Whither Lies the Self: Intersex and Transgender Individuals and A Proposal for Brain-Based Legal Sex

Blaise Vanderhorst*

I. The Need for a Better Standard of Legal Sex

The last few decades have seen remarkable progress towards greater social visibility and legal recognition of the substantive rights of two minority groups: transgender\(^1\) individuals, those “whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth” and the intersex.\(^2\) For the former, this progress has been marked by statutory and judicial developments increasing the availability of medical treatment,\(^3\) expanding protections from discrimination in the workplace,\(^4\) and easing the processes by which transgender individuals may change their legal sex to correspond to their gender identity.\(^5\) In addition, transgender issues have moved into the consciousness of far greater numbers of average, “not-involved-in-LGBT-activism” Americans, as demonstrated by transgender actress Laverne Cox’s Emmy nomination and her appearance on the cover of Time Magazine, both historic firsts for a transgender person.\(^6\)

\(^{*}\) J.D., Chapman University, Dale E. Fowler School of Law, 2013; B.A. in History, University of California, Santa Barbara. The author wishes to thank Professor Marissa Cianciarulo, Professor Donald J. Kochan, and his classmate Nancy Sandoval for their invaluable assistance in writing this article, Professor Sandra Skahen for mentorship and encouragement throughout law school, and Ashley and Uncle Stevie.

\(^{1}\) “Transsexual” is increasingly seen as a diagnostic category or else exclusive to those who seek sexual reassignment surgery. As this article is concerned with the legal sex of all persons who do not conform to societal gender expressions and calls for a standard of legal sex premised solely on gender identity, “transgender” is the term used throughout the article. See Transgender Terminology, NAT’L CTR. FOR TRANSGENDER EQUAL. (Jan. 2014), http://perma.cc/RXV9-XGBB.

\(^{2}\) An intersex person, using the most inclusive definition, includes “anyone with a congenital condition whose sex chromosomes, gonads, or internal or external sexual anatomy do not fit clearly into the binary male/female norm.” JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW 1 (2012).


\(^{5}\) See CAL. HEALTH & SAFETY CODE § 103426 (2014); see generally Megan Townsend, Timeline: A Look Back at the History of Transgender Visibility, GLAAD (Nov. 19, 2012), http://perma.cc/2WUT-ANQW.

For intersex individuals the progress has been less dramatic, but still substantial. For example, thanks to the advocacy of organizations such as the Intersex Society of North America (ISNA) and Advocates for Informed Choice, the American Academy of Pediatrics has revised its guidelines to advise greater caution in “corrective” genital surgery on non-consenting intersex minors.\footnote{GREENBERG, supra note 2, at 21–23.} Mainstream Lesbian, Gay, Bisexual and Transgender (LGBT) groups have included intersex individuals and concerns within their agendas.\footnote{Id. at 101–02.} Finally, public awareness of intersex issues, once hidden by family shame and the medical practice’s destruction of intersex visibility, has grown, leading to fewer surgeries on minors.\footnote{Id. at 21, 28 (noting that “surgeries to ‘create gender’ had diminished” and that “a significant minority of parents now decline or postpone surgery on their children with atypical genitalia . . . ”).} Despite this progress, the law remains largely blind to the subtleties of sex and gender identity, and persists in trying to assign individuals legal and social identities not their own based on criteria which themselves are uninformed assumptions and stereotypes.\footnote{“The law typically has operated under the assumption that the terms ‘male’ and ‘female’ are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true.” Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265, 267 (1999) (footnote omitted).}

For both transgender and intersex persons, legal sex is a chain weighing them down, holding them back from their self-realization and full participation in society. A driver’s license or passport with the wrong sex can mean the loss of a job, the inability to travel, arrest for fraud when trying to make a credit card purchase,\footnote{“Forcing persons who appear to be females to carry male identity cards will likely result in embarrassment, ridicule, harassment, and even possible arrest for fraud.” Id. at 317.} or placement in the wrong jail.\footnote{Marie-Amelie 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, 697 (2006).} Three states refuse to change a person’s birth certificate from the anatomical sex assigned at birth to the person’s self-identified gender.\footnote{See LAMBDA LEGAL, Changing Birth Certificate Designations: State-By-State Guidelines, http://perma.cc/4TMF-J3ZA (last updated July 14, 2014).} In those states, the chain of legal sex fastens the hapless individual in an identity not their own. In other states, a person may be female on their birth certificate, but male for the purposes of marriage.\footnote{See, e.g., Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (holding that an amended Texas birth certificate did not change the appellant’s sex for the purposes of marriage); In re Marriage License for Nash, 2003-Ohio-7221, 2003 WL 23097095 (Ohio Ct. App. 2003) (holding that an amended Massachusetts birth certificate does not determine the petitioner’s sex for the purposes of marriage).} Ohio, Kansas, Texas, Florida, and Illinois refuse to recognize changes in legal sex for the purposes of marriage,\footnote{In re Marriage of Simmons, 825 N.E.2d 303, 308 (III. App. Ct. 2005) (in interpreting the unique Illinois law that allows a change of sex with proof of an operation, the court held that the plaintiff’s operations were insufficient for a legal change of sex, although he had
gender and intersex person’s legal sex and throwing their identity into a state of uncertainty. Likewise, a person may be one sex to their own state’s government, but another to the federal government.  

This state of legal uncertainty has occurred because, prior to the advent of the modern transgender and intersex rights movements, the American legal system, like most of American society, considered sex, gender, and gender identity to be synonymous, uncomplicated, and always in-sync. Such assumptions are accurate for most of the population, as their sex and gender identities are in fact accord, but they are not so for intersex and transgender persons. Such inaccurate assumptions are plainly displayed in Texas Appellate Court’s statements in *Littleton v. Prange*, declaring sex something that even children can distinguish, especially if the person in question is naked, and “immutably fixed” by divine command. Transgender and intersex persons call into question these simplistic assumptions, and demonstrate that sex is a complicated phenomenon, one that cannot be determined by a single factor or simply seeing a person naked. Judges without backgrounds...

16 See *NAT’L CTR. FOR TRANSGENDER EQUAL.*, *Understanding the New Passport Gender Change Policy*, http://perma.cc/579K-ZJJM (last updated Jan. 2012) (stating that, as of June 2010, transgender persons can obtain a passport reflecting their identity if all their documents reflect their current gender or if they submit a physician’s certification that they are receiving “appropriate clinical treatment”); *TRANSGENDER LAW CTR., Victory! Social Security Administration Updates Gender Change Policy*, http://perma.cc/T3NJ-XV1LV (last visited Dec. 1, 2014) (stating that the Social Security Administration will now recognize an individual as their desired gender if they provide a letter from their doctor confirming that they have undergone “appropriate clinical treatment for gender transition,” a passport, a state-issued birth certificate, or a court order indicating their new sex).

17 See *AM. PSYCHOLOGICAL ASS’N, Definition of Terms: Sex, Gender, Gender Identity, and Sexual Orientation*, http://perma.cc/262H-FHSA (last visited Dec. 1, 2014) (“Sex refers to a person’s biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female). There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia. Gender refers to the attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex. Behavior that is compatible with cultural expectations is referred to as gender-normative; behaviors that are viewed as incompatible with these expectations constitute gender non-conformity. Gender identity refers to ‘one’s sense of oneself as male, female, or transgender’ . . . . When one’s gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category . . . .”) (citations omitted).

18 *Littleton*, 9 S.W.3d at 223–24.

19 GREENBERG, supra note 2, at 11–12. (“Medical experts now recognize that at least eight attributes contribute to a person’s sex. These factors include genetic or chromosomal sex, gonadal sex (reproductive sex glands), internal morphologic sex (semenal vesicles, prostate, vagina, uterus, and fallopian tubes), external morphologic sex (genitalia), hormonal sex (androgens and estrogens), phenotypic sex (secondary sexual features such as facial hair or breasts), assigned sex and gender or rearing, and gender identity. . . . Millions of people do not follow the...
in biology or psychology have had to formulate ad hoc rules without statutory guidance, and they have often deferred to simplistic dictionary definitions, biased cultural assumptions, or their own personal prejudices.20

The lack of a fair and uniform standard for legal sex has not just resulted in unfair rulings for individual plaintiffs, but has created a legal uncertainty which adds to the marginalization of transgender and intersex persons. This denies their identities or forces them to adhere to sexual stereotypes in order to obtain recognition.

The law should look not to anatomical checklists, which do not reflect the diversity of human bodies, or chromosomes, which do not always correspond to anatomy or gender identity. Nor should it rely on outdated cultural assumptions, which so often, as the numerous cases involving racial and gender-based discrimination have demonstrated, are irrational and oppressive.21 Rather, the law should look within. Modern science teaches that the brain is the organ responsible for memory, thought, emotion, and learning.22 It is in the brain that individual identity lies, and indeed, gender identity. Scientists aided by powerful imaging technologies have discovered that there are slight, but noticeable differences in brain structure between the male and female brain.23 Scientists have also discovered that transgender individuals, both before and after hormone therapy, have brains that correspond more to their identified gender than to their genetic or anatomic sex.24 The experiences of intersex individuals assigned one sex at birth but who

20 For example, the Kansas Supreme Court’s declaration that “[t]he words ‘sex,’ ‘male,’ and ‘female’ in everyday understanding do not encompass transsexuals,” In re Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002), is hard to explain as anything other than an exercise in prejudice. See also Taylor Flynn, The Ties That (Don’t) Bind: Transgender Family Law and the Unmaking of Families, in TRANSGENDER RIGHTS 32, 37 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) (noting that if taken seriously, the Gardiner court’s ruling would exempt transgender people from most laws (“I didn’t have to obey that criminal law, your Honor . . . these laws apply to ‘men’ and ‘women,’ but the legislature said nothing about transsexuals!”) and that “the desexing of trans people will not be enforced unless it has (undoubtedly discriminatory) social meaning,” such as “protecting the ‘purity’ of marriage from trans heterosexuals while reinforcing the ban against same-sex marriage”).


22 “The brain is the most complex part of the human body. This three-pound organ is the seat of intelligence, interpreter of the senses, initiator of body movement, and controller of behavior . . . . [T]he brain is the source of all the qualities that define our humanity.” Brain Basics: Know Your Brain, NAT’L INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, http://perma.cc/HL7X-WZ9Y (last updated Apr. 28, 2014).

23 GREENBERG, supra note 2, at 20.

have later come to reject that assignment, feeling instead as though they
have been the other sex, supports the theory that the state of the brain at birth
determines gender identity. Gender is truly between the ears, not between
the legs.

This article endorses gender identity as the sole criterion for legal sex. The
argument for such a standard is both scientific and normative. A growing
body of evidence demonstrates that gender identity is the result of neuro-
logical phenomena, and thus is an innate characteristic. Given the emerging
scientific consensus that the brain is the center of a person’s identity, this
article proposes that gender identity, as the manifestation of one’s “neuro-
logical sex,” be the basis of legal sex, and be determinative of individuals’ legal
sex for all purposes. On the normative front, a gender-identity based
standard would be the most fair, as it would afford all persons recognition as
their identified gender, promote individual autonomy, and further legal and
social equality for those who are currently burdened with the challenges im-
possed by anatomical standards. This article proposes that all surgical or med-
ical intervention as a criterion for legal change of sex be abolished, so as to
diminish the burden and delay currently imposed on transgender and inter-
sex individuals seeking recognition of their identities. Further, this article
supports the legal recognition of intersexed individuals as their identified
gender, rather than as any surgically assigned identity, as well as the aboli-
tion of the surgical assignment of intersex infants, in recognition of the fact
that the genders of such infants are not readily knowable at birth.

This article acknowledges that such a proposal will be difficult to im-
plement: the religious and cultural biases against gender nonconformity,
which have produced many of the more negative cases addressing trans-
gender and intersex rights, remain firmly entrenched in many areas of the
country. As state law governs the issuance of birth certificates and driver’s
licenses, it will be up to the legislatures of the various states to implement
such changes, which will be difficult to achieve against popular disapproval.
Similarly, the medical and psychiatric professions, which currently serve as
the “gatekeepers” of intersex and especially transgender identities, will be
reluctant to relinquish the power and profits they garner by virtue of
mandatory medical procedures for legal change of sex. Regardless, this

27 This article is not the first to call for such a standard. See Flynn, supra note 20, at 39.
29 See JOANNE MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 225 (2004) (describing the standards imposed for receiving sexual reas-
article stands for the proposition that “neurological sex,” as expressed by the gender identity of the individual, is the only rational and humane criteria for legal sex, and that it would benefit intersex and transgender individuals if it was adopted as the universal standard.

This article explores how society and the law have defined sex and how the present inconsistency of the standards for legal sex, the lack of ability to change legal sex, and the use of anatomical standards where a legal change of sex is allowed, all contribute to the marginalization of transgender and intersex persons. Part II of this article explores the history of transgender and intersex persons, from the various cultures around the world that have recognized and still recognize gender nonconforming individuals as their identified gender, and not as anatomical or assigned sex, to the modern transgender and intersex movements. The purposes of such historical exploration are threefold. The long and diverse history of transgender and intersex persons demonstrates their presence in human society from its inception. The existence of third genders, or of social practices wherein individuals have received recognition as the gender other than the one corresponding to their assigned sex at birth, shows that the lives of the gender nonconforming and anatomically atypical have been recognized and accorded certain respect. Finally, and most critically to the thesis of this article, they demonstrate that it is possible for a society to define gender based on gender identity, rather than anatomy. Part III explores the statutes and jurisprudence involved in determinations of legal sex in the United States, and the problems created by these inconsistent and stereotype-based standards. Part IV proposes an alternative, uniform standard of legal sex based on gender identity, as a solution to the problems posed to transgender and intersex individuals by inconsistent, unfair, and predominantly anatomy-based standards of legal sex.

II. The History of Intersexuality and Transgenderism in Society

Sex is an obvious and seemingly universal division within human society, but contrary to what some courts and many legislative bodies have assumed, the definitions of “sex,” “gender,” “man,” and “woman” are not self-evident, but vary radically based on medical criteria and social values. While some cultures have and continue to recognize individuals based on gender identity rather than their anatomy, in the West, transgender and intersex persons have fought a long and difficult battle for acceptance, one that is still ongoing.
A. Third Sexes and Cross-Identification: Social Recognition of Gender Apart from Anatomy

Intersex and transgender individuals have been part of the human population throughout history. The names they have been called, and the respect and opportunities afforded those individuals, however, have varied across time and cultures. Many societies have recognized or still recognize such persons by either allowing persons to identify as the other gender, regardless of anatomy, or by offering a special category, a “third sex” for those who did not fit neatly into the standard boxes. All of these unique identities demonstrate that throughout history and across the globe there have been individuals whose bodies or personalities did not fit within the rigid framework of “masculine male/feminine female,” and that societies have accepted the existence of such individuals by offering social roles that recognized the existence and uniqueness of such individuals, including them into the larger cultural whole.

A type of third-sex or cross-gender individual was recognized by some roughly 130 Native American societies due to the forces of Christianization and attempts to forcibly assimilate Native peoples into European culture, significantly fewer tribes have retained such cultural practices. The term “Two-Spirit” people is the commonly used term to describe comparable social roles across numerous different Native cultures, while the formerly used “berdache” has fallen out of favor. Two-Spirit individuals were men, or less often women, who acted in ways not comporting with traditional gender roles. In their respective societies, it was the individual’s social role, not their anatomy, which determined their social identity. While it is hard to put a modern label on practices specific to different cultures, and while Two-Spirit identities are often classified anthropologically as a third gender, neither one nor the other, the essential lesson is that numerous North American Indian tribes, from the Aleuts in Alaska to the Navajo in the South

30 George, supra note 12, at 683–85.
31 Id. at 685.
32 Wesley Thomas, Two-Spirit People, in An Encyclopedia of Traditions, Diversity, and Popular Expressions, Religion and American Cultures 226, 227 (Gary Laderman, Luis D. León eds., 2003) (noting four genders in Navajo culture, encompassing masculine female and intersex individuals and feminine male and intersexed individuals).
35 “Navajo Indians, for example, did not group women and men according to genitalia, but rather according to the role that the individual performed. Consequently, ‘the Navaho Indians of the nineteenth century were addressed by male or female kinship terms according to the type of clothing they wore,’ which did not necessarily correlate to their genitals. Similarly, as a person in the Zuni community embraced the tasks performed by one sex or the other, or a combination thereof, s/he became that gender, rendering genital anatomy immaterial.” George, supra note 12, at 685 (quoting Suzanne J. Kessler & Wendy McKenna, Gender: An Ethnomethodological Approach 38 (1985)) (footnote omitted).
to the Crow of the Midwest, recognized a place for persons whom we might call transgender or intersex. In these societies, the "gender focus . . . was on the unfolding and coalescing of the internal self rather than on the correctness of external manifestations." While subject to fierce persecution by Christian colonizers, and subsequently their own tribes upon Christianization, Two-Spirits identities continue to exist in some tribal societies, and have begun to seek, and in some cases obtain, increasing acceptance and renewed recognition.

In India, Pakistan, Nepal, and Bangladesh, there is an identity known as the hijra which also constitutes a "third sex," a cultural role for intersex, transgender, and gender non-conforming individuals. Hijra “may be born with intersex[ ] conditions; some are raised as girls until it becomes clear that they are not developing appropriate secondary sex characteristics and/or will not menstruate.” Individuals who “do not have the sexual desires men have” may also become hijra, indicating that the category may encompass what we would call transgender individuals and perhaps effeminate homosexuals. Hijra may undergo a castration procedure for the removal of their testes and sometimes also their penis, if they have them. Hijra dress as women do in their respective societies, with feminine jewelry and the bindi mark worn by Hindu women. Hindu hijra communities may engage in devotional practices to Bahuchara Mata, an aspect of the Mother Goddess, whose stories involve cross-gender themes, or the god Shiva in his aspect of Ardhanari, where the god is merged with his female consort Parvati into a deity that is half-male and half-female. Hijra are recognized within Muslim communities in the sub-continent as well. Socially, hijra are truly a third gender, seen as neither male nor female, with elements of both.

The Indian subcontinent and North America are not unique in recognizing third sexes or special social roles for gender non-conforming individuals. An example of such a culture from Europe that persisted into modern times is the “sworn virgins” of Albania, Montenegro, and Macedonia. Sworn virgins are women who “wear men’s clothing, carry men’s weapons, perform

36 Thomas, supra note 32, at 227.
37 George, supra note 12, at 685.
40 GEORGIA WARNKE, DEBATING SEX AND GENDER 47 (2010).
41 Id.
42 Id.
43 Id. (quoting SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA 16 (1999)).
45 Lauren Frayer, Pakistan’s Transgenders In A Category Of Their Own, NPR (Sept. 3, 2012), http://perma.cc/TG77-NZ6R.
46 Greenberg, supra note 10, at 276.
47 WARNKE, supra note 40, at 46.
men’s jobs, and at least in some cases, receive public recognition as men.”

The sworn virgins take their name from the fact that in their native culture, the life of a virgin female is equal in value to that of a man. In order to obtain their position as a “male,” they must take a vow of celibacy and obtain approval from both their father and the village elders. There were other socially recognized cross-gender identities in Europe and the Middle East, such as the Scythian Enarees, the Mesopotamian Assinnu, and the Roman Galli. In Thai culture, the word kathoey, often translated in English as “ladyboy,” encompasses a broad spectrum of individuals from effeminate male-bodied persons attracted to males to male-to-female transgender individuals who seek hormone therapy and sexual reassignment surgery. Despite being born anatomically male, kathoeys are seen by many in Thai culture not as being homosexual men, but as either a type of woman or third category of person completely. Samoan culture has a similar category for female-identifying male-bodied persons, called fa’afafines. Some culture-specific categories of third gender are specific recognitions of intersex individuals, such as the guevedoche (“balls at twelve”), or machihembra (“male-female”) in the Dominican Republic and the kwolu-aatmwol of the Sambia people in Papua New Guinea.

Numerous societies have had, and some still have, places for those who do not fit into the binary. Whether revered as shamans, whose connection to both sexes was extended to a connection between this world and the next, or looked down upon, or somewhere in between, and whether these culturally-specific identities encompassed the phenomena that modern society would

48 Id.
49 Id.
53 See, e.g., Hannah Beech, Where the ‘Ladyboys’ Are, TIME MAGAZINE (July 7, 2008), http://perma.cc/MFP7-NT2B.
54 Sam Winter, Language and Identity in Transgender: Gender Wars and the Case of the Thai Kathoeys, Address at the Hawaii Conference of Social Sciences (June 2013), available at http://perma.cc/FA9M-99XQ.
55 Id. (“Thais are pretty evenly split on this issue, with around 50% seeing them as males with the mistaken minds, but the other half seeing them as either women born into the wrong body (around 15%) or as a third sex/gender (35%).”).
56 The guevedoche are born with an XY karyotype that has a 5-alpha reductase deficiency, one of the intersex conditions. While born looking anatomically female, and raised as girls, the guevedoche begin to develop male traits in puberty, and subsequently, may socially become males. Anthropologist Gilbert Herdt describes the Dominican system as recognizing three sexes—male, female, and guevedoche—but just two genders. See Warnke, supra note 40, at 15, 36–37.
label as intersexuality, transgenderism, same-sex attraction, or all of the above, the recognition of gender non-conforming persons in these societies demonstrates three important facts. The first is that transgender, intersex, and other gender-variant persons have been with the human species from time immemorial and are a part of its natural composition. The second is that countless societies on all continents have recognized the existence of transgender, intersex, and gender-nonconforming persons. The third is that it is possible for societies to recognize an individual’s identity without regard for anatomy or assignment at birth. In some instances, these practices have survived to this day and have obtained formal legal recognition, as seen by the legal status of hijra in India\(^{58}\) and Pakistan,\(^{59}\) and the kathoey in Thailand.

In the West, meanwhile, the Christian view of sex supplanted recognition afforded transgender and intersex individuals by some pagan societies. In Christian theology, male and female are seen as distinct, complementary, divinely-ordained categories.\(^{60}\) Christianity took the Old Testament prohibitions of homosexual acts\(^{61}\) and cross-dressing\(^{62}\) (and, potentially, disfavored view of gender-variant individuals\(^{63}\)) and incorporated them into a theological framework wherein the human body was not just a temporary vessel for a spirit, but was also an essential and inseparable part of the individual’s identity.\(^{64}\) As such, the spread and eventual legal and social dominance of Christianity in Europe saw the eradication of cross-gender cultic practices, the codification of prohibitions for homosexuality, cross-dressing, and gender-transgressive pagan practices,\(^{65}\) and the beginning of centuries of efforts to pigeonhole the whole spectrum of human gender, sexual, and romantic expression into a gender binary.\(^{66}\)

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58 See National Legal Services Authority v. Union of India (2013) 109 (declaring that requiring surgery for recognition as a legal third sex is illegal).
59 Homa Khaleeli, Hijra: India’s Third Gender Claims Its Place in Law, THE GUARDIAN (Apr. 16, 2014), http://perma.cc/XR83-KDB8 (“[T]he supreme court of India ruled that transgender people would be recognised on official documents under a separate ‘third gender’ category. The change follows similar legislation in Nepal, Pakistan and Bangladesh.”).
61 Leviticus 18:22 (English Standard Version) (“You shall not lie with a male as with a woman; it is an abomination.”); Leviticus 20:13 (English Standard Version) (“If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them.”).
62 Deuteronomy 22:5 (English Standard Version) (“A woman shall not wear a man’s garment, nor shall a man put on a woman’s cloak, for whoever does these things is an abomination to the Lord your God.”).
63 See Deuteronomy 23:1 (English Standard Version) (“No one whose testicles are crushed or whose male organ is cut off shall enter the assembly of the Lord.”).
65 ARTHUR EVANS, THE GOD OF ECSTASY: SEX-ROLES AND THE MADNESS OF DIONYSOS 20 (1988) (describing the decision by the Council of Constantinople in 691 to forbid “dances and initiation rites of the ‘gods’ as they are falsely called among the Greeks . . . and we decree that no man shall put on a woman’s dress nor a woman, clothes that belong to men . . . .”).
66 Because of Catholicism’s historical influence on Western Europe and Western culture, and the fact that Catholicism was the sole denomination of Christianity prior to the Protestant
B. Hermaphrodites, “Monstrous Births,” and Medicine

While recognized since ancient times, intersex individuals, called “hermaphrodites” in most literature prior to the twentieth century, have long faced mistreatment. While the Romans had the myths of Hermaphroditus, and recognized the Galli—castrated, female-dressing devotees of the cult of mother-goddess Cybele—intersex children were sometimes killed as “monsters” at birth. Christian, post-Roman Europe did not have room for a third sex. One was either male or female, and the rights and responsibilities varied greatly depending on which one was. “Hermaphrodites,” that is, persons who we would now call intersex, were recognized, but a distinct social role for such persons was not. Medieval English law recognized two categories of persons with physical abnormalities: monsters and deformities. Monsters, whose existence was often explained as the result of intercourse with demons, were considered “outside the law” and not to be classified as children, while “deformities” were considered fully human. Hermaphroditism (intersexual conditions), were treated by English law as a “deformity,” so at least legally, such children were not monsters. Socially, however, such children were seen as monsters “of identity of the most profound sort,” as their being challenged the clear division of the sexes espoused by Christian doctrine and gendered system of Medieval laws. It was therefore crucial to the maintenance of the Medieval system of inheritance to place intersex persons in one category or another, and, given the body essentialism of the thinking at the time, such determinations were based on “predominance of the sexual organs.” While recognized as a third physical category of the human being, intersex children under thirteenth century English law were treated by English law as a “deformity,” so at least legally, such children were not monsters. Socially, however, such children were seen as monsters “of identity of the most profound sort,” as their being challenged the clear division of the sexes espoused by Christian doctrine and gendered system of Medieval laws. It was therefore crucial to the maintenance of the Medieval system of inheritance to place intersex persons in one category or another, and, given the body essentialism of the thinking at the time, such determinations were based on “predominance of the sexual organs.”

Reformation, this article primarily relies on Catholic sources. The Catholic Church remains adamantly opposed to the recognition of transgender identities, issuing in 2000 an initially secret ruling that stated that transgender individuals remain their birth sex in the eyes of the church regardless of surgery, because “the (transsexual) surgical operation is so superficial and external that it does not change the personality.” The document also declared transgender individuals unfit for marriage. See John Norton, Vatican Says “Sex-Change” Operation Does Not Change Person’s Gender, NAT’L CATHOLIC REP., Sept. 19, 2011, available at http://perma.cc/WV4N-BH4J; see also Paisley Currah, Gender Pluralisms, in TRANSGENDER RIGHTS, supra note 20, at 17.

Greek and Roman myths mentions the hermaphroditic/androgynous deity Hermaphroditus; the Jewish Talmud and Tosefta describe both animals and humans called androgynos and hermaphrodit and also set forth rules of conduct for humans of ambiguous gender. Greenberg, supra note 57, at 53, 54.

64 Enres, supra note 52.

65 George Androutsos, Hermaphroditism in Greek and Roman Antiquity, 5 HORMONES 214, 216 (2006).

66 Andrew Neville Sharpe, Foucault’s Monsters and the Challenge of Law 63 (2010).

67 Id.

68 Id.

69 Id.

70 Id.

71 Id.

72 Id.

73 Id.

74 Id.

75 Id.

76 Id. at 62.
English law were to be classified as male or female, depending on the predominance of their physical features.\textsuperscript{77}

For intersex individuals from the Middle Ages until the later modern period, their uncertain identities often exposed them to danger. Uncertain legal identities meant that intersex persons potentially faced criminal sanctions under laws penalizing homosexual conduct and cross-dressing, the loss of legal standing as men if found to be women, and the general mistreatment society affords to those who do not fit in. The case of Marie/Marin le Marcis typifies the double-bind and double standards intersex and other non-conforming individuals faced.\textsuperscript{78} Le Marcis initially lived as woman, but was intersex, for he had an organ that was either a small penis or an enlarged clitoris.\textsuperscript{79} At twenty-one, le Marcis began wearing men’s clothing and decided to marry the woman with whom he had been living.\textsuperscript{80} For this transgression, le Marcis was charged with both sodomy and cross-dressing, and was faced with execution, first by burning at the stake, and then by strangulation. Medical authorities were called in to determine whether “the candidate for an external penis entitled her for the prerogatives of penis possession.” Ultimately, le Marcis was determined to possess a penis, and therefore, to be male. Curiously, the court ordered that le Marcis transition gradually before being awarded full male status. A later case in Connecticut involved a Whig voter named Levi Suydam.\textsuperscript{81} Mr. Suydam’s ability to cast a ballot was challenged on the grounds of his extreme femininity.\textsuperscript{82} A doctor was consulted, who determined that Mr. Suydam possessed the requisite penis and testicles, and the Whigs won the local election by one vote.\textsuperscript{83} It was discovered only a few days after the election that Suydam menstruated and had a vaginal opening.\textsuperscript{84} Also of consideration was Mr. Suydam’s “feminine propensities, such as fondness for gay colors, for pieces of calico, and com-
paring and placing them together, and an aversion for bodily labor and an
inability to perform the same." While it is not known whether Mr. Suydam
subsequently lost his right to vote, his case, and that of Mr. le Marcis, dem-
strates the perils and pitfalls faced by intersex persons prior to the twenti-
eth century, and both gentlemen were arguably the lucky ones.

In the late nineteenth century, advancements in medical science laid the
foundation for the current surgical erasure of intersex identities. The in-
creasing access to medical care led to even greater numbers of intersex in-
fants being catalogued, and consequently, greater interest in the phenomena,
which lead in turn to prominence in the medical community for the many
doctors who published on the topic. By the 1870s, a gonad tissue test re-
placed the predominance test, which been used to determine legal sex since
the Middle Ages. This test, however, posed several difficulties, as the ab-
sence of visible gonads and the inability to analyze them in vivo left ambigu-
ous bodies unclassified.

C. Emerging from the Shadows: The Brief History of
Transgender Rights in America

The twentieth century witnessed the emergence of transgender individ-
uals in American society. While they have always been a part of humanity,
transgender individuals have not been able to be socially visible. Criminal
sanctions for cross-dressing and same-sex activities, religious prohibitions,
and cultural stigma have impeded transgender individuals’ visibility in the
United States until very recently. The lack of any real means of transition-
ing until the very recent past meant that most transgender individuals had to
endure the hardship of living in bodies incongruous with their gender identi-
ties. Regardless, transgender individuals managed to survive. Jennie June,
born Earl Lind, was one of the first transgender Americans to tell her story,
publishing The Autobiography of an Androgyne (1918) and The Female Im-
personators (1922); as the terminology had not yet been invented, the terms
“transgender” or “transsexual” are not used in her works—she describes
herself as “androgyne,” “bisexuals,” and “female impersonators”—but the
identity is the same. Lind was part of a small group gender-variant individ-

85 Id.
86 "An earlier case in 1459 did not have such a relatively happy ending. In this case, an
intersex individual lived most of her life as a woman but made the mistake of impregnating her
employers daughter, and for that, she was burned at the stake.” Warnke, supra note 40, at 36.
87 See Greenberg, supra note 2, at 15.
88 Warnke, supra note 40, at 38–39.
89 Greenberg, supra note 2, at 15.
90 Warnke, supra note 40, at 39–40.
of anti-sodomy laws), overruled by Lawrence v. Texas, 539 U.S. 558 (2003); Meyerowitz,
supra note 29, at 137, 247 (discussing laws against cross-dressing).
92 Jonathan Ned Katz, Introduction: Earl Lind (Ralph Werther-Jennie June): The Riddle of
the Underworld, 1921, OTHISTORY, http://perma.cc/AR68-WNPW (last visited Dec. 1,
2014).
uals in late nineteenth and early twentieth-century New York, the Cercle Hermaphroditos, formed of fellow “androgyne” to “unite for defense against the world’s bitter persecution,” and whose members argued that their condition was natural and benign.93 The jazz musician Billy Tipton, a female-to-male jazz singer who was born in 1914, is another example of a pre-transition-era transgender American.94

Medical innovations led to the possibility of transgender individuals to conform their anatomies to their identified genders. The emergence of the social sciences—psychology and sexology in particular—in the late nineteenth century led to organized study of gender variations, which in turn led to surgical exploration of the nature of sex.95 German and Austrian researchers led the way in pioneering the study.96 In the early 1900s, Dr. Magnus Hirschfield, founder of the Institute for Sexual Science, first described what he called “psychic transsexuality.”97 Crude attempts at surgical sexual reassignment were made in the 1910s and 1920s, with the first complete operation in 1931.98 Synthetic hormones were developed in the late 1930s and early 1940s.99 The advent of surgical and hormonal treatment subsequently enabled transgender individuals to seek the bodies, and the gender roles, they wanted. In 1952, Christine Jorgensen, the first American known to have had the operation, received surgical sexual reassignment in Denmark.100 American doctors refused to perform the practice initially, fearing criminal or civil liability.101 Experimental clinics operated by medical schools, first at John Hopkins University, and soon at others, were the first to offer the procedures under strict guidelines.102 Slowly, the procedure gained medical acceptance, and by the late 1970s, reputable private doctors began offering the procedure.103

Political change accompanied these medical developments. Organized transgender groups began to grow in the 1960s through networks of sexual reassignment patients and newsletters.104 The EFF, founded in 1964 by Reed Erickson, a wealthy transgender man, funded both research and activist groups.105 Transgender individuals were part of the Lesbian Gay Bisexual and Transgender (“LGBT”) rights movement from the beginning, with Syl

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93 Id. (quoting Lind).
94 Dinitia Smith, Billy Tipton Is Remembered With Love, Even by Those Who Were Deceived, N.Y. TIMES (June 2, 1998), http://perma.cc/JQ5Q-A5RS.
95 MEYEROWITZ, supra note 29, at 15–19.
96 Id.
97 Id.
98 Id.
99 Id. at 21.
100 Although Jorgensen is often called the first, there were a few Americans who obtained sexual reassignment surgery prior to Jorgensen, either in the states, sometimes by posing as intersex individuals, or abroad in Germany or other European nations. See id. at 29–31, 49–50, 62.
101 Id. at 120–21.
102 Id. at 218, 222.
103 Id. at 272.
104 Id. at 290–31
105 Id. at 209–11.
via Rivera and other gender-nonconformists taking part in the Stonewall Riots and the subsequent formation of the Gay Liberation Front (GLF). The ensuing years were chaotic, full of alliances, splits, and infighting among gay, feminist, and transgender groups, with the movement witnessing both victories and defeats in the courts. The 1970s and 1980s saw the striking down of anti-crossdressing ordinances and the recognition and support of the American Civil Liberties Union (ACLU) for the transgender rights movement. A handful of states agreed to change birth certificates; in 1976, New Jersey recognized both a legal change of sex and a heterosexual marriage involving a transgender spouse, while California passed a statute permitting birth certificate changes in 1978. By the 1990s, the transgender movement came into its own as a social movement with heft.

The transgender movement has made massive progress in the past two decades. Mainstream gay rights movements have adopted the LGBT acronym, including, at least in name, the realization of transgender rights in their goals. The State Department and Social Security Administration no longer require genital surgery as a condition for changing an individual’s sex on passports and Social Security Cards. Eighteen states and the District of Columbia have enacted transgender anti-discrimination statutes and the Equal Employment Opportunity Commission, as of 2012, has held that the prohibition of sex discrimination in Title VII of the Civil Rights Act encompasses transgender individuals. As it currently stands, only three states fail to recognize the ability of an individual to change their legal sex, although, as will be discussed below, there are some inconsistencies in regards to the application and recognition of such changes. While much more work remains, the struggle for transgender rights has made significant progress.

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107 MEYEROWITZ, supra note 29, at 258–59.
108 Id. at 247.
110 MEYEROWITZ, supra note 29, at 274.
111 See id. at 283–84.
114 See NAT’L CTR. FOR TRANSGENDER EQUAL., supra note 16; see also TRANSGENDER LAW CTR., supra note 16.
117 See LAMBDA LEGAL, supra note 13.
D. Intersex Rights and Genital Surgery

While young as a movement, the Intersex Rights Movement is making substantial progress in its goals of raising awareness and ending the surgical destruction of intersex bodies. Since it became the norm in the 1950s, intersex children have been overwhelmingly subject to genital surgery in order to comport with binary gender norms. With sex defined in the minds of many, including those in the medical profession, by the possession of the proper genitals, intersex births were classified as “social emergencies” requiring immediate action. Informed by the belief that gender identities were malleable in childhood, doctors told parents that surgery was necessary for the children to develop normal identities. Surgical standards were based on heteronormative concerns: boys needed to be able to penetrate, girls needed to be fertile and able to be penetrated. The existence of intersex persons was hidden by medical erasure and family secrecy and shame.

The movement for intersex rights began in 1993, when Bo Laurent formed the Intersex Society of North America (“INSA”). INSA’s goals were to provide support for the intersex community and to end the “shame, secrecy, and unwanted genital surgeries for people born with an anatomy that someone decided is not standard for male or female.” From early on, INSA worked closely with both LGBT and disabled rights groups and drew parallels between the struggles of the intersex community to those of the transgender community. The work of intersex activists, including a demonstration outside the American Academy of Pediatrics meeting in Boston in 1996, helped to bring intersexuality, long hidden from the public by

118 GREENBERG, supra note 2, at 16.
120 See GREENBERG, supra note 2, at 19. (Normal genitalia for boys required an ‘adequate’ penis . . . . The penis became the essential determinant for sex because medical experts believed that a male could only be a true man if he possessed a penis that was capable of penetrating a vagina and allowed him to urinate in a standing position . . . . XY infants with smaller penises were surgically and hormonally altered and raised as girls because the dominant belief that growing up as a boy with an ‘inadequate’ penis was too psychologically traumatic to risk. Some XY infants who had fully functional testicles had their ability to reproduce destroyed rather than having them be raised with a penis that was considered smaller than the norm. XX infants with a phallus that was more similar in length to a penis than a clitoris . . . . [i]f they had the ability to bear a child as an adult, doctors would maintain their reproductive capacity. They would surgically remove the clitoris or reduce it to a size that they considered acceptable, even though the surgery might diminish or destroy the person’s ability to engage in satisfactory sex. . . . In other words, the dominant protocol required children should only be raised as males if as adults they would be able to engage in conventional sex acts . . . . For females, however, the primary emphasis was on maintaining reproductive capacity rather than preserving the ability to enjoy sexual acts.”) (footnotes omitted).
121 See Greenberg, supra note 10, at 327.
122 GREENBERG, supra note 2, at 85.
123 INTERSEX SOCIETY OF NORTH AMERICA, http://perma.cc/NNT8-5RBP.
124 See MEYEROWITZ, supra note 29, at 283.
125 See GREENBERG, supra note 2, at 101.
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surgery, shame, and medical paternalism, into the public eye.127 The case of David Reimer, referred to in the media initially as “John/Joan,” also raised the public’s awareness, and, along with the other stories of other intersex adults, demonstrated the resilience of innate gender identity and dashed what remained of Money’s theory that gender was malleable.128 The intersex rights movement’s goals, beyond ending surgical intervention on unconsenting minors, include obtaining protection from discrimination, changing harmful policies regarding official documentation, gaining recognition for intersex persons who identify as other than male or female, and generally bringing attention to the existence and humanity of intersex persons.

While surgery continues to be performed upon intersex children, the intersex rights movement has succeeded in making its medical necessity and propriety increasingly suspect. The 2006 Consensus Statement endorsed by the American Academy of Pediatrics encourages greater caution, emphasizes preserving genital function over cosmetic goals, and acknowledges that no evidence supports the assumption that genital surgery improves the parent-child bond.129 INSA was also involved as amicus curiae in a groundbreaking 1999 Colombian Constitutional Court decision, which acknowledged the rights of intersex minors to bodily autonomy and informed consent over the right of parents to consent on their behalf to risky surgeries or treatments that do not produce medical benefits.130 In that case, the parents of two children with intersex conditions sought court authority for cosmetic genital surgery after their doctors refused to proceed.131 The Court balanced the interests of the intersex child to autonomy and self-determination and against the rights of the child’s parents, and concluded that allowing parental autonomy to consent in the case of an intersex child would be inappropriate, as parents were influenced by social stigmas.132 While the Court stopped short of banning all genital surgery on minors on the grounds of family privacy, the Court ruled that a special degree of informed consent, “qualified

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128 See GREENBERG, supra note 2, at 88–89. David Reimer was born a non-intersex male, but lost his penis in a botched circumcision. See id. at 19. Reimer received genital reassignment surgery and was raised as a girl, which was initially championed as a success by his doctor. See Chinere Ezie, Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—The Need for Strict Scrutiny, 20 COLUM. J. GENDER & L. 141, 152 n.34 (2011). However, Reimer expressed from early in childhood strong feelings that he was not a girl. See id. As a teen, Reimer chose to have surgery and hormone therapy, and regained his masculine identity. See GREENBERG, supra note 2, at 19. Reimer spoke with sexologists Milton Diamond and Keith Sigmundson about his experience in order to dissuade other doctors from similar treatment of infants. See id. Tragically, Reimer, committed suicide due at least in part to his struggle with his sex/gender identity. See Ezie, supra, at 152 n.34.
129 Id. at 6, 35–36.
130 Id. at 22–23.
131 Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 1995, Sentencia No. T-477/95 (Colom.), available at http://perma.cc/HQ3D-6PPF; Corte Constitucional [C.C.] [Constitutional Court], mayo 12, 1999, Sentencia SU-337/99 (Colom.), available at http://perma.cc/GT4-ATTM.
132 Corte Constitucional [C.C.] [Constitutional Court], mayo 12, 1999, Sentencia SU-337/99 (Colom.), available at http://perma.cc/GT4-ATTM.
and persistent” informed consent, was necessary to protect the interests of the child and to ensure that parents were making decisions in the child’s best interest.\textsuperscript{133}

\textbf{E. The Modern Understanding of Intersexual Conditions and Transgenderism}

Advances in medical science have resulted in a better understanding of the causes underlying intersexuality and transgenderism. We now know that the fetuses of both sexes are indistinguishable for the first seven weeks of development.\textsuperscript{134} At eight weeks, hormones trigger the development of differentiated genitals.\textsuperscript{135} In most people, everything lines up: chromosomes, hormones, gonads, internal and external organs, and gender identity all conform, producing anatomically typical, cisgender males and females.\textsuperscript{136}

Medicine now recognizes a variety of conditions that can lead to intersexual conditions: chromosomal conditions, gonadal sex conditions, internal organ conditions, external organ conditions, and hormonal conditions. Chromosomal anomalies include Klinefelter syndrome, wherein an individual has an XXY karyotype,\textsuperscript{137} and Turner syndrome, wherein an individual has an XO karyotype (only one copy of an X chromosome).\textsuperscript{138} Gonadal sex disorders include Swyer Syndrome, in which an individual has an XY karyotype, but female anatomy and (typically) identity,\textsuperscript{139} and De la Chapelle Syndrome, in which an individual has two X chromosomes, but one X has received some of the sex-determining genes from the Y chromosome; such individuals typically develop male bodies and identities, although they are sterile and smaller than most XY males.\textsuperscript{140} Internal organ anomalies can result from a failure to produce anti-Mullerian hormones, leading to the development of fallopian tubes and a uterus in genetic and otherwise anatomic

\textsuperscript{133} See Morgan Holmes, \textit{Deciding Fate or Protecting a Developing Autonomy?}, in \textit{Transgender Rights}, (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) at 130–31 (translating Corte Constitucional [C.C.] [Constitutional Court], mayo 12, 1999, Sentencia SU-337/99 (Colom.), http://perma.cc/9GT4-ATTM)).

\textsuperscript{134} \textit{Greenberg, supra} note 2, at 12.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Greenberg, supra} note 10, at 278.

\textsuperscript{137} Individuals with Klinefelter Syndrome typically have male bodies and gender identities, although some have ambiguous genitalia or feminine secondary characteristics. \textit{See, e.g.}, Greenberg, \textit{supra} note 57, at 57–58; Noa Ben-Asher, \textit{The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties}, 29 \textit{Harv. J.L. & Gender} 51, 81 (2006).

\textsuperscript{138} Individuals with Turner Syndrome are generally female-bodied and have female gender identities; they may possess a uterus, but always lack ovaries and eggs and typically require exogenous estrogen for the development of secondary sexual traits. \textit{See Warnke, supra} note 40, at 41; Greenberg, \textit{supra} note 57, at 58.

\textsuperscript{139} \textit{Id.}

males.141 Hormonal conditions include androgen insensitivity syndrome, both complete (CAIS) and partial (PAIS), 5-alpha reductase deficiency (5-ARD), congenital adrenal hyperplasia (CAH), and progestin-induced virilization.142 Some of these conditions can lead to external organ anomalies, which are classified as male pseudohermaphroditism (testes, no ovaries, some aspects of female genitalia), female pseudohermaphroditism (ovaries, no testes, some aspects of male genitalia), and “true hermaphroditism” (ovarian and testicular tissues).143 These conditions, and the variety of ways in which the people with them identify themselves, demonstrate the complexity of human existence and belie societal understandings of what makes a person a man or a woman.

While the medical origins of transgenderism are less studied and not as well understood as the causes of intersexuality, there is a growing body of research supporting the position that there is an empirically measurable, anatomical explanation for transgenderism that lies in the brain.144 While such research is contentious for obvious reasons, there is some evidence that male and female brains differ in size and organizational structure.145 Research into the sexual dimorphism of the human brain has shown that several distinct regions of the brain in transgender individuals—both transmen and transwomen, including those who have yet to undergo hormone therapy—are more alike in structure to the brains of members of their identified gender than those of their genetic/anatomical sex.146 Some research has indicated

141 Greenberg, supra note 57, at 58–59.

142 Id. at 58–61; see also WARNKE, supra note 40, at 41 (explaining how persons with CAIS have female external anatomy and typically have female identities, but no female internal organs; those with PAIS may have completely or partially masculinized genitals; 5-ARD can result in female appearance at birth, but masculinization at puberty; CAH individuals, unlike the aforementioned groups, have an XX karyotype and female gonads, but may have ambiguous genitals, and females with the condition are popularly stereotyped as masculine and have a higher likelihood of bisexuality and homosexuality; and PAH individuals, similarly, have XX genotype but may have an enlarged phallus).

143 Greenberg, supra note 57, at 59.


145 Id.

146 See, e.g., Jiang-Ning Zhou et al., A Sex Difference in the Human Brain and its Relation to Transsexuality, 378 NATURE 68, 68–70 (1995) (demonstrating that size of the bed nucleus of the stria terminalis (BSTc), a region of the brain associated with sexual behavior, was female-sized in the brains of transwomen regardless of sexual orientation); Frank P.M. Kruijver et al., Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus, 85 J. CLIN. ENDOCRINOL. METAB., 2034, 2041 (2000), available at http://perma.cc/4PC6-MCFQ (finding, in a study that included not only male and female control brains but also the brains of cisgender men who had been castrated several years prior to death, that transgender women have female neuron numbers in the limbic nucleus; “the present study of SOM neurons in the human BSTc provides unequivocal new data supporting the view that transsexualism may reflect a form of brain hermaphroditism such that this limbic nucleus itself is structurally sexually differentiated opposite to the transsexual’s genetic and genital sex”); Eileen Luders et al., Regional Gray Matter Variation in Male-to-Female Transsexualism, 46 NEUROIMAGE 904 (2009) (finding that transgender women who have not received hormone treatment have higher than average levels of gray matter in the right putamen); Guiseppe Rametti et al., The Microstructure of White Matter in Male to Female Transsexuals Before Cross-Sex Hormonal Treat-
hormone-mediated sexual differentiation of the genitals and the brain occur during different stages of pregnancy, which would explain how otherwise non-intersexual individuals could develop neurological features more like those of the opposite sex.147 The significance of these studies is hard to understate: if neurological structures in the brain are sexually dimorphic, and if transgender individuals have neurological structures in their brain that correspond to the opposite sex, then transgender individuals are arguably intersex, neurologically intersex. Phrased as “neurological intersexuality,” transgenderism is removed from the realm of mental health completely, and placed into the purview of pure physical medicine. Further, a neurological basis for gender identity establishes it as an innate trait, which would then facilitate greater legal protection for transgender individuals. While it is not known if all transgender individuals have all or some of these neurological features, or if such features always correspond to being transgender, these studies demonstrate that sex is more complicated than observable anatomy or genetics.

Both intersexuality and transgenderism challenge the understanding of sex as a single-factor test based on observable anatomical features. Both realities demonstrate that sex, while an objective biological reality, is a more complicated phenomenon than society would have us believe.

III. THE DISORDERED STATE OF LEGAL SEX

Intersex and transgender individuals remain legally and culturally marginalized, with many individuals denied recognition of their identities by the law’s insistence on placing all human beings within a binary system based on anatomical features. This Part will discuss the problems created by a lack of a uniform definition of sex across the United States, and how that absence has led to inconsistent and often nonsensical decisions by different courts. It will address legal precedents that deny changes of legal sex to those seeking them and the problematic nature of the standards employed for the determination of legal sex even in jurisdictions that allow for a legal change of sex. The legal and social ramifications of these legal doctrines of sex and gender on the lives of transgender and intersex people will also be examined. The lack of fair and uniform criteria for legal sex in the United States, and the resultant uncertain and disfavored legal status suffered by transgender and intersex individuals, detailed in this Part, is why this article advocates for a gender-based standard of legal sex and greater ease of changing legal sex.

A Proposal for Brain-Based Legal Sex

A. No Clear Standard, No Uniformity

Sex, as important as it is to law and society, is rarely defined by statute. With the advent of hormone therapy and sexual reassignment, courts were forced to determine who, and under which circumstances, qualified as a male or a female. Without clear guidelines, courts in different states have created different tests. Some have turned to the dictionary to define sex, while other courts insist that the sex that one was assigned at birth based on the typical indicators remains one’s legal sex regardless of subsequent surgical intervention. Some courts have relied on chromosomes. A Texas court concluded that sex is immutably fixed by our Creator. Other courts have relied on a combination of factors, including gonads, chromosomes, and genitalia, and sometimes considering gender identity as a relevant factor.

Leaving the formulation of the criteria for legal sex to the courts has not just resulted in a patchwork of incongruous criteria across the nation: the ad hoc formulation of the criteria for determining so critical a component of a person’s identity has led, all too often, to the substitution of stereotypes and prejudices for sound legal analysis. In Littleton v. Prange, for example, the Texas Appellate Court’s language is demonstrative of such prejudice: the court begins its overview by remarking that the word “transsexual” is “not often heard on the streets of Texas, nor in its courtrooms,” refers to a transgender petitioner in another case as “the transsexual,” and concludes that the petitioner was a male because “a person’s gender” is immutably fixed by our Creator at birth.

The inconsistency in who is legally which sex is not just interstate, but intrastate: a number of states have held that, for the purposes of marriage, a transgender or (presumably) an intersex person, regardless of subsequent

148 See Greenberg, supra note 10, at 267 (“The law typically has operated under the assumption that the terms ‘male’ and ‘female’ are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true.”).
149 MEYEROWITZ, supra note 29, at 241–43.
150 In re Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002).
152 In re Ladrach, 32 Ohio Misc. 2d 6, 10 (Prob. Ct. 1987).
153 Littleton, 9 S.W.3d at 231 (“Christie was created and born a male.”).
154 Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (noting that “an individual’s sex includes many components, including chromosomal, anatomical, hormonal, and reproductive elements, some of which could be ambiguous or in conflict within an individual,” the court concluded that the plaintiff, who was “anatomically and hormonally female,” was legally female); In re Heilig, 816 A.2d 68, 72–73, 87 (Md. 2003) (citing Greenberg, supra note 10, at 278, for the medical viewpoint that numerous factors, including chromosomes, genitals, gonads, hormones, internal organs, secondary traits, and “sexual identity” constitute sex, and ultimately finding that legal sex is subject to modification); M. T. v. J. T., 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976) (applying a dual factor test of genitals and “psychological sex,” and concluding that, as the elements were brought into harmony, the plaintiff was to be recognized as a woman).
155 Littleton, 9 S.W.3d at 224–25, 227.
surgery or changes to their birth certificate, is the sex of their birth. In *Littleton*, the appellant, Christine Littleton, had completed sexual reassignment and had changed her name and the sex on her birth certificate in accordance with Texas law. The San Antonio appellate court rejected the validity of Christine’s amended birth certificate, stating that the statute allowed for changes only if the record was “incomplete or proved by satisfactory evidence,” and as Littleton was born with “the normal male genitalia: penis, scrotum, and testicles” and as she did not, at birth or after surgery, have a “womb, cervix, or ovaries,” the certificate was not “inaccurate as of the time the certificate was recorded.” The Florida case of *Kantaras v. Kantaras*, produced a similar result: despite sexual reassignment surgery and a change in the sex indicated on his birth certificate, Mr. Kantaras was held to be female based on his sex assigned at birth and his presumably female chromosomes. Out of state birth certificate changes have been rejected too, as in the Kansas Supreme Court case of *In re Estate of Gardiner* and the Ohio Eleventh Appellate District case of *In re Marriage License for Nash*.

After the case, Littleton’s lawyer later remarked that her client “while in San Antonio, Tex., is a male and has a void marriage; as she travels to Houston, Tex., and enters federal property, she is female and a widow; upon traveling to Kentucky, she is female and a widow; but, upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male.” The absurd and unfair situation is the result of courts and legislatures across the fifty states all propounding different standards of sex. Merely asking the question of what defines sex threatens the very system of power on which it is based. As a result, judges in conservative jurisdictions such as Texas, Kansas, Florida, and Ohio have defined sex in ways that shore up entrenched, scientifically inaccurate under-
A Proposal for Brain-Based Legal Sex

standings of sex and gender, and which deny large numbers of men and women recognition of their identities.

From the beginning, sexual reassignment surgery and the ability of a person to change their legal sex were controversial and strongly opposed.\(^{164}\) Five states forbid legal change of sex by statute, with Tennessee’s statute specifically prohibiting the modification of the sex listed on birth certificates for transgender individuals.\(^{165}\) Since Littleton v. Prange, some Texas jurisdictions have refused to issue amended birth certificates.\(^{166}\) While intersex individuals have historically had an easier time changing their birth certificates on the grounds of mistake, there are anecdotal reports of increasing difficulty, which is not surprising: thanks to cases such as Littleton, which held that designated sex at birth controls absent fraud or error and that chromosomes are similarly determinative, an XX intersex person who identifies as male but was erroneously assigned female would be deemed to have been made a female by his Creator. Similarly, an intersex person who identifies as female, but who has ambiguous genitalia that could be classified as male, may be held to be permanently male by virtue of her not having a uterus.

B. Problematic Standards

Even in the cases where sex changes are permitted, and recognized in all contexts, including marriage, courts and legislatures have all too often imposed undue burdens on the individual seeking legal recognition of their gender. These burdensome and often expensive limitations are part and parcel with the legal policing of gender boundaries that arise when sex is based on anatomy or is unchangeable and are based upon arguments that legal sex, rather than creating and reifying a social construct, is simply the legal recognition of the Creator’s immutable assignment.

Many courts and legislatures have made “irreversible” surgical genital alteration a requirement for recognition of a change in legal sex.\(^{167}\) In the case of In re Heilig,\(^{168}\) the plaintiff sued the Maryland Department of Health to change her name and sex, and the Maryland Supreme Court required the petitioner to “present sufficient medical evidence of both the relevant criteria for determining gender and of the fact that, applying that criteria, he has completed a permanent and irreversible change from male to female.”\(^{169}\)

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\(^{164}\) See, e.g., Anonymous v. Weiner, 50 Misc. 2d 380, 382 (N.Y. Sup. Ct. 1966) (“[I]t is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation.”); MEYEROWITZ, supra note 29, at 242–44 (noting that the Committee of the New York Academy of Medicine, consulted by the Department of Health in the Weiner case, viewed transgender persons as “sick” and “psychotic” and advised against recognition of legal change of sex on the grounds that it “might encourage . . . ‘operations of mutilation’”).

\(^{165}\) TENN. CODE ANN. § 68-3-203(d) (2006).

\(^{166}\) LAMBDA LEGAL, supra note 29.

\(^{167}\) See, e.g., id.

\(^{168}\) In re Heilig, 816 A.2d 68, 73 (Md. 2003).

\(^{169}\) The Court decided to use male pronouns for petitioner “[b]ecause of our conclusion that petitioner has not yet established an entitlement to a determination that his gender has
Currently, the statutes or case law of 28 states require sexual reassignment surgery (SRS) in order to amend or issue a new birth certificate with a different sex. The reasons courts have given for requiring sexual reassignment surgery include concerns for accurate official records, avoiding “sanctioning a deception on the public,” and the “comfort needs of the public.”

Obtaining SRS is an expensive and arduous process, and mandating that individuals receive it before their identities will be recognized places the power to grant or deny transgender individuals the chance to realize their gender identities, both legally and physically, in the hands of medical practitioners. Before SRS can even take place, one must first be diagnosed as having gender identity disorder (GID), with the attendant stigma of a mental disorder. To obtain surgery, one 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. The standards for obtaining SRS, and its requirement for a legal change of sex, are often inherently heterosexist, cissexist, and classist.

C. Legal Sex for Intersex Persons

The issue of official sex is a problem that intersex individuals share with transgender individuals. American jurisprudence is scarce on the matter, but one Australian and two British cases are demonstrative of the similar obstacles faced by intersex individuals in finding legal recognition for their gender identities. In one Australian case from 1979, the Australian Family Court concluded, in a highly-criticized opinion, that an individual named Dennis was neither male nor female, and therefore unable to marry anyone been effectively changed from male to female . . . . We do so not to disparage petitioner’s undoubtedly sincere belief that his transition is, indeed, complete, but simply to be consistent with our conclusion that he has yet to offer sufficient evidence to warrant that determination as a legal matter.”

170 LAMBDA LEGAL, supra note 29; see also LAMBDA LEGAL, supra note 13.
173 See Ezie, supra note 128, at 199 n.50.
174 See id. at 199.
175 See Dean Spade, Compliance is Gendered, in TRANSgender RIGHTS 228 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) (“Whether seeking to prove our marriage valid . . . or attempting to change our names and gender on our identity documents . . . medical evidence remains the defining factor in determining [transgender persons’] rights. This is problematic because access to gender-related medical intervention is usually conditioned on successful performance and rigidly defined and harshly enforced understandings of binary gender, because many gender-transgressive people may not wish to undergo medical intervention, and because medical care of all kinds . . . remains extremely inaccessible to most low-income gender-transgressive people.”) (footnotes omitted).
of either sex. In one recent British case, an infant was born with ambiguous genitalia and several of her internal organs outside of her body. Her parents, fearing that she might not live for very long, hastily christened her David Joel. The child survived the lengthy surgeries to properly place her organs and seal the hole in her abdomen, after which her parents, at the advice of the doctors, decided to raise their child as a girl and rename her Joella. The Office of National Statistics refused to change Joella’s designated sex. It was only after years of struggling, extensive media coverage, and the personal intervention of Princess Diana that the Office of National Statistics agreed to change Joella’s birth certificate. The case of W v. W, saw, like Kantaras, a spouse seeking to declare a marriage a nullity on the basis that their spouse was not their identified sex. In that case, the wife, a woman named Whitney who had Partial Androgen Insensitivity Syndrome (PAIS), had been born with ambiguous genitalia, designated a male at birth, but insisted from early childhood that she was female, and in puberty developed feminine features. The court asked Whitney to provide embarrassingly detailed information about her anatomy and private behaviors, inquiring, in its quest to determine the validity of her womanhood, such details as where Whitney’s urethra was located and whether she had ever urinated while standing. The court, applying a six factor test analyzing “chromosomes (male), gonads (male), genitalia, including internal sex organs (ambiguous), psychological factors (female); hormones (no response to testosterone), and secondary sexual characteristics (“mixed but primarily female”), as well as the fact that most individuals with PAIS are raised as females, concluded that Whitney was indeed female.

While there are no available cases addressing intersex individuals and their right to change their legal sex, there is evidence that some intersex individuals in the United States have run into resistance amending vital documents to match their identified gender. As with transgender individuals, legal sex designation is an important issue for intersex individuals: a majority of intersex children have been surgically assigned a sex at birth, and as many as 25 percent of them are dissatisfied with their assigned sex. Such persons would run into the same barriers faced by transgender individuals if their birth certificate is deemed to not be in error, despite the surgical inter-

176 In re Marriage of C and D (falsely called C) (1979) 35 FLR 340 (Austl.). The decision of the Australian Family Court in this matter parallels the Kansas Supreme Court’s decision in Gardiner that Mrs. Gardiner was, because of her status as a “transsexual,” incapable of marrying either men or women.

177 GREENBERG, supra note 2, at 67–69.

178 See id.

179 Id. at 68.

180 W v. W, 58 BMLR 15 (Fam. 111 2001); see also GREENBERG, supra note 2, at 52 n.2.

181 Id. at 52–54.

182 Id. at 53.

183 Id.

184 Id. at 8.

185 Id. at 20.
vention, or if their DNA conflicts with their anatomy and identity.186 Similarly, those who have not undergone surgery and possess ambiguous genitalia, or genitalia conflicting with their DNA, internal organs, gonads, or identity, will similarly be disadvantaged by the current standards for legal sex.187

D. The Common Struggle

Intersex and transgender individuals, although distinct in their identities, are united in their common struggle against the gender stereotypes ingrained in the law. Both groups are forced to conform both their bodies and behaviors to the heterosexist ideal. Intersex individuals are surgically modified shortly after birth to conform to anatomical criteria for male and female, and transgender individuals are likewise forced to conform to legal expectations of what male or female bodies are supposed to look like. Both groups, while part of the normal spectrum of anatomical and psychological variation, are classified by society as “disordered”; transgender individuals have “disordered minds,” intersex people have “disordered bodies,” and both must be “fixed” lest they undermine society’s rigid division of male and female.188

When states deny the ability to change legal sex, they inflict harm on both the petitioner and the law itself. By refusing to acknowledge the genders of the plaintiffs in Littleton, Gardiner, and Kantaras, the courts in each case destroyed what had been believed to be valid marriages. In Kantaras, the Florida court did not merely annul the plaintiff’s marriage, but also his parental rights.189 While Kantaras and Littleton, being legally their birth sexes in Florida and Texas, could in theory legally marry a man or a woman respectively, such an “opposite-sex marriage” would appear to society to be a same-sex one; it is hard to conceive of the drafters of Texas and Florida’s versions of the federal Defense of Marriage Act supporting such a relationship being a valid legal marriage, but that is the result of these decisions. Gardiner is particularly troubling because it implies that a transgender person, being neither male nor female, would be incapable of marrying at all, which is in clear violation of Supreme Court rulings finding marriage to be a fundamental right.190 Fortunately, the rapidly advancing progress of marriage equality191 may very well end the issue of transgender individuals being de-

186 Kate Haas, Who Will Make Room for the Intersex?, 30 AM. J.L. & MED. 41, 60–61 (2004) (observing that an intersex person who has undergone genital construction surgery to render their genitals female in appearance may not be able to change their sex legally without a second round of surgeries).
187 GREENBERG, supra note 2, at 108–09.
188 Ezrie, supra note 128, at 159.
189 Flynn, supra note 20, at 32, 42.
190 Loving v. Virginia, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).
nied marriage rights, unless other courts are willing to follow Gardiner’s reasoning that transgender individuals are somehow neither male nor female.

Beyond the realm of family, these court decisions (and Tennessee’s explicit statutory prohibition) inflict dire economic and social costs upon individuals seeking to change their sex. Having the wrong sex indicated on identifying documents can lead to discrimination and even violence in any number of routine interactions. Employers may refuse to hire a person when their transgender or intersex status is revealed by an incongruous “M” or “F” on their paperwork, and travel and arrests become needlessly riddled with peril. Arrest and imprisonment are especially dangerous: if a male-to-female transgender person, or a female-appearing and identifying intersex person who is legally male, is sent to a male penitentiary, they are faced with either the near certainty of rape and violence or long-term solitary confinement. On top of it all, the refusal by courts and legislatures to recognize individuals as their identified gender strikes at the very core of that person’s identity, saying in effect: “You are not who you say you are.”

The criteria for legal sex in the states that disallow a change in legal sex are flawed because they prohibit self-identification and are based on stereotyped and unscientific understandings of sex. For example, the Kansas Supreme Court relies on dictionaries that define males as producing sperm and females as producing ova. Not every male has the capacity to fertilize ova and beget offspring, nor does every woman have the ability to produce ova or bear offspring; even if we exclude those who are infertile due to surgery or age, XX males and XY/XO women are typically infertile. Similarly, the Littleton court’s reliance on the presence or absence of a uterus is inadequate, since women with 5-ARS, PAIS, and Turner Syndromes are born without uteri, yet they are female in anatomy and identity. Likewise, many women have had hysterectomies, yet they remain as much female as men who have had to have their testicles removed. Chromosomes, relied on by the Ohio and Florida courts, are not always an indicator of either anatomy or gender identity, as demonstrated by numerous intersexual conditions as well as the lives of transgender individuals. Finally, birth certificates, which are based on cursory visual assessment at birth, are not a reliable standard. External genitalia may not match internal anatomy or DNA, and the assignment may have been based on the inaccurate AAP criteria, surgical alteration may have occurred, or, in the case of 5-ARD, the appearance of the genitals may change between birth and the end of puberty.
Even standards employed by the U.S. jurisdictions that allow changes are deeply problematic, since the standards overwhelmingly mandate surgery, reducing identity to possession of body parts and denying legal recognition to countless individuals. The use of genitals as a standard, often manifested in statutes requiring sexual reassignment surgery for birth certificate changes—and the aforementioned cases discussing anatomy, “irreversible” sex changes, and vaginal adequacy—are examples of flawed criterions for legal sex. Sexual reassignment is not an option for many transgender and intersex persons, because of financial reasons, health, or a lack of satisfactory surgical options for female-to-male transgender people and female-assigned intersex men.200 By mandating surgery for legal recognition of one’s gender, courts and legislatures make self-realization and access to official documents that match one’s presentation conditioned on conforming to a reductive definition of sex which ignores its complexity as a biological and social phenomenon. The use of genitals as a standard also invites invasive scrutiny of the bodies of the intersex and transgender persons, leading to probing questions about how one has sex and with whom, or how one urinates, or whether a vagina is “satisfactory.” Genitals as the legal standard of sex reduces maleness and femaleness down to possession of parts and ignores the reality of intersex persons’ identities, as well as those who lack those “essential parts” due to accident, injury, or medical condition. The obsession with “irreversible change” in some court decisions shows the anxieties and prejudices surrounding those who change sex: without “irreversible changes,” an individual could be legally female but possess male anatomy, undermining the carefully delineated categories enforced through the surgical erasure of intersex persons and the legal non-recognition of transgender persons as their identified gender.

Chromosomes, seen by some as an incontrovertible evidence of maleness or femaleness, are in fact quite unreliable. There are intersex men who are born with XX and XXY karyotypes, women born with XY or XXY, and persons of both sexes born with two or more sets of karyotypes (chimerism).201 Hormones are likewise an inadequate criterion for legal sex, since their presence or absence does not always guarantee masculine or feminine traits. Further, both male and female sex hormones are found naturally in both men and women, and their presence or absence can readily be changed.

200 MEYEROWITZ, supra note 29, at 148–50, 163.
201 Aruna N. et al., 46, XX/46, XY Chimerism – A Case Report, 55 J. ANATOMICAL SOC’Y INDIA 30, 30 (2006), available at http://perma.cc/LYW8-M9YQ (“46, XY/46, XX mosaic is an individual in whom some cells have the male chromosomal complement (XY) and some cells have the female chromosomal complement (XX). This kind of condition, where there is more than one set of cell lines with different sets of chromosomes making up the body is known as chimism [sic] [. A] chimera is an individual, with (at least) two different populations of cells, which are genetically distinct and originate in different zygotes (fertilized eggs). Chimeras are named after the mythological creature Chimera. . . . Natural incidence of chimism is unknown . . . [in one infant, 46, XY/46, XX chimism] account[ed] for 20% of ‘true hermaphroditism,’ which is a rare condition and makes up less than 10% of all intersex cases.”).
Secondary sexual characteristics are likewise mutable and not confined entirely to one sex or the other. The use of flawed anatomical standards by courts and legislatures obstructs access to legal recognition, inflicts social, psychological, and economic harm on transgender and intersex individuals, and denies transgender and intersex persons the right to self-determination.

IV. LEGAL SEX THAT MAKES SENSE: “NEUROLOGICAL SEX” AND BODILY AUTONOMY

Affording intersex and transgender persons full self-determination and legal recognition within society is possible, but it would require the law to recognize that it is currently “not merely reflecting, but rather constructing, sex.” As a solution to the problems the current system of legal sex imposes upon the transgender and intersex, this article proposes a uniform standard of legal sex based on gender identity (“neurological sex”) and a minimally difficult procedure for legal change of sex. These changes are not without historical or legal precedent and are supported by the growing body of research suggesting a neurological basis for gender identity. They would improve the lives of those excluded from their identified genders by laws that insist that sex assignment at birth is immutable, or that sex is defined by possession of certain parts, as well as those excluded from recognition entirely by the current black-and-white definition of sex. Courts should not deny them the ability to express who they are and obtain recognition for their identities, or precondition recognition on possession of certain anatomical traits or having undergone surgical procedures.

The solution to inconsistencies and injustices described in the Parts above is the adoption of gender identity (“neurological sex”) as the standard for legal sex and a streamlined process of legal sex change. A uniform standard of sex based on gender identity, as will be discussed below, is an easy-to-apply standard with both scientific and international bases and would yield consistent and equitable results. Combined with a streamlined process of sex change, one eliminating surgical requirements, medical authorization, or court appearances, a standard of sex based on the brain and not on genitals, chromosomes, or divine mandate would increase the availability of accurate legal documents to intersex and transgender individuals, grant them greater autonomy in determining their identities, and diminish the social stigma borne by those who do not fit the current rigid, and conflicting, definitions of male and female. By weakening the connection between anatomy and legal sex, and allowing for greater autonomy in determining one’s legal identity, a gender identity-based standard of legal sex would also help con-

202 George, supra note 12, at 706. While this article concurs with George that any definition of sex will necessarily have a political dimension and can only approximate, at best, given the complex realities of sex, it is this article’s position that a brain-based definition of legal sex would be the fairest formulation.
tribute to recognition of the identities of individuals whose identities fall outside the binary.203

A. Neurological Sex: Gender Identity as the Standard of Legal Sex

Of all the factors medicine considers indicative of sex, only one is consistently associated with what the individual wants: that factor is what Greenberg calls “sexual identity,”204 what the Australian Family Court in Kevin called “brain sex,”205 and what psychology and LGBT activists term “gender identity.”206 The conflict between gender identity and anatomy is what causes more than half of all transgender individuals to seek a physical transition.207 It is also why some intersex individuals, despite being assigned one sex at birth, grow up to identify as another in adulthood, and why many intersex activists oppose “corrective surgery” on the genitals of unconsenting intersex minors. Gender identity is generally believed to be immutable, and attempts to change it ineffective.208 Attempting to change gender identity also poses troubling questions of individual autonomy and integrity, which is why “reparative therapy” designed to change gender identity in transgender minors (and sexual orientation in LGB minors) has been banned for minors in New Jersey and California.209 If gender identity is immutable and connected to identity, it is fundamentally unjust to impose legal identities that contradict one’s gender identity upon a person based merely on assignment at birth, which can be erroneous, or on chromosomes, which are not always determinative of either gender identity or of anatomical features.

203 Such individuals include some intersex individuals, who identify as non-binary, as well as other individuals who do not identify as either male or female. While the case for legal sexes other than male and female is beyond the scope of this article, this article does endorse legal recognition of non-binary identities.

204 Greenberg, supra note 10, at 278.


207 JAIME M. GRANT, ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, NATIONAL TRANSGENDER DISCRIMINATION SURVEY: REPORT ON HEALTH AND HEALTH CARE (2010), http://perma.cc/43M5-PP6K (describing a 2008 study and noting that “[m]ost survey respondents had sought or accessed some form of transition-related care” with “the majority report[ing] wanting to ‘someday’ be able to have surgery.” Of the 7,000 survey respondents, 62% reported receiving hormone therapy with another 23% hoping to obtain it. In addition, over 70% of transgender women reported having or hoping to have chest surgery, orchietomies (castration method for testicle removal), and genital surgery. For transgender men, many survey respondents had (41%) or want to someday have (51%) mastectomies and similar percentages had or wanted hysterectomies (20% and 57%, respectively). Fewer transgender men had obtained or desired genital surgery (2% and 26%, respectively), largely due to the perceived inadequacy of results.).


Gender identity as the legal standard for sex would be a simple, fair, and workable standard, one that would benefit the transgender and intersex communities while conserving judicial resources. Use of gender identity would eliminate the need for individualized fact-finding, with invasive inquiries into the adequacy of the petitioner’s organs and whether they have ever stood to urinate. It would eliminate the requirement of surgical intervention, a requirement in many states that reinforces an inaccurate understanding of sex, imposes heavy costs (physical, emotional, and financial) on those seeking a legal transition, pathologizes gender non-conformity, and denies legal recognition of the identities of those unable to afford, or unwilling to obtain, radical genital surgery. Intersex individuals, for example, may be unable to be surgically given “adequate” genitalia because of the operations they had forced upon them as infants; denying them legal recognition of their identity because of their inability to meet a “body parts checklist” or conform to heteronormative expectations serves only to revisit upon them the same violation of their identities they suffered as infants. Surgical requirements for changes in legal sex are increasingly viewed as discriminatory and unfair, and they have been repealed or faced repeal efforts in a number of states. Internationally Argentina and the Netherlands recently abolished the need for surgical intervention for a change in all vital documents.

Obtaining a nationwide gender identity-based legal standard of sex would be difficult. Given the assumptions generally held about sex and hostility toward those who challenge the binary system, the passage of such bills will require more than appeals to the benefits such a standard would bring to transgender and intersex persons and international norms. One way to circumvent prejudices and misguided arguments such as those advanced by the Littleton court would to appeal to emerging neurological science. There is growing evidence that the brains of transgender individuals appear in their structure to be more like the brains of cisgender individuals of their identified gender (where the brain conforms to the person’s gender identity) than the brains of persons sharing their assigned sex. While there are no known studies regarding the brains of intersex individuals and their gender identi-

ties,213 given the similar distress suffered by intersex persons who believe they have been surgically assigned the wrong sex after birth, they too probably possess neurology corresponding to people with their respective gender identities. The significance of these studies to the goals of this article is manifold. For one, these studies legitimize transgenderism as a real and physical condition, one that courts cannot dismiss. Second, as the brain is the seat of thought, memory, emotion, and identity, “neurological sex,” if recognized by the courts as a medical theory supported by a growing body of empirical data, would support the contention that transgender and intersex persons really are their identified gender, and should be recognized as such regardless of chromosomes or genitals.

Reliance on scientific studies showing the differences of brains between the sexes, if incorporated into the law, is not without perils. Incorporation of an understanding of sex-based neurological and cognitive differences could serve as a backdoor for legal discrimination against women premised on “scientific fact.” The counter-argument to such concerns is that mere difference is not inferiority (or superiority). Even if the law were to acknowledge that the brains of men and women are different, it does not follow that the law must therefore hold one to be superior, or deserving of greater or fewer rights. Additionally, future research could upend the conclusions reached by the extant research and undermine “neurological sex” as an argument. If that were to become the case, however, the normative arguments for gender identity-based standards of sex would still stand, as such a legal definition of sex would still be the most fair and inclusive, excluding no one from their identified sex. There is the chance that courts and legislatures will reject the science, just as the Texas Court in Littleton rejected offhand the petitioner’s expert testimony.214 There is also a chance that relying on brain imaging may invite another form of judicial inquisition into the anatomy of transgender and intersex petitioners, and lead to the potential denial of legal recognition to those individuals who may appear to lack the right neurology. In regards to that concern, the best response is that gender identity is itself a manifestation of the underlying neurology, making imaging unnecessary. After all, most people with mental health conditions are diagnosed not by neural imaging, even though such technology is helpful, but by a professional observation of behavior. Recognizing these challenges, this article stands for the proposition that the concept of “neurological sex” would be a useful tool for promoting a gender identity-based standard of legal sex in some jurisdictions.

213 One study, while not involving brain imaging or functional modeling, did indicate that out of a group of XY karyotype individuals with cloacal exstrophy who had been assigned female sex at birth due to “severe phallic inadequacy or phallic absence,” all the children surveyed identified as male despite being surgically assigned female genitalia and being raised as girls. See William G. Reiner & John P. Gearhart, Discordant Sexual Identity in Some Genetic Males with Cloacal Exstrophy Assigned to Female Sex at Birth, 350 NEW ENG. J. MED. 333–41 (2004).

Ultimately, any legal definition of sex will be a construction: sex is a complicated biological and social phenomenon, and any attempt to define it will necessarily simplify its complexities. A definition based on gender identity, however, would be the ideal formulation of legal sex. Such a definition would be the most inclusive, as it would not exclude from their identified sex those who lack “the right” genitals or chromosomes. It would be the most equitable, as it would respect the rights of self-expression and autonomy of transgender and intersex individuals. And it would be a definition supported both by historical precedent and by a growing body of scientific research.

B. Ease of Change

If the laws of this nation are to treat intersex and transgender persons equitably, they must allow for as painless a procedure as possible for a change of legal sex. It is a great enough burden to be born with a body that does not match one’s identity, or to have one’s body surgically altered as an infant in order to ease parental anxiety and allow the nurse to check off the right box on a birth certificate. Requiring proof of expensive and unwanted medical procedures, or the signing-off of a medical professional, adds additional and unnecessary cost, delay, and humiliation to individuals already painfully aware of their differences, all for the purpose of preserving outdated and harmful assumptions about the nature of sex and gender. Uncomplicated changes of legal sex are not without precedent: several examples of minimally invasive procedures which give extreme deference to gender identity can be seen in legal sex change laws recently enacted in California, several European nations and Argentina.

California, which has already done away with mandatory SRS for a legal change of sex, has recently abolished the requirement for a judicial hearing for a change of legal sex.215 Under the new rules, the State Registrar will issue a new birth certificate with simply a letter from the applicant and an accompanying affidavit from a physician that they are undergoing “clinically appropriate treatment” for their condition.216 Overseas, Germany, Portugal, the United Kingdom, Austria, and most recently the Netherlands have abolished surgery and hormone therapy as requirements for recognizing a change in legal sex.217 Argentina has gone even further, declaring gender

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216 CAL. HEALTH & SAFETY CODE § 103426 (West 2014).
217 HUMAN RIGHTS WATCH, supra note 211. While these advances have been applauded as a victory, the requirement of a mental health professional’s approval is cited by many activists as a lingering defect in these nations’ laws, and its removal is the focus of the ongoing efforts to achieve full legal and social equality.
The United States, a nation which prides itself on its strong constitutional guarantees of individual liberty, whose Declaration of Independence declares as self-evident the rights to “life, liberty, and the pursuit of happiness,” should work to craft its laws to guarantee all its citizens complete personal autonomy to live their identities and to recognize the identities of the people living under its laws.

Sex and identity are complex matters. While sex is a real phenomenon, it is, like colors, a continuum, not a binary. Many factors, themselves sometimes quite subtle, have been used to define the sex of different individuals, but while medically relevant, only one of those factors is relevant to the essence of individual identity, and that is gender of the mind. Science has begun to lend credence to what was a reality to many ancient peoples, and to some societies today: that a person is their gender not because of their genitals, but because of what that person is inside. Gender identity, far from being a choice or a delusion, is the manifestation of one of the many ways our bodies manifest the phenomenon of sex. As it reflects the sex of the organ responsible for thought and identity, gender identity is the factor that should be determinative of what the law and society recognize the individual to be. The law, which strives to be an instrument of justice and of truth, and a reflection of a society’s values and aspirations, should recognize the gender identity of each individual as that individual’s legal sex.

The Littleton court implied that any child can tell men and women apart based on anatomy, and that the law should do likewise. Instead, medical science and the countless individual stories of transgender and intersex Americans demonstrate something that any child who has read a story about a person whose outer form was changed by magic, or who has heard the old adage “don’t judge a book by its cover,” knows to be true: the measure of a person, their essence, what they truly are, is not in their exterior, but what is inside. Just as a prince remains a prince, even turned into a frog or a beast, and just as a person is good, regardless of their clothing or their physical features, a woman is a woman, and a man a man, not because of what they’re wearing, what they look like, or which chromosomes they were born with, but because, inside, that is what they truly are. A child can recognize that simple truth. The law should do the same, and recognize “neurological sex,” expressed as gender identity, as the sole criterion for legal sex.

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218 See Argentina Gender Identity Law, TRANSGENDER EUROPE (Sept. 12, 2013), http://perma.cc/2TS5-Q8EG; Schmall, supra note 211; see also HUMAN RIGHTS WATCH, supra note 211.