DISCRIMINATING GENDER: LEGAL, MEDICAL, AND SOCIAL PRESUMPTIONS ABOUT TRANSGENDER AND INTERSEX PEOPLE

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INTRODUCTION

Medicine and law have long assumed and re-enforced a binary view of gender in proposing care for and defining the rights of transgender and intersex people. This Article considers that history and its consequences for the people most directly affected by it. Further, it considers recent challenges to the binary gender presumption and to the medical and legal responses that that presumption has engendered.[1]

In crafting responses to the needs of transgender and intersex people, both law and medicine have echoed society's assumptions about sex[2] and

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1. This recent trend may, itself, prove to be short-lived, at least for now. Since the start of the Trump administration, in early 2017, federal policy has moved away from support for transgender people. For instance, in July 2017, Donald Trump announced through the Twitter medium that the U.S. military would prohibit service by transgender people. Julie Hirschfield Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html?_r=0. Further, the U.S. Departments of Education and Justice have withdrawn interpretations of federal law that protected transgender and intersex people. *See infra* Part IV.

2. *See* Ann-Maree Nobelius, *What Is the Difference Between Sex and Gender?*, MONASH UNIV. MED., NURSING, AND HEALTH SCI. (June 23, 2004), http://www.med.monash.edu.au/

gender[3] and have, in turn, developed explanations and rules for intersex and transgender communities.[4] Although open to challenge in recent years, the notion that a binary approach to gender and its correlates are inexorably grounded in biological truths is deeply embedded in Western culture. Yet, more than one percent of people are born intersex,[5] and transgender people are estimated to account for between 0.1 and 0.5 percent of the population.[6]

The presumption that gender refers to two mutually exclusive categories of people – one female, one male – has been challenged less often than other presumptions that support traditional views of family, reproduction, sex, and personhood in the United States. Yet, the assumption that all people are either male or female conflicts with reality[7] – a conflict that holds major consequences for intersex and transgender people. This Article suggests that the strength of the binary-gender presumption underlies many of the differences in society, medicine, and the law's modes of discriminating against transgender people and their modes of discriminating against intersex people.[8] These differences have had consequences for the ability of people in these populations to receive

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gendermed/sexandgender.html (defining "sex" in reference to "biological differences, chromosomes, hormonal profiles, internal and external sex organs").

3. The National Center for Transgender Equality defines "gender identity" as "your internal knowledge of your own gender—for example, your knowledge that you're a man, a woman, or another gender." *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 19, 2016), http://www.transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf.

4. The term "community" is used loosely. *See* DAVID VALENTINE, IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY 72 (2007) (citing TOM BOELLSTORFF, THE GAY ARCHIPELAGO: SEXUALITY AND NATION IN INDONESIA (2005)) (noting that when he began an ethnography of transgender people, he came to realize that there is no "pre-existing community," but rather "a variety of dispersed places which are brought together *by* 'transgender' into an idea of community.").

5. Xavier Symons, *Human Rights Group Calls for Ban on Intersex Surgery*, BIOEDGE.ORG (July 29, 2017), https://www.bioedge.org/bioethics/human-rights-group-calls-for-ban-on-intersex-surgery/12363?utm_source=BioEdge&utm_campaign=ab0a5e08ec-EMAIL_CAMPAIGN_2017_07_29&utm_medium=email&utm_term=0_76ab23e62c-ab0a5e08ec-124706243 (noting that "as many as 1.7 percent of babies are different from what is typically called a boy or a girl").

6. Gary J. Gates, *LGBT Identity: A Demographer's Perspective*, 45 LOY. L.A. L. REV. 693, 698 (2012) (citing GARY J. GATES, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 5 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf).

7. *See supra* notes 5-6 and accompanying text.

8. *See* discussion *infra* Parts II-III. Some people identify as both transgender and intersex; the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual acknowledges that a person can be both intersex and transgender. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5 451, 456 (5th ed. 2013) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-5].

wanted medical care, to avoid unwanted care, to marry, to gain access to bathrooms and locker rooms that conform with gender identity, and to join sports teams.[9] Such differences in treatment shape and are shaped by the lens through which law, medicine, and society understand and respond to intersex and transgender individuals.

The medicalization[10] of transgender and intersex people, especially since the second half of the twentieth century, has buttressed the binary-gender perspective and has played a significant role in framing judicial responses in cases involving these populations. Medicalization offers a powerful frame for understanding and controlling variations in gender and sex; its effects have sometimes, but not always, been salutary. Medicalization has had different consequences for intersex and transgender people, depending on the particular issues at stake. Intersex activists decry the medicalization and consequent treatment of intersex infants, treatment often aimed at categorizing them as female or male (though more often female, than male) and thus masking their intersex status and sometimes depriving them of a reproductive future and even of sexual enjoyment.[11] In contrast, many transgender people have struggled to obtain medical care that shapes their sex and their bodies to conform with their gender identities. Transgender status was also medicalized by the American Psychiatric Association, and then more recently, de-medicalized by the same group.[12]

For the most part, medicalization has assumed that all people should be categorizable as male or female, with little room for visible ambiguities. That approach has reinforced the presumption that everyone should and *can* identify as male or female.[13] Yet, that understanding of gender has begun to splinter as society has begun to view gender as a reflection of cultural choices as well as biology.

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9. The list offered here includes areas of discrimination addressed in this Article. There are other important areas of discrimination impacting intersex and transgender people, for instance in employment, that are not addressed here.

10. *See infra* Subsection I.A.2.

11. *See* Whitney Barnes, *The Medicalization of Transgenderism*, TRANSHEALTH (July 18, 2001), http://www.trans-health.com/2001/medicalization-of-transgenderism/.

12. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (4th ed. 2000) [hereinafter AM. PSYCHIATRIC ASS'N, DSM-IV] (replaced in 5th addition by term "gender dysphoria"); AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8.

13. *See* Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 ANNALS HEALTH L. 195, 200 (2002).

Part I of this Article reviews efforts to define and explain intersex and transgender status.[14] First, the Part summarizes social, medical, and biological definitions and responses. Then, Section B contextualizes these definitions and responses within the larger history and culture of the West. Finally, it describes alternative approaches to gender and sex in several other societies.

Part II then examines the implications of the binary-gender approach for intersex people asking to be identified with no gender or with more than one gender. Section A summarizes efforts by intersex litigants in the United States to be recognized as such on passports and other identity documents. Then, Section B reviews efforts by transgender people to change identity documents so that they reflect gender identity.

Part III addresses the strength of the binary-gender presumption as a determinative factor in cases about the validity of marriages involving transgender and intersex people. In 2015, the United States Supreme Court identified a constitutional right to marry regardless of sex or gender.[15] That decision renders disputes about the validity of marriages involving transgender or intersex people a matter of historical, rather than active, concern. Finally, in light of the binary-gender presumption and the relative significance of medicalization and the positions it has occasioned, Part IV analyzes the exclusion of transgender and/or intersex people from bathrooms, locker rooms, and sporting events that conform to their gender identity.

This choice of issues may be open to criticism for focusing on a series of concerns that have gained social and legal attention over time, sometimes at the cost of diverting attention away from other, equally significant concerns. That choice seems justified in this Article, however, since the Article reviews legal issues from within the parameters of an anthropological frame. Thus, the issues on which society and the law have chosen to focus over time may suggest cultural readiness to entertain specific issues at particular moments in time more than they suggest the issues that are, in fact, most critical to intersex and transgender people.[16]

14. The term "status" is used here as an alternative to the word "condition" in order to avoid the suggestion that transgender and intersex people have a "condition" that should subject them to medical diagnosis and/or treatment.

15. Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

16. Thus, exploring those other issues is beyond the scope of this Article, though it is planned as the focus of a future Article.

I. INTERSEX, TRANSGENDER, AND A BINARY-GENDER PRESUMPTION

There are no definitive meanings for the words "transgender" and "intersex." Even more, various words have been employed to refer to what this Article refers to as "transgender" or "intersex" people.[17] Section A of this Part, reviews some of the meanings that have been attached to "transgender" and "intersex" and related terms. Section B then describes visions of gender in other cultural settings and compares those views with the binary approach to gender that has predominated in the United States, and in the West, more generally.

A. Definitions, Other Definitions, Biology and Medicalization

In the West, transgender and intersex people have challenged deeply embedded presumptions about bodies and thus about personhood, families, and relationships. Transgender status upsets the presumption that sex and gender are coincident, that they are established at the start of a baby's life, and that they are immutable. Intersex status upsets the presumption that people, in the "nature" of the case, must be categorized as either male or female.

Society has been unforgiving to intersex and transgender populations, the more either group threatens the binary gender presumption. In certain contexts, society has viewed intersex people to pose a stronger challenge to the presumption than transgender people (e.g., efforts to obtain identity documents that reflect an intersex gender), and in other contexts society has viewed transgender people as more challenging to the same presumption (e.g., in questioning rules about bathroom and locker room use, as determined by sex).[18]

The very terms "intersex" and "transgender" do not conform with a binary-gender presumption and has led people to wonder what sex and gender "really" are. Alice Dreger captured part of this query in her answer to students (in classes about the history of sex). Dreger's students asked what sex "really" is:

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17. Sometimes other terms suggest somewhat different meanings. David Valentine notes a number of "identity categories." VALENTINE, *supra* note 4, at 33; *see also infra* note 23 and accompanying text.

18. The fact of transition can threaten society's commitment to a binary gender categorization, but once a transgender person becomes a member of the "other" gender, that person can be encompassed within a traditional vision of binary-gender categories. The medicalization of intersex during infancy has aimed, often expressly, to hide or obliterate evidence of a baby's being intersex. *See supra* note 11 and accompanying text; *see also infra* notes 34, 36 and accompanying text.

> "What really is the key to being male, female, or other?" But, as I tell them . . . the answer necessarily changes with time, with place, with technology, and with the many serious implications – theoretical and practical, scientific and political – of any given answer. The answer is, in a critical sense, historical – specific to time and place. There is no "back of the book" final answer to what *must* count for humans as "truly" male, female, or hermaphroditic, even though the decisions we make about such boundaries have important implications.[19]

The first subsection of this Section presents various definitions of both terms (intersex and transgender). Then, subsection two considers the particular power of biological presumptions about personhood and some consequences of medicalizing transgender and intersex people.

1. Definitions and Other Definitions

Definitions of the terms "Intersex" and "transgender" vary. Scholars, activists, lawmakers, health care professionals, and public media have defined the terms variously. Julie Greenberg offers straightforward definitions of these and related terms:

> Generally, intersexuality refers to a condition in which a person's biological sex markers are not all clearly male or female, while transgenderism and transsexuality are used to describe behaviors or identities of people whose gender expression, gender identity, or both, do not necessarily conform with the binary sex norm or may be different from the sex assigned to them at birth.[20]

The National Center for Transgender Equality defines the term "transgender" as:

> A term for people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth. Transgender is a broad term and is good for non-transgender people to use. "Trans" is shorthand for "transgender."[21]

Anthropologist David Valentine has focused on variations in the meaning of the term "transgender" among activists. The term, he suggests,

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19. ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 9 (1998).

20. Julie A. Greenberg, *Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 LOY. L.A. L. REV. 849, 855 (2012) (citing *GLAAD Media Reference Guide – Transgender Glossary of Terms*, GLAAD, http://www.glaad.org/reference/transgender (last visited Oct. 27, 2017)).

21. *Frequently Asked Questions About Transgender People*, *supra* note 3. A "transgender man" is defined as someone who "lives as a man today, but was thought to be female when he was born." *Id.* A "transgender woman" is defined as someone who "lives as a woman today, but was thought to be male when she was born." *Id.*

has served to "wrest[ ] control over the meanings and definitions of gender variance from medical and mental health professionals to replace an assumption of individual pathology with a series of claims about citizenship, self-determination, and freedom from violence and discrimination."[22] "Transgender" also serves as an "umbrella" term that includes a host of other terms, each with its own nuances and variations:

> Contemporary activists, providers, and scholars include different kinds of people in this collective/spectrum/umbrella, and a relatively modest list would include at least some of the following identity categories: transsexuals, transvestites, cross-dressers, men or women of transgender or transsexual experience, drag queens, drag kings, female or male impersonators, genderqueers, intersexuals, hermaphrodites, fem queens, girls, boys, trannies, feminine gay men, butch lesbians, male-to-female, female-to-male, female embodied masculine persons, and even, simply, men or women.[23]

Transgender and intersex status can co-exist in one person. Yet, courts and lawmakers, much like clinicians, individuals named (by self or others) as transgender or intersex, and society generally, have struggled to distinguish one from the other.[24] In 1984, the Seventh Circuit distinguished a "[t]ranssexual" from a "hermaphrodite": "[t]ranssexualism is a condition that exists when a physiologically normal person (i.e., not a hermaphrodite – a person whose sex is not clearly defined due to a congenital condition) experiences discomfort or discontent about nature's choice of his or her particular sex and prefers to be the other sex." [25] Thus, the court recognized a clear distinction between transgender and intersex people.

2. Biology and Medicalization

Definitions of intersexuality, more often than definitions of transgender status, tend to entail extended consideration of chromosomal and hormonal factors.[26] Contrary to popular belief, intersex people do not have the

22. VALENTINE, *supra* note 4, at 33.

23. *Id.* While allowing the term "transgender" to denote "all people who are in some ways gender-variant," Valentine also posits the continuing need to consider what is "gender-variant" and who is "transgender." *Id.* at 37.

24. *See* Greenberg, *supra* note 20, at 855.

25. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1083 n.3 (7th Cir. 1984) (deciding a Title VII claim by transman – referred to by court as a "male transsexual"). The court further distinguished from these categories both "homosexuals" and "transvestites." *See id.*

26. *See, e.g.*, DREGER, *supra* note 19, at 35-43.

"complete external genitalia" of a man and a woman.[27] They are more likely to have what are often referred to as "ambiguous genitalia."[28]

> While identification of a child as intersex can often be made by physical examination alone, in some cases normal-appearing external genitalia can hide an internal ambiguity or an anomalous chromosomal sex. As a result, families and physicians face a dilemma concerning how to treat such infants. Prior to the advent of modern surgery, such individuals were left as they were born. . . . [I]n 16th century England, Lord Coke declared with respect to the law of inheritance that "a hermaphrodite may be either male or female, and it shall succeed according to the kind of sex that doth prevail."[29]

Others have resisted medical definitions of intersex. Responding to a New York Times piece that quoted an "expert on sexual development disorders," Hida Viloria, an intersex person and advocate, wrote:

> *Disorder*, *disorder*, *disorder*. The word spins around in my mind, making a mockery of my self-esteem. It's as if the *New York Times*, the "experts" at the meeting [referred to in the *Times* article], and everyone who supported pathologizing me is saying, "Sure, you think you're okay, but you're oh so very wrong. You are not okay. You need to be treated."[30]

Intersex activists belonging to the Organization Intersex International Australia (OII – Australia) have compiled a list of traits identified with transgender people as compared with traits identified with intersex people.[31] The group associates "trans/gender diverse" people as having "[n]o ambiguity in innate biological sex characteristics," and associates intersex people as showing "[n]atural variations in biological sex characteristics [that] do not match social expectations for female or male bodies."[32] Further, transgender people experience differences between "apparent legal sex assigned at birth" and "self-identified gender," while intersex people are described as having "physical differences" that "may affect the whole of the body including genetic, chromosomal and hormonal differences, and especially sex anatomy."[33] Among health care professionals, lawmakers,

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27. Hermer, *supra* note 13, at 195-96.

28. *Id.* at 196.

29. *Id.*

30. HIDA VILORIA, BORN BOTH: AN INTERSEX LIFE 235 (2017).

31. *Basic Differences Between Intersex and Trans*, ORG. INTERSEX INT'L AUSTL. LTD. (June 3, 2001), https://oii.org.au/18194/differences-intersex-trans/?gclid=CjwKEAjw4IjKBRDr6p752cCUm3kSJAC-eqRtmzOobOxyUsAr299V_ZBYFN-ypD4PLwEZKucm_4LQnRoCpGvw_wcB.

32. *Id.*

33. *Id.* Visit the website to view twenty features identified with trans/gender diverse people and twenty-two features identified with intersex people. Mainstream assumptions about biology or even, sometimes, challenges to those assumptions have guided efforts to define the terms

and the public, a medical focus has consistently attended understandings of intersex people and, to a lesser extent, of transgender people. Intersex people have to struggle to avoid medicalized definitions of self,[34] even as many transgender people seek medical and surgical treatment that will facilitate the process of transitioning.[35]

During the last half of the twentieth century, spurred on, perhaps, by the work of John Money, advocating for surgery on intersex infants under the presumption that children's gender identities would conform to surgically re-shaped genitals,[36] medical researchers identified a wide variety of "underlying causes" for intersex.[37]

> Congenital adrenal hyperplasia (CAH) and androgen insensitivity syndrome (AIS), for example, describe atypical adrenal, hormonal and genetic functions thought to result in the development of intersex features. Importantly, however, such atypical adrenal, hormonal and genetic functions do not always produce a visually ambiguous sex, and so the diagnostic language cannot be thought to refer in any precise way to what the public now popularly understands as the term "intersex": that is, a body that confounds in some way the *visible*, physical features thought to be exclusively of one sex or the other.[38]

"transgender" and "intersex." Similarly, biological assumptions and, in recent years, challenges to them have undergirded discriminatory responses to women as well as to transgender and intersex people. "[B]iology or anatomy serve[s] as metaphors for a kind of inferiority that characterizes society's view of women." And they serve as models against which society has marginalized those whose bodies or whose sense of their bodies do not harmonize with binary gender categories.

34. VILORIA, *supra* note 30, at 234-36. The psychologist John Money popularized the view that intersex babies should be assigned a gender early and undergo surgical procedures to conform their external genitalia to the assigned gender. That position was widely accepted and resulted in genital surgery on many intersex infants and children. *See generally* JOHN MONEY & ANKE A. EHRHARDT, MAN & WOMAN, BOY & GIRL: GENDER IDENTITY FROM CONCEPTION TO MATURITY (Jason Aronson 1996) (1972); *see also supra* note 11 and accompanying text; DREGER, *supra* note 19, at 181-82.

35. Shannon Gilreath and Lydia E. Lavelle noted "the recognition of transsexualism as a medical phenomenon in the 1950s and the relatively widespread access to hormones and sex-reassignment surgeries in the 1960s and 70s." SHANNON GILREATH & LYDIA E. LAVELLE, SEXUAL ORIENTATION AND IDENTITY: POLITICAL AND LEGAL ANALYSIS 428 (2016) (noting that this medicalization was a "necessary, if not sufficient" factor in the emergence of transgender people as a political and social community).

36. *See generally* MONEY & EHRHARDT, *supra* note 34.

37. This Article uses the term "intersex" as both a noun and as an adjective.

38. Morgan Holmes, *The Intersex Enchiridion: Naming and Knowledge*, SOMATECHNICS, Aug. 2011, at 388, 390.

Such lists suggest that being intersex is not a choice, and they have encouraged masking intersexuality with surgery and other medical treatments.[39]

As recently as 2006, efforts to medicalize intersex people resulted in the term "Disorders of Sex Development" (DSD).[40] The term[41] has been understood in connection with: "congenital conditions with atypical development of chromosomal, gonadal, or anatomic sex."[42] OII - Australia has criticized this definitional effort, seeing it as replacing human rights advocacy for intersex people with "medical authority."[43] Hida Viloria, an advocate for the intersex community, notes her own preference for the term "hermaphrodite" because it facilitates her saying "'I'm a hermaphrodite' in the same way [she has] also said 'I'm a woman.'"[44] Yet, other intersex people dislike the term hermaphrodite because "they don't want to be identified as this third-gender *thing*, a hermaphrodite."[45] Other activists have disagreed with Viloria's approach and have preferred medical

39. Some advocates for intersex people suggest that the medicalization of intersex has allowed medicine to gain control over the lives of intersex people. Barnes, *supra* note 11 and accompanying text; *see also infra* note 46 and accompanying text. "Claim[ing] [intersex] as a positive embodied characteristic" occurs simultaneously with "wrest[ing] [intersex] back from its negative object status as a diagnostic process," advocate Morgan Holmes aims to "cultivate open and positive identification of and for the intersexed" whereas the "clinical goal" has focused on "revealing 'true sex'." Holmes, *supra* note 38, at 391-92. The medical response placed safeguarding a binary view of gender at the center and offered to control that process through surgical and endocrinological tools. *See id.* at 403; *see also supra* notes 34, 36 and accompanying text.

40. Christopher P. Houk et al., *Summary of Consensus Statement on Intersex Disorders and Their Management*, PEDIATRICS, Aug. 2006, at 753, 753.

41. The term "Disorders of Sex Development" was created and defined by a group that participated in an invitation-only conference of pediatric endocrinologists ("Intersex Disorders and Their Management" Conference) in Chicago in 2006. *What is Intersex?*, ORG. INTERSEX INT'L AUSTL. LTD. (Aug. 2, 2013), https://oii.org.au/18106/what-is-intersex/; Holmes, *supra* note 38, at 388. Morgan Holmes described the term DSD as a threat to "the hard-won right to secure for ourselves the ability to operate socially without the stamp of 'disorder' or 'disease' strictly delineating what counts as 'truth' with regard to embodiment." Holmes, *supra* note 38, at 388. Later the medical establishment used the acronym DSD as shorthand for "Differences [rather than Disorders] in Sex Development." *Sexual and Gender Minority Health Resources*, ASS'N OF AM. MED. COLLEGES, https://www.aamc.org/initiatives/diversity/lgbthealthresources/ (last visited June 18, 2017) (referring to people who are "lesbian, gay, bisexual, transgender (LGBT), gender nonconforming (GNC), and/or born with differences of sex development (DSD).") Some intersex advocates reject this term as well insofar as it continues to suggest that being intersex is to "have" a pathological condition. *See* VILORIA *supra* note 30, at 313-14.

42. Houk et al., *supra* note 40, at 753.

43. *What is Intersex?*, *supra* note 41.

44. VILORIA *supra* note 30 at 195.

45. *Id.*

language such as "Disorders of Sexual Development" (DSD), a term that forges links with physicians.[46]

Beginning in the mid-twentieth century, the medicalization of intersex people began routinely to result in assigning babies identified as intersex to one gender or the other and then subjecting infants to surgery to re-shape their genitals so that they would resemble genitals associated with the assigned gender as much as possible.[47] John Money, a psychologist, publicized the belief that gender is culturally crafted and could thus be successfully imprinted if shaped early enough in a child's life.[48] Subsequent research has failed to demonstrate that early surgery to re-shape an intersex child's genitals, accompanied by socialization within the assigned gender, results in a better or "more 'typical'" childhood.[49] To the contrary, surgery to conform the appearance of genitalia to a gender selected by doctors and/or parents early in a child's life is likely to result in psychological difficulties that affect the child and the adult that child will become.[50] In the view of Suzanne Kessler, decisive and immediate gender assignment "serves to maintain the credibility of the medical profession, reassure the parents and reflectively substantiate Money and Ehrhardt's theory [that either male or female gender can be effectively assigned to any child regardless of biology]."[51] The vast majority (about 90%) of genital surgical operations on intersex infants or young children aim to make the child's genitalia female in appearance.[52]

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46. *See id.* at 201-02. In Viloria's view, the term DSD "pathologizes intersex people" and thus "contributes to doctors' efforts to medically 'normalize' us: the very thing we've all been working against." *Id.* at 204.

47. *See supra* note 36 and accompanying text. Morgan Holmes has contended that "narrative credibility, rather than illumination, appears to be the defining concern of the standards for practice that arose following [John] Money's treatment paradigm." Holmes, *supra* note 38, at 390. John Money advocated for assigning intersex infants a gender "immediately, decisively, irreversibly." *Id.* (quoting Suzanne J. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, SIGNS, Autumn 1990, at 3, 8).

48. *See* Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 54 (2006).

49. Amicus Curiae Brief in Support of the Plaintiff-Appellee M.C. for Affirmance of the District Court Decision, at 5-6, M.C. *ex rel.* Crawford v. Amrhein, 598 F. App'x 143 (4th Cir. 2015) (Nos. 13-2178(L), 13-2182, 13-2183) [hereinafter AIS-DSD Brief].

50. *Id.* at 6.

51. Holmes, *supra* note 38, at 390-91 (alteration in original) (citation omitted) (quoting Kessler, *supra* note 47, at 8).

52. AIS-DSD Brief, *supra* note 49, at 3. The brief further notes that the preference for creating female genitalia can be attributed to the lower cost and less invasive procedure needed "to remove a penis and build a vagina than . . . to remove female reproductive organs." *Id.* (citing Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 71, 105 (2005)).

The case of David Reimer illustrated the worst consequences of surgery and gender reassignment during infancy or early childhood. Reimer was born male. After a surgical loss of his penis during infancy, Reimer was raised as a girl.[53] When he was a teenager, Reimer reclaimed male gender identity. Later, he married a woman and adopted her children.[54] But Reimer's story ended sadly; he eventually killed himself.[55]

The medicalization of transgender status has been less encompassing, in part because science has not constructed broadly accepted medical explanations for a divergence between a person's sex at birth and that person's gender identity. Yet, medical care and legal protections for transgender people have often been reserved for people willing and able to mask their "transsexual status and approximate a 'normal' heterosexual life."[56] The notion of "gender identity disorder" was introduced in 1980 in the third edition of the American Psychiatric Association's Diagnostic and Statistical Manual.[57] The fourth edition of the manual merged two "types" of transgender status listed separately in DSM-III – transsexualism and nontranssexualism. In DSM-IV, "gender identity disorder" became the official diagnosis.[58] The fifth edition of the Manual refers to "gender dysphoria," rather than "gender identity disorder." Importantly, the DSM-5 description requires that an individual feel distress about having the "condition"[59] before that person is deemed to have "gender dysphoria."[60]

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53. Ben-Asher, *supra* note 48, at 68.

54. *Id.*

55. *Id.* at 69.

56. GILREATH & LAVELLE, *supra* note 35, at 428.

57. J. Koh, *The History of the Concept of Gender Identity Disorder*, 114 SEISHIN SHINKEIGAKU ZASSHI 673 (2012) (Japan). The translated abstract in English is available at https://www.ncbi.nlm.nih.gov/pubmed/22844818.

58. *See* AM. PSYCHIATRIC ASS'N, DSM-IV, *supra* note 12, at 537-38. In DSM-IV, the "diagnostic features" of "gender identity disorder" were described to include "two components . . . both of which must be present to make the diagnosis. There must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex." *Id*. at 532.

59. Using the term "condition" suggests a medical context. In general, this Article uses another word – such as "status"—rather than "condition" to avoid the assumption that a medical matter is necessarily at issue. Here the term condition is used to reflect the wording of the DSM-5.

60. Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift in Perspective on Gender Identity*, HUFFPOST, (June 4, 2013), http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html; AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8. For some, an advantage of medicalizing transgender status is an increased likelihood that insurers will pay for surgery and hormone treatments used in transitioning. One study concluded that the costs of transitioning reflect a "one-time cost" and is not exorbitant and can be "cost-effective" for health insurance companies. Halland Chen, *Sex Reassignment Surgery for Transgenders: Should It Be Covered by Health Insurance?*, HEALTHECONOMICS, http://www.healtheconomics.com/

DSM-5 explains that the "condition is associated with clinically significant distress or impairment in social, school or other important areas of functioning."[61] In consequence, a person can be transgender and not be considered to have gender dysphoria, pursuant to the 2013 edition of DSM. This is a significant move away from compelled medicalization.[62]

At one time, psychiatry presumed that there is no convergence between transgender and intersex people. The fourth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) defined "gender identity disorder" so that it did not overlap with "a physical intersex condition."[63] When the fifth edition replaced the term "gender identity disorder" with "gender dysphoria," it

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blog/2016/09/sex-reassignment-surgery-for-transgenders-should-it-be-covered-by-insurance/ (last visited July 21, 2017).

61. AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 452-53. The tone and impact of DSM-5's characterization of transgender status as a psychiatric, and thus medical issue (if a transgender individual suffers distress) are not reflected in the vision of transgender people, as categorized in the Americans with Disabilities Act (ADA) – which excludes transgender people from coverage. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2010). Far more concerning, the ADA classifies transgender with behaviors deemed unsavory and with illegal acts. Section 12211 expressly excludes from conditions referred to by the term "disability" for purposes of ADA coverage, the following: "transvestism, transsexualism, pedophilia, exhibitionism voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." *Id.* § 12211(b)(1). Far more disturbing, two additional categories of conditions excluded from the ADA's coverage and noted in the same section both refer to negative behaviors, including "compulsive gambling, kleptomania, or pyromania" or (category 3), "psychoactive substance use disorders resulting from current illegal use of drugs." *Id.* § 12211(b)(2).

However, a 2017 case, decided by the district court for the Eastern District of Pennsylvania, concluded that "gender dysphoria" (the term used in DSM-5) is not subject to the ADA exclusion. Blatt v. Cabela's Retail, Inc., 2017 U.S. Dist. LEXIS 75665, at *1, *5-9, (E.D. Pa. May 18, 2017). The case, though holding for the transgender litigant, embraces a medical model. Christopher Czerwonka has confirmed that some disability and transgender rights advocates have challenged this approach. E-mail from Christopher Czerwonka, to Janet Dolgin (Aug. 7, 2007) (on file with author).

62. Further, DSM-5 replaces the word "sex" with "gender" to provide for intersex people to be diagnosed with the condition. AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 452-53; Parry, *supra* note 60. It is not clear how often, in fact, transgender people are considered not to have the psychiatric condition labelled "gender dysphoria," pursuant to DSM-5, in cases in which they assert that they are comfortable that their lived gender differs from their sex at birth.

63. *See* AM. PSYCHIATRIC ASS'N, DSM-IV, *supra* note 12, at 537-38. The Fourth edition's "diagnostic criteria for Gender Identity Disorder" include:

> (A) A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex). . . .
>
> (B) Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex.
>
> (C) The disturbance is not concurrent with a physical intersex condition.

Id.

allowed for the possibility that a person may be both transgender and intersex.[64]

The medicalization of intersex and transgender people has not been universal. Other societies have viewed gender and sex more fluidly than has the United States and have envisioned variations in sex and gender identity less as matters of medical concern than as expected biological and social variations.[65]

B. Visions of Family, Gender, Intersex, and Transgender: Culture and History

A society's understandings of family, gender, reproduction, sex and relationships (those deemed appropriate and those deemed inappropriate) almost always reflect that society's deepest presumptions about personhood and community. Often, societies voice such presumptions through reference to "nature." Invocation of "nature" (or equally, for believers, of divine law, which may or may not be viewed as coincident with nature's law) generally aims to settle dispute by reference to a vision of truth that is considered inexorable. Societies, through time and space, have had different understandings of the natural and the supernatural as well as different understandings of family, gender, reproduction, sex, and relationships.

In the West, the binary-gender presumption has served to shape and re-enforce society's perspective about gender in the broadest terms, leaving little room for anyone claiming to be a third gender, a fourth gender, or no specific gender (that is, identifying neither as male nor as female). Even apparent legal victories by intersex or transgender people have often depended upon and re-affirmed a binary approach to gender or have depended on forms of medicalization that do not always or adequately serve intersex or transgender people. The message expressed in these victories is that a transgender or intersex litigant can choose to be male or female, but legal recognition of one's personhood depends on choosing one or the other – a decision that can be buttressed with medical treatments or surgery.[66]

The presumptive options—male or female (no fewer, no more)—are at the heart of *Zzyym v. Tillerson* (originally *Zzyym v. Kerry*),[67] a case that

64. The Fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (2013) replaced "gender identity disorder" with the term "gender dysphoria." *See* AM. PSYCHIATRIC ASS'N, DSM-5, *supra* note 8, at 452-53.

65. *See infra* subsection II.B.1.

66. *See* Zzyym v. Kerry, 220 F. Supp. 3d 1106, 1108, 1111-14 (D. Colo. 2016).

67. *Id.*

involves an intersex person's request to be identified on their[68] U.S. passport as "X" (i.e., neither male nor female). That presumption is deeply ingrained in U.S. culture, though it has met some challenges in the last several decades. Still, it is often difficult for people to accept the possibility that a person could belong to a third or fourth gender category or that a person could transition from one gender to another.[69]

This is not the case in all cultures. Before looking at the implications of shifting views of nature, the capacity of medicine to re-shape nature, as it were, and the binary-gender presumption in the United States, this Article reviews visions of gender in societies that have offered a more fluid and flexible portrait of gender and gender identity than has been the case in the United States. Subsection one of this Section describes more fluid views of gender found elsewhere in the world. Subsection two briefly summarizes the history of the notion of the binary-gender categorization in the West.

1. Diverse Views About Gender

In *Transgender History*, Susan Stryker explains:

> Historically and cross-culturally, there have been many different systems of organizing people into genders. Some cultures, including many Native American cultures, have had three or four social genders. Some attribute social gender to the work people do rather than to the bodies they live in.

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68. Dana Zzyym prefers to be referred to by plural pronouns. Travis M. Andrews, *The Singular, Gender-neutral "they" Added to the Associated Press Stylebook*, WASH. POST: MORNING MIX (Mar. 28, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/28/the-singular-gender-neutral-they-added-to-the-associated-press-stylebook/?utm_term=.5602381f1ddf; Corinne Segal, *Judge Rules in Favor of Intersex Veteran Who Was Denied Passport*, PBS NEWSHOUR, (Nov. 23, 2016), http://www.pbs.org/newshour/rundown/intersex-dana-zzyym-passport-decision/. That choice is respected in this Article.

69. One blog offered responses to a bill in Texas (SB 6) that would have precluded transgender people from using public bathroom and locker rooms conforming with their gender identity. Jonathan Tilove, *"My Heart Breaks Over Their Deception." On Christian Conservative Opposition to Transgender Rights*, MY STATESMAN: FIRST READING (Mar. 8, 2017), http://politics.blog.mystatesman.com/2017/03/08/my-heart-breaks-over-their-deception-on-the-christian-opposition-to-transgender-rights/. Tilove quotes a pastor from East Texas as having said,

> [I am surprised] that we even need to consider a bill such as SB 6 to provide for the safety and protection of our children. Just plain common sense says that biological males should use the boys' rest room and not have access to the girls' restroom and dressing rooms, and allowing boys to use the girls' restrooms and dressing rooms is foolish with a capital F and flies in the face of common sense and decency.

Id. The speaker added, "Jesus said, in the beginning . . . they were created male and female. It's always been that way." Another spokesperson explained: "Trying to get out of my head the words transgender, cigender [sic], 'don't call me a he or she pronoun', agender, bigender, and the list goes on . . . . This was the actual vocabulary of the protestors that testified . . . ." The speaker, here, was referring to people who spoke against SB 6. *Id.*

> In some cultures people can change their social gender based on dreams or visions. . . . [G]ender . . . varies from place to place and culture to culture, and . . . is contingent . . . . This takes us into one of the central issues of transgender politics – that the sex of the body does not bear any necessary or deterministic relationship to the social category in which that body lives.[70]

In Tahiti and elsewhere in Polynesia, *Mahu* are "male-bodied persons of Polynesian descent who have a significant investment in femininity."[71] Acceptance of *Mahu*, even in Tahiti—and more so in Hawaii—has diminished since the arrival of Europeans and Americans.[72] In traditional French Polynesian society, *Mahu* have not been marginal socially or economically. On Tahiti, *Mahu* have long been allowed to participate in "traditional adoption arrangements," and play an integral role in Polynesian economies, though generally in positions associated with women rather than men – positions such as social work, nursing, and the hospitality industry.[73] In Hawaii, in contrast, many *Mahu* today "must work the streets in order to survive."[74]

Many Native American and Alaska Native societies have provided for gender variation with the notion of a two-spirit woman.[75]

> Two-spirit is a contemporary, unifying, intertribal term adopted by some AIANs (American Indian, Alaska Natives), First Nations, and Aboriginal peoples to signify their spiritual, sexual, gender, cultural, and community identities. Many make use of the two-spirit term by referencing embodied feminine and masculine duality; a gender identity or expression that does not fit well into Western notions of a binary gender division, but that is more aligned with their traditional indigenous understanding of a non-female, non-male gender; as a cultural reference of being lesbian, gay, bisexual, transgender, or queer; and/or as having an identity that centers the spiritual aspect of their identity.[76]

The term (two-spirit), in short, reflects the fluidity behind many tribes' responses to gender and sex. The perspective does not presume a binary categorization of gender.

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70. SUSAN STRYKER, TRANSGENDER HISTORY 11 (2008).

71. Aleardo Zanghellini, *Sodomy Law and Gender Variance in Tahiti and Hawai'i*, 2 LAWS 51, 51-52 (2013).

72. *Id.*

73. *Id.* at 54.

74. *Id.* at 54-55 (quoting ANDREW MATZNER, O AU NO KEIA: VOICES FROM HAWAII'S MAHU AND TRANSGENDER COMMUNITIES 284 (2001)).

75. Jessica H. L. Elm et al., *"I'm in This World for a Reason": Resilience and Recovery Among American Indian and Alaska Native Two-spirit Women*, 20 J. LESBIAN STUD. 352, 352 (2016).

76. *Id.* at 353.

Still, other cultures have recognized gender variance, though not always without prejudice, especially in the modern era.[77] The South American *travesties* are biologically male.[78] Yet, they enjoy female gender identities. Although once Brazilian *travesties* were known primarily for their appearance as women in Carnival parodies, *travesties* now are often engaged in sex work.[79]

In India, the *hijra* communities of intersex and transgender people have faced significant prejudice in modern society.[80] Traditionally, however, *hijras* enjoyed religious respect.[81] And even today *hijras* are called on to offer blessings at births and marriages. [82] Respect paid to *hijras* diminished with the British colonization of India.[83] However, in 2014, the Supreme Court of India offered some protection to *hijras* by recognizing a legal third gender. It was expected that that recognition would allow *hijras* to obtain jobs with the government more easily and to gain admission to college.[84]

Recently, some European countries have implemented laws that respect peoples' gender identities regardless of their sex.[85] In 2015, the government of Malta enacted a statute that provides far-reaching protections to transgender and intersex people.[86] This law—the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC) provides:

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77. Marcos R.V. Garcia & Yvette Piha Lehman, *Issues Concerning the Informality and Outdoor Sex Work Performed by Travestis in Sao Paulo, Brazil*, 40 ARCH. SEX BEHAV. 1211, 1211 (2011).

78. *Id.*

79. *Id.*

80. Jefferson Mok & Stephanie Linning, *Hidden World of the Hijras: Inside India's 4,000-year-old Transgender Community Where Religious Respect Doesn't Protect Them from Modern-day Discrimination*, DAILY MAIL, (June 30, 2015, 5:28 EDT), http://www.dailymail.co.uk/news/article-2852834/Hidden-world-hijras-Inside-India-s-4-000-year-old-transgender-community-religious-respect-doesn-t-protect-modern-day-discrimination.html.

81. *Id.*

82. Homo Khaleeli, *Hijra: India's Third Gender Claims Its Place in Law*, THE GUARDIAN, (Apr. 16, 2014, 14:37 EDT), https://www.theguardian.com/society/2014/apr/16/india-third-gender-claims-place-in-law.

83. *Id.*

84. *Id.* Some hijras prefer to be known as male or female (the gender of their identity) rather than as part of a third gender. *Id.* A Pakistani woman who ran for a provincial office in Pakistan reported that recognition of hijras in Pakistan has not significantly diminished discrimination against hijras. *Id.* In fact, prejudice against hijras in India lingered even after the 2014 Indian Supreme Court ruling. However, in 2017, a government owned train network in Kerala hired about two-dozen hijras. *Id.*

85. *See infra* notes 86-95 and accompanying text.

86. *Malta Adopts Ground-breaking Trans and Intersex Law – TGEU Press Release*, TRANSGENDER EUROPE (Apr. 1, 2015), http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law; Elena Cherubini, *Transgender Women Hired by Government-owned Indian Rail for the First Time*, PINK NEWS (May 15, 2017, 5:33 PM),

> (1) All persons being citizens of Malta have the right to –
>
> (a) the recognition of their gender identity;
>
> (b) the free development of their person according to their gender identity;
>
> (c) be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and
>
> (d) bodily integrity and physical autonomy.[87]

Even more, the Act provides that the "right to gender identity" does not depend on showing "proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment. . . ."[88] GIGESC imposes a fine on anyone who "knowingly expose[s] any person who has availed of the provisions of this Act, or shall insult or revile a person"[89] and on anyone who "violates any of the provisions of this Act."[90]

In 2016, Norway became the fourth European nation to provide legal recognition to a person's gender in conformity with gender identity without requiring the submission of medical evidence.[91] The others are Denmark, Malta, and Ireland.[92] The Norwegian law applies to all people over six years of age.[93] In 2017, the European Court of Human Rights responded to countries that compel sterilization as a prerequisite for being legally recognized as belonging to the gender that conforms with a person's gender identity in cases in which that gender differs from one's biological sex.[94] The Court concluded that the requirement was a violation of human rights.[95] European nations must conform their laws to this ruling.[96] However, the court did not preclude nations from requiring a medical examination or a

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http://www.pinknews.co.uk/2017/05/16/transgender-women-hired-government-owned-indian-rail-first-time/.

87. Gender Identity, Gender Expression and Sex Characteristics Act, § 3(1) – (3) (Act No. XI of 2015) (Malta) [hereinafter GIGESC].

88. *Id.* § 4.

89. *Id.* § 11.

90. *Id.*

91. J. Lester Feder, *Norway is the Latest Country to Make Life Way Easier for Transgender People*, BUZZFEEDNEWS, (June 3, 2016, 12:19 PM), https://www.buzzfeed.com/lesterfeder/norway-will-soon-let-you-change-your-official-gender-with-ju?utm_term=.av89Y7gXK3#.utM8nqa7LB.

92. *Id.*

93. *Id.*

94. *Transgender Europe Human Rights Victory! European Court of Human Rights Ends Forced Sterilisation*, TRANSGENDER EUROPE (Apr. 6, 2017), http://tgeu.org/echr_end-sterilisation/.

95. *Id.*

96. *Id.*

psychiatric diagnosis before providing for a change in gender on identity documents.[97]

2. Gender in the West Over Time: the Binary Presumption

In the United States and elsewhere in the West, the binary-gender presumption has been central to visions of personhood, social roles, and family statuses and obligations for many centuries. Mostly, it has been taken-for-granted and thus virtually never challenged. However, in concert with changes in society's perspectives about personhood, family relationships, and gender more generally, especially during the last century, some challenges to the binary-gender presumption are being voiced.[98] This section briefly summarizes understandings of gender in the West at a few points in time since the Medieval world. During the Middle Ages, gender roles and statuses grounded in gender separated men from women in many domains of life. Slowly, gender status became less central to everyday life, and gender roles became more flexible. That process, described in summary form here, was a precursor to the recognition and increasing acceptance of transgender and intersex people in the twenty-first century.

In the Medieval world, gender was clear-cut and central to one's role and status in familial and public life. Georges Duby described private life in the Medieval world to include a "private sphere," generally represented geographically as a home or a community of homes, enclosed by a wall.[99] This space enclosed private property, "including reserves of food and clothing and livestock," as well as "those human beings not counted as part of the *populus*—males too young to [participate in the life of adult men]; women; minors; and the nonfree of both sexes and all ages."[100] Thus, status distinctions governed private life as well as public life (since minors, young boys, women, and nonfree people were beholden to their head of household or to public authorities even in areas outside the private domain).[101] To be a

97. *Id.* (noting that "the Court denied that forced medical examinations ordered by the national court (E. Garcon v. France) or a mental health diagnosis (A.P. v. France) contradict the Convention").

98. *Id.*

99. Georges Duby, *Introduction: Private Power, Public Power*, *in* 2 A HISTORY OF PRIVATE LIFE: REVELATIONS OF THE MEDIEVAL WORLD 1, 12 (Georges Duby ed., Arthur Goldhammer trans., 1988).

100. *Id.* at 12-13.

101. *Id.* at 12-14. Boys, minors, women, and nonfree people were under public authority's rule only,

> 1. If they ventured outside the enclosure into public territory, roads, or places and were not accompanied by either the head of the household or other free men of the family; in such cases they were classed with aliens, and it was up to the magistrate, as surrogate for paternal authority, to oversee their "conduct" and maintain discipline;

man or a woman was to be categorized as essentially different, each from the other. A social division between genders was "institutionalized" in a manner that affected most aspects of life.[102] Yet, long before Western legal systems openly considered the rights of transgender and intersex people, women began to play a more significant role in the public sphere, previously reserved for men, and the role of women in the private sphere of home and hearth broadened as well. In the nineteenth century, changes in visions of family brought new flexibility to family life for men and for women.[103] Further, the entry of women into the modern capitalist marketplace of wage labor, though often oppressive in its consequences, can be viewed as a "first step toward autonomy for women."[104] Moreover, in the last six decades of the nineteenth century, every state in the U.S. passed some form of married women's property acts, relieving women from laws that transferred a woman's property to her husband upon marriage.[105]

Ironically, a nineteenth century obsession with the role and presumed marginality of single women, reflected, in fact, the end of an age that presumed that women belonged at home, subject to the rule of their husbands or fathers. Cecile Dauphi suggests that "single women somehow crystallized all the fears of women's autonomy – sexual, social, economic, and intellectual."[106] Nineteenth century society had become obsessed with the image of the "spinster."

> Virago, lesbian, amazon, whore, *grisette*, bluestocking – these pejoratives for single women have no real foundation and are ubiquitous in Western culture. But the literary figure of the spinster and the popularization of the stereotype were the work of the nineteenth century.[107]

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2. When the head of household was absent and no free adult male capable of protecting the minors of the "family" was available; it was the original function of the king, which he delegated to his agents, to take care of widows and orphans; and

3. The authority of the magistrate could be expressly invoked by an appeal, a complaint, known as the clamor or "hue and cry"; the grievance was thus made public, and the guilty parties turned over to communal authorities.

Id.

102. Georges Duby et al., *Portraits*, *in* 2 A HISTORY OF PRIVATE LIFE: REVELATIONS OF THE MEDIEVAL WORLD 80 (Georges Duby ed., Arthur Goldhammer trans., 1988).

103. Genevieve Fraisse, *A Philisophical History of Sexual Difference*, *in* 4 A HISTORY OF WOMEN: EMERGING FEMINISM FROM REVOLUTION TO WORLD WAR 48, 71 (Genevieve Fraisse & Michelle Perrot, eds., Arthur Goldhammer, trans., 1993).

104. *Id.* at 66.

105. *Married Women's Property Acts Law and Legal Definition*, US LEGAL, https://definitions.uslegal.com/m/married-womens-property-acts/ (last visited July 3, 2017).

106. Cecile Dauphin, *Single Women*, *in* 4 A HISTORY OF WOMEN: EMERGING FEMINISM FROM REVOLUTION TO WORLD WAR 427, 442 (Genevieve Fraisse & Michelle Perrot, eds., Arthur Goldhammer, trans., 1993).

107. *Id.* at 441.

Images of the single woman – the woman who lived without a man echoed, even as they appeared to distain, modernity's increasing acceptance of women in the world of work as well as that of home: the notion of the single woman "reveals . . . the grammar of Western 'modernity,' which has been characterized by 'a plurality of forms of individualism corresponding to a like plurality of forms of sociability.'"[108] We see here an early and peculiar shift in the binary-gender perspective – a fragmenting of images within the gender "woman." That process foreshadows by a century a fragmentation of images of gender as a domain that contains "males" and "females" but no other options.

Women were increasingly granted civil rights during the nineteenth century. Yet, each development that brought women greater access to a world previously populated only by men also brought fears about abandoning the "natural" order.[109] Emile Zola's observed that women had become free to "fill the man's role in every way and everywhere."[110] Yet, that development, Zola explained, reflected self-mutilation, "denying desire, setting oneself apart from life? . . . Thus the natural order soon reasserted itself and peace was made between reconciled sexes, each one finding its happiness in the happiness of the couple."[111] Still, shifts in perspective witnessed by the nineteenth century spawned a new reality by the second half of the twentieth century – one that included re-shaped images of marriage, reproduction, and gender. By the 1970s, a view of family that facilitated autonomous choice within the domestic sphere for men and for women displaced a nineteenth century view of families as enduring units defined by status relationships (based primarily on age and gender).[112] The law acknowledged that momentous change.[113]

Changes in family organization do not signal abandonment of the binary-gender perspective. But they do suggest realigned images of each

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108. *Id.* at 442 (quoting Serge Moscovici, L'Individu et ses representations, 264 Magazine litteraire 28 (1989)).

109. Annelise Maugue, *The New Eve and the Old Adam*, *in* 4 A HISTORY OF WOMEN: EMERGING FEMINISM FROM REVOLUTION TO WORLD WAR 515, 516 (Genevieve Fraisse & Michelle Perrot, eds., Arthur Goldhammer, trans., 1993).

110. *Id.* at 516 (quoting Émile Zola, TRAVAIL 487, Vol. 2 (1901, 1906)).

111. *Id.* (quoting Émile Zola, TRAVAIL 487, Vol. 2 (1901, 1906)).

112. *See* Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1535 (1994) (noting that by 1970s half of marriages in the United States ended in divorce; and only a third of families were composed of two parents of opposite genders and their minor children).

113. *Id.* at 1561. Provision for no-fault divorce, cohabitation contracts, and pre-nuptial agreements depended upon recognition of spouses and cohabitants as independent people, not inexorably tied together by nature's presumptive dictates or by traditional understandings of families as small social worlds defined through relationships of status. *Id.*

gender's appropriate role – images that reflect more varied understandings of "woman" and "man." That realignment facilitated greater social acceptance to women who entered into a previously "male" marketplace, who increasingly dressed in styles once associated only with men (e.g., pants), and who took on leadership roles (not only in the marketplace but in schools, sports, and communal groups) that had previously been closed to them. Yet, women remained the marked gender, and social acceptance for men entering into jobs once viewed as "female" and dressing in colors and styles previously associated with women has come about more slowly and with more hesitation.[114]

Susan Stryker has described the emergence of a "transgender aesthetic" in the U.S. in the 1970s.[115] This did not immediately coincide with greater openness to transgender people within mainstream society, though in the late 1960s and 1970s, it became possible, essentially for the first time, for transgender people to receive medical care to change their sex to reflect gender identity.[116] Yet, even that development supported a binary approach to gender. Stryker reported:

> [t]he new university-based scientific research programs were far more concerned with restabilizing the gender system, which seemed to be mutating all around them in bizarre and threatening directions, than they were in helping that cultural revolution along by further exploding mandatory relationships between sexed embodiment, psychological gender identity, and social gender role.[117]

Thus, despite increased availability of genital surgery in the U.S. for transgender people by the 1960s and 1970s, medical categorizations encouraged "compliance with overtly homophobic and sexist standards."[118] Medical treatment of transmen and transwomen facilitated their assimilation within binary-gender categories, and thus, in that regard, their social disappearance.

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114. Susan Chira, *Men Don't Want to Be Nurses. Their Wives Agree*, N.Y. TIMES (June 24, 2017), https://www.nytimes.com/2017/06/24/opinion/sunday/men-dont-want-to-be-nurses-their-wives-agree.html?_r=0 (noting that "notions of masculinity die hard"); David Vlahov & Molly C. Spurlock, Letters to the Editor, *Beyond the Stereotype: The Nurse Is a Man*, N.Y. TIMES: OPINION LETTERS (July 2, 2017), https://www.nytimes.com/2017/07/02/opinion/beyond-the-stereotype-the-nurse-is-a-man.html (noting society's comfort, despite some pushback, with men in nursing positions).

115. STRYKER, *supra* note 70, at 91.

116. *Id.* at 93 (noting that previously it was necessary to travel abroad to receive re-assignment surgery).

117. *Id.* at 93-94.

118. GILREATH & LAVELLE, *supra* note 35, at 428.

By the 1990s, however, the term "transgender" began to serve as "a catchall phrase for all nonnormative forms of gender expression and identity," and the transgender community[119] evolved and grew.[120] By the twenty-first century, mainstream society in the United States had begun to assimilate and accept transgender people.[121] Mass media portrayed transgender people with less prejudice than had been the case.[122] Legal victories followed from the activism of transgender organizations.[123]

The same decades saw the emergence of an "intersex political movement."[124] The Intersex Society of North America (ISNA), created in 1993, challenged the practice of performing genital surgery on infants and young children.[125] In earlier times, considerable confusion existed in society and among physicians about intersex people (often referred to as hermaphrodites).[126] Even in the second half of the twentieth century, when physicians had knowledge of the role of hormones and chromosomes in sex, they focused on "external genitalia" in responding to intersex people.[127] John Money,[128] the psychologist associated with the institutionalization and justification of genital surgery on intersex infants and young children concluded:

> [t]he chromosomal sex should not be the ultimate criterion, nor should the gonadal sex. By contrast, a great deal of emphasis should be placed on the morphology of the external genitals and the ease with which those organs can be surgically reconstructed to be consistent with the assigned sex.[129]

Historian Elizabeth Reis noted that this approach "has had lasting negative consequences."[130] Some intersex activists today advocate for the end of "the institutionalized 'medicalization' of intersex people" and for denotation of genital surgery on intersex infants and children as a human rights violation.[131] Yet, intersex people who openly reject the binary-

119. *See supra* note 4 (commenting on use of word "community").

120. STRYKER, *supra* note 70, at 123.

121. *Id.* at 147.

122. *Id.*

123. *Id.* at 148-49.

124. *Id.* at 138.

125. *Id.*

126. *See* Elizabeth Reis, *Impossible Hermaphrodites: Intersex in America, 1620-1960*, 92 J. OF AM. HIST. 411, 411-12 (2005).

127. *Id.* at 440.

128. *See supra* note 48 and accompanying text.

129. At that time, the term "hermaphrodite" was used widely to refer to intersex people. Reis, *supra* note 126, at 440 (quoting John Money et al., *Imprinting and the Establishment of Gender Role*, 77 AMA ARCHIVES OF NEUROLOGY & PSYCHIATRY 333, 334 (1957)).

130. Reis, *supra* note 126, at 440.

131. VILORIA, *supra* note 30, at 266.

gender prerogative face significant challenges. Hida Viloria, an engaged intersex person and lesbian, explained to a friend:

> "[G]irls always like me more one way or the other, pretty or handsome, you know? And then when I switch [from appearing more female or male to appearing more as the other] it bugs them, but no matter how hard I've tried to pick one, it just doesn't work. After a while I want to look like the other again. It's like I'm both, but I don't know how to *be* that, or if anyone's ever going to be into it. . . ."[132]

Viloria's self-analysis reveals the challenge facing intersex people who aspire to identify positively and openly with their gender identity.

II. "I DON'T KNOW HOW TO *BE* THAT"[133]: A NEW GENDER OR NO GENDER

Hida Viloria, intersex and pro-active, writes about her own struggle to construct an identity that did not reflect a binary division of genders. Dana Alix Zzyym, certain that their intersex body rendered them[134] "neither male nor female",[135] argued for the right to identify themself on their passport through a third gender category. Viloria, who worked with Zzyym at Organization Intersex International – USA (OII – USA), reported "an immediate sense of understanding"[136] when she first met Zzyym:

> It's been years now since I came to realize that, although I know what it's like to live as a woman *and* as a man, in the core of my being I am neither. I am a herm, just like Dana. I'm a hermaphro*dyke*, to be exact: a herm who was raised as a woman and loves women.[137]

Both Zzyym, who chooses to be referred to by the pronouns they/them/and their, and Viloria are discomforted by the many intersex people who chose to identify through the binary gender scheme.[138]

A. Intersex Passport Identity

In 2015, Dana Zzyym sued the U.S. Department of State because the Department denied them the right to obtain a passport without identifying

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132. *Id.* at 145. The book's chronological organization suggests that Viloria took this position in 1999.

133. *Id.*

134. Again, this article reflects Zzyym's preference for use of plural pronouns to refer to Zzyym. *See* Andrews, *supra* note 68.

135. VILORIA, *supra* note 30, at 303.

136. *Id.*

137. *Id.*

138. *Id.* at 302, 304.

themself as male or female.[139] The government's response to Zzyym reflects a strict, though largely unexamined, commitment to the binary gender perspective.[140] It also reflects apparent indifference to an applicant's sex or gender identity – or to a presumption of harmony between the two – so long as the applicant does not resist being categorized as either female or male. More particularly, the Department of State has taken contrasting positions in response first, to intersex people seeking to be acknowledged as such, and second, to transgender people requesting to have their gender identity acknowledged on their passports.[141] The first group threatens the binary-gender presumption more than the second. In *Zzyym v. Kerry*,[142] the government stated explicitly that its primary interest in rejecting requests from intersex people to be recognized through a gender other than female or male has been its interest in safeguarding a binary system for categorizing gender.[143]

Zzyym supported their claim to be neither male nor female with medical evidence and contended that marking a box on the passport application confirming "M" (male) or "F" (female) gender would have been to have lied to the State Department.[144] Zzyym's Complaint defines Zzyym as "born intersex, with ambiguous external sex characteristic [and notes that] the sex field on Dana's birth certificate was initially left blank."[145] Zzyym is a veteran of the U.S. military. Medical reports from the U.S. Department of Veterans Affairs attested to Zzyym's intersex status.[146]

Sometime after Zzyym's birth, their parents, in consultation with physicians, decided Zzyym should be raised as a male.[147] Their[148] birth certificate was then completed, categorizing Zzyym as male. As a young

139. *See generally* Zzyym v. Kerry, 220 F. Supp. 3d 1106 (D. Colo. 2016).

140. *See infra* notes 142-43, 158-60, 171-72, 174 and accompanying text.

141. *Zzyym*, 220 F. Supp. 3d at 1109, 1113.

142. *See generally id.* at 1106.

143. *See id.* at 1113-14.

144. Transcript of Hearing on Pending Motions at 13, Zzyym v. Kerry, 220 F. Supp. 3d 1106 (D. Colo. 2016) (No. 15-cv-02362-RBJ) [hereinafter Zzyym Hearing].

145. Complaint for Declaratory, Injunctive and Other Relief at 4, Zzyym v. Kerry, 220 F. Supp. 3d 1106 (D. Colo. 2016) (No. 1:15-cv-2362) [hereinafter Zzyym Complaint].

146. Zzyym Hearing, *supra* note 144, at 28.

147. Zzyym Complaint, *supra* note 145, at 5.

148. Again, this summary conforms with Zzyym's preference for plural pronouns. *See supra* note 68. This Article follows the pronoun preference of each person mentioned insofar as that preference is known. Sometimes that results in awkward grammatical constructions. Until a reasonable option (e.g., zhe, per) is accepted among English speakers, the grammatical awkwardness is the mechanism through which to respect individuals' gender identity and lived sex.

child, surgery was performed[149] on them to "make Dana's body conform to binary sex stereotypes."[150] Surgery left Zzyym with irreversible physical changes but, still, a patently "intersex nature."[151] Raised as a boy, Zzyym lived as a woman for some period after their army service. Later, they "came to understand that living as a woman was not right either."[152]

Zzyym's complaint asserted that the Department of State's denying them the right to apply for a passport reflecting a third gender category was "arbitrary and capricious" and thus violated the Administrative Procedure Act,[153] and that it was a violation of constitutional principles that protect equality and liberty.[154] Zzyym's complaint asserted that gender identity forms "a core aspect of individual self-definition" and that "Defendant's Policy as applied to Plaintiff impermissibly interferes with the most intimate choices a person may make in a lifetime, including Plaintiff's right to existence and self-expression as a person who identifies neither as male nor female."[155]

Judge Jackson declined to entertain the constitutional issues at stake since, in his view, it was necessary to consider the Plaintiff's allegation that the agency action was "arbitrary and capricious":[156]

> I find that the administrative record contains no evidence that the Department followed a rational decisionmaking process in deciding to implement its binary-only gender passport policy. Therefore, the proper next step is to remand the case to the Department to give it an opportunity either to shore up the record, if it can, or reconsider its policy.[157]

Testimony offered to the court by the government indicated that the government's interest in sustaining a binary gender system is so important that the government encouraged intersex applicants to fabricate a gender identity that complied with the binary system.[158] Not answering the question about sex on a passport application form or answering without

149. Zzyym Complaint, *supra* note 145, at 5.

150. *Id.*

151. *Id.*

152. *Id.* at 6.

153. Zzyym v. Kerry, 220 F. Supp. 3d 1106, 1109 (D. Colo. 2016) (noting that Zzyym argued that the State Department's denying them the right to a passport application violated the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A)).

154. Zzyym Complaint, *supra* note 145, at 2. The Complaint further grounded the suit in the Department's acting "in excess of statutory jurisdiction and authority" and "not in accordance with law." *Id.*

155. Zzyym Complaint, *supra* note 145, at 16.

156. *Zzyym*, 220 F. Supp. 3d at 1111.

157. *Id.*

158. Zzyym Hearing, *supra* note 144, at 13-15.

identifying oneself as "M" or "F" precludes receipt of a passport and thus makes it virtually impossible to leave the United States.[159]

Ryan Parker, a lawyer for the Department of Justice invoked the Passport Act of 1926 in responding to the court's queries about the "reasons" for the government's insistence that Zzyym define themself officially as male or female as a prerequisite for receiving a passport.[160] That Act, the court noted, was 90 years old and reflective of the concerns of a different era. Judge Jackson elaborated:

> Things have changed a lot in the last 90 years. Things are changing as we speak. We've all seen just in recent jurisprudence the Supreme Court recognize the right of gay people. We have this whole issue that's being discussed and even litigated about transsexual people. And now we've got a different category, intersex people.[161]

Still, Parker made it clear that Zzyym was free to identify on the application form as either "F" (in line with Zzyym's driver's license)[162] or, with appropriate documentation, to change Zzyym's official gender and identify as "M." Zzyym was not, however, free to declare what to Zzyym, and apparently to the court,[163] was the truth – that Zzyym could not accurately be defined as either "M" or "F." Judge Jackson wondered what options exist for intersex people seeking passports.

> Now, your State Department, our State Department tells these people they can't submit false information on a passport application. That's a big no-no. You can't do that. It's illegal. But this person doesn't identify with and doesn't have genitalia, even, that correspond with one or the other.[164]

Here Parker struggled to justify State Department policy:

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159. *Id.*

160. *Id.* at 4.

161. *Id.* at 8.

162. Zzyym's attorney, Paul Castillo, noted that the driver's license is not universally accepted as determinative evidence of gender:

> . . . the State Department's own foreign affairs manual . . . actually recognizes that state law and foreign laws may vary as to whether driver's license or other forms of identification such as a state driver's license is consistent or inconsistent with a person who is applying for a passport application; case in point with respect to individuals who are transgender oftentimes are unable to have insufficient financial resources to change either their birth documentation or their state documentation, but yet, despite that inconsistency, the State Department has a policy that allows a transgender individual to apply on the passport form with the gender marker that's different from their underlying documents.

Id. at 26-27. Castillo's response here suggests the centrality of a binary approach to sex identification. It would seem that the State Department is less concerned with the form of documentation offered to show identity than with the preservation of a binary approach to gender and sex.

163. *Id.* at 13.

164. *Id.*

> It [a passport] is not, for example, the plaintiff's document. This is a document that the government uses for specific purposes. And one of those purposes is that when a passport holder crosses the borders of the United States, the State Department uses a computerized system to link that person with critical law-enforcement information. The information that is input into this system from various law-enforcement agencies [that] only identifies individuals as male or female. And the sex identifier that the government uses on the government document is important for linking individuals to relevant law-enforcement information.[165]

Judge Jackson wondered how the government could at once invoke law-enforcement needs as justification for its binary-sex policy but still allow an applicant to claim one gender even when "state identification documents (and perhaps law enforcement database records?)" categorized the applicant as belonging to the other gender.[166] The government had not (and perhaps could not) explain how it presumed to "sync a transgender individual's passport information with law enforcement records that might list that very same passport holder as the opposite sex" and yet claimed that it could not achieve a similar end for intersex people unwilling to be classified as female or male.[167] Judge Jackson observed that the record did not demonstrate through reference to law enforcement needs that its binary-gender passport policy served a rational end.[168]

Further, the judge summarized the consequences for Zzyym and others like Zzyym:

> [T]his person with the ambiguous genitalia, who is neither male or female, can't leave the country because you have to have the passport to get out legally, can't leave the county unless they lie. And by lie, they check "F" or they check "M." Either one, as long as they check one, government doesn't care which one. Check one, fine. Don't check one, you're stuck.[169]

The court asked Parker if the Department had a policy regarding passport sex identification for transgender people. Parker responded positively and described that policy as "very progressive." He explained that the Department may issue a passport to a person who has submitted medical documentation "saying that the individual has gone through the

165. *Id.* at 13-14.
166. Zzyym v. Kerry, 220 F. Supp. 3d 1106, 1114 (D. Colo. 2016).
167. *Id.*
168. *Id.*
169. Zzyym Hearing, *supra* note 144, at 14-15.

clinical treatment necessary to transition. . .” even if that passport indicates a sex that “differs from some of their identification documentation.”[170]

Then, however, when asked about the State Department’s policy for sex identification on an intersex person’s passport, Parker asserted that “the change from a binary system would be extremely disruptive for the Department. . . .”[171] In attempting to explain this position, Parker, in effect, reiterated it:

> Your Honor, I certainly concede that the Department could [have an additional category or categories reflecting sex on a passport form]. But that would upend the process that they have in place for verifying identity . . . It really comes back to the traditional binary that we see throughout our society. And I understand Your Honor’s view that that binary may be outdated, but the State Department as it looks at the way that it uses the passport, the way that it uses it to identify the individual and especially the way that it uses it when individuals try to use passports to cross the borders of the United States, that binary is still very important because it’s a key piece of identifying information.[172]

In May 2017, the Department of State asserted that it had reviewed its “binary-only gender passport policy,” as directed by Judge Jackson, and again denied Zzyym a passport that would have identified Zzyym as other than male or female.[173] In June 2017, Judge Jackson agreed to consider the constitutionality of the State Department rule requiring passport applicants to identify as male or female.[174]

B. Transgender Passport Identity and State ID

The federal government’s insistence on preserving a binary gender categorization has different consequences for transgender and for intersex people. A transgender person able to submit supporting medical documentation can be identified on a U.S. passport in conformity with his or her gender identity.[175] In contrast, an intersex person, who identifies neither as “F” nor as “M” or who identifies as male and female is required

170. *Id.* at 21.

171. *Id.*

172. *Id.* at 22.

173. Keith Coffman, *U.S. Judge Reopens Case of Colorado “Intersex” Veteran Denied Passport*, REUTERS NEWS (June 28, 2017), https://www.reuters.com/article/us-colorado-intersex/judge-reopens-case-of-colorado-intersex-veteran-denied-passport-idUSKBN19J00W.

174. *Id.* Zzyym’s petition for review was not opposed by the Department of State. *Id.* The case is now referred to as Zzyym v. Tillerson. LAMBDA LEGAL, Zzyym v. Tillerson *(formerly* Zzyym v. Kerry*)*, https://www.lambdalegal.org/in-court/cases/co_zzyym-v-tillerson (last visited Oct. 15, 2017).

175. Zzyym v. Kerry, 220 F. Supp. 3d 1106, 1113 (D. Colo. 2016).

to lie or to refrain from travel outside of the United States. As noted,[176] the government's attorney in *Zzyym* concluded his testimony before Judge Jackson by applauding the State Department's "progressive policy with regard to transgender individuals."[177] That line of argument presents a curious disconnect between apparent pride about having a flexible view of gender and entrenched commitment to a binary view of gender.

Transgender people have also struggled to have their gender recorded in accordance with their gender identity on governmental identity documents. But their struggle has differed from that of intersex people in that the possibility of changing one's gender identity within the binary-gender framework is less often at issue today than is the possibility of identifying as part of more than one gender group or as belonging to no gender.

The federal government's policy has provided support to transgender litigants in cases challenging rules about changes in gender identity on state-issued documents such as drivers' licenses. In 2010, Michigan Secretary of State Ruth Johnson implemented a policy requiring anyone seeking to alter gender on state ID to present an amended birth certificate.[178] This posed problems for transgender people born in states that will not provide amended birth certificates, indicating a person's "lived gender," rather than sex at birth.[179] Moreover, Michigan precluded reliance on a passport as evidence of gender for purposes of altering state documents.[180] Other states predicate a change in gender on a person's birth certificate on the applicant's having had gender reassignment surgery.

A group of transgender people challenged Michigan's policy.[181] Plaintiffs contended that being compelled to rely on official identification documents that did not reflect their appearance intruded on privacy by "indirectly divulg[ing] their transgender status to complete strangers" and put them at risk of harm.[182] In *Love v. Johnson*, Judge Edmunds for the U.S. district court summarized the plaintiffs' concerns:

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176. *See supra* note 170 and accompanying text.

177. Zzyym Hearing, *supra* note 144, at 55.

178. Love v. Johnson, No. 15-11834, 2016 U.S. Dist. LEXIS 112035, at *3 (E.D. Mich. Aug. 23, 2016).

179. *Id.* at *1-2.

180. Love v. Johnson, 146 F. Supp. 3d 848, 851 (E.D. Mich. 2015). *But see Love*, 2016 U.S. Dist. LEXIS 112035, at *2, *4 (noting that Michigan provided for reliance on U.S. passport to show gender after commencement of *Love*).

181. *Love*, 2016 U.S. Dist. LEXIS 112035 (granting defendant's motion to dismiss in light of change in state policy). Other states predicate a change in gender on a person's birth certificate on the applicant's having had gender reassignment surgery. *Id.* at *2.

182. *Love*, 146 F. Supp. 3d at 850.

> Under the Policy, then, transgender individuals must procure an amended birth certificate in order to obtain a new state ID. Plaintiffs maintain that this requirement places "onerous and in some cases insurmountable obstacles to prevent transgender persons from correcting the gender on driver's licenses and state IDs . . . [and] stands in contrast with the decisions of the federal government and numerous states to ease restrictions on changing gender on identity documents . . . ." Indeed, according to Plaintiffs, the U.S. Department of State only requires a doctor's certification that a person "has had appropriate clinical treatment for gender transition" to change the gender on his or her passport. Likewise, "[a]t least 25 of the States and the District of Columbia do not require a transgender person to undergo surgery to change the gender" on their state ID.[183]

Judge Edmonds denied Johnson's motion to dismiss, concluding that the state's policy "directly implicated Plaintiffs' fundamental right to privacy under the *Fourteenth Amendment*."[184] Four months after the court's decision, the state amended its policy to provide for a gender change on a driver's license based on production of an amended birth certificate, a U.S. passport, a U.S. Passport Card, or a court order showing that a sex change had gained legal recognition.[185] As a result, the district court concluded that there no longer was "'a live controversy' between the parties."[186] Although the plaintiffs in *Love* opposed the court's summary judgment for the defendant – even in light of the policy change announced by the state – the case shows, again, that at least during the first decade-and-a-half of the twenty-first century, it often proved easier for transgender people than for intersex people to gain gender recognition. The binary gender presumption has continued to constrain the requests of intersex people for legal recognition of their intersexuality.

III. MARRIAGE AND GENDER BEFORE *OBERGEFELL*[187]

A different pattern emerged during the last half of the twentieth century in legal responses to questions about the permissibility or existence of marriages involving transgender and intersex people.[188] At least in part,

183. *Id.* at 851.

184. *Love*, 2016 U.S. Dist. LEXIS 112035, at *2.

185. *Id.* at *4.

186. *Id.* at *12-13.

187. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) (upholding right to marry for same-sex couples).

188. Many of the conundrums that courts faced in these cases were resolved by the decision of the U.S. Supreme Court in *Obergefell v. Hodges*. *See id.* (recognizing constitutional right of same-gender couples to marry).

that difference reflects the implications of medicalization. This Part considers judicial responses in the U.S. and Britain to disputes that questioned the validity of a marriage in which a partner was intersex or transgender.

A set of British cases, decided in the second half of the twentieth century reflect the force of the binary gender presumption as well as differences in consequences that that presumption may hold for transgender and intersex people.[189] In 1963, a British court validated a marriage between an intersex woman and a man.[190] The wife had been born with vaginal atresia, resulting in a short vaginal passage.[191] She had agreed to surgery to "remove the impediment that existed to full penetration by her husband."[192] The husband contended that this could not provide a "true vagina." The court refused to annul the marriage. Apparently assuming that the wife was a female at birth, the court concluded as well that a re-constructed vagina was a "real" vagina and that the husband lacked grounds to annul the marriage.[193]

Corbett v. Corbett, decided in Britain in 1970, involved a marriage between a cisgender male and a transwoman.[194] Judge Omrod in *Corbett*

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189. *See, e.g.*, W v. W. [2001] Fam. 111 at 111 (Eng.); Corbett v. Corbett, [1971] P 83 at 107-08; S.Y. v. S.Y., [1963] P 37 at 61 (Eng.).

190. *See S.Y.*, [1963] P 37 at 61.

191. *See id.*

192. *Id.* at 38.

193. Judge Karminski grounded that decision in the likelihood that the wife's reconstructed vagina would provide the husband with "a large degree of [sexual] satisfaction." *Id.* at 42. The lower court opinion is included in that of the Court of Appeal. Even in considering the wife's potential sexual satisfaction should she submit to vaginal reconstruction, that court focused, instead, on the husband's potential satisfaction:

> It is suggested [the husband's] satisfaction would be limited by the fact that the woman was deriving little if any pleasure from [sexual intercourse], but again the consultant took the view that, although probably the woman would not have quite the same satisfaction as she would do if she was normal and had an ordinary vagina, she would get pleasurable sensations which would in turn communicate themselves to the husband.

Id. In short, the wife's pleasure, to the extent that she received any, was viewed as important for the added pleasure it might bring to the husband. *See id.* The Court of Appeal affirmed the lower court's dismissal of the husband's annulment petition: "In these circumstances, I am not persuaded that the judge came to a wrong conclusion when he declined to hold that this wife was incapable of consummating the marriage." *Id.* at 61. For Judge Wilmer of the appellate court, it was assumed that the wife was a woman from birth and essential that the operation to which she had agreed to submit was available. *See id.* at 58. Judge Wilmer distinguished an earlier case with similar facts and a different result on the grounds that at the time of the earlier case, "an operation such as that contemplated by the consultant in the present case was something unknown to medical science." *Id.* at 55.

194. *Corbett*, [1971] P 83 at 107-08. Susan Stryker explains "cisgender" as referring to "the usually unstated assumption of nontransgender status contained in the words 'man' and 'woman.'" STRYKER, *supra* note 70, at 22.

distinguished *S.Y.*[195] The wife in *Corbett* had had sex re-assignment surgery before the marriage.[196] But the court concluded, nonetheless, that she had never been and could never become a woman.[197]

In short, the *Corbett* court viewed the intersex wife in *S.Y.* as really female, but it viewed the transwife in *Corbett* as really male because born male.[198] Interestingly, even the lawyer for the wife in *Corbett* argued that the wife "should be classified, medically, as a case of inter-sex, and that, since the law knew only two sexes, male and female, she must be 'assigned' to one or the other, which, in her case, could only be female, and that she should thus be regarded for all purposes as a woman."[199]

In another British case, *W. v. W.*,[200] decided at the start of the twenty-first century, a husband sought to show that his marriage was never valid because his wife was not a woman.[201] The court agreed that the "biological test" established in *Corbett* was not "satisfied" with regard to the wife.[202] Yet, the court held for the wife, identifying her as a woman at the time of the couple's marriage.[203] The court further reflected that had Judge Ormrod in *Corbett* understood that case to involve "physical inter-sex," the court would have faced a greater challenge and would likely have "given weight to the genital criteria."[204] The *W. v. W.* court thus concluded that had the wife in the case

> . . . been born today the medical decision taken would have been that she should be brought up as a girl. If that decision had been made at the time of the respondent's birth it would have been vindicated by the respondent's physical development as a result of her partial androgen insensitivity, her desire from an early age to live as a girl and her final choice to live as a woman before she started taking oestrogen and had her surgery.[205]

Thus, the court, recognizing the wife as intersex, identified her as a woman and noted that she would have been identified as female if "born

195. *See* Corbett v. Corbett, [1971] P 83 at 110.

196. *See id.* at 106.

197. *Id.* at 107 (describing the wife's vagina, constructed through surgery, as a "cavity"). Judge Omrod further described the story of the couple's relationship and marriage as "essentially pathetic" and "almost incredible." *Id.* at 92.

198. *See id.* at 100-04.

199. *Id.*

200. *See* W v. W. [2001] Fam. 111 at 111 (Eng.).

201. *Id.* at 112.

202. *Id.* at 139.

203. *Id.* at 146-47.

204. *Id.* at 141.

205. *Id.* at 146.

today."[206] This conclusion, apparently necessary to validate the couple's marriage, reflected a social shift since *Corbett*.[207] At the same time, despite its comparative flexibility about gender, the court in *W. v. W.* assumed, and thus supported, the binary gender presumption.

In the United States, it seems, only one court validated a marriage between a transgender spouse and a spouse of the other gender before the twenty-first century;[208] other courts, often referring to the British cases, concluded that a transgender spouse belonged to the gender into which that person had been born.[209] In short, before the U.S. Supreme Court concluded in *Obergefell v. Hodges* in 2015 that same gender marriage is a constitutional right,[210] states rarely validated a marriage between a transgender individual and another person of the sex corresponding with the transgender individual's biological sex at birth.[211] And when they did, they depended heavily on the existence of medical evidence that the transgender party had undergone a biological transition.[212] That requirement suggested that transgender people who had transitioned under medical care did not pose a threat to binary gender assumptions.

In 1999, almost three decades after the British court's decision in *Corbett*, a Texas court reached a decision that reflected many of the assumptions at play in *Corbett*.[213] In the Texas case, *Littleton v. Prange*, the court held that the marriage between a transwoman and a cisgender man was not and never could be valid.[214] Judge Hardberger, who wrote the *Littleton* opinion, seemed unable to credit the possibility that Christie, a transwoman, was not, in fact, forever a man.

> This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes. These are observations that each of us makes early in

206. *Id.*

207. Corbett v. Corbett, [1971] P 83 at 106 (Eng.).

208. M.T. v. J.T., 355 A.2d 204 (N.J. App. 1976).

209. Littleton v. Prange, 9 S.W.3d 223, 227-28, 205 (Tex. App. 1999) (noting exception was opinion of N.J. court in M.T. v. J.T., 355 A.2d 204, 205 (N.J. App. 1976); that court concluded that medical procedures could change an individual's gender but safeguarding a binary view of gender).

210. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) (upholding fundamental right to marry for same-sex couples).

211. *See In re* Estate of Araguz, 443 S.W.3d 233, 245 (Tex. App. 2014).

212. *See id.* at 249-50.

213. *Littleton*, 9 S.W.3d 223 (involving wrongful death action filed by surviving spouse, herself a transwoman).

214. *See id.* at 231.

> life and, in most cases, continue to have more than a passing interest in for the rest of our lives. It is one of the more pleasant mysteries.
>
> The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth? The answer to that question has definite legal implications that present themselves in this case involving a person named Christie Lee Littleton.[215]

The court presumed that the binary gender presumption followed inexorably from the incontrovertible character of natural and supernatural laws.[216]

A year before the Supreme Court recognized a constitutional right to same-sex marriage,[217] a court in Texas—the same state that had decided *Littleton* fifteen years earlier—identified "a genuine issue of material fact" about the gender of a woman who had been born male.[218] In the fifteen years between the two cases, a notable social shift had displaced Judge Hardberger's reliance on nature's eternal truths. In *Araguz*,[219] the court validated a marriage between a man and a transwoman.[220]

The court, noting that under Texas law marriages were only valid if entered into by "one man and one woman,"[221] concluded, as well, that state law provided that "an individual who has had a 'sex change' [was] eligible to marry a person of the opposite sex."[222] The court relied heavily on medical testimony confirming the wife's transition which included "sex reassignment surgery" to "raise a fact issue regarding [her] sex."[223] Thus, the court preserved a binary gender presumption but acknowledged that someone could transition legally from one gender to the other.[224] By this

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215. *Id.* at 223-24.

216. *See id.* at 224.

217. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).

218. *In re* Estate of Araguz, 443 S.W.3d 233 (Tex. App. 2014).

219. *Id.*

220. *Id.* at 244 (relying primarily on a 2009 legislative change in state law that allowed proof of identity and age for receipt of marriage license to include "a court order related to an applicant's 'sex change'").

221. *Id.* at 245.

222. *Id.* More particularly, the court concluded that the trial court's summary judgment in this case cannot be affirmed because "*Littleton* [9 S.W.3d 223] has been legislatively overruled." *Id.*

223. *See id.* at 248-49.

224. At the time, some commentators even wondered whether validation of marriages involving a transgender person supported a heteronormative view of marriage that could disrupt movement toward the recognition of same-gender marriages. *See* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 417 (2001) (noting that recognition of validity of

time (2014) visions of transgender people had been so broadly transformed that it might have been more difficult for an intersex partner who identified as belonging to no gender or more than one gender to have been recognized as a legal spouse than a transgender person.[225]

Since the decision of the U.S. Supreme Court in *Obergefell*,[226] cases of the sort discussed in this section have become obsolete. Marriage is a constitutional right, regardless of the sex or gender of either party.[227] However, the cases reviewed in this Part offer a powerful insight into society and the law's shifting visions of sex, gender, and transgender status. These cases show, once again, the continuing commitment of society, medicine, and the law to the binary-gender approach, even as they suggest the development in recent years of a more flexible vision of gender and sex.[228]

IV. BATHROOMS, LOCKER ROOMS, AND SPORTS EVENTS

This Part focuses on recent challenges to rules excluding transgender (and to some extent, intersex) people from bathrooms and locker rooms, and both groups from sports teams that conform with individuals' gender identity. During the years of the Obama administration, the law began to question, and thus to mitigate, such rules of exclusion. Since the start of the Trump administration, that momentum has slowed and, in some instances, been stilled.[229]

Most of the cases addressed in this Part involve transgender people. Yet, the issues also affect intersex people, though often differently, in large part because being intersex often can be, and is, kept private. An intersex high school girl explained that she had been "lucky because my intersex condition doesn't impact my outward physical traits. . . . I've never experienced direct discrimination in bathrooms or in school. I would have to explain to someone my internal anatomy for someone to understand."[230]

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marriages between transsexual people and people of the opposite gender "run[s] the risk of reinscribing marriage as a solely heterosexual union.").

225. No cases have been identified in the relevant time period that reflect such facts.

226. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) (upholding fundamental right to marry for same-sex couples).

227. *See id.*

228. *Araguz*, 443 S.W.3d 233 (Tex. App. 2014), and non-marital cases that recognize the possibility of changing one's gender show the continuing reliance of many courts on medical evidence in confirming the gender of intersex and transgender people.

229. *See infra* notes 272-73 and accompanying text.

230. Mary Emily O'Hara, *Intersex Youth Poised to Complicate School Bathroom Battle*, NBC NEWS: NBC OUT, (Mar. 4, 2017, 1:59 PM), https://www.nbcnews.com/feature/nbc-out/intersex-

Yet, intersex people pose a challenge to those who favor segregating bathrooms, locker rooms and to some extent, sports activities by biological sex. The intersex advocacy group InterACT has pointed to intersex children as "proof that physiological sex is not 'binary, objective, and self-evident' any more than is gender identity."[231] The "lived biological reality" of intersex people challenges traditional views of sex as binary.[232] Thus, quite as much as is the case for transgender people, "the intersex community is poised to throw a wrench in the argument that facilities should be segregated according to 'biological' sex rather than gender identity."[233]

The first Section of this Part reviews rules in other nations that provide significant flexibility for transgender people, including students, to use bathrooms and locker rooms consistent with gender identity. Part B then considers cases in the U.S. that have challenged rules that preclude transgender people[234] from using bathrooms and locker rooms that reflect their gender identity. Finally, Section C examines rules regulating the right to participate on sports teams and in sports events segregated by sex in conformity with gender identity rather than with apparent sex at birth.

A. Approaches to Gender and Responses of Other Nations[235]

Even courts in the U.S. that have supported the right of transgender people to use bathrooms and locker rooms consistent with gender identity have tended to assume a binary approach to gender. Sometimes this suits transgender people, who accept a binary categorization of gender in aiming to be accepted as one gender or the other. Preservation of a binary gender perspective has often occurred outside the U.S. as well, even in nations that have been at the forefront in facilitating social and legal acceptance for transgender people as members of the gender with which they identify.

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youth-poised-complicate-school-bathroom-battle-n728886. The child quoted, referred to as "Ellie," has Swyer Syndrome, resulting in XY chromosomes, and "unformed sex glands." *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. There seem to be no reported cases involving the right of intersex people to use bathrooms of one gender or the other (or all bathrooms, regardless of gender markings). This does not refer to people who are intersex and transgender. In that situation, a person may face the same constraints on the use of public bathroom as are faced by other transgender people. The situation of bathroom use by intersex people is noted in at least one case involving transgender litigants. G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 720-21 (4th Cir. 2016), *vacated*, Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (mem.).

235. *See also supra* notes 85-97 and accompanying text.

Many nations that have begun to meet the needs of transgender people still cling to a binary vision of gender, but at least eight nations have accepted a non-binary notion of gender and now provide for an "unspecified" gender identity on passports.[236] In Malta, Ireland, Argentina, New Zealand, Denmark, and Colombia, people can obtain new gender designations on official documents without submitting supporting medical documentation.[237] In most of these nations, society and the law have also begun to offer bathroom and locker room access to transgender people on the basis of gender identity.[238] School children in Malta, Norway, Argentina, and Ireland can use bathrooms and locker rooms consistent with their gender identities.[239] And in Norway, the nation's "sports federation" directs schools to allow transgender girls to play on girls' sports teams. The explanation focuses on "inclusiveness," which the League has explained, outweighs "any concerns about competitive advantage."[240] One ten-year old Norwegian transgender girl reported feeling "liberated" by that nation's law. Now registered as a girl, the child, born male, has access to female bathrooms and locker rooms.[241]

Still, however, most responses to such issues, even in nations with more flexible responses than those in the U.S., assume the perseverance of a binary approach to gender. Transitioning between genders is accommodated, but, still, it is usually assumed that one must be male or female. Cases considered in the next Section of this Article similarly demonstrate some flexibility regarding traditional views of sex and gender. Yet, still, these cases give little heed to the concerns of those who would

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236. Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Document*, 39 HARV. J.L. & GENDER 491, 512 (2016). These nations include Malta, Nepal, New Zealand, Denmark, Germany, Australia, Bangladesh, and India. *Id.* at 517.

237. *Id.* at 509-11 n.115 (citing GIGESC § 3(1)(c)); *see also* Shawn Pogatchnik, *Transgender-rights Battle in U.S. Leaves Europeans Baffled: Trump's Toilet Policy Causes Bewilderment*, TIMES COLONIST (Victoria, B.C.), Feb. 25, 2017, at C1. *See also supra* notes 85-90 and accompanying text (explaining Malta's law on right to "be treated according to . . . gender identity and . . . to be identified in that way in the documents providing . . . identity therein").

238. *See* Pogatchnik, *supra* note 237, at C1.

239. *Id.* Pogatchnik reported that transgender children in Norway, permitted to use bathrooms and locker rooms consistent with their gender identity may be asked to arrive at the school locker room a few minutes before the other children when changing in the locker room. *Id*. *See also* Shawn Pogatchnik, *Other Nations Shaking Heads at US Transgender Toilet Battle*, THE SALT LAKE TRIBUNE (Feb. 24, 2017, 9:01 AM), http://archive.sltrib.com/article.php?id=4979326&itype=CMSID.

240. Pogatchnik, *supra* note 237, at C1.

241. *Id.* The only difference between this girl and other girls is that she arrives 5 minutes before other girls when she changes in the locker room at her school. *Id.*

choose to be identified as both genders or who do not identity with the male or female gender.

B. The Right to Choose One's Bathroom or Locker Room in Conformity with One's Gender Identity

In 2010, a law review article referred to "bathroom" cases as "one type of case that [transgender individuals] still consistently lose."[242] That has changed. However, the issue continues to be hotly disputed in courts and within society. And, while transgender litigants have won some bathroom-access cases in the United States in the last few years, that trend may be reversing, at least in part due to the 2016 change in the federal administration.[243]

Access to school and public bathrooms can significantly impact one's everyday life – and one's emotional responses. Without access to bathrooms, it is difficult to travel, to remain at work or school throughout a day, and to avoid a sense of humiliation. Transgender people are not the first group in the United States to initiate legal cases seeking the right to use bathrooms to which they have been denied access in schools, places of employment, restaurants, and other public domains.[244] Ruth Colker recalls "[w]hites only signs" and suggests that they remind society of how recently and how "commonplace" it was that racial segregation in the South in the U.S. included separate bathrooms for whites and blacks.[245]

Many of the cases about the right of transgender people to access bathrooms conforming with their gender identities have challenged courts to interpret federal civil rights laws that protect people against "sex" discrimination – especially Title VII of the Civil Rights Act of 1964 and Title IX of the Educations Amendments of 1972[246]— to also protect people

242. Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination "Because of . . . [Perceived] Sex"*, 34 N.Y.U. REV. L. & SOC. CHANGE 55, 115 (2010) (referring, in particular, to cases brought pursuant to Title VII).

243. *See infra* notes 272-73 and accompanying text; *see also* Texas v. United States, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016). In 2017, Shannon Minter reported an "unprecedented backlash" against transgender people. Two states, Mississippi and North Carolina passed laws denying protections to transgender people. Both laws have been challenged in court. Shannon Minter, *Feature, Transgender Rights: A Time of Transition*, 34 GPSOLO 26, 26 (2017).

244. Ruth Colker, *Public restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 146-47 (2017).

245. *Id.*

246. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against job applicants and employees with regard, among other matters, to hiring, firing, pay, and the terms of employment on the basis of an "individual's race, color, religion, sex, or national origin." Title VII of the Civil Rights Act of 1964, 42 U.S.C.S § 2000e-2(a) (LEXIS through Pub. L. No. 115-73). Second, Title IX of the Education Amendments Act of 1972, states that "[n]o person . . .

against discrimination on the basis of gender identity. Although some courts have responded affirmatively to that challenge and have interpreted "sex" to encompass gender identity, they have often also re-enforced binary understandings of gender.[247] Moreover, the anti-discrimination laws on which litigants have relied have generally depended upon and supported the presumption that people are either male or female.

1. Public Bathrooms

Cases involving transgender people seeking to use bathrooms conforming with their gender identity rather than their sex at birth are more likely to reinforce a binary categorization of people (here, regarding gender) than were bathroom-access cases involving blacks precluded from access to "whites only" bathrooms (then, regarding race). Indeed, some transgender people have favored the binary-gender presumption and have stressed the importance of having separate bathrooms for men and women.

Laverne Cox, a transwoman, was asked during an ABC interview why she continues to struggle with the public restroom issue.[248] Cox answered:

> Well I, as a transgender American, I often find myself, especially in public spaces, I remember recently, I was doing a TV show, and I was on television to talk about the bathroom issue. And I was at MSNBC, and I was like, everybody's watching me. I was, like, where's the, may I use the ladies' room? And I was, like everybody is going to look and see which bathroom I'm going in. So, it's just something. It's an extra thing I find myself thinking about because I'm trans.[249]

Dean Spade, a transgender man, attorney, and law professor, has described the indignity of being told one cannot use a bathroom consistent with one's gender identity. Spade wrote about his own arrest in 2002 for using a men's room in Grand Central Station. Spade was kept in jail for 23 hours "on a false trespassing charge."[250] In response to the arrest, Spade explained:

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shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Title IX of the Education Amendments Act of 1972, 20 U.S.C.S. § 1681(a) (LEXIS through Pub. L. No. 115-73).

247. Most of the recent cases within the set examined in this Part involve claims by transgender, not intersex, people.

248. Interview by Sara Haines with Laverne Cox, Actor, *Orange is the New Black*, *The View* (ABC television broadcast June 16, 2017) (transcript available on LEXIS).

249. *Id.*

250. Dean Spade, *Commentary: Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 17 n.5 (2003). Through this humiliating experience, Spade gained a sense "of what more vulnerable trans people (homeless, youth, people of color, disabled) face daily." *Id*.

> [p]eople all over the internet seem to be wondering: Is my claim to use the men's room legitimate? Have I failed to meet the conditions of manliness (or transmanliness) such that the arrest was deserved? What do I look like? Trans people and non-trans people alike have been making arguments on list serve, comment boards, and in emails to me with varying levels of blame about my arrest. To some, whether or not I am to blame depends on whether or not what I did was illegal (which it was not). To others, whether or not I am to blame depends on how much I look like a man. And a third set seem to be saying that the fact that this experience happened to me means that it was deserved, because I failed to pass as a man and that is my shortcoming.[251]

The third explanation for "blame" offered by Spade assumes a binary gender perspective as the assessor of appropriate (transgender) conduct.

2. School Bathrooms and Locker Rooms

More than a decade after Spade wrote about his having been arrested for using a public men's room, Gavin Grimm, a transgender boy (known as G.G. in court papers), sued his community's school board, seeking the right to use the boys' bathroom at his school.[252] Gavin's case as well as Gavin, himself, attracted significant media attention.[253]

Gavin, whose sex at birth was female, began to transition in 2014, before his sophomore year of high school.[254] After talking with school officials about his transition, Gavin initially agreed to use a bathroom in the office of the school nurse and to satisfy the school's physical education requirement through a home school program.[255] For a short time in 2014, Gavin was permitted to use the boy's bathroom at school.[256] Gavin has explained that his peers did not object to that: "All I want," he asserted, "is to . . . use the restroom in peace, and I have had no problems from students to do that – only from adults."[257] Responding to pressure from community

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251. Dean Spade, *2 Legit 2 Quit, "What was He Wearing?"*, PISS & VINEGAR, http://www.makezine.org/2legit.html (last visited July 11, 2017).

252. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015), *rev'd*, 822 F.3d 709 (4th Cir. 2016), *vacated*, Gloucester Cty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (mem.).

253. A Lexis search (July 2017) for "Gavin Grimm" AND transgender AND bathroom yielded over 2,200 results in the Lexis News file.

254. *G.G.*, 132 F. Supp. 3d at 739.

255. *Id.* at 740.

256. *Id.*

257. Rebecca Klein, *Gavin Grimm Could Be a National Hero for Trans Students, But He'd Rather Be a "Normal Child"*, HUFF. POST (Oct. 14, 2016, 2:06 PM), https://www.huffingtonpost.com/entry/gavin-grimm-supreme-court-transgender_us_58002c89e4b0e8c198a74692. The district court noted that a declaration

members, the school board intervened, precluding Gavin's continued use of the boy's room. In December 2014, the board voted 6-1 in favor of a resolution that provided, in part:

> It shall be the practice of the [Gloucester County Public Schools] to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.[258]

After passage of that resolution, the school installed three single-stall restrooms that could be used by anyone.[259] Gavin contended that use of these restrooms would "stigmatize and isolate" him.[260] Gavin then sued the school board, arguing that the board's refusing to allow him to use the boys' restrooms violated Title IX[261] and the equal protection clause of the Fourteenth Amendment.[262]

In 2015, a year after Gavin brought his case, the Office for Civil Rights (OCR) issued an opinion letter that explained: "When a school elects to separate or treat students differently on the basis of sex. . . a school generally must treat transgender students consistent with their gender identity."[263] That interpretation concerned an agency regulation that allowed limiting access to bathrooms "on the basis of sex."[264] Yet, a federal district court in Virginia concluded that it did not owe "Chevron-style deference" to the agency's "interpretation"[265] and that the regulation at issue was not "ambiguous." The district court opined that since the regulation permitted the school board "to limit bathroom access 'on the

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submitted to the court from Troy Andersen, a School Board member, reported the Board to have "receiv[ed] numerous complaints from parents and students" after G.G. began to use the boys' bathroom. *G.G.*, 132 F. Supp. 3d at 750.

258. *Id.* at 740.

259. *Id.* at 741.

260. *Id.*

261. Title IX of the Education Amendments Act of 1972, 20 U.S.C.S. § 1681(a) (LEXIS through Pub. L. No. 115-73).

262. *G.G.*, 132 F. Supp. 3d at 738.

263. Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Pol'y, U.S. Dep't of Educ., Office for Civil Rights (Jan. 7, 2015), http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf. *See also* U.S. Dep't of Just. & U.S. Dep't of Educ., *Dear Colleague Letter on Transgender Students*, ED.GOV, (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (also noting: "As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.").

264. *G.G.*, 132 F. Supp. 3d at 744-46 (referring to 34 C.F.R. § 106.33 (2017)).

265. *Id.* at 746 (quoting Christensen v. Harris Cty., 529 U.S. 576, 587 (2000)).

basis of sex,' including birth or biological sex,"[266] the board was not violating the regulation by refusing to recognize Gavin's "sex" as male. Accordingly, the court dismissed Grimm's Title IX claim and thus denied his request for a preliminary injunction.[267] The court concluded, in short, that requiring Gavin Grimm to use the female bathroom or one of the three single-stall bathrooms "did not impermissibly discriminate against him on the basis of sex" because he was biologically female.[268]

Grimm appealed to the Fourth Circuit. That court gave more weight to the interpretation offered by the Office for Civil Rights (OCR),[269] finding the language of the regulation "ambiguous" with regard to "how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms."[270] The court wrote:

> We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading – determining maleness or femaleness with reference exclusively to genitalia – and the Department's interpretation – determining maleness or femaleness with reference to gender identity.[271]

The Fourth Circuit's framing of Gavin's case made his victory there vulnerable to future shifts in interpretation. More specifically, the court's focus on OCR's letter interpreting the agency regulation opened the way for alternative conclusions should the agency rescind or replace its interpretative letter with a different letter, taking a position less favorable to transgender students such as Gavin. That happened in the early months of the Trump administration, soon after the Fourth Circuit decision was handed down.[272] In light of the Fourth Circuit's dependence on the agency's interpretation of the regulation and the shift in agency policy during the early months of the Trump administration, in March 2017, the U.S. Supreme Court vacated the Fourth Circuit judgment and remanded the case.[273]

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266. *Id.* at 746.

267. *Id.* at 753.

268. G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 717 (4th Cir. 2016) (explaining conclusion of district court).

269. *Id.* at 718-21.

270. 34 C.F.R. § 106.33; *see also G.G.*, 822 F.3d at 715.

271. *G.G.*, 822 F.3d at 720.

272. Gloucester Cty Sch. Bd. v. G.G., 137 S. Ct. 1239 (U.S. 2017) (vacating judgment and remanding case to the Fourth Circuit "in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017").

273. *Id.*; *see also*, *Transgender Teen Hailed by DOJ Group*, WASH. POST, June 29, 2017, at B03.

Alternatives were available to the court. An independent interpretation of Title IX that relied on judicial interpretations of Title VII of the Civil Rights Act of 1964[274] could have supported Gavin's claim, thereby allowing the Fourth Circuit to reach the same conclusion that it did reach, though on different and less fragile grounds.[275] The Fourth Circuit could have protected Gavin's right to use the boy's bathroom through reference to *Price Waterhouse v. Hopkins.*[276] While the implications of Title VII for transgender people remain uncertain, the U.S. Supreme Court's analysis in *Price Waterhouse*[277] can be read to extend Title VII protection to transgender populations. In that case, the Supreme Court concluded that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[278] Moreover, by 2017, six federal circuit courts had extended protection to transgender people pursuant to Title VII.[279]

In response to the Supreme Court's order to vacate and remand in Gavin Grimm's case, the Fourth Circuit vacated the preliminary injunction that gave Grimm the right to use the boy's bathroom in his high school.[280] Judge Andre Davis, who concurred in the unopposed motion to vacate the preliminary injunction,[281] counted Gavin Grimm among "the list of plaintiffs whose struggle for justice has been delayed and rebuffed" – people such as "Dred Scott, Fred Korematsu, Linda Brown, Mildred and Richard Loving, Edie Windsor, and Jim Obergefell."[282] Judge Davis continued:

> [A]s Dr. King reminded us, however, "the arc of the moral universe is long, but it bends toward justice." G.G.'s journey is delayed but not finished. G.G.'s case is about much more than bathroom. It's about a boy asking his school to treat him just like any other boy. It's about protecting

274. Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e (LEXIS through Pub. L. No. 115-73).

275. *See, e.g.*, Sam Williamson, *Note and Comment, G.G. ex rel. Grimm v. Gloucester County School Board: Broadening Title IX's Protections for Transgender Students*, 76 MD. L. REV. 1102, 1112-13 (2017).

276. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

277. *Id.*

278. *Id.* at 250.

279. Minter, *supra* note 243, at 27 (noting that First, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have interpreted Title VII to protect transgender people).

280. G.G. v. Gloucester Cty. Sch. Bd., 2016 U.S. Dist. LEXIS 93164, at *3 (E.D. Va. June 23, 2016).

281. G.G. v. Gloucester Cty. Sch. Bd., 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring) (concurring in unopposed motion to vacate preliminary injunction).

282. *Id.*

> the rights of transgender people in public spaces and not forcing them to exist on the margins. It's about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity. His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected.[283]

At that time (early 2017), Gavin Grimm was a high school senior. That spring he graduated. Yet, his attorneys filed a new brief with the Fourth Circuit, claiming that Grimm, as an alumnus visiting the school, would be subject to the school's bathroom rules.[284]

Although *G.G.* involved a transgender boy, the 2016 Fourth Circuit opinion in the case offers one of the very few court decisions (among those considering the applicability of Title IX to transgender students seeking the right to use bathrooms conforming with their gender identity) that mentions intersex people.[285] Judge Floyd, writing for the Fourth Circuit, concluded that the federal regulation at issue in the case contained ambiguities, and then asked about the application of the federal rule to several groups, distinct, at least in some regard, from the transgender community:

> It is not clear to us how the regulation would apply in a number of situations – even under the Board's own "biological gender" formulation. For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident?[286]

In the same year that the Fourth Circuit held for Gavin Grimm, a federal district court in Ohio held for an eleven-year old transgender girl who wanted to use the girls' bathroom in her Palatine, Ohio elementary school.[287] The girl ("Jane Doe" (hereinafter "Jane")) had transitioned socially, but not physically.[288] The girl's school—Highland Elementary

283. *Id.*

284. Associated Press, *Transgender Teen Argues Case Still Relevant After Graduation*, U.S. NEWS (May 8, 2017, 5:51 PM), https://www.usnews.com/news/best-states/virginia/articles/2017-05-08/transgender-teen-argues-case-still-relevant-after-graduation.

285. Even in other contexts, there are few to no Title VII or Title IX cases involving intersex people. Writing in 2010, Ilana Gelfman noted the existence of only one sex discrimination case in the employment context with an intersex plaintiff. Gelfman, *supra* note 242, at 72-73. And that case, Wood v. C.G. Studios Inc., 660 F. Supp. 176 (E.D. Pa. 1987), was decided pursuant to the Pennsylvania Human Relations Act. Gelfman, *supra* note 242, at 72-73.

286. *G.G.*, 822 F.3d at 720-21.

287. Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't Educ., 208 F. Supp. 3d 850, 878-79 (S.D. Ohio 2016).

288. *Id.* at 855.

School in Ohio—agreed to refer to Jane by her female name but refused to change official records to reflect that name. Further, school policy provided for bathroom use corresponding to a child's "biological sex."[289]

Jane used the office bathroom during first grade. Her parents told the school's principal that this practice had negative mental health consequences for Jane.[290] During second grade, she was required to use a unisex bathroom in the teachers' lounge. According to Jane, teachers looked at her unkindly ("glare[d] at her") when she passed through the lounge to use the restroom.[291] Further, Jane said that members of the school's staff referred to her with male pronouns, and that the school failed to respond to students who harassed her.[292] Thus, the issues facing Jane included but went beyond her access to bathrooms corresponding to her gender identity. By the end of the school year, Jane suffered from "suicidal ideation and depressed mood," resulting in her hospitalization.[293] Before starting fourth grade, Jane tried to commit suicide.[294]

During the next few years, school policy remained firm,[295] and parents of other students asserted that their children were discomforted by Jane's bathroom use – explaining, in effect, that they were discomforted by any transgender student's presence in the school. One parent of a boy at the school explained that she "did not approve of her son sharing a restroom, locker room, or overnight accommodations with girls."[296] Another parent at the school reported that her foster daughters had suffered sexual abuse, that for them "the male anatomy is a weapon by which they were assaulted," and that they would "feel vulnerable being in the presence of biological males when showering, changing clothes, or using the bathroom."[297]

In the spring of 2016, the Office of Civil Rights (OCR) of the U.S. Department of Education informed the school that it was violating Title IX by not allowing Jane to use facilities consistent with her female identity.[298]

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289. *Id.* at 856.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *See generally id.*

296. *Id.* at 858 (quoting and citing Declaration of Parent H., Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't Educ., No. 2:16-CV-524 (S.D. Ohio 2016) Doc. No. 68 ¶¶ 2, 5).

297. *Id.* (quoting and citing Declaration of S.B., Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't Educ., No. 2:16-CV-524 (S.D. Ohio 2016) Doc. No. 69 ¶¶ 6, 14-15).

298. *Id.* Under Title IX, no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2012).

The school rejected OCR's Resolution Agreement and brought suit.[299] In June 2017, the Education Department's Office of Civil Rights under the Trump administration withdrew from the case.[300] The acting head of the office explained that the administration had rescinded the guidance that directed schools to give transgender students access to bathrooms conforming with their gender identities.[301] Further, she noted, Jane had filed a legal challenge to Highland's rules. The courts, she explained, would resolve the girl's claim, apparently without help from OCR.[302]

Further, litigation challenging the Department of Education's position on bathroom and locker room use for transgender students under the Obama administration was filed by Texas, joined by eleven other states,[303] in July 2016.[304] A Texas district court granted plaintiffs' request for a preliminary injunction that prohibited enforcement of the agency's guidance on transgender students' bathroom use.[305] The United States appealed to the Fifth Circuit.[306] However, early in the Trump administration, a "Dear Colleague" letter from the Departments of Justice and Education withdrew the departments' letters authored during the previous administration (of January 2016 and May 2016) that requested schools to provide transgender students with access to bathrooms and locker rooms consistent with their gender identity.[307] In March 2017, the federal government moved to dismiss the appeal to the Fifth Circuit.

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299. *See* 208 F. Supp. 3d at 859. The court allowed Jane and her parents to intervene in the case. *Id.* It concluded that Jane was likely to succeed on her Title IX and equal protection claims. The court further opined that the equal protection claim required "heightened scrutiny," *id.* at 872, but that Jane would likely succeed were the court to "apply a rational basis review." *Id.* at 877. In significant part, this conclusion followed from Highland's failure to show that Jane's use of girls' bathrooms posed a privacy or security concern for other students. *See id.*

300. Emma Brown, *Education Department Closes Transgender Student Cases; Feds Push to Scale Back Civil Rights Investigations*, DAYTON DAILY NEWS, June 22, 2017, at B9 (LEXIS).

301. *Id.*

302. *See id.*

303. In addition to Texas, these states included Alabama, Wisconsin, Tennessee, Arizona, Maine, Oklahoma, Louisiana, Utah, Georgia, West Virginia, Mississippi, and Kentucky. Texas v. United States, 679 Fed. App'x 320, 322 (5th Cir. 2017).

304. Texas v. United States, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016).

305. *Id.* at 836.

306. *Texas*, 679 Fed. App'x at 322.

307. U.S. Dep't of Just. & U.S. Dep't of Educ., *Dear Colleague Letter*, JUSTICE.GOV, (Feb. 22, 2017), https://www.justice.gov/opa/press-release/file/941551/download. The letter opined that the Obama administration "guidance documents on transgender students' right to access bathroom and locker rooms consistent with gender identity were not subject to "extensive legal analysis." Further the Feb. 22, 2017 letter read:

> [The Obama administration] interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that "sex" in the regulations is ambiguous and deferred to what the court

C. Sports Teams and Sports Events

The world of sports long functioned through the lens of a binary-gender perspective. Opposition to facilitating the participation of transgender and intersex athletes in conformity with their gender identities has been strong. Yet, concerns among those opposing such participation often differ from the concerns of those opposing use of bathrooms and even locker rooms consistent with gender identity. In the domain of sports, a central challenge to the participation of transwomen athletes and of some female intersex athletes has focused on questions about competitive unfairness. Dorianne Coleman, a law professor and former runner commented critically on the possible inclusion in women's sports of intersex athletes: "'If you start to do this, you are making a joke of the fact that there are two classifications – male and female.'"[308] Furthermore, she suggested, it would make as much sense to "'open it up and have women competing with men.'"[309] This Section first considers responses to intersex and transgender athletes in international sports; it then considers responses regarding participation in school teams and at school sporting events in the United States.

1. Competitive International Sports

Challenges to participation in sports have faced transwomen and intersex women, rather than transmen and intersex men. Renee Richards (born Richard Raskin) was an ophthalmologist, a parent, and a tennis player when he had gender reassignment surgery.[310] After the surgery, she was prohibited from playing in the U.S. Open. Richards sued and won. Richards attributed her legal victory to an affidavit from champion tennis player, Billie Jean King, who affirmed that she knew Richards, that Richards was female, and that she should be allowed to compete as a female

> characterized as the "novel" interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term "sex" unambiguously refers to biological sex and that, in any event, the guidance was "legislative and substantive" and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned. In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

Id.

308. Gina Kolata, *I.O.C. Panel Calls for Treatment in Sex Ambiguity Cases*, N.Y. TIMES (Jan. 20, 2010), http://www.nytimes.com/2010/01/21/sports/olympics/21ioc.html?emc=eta1.

309. *Id.*

310. Sara Lentati, *Tennis's Reluctant Transgender Pioneer*, BBC (June 26, 2015), http://www.bbc.com/news/magazine-33062241.

tennis player.[311] Richards, who retired from tennis in 1981, did well, though not superbly, as a female competitor.[312] As Richards's story might suggest, virtually all of the shifts favoring transgender participation on teams and in sports events corresponding with gender identity have safeguarded a binary-gender perspective. Precluding athletes deemed male[313] from participating in women's sports[314] re-enforces a binary-gender approach by concentrating on presumed differences between men and women in athletic events. It has also held serious, often painful, consequences for both intersex and transgender athletes.

For thirty years, beginning in 1968, international sports competition, including the Olympics, relied on a test – the Barr Body test – which checked for the number of X chromosomes in an individual's genome.[315] This test, in theory at least, identified male athletes under the presumption that males had an XY genotype.[316] Yet, even though an XY male could, in theory, be identified through use of the test, the test would fail to identify some females as female (e.g., those with only one X) and would identify some males as female (e.g., those with an XXY genotype).[317] Furthermore, the Barr Body test does not assess steroid or testosterone levels.[318]

In the early 2000s, the International Olympic Committee (IOC) resolved uncertainty about the eligibility of transgender athletes to compete in sports in conformity with the gender with which they identified. Following the recommendations of the IOC Medical Commission which met in Stockholm, the IOC provided that anyone who went through gender

311. *Id.*

312. *Id.*

313. *See generally infra* note 316 and accompanying text.

314. The assumption behind this effort has been that males are more competitive as athletes than women. That is a statistical conclusion, and is not accurate for all sports. *See generally* Lexa W. Lee, *How Do Men and Women Differ Athletically?*, LIVESTRONG.COM, (Sept. 11, 2017), http://www.livestrong.com/article/347443-athletic-differences-between-men-women/. Lee notes that in sports such as shooting and equestrian activities, women are competitive with men. These sports require "balance and mental concentration." *Id.*

315. The number of Barr bodies is one less than the number of X chromosomes. Thus, in theory an XX woman has one Barr Body, and an XY male has none. However, a female with only one X will also have no Barr bodies and an XXY male will have one. *See* Robert Ritchie et al., *Intersex and the Olympic Games*, 101 J. ROYAL SOC'Y MED. 395, 397 (2008).

316. Erin Buzuvis, *Hormone Check: Critique of Olympic Rules on Sex and Gender*, 31 WIS. J.L. GENDER & SOC'Y 29, 33 (2015).

317. *See* Ritchie et al., *supra* note 315.

318. Buzuvis, *supra* note 316, at 33 (noting that an intersex person with Androgen Insensitivity Syndrome has an XY genotype). Although people with Androgen Insensitivity Syndrome produce male hormones, they cannot use them. Further, the Barr Body test would identify women with Turner's syndrome (and an X genotype) as not female but not identify as male an XXY male with Klinefelter's syndrome. *Id.* at 34.

reassignment during childhood would be identified for purposes of competing as a member of the gender to which the person had transitioned.[319] Those who transitioned after childhood could compete in conformity with their gender identity if they had undergone "surgical anatomical changes . . . including external genitalia changes and gonadectomy and met several other tests."[320] Three years earlier, the IOC had adopted a rule that depended on hormone levels. IOC's report declares that "[n]othing in these Regulations is intended to make any determination of sex. Instead, these Regulations are designed to identify circumstances in which a particular athlete will not be eligible (by reason of hormonal characteristics) to participate in 2012 OG Competitions in the female category."[321] A rule that measures hormone levels excludes many intersex women and transwomen from sports competition as women.[322] And, again, despite the disclaimer in the rule, it supports the binary-gender presumption. In 2014, the Court of Arbitration for Sport suspended the rule, offering a partial victory to Dutee Chand, a female intersex runner,[323] who brought a case after having been excluded from competition by the International Association of Athletics Federations (IAFF)[324] because her

319. INT'L OLYMPIC COMM. MED. COMM'N, STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (2003), https://stillmed.olympic.org/Documents/Reports/EN/en_report_905.pdf.

320. These athletes were required to obtain legal recognition from "appropriate official authorities" concerning their gender identity and to have received hormonal therapy so as "to minimize gender-related advantages in sport competitions." *Id.* This protocol limits participation in international competitions for transgender people who lack the resources to have sex reassignment surgery or who live in places that make it difficult to obtain legal recognition of a gender change. LINDSAY PARKS PIEPER, SEX TESTING: GENDER POLICING IN WOMEN'S SPORTS 223 n.77 (2016). Although the Stockholm consensus appears to be gender neutral, it makes far less sense for a transman competing in international sports competitions than for a transwoman. Buzuvis, *supra* note 316, at 33. In 2015, IOC guidelines acknowledged transmen and provided that they were free to compete as men. *Id.* at 39.

321. INT'L OLYMPIC COMM., IOC REGULATIONS ON FEMALE HYPERANDROGENISM (2012), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf.

322. *See* Buzuvis, *supra* note 316, at 36. Female athletes may compete, despite hormones above the limits set, by showing that they have androgen insensitivity syndrome or for some other reason, are hyperandrogenic. *Id.* at 37-38.

323. Chand seems to have been diagnosed with hyperandrogenism which causes her to have more androgen than most females. *See* Ronald S. Katz & Robert W. Luckinbill, *Changing Sex/Gender Roles and Sport*, 28 STAN. L. & POL'Y REV. 215, 237-38 (2017).

324. The IAAF is an international sports governing body, www.iaaf.org.

testosterone levels were reportedly too high for her to compete as a female.[325]

In 2015, the IOC updated its policy about transwomen's participation in women's athletic events so as to allow a transwoman to compete in competitive sports as a woman by showing that she has identified as a female for at least four years and that her testosterone had not exceeded a set level for one year.[326] Reliance on such tests insists – though not expressly – on safeguarding a binary view of gender. It is also troublesome because the interpretation of such tests (even if one assumes that gender is binary) can result in inaccurate or uncertain assessments.[327]

2. School Sports

Within the U.S., there has been significant debate and disagreement about facilitating the participation of transgender girls in school athletic activities. Some states have enabled students to participate in competitive sports on the basis of their gender identities.[328] Others have not.[329] During the Obama administration, the Departments of Education and Justice directed schools receiving federal funds to allow students to take part in school sports in accordance with their gender identities. That participation was not made contingent on a medical diagnosis.[330] In February 2017, the guidance was revoked by the Department of Education and the Department

325. Chand had been precluded from participating in competition because her testosterone level was above the set level. Chand v. Int'l Ass'n of Athletics Fed'ns, CAS 2014/A/3759, Ruling of Hon. J. Bennett 2 (July 24, 2015); Buzuvis, *supra* note 316, at 39.

326. Buzuvis, *supra* note 316, at 38.

327. Katz & Luckinbill, *supra* note 323, at 232-34.

328. *See, e.g.*, CAL. EDUC. CODE § 221.5 (West 2002 & Supp. 2017). California's Education Code provides:

> (e) Participation in a particular physical education activity or sport, if required of pupils of one sex, shall be available to pupils of each sex.
>
> (f) A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.

Id. The Washington Interscholastic Activities Association (WIAA) allows for participation by students in athletics in conformity with gender identity. 2015-2016 WASH. INTERSCHOLASTIC ACTIVITIES ASS'N, HANDBOOK 31 (ed. 2015), http://www.wiaa.com/ConDocs/Con1544/Handbook%20201516.pdf. The handbook explains: "All students should have the opportunity to participate in WIAA activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records." *Id.* at 32.

329. *See* Morgan Shell, Comment, *Transgender Student-Athletes in Texas School Districts: Why Can't the UIL Give All Students Equal Playing Time?*, 48 TEX. TECH. L. REV. 1043, 1045 (2016).

330. U.S. Dep't of Just. & U.S. Dep't of Educ., *Dear Colleague Letter on Transgender Students*, ED.GOV, (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

of Justice under the Trump administration.[331] Students may still receive protection under state law, but not all states offer such protection.[332]

Among the states, California is the most inclusive of transgender students' wishing to participate in sports activities in conformity with their gender identity. That state's statutory law permits students to participate in sports on the basis of assumed gender[333] and does not predicate that participation on the student's having had surgery or hormone therapy.[334] In other states, transgender students may gain the right to participate in sports in conformity with their gender identity only if they have had sex-reassignment or other medical interventions.[335] In Idaho, for instance, a transgender girl can take part in girls' sports at school only after showing that she has had at least a year of hormone treatment.[336] In 2016, school superintendents and directors of school athletics in Texas voted to require student athletes to participate in sports in conformity with the gender on their birth certificates.[337]

Yet, student and professional athletes whose gender identity is ambiguous or does not conform with biological sex at birth have recently enjoyed increasing opportunities to compete on teams reflecting their gender identity.[338] Whether that trend will continue, at least in the U.S. under the present federal administration, is not certain. In any event, increased flexibility in understandings of gender during the first decade and a half of this century served transgender athletes who continued, after transition, to identify as male or female. The new flexibility served athletes who chose be to identified as members of more than one gender or of no

331. Plus Media Solutions, *Oregon: Transgender Student Ruling Doesn't Affect Oregon Schools*, U.S. OFFICIAL NEWS, Feb. 28, 2017 (LEXIS).

332. *Id.* (noting that Oregon Law, ORS 659.850 and ORS 174.100, prohibits state schools from discriminating against students on the basis of gender identity and reporting that students receive similar protection in fifteen states).

333. *See* CAL. EDUC. CODE § 221.5 (West 2002 & Supp. 2017).

334. Shell, *supra* note 329, at 1064; Ellen Huet, *New State Law Opens Doors for Transgender Students*, SFGATE.COM (Aug. 12, 2013), http://www.sfgate.com/news/article/New-state-law-opens-doors-for-transgender-students-4726696.php.

335. *See* Shell, *supra* note 329, at 1066.

336. *Id.*

337. Schuyler Dixon, *Texas Officials Grapple with Issues in Transgender Case: Injunction Denied*, NATIONAL POST, Feb. 24, 2017, at B7 (LEXIS). In 2017, the state legislature considered a bill (passed in the Senate but left in committee in the state House) that ostensibly focuses on steroid use but that, in fact, discriminates against transgender students wanting to join sports teams. Madison Park, *Protest and Turmoil Rock Last Day of Texas Legislative Session*, CNN.COM, May 30, 2017 (LEXIS). *See generally* Shell, *supra* note 329, at 1064.

338. *See generally* Shell, *supra* note 329, at 1064.

gender less often.[339] Again, this difference reflects the strength of the binary-gender presumption.

CONCLUSION

Society has long assumed – and more recently, law and medicine have helped safeguard – a binary-gender perspective. This perspective, understood as reflecting biological "truth," has not accounted for or accommodated intersex and transgender populations. Both groups have faced significant discrimination, including even efforts to mask and deny their existence. Yet, views of intersex people and discrimination against them have differed from views of transgender people and discrimination against them. In large part, those differences can be explained by distinctions in the challenges each group presents to the binary-gender perspective.

The consequences of discrimination for intersex and transgender people are often overwhelming. They have included lack of access to needed medical care; provision of unwanted medical care; legal prohibitions on marrying the person of one's choice;[340] inability to obtain identity documents in conformity with gender identity; and exclusion from bathrooms, locker rooms and sports teams conforming with gender identity, as well as ostracism, humiliation, and prejudice at school and at work.[341] The Article has framed the role that medicine and law have played, often in concert, in preserving – sometimes even while attempting to ameliorate— such discriminatory treatment. In significant part, that can be attributed to the strength of the binary-gender presumption.

During the present century, society, law and medicine have seemed increasingly ready to accept gender fluidity, but only to a limited extent. For people whose gender fluidity involves a transition from one gender to another, the law in the U.S., reflecting the perspective of a good part, but not all, of the society, has offered some recognition and assistance to

339. *See generally* Katz, & Luckinbill, *supra* note 323, at 243.

340. Although some courts had begun to validate marriages between transgender people and members of the other gender before 2015, *see supra* notes 217-25 and accompanying text, the Supreme Court's 2015 decision in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015), found a constitutional right for people of the same gender to marry. As a result, the presumed gender or sex at birth of a transgender marriage partner (or partners) no longer bars their entering into valid marriages.

341. People whose genders do not conform with a binary-approach to gender have faced significant discrimination in employment contexts as well. That is, however, beyond the scope of this Article.

transgender people.[342] Whether that trend will continue in the years ahead, however, is uncertain. During the first months of the Trump administration, the Departments of Education and Justice rescinded interpretive guidelines issued during the Obama administration that had included gender identity as an aspect of the definition of the term "sex," as used in Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.[343] And in July 2017, President Trump announced on Twitter that the military would no longer allow transgender people to serve in the nation's armed forces. [344]

The U.S. has reached a pivotal moment, one testing its willingness to sustain and expand upon protections afforded to intersex and transgender people. The issues carry significant implications for those most directly affected, for those who are part of or who support the larger LGBT community, and for society more broadly.

342. *See supra* notes 115-23 and accompanying text; *see also supra* subsections IV.B.1 & 2.

343. *See supra* note 331 and accompanying text.

344. Davis & Cooper, *supra* note 1. President Trump's announcement, originally delivered through Twitter, was formalized in August with a Memorandum. Stone v. Trump, No. MJG-17-2459, 2017 WL 5589122, at *4 (D.C. Md. Nov. 21, 2017) (citing President's Mem. § 1(a), Pls.' Mot. Ex. 18, ECF No. 40–21). Since that time, several suits have contested the new policy. *See, e.g.*, *Stone*, 2017 WL 5589122, at *18 (halting ban on transgender people in military); Doe 1 v. Trump, No. 17-1597 (CKK), 2017 WL 4873042, at *33 (D.D.C. Oct. 30, 2017) (halting ban on transgender people in military); Complaint for Declaratory and Injunctive Relief, Karnoski v. Trump, No. 2:17–cv–01297–MJP, (W.D. Wash. Aug. 28, 2017); Complaint for Declaratory and Injunctive Relief, Stockman v. Trump, No. 2:17–cv–06516, (C.D. Cal. Sept. 5, 2017).