

ARTICLES

SEX ASSIGNED AT BIRTH

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Transgender rights discussions often turn on the distinction between “gender identity” and “sex assigned at birth.” Gender identity is a person’s own internal sense of whether they are a man, a woman, or nonbinary. “Sex assigned at birth” means the male or female designation that doctors ascribe to infants based on genitalia and is marked on their birth records. Sex assigned at birth is intended to displace the concept of “biological sex.”

This Article provides an account of the origins of the terms “biological sex” and “sex assigned at birth” and assesses the potential of the shift to sex assigned at birth for transgender rights arguments. The debate is not one over mere nomenclature. This Article’s examination reveals that the term “biological sex” rose to prominence to lend a veneer of scientific support to projects denying the validity of transgender identities and that the unquestioned use of that concept continues to underwrite exclusion. By referring instead to sex assigned at birth, transgender rights advocates convey that “biological sex” is not simple, static, or binary and that gender identity also has biological aspects. Furthermore, the phrase “assigned at birth” invokes philosophical arguments against assigning particular social roles to individuals at birth. It taps into the moral intuition that a person’s genitalia and health data are private matters.

This Article argues that sex assigned at birth is an important concept that clarifies the stakes of disputes over transgender rights. But it cautions that this conceptual shift is not sufficient to secure victories in transgender rights litigation. Ultimately, definitional debates about sex and gender cannot resolve the moral and practical questions at the heart

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of contemporary controversies over transgender rights. Recent legal victories on transgender rights issues have done more than debate the meanings of sex and gender: They have addressed practical objections to transgender inclusion, cultivated empathy for plaintiffs, and staked claims in the registers of equality, autonomy, and dignity.

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INTRODUCTION

In the last few years, the concept of “sex assigned at birth” has appeared with increasing frequency in U.S. case law on discrimination against transgender people.¹ The phrase had been used, at least since the

1. See, e.g., *Williams v. Kincaid*, No. 21-2030, 2022 WL 3364824, at *1 (4th Cir. Aug. 16, 2022) (“Williams is a transgender woman whose gender identity (female) differs from the gender (male) she was assigned at birth.”); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1305 (11th Cir. 2021) (“The sex assigned to Mr. Adams at the time of birth was female, but his consistent, internal sense of gender is male.”), vacating and superseding 968 F.3d 1286 (11th Cir. 2020), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) (“By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”); *A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *1 (S.D. Ind. July 26, 2022) (“Plaintiff A.M. is a ten-year-old transgender girl whose birth-assigned sex was male.”), appeal docketed, No. 22-2232 (7th Cir. July 27, 2022); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 351 (S.D. W. Va. 2021) (explaining that “B.P.J.

1960s, to describe an obstetrician’s “casual pronouncement of the newborn as a male or female,” “based upon inspection of the external genitalia.”² This pronouncement, then and now, results in a male or female designation on a child’s birth certificate that is sometimes considered the person’s legal sex, unless changed through formal processes.³ Over the past two decades, the concept of sex assigned at birth has been taken up by transgender rights advocates to replace the troublesome term “biological sex.”⁴ Assigned sex is opposed to gender identity—an individual’s own internal sense of whether they are a man, a woman, or nonbinary.⁵ It is the basis for the legal definition of “transgender”: having a gender identity that does not match the one expected for an individual’s sex assigned at birth.⁶ It appeared in 2016

is a transgender girl who, while assigned the sex of male at birth, knew from a young age that she is a girl”); *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1313 (M.D. Ala. 2021), appeal docketed, No. 21-10486 (11th Cir. Feb. 21, 2021) (“For individuals born in Alabama or previously licensed here whose gender identity differs from the sex they were assigned at birth, the policy requires surgery, which results in permanent infertility in ‘almost all cases,’ to be able to obtain a license with a sex designation that matches their gender.”); *Hecox v. Little*, 479 F. Supp. 3d 930, 957 n.11 (D. Idaho 2020) (stating that it was permissible to refer to the plaintiff as “a person whose sex assigned at birth (male) differs from her gender identity (female)”), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 836 (S.D. Ind. 2019) (“J.A.W. was assigned the gender of female at birth.”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 272 (W.D. Pa. 2017) (using the term “assigned sexes” and explaining that transgender plaintiffs “had ‘male’ listed on their birth certificates when they were born”).

2. See, e.g., Edgar Burns, Albert Segaloff & G.M. Carerra, Reassignment of Sex: Report of 3 Cases, 84 *J. Urology* 126, 126 (1960) (using the phrase “[a]ssignment of sex at birth”).

3. See, e.g., *Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1034 (D. Minn. 2012) (holding that the sex on a Minnesota birth certificate is an individual’s “legal sex” for all purposes). Although some legal authorities refer to the birth certificate as establishing “legal sex,” see, e.g., *id.*, administrative practices of sex classification are varied, complex, and contradictory, and birth certificate designations do not control in every legal context. See, e.g., Paisley Currah, *Sex Is as Sex Does: Governing Transgender Identity 7–10* (2022) [hereinafter Currah, *Sex Is as Sex Does*]; Dean Spade, *Documenting Gender*, 59 *Hastings L.J.* 731, 734 (2008) [hereinafter Spade, *Documenting Gender*].

4. See *infra* section I.C.

5. GLAAD, *Glossary of Terms: Transgender*, GLAAD Media Reference Guide (11th ed.), <https://www.glaad.org/reference/trans-terms> [https://perma.cc/99U2-TMLC] (last visited Aug. 13, 2022) (explaining that “infants are assigned a sex at birth, ‘male’ or ‘female,’ based on the appearance of their external anatomy” and defining “gender identity” as “[a] person’s internal, deeply held knowledge of their own gender,” which may or may not “align with the sex they were assigned at birth”).

6. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1756 n.6 (2020) (Alito, J., dissenting) (“The Court does not define what it means by ‘transgender status,’ but the American Psychological Association describes ‘transgender’ as ‘[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth.’” (quoting *A Glossary: Defining Transgender Terms*, 49 *Monitor on Psych.* 32, 32 (2018))); GLAAD, *supra* note 5.

regulations interpreting the Affordable Care Act⁷ and in a proposed 2021 federal law that would bar discrimination on the basis of LGBTQ status in employment, health care, and housing.⁸

But courts have been reluctant to embrace the concept. In the Supreme Court's landmark *Bostock v. Clayton County* decision, which held that Title VII of the Civil Rights Act forbids discrimination against transgender people, the Court declined to use the term sex assigned at birth.⁹ Instead, it proceeded on the assumption that "sex" refers "only to biological distinctions between male and female."¹⁰ In this respect, *Bostock* is representative. Many federal court decisions fail to critically consider the differences between sex assigned at birth and "biological sex" or even conflate the two concepts.¹¹

7. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,467 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (defining "gender identity" as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth"). In 2020, the Trump Administration repealed these regulations. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,161–62 (June 19, 2020). In 2022, the Biden Administration proposed regulations that would revert to the Obama-era policy. Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824, 47,828 (Aug. 4, 2022). The proposed regulations also refer to "sex assigned at birth." *Id.* at 47,918.

8. Equality Act, H.R. 5, 117th Cong. § 1101(a)(2) (2021) ("The term 'gender identity' means the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth.").

9. *Bostock*, 140 S. Ct. at 1731. The employees' briefs in *Bostock* used the term "sex assigned at birth," but at oral argument, David Cole, the advocate for Aimee Stephens, a transgender woman, conceded that assigned sex and biological sex were one in the same. Ezra Ishmael Young, What the Supreme Court Could Have Heard in *R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 Calif. L. Rev. Online 9, 11 (2020) (criticizing Cole's decision). At one point, Cole resisted Chief Justice John Roberts's references to "biological sex," arguing that the issue was discrimination based on "what we think is more accurately referred to as sex assigned at birth," but he did not press the point. Transcript of Oral Argument at 7, Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 139 S. Ct. 1599 (2019) (No. 18-107), 2019 WL 9096155.

10. *Bostock*, 140 S. Ct. at 1739 ("[B]ecause nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female."). *Bostock* assumed that these biological distinctions were synonymous with sex "identified," not assigned, "at birth." *Id.* at 1741. There is a meaningful difference between identification, a term that implies an objective process of classification, and assignment, a term that connotes the imposition of expectations. See *infra* section II.B.

11. See, e.g., *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1304 (11th Cir. 2021) ("Mr. Adams is transgender, meaning when he was born, doctors *assessed* his sex and wrote 'female' on his birth certificate . . ." (emphasis added)), vacating and superseding 968 F.3d 1286 (11th Cir. 2020), vacated and reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020) ("This case concerns whether an Oregon public school district may allow transgender students to use school bathrooms, locker rooms, and showers that match their gender identity rather than the *biological* sex they were assigned at birth." (emphasis added)); *Doe ex*

This confusion is dangerous. In the wake of *Bostock*, there has been an unprecedented onslaught of federal and state legislation aimed at curtailing transgender rights,¹² almost all of it directly invoking the idea of “biological sex.”¹³ Federal courts will soon be asked to consider the definition of sex as they resolve challenges to new laws in eighteen states barring transgender women and girls from sports,¹⁴ two laws banning certain forms of gender-affirming health care for transgender youth,¹⁵ three laws

rel. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018) (“‘Sex’ is defined as the ‘anatomical and physiological processes that lead to or denote male or female.’ Typically, sex is *determined* at birth based on the appearance of external genitalia.” (emphasis added)); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (“The crux of this case is whether transgender students are entitled to access restrooms for their identified gender rather than their *biological* gender at birth.” (emphasis added)); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 273 n.3 (W.D. Pa. 2017) (“[T]he Court will use the term ‘assigned sex’ to refer to the physical characteristics of the external sex organs of a person being referenced.”).

12. See, e.g., Tommy Beer, Latest GOP Trans Ban Fails: Sen. Tuberville’s Effort Is Latest Related to Sports Participation, *Forbes* (Mar. 6, 2021), <https://www.forbes.com/sites/tommybeer/2021/03/06/latest-gop-trans-ban-fails-sen-tubervilles-effort-is-latest-related-to-sports-participation/?sh=5d76491e67ac> (on file with the *Columbia Law Review*) (describing a proposed amendment to federal COVID-19 relief legislation in 2021 that would have barred transgender women and girls from women’s and girls’ athletics but was voted down in the Senate 49-50); Matt Laviertes & Elliott Ramos, Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People, *NBC News* (Mar. 20, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418> [<https://perma.cc/8KBX-3V9K>] (discussing the rise in state anti-LGBTQ bills in response to *Bostock*, including 238 in the first three months of 2022 alone).

13. See *infra* notes 144, 147–149 (quoting recent state laws invoking “biological sex” to restrict transgender rights).

14. See *infra* note 144 (collecting state laws restricting transgender students from participating in sports). Thus far, federal courts have reached decisions in three cases challenging these laws. *A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *14 (S.D. Ind. July 26, 2022) (granting a preliminary injunction against enforcement of an Indiana law that would prohibit a ten-year-old transgender girl from playing softball on the school’s girls’ team), appeal docketed, No. 22-2332 (7th Cir. July 27, 2022); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 358 (S.D. W. Va. 2021) (granting a preliminary injunction against enforcement of a West Virginia law that would prohibit an eleven-year-old transgender girl from participating in girls’ track and field); *Hecox v. Little*, 479 F. Supp. 3d 930, 989 (D. Idaho 2020) (granting a preliminary injunction against the enforcement of an Idaho law that would have barred a transgender woman from competing in women’s track and field at Boise State University), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020).

15. See *infra* note 147 (discussing laws passed by Alabama and Arkansas). Both of these laws have been preliminarily enjoined. *Eknes-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 2022 WL 1521889, at *1 (M.D. Ala. May 13, 2022), appeal docketed, No. 22-11707 (11th Cir. May 18, 2022); *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 894 (E.D. Ark. 2021), *aff’d*, No. 21-2875, 2022 WL 3652745 (8th Cir. Aug. 25, 2022). In February 2022, government officials in Texas invoked biological sex in support of an executive directive to investigate parents of children undergoing certain forms of gender-affirming health care for child abuse. *Tex. Att’y Gen., Opinion Letter on Whether Certain Medical Procedures Performed on Children Constitute Child Abuse 2–3* (2022), <https://texasattorneygeneral.gov/sites/default/files/global/KP->

limiting restroom access,¹⁶ and three laws restricting a person's ability to change the sex designation on their identification documents.¹⁷ Although a "growing consensus" of courts agree that it is impermissible discrimination for schools to refuse to allow transgender students to use restrooms consistent with their gender identities,¹⁸ the Eleventh Circuit is currently reconsidering the issue en banc.¹⁹ *Bostock* declined to spell out its implications for restrooms, sports, identity documents, or other such controversies, and so transgender rights may end up back in the Supreme Court again soon.²⁰

0401.pdf [https://perma.cc/BBM2-GY9P] ("[I]t is important to note that it remains medically impossible to truly change the sex of an individual because this is determined biologically at conception."). In May 2022, the Texas Supreme Court held that those executive officials did not have statutory authority to *require* the relevant state agency to conduct child abuse investigations. In re Abbott, 645 S.W.3d 276, 281 (Tex. 2022). At the time of this writing, litigation over the investigations is ongoing. See PFLAG National, Lambda Legal, and ACLU File New Lawsuit to Stop Texas From Persecuting Parents With Transgender Kids, Lambda Legal (June 8, 2022), https://www.lambdalegal.org/blog/abbott_tx_20220608_pflag-ll-and-aclu-file-new-lawsuit-to-stop-tx-from-persecuting-parents-with-transgender-kids [https://perma.cc/K27V-RSPC].

16. See *infra* note 148 (discussing laws passed by Alabama, Oklahoma, and Tennessee); cf. *Bongo Prods., LLC v. Lawrence*, No. 3:21-CV-00490, 2022 WL 1557664, at *1 (M.D. Tenn. May 17, 2022) (granting summary judgment in favor of plaintiffs on their First Amendment challenge to a Tennessee law requiring that entities with transinclusive restroom policies post warning signs).

17. See *infra* note 149 (discussing laws passed by Idaho, Montana, and Oklahoma). A number of recent court decisions have found problems with such laws and policies. See, e.g., *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1323 (M.D. Ala. 2021), appeal docketed, No. 21-10486 (11th Cir. Feb. 21, 2021) (holding that an Alabama rule that requires genital surgery before an individual can change the sex designation on their driver's license violated the Equal Protection Clause); *FV. v. Jeppesen*, 477 F. Supp. 3d 1144, 1150 (D. Idaho 2020) (prohibiting Idaho from categorically refusing to change birth certificate sex designations for transgender individuals); *Marquez v. Montana*, No. DV 21-873, para. 183 (Mont. 13th Jud. Dist. Ct. Apr. 21, 2022) (granting motion for preliminary injunction against enforcement of the Montana statute, because the plaintiffs made out a prima facie case that the statute violated their rights to due process because it was impermissibly vague with respect to which surgeries might be required).

18. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021) (mem.). Justices Clarence Thomas and Samuel Alito would have granted the petition for certiorari. *Gloucester Cnty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878, 2878 (2021) (mem.).

19. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 9 F.4th 1369, 1372 (11th Cir. 2021) (mem.) (vacating and granting en banc review of a panel decision holding that exclusion of a transgender boy from the boys' restroom violated the Equal Protection Clause), vacating and granting reh'g en banc 3 F.4th 1299 (11th Cir. 2021).

20. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020) ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind . . . Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."); see also *Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, at *3 (E.D. Tenn. July 15, 2022) (granting motion for preliminary injunction barring federal agencies from enforcing interpretations of Title IX that would bar discrimination on the basis of LGBTQ

This Article attempts to uncover the history of the concept of sex assigned at birth, as well as that of its main competitor, “biological sex,” and to set forth the case in favor of the shift toward sex assigned at birth as an idea that can advance legal protection for transgender, nonbinary,²¹ and gender-nonconforming people.²²

One contribution of this Article is to excavate the histories of the concepts of “biological sex” and “sex assigned at birth.”²³ In recent years, many courts and legislatures have taken for granted that there is some simple attribute called “biological sex” that is easily separable from gender identity.²⁴ In litigation over access to sex-segregated restrooms and sports, opponents of transgender rights lean heavily on “biology” as a simple and scientific basis for excluding transgender individuals from the categories of “male” and “female.”²⁵ But the idea of “biological sex” as distinct from gender identity is not a time-honored scientific or legal category; it is a

status and interpretations of Title VII that would apply *Bostock* in the contexts of “dress codes, bathrooms, locker rooms, showers, and use of preferred pronouns or names”).

21. This Article uses the term “nonbinary” to refer to a person who does not exclusively identify as a man or a woman. See, e.g., Jessica A. Clarke, *They, Them, and Theirs*, 132 *Harv. L. Rev.* 894, 905–14 (2019) [hereinafter Clarke, *They, Them, and Theirs*] (discussing the diversity of nonbinary gender identities and reasons for bias and discrimination against them).

22. This Article uses the term “gender nonconforming” to refer to those who do not reject the *gender identity* associated with the sex assigned to them at birth but who deviate from the roles, behaviors, and appearances expected of their sex. Cf. Mary Anne Case, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 *Stan. L. Rev.* 1333, 1335–36 (2014) (discussing “gender benders” such as men who do not claim to be transgender but “nevertheless engage[] in behavior seen as stereotypically feminine”).

23. See *infra* Part I. Other scholars have delved into the meaning of the term “sex” as it is used in the Civil Rights Act of 1964. See, e.g., William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 *Mich. L. Rev.* 1503, 1549 (2021) (explaining that “[s]ex was a broad, catchall term in 1964, used in circumstances where we would use terms such as *gender*, *sexuality*, and *sexual orientation*”). But they have not inquired into the origins of “biological sex,” a concept now being deployed by state legislators seeking to restrict transgender rights, or its progressive alternative, “sex assigned at birth.”

24. See *infra* notes 144, 147–149 (collecting statutes).

25. See, e.g., *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1322 (11th Cir. 2021) (Pryor, C.J., dissenting) (asserting that a school did not violate the Equal Protection Clause by excluding a transgender boy from the boys’ restroom based on its definition of “sex” in its ordinary, traditional sense” as synonymous with “biological sex”), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); *Intervenors-Appellants Madison Kenyon and Mary Marshall’s Opening Brief at 4, Hecox v. Little*, Nos. 20-35813, 20-35815 (9th Cir. filed Nov. 12, 2020) (“Recently . . . women and girls have become bystanders in their own sports as biologically male athletes who identify as female demand to be able to compete against women and girls.”); *id.* at 1–64 (using the terms “biological male” or “biologically male” sixty-eight times in a sixty-four page brief). The *Hecox* litigation pertains to the constitutionality of Idaho’s Fairness in Women’s Sports Act, which defines sex as “biological” and requires that it be verified based on “the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.” Idaho Code § 33-6203 (2021).

contested concept from mid-twentieth-century medicine. In the 1970s, “biological sex” found its way into legal doctrine as a result of an outdated understanding of transgender identity as a mental illness caused by early childhood experiences, along with policy concerns about the need to distinguish the sexes for purposes such as avoiding same-sex marriage.²⁶ Lawmakers today are unable to agree on any definition of “biological sex” based in anatomy, genetics, hormones, or other such properties, so they often enact laws that define sex as the male or female designation on an individual’s original birth certificate.²⁷ Rather than vindicating any biological standard, these laws endeavor to exclude transgender people. Assigned sex terminology also emerged at midcentury in medical research related to people with intersex variations. “Intersex” is “an umbrella term for differences in sex traits or reproductive anatomy,” such as “differences in genitalia, hormones, internal anatomy, or chromosomes, compared to the usual two ways that human bodies develop.”²⁸ Transgender theorists borrowed this terminology in the 1990s to describe the process of assigning sexes to all infants, and it began to appear in legal contexts in the early 2000s.²⁹ It now competes with the term “biological sex” in legal disputes over transgender rights.³⁰

Another contribution of this Article is to present the full theoretical case in favor of “sex assigned at birth” as an alternative to “biological sex.”³¹ “Sex assigned at birth” is not a euphemism for “biological sex” but a critique of the very concept. It acknowledges that “sex” can be defined in many ways. To speak of assigned sex is to point out that while administrative “M” and “F” classifications might be simple, the biology of sex is not. “Biological sex” is not binary, stable, or uniform.³² And it is inconsistent with medical research to assert that gender identity has no biological underpinnings.³³ The claim that sex is assigned at birth, rather

26. See *infra* section I.B.

27. See *infra* notes 144–150 and accompanying text (collecting statutes invoking “biological sex” without any consistent definition of that term).

28. What Is Intersex?, InterACT, <https://interactadvocates.org/faq/#definition> [<https://perma.cc/NAK2-93G9>] (last updated Jan. 26, 2021).

29. See *infra* sections I.B–C.

30. See *infra* section I.C.

31. I do not argue that “sex assigned at birth” should be the definition of “sex” whenever that term appears in the law; as I have argued elsewhere, to the extent that legal sex classifications are justified at all, sex determinations should reflect each law’s particular purposes, as well as the values of autonomy, dignity, and equality. Clarke, *They, Them, and Theirs*, *supra* note 21, at 933–36. Rather, sex assigned at birth is useful as an explanatory concept that challenges the idea that every person has one true sex. See *infra* Part II.

32. See, e.g., Claire Ainsworth, *Sex Redefined*, 518 *Nature* 288, 288 (2015) (“[N]ew technologies in DNA sequencing and cell biology are revealing that almost everyone is, to varying degrees, a patchwork of genetically distinct cells, some with a sex that might not match that of the rest of their body.”); see also *infra* notes 170–179 and accompanying text.

33. See, e.g., Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 *J. Clinical Endocrinology & Metabolism* 3869, 3874 (2017) (“Results of studies from a variety

than being a self-evident biological property that naturally corresponds with certain gender identities and roles, goes beyond the feminist argument against biology as destiny.³⁴ Administrative *assignments* of identities and social roles threaten liberal principles of autonomy that insist that every person should be, at least in part, the author of their own life story,³⁵ as well as postmodern sensibilities about the role of creativity and play in constructing the self.³⁶ The idea of assignments *at birth* evokes the egalitarian's umbrage at lotteries of birth in which roles and opportunities are distributed in infancy.³⁷ That these assignments subject individuals to intersecting social hierarchies—such as those that elevate men over women, gender conformers over nonconformers, and cisgender over transgender people—offends theories of the purpose of antidiscrimination law as undermining systemic patterns of subordination.³⁸ Moreover, by pointing out that sex is assigned at birth, advocates draw attention to the fact that institutions that exclude transgender people are doing so based on what

of biomedical disciplines—genetic, endocrine, and neuroanatomic—support the concept that gender identity and/or gender expression likely reflect a complex interplay of biological, environmental, and cultural factors.”); Joshua D. Safer & Vin Tangpricha, Care of Transgender Persons, 381 *New Eng. J. Med.* 2451, 2451 (2019) (collecting sources in support of the claim that “[a]lthough the mechanisms that inform gender identity are unknown, current data suggest a biologic underpinning programmed from birth”); cf. Aditi Bhargava et al., Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement, 42 *Endocrine Revs.* 219, 227 (2021) (concluding “there is ample but incomplete evidence for biological substrates—neuroanatomic, genetic, and hormonal—for gender orientation, making this an important area of ongoing research”). For a plain-language explanation, see Denise Grady, Anatomy Does Not Determine Gender, Experts Say, *N.Y. Times* (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/health/transgender-trump-biology.html> (on file with the *Columbia Law Review*).

34. See *infra* section III.A (discussing the feminist argument that while biology may not be changeable, social norms with respect to the roles of men and women can be contested politically).

35. Cf. Joseph Raz, *The Morality of Freedom* 370 (1986) (“The autonomous person is part author of his life.”).

36. Cf. Julie E. Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* 133–35 (2012) (discussing a dynamic view of the self that is in some ways culturally determined but also evolves through “[p]lay with texts, artifacts, personae, and social conventions”).

37. Cf. John Rawls, *A Theory of Justice* 74–75 (1971) (criticizing a conception of equality that allows the distribution of resources to be “decided by the outcome of the natural lottery”); Elizabeth S. Anderson, What Is the Point of Equality?, 109 *Ethics* 287, 289–90 (1999) [hereinafter Anderson, *Point of Equality*] (discussing theories of “luck egalitarianism” that appeal because of “the force of the obviously correct claim that no one deserves their genetic endowments or other accidents of birth, such as who their parents are or where they were born”).

38. See, e.g., Anderson, *Point of Equality*, *supra* note 37, at 312 (explaining how egalitarian political movements oppose hierarchical social relationships that “generate, and were thought to justify, inequalities in the distribution of freedoms, resources, and welfare”); cf. Tarunabh Khaitan, *A Theory of Discrimination Law* 91 (2015) (explaining that the purpose of “discrimination law is to secure an aspect of the well-being of persons by reducing the abiding, pervasive, and substantial relative disadvantage faced by members of protected groups”).

is essentially a medical record of a doctor's examination of a person's genitalia in infancy. Yet genitalia and medical records are quintessentially private.

Thus, the idea that sex is assigned at birth has the potential to disrupt legal invocations of "biological sex" as a simple, natural, neutral, and normatively unproblematic basis for classifying individuals. In practice, however, sex assigned at birth has not lived up to its theoretical potential. Another contribution of this Article is to explain why.³⁹ Of course, some oppose the concept due to ideological opposition to transgender rights in general. But the idea has encountered resistance even from those without fixed positions in this particular culture war. One reason is that the idea of "biological sex" as a self-evident essence is an entrenched form of common sense that is difficult to dislodge, even though it has been undermined by advances in science and medicine. The concept is reinforced by the insistence of many feminists that there is an important difference between biological sex and social gender.⁴⁰ Another reason for the persistence of biological sex is dissatisfaction with gender identity as an alternative basis for sex or gender classification. Judges and other decisionmakers are often concerned that gender identity is too subjective and easily manipulated to serve as the basis for sorting individuals into male and female categories.

A final contribution of this Article is to discuss ways to overcome these barriers.⁴¹ Sex assigned at birth clarifies what is at stake in disputes over restrooms, sports, and identity documents—these are not debates over biology; rather, they are controversies over how to prioritize conflicting values and whether, as an empirical matter, more inclusive policies will have deleterious effects. While sex assigned at birth can clarify what the stakes are, it cannot, on its own, resolve the moral and practical questions at the heart of contemporary transgender rights controversies. This Article cautions against an approach taken by many courts, which is to attempt to evade moral and practical questions by insisting that an individual's true sex is their gender identity as a man or a woman, if medical experts verify that they live all aspects of their lives consistently with that gender identity. The result of such an approach may be to limit legal protection to only that subset of the transgender community that can prove the bona fides of their gender identities to medical experts and to base the case for protection on a scientific foundation that may not be able to bear its weight. Moreover, this approach is not necessary. A review of recent litigation demonstrates that advocates have won transgender rights cases not just with appeals to scientific authorities on the validity of transgender people's gender identities but also with arguments that tap into values like equality, autonomy, and dignity, with stories that cultivate empathy, and with evidence debunking practical objections to transgender inclusion.

39. See *infra* Part III.

40. See *infra* section III.A.

41. See *infra* Part IV.

While theorists and advocates have been deploying the concept of sex assigned at birth for the past two decades,⁴² no work of legal scholarship has explored the idea's potential for transgender rights arguments, or unearthed the origins of that term and its main competitor, "biological sex."⁴³ Transgender people continue to face uniquely high rates of discrimination, harassment, and violence with devastating consequences.⁴⁴ Moreover, rules requiring that people conform with expectations for their assigned sex impact individuals who do not necessarily identify as transgender but are gender nonconforming or nonbinary.⁴⁵ In addition to its contributions to the study of transgender rights litigation, this Article's account is of relevance to feminist scholarship on biological concepts of sex and gender.⁴⁶

Part I of this Article uncovers the origins of the debate between "biological sex" and "sex assigned at birth" in transgender rights advocacy and public policy. Part II sets out the theoretical argument for the shift to

42. See, e.g., Susan Stryker, *Transgender History: The Roots of Today's Revolution* 19 (2d ed. 2017) [hereinafter Stryker, *Transgender History* (2d ed.)] (employing the term "birth-assigned gender"); Paisley Currah, *Transgender Rights Without a Theory of Gender?*, 52 *Tulsa L. Rev.* 441, 450 n.36 (2017) [hereinafter Currah, *Transgender Rights Without a Theory of Gender?*] (discussing the author's work to pass a 2002 New York City Human Rights Law amendment using the term "legal sex assigned to that person at birth").

43. Much recent legal scholarship has focused on what it means to ban *discrimination* "because of sex" for purposes of the Civil Rights Act of 1964, the issue in *Bostock*. See, e.g., Eskridge, *supra* note 23. The discrimination question is distinct from the less-explored issue of how the law defines who counts as male or female in those contexts in which distinctions might still be permitted. This Article builds on the important insights of Professor Paisley Currah and Professor Dean Spade on this issue. See Currah, *Sex Is as Sex Does*, *supra* note 3, at 7–10 (arguing that how the state defines who is recognized as male or female often depends on the work that a particular arm of the state is doing); Spade, *Documenting Gender*, *supra* note 3, at 733 (detailing the "rarely discussed" matrix of rules governing gender reclassification in the United States).

44. Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey* 2, 5 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [<https://perma.cc/2MKH-MN2C>] (surveying 27,715 transgender people and finding they reported "high levels of mistreatment, harassment, and violence in every aspect of life"). The Williams Institute estimates that the number of adults in the United States who identify as transgender is 1.3 million, or 0.5% of the population. Jody L. Herman, Andrew R. Flores & Kathryn K. O'Neill, *Williams Inst., How Many Adults and Youth Identify as Transgender in the United States?* 4 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf> [<https://perma.cc/KE9F-RBSF>].

45. See *supra* notes 21–22 (defining these terms).

46. See, e.g., Katrina Karkazis, *The Misuses of "Biological Sex"*, 394 *Lancet* 1898, 1898 (2019) [hereinafter Karkazis, *Misuses of "Biological Sex"*] (discussing the "long history of using—and misusing—discrete biological criteria to determine sex and thereby include or exclude certain people from categories"); Heather Shattuck-Heidorn & Sarah S. Richardson, *Neurogenderings: Sex/Gender and the Biosocial Turn*, *Scholar & Feminist Online* (2019), <https://sfoonline.barnard.edu/sex-gender-and-the-biosocial-turn/> [<https://perma.cc/3Q8H-84ZC>] (discussing feminist criticisms of the concept of "sex as a biological variable").

sex assigned at birth and explains why that concept is superior to alternatives. It demonstrates that sex assigned at birth does useful work in litigation by disrupting the assumption that sex classifications reflect mere biology and pointing to how those classifications can threaten autonomy, equality, privacy, and dignity. Part III explains why courts have been reluctant to abandon biological sex in favor of sex assigned at birth. Part IV offers an analysis of recent transgender rights litigation that concludes that, to overcome this reluctance, the claim that sex is assigned at birth must be accompanied by arguments that speak to values, practicalities, and empathy in particular cases.

I. ORIGINS OF BIOLOGICAL SEX AND SEX ASSIGNED AT BIRTH

This Part excavates the origins of two competing concepts: “biological sex” and “sex assigned at birth.” For much of the twentieth century, many people subscribed to a simple model of the biology of sex that posited that every person has a male or female sex dictated by their genetics at birth; that those genes determine the hormones produced by an individual’s body; and that those hormones cause men’s and women’s physical and behavioral differences.⁴⁷ Deviations from this model were seen as disorders of the physical or mental varieties.⁴⁸ The term “biological sex” began appearing in U.S. legal authorities in the 1970s, reflecting the theories of midcentury psychologists who regarded transgender identity as a mental illness caused by early childhood influences, as well as the concerns of jurists about the need for a legal definition of sex that would preclude, for example, same-sex marriage.⁴⁹ The term “sex assigned at birth” arose in the 1950s in the context of medical treatment of infants with intersex variations.⁵⁰ In the 1990s, transgender rights advocates and activists reap-

47. See, e.g., Sarah Richardson, *Sex Itself: The Search for Male and Female in the Human Genome* 225 (2013) [hereinafter Richardson, *Sex Itself*] (explaining that the scientific view of sex that prevailed for much of the twentieth century understood “genes [as] responsible for throwing the initial switch to determine sex, hormones for all the complexities and riches of sex difference”); Alex Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* 39 (2002) (describing twentieth-century judicial approaches that “have consistently articulated a *sex is determined at birth* narrative whereby sex precedes, and therefore provides, an apparent foundation for gender” although “the precise configuration of legally relevant factors to be considered at birth will be seen to vary”).

48. See, e.g., Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII’s Sex Discrimination Provision Wrong*, 98 *Tex. L. Rev. Online* 83, 88 (2019) [hereinafter Clarke, *First Forty Years*] (discussing how doctors’ characterizations of transgender individuals as “undeveloped psychologically; as immature; as crippled; as disabled, if not sick” influenced early court decisions denying protection under Title VII (quoting Joseph C. Finney, Jeffrey M. Brandsma, Murray Tondow & Gress LeMaistre, *A Psychological Study of Transsexualism*, in *Proceedings of the Second Interdisciplinary Symposium on Gender Dysphoria Syndrome* 82, 85 (Donald R. Laub & Patrick Gandy eds., 1974))).

49. See *infra* section I.B.

50. See *infra* section I.A.

propriated the term to craft a more inclusive definition of their community,⁵¹ and it began circulating in legal sources, such as statutes and judicial opinions, in the 2000s.⁵² “Sex assigned at birth” is now commonly used in judicial opinions, often in competition with “biological sex.”⁵³

A. *Sex in Midcentury Medicine*

As historian of science Sarah Richardson explains, biological understandings of the “‘essence’ of sex difference have changed over time.”⁵⁴ The very idea that men and women are sexually dimorphic in the sense of being “opposite sexes” that are different in kind is not an ahistorical one; it rose to prominence by around 1800, partially displacing earlier understandings of the sexes as different in degree, with women being lesser or imperfect men.⁵⁵ By the latter part of the nineteenth century, the prevailing view among scientific researchers was that sex is “a complicated, spectrum-like, and highly variable phenomenon” that is “flexible and open to influence from external cues in the environment.”⁵⁶ But by the mid-twentieth century, developments in genetics had contributed to a popular understanding of sex as originating in the X and Y chromosomes: the “molecular agents” that trigger the development of gonads and hormones, causing sex differentiation in bodies and minds.⁵⁷

51. See *infra* section I.B.

52. See *infra* section I.C.

53. See *infra* section I.C.

54. Richardson, *Sex Itself*, *supra* note 47, at 225 (“Biological conceptions of human sex difference have changed over time Reproductive organs, blood color and density, skeletal morphology, brain size and lateralization, and hormones have each been claimed as the ‘essence’ of human sex difference.”).

55. See Thomas Laqueur, *Making Sex: Body and Gender From the Greeks to Freud* 4–6 (1992) (arguing that “[b]y around 1800” a “model of radical dimorphism, of biological divergence” between women and men “replaced a metaphysics of hierarchy” as the dominant strand of thought about sex differences in writings in the Western tradition); Maayan Sudai, *Sex Ambiguity in Early Modern Common Law (1629–1787)*, 47 *Law & Soc. Inquiry* 478, 479–80, 479 n.1 (2022) [*hereinafter* Sudai, *Sex Ambiguity*] (documenting a transition in early modern Anglo-American legal treatment of people of “doubtful sex” that reflected a change in the underlying model of sex “from a ‘shaky’ continuum to a binary”). Other cultures have had other models at other times, including recognition of “third sexes and third genders.” See, e.g., Gilbert Herdt, *Introduction to Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History* 21, 21–85 (Gilbert Herdt ed., 1994) (discussing how nineteenth-century Western ideas about “sexual dimorphism” influenced by Charles Darwin and Sigmund Freud “marginalized the study of sexual and gendered variations in human history and society”).

56. Richardson, *Sex Itself*, *supra* note 47, at 24–25; see also Jules Gill-Peterson, *Histories of the Transgender Child* 35 (2018) (discussing late-nineteenth and early-twentieth-century scientific views that every human was naturally “bisexual,” meaning “a mix of masculine and feminine forms,” and that these forms varied among the races).

57. Richardson, *Sex Itself*, *supra* note 47, at 71.

This “master switch”⁵⁸ model of sex difference is inconsistent with today’s science,⁵⁹ which understands the biology of sex and gender as more akin to a complex “network”⁶⁰ or “choreography.”⁶¹ As Richardson explains, “Decades of research across scientific disciplines have built an understanding of human sex as a multidimensional trait with biological and social components that can vary over the life course.”⁶² Even at midcentury, the master switch model was confounded by the fact that “[t]here are many biological markers of sex but none is decisive: that is, none is actually present in all people labeled male or female.”⁶³ For example, some people with XY chromosomes are born with genitals that would generally be considered “female.”⁶⁴

Nonetheless, some midcentury medical professionals regarded deviations from the master switch model as “freaks of nature,” rather than evidence that the model was not natural fact.⁶⁵ The language of sex as

58. See *id.* at 129 (discussing the “master switch” theory that embryos are female by “default,” but “a gene on the Y chromosome triggers the development of testes,” which produce hormones that “‘masculinize’ the fetus and initiate hormonal control of sexual development”).

59. For example, we now know that “[g]enes essential to the maintenance of ovarian and testes differentiation . . . are not located on the sex chromosomes” and “extreme sexual dimorphism is observed in many species that lack sex chromosomes.” *Id.* at 204.

60. *Id.* at 136 (“By the late 1990s, biologists began to move away from metaphors of ‘master genes’ and ‘genetic programs’ and toward nondeterministic, complex regulatory network approaches to biological explanation.”).

61. *Id.* at 8 (“[R]esearchers acknowledge that human biological ‘sex’ is not diagnosed by any single factor, but is the result of a choreography of genes, hormones, gonads, genitals, and secondary sex characters.”).

62. Sarah Richardson, *Transphobia, Cloaked in Science*, L.A. Rev. of Books Blog (Nov. 8, 2018), <https://blog.lareviewofbooks.org/essays/transphobia-cloaked-science/> [<https://perma.cc/6W5X-EQAT>] [hereinafter Richardson, *Transphobia, Cloaked*] (explaining that “[t]he science of human sex is not complete without the construct of gender identity”).

63. Katrina Karkazis, Rebecca Jordan-Young, Georgiann Davis & Silvia Camporesi, *Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes*, 12 *Am. J. Bioethics* 3, 6 (2012); see also Bhargava et al., *supra* note 33, at 221 (“A simple biological definition of male and female, satisfactory to all people, is elusive.”); Sari M. van Anders, Zach C. Schudson, Emma C. Abed, William J. Beischel, Emily R. Dibble, Olivia D. Gunther, Val J. Kutchko & Elisabeth R. Silver, *Biological Sex, Gender, and Public Policy*, 4 *Pol’y Insights From Behav. & Brain Scis.* 194, 195–96 (2017) (“Scientists acknowledge no single or objective way to define sex . . . and hold that, while sex can matter, it should not take precedence over gender.”).

64. Richardson, *Sex Itself*, *supra* note 47, at 8 (discussing androgen insensitivity syndrome); see also Anne Fausto-Sterling, *Opinion, Why Sex Is Not Binary*, *N.Y. Times* (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/opinion/sex-biology-binary.html> (on file with the *Columbia Law Review*) (explaining that there is no “simple genetic test to determine ‘true’ sex” because “fetal embryonic testes or ovaries develop under the direction of opposing gene networks, one of which represses male development while stimulating female differentiation and the other of which does the opposite”).

65. Harold Garfinkle, *Passing and the Managed Achievement of Sex Status in an “Intersexed” Person*, in *The Transgender Studies Reader* 58, 63 (Susan Stryker & Stephen

“assignment” seems to originate in the context of medical literature on individuals with intersex variations.⁶⁶ Beginning in the latter half of the twentieth century, when an infant was born with genitalia considered ambiguous, clinicians would conduct tests and assign a male or female sex.⁶⁷ Clinicians thought rapid sex assignments were necessary so that parents would not be confused about whether to raise the child as a girl or a boy and so that children would not be confused about their gender identities and roles.⁶⁸ Some physicians continue to regard “sex assignment” as male or female to be the “first step” in managing intersex variations,⁶⁹ despite concerns that these assignments are used to justify medically unnecessary genital and gonadal surgical procedures that can have lifelong consequences such as sterilization and lack of sensation⁷⁰ and that some individuals turn out to have gender identities inconsistent with these assignments.⁷¹ In cases in which an infant’s sex is not readily apparent to

Whittle eds., 2006) (quoting an unnamed prominent psychiatrist’s comment in an essay originally published in 1967).

66. See, e.g., Burns et al., *supra* note 2, at 126; John Money, Joan G. Hampson & John L. Hampson, *Hermaphroditism: Recommendations Concerning Assignment of Sex, Change of Sex, and Psychologic Management*, 97 *Bull. Johns Hopkins Hosp.* 284, 290 (1955) (“For neonatal and very young infant hermaphrodites, our recommendation is that sex be assigned primarily on the basis of the external genitals and how well they lend themselves to surgical reconstruction in conformity with assigned sex, due allowance being made for a program of hormonal intervention.”); John Money, Joan G. Hampson & John L. Hampson, *Imprinting and the Establishment of Gender Role*, 77 *A.M.A. Archives Neurology & Psychiatry* 333, 333 (1957) (contrasting an individual’s “sex of assignment and rearing” with “various physical sexual variables”).

While assigning terms do not seem to be used with frequency prior to the mid-twentieth century, descriptions of practices akin to assignment for individuals with intersex variations can be found in various cultures and historical moments. See, e.g., Elizabeth Reis, *Bodies in Doubt: An American History of Intersex* 11 (2009) (discussing a 1741 legal treatise that “required that hermaphrodites or their parents make a permanent choice of sex” for legal purposes and explaining that eighteenth-century medical manuals on hermaphrodites drew on legal principles from “Jewish Talmudic law and ancient Latin canon and civil law”).

67. See, e.g., Suzanne J. Kessler, *Lessons From the Intersexed* 12–13 (1998). Prior to midcentury, intersex births were not considered matters for medical intervention and treatment was “ad hoc.” Katrina Karkazis, *Fixing Sex: Intersex, Medical Authority, and Lived Experience* 7 (2008) [hereinafter *Karkazis, Fixing Sex*].

68. Karkazis, *Fixing Sex*, *supra* note 67, at 55; see also *id.* at 50 (discussing the theories of psychologist John Money “that the sex of rearing was a primary determinate of an individual’s gender role and psychosexual orientation”).

69. See, e.g., Mariam Moshiri et al., *Evaluation and Management of Disorders of Sex Development: Multidisciplinary Approach to a Complex Diagnosis*, 32 *Radiographics* 1599, 1599 (2012).

70. See, e.g., Georgiann Davis, *Contesting Intersex: The Dubious Diagnosis* 73 (2015) (criticizing the ways that sex assignments rationalize surgeries); Karkazis, *Fixing Sex*, *supra* note 67, at 3 (describing how intersex advocates have challenged “rapid gender assignment and genital surgery” for causing “extraordinary and irrevocable harm” and “naturaliz[ing] ideas about gender difference”).

71. See, e.g., William G. Reiner & John P. Gearhart, *Discordant Sexual Identity in Some Genetic Males With Cloacal Exstrophy Assigned to Female Sex at Birth*, 350 *New Eng. J. Med.* 333, 333 (2004) (reporting that eight out of fourteen “genetic males” who “underwent

clinicians, assignments are made based on factors including chromosomes, hormones, gonads, and genitalia, considering how the child's body will develop at puberty, their future fertility, and what sorts of "somatic traits and configurations clinicians believe are necessary (or even allowed) to be male or female."⁷²

In this context, the language of "assignment" points to the fact that an infant's male or femaleness is the product of a medical judgment based in professional, social, and cultural standards, not an observation of natural or neutral fact.⁷³ Yet twentieth-century physicians failed to draw this lesson from their practices of sex assignment; rather, they understood sex assignments to be cultural necessities, essential to alleviate the anxiety and humiliation suffered by the infant's parents.⁷⁴ The idea that sexes are universally assigned at birth, not just to patients with visible intersex variations, did not emerge from this research.

The idea of assigned sex popped up in discussions of transgender individuals in the 1960s, when American physicians adopted the term "sex reassignment" to describe surgical procedures for transgender patients.⁷⁵ The term "reassignment" appears to have been borrowed from discussions of surgical procedures for people with intersex variations.⁷⁶ The use of assigning language in this context may have been part of a larger debate in the medical community at midcentury about whether transgender identity was a type of intersex variation resulting from biological causes that should be treated with surgery or a psychological malady resulting from early childhood development that should be treated with psychotherapy.⁷⁷

neonatal assignment to female sex" due to "phallic inadequacy" identified as male at ages five to sixteen).

72. Karkazis, *Fixing Sex*, supra note 67, at 94, 97–99.

73. Cf. Kessler, supra note 67, at 31 ("If authenticity for gender resides not in a discoverable nature but in someone's proclamation, then the power to proclaim something else is available.").

74. *Id.* at 31–32. Professor Suzanne Kessler explains this as a "failure of imagination." *Id.* at 32. Faced with parental distress, physicians "talk[ed] as though they ha[d] no choice but to use medical technology in the service of a two-gender culture." *Id.*

75. See, e.g., Harry Benjamin, Introduction to *Transsexualism and Sex Reassignment* 1, 6–7 (Richard Green & John Money eds., 1969) [hereinafter Benjamin, Introduction to *Transsexualism and Sex Reassignment*].

76. See Richard Green, Robert J. Stoller & Craig MacAndrew, Attitudes Toward Sex Transformation Procedures, 15 *Archives Gen. Psychiatry* 178, 180–81 (1966) (using the term "sex reassignment" in the contexts of people with and without "genital anomal[ies]").

77. See Joanne Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* 106 (2004). The medicalization of transgender identity is a historically and culturally specific development. For example, in the eighteenth century, there were a wide range of responses to people we might today call transgender men, "from brutal public whippings to a certain amount of public respect," and many contemporary accounts of these individuals "advanced the view that living as a man *made one into more of a man*, and that anyone could do it." Jen Manion, *Female Husbands: A Trans History* 261–62 (2020) (offering a history of "female husbands," defined as people assigned male at birth who lived as men and married women in the United Kingdom and United States from the mid-1700s to

This shift to assigning language may have entailed an implicit critique of the idea that original birth certificate designations are authoritative pronouncements of “legal sex.”⁷⁸ One contributor to a 1969 collection of essays on medical treatment of “transsexuality” referred to the practice of assigning sexes on birth certificates as “arbitrary” and “superficial.”⁷⁹ Doctors advocating for sex reassignment surgery in the 1960s distinguished “sex assignment at birth” from other definitions of sex, such as psychological sex, social sex, sex of rearing, anatomical sex, and legal sex.⁸⁰ In the 1960s, psychoanalyst Robert Stoller coined the term “gender identity” to describe psychological sex.⁸¹

Some medical professionals, however, resisted a multifaceted understanding of sex in favor of the fiction that sex is a simple matter of X or Y chromosomes—a fiction that seemed to serve the purposes of legal rules that distinguished between men and women. For example, in New York City in the 1960s, a few transgender women who had socially transitioned and undergone hormone therapy and gender-affirming surgeries were able to persuade city bureaucrats to change their birth certificate sex designations.⁸² In 1965, the New York City Board of Health convened a

the early 1900s). But by the mid-1800s, female husbands were seen as a “symptom” of the women’s movement and attitudes toward them became more hostile, *id.*, and by the turn of the twentieth century, “[d]octors associated those who transed gender with mental illness and sexual deviance,” *id.* at 263.

78. John P. Holloway, *Transsexuals and Their “Legal Sex”*, in *Transsexualism and Sex Reassignment*, *supra* note 75, at 431, 431.

79. *Id.* (“The decision as to the sex of a baby at birth is arbitrarily made by the attending physician or midwife, and is based upon a superficial examination of the external genitalia of the baby.”). But rather than being intended to criticize sex assignments generally, the shift to the term reassignment seems to have been motivated by the desire of physicians to make surgery “a legitimate treatment for a selected group of transsexuals.” See, e.g., Harry Benjamin, *The Transsexual Phenomenon*, app. A at 164 (1966) [hereinafter Benjamin, *Transsexual Phenomenon*]. The term “reassignment” was a shift away from terms like “sex transformation” and “sex change” operations—terms that sound sensational and imply a more thoroughgoing metamorphosis. Compare Green et al., *supra* note 76, at 178–79 (a 1966 article by psychologists who treated transgender patients using the terms “sex transformation” and “sex reassignment” synonymously), with Richard Green, *Sex Reassignment Surgery*, 124 *Am. J. Psychiatry* 994, 997 (1968) (letter to the editor by one of the 1966 article’s authors using the term “sex reassignment” exclusively).

80. See, e.g., Benjamin, *Transsexual Phenomenon*, *supra* note 79, at 3–10.

81. Robert Stoller, *A Contribution to the Study of Gender Identity*, 45 *Int’l J. Psychoanalysis* 220, 220 (1964) [hereinafter Stoller, *Contribution to the Study of Gender Identity*] (hypothesizing that gender identity is a result of anatomy, upbringing, and an unspecified “biological force” based on two case studies of individuals with intersex variations). Although the term was novel, the concept was not: Sexologists of the late nineteenth and early twentieth century had long distinguished between the sex of the visible body and the sex of the psyche or soul. See Meyerowitz, *supra* note 77, at 111. Following in this tradition, Stoller posited a distinction between sex as biological and gender as psychological. See, e.g., Robert Stoller, *I Sex and Gender: The Development of Masculinity and Femininity*, at vi–vii (1968) [hereinafter Stoller, *Sex and Gender*].

82. See Currah, *Sex Is as Sex Does*, *supra* note 3, at 31 (discussing four examples in New York City in the 1960s).

committee of medical experts that decided not to allow any further changes on the ground that “male-to-female transsexuals are still chromosomally males while ostensibly females.”⁸³ As Professor Paisley Currah observes, the reasoning behind this rule was not scientific; it was legal.⁸⁴ In a letter, the head of the committee asked: “[I]f sex is not a biologic phenomenon, then what would the implications be if the Board of Health permitted a psychological determination of sex to be the compelling issue[?]”⁸⁵ Specifically, the committee cited concerns about the implications of allowing changes to birth certificates for legal rules that turned on sex, such as the prohibition on same-sex marriage, the all-male draft, and benefits programs available only to women.⁸⁶

B. *Legal Understandings of Sex, 1970s to 1990s*

Prior to 1970, U.S. legal authorities generally referred to “sex” simpliciter, not distinguishing between various biological, social, psychological, legal, or other meanings of that concept.⁸⁷ This reflected the common understanding of the term “sex” to encompass what we might today think of as questions of gender or sexuality.⁸⁸ In law, the term “gender” was used to refer to grammar,⁸⁹ or occasionally as a sanitized synonym for sex, denoting male or female identity while avoiding connotations related to sexuality.⁹⁰

83. *Id.* at 33 (quoting New York Academy of Medicine Committee on Public Health, Change of Sex on Birth Certificates for Transsexuals, 42 Bull. N.Y. Acad. Med. 721, 724 (1966) (on file with the *Columbia Law Review*)).

84. *Id.*

85. *Id.* at 32 (quoting Letter from Dr. George James, Comm’r, N.Y.C. Bd. of Health, to Dr. Harry Kruse, Exec. Sec’y, Comm. on Pub. Health, N.Y. Acad. of Med. (Apr. 2, 1965) (on file with the *Columbia Law Review*)).

86. *Id.* at 33 (discussing New York Academy of Medicine Committee on Public Health, Change of Sex on Birth Certificates for Transsexuals, 42 Bull. N.Y. Acad. Med. 721, 723 (1966) (on file with the *Columbia Law Review*)).

87. See Eskridge et al., *supra* note 23, at 1550–58. Even in the 1970s, this usage still appeared. See also *City of Chicago v. Wilson*, 357 N.E.2d 1337, 1339 (Ill. App. Ct. 1976), *rev’d*, 389 N.E.2d 522, 523 (Ill. 1978) (discussing a 1974 prosecution under a Chicago Municipal Code provision that made it a crime for a person to “appear in a public place . . . in a dress not belonging to his or her sex, with intent to conceal his or her sex”).

88. Eskridge et al., *supra* note 23, at 1554–58.

89. See, e.g., *Wilco Mfg. Co. v. Standard Prods. Co.*, 409 F.2d 56, 57 (5th Cir. 1969) (referring to the rule of statutory construction that “the masculine gender shall include the feminine and neuter”). But see *Seidenberg v. McSorleys’ Old Ale House, Inc.*, 308 F. Supp. 1253, 1260 (S.D.N.Y. 1969) (using the terms “sex” and “gender” as synonyms).

90. When litigating landmark women’s rights cases in the 1970s, Justice Ruth Bader Ginsburg used the term “gender” rather than “sex” in her briefs because her assistant suggested that judges would be distracted by seeing the term “sex, sex, sex.” See, e.g., Catherine Crocker, *Ginsburg Explains Origin of Sex, Gender*, L.A. Times (Nov. 21, 1993), <https://www.latimes.com/archives/la-xpm-1993-11-21-mn-59217-story.html> [<https://perma.cc/62HL-5XLU>].

In 1970, the idea that sex “assignment” was legally relevant was rejected in *Corbett v. Corbett*, an influential English case on how marriage law pertains to transgender individuals.⁹¹ The question in *Corbett* was whether April Ashley, a transgender woman, counted as a woman for purposes of her marriage to a man.⁹² The court concluded that the validity of the marriage depended on Ashley’s “true sex,” a question on which it heard conflicting testimony from several medical experts.⁹³ Ashley did not dispute that she was born with a penis, but argued that because her psychological sex was female, she “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, must be the female.”⁹⁴ However, the court was not persuaded that “transsexualism” was a type of intersex condition, due to the testimony of experts that “transsexualism” was “a psychological disorder after birth, probably as a result of some as yet unspecified experiences in early childhood.”⁹⁵ In this era, psychologists often blamed the parents for a child’s “transsexualism.”⁹⁶ For example, Robert Stoller, a leading researcher, speculated that mothers caused their sons to become transgender by lavishing too much affection on them.⁹⁷ The *Corbett* court concluded that “the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.”⁹⁸ Only a person’s “biological sexual constitution” counted for purposes of marriage, because the “essential element” of marriage was having “natural hetero-sexual intercourse.”⁹⁹

91. [1971] P 83 at 108 (Eng.) (concluding that a marriage between a man and a transgender woman was void under laws that only permitted marriage between a man and a woman); David B. Cruz, Getting Sex “Right”: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship, 18 *Duke J. Gender L. & Pol’y* 203, 207–08 (2010) [hereinafter Cruz, Getting Sex “Right”] (discussing *Corbett*’s influence in U.S. cases contesting the marriages of transgender people). Not all courts followed *Corbett*. See, e.g., *M.T. v. J.T.*, 355 A.2d 204, 208–11 (N.J. Super. Ct. App. Div. 1976) (rejecting *Corbett*’s reasoning and concluding that for purposes of marriage, sex should be determined based on an individual’s psychological sex and whether that person currently has anatomy that makes sexual intercourse possible, even if that anatomy had been altered through surgery).

92. *Corbett*, P 83 at 84–86.

93. *Id.* at 89.

94. *Id.* at 104.

95. *Id.* at 99.

96. See, e.g., Jack Turban, The Disturbing History of Research Into Transgender Identity, *Sci. Am.* (Oct. 23, 2020), <https://www.scientificamerican.com/article/the-disturbing-history-of-research-into-transgender-identity/> [<https://perma.cc/7UJ7-HY9R>].

97. See, e.g., Robert J. Stoller, Male Childhood Transsexualism, 7 *J. Am. Acad. Child Psychiatry* 193, 200–01 (1968) [hereinafter Stoller, Male Childhood Transsexualism] (speculating that “the essential psychodynamic process” in case studies of three transgender girls was “excessive identification with their mothers” caused by “constant cuddling”).

98. *Corbett*, P 83 at 104.

99. *Id.* at 104–05.

The court regarded Ashley's vagina to be "artificial,"¹⁰⁰ rendering sex with her husband indistinguishable from homosexual activity.¹⁰¹ It rejected Ashley's argument that her female "assignment" should count for purposes of marriage because, in the court's view, Ashley had "confuse[d] sex with gender."¹⁰²

Corbett rested on now-outdated understandings of the origins of transgender identity and the purpose of marriage—understandings that dictated a rigid separation between biological and psychological phenomena.¹⁰³ Although *Corbett* did not use the term "biological sex," that concept began to trickle into U.S. case law in the 1970s, used almost exclusively in cases involving transgender rights.¹⁰⁴ In the 1980s, the term "biological sex" appeared in army regulations on the exclusion of gay men, lesbians, and bisexual people from military service.¹⁰⁵ Defining sex as fixed by biology at birth was a way to reinforce homophobic policy because it prevented, for example, one member of a same-sex couple from using sex

100. *Id.* at 107.

101. Sharpe, *supra* note 47, at 95–97. For analysis of how the case's logic rests on homophobia, see *id.* at 96–100 (noting that the case compared intercourse with a surgically constructed vagina to anal sex and concluding that "the overriding concern . . . is to insulate marriage, the institution of 'natural' heterosexual intercourse, from perceived 'homosexual' practice").

102. *Corbett*, P 83 at 104 ("The word 'assign', although it is used by doctors in this context, is apt to mislead since, in fact, it means no more than that the doctors decide the gender, rather than the sex, in which such patients can best be managed.").

103. See *supra* note 33 (describing research supporting the claim that gender identity is a result of the interplay of biological, cultural, and environmental dynamics).

104. See *Kirkpatrick v. Seligman & Latz, Inc.*, 475 F. Supp. 145, 147 (M.D. Fla. 1979) (rejecting a transgender woman's equal protection claim because "[c]learly there is a rational basis for an employer's requiring its employees who deal with the public to dress and act as persons of their biological sex: allowing employees to do otherwise may disturb the customers and cause them to take their business elsewhere"), *aff'd*, 636 F.2d 1047 (5th Cir. 1981); *Rush v. Parham*, 440 F. Supp. 383, 386 (N.D. Ga. 1977), *rev'd*, 625 F.2d 1150 (5th Cir. 1980) (describing the plaintiff in a case seeking Medicaid coverage for gender-affirming surgery as a person who "has been diagnosed by at least two physicians as a true transsexual, who is biologically male but psychologically female"); *G.B. v. Lackner*, 145 Cal. Rptr. 555, 557 (Ct. App. 1978) (quoting a medical expert as saying that "[t]he patients have no motivation for psychotherapy and do not want to change back to their biological sex" in a case concluding that surgery for a transgender patient was medically necessary under a state health care program); *City of Chicago v. Wilson*, 357 N.E.2d 1337, 1339 (Ill. App. Ct. 1976), *rev'd*, 389 N.E.2d 522 (Ill. 1978) (cross-dressing prosecution discussing an individual who described herself as "a person who has the mind of a female and the body of a male" and as "biologically male"); *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977) (using the term "biological males" to describe "preoperative or postoperative transsexuals" but concluding that "the overwhelming medical evidence" demonstrated that a transgender woman was "female" for purposes of tennis competition, despite her Y chromosome).

105. See *Watkins v. U.S. Army*, 875 F.2d 699, 713 n.5 (9th Cir. 1989) (Norris, J., concurring) (stating that it was evidence of homosexuality that "[t]he soldier has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the person involved)" (quoting U.S. Dep't of the Army, Reg. 635-200, ch. 15, §§ 2–3 (1981))).

reclassification to evade the ban on same-sex marriage.¹⁰⁶ In the 1980s, courts continued to use terms like “biological sex” almost exclusively in the context of debates over LGBTQ rights.¹⁰⁷ An infamous Seventh Circuit opinion in 1984 held that transgender individuals were not covered by the sex discrimination provision of Title VII because “sex” means only “biological male or biological female,” an attribute that cannot be changed.¹⁰⁸ That opinion characterized “transsexualism” as deviant, unnatural, and pathological, reflecting popular views of the time.¹⁰⁹

By contrast, beginning in the 1980s, the medical community increasingly used the term “assigned sex” to replace anatomical sex in discussions of transgender patients. The American Psychiatric Association’s influential *Diagnostic and Statistical Manual of Mental Disorders* (DSM) began to classify conditions related to transgender status as disorders in 1980.¹¹⁰ In 1987, a revised version of the third edition of the DSM defined gender identity disorders as “an incongruence between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity.”¹¹¹ The term “assigned sex” replaced the term “anatomic sex” that had appeared in that passage in the 1980 edition.¹¹² This change seems to have

106. Currah, *Sex Is as Sex Does*, supra note 3, at 106.

107. A Westlaw search of federal and state cases, as of September 21, 2022, for “te(biological! /1 sex gender male female man woman) & da(aft 1979) & da(bef 1990)” yielded only nineteen results, ten on transgender rights, three on army regulations prohibiting homosexuality, and six cases discussing parentage (i.e., defining a father as “the biological male parent”) rather than sex.

I have found the term “biological sex” in only one case not involving LGBTQ rights decided before 2000, in which the court generally used the term “sex” alone but used the term “biological sex” a single time to emphasize a contrast with “psychological or personality” characteristics. *Diaz v. Pan Am. World Airways, Inc.*, 311 F. Supp. 559, 567 (S.D. Fla. 1970), rev’d 442 F.2d 385 (5th Cir. 1971).

108. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984).

109. See *id.* at 1083 n.3; see also Clarke, *First Forty Years*, supra note 48, at 107–11.

110. Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 261 (3d ed. 1980) [hereinafter DSM III]. These conditions were initially termed “psychosexual disorders” with variations including “transsexualism” and “gender identity disorder” for children and adults. *Id.* Transsexualism was defined as “a persistent sense of discomfort and inappropriateness about one’s anatomic sex” and “a persistent wish to be rid of one’s genitals and to live as a member of the other sex.” *Id.* at 261–62.

This entire classificatory scheme has been revised many times over the years. See Titia F. Beek, Peggy T. Cohen-Kettenis & Baudewijntje P.C. Kreukels, *Gender Incongruence/Gender Dysphoria and Its Classificatory History*, 28 *Int’l Rev. Psychiatry* 5, 5 (2016). Transsexualism is no longer regarded as a psychiatric condition and the term gender identity disorder has been abandoned in favor of “gender dysphoria.” Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 452 (5th ed. 2013) [hereinafter DSM V].

111. Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 71 (3d ed. rev. 1987) [hereinafter DSM III-R]; see also Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 532–33 (4th ed. 1994) [hereinafter DSM IV] (referring to “designated sex” in its discussion of “gender identity disorder”).

112. DSM III, supra note 110, at 261. Various subtypes of these disorders still had requirements related to anatomy. *Id.* at 261–62. In the DSM V, the term “assigned sex” was

been intended to broaden the definition to apply regardless of whether the individual felt that their identity was inconsistent with their anatomy.¹¹³ However, the change was not made consistently: Although the DSM's diagnostic classifications in 1994 and 2000 used assigned terminology,¹¹⁴ its glossaries referred to "biological sex" rather than assigned sex in defining transsexualism and gender dysphoria.¹¹⁵

In the 1990s, transgender theorists reappropriated the concept of sex assignment in an effort to define their community. The term transgender emerges from grassroots organizing and was "[c]rafted to resist the imposition of labels created by the psychiatric establishment to define and contain cross-gender identities and behaviors."¹¹⁶ Virginia Prince, who is sometimes credited with coining the term transgender in the 1970s, defined it as "somebody who lives full time in the gender opposite to their anatomy," as opposed to a "transsexual," meaning a person who has sought medical intervention to alter their anatomy.¹¹⁷ In the 1990s, scholars and activists struggled to find an "umbrella" term to describe the coalition that included transsexual, transgender, and many gender-nonconforming individuals, among others.¹¹⁸ These scholars and activists

replaced with the term "assigned gender." See DSM V, *supra* note 110, at 452; Kenneth J. Zucker et al., Memo Outlining Evidence for Change for Gender Identity Disorder in the DSM-5, 42 *Archives Sexual Behav.* 901, 903 (2013) (discussing the reasons for this change).

113. See Beek et al., *supra* note 110, at 8 (explaining that DSM III-R included a new diagnosis, "gender identity disorder of adolescence and adulthood, nontranssexual type," that did not involve a "preoccupation with getting rid of one's primary and secondary sex characteristics and acquiring those of the other sex").

114. See *supra* note 112 and accompanying text.

115. DSM IV, *supra* note 111, at 767 (defining "gender dysphoria" as "[a] persistent aversion toward some or all of those physical characteristics or social roles that connote one's own biological sex"); *id.* at 771 (defining "transsexualism" similarly); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 823 (4th ed. rev. 2000) [hereinafter DSM IV-TR] (offering the same definitions as DSM IV). One commentator argued the use of the term "biological sex" in DSM IV-TR was "problematic" because "[i]t is curious that the term 'gender' in 'gender dysphoria' means 'biological sex', while the term 'gender' in 'gender identity' and 'gender role' does not." A.A. Howsepian, *The DSM-IV-TR 'Glossary of Technical Terms': A Reappraisal*, 41 *Psychopathology* 28, 31 (2008). The DSM V does not include any reference to "biological sex" in its discussions of gender dysphoria. DSM V, *supra* note 110.

116. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *Transgender Rights* 3, 4 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006) [hereinafter Currah, *Gender Pluralisms*].

117. Leslie Feinberg, *Transgender Warriors: Making History From Joan of Arc to RuPaul*, at x (1996) (quoting Prince on her definition of "transgenderist"). Although Prince thought she coined the term in the 1980s, *id.*, Stryker recalls it being used in this sense in the 1970s, see Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 *GLQ* 237, 251 n.2 (1994) [hereinafter Stryker, *My Words to Victor Frankenstein*].

118. See Currah, *Gender Pluralisms*, *supra* note 116, at 4; see also Feinberg, *supra* note 117, at x; Stryker, *My Words to Victor Frankenstein*, *supra* note 117, at 251 n.2. As Leslie Feinberg explains, transgender activists in the 1990s regarded their coalition as including, among others, "transsexuals, transgenders, transvestites, transgenderists, bigenders, drag

began using “assigned” terminology, rather than anatomy or biology, to define various identities under the transgender umbrella.¹¹⁹ But unlike the use of assigned terminology in medicine, in scholarship on transgender identity, assigned terminology went along with a unifying idea—the right to self-definition with respect to sex and gender.¹²⁰ Transgender theorists crafted a definition of their community that recognizes that transgender people move “across a socially imposed boundary away from an unchosen starting place” with respect to sex or gender.¹²¹ That definition does not specify what their “destination or mode of transition” must be.¹²²

Nonetheless, the phrases “sex assigned at birth” and “assigned sex” did not appear in a handbook by leading experts on transgender rights legislation published in the year 2000.¹²³ And those terms appeared in only a small number of reported judicial opinions.¹²⁴ Perhaps as a result of reliance on older versions of the DSM, courts in the 1990s began referring to

queens, drag kings, cross-dressers, masculine women, feminine men, intersexuals (people referred to in the past as ‘hermaphrodites’), androgynes, cross-genders, shape-shifters, passing women, passing men, gender-benders, gender-blenders,” and more. Feinberg, *supra* note 117, at x.

119. See, e.g., Feinberg, *supra* note 117, at x (“*Transsexual* men and women traverse the boundary of the *sex* they were assigned at birth *Transgender* people traverse, bridge, or blur the boundary of the *gender expression* they were assigned at birth.”); Stryker, *My Words to Victor Frankenstein*, *supra* note 117, at 251 n.2 (noting that the meaning of the term “transgender” was a matter of debate, but, as used in the 1970s, it described people who “do not seek surgical alteration of their bodies but do habitually wear clothing that represents a gender other than the one to which they were assigned at birth”). Today’s definitions of transgender exclude those individuals who do not *identify* as something other than what they were assigned at birth. See *supra* note 6.

120. Feinberg, *supra* note 117, at xi (“The glue that cements these diverse communities together is the defense of the right of each individual to define themselves.”); *id.* at 166 (appending the International Bill of Gender Rights adopted in 1995 by the International Conference on Transgender Law and Employment Policy, which asserted that “[i]t is fundamental that individuals have the right to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role”).

121. Susan Stryker, *Transgender History 1* (2008) [hereinafter Stryker, *Transgender History* (1st ed.)].

122. *Id.*

123. See Paisley Currah & Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers* 3 (2000), <https://static1.squarespace.com/static/6160c919d79c1674b1ff1df5/t/6162cacc52235f0a5e217f1f/1633864396967/TransgenderEquality+%281%29.pdf> [<https://perma.cc/WKV9-WLTP>] (offering a capacious definition of “transgender” as an “umbrella” concept).

The term appeared in law review literature on transgender rights prior to that time, in the context of discussions of intersex variations and as one in a list of various medical definitions of sex. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 269 (1999) (listing several definitions of sex developed by doctors in the context of intersex variations, including “assigned sex” in an argument for transgender rights).

124. Assigning terms appeared in three cases quoting or referring to the DSM before 2000. *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 741 (N.D. Iowa 1999), *aff’d in part, rev’d in part*, 249 F.3d 755 (8th Cir. 2001); *Long v. Nix*, 877 F. Supp. 1358, 1364–65 n.7 (S.D. Iowa

“biological sex” with increasing regularity.¹²⁵ The first U.S. Supreme Court opinion on transgender rights, *Farmer v. Brennan*, decided in 1994, referred to “anatomical” and “biological sex” rather than assigned sex, and labeled a transgender woman who had not completed genital surgery as “biologically male.”¹²⁶ In the late 1990s, a few municipalities defined transgender status with respect to “biological sex” in their anti-discrimination statutes.¹²⁷ In 2000, only one state—Minnesota—had a law forbidding discrimination on the basis of transgender status, which it defined by reference to biology: “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.”¹²⁸

C. *Assigned Versus Biological Sex, 2000 to the Present*

In the early 2000s, transgender rights advocates and legal scholars advanced a shift toward the language of assigned sex rather than references to anatomy, biology, or other aspects of the body.¹²⁹ In 2002, Philadelphia and New York City amended city laws to forbid discrimination

1995), *aff’d*, 86 F.3d 761 (8th Cir. 1996); *Phillips v. Mich. Dep’t of Corr.*, 731 F. Supp. 792, 793 n.2 (W.D. Mich. 1990), *aff’d*, 932 F.2d 969 (6th Cir. 1991).

125. While a Westlaw search of federal and state cases for “TE(biological! /1 sex gender male female man woman) & da(bef 1990)” yielded only thirty-three results, that same search of cases between 1990 and 1999 yielded 113 results as of September 21, 2022.

126. 511 U.S. 825, 829 (1994) (vacating and remanding a decision holding that a transgender woman could not sue prison officials for violations of her Eighth Amendment rights when they placed her in a male facility where she was beaten and raped by another inmate). The plaintiff had undergone hormonal treatments and breast surgery. *Id.*

127. Currah & Minter, *supra* note 123, at 46–47 (discussing a New Orleans, Louisiana rule that referred to “one’s biological or legal sex at birth” and a Seattle, Washington ordinance that used the phrase “whether or not traditionally associated with one’s biological sex or one’s sex at birth”).

128. *Id.* at 48 (quoting Minn. Stat. § 363.01(45) (1993)). A handful of localities at the time had laws forbidding discrimination on the basis of transgender status, including a few that made reference to “sex at birth,” and one referencing “biological or legal sex at birth,” but these laws did not refer to the concept of assignment. *Id.* at 45–46.

129. See Paisley Currah, *The Transgender Rights Imaginary*, 4 *Geo. J. Gender & L.* 705, 706 (2003) [hereinafter Currah, *Transgender Rights Imaginary*] (“Should we demand that the state base legal sex assignment on reassigned sex rather than the sex assigned at birth, or on gender identity rather than ‘biological’ sex?”); Chai R. Feldblum & Lisa Mottet, *Gay People, Trans People, Women: Is It All About Gender?*, 17 *N.Y.L. Sch. J. Hum. Rts.* 623, 676–77 (2000) (discussing the lack of legal protection for “those individuals who actually *cross* sexual borders, or who seek to *live* as a member of a gender different from the person’s assigned sex at birth”); Lisa Mottet, *Access to Gender-Appropriate Bathrooms: A Frustrating Diversion on the Path to Transgender Equality*, 4 *Geo. J. Gender & L.* 739, 740 (2003) (“Treatment of a transgender person based on their sex assigned at birth, rather than based on their gender identity, is both offensive and discriminatory.”); Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 *Mich. J. Gender & L.* 253, 262–63 (2005) (“The sex-gender distinction implies that transgender people are not who they say they are, that their true, objective gender is the one they were assigned at birth.”).

based on gender identity, regardless of “sex assigned at birth.”¹³⁰ The state of California adopted similar language in 2004.¹³¹ By 2006, the editors of a collection of essays on transgender rights began by explaining that the term transgender “is now generally used to refer to individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.”¹³²

Although the 2013 DSM V used the term “natal sex,”¹³³ that term appears infrequently in case law.¹³⁴ After 2014, a year often described as a “tipping point” for public acceptance of the transgender rights movement,¹³⁵ references to assigned sex began to proliferate in the case law.¹³⁶

130. NYC., NY, Admin. Code § 8-102 (2002) (forbidding discrimination based on “a person’s gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth”); Phila., Pa., Code § 9-1102 (2002) (forbidding discrimination based on “gender identity,” defined as “[s]elf-perception, or perception by others, as male or female, and shall include a person’s appearance, behavior, or physical characteristics, that may be in accord with, or opposed to, one’s physical anatomy, chromosomal sex, or sex assigned at birth; and shall include, but is not limited to, persons who are undergoing or have completed sex reassignment”).

131. Cal. Gov’t Code § 12926(p) (2004) (forbidding discrimination based on “gender, as defined in Section 422.56 of the Penal Code”); Cal. Penal Code § 422.56(c) (2004) (defining “Gender” to include “person’s gender identity . . . and gender-related appearance and behavior whether it is stereotypically associated with the person’s assigned sex at birth”). A number of other states subsequently adopted similar definitions. See, e.g., N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13(b)(2) (2016) (“A transgender person is an individual who has a gender identity different from the sex assigned to that individual at birth.”).

132. Paisley Currah, Richard M. Juang & Shannon Price Minter, Introduction to Transgender Rights, *supra* note 116, at xiii, xiv.

133. DSM V, *supra* note 110, at 822 (defining “gender assignment” as “[t]he initial assignment as male or female, which usually occurs at birth and is subsequently referred to as the ‘natal gender’”).

134. A Westlaw search for “natal sex” or “natal gender” in the “all state and federal” case databases on September 21, 2022 yielded only eighteen results.

135. See, e.g., Katy Steinmetz, The Transgender Tipping Point, *TIME* (May 29, 2014), <https://time.com/135480/transgender-tipping-point/> [<https://perma.cc/GXT3-MQJB>].

136. A Westlaw search of federal and state cases for “TE(transgender! transsexual! transexual! & sex /4 assign!) & da(aft 2014)” conducted on September 21, 2022 yielded 192 results. That same search but with “da(bef 2015)” yielded only 44 responses. In most cases before 2015, courts did not seem to regard the distinction between assigned sex and anatomical sex to be of any import. See, e.g., *Phillips v. Mich. Dep’t of Corr.*, 731 F. Supp. 792, 793 n.2 (W.D. Mich. 1990), *aff’d*, 932 F.2d 969 (6th Cir. 1991) (using “sex assigned at birth” synonymously with “gender based on physical characteristics”). Most of them simply quoted some other source using the phrase. See, e.g., *Schroer v. Billington*, 525 F. Supp. 2d 58, 61 (D.D.C. 2007) (quoting expert testimony); *Creed v. Fam. Express Corp.*, No. 306-CV-465RM, 2007 WL 2265630, at *1 n.1 (N.D. Ind. Aug. 3, 2007) (quoting DSM IV-TR); *Hispanic Aids F. v. Estate of Bruno*, 792 N.Y.S.2d 43, 45 (App. Div. 2005) (quoting New York City’s Administrative Code). In a few of these early cases, courts regarded assigned sex to be different than the anatomical sex of a transgender person who had undergone surgery, with the transgender person’s current anatomy providing the better indication of their current sex. See, e.g., *Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (concluding that plaintiff

This shift was likely driven by the efforts of advocates for transgender plaintiffs to use the term in their briefs and distinguish it from “biological sex.”¹³⁷ For example, a 2015 complaint filed by the ACLU on behalf of Gavin Grimm, a transgender boy who was denied access to the boys’ restrooms at school, used assigned sex terminology¹³⁸ and noted its disagreement with the school district’s definition of “biological sex” by placing the term in scare quotes.¹³⁹

During this same period, the competing term “biological sex” began to pop up in more legal and policy contexts. The term “biological sex” had appeared infrequently in biomedical research prior to the 2010s, but its usage increased over the course of that decade.¹⁴⁰ In 2016, it appeared in a much-discussed North Carolina law excluding transgender people from restrooms consistent with their gender identities.¹⁴¹ Around that time, similar legislation was proposed in many other states and localities, offering

who had undergone sex reassignment surgery and changed her birth records had changed her sex and “[i]t would be wholly inappropriate for this Court to invent a narrow federal definition of ‘sex’ based on the sex assigned at birth and impose that construction on a Minnesota statute”); *Creed*, 2007 WL 2265630, at *1 (referring to the DSM’s term “assigned sex” but still noting that “[i]t is unclear whether the plaintiff is still biologically a male”).

One state appellate decision adopting a definition of sex for purposes of marriage considered eight factors, including “assigned sex,” in accord with a law review article by Professor Julie Greenberg, but that holding was reversed by the state’s supreme court. In re Estate of Gardiner, 22 P.3d 1086, 1110 (2001) (discussing Greenberg, *supra* note 123), *rev’d*, 42 P.3d 120 (Kan. 2002).

137. Briefs by LGBTQ advocacy groups used the term “assigned sex” at least as early as 2005, but they did not endeavor to distinguish the concept of assigned sex from that of biological sex. See, e.g., Brief of Amici Curiae American Civil Liberties Union et al. in Support of Appellant Krystal Etsitty and Reversal of the District Court at 4 n.1, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (No. 05-4193), 2005 WL 3516739 (using assigned sex terminology but also offering a definition of “a transsexual person as ‘[a] person with the external genitalia and secondary sex characteristics of one sex, but whose personal identification and psychosocial configuration is that of the opposite sex’” (quoting *Transsexual*, *Stedman’s Medical Dictionary* 1865 (27th ed. 2000))).

138. Complaint ¶¶ 1, 3–4, *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15cv54), 2015 WL 4086446.

139. *Id.* ¶¶ 64–65 (describing the School Board’s policy of “excluding G.G.—a transgender boy—from the boys’ restrooms because the School Board does not deem him to be ‘biologically’ male”). For an earlier example, see Brief of Appellants John and Jane Doe as Parents and Next Friend of Susan Doe at 2, *Doe v. Reg’l Sch. Unit* 26, 86 A.3d 600 (Me. 2014) (No. PEN-12-582), 2013 WL 8351145 (using assigned sex terminology); *id.* at 14 (placing “biological sex” in scare quotes).

140. A search of the PubMed.gov database on September 21, 2022 for the term “biological sex” revealed 13 or fewer results per year until 2009, between 23 and 54 results from 2009 through 2015, 71 results in 2016, 80 results in 2017, 125 results in 2018, 142 results in 2019, and 225 results in 2020.

141. 2016 N.C. Sess. Laws 12–14 (requiring that public agencies ensure that certain bathrooms be “designated for and used only by” persons based on their “biological sex,” defined as “[t]he physical condition of being male or female, which is stated on a person’s birth certificate”), repealed by 2017 N.C. Sess. Laws 81.

various definitions of “biological sex” based on criteria such as reproductive organs or genetics.¹⁴² These varying legal definitions reflect the fact that there is no agreed upon definition of “biological male” or “biological female” in the sciences.¹⁴³

These trends have continued with laws enacted beginning in 2020. Eighteen states have invoked “biological sex” in new laws barring transgender girls and women from girls’ and women’s sports.¹⁴⁴ Because it

142. See Zein Murib, *Administering Biology: How “Bathroom Bills” Criminalize and Stigmatize Trans and Gender Nonconforming People in Public Space*, 42 *Admin. Theory & Praxis* 153, 160–62 (2020) (analyzing seventy-one proposed state and local bills proposed between January 1, 2014 and February 7, 2018 intended to curtail transgender rights and finding that definitions of sex based on chromosomes were most common, followed by those that defined sex based on the birth certificate at the time of birth); Maayan Sudai, *Toward a Functional Analysis of Sex in Federal Antidiscrimination Law*, 42 *Harv. J.L. & Gender* 421, 456–57 (2019) [hereinafter Sudai, *Toward a Functional Analysis of Sex*] (analyzing definitions of “biological sex” in fourteen bills).

143. See *supra* note 63 (citing sources on the lack of an agreed-upon biological definition of male and female); see also Van Anders et al., *supra* note 63, at 194–95 (“Sometimes nonexperts use *biological sex*, which has thus entered some policy language, but scientists generally do not because it is redundant and carries no scientific meaning beyond just sex.”).

144. Ala. Code § 16-1-52 (2022) (referring to “biological males” and “biological females” without defining those terms); 2022 Ariz. Legis. Serv. Ch. 106 (S.B. 1165) (West) (finding that “[b]iological differences between males and females are determined genetically during embryonic development” (internal quotation marks omitted) (quoting Stefanie Eggers & Andrew Sinclair, *Mammalian Sex Determination—Insights From Humans and Mice*, 20 *Chromosome Res.* 215, 216 (2012)) (to be codified at Ariz. Rev. Stat. Ann. § 15-120.02)); Ark. Code Ann. §§ 16-130-103 to -104 (2022) (defining “sex” as “a person’s immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth”); Fla. Stat. Ann. § 1006.205 (West 2022) (providing that “a statement of a student’s biological sex on the student’s official birth certificate is considered to have correctly stated the student’s biological sex at birth if the statement was filed at or near the time of the student’s birth”); Idaho Code § 33-6203 (2021) (setting up a verification process for determining a student’s “biological sex” based on “the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels”); Ind. Code Ann. § 20-33-13-4 (West 2022) (defining sex “based on a student’s biological sex at birth in accordance with the student’s genetics and reproductive biology”); Iowa Code Ann. §§ 261I.1–.2 (West 2022) (defining “sex” as “biological”); Ky. Rev. Stat. Ann. § 164.2813(2) (West 2022) (determining “biological sex” based “on the student’s original, unedited birth certificate” or by a sworn statement by a medical professional indicating “the student’s biological sex at the time of birth”); 2022 La. Sess. Law Serv. 283 (S.B. 44) (West) (defining “biological sex” as “a statement . . . on the student’s official birth certificate which is entered at or near the time of the student’s birth”) (to be codified at La. Stat. Ann. §§ 4:441–:446); Miss. Code Ann. § 37-97-1 (2022) (invoking “biological sex” without defining that term); Mont. Code Ann. § 20-7-1306 (West 2021) (same); Okla. Stat. tit. 70, § 27-106 (2022) (providing that sex shall be determined based on “an affidavit” signed by a parent or legal guardian “acknowledging the biological sex of the student at birth”); S.C. Code Ann. § 59-1-500 (2022) (providing that “a statement of a student’s biological sex on the student’s official birth certificate is considered to have correctly stated the student’s biological sex at birth if the statement was filed at or near the time of the student’s birth”); S.D. Codified Laws § 13-67-1 (2022) (requiring that school sports be segregated by “biological sex” and defining that term as “either female or male”); Tenn. Code Ann. § 49-6-310 (2022) (providing that a

is impossible to devise and apply any all-purpose medical definition,¹⁴⁵ most of these laws either neglect to define “biological sex” or provide that “biological sex” is to be determined not based on any aspect of biology, but rather, based on the original birth certificate.¹⁴⁶ States have also

student’s “gender” for purposes of participation in certain sports “must be determined by the student’s sex at the time of the student’s birth, as indicated on the student’s original birth certificate”); Tex. Educ. Code Ann. § 33.0834 (West 2022) (limiting participation in school sports based on a “student’s biological sex on the student’s official birth certificate . . . entered at or near the time of the student’s birth”); Utah Code § 53G-6-901 (2022) (defining “sex” as “the biological, physical condition of being male or female, determined by an individual’s genetics and anatomy at birth”); W. Va. Code Ann. § 18-2-25d (LexisNexis 2022) (defining “biological sex” as an “individual’s physical form as a male or female based solely on the individual’s reproductive biology and genetics at birth”). Georgia passed a law deferring the decision to a commission. 2022 Ga. Laws 719 (to be codified at Ga. Code Ann. § 20-1-11). Four of these states—Alabama, South Carolina, Tennessee, and Texas—also bar transgender men and boys from some men’s and boys’ sports. Ala. Code § 16-1-52(b); S.C. Code Ann. § 59-1-500(B)(2); Tenn. Code Ann. § 49-6-310(a); Tex. Educ. Code Ann. § 33.0834(a).

145. See *supra* note 63. An early version of a Texas law excluding transgender children from sports would have defined “biological sex” as “the physical condition of being male or female as determined by the sex organs, chromosomes, and endogenous profile of the individual at birth.” H. Journal, 87th Cong., 3d Sess. 140 (Tex. 2021), <https://journals.house.texas.gov/hjrnl/873/pdf/87C3DAY05CAFINAL.PDF> [<https://perma.cc/C8JL-A5HE>]. But ultimately the Texas legislature decided that any medical definition would have caused “problems,” and so it defined biological sex solely based on the original birth certificate. Tex. Educ. Code Ann. § 33.0834; Senate Session (Part III), 2021 Leg., 87th Sess., at 04:26–04:49 (Tex. 2021), https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=16678 (on file with the *Columbia Law Review*).

146. Four states do not define “biological sex.” See Ala. Code § 16-1-52; 2022 Ariz. Legis. Serv. Ch. 106; Miss. Code Ann. § 37-97-1; Mont. Code Ann. § 20-7-1306.

Eight states define biological sex based on the original birth certificate. Fla. Stat. Ann. § 1006.205; Iowa Code Ann. § 261I.1(3); Ky. Rev. Stat. Ann. § 164.2813(2)(a) (allowing proof of biological sex based on the original birth certificate or an affidavit from a health care provider as to the student’s “biological sex at the time of birth”); 2022 La. Sess. Law Serv. 283 (defining “biological sex” as the designation on the original birth certificate, but providing that a “female” designation merely “creates a rebuttable presumption that the student’s biological sex is female”); S.C. Code Ann. § 59-1-500(A) (considering “a statement of a student’s biological sex on the student’s official birth certificate” to have correctly “stated the student’s biological sex at birth if the statement was filed at or near the time of the student’s birth”); S.D. Exec. Order 2021-05 (defining biological sex based on the birth certificate or affidavit provided upon initial enrollment in the context of high school sports); S.D. Exec. Order 2021-06 (college sports); Tenn. Code Ann. § 49-6-310(a) (determining a student’s gender for purposes of participation in athletic activity as “the student’s sex at the time of the student’s birth, as indicated on the student’s original birth certificate”); Tex. Educ. Code Ann. § 33.0834(a) (defining the student’s biological sex as that stated on “the student’s official birth certification” or, if unobtainable, “another government record”).

One state provides that sex shall be determined based on “an affidavit” signed by a parent or legal guardian “acknowledging the biological sex of the student at birth.” Okla. Stat. tit. 70, § 27-106.

Four states refer nonspecifically to anatomy and genetics at the time of birth. Ark. Code Ann. § 16-130-103(2) (defining “sex” as a “person’s immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth”); Ind. Code Ann. § 20-

invoked “biological sex” in their new laws banning certain forms of gender-affirming health care for transgender youth,¹⁴⁷ limiting restroom access for transgender students,¹⁴⁸ and restricting changes to sex designations on identification documents.¹⁴⁹ Some state legislatures have even come up with different definitions of biological sex in the very same session.¹⁵⁰ Nonetheless, the proponents of these laws use the language of

33-13-4(b) (setting athletic eligibility “based on a student’s biological sex at birth in accordance with the student’s genetics and reproductive biology”); Utah Code § 53G-6-901(3) (defining “sex” as “the biological, physical condition of being male or female, determined by an individual’s genetics and anatomy at birth”); W. Va. Code Ann. § 18-2-25d(b)(1) (defining “biological sex” as “an individual’s physical form as a male or female based solely on the individual’s reproductive biology and genetics at birth”).

One state has a verification process based on “one (1) or more of the following: the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.” Idaho Code § 33-6-203; see also *Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020) (concluding that this provision detracts from the law’s supposed purpose of assisting women and girls by “subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations”), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020).

147. Ala. Code § 26-26-2(1) (2022) (finding that “[t]he sex of a person is the biological state of being female or male, based on sex organs, chromosomes, and endogenous hormone profiles, and is genetically encoded into a person at the moment of conception, and it cannot be changed”); Ark. Code Ann. § 20-9-1501 (2022) (defining “biological sex” as “the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads and non-ambiguous internal and external genitalia present at birth, without regard to an individual’s psychological, chosen or subjective experience of gender”).

148. Ala. Code § 16-1-54(a)(1) (defining “biological sex” as “the physical condition of being male or female, as stated on the individual’s original birth certificate”); Okla. Stat. tit. 70, § 1-125 (“Sex” means the physical condition of being male or female based on genetics and physiology, as identified on the individual’s original birth certificate”); Tenn. Code Ann. § 49-2-802 (defining “sex” as “a person’s immutable biological sex as determined by anatomy and genetics existing at the time of birth”). For analysis of an earlier wave of such bills, see Sudai, *Toward a Functional Analysis of Sex*, *supra* note 142, at 456 (“Bill proposers appear to regard ‘biological sex’ as a stable, coherent, organizing criterion; however, a random collection of fourteen bathroom bills reveals that legislators’ definitions of ‘biological sex’ vary substantially from state to state.”).

149. Idaho Code § 39-245A (2022) (assuming that “[d]ecades of court opinion have upheld the argument that biological distinctions between male and female are a matter of scientific fact, and biological sex is an objectively defined category that has obvious, immutable, and distinguishable characteristics”); 2022 Mont. Laws 1179 (to be codified at Mont. Code Ann. § 50-15-224) (requiring proof of surgery before allowing gender marker changes on birth certificates because “accurate vital statistics play an important role in society”); Okla. Stat. tit. 63, § 1-313 (2022) (“[T]he biological sex designation on a certificate of birth issued under this section shall be either male or female and shall not be nonbinary or any symbol representing a nonbinary designation including but not limited to the letter ‘X.’”). For a useful typology and critique of varying state approaches to sex classification, see Ido Katri, *Transitions in Sex Reclassification Law*, 70 *UCLA L. Rev.* (forthcoming 2023), <https://ssrn.com/abstract=4042055> [<https://perma.cc/QXS7JZ4L>].

150. Arkansas is one example. Compare Ark. Code Ann. § 20-9-1501 (defining “biological sex” for purposes of a law forbidding certain forms of gender-affirming health care for minors as “biological indication of male and female in the context of reproductive

biology to suggest that their motives are to vindicate science¹⁵¹ (intertwined with religious beliefs¹⁵²) rather than to marginalize and exclude transgender individuals. References to “biological sex” in judicial opinions have continued to abound at the beginning of the twenty-first century,¹⁵³ in competition with sex assigned at birth.¹⁵⁴ Sex assigned at birth is now ubiquitous in scholarly and popular writing on issues related to transgender identity. It has even generated new acronyms: “AFAB” for assigned female at birth and “AMAB” for assigned male at birth.¹⁵⁵

II. THE CASE FOR SEX ASSIGNED AT BIRTH

This Part outlines the theoretical advantages of the concept of sex assigned at birth and explains how these advantages have played out in legal debates. This discussion pertains to a question not resolved by *Bostock*: Who counts as a man or a woman for purposes of legal rules that require classification or segregation? In this context, transgender rights advocates

potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual’s psychological, chosen, or subjective experience of gender”), with Ark. Code Ann. § 16-130-103 (defining “biological sex” for purposes of limiting participation in sports as “a person’s immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth”). Tennessee is another. Compare Tenn. Code Ann. § 49-2-802 (defining “sex” for purposes of restroom use as “a person’s immutable biological sex as determined by anatomy and genetics existing at the time of birth”), with Tenn. Code Ann. § 49-6-310 (defining “gender” for purposes of sports participation based on “the student’s sex at the time of the student’s birth, as indicated on the student’s original birth certificate”).

151. Orion Rummmler & Kate Sosin, *The Word Missing From the Vast Majority of Anti-Trans Legislation?* Transgender, 19th News (Nov. 12, 2021), <https://19thnews.org/2021/11/state-legislation-transgender/> [<https://perma.cc/4CGH-SVJS>] (“Republican Rep. Valoree Swanson introduced the [Texas] bill [restricting transgender children from playing school sports], and when she was pressed by lawmakers about negative effects the bill could have, she denied that the bill had anything to do with trans youth. It was, she said, not about gender at all but about ‘biological sex.’”).

152. Religious references are not infrequent in public debates over these laws. For a few colorful examples, see Madison Cawthorn (@CawthornforNC), Twitter (Apr. 18, 2022, 8:12 PM), <https://twitter.com/CawthornforNC/status/1516208056362807299> (on file with the *Columbia Law Review*) (statement by Rep. Madison Cawthorn (R-NC) that “[t]here’s only one God and two genders”); Kay Ivey for Governor, *Identity, YouTube*, at 00:05–00:30 (May 12, 2022), <https://www.youtube.com/watch?v=BRoZLk9cmYQ> (on file with the *Columbia Law Review*) (“[G]ender is a question of biology, not identity . . . Here in Alabama, we’re going to go by how God made us, because we identify with something liberals never will: reality.”).

153. A Westlaw search of federal and state cases for “TE(biological! /1 sex gender male female man woman)” yielded 166 results in the 2000s and 390 results in the 2010s as of September 21, 2022.

154. See *supra* notes 1, 136 and accompanying text.

155. See Stryker, *Transgender History* (2d ed.), *supra* note 42, at 12. These acronyms displace male-to-female (MTF) and female-to-male (FTM). Unlike MTF and FTM, the acronyms AMAB and AFAB do not assume that (a) sex and gender identity are the same thing, (b) that there are only two potential destination identities, or (c) that all transgender people transition from one identity to another. See *id.* at 11–12.

do not argue that the term “sex,” as used in statutes, rules, and regulations, *should* be defined as “sex assigned at birth.”¹⁵⁶ To the contrary, they argue it should not. Advocates introduce “sex assigned at birth” for other explanatory purposes, such as to define what it means to be transgender and in discussions of background facts about transgender identity, often with expert testimony. This debate is not about terms; it is about how courts should conceptualize sex and gender as complicated, intertwined, and multifaceted phenomena. Sex assigned at birth is a concept that does important descriptive and normative work in legal disputes. It challenges premises that are central to opposition to transgender rights: the explicit premise that biological sex provides a neutral and objective basis for rules intended to exclude transgender people, and the implicit one that transgender identity is not “real” because it is inconsistent with biological sex. Additionally, sex assigned at birth invokes concerns about autonomy and equality by appealing to the injustice of assignments of identities that dictate an individual’s rights, privileges, and obligations. And it resonates with the argument that information about a person’s genitalia at birth is personal health data, not a matter that should be made public in ways that are offensive to individual dignity. These advantages support the case for introducing the idea that sex is assigned at birth rather than assuming sex is “biological,” “natal,” or “identified at birth.”¹⁵⁷

A. *Challenging “Biological Sex”*

Opponents of transgender rights often rest their arguments on the assumption that “biological sex” is a simple, static, binary, self-evident characteristic that does not encompass “gender,” which is a social, psychological, or even ideological phenomenon.¹⁵⁸ They frame controversies as contests between science and culture, portraying themselves as standing for biology, nature, and truth, and the other side “as hectoring from a postmodern gender La La Land.”¹⁵⁹ Their central argument, in equal protection controversies over restrooms and sports, is that “biological sex”

156. In *R.G. & G.R. Harris Funeral Homes*, a case later consolidated with *Bostock*, Aimee Stephens’s advocates argued that even assuming “sex” refers to “sex assigned at birth,” Stephens was fired for “having a male sex assigned at birth.” Reply Brief for Respondent Aimee Stephens at 4–5, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm’n*, 139 S. Ct. 1599 (2019) (No. 18-107), 2019 WL 5079990. The Court agreed, reasoning that Stephens’s employer had fired her “for traits or actions that it [would have tolerated] in an employee identified as female at birth.” *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020). It does not matter, to this formalistic argument, whether the sex ascribed to Stephens at birth reflected her biology, social norms, or something else.

157. See, e.g., *Bostock*, 140 S. Ct. at 1741 (referring to sex as “identified . . . at birth”).

158. Cf. Shannon Price Minter, “Déjà Vu All Over Again”: The Recourse to Biology by Opponents of Transgender Equality, 95 N.C. L. Rev. 1161, 1163, 1199 (2017) (“Biology-based arguments have come to dominate opposition to the equal inclusion of transgender people in workplaces, schools, and other public arenas—and particularly in public restrooms.”).

159. Karkazis, Misuses of “Biological Sex”, *supra* note 46, at 1899.

is a neutral and nondiscriminatory basis for excluding transgender students.¹⁶⁰ In both equal protection and statutory contexts, judges denying transgender rights claims reason that rules based on the nature of sexual difference are biological, not social, and so cannot be prohibited as sex stereotypes.¹⁶¹ For example, in *Johnston v. University of Pittsburgh of the Commonwealth System of Higher Education*, a district court rejected a transgender man's claim that his university had unlawfully discriminated against him by refusing to allow him to use the men's restrooms and locker facilities.¹⁶² The court distinguished Supreme Court precedents forbidding sex stereotyping on the ground that the school had "simply classified [the plaintiff] based on his birth sex and prohibited him from entering sex-segregated spaces based on that classification."¹⁶³ Conflating biological sex with assigned sex, the court concluded that the plaintiff's female "birth sex" designation was "fatal" to his claim.¹⁶⁴ Judges and legislatures adopting this reasoning point to the Supreme Court's observation in *United*

160. See, e.g., *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1331 (11th Cir. 2021) (Pryor, C.J., dissenting) (arguing that a policy that requires transgender students to use a "gender-neutral restroom" or one "corresponding to their biological sex" is not discriminatory because it "does not facially classify on the basis of transgender status"), vacating and superseding 968 F.3d 1286 (11th Cir. 2020), vacated and reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 636 (4th Cir. 2020) (Niemeyer, J., dissenting) ("[I]t was not 'bias' for a school to have concluded that, in assigning a student to either the male or female restrooms, the student's biological sex was relevant."), cert denied, 141 S. Ct. 2878 (2021); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 353 (S.D. W. Va. 2021) (discussing West Virginia's argument that its law barring transgender girls and women from sports was not discriminatory because it "is premised on 'biological sex,' and it treats all 'biological males' similarly by prohibiting them from participating on girls' sports teams"); *Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020) ("Defendants and the United States suggest the Act does not discriminate against transgender individuals because it does not expressly use the term 'transgender' and because the Act does not ban athletes on the basis of transgender status, but rather on the basis of the innate physiological advantages males generally have over females."), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020).

161. See, e.g., *Adams*, 3 F.4th at 1333 (Pryor, C.J., dissenting) ("The policy does not turn on how students 'act and identify.' It assigns bathrooms by sex, which is not a stereotype."); *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting) (arguing that a policy that defines sex as "the anatomical and physiological differences between males and females" is not based on "discriminatory notions of what 'sex' means" because it "relie[s] on the commonly accepted definition of the word 'sex'"); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) ("However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms."); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 643 (M.D.N.C. 2016) ("[T]he privacy interests that justify the State's provision of sex-segregated bathrooms, showers, and other similar facilities arise from physiological differences between men and women, rather than differences in gender identity."); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 670 (W.D. Pa. 2015) (concluding that "separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause").

162. 97 F. Supp. 3d at 661.

163. See *id.* at 681.

164. See *id.* at 671.

States v. Virginia that sex classifications may sometimes be justified because “[p]hysical difference[s] between men and women . . . are enduring”¹⁶⁵ and “inherent.”¹⁶⁶ But few identify which particular physical differences are relevant or why,¹⁶⁷ let alone offer a justification for discrimination based on those differences.¹⁶⁸

Sex assigned at birth challenges the view that the sex classification on a birth certificate equates with some unified concept of “biological sex.” It points to the fact that the biology of sex is complex, multifaceted, and dynamic, and the process of assigning sexes to infants is a social one. It opens space for the argument that rather than being purely social, gender identity is, for many individuals, at least partly a result of biological processes.

The concept of sex assigned at birth complicates the supposed distinction between biological sex and gender identity,¹⁶⁹ allowing transgender rights advocates to tap into medical and scientific expertise to support their arguments.¹⁷⁰ Sex assigned at birth is generally based on a

165. See *id.* at 670 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). For other examples of citation of this passage by courts, see *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 735 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part), vacated and remanded, 137 S. Ct. 1239 (2017) (mem.); *Carcaño*, 203 F. Supp. 3d at 642.

166. See Ark. Code Ann. § 16-130-102(6)–(7) (2022); Idaho Code § 33-6202(1)–(2), (8) (2021); 2022 La. Sess. Law Serv. 283, § 442(3) (S.B. 44) (West) (to be codified at La. Stat. Ann. §§ 4:441–:446); see also W. Va. Code Ann. § 18-2-25d(a)(1) (LexisNexis 2022) (“There are inherent differences between biological males and biological females . . .”).

167. See *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1301 (11th Cir. 2020) (reasoning that equal protection cases stating physical differences between men and women are relevant grounds for legal distinctions pertained to reproductive matters such as pregnancy and childbirth but are inapposite here because “no anatomical differences between the sexes were required to be on display in the school restrooms”), vacated and superseded, 3 F.4th 1299 (11th Cir. 2021), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.).

168. Cf. Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stan. L. Rev.* 261, 268 (1992) (criticizing one line of equal protection doctrine for “physiological naturalism”: immunizing regulation of differences in reproductive biology from constitutional scrutiny); see also Cary Franklin, *Biological Warfare: Constitutional Conflict Over “Inherent Differences” Between the Sexes*, 2017 *Sup. Ct. Rev.* 169, 174 (explaining that the most recent Supreme Court decisions on sex equality have “carefully examined the government’s ostensibly biological justifications for treating the sexes differently” and found them lacking).

169. See, e.g., *Sex and Gender Identity*, Planned Parenthood, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity> [<https://perma.cc/4CZB-TUDT>] (last visited Aug. 3, 2022) (“Some people call the sex we’re assigned at birth ‘biological sex.’ But this term doesn’t fully capture the complex biological, anatomical, and chromosomal variations that can occur.”).

170. See, e.g., Editorial, *Anatomy Does Not Define Gender*, 563 *Nature* 5, 5 (2008), <https://www.nature.com/articles/d41586-018-07238-8> [<https://perma.cc/Y6C6-MKPX>] (“The research and medical community now sees sex as more complex than male and female, and gender as a spectrum The idea that science can make definitive conclusions about a person’s sex or gender is fundamentally flawed.”); Madeleine Pape, Co-Production, *Multiplied: Enactments of Sex as a Biological Variable in U.S. Biomedicine*, 51 *Soc. Stud.*

medical professional's visual observation of a person's genitals as a newborn.¹⁷¹ But the biology of sex is not simply about genitalia at birth—it involves chromosomes, hormones, gonads, and changes at puberty—some of which may not be “strictly binary” or in accordance.¹⁷² Although genitals and sex chromosomes may seemingly be amenable to binary classification for approximately ninety-eight percent of individuals, “very little else about sex is so binary—not height or body size, not hormones, nor brains or psychological traits, which largely overlap between the sexes, and which change over the course of a life.”¹⁷³ Additionally, the genetic and hormonal aspects of sex are not fixed and innate; they are influenced by environment and experience over time.¹⁷⁴

As the process of assigning sex to infants with intersex variations demonstrates, social understandings go into sex assignments at birth. Anthropologist and bioethicist Katrina Karkazis observes that in cases of intersex variation, clinicians often make sex assignments based on “practical concerns” such as “predictions of a child's quality of life living as one gender or the other given the individual's diagnosis; the feasibility of reconstructive surgery for the chosen gender assignment; and familial concerns,” particularly with respect to social acceptance of “males born with small or morphologically abnormal penises.”¹⁷⁵ Moreover, a person's genitalia as an adult may be different from that at birth, due to surgeries such as vaginoplasty and phalloplasty.¹⁷⁶ And gender identity is not just

Sci. 339, 349 (2021) (explaining how sex-difference researchers “frequently acknowledge the complex entanglement of sex and gender in practice,” including that “there is no such thing as a pure biological effect” (quoting Theresa M. Wizeman & Mary-Lou Pardue, *Exploring the Biological Contributions to Human Health: Does Sex Matter?* 14 (2001))).

171. Karkazis, *Fixing Sex*, supra note 67, at 95 (“At birth genitals are thus viewed as symbolically and literally revealing the truth of gender.”).

172. See, e.g., Fausto-Sterling, supra note 64 (“These kinds of inconsistencies throw a monkey wrench into any plan to assign sex as male or female, categorically and in perpetuity, just by looking at a newborn's private parts.”).

173. Richardson, *Transphobia, Cloaked*, supra note 62; see also Janet Shibley Hyde et al., *The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary*, 74 *Am. Psych.* 171, 172 (2019) (discussing studies challenging the “gender binary” from “neuroscience, behavioral neuroendocrinology, research on gender similarities and differences, research on the experiences of transgender individuals, and the developmental psychology underlying the psychological process of categorizing by gender”).

174. Laura R. Cortes, Carla D. Cisternas & Nancy G. Forger, *Does Gender Leave an Epigenetic Imprint on the Brain?*, 13 *Frontiers Neurosci.*, Feb. 2019, at 1, 2 (discussing “epigenetics,” the study of how “individuals (or cells) with the same genes may wind up with very different observable characteristics (phenotypes) based on environmental interventions at key developmental stages” and giving “examples of how gender, rather than sex, may cause the brain epigenome to differ in males and females”); Shattuck-Heidorn & Richardson, supra note 46 (discussing research demonstrating the effects of gender on biology, such as studies showing “testosterone levels in men respond to childcare-giving, with men who provide care and live in close proximity to their infants exhibiting lower testosterone than men who do not”).

175. Karkazis, *Fixing Sex*, supra note 67, at 113.

176. See, e.g., Safer & Tangpricha, supra note 33, at 2453–57.

about social factors.¹⁷⁷ The best research suggests that “[g]ender identity development most likely occurs from a complex interplay between biological, environmental, cultural, and psychological factors.”¹⁷⁸ Ideals of sexual dimorphism are not free of ideology; at the turn of the twentieth century, science on sexual dimorphism developed in conjunction with racist and colonial taxonomies that ranked white Europeans as more evolved due to the supposedly higher degree of differentiation between their women and men.¹⁷⁹ Thus, sex is not “identified” at birth through any sort of value-free diagnostic procedure; it is assigned via a social process. But judges need not be convinced to adopt postmodern theories about the social construction of sex to be persuaded that laws based on biological sex are suspect; explanations of how sex is assigned at birth from mainstream medical experts often suffice.

With the concept of sex assigned at birth, transgender rights advocates expose how rules that purport to turn on “biological sex” are incoherent, narrow, unworkable, arbitrary, and ideological.¹⁸⁰ For example, in a 2021 case on birth certificates, *Childers-Gray*, the Utah Supreme Court was asked to interpret a 1975 provision of the Utah Code authorizing courts to approve “sex change[s].”¹⁸¹ A dissent argued that the term “sex” meant “biological sex,”¹⁸² which is “an objective *determination*

177. See *supra* note 33 and accompanying text (collecting sources summarizing the scientific evidence that gender identity results from the interaction of biological, environmental, and cultural factors).

178. See, e.g., Oksana Hamidi & Todd B. Nippoldt, *Biology of Gender Identity and Gender Incongruence*, in *Transgender Medicine* 39, 47 (Leonid Poretsky & Wylie C. Hembree eds., 2019); see also *supra* note 33 and accompanying text (collecting sources).

179. See, e.g., Herdt, *supra* note 55, at 27 (“Well into the twentieth century we find anthropometry stressing sexually dimorphic differences between the so-called biological races, with clear implications for Social Darwinism.”); Sally Markowitz, *Pelvic Politics: Sexual Dimorphism and Racial Difference*, 26 *Signs* 389, 390 (2001) (discussing evidence from the late nineteenth century that “in dominant Western ideology a strong sex/gender dimorphism often serves as a human ideal against which different races may be measured and all but white Europeans found wanting”); see also Gill-Peterson, *supra* note 56, at 122, 186 (arguing that racialized notions continue to influence science and medicine on sex and gender even after abandonment of eugenics).

180. Some early cases in which courts were asked how to classify transgender individuals for purposes of birth certificate designations or marriage provide examples. See, e.g., *In re Heilig*, 816 A.2d 68, 77 (Md. 2003) (concluding that Maryland courts had jurisdiction to order changes to birth certificate sex designations, based on research on the concept of “assigned” sex and intersex conditions, and the court’s assessment (*contra Corbett v. Corbett* [1971] P 83 at 108 (Eng.)) that “[t]he studies imply that transsexualism may be more similar to other physiological conditions of sexual ambiguity, such as androgen insensitivity syndrome, than to purely psychological disorders”); M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 *Vt. L. Rev.* 943, 985–90 (2015) (discussing examples of cases in which courts validated gender identity over assigned sex).

181. *In re Sex Change of Childers-Gray*, 487 P.3d 96, 118 (Utah 2021) (quoting Utah Code § 26-2-11(2)(a) (1995)).

182. *Id.* at 133 (Lee, C.J., dissenting).

based on observation of physical characteristics,” generally made at birth.¹⁸³ Thus, the dissent argued, any birth certificate change required that the petitioners change their physical characteristics with “sex-reassignment surgery.”¹⁸⁴ The majority, by contrast, understood the distinction between sex assigned at birth and biological sex. It regarded birth certificate sex designations as creatures of the law, not simply reflections of biology,¹⁸⁵ explaining that “[l]ike with a legal name, a person is assigned a sex designation at birth, and it appears on their birth certificate.”¹⁸⁶ The court observed that “the ‘anatomical examination’ done at birth contemplates only the observable genitalia, which is limited at the neonatal stage”; does not entail “an examination of the individual’s chromosomal makeup”; and does not account for “secondary sex characteristics, such as those that may be altered by hormone therapy.”¹⁸⁷ Moreover, the majority noted that some dictionary definitions of sex circa 1975 focused on “‘psychological,’ ‘behavior[al],’ or ‘character’ differences.”¹⁸⁸ The court “caution[ed] against relying even on the term ‘biological sex’ as defined by observable external attributes,” noting that not all transgender people pursue surgeries;¹⁸⁹ and in any event, the question is best left to “medical professionals.”¹⁹⁰ Therefore, the court rejected any surgical requirement, and required that petitioners simply present objective evidence from a “licensed medical professional” that they were receiving “appropriate clinical care or treatment for gender transitioning or change”¹⁹¹ and demonstrate that they were not seeking the change for “wrongful or fraudulent purpose[s].”¹⁹²

183. *Id.* at 151 (emphasis added).

184. *Id.* at 149. Changes would also be permissible if the initial designation were a mistake, or with “a showing that the biological features of an intersex person have developed differently than expected at birth.” *Id.* at 150.

185. *Id.* at 121 (majority opinion) (“But if ‘sex’ on a birth certificate indicates a purely biological trait and not an identifier of legal status, then why does one need a court order to change it?”).

186. *Id.* at 123.

187. *Id.* at 120–21.

188. *Id.* at 120.

189. *Id.* at 122 (“Transgender individuals have an array of surgical options by which they can effectuate their transition, if that is indeed the route they wish to take.”). Nor is there agreement on which of the many surgical options count as “reassignment.” *Id.* (listing options including “facial reconstruction, orchiectomy (removal of gonads), vaginoplasty, mammoplasty, mastectomy, hysterectomy, vaginectomy, phalloplasty, and ‘surgical procedures of non-genital, or non-breast, sites (nose, throat, chin, cheeks, hips, etc.) conducted for the purpose of effecting’ the appearance of the adopted sex” (quoting *O’Donnabhain v. Comm’r*, 134 T.C. 34, 38 (2010) (citations omitted))).

190. *Id.*

191. *Id.* at 125.

192. *Id.* at 123.

In recent cases on restroom use, advocates have criticized school policies that require students to use restrooms consistent with their assigned sexes, arguing that it is incoherent to treat assigned sex as “a true proxy for an individual’s biological sex.”¹⁹³ One example is *Grimm v. Gloucester County School District*, a case in which the Fourth Circuit held that a school district’s refusal to allow Gavin Grimm, a transgender boy, to use the boys’ restroom violated sex equality law.¹⁹⁴ The school board implemented a policy requiring students to use restrooms consistent with their “biological gender.”¹⁹⁵ One judge concurred to criticize the school board for its inconsistent and arbitrary definitions of “biological gender,” noting that the term was not synonymous with assigned sex as the school board purported.¹⁹⁶ That judge observed that the school board presumed that there was “some set of physical characteristics that fully identify someone as ‘male’ or ‘female,’” but it never specified what those characteristics might be.¹⁹⁷ Grimm “lacked breasts (due to his chest reconstruction surgery); had facial hair, a deepened voice, and a more masculine appearance (due to hormone therapy); and presented as male through his haircut,” but the school board dismissed these features as “physical” rather than “biological,” a distinction that does not make sense.¹⁹⁸ That is because the school’s rule was not based in biology; it was rooted in disapproval of transgender identity. Because of his masculine appearance, Grimm’s use of the girls’ restroom would have seemed like an intrusion, yet because of the school policy, he could not use the boys’ restroom.¹⁹⁹ Thus, his only option was to use a separate restroom specifically for “students with gender identity issues,” which singled him out as different from all the other students and produced a “vicious and ineradicable stigma.”²⁰⁰

Another example is *Evancho v. Pine-Richland School District*, in which a school defined “biological sex” as “the then-existing presence of a penis

193. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1053 (7th Cir. 2017) (reasoning that defining sex based on birth assignment fails to account for chromosomes or “genitalia that is ambiguous in nature”); see also *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 621–22 (4th Cir. 2020) (Wynn, J., concurring) (pointing out that the term “biological gender” “has no standard meaning (to say nothing of widespread acceptance) in the medical field”), cert. denied, 141 S. Ct. 2878 (2021); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 279 (W.D. Pa. 2017) (criticizing a policy based on “biological sex” defined as “then-existing presence of a penis (boys) or a vagina (girls)”).

194. 972 F.3d at 593 (concluding that the policy violated the Equal Protection Clause of the Constitution and Title IX).

195. *Id.* at 619 (“[T]he Board relied on its own invented classification, ‘biological gender,’ for which it turned to the sex on his birth certificate.”).

196. *Id.* at 621–22 (Wynn, J., concurring).

197. *Id.* at 621.

198. *Id.* at 621–22.

199. *Id.* at 623; see also *id.* at 600 (majority opinion).

200. *Id.* at 620–21 (Wynn, J., concurring).

(boys) or a vagina (girls).²⁰¹ The court criticized this definition as without any basis in “medical, psychological, psychiatric,” or other expert opinions and adopted only as a result of the demands of a majority of attendees at school board meetings.²⁰² Little thought had gone into how to classify an individual “born with indeterminate primary external sex organs” or a boy who “had lost his penis due to trauma or surgery.”²⁰³ Moreover, the record did not reveal “how the District would as a practical matter assess the presence of such external anatomy in a disputed case essentially ‘on the spot,’ or how it would day to day assess the compliance by the hundreds of students at the High School.”²⁰⁴ Rather than referring to the “biological sex” of any of the transgender students, the court was precise in referring to the sexes that were “listed on their birth certificates when they were born,” their “external sex organs,” their “gender identities,” and how they were recognized socially.²⁰⁵

Yet another example comes from a successful First Amendment challenge²⁰⁶ to a 2021 Tennessee law that required public restrooms with transinclusive policies to post signs stating, in block letters: “THIS FACILITY MAINTAINS A POLICY OF ALLOWING THE USE OF RESTROOMS BY EITHER BIOLOGICAL SEX, REGARDLESS OF THE DESIGNATION ON THE RESTROOM.”²⁰⁷ The law’s sponsor introduced the act out of concern that, hypothetically, sexual predators could “take advantage of” transinclusive restroom policies to “‘assault[] or rape[]’ other restroom users.”²⁰⁸ The owner and chief manager of a Nashville coffee shop challenged the law, arguing that it compelled businesses to make statements they did not agree with, and therefore, under the First Amendment, it had to meet the standard of strict scrutiny, which required that it be narrowly tailored to serve a compelling governmental interest.²⁰⁹ The defendants argued that strict scrutiny should not apply because the

201. 237 F. Supp. 3d 267, 279 (W.D. Pa. 2017).

202. *Id.* at 279–80.

203. *Id.* at 279 (stating that counsel for the school board stated at oral argument that a boy who “had lost his penis due to trauma or surgery” would not count as a boy under the school’s policy).

204. *Id.*

205. *Id.* at 272–73.

206. *Bongo Prods., LLC v. Lawrence*, No. 3:21-cv-00490, 2022 WL 1557664, at *1 (M.D. Tenn. May 17, 2022) (granting summary judgment for plaintiffs); *Bongo Prods., LLC v. Lawrence*, 548 F. Supp. 3d 666, 666 (M.D. Tenn. 2021) (granting motion for preliminary injunction).

207. Tenn. Code Ann. § 68-120-120 (2021). The law applies to facilities with multi-user restrooms that are open to the public and designated for men or women if the entity operating the facility, “as a matter of formal or informal policy, allows a member of either biological sex to use any public restroom.” *Id.*

208. *Bongo Prods.*, 2022 WL 1557664, at *4. The court concluded there was no evidence in the record of any such problem, nor was there any “reason to think that, if such a problem existed, the mandated signs would address it.” *Id.* at *18.

209. *Id.* at *2, *5.

law required only “a simple truthful statement of fact . . . aimed at informing the public.”²¹⁰ In response, the plaintiffs pointed out that the sign compelled them to use the “contested term ‘BIOLOGICAL SEX’” and to suggest “that individuals using the bathroom that corresponds to their gender identity are doing so ‘REGARDLESS OF THE DESIGNATION ON THE RESTROOM,’ when, in fact, the plaintiffs believe that such an individual would, if anything, actually be complying with the designation of the restroom, not ignoring it.”²¹¹ In support, the plaintiffs presented testimony from a medical expert explaining that the term “biological sex” “has no place or meaning in either science or medicine, because experts who study sex and gender understand that the biology and identity of a human being is far more complex than what can be identified on an individual’s genital anatomy or chromosomal evaluation.”²¹² In siding with the plaintiffs, the court quoted the expert’s testimony at length, including her explanation of how sex is “assigned,”²¹³ and observed that the expert’s views were supported by medical publications.²¹⁴

Opponents of transgender rights deploy the concept of “biological sex” to lend a veneer of objectivity and scientism to efforts at gate-keeping.²¹⁵ Sex assigned at birth calls into question the concept of “biological sex” when used to sort individuals into male or female categories. It points to the fact that what many people think of as “biological sex” is just a doctor’s observation of whether an infant’s genitalia are best classified as male or female. Yet there are many other ways to define sex and gender. It is thus imprecise to assume that there is one definition of “biological sex,” that it accords with a person’s birth records, or that it excludes gender identity. Laws that do so are in furtherance of an ideological project of transgender exclusion, not a scientific project of accurate classification.

210. *Id.* at *19 (internal quotation marks omitted) (quoting Defendants’ Response in Opposition to Plaintiffs’ Motion for Summary Judgment at 12, *Bongo Prods.*, 2022 WL 1557664 (No. 3:21-CV-00490)).

211. *Bongo Prods.*, 548 F. Supp. 3d at 681–82; see also *Bongo Prods.*, 2022 WL 1557664, at *15 (“[T]he question of whether humans should be organized into two binary and all-inclusive ‘biological sexes’ involves contested ideological premises, not merely a statement of fact.”).

212. *Bongo Prods.*, 548 F. Supp. 3d at 674 (internal quotation marks omitted) (quoting Declaration of Shayne Sebold Taylor, M.D. ¶ 28, *Bongo Prods.*, 2022 WL 1557664); see also *Bongo Prods.*, 2022 WL 1557664, at *6 (similar).

213. *Bongo Prods.*, 2022 WL 1557664, at *6–8; *Bongo Prods.*, 548 F. Supp. 3d at 673–75. The expert explained, “[F]rom a medical perspective, the category of ‘sex’ is ‘far more complex than what is seen on genital exam’—the mechanism through which individuals are typically assigned a sex designation at birth.” *Bongo Prods.*, 2022 WL 1557664, at *6.

214. *Bongo Prods.*, 2022 WL 1557664, at *8; *Bongo Prods.*, 548 F. Supp. 3d at 675.

215. Karkazis, Misuses of “Biological Sex”, *supra* note 46, at 1898–99.

B. *Invoking Autonomy and Equality*

In addition to exposing the ideology behind legal invocations of biological sex, the concept of sex assigned at birth also invokes the egalitarian concern that a person's life course should not be dictated by the circumstances of their birth. It connects discrimination on the basis of transgender status with other caste-like social systems that slot people into lifelong roles and expectations at a time when they are too young to have any meaningful choice. In these ways, it invokes the values of autonomy and equality that underscore the antistereotyping principle in constitutional²¹⁶ and statutory sex discrimination law.²¹⁷

Transgender rights theorists who adopted the concept of assigned sex rather than biological sex did so to emphasize the importance of autonomy.²¹⁸ Professor Susan Stryker explains how "assigning terms" implicate the value of autonomy in defining one's own identity:

Bodily differences are real, and they set us on different trajectories in life, but what people who use these "assigning" terms are trying to point out is that our bodies and the paths they put us on, however unchosen they were initially, need not determine everything about us. Our assigned categories remain situations within which we can make decisions about ourselves and take meaningful actions to change our paths, including reassigning ourselves.²¹⁹

This idea resonates with the tenet of liberal philosophy²²⁰ that, in the words of Professor Currah, "celebrates individuals as authors of their own lives."²²¹

This idea also resonates with and elaborates on feminist claims that biology is not destiny. Feminists have long sought to resist sex-based expectations about behavior, roles, and appearances, particularly "the sexual division of labor," in which men are expected to be breadwinners while women are expected to be caretakers.²²² The transgender rights movement extends this idea to the very identities of men and women. Assigned

216. See, e.g., Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 88 (2010) (discussing the principle "that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles" in equal protection cases).

217. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . .").

218. See *supra* notes 120–122 and accompanying text.

219. Stryker, *Transgender History* (2d ed.), *supra* note 42, at 12; see also *Planned Parenthood*, *supra* note 169 ("Instead of saying 'biological sex,' some people use the phrase 'assigned male at birth' or 'assigned female at birth.' This acknowledges that someone (often a doctor) is making a decision for someone else.").

220. See *supra* note 35 and accompanying text.

221. Currah, *Transgender Rights Imaginary*, *supra* note 129, at 718.

222. See, e.g., Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in *Toward an Anthropology of Women* 157, 178 (Rayna R. Reiter ed., 1975).

sex language suggests it is not biology, but administrative labels and the social expectations attached to them, that slot people into standardized “M” and “F” lives. Thus, the concept of sex assigned at birth is part of an argument for freedom from oppressive demands for conformity. As Professors B Lee-Harrison Aultman and Paisley Currah explain: “To be transgender is to confound hegemonic external cultural expectations that the sex one is assigned at birth dictates one’s gender for life.”²²³

Gender here does not just mean gender identity as a man, woman, or nonbinary person but any number of constricting rules for how a person should name themselves, behave, look, act, love, or otherwise arrange their life based on assigned sex. Resistance to sex assignments may take many forms. Professor Stryker explains:

Some people move away from their birth-assigned gender because they feel strongly that they properly belong to another gender through which it would be better for them to live; others want to strike out toward some new location, some space not yet clearly described or concretely occupied; still others simply feel the need to challenge the conventional expectations bound up with the gender that was initially put upon them.²²⁴

On this account, autonomy is not limited to those who seek to transition to a gender identity as a man or a woman consistently and permanently. Rather, it is a broader vision of gender freedom that would allow individuals “to define, and to redefine as their lives unfold, their own gender identities,”²²⁵ including those whose identities combine, reject, or even parody the categories of man and woman.²²⁶ The same principle supports autonomy for those who do not reject the identity assigned to them at birth but deviate from the roles, behaviors, and appearances expected of their sex.

The fact that sex is assigned *at birth* connects the concept to liberal theories that see injustice in other caste-like systems that allocate social roles at birth, such as noble or commoner, white or Black, Christian or Muslim.²²⁷ It resonates with the Supreme Court’s insistence that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as

223. B Lee Aultman & Paisley Currah, *Politics Outside the Law: Transgender Lives and the Challenge of Legibility*, in *LGBTQ Politics: A Critical Reader* 34, 45 (Maria Brettschneider, Susan Burgess & Christine Keating eds., 2017).

224. Stryker, *Transgender History* (2d ed.), *supra* note 42, at 1.

225. Feinberg, *supra* note 117, app. A at 166 (reproducing the International Conference on Transgender Law and Employment Policy, *International Bill of Gender Rights* (1995)).

226. See, e.g., *id.* at x; Currah, *Gender Pluralisms*, *supra* note 116, at 3.

227. See Herbert Spiegelberg, ‘Accident of Birth’: A Non-Utilitarian Motif in Mill’s *Philosophy*, 22 *J. Hist. Ideas* 475, 477–79 (1961) (discussing historical usage of the phrase “accident of birth”).

simply components of a racial, religious, sexual or national class.”²²⁸ This anticlassification principle is often contrasted with the antistatification one, which holds that the Equal Protection Clause forbids group-based subordination.²²⁹ But transgender rights also resonate with concerns about group-based subordination,²³⁰ because failure to conform with expectations for one’s assigned sex often results in exclusion, stigmatization, discrimination, and even violence.²³¹ This is particularly true for transgender people at the intersections of various social hierarchies, such as those who are women²³² and people of color.²³³ The principle here is that adherence to identities, roles, and expectations that accord with sex assigned at birth should not be a condition of educational, employment, political, or other opportunities.

This idea has had some traction in case law. Several of the cases on restroom access reason that prohibiting transgender students from using restrooms consistent with their gender identities is a form of “punish[ment]” of a transgender child “for not conform[ing] to [their] sex-assigned-at-birth.”²³⁴ The theme also runs through *Corbitt v. Taylor*, a federal district court case that struck down Alabama’s Policy Order 63, which required individuals “whose gender identity differs from the sex they were assigned at birth” to “surgically modify their genitals before they can change the sex designation on their [drivers’] licenses.”²³⁵ The court reasoned that, through its policy, “the State sets the criteria by which it channels people into its sex classifications” and “[i]n so doing, the policy

228. *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal quotation marks omitted) (quoting *Metro Broad., Inc. v. Fed. Comm’n Comm’n*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting)).

229. See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatification?*, 58 U. Mia. L. Rev. 9, 9 (2003) (“Antistatification theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”).

230. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (invoking both anticlassification and antistatification principles in a case holding a school may not bar a transgender boy from using the boys’ restroom), cert. denied, 141 S. Ct. 2878 (2021).

231. See *supra* note 44 and accompanying text.

232. See, e.g., Julia Serrano, *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* 4 (2009) (discussing how discrimination against trans women is often motivated by a unique form of misogyny: “The fact that we identify and live as women, despite being born male and having inherited male privilege, challenges those in our society who wish to glorify maleness and masculinity”).

233. See, e.g., James et al., *supra* note 44, at 4 (reporting that transgender people of color are more likely to experience health disparities, be living in poverty, and be unemployed than white transgender people and the U.S. population).

234. E.g., *Grimm*, 972 F.3d at 617 n.15.

235. 513 F. Supp. 3d 1309, 1312–13 (M.D. Ala. 2021), appeal docketed, No. 21-10486 (11th Cir. Feb. 21, 2021); see also *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049–50 (7th Cir. 2017) (“A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”).

imposes its sex classification, denying the women who are plaintiffs in this case the ability to decide their sex for themselves instead of being told who they are by the State.”²³⁶ The court observed that the constitutional problems with this law would be “apparent” if it “pertained to race or religion instead of sex,” discussing the “loathsome history” of “bureaucrats comparing skin tones and tracing family lineages to decide who is white and who is black.”²³⁷ This reasoning connects the anticlassification thrust of the Supreme Court’s equal protection jurisprudence with the principle that the state should not dictate individual identity.

While *Corbitt* disclaimed any reliance on concerns about the way the Alabama law reinforced the subordination of transgender people, it is apparent that these concerns animated the court’s reasoning.²³⁸ The judge felt compelled to explain the “severe” injuries the policy imposed on transgender individuals.²³⁹ Gonadal surgery can result in “permanent infertility” and is not affordable for many transgender people.²⁴⁰ Those forced to carry identification documents that do not match their gender identities frequently experience discrimination, harassment, and even physical violence after presenting these documents.²⁴¹ One plaintiff lost her job and was “nearly killed by her co-workers because of her transgender status.”²⁴² Cases on restroom access reflect similar anti-subordination concerns, reasoning that policies that exclude transgender students from restrooms consistent with their gender identities are constitutionally suspect not just because they classify based on sex but also because they classify based on transgender status.²⁴³ These cases emphasize the “stigma” imposed on transgender children,²⁴⁴ sometimes relating it to

236. *Corbitt*, 513 F. Supp. 3d at 1315.

237. *Id.*

238. See *id.* at 1314 (“The State need not favor or disfavor men or women to trigger such scrutiny; the classification itself is the trigger.”); *id.* at 1315 n.3 (“The court therefore does not base its decision on any ‘special burden’ that Policy Order 63 places on transgender individuals.”).

239. *Id.* at 1313.

240. *Id.* There are methods for preserving fertility for future use of artificial reproductive technologies. See, e.g., Joshua Sterling & Maurice M. Garcia, Fertility Preservation Options for Transgender Individuals, 9 *Translational Andrology & Urology* S215, S217–18 (2020).

241. *Corbitt*, 513 F. Supp. 3d at 1313–14.

242. *Id.* at 1314.

243. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (concluding that “heightened scrutiny applies to Grimm’s claim because the bathroom policy rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class”), cert. denied, 141 S. Ct. 2878 (2021).

244. See, e.g., *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017) (“The School District actually exacerbated the harm, when it dismissed him to a separate bathroom where he was the only student who had access. This action further stigmatized Ash, indicating that he was ‘different’ because he was a transgender boy.”); see also *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1306–07 (11th Cir. 2020), vacated and superseded, 3 F.4th 1299 (11th Cir. 2021),

the stigma of racial segregation.²⁴⁵ As the Third Circuit put it, forcing transgender students to use special single-user restrooms “would very publicly brand all transgender students with a scarlet ‘T,’ and they should not have to endure that as the price of attending their public school.”²⁴⁶

Thus, the concept of sex assigned at birth has had utility in connecting transgender rights arguments with concerns about how bureaucratic assignments of identity can impair individual autonomy and result in inequality. It helps courts to see the analogy to the antistereotyping principle in sex discrimination law, overcoming the argument that laws that classify individuals on the basis of biology do not implicate the equality and autonomy interests behind that doctrine because they do no more than reflect objective facts.²⁴⁷

C. *Exposing Harms to Privacy and Dignity*

Arguments about sex assigned at birth also tap into intuitions about health information and genitalia as personal and intimate matters. Reflection on the phrase “sex assigned at birth” calls to mind the process in which medical professionals choose a male or female designation based on visual observation of an individual’s genitalia at birth—genitalia which, for some transgender people, may have been changed through surgery. Yet one’s genitals are generally regarded as private. So is health information.²⁴⁸ In this light, the demand to know an individual’s sex assigned at birth is unsettling to traditional expectations of privacy. While the mere invocation of “sex assigned at birth” may not amount to the assertion of any sort of constitutional or statutory claim of privacy violation—and this Article does not advance any argument in favor of such claims²⁴⁹—that concept ought to make decisionmakers uncomfortable with policies that

vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017).

245. See, e.g., *Grimm*, 972 F.3d at 617; cf. *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 350 (S.D. W. Va. 2021) (“Out of fear of those less like them, the powerful have made laws that restricted who could attend what schools, who could work certain jobs, who could marry whom, and even how people can practice their religions. Recognizing that classifying human beings in ways that officially sanction harm is antithetical to democracy, the states ratified the Fourteenth Amendment.”).

246. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018).

247. See *supra* notes 160–166 and accompanying text.

248. Sex assignments are recorded on the form birth certificate along with other health information, such as birthweight, whether the infant had to be admitted to the NICU, and “congenital anomalies.” U.S. Standard Certificate of Live Birth, CDC, <https://www.cdc.gov/nchs/data/dvs/birth11-03final-acc.pdf> [<https://perma.cc/CY5J-XNJ9>] (last updated Nov. 2003).

249. I consider such claims in other work, see, e.g., Jessica Clarke, *Gender Reveal? 5* (Jan. 20, 2020) (unpublished manuscript) (on file with the *Columbia Law Review*), and I have advocated for reforms to the birth certificate to treat sex assigned at birth as private health data, see, e.g., Vadim M. Shteyler, Jessica A. Clarke & Eli Y. Adashi, *Failed Assignments—Rethinking Sex Designations on Birth Certificates*, 383 *New Eng. J. Med.* 2399, 2401 (Dec. 12, 2020).

require an individual to declare private health information about their genitals at birth in order to secure rights and opportunities. By framing sex as assigned at birth, advocates prompt jurists to be critical of policies that presume that it is always legitimate to make assumptions or ask questions about an individual's reproductive biology and medical records.

As courts have recognized, people have “a special sense of privacy in their genitals.”²⁵⁰ Genitalia are regarded as so quintessentially private that the metaphor of “stripping someone bare” is used to describe other privacy violations.²⁵¹ Professor David Alan Sklansky explains:

Notions of bodily modesty are culturally conditioned and vary widely, but the core idea that an individual's body is not public property, that the individual should control access to [their] body, runs deep and is likely universal. If our bodies are not our own, it is hard to imagine that anything is.²⁵²

Another reason for this intuition is the connection of genitalia to reproduction²⁵³ and sexual intimacy,²⁵⁴ areas of private autonomy shielded from public coercion. Yet another is that exposure of an individual's genitalia often expresses degradation, humiliation, or dehumanization and reinforces the individual's abjection and helplessness.²⁵⁵ Questions about genitals are often means of exclusion and humiliation, as in one case in which a transgender boy was permitted to use the boys' locker room,

250. See, e.g., *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (internal quotation marks omitted) (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

251. David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 *Calif. L. Rev.* 1069, 1092 (2014); *id.* at 1081–82 (discussing a distinct late twentieth-century concept of privacy described through “the metaphor of stripping naked”); see also Anita L. Allen, *Genetic Privacy: Emerging Concepts and Values*, *in Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era* 31, 46 (Mark A. Rothstein ed., 1997) (“The human body, like information, is an object of privacy. Physical senses of privacy are among the paradigmatic ones.”).

252. Sklansky, *supra* note 251, at 1109; *id.* at 1117 (“[T]he body is so closely linked to the self that it stands at or near the center of any plausibly sketched zone of personal sovereignty.”); see also Allen, *supra* note 251, at 46 (“American law cloaks the human body in a protective shield, by ascribing rights and remedies that recognize the profound personal interest in bodily integrity and collateral peace of mind.”).

253. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

254. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (“Only the most willful blindness could obscure the fact that sexual intimacy is ‘a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.’” (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003))).

255. See, e.g., Danielle Keats Citron, *Sexual Privacy*, 128 *Yale L.J.* 1870, 1890–93 (2019) (discussing examples involving sexual privacy violations of women of color); Sklansky, *supra* note 251, at 1112 (discussing examples, including the Stanford Prison Experiment, in which individuals placed in roles of guards stripped down those placed in the roles of prisoners, and Abu Ghraib, where guards stripped and photographed Iraqi detainees).

and the other boys laughed at him, one yelling “if you don’t have a dick, get the fuck out,” and another responding “‘if you have a dick, raise your hand,’ which caused a bunch of boys to raise their hands.”²⁵⁶ While these harms might be described as assaults on dignity, the concept of privacy violation more specifically gets at the sense in which exposure of genitalia offends an individual’s sovereignty over their body.²⁵⁷

The longstanding view of health information as private also supports privacy for sex assigned at birth. The idea that health information should be private is an ancient one. The Hippocratic Oath requires that doctors maintain patient confidences and refrain from disclosing any information learned in the course of treatment.²⁵⁸ Health law requires that health care providers implement safeguards to maintain the confidentiality of patient information,²⁵⁹ at great expense.²⁶⁰ Employment law also reflects the need for medical privacy in barring employers from even asking about health conditions that are unrelated to an applicant’s ability to perform the job.²⁶¹ Sex assigned at birth should be treated as health information because it is a medical record regarding a person’s past health condition. The fact that this information is collected at birth strengthens the argument for protection, because an infant is unable to give informed consent to uses of that information.²⁶² The CDC deidentifies birth certificate data before allowing researchers to use it and requires that if researchers inadvertently discover the identity of any individual in the data set, that the researchers make no use of that information.²⁶³ As a judge in one case explained, “Generally, it

256. *Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 353 (E.D. Pa. 2017), *aff’d*, 897 F.3d 518 (3d Cir. 2018).

257. Sklansky, *supra* note 251, at 1106 (arguing that “[t]he language of privacy seems useful in identifying a particular kind of threat to dignity”).

258. Alan F. Westin, *Computers, Health Records, and Citizen Rights* 19 (Nat’l Bureau of Standards, Monograph 157, 1976) (“Whatsoever things I see or hear concerning the life of [patients], in any attendance on the sick or even a part therefrom, which ought not to be noised about, I will keep silent thereon, counting such things to be professional secrets.” (quoting the Hippocratic Oath)).

259. See, e.g., 42 U.S.C. § 1320d-2(d)(2) (2018); 45 C.F.R. §§ 160, 164 (2020) (HIPAA privacy rule).

260. See, e.g., Erin B. Bernstein, *Health Privacy in Public Spaces*, 66 *Ala. L. Rev.* 989, 1008–09 (2015) (“In implementing these laws, the federal government has expended significant resources toward enforcement, and public and private health care providers expend countless resources toward compliance.”).

261. See, e.g., Mark A. Rothstein, Jessica Roberts & Tee L. Guidotti, *Limiting Occupational Medical Evaluations Under the Americans With Disabilities Act and the Genetic Information Nondiscrimination Act*, 41 *Am. J.L. & Med.* 523, 538 (2015). After an employer has extended a conditional offer of employment, it may require a medical examination in certain circumstances. *Id.* at 540–41.

262. Cf. Jorge L. Contreras, *Genetic Property*, 105 *Geo. L.J.* 1, 13 (2016) (discussing the origins of the doctrine of informed consent in medical research, which ensures “respect for individuals” by “giving individuals the opportunity to choose, with the benefit of adequate information, whether to participate in a particular research study”).

263. CDC, *Data Use Restrictions*, CDC Wonder, <https://wonder.cdc.gov/datause.html> [<https://perma.cc/WR3X-W662>] (updated Aug. 30, 2022); see also Sharona Hoffman,

is offensive and inappropriate to ask anyone, including a transgender individual, whether their genitals correspond with their self-proclaimed gender identity.”²⁶⁴

It may seem like a stretch to protect the privacy of sex assigned at birth, considering the fact that many gender-conforming individuals are unconcerned about the dissemination, protection, or use of that information. This may be because cisgender people, unlike transgender people, are rarely asked to verify their sex or discuss the details of their genitalia.²⁶⁵ Popular depictions of transgender people often center around genitalia and surgery in ways that “normaliz[e] intrusions into [their] private lives.”²⁶⁶ Media regularly ask transgender actors “about their genitalia and sex lives in a manner that most viewers would recognize as invasive if the questions were directed towards cisgender actors.”²⁶⁷ For example, journalist Katie Couric went so far as to ask Carmen Carrera, a transgender model, “Your, your, your private parts are different now, aren’t they?”²⁶⁸ Carrera’s response was “to literally shush Couric.”²⁶⁹ The intrusiveness of this question should have been apparent to Couric, whose use of the term “private parts” was an explicit recognition that genitalia are private matters.²⁷⁰ In response to debates over her restroom usage, one transgender teenager implored adults to “[s]top talking about my genitals—I’m a kid.”²⁷¹ Although most people regard their own genitalia as private, a sort

Citizen Science: The Law and Ethics of Public Access to Medical Big Data, 30 Berkeley Tech. L.J. 1741, 1766–68 (2015) (discussing rules for deidentified data under the HIPAA privacy rule).

264. *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *2 n.1 (D. Minn. Mar. 16, 2015). The court’s opinion discussed the plaintiff’s genitalia because the case “pertain[ed] to the medical care that Plaintiff received to treat his genital pain.” *Id.*

265. But see Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory* 23 (1983) (noting that everyone is expected to “*tell* us [their sex] in one way or another” with “garments and decorations which serve like badges and buttons to announce our sexes”).

266. Jaydi Funk, Steven Funk & Sylvia Blaise Whelan, *Trans*+ and Intersex Representation and Pathologization: An Interdisciplinary Argument for Increased Medical Privacy*, 34 Berkeley J. Gender L. & Just. 117, 124 (2019).

267. *Id.* at 124–27 (collecting examples).

268. *Id.* at 125–26, 126 n.39 (quoting J. Bryan Lowder, *Katie Couric Offers a “Possibility Model” for How to Conduct a Really Offensive Transgender Interview*, Slate (Jan. 7, 2014), <https://slate.com/human-interest/2014/01/laverne-cox-and-carmen-carrera-endure-transphobic-katie-couric-interview.html> [<https://perma.cc/7Q74-NVVZ>]).

269. Lowder, *supra* note 268.

270. Couric recognized her mistake. Samantha Allen, ‘I Think I Made a Mistake’: Katie Couric on Her Transgender Evolution, *Daily Beast* (July 13, 2017), <https://www.thedailybeast.com/i-think-i-made-a-mistake-katie-couric-on-her-transgender-evolution> [<https://perma.cc/NP7K-ETR2>] (quoting Couric explaining that she “wanted to make sure that people knew that I recognized I made a mistake” and discussing how Couric went on to create a two-hour National Geographic documentary on gender and identity).

271. Grace Donal-Sandrino, *I’m a Trans Teen—Stop Talking About My Genitalia Under the Guise of ‘Privacy’*, *Vice* (Apr. 10, 2017), https://www.vice.com/en_us/article/8x4q4z/

of transgender exceptionalism operates to deny transgender people similar respect.

The same dynamic runs through the law. As Dru Levasseur explains, “[C]ourts, like the general public, feel that transgender people’s bodies are fair game for discussion and dissection and demand that transgender people disclose intimate details about their bodies, which courts then analyze through a cisgender lens of what is considered ‘normal.’”²⁷² Judicial opinions on transgender rights routinely proceed through a “‘body-parts’ checklist” in assessing whether a transgender person meets some standard for being male or female.²⁷³ Levasseur argues that it is sex stereotyping to penalize an individual for having “body characteristics and traits . . . not considered ‘typical’ for a man or a woman.”²⁷⁴ In 2020, some Eleventh Circuit judges agreed with this reasoning, concluding that an employer’s discomfort with a transgender woman’s “femininity combined with her private anatomy were proof of unconstitutional gender stereotyping.”²⁷⁵

Laws targeting transgender students can cause harm by “outing” them to classmates who are unaware of their sexes assigned at birth, as one judge recognized in a case involving a sports ban.²⁷⁶ But to argue that sex assigned at birth is private information is not necessarily to argue it should be kept a secret. As many privacy scholars have explained, privacy is not secrecy.²⁷⁷ For example, Professor Helen Nissenbaum offers a sociological explanation of privacy as ensuring that information only flows in ways that are normatively appropriate.²⁷⁸ This theory explains why “there is no paradox in caring deeply about privacy and, at the same time, eagerly sharing information as long as the sharing and withholding conform with the principled conditions prescribed by governing contextual norms.”²⁷⁹ There

im-a-trans-teenstop-talking-about-my-genitalia-under-the-guise-of-privacy [https://perma.cc/76FJ-PJTM].

272. Levasseur, *supra* note 180, at 998.

273. *Id.* (quoting Taylor Flynn, *The Ties that (Don’t) Bind: Transgender Family Law and the Unmaking of Families*, in *Transgender Rights*, *supra* note 116, at 32, 37).

274. *Id.* at 1000.

275. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1302 (11th Cir. 2020) (interpreting *Glenn v. Brumby*, 663 F.3d 1312, 1320–21 (11th Cir. 2011)), vacated and superseded, 3 F.4th 1299 (11th Cir. 2021), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.).

276. *A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *11 (S.D. Ind. July 26, 2022) (recognizing that a policy forbidding a transgender girl from playing on the girls’ softball team would cause “significant emotional harm” including the potential “trauma of being ‘outed’ as not ‘really’ a girl”), appeal docketed, No. 22-2232 (7th Cir. July 27, 2022).

277. See, e.g., Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* 186 (2010) (arguing that the harm of privacy violations “is not that they diminish our control and pierce our secrecy, but that they transgress context-relative informational norms”).

278. *Id.* at 187.

279. *Id.*

are spheres of social life in which the voluntary sharing of intimate information is valuable and important. But it is offensive to require the unnecessary disclosure of such information.

This theoretical benefit of the concept of sex assigned at birth has had an indirect but important impact in recent transgender rights arguments. Laws often sort people into male and female categories based on sex assigned at birth because that designation is thought to be a proxy for an individual's current genitalia. Yet courts have recognized that a person's genitals, because they are private, are generally irrelevant to any legitimate legal purpose. In *Corbitt*, for example, Alabama defended its policy requiring transgender people to have genital surgery in order to change their drivers' license sex designations on the ground that the policy was necessary to help law enforcement officers to identify individuals.²⁸⁰ But as the court observed, "[L]icenses denoting the license-holder's genital status are wholly unhelpful for this purpose, as . . . officers don't typically check a person's genitals when stopping or arresting them."²⁸¹ In studying media campaigns against transgender rights, sociologists Kristen Schilt and Laurel Westbrook observed that "opponents worried about what transgender women, who they assume have penises, might do if they were allowed access to women-only spaces."²⁸² However, in school restroom litigation, courts have rejected these concerns as unfounded.²⁸³ One federal district court observed that when a transgender student uses the restroom, he "enters a stall, closes the door, relieves himself, comes out of the stall, washes his hands, and leaves."²⁸⁴ Thus, in the contexts of identification documents and restrooms, social norms with respect to genitals and privacy demonstrate the irrelevance of sex assigned at birth to any legitimate government purpose.

The concept of assigned sex requires the acknowledgement that transgender people are often identified for discrimination and exclusion

280. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1320–21 (M.D. Ala. 2021), appeal docketed, No. 21-10486 (11th Cir. Feb. 21, 2021).

281. *Id.* at 1323.

282. Kristen Schilt & Laurel Westbrook, *Bathroom Battlegrounds and Penis Panics*, *Contexts* (Aug. 20, 2015), <https://contexts.org/articles/bathroom-battlegrounds-and-penis-panics/> [<https://perma.cc/5HUS-Q6HM>].

283. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 614 (4th Cir. 2020) ("The Board does not present any evidence that a transgender student, let alone Grimm, is likely to be a peeping tom, rather than minding their own business like any other student."), cert. denied, 141 S. Ct. 2878 (2021); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1313 (11th Cir.) ("[T]his record nowhere indicates that there has ever been any kind of 'exposure' in the bathrooms at Nease High School, which all contain separate stalls with doors that close and lock."), vacating and superseding 968 F.3d 1286 (11th Cir. 2020), vacated and reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.).

284. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1314 (M.D. Fla. 2018), aff'd, 968 F.3d 1286 (11th Cir. 2020), vacated and superseded, 3 F.4th 1299 (11th Cir. 2021), vacated and reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.).

based on medical information about their genitalia at birth, which is considered, often wrongly, a proxy for their current genitalia. Moreover, this is a misuse of private health information that is demeaning to dignity.

* * *

Thus, this Part has argued that behind the term “sex assigned at birth” is a set of important concepts that challenge regulatory projects that endeavor to exclude transgender people in the name of “biological sex.” Sex assigned at birth invokes the intertwined values of autonomy, equality, privacy, and dignity that are threatened by regulations that enforce different rules for people assigned male and people assigned female. The concept has been influential in illustrating the stakes of equal protection and statutory disputes over transgender rights, revealing that rules based on biological sex are not simply defaults dictated by science; rather, they are legal choices with significant costs in terms of important values.

It is important to note that the mere invocation of the term “sex assigned at birth” does not necessarily convey or clarify these important ideas;²⁸⁵ nor is there anything magical about that set of words in terms of persuasive power. Other terms, such as “sex designated at birth” or “birth-assigned gender,” might convey the same concept. The terminology around identity-based social movements is constantly evolving to reflect new generations of people, ideas, and challenges, and this Article’s project is not to engrave any specific term into the progressive bedrock. Rather, it argues that at present, the ideas behind the phrase “sex assigned at birth” have powerful force in displacing common-sense intuitions about the obviousness of sex as a simple, constant, and binary characteristic that can serve as an unproblematic basis for regulation. But that force is not always compelling.

III. REASONS FOR ASSIGNED SEX’S LIMITED LEGAL UPTAKE

Despite the theoretical promise of sex assigned at birth, it has fallen short of achieving the aim of displacing biological sex in legal disputes. Some judges may resist the idea due to simple lack of familiarity²⁸⁶—a problem that could resolve over time as they encounter more cases involving transgender rights issues. Others resist it because they are ideologically committed to a concept of “biological sex” that would not recognize

285. Indeed, some judicial decisions use the terms sex assigned at birth and biological sex interchangeably. See *supra* note 11 and accompanying text.

286. See Currah, *Sex Is as Sex Does*, *supra* note 3, at x–xi (describing the phenomenon of “gender disorientation”—how requiring people who are unfamiliar with transgender identity to grapple with the concept can leave them with “little cognitive capacity left” to deal with anything else); Lal Zimman, *Transgender Language Reform: Some Challenges and Strategies for Promoting Trans-Affirming, Gender-Inclusive Language*, 1 *J. Language & Discrimination* 84, 98–100 (2017) (explaining that “[t]o the uninitiated,” phrases such as assigned female at birth “can seem wordy, complex or even amusing”).

transgender women as women or transgender men as men.²⁸⁷ For example, one Fifth Circuit judge has gone so far as to use the phrase “biological pronouns”²⁸⁸ to justify the harmful practice of referring to a transgender child with pronouns that are inconsistent with that child’s gender identity.²⁸⁹ Pointing out that these ideologues misunderstand the science will not persuade them. As research on partisanship demonstrates, new factual information rarely dislodges entrenched views on controversial issues.²⁹⁰ Ideological opponents of transgender rights acknowledge intersex variations, for example, but dispute that the exception undermines the rule of sexual dimorphism²⁹¹ or that transgender people have intersex variations.²⁹²

287. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1758, 1778–83 (2020) (Alito, J., dissenting) (assuming that “biological sex” refers only to the “genes and organs” an individual is “born with,” rather than their gender identity, in arguing that *Bostock*’s holding was “radical,” and would result in numerous harmful consequences, most all of which were with respect to transgender rights); *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part) (“Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females.”), vacated and remanded, 137 S. Ct. 1239 (2017) (mem).

288. *Oliver v. Arnold*, 19 F.4th 843, 844 (5th Cir. 2021) (Ho, J., concurring) (offering, as an example of unconstitutional “indoctrination,” a public school in which some teachers “forbid students from using biological pronouns and other terms that ‘invalidate’ a person’s gender identity—notwithstanding the widely-held view that biological pronouns invalidate no one, but are dictated by science, faith, grammar, or tradition”).

289. For a discussion of how misgendering can be a component of sex-based harassment, see *Clarke, They, Them, and Theirs*, supra note 21, at 957–63.

290. See, e.g., P. Sol Hart & Erik C. Nisbet, *Boomerang Effects in Science Communication: How Motivated Reasoning and Identity Cues Amplify Opinion Polarization About Climate Mitigation Policies*, 39 *Comm’n Rsch.* 701, 704–05, 715 (2012) (offering empirical support for a “boomerang effect” in which informing people about scientific facts about climate change that counter their partisan views on the issue only reinforces those partisan views).

291. For example, the sponsor of Texas’s H.B. 25, which defines “sex” based on original birth certificate designations for purposes of sports, dismissed arguments about intersex variations based on the assertion that those variations occur in only “0.0002% of the population and most of those work themselves out naturally[,] . . . [as] one set of the sex organs will dominate and the other one will not. They cannot coexist.” Hearing before H. Select Comm. on Constitutional Rights & Remedies, at 29:43–30:02 (Tex. 2021) (testimony of Rep. Valoree Swanson), https://tlchouse.granicus.com/MediaPlayer.php?view_id=46&clip_id=22585 (on file with the *Columbia Law Review*); see also Kathleen Stock, *Changing the Concept of “Woman” Will Cause Unintended Harms*, *Economist* (July 6, 2018), <https://www.economist.com/open-future/2018/07/06/changing-the-concept-of-woman-will-cause-unintended-harms> (on file with the *Columbia Law Review*) (“That intersex people exist doesn’t seriously threaten [the] category [woman], since most categories have statistical outliers.”).

292. Colin Wright, *Is Sex ‘Assigned’ at Birth?, Reality’s Last Stand* (Dec. 17, 2020), <https://colinwright.substack.com/p/is-sex-assigned-at-birth> [<https://perma.cc/R7XD-RQ57>]

But even jurists willing to rule in favor of transgender litigants have been reluctant to abandon the idea of biological sex. Although the Supreme Court ruled in favor of transgender litigant Aimee Stephens in *Bostock*, that case assumed for the sake of argument that the term “sex” referred to “biological distinctions.”²⁹³ Courts ruling in favor of restroom policies that are inclusive of transgender students are inconsistent in their uses of the concepts of biological and assigned sex.²⁹⁴ *Hecox v. Little*, in which a district court preliminarily enjoined Idaho from enforcing a law that would have excluded transgender girls and women from girls’ and women’s sports, also eschewed assigned sex terminology, instead adopting a definition of sex based on “anatomical and physiological processes.”²⁹⁵

This Part explains that the limited judicial adoption of assigned sex may be a result of two dynamics: entrenched views about the distinction between sex and gender and practical concerns about the open-ended nature of gender identity.

A. *Persistence of the Sex/Gender Dualism*

One reason courts inconsistently employ the concept of assigned sex may be that the distinction between biological sex and social gender is so entrenched. The sex/gender distinction has long been deployed by feminists seeking to refute the argument that women are subordinate by nature. That dichotomy is now so familiar that judges may map it onto the assigned sex/gender identity one, even though there are critical differences between assigned sex and biological sex and between gender identity and gender roles. Opponents of transgender rights have seized on the sex/gender distinction to take advantage of these confluences.²⁹⁶

The biological sex/social gender distinction is a stickily persistent idea. One reason is that it is a mainstay of feminist theory.²⁹⁷ Women’s second-class legal status has historically been justified by the argument that women are, by nature of their reproductive biology, different from men,

(“The vast majority of transgender people, however, *are not intersex* and their sex has been recorded correctly at birth.”).

293. See *supra* note 9 and accompanying text. The court’s reasoning did not turn on whether sex was defined as biological or assigned.

294. See *supra* note 11 and accompanying text.

295. 479 F. Supp. 3d 930, 945 (D. Idaho 2020) (adopting a definition of “sex” as “the anatomical and physiological processes that lead to or denote male or female” and using the language “determined at birth” rather than “assigned”), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020).

296. See, e.g., Plaintiffs’ Response in Opposition to Motion to Dismiss at 13, *Soule ex rel. Stanescu v. Conn. Ass’n of Schs.*, No. 3:20-CV-00201 (D. Conn. Sept. 11, 2020), 2020 WL 6580269 (asserting that the difference between sex and gender identity justifies the exclusion of transgender girls from girls’ sports).

297. But see Gill-Peterson, *supra* note 56, at 99 (arguing that the concept of gender is often misattributed to feminists, when it was first developed as part of a socially conservative project looking to shore up the notion of binary sex in the face of medical evidence that human biology was not binary).

with temperaments and abilities that befit them for roles in the “domestic sphere” as wives and mothers, not the public sphere of work and government.²⁹⁸ To rebut this line of thinking, midcentury feminists argued that the psychological and behavioral traits associated with women are not the results of biology but rather of cultural conditioning and discrimination.²⁹⁹ In the 1970s, feminists borrowed the term “gender” from the work of psychoanalysts on intersex variations and transgender identity.³⁰⁰ They employed that term to distinguish the social (“gender”) from the biological (“sex”), and to argue that women’s subordination is not the inevitable result of biology; rather, it is a political decision.³⁰¹

This line of feminist thinking takes for granted that “sex” means the raw materials of nature.³⁰² Its premise is that while nature may be unchangeable, gendered social norms are amenable to political contestation. The idea of gendered social norms easily slips into the idea of gender *identity*—the way an individual identifies themselves with the social categories of man or woman.³⁰³ This is even though, as transgender rights advocate

298. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (upholding Illinois’s refusal to give a license to practice law to a woman because “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life”).

299. See, e.g., Mari Mikkola, Stanford Encyclopedia of Phil., *Feminist Perspectives on Sex and Gender* (Edward N. Zalta & Uri Nodelman eds., 2022), <https://plato.stanford.edu/archives/sum2022/entries/feminism-gender/> [<https://perma.cc/22PM-4HB5>].

300. See *supra* note 81 and accompanying text (discussing psychoanalyst Robert Stoller’s use of the term “gender”).

301. See, e.g., Ann Oakley, *Sex, Gender, and Society* 204 (1972) (differentiating sex from gender and analogizing gender to caste); Donna J. Haraway, ‘Gender’ for a Marxist Dictionary: The Sexual Politics of a Word, *in Culture, Society, and Sexuality: A Reader* 82, 85 (Richard Parker & Peter Aggleton eds., 2d ed. 2006) (explaining that the purpose of the concept of gender was “to contest the naturalization of sexual difference in multiple arenas of struggle”); Rubin, *supra* note 222, at 158–59 (discussing, in 1975, the “sex/gender system”: the “systematic social apparatus which takes up females as raw materials and fashions domesticated women as products”).

302. Competing strands of feminist theory call for interrogation of how not just gender but also what we mean by sex is constructed. See, e.g., Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* 10 (1991) (questioning the idea of sex as “given”); Suzanne Kessler & Wendy McKenna, *Gender: An Ethnomethodological Approach*, at xi (1978) (reviewing scientific work on sex and gender and arguing “that the constitutive belief that there are two genders not only produces the idea of gender role, but also creates a sense that there is a physical dichotomy”); Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *Signs* 635, 635 n.1 (1983) (“Since I believe sexuality is fundamental to gender and fundamentally social, and that biology is its social meaning in the system of sex inequality, which is a social and political system that does not rest independently on biological differences in any respect, the sex/gender distinction looks like a nature/culture distinction.”).

303. See, e.g., Wendy Wood & Alice H. Eagly, *Two Traditions of Research on Gender Identity*, 73 *Sex Roles* 461, 461 (2015) (“Gender consists of the meanings ascribed to male and female social categories within a culture. When people incorporate these cultural meanings into their own psyches, then gender becomes part of their identities.”).

Jennifer Levi puts it, the experience of inhabiting a gender identity may not feel constructed or contingent to many individuals³⁰⁴ and may not be changeable through any course of treatment or deliberate process.³⁰⁵

Another reason the sex/gender distinction persists is that it parallels other ingrained dualisms, like nature versus nurture or genetics versus environment. The distinction between biological sex and gender identity derives persuasiveness from the Cartesian dualism between body and mind³⁰⁶ that strikes many people as common sense.³⁰⁷ Even transgender rights advocates have, at various times, employed this distinction, arguing that “sex is between the legs, and gender is between the ears,”³⁰⁸ or that being a transgender woman is like being “a woman trapped inside the body of a man.”³⁰⁹ Opponents of transgender rights take advantage of these slippages between dualistic concepts to support their arguments.³¹⁰ To avoid this problem, advocates of feminist and LGBTQ causes might take care to avoid dualistic dogma about the distinction between sex and gender and to be more precise when discussing specific concepts related to those ideas.³¹¹

B. *Objections to Gender Identity Rules*

Dualistic thinking, however, is not the only reason for resistance to sex assigned at birth. The concept of sex assigned at birth illuminates the harms of rules that purport to divide people on the basis of biological sex, in terms of infringements on autonomy, equality, privacy, and dignity. But

304. Jennifer Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 *Colum. J. Gender & L.* 90, 112 (2006) (“[E]ven though lives are given meaning and structured by social norms that are contingent, the fact still remains that for any given individual, the experience of inhabiting those norms feels, and in some sense is, non-contingent.”).

305. See Am. Psych. Ass’n, *APA Resolution on Gender Identity Change Efforts 4* (2021), <https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf> [<https://perma.cc/5U63-U9BP>] (opposing gender identity change efforts on grounds including the absence of evidence demonstrating “that gender identity can be changed through treatment”).

306. Haraway, *supra* note 301, at 85 (discussing how the sex versus gender distinction parallels the one between nature and society).

307. See, e.g., Paul Bloom, *Religion Is Natural*, 10 *Developmental Sci.* 147, 149 (2007) (discussing “common sense” understandings of mind/body dualism “of the sort defended by philosophers like Plato and Descartes,” and research showing even young children subscribe to the “notion that consciousness is separable from the body”).

308. Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 *Temp. Pol. & C.R. L. Rev.* 573, 608 (2009) (criticizing this idea).

309. *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 268 (Sup. Ct. 1977) (quoting plaintiff Renee Richards).

310. See *supra* note 296 and accompanying text.

311. Cf. Clarke, *They, Them, and Theirs*, *supra* note 21, at 933–45 (arguing in favor of specific and contextual definitions of sex and gender concepts that are tailored to serve the interests at stake, to the extent that definitions are required).

it does not offer complete answers to the questions asked by sex discrimination law, such as, in the equal protection context, whether important state interests might nonetheless justify some sex distinctions,³¹² and in the Title IX context, how school administrators should determine sex for purposes of enforcing permissible distinctions between men's and women's restrooms and sports.³¹³ Another explanation for the resistance to the idea that assigned sex is not synonymous with biological sex is the worry that, without biological sex, legal rules will have to turn on gender identity, with unfortunate practical consequences and at the cost of other important values.

Opponents of transgender rights contend that the subjective nature of gender identity renders it too unstable to serve as a basis for sorting individuals into sex-segregated spaces and activities.³¹⁴ They raise concerns that definitions based on gender identity will invite fraud, allow inconsistent identifications, and dilute opportunities for cisgender women. For these reasons, even jurists who do not oppose transgender rights across the board may be wary of abandoning biological sex or some partial proxy for that status, such as an original birth certificate.

Defendants in restroom cases often claim that rules based on gender identity would mean "any person could demand access to any school facility or program based solely on a self-declaration of gender identity or confusion."³¹⁵ They argue that without objective standards for who counts as male or female, law enforcement could not prosecute cisgender men who enter women's facilities for purposes of voyeurism or disruption.³¹⁶ In

312. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that to survive intermediate scrutiny, a "State must show 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'" and "the reviewing court must determine whether the proffered justification is 'exceedingly persuasive'" (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

313. 34 C.F.R. § 106.33 (2021) ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."); *id.* § 106.41 (permitting "separate teams for members of each sex" for sports under certain conditions).

314. See, e.g., Jo Wuest, *The Scientific Gaze in American Transgender Politics: Contesting the Meanings of Sex, Gender, and Gender Identity in the Bathroom Rights Cases*, 15 *Pol. & Gender* 336, 351 (2019) (discussing "a conservative strategy that refers to gender identity as 'fuzzy and mercurial' and without stable meaning").

315. *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014); see also *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 599 (4th Cir. 2020) (discussing the concern that "allowing transgender students to use the bathroom matching their gender identity would open the door to predatory behavior, particularly by male students pretending to be transgender in order to use the girls bathroom"), cert. denied, 141 S. Ct. 2878 (2021); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017) (discussing the defendant's argument that a policy relying on gender identity to determine restroom usage would allow the plaintiff to "'unilaterally declare' his gender").

316. See, e.g., Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 *Harv. J.L. & Pub. Pol'y* 309, 335 (2018) [hereinafter Anderson, *Brave New World of Transgender*].

the school context, some “fear[] any student might be able to gain access to any bathroom facility by identifying or pretending to identify as ‘gender-fluid.’”³¹⁷ With respect to sports, they claim that “because the definition of ‘transgender’ is both subjective and capacious, the true potential for female displacement by [transgender athletes] is unknown, and cannot be dismissed as insubstantial.”³¹⁸ Casting gender identity as fantasy, the sponsor of an Arkansas Senate bill barring transgender girls from girls’ sports argued that she “would love to identify as a 110 pound, 6’4” blond supermodel,” but rules of eligibility had to be set without regard for “identity and what your feelings are.”³¹⁹ Even judges reaching rulings in favor of transgender rights may be wary of the connotations of the term “gender identity.” In *Childers-Gray*, the Utah Supreme Court eschewed the term “gender identity” and instead referred to the transgender plaintiffs’ “adopted sex,” a phrase that invokes the idea of “adopted” children, legitimate in the eyes of the law.³²⁰

Regulators might respond to the difficulties of determining “biological sex” on a case-by-case basis³²¹ by adopting rules that determine sex based on the original birth certificate³²² or original school enrollment records.³²³ During the Trump Administration, the Department of Health and Human Services proposed a definition of sex “as either male or

Policy] (arguing that “objective definitions and standards” for determining who is a man and who is a woman are required for law enforcement purposes).

317. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1294 (11th Cir. 2020), vacated and superseded, 3 F.4th 1299 (11th Cir. 2021), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); see also *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 386 (E.D. Pa. 2017), aff’d, 897 F.3d 518 (3d Cir. 2018) (discussing concerns about “gender fluidity, gender nonconformity, or other gender identity issues that fall along the spectrum”).

318. Brief of Amicus Curiae Women’s Liberation Front in Support of Appellants and Reversal at 16, *Hecox v. Little*, Nos. 20-35813, 20-35815 (9th Cir. filed Nov. 19, 2020).

319. Senate Chamber Debate, 2021 Leg., 93rd Sess., at 2:21:00–2:21:40 (Ark. 2021), (statement of Sen. Missy Irvin), https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/21311#handoutFile_ (on file with the *Columbia Law Review*).

320. *In re Sex Change of Childers-Gray*, 487 P.3d 96, 120 (Utah 2021) (“[W]e are not convinced that a standard of ‘biological sex’ would preclude the adopted sex of transgender individuals.”).

321. See, e.g., *Hecox v. Little*, 479 F. Supp. 3d 930, 985–87 (D. Idaho 2020) (holding that an Idaho law defining “sex” as biological for purposes of women’s athletics was likely to violate the Equal Protection Clause because it potentially subjected all women athletes to invasive medical sex-verification procedures), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020).

322. See *supra* note 146.

323. But see *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1310 (11th Cir. 2021) (concluding that this rule was impermissibly arbitrary because “[t]he designation of a student’s sex on his school enrollment documents is not a ‘legitimate, accurate proxy’ for assigning a student to a particular bathroom to protect student privacy”), vacating and superseding 968 F.3d 1286 (11th Cir. 2020), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.).

female, unchangeable, and determined by the genitals that a person is born with,” because government agencies required a definition “that is clear, grounded in science, objective and administrable.”³²⁴

While such rules may not perfectly prevent, for example, people with penises from entering women’s restrooms, some courts conclude they are reasonable enough proxies.³²⁵ Florida, Iowa, Kentucky, South Carolina, South Dakota, Tennessee, and Texas have excluded transgender girls from girls’ sports by defining who may participate based on the designation on an athlete’s original birth certificate.³²⁶ Similar rules have been proposed at the federal level.³²⁷ During debates over the Tennessee law, its sponsor asserted, without citing any evidence or other support, that even a transgender girl who had taken puberty-blocking medications would have athletic advantages in terms of bone, muscle, and ligament structure, and the Tennessee legislature assumed that the sex on her birth certificate was a proxy for these advantages.³²⁸

324. Erica L. Green, Katie Benner & Robert Pear, ‘Transgender’ Could Be Defined Out of Existence Under Trump Administration, N.Y. Times (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> (on file with the *Columbia Law Review*). Echoing this concern, in one restroom case, a defendant argued that a policy that segregated people for restroom purposes based on birth certificate designations was superior to one that used “biological gender,” because a birth certificate test is “a simple, objective criterion.” *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 638 (M.D.N.C. 2016).

325. *Carcaño*, 203 F. Supp. 3d at 645 (“[P]hysiological differences between men and women give rise to the privacy interests that justify segregating bathrooms, showers, and other similar facilities on the basis of sex. In addition, Plaintiffs admit that the vast majority of birth certificates accurately reflect an individual’s external genitalia.”); see also *Adams*, 3 F.4th at 1323–25 (Pryor, C.J., dissenting) (arguing that the sex reported on original school enrollment documents is an adequate metric of “biological reality” despite the “possibility of evasion”).

326. See *supra* note 146. Arkansas, Indiana, Utah, and West Virginia determine sex based on attributes such as genetics and anatomy “at birth,” which would presumably be demonstrated with an original birth certificate. *Id.*

327. Protect Women’s Sports Act of 2020, H.R. 8932, 116th Cong. (proposing an amendment to Title IX to clarify that the statute prohibits federally funded educational programs from “permit[ting] a person whose biological sex at birth is male to participate in an athletic program or activity that is designated for women or girls”); U.S. Dep’t of Educ., Revised Letter of Impending Enforcement Action 35 (Aug. 31, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf> [<https://perma.cc/UDX4-VZCS>] (taking the position that regulations under Title IX “authorize single-sex teams based only on biological sex at birth—male or female—as opposed to a person’s gender identity”).

328. Hearing on HB0003 Before the H. K-12 Subcomm. of the H. Educ. Admin. Comm., 2021 Leg., 112th Sess., at 39:00–39:49 (Tenn. 2021) (statement of Rep. Scott Cepicky, Member, H. K-12 Subcomm.), https://tnga.granicus.com/MediaPlayer.php?view_id=610&clip_id=23848 (on file with the *Columbia Law Review*). Research on this topic is “limited.” Timothy A. Roberts, Joshua Smalley & Dale Ahrendt, Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organisations and Legislators, 55 *Brit. J. Sports Med.* 577, 577 (2020). Two oft-cited recent

Thus, resistance to the idea that sex is assigned rather than objectively determined at birth may stem from concerns about the potential consequences of rules that rely on gender identity. Strategies in addition to new concepts to explain sex and gender are necessary to respond to these concerns.

IV. BEYOND SEX ASSIGNED AT BIRTH

Despite the Supreme Court's hard pivot to the right, transgender rights advocates have won a number of notable recent victories in U.S. courts in cases challenging rules that exclude transgender individuals based on biological sex. On the issue of whether the Equal Protection Clause or Title IX requires that transgender schoolchildren be permitted to use restrooms or changing facilities consistent with their gender identities, every federal court to consider the merits in the past five years has found in favor of the transgender plaintiffs.³²⁹ With respect to state laws

studies suggesting that transgender women have advantages did not involve youth or puberty blockers. See *id.* at 577 (comparing pre- and post-hormone fitness test results of forty-six transgender women in the Air Force with an average age of 26.2); Anna Wiik et al., *Muscle Strength, Size, and Composition Following 12 Months of Gender-Affirming Treatment in Transgender Individuals*, 105 *J. Clinical Endocrinology & Metabolism* e805, at e806 (2020) (studying the effects of hormone treatment on eleven transgender women aged "27 +/- 4"). For a recent summary of this research, see Joanna Harper, *Transgender Athletes and International Sports Policy*, 85 *Law & Contemp. Probs.* 151, 155–58 (2022).

329. See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020) (affirming summary judgment in favor of a transgender schoolchild on equal protection and Title IX claims), cert. denied, 141 S. Ct. 2878 (2021); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044–50 (7th Cir. 2017) (affirming grant of preliminary injunctive relief to a transgender schoolchild and concluding he was likely to succeed on the merits of his equal protection and Title IX claims); *B.E. v. Vigo Cnty. Sch. Corp.*, No. 2:21-CV-00415-JRS-MG, 2022 WL 2291763, at *1 (S.D. Ind. June 24, 2022) (granting a motion for a preliminary injunction and holding that transgender students were likely to succeed on the merits of their Title IX claims), appeal docketed, No. 22-2318 (7th Cir. July 26, 2022); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, No. 1:21-cv-02965-TWP-MPB, 2022 WL 1289352, at *1, *6 (S.D. Ind. Apr. 29, 2022) (granting a motion for a preliminary injunction and holding that a transgender schoolchild was likely to succeed on the merits of his equal protection and Title IX claims); *A.H. ex rel. Handling v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536, 570–73, 578 (M.D. Pa. 2019) (granting partial summary judgment to a transgender schoolchild on her equal protection and Title IX claims); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 841, 843 (S.D. Ind. 2019) (granting summary judgment to a transgender schoolchild on his equal protection and Title IX claims); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 726 (D. Md. 2018) (denying a school district's motion to dismiss a transgender schoolchild's equal protection and Title IX claims); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 273–74 (W.D. Pa. 2017) (granting a motion for a preliminary injunction in favor of transgender schoolchildren and finding a likelihood of success on the merits of their equal protection claims). But see *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 9 F.4th 1369, 1372 (11th Cir. 2021) (mem.) (vacating and granting en banc review of a panel decision holding that exclusion of a transgender boy from the boys' restroom violated the Equal Protection Clause), vacating and granting reh'g en banc, 3 F.4th 1299 (11th Cir. 2021).

barring transgender girls and women from girls' and women's sports, there have been only three court decisions to date, and, in all three, district courts granted preliminary injunctions, concluding that the challengers were likely to prevail on their equal protection or Title IX claims.³³⁰ For similar reasons, courts have granted preliminary injunctions against both of the two state laws limiting gender-affirming health care for transgender minors, and one of those decisions has been affirmed on appeal.³³¹

In these cases, sex assigned at birth is an important concept that clarifies the stakes of the controversy, but it cannot necessarily resolve these controversies, which often involve conflicting values and practical concerns. This Part discusses how advocates in recent transgender rights controversies have gone beyond explaining how sex is assigned at birth to win cases. It warns against one specific strategy: convincing judges that biological sex should be determined based on an individual's gender identity as confirmed by medical professionals and accepted by their community. While this strategy has had significant successes,³³² it has inherent limits: It only works for those members of the transgender community who can demonstrate the bona fides of their gender identities to medical experts and their communities. Debates over the most scientifically accurate way to determine who is male and who is female do not answer practical and moral questions, such as why we classify people in this way to begin with and who suffers when we do.³³³ In addition to advancing the concept of

Two circuits have rejected challenges to transinclusive school restroom policies from cisgender students alleging infringements on their rights to privacy and other violations of constitutional and statutory rights. See *Parents for Priv. v. Barr*, 949 F.3d 1210, 1240 (9th Cir. 2020) (affirming grant of motion to dismiss); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018) (affirming denial of preliminary injunction).

330. *A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *1 (S.D. Ind. July 26, 2022), appeal docketed, No. 22-2232 (7th Cir. July 27, 2022) (Title IX); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 351 (S.D. W. Va. 2021) (equal protection); *Hecox v. Little*, 479 F. Supp. 3d 930, 989 (D. Idaho 2020) (equal protection), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020). A high-profile Connecticut case brought by cisgender high school track athletes alleging they were put at an unfair disadvantage by having to race against transgender girls was dismissed as moot by the district court after the transgender athletes in question graduated. *Soule ex rel. Stanescu v. Conn. Ass'n of Schs.*, No. 3:20-CV-00201, 2021 WL 1617206, at *5 (D. Conn. Apr. 25, 2021), appeal docketed, No. 21-1365 (2d Cir. May 26, 2021).

331. See *Eckes-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 2022 WL 1521889, at *1 (M.D. Ala. May 13, 2022), appeal docketed, No. 22-11707 (11th Cir. May 18, 2022); *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 892 (E.D. Ark. 2021), *aff'd*, 2022 WL 3652745, 47 F. 4th 661 (8th Cir. Aug. 25, 2022).

332. See *infra* notes 339–346 and accompanying text (discussing the role of this strategy in litigation over restroom policies).

333. Cf. Cruz, *Getting Sex “Right”*, *supra* note 91, at 217 (arguing for appeals to “political judgments,” rather than to the “natural or to ‘the facts’ of sex (as proclaimed by medical practitioners)"); Robin Dembroff, *Real Talk on the Metaphysics of Gender*, 46 *Phil. Topics* 21, 26 (2018) (arguing that metaphysical debates over whether someone really is a man, a woman, or nonbinary in the abstract do not settle important moral questions about

sex assigned at birth, recent cases demonstrate that transgender rights advocates can prevail in court by addressing practical concerns with respect to rules that divide people based on sex, by telling stories that elicit empathy for plaintiffs and by making arguments that speak directly to the values at stake in particular controversies.³³⁴

A. *The Gender Identity Essentialism Trap*

One pitfall in recent litigation is what this Article will refer to as “gender identity essentialism”: the idea that an individual’s sex, for legal purposes, is that individual’s immutable, binary, medically verified, and socially accepted gender identity.³³⁵ In other words, that the law should treat a transgender boy, for example, as a boy if he consistently lives his life according to traditional expectations for boys and if doctors and his community accept him as a boy. As this section will demonstrate, many recent restroom cases go to lengths to emphasize that the particular transgender plaintiffs lived all aspects of their lives consistent with their gender identities as boys or girls; that they had undergone hormone therapy or other

whether practices of gender classification operate to unjustly and oppressively marginalize and exclude).

334. *Infra* sections IV.B–C. A distinct concern is that sex assigned at birth necessarily harkens back to an individual’s pretransition status. A concept of biological sex that is expansive enough to encompass gender identity and changes to the body through medical interventions does not have this disadvantage. I am grateful to Ezra Young for this point, although section IV.A of this Article argues that progressive arguments from biology should be approached with caution. In a better world, perhaps we would not need a concept like assigned sex. I have advocated for policy changes that would treat birth certificate sex assignments as private health information. Shteyler et al., *supra* note 249, at 2399. But at present, the legal definition of transgender identity, which supplies the basis for many non-discrimination rules, relies on the idea that individuals have some sort of pre- and post-transition status. See *supra* note 132 and accompanying text.

335. I don’t mean to be essentialist about essentialism. There are many variations of essentialist arguments about identities. See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument From Immutability*, 46 *Stan. L. Rev.* 503, 547–50 (1994) (outlining different varieties of essentialist arguments in the sexual orientation context). Here I refer to a specific form of essentialist argument that has taken place in restroom litigation and envisions sex as gender identity, both a natural essence—caused by biology and verified by medical professionals—and a culturally constructed one—enacted by the individual who lives their life as a boy or girl and is recognized by their community as such.

A related concept is “transnormativity,” a term meant to criticize the ways some transgender identities are privileged as the norm and others are disregarded or subordinated. See Austin H. Johnson, *Transnormativity: A New Concept and Its Validation Through Documentary Film About Transgender Men*, 86 *Socio. Inquiry* 455, 465–66 (2016) (defining “transnormativity” “as the specific ideological accountability structure to which transgender people’s presentations and experiences of gender are held accountable” and criticizing the “hegemonic ideology that structures transgender experience, identification, and narratives into a hierarchy of legitimacy that is dependent upon a binary medical model and its accompanying standards”). This Article does not employ the term “transnormativity” because the conception of gender identity advanced by these cases is not just about transgender people; it is about the essential and universal meaning of sex.

medical treatments; that medical professionals confirmed their gender identities; that their communities accepted them as the boys or girls they are; and that gender identity is an immutable trait.

This section will explain why gender identity essentialism appears to have strategic utility in litigation, but it argues this move is not consistent with the initial goals behind the shift to the term “sex assigned at birth.”³³⁶ The initial goals of assigning terms were to displace the concept of biological sex, to provide a more expansive definition of who falls under the transgender umbrella, and to liberate individuals to define their own personalities and life paths without birth-assigned constraints.³³⁷ But rather than expanding the scope of individual autonomy with respect to gender, courts employing gender identity essentialism adopt a narrow view of gender identity as confined to traditional understandings of what it means to live one’s life as a man or woman. This approach is unlikely to work for those individuals without the resources to access medical assistance, without the advantages that might enable them to secure community support, or whose lives just don’t fit the scripts.³³⁸

Many recent restroom cases turn on gender identity essentialism. These cases begin with a critique of sex assigned at birth, castigating schools for defining biological sex in a way that “reduces [transgender students] ‘to nothing more than the sum of [their] external genitalia at birth,’ to the exclusion of all other characteristics.”³³⁹ Then they pivot to

336. This Article is by no means the first work of legal scholarship to issue criticism in this vein. See Scott Skinner-Thompson, *Identity by Committee*, 57 Harv. C.R.-C.L. L. Rev. (forthcoming 2022) (manuscript at 1–2), <https://ssrn.com/abstract=4045721> [<https://perma.cc/93QM-VH7K>] (criticizing school district processes for verifying a transgender students’ gender identity); see also Currah, *Gender Pluralisms*, supra note 116, at 7–13 (school dress code litigation); Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 Wis. L. Rev. 503, 579–85 (social movement tactics); Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. Pa. L. Rev. 757, 769 & n.56 (2013) (Title VII dress code litigation); Noa Ben-Asher, *Paradoxes of Health and Equality: When a Boy Becomes a Girl*, 16 Yale J.L. & Feminism 275, 287–90, 305 (2004) (child custody case); Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 Berkeley Women’s L.J. 15, 17–18 (2003) [hereinafter Spade, *Resisting Medicine*] (transgender rights advocacy generally).

337. See supra notes 116–122 and accompanying text.

338. This risk should not be overstated; it is highly dependent on the legal context. See, e.g., David B. Cruz, *Acknowledging the Gender in Anti-Transgender Discrimination*, 32 Law & Ineq. 257, 277–78 (2014) (explaining that the “actual rule courts have articulated” for standard Title VII claims does not require that plaintiffs fit a certain essentialist gender-identity mold).

339. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1310 (11th Cir. 2020) (quoting Supplemental Brief of Appellee at 11, *Adams*, 968 F.3d 1286 (No. 18-13592)), vacated and superseded, 3 F.4th 1299 (11th Cir. 2021), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); see also *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 524 (3d Cir. 2018) (quoting an expert as saying that “forcing transgender students to use facilities that are not aligned with their gender identities . . . is ‘society reducing them to their genitals’”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 273 n.3 (W.D. Pa. 2017) (expressing skepticism of the school district’s use of the term

gender identity essentialism. A good example is *Adams v. School Board of St. Johns County*, in which the Eleventh Circuit noted that the plaintiff “is transgender, meaning when he was born, doctors assessed his sex and wrote ‘female’ on his birth certificate, but today Mr. Adams knows ‘with every fiber of [his] being’ that he is a boy.”³⁴⁰ The original opinion faulted the dissent for “ignor[ing] the finding of the District Court that, in light of Mr. Adams’s social, medical, and legal gender transition, he is ‘like any other boy.’”³⁴¹ It went into detail about the various medical procedures that Adams had undergone so as to have a “masculine physiology.”³⁴² It criticized the school board for enforcing a gender stereotype that “labeled Mr. Adams as a ‘girl’ for purposes of his bathroom use, based solely on his sex assigned at birth.”³⁴³ But the problem was not that this stereotype infringed on Adams’s autonomy to decide his own life course. Rather, the problem was that the label was incorrect: “This label gives no regard to the fact that . . . Mr. Adams lives and presents as a boy and has been declared a boy by his family, the State of Florida, the federal government, and his medical providers.”³⁴⁴ The Eleventh Circuit ultimately vacated its original opinion, cutting back on its analysis of Adams’s gender identity but nonetheless concluding that the school district’s policy was arbitrary because Adams was essentially a boy.³⁴⁵ Other cases seem to suggest that the more a transgender girl, for example, adheres to feminine stereotypes and is accepted as a girl, the more she is a girl. In *Evancho v. Pine-Richland*, the

“assigned sex” to refer to “external sex organs” because the court was “reluctant to use any descriptive term that can have the unintended effect of reducing any person on any side of any case to a label”).

340. 968 F.3d at 1291.

341. *Id.* at 1293 n.2 (quoting *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1297 (M.D. Fla. 2018)).

342. *Id.* at 1301.

343. *Id.* at 1302.

344. *Id.*; see also *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) (advancing a similar argument), cert. denied, 141 S. Ct. 2878 (2021); *id.* at 594 (emphasizing that gender identity “is natural and is not a choice”). But see *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, No. 1:21-cv-02965-TWP-MPB, 2022 WL 1289352, at *6 (S.D. Ind. Apr. 29, 2022) (holding that a thirteen-year-old transgender boy was likely to succeed on the merits of his claim that his school had discriminated against him by refusing to let him use the boy’s restroom, even though he was not taking hormones and had not changed the gender marker on his birth certificate).

345. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1312–13 (11th Cir. 2021) (“[A]s a court of law, we cannot simply ignore the legal definition of sex the state has already provided us, as reflected in the official documentation of Mr. Adams’s sex as male on his driver’s license and birth certificate.”), vacating and superseding 9668 F.3d 1286 (11th Cir. 2020), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); *id.* at 1312 (noting that there is “no evidence to suggest that [Adams’s] identity as a boy is any less consistent, persistent and insistent than any other boy” (alteration in original) (quoting *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1317 (M.D. Fla. 2018))).

district court noted the plaintiffs sought to attend school “in about as unexceptional a way as is possible” and that one transgender girl was a finalist for Homecoming Queen.³⁴⁶

Courts turn to gender identity essentialism for two strategic reasons: to refute pragmatic slippery slope arguments about transgender inclusion, and to support the claim that transgender identity deserves constitutional protection because it is immutable. Gender identity essentialism is useful to courts in responding to practical objections to transgender inclusion, such as concerns about fraudulent assertions of gender identity. The fact that a plaintiff’s gender identity is binary, stable, immutable, and medically and socially accepted provides an easy way to distinguish them from someone who might pretend to be transgender to engage in predatory behavior in restrooms. It would be absurd to imagine an “imposter” might undertake all the effort of transitioning socially and seeking medical care just to engage in illegal conduct.³⁴⁷ Gender identity essentialism also invokes the theory of immutability—that special constitutional protection should attach to those traits an individual cannot change.³⁴⁸ Indeed, evidence that gender identity is immutable rather than a choice has sometimes been a factor that supports the conclusion that heightened constitutional scrutiny applies.³⁴⁹

But essentialist arguments about gender identity could make future challenges to sex-based rules more difficult for any plaintiff a judge does not see as “like any other boy” or girl.³⁵⁰ In the largest survey of

346. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 276 (W.D. Pa. 2017).

347. See, e.g., *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018) (“A case involving transgender students using facilities aligned with their gender identities after seeking and receiving approval from trained school counselors and administrators implicates different privacy concerns than, for example, a case involving an adult stranger sneaking into a locker room to watch a fourteen year-old girl shower.”); *Evancho*, 237 F. Supp. 3d at 291 n.39 (explaining that the plaintiffs had engaged in “an extensive social and medical undertaking” to live their lives according to their gender identities and be accepted in their communities, and for an “imposter” to do the same “would . . . be a really big price to pay in order to engage in intentionally wrongful conduct that is unlawful under state law and contrary to the District’s stated expectations as to student conduct”).

348. E.g., Jessica A. Clarke, *Against Immutability*, 125 Yale L.J. 2, 4 (2015) [hereinafter Clarke, *Against Immutability*].

349. See Halley, *supra* note 335, at 507–16. The Supreme Court considers whether a class “exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group” as one factor indicating that class-based distinctions must be carefully scrutinized under the Equal Protection Clause. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Some cases have held that transgender people are a quasi-suspect class because “gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice.” *Grimm*, 972 F.3d at 612; see also *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 720–21 (D. Md. 2018) (collecting district court cases concluding “transgender status is immutable”).

350. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1293 n.2 (11th Cir. 2020), vacated and superseded, 3 F.4th 1299 (11th Cir. 2021), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.).

transgender people to date, over one-third identified as nonbinary.³⁵¹ Twenty percent of nonbinary individuals describe their identities as “gender fluid” or “fluid.”³⁵² These individuals “might experience their gender[s] differently at different times.”³⁵³ The logic of immutability may fail for this group. Even though fluidity may be immutable in the sense that it is involuntary,³⁵⁴ the very concept of fluidity may strike some jurists as opposed to immutability.

It is not clear how the recent restroom cases pertain to nonbinary students.³⁵⁵ For these students, all-gender restrooms that provide privacy for each individual stall may be the best solution,³⁵⁶ yet the integration of transgender people with exclusively male or female gender identities into sex-segregated facilities and institutions might relieve pressure to build all-gender ones. The Seventh Circuit pointed out, approvingly, that school “administrators have found that allowing transgender students to use facilities that align with their gender identity has actually reinforced the concept of separate facilities for boys and girls.”³⁵⁷ More generally, protections that are premised on the right to be treated consistently with one’s gender identity as a man or a woman do not necessarily extend to gender nonconformers who behave in ways that are inconsistent with their gender identities, such as cisgender women who object to requirements that they wear makeup or dresses.³⁵⁸

351. James et al., *supra* note 44, at 18, 45; see also Clarke, *They, Them, and Theirs*, *supra* note 21, at 905–10 (discussing the diversity of nonbinary gender identities).

352. James et al., *supra* note 44, at 44; see also M. Paz Galupo, Lex Pulice-Farrow & Johanna L. Ramirez, “Like a Constantly Flowing River”: Gender Identity Flexibility Among Nonbinary Transgender Individuals, *in* *Identity Flexibility During Adulthood: Perspectives in Adult Development* 163, 165, 171 (Jan D. Sinnott ed., 2017) (offering a thematic analysis of an online survey of 197 adults who self-identified as gender variant or agender and describing how “[c]entral to some participants’ descriptions of their gender was the notion of change”).

353. Clarke, *They, Them, and Theirs*, *supra* note 21, at 907.

354. See Laura K. Case & Vilayanur S. Ramachandran, *Alternating Gender Incongruity: A New Neuropsychiatric Syndrome Providing Insight Into the Dynamic Plasticity of Brain-Sex*, 78 *Med. Hypotheses* 626, 626–27 (2012) (surveying thirty-two bigender people who “experience *involuntary* alternation between male and female states”).

355. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 596 (4th Cir. 2020) (clarifying that its holding was “limited to how school bathroom policies implicate the rights of transgender students who ‘consistently, persistently, and insisently’ express a binary gender” while noting the existence of “other gender-expansive youth who may identify as nonbinary, youth born intersex who do or do not identify with their sex-assigned-at-birth, and others whose identities belie gender norms”), cert. denied, 141 S. Ct. 2878 (2021).

356. See, e.g., Clarke, *They, Them, and Theirs*, *supra* note 21, at 981–83.

357. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1055 (7th Cir. 2017).

358. See, e.g., Currah, *Gender Pluralisms*, *supra* note 116, at 7–13 (comparing *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), in which a transgender girl prevailed in a dress code case by arguing that her need to dress in feminine attire was rooted in her gender identity, with *Youngblood ex rel. Youngblood v. Sch. Bd. of Hillsborough Cnty.*, No. 8:02-CV-1089-T-24MAP, slip op. at 1 (M.D. Fla. Sept. 25, 2002), in

A related problem is medical gatekeeping—the requirement that a medical professional attest to the authenticity of a transgender person’s account of themself.³⁵⁹ Some courts have reasoned that there was no need to consider the implications of restroom policies for gender fluid students because “gender fluid, unlike gender dysphoria, is ‘not a clinical term.’”³⁶⁰ This reasoning misunderstands the definition of “gender dysphoria,” which is “distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.”³⁶¹ People who are gender fluid or nonbinary can and do experience gender dysphoria.³⁶² The emphasis on expert opinions as to plaintiffs’ gender identities could become a barrier for future challengers to hostile policies of sex segregation who cannot afford medical care or do not wish to subject themselves to medical scrutiny.³⁶³ The Maine Supreme Court noted that its holding in favor of a transgender student in a restroom case was contingent on the “accepted and respected diagnosis” of the plaintiff’s gender dysphoria, and the fact that “[t]he school, her parents, her counselors, and her friends all accepted that Susan is a girl.”³⁶⁴ This logic not only puts medical professionals, but also entire communities, in the roles of gatekeepers. It incentivizes school districts to create gender verification bureaucracies that pose risks to student privacy and are likely to compound structural inequalities based on class and race.³⁶⁵

which a cisgender girl lost a dress code case because the judge saw her desire to wear a suit and tie as “mere whimsy”). Another example is *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1106, 1112 (9th Cir. 2006) (en banc), a case in which a casino fired a cisgender female bartender because she refused to comply with a policy requiring women, but not men, to wear makeup. In a much-criticized decision, the Ninth Circuit held that the casino’s makeup policy did not amount to sex discrimination. See, e.g., Kimberly Yuracko, *Gender Nonconformity and the Law 1–2* (2016) (asking why transgender plaintiffs win their cases when “garden-variety gender benders” like *Jespersen* do not and concluding that courts see transgender identity as a status that requires protection).

359. See, e.g., Spade, *Resisting Medicine*, supra note 336, at 23–26 (discussing problems with “the medical model of transsexuality” and doctors as gatekeepers to legal recognition); see also Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto* (1987), <https://sandystone.com/empire-strikes-back.pdf> [<https://perma.cc/K8QR-K8VE>] (similar).

360. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1294 n.4 (11th Cir. 2020) (quoting *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 365 (E.D. Pa. 2017), *aff’d*, 897 F.3d 518 (3d Cir. 2018)), vacated and superseded, 3 F.4th 1299 (11th Cir. 2021), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.).

361. *DSM V*, supra note 110, at 451.

362. See, e.g., M. Paz Galupo, *Lex Pulice-Farrow & Emerson Pehl*, “There Is Nothing to Do About It”: Nonbinary Individuals’ Experience of Gender Dysphoria, 6 *Transgender Health* 101, 108 (2021).

363. Wuest, supra note 314, at 342 (“In the context of recent bathroom access cases, for instance, the plaintiffs generally have been white and gender normative, and they have had access to the medical care and documentation necessary to meet the biomedical criteria for who is considered transgender and thus deserving of legal protection.”).

364. *Doe v. Reg’l Sch. Unit 26*, 86 A.3d 600, 607 (Me. 2014).

365. *Skinner-Thompson*, supra note 336, at 23, 27–33.

With respect to the assertion of immutability, overreliance on medical and scientific authorities is a risky strategy for a group seeking anti-discrimination protection.³⁶⁶ Science has not and may never be able to sort out the precise ways that “nature” versus “nurture” influence gender identity.³⁶⁷ Hinging rights on a particular narrative about what causes transgender identity leaves those rights vulnerable to shifts in prevailing scientific understandings. Moreover, in terms of the persuasiveness of this argument, if protection for gender identity turns on the fact that it is biologically immutable, then every story about a transgender person who “detransitioned” seems to refute the claim for transgender rights.³⁶⁸ This is notwithstanding the fact that most people who detransition seem to do so because of external social forces such as discrimination;³⁶⁹ that fluctuations in gender identity may not be within an individual’s conscious control;³⁷⁰ and that detransition may indicate simply that a particular individual was uncertain about their own gender identity, rather than suggesting anything about gender identity in general. Opponents of transgender rights nonetheless draw on these complexities to argue that

366. See, e.g., Clarke, *Against Immutability*, *supra* note 348, at 18 (criticizing the idea that discrimination law should only protect immutable traits as based in moralizing judgments that reinforce patterns of subordination); Halley, *supra* note 335, at 520–21 (explaining how anti-gay arguments often proceed from the premise that sexual orientation is immutable for most, but not all people, and that the law may appropriately deter that subset of people who have some choice with respect to sexual orientation from engaging in same-sex relationships). See generally Craig Konnoth, *Medicalization and the New Civil Rights*, 72 *Stan. L. Rev.* 1165, 1248 (2020) (discussing the difficult cost/benefit analysis involved in civil rights claims that rest on medical authority).

367. See, e.g., Safer & Tangpricha, *supra* note 33, at 2451 (explaining that “the mechanisms that inform gender identity are unknown” although “current data suggest a biologic underpinning programmed from birth”); see also Hembree et al., *supra* note 33, at 3874 (explaining that gender identity “likely reflect[s] a complex interplay of biological, environmental, and cultural factors”).

368. Masha Gessen, *We Need to Change the Terms of the Debate on Trans Kids*, *New Yorker* (Jan. 13, 2021), <https://www.newyorker.com/news/our-columnists/we-need-to-change-the-terms-of-the-debate-on-trans-kids> [<https://perma.cc/N7TH-83GV>] (“If we hold to the premise that transness is an immutable, inborn trait, it follows that every young person who chooses to detransition will undermine the case any other young person may have for seeking trans care.”).

369. See, e.g., Jack L. Turban, Stephanie S. Loo, Anthony N. Almazan & Alex S. Keuroghlian, *Factors Leading to “Detransition” Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis*, 8 *LGBT Health* 273, 276–77 (2021) (analyzing data from the U.S. Transgender Survey, a nonprobability sample, and concluding that, among the 13.1% of respondents with a history of detransition, “82.5% cited at least one external driving factor,” such as “pressure from family” and “societal stigma,” while 15.9% “cited at least one internal driving factor, including uncertainty about gender identity [or] fluctuations in gender identity”). It is important to note that “detransition is not synonymous with regret.” *Id.* at 279. For a fictional account of the complexities of detransition, see generally Torrey Peters, *Detransition, Baby* (2021).

370. See Case & Ramachandran, *supra* note 354, at 627.

gender identity is mutable and therefore unlike the paradigm suspect classes.³⁷¹

If courts come to regard gender identity as the new determinant of an individual's binary biological sex, it may be harder to pursue future challenges to sex-based rules that harm nonbinary individuals, those without medical sponsors, and gender nonconformers who do not identify as transgender. Yet, as the next two sections will discuss, recent cases demonstrate alternative ways to address the practical and value-based concerns that seem to require gender identity essentialism. Practical concerns about the workability of gender identity rules can be addressed with empirical evidence from jurisdictions, school districts, and sporting authorities that have adopted transinclusive policies. Arguments denying that classifications based on transgender status deserve heightened scrutiny or suggesting that other concerns are more important than enforcing non-discrimination rules can be rebutted with appeals to values and empathy.

B. *Addressing Practical Concerns With Empirical Arguments*

Rather than basing their conclusions on the truth about a plaintiff's sex, courts can find other context-specific ways to respond to practical concerns about fraud, the demise of all forms of sex classification, or threats to cisgender women's opportunities.

Cases that have rejected arguments about the risks of fraudulent assertions of gender identity for purposes of restroom misconduct have done so with practical and empirical arguments. These decisions explain that school districts around the country have now had extensive experience implementing transinclusive restroom and locker room policies, and hypothetical concerns about privacy and misconduct have not materialized.³⁷² They observe that the schools involved in the litigation had

371. See, e.g., Reply Brief of Defendants-Appellants at 12–13, *Brandt v. Rutledge*, No. 21-2875 (8th Cir. Feb. 3, 2022), 2022 WL 426514.

372. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1313 (11th Cir.) (“[N]othing in the record suggests Mr. Adams or any other transgender student ever threatened another student's privacy. Indeed, the School District confirmed it was unaware of a single negative incident involving a transgender student using a restroom, even as Mr. Adams used the boys' bathroom for several uneventful weeks.”), vacating and superseding 968 F.3d 1286 (11th Cir. 2020), vacated and reh'g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 620 (4th Cir. 2020) (referring to the experiences of schools nationwide that implemented transinclusive bathroom policies “without incident,” which “demonstrate[s] that hypothetical fears such as the ‘predator myth’ were merely that—hypothetical”), cert. denied, 141 S. Ct. 2878 (2021); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046–50, 1055 (7th Cir. 2017) (discussing an amicus brief from school administrators from twenty-one states and the District of Columbia who had implemented transinclusive restroom policies and “uniformly agree[d] that the frequently raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity [had] simply not materialized”); *Bd. of Educ. of Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 876 (S.D. Ohio 2016) (“[A] *mici* school administrators testified

restroom stalls and locker rooms with partitions, curtains, or other such private areas for every student,³⁷³ and that voyeurism is already forbidden by school rules or state laws.³⁷⁴ If it were to occur, the problem of students falsely claiming gender identities for purposes such as gaining a competitive advantage in athletics could be addressed by a rule forbidding students from asserting gender identities in bad faith, in other words, for the primary purpose of prevailing in competition.³⁷⁵ Such rules are not impossible to administer—the law on religious accommodations provides a model for how to scrutinize “asserted . . . beliefs for sincerity without delving into their validity or verity.”³⁷⁶

The emphasis on plaintiffs’ consistently binary gender identities as girls or boys also responds to the argument that transinclusive policies will lead to the demise of all sex-segregated restrooms.³⁷⁷ But the argument that allowing, for example, a transgender girl to use the girl’s restroom at

that *no* incidents of individuals using an inclusive policy to gain access to sex-segregated facilities for an improper purpose have *ever* occurred.”).

373. *Grimm*, 972 F.3d at 614 (explaining that, as a result of the transgender plaintiff’s use of the restroom, “privacy in the boys restrooms actually increased, because the Board installed privacy strips and screens between the urinals”); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 724 (D. Md. 2018) (“In fact, the boys’ locker room here has partitioned stalls for changing clothes and stalls that have toilets and stall doors.”).

374. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293, 1314 (M.D. Fla. 2018) (rejecting privacy arguments about potential voyeurs because “any student engaging in voyeurism in the bathroom would be engaging in misconduct which is subject to discipline through the School District’s code of conduct”), *aff’d*, 968 F.3d 1286 (11th Cir. 2020), *vacated and superseded*, 3 F.4th 1299 (11th Cir. 2021), *vacated and reh’g en banc granted*, 9 F.4th 1369 (11th Cir. 2021) (mem.); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 281 (W.D. Pa. 2017) (“[T]he District appeared to agree that its existing codes of student conduct would proscribe and as necessary punish any student that engaged in such maliciously improper conduct. Certainly the statutory law of Pennsylvania would appear to do so.”).

375. See Clarke, *They, Them, and Theirs*, *supra* note 21, at 972 (suggesting a similar sincerity rule); David B. Cruz, *Disestablishing Sex and Gender*, 90 *Calif. L. Rev.* 997, 1035 (2002) (proposing a sincerity rule for gender modeled on that applied with respect to the right to religious free exercise).

376. Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 *Stan. L. Rev. Online* 59, 59–60 (2014) (surveying case law on religious sincerity). For example, courts have experience determining whether a claim to religious belief is sincere or motivated primarily by some nonreligious purpose, such as “insulat[ing] . . . drug transactions from confiscation,” see, e.g., *United States v. Quaintance*, 608 F.3d 717, 722 (10th Cir. 2010), or securing tax exemptions, see, e.g., *Ideal Life Church of Lake Elmo v. County of Washington*, 304 N.W.2d 308, 318 (Minn. 1981) (Wahl, J., concurring).

377. See, e.g., *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1293 n.2 (11th Cir. 2020) (“Because the dissent does not consider Mr. Adams’s transgender status analytically relevant, it expresses the view that allowing Mr. Adams to use the boys’ restroom erodes restroom divisions for all. This argument cannot stand together with the fact . . . that Mr. Adams is ‘like any other boy.’”), *vacated and superseded*, 3 F.4th 1299 (11th Cir. 2021), *vacated and reh’g en banc granted*, 9 F.4th 1369 (11th Cir. 2021) (mem.).

school will require all-gender restrooms is a non sequitur.³⁷⁸ In responding to this objection, courts can point to the fact that the many transinclusive restroom policies at schools around the country have not resulted in all-gender restrooms,³⁷⁹ as unfortunate as that may be.

Likewise, in the *Hecox*, *B.P.J.*, and *A.M.* decisions, which granted preliminary injunctions to prevent states from enforcing laws barring transgender girls and women from girls' and women's sports, the courts relied on pragmatic points about the fairness of the decision to exclude particular transgender athletes, rather than debating the definition of sex.³⁸⁰ The courts carefully examined the rationales for having separate athletic events for women and concluded that those rationales did not justify the exclusion of the plaintiffs.³⁸¹ One reason for excluding men from women's sports is the history of women's disadvantage—but the *Hecox* court observed that “like women generally, women who are transgender have historically been discriminated against, not favored.”³⁸² A second justification for separate events for women is that cisgender men are not harmed because they can participate in men's events.³⁸³ But it is unethical and unrealistic to expect transgender girls and women to participate on boys' and men's teams because the inescapable message, in our current culture, would be that they do not count as girls or women.³⁸⁴ In cases in which a transgender girl's sex assigned at birth is unknown to her classmates, like *A.M.*, the suggestion that she play on the boys' team

378. See *Grimm*, 972 F.3d at 618 (responding to this argument by pointing out that the plaintiff “does not challenge sex-separated restrooms; he challenges the Board's discriminatory exclusion of himself from the sex-separated restroom matching his gender identity”).

379. *Id.* at 618 n.17.

380. *A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *12–13 (S.D. Ind. July 26, 2022), appeal docketed, No. 22-2232 (7th Cir. July 27, 2022); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 350 (S.D. W. Va. 2021); *Hecox v. Little*, 479 F. Supp. 3d 930, 977 (D. Idaho 2020), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020). In *A.M.* and *B.P.J.*, ten- and eleven-year-old transgender girls who had undergone puberty-delaying treatment brought as-applied challenges. *A.M.*, 2002 WL 2951430, at *5; *B.P.J.*, 550 F. Supp. 3d at 351, 355. In *Hecox*, the court dismissed a facial challenge to the Idaho law, *Hecox*, 479 F. Supp. 3d at 971, but did not dismiss as-applied challenges by Lindsay Hecox, a transgender woman and college athlete who had undergone testosterone suppression, and Jane Doe, a cisgender girl and high school athlete who alleged the law put her at risk of being forced to submit to invasive sex testing, a risk that boys were not subjected to, *id.* at 946.

381. *A.M.*, 2022 WL 2951430, at *12–13; *B.P.J.*, 550 F. Supp. 3d at 355–57; *Hecox*, 479 F. Supp. 3d at 977.

382. *Hecox*, 479 F. Supp. 3d at 977.

383. *Id.* at 976–77.

384. *B.P.J.*, 550 F. Supp. 3d at 357; *Hecox*, 479 F. Supp. 3d at 977. Moreover, this requirement may violate privacy by forcing an athlete to out herself. Cf. Katrina Karkazis & Morgan Carpenter, Impossible “Choices”: The Inherent Harms of Regulating Women's Testosterone in Sport, 15 J. Bioethical Inquiry 579, 585 (2018) (raising a similar point with respect to intersex athletes).

would amount to “outing.”³⁸⁵ A third argument is that men pose safety risks to women in contact sports, but, as the *B.P.J.* court reasoned, there are no such dangers in track and field.³⁸⁶

The main justification for excluding men from women’s sports is that, due to their on-average physiological advantages, men would displace women and diminish women’s opportunities to win.³⁸⁷ But while men are close to one-half of the population, transgender women are less than one-half of one percent.³⁸⁸ As the *Hecox* court observed, the Idaho Legislature lacked empirical support for its fear that transgender women would substantially displace cisgender women, relying instead on anecdotes about three out-of-state competitors.³⁸⁹ The extensive coverage of this issue by right-wing media has cultivated the public misperception that transgender athletes regularly win women’s athletic competitions, even though there are very few such athletes and none dominate their sports.³⁹⁰ On appeal in *Hecox*, states, including California and New York, submitted an amicus brief arguing that they have long required that schools permit transgender students to compete in the division consistent with their gender identities, and that concerns about transgender girls and women dominating women’s sports have not materialized.³⁹¹

385. Cf. *A.M.*, 2022 WL 2951430, at *11 (recognizing that even excluding a transgender girl from the girls’ team could cause trauma by suggesting that she is not “really” a girl”).

386. *B.P.J.*, 550 F. Supp. 3d at 356. Nor is there research specifically supporting claims that transgender women and girls are dangerous to cisgender women and girls in other sports.

387. *Hecox*, 479 F. Supp. 3d at 977 (discussing the argument that transgender women might “displace” cisgender women in athletics “to a substantial extent” (quoting *Clark ex rel. Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982))); cf. *B.P.J.*, 550 F. Supp. 3d at 353 (noting that West Virginia asserted that one “objective of the statute is to provide equal athletic opportunities for female athletes”).

388. *B.P.J.*, 550 F. Supp. 3d at 356; *Hecox*, 479 F. Supp. 3d at 977.

389. *Hecox*, 479 F. Supp. 3d at 978–79; cf. *A.M.*, 2022 WL 2951430, at *12 (“The harm the State suggests could occur . . . is speculative, and there is no evidence in the record that allowing *A.M.* to play on the girls’ softball team will make this harm a reality.”); see *B.P.J.*, 550 F. Supp. 3d at 350 (“At this point, I have been provided with scant evidence that this law addresses any problem at all, let alone an important problem.”).

390. See, e.g., Mia Gingerich & Alex Paterson, Fox News Leads Hate Campaign Against Trans College Swimmer Lia Thomas, Airing 32 Segments About Her in Just 6 Weeks, *Media Matters* (Jan. 13, 2022), <https://www.mediamatters.org/fox-news/fox-news-leads-hate-campaign-against-trans-college-swimmer-lia-thomas-airing-32-segments> [<https://perma.cc/3VW6-RYBU>]; Brianna January, Fox News Has Aired More Segments on Trans Athletes So Far in 2021 Than It Did in the Last Two Years Combined, *Media Matters* (May 3, 2021), <https://www.mediamatters.org/fox-news/fox-news-has-aired-more-segments-trans-athletes-so-far-2021-it-did-last-two-years-combined> [<https://perma.cc/V3JW-AK93>] (discussing 126 reports on Fox News about transgender athletes from January 2019 through March 2021 that mentioned only nine athletes).

391. Brief for the States of New York et al. as Amici Curiae in Support of Plaintiffs-Appellees at 16, *Hecox*, Nos. 20-35813, 20-35815. Lawmakers in states that have passed bills excluding transgender girls from sports have been unable to find local examples of transgender girls dominating sports. David Crary & Lindsay Whitehurst, *Lawmakers Can’t*

Opponents of transgender participation argue that the problem is that even a single transgender athlete will have physiological advantages that put her atop the medal stand, denying a cisgender woman the disproportionate advantages of first place, such as scholarship opportunities.³⁹² The *Hecox* court rejected this argument because the assumption that every transgender woman has physiological advantages is “based on overbroad generalizations without factual justification.”³⁹³ Idaho had defined an athlete’s “biological sex”³⁹⁴ to give no consideration to the one factor that research suggests might be a driver of sex differences in athletic performance: an athlete’s “actual testosterone levels after hormone suppression.”³⁹⁵ Moreover, as a result of puberty blockers and gender-affirming hormone therapy, some transgender girls have no “ascertainable advantage over cisgender female athletes.”³⁹⁶ Plaintiff Lindsay Hecox had undergone testosterone suppression to level any physiological advantage she might have in accord with the requirements of the National Collegiate Athletic Association,³⁹⁷ and A.M. and B.P.J. had undergone puberty-blocking treatment.³⁹⁸

The concept of sex assigned at birth alone does not address practical objections to transgender inclusion. Practical arguments about the aims of sex segregation and what sort of legal rules are best tailored to achieve those aims are required.

Cite Local Examples of Trans Girls in Sports, AP News (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7> [<https://perma.cc/54DM-WYWJ>].

392. *Hecox*, 479 F. Supp. 3d at 982–83 (finding no evidence this had in fact occurred and noting that this concern could not justify the breadth of the Idaho law, which applies to virtually every type of sport “from kindergarten through college”).

393. *Id.* at 982.

394. Idaho defined biological sex based on “one (1) or more of the following: the student’s reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels.” *Id.* at 949 (internal quotation marks omitted) (quoting Idaho Code § 33–6203(3) (2021)). “Endogenously produced” means an athlete’s testosterone levels without any hormone suppression. See *id.* at 984.

395. *Id.* at 984. Even the evidence about the effects of testosterone on athletic performance is disputed. See, e.g., Rebecca M. Jordan-Young & Katrina Karkazis, 4 Myths About Testosterone, *Sci. Am.* (June 18, 2019), <https://blogs.scientificamerican.com/observations/4-myths-about-testosterone/> [<https://perma.cc/5SRX-E2Y9>] (discussing “profound disagreements about the evidence”).

396. *Hecox*, 479 F. Supp. 3d at 980.

397. *Id.* at 962.

398. *A.M. ex rel. E.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075-JMS-DLP, 2022 WL 2951430, at *5 (S.D. Ind. July 26, 2022), appeal docketed, No. 22-2232 (7th Cir. July 27, 2022); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 351 (S.D. W. Va. 2021). In *A.M.*, the court refused to consider testimony about whether there are differences in athletic performance before puberty because the plaintiff, A.M., had played on the girls’ softball team the prior year, and there was “no evidence that other players complained about A.M. being on the team due to an athletic advantage, or that she actually has an athletic advantage.” *A.M.*, 2022 WL 2951430, at *12.

C. *Appealing to Values and Empathy*

A final caution about the conceptual shift to sex assigned at birth is that the idea is not self-explanatory, and the concept's implications in terms of autonomy, equality, privacy, and dignity must be explained and illustrated with compelling stories in the contexts of specific legal arguments and cases. This approach better taps into what is compelling about forbidding discrimination based on certain traits than invocations of immutability. It is particularly important in those cases in which opponents attempt to cast transgender rights as threats to First Amendment freedoms of speech and religion. Appeals to facts and expert opinions about sex and gender are insufficient to defeat these arguments. Stories, face-to-face interactions, and shifts in public opinion have persuaded judges to empathize with and rule in favor of transgender plaintiffs.

By framing issues in restroom cases as questions of fact about the definition of sex,³⁹⁹ courts miss values that are at stake other than truth and accuracy. For example, in *Grimm v. Gloucester County School Board*, the Fourth Circuit concluded that the school board's policy had been a result of impermissible prejudice.⁴⁰⁰ In reaching this conclusion, the court observed that the policy "was concocted amidst a flurry of emails from apparently concerned community members and adopted in the context of two heated Board meetings filled with vitriolic, off-the-cuff comments," including referring to Grimm, a transgender boy, as a "freak."⁴⁰¹ The court described the board meetings in detail, at which adults openly disparaged Grimm, a teenager.⁴⁰² One speaker compared Grimm to a person who thinks he is a dog and wants to urinate on a fire hydrant.⁴⁰³ The Board designed a policy to exclude Grimm from the boys' restroom, but gave little thought to how it might apply to other students, such as those with intersex variations.⁴⁰⁴ The policy was justified by hypothetical concerns unsupported by evidence.⁴⁰⁵ In short, the policy was plainly designed to communicate Grimm's inferiority, stigmatize him, and relegate him to inferior status.⁴⁰⁶ Yet the majority opinion suggested that what was wrong

399. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020) (beginning its opinion by explaining that "[w]ith the help of our amici and Grimm's expert, we start by . . . developing a fact-based understanding of what it means to be transgender, along with the implications of gendered-bathroom usage for transgender students"), cert. denied, 141 S. Ct. 2878 (2021).

400. *Id.* at 615.

401. *Id.*

402. *Id.* at 599.

403. *Id.*

404. *Id.* at 599, 623–24.

405. *Id.* at 614–15 (rejecting as "insubstantial[]" concerns that transinclusive restroom policies would lead to privacy violations and misconduct).

406. Judge James Wynn invoked antistatutory arguments in his concurrence. *Id.* at 625 (Wynn, J., concurring) ("I see little distinction between the message sent to Black children denied equal treatment in education under the doctrine of 'separate but equal'

with this policy was that the board was incorrect about “Grimm’s transgender status or his medical need to socially transition, as identified by his treating physician.”⁴⁰⁷ While it is true that the board harbored misunderstandings about Grimm specifically and transgender identity generally, these mistakes do not capture what was so deeply harmful about the way the board treated him.

Rather than leaning on the immutability of gender identity in cases questioning whether classifications based on transgender status deserve heightened constitutional scrutiny, some courts have appealed to how discrimination on the basis of transgender status is interlinked with sex discrimination and is a basis for subordination.⁴⁰⁸ Sex assigned at birth is immutable in the same way as other suspect and quasi-suspect classifications marked at birth, such as legitimacy, race, and alienage—all traits that have been, at various points in U.S. history, memorialized on birth certificates and thereafter used to enforce unjust social hierarchies and constrain individual autonomy.⁴⁰⁹ In accord with *Bostock*, some courts reason that discrimination based on transgender status is logically entangled with classifications based on sex, and sex classifications already require heightened scrutiny.⁴¹⁰ Another court eliminated the immutability factor by recharacterizing it as asking whether “the characteristic of the class calls down discrimination when it is manifest,” rather than whether the trait was a choice or is unchangeable.⁴¹¹

and transgender children relegated to the ‘alternative appropriate private facilit[ies]’ provided for by the Board’s policy.”).

407. *Id.* at 615 (majority opinion) (arguing the mistake was that the Board “treated Grimm as ‘questioning’ his identity and lumped his in with what it considered to be ‘gender identity issues’”).

408. Some courts have reached the conclusion that heightened scrutiny applies without finding that transgender status is immutable. See, e.g., *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 570 (Minn. Ct. App. 2020).

409. See, e.g., Susan J. Pearson, *The Birth Certificate: An American History* 5, 291–92 (2021) (discussing and critiquing the development of the birth certificate as a technology for identifying individuals in terms of sex, race, nationality, and parentage).

410. See, e.g., *Brandt v. Rutledge*, No. 21-2875, 2022 WL 3652745, at *3 (8th Cir. Aug. 25, 2022) (concluding that the plaintiffs were likely to succeed on their argument that a law forbidding gender-affirming health care for minors was subject to heightened scrutiny because “[t]he biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not”); *Grimm*, 972 F.3d at 608 (holding, in the alternative, that heightened scrutiny applies to sex-based classifications used to exclude transgender students from restrooms); *Whitaker*, 858 F.3d at 1051 (reasoning that a transexclusive restroom policy “is inherently based upon a sex-classification and heightened review applies”); *N.H.*, 950 N.W. 2d at 568 (reasoning that, after *Bostock*, and in line with past Supreme Court precedents, “classifications based on either sex or gender receive intermediate scrutiny”).

411. *Bd. of Educ. of Highland Loc. Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (quoting *Windsor v. United States*, 699 F.3d 169, 183 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013)). This move is not inconsistent with Supreme Court precedent, which asks if the class “exhibit[s] obvious, immutable, or distinguishing characteristics.”

In *Hecox*, the fact that the Idaho Legislature neglected to consider empirical evidence of what might cause men’s advantages in sports demonstrated to the court that its purported motivation—ensuring fair competition—was false, and the law’s actual purpose was to exclude and marginalize transgender athletes.⁴¹² The court was also persuaded that plaintiff Lindsay Hecox would suffer “irreparable harm” if the law went into effect, because, in addition to losing her opportunity to compete, the Idaho law “communicates the State’s ‘moral disapproval’ of her identity.”⁴¹³ Moreover, the law potentially subjected *all* girls and women to invasive, medically unnecessary, and humiliating sex-verification examinations.⁴¹⁴ The court concluded that the purported benefits of the law did not “overcome the injury and indignity” inflicted on female athletes, including cisgender athletes, whose sexes could be subject to dispute.⁴¹⁵

Opponents of transgender rights often characterize demands for civil rights as efforts to dictate speech, thought, or belief.⁴¹⁶ A focus on more accurate concepts to explain sex and gender, without attention to the harms of exclusion, could foster this dynamic, or worse—it could appear to be mere language policing.⁴¹⁷ For example, in his *Bostock* dissent, Justice Samuel Alito cited *Prescott v. Rady Children’s Hospital*, a case in which a fourteen-year-old transgender boy was hospitalized due to suicidal thoughts resulting from his gender dysphoria, only to have hospital staff repeatedly and intentionally misgender him.⁴¹⁸ As a result, the boy had to be discharged before his condition had improved and died by suicide soon after.⁴¹⁹ Overlooking these tragic circumstances, Justice Alito cited *Prescott*

Bowen v. Gilliard, 483 U.S. 587, 602–03 (1987) (emphasis added) (quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313–14 (1976) (per curiam)).

412. *Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020). The court also concluded that the fact that collegiate and elite athletic bodies allow transgender women to participate in sports if they have undergone hormone suppression suggested that Idaho’s sex classification was not a legitimate proxy for its interest in ensuring fairness. *Id.* at 982.

413. *Id.* at 987 (quoting *Lawrence v. Texas*, 539 U.S. 558, 582–83 (2003)).

414. *Id.* at 985–86.

415. *Id.* at 987.

416. See, e.g., Anderson, *Brave New World of Transgender Policy*, *supra* note 316, at 315–18, 344 (describing inclusive school policies as “[g]ender [i]ndoctrination at [s]chool” and arguing that gender identity antidiscrimination laws “impose . . . orthodoxy by punishing dissent and treating as irrational, bigoted, and unjust the belief that men and women are biologically rooted”).

417. Cf. Zimman, *supra* note 286, at 85 (noting that opponents of transgender rights often “frame trans-inclusive language as a form of political correctness that imposes the leftist ideology that trans people’s identities should be affirmed and respected”).

418. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1782–83 (2020) (Alito, J., dissenting) (citing *Prescott v. Rady Children’s Hosp.*, 265 F. Supp. 3d 1090, 1096–100 (S.D. Cal. 2017)). Gender dysphoria is “clinically significant distress” related to “a marked incongruence between one’s experienced/expressed gender and assigned gender.” DSM V, *supra* note 110, at 452–54.

419. *Prescott*, 265 F. Supp. 3d at 1097.

to argue that the majority opinion in *Bostock* was incorrect because it could result in claims by plaintiffs “that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination.”⁴²⁰ The Mississippi state legislature has gone so far as to pass a law that allows certain entities to discriminate based on their “religious beliefs or moral convictions” that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”⁴²¹

Arguments about autonomy, equality, and material harms are essential counterweights to First Amendment objections that characterize LGBTQ rights as demands for ideological conformity or mere language policing. Discrimination law necessarily restrains speech, because discrimination is often accomplished through speech.⁴²² Harassment is a prime example.⁴²³ Advocates can succeed by explaining how, for example, harassment based on transgender status denies an individual equal access to education, employment, or health care, with real consequences, as in *Prescott*. For instance, recent cases have “denounced” the misgendering of litigants in briefs “as degrading, mean, and potentially mentally devastating to transgender individuals.”⁴²⁴ Judges have retold vivid stories of bullying, stigmatization, and exclusion experienced by transgender children in ways demonstrating care and concern.⁴²⁵ A judge appointed by President

420. *Bostock*, 140 S. Ct. at 1782 (Alito, J., dissenting).

421. See Miss. Code Ann. § 11-62-3 (2022). A district court preliminarily enjoined the law from going into effect, but the Fifth Circuit reversed on the ground that the law’s challengers lacked standing to sue. See *Barber v. Bryant*, 860 F.3d 345, 358 (5th Cir. 2017).

422. See *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006) (“Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.”).

423. See Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn’t Bark*, 1994 Sup. Ct. Rev. 1, 1 (discussing how the Supreme Court’s decision on what type of speech constitutes severe or pervasive harassment in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), did not refer to First Amendment questions, despite the fact that the parties briefed them).

424. *Hecox v. Little*, 479 F. Supp. 3d 930, 957 (D. Idaho 2020) (collecting cases), appeal docketed, Nos. 20-35813, 20-35815 (9th Cir. Sept. 17, 2020).

425. See, e.g., *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1319 (11th Cir. 2021) (quoting the plaintiff’s testimony that, because of his school’s restroom policy, “I know that the school sees me as less of a person, less of a boy, certainly, than my peers”), vacating and superseding 968 F.3d 1286 (11th Cir. 2020), vacated and reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021) (mem.); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020) (“Grimm’s four years of high school were shaped by his fight to use the restroom that matched his consistent and persistent gender identity. In the face of adults who misgendered him and called him names, he spoke with conviction at two Board meetings.”), cert. denied, 141 S. Ct. 2878 (2021); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (“Highland’s exclusion of Doe from the girls’ restrooms has already had substantial and immediate adverse effects on the daily life and well-being of an eleven-year-old child (i.e. multiple suicide attempts prior to entry of the injunction.)”); *Evancho v. Pine-*

Donald J. Trump was persuaded to grant a preliminary injunction against an Alabama law that would have criminalized puberty-blocking drugs for minors, based on, among other things, the testimony of Megan Poe, the mother of a transgender daughter, who said that her daughter was “thriving” as a result of receiving the medications, but without them, “she feared her daughter would commit suicide.”⁴²⁶ In support of the injunction, the judge invoked “the ‘enduring American tradition’ that parents—not the States or federal courts—play the primary role in nurturing and caring for their children.”⁴²⁷

Compelling narratives can help judges resolve arguments about conflicting values. In a number of restroom cases, courts have shown that they are able to distinguish between the harms to transgender children who are singled out and the harms to students who object to sharing restrooms with transgender students for religious or other reasons.⁴²⁸ Cisgender students who object to using restrooms with transgender students often argue that transinclusive restroom policies require cisgender objectors to avoid the restroom⁴²⁹ or unfairly relegate them to single-user restrooms.⁴³⁰ Courts have recognized, however, that there is an important difference: “For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for [the transgender plaintiff], using those

Richland Sch. Dist., 237 F. Supp. 3d 267, 294 (W.D. Pa. 2017) (“[I]t is not a long leap, nor really a leap at all, to give credence to the Plaintiffs’ assertions that they subjectively feel marginalized, and objectively are being marginalized, which is causing them genuine distress, anxiety, discomfort and humiliation.”); Bd. of Educ. of Highland Loc. Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 871 (S.D. Ohio 2016) (discussing the plaintiff’s testimony that she “feels stigmatized when she is not treated as a girl and that she has been bullied at school”).

426. *Eknesh-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 2022 WL 1521889, at *5 (M.D. Ala. May 13, 2022), appeal docketed, No. 22-11707 (11th Cir. May 18, 2022).

427. *Id.* at *13 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)) (assessing the balance of the equities). The court reasoned that the plaintiffs were likely to succeed on their claims that the Alabama law violated the parents’ fundamental rights to direct the health care of their children, as well as the children’s rights to equal protection. *Id.* at *9–10.

428. See, e.g., *Parents for Priv. v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020) (affirming the dismissal of a case brought by students and parents of students challenging a transinclusive restroom policy on the grounds that it violated “Title IX, as well as the constitutional rights—including the right to privacy, the parental right to direct the education and upbringing of one’s children, and the right to freely exercise one’s religion . . .”); *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 538 (3d Cir. 2018) (concluding that students and parents alleging a transinclusive restroom policy violated their constitutional rights of bodily privacy as well as Title IX and state tort law were unlikely to succeed on the merits).

429. See, e.g., *Doe*, 897 F.3d at 529–30.

430. See, e.g., *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 724 (D. Md. 2018).

same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students.”⁴³¹

Shifts in public opinion in favor of transgender equality also play a role.⁴³² In *Grimm*, the Fourth Circuit observed that opposition to transinclusive restroom policies generally comes from adults, rather than young people, who “can understand and empathize with someone who just wants to use the bathroom.”⁴³³ The court concluded: “The proudest moments of the federal judiciary have been when we affirm the burgeoning values of our bright youth, rather than preserve the prejudices of the past.”⁴³⁴

CONCLUSION

“Sex assigned at birth” was a brilliant conceptual innovation by transgender rights advocates to highlight the problems with an overly simplistic, outdated idea of “biological sex” and to demand autonomy in constructing one’s own identity. The concept also connects with arguments for equality in the antisubordination tradition and does useful work to expose privacy and dignitary violations. But despite its theoretical potential, its uptake by courts has been uneven, and even when it is adopted, it is often conflated with the old biological sex. This may be due to ideological resistance, the persistence of dualistic thinking about sex as biological and gender as social, and practical concerns about unmooring the definition of sex from objectively measurable characteristics. In an overreaction to this last concern, some courts insist that gender identity is immutable, binary, and medically and socially validated. Yet this essentialist model of gender identity does not fit the lived realities of many people who are oppressed due to the expectation that they live in accord with the sex assigned to them at birth. Ultimately, arguments over the true nature of sex and gender are insufficient to achieve gender justice. In addition to deconstructing the concept of “biological sex,” successful legal arguments have made claims in civil rights registers—to autonomy, equality, privacy, and dignity. They have built empathy for plaintiffs by telling their stories and detailing the harms of stigmatization and exclusion. They have

431. *Id.* at 725 (alteration in original) (internal quotation marks omitted) (quoting *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 729 (4th Cir. 2016) (Davis, J., concurring), vacated and remanded, 137 S. Ct. 1239 (2017) (mem.)); see also *Doe*, 897 F.3d at 530 (“Nothing in the record suggests that cisgender students who voluntarily elect to use single-user facilities to avoid transgender students face the same extraordinary consequences as transgender students would if they were forced to use them.”).

432. Jami K. Taylor, Daniel C. Lewis & Donald P. Haider-Markel, *The Remarkable Rise of Transgender Rights* 73 (2018) (discussing a 2015 study that found that over sixty percent of respondents agreed that “transgender people deserve the same rights and protections as other Americans” (internal quotation marks omitted)).

433. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 620 (4th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021).

434. *Id.*

countered practical objections with empirical evidence. Descriptive and definitional debates are vital, but they cannot replace the difficult work of persuasion based on values, empathy, and practicalities.