproductive organs and give birth naturally. *See, e.g.*, *Thomas Beatie's Not The First Pregnant Man*, OREGON LIVE, Apr. 4, 2008, http://blog.oregonlive.com/qpdx/2008/04/thomas_beaties_not_the_first_p.html; Sam Dylan More, *The Pregnant Man–An Oxymoron*, 7 J. GENDER STUD., 319, 319–28 (1998).

discrimination should be treated to lessened scrutiny also falls apart.[133]

As earlier sections have explained, the view that sex is socially constructed does not deny sex its social significance or materiality, nor rob people of the ability to use sex designations for the purposes of self-identification. Instead, it ejects the state from its current position as creator, administrator and arbiter of sex difference. Nor does this Article eschew identity politics or organizing premised on common identities—a move more typical of anti-essentialist approaches.[134] Instead, with respect to the state, it argues for large-scale reclassification, insisting that, to the extent that the state adopts a theory of the body, it must truly group oranges with oranges; that is to say, sex classifications must be premised not on biology but on self-identified gender.

1. Why the Social Construction Thesis is Not Fatal to Equal Protection Claims

While other writers who have argued that sex (and sexual orientation) discrimination should be viewed as a suspect classification, they have couched their arguments on a very different premise: namely, that sex is immutable and concrete, or

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[133] Another way of reaching the same conclusion is tracing the evolution of Fourteenth Amendment jurisprudence and the pertinent classes through cases like *United States v. Carolene Products*, 304 US 144, 152 n.4 (1938), *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973), *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Discussing the extent to which sex discrimination warrants heightened scrutiny, the Court in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), aptly notes: "We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history. It is necessary only to acknowledge that 'our Nation has had a long and unfortunate history of sex discrimination.'" *Id.* at 136 (internal citations omitted).

[134] Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 633–34 (2002) [hereinafter Goldberg, *On Making Anti-Essentialist Arguments*] (defining terms).

at least as concrete as race.[135] This Article adopts an alternative approach: asserting that the constructed character of sex, and its mutability, provide an independent basis for finding sex classifications suspect. As this section demonstrates, while this position is perhaps controversial, it is not without support.

Equal protection cases pertaining to racial discrimination reveal implicit acceptance of social constructionist theories. For example, in *Saint Francis College v. Al-Khazraji*, the Supreme Court observed,

> [C]lear-cut [racial] categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. . . . These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.[136]

Rather than undermine the proposition that race classifications should be subject to strict scrutiny, social constructionist theories have seemingly bolstered it, confirming the judiciary's belief that racial classifications should be viewed with suspicion.[137] As Donald Braman notes:

> [T]he Court has not held—indeed, could not have held—racial status to be biological, but . . . . has instead treated that status as the product of institutions that were necessarily

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[135] *See, e.g.*, Catherine Jean Archibald, *De-Clothing Sex-Based Classifications—Same-Sex Marriage is Just the Beginning: Achieving Formal Sex Equality in the Modern Era*, 36 N. KY. L. REV. 1, 11 (2009) (arguing that strict scrutiny is proper because "[b]oth sex and race are equally immutable").

[136] 481 U.S. 604, 610 n.4 (1987) (internal citations omitted). Other commentators have noted this as well. *See* Suzanne B. Goldberg, *Equality without Tiers*, 77 S. CAL. L. REV. 481, 486 n.22 (2004) [hereinafter Goldberg, *Equality without Tiers*] (noting "[t]he Court has recognized that the significance accorded to race in American society may be socially constructed").

[137] *Al-Khazraji*, 481 U.S at 610 n.4.

> social and political. . . . The notion that other marginalized groups must demonstrate that their status is based on a biologically immutable characteristic in order to analogize to race has created a false barrier to garnering heightened scrutiny of discriminatory classifications.[138]

Thus, although arguments regarding the constructed character of a trait may not be fruitful in all instances,[139] continued reliance on biological theories of sex that deny the unruliness of bodies or the complexities of sex identity is equally unfruitful.[140] Under the social constructionist approach that this Article advocates, courts presently engaged in the practice of sizing up gaits, gonads, and genitals in order to determine whether petitioners have been discriminated against on basis of sex will adopt less offensive forms of scrutiny—halting their search for proof of sex and looking instead to gender.

2. The Significance of Immutability

Arguing against biological immutability is not fatal to equal protection claims, either. As scholarship reveals, the belief that immutability has always been central to the equal protection jurisprudence, and that immutability is synonymous with biology, is largely a misapprehension.[141] Immutability made its way into the equal protection doctrine in 1967 as a prohibition on the use of status categories unrelated to performance, merit

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[138] Donald Braman, *Of Race And Immutability*, 46 UCLA L. REV. 1375, 1446–47 (1999) (suggesting that a non-biological conceptions of race took hold as early as *McLaughlin* and *Loving*).

[139] Goldberg, *On Making Anti-Essentialist Arguments*, *supra* note 134, at 657–59 (questioning whether the claims of groups that lack visibility—e.g., ethnicity and sexual orientation—would be susceptible to this analysis).

[140] This responds to the concern some commentators have expressed that anti-essentialist arguments will complicate the merits determination in discrimination cases and invite fact-finding on subjects well outside the court's expertise. *See id.* at 636–37; 641–42. However, as cases like *Littleton* and *Gardiner* have shown, presently there is no shortage of judicial fact-finding on issues related to sex.

[141] Braman, *supra* note 138, at 1378.

and ability,[142] and this conception of immutability is what has endured in the racial discrimination context, to the extent that it appears at all.[143] Thus, in considering those who press for sexual orientation to be regarded as a suspect classification, Donald Braman notes: "a nonbiological understanding of race compels the conclusion that the immutability standard is not grounded in understandings of biological variation either."[144]

Indeed, arguments regarding immutability on the basis of physical traits have not paved an avenue to heighted scrutiny as much as placed a ceiling on claims. In *Michael M. v. Superior Court*, the Supreme Court stated that, "while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes."[145]

Something similar was at work in *Cleburne v. Cleburne Living Center*, when the Court heard an equal protection claim brought by a group of disabled persons.[146] Holding that the

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[142] *Id.* at 1448–50 (citing *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969)). *Developments in the Law* was cited to with approval in *Frontiero v. Richardson*, 411 U.S. 677, 686 n.18 (1973), the first case to use immutability language.

[143] Indeed, arguments regarding immutability on the basis of physical traits have not paved an avenue to heighted scrutiny as much as placed a ceiling on claims. *See* Michael M. v. Superior Ct., 450 U.S. 464, 468 (1981) (noting that the Equal Protection Clause does not require "things which are different in fact . . . to be treated in law as though they were the same."); *see also id.* at 478 (Stevens, J., concurring) ("[W]hile detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes."). Something similar was at work in *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), when the Court ruled that disabled persons were not a quasi-suspect class. *See id.* at 442 ("[Disabled persons] are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one.").

[144] Braman, *supra* note 138, at 1381.

[145] *See Michael M.*, 450 U.S. at 478 (Stevens, J., concurring); *see also id.* at 468.

[146] 473 U.S. 432 (1985).

claims of disabled persons were not subject to heightened scrutiny, the Court noted "[Disabled persons] are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one."[147] From there, the Court proceeded to question the very vitality of immutability analysis, stating:

> [I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities. . . . We are reluctant to set out on that course, and we decline to do so.[148]

Then, revealingly—as if to acknowledge the paradox it had created—the court cited in a footnote John Hart Ely's *Democracy and Distrust*, stating:

As Dean Ely has observed:

> Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point, there's not much left of the immutability theory, is there?[149]

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[147] *Id.* at 442.

[148] *Id.* at 445.

[149] *Id.* at 442 n.10 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST 150 (1980) (emphasis in original)).

Appropriately then, today immutability has been given diminished significance both in courts and legal commentary. As Suzanne Goldberg has critiqued, "the importance accorded to immutability as an indicia of suspectness runs contrary to the Court's own recognition that society, not nature, gives many traits their significance."[150] State courts and lower federal courts have seemingly reached an identical conclusion, and recent cases in the area of sexual orientation have accorded less weight to immutability when determining the proper degree of judicial scrutiny, looking instead to other factors such as political powerlessness.[151]

Finally, in the contexts where immutability determinations are still required—specifically, petitions for asylum[152]—the term has taken on new meanings. As the Board of Immigration Appeals explained in *Acosta*, immutability refers to those characteristics that "members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[153] Further, as one writer has observed, "while courts use the terms 'fundamental' and 'immutable' to describe the characteristic linking a particular social group, they have also made clear that biological innateness is not a requirement and that a characteristic may be a wholly social construct."[154]

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[150] Goldberg, *Equality without Tiers*, *supra* note 136, at 505–06.

[151] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 429, 432 (Conn. 2008) (rejecting immutability as an equal protection requirement); *see also* Tanner v. Or. Health Sciences Univ., 971 P.2d 435, 446–47 (Or. Ct. App. 1998); Conaway v. Deane, 932 A.2d 571, 609–14 (Md. 2007) (examining political powerlessness instead). Although these cases arise under state constitutions, in many respects their analysis is identical. *See Kerrigan*, 957 A.2d at 423 ("We there apply the same three-tiered equal protection methodology that is applied under the federal equal protection clause for purposes of our state constitution.").

[152] *See* Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 373–74 (2010) (discussing requirements of asylum based on membership in a particularized social group).

[153] Hernandez-Montiel v. INS, 225 F.3d 1084, 1092 (9th Cir. 2000) (citing Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985)).

[154] Hinger, *supra* note 152, at 374 (internal citations omitted).

Viewed in total, this Article calls for suspect classification on grounds that are wholly proper: when immutability is described in the biological sense, it is perhaps the least important criterion in determining whether a group is deserving of strict scrutiny (indeed, as *Cleburne* shows, it counter-indicates strict scrutiny classification); when immutability is viewed under the definition supplied by *Acosta*, sexual identity clearly fits as one such characteristic.

B. What's At Stake: The Final Frontiers of Sex Discrimination

Intermediate scrutiny premised on biological theories of sex has given a presumption of validity to sex discrimination, obscuring the ways that sex discrimination and sex classifications remain invidious.[155] By adopting *Frontiero*'s argument that sex classifications are inherently suspect, this Article proposes a strong prophylactic to sex discrimination's most persistent forms. This section discusses the so-called final frontiers of sex discrimination and examines how strict scrutiny may merit revisitation. The following section takes a closer look at the compelling state interests that sex discrimination may serve.

1. Identity Documents and Sex Classifications

Sex is presently assigned at birth, memorialized on birth certificates and displayed prominently on identity documents and public records. Under Public Records laws and the REAL ID Act, this use of sex categorizations has gone from casual to mandatory, making the binary classification of bodies a state imperative.[156] Under strict scrutiny, this practice of compulsory designation would yield to a regime where sexual identity, like race, would be removed from identity documents and only be

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[155] Baldez et al., *supra* note 119, at 249.

[156] *See, e.g.*, Reilly, *supra* note 24, at 319 (discussing birth certificate requirements); Spade, *Documenting Gender*, *supra* note 1, 797–800 (discussing REAL ID); McGrath, *supra* 1 (same).

voluntarily reported.[157] By disabling state technologies of sex designation and administration, both the transgender and intersex communities would enjoy greater liberatory space. Transgender people who wish to pursue medical transitions would be able do so without legal necessity, and SRS would cease to be a precondition to gender-affirming identity documents and legal personhood. Meanwhile, intersex persons would benefit from a cultural shift: since doctors would no longer have to rush to make sex determinations on birth certificates, the crisis model of intersex healthcare management would cede.[158] The current goals of intersex management—engineering bodies that are capable of heterosexual sex—might also be called into question, much like the strands of science that served explicitly racialized ends.[159]

2. Employment Discrimination

Although transgender people experience overt forms of discrimination in the work place, most courts have found that it is not discrimination based on sex, but something else.[160] The exclusion of transgender people from the ambit of Title VII and the Equal Protection Clause has contributed to a nationwide transgender unemployment rate estimated at seventy percent.[161] The difficulties faced by transgender people searching for legitimate work fuels entry into "criminalized economies"—

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[157] *See* Anderson v. Martin, 375 U.S. 399 (1964) (holding that the compulsory designation of race on ballots is unconstitutional under the Equal Protection Clause); Reilly, *supra* note 24, at 316–17 ("[T]he race of the child is not collected, because race is understood to be a part of identity that can only be self-reported.") (contrasting public records for race and sex).

[158] *See* American Academy of Pediatrics, *supra* note 18, at 138 (recommending a treatment protocol for dealing with the "social emergency" of intersex births).

[159] Haney López, *supra* note 98, at 20–25 (discussing the abandonment of racial science in law as well as society at large).

[160] M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 CHI.-KENT L. REV. 559, 570–74 (2009) (estimating employment discrimination rates as high as fifty-seven percent).

[161] Spade, *Documenting Gender*, *supra* note 1, at 751–52.

introducing the threat of incarceration in single-sex facilities based on birth-assigned sex, not self-identified gender.[162]

Under a new jurisprudence on equal protection, sex would be freed from the stranglehold of outdated notions of "real women" and "real men" to the benefit of transgender people as well as all those who are sexual identity-deviant.[163] Courts hearing employment discrimination cases would scrutinize whether compulsory performances of gender are being demanded of the body, and whether bodies are being disciplined to conform with societal expectations of masculine and feminine, and male and female. As such, sex and gender will cease to have divergent meanings in the Equal Protection and Title VII context, and courts will come to acknowledge what scholars like Butler and Franke suspected all along—*that gender sexes the body*.[164]

3. Sex-Segregated Facilities

a. Bathrooms

The vast majority of public restrooms are currently single-sex—a policy which disadvantages transgender and gender-nonconforming persons, as well as disabled individuals and

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[162] *See* Tarzwell, *supra* note 58, at 175–76; *see also* Darren Rosenblum, *"Trapped" In Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 501 (2000) (describing the harms of prison placement policies for transgender persons). Police profiling of male-to-female transgender women—on city streets and in public space—exerts an independent effect, with many falling subject to police harassment and baseless arrests for solicitation. Shield, *supra* note 58, at 377 (reporting on high rates of arrest). In addition, many transgender persons are routed to prisons when sex-segregated "alternatives to incarceration" programs refuse to accept them. Spade, *Documenting Gender*, *supra* note 1, at 757–58.

[163] I use this term to include transgender persons as well as the effeminate men and feminine women whose plight scholars have called attention to. *See* Case, *supra* note 14, at 61–75 (discussing effeminate men and feminine women); Render, *supra* note 14, at 99–103 (discussing feminine women).

[164] Since many employment discrimination cases lack a state actor, the primary affect of strict scrutiny will be to diminish the imaginary division between sex and gender discrimination, making transgender discrimination claims more cognizable.

parents with young children.[165] Strict scrutiny would require states to smoke out the justifications for these architectures of sex difference and ensure that the means fits snugly with the goal.

b. Prisons

Under a strict scrutiny approach, the government would be forced to revisit its incarceration policies. As the court has held in the context of race, "[t]he right not to be discriminated against based on one's race . . . is not a right that need necessarily be compromised for the sake of proper prison administration."[166] Therefore, state governments and federal agencies seeking to maintain sex-segregated facilities would have to provide a compelling justification beyond mere administrative convenience.[167]

c. Schools

Strict scrutiny would also apply to the handful of sex-segregated public schools—ninety-one schools in all, along with five-hundred forty other schools offering sex-segregated programming—that have sprung up across the country since *United States v. Virginia* with the implicit endorsement of the Supreme Court.[168] Suspect classification would not necessarily spell an end to these programs;[169] however, it would require states to revisit both the classifications used and the purposes served. Any program that relies on a strictly biological notion of

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[165] Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 4–5 (2007).

[166] Johnson v. California, 543 U.S. 499, 510 (2005) (reviewing prison policy that assigned prisoners to cells based on race).

[167] *See* Part II.C, *infra*, for a discussion of compelling state interests.

[168] 518 U.S. 515 (1996) (ordering the integration of the Virginia Military Institute); *see also* Cohen, *supra* note 64, manuscript at 10 (documenting trends) (citing Nat'l Ass'n for Single Sex Pub. Educ., *Single-Sex Schools*, http://www.singlesexschools.org/schools-schools.htm (last visited May 1, 2011)).

[169] *See* Part II.C, *infra*.

sex identity would be expected to embrace a model premised instead on gender expression and voluntary identification.

d. The Military

Applying strict scrutiny to sex classifications would also challenge the precedent of *Rostker v. Goldberg*, a peculiar case upholding the military's exclusion of women from the selective draft due to the military's adherence to an even more invidious form of discrimination—exclusion from the ranks of combat forces.[170] By demanding that a compelling state interest be shown, sex-segregation policies such as these would cease to be self-perpetuating and self-reinforcing.[171]

C. Compelling State Interests: Babies and Bathrooms

Having identified key areas where sex difference and sex classifications remain inscribed in the law, this section examines the state interests that might provide a compelling justification.

1. Rape Prevention

The prevention of rape and sexual assault is a state interest that implicates two existing regimes of sex-segregation: prisons and bathrooms. Rape prevention is a compelling interest in all conventional senses of the term; thus, the question becomes whether current practices of sex-segregation are a narrowly tailored remedy that serve this end.

a. Prisons

In the case of prisons, serious doubts emerge as to efficacy and fit. Current incarceration policies place transgender women in men's facilities, irrespective of whether they have begun medical transition—a practice which has led to rape, sexual

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[170] 453 U.S. 57 (1981).

[171] If courts wished to accord deference to the military policy, this could be done through traditional prudential mechanisms: the political question doctrine and separation of powers.

assault and forced prostitution.[172] Current incarceration policies also leave countless others vulnerable.[173] Given both the demands of strict scrutiny and the extent to which current policies systematically fail, states would have the onus of ensuring that the classifications they employ are neither overinclusive nor underinclusive. At minimum, this would likely mean that gender, not genitals, be used to determine prisoner placement. Thus, when a person's subjective gender identity is female, placement would be proper with other self-identified females.[174] In addition, such states would be expected to devise policies that address rape and vulnerability in facilities solely housing *cisgender* men.[175]

Requiring more rigorous interrogation of incarceration policies would also encourage policymakers to revisit key assumptions. Sex-segregated prisons are viewed as a fixture in our system of corrections partially because of their ubiquity. Yet, as Dean Spade points out, this notion belies American history: the earliest American prisons were co-ed facilities,[176] and today, state experimentation with integrated prisons has shown encouraging results, with decreased rates of violence, sexual

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[172] Prison placement is generally based on birth-assigned sex and/or genitalia. Rosenblum, *supra* note 162, at 520–22 (discussing prison placement policies). Once there, transgender women face extreme brutality. SYLVIA RIVERA LAW PROJECT, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 25–26 (2007), *available at* http://srlp.org/files/warinhere.pdf.

[173] Spade, *Documenting Gender*, *supra* note 1, at 811–12 (discussing incidence of pregnancy at all women's facilities); David M. Siegal, *Rape In Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Seiter, 44 STAN. L. REV. 1541, 1541–47 (1992) (discussing high incidence of prison rape among *cisgender* men).

[174] Rosenblum, *supra* note 162, at 523–29 (arguing for an end to genital based placement); Tarzwell, *supra* note 58, at 214 n.225 (recommending that transgender women be placed with women and transgender men be placed in a facility for vulnerable men).

[175] To ensure that "prevention of rape" is not merely pretext, I argue that the law requires a symmetrical approach that addresses both "male" and "female" vulnerabilities.

[176] Spade, *Documenting Gender*, *supra* note 1, at 780–81 (discussing early prisons).

assault and recidivism being reported across the board.[177] Co-ed incarceration programs, or "co-corrections", relies on an entirely different model of prison administration than the current system, which carelessly deposits transgender women into all-male prisons, and its successes raise the question of what goals, if any, sex-segregation actually achieves.[178] This bolsters research that suggests that the quality of inmate supervision is in fact the better indicator of the vulnerability that persons will experience behind bars.[179]

b. Bathrooms

Although sex-segregated bathrooms ostensibly serve the goal of rape prevention, they, too, may be viewed as fatally over- and under-inclusive. As Terry Kogan explains, the origins of single-sex bathrooms are far from benign; instead, they reflect the logic of separate spheres, and were designed to provide a public "haven to protect the weaker body of the woman worker" and to "protect and vindicate social morality."[180] Given the architectural flaws of single-sex toilets—their inconvenience to transgender persons and to families, and their inability to accommodate the disabled, particularly when they require the assistance of other persons—and the architectural alternatives that could be readily designed, the tailoring and fit of sex-segregated bathrooms seem questionable. In lieu of strict sex-segregation, governments could build more unisex bathrooms and solicit proposals for new restroom designs that better accommodate a wide range of bodies. One small design innovation that could serve the end of rape prevention is giving restrooms more public space—for instance, placing stalls in

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[177] *Id.* at 811–12 (discussing co-corrections).

[178] *See id.* at 813 (posing a similar question).

[179] Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1202 (1985) (advocating for a turn to co-correctional facilities on efficacy and equal protection grounds) (citing *Washington v. Lee*, 390 U.S. 333 (1968), for the proposition that safety does not justify total segregation).

[180] Kogan, *supra* note 165, at 41–50 (explaining that the law mandated separate toilets, as well as separate lunch facilities and recreational spaces, to achieve the ends of privacy and modesty).

corridors instead of an enclosed room, and ensuring that good lighting, large aisles, and clear exits are present.[181]

2. National Security and Fraud

Under a strict scrutiny approach, restrictive identity document policies will be properly understood to thwart the very ends they pursue. Although restrictions on the issuance of new identity documents are typically justified as a measure to prevent fraud, they actually enable fraud by forcing increasingly large populations of transgender people to live "off paper," without drivers' licenses, birth certificates, passports, or other documents that can confirm their names or identities.[182] As an identifier on passports and drivers' licenses, sex classifications are also fatally imprecise: given the sheer variety of bodies (e.g., stocky, lanky, curvy, flat-chested) and genders (e.g., masculine, feminine, androgynous) that exist, sex classifications only operate as a reliable identification tool when accompanied by a demand for specific performances of gender—that is, stereotypical performances of gender and dress that make the body legible as male or female. Under strict scrutiny, the use of such coercive classifications is simply unsupportable.[183]

Finally, even when the state pursues what is undoubtedly its compelling interest in national security, there is no reason why sex classifications should be treated differently than race. Although race remains a powerful descriptor and visual cue, no serious argument has been made to begin including racial data on passports, birth certificates or drivers' licenses. This is true even with the passage of the REAL ID Act. As one scholar explains, "race or skin color is not required under the REAL ID Act, ostensibly *because legal determinations should not be made*

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[181] For this insight, I thank Stuti Desai.

[182] *See generally* Spade, *Documenting Gender*, *supra* note 1 (discussing the effects of onerous and oftentimes conflicting gender reclassification policies).

[183] For an interesting exposition in the race context, see Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and A Color-Blind Society*, 11 MICH. J. RACE & L. 367, 382–88, 392 (2006) (noting that "[w]ithout a consensus about the specific content, both meaning and boundaries, of racial categories, assertions about racial identity are impossible to evaluate in a rational fashion").

based on those criteria."[184] In the end, the state cannot make use of a suspect classification like race or sex for "mere administrative convenience," particularly given the existence of other, more reliable identifiers—fingerprints and retinal data being just two examples.[185]

3. The State Interest in Procreation

To the extent that sex classifications are incorporated into same-sex marriage bans,[186] states may try to claim that sex classifications serve the compelling state interest of ensuring procreation and child development.[187] As scholars have pointed out, however, these arguments quickly collapse in the face of the infertility rates that exist among *cisgender* women and heterosexual couples; the constitutional protection afforded to the decision *not* to procreate; and the degree to which dysfunctional child-rearing by heterosexual couples has led to state interventions and a widening web of LGBTQ caregiving.[188] Therefore, even if the state's interest in procreation and stable

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[184] McGrath, *supra* note 1, at 404 (emphasis added).

[185] *Id.* at 404–05.

[186] This Article leaves the probable effect of heighted scrutiny on sexual orientation discrimination for another day. However, it regards with approval caselaw and scholarship which has laid the groundwork for thinking of sexual orientation discrimination as an instance of sex discrimination, see, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); or independently meriting heightened scrutiny, see, e.g., Carol Steiker, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985). *See also* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996–97 (N.D. Cal. 2010) (concluding that laws which discriminate on the basis of sexual orientation discriminate on the basis of "sex," but that sexual orientation discrimination independently warrants heightened scrutiny).

[187] For a sampling of these arguments, see Defendant-Intervenors' Answer to Questions for Closing Argument, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292 VRW) (discussing the state interests that support the California gay marriage ban).

[188] *See, e.g.*, Jose Gabilondo, *Irrational Exuberance About Babies: The Taste for Heterosexuality and its Conspicuous Reproduction*, 28 B.C. THIRD WORLD L.J. 1 (2008) (advancing these arguments).

childrearing is viewed as compelling, existing sex classifications do not advance this interest, and serious redrawing is needed.

VII. STRICT SCRUTINY, LINKED FATE: TOWARD A GENDER BLIND CONSTITUTION?

The equal protection doctrine is steeped in a long tradition of analogy.[189] Following in this tradition, this Article has relied on several such metaphors. First, this Article reviewed the history of racial regulation and racial classification in the United States in order to suggest the impropriety of such ongoing practice with respect to sex, critiquing the state's role in the construction and administration of identity. Second, this Article highlighted the more nuanced understanding of race that appears in the modern equal protection doctrine, using it to argue that courts are starting to adopt social constructionist theories of identity, and that these theories increase, rather than decrease, the extent to which relevant classifications are deserving of scrutiny.

Until now, however, this Article has not addressed the experiences of racial minorities under the regime of strict scrutiny—perhaps the most fertile grounds for comparison. As this section will show, recent developments in the equal protection doctrine for racial classification suggest some of the perils of suspect classification that transgender and *cisgender* persons can expect to face. However, instead of reaching a definitive conclusion as to whether suspect classification will be wholly beneficial, it ends with a question: *What does the Fourteenth Amendment guarantee at its core, and to what extent does it embody principles of anti-subordination?*

A. Empowerment or Erasure? The Experience of Racial Minorities with the Fourteenth Amendment

For racial minorities, the experience of strict scrutiny has been bittersweet. In 1954, the Supreme Court began its modern crusade against racial discrimination with a thunderclap, overruling the doctrine of separate but equal and striking down one of the largest edifices of racial inferiority, racially segregated

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[189] *See* Frontiero v. Richardson, 411 U.S. 677, 686–88 (1973).

public schools.[190] In the thirty years that followed, more barriers fell under the court's searching gaze as Jim Crow laws were attacked in the areas of busing, public parks, restrooms, interracial cohabitation, and finally, marriage.[191]

Today, however, this work is being carefully undone. Nowhere is this more apparent than in the place where it all began: segregated public schools. Today, *Brown v. Board*, the precedent which called for the dismantling of racially segregated schools, has become a buttress against affirmative action programs designed to equalize educational opportunities. Citing to *Brown*, the Supreme Court has twice-held that racial classifications cannot be used to achieve racial balance in schools or remedy past discrimination.[192] Thus, instead of ensuring minorities access to a quality public education for purposes of empowerment, the state's only compelling interest in this domain is pursuing diversity with the end that "classroom discussion [become] livelier, more spirited, and simply more enlightening and interesting," and that (ostensibly non-minority) students gain "exposure to widely diverse people, cultures, ideas and viewpoints."[193]

In a parallel move, recent Supreme Court cases have blurred the line between the benign and invidious use of racial classifications, subjecting each and every use to strict scrutiny and a presumption of invalidity.[194] Critiques of the Court's new

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[190] Brown v. Bd. of Educ. Topeka, Kan., 347 U.S. 483, 495 (1954).

[191] *See, e.g.*, Browder v. Gayle, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); New Orleans City Park Improvement Ass'n v. Detiege, 252 F.2d 122, *aff'd by* 358 U.S. 54 (1958) (municipal parks); Boynton v. Virginia, 364 U.S. 454 (1960) (public restaurants); Turner v. City of Memphis, 369 U.S. 350 (1962) (public restaurants and restrooms); McLaughlin v. Florida, 379 U.S. 184 (1964) (interracial cohabitaiton); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage).

[192] Grutter v. Bollinger, 539 U.S. 306, 330 (2003); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007).

[193] *Grutter*, 539 U.S. at 330.

[194] Adarand Constructors v. Pena, 515 U.S. 200 (1995).

"color-blindness"[195] doctrine have been vociferous, with some scholars calling for the abandonment of strict scrutiny all together.[196] Minorities' discontentment with "life under strict scrutiny" raises important questions for all other groups seeking increased protections under the Equal Protection Doctrine, including transgender persons, as well as lesbians, bisexuals and gays seeking to have strict scrutiny accorded to sexual orientation discrimination.

If suspect classification prevents people from being named in the law for invidious as well as beneficial purposes, then with respect to principles of anti-subordination, strict scrutiny is arguably more *expressive* than protective.[197] However, the fact that strict scrutiny is expressive does not mean that it is toothless. Instead, it implies that LGBTQ and feminist activists fighting for suspect classification may be acting against interest, pursing a symbolic goal that ultimately prevents the more instrumental use of law.[198] Although these concerns are numerous enough to deserve separate academic consideration,[199] the following section examines the merits and drawbacks of strict scrutiny for sex discrimination with respect to a few key areas.

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[195] *Parents Involved*, 551 U.S. at 770–72 (Thomas, J., concurring) (arguing for a color-blind Constitution).

[196] *See, e.g.*, Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 282 (2002).

[197] *Id.*

[198] Consider the example of public schools. Presently there are several dozen single sex public schools as well as schools that are specially designed for LGBTQ students. Under intermediate and rational basis scrutiny, these programs easily evade review. *See, e.g.*, Cohen, *supra* note 64. As *Parents Involved* suggests, under strict scrutiny these and other programs that were sex or sexual orientation conscious would likely be struck down.

[199] In a future paper, I hope to unpack the social significance of strict scrutiny for disadvantaged minority groups and disentangle it from the legal significance—analyzing why attaining suspect classification continues to be a movement goal.

B. Paradoxes of Anti-Discrimination: Toward a Gender-blind Constitution?

As Part III.A reveals, in the racial discrimination context, the equal protection clause has been a site of paradoxes. What began as a jurisprudence bent on eradicating "measures designed to maintain White Supremacy,"[200] has morphed into a doctrine that assails the use of most race conscious remedies.[201] If strict scrutiny would similarly call for a doctrine of "gender-blindness," then intermediate scrutiny—or living in the shadow of law—may present welcome opportunities.[202] To explore these issues further, the following section takes a brief and speculative look at how women's protective legislation will fare under strict scrutiny.

1. Unintended Consequences: The Status of Women's Protective Legislation

For the traditional constituents of sex antidiscrimination law—*cisgender* women—women's protective legislation such as maternity leave laws and the Violence Against Women Act (VAWA) are arguably the equivalent of affirmative action programs, in the sense that they were designed to serve a remedial function. Thus, one way of gauging the desirability and undesirability of strict scrutiny is seeing how these laws perform under the regime.

In the case of maternity leave laws, the application of strict scrutiny would have a clearly desirable effect—unseating the

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[200] Loving v. Virginia, 388 U.S. 1, 11 (1967).

[201] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003); Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

[202] Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1425–26 (2004) [hereinafter Franke, *Domesticated Liberty*] (discussing the promise and possibility of law-free zones).

precedent of *Geduldig v. Aiello*,[203] a case which declared that pregnancy discrimination was not a form of sex discrimination. Turning toward a more robust doctrine on sex discrimination would eradicate this distinction by highlighting the ways that pregnancy, like gender, sexes the body.[204] Recognizing pregnancy discrimination as an instance of sex discrimination would have an immediate benefit for sex discrimination's traditional constituents, *cisgender* women seeking equal opportunities and equal consideration in the workplace, particularly after becoming mothers.

However, with the benefits of strict scrutiny would also come a burden of greater semantic precision, and terms used in family leave statutes would have to be drawn more carefully to survive the presumption of invalidity presently accorded to suspect classifications. Thus, instead of extending medical leave to expecting mothers, states would have to provide benefits to all those who take primary responsibility for nurturing children and providing caregiving,[205] expanding the web of beneficiaries to include pregnant women as well as the men who occasionally conceive,[206] adoptive parents, and families who expand through the use of surrogates.

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[203] 417 U.S. 484 (1974) (holding that pregnancy discrimination is not a constitutional violation); *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (extending *Geduldig* to Title VII). Although *Geduldig* can be read to suggest that interrogating sex categories necessarily ratchets equal protection down, *id.* at 497 n.20, this Article's position is that *Geduldig* makes a category mistake—overlooking the way that pregnancy, like gender, sexes the body.

[204] The Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k) (2010), passed in response to *Gilbert* and *Geduldig*, makes pregnancy discrimination a violation of federal statutory law. However, had sex been initially regarded as a suspect classification, it is unlikely that pregnancy discrimination would have ever withstood judicial scrutiny. *See* Rachel Weissmann, *Constitutional Law What "Choice" Do They Have?: Protecting Pregnant Minors' Reproductive Rights Using State Constitutions*, 1999 ANN. SURV. AM. L. 129, 164–66 (expressing one such view).

[205] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736–37 (2003) (suggesting that laws provisioning family leave benefits on the basis of gender may be invalid, even under intermediate scrutiny).

[206] *See supra* note 132 (discussing pregnant men).

The status of VAWA in its current form is perhaps a more complex issue; and it is one that highlights the need for ongoing study of the equal protection doctrine, and consideration of how statutes designed to achieve anti-subordination might nonetheless serve compelling state interests. Indeed, it tracks the calls of critical race theorists for an equal protection doctrine that is more sensitive to category-types and more faithful to the anti-subordination principle first articulated by the Supreme Court.[207]

2. Transgender and Intersex Struggles: The Work that Will Remain

Rejuvenating the equal protection doctrine for sex will not displace the need for other rights-based approaches. The equal protection clause will not come to the aid of transgender persons seeking state assistance for their SRS procedures; to achieve these ends, an affirmative right to healthcare and Medicaid coverage may well be needed.[208] Similarly, equal protection, by its own force, will not dismantle all of the intersex management practices that take place in private hospitals; although it will eradicate the crisis-framework, and the practice of rushing to judgment and assigning sex for the purposes of birth certificates. To the extent that intersex advocates seek stronger medicine—for instance, a retooled doctrine of informed consent, or a regime of civil and criminal sanctions for doctors who perform nonconsensual pediatric surgeries—legislative advocacy may be needed.

CONCLUSION

As this Article maintains, given the mutability and incoherence of sex as a category, it is best understood as a socially constructed and arbitrary classification. Under the equal protection analysis that has evolved in the racial discrimination context—one which has viewed the constructed character of race as a sign of its irrelevance—there is ample ground for sex

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[207] *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1996).

[208] *See* Ben-Asher, *supra* note 17, at 96 (calling for "affirmative government action that facilitates an individual's pursuit of freedom").

categories to be subjected to strict scrutiny. The use of more searching forms of scrutiny will advance the interests of transgender, intersex, and *cisgender* men and women by "defus[ing] the power of gender as a mechanism of discrimination."[209]

Yet, in the racial discrimination context, the equal protection clause has also been a site of paradoxes: what began as a jurisprudence bent on eradicating "measures designed to maintain White Supremacy"[210] has morphed into a doctrine that assails the use of most race-conscious remedies.[211] Thus, this Article is sensitive to the critiques of tiered scrutiny that caution hesitation. As the emergence of the "color-blindness" doctrine suggests, serious consideration must be given as to whether strict scrutiny continues to embody anti-subordination principles and create an emancipatory space. If strict scrutiny spells "gender-blindness," then it may be necessary to acknowledge that being *named in the law* through suspect classification is more expressive than protective, and to abandon it as a movement goal altogether.[212]

However, until that day, building on the promise of *Frontiero v. Richardson*, and the robust vision of equal protection as a mechanism for anti-subordination espoused by early cases like *Loving v. Virginia*, sex discrimination and the state's involvement in the construction, administration, and adjudication of sex difference should be regarded as inherently suspect and subjected to the most rigorous forms of scrutiny.

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[209] Taylor Flynn, Essay, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 420 (2001).

[210] Loving v. Virginia, 388 U.S. 1, 11 (1967).

[211] *See* Gratz v. Bollinger, 539 U.S. 244 (2003).

[212] *See, e.g.*, Goldberg, *Equality without Tiers, supra* note 136, at 527–58 (recommending a unitary approach). For yet another alternative—living under the shadow of law, see Franke, *Domesticated Liberty, supra* note 202, at 1425–26 (discussing the promise and possibility of law-free zones).