

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

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## 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<sup>1</sup> individuals, those “whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth” and the intersex.<sup>2</sup> For the former, this progress has been marked by statutory and judicial developments increasing the availability of medical treatment,<sup>3</sup> expanding protections from discrimination in the workplace,<sup>4</sup> and easing the processes by which transgender individuals may change their legal sex to correspond to their gender identity.<sup>5</sup> 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.<sup>6</sup>

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<sup>1</sup> “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/RXXV9-XGBB>.

<sup>2</sup> 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).

<sup>3</sup> See Jessica Jeanty & Harper Jean Tobin, *What’s in the ACA for Transgender People?*, HRC BLOG (Oct. 11, 2013), <http://perma.cc/7K8B-85A6>.

<sup>4</sup> *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*11 (Equal Emp’t Opportunity Comm’n Apr. 20, 2012) (holding that employment discrimination against an individual on the basis of “gender identity, change of sex, and/or transgender status” is actionable under Title VII of the Civil Rights Act of 1964).

<sup>5</sup> 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>.

<sup>6</sup> Aleksandra Gjorgievska & Lily Rothman, *Laverne Cox Is the First Transgender Person Nominated for an Emmy—She Explains Why That Matters*, TIME MAGAZINE, July 10, 2014, available at <http://time.com/2973497/laverne-cox-emmy/>; see also Jason Hughes, ‘Orange Is

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.<sup>7</sup> Mainstream Lesbian, Gay, Bisexual and Transgender (LGBT) groups have included intersex individuals and concerns within their agendas.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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,<sup>11</sup> or placement in the wrong jail.<sup>12</sup> Three states refuse to change a person’s birth certificate from the anatomical sex assigned at birth to the person’s self-identified gender.<sup>13</sup> 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.<sup>14</sup> Ohio, Kansas, Texas, Florida, and Illinois refuse to recognize changes in legal sex for the purposes of marriage,<sup>15</sup> bifurcating the trans-

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*the New Black’ Star Laverne Cox First Transgender to Cover TIME Magazine*, THE WRAP (May 29, 2014), <http://perma.cc/TEU3-PF2Z>.

<sup>7</sup> GREENBERG, *supra* note 2, at 21–23.

<sup>8</sup> *Id.* at 101–02.

<sup>9</sup> *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 . . .”).

<sup>10</sup> “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).

<sup>11</sup> “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.

<sup>12</sup> 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).

<sup>13</sup> See LAMBDA LEGAL, *Changing Birth Certificate Designations: State-By-State Guidelines*, <http://perma.cc/4TMF-J3Z4> (last updated July 14, 2014).

<sup>14</sup> 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).

<sup>15</sup> *In re Marriage of Simmons*, 825 N.E.2d 303, 308 (Ill. 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.<sup>16</sup>

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<sup>17</sup> 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 in 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.<sup>18</sup> 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.<sup>19</sup> Judges without backgrounds

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presented an affidavit from his doctor and had his birth certificate amended, because he still possessed female genitals and breasts); see TRANSGENDER LAW CTR. ET AL., *Transgender People and the Federal Marriage Amendment: Frequently Asked Questions 2*, <http://perma.cc/MBE7-QTQ4> (last visited Dec. 1, 2014) (noting that Kansas, Ohio, and Texas courts have held transgender people cannot change their birth gender); see also Tina Kelley, *Through Sickness, Health and Sex Change*, N.Y. TIMES (Apr. 27, 2008), <http://www.nytimes.com/2008/04/27/fashion/27trans.html?pagewanted=all>, <http://perma.cc/6A4P-MVTP> (discussing the issues in Florida).

<sup>16</sup> 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-XVLV> (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).

<sup>17</sup> 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).

<sup>18</sup> *Littleton*, 9 S.W.3d at 223–24.

<sup>19</sup> 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 (seminal 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.<sup>20</sup>

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.<sup>21</sup> Rather, the law should look within. Modern science teaches that the brain is the organ responsible for memory, thought, emotion, and learning.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> The experiences of intersex individuals assigned one sex at birth but who

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typical sexual differentiation path and they have sex indicators that are not all clearly male or female.”) (footnote omitted).

<sup>20</sup> 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 *TRANSSEXUAL 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”).

<sup>21</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 191–94 (1986) (upholding Georgia’s challenged sodomy law largely on the grounds that such laws had “ancient roots”), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring unconstitutional Virginia’s criminal prohibition of interracial marriage).

<sup>22</sup> “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).

<sup>23</sup> GREENBERG, *supra* note 2, at 20.

<sup>24</sup> *Id.*; see also Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection*, in *TRANSSEXUAL RIGHTS*, 74, 85 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006); Dick F. Swaab, *Sexual Differentiation of the Brain and Behavior*, *BEST PRACTICE & RESEARCH CLINICAL ENDOCRINOLOGY & METABOLISM*, 431, 437 (2007); Jessica Hamzelou, *Transsexual Differences Caught on Brain Scan*, *NEWSIDENTIST* (Jan. 26, 2011), <http://perma.cc/K85M-B4AB>.

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.<sup>25</sup> Gender is truly between the ears, not between the legs.<sup>26</sup>

This article endorses gender identity as the sole criterion for legal sex.<sup>27</sup> The argument for such a standard is both scientific and normative. A growing body of evidence demonstrates that gender identity is the result of neurological 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 "neurological sex," be the basis of legal sex, and be determinative of individuals' legal sex for all purposes.<sup>28</sup> 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 imposed by anatomical standards. This article proposes that all surgical or medical intervention as a criterion for legal change of sex be abolished, so as to diminish the burden and delay currently imposed on transgender and intersex 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 abolition 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 implement: the religious and cultural biases against gender nonconformity, which have produced many of the more negative cases addressing transgender 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.<sup>29</sup> Regardless, this

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<sup>25</sup> 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), available at <http://perma.cc/6UJH-C4KA>.

<sup>26</sup> See Mark E. Berghausen, *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 NW. U. L. REV. 1281, 1286 n.30 (2011).

<sup>27</sup> This article is not the first to call for such a standard. See Flynn, *supra* note 20, at 39.

<sup>28</sup> M. T. v. J. T., 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976) (describing gender identity as "psychological sex"); Kevin v. Attorney General, (2001) Fam LR 1074 ¶¶ 252, 273 (Austl.) (concluding that a female-to-male transsexual man was indeed male and his marriage was valid, in part because his "brain sex" was male).

<sup>29</sup> 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.<sup>30</sup> 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;<sup>31</sup> due to the forces of Christianization and attempts to forcibly assimilate Native peoples into European culture, significantly fewer tribes have retained such cultural practices.<sup>32</sup> 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.<sup>33</sup> Two-Spirit individuals were men, or less often women, who acted in ways not comporting with traditional gender roles.<sup>34</sup> In their respective societies, it was the individual’s social role, not their anatomy, which determined their social identity.<sup>35</sup> 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

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<sup>30</sup> George, *supra* note 12, at 683–85.

<sup>31</sup> *Id.* at 685.

<sup>32</sup> 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).

<sup>33</sup> Walter L. Williams, *The ‘Two-Spirit’ People of Indigenous North Americans*, THE GUARDIAN (Oct. 11, 2010), <http://perma.cc/J2KN-LTUK>.

<sup>34</sup> Terry S. Kogan, *Intersections of Race, Ethnicity, Class, Gender & Sexual Orientation: Transsexuals and Critical Gender Theory: The Possibility of A Restroom Labeled “Other,”* 48 HASTINGS L.J. 1223, 1242–43 (1997).

<sup>35</sup> “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).

West<sup>36</sup> to the Crow of the Midwest, recognized a place for persons whom we might call transgender or intersex.<sup>37</sup> In these societies, the “gender focus . . . was on the unfolding and coalescing of the *internal* self rather than on the correctness of *external* manifestations.”<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup> *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.”<sup>41</sup> 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.<sup>42</sup> *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.<sup>43</sup> 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.<sup>44</sup> *Hijra* are recognized within Muslim communities in the sub-continent as well.<sup>45</sup> Socially, *hijra* are truly a third gender, seen as neither male nor female, with elements of both.<sup>46</sup>

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.<sup>47</sup> Sworn virgins are women who “wear men’s clothing, carry men’s weapons, perform

<sup>36</sup> Thomas, *supra* note 32, at 227.

<sup>37</sup> George, *supra* note 12, at 685.

<sup>38</sup> *Id.* (quoting Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 220 (1995)) (emphasis in original).

<sup>39</sup> Thomas, *supra* note 32, at 226–29.

<sup>40</sup> GEORGIA WARNKE, *DEBATING SEX AND GENDER* 47 (2010).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (quoting SERENA NANDA, *NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA* 16 (1999)).

<sup>44</sup> See Ruth M. Pettis, *Hijras*, in *GLBTQ: AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, AND QUEER CULTURE* (2004), available at <http://perma.cc/8UVC-UU63> (last updated Mar. 16, 2011).

<sup>45</sup> Lauren Frayer, *Pakistan’s Transgenders In A Category Of Their Own*, NPR (Sept. 3, 2012), <http://perma.cc/TGE7-NZ6R>.

<sup>46</sup> Greenberg, *supra* note 10, at 276.

<sup>47</sup> WARNKE, *supra* note 40, at 46.



men's jobs, and at least in some cases, receive public recognition as men."<sup>48</sup> 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.<sup>49</sup> There were other socially recognized cross-gender identities in Europe and the Middle East, such as the Scythian Enarees,<sup>50</sup> the Mesopotamian Assinnu,<sup>51</sup> and the Roman Galli.<sup>52</sup> In Thai culture, the word *kathoey*, often translated in English as "ladyboy,"<sup>53</sup> 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.<sup>54</sup> Despite being born anatomically male, *kathoey*s 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.<sup>55</sup> 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 *machiembra* ("male-female") in the Dominican Republic<sup>56</sup> and the *kwolu-aatmwol* of the Sambia people in Papua New Guinea.<sup>57</sup>

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Michael Lambert, *Scythians*, in 2 GAY HISTORIES AND CULTURES: AN ENCYCLOPEDIA 785–786 (George E. Haggerty ed., 2000); HERODOTUS, 1 THE HISTORY ¶ 105 (A. D. Godley, trans., Harvard University Press, 1920).

<sup>51</sup> MARTTI NISSINEN, HOMOEROTICISM IN THE BIBLICAL WORLD: A HISTORICAL PERSPECTIVE 28 (1998).

<sup>52</sup> Nikolai Enres, *Galli: Ancient Roman Priests*, in GLBTQ: AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, AND QUEER CULTURE (2005), available at <http://perma.cc/KJY8-WC66> (last updated Nov. 15, 2006).

<sup>53</sup> See, e.g., Hannah Beech, *Where the 'Ladyboys' Are*, TIME MAGAZINE (July 7, 2008), <http://perma.cc/MFP7-NT2B>.

<sup>54</sup> Sam Winter, Language and Identity in Transgender: Gender Wars and the Case of the Thai *Kathoey*s, Address at the Hawaii Conference of Social Sciences (June 2013), available at <http://perma.cc/FA9M-99XQ>.

<sup>55</sup> *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%).")

<sup>56</sup> 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.

<sup>57</sup> Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in TRANSGENDER RIGHTS 53 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006).

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<sup>58</sup> and Pakistan,<sup>59</sup> and the *kathoys* 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.<sup>60</sup> Christianity took the Old Testament prohibitions of homosexual acts<sup>61</sup> and cross-dressing<sup>62</sup> (and, potentially, disfavored view of gender-variant individuals<sup>63</sup>) 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.<sup>64</sup> 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,<sup>65</sup> and the beginning of centuries of efforts to pigeonhole the whole spectrum of human gender, sexual, and romantic expression into a gender binary.<sup>66</sup>

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<sup>58</sup> See National Legal Services Authority v. Union of India (2013) 109 (declaring that requiring surgery for recognition as a legal third sex is illegal).

<sup>59</sup> 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.”).

<sup>60</sup> See *Genesis* 2:18–24 (English Standard Version); CATECHISM OF THE CATHOLIC CHURCH ¶¶ 369–373 (2d ed., 1992).

<sup>61</sup> *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.”).

<sup>62</sup> *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.”).

<sup>63</sup> 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.”).

<sup>64</sup> CATECHISM OF THE CATHOLIC CHURCH ¶¶ 362, 364 (2d ed., 1992) (“The human body shares in the dignity of ‘the image of God’ . . . . Man, though made of body and soul, is a unity.”) (footnotes omitted).

<sup>65</sup> 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 . . .”).

<sup>66</sup> 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,<sup>67</sup> 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<sup>68</sup>—intersex children were sometimes killed as “monsters” at birth.<sup>69</sup> 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.<sup>70</sup> “Hermaphrodites,” that is, persons who we would now call intersex, were recognized, but a distinct social role for such persons was not.<sup>71</sup> Medieval English law recognized two categories of persons with physical abnormalities: monsters and deformities.<sup>72</sup> 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.<sup>73</sup> Hermaphroditism (intersexual conditions), were treated by English law as a “deformity,” so at least legally, such children were not monsters.<sup>74</sup> 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.<sup>75</sup> 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 “pre-dominance of the sexual organs.”<sup>76</sup> While recognized as a third physical category of the human being, intersex children under thirteenth century En-

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Reformation, this article primarily relies on Catholic sources. The Catholic Church remains adamant in its opposition 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-BHAJ>; see also Paisley Currah, *Gender Pluralisms*, in *TRANSGENDER RIGHTS*, *supra* note 20, at 17.

<sup>67</sup> Greek and Roman myths mentions the hermaphroditic/androgynous deity Hermaphroditus; the Jewish Talmud and Tosefta describe both animals and humans called *androgynos* and *hermaphrodite* and also set forth rules of conduct for humans of ambiguous gender. Greenberg, *supra* note 57, at 53, 54.

<sup>68</sup> Enres, *supra* note 52.

<sup>69</sup> George Androutsos, *Hermaphroditism in Greek and Roman Antiquity*, 5 *HORMONES* 214, 216 (2006).

<sup>70</sup> ANDREW NEVILLE SHARPE, *FOUCAULT’S MONSTERS AND THE CHALLENGE OF LAW* 63 (2010).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 62.

glish law were to be classified as male or female, depending on the predominance of their physical features.<sup>77</sup>

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.<sup>78</sup> Le Marcis initially lived as woman, but was intersex, for he had an organ that was either a small penis or an enlarged clitoris.<sup>79</sup> At twenty-one, le Marcis began wearing men's clothing and decided to marry the woman with whom he had been living.<sup>80</sup> 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.<sup>81</sup> Mr. Suydam's ability to cast a ballot was challenged on the grounds of his extreme femininity.<sup>82</sup> 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.<sup>83</sup> It was discovered only a few days after the election that Suydam menstruated and had a vaginal opening.<sup>84</sup> Also of consideration was Mr. Suydam's "feminine propensities, such as fondness for gay colors, for pieces of calico, and com-

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<sup>77</sup> In the sixteenth century, Lord Coke, the renowned jurist, writing about the laws of succession in England, declared, "Every heir is either a male, or female, or an hermaphrodite, that is both male and female. And an hermaphrodite (which is also called Androgynus) shall be heire, either as male or female, according to that kind of the sexed which doth prevaile." Greenberg, *supra* note 57, at 54. See also Anne Fausto-Sterling, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 35 (2000) (explaining that there was no "clearinghouse" for the determination of legal sex in the Middle Ages, and that such determinations, when the need for them arose, were predominantly handled by Church authorities, and if not, then by secular courts or physicians); Elizabeth Reis, *Impossible Hermaphrodites: Intersex in America, 1620–1960*, J. AM. HIST. 411, 421–22 (2005) (noting an 1806 edition of Aristotle's *Master-Piece* describes the test of "true sex" for an intersexed person as whether pleasure is drawn from the vagina or the clitoris/penis, and "which member is fittest for the act of copulation"); SHARPE, *supra* note 70, at 63 n.12 (arguing that while there is some evidence, based on Canon Law, that intersexual individuals were allowed some leeway to choose their identities, as the Middle Ages advanced into the Renaissance, and the involvement of secular courts became more common, the predominant sex test seems to have prevailed).

<sup>78</sup> WARNKE, *supra* note 40, at 35–36.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> GREENBERG, *supra* note 2, at 47–48.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

paring and placing them together, and an aversion for bodily labor and an inability to perform the same.”<sup>85</sup> While it is not known whether Mr. Suydam subsequently lost his right to vote, his case, and that of Mr. le Marcis, demonstrates the perils and pitfalls faced by intersex persons prior to the twentieth century, and both gentlemen were arguably the lucky ones.<sup>86</sup>

In the late nineteenth century, advancements in medical science laid the foundation for the current surgical erasure of intersex identities.<sup>87</sup> The increasing access to medical care led to even greater numbers of intersex infants being catalogued, and consequently, greater interest in the phenomena, which led in turn to prominence in the medical community for the many doctors who published on the topic.<sup>88</sup> By the 1870s, a gonad tissue test replaced the predominance test, which had been used to determine legal sex since the Middle Ages.<sup>89</sup> This test, however, posed several difficulties, as the absence of visible gonads and the inability to analyze them *in vivo* left ambiguous bodies unclassified.<sup>90</sup>

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

The twentieth century witnessed the emergence of transgender individuals 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.<sup>91</sup> The lack of any real means of transitioning until the very recent past meant that most transgender individuals had to endure the hardship of living in bodies incongruous with their gender identities. 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 Impersonators* (1922); as the terminology had not yet been invented, the terms “transgender” or “transsexual” are not used in her works—she describes herself as “androgynes,” “bisexuals,” and “female impersonators”—but the identity is the same.<sup>92</sup> Lind was part of a small group gender-variant individ-

<sup>85</sup> *Id.*

<sup>86</sup> “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.

<sup>87</sup> See GREENBERG, *supra* note 2, at 15.

<sup>88</sup> WARNKE, *supra* note 40, at 38–39.

<sup>89</sup> GREENBERG, *supra* note 2, at 15.

<sup>90</sup> WARNKE, *supra* note 40, at 39–40.

<sup>91</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (discussing the nation’s history 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).

<sup>92</sup> Jonathan Ned Katz, *Introduction: Earl Lind (Ralph Werther-Jennie June): The Riddle of the Underworld, 1921*, OUTHISTORY, <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 “androgynes” to “unite for defense against the world’s bitter persecution,” and whose members argued that their condition was natural and benign.<sup>93</sup> 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.<sup>94</sup>

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.<sup>95</sup> German and Austrian researchers led the way in pioneering the study.<sup>96</sup> In the early 1900s, Dr. Magnus Hirschfield, founder of the Institute for Sexual Science, first described what he called “psychic transsexuality.”<sup>97</sup> Crude attempts at surgical sexual reassignment were made in the 1910s and 1920s, with the first complete operation in 1931.<sup>98</sup> Synthetic hormones were developed in the late 1930s and early 1940s.<sup>99</sup> 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.<sup>100</sup> American doctors refused to perform the practice initially, fearing criminal or civil liability.<sup>101</sup> 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.<sup>102</sup> Slowly, the procedure gained medical acceptance, and by the late 1970s, reputable private doctors began offering the procedure.<sup>103</sup>

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

<sup>93</sup> *Id.* (quoting Lind).

<sup>94</sup> 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>.

<sup>95</sup> MEYEROWITZ, *supra* note 29, at 15–19.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 21.

<sup>100</sup> 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.

<sup>101</sup> *Id.* at 120–21.

<sup>102</sup> *Id.* at 218, 222.

<sup>103</sup> *Id.* at 272.

<sup>104</sup> *Id.* at 230–31

<sup>105</sup> *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).<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup> 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,<sup>109</sup> while California passed a statute permitting birth certificate changes in 1978.<sup>110</sup> By the 1990s, the transgender movement came into its own as a social movement with heft.<sup>111</sup>

The transgender movement has made massive progress in the past two decades.<sup>112</sup> Mainstream gay rights movements have adopted the LGBT acronym, including, at least in name, the realization of transgender rights in their goals.<sup>113</sup> 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.<sup>114</sup> Eighteen states and the District of Columbia have enacted transgender anti-discrimination statutes,<sup>115</sup> 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.<sup>116</sup> As it currently stands, only three states fail to recognize the ability of an individual to change their legal sex,<sup>117</sup> 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.

<sup>106</sup> See Betty Luther Hillman, "The Most Profoundly Revolutionary Act a Homosexual Can Engage In": *Drag and the Politics of Gender Presentation in the San Francisco Gay Liberation Movement, 1964–1972*, 20 J. HIST. SEXUALITY 153, 154 & n.7 (2011).

<sup>107</sup> MEYEROWITZ, *supra* note 29, at 258–59.

<sup>108</sup> *Id.* at 247.

<sup>109</sup> M. T. v. J. T., 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976).

<sup>110</sup> MEYEROWITZ, *supra* note 29, at 274.

<sup>111</sup> See *id.* at 283–84.

<sup>112</sup> See, e.g., Editorial, *Progress on Transgender Rights and Health*, N.Y. TIMES (June 9, 2014), [http://www.nytimes.com/2014/06/10/opinion/progress-on-transgender-rights-and-health.html?\\_r=0](http://www.nytimes.com/2014/06/10/opinion/progress-on-transgender-rights-and-health.html?_r=0), <http://perma.cc/UV4T-TSBM>.

<sup>113</sup> See Paisley Currah, Richard M. Juang & Shannon Price Minter, *Introduction*, in TRANSGENDER RIGHTS, *supra* note 20, at xiii, xxiii.

<sup>114</sup> See NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 16; see also TRANSGENDER LAW CTR., *supra* note 16.

<sup>115</sup> AM. CIVIL LIBERTIES UNION, *Know Your Rights – Transgender People and the Law* (2013), <http://perma.cc/U67F-JJEQ>.

<sup>116</sup> *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*11 (Equal Emp't Opportunity Comm'n Apr. 20, 2012).

<sup>117</sup> 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.<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup> Surgical standards were based on heteronormative concerns: boys needed to be able to penetrate, girls needed to be fertile and able to be penetrated.<sup>121</sup> The existence of intersex persons was hidden by medical erasure and family secrecy and shame.<sup>122</sup>

The movement for intersex rights began in 1993, when Bo Laurent formed the Intersex Society of North America (“INSA”).<sup>123</sup> 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.”<sup>124</sup> From early on, INSA worked closely with both LGBT and disabled rights groups<sup>125</sup> and drew parallels between the struggles of the intersex community to those of the transgender community.<sup>126</sup> 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

<sup>118</sup> GREENBERG, *supra* note 2, at 16.

<sup>119</sup> See Elizabeth Reilly, *Radical Tweak—Relocating the Power to Assign Sex: From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality*, 12 CARDOZO J.L. & GENDER 297, 310 (2005).

<sup>120</sup> See GREENBERG, *supra* note 2, at 19.

<sup>121</sup> See *id.* at 16–17. (“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).

<sup>122</sup> See Greenberg, *supra* note 10, at 327.

<sup>123</sup> GREENBERG, *supra* note 2, at 85.

<sup>124</sup> INTERSEX SOCIETY OF NORTH AMERICA, <http://perma.cc/NNT8-5RBP>.

<sup>125</sup> See MEYEROWITZ, *supra* note 29, at 283.

<sup>126</sup> See GREENBERG, *supra* note 2, at 101.



surgery, shame, and medical paternalism, into the public eye.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> In that case, the parents of two children with intersex conditions sought court authority for cosmetic genital surgery after their doctors refused to proceed.<sup>131</sup> 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.<sup>132</sup> 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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<sup>127</sup> See Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, 4 GLQ: J. LESBIAN & GAY STUD. 189, 200, 203 (1998).

<sup>128</sup> 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* Chinyere 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.

<sup>129</sup> GREENBERG, *supra* note 2, at 22–23.

<sup>130</sup> *Id.* at 6, 35–36.

<sup>131</sup> Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 1995, Sentencia No. T-477/95 (Colom.), available at <http://perma.cc/HQ3D-6PFF>; Corte Constitucional [C.C.] [Constitutional Court], mayo 12, 1999, Sentencia SU-337/99 (Colom.), available at <http://perma.cc/9GT4-ATTM>.

<sup>132</sup> Corte Constitucional [C.C.] [Constitutional Court], mayo 12, 1999, Sentencia SU-337/99 (Colom.), available at <http://perma.cc/9GT4-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.<sup>133</sup>

*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.<sup>134</sup> At eight weeks, hormones trigger the development of differentiated genitals.<sup>135</sup> 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.<sup>136</sup>

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,<sup>137</sup> and Turner syndrome, wherein an individual has an XO karyotype (only one copy of an X chromosome).<sup>138</sup> Gonadal sex disorders include Swyer Syndrome, in which an individual has an XY karyotype, but female anatomy and (typically) identity,<sup>139</sup> 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.<sup>140</sup> 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

<sup>133</sup> See Morgan Holmes, *Deciding Fate or Protecting a Developing Autonomy?*, in TRANS-GENDER 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>).

<sup>134</sup> GREENBERG, *supra* note 2, at 12.

<sup>135</sup> *Id.*

<sup>136</sup> Greenberg, *supra* note 10, at 278.

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

<sup>138</sup> 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. See WARNKE, *supra* note 40, at 41; Greenberg, *supra* note 57, at 58.

<sup>139</sup> Greenberg, *supra* note 57, at 58.

<sup>140</sup> See, e.g., 46, XX Testicular Disorder of Sex Development, GENETICS HOME REFERENCE (2008), <http://perma.cc/W9Y7-KULJ>; N. Abusheikha, A. Lass & P. Brinsden, *XX Males Without SRY Gene and with Infertility*, 16 OXFORD J. HUM. REPROD. 717 (2001), available at [http://www.researchgate.net/publication/12055688\\_XX\\_males\\_without\\_SRY\\_gene\\_and\\_with\\_infertility/links/0c96051f921fc7ff0f000000](http://www.researchgate.net/publication/12055688_XX_males_without_SRY_gene_and_with_infertility/links/0c96051f921fc7ff0f000000).

males.<sup>141</sup> 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.<sup>142</sup> 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).<sup>143</sup> 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.<sup>144</sup> While such research is contentious for obvious reasons, there is some evidence that male and female brains differ in size and organizational structure.<sup>145</sup> 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.<sup>146</sup> Some research has indicated

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<sup>141</sup> Greenberg, *supra* note 57, at 58–59.

<sup>142</sup> *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).

<sup>143</sup> Greenberg, *supra* note 57, at 59.

<sup>144</sup> See, e.g., Madhura Ingalhalikar et al., *Sex Differences in the Structural Connectome of the Human Brain*, 111 PROC. NAT'L ACAD. SCI. U.S. 823 (2014), available at <http://www.pnas.org/content/111/2/823.full>, <http://perma.cc/5V95-WGUH>.

<sup>145</sup> *Id.*

<sup>146</sup> 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); Guiseppina 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.<sup>147</sup> 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.

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ment, 45 J. PSYCHIATRIC RES. 949 (2011) (finding that pre-hormone therapy transgender men possessed white matter microstructure in between male and female ranges).

<sup>147</sup> See Dick F. Swaab, *Sexual Differentiation of the Brain and Behavior*, 21 BEST PRAC. RES. CLINICAL ENDOCRINOLOGY METABOLISM 431 (2007).

A. *No Clear Standard, No Uniformity*

Sex, as important as it is to law and society, is rarely defined by statute.<sup>148</sup> 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.<sup>149</sup> Without clear guidelines, courts in different states have created different tests. Some have turned to the dictionary to define sex,<sup>150</sup> 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.<sup>151</sup> Some courts have relied on chromosomes.<sup>152</sup> A Texas court concluded that sex is immutably fixed by our Creator.<sup>153</sup> Other courts have relied on a combination of factors, including gonads, chromosomes, and genitalia, and sometimes considering gender identity as a relevant factor.<sup>154</sup>

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.<sup>155</sup>

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

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<sup>148</sup> 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.").

<sup>149</sup> MEYEROWITZ, *supra* note 29, at 241–43.

<sup>150</sup> *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

<sup>151</sup> See *id.* at 137; *Littleton v. Prange*, 9 S.W.3d 223, 231–32 (Tex. App. 1999); *In re Marriage License for Nash*, 2003-Ohio-722, 2003 WL 23097095, at \*5 (Ohio Ct. App. 2003).

<sup>152</sup> *In re Ladrach*, 32 Ohio Misc. 2d 6, 10 (Prob. Ct. 1987).

<sup>153</sup> *Littleton*, 9 S.W.3d at 231 ("Christie was created and born a male.").

<sup>154</sup> *Radtko 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, genitalia, 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 genitalia and "psychological sex," and concluding that, as the elements were brought into harmony, the plaintiff was to be recognized as a woman).

<sup>155</sup> *Littleton*, 9 S.W.3d at 224–25, 227.

surgery or changes to their birth certificate, is the sex of their birth.<sup>156</sup> 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.<sup>157</sup> 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."<sup>158</sup> 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.<sup>159</sup> Out of state birth certificate changes have been rejected too, as in the Kansas Supreme Court case of *In re Estate of Gardiner*<sup>160</sup> and the Ohio Eleventh Appellate District case of *In re Marriage License for Nash*.<sup>161</sup>

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."<sup>162</sup> 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.<sup>163</sup> 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-

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<sup>156</sup> See *Gardiner*, 42 P.3d at 137; *Kantaras v. Kantaras*, 884 So.2d 155, 156 (Fla. Dist. Ct. App. 2004); *Nash*, 2003 WL 23097095, at \*9; *Littleton*, 9 S.W.3d at 231; *Ladrach*, 32 Ohio Misc. 2d at 10.

<sup>157</sup> TEX. HEALTH & SAFETY CODE ANN. § 191.028 (2014); *Littleton*, 9 S.W.3d at 226.

<sup>158</sup> *Littleton*, 9 S.W.3d at 224, 230–31.

<sup>159</sup> *Kantaras*, 884 So.2d at 156, 161. ("Thus, the question of whether a postoperative transsexual is authorized to marry a member of their birth sex is a matter for the Florida legislature and not the Florida courts to decide. Until the Florida legislature recognizes sex-reassignment procedures and amends the marriage statutes to clarify the marital rights of a postoperative transsexual person, we must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth. Therefore, we hold that the marriage in this case is void ab initio.").

<sup>160</sup> *Gardiner*, 42 P.3d at 134–35.

<sup>161</sup> *Nash*, 2003 WL 23097095, at \*9.

<sup>162</sup> WARNKE, *supra* note 40, at 117.

<sup>163</sup> George, *supra* note 12, at 679 (noting that "like mulattoes, whose existence questioned the racial hierarchy on which the plantation economy of the antebellum South relied, the intersex have the potential to undermine an important political, economic, and social system").

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.<sup>164</sup> 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.<sup>165</sup> Since *Littleton v. Prange*, some Texas jurisdictions have refused to issue amended birth certificates.<sup>166</sup> 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.<sup>167</sup> In the case of *In re Heilig*,<sup>168</sup> 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."<sup>169</sup>

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<sup>164</sup> 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'").

<sup>165</sup> TENN. CODE ANN. § 68-3-203(d) (2006).

<sup>166</sup> LAMBDA LEGAL, *supra* note 29.

<sup>167</sup> See, e.g., *id.*

<sup>168</sup> *In re Heilig*, 816 A.2d 68, 73 (Md. 2003).

<sup>169</sup> 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.<sup>170</sup> 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.”<sup>171</sup>

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.<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup> The standards for obtaining SRS, and its requirement for a legal change of sex, are often inherently heterosexist, cissexist, and classist.<sup>175</sup>

### 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

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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.” *Id.* at 70 n.1.

<sup>170</sup> LAMBDA LEGAL, *supra* note 29; see also LAMBDA LEGAL, *supra* note 13.

<sup>171</sup> *In re McIntyre*, 33 Pa. D. & C.4th 79 (Com. Pl. 1996) *aff’d sub nom.* Matter of McIntyre, 687 A.2d 865 (Pa. 1996).

<sup>172</sup> See Judith Butler, *Undiagnosing Gender*, in TRANSGENDER RIGHTS, (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) at 274, 279–81.

<sup>173</sup> See Ezie, *supra* note 128, at 199 n.50.

<sup>174</sup> See *id.* at 199.

<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> The Office of National Statistics refused to change Joella's designated sex.<sup>178</sup> 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.<sup>179</sup> The case of *W v. W*, saw, like *Kantaros*, a spouse seeking to declare a marriage a nullity on the basis that their spouse was not their identified sex.<sup>180</sup> 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.<sup>181</sup> 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.<sup>182</sup> 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."<sup>183</sup>

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.<sup>184</sup> 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.<sup>185</sup> 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-

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<sup>176</sup> *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.

<sup>177</sup> GREENBERG, *supra* note 2, at 67–69.

<sup>178</sup> *See id.*

<sup>179</sup> *Id.* at 68.

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

<sup>181</sup> *Id.* at 52–54.

<sup>182</sup> *Id.* at 53.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 8.

<sup>185</sup> *Id.* at 20.

vention, or if their DNA conflicts with their anatomy and identity.<sup>186</sup> 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.<sup>187</sup>

#### 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.<sup>188</sup>

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.<sup>189</sup> 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.<sup>190</sup> Fortunately, the rapidly advancing progress of marriage equality<sup>191</sup> may very well end the issue of transgender individuals being de-

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<sup>186</sup> 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).

<sup>187</sup> GREENBERG, *supra* note 2, at 108–09.

<sup>188</sup> Ezie, *supra* note 128, at 159.

<sup>189</sup> Flynn, *supra* note 20, at 32, 42.

<sup>190</sup> *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.”).

<sup>191</sup> *See States, FREEDOMTOMARRY*, <http://perma.cc/P2RD-G5CE> (last updated Nov. 19, 2014) (indicating that 35 states currently recognize marriage between same-sex couples).

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,<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup> 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.<sup>197</sup> Finally, birth certificates, which are based on cursory visual assessment at birth,<sup>198</sup> 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.<sup>199</sup>

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<sup>192</sup> Spade, *supra* note 175, at 219.

<sup>193</sup> GREENBERG, *supra* note 2, at 76–78.

<sup>194</sup> *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

<sup>195</sup> WARNKE, *supra* note 40, at 41; Greenberg, *supra* note 57, at 57–58.

<sup>196</sup> Greenberg, *supra* note 57, at 56–60.

<sup>197</sup> *Id.*

<sup>198</sup> See, e.g., *In re Ladrach*, 32 Ohio Misc. 2d 6, 10 (Prob. Ct. 1987); Greenberg, *supra* note 10, at 309.

<sup>199</sup> *Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) ("The assigned sex of an individ-

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 criteria 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.<sup>200</sup> 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).<sup>201</sup> 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.

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ual at birth is based only on observation of anatomy at birth, which itself may change when the individual reaches puberty.”).

<sup>200</sup> MEYEROWITZ, *supra* note 29, at 148–50, 163.

<sup>201</sup> 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 chimerism [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 chimerism is unknown . . . [in one infant, 46, XY/46, XX chimerism] 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.”<sup>202</sup> 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-

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<sup>202</sup> 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.<sup>203</sup>

### 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,”<sup>204</sup> what the Australian Family Court in *Kevin* called “brain sex,”<sup>205</sup> and what psychology and LGBT activists term “gender identity.”<sup>206</sup> The conflict between gender identity and anatomy is what causes more than half of all transgender individuals to seek a physical transition.<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup> 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.

<sup>203</sup> 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.

<sup>204</sup> Greenberg, *supra* note 10, at 278.

<sup>205</sup> *In re Kevin*, (2001) Fam LR 1074 ¶¶ 252, 273 (Austl.).

<sup>206</sup> *Gender Identity*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://perma.cc/24MM-CDJF> (last updated Oct. 17, 2013).

<sup>207</sup> 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, orchiectomies (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.).

<sup>208</sup> *See, e.g.*, *M. T. v. J. T.*, 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976).

<sup>209</sup> Paul Elias, *California Gay Conversion Therapy Ban Upheld By Federal Court*, HUFFINGTON POST (Aug. 29, 2013), <http://perma.cc/RTP6-CPA8>; *see also* Victoria Cavaliere, *New Jersey Bans Gay Conversion Therapy*, ASSOCIATED PRESS (Aug. 19, 2013), <http://perma.cc/6GWR-Y9VA>.

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.<sup>210</sup> Internationally Argentina and the Netherlands recently abolished the need for surgical intervention for a change in all vital documents.<sup>211</sup>

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.<sup>212</sup> While there are no known studies regarding the brains of intersex individuals and their gender identi-

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<sup>210</sup> See Matt Flegenheimer, *Easing the Law for New Yorkers Shifting Gender*, N.Y. TIMES, Oct. 7, 2014, <http://perma.cc/KCU7-UZJP>.

<sup>211</sup> HUMAN RIGHTS WATCH, *The Netherlands: Victory for Transgender Rights*, <http://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights>, <http://perma.cc/P2RN-2UNG> (Dec. 20, 2013) ("The new law will allow transgender people to change the gender marker in their official identity papers to their preferred gender. It does away with previous requirements for taking hormones and surgery, including irreversible sterilization . . ."); Emily Schmall, *Transgender Advocates Hail Law Easing Rules in Argentina*, N.Y. TIMES, May 24, 2012, [http://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html?\\_r=0](http://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html?_r=0), <http://perma.cc/E6XA-Y4FP> ("Argentina has put in place some of the most liberal rules on changing gender in the world, allowing people to alter their gender on official documents without first having to receive a psychiatric diagnosis or surgery.")

<sup>212</sup> See, e.g., Eileen Luders et al., *Regional Gray Matter Variation in Male-to-Female Transsexualism*, 46 NEUROIMAGE 904 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2754583/>, <http://perma.cc/7AMG-XP2N>.

ties,<sup>213</sup> 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.<sup>214</sup> 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.

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<sup>213</sup> 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).

<sup>214</sup> *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).



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.<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup> Argentina has gone even further, declaring gender

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<sup>215</sup> *California Governor Signs Bill to Remove Barriers for Transgender People to Change Name and Identity Documents*, TRANSGENDER LAW CTR., <http://perma.cc/9DXB-4CDL> (last visited Dec. 1, 2014).

<sup>216</sup> CAL. HEALTH & SAFETY CODE § 103426 (West 2014).

<sup>217</sup> 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.

recognition a right, and abolishing the need for any medical treatment.<sup>218</sup> 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.

### CONCLUSION

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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<sup>218</sup> 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.