Defining Sex and Gender in Law, Politics, and Science

by

John Parsi

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Graduate Supervisory Committee:
William Crittenden, Chair
David Guston
Gary Marchant

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ABSTRACT

Gender and sex are often conflated. Our laws, policies, and even science establish sex and gender as intrinsically linked and dimorphic in nature. This dissertation examines the relationship between sex and gender and the repercussions of this linked dimorphism in the realms of law, politics, and science. Chapter One identifies the legal climate for changing one's sexual identity post-surgical reassignment. It pays particular attention to the ability of postsurgical transsexuals to marry in their acquired sex. Chapter Two considers the process for identifying the sex of athletes for the purposes of participation in sex-segregated athletic events, specifically the role of testing and standards for categorization. Chapter Three explores the process of identifying and assigning the sex of intersex children. Chapter Four examines the process of prenatal sex selection and its ethical implications. Chapter Four also offers an anticipatory governance framework to address these implications.

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PREFACE

In the beginning, I would like to set a context for how I came to this topic-- the questions that shaped this project, and why I pursued them.

My dissertation initially developed from the work I was doing with Dave Guston at the Center for Nanotechnology in Society (CNS) starting in 2005. Our work at CNS centered on the ethical, political, and policy dimensions of nanotechnology, transhumanism, and human enhancement technology. In part, the research focused on tracing an issue in the discourse about transhumanism and human enhancement technology that was leading to a seeming divide. On one end were a group of individuals who spoke about scientific technological development as being problematic, either neoludites or those who had religious objections to transhumanism or human enhancement technology. This included people like Leon Kass and Francis Fukuyama. They often advocated banning practices they found objectionable or immoral. On the other end was a libertarian approach to human enhancement and nanotech research. This camp advocated permitting people to enhance their bodies as they see fit and permitting unfettered scientific development. In response we developed a chapter on anticipatory governance which began to link the two sides by looking to anticipate and regulate the issues that led to undesirable use of technology, rather than the use of the technology itself. In this work, I encountered men and women who had traditions expanding beyond the science and technology realm to include political philosophy, political theory, and ethics. This perspective became central to my thinking, and my work with CNS transformed some of my academic interests. I was inspired to consider a project that would look at how technological developments shaped our political outcomes.

One of the concerns we saw over and over again as we attended conferences or saw speeches or presentations in science and technology ethics studies was the speculative nature of discussing transhumanism and human enhancement technology. The research was being denigrated as hyperbolic, science fiction, contrived, and unnecessary. To counter this, I became interested in the way those technologies were having effects today rather than speculating about technological developments that could occur. In particular, I was interested in the way that technological developments impact identity politics and our traditional notions of justice--how justice interplays with people's ability to transform themselves and how those transformations and interactions with technology give them some political credence, ability or power within society. Are these technological changes politically and legally recognized? Are these transformations known and understood? How do we govern them? What is the interplay between politics and technology? What are the ethical dimensions or repercussions of these decisions? In that realm, I became particularly fascinated with questions of sex and gender.

Looking to the works of Foucault and Hankins, one can see that ordering systems are omnipresent in our society and create mechanisms by which to categorize everything.[1] Categories identify and separate groups of people and often carry significant political force.[2] Indeed, the management of these categories, particularly when they convey political and social dimensions, shapes life's opportunities. The category of race

[1] For a strong argument on the human propensity for ordering, see Michel Foucault, *The Order of Things: An Archeology of the Human Sciences* (Vintage Books 1994) (1966); Thomas L. Hankins, *Science and the Enlightenment* (1985).

[2] Foucault, *supra* note 1; Hankins, *supra* note 1.

is a prime example of what a serious and complex issue categorizing people can be.[3] Before the late 1960s in the United States, race commonly determined citizens' ability to vote, the schools they could attend, and even which water fountains they could drink from. Rationales for categorizing people by race ranged from scientific evidence to common knowledge.[4]

Identity politics sees these groups as socially constructed. Our conception of what it means to be Hispanic or a woman is not founded primarily on biological distinction, but based on legal, political, and social standards for categorizing and identifying people. These categories are then defined both by what attributes are identifiable within the group and what attributes exclude a person from the dominant group. The production of these identities forms the heart of how we see ourselves and each other.

The production of identity has traditionally been seen as stemming from the dominant power. Those in control define the parameters of who is a part of the dominant group and who is excluded. Traditionally the most powerful group in Western society is white, male, heterosexual, and propertied. All others are seen in relation to this politically powerful group. Definitions begin to produce what is other than white, male, heterosexual, and propertied. So, African-Americans are defined by what makes them not white. The non-white characteristics--darkness of skin, the kink of hair-- demark

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[3] *See* Ian Haney López, *White by Law: The Legal Construction of Race* (10th anniversary ed. 2006). Haney López outlines how Supreme Court decisions forge the definition of the White race. López traces the Justices' rationales for their decisions—ranging from scientific evidence and common knowledge to legal precedence and congressional decisions. López contends that classification as White or not White, particularly as related to the beneficiaries of immigration law, is a significant political determination with critical impacts on the agency of individuals based upon their White/not White categorization.

[4] *Id.*

who is African-American. But, these biological characteristics are not the limit of defining African-American as "other." Social attributes or quasi-biological characteristics are also ascribed to the group. For example, African-Americans may be considered physically stronger, better singers, and less intellectually capable than the dominant group. The powerful group defines these identities as a way to segregate groups and identify them as inferior.

As the social construction of identity has been exposed, identity groups have started to create meaning for the groups themselves. Rather than seeing themselves as restricted by the identity constructed by the majority culture, minority identity groups have started to construct new meaning for their own identity. For example, many feminists have embraced the identity of women and worked to construct a more positive political position for themselves. By embracing their identity the goal becomes to provide a place for women in the political, legal, and social world. Negative attributes were re-conceptualized as positive and embraced. For example, women's propensity for caring and nurturing which was connected to the biological role of women as mothers and once used as justification for excluding women from public life was given political capital under an argument that women are more empathetic and therefore more capable of creating laws and policies that positively impact people's lives. It is the social significance of embracing an identity "oppositional to the prevailing norm" that creates "political potential."[5]

[5] Stevi Jackson, *Sexual Politics: Feminist Politics, Gay Politics and the Problem of Heterosexuality*, *in* POLITICS OF SEXUALITY: IDENTITY, GENDER, CITIZENSHIP 87 (Terrell Carver & Veronique Mottier ed., 1998)

Sex and gender issues piqued my interest in particular because we generally conceive of gender as something changeable. Our interactions with others are malleable and a person can be increasingly masculine or feminine based on personal decisions at any given time. We conceive of gender as socially constructed, constructed by interactions with others and societal expectations. Men are supposed to wear pants. There is nothing biological that divines that men ought to wear pants or need to wear pants, but instead that is the custom in most Western societies. So we follow that custom.

On the other hand we generally think of sex as something rigid, biological, and determined by nature rather than something that is socially constructed. There are a group of political philosophers, political theorists, and others that have discussed the possibility that sex itself is socially constructed. The works of Judith Butler are particularly important here. Butler argues that sex itself is constructed socially because the bodies that we represent--the way we represent our physical form-- is based on societal expectations. Society determines what a feminine body is supposed to look like and what a masculine body is supposed to look like. Butler has a notion of gender being a performance of a person's sex. So rather than simply speaking about these things as constructed on the gender end; we may also talk about them as constructed on the sex end.

This led me to consider the prevailing dimorphism of sex and gender. Sex dimorphism is the view that there are two separate, well-defined, and distinguishable sexes. The dimorphic view iterates various categories for distinguishing individuals. There may be various biological categories, such as:

1. Primary sex characteristics (sexual organs – phenotypical)

2. Secondary sex characteristics (sex differentiation at puberty – phenotypical)
3. Hormonal sex characteristics (generation and use of primarily oestrogens or androgens)
4. Gonadal sex characteristics (presence of ovaries and testes – reproductive role)
5. Chromosomal sex characteristics (human X or Y combinations – genetics)
6. Brain structures and functions (characteristics generally vary by sex)
7. Gender identity (psychological sense of self in regard to gender typing).[6]

But, dimorphism extends beyond physical or biological characteristics to gender roles. A dimorphic view categorizes the two sexes as being divergent and distinguishable along these lines. So, a person is either distinctly male/masculine/man or female/feminine/woman.

Judith Butler challenges the project of feminist theory for a series of reasons. Among her criticisms is the formation of a monolithic gender identity of women.[7] The existence of this identity is both criticized by feminists as a source of oppression and used as a starting point for overcoming political oppression. "For the most part, feminist theory has assumed that there is some existing identity, understood through the category of women, who not only initiates feminist interest and goals within discourse, but

[6] Tere Prasse, *Medical Sex v. Social Gender: Tried in the Court of Human Knowledge and Experience, the 21st Century CE.* (2000), http://christielee.net/med3.htm

[7] Part of Butler's concern is about intersectionality. A monolithic conception of gender ignores the differences between say an urban, heterosexual, African-American woman and a rural, white, lesbian woman. In addition, a monolithic approach ignores differences of culture, history, technological advancement, and religion that may make remarkable differences in conceptions of what it may mean to be a "woman."

constitutes the subject for whom political representation is pursued."[8] Butler contends that feminism's embrace of women as a category was necessitated by the desire to engage in political discourse. "For feminist theory, the development of a language that fully or adequately represents women has seemed necessary to foster political visibility of women. This has seemed obviously important considering the pervasive cultural condition in which women's lives were either misrepresented or not represented at all."[9]

But the struggle for representation has allowed for power to be placed in legal and political hands that help to define and limit what the identity category means and represents. "Juridical notions of power appear to regulate political life in purely negative terms -- that is, through the limitations, prohibition, regulation, control, and even 'protection' of individuals related to that political structure through the contingent and retractable operation of choice."[10] Identity creates boundaries within which individuals are allowed to operate. Identity becomes a limit on the actions of an individual. "But the subjects regulated by such structures are, by virtue of being subjected to them, formed, defined, and reproduced in accordance with the requirements of those structures."[11] For Butler the law and politics create the boundaries of identity by defining what is not a part of the category. "[T]he political construction of the subject proceeds with certain legitimating and exclusionary aims, and these political operations are effectively concealed and naturalized by political analysis that takes juridical structures as their

[8] Judith Butler, Subjects of Sex/Gender/Desire, in Feminism and Politics, 273 (ed. Anne Phillips 1998).

[9] *Id.* at 273

[10] *Id.* at 274

[11] *Id.*

foundation."[12] The limits that the law and policy place on identity are constructed as occurring naturally rather than artificially. "Juridical power inevitably 'produces' what it claims to merely represent."[13] The law is then seen as working within those natural foundations rather than producing them. "In effect, the law produces and then conceals the notion of 'a subject before the law' in order to invoke the discursive formation as a naturalized foundational premise that subsequently legitimates the law's own regulatory hegemony."[14]

For Butler feminist liberation is only possible when feminists understand how the feminine is constructed in law and policy. "Feminist critique ought also to understand how the category of 'women,' the subject of feminism, is produced and restrained by the very structures of power through which emancipation is sought."[15] For Butler feminism requires exposing this structure and attacking the identities that are produced within the structure. "[The political] task is to formulate within this constituted frame a critique of the categories of identity that contemporary juridical structures engender, naturalize, and immobilize."[16]For Butler the danger in untangling sex from gender is the perception that gender is malleable while sex is rigid and that gender can be disassociated from sex. Butler contests the concept of sex is rigid and fixed. "If the immutable character of sex is contested, perhaps this construct called 'sex' is as culturally constructed as gender."[17]

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[12] *Id.*
[13] *Id.*
[14] *Id.* at 275
[15] *Id.*
[16] *Id.* at 277
[17] *Id.* at 279

Butler argues that sex and gender form a cohesive connection, where both sex and gender are constructed together and in terms of one another. [18] Butler sees gender as a performance of sex.[19] The normative standards for performing gender correctly are intimately connected with the normative standards for the appearance of the body that corresponds with that gender.[20] For Butler bodies matter when they are categorized "within the productive constraints of certain highly gendered regulatory schemas."[21] The gender-sex link is important because it creates bodies that have physical and social attributes that are seen to be beneficial to society.[22] Exposing this framework for Butler is part of feminist liberation.

But challenging the production of sex is not intuitive precisely because it is constructed as natural. Sex, in many ways, is the ultimate category for distinguishing and categorizing individuals, because it is seen as a scientific category—not a socially constructed category, but a function of biology.[23]

Nonetheless, even as a "scientific" category, sex is often not clearly delineated. For example, it is estimated that nearly two percent of children are born intersex—not

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[18] Judith Butler, Gender Trouble: Feminism and the Subversion of Identity, (1990).

[19] *Id*.

[20] Judith Butler, Bodies that Matter: On the Discursive Limits of "Sex," (1993).

[21] *Id.* at xi.

[22] *Id.*

[23] *See* Howard Garfinkel, *Studies in Ethnomethodology* 122–28 (1967). More credence is given to the view of race, ethnicity, and nationality as social categories. *See e.g.*, Benedict Anderson, Imagined Communities (rev. ed. 2006) (describing the social construction of nationality). There is significant discussion on the performance and construction of sex. *See e.g.*, Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex"* (1993). Nonetheless, it appears that sex is considered more rigidly biological than social. *See e.g.*, Sally Raskoff, Everyday Sociology Blog, *The Social Construction of Race, Ethnicity, Sex, and Gender*, http://nortonbooks.typepad.com/everydaysociology/2009/03/the-social-construction-of-race-ethnicity-sex-and-gender.html (Mar. 25, 2009).

belonging entirely to either the male or female sex.[24] Other people are born as a member of one biological sex, but have the identity of the opposite sex—this is known as gender identity disorder.[25]

Gender identity disorder, as classified by the *International Statistical Classification of Diseases and Related Health Problems*, is a mental disorder defined as:

> A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.[26]

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[24] Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality*51(2000). The general medical practice for children who are intersex is surgical alteration at birth and assignment to one of the two sexes. Elizabeth Weil, *What if It's (Sort of) a Boy and (Sort of) a Girl?*, N.Y. Times, Sept. 24, 2006 (Magazine), at 48. This standard medical practice is generally necessitated by the need to provide sex identification on the birth certificate as a legal requirement. The decision to assign the sex of the child at birth has been challenged in court in the United Kingdom. A British court held that sex assignment surgery is preferable to non-surgery because not assigning a sex would leave the child in social and legal limbo. *See* W. v. W. (Physical Inter-sex) [2001] Fam. 111. In 2006, fifty international experts on intersex children signed *The Consensus Statement on the Management of Intersex Disorders*, contending that a child's sex should still be assigned as soon as possible, but discouraging doctors and families of intersex children from having surgery right away. Christopher P. Houk et al., *Summary of Consensus Statement on Intersex Disorders and Their Management,* 118 Pediatrics 755 (2006).

[25] An estimate on the percentage of people who have gender identity disorder is difficult to attain. *See, e.g.*, Jonathan V. Last, *She ain't necessarily so: Jonathan V. Last takes us to the newest frontier in sexual politics—transgender chic*, Women's Q., Summer 2002, at 4.

[26] World Health Org. (WHO), International Statistical Classification of Diseases and Related Health Problems, ch. 5, § F64.0 (10th rev., 2007), http://apps.who.int/classifications/apps/icd/icd10online/. Published by the World Health Organization, the *International Statistical Classification of Diseases and Related Health Problems* establishes a coding system for categorizing diseases and a wide variety of signs, symptoms, abnormal findings, complaints, social circumstances, and external causes of injury or disease. This system is designed to promote international comparability in the collection, processing, classification, and presentation of these statistics and to help in the diagnosis of diseases. The system is widely used for purposes of statistical comparability and standardized diagnosis. The *International Statistical Classification* includes a section classifying mental and behavioral disorders, which was developed alongside the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*("DSM"); the two manuals seek to use the same codes. They represent the primary mental health diagnosis systems worldwide. The DSM, which is the United States' separate diagnostic manual, is connected to the *International Statistical Classification of Diseases and Related Health Problems* but uses slightly different standards that more closely approximate U.S. practices. The DSM provides four criteria for gender identity disorder: (1) "[S]trong and persistent cross-gender identification," (2) "[P]ersistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex," (3) "The diagnosis is not made if the individual has a concurrent physical intersex condition," and (4) "[C]linically significant distress or

There are two important predicates in the diagnosis of gender identity disorder. First, gender identity disorder is based upon a desire to live as a member of the opposite sex.[27] Thus, the medical community focuses on the congruence between the person's self-identified and biological sexes. Second, after psychological evaluation, doctors often recommend a sex change operation along with hormone therapy.[28]

Engaging in speculative discussion of the production of gender and sex is not sufficient for understanding either the underlying mechanism or its repercussions. Examining the very systems at play in constructing sex and gender is necessary to understand both the construction of these terms and their relationship, which I do in this dissertation.

But I am also interested in the role that science has in the production of sex as a natural and well defined category. In the lay community, science is often thought of as rigid, logical, and well defined. Because sex is a scientific category it is presumed to be fixed. But the fixed view of sex may merely be a result of our attempts to place all bodies into a defined category. Thomas Khun noted this problem as occurring in "normal science," the third and final phase of a shifting paradigm.[29] Khun contended that in normal science contradictory evidence was dismissed as a fault of the researcher, rather than considered for its own potential value in refuting the norm.[30] The view that sex is dichotomous is so entrenched as normal science that it is hardly disputed. When

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impairment in social, occupational, or other important areas of functioning."Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders356 (4th ed. text rev. 2000). The criteria used by the two sources are sufficiently similar for purposes of this analysis.

[27] WHO, *supra* note 26, at ch. 5, § F64.0.

[28] *Id.*

[29] Thomas Kuhn, The Structure of Scientific Revolutions, 24-25 (The University of Chicago Press, 2000).

[30] *Id.*

evidence is provided that there may be some variability in the standard, it is treated as an abnormality. Thus, the definition of sex may change at the margins to include outliers within the standard definition.

The relationship between the legal, political, and scientific is the foundation for this dissertation. The production of sex and gender as interrelated categories is not traced through merely speculative philosophy, but through real legal and ethical struggles surrounding lived identities outside of the traditional male-female dichotomy. The goal is to expose the issues related to the lived experiences of people who deal with the dilemma of sex and gender identity. I explore both categorization and scientific advancements as a function of identity politics.

My dissertation examines three specific areas where I think that sex matters. These are areas where there is scientific concern about whether or not there are just 2 categories of sex--male and female, and the ways in which there is a clash between our ethical perceptions, our political perceptions, our legal obligations, and our scientific understandings.

My first chapter looks at transsexuals and their right to get married in their acquired sex. To begin with, in Western society, someone who is transsexual is someone who has been identified as having Gender Identity Disorder. The primary way that you have a sex reassignment surgery is if you have been diagnosed with Gender Identity Disorder, which means that you have a persistent feeling that you exist in the wrong sex and that changing your sex is necessary for you to lead a healthy, well balanced life. To that end, if you are diagnosed with Gender Identity Disorder, you are required to have one year of treatment. Part of that treatment includes hormone therapy, but also

psychological therapy. At the end of that one year process, you can be given, as a cure, sex reassignment surgery.

From the scientific perspective, a person who is transsexual has acquired this sex. They have become female if they have transitioned from male to female. The only real change that does not occur biologically with sex reassignment surgery is a change in chromosomes and the ability to reproduce.

The clashes occur when these individuals try to acquire the rights in their acquired sex. There are certain areas in which being a member of a particular sex matters. The area where this matters most for now in the United States is the ability to get married. I explore that issue in Chapter One. I outline how the law deals with the fact that the scientific community says that that person who was born male and who has had a sex reassignment surgery is now a female. What do the law and our policies say in terms of governing how people are treated once they have transitioned? In fact, in the United States, for the most part, the law says that a person is still a member of their born biological sex. I trace changes in the European system. The European Court of Human Rights at first did not recognize the acquired sex of post-operative transsexuals, but now does. I outline how the United States could import that logic. Chapter One engages in a discussion of those particular issues.

In Chapter Two I talk about the participation of transsexuals and intersex people in sports. Someone who is born intersex is born with, what the medical community calls sex related abnormalities. There are a series of them. Some of them may involve differences in the way genitalia looks--so the genitals might not be fully formed; may look feminine, but the person appears to be a male; they may look masculine and the

person might actually be categorized as a female at birth. There may be a chromosomal abnormality. There may be hormonal issues. Somewhere between two and four percent of the population has been identified at birth as having some kind of intersex condition.

In sports, sex matters. We have sex divided sports. We have sports for men and sports for women. In terms of athletic competition, there has been a long concern-- since about the 1930s, but more prominently in the 1960s, during the time of the rise of the USSR-- that there were athletes competing as women who were "faking it" or were men masquerading as women.

A set of tests was instituted to ensure that we could root these people out. At first, it was simply to look at people's genitals. A person would stand up naked, their genitalia would be examined, and then an official would make a determination about whether that person was capable of competing as a woman. Later, people thought that process impinged on an athlete's privacy interests, so they instituted new policies that required for people to wear Spandex when they made those examinations.

Later, it became chromosomal tests and, eventually we have come to the regimen we have today. In that regimen, we test the person for not only the Y chromosome, which is indicative of a person who is male, but also engage in further tests to ensure that this person does not suffer from some intersex condition. Then there are a series of tests within that intersex condition to determine whether or not someone can participate as a woman in these sporting events.

I think examining the issue of sex in sports kind of sets the line for how difficult it is to determine what is female and what is male. It is difficult from a scientific

perspective, not just from a legal or political perspective. Scientists themselves struggle with these types of questions.

In particular when we look at sports, we struggle with the question of how do we make that body that is female, or has been assigned as female, competitive with other female athletes--so that the person does not have a competitive advantage? The answer from the scientific perspective is, in essence, to suppress a lot of the advantages that someone who is intersex or a person who has made a transsexual transition would have in competing in those sports. So, we give them medication to reduce their hormone levels. We ensure that their body fat distribution is more in line with the female norm. We ensure that their musculature development is more aligned with someone who is female.

These decisions create a dilemma in terms of the way bodies matter, the way that we conceive of sex and gender and that interplay. From my perspective that leaves two kinds of notes. The first is that we are trying to bind people into dimorphic male/female categories and those definitions in sports are based on what it means to have an athletic body. That athletic body is generally male. So we see strength as the indicator of athletic prowess, which is an advantage that men have biologically via their musculature, versus what women may have. We do not support sports where women may have an advantage. For example, sports that preference endurance. Women have higher metabolic rates and better fat distribution and may be advantaged in ultra long distances. For example, in ultra-marathons, women often succeed in winning races over male athletes.

On the other hand, I also think that it is interesting in terms of what it means in women's sports. Once we start labeling people who are transsexuals or people who are intersex as having an advantage because they have some remnants of their male biology,

then we are necessarily saying that women's sports is less than men's sports. We are saying that women's sports are somehow men's sports minus all these advantages. More or less, we are claiming that in some ways it is a disability to be a woman, to be female. That is what the second chapter tracks.

Chapter Three discusses the way we assign sex for people who are intersex. When children are born intersex, doctors used to conduct a physical exam and determine, based on what the baby's body looked like, if that person was male or female and then assign the baby to that sex. The traditional standard was based on the length of the clitoris. If the clitoris was more than an inch long, it was assigned as a male. If the clitoris was less than an inch long or if they had some kind of other biological abnormality in terms of development, they would assign that child as female.

That protocol was largely rooted in the work of John Money, who believed that gender was socially constructed, which was fairly progressive for him in the 1950s. Money argued that gender could in fact control sex, that it did not matter what your biology was, because your gender mattered more. His theory was that you could assign someone to a particular sex and then normalize their gender to that sex, so they felt normal in society as someone who was male/masculine/man or female/feminine/woman.

As studies have continued, there has been greater concern about-- does that intersex condition necessarily mean that it is more likely that the person is going to want to live as a male person or as a female person? What are the reproductive consequences for that person and can that person reproduce? And, what are the mental health solutions in the long run? There has been a push in recent years for people who are intersex to

have more flexibility in those decisions from giving parents input into a child's sex to giving intersex children input into their sex by delaying puberty for that decision

What is interesting from this intersex perspective is that, in my mind, it profoundly shows how the link between sex and gender are important. We still care about these things. It still matters that a sexed body is aligned with a gendered body. We are always concerned that a person is acting opposite of their sex in terms of their gender in whatever manifestations that may be. Often times we are willing to ignore the scientific or the medical reasons for engaging in surgical intervention early on in life with intersex children, because we want to make sure that this person's sex aligns directly with their gender. I think that those consequences are significant and they illuminate how we perceive these issues even when we think of them as progressive. That is why I, for example, included the case of Sasha-- a child who was born male and whose parents did not want to label it as either being male or female. Sasha was raised until he was five not being assigned to a sex or gender by his parents for the general public. But, his parents continuously talk about these issues in gendered terms. His parents say, "We do not want Sasha to wear super masculine stuff. We do not want Sasha to have a Barbie. We want to make Sasha wear a girl's blouse to school, because we want Sasha to be androgynous." In that sense of androgyny, what they are really doing is pushing against what his desires may be. His desires may not be to wear a blouse. His desires obviously are to occasionally wear hypermasculine clothes or to play with a Barbie. They are denying him those interests. In doing so, in essence, I think his parents are acknowledging that gender and sex matter. They matter in an incredibly important way even for a child that they are trying to raise androgynously.

From my perspective in terms of intersex children there is a balance between wanting to do or needing to do what is medically necessary as early in the process as possible and acknowledging that the child can have some gender flexibility as that child moves forward.

Chapter Four is about sex selection. It traces this process of sex selection from prehistory to today. It outlines the process of aborting children or selecting the sex of a child before a child is implanted or born. I think this is related because it gives us a sense of what our preferences are as a society in terms of the children we want to produce. Why is it that for thousands of years, since before recorded history, there has been some level of preference for having male children in most societies? There are a number of gender reasons that we have those preferences-- whether that be that female children have to pay a dowry, that male children inherit the name and the money from the family, or that male children are perceived to provide financial benefits, or whether it is just a stated preference for having a daughter who is girly or frilly versus a boy who is tough and plays with trucks.

The approach from an ethical perspective about these particular questions has always been-- how do we restrict these practices and what are the justifications for restricting these practices? In particular, limiting sex selection has been problematic because there are a number of sex linked disorders that could be reasons why people would want to select, generally, a female child to prevent such a disorder. All of these approaches have come from the perspective of how we regulate this practice. I think that that perspective is somewhat turned around.

I think that the more important question is: Why do people care? Why do we want to select our children's sex? How do we intervene to resolve *that* problem? I think that is not only the more interesting problem, but the more important issue. I think the answer on that end is to eradicate issues of sex inequality, so that that preference is no longer articulated. The reason why parents care about the sex of their children is because of sex inequity. That is the manifest reason why we believe that those things are important.

The other end of that is to permit gender flexibility. The more flexible people's gender roles are-- how they act in society-- the less importance sex holds. If we have female children who are born and we believe that they can become professional athletes or they can become the President of the United States, and that they can act in traditionally masculine ways, if they can inherit property, if they do not have to pay dowries-- if those roles are eliminated, then the relevance of the sex and gender become less important.

These are fairly complicated issues. Examining these issues in terms of the lived realities of individuals, in terms of issues that are occurring now rather than speculating about issues that might occur, talking about the problems in terms of defining sex and gender from all three of these perspectives--from the legal, the political, and the scientific-- illustrates that this is a problem area. The solution, from my perspective, is to continue to press for increased legal and political equality for the sexes and for more flexibility in terms of individuals' gender.

CHAPTER 1.

THE (MIS)CATEGORIZATION OF SEX IN ANGLO-AMERICAN CASES OF TRANSSEXUAL MARRIAGE

A legal dilemma occurs when post-operative transsexuals attempt to gain legal recognition of their acquired sex. Given the widespread belief that sex is easily categorized and fixed at birth, attaining legal recognition of an acquired sex can be difficult.[31] Particularly contentious is the recognition of sex in legal agreements in which the parties' sex is legally relevant. Of these legal agreements, marriage is the most salient and controversial, as it is often limited by law to a partnership between two people of opposite sex.[32]

Currently, states lack uniformity in whether and how they recognize the acquired sex of post-operative transsexuals in both birth certificates and for the purpose of marriage, resulting in sex being determined largely by a person's state of residency.

When states fail to recognize transsexuals' acquired sex, individuals' rights are limited. As I will argue in this Chapter, these limitations constitute a violation of the Fourteenth Amendment.[33] Throughout the United Kingdom,[34] in contrast, the law

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[31] Typically legal recognition comes in the form of official documents such as birth certificates, insurance, marriage documents, etc.

[32] *E.g.*, Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1996)).

[33] *See infra* Section 3.

[34] This Chapter will examine both the case law in the United Kingdom and the European Court of Human Rights. The European Court of Human Rights is a constitutional court established by the European Convention of Human Rights to monitor human rights in member states through application of the Convention. The United Kingdom is the primary focus of this Chapter for two reasons. First, the European Court of Human Rights case law on transsexuals' rights to gain recognition in their acquired sex deals with cases from the United Kingdom. Decisions made by the European Court of Human Rights interpret and apply either the European Convention on Human Rights, which binds all member states, or the law of member states directly. Accordingly, its decisions are binding on member states. The decisions made by the

recognizes the acquired sex of post-operative transsexuals for nearly all purposes, including for birth certificates and marriage. In this Chapter I will explore the legal hurdles faced in determining the sex of a post-operative transsexual for the purpose of marriage in the Anglo-American legal system. Examining the differences between the laws in the United States and the United Kingdom clarifies both the problem of sex categorization and the arguable legal denial of many transsexuals' substantive due process and equal protection rights.

I will establish that the United Kingdom's approach, as detailed both in decisions of courts in the United Kingdom and the European Court of Human Rights ("ECHR"), is consistent with U.S. Constitutional requirements and provides a reasoning that the United States should borrow in its own consideration of these issues. In Part I, I demonstrate the inconsistent approach to recognizing the acquired sex of post-operative transsexuals for the purpose of marriage in the United States. I will analyze the systematic change in legal reasoning in the United Kingdom that eventually led to the recognition of a post-operative transsexual's sex for the purpose of marriage in Part II. In Part III I argue that the sex equality model underpinning the change in the United Kingdom should be imported into the United States to resolve the state court split in favor of recognizing the acquired sex of a post-operative transsexual. Additionally, in Part III I will provide a legal framework for making this change in the United States.

European Court of Human Rights with regard to the status of transsexuals in the United Kingdom are thus binding on the United Kingdom, adding to their case law, as these decisions both interpret the Convention, to which the United Kingdom is bound, and the law of the United Kingdom directly. Moreover, the United Kingdom, like the United States, is a common law nation. Given the historical links between the United Kingdom and the United States in terms of common law, the United Kingdom is the most relevant nation for comparison.

SECTION 1.

States in the United States Are Divided on Recognition of Acquired Sex

In the United States, the recognition of a transsexual's acquired sex is currently an issue addressed solely by state law. A birth certificate is the legal record of a person's sex.[35] Therefore, a transsexual must have the sex on his/her birth certificate changed in order to attain legal recognition of an acquired sex. Transsexuals must modify their birth certificates before updating their acquired sex on other legal documents. States have various approaches to recognizing a person's acquired sex. In this Section I outline the various approaches taken by states regarding recognition and presents background to furnish the argument developed in Sections 2 and 3. Within Subsection A I examine the right to change a birth certificate to reflect a sex change and demonstrate that state practices vary dramatically. In Subsection B I discuss variations among states' laws regarding the right to marry as a member of an acquired sex.

A. *Changing the Sex Listed on Birth Certificates*

The policies of changing the sex listed on a birth certificate fit into three general approaches. First, there are states with a permissive statutory or administrative approach. There are also states that do not allow changes to the sex listed on a birth certificate. Finally, there are states that do not yet have a set administrative or statutory system for addressing changes to the sex listed on a birth certificate.

[35] Birth certificates are the primary document used for the assignment of other legal documents, including driver's licenses, passports, etc. Thus, the sex listed on a birth certificate may be determinative of the sex listed on other legal documents.

1. States with a Permissive Statutory or Administrative System

Twenty-eight states have a permissive statutory or administrative policy that provides a mechanism for changing the sex on a birth certificate. Currently, twenty-four states and the District of Columbia statutorily permit changing a birth certificate to recognize a transsexual's acquired sex.[36] These states also allow modification of other official state documents.[37] But most of these states require proof of a sex change operation before permitting the alteration of other legal documents.[38]

Four other states—Kansas, Maine, Nevada, and New York—have no statutes regarding transsexuals' right to legally change their acquired sex on their birth certificates.[39] Instead, these four states provide an administrative process for the modification of birth certificates,[40] which requires demonstrating a need to change the birth certificate.[41] A post-operative transsexual would likely be able to attain a birth certificate change to recognize the acquired sex by using this process.[42] The problem is that there is no set standard for what "need" entails. For instance, in Kansas the Department of Health and Environment requires medical certification of a sex change operation,[43] whereas in New York, a court order, made at the judge's discretion and based on surgical

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[36] Julie A. Greenberg & Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 Wash. L. Rev. 819, 837 (2005).

[37] *Id.*

[38] *E.g.*, Iowa Code Ann. § 144.23(3) (West 2009).

[39] *See* Lambda Legal, Amending Birth Certificates to Reflect Your Correct Sex, http://lambdalegal.com (search for "Amended Birth Certificates" and then click "view the law in your state") (last visited Feb. 21, 2010).

[40] *See Id.*

[41] *See Id.*

[42] *See Id.*

[43] Kansas Department of Health and Environment, How to Amend Birth Certificates for Adults, http://www.kdheks.gov/vital/amend_birth_adults.html (last visited Feb. 21, 2010). The Department also notes, "Taking hormones or breast reassignment surgery does not qualify as a sex or gender change." *Id.*

documentation, is required.[44] Thus, despite statutory or administrative mechanisms for recognizing a change in birth certificates, some changes are not approved.[45]

2. States with Prohibitive Statutory Systems

Two states, Texas and Tennessee, expressly prohibit changing sex on birth certificates. Texas courts have ruled that administrative changes to the sex listed on a birth certificate can only be made if the birth certificate contains an inaccuracy.[46] Texas has specifically stated that a sex change operation does not constitute an inaccuracy for the purpose of modifying a birth certificate.[47] Tennessee has specific legislation forbidding the modification of a birth certificate to reflect the acquired sex of a post-operative transsexual.[48]

3. States with Neither a Statutory nor Administrative Mechanism

The remaining twenty states have no specific statutory or administrative mechanism for allowing post-operative transsexuals to change the sex listed on a birth certificate. In such jurisdictions, the only way to modify a birth certificate is within the courts.[49] Case law demonstrates a divergence of states' recognition of post-operative transsexuals' acquired sex.[50] Legal sex is particularly important relative to the right of

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[44] Becky Alison, Transgender Roadmap, http://www.tsroadmap.com/reality/name/new-york-birth-certificate.html (last visited Feb. 21, 2010).

[45] *See* Press Release, Lamda Legal, Refusals To Change Transgendered People's Birth Certificates Almost Always Conflict with State Laws (Nov. 12, 2002), http://www.lambdalegal.org/news/pr/birth-certificate-amend-male-female.html.

[46] Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999).

[47] *Id.* (interpreting the Texas statute and codifying that sex reassignment surgery is not a mistake).

[48] Tenn. Code Ann. § 68-3-203(d) (2009) ("The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.").

[49] Greenberg & Herald, *supra* note 36, at 838.

[50] *See infra* Section I.B.

marriage in the United States, because most states do not currently recognize same-sex marriage.[51]

B. *Recognizing a Change in Sex for the Purpose of Marriage*

States' marriage laws also vary in their treatment of changes in sex. Issues relating to marriage validity in which one of the parties is a post-operative transsexual have been litigated in several state courts in the past decade. In California,[52] trial courts have held that post-operative transsexuals can legally be recognized as a member of the acquired sex. During the same period, the Supreme Court of Kansas[53]and the Courts of Appeals of Florida,[54] Texas,[55] and Ohio[56] all ruled that for purposes of marriage, transsexuals are recognized only as members of their born sex, and not their acquired sex. Further investigation of the legal decisions in the United States will highlight two divergent views on the right of transsexuals to marry as members of their acquired sex. Section 1.B.1 establishes that most jurisdictions do not recognize the acquired sex of post-operative transsexuals. Section 1.B.2 discusses the reasoning expressed by jurisdictions that recognize an acquired sex for the purpose of marriage, demonstrating a lack of comprehensive analysis behind the underlying goals of such a policy.

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[51] If a state recognizes same-sex marriage, the need to change the sex on a birth certificate is less consequential because the sex of your spouse would not preclude you from getting married. Of course, there are other reasons a transsexual may want to change the sex listed on his/her birth certificate.

[52] *See, e.g.*, *Transgender Ruling*, L.A. Daily J., Nov. 26, 1997, at 1.

[53] *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002).

[54] Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

[55] Littleton v. Prange, 9 S.W.3d 223, 224 (Tex. App. 1999).

[56] *In re* Marriage License for Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

1. Most Jurisdictions Do Not Recognize the Acquired Sex of Post-Operative Transsexuals

In the Texas case *Littleton v. Prange*, a post-operative male-to-female transsexual petitioned for the right to sue for malpractice and the wrongful death of her husband.[57] The defendant, Dr. Mark Prange, petitioned the court, successfully arguing that the plaintiff, Christie Lee Littleton, could not bring a claim for wrongful death because she was a man and her marriage was therefore invalid. Littleton appealed the decision to the Court of Appeals of Texas.[58] Chief Justice Hardberger, writing for the majority, explained that, although Littleton physically looked like a woman, she was not legally a woman because she did not possess a womb, ovaries, or a cervix and because she retained male chromosomes.[59] The majority concluded Christie was a man who could not be legally married to another man.[60] The Court thereby affirmed the lower court ruling, indicating that sexual identity is not determined by sexual organs, but instead by chromosomes.[61] The court thus invalidated Littleton's marriage, precluding her from suing on her husband's behalf.[62]

The court of appeals judges in *Littleton* were unwilling to rely primarily on scientific literature regarding post-operative transsexuals in reaching their holding.[63] The court did acknowledge, however, that sex determination involves profound philosophical,

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[57] *Littleton*, 9 S.W.3d at 225.
[58] *Id.*
[59] *Id.* at 230–31.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*

metaphysical, and policy concerns.[64] But instead of consistently focusing on the biology of sex and the rights stemming from it, the court employed an analysis of the moral and religious aspects of the issue as proxies for biology (although the court did not rest its holding on this reasoning).[65] Sidestepping strictly legal concerns, the court asked, "[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"[66]

Regardless of the court's acknowledgement of these issues, the ultimate focus in *Littleton* was on a chromosomal standard and, to a lesser extent, functioning biology to categorize a sex ambiguity into a dimorphic position. Chief Justice Hardberger explained, "Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied."[67] Hardberger noted, "The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male."[68] The court did not recognize Littleton's sex in spite of the fact that the decision to undergo a sex change operation was medically advised and the change in her sex was recognized by the medical community.[69]

The *Littleton* reasoning represents the prevailing view of jurisdictions that do not recognize the acquired sex of post-operative transsexuals. In *Estate of Gardiner*, the

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[64] *Id.* at 231.
[65] *See Id.* at 224.
[66] *Id.*
[67] *Id.* at 231.
[68] *Id.* at 230.
[69] *Id.* at 224–25.

Kansas Supreme Court, citing *Littleton*, concluded, "A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes."[70] Similarly, in *Kantaras v. Kantaras* the Florida Court of Appeals held, "We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth."[71]

The message of the *Littleton* court is that, even though a sex change operation is medically prescribed and the person physically changed, a person's acquired sex will not be legally recognized in some states. The end result is that, in these states, transsexuals can never fully attain recognition of their sex. These cases reveal that, ultimately, the question of legal rights was of lesser concern than the recognition of a biological or a moral standard.

2. The Reasoning Supporting the Recognition of the Acquired Sex of Post-Operative Transsexuals

The primary model for recognizing an individual's acquired sex is statutory or administrative, so few cases illustrate the underlying rationale for accepting an individual's acquired sex. The earliest of these cases in the United States, *M.T. v. J.T.*, recognized the legal right of transsexuals to marry in their acquired sex.[72] The case

[70] 42 P.3d 120,135 (Kan. 2002).
[71] 884 So.2d 155 (Fla. Dist. Ct. App. 2004).
[72] 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976).

began when M.T. filed a claim with the Juvenile and Domestic Relations Court in New Jersey for support and maintenance.[73] In defense of not paying support and maintenance, J.T, a man, claimed that the marriage between J.T. and M.T., a male-to-female transsexual, was invalid because M.T. was male and not female.[74] J.T. first met M.T. in 1964, seven years before M.T. had a sex change operation.[75] When J.T. and M.T. first met, M.T. was living as a woman, but J.T. was aware that M.T. was biologically born male.[76] In 1971, M.T. had a sex change operation.[77] In 1972, J.T. and M.T. had a marriage ceremony, consummated their relationship, and lived together for two years.[78]

The court focused on the psychological aspects of sex as a key component in determining a transsexual's sex for the purpose of marriage. The court reasoned that mere biology was not significant in determining sex. "A person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character."[79] The court concluded that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."[80] The decision placed greater focus on the individual's identity, and the alignment of sex and gender to meet that perception, as the proper measure for determining a person's sex.

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[73] *M.T.*, 355 A.2d at 205.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 209.
[80] *Id.*

Although *M.T. v. J.T.* was a significant step towards transsexuals' ability to gain recognition of an acquired sex, the case contained some significant caveats. The primary limitation of the decision was that the court explicitly held that the ability to have full intercourse determines the validity of a marriage. Specifically, the court stated, "Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female."[81] Thus, the court limited the recognition of a post-operative transsexual by the capacity to consummate a relationship: A person having a sex change operation that did not result in the ability to have traditional heterosexual penetrative intercourse would not have his or her sex recognized for the purposes of marriage. In particular, the court noted, "[A] female transsexual [who] had had a hysterectomy and mastectomy but had not received any male organs and was incapable of performing sexually as a male" would be ineligible for recognition in the acquired sex for the purpose of marriage.[82]

There have been no significant cases recognizing the acquired sex of a post-operative transsexual for the purpose of marriage since *M.T. v. J.T.*[83] Cases in other jurisdictions have recognized the acquired sex of post-operative transsexuals, utilizing a slightly different rationale. For example, in *Richards v. United States Tennis Ass'n*, Renee Richards, a post-operative male-to-female transsexual, petitioned the state of New

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[81] *Id.*

[82] *Id.*

[83] One known case in California, *Vecchione v. Vecchione*, concurred with the court in *M.T. v. J.T.*, but because there was no appeal there is no reported decision. Vecchione v. Vecchione, Civ. No. 96D003769 (Cal. Super. Ct. 1997); *see Transgender Ruling*, *supra* note 52, at 1.

York for the right to compete as a woman in the U.S. Open.[84] Richards had previously participated as a man in the competition before undergoing sex reassignment surgery.[85] The United States Tennis Association rejected her application on the theory that she was unfairly advantaged because her previous status as a man made her physically stronger.[86] Specifically, the United States Tennis Association argued that the Barr body test indicated Richards had a Y chromosome and that the very expression of the Y chromosome gave her an improper and unfair physical advantage.[87] The New York State Supreme Court rejected the application of the Barr body test for chromosomes because hormone therapy had effectively repressed the impact of the Y chromosome,[88] and Richards was granted the right to compete as a woman in the U.S. Open.

Richards and *M.T. v. J.T.* focused on biology in determining the right to be recognized in an acquired sex. Both cases were guided by the same principle (although they focused on different aspects of biology), and therefore both indicate a willingness to legally recognize sex changes. The court in *Richards* considered the modification of Richards's chromosomal impact, as a result of operation, sufficient to recognize a change in sex. The focus was not on the right to change her sex, but on the biology of the change and its recognition.

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[84] Elizabeth Fee, et al. *One Size Does Not Fit All in the Transgender Community*, 93 Am. J. Pub. Health.899 (2003).

[85] *Id.*

[86] *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 270 (Sup. Ct. 1977).

[87] *Id.* at 268–69.

[88] *Id.* at 272–73.

SECTION 2.

The United Kingdom and the ECHR Model: Recognizing Transsexuals' Legal Rights in Their Acquired Sex

During the last four decades, the United Kingdom has significantly expanded transsexuals' legal right to marry in their acquired sex. Forty years ago the United Kingdom did not allow post-operative transsexuals the right to seek a change in the sex listed on a birth certificate and actually invalidated marriages of transsexuals in their acquired sex. Critical rulings by the ECHR, however, changed the legal rights of transsexuals. An examination of the case law reveals how the legal doctrine was reshaped and ultimately came to recognize the acquired sex of post-operative transsexuals. In Subsection A I discuss the United Kingdom's initial position that post-operative transsexuals could not marry as members of their acquired sex. In Subsection B I examine the shift in legal decisions by the ECHR that led to the eventual recognition of the acquired sex of post-operative transsexuals for the purpose of marriage in the United Kingdom.

A. *The United Kingdom's Initial Position: Post-Operative Transsexuals Did Not Have the Right to Marry As Members of Their Acquired Sex*

The United Kingdom initially took the legal position that a post-operative transsexual could not marry a person with a sex matching the transsexual's birth sex.[89] Forty years ago, in the landmark case *Corbett v. Corbett*, the United Kingdom established

[89] Corbett v. Corbett, [1970] 2 All E.R. 33, 88 (P.).

sex as fixed at birth.[90] The court held 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."[91] The court arrived at this conclusion by examining the testimony of various medical practitioners who all argued that sex is determined at birth.[92] Specifically, the court focused on determinations by the experts that an individual's sex is determined by four factors: (1) chromosomal, (2) gonadal, (3) genital, and (4) psychological.[93] The court concluded that the psychological factor was not relevant in determining sex, disregarding the experts' opinion,[94] and proceeded to hold that "the law should adopt . . . the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention."[95] The court acknowledged that there may not be full congruence on the three factors, writing that "[t]he real difficulties, of course, will occur if these three criteria are not congruent."[96] Judge Omrod, writing for the court, indicated in dictum that "greater weight would probably be given to the genital criteria than to the other two."[97] The only specific recognition of a sex change acknowledged by the court was when "a mistake as to sex is made at birth and subsequently revealed by further medical investigation."[98] The Corbett marriage was invalidated, in part under the view that a marriage cannot be consummated

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[90] *Id.* at 104.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 100.
[94] *Id.* at 106.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 84.

unless there is full penetration, which is only possible when the female is born with a vagina.[99]

The United Kingdom's legal position on transsexuals was further solidified by the ECHR in *Rees v. United Kingdom*.[100] From birth, Brenda Margaret Rees possessed "the physical and biological characteristics of a child of the female sex" and was designated a female in the register of births.[101] "However, already from a tender age the child started to exhibit masculine behavior and was ambiguous in appearance."[102] Rees began hormone treatment, had a double mastectomy, and changed her name to Brendan Mark Rees.[103] Rees eventually had all legal documents, with the exception of his birth certificate, reflect his sex change.[104] Rees brought a case to have his birth certificate changed and to attain the right to marry as a member of his acquired sex. A medical expert testified that:

> [O]f the four criteria of sex—namely chromosomal sex, gonadal sex, apparent sex (external genitalia and body form) and psychological sex, the last was the most important as it determined the individual's social activities and role in adult life, and it was also, in his view, pre-determined at birth, though not evident until later in life."[105]

The expert concluded "the applicant's psychological sex was male, [so] he should be assigned male."[106]

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[99] *Id.* at 105 (acknowledging that there may be some difficulty in this determination if a person suffers from a congenital defect that makes full penetration impossible and indicating that under such circumstances an operation may enlarge the vagina or an argument may be made for incapacity).

[100] App. No. 9532/81, 9 Eur. H.R. Rep. 56 (1987).

[101] *Rees*, 9 Eur. H.R. Rep. para. 12.

[102] *Id.*

[103] *Id.*paras. 13–14.

[104] *Id.*para. 17.

[105] *Id.*para. 16.

[106] *Id.*

Rees contended that the United Kingdom's refusal to recognize his acquired sex violated the European Convention on Human Rights under both Article 8[107] (the right to respect of private life) and Article 12[108] (the right to marry and form a family).[109] The court rejected the Article 8 claim, reasoning that the government had a significant interest in not altering birth certificates or providing alternative sex documentation. The ECHR found that the United Kingdom might have "positive obligations inherent in an effective respect for private life," but that the governmental interest outweighed private individual interests.[110] The ECHR went on to hold that there was no Article 12 violation because "the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex," and the primary focus is on the formation of family.[111] The holding clarified that Article 12 ensures only that "the very essence of the right" is not impaired and that, as long as people of the opposite biological sex are allowed to marry, the law in the United Kingdom is permissible.[112] Yet the ECHR noted, "The need for appropriate legal measures [for transsexuals] should therefore be kept under review having regard particularly to scientific and societal developments."[113]

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[107] Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

[108] *Id.* at art. 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.").

[109] *Rees*, 9 Eur. H.R. Rep. para. 31. The United Kingdom is bound by the European Convention on Human Rights.

[110] *Id.* para. 35.

[111] *Id.* para. 49. The ECHR is making two assumptions with this holding: first, that the goal of marriage is reproduction and the formation of a family, and second, that transsexual couples are incapable of forming a family.

[112] *Id.* para. 50.

[113] *Id.* para. 47.

Three years later, the ECHR reviewed *Rees* in *Cossey v. United Kingdom*.[114] *Cossey* concerned Caroline Cossey, a post-operative transsexual who was born male. Beginning at age 13, Cossey began feeling differently from other males, later feeling psychologically female, and eventually pursuing hormone treatment and sexual reassignment surgery to make her physically female.[115] Caroline Cossey married in 1989;[116] but, in 1990, the English High Court "pronounced [the marriage] to have been by law void by reason of the parties not being respectively male and female."[117]

Cossey, like Rees, argued the United Kingdom violated Articles 8 and 12 of the European Convention of Human Rights. While Cossey attempted to distinguish herself from Rees, because Mr. Rees did not yet have a partner wishing to marry him,[118] the ECHR found this distinction immaterial.[119] And, although the ECHR reviewed the case, they concluded they had "been informed of no significant scientific developments that have occurred in the meantime; in particular, it remains the case—as was not contested by the applicant—that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex."[120] In the end, the ECHR refused to depart from the holding in *Rees*, stating "that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purpose of marriage."[121]

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114 Cossey v. United Kingdom, App. No. 10843/84, 13 Eur. H.R. Rep. 622 ara. 1 (1990).
115 *Id.* paras. 10–11.
116 *Id.* para. 14.
117 *Id.*
118 *Id.* para. 44.
119 *Id.*
120 *Id.* para. 40.
121 *Id.* para. 46.

Seven years later, the ECHR examined not the right to marry, but the right for a female-to-male transsexual to be named as the father of a child on the child's birth certificate with *X, Y, & Z v. United Kingdom*.[122] The ECHR relied heavily on the conceptions of sex solidified in *Corbett*, *Rees*, and *Cossey* to hold that the European Convention on Human Rights does not grant an individual right to the recognition of a sex change that is medically required. In the end, the ECHR acknowledged that transsexual identity "raises complex scientific, legal, moral and social issues," but refused recognition of the acquired sex.[123]

In *Sheffield & Horsham v. United Kingdom*, the ECHR continued to apply the biological standards in *Corbett*, *Rees*, and *Cossey* in determining that transsexuals had no right to recognition of an acquired sex for purposes of marriage or modification of a birth certificate.[124] Simultaneously, however, the ECHR acknowledged a need for the United Kingdom to alter laws concerning transsexuals.[125] Though the court maintained that "the applicants have not shown that since the date of adoption of its *Cossey* judgment in 1990 that there have been any findings in the area of medical science which settle conclusively the doubts concerning the causes of the condition of transsexualism,"[126] it acknowledged that a change in this policy could occur.

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[122] X, Y, & Z v. United Kingdom, App. No. 21830/93, 24 Eur. H.R. Rep. 143paras. 12–17 (1997).

[123] *Id.* para. 3.

[124] Sheffield & Horsham v. United Kingdom, App. Nos. 22885/93, 23390/94, 27 Eur. H.R. Rep. 163 paras. 36–37 (1998).

[125] As in the previous cases, in *Sheffield & Horsham v. United Kingdom* "the issue [raised by the applicants] before the court is not that the respondent State should abstain from acting to their detriment but that it has failed to take positive steps to modify a system which [they] claim operates to their detriment." *Id.* para. 51.

[126] *Id.* para. 56.

The Court reasoned that the status of transsexuals could change if scientific research indicated a conclusive position on the sex of transsexuals. Moreover, the ECHR reminded the United Kingdom that "there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States."[127] The ECHR acknowledged that, in addition to potential scientific codification resulting in the acknowledgement of the right for transsexuals to be recognized in their acquired sex, the increased social acceptance warranted review of the sex status of post-operative transsexuals.[128]

B. *The United Kingdom's Policy Now Recognizes the Acquired Sex of Transsexuals for the Purposes of Marriage*

The grounds for further reflection and alteration in policy were set in *Sheffield & Horsham v. United Kingdom,* but it would take another four years for the policy in the United Kingdom to change. Two pivotal cases, *Goodwin v. United Kingdom* and *I v. United Kingdom,* brought jointly before the ECHR and referred to as *Goodwin v. United Kingdom,* altered the legal status of post-operative transsexuals in the United Kingdom.[129] Ultimately, these cases led to the recognition of the acquired sex of transsexuals for the purposes of marriage.

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[127] *Id.* para. 60.

[128] In addition, nine of the twenty justices dissented from the opinion in *Sheffield & Horsham v. United Kingdom* on Article 8 grounds. *Id.* para. 80.

[129] App. No. 28957/95, 35 Eur. H.R. Rep. 447 (2002).

In 2002, the ECHR reversed its precedent regarding the status of post-operative transsexuals in *Goodwin v. United Kingdom*. The ECHR noted that the United Kingdom was already reexamining the basis of its treatment of transsexuals.[130] On April 14, 1999, "the Secretary of State for the Home Department announced the establishment of an Interdepartmental Working Group on Transsexual People."[131] In 2000, the Interdepartmental Working Group on Transsexual People concluded that "the principal areas where the transsexual community is seeking change are birth certificates, the right to marry and full recognition of their new gender for all legal purposes."[132] The ECHR concluded that the Interdepartmental Working Group on Transsexual People and its findings constituted an acknowledgement of the changing societal status of transsexuals in the United Kingdom and Europe more generally.[133]

In accepting the right of transsexuals to legal recognition of their acquired sex, the court acknowledged sex discrimination against transsexuals. The court noted that the lack of legal recognition of the acquired sex of post-operative transsexuals had the greatest "effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women."[134]

The ECHR also recognized a violation of the right to privacy, indicating "that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity."[135] In effect, the court asserted that there is

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130 *Goodwin*, 35 Eur. H.R. Rep. 447.
131 *Id.*Para. 49.
132 *Id.*para. 50 (citation omitted).
133 *Id.*
134 *Id.* para. 76.
135 *Id.* para. 77.

"discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of [sex]."[136] Transsexuals are denied the right by courts to live their lives as they see fit because of rules that deny a concordance between their personal identity and their legal status.[137]

The ECHR also noted a peculiar disparity between the medical diagnosis that eventually motivated the decision to undergo a sex change operation and the legal status of transsexuals.[138] A sex reassignment surgery is a procedure recommended for some people who suffer from gender identity disorder,[139] the belief that one's sex and gender are not properly aligned.[140] The goal of sex reassignment surgery is "as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs."[141] In fact, the National Health Service in the United Kingdom recognizes gender identity disorder and sex reassignment surgery.[142] "Where a State has authorized the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations . . . it appears illogical to refuse to recognize the legal implications of the result to which the treatment leads."[143]

The ECHR continued by concluding that scientific evidence points to a distinct biological and psychological recognition of transsexuals as members of their acquired

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[136] *Id.*

[137] *Id.*

[138] *Id.* para. 78

[139] In the United Kingdom, gender identity disorder is often referred to as gender dysphoria. For purposes of clarity, this Note will use the term gender identity disorder rather than gender dysphoria.

[140] *Goodwin*, 35 Eur. H.R. Rep. 447 para. 78.

[141] *Id.*

[142] *Id.*

[143] *Id.*

sex.[144] The Court also concluded that "the principal unchanging biological aspect of [sex] is the chromosomal element."[145] It went on to acknowledge that there may be natural chromosomal abnormalities that still require a person to be designated as a member of one sex or the other, despite that person not fitting into the traditional distinction between male (XY) and female (XX).[146] Thus, the lack of recognition of the acquired sex of post-operative transsexuals was not congruent with provisions of Article 8.

Regarding the right to marry specifically, the ECHR overruled *Rees*[147] and *Cossey*.[148] The ECHR held "that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex."[149] The ECHR found its previous position incommensurate with the desire for a post-operative transsexual to marry someone opposite of his or her acquired sex. The ECHR noted that Goodwin lived as a female and "is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed."[150]

Ultimately, the ECHR held that the United Kingdom must take steps "to implement such measures as it considers appropriate to fulfill its obligations to secure the applicant's, and other transsexuals', right to respect for private life and right to marry in

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144 *Id.* para. 81.
145 *Id.* para. 82.
146 *Id.*
147 Rees v. United Kingdom, App. No. 9532/81, 9 Eur. H.R. Rep. 56 (1987).
148 Cossey v. United Kingdom, App. No. 10843/84, 13 Eur. H.R. Rep. 622 (1990).
149 *Goodwin*, 35 Eur. H.R. Rep. para. 101.
150 *Id.*

compliance with this judgment."[151] The end result was the establishment of the Gender Recognition Act in 2004, which provided full recognition of the sex of both post- and pre-operative adult transsexuals.[152]

SECTION 3.

Applying a Sex Equality Model Emerging From the United Kingdom and the ECHR as a Method for Resolving the Divided State Positions in the United States

The lack of a coherent position within the United States places transsexuals in a position where recognition of their sex is entirely dependent upon their state of residence. The result is that fundamental liberties stemming from recognition of an acquired sex are arbitrarily governed by residency. Therefore, a post-operative transsexual wishing to challenge a state's refusal to change the sex on his/her birth certificate should utilize a Fourteenth Amendment claim by arguing that the U.S. Supreme Court should borrow the legal reasoning the ECHR applied to the United Kingdom.[153] Subsection A explains the concept of reason-borrowing, discusses when and why it is invoked, and argues that the ECHR is an appropriate source from which U.S. courts should reason-borrow. This Section will continue by examining specific reasoning that should be imported from the ECHR to support recognition under the U.S. Constitution of the right of transsexuals to

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[151] *Id.* at 483.

[152] Gender Recognition Act, 2004, c. 7.

[153] See *supra* note 34 for a discussion of the connection between laws in the UK and the ECHR and their applicability to constitutional analysis.

be recognized in their acquired sex for marriage purposes.[154] In particular, Subsection B will propose borrowing ECHR's reasoning on privacy and liberty. Subsection C examines potential reason-borrowing from the ECHR on sex discrimination. Finally, Subsection D explains how the Supreme Court can borrow ECHR reasoning on emergent post-operative transsexual treatment.

A. *Precedent for Reason-Borrowing*

The reason-borrowing framework provides support for protecting transsexuals' right to marry in their acquired sex.[155] Reason-borrowing would import the reasons given by a foreign or international decision maker for arriving at a particular position into United States jurisprudence.[156]

Reason-borrowing has been strongly advocated for by Supreme Court Justices when similar issues were raised in similarly situated foreign courts. Justice Breyer noted, "[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. . . . Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances . . . ."[157] In other words, Justice Breyer is suggesting that the Supreme

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[154] Larsen looks to *Smith v. California*, 361 U.S. 147, 166–67 (1959) (Frankfurter, J., concurring), to provide an illustration of the reason-borrowing framework. Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 Ohio St. L.J. 1283, 1292 (2004). Justice Frankfurter looked to the House of Commons debate in evaluating if a California statute making booksellers strictly liable for possession of obscene material violated the First Amendment. *Smith*,361 U.S. at 166–67 (citing legislative history in Parliament regarding a similar provision in a British law about obscene publications).

[155] See Larson, *supra* note 154, at 1291–92, for a general discussion of the reason-borrowing approach.

[156] *Id.*

[157] Stephen Breyer, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 2–5, 2003), *in* 97 Am. Soc'y Int'l L. Proc. 265, 265 (2003).

Court use foreign courts as sources of legal reasoning upon which to support opinions in United States courts when the U.S. court and foreign court are addressing similar issues. Justice O'Connor argued:

> There has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes. While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.[158]

Justice O'Connor is similarly advocating for the use of reason-borrowing in United States courts. Chief Justice Rehnquist also advocated for the use of decisions by other nations' constitutional courts in the deliberative process of United States courts:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority . . . . But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.[159]

The views of various Justices advocating differing forms of reason-borrowing are indicative of its usefulness as a tool in constitutional jurisprudence.[160] When faced with particularly difficult constitutional questions, which foreign constitutional courts have previously addressed, the process of reason-borrowing is beneficial in developing the Court's own reasoning.

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[158] Sandra Day O'Connor, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law (Mar. 13–16, 2002), *in* 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

[159] William Rehnquist, *Constitutional Courts-Comparative* Remarks, *in* Germany and its Basic Law: Past, Present and Future- A German-American Symposium 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

[160] Leading scholars have similarly argued for reason-borrowing. *See* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819, 825–26 (1999); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. Pa. J. Const. L. 583, 601 (1999); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 Duke L.J. 223, 263 (2001); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1228 (1999).

The Supreme Court has previously engaged in reason-borrowing, specifically in cases that have dealt with the Due Process Clause of the Fourteenth Amendment. *Smith v. California* provides an illustration of the reason-borrowing framework.[161] In *Smith*, the Supreme Court reviewed the legality of a Los Angeles ordinance restricting the presence of obscene books in bookstores.[162] Section 41.01.1 of the Municipal Code of the City of Los Angeles made it unlawful "for any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business where . . . books . . . are sold or kept for sale."[163] The Municipal Court of Los Angeles, and later the Superior Court of California, imposed a jail sentence on Mr. Smith based on the presence of a "book found upon judicial investigation to be obscene" in his bookstore.[164] "The definition included no element of scienter—knowledge by appellant of the contents of the book—and thus the ordinance was construed as imposing a 'strict' or 'absolute' criminal liability."[165] In examining the application of the First and Fourteenth Amendments in *Smith*, Justice Frankfurter looked to a debate of the British House of Commons.[166] Frankfurter noted that obscenity is understood in the context of "contemporary community standards."[167] The evidence of the "contemporary community standards" requires evidentiary support.[168] Frankfurter contends, "The importance of this type of evidence in prosecutions for obscenity has been impressively attested by the recent debates in the

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[161] 361 U.S. 147, 166–67 (1959) (Frankfurter, J., concurring). *Smith* dealt with issues arising under both the Due Process Clause of the Fourteenth Amendment and the First Amendment.

[162] *Id.* at 147 (majority opinion).

[163] *Id.* at 148.

[164] *Id.* at 149.

[165] *Id.* (footnote omitted).

[166] *Id.* at 166 (Frankfurter, J., concurring) (citing 597 Parl. Deb., H.C. (5th ser.) (1958) 36).

[167] *Id.* at 165.

[168] *Id.* at 166.

House of Commons dealing with the insertion of such a provision in the enactment of the Obscene Publications Act."[169] Frankfurter was borrowing the reasoning of the House of Commons as support for the proposition that prosecuting obscenity requires an evidentiary investigation of "contemporary community standards." Frankfurter also looked to the reasoning of the Court of Appeals of New Zealand, noting, "[i]t has been well observed of a statute construed as dispensing with any requirement of scienter that: 'Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.' "[170] Once again, Frankfurter was borrowing the reasoning of a foreign court to lend support to his conclusion. *Smith* illustrates that the Court has and is willing to borrow reasoning from similarly situated foreign courts in interpreting constitutional provisions. Frankfurter relies on the reasoning of other courts and legislatures[171] in arriving at a decision.

Similarly, Chief Justice Rehnquist in *Washington v. Glucksberg*,[172] cited and described decisions from other nations' constitutional courts in identifying the relevant "background" to evaluate the claim that the State of Washington's prohibition on assisted suicide violates the Due Process Clause of the Fourteenth Amendment.[173] In *Glucksberg*, four Washington physicians who treated the terminally ill, three terminally ill patients,

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[169] *Id.* (footnote and citation omitted).

[170] *Id.* at 153 (majority opinion) (footnote omitted) (quoting R v. Ewart, [1905] 25 N.Z.L.R. 709, 729 (C.A.)).

[171] Although borrowing reasoning from legislative bodies is not expressively advocated by Breyer, Rehnquist, or O'Connor, the Supreme Court has in practice borrowed from legislative bodies because legislatures also provide reasoning for laws.

[172] 521 U.S. 702 (1997).

[173] *Glucksberg*, 521 U.S. at 718 n.16.

and a nonprofit organization sought a declaration that the ban on assisted suicide was unconstitutional on its face.[174] The contention was that the doctors would otherwise have assisted in the suicide of the patients but did not do so because of Washington's ban on the practice.[175] "[Respondents] assert[ed] a liberty interest protected by the Fourteenth Amendment's Due Process Clause which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide."[176] Rehnquist supports the proposition that there is no right to assisted suicide by citing decisions of multiple foreign bodies: the Supreme Court of Canada, which rejected a claim of a fundamental right to assisted suicide in the Canadian Charter of Rights and Freedoms;[177] the British House of Lords Select Committee on Medical Ethics, which refused to change Great Britain's assisted-suicide prohibition;[178] and New Zealand's Parliament, which rejected a "Death With Dignity Bill" legalizing physician-assisted suicide.[179] Again, the Court illustrated its willingness to borrow reasoning from foreign courts and governments in interpreting provisions of the Fourteenth Amendment.

There are two strong foundations for the Supreme Court to engage in reason-borrowing from the ECHR's jurisprudence regarding the legal recognition of an acquired sex. First, the borrowed reasoning is from a constitutional court. Some criticism of the Supreme Court has focused on the lack of reason-borrowing that is derived from

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174 *Id.* at 702.

175 *Id.*

176 *Id.*

177 *Id.* at 718 n.16 (citing Rodriguez v. British Columbia (Attorney Gen.), [1993] 107 D.L.R. 342).

178 *Id.* (citing House of Lords, *Session 1993–94 Report of the Select Committee on Medical Ethics*, 12 Issues in Law & Med. 193, 202 (1996) ("We identify no circumstances in which assisted suicide should be permitted.")).

179 *Id.* (citing Graeme Lee, *MPs Throw out Euthanasia Bill*, The Dominion Post, Aug. 17, 1995, at 1).

similarly situated constitutional courts whose focus would also be constitutional rights and provisions.[180] The ECHR is tasked with interpretation of the European Convention on Human Rights.[181] Cases rise to the ECHR upon an allegation that a member state violated the European Convention on Human Rights. This parallels the system in the United States where the Supreme Court hears cases dealing with potential violations of the Constitution. Decisions of the ECHR are binding on the parties including member states. Again, this parallels the United States, where decisions made by the Supreme Court are binding on the parties to the case. Given the somewhat parallel tasks of the Supreme Court and the ECHR, borrowing the reasoning of the ECHR would be appropriate. Second, the specific provisions of the European Convention on Human Rights are analogous to the Due Process Clause protections of the Fourteenth Amendment. An advocate for the recognition of the transsexuals' rights in their acquired sex should argue that the Supreme Court borrows ECHR reasoning in three areas: privacy and liberty, sex discrimination, and the awareness of an emergent treatment of post-operative transsexuals. By borrowing from the reasoning of the ECHR, the Fourteenth Amendment's Due Process Clause should be interpreted to protect the right of post-operative transsexuals to be recognized in their acquired sex.

B. *Borrowing the ECHR Reasoning on Privacy and Liberty*

A primary concern expressed by the ECHR was that a prohibition on the right of post-operative transsexuals to marry in their acquired sex constituted a violation of their

[180] *E.g.* Jackson, *supra* note 160, at 226. ("[E]ven when the Court has considered the constitutional experiences of other nations, it almost never has engaged the reasoning of other constitutional courts.").

[181] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 107, t.32 ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 47.").

privacy under Article 8 of the Convention.[182] Although the right to privacy is not explicitly present in the U.S. Constitution, the Supreme Court has held that privacy is a protected Constitutional right under the Fourteenth Amendment's Equal Protection Clause and substantive due process in a line of cases—*Griswold v. Connecticut*,[183]*Eisenstadt v. Baird*,[184] and *Roe v. Wade*.[185] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court found:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[186]

For people with gender identity disorder, making the decision to live the life as a member of the gender with which you identify is an intimate and personal decision that is tied to essential conceptions of autonomy and dignity; it is fundamental to defining "one's own concept of existence."[187] The underlying argument ties together privacy and liberty. As Justice Kennedy noted in *Lawrence v. Texas*, "the individual [has a] right to make certain unusually important decisions that will affect his own or his family's destiny."[188]

The position of the ECHR provides the reasoning necessary to complete a privacy and liberty argument for recognizing a person's acquired sex. The ECHR concluded "that serious interference with private life can arise where the state of domestic law conflicts

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[182] *Id.* art. 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

[183] 381 U.S. 479 (1965).

[184] 405 U.S. 438 (1972).

[185] 410 U.S. 113 (1973).

[186] 505 U.S. 833, 851 (1992). This very argument was restated verbatim in *Lawrence v. Texas*, further solidifying the position that privacy is protected by the Constitution. 539 U.S. 558, 574 (2003).

[187] *Casey*, 505 U.S. at 851.

[188] *Washington v. Glucksberg*, 521 U.S. 702, 744 (1997) (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719–20 (7th Cir. 1975)).

with an important aspect of personal identity."[189] Specifically, the ECHR held that "[t]he stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot . . . be regarded as inconvenience arising from a formality."[190]

The view espoused by the ECHR parallels the position taken by the Supreme Court in *Casey*[191] and *Lawrence*,[192] which generally hold that certain personal decisions ought to be protected. As the Supreme Court noted in *Lawrence*, "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[193] Borrowing the reasoning established in the ECHR and applying it to the view expressed by the Supreme Court provides strong ground for the position that post-operative transsexuals should have the right to get married in their acquired sex.

C. *Borrowing the ECHR Reasoning on Sex Discrimination*

Advocates for transsexual rights should also utilize reason-borrowing from the ECHR's approach by finding that denying transsexuals the right to marry in their acquired sex is sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court first applied the Equal Protection Clause to sex

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189 Goodwin v. United Kingdom, App. No. 28957/95, 35 Eur. H.R. Rep. 447 para.77 (2002).

190 *Id.*

191 505 U.S. at 851.

192 539 U.S. at 573–74.

193 *Lawrence*, 539 U.S. at 574; *see also Casey*, 505 U.S. at 851.

discrimination in *Craig v. Boren*.[194] The Court established that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[195] Since *Craig v. Boren*, a series of cases have led the Supreme Court to raise the threshold of intermediate scrutiny.[196] As Justice Ginsburg explains in *U.S. v. Virginia*, "[t]o summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' "[197] The government carries the burden under intermediate scrutiny as outlined in *U.S. v. Virginia*. As Ginsburg notes, "[t]he burden of justification is demanding and it rests entirely on the State."[198]

The reasoning of the ECHR provides a strong parallel to the view of sex discrimination outlined by the Supreme Court. The ECHR indicated that the primary problem in the treatment of post-operative transsexuals is "discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of [sex]."[199] The view is that the denial of the right to be recognized in one's acquired sex is a denial of the sex in which the person lives their life, a sex that is medically prescribed. The result is that the government, in choosing not to recognize a post-operative transsexual's sex, is discriminating against the transsexual based upon his/her actual lived sex. As the ECHR notes, non-recognition has

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194 429 U.S. 190 (1976).

195 *Craig*, 429 U.S. at 197.

196 *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).

197 518 U.S. 515, 532–533 (1996).

198 *Virginia*, 518 U.S. at 533.

199 Goodwin v. United Kingdom, App. No. 28957/95, 35 Eur. H.R. Rep. 447, para. 76, 77 (2

its most substantial "effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women."[200] The impact of not recognizing a person's acquired sex is to discriminate inherently against them in instances when sex matters. The contention is that non-recognition leads to discrimination against a person based upon the sex that person has acquired. Once a transsexual has had a sex-change operation, the decision to deny legal rights based upon his or her sex unjustifiably limits the individual's basic legal and political rights.[201] Advocates for transsexual rights should borrow the ECHR reasoning that discrimination against post-operative transsexuals is sex discrimination.[202] Importing this reasoning would bring consistency to the United States' position and protect the rights of post-operative transsexuals from unlawful sex discrimination.[203]

Further supporting the sex equality approach is the fact that the Supreme Court includes discrimination based on gender in its definition of sex discrimination. The inclusion of gender within sex discrimination permits transsexuals a stronger foundation

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[201] *Id.*

[202] This Note does not take up the issue, but it is possible to argue that transsexuals should be considered a protected class under the Equal Protection Clause. Justice O'Connor has indicated that targeting a group of people for disfavored treatment based upon a single characteristic could form an "underclass" status. Lawrence v. Texas, 539 U.S. 558, 584 (2003) (O'Connor, J., concurring). But even O'Connor has been unwilling to go as far as to claim that this constitutes a protected class requiring the constitutional protection of strict scrutiny.

[203] It is important to note that the Seventh Circuit has previously indicated that transsexuals cannot claim sex discrimination in the Title VII employment context. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), *cert. denied* 471 U.S. 1017 (1985). But, the holding focused only on the definition of sex as used in Title VII. *Id.* at 1087. The Seventh Circuit held that including transsexuals was beyond Title VII's "common and traditional interpretation" and that if "the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress." *Id.* at 1086–87. The argument discussed here is not similarly bound by the language of Title VII. It is important to note that after the holding in *Ulane* the Supreme Court has held that gender discrimination based on gender/sex stereotyping is not permitted. *See supra* notes 183–186 and accompanying text.

for a sex discrimination claim under the Fourteenth Amendment. The Supreme Court's primary contention in sex discrimination cases focuses on the social (gender) rather than the biological (sex) concerns.[204] The Court continuously uses sex and gender as proxies for one another, indicating that they are linked. The first, most stark, and most unpleasant evidence of the connection was present in *Bradwell v. Illinois*, in which Justice Bradley noted:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[205]

Bradley was making the claim that the biological characteristics of women incline them to certain social positions.[206] Bradley's position sees an immutable bind between sex and gender. Although *Bradwell* is admittedly a very old case, it has never been overruled and thus is still good law.

The interchangeability of sex and gender can also be seen in Title VII cases. Under Title VII, gender discrimination is prohibited as sex discrimination. The Supreme Court in *Price Waterhouse v. Hopkins* held that sex-type stereotyping was a sex-based violation of Title VII.[207] The Court noted, "[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it

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[204] Catharine A. MacKinnon, Sex Equality 211(2d ed. 2007).
[205] 83 U.S. 130, 141 (1872) (Bradley, J., concurring).
[206] *See Bradwell*, 83 U.S. at 141.
[207] 490 U.S. 228 (1989) (plurality opinion).

would have made the same decision even if it had not taken the plaintiff's gender into account."[208] The Court also indicated,

> [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, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.[209]

The Supreme Court has not expressly proffered such a strong position on the connection of sex and gender under the Equal Protection Clause. But it has continued to view or consider sex and gender as bound, and gender discrimination as impermissible under the Equal Protection Clause. In *Craig v. Boren*, the Court found a "gender-based" difference in drinking age unconstitutional.[210] The Court even noted that the primary basis for discrimination was social stereotyping.[211] In *U.S. v. Virginia*, the Court found "official classification based on gender" to be impressible.[212] The Court objected to discrimination that is based upon social categories, specifically the distinct "capacities," "tendencies," and "preferences" of men and women.[213]

The focus on gender discrimination as impermissible discrimination under the Equal Protection Clause indicates both that the Court sees sex and gender as connected and that the Court finds gender discrimination impermissible. In fact, prohibited sex discrimination is founded on "principally social meaning [gender] in legal

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[208] *Hopkins*,490 U.S. at 258.

[209] *Id.* at 251 (quoting L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978*). Forms, Inc.*, is the most recent court to validate the *Price Waterhouse* holding. *See*579 F.3d 285, 290 (3d Cir. 2009).

[210] 429 U.S. 190, 192 (1976).

[211] *Id.* at 202n.14.

[212] 518 U.S. 515, 532–33 (1996).

[213] *Id.* at 541.

application."[214] Therefore, U.S. courts acknowledge that what is called sex discrimination applies to discrimination based on both sex and gender.[215]

The rhetorical interchangeability of sex and gender as applied by U.S. federal courts indicates that gender is an important part of Fourteenth Amendment sex discrimination claims. The view forwarded by U.S. federal courts is commensurate with the ECHR's view regarding the importance that gender plays in determining a person's sex.[216] The ECHR noted that gender is a critical part in assessing a person's sex.[217] For a post-operative transsexual, a medical decision was made to align sex and gender.[218] Non-recognition of the acquired sex by U.S. courts is in direct contrast to the medical decision, which presupposes that a person can fully transition into the new sex.[219]

As the ECHR notes, the goal of sex reassignment surgery is "achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs."[220] This view indicates that gender is an important part of sex. Denying a person the ability to marry as a member of their acquired sex would discriminate against the person's gender—namely because people whose gender aligns with their sex are allowed to marry people of the opposite sex, but people whose gender and sex do not align at birth and then have sex reassignment

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214 MacKinnon, *supra* note 204, at 211.

215 *See* Kahn v. Shevin, 416 U.S. 351, 352 (1974) (holding "the [Florida] statute violative of the Equal Protection Clause of the Fourteenth Amendment because the classification 'widow' was based upon gender."); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (holding that sex references both biological and social differences); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that Title VII protection against sex discrimination encompasses both sex and gender).

216 *See* Goodwin v. United Kingdom, App. No. 28957/95, 35 Eur. H.R. Rep. 447 (2002).

217 *See id.*

218 *See Id.* at 78.

219 *See id.*

220 *Id.*

surgery to align their sex and gender are denied the right to marry people opposite of their acquired sex. The clear interchangeability of sex and gender in equal protection sex discrimination cases in the United States indicates that not recognizing the sex identity of post-operative transsexuals should be considered a violation of the Fourteenth Amendment.

A challenge to the sex and gender discrimination position could be made to the effect that post-operative transsexuals can still marry someone opposite of their born sex. But the ECHR provides strong reasoning that could be borrowed to indicate that this position is tenuous at best. The ECHR held "that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex."[221] Post-operative transsexuals want to align their sex and gender, and, if they additionally want to fit into traditional sex and gender roles, they often want to marry a person that is opposite their acquired sex. Denying them the right to marry someone opposite the sex they have acquired would deny them a basic right that belongs to members of their acquired sex. The ECHR noted that a person who acquires a sex and wants to marry someone opposite of that sex is denied the very right of that sex in marriage, thus "the very essence of her right to marry has been infringed."[222]

[221] *Id.* para. 101.
[222] *Id.*

D. *Borrowing the ECHR Reasoning on the Awareness of an Emergent Treatment of Post-Operative Transsexuals*

Transsexual rights advocates should acknowledge the continuing trend toward the recognition of the rights of post-operative transsexuals in their acquired sex. The Supreme Court has acknowledged that an examination of a legislative or legal movement can be important in assessing equal protection claims.[223] The conclusions of the ECHR along with the research that was done in arriving at that conclusion could be borrowed to illustrate a movement toward recognition. The Interdepartmental Working Group on Transsexual People found that the growing demand and recognition of the legal rights of transsexuals in their acquired sex made a significant impression on the ECHR.[224] The ECHR concluded that the Interdepartmental Working Group on Transsexual People and its findings constituted an acknowledgement of the changing societal status of transsexuals in the United Kingdom and Europe more generally.[225]

The movement within the United States toward recognition further supports this conclusion. Twenty-four states allow post-operative transsexuals to change their birth certificate to recognize their acquired sex, while only two states do not allow for the change of sex to be recognized on a birth certificate.[226] In addition, the medical

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[223] *See* Lawrence v. Texas, 539 U.S. 558, 559 (2003); County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring); Collins v. City of Harker Heights, Tex., 503 U.S. 115, 126 (1992).

[224] Goodwin v. United Kingdom, App. No. 28957/95, 35 Eur. H.R. Rep. 447 paras.45, 50–51 (2002) (citation omitted).

[225] *See Id.* It is also important to note that the Supreme Court has acknowledged conclusions of the ECHR as an indication of legal and legislative movement. *See Lawrence*, 539 U.S. at 560.

[226] *See supra* Section I.A.

community seems to be converging on the position that a sex change operation allows transsexuals to attain their proper sex. [227]

E. *If the U.S. Borrows the Reasoning of the ECHR, it should be Mindful not to Further Conflate Sex and Gender.*

The primary problem with recognizing the post-operative sex of a transsexual is that it may further lend credence to the misconception that sex and gender are either the same or are dimorphic and connected.[228] As noted above, the Supreme Court often mistakes sex as a biological category and gender as a social category. If recognition of the right for transsexuals to marry in their acquired sex is tied to jurisprudence that indicates that sex discrimination contains both discrimination based on sex and gender, it may work to reify the connection between the two.

The conflation of these terms can lead to a fiction of coherence, imposing a correlation between biological sex and gender.[229] The result is that the acceptable standard for someone who is female is to act like a woman and be feminine, while a male would act like a man and be masculine.[230] Correlating sex and gender into this fictive coherence may further stigmatize individuals who do not adhere to the dimorphism. The end result may be that people who do not align their sex and gender to each other will be

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[227] *See supra* notes28and119-24.

[228] Dimorphism is the view that there are two precise sex categories that are easily and appropriately distinguished. A dimorphic conception of sex and gender would mean that a person is either a man, male, and masculine or a woman, female, and feminine.

[229] Judith Butler, *Gender Trouble* 134-41 (1990).

[230] *See e.g.*, David H. Guston et al., *Anticipating the Ethical and Political Challenges of Human Nanotechnologies, in* NANOETHICS: THE ETHICAL AND SOCIAL IMPLICATIONS OF NANOTECHNOLOGIES185, 194 (Fritz Allhoff et al. eds., 2007) ("Moreover, sexual reassignment surgery may create limits in the patient's ability to choose how to act after making their gender and sex congruous, in turn feeding social pressures and the reifying the correspondence of gender and sex.").

marginalized.[231] For example, recognizing the post-operative sex of transsexuals may stigmatize people who are transgendered and choose not to have sex reassignment surgery. Females who act masculine may be subject to scrutiny for not aligning their sex with their gender. The position of transsexuals in Iran is one indication of this potential problem. Since 1983 sex reassignment surgery has been legal in Iran.[232] "Ayatollah Khomeini, the spiritual leader of the 1979 Islamic revolution, passed a fatwa - a religious edict - authorizing them for 'diagnosed transsexuals.' Today, Iran carries out more sex change operations than any other nation in the world except for Thailand."[233] Meanwhile, homosexuality is still criminal in Iran.[234] The result is that there often is social pressure on homosexuals to have sex reassignment surgery.[235] The pressure is created because homosexuals are viewed as people trapped in the wrong sex.[236] The conflation in the Iranian case is between sexuality and sex, but this is primarily driven by the view that homosexuals are gender feminine.[237] The pressure on homosexuals to have sex reassignment surgery is persistent despite doctors knowing that there is a significant difference between homosexuals and transsexuals.[238] Conflating sex, gender, and sexuality may lead to such repercussions and some caution ought to be paid in ensuring

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[231] Aeyal Gross, *Gender Outlaws before the Law: The Courts of the Borderland*, 32 Harv. J. L. & Gender 165, 181 (2009).

[232] Vanessa Barford, *Iran's 'diagnosed transsexuals'*, BBC, Feb. 25, 2008, http://news.bbc.co.uk/2/hi/middle_east/7259057.stm

[233] *Id.*

[234] *E.g.* Safra Project, Country Information Reports: Iran 13 (2004), http://www.safraproject.org/Reports/SP_Country_Information_Report_Iran.pdf

[235] *Id.*

[236] Frances Harrison, *Iran's sex-change operations*, BBC, Jan. 5, 2005, http://news.bbc.co.uk/2/hi/programmes/newsnight/4115535.stm.

[237] *See e.g.*, Barford, *supra* note 232.

[238] *See e.g.*, Robert Tait, *A fatwa for transsexuals*, Salon.com, July 28, 2005, http://dir.salon.com/story/news/feature/2005/07/28/iran_transsexuals/index.html (discussing the views of Mir-Jalali a surgeon in Iran who conducts sex reassignment surgery).

that legal positions that protect the rights of post-operative transsexuals do not lead to such misconceptions.

SECTION 4.

Conclusion

Exploring the Anglo-American legal system's treatment of the acquired sex of post-operative transsexuals exposes the tenuous nature of the category of sex. It also reveals the potential consequences of legal decisions attempting to codify sex at birth. Although we may be reluctant to acknowledge it, traditional conceptions of sex are just as easily and erroneously constructed, both socially and legally, as race. However, there have been advances in recognizing the difficulties of a rigid categorization focusing solely on biological factors at birth.

The United Kingdom has advanced further than the United States in this respect, and the United Kingdom's progress presents a set of legal arguments that may help to resolve the lack of continuity in the United States' system. The United Kingdom's acknowledgment that non-recognition is a form of sex discrimination comports well with the sex discrimination view articulated in the U.S. jurisprudence. Advancing a sex equality approach in recognizing the acquired sex of post-operative transsexuals could elevate the issues from states to federal courts and bring coherence to the treatment of post-operative transsexuals in the United States.

CHAPTER 2.
THE IMPACT OF SEX IDENTIFICATION AND TESTING IN ATHLETICS

The concept of "fair play" is invoked in sex segregation because female and male bodies are biologically different. These differences are understood to give a general advantage to male athletes. But, the desire to segregate the sexes for competitive sports runs into one significant problem: when athletes do not neatly fit into traditional biological definitions of male or female.

The traditional view of sex segregated sports is that male athletes have a biological competitive advantage over female athletes. This view is rooted in biological realities of the shape of male and female bodies. Males tend to have "longer arms, bigger and stronger legs, more muscle fiber, ten percent larger hearts and lungs, and stronger and broader shoulders."[239] Males' larger hearts result in 16 percent more blood pumped per heartbeat.[240] Larger male lungs result in 25 to 30 percent higher oxygen consumption; elite male athletes have maximum oxygen consumption that is about 10 percent higher than their female counterparts.[241] These attributes tend to give male athletes an advantage in competitions that require pure strength.

These physical differences between males and females are the primary reason there is such concern about male athletes competing in female competitions. The assumption is that these biological differences significantly advantage male athletes. If athletes who have genetic advantages resulting from higher androgen levels are

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[239] Syda Kosofsky, *Toward Gender Equality in Professional Sports*, 4 HASTINGS WOMEN'S L.J. 209, 214 (1993).

[240] Diane Hales, An Invitation to Health (2010).

[241] *Id.*

competing with female athletes who do not have similarly elevated levels of androgens, the view is that the latter will be at a significant disadvantage.

In this Chapter I explore the history of sex testing in sports, focusing on both transsexual and intersex athletes participating in female competition. By delineating the mechanism and rationale behind sex testing and the history and impact sex testing has had on transsexual and intersex athletes, I highlight the issues and consequences of sex testing and sex segregated sports. Sex testing illuminates the difficulty in arriving at bright-line rules in distinguishing male from female in certain cases. Sex testing also has the unforeseen consequence of asserting that female athletes are disadvantaged as compared to male athletes.

I begin this Chapter by tracing the history of sex testing in international sports. I then trace the significant events in participation by transsexual and intersexual athletes. Finally, I explore the underlying assumption that female athletes are disadvantaged and why this assumption may be inaccurate.

SECTION 1.

The History of Sex Testing in International Sports

Formalized sex testing in competitive athletic competitions began in the 1960s.[242] The Olympics instituted their first official sex testing practices for the 1968 Games.[243]

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[242] *See* Jill Pilgrim, David Martin, &Will Binder, *Far From the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA &ENT.L.J.495, 509 (2003).

[243] *See Id.* The Summer Olympics were held in Mexico City, Mexico and the Winter Olympics were held in Grenoble, France.

During the 1968 Olympics, sex testing consisted of a visual inspection of each female athlete to ensure a proper female phenotype.[244] Athletes complained that the test was invasive and degrading.[245] Phenotype testing was imprecise and at times led to inconclusive or erroneous results.

Both the inaccurate testing and the athletes' privacy concerns led most sporting events to change to a chromosomal test (such as the Barr body test) or a DNA test (such as a polymerase chain reaction test).[246] The most often used test was the Barr body test. The Barr body test detects the presence of two X chromosomes indicating that a person is female or an X and a Y chromosome indicating that a person is a male.

The International Amateur Athletic Federation (IAAF), the governing body of amateur athletics, officially ceased subjecting all female athletes to sex testing in 1991.[247] The International Olympic Committee (IOC) officially ceased subjecting all female athletes to sex testing in 2000.[248] Yet, both the IAAF and the IOC continue to subject select individual female athletes to sex testing.[249] The number of individual sex tests conducted is unknown because the IOC and the IAAF attempt to conduct these tests confidentially to secure the privacy of athletes.[250]

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[244] *See Id.*

[245] *See* Shawn M. Crincoli, *You Can Only Race if You Can't Win? The Curious Case of Oscar Pistorius & Caster Semenya*, 12 TEXAS REV. OF ENT. & SPORTS L.133, 159-160 (2011).

[246] *See Id.*

[247] *See e.g.* Joe Leigh Simpson et al., *Gender Verification in the Olympics*, 284 JAMA 1568, 1568-69 (2000).

[248] *Id.*

[249] *See* Crincoli, supra note 245, at 160.

[250] *See Id.*

The individual athlete testing protocol is more elaborate and undertakes to evaluate multiple components of sex in determining the sex of an athlete.[251] Individualized testing can include the use of a gynecologist, endocrinologist, internist, psychologist, and gender expert.[252] The rules first established in 2006 created five categories of athletes eligible to compete in female athletic events.[253]

First, if an athlete is phenotypically and genotypically female.

Second, "if sex change operations as well as appropriate hormone replacement therapy are performed before puberty then the athlete is allowed to compete as a female."[254] The implication is that sex reassignment before puberty ensures that a male-to-female transsexual does not obtain the advantages associated with a major influx of testosterone during puberty.

Third, "if the sex change and hormone therapy is done after puberty then the athlete has to wait two years after a gonadectomy before a physical and endocrinological evaluation is conducted."[255] The rationale for this rule is once again centered on the advantage of being exposed to elevated testosterone levels. "The crux of the matter is that the athlete should not be enjoying the benefits of natural testosterone predominance normally seen in a male."[256]

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[251] The IAAF Medical and Anti-Doping Commission, *IAAF Policy on Gender Verification*, at 1-7 (2006) (available at http://www.iaaf.org/mm/document/imported/36983.pdf).

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

Fourth are a series of intersex conditions that "accord no advantage over other females."[257] They include: androgen insensitivity syndrome, gonadal digenesis, and Turner's syndrome.[258]

Fifth are a series of intersex conditions that "accord some advantages but nevertheless [are] acceptable."[259] The list includes: congenital adrenal hyperplasia, androgen producing tumors, and an ovulatory androgen excess (polycystic ovary syndrome).[260]

This leaves an unspoken sixth class of applicants: those who are determined not to be female and are excluded from completion.

For the 2008 Summer Olympics in Beijing, China, the IOC established a laboratory to conduct sex testing.[261] In 2010 the IOC announced the expansion of the laboratory program and the desire to set up more testing centers.[262] In 2010 the IOC and the IAAF once again revisited the issue of sex testing, given concerns over whether and how to include intersex athletes with hyperandrogenism.[263]

The conferences held to examine this issue resulted in two general conclusions. First, "in order to protect the health of the athlete, sports authorities should have the responsibility to make sure that any case of female hyperandrogenism that arises under

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257 *Id.*
258 *Id.*
259 *Id.*
260 *Id.*
261 *See Id.*
262 *See Id.*
263 The IOC Communications Department, *IOC Addresses Eligibility of Athletes with Hyperandrogenism* (April 5, 2011) (available at http://www.olympic.org/about-ioc-institution?articleid=124006).

their jurisdiction receives adequate medical follow-up."[264] Second, "rules need to be put into place to regulate the participation of athletes with hyperandrogenism in competitions for women."[265] The final rules established for the 2012 Summer Olympics in London, England, held that if "the investigated athlete has female hyperandrogenism that confers a competitive advantage (because it is functional and the androgen level is in the male range), the investigated athlete may be declared ineligible to compete in the 2012 [Olympics]."[266]

The conferences dealing with hyperandrogenism led the IOC to reexamine its general rules for sex testing. First, "A female recognized in law should be eligible to compete in female competitions provided that she has androgen levels below the male range . . . or, if within the male range, she has an androgen resistance such that she derives no competitive advantage from such levels."[267] The language focuses on the need to ensure that female athletes gain no competitive advantage from their status. Additionally, the rule places the responsibility on legal institutions to make determinations about an athlete's sex.

Second, all evaluations must be anonymous and, "[s]hould an athlete be considered ineligible to compete, she would be notified of the reasons why, and informed of the conditions she would be required to meet should she wish to become eligible

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[264] *Id.*

[265] *Id.*

[266] International Olympic Committee, *IOC Regulations of Female Hyperandrogenism* (June 22, 2012) (available at http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf).

[267] The IOC Communications Department, supra note 263.

again."[268] The second rule presents a possibility for athletes to seek further treatment to reduce competitive advantage and bring them within the eligibility requirement for a female athlete.

Finally, the IOC explained the rationale behind testing protocols. "Although rare, some women develop male-like body characteristics due to an overproduction of male sex hormones, so-called 'androgens.' The androgenic effects on the human body explain why men perform better than women in most sports and are, in fact, the very reason for the distinction between male and female competition in most sports."[269] The IOC's policy is entirely dependent on creating a rationale for sex separation where female athletes are protected from competition with "better" male athletes.

The history of the participation of transsexual and intersex athletes illustrates why these changes have occurred and the consequences for transsexual and intersex athletes, as well as female athletes. This section continues by examining the case of Renee Richards and her participation in the U.S. Open Tennis Tournament before examining several high profile instances involving intersex athletes.

A. *The Case of Renee Richards and Participation by Transsexual Athletes in Female Sports*

In the history of sex testing there may be no case more controversial than that of Dr. Renee Richards. Her case is also noteworthy because she is the only athlete to date to reach out to the courts to obtain permission to compete as a female athlete. The

[268] *Id.*
[269] *Id.*

reasoning underlying the court's decision is illustrative of the concerns that underpin sex testing and its role in sport.

Dr. Renee Richards was born Richard Raskind.[270] She had been an ophthalmologist, husband, and father when she underwent a sex reassignment surgery.[271] Before her surgery she was "an accomplished male tennis player" and ranked 3rd in the East and 13th in the United States overall for men over 35 years-old.[272] After her operation Richards wanted to again participate in competitive tennis tournaments, but in the women's division. Before applying for the 1976 United States Open, Richards entered nine women's tennis tournaments winning twice and finishing as a runner-up three times.[273]

In 1976 the Unites States Tennis Association (USTA) and the United States Open Committee (USOC) for the first time implemented the Barr body test (sex-chromatin test) to confirm the sex of female athletes.[274] The Barr body test had been employed by the International Olympic Committee starting in the 1968 Olympics.[275] Both the USTA and the USOC acknowledged that they implemented the Barr body test as a direct result of Richards application to enter the U.S. Open as a female tennis player.[276] Previously, the

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[270] Shawn M. Crincoli, *You Can Only Race if You Can't Win? The Curious Case of Oscar Pistorius& Caster Semenya*, 12 TEX. REV. ENT. & SPORTS L. 133, 175 (2011).

[271] *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977).

[272] *Id.* at 268.

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.* In applying to compete in the U.S. Open Richards had sent a letter to Mike Blanchard, chairman of the U.S. Open, discussing her sex status and sex reassignment.

U.S. Open only implemented a phenotype test (an observation of primary and secondary sexual characteristics) in establishing the sex of an athlete.[277]

The USTA and the USOC contended the Barr body test was implemented to ensure fairness.[278] Their primary claim was that those who have had sex reassignment surgery have a competitive advantage over natural-born female athletes. The advantage is gained from "physical training and development as a male."[279] George E. Gowen of the USTA noted, "'We have reason to believe that there are as many as 10,000 transsexuals in the United States and many more female impersonators or imposters. The total number of such persons throughout the world is not known.'"[280] Gowen indicated that the USTA was concerned about cheating and the use of "'experiments . . . , to produce athletic stars by means undreamed of a few years ago.'"[281] USTA's apparent concern was over the infusion of male athletes having sex reassignment surgery in order to enter into female competitions.[282] The Barr body test would bar those athletes who had undergone sex reassignment surgery to maintain "'its obligation to assure fairness.'"[283]

The USTA and the USOC introduced testimony by Dr. Daniel Federman, professor and chairman of the Department of Medicine at Stanford University, who, in part, testified that the presence of the Y chromosome provides "'physical characteristics

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277 *Id.*
278 *Id.* at 269.
279 *Id.*
280 *Id.*
281 *Id.*
282 *See Id.*
283 *Id.*

in the normal male that affect an individual's competitive athletic ability.'"[284] Federman explained that the Y chromosome and the correspondingly higher levels of androgen (male sex hormone) to estrogen (female sex hormone) results in "'greater height, different body proportions, and a higher muscle mass.'"[285] He also testified that sex reassignment surgery would not impact many of these advantages. "'In the adult male beyond puberty, neither the removal of the testes by sex reassignment surgery, nor any subsequent treatment with estrogen can affect the individual's achieved height or skeletal structure.'"[286] Indeed, sex reassignment surgery alone would not reduce male musculature either.[287] "'Removal of the testes plus ingestion of estrogens can reduce male strength, but any such effect is partial and depends upon continued ingestion of estrogen to be sustained.'"[288] Thus, a post-operative male-to-female transsexual would still possess the competitive physical attributes of a male and could only hope to reduce male musculature through continued use of estrogen.[289] Federman's testimony supported the view that transsexual athletes would possess an unfair advantage physically because they retained male physical attributes.[290]

The USTA and the USOC also introduced affidavits from professional female tennis players attesting to the advantage of postoperative male-to-female transsexuals in competing against natural-born female athletes.[291] Francoise Durr, Janet Newberry, and

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284 *Id.*
285 *Id.*
286 *Id.*
287 *Id.*
288 *Id.*
289 *See Id.*
290 *Id.*
291 *See Id.* at 270.

Kristen K. Shaw each testified that, assuming similar skill levels, a former male has a significant advantage both from being taller and stronger.[292] The position supports the conclusion that inherent height and strength advantage conferred by being born male (or possessing a Y chromosome) can result in competitive advantage.[293] Vicki Berner, Director of Women's Tennis for the USTA, a former successful professional tennis player, stated, "she was unable to find a record of any woman player over age 40 who has had such a successful competitive record as [Richards], a record unparalleled in the history of women's professional tennis."[294] The implication of Berner's statement is that Richards' success could only be explained by the competitive advantage she obtained by being born male.[295] The testimony of these professional tennis players all indicated that Richards had a competitive advantage.

Dr. Roberto Granato, the surgeon who performed Richards' sex reassignment surgery, testified that Richards did not possess a competitive advantage over female athletes.[296] Granato testified that the removal of the testes and estrogen therapy reduced androgen levels and decreases muscular mass.[297] Granato also stated that Richards' muscle to fat ratio corresponded to a female body, including breast development.[298] His contention was that Richards' "'muscle development, weight, height, and physique fit

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[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.* at 271.
[297] *Id.*
[298] *Id.*

within the female norm.'"[299] His ultimate conclusion was that Richards, "should be considered a woman, classified as a female and allowed to compete as such."[300]

Dr. Jon Money, a psychologist and professor practitioner at Johns Hopkins Medical School, whom Richards had consulted, testified that Richards was female and did not have a competitive advantage.[301] Money testified that the Bar body test would have an unjust effect if applied to Richards because all other indicators were that she was female.[302] He explained:

> [Dr. Richards] external genital appearance is that of a female; her internal sex is that of a female who has been hysterectomized and ovariectomized; Dr. Richards is psychologically a woman; endrochronologically female; *somatically (muscular tone, height, weight, breasts, physique) Dr. Richards is female and her muscular and fat composition has been transformed to that of a female*; socially Dr. Richards is female; Dr. Richards' gonadal status is that of an ovariectomized female.[303]

Money argued that all of these factors meant that Richards must be recognized as a female "and for anyone in the medical or legal field to find otherwise is completely unjustified."[304] He argued that Richards would "have no unfair advantage when competing against other women."[305] This conclusion was based on Richards fitting within the "female norm" for "muscle development, weight, height and physique."[306]

Finally, Richards introduced the testimony of professional tennis player Billie Jean King who supported Richards' competing as a female in tennis tournaments.[307]

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[299] *Id.*
[300] *Id.*
[301] *See Id.* at 272.
[302] *Id.*
[303] *Id.* (emphasis added).
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *See Id.*

King had participated as a doubles teammate with Richards and had competed in two singles tournaments where Richards also participated.[308] King testified: "'[Richards] does not enjoy physical superiority or strength so as to have an advantage over women competitors in the sport of tennis.'"[309]

The court ruled in Richards' favor, deciding that she did not have an advantage over other female athletes and ought to be considered a female and admitted as such in the U.S. Open.[310] The court held, "the requirement of [the USTA and the USOC] that [Richards] pass the Barr body test in order to be eligible to participate in the women's singles of the U.S. Open is grossly unfair, and violative of her rights under the Human Rights Law of [New York]."[311] But the court did not eliminate the Barr body test as a method of determining sex, "as it appears to be a recognized and acceptable tool for determining sex. However it is not and should not be the sole criterion, whereas here, the circumstances warrant consideration of other factors."[312] Instead the court noted that "[t]he only justification for using a sex discrimination test in athletic competition is to prevent fraud, i.e. men masquerading as women, competing against women."[313]

Ultimately, the court did not find justification for precluding Richards because she was advantaged, noting "the unfounded fears and misconceptions of [the USTA and the

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308 *Id.*
309 *Id.*
310 *Id.*
311 *Id.*
312 *Id.* at 272-273.
313 *Id.* at 272.

USOC] must give way to the overwhelming medical evidence that this person is now a female."[314]

The Richards decision represents a significant victory for the recognition of transsexuals both in sport and in society. The case remains the only legal decision regarding transsexuals participating in sports in their acquired sex. But, Richards' case also presents a significant problem in the way we conceptualize female athletic competition. The decision was predicated on Richards not having an advantage over other female competitors. The advantage was her retaining any male characteristics. The court concluded that her competing with other females was appropriate because she no longer possessed those advantages. Her sex reassignment surgery and hormone therapy suppressed the benefits of her Y chromosome. The court's reasoning supports a view that femaleness is a disability as compared to maleness. From an athletic stand point possessing a Y chromosome and obtaining its benefits is an enhancement for a female athlete.

After the Richards decision several sports now include transsexuals that compete as female athletes. Among those athletes are: Mianne Bagger a Danish born Australian golfer who competes on the Ladies European Tour, Canadian cyclist Kristen Worley, and Canadian mountain biker Michelle Dumaresq.[315]

B. *Case Studies of Intersex Athletes Participating in Female Sports*

The history of intersex athletes in the Olympics illustrates the difficulty with sex testing protocols. Often intersex athletes are unaware of their condition and are raised as

[314] *Id.*

[315] Crincoli, supra note 270, at 172.

female. Sex testing can expose their condition to the world and to themselves. In addition, because of changes in sex-testing protocols the timing of an athlete's exposure to testing can often be the difference between being labeled female or male. Finally, while the protocols may change, the focus has always remained on eliminating competitive advantages that intersex athletes may possess.

Stainislawa Walasiewicz, known as Stella Walsh, was a Polish immigrant living in the United States when she competed for Poland in the 1932 and 1936 Summer Olympics.[316] Walsh was a very successful sprinter in the 1930s, setting or matching the 100 meter sprint world record time on six occasions.[317] Her final world record time stood for 11 years.[318] One of her world record times was captured at the 1932 Olympics in Los Angeles, California.[319] Four years later in Berlin she attempted to duplicate her feat.[320] Instead, she was defeated by United States sprinter Helen Stephens.[321] Polish media questioned the victory claiming that Stephens was male and masquerading as female.[322] Responding to the accusations, the IOC conducted a visual inspection of Stephens's external genitalia and confirmed that she was female.[323]

In December 1980, Stella Walsh was shot and killed during a robbery in Cleveland, Ohio.[324] During her autopsy the coroner, Samuel Gerber, discovered that

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316 Paul Farhi, *The Runner's Secret*, THE WASHINGTON POST (Aug. 22, 2008) (available at http://www.washingtonpost.com/wp-dyn/content/article/2008/08/21/AR2008082103680.html).

317 *Id.*

318 *Id.*

319 *Id.*

320 *Id.*

321 *Id.*

322 *Id.*

323 *Id.*

324 *Id.*

Walsh "had no internal female reproductive organs, and possessed an underdeveloped and non-functioning penis, 'masculine' breasts and an abnormal urinary opening."[325] Gerber determined that Walsh's sex was "likely ambiguous at birth" and that her parents choose to raise her as a girl.[326] Gerber concluded, "Walsh 'lived and died a female . . . . Socially, culturally and legally, Stella Walsh was accepted as a female for 69 years.'"[327] Walsh, in fact, had "mosaicism, a mutation that causes some cells to be XY and others to be XX."[328] The IOC decided not to strip Walsh of her medals.[329]

The 1936 Olympics also included a controversy surrounding Dora Ratjen (aka Heinrich Ratjen).[330] Ratjen competed in the Olympics as a female high jumper and placed fourth. At birth he was identified as female and his parents raised him as female.[331] When he hit puberty he realized that his outward appearance was not female and began to think he was male.[332] Nonetheless Ratjen continued to compete as a female in athletic competitions.[333] In 1938, on a train ride from Vienna to Cologne the conductor reported that a male was on the train dressed as a woman.[334] Police investigated and Ratjen explained his story and produced documents identifying him as

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325 *Id.*

326 *Id.*

327 *Id.*

328 *See* Crincoli, supra note 270, at 169.

329 *Id.*

330 Stefan Berg, *How Dora the Man Competed in the Woman's High Jump*, SPIEGEL ONLINE (Sept. 15, 2009) (available at http://www.spiegel.de/international/germany/1936-berlin-olympics-how-dora-the-man-competed-in-the-woman-s-high-jump-a-649104.html).Ratjen is sometimes referred to as Hermann. Some publications claim that Ratjen was intentionally deceitful and was a male masquerading as a female. *See e.g.* Samantha Glazer, Note, *Sporting Chance: Litigating Sexism Out of the Olympic Intersex Policy*, 20 J.L. & POLICY 545, 556 (2012).

331 *Id.*

332 *Id.*

333 *Id.*

334 *Id.*

male.[335] A physician examined Ratjen and identified him as male.[336] He concluded, '"The secondary sexual characteristics are entirely male.' . . . . However the doctor did note one distinctive feature: 'A thick band of scar tissue running backwards from the underside of the penis in a relatively broad line.'"[337] Ratjen's scarring is the likely reason he was identified at birth as female.[338] Prosecutors ultimately dropped the fraud charges against Ratjen.[339] The lead prosecutor noted, "'Fraud cannot be deemed to have taken place, . . . [h]is activities and relations were always feminine.'"[340] Despite the decision, Ratjen was stripped of his competitive success and participation in sports as a female.[341] Unfortunately Ratjen's sex was left in limbo for a period of time while authorities attempted to determine if he should be considered male or female, precluding him from participating in sports altogether.[342]

In the 1964 Summer Olympics in Tokyo, Japan, Ewa Klobukowska, representing Poland, won a gold medal in the 4 x 100 relay and a bronze medal in the 100 meter sprint.[343] In the 1965 World Championships in Prague, Czechoslovakia, she set the world record in the 100 meter sprint.[344] In 1966 she earned gold medals in the 4 x 100 relay and the 100 meter sprint and a silver medal in the 200 meter sprint.[345] But, at the 1967

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335 *Id.*
336 *Id.*
337 *Id.*
338 *Id.*
339 *Id.*
340 *Id.*
341 *Id.*
342 *Id.*
343 M.A. Ferguson-Smith & Elizabeth A. Ferris, *Gender Verification in Sport: the Need for Change?*, 25 BRITISH J. SPORTS MED. 17, 18 (1991).
344 *Id.*
345 *Id.*

European Cup in Kiev, Ukraine, Klobukowska failed a phenotype sex test.[346] She was later diagnosed with XX/XXY mosaicism.[347] During her childhood Klobukowska had testes surgically removed and underwent estrogen treatment.[348] She was stripped of her medals and records and banned from competition as a female athlete.[349] If Klobukowska had foregone the European Cup and instead participated only in the 1968 Olympics in Mexico City, she would have been exposed to a Barr body test and would have been eligible to compete.[350]

In 1966 Austrian Erik Schinegger (then known as Erika) won the gold medal in women's downhill skiing at the World Championships in Portillo, Chile.[351] Schinegger was even named Austrian athlete of the year.[352] In 1968 Schinegger was set to compete in the Olympics in Grenoble, France.[353] Schinegger was subjected to the Barr body test and was identified as having male chromosomes which precluded him from participating in the Olympics.[354] Further medical testing determined that Schinegger had male genitalia that had not descended before birth or after.[355] Schinegger was raised as a female because an external examination indicated a female phenotype.[356] Schinegger

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346 *Id.*
347 *Id.*
348 *Id.*
349 *Id.*
350 *Id.*
351 John Fry, The Story of Modern Skiing, 131-32 (2006).
352 *Id.*
353 *Id.*
354 *Id.*
355 *Id.*
356 *Id.*

eventually underwent surgery and treatment.[357] He went on to marry and have children.[358] Schinegger was never stripped of his World Championship medal.[359]

María José Martínez-Patiño was a Spanish hurdler.[360] In 1983 she underwent sex verification at the World Track & Field Championships in Helsinki, Finland.[361] The test result indicated that she was female, and she competed.[362] In 1985 at the World University Games in Kobe, Japan, her Barr body test indicated that she was male and she was not allowed to compete.[363] She was told to feign injury and no longer compete as a female.[364] In 1986 she competed in the Spanish championships as a female and won the 60 meter hurdles.[365] Martínez-Patiño was stripped of her victory and kicked off of the Spanish national team.[366] Martínez-Patiño challenged her disqualification.[367] She explained, "I knew that I was a woman, and that my genetic difference gave me no unfair physical advantage. I could hardly pretend to be a man; I have breasts and a vagina. I never cheated. I fought my disqualification."[368] In 1988 the IAAF reinstated her eligibility.[369] Martínez-Patiño demonstrated that she had Androgen Insensitivity

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357 *Id.*

358 *Id.*

359 *Id.*

360 Cyd Zeigler Jr., *Moment #27: María José Martínez-Patiño Kicked off Spanish Track Team, Titles Stripped*, OUT SPORTS (Sept. 7, 2011) (available at http://outsports.com/jocktalkblog/2011/09/07/moment-27-hurdler-maria-jose-martinez-patino-kicked-off-spanish-track-team-stripped-of-titles).

361 *Id.*

362 *Id.*

363 *Id.*

364 *Id.*

365 *Id.*

366 *Id.*

367 *Id.*

368 *Id.*

369 *Id.*

Disorder.[370] While she possessed XY chromosomes, her body did not properly process androgen leaving her with female sex characteristics.[371] Unfortunately, Martínez-Patiño's reinstatement came too late in her career, and she failed to qualify for the 1992 Olympics.[372] Martínez-Patiño demonstrated the need to have a more efficient system and rules in arriving at sex determination for organized sports.[373]

Edinanci Silva was a judoka competitor for Brazil.[374] She competed in the 1996, 2000, and 2004 Olympics.[375] Silva was born with both male and female genitalia and had surgery in the 1990s choosing to live her life as a female.[376] After her surgery the IOC recognized her as female for competition purposes.[377]

Santhi Soundarajan was an elite middle distance runner representing India in international competition before being disqualified after a sex test.[378] Soundarajan was born into the Dalits, the lowest caste in India, previously known as the untouchables.[379] She learned to run when she was 13, and her abilities catapulted her to victories on the track and to scholarships in the classroom.[380] She attended university on a track

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370 *See* Crincoli, supra note 4, at 159.

371 *Id.*

372 *Id*.

373 *Id.*

374 Emine Saner, *The Gender Trap*, THE GUARDIAN (July 30, 2008) (available at http://www.guardian.co.uk/sport/2008/jul/30/olympicgames2008.gender).

375 *Id.*

376 *Id.*

377 *Id.*

378 Samantha Shapiro, *Caught in the Middle*, ESPN THE MAGAZINE (Aug. 1, 2012) (available at http://espn.go.com/olympics/story/_/id/8192977/failed-gender-test-forces-olympian-redefine-athletic-career-espn-magazine)

379 *Id.*

380 *Id.*

scholarship and was successful in international meets.[381] In 2005 she took the silver medal in the 800 meters at the Asian Athletics Championships in South Korea.[382] A year later she represented India in the Asian Games in Doha, Qatar.[383] She again claimed the silver medal in the 800 meters.[384] The day after the race she was brought in for a sex test.[385] She was subjected to examination by a gynecologist and endocrinologist and a series of lab tests.[386] The next day she was told to leave the Asian Games.[387] Soundarajan was diagnosed with Androgen Insensitivity Disorder.[388] She was stripped of her medals and banned from competing as a female athlete.[389] After the controversy surrounding her sex, Soundarajan attempted suicide.[390] She eventually recovered and now works making bricks at a kiln in her home and coaching other runners.[391] But, she still wishes that she could run competitively.[392]

The most recent sex testing controversy surrounds South African middle distance runner Caster Semenya.[393] Semenya made her international debut at the 2008 World Junior Championships in Poland.[394] At the 2008 Commonwealth Youth Games she won gold in the 800 meters.[395] At the 2009 African Junior Championships she won gold in

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381 *Id.*
382 *Id.*
383 *Id.*
384 *Id.*
385 *Id.*
386 *Id.*
387 *Id.*
388 *Id.*
389 *Id.*
390 *Id.*
391 *Id.*
392 *Id.*
393 *See* Crincoli, supra note 4, at 137.
394 *Id.* at 154.
395 *Id.*

both the 800 and 1,500 meters.[396] Her 800 meter time set a junior national record, a meet record, and was the fastest time by a female athlete at that stage of the 2009 track season.[397] Semenya's time qualified her for the 2009 World Championship in Berlin, Germany.[398] She took gold at the World Championship and improved on her earlier time.[399] Citing the drastic improvements in Semenya's times between the 2008 and 2009 track season, the IAAF launched an investigation. She was subjected to both drug and sex testing.[400] In November 2009, the IAAF announced that Semenya was still undergoing testing to determine her eligibility.[401] In March 2010, the IAAF announced that no further progress had been made in Semenya's case.[402] Later in the same month, Semenya announced her intention to return to competition, she confirmed her commitment in June indicating that she was neither banned nor declared ineligible.[403] In July 2010, the IAAF announced that Semenya was eligible to compete.[404]

The IAAF attempts to keep sex testing confidential and has not made any official announcement about Semenya's diagnosis.[405] Reports indicated that Semenya likely had an intersex condition including the presence of internal testes and male reproductive organs.[406] The length of the delay in announcing her ability to compete is also assumed

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396 *Id.*
397 *Id.*
398 *Id.*
399 *Id.*
400 *Id.* at 155.
401 *Id.*
402 *Id.* at 157.
403 *Id.*
404 *Id.*
405 *Id.* at 137.
406 *Id.*

to correspond to increased levels of androgens and testosterone in her system.[407] Her eligibility determination is linked either to treatment to reduce the advantage she gained from her intersex condition or a determination that she gained no advantage from the condition.[408] Due in part to Semenya's case the IAAF launched further meetings to discuss sex testing practices and specifically to focus on the inclusion of athletes with hyperandrogenism.[409]

This is not an exhaustive list of female athletes who have either been identified as intersex or failed sex testing in some other fashion. Part of the reason this list is incomplete is that the IAAF attempts to maintain the privacy of athletes, and test results are often not released. Nonetheless, there are indications that during the 1972, 1976, and 1984 Olympics nine athletes were determined to be ineligible as a result of sex testing.[410] During the 1996 Summer Olympics in Atlanta eight athletes failed sex testing.[411] Reports indicate that of the eight, seven had Androgen Insensitivity Disorder, and the eighth had 5-alpha-reductase deficiency.[412] All eight were allowed to compete.[413]

These vignettes illustrate the difficulty in making sex determinations for female athletes. They also highlight the human element involved in these cases. In the majority of cases the women who are sex tested and found to be intersex had no idea of their

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[407] *Id.*

[408] *Id.* at 158.

[409] *Id.* at 158.Hyperandrogenism is any of a number of conditions resulting in the secretion of larger than normal levels of androgens.

[410] M.A. Ferguson-Smith & Elizabeth A. Ferris, *Gender Verification in Sport: the Need for Change?*, 25 BRITISH J. SPORTS MED. 17, 19 Table 1 (1991).

[411] Robert Ritchie et al., Intersex and the Olympic Games, 101 J. Royal Soc'y Med. 395, 398 (2008).

[412] *Id.*5-alpha-reductase deficiency results in normal male gonads including testes, but normally is accompanied with female primary sex characteristics.

[413] *Id.*

condition. The results were as much a surprise to them as they were to the officials conducting the tests. Athletic competitions are concerned about the advantage that intersex athletes may have over other female athletes. It is under the banner of fairness that sex testing policies are enacted.

SECTION 2.

The Assumptions Built into Female Athletics by Sex Testing and Why these Assumptions may be Inaccurate

Sex segregation in sport is based on the assumption that males have more athletic bodies. The larger skeletal frame, muscle mass, lungs, and heart provide males with greater strength. Greater strength results in a competitive advantage for male athletes. The views expressed by the *Richards* court and the various rules established by the IAAF and the IOC focus on eliminating this advantage. The inherent assumption in this view is that the female athlete is disabled or disadvantage as compared to the male athlete and the transsexual and intersex athlete who possess elevated levels of androgens or some other advantage conferred by the presence of a male chromosome. This does not discount the very real benefit of the expanded view of sex exemplified by the *Richards* court, nor the attempts by the IAAF and the IOC to be more inclusive over the years. It rather forms the covert premise that underlies the rules that govern female sports. In fact, there is no sex testing in male sports, because the assumption is that if a female were to participate she would possess no genetic advantage.

But a straight comparison between the biological differences between males and females paints an incomplete picture of the dynamic of competitive sports. First, it inherently ignores some of the advantages that female athletes may have over male athletes. Second, it ignores the role that social and economic conditions play in the development of sports.

A. *The Biological Advantages of Female Athletes*

The first major assumption that is ignored in sex testing's assumption that male athletes are biologically advantaged is that female athletes also possess biological advantages. Female athletes' burn fat at a higher ratio to carbohydrates than male athletes during endurance exercise.[414] Burning more fat and less carbohydrates is a more efficient use of energy and provides a marked endurance advantage for female athletes.[415] Females also possess more uniformly distributed and efficient sweat glands; helping both with endurance and energy efficiency.[416] While females tend to weigh less, they have a higher percentage of body fat.[417] Female body fat tends to be distributed along the thighs, buttocks, and breasts, providing a heavier lower body and better center of gravity.[418] Body fat distribution also makes women more buoyant and thus more efficient swimmers, in particular over long distances.[419]

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[414] S.L. Carter, C. Rennie, & M.A. Tarnopolsky, *Substrate Utilization during Endurance Exercise in Men and Women after Endurance Training*, 6 AM. J. PHYSIOLOGY 208 (2001).

[415] *Id.*

[416] Carol L. Rose, *The ERA and Women's Sports: An Hypothetical Trial Case*, in WOMEN AND SPORTS: FROM MYTH TO REALITY 239 (Carole Oglesby ed., 1978) (internal citations omitted).

[417] *Id.*

[418] *Id.*

[419] *Id.*

The composition of female bodies establishes some advantages in endurance capabilities. The distribution of sweat glands, the more efficient use of fat and carbohydrates, and the distribution of fat make females more efficient endurance athletes.

In competitive ultra-marathon races females fatigue less quickly than males providing them with a distinct biological advantage.[420] Ultra-marathon runners like Laura McDonough, Rhonda Provost, Pam Reed, and Ann Trason have on several occasions beaten similarly trained men in ultra-marathon races sometimes by hours.[421] Similarly, in the endurance event of ultra-cycling, female racers are competitive with male racers. Seana Hogan, for example, has been competitive with male racers in various ultra-cycling events and on several occasions has beaten male competitors and set race records.[422]

Two women have won the Iditarod Trail Sled Dog Race.[423] Libby Riddles won in 1985 and Susan Butcher won four times between 1986 and 1990, including three

[420] J. Bam et al., Could Women Outrun Men in Ultramarathon Races?29 Med. & Sci. in Sports & Exercise 244 (1997).

[421] Patricia Nell Warren, *Kelly Kulick and Woman vs. Man*, Outsports (Feb. 2, 2010) (available at http://outsports.com/jocktalkblog/2010/02/02/10448/);Lisa Jhung, *Why Women Rule*, Runner's World (June 21, 2010) (available at http://www.runnersworld.com/cda/microsite/article/0,8029,s6-238-511--13593-F,00.html); Fit and Feminist, *The Secret Feminism of "Born to Run" Pt. 1: Women and Ultrarunning* (Sept. 1, 2011) (http://fitandfeminist.wordpress.com/2011/09/01/the-secret-feminism-of-born-to-run-pt-1-women-and-ultrarunning/).

[422] Ed Fleming & John Hughes, *UltraCycling Hall of Fame 2004 Inductee Seana Hogan*, http://ultracycling.com/old/about/hof_hogan.html (last accessed October 3, 2012).

[423] Iditarod, *Champions & Record Holders*, http://iditarod.com/about/champions-records/ (last accessed Oct. 3, 2012).

consecutive races.[424] Butcher is one of only six people to win the Iditarod at least four times.[425]

In addition to endurance benefits, female athletes' fat distribution makes them more efficient distance swimmers.[426] Female athletes are routinely faster than male athletes in open water distance swims and their advantage increases as the distance increases.[427]

Other sports that segregate between female and male athletes focus on the differences in biology. The quintessential example is artistic gymnastics. The two competitions only share two events, the vault and the floor exercise. Females additionally participate in balance beam and uneven bars. Males compete in the pommel horse, high bar, parallel bars, and the still rings. The male events place a greater emphasis on upper body strength, an area where biological factors benefit male athletes. The balance beam advantages a lower center of gravity and the nimbleness that corresponds to smaller body size. The uneven bars are designed to require the athlete to travel from a lower to a higher bar. The position of the bar and the need to travel between the two bars is advantageous to smaller athletes.

The differences in competitive achievement between male and female athletes may have less to do with the advantages of male athletes and more to do with having more sports that prize the athletic advantages that males possess. If sports were instead

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[424] *Id.*

[425] *Id.*

[426] Steven Munatones, *Men Vs. Women In Endurance Sports*, Active, http://www.active.com/swimming/Articles/Men-Vs-Women-in-Endurance-Sports.htm?page=3 (last accessed October 3, 2012).

[427] *Id.*

focused on the advantages of female athletes, female athletes would (and sometimes do) outperform males. Fostering an environment that prizes female athletic advantages may even eliminate the need for sex comparison and reduce the tension over participation by transsexual or intersex athletes.

B. *The Impact of Social and Economic Conditions on Female Athletes*

At the start of the modern Olympics in 1896 female athletes were excluded. Pierre de Coubertin, the founder of the modern Olympics, explained that female participation would be "impractical, uninteresting, unaesthetic, and incorrect."[428] Female athletes began limited participation at the 1900 Olympics in Paris, France.[429] More significant participation by female athletes did not begin until the 1930s.[430] During this early period female athletic participation was generally discouraged because sports were thought to be too violent.[431] The medical community even indicated that participation was bad for reproductive health.[432] Criticism of female participation in sports often centered on the erosion of femininity associated with athletic bodies.[433]

Participation by female athletes increased markedly in the United States with the passage of Title IX of the Education Amendments of 1972.[434] Title IX established, "No person in the United States shall, on the basis of sex, be excluded from participation in,

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[428] Paul Caridad, *The First Modern Summer Olympics*, VISUAL NEWS (Aug. 9, 2012) (available at http://www.visualnews.com/2012/08/09/1896-olympics/).

[429] *Id.*

[430] Kosofsky, *Toward Gender Equality in Professional Sports*, 4 HASTINGS WOMEN'S L.J. 209, 218 (1993).

[431] *Id.*

[432] *Id.*

[433] *Id.*

[434] *Id.*

be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[435] Title IX required schools to provide equal opportunities for athletic participation for both female and male athletes. The result was a significant increase in the female athletic opportunities in schools from primary through post-secondary. Despite the increased opportunities for female athletes, many of the social attitudes against female participation in sport have been slow to change.[436]

Title IX revolutionized opportunities for female participation in amateur sports, but there has yet to be similar opportunities for professional female athletes. The only major team sport for professional female athletes in the United States is the Women's National Basketball Association. A four team National Professional Fastpitch Softball league does exist, but does not have significant coverage.[437] The Women's Professional Soccer League, the last operating female soccer association, cancelled the 2012 season.[438] Although the WNBA provides opportunities for female athletes to participate in professional basketball, the pay for WNBA players is significantly lower than their male counterparts. The median salary for an NBA player is $2.5 million.[439] The minimum salary for an NBA player is $473,604.[440] The salary cap for a team of 11 WNBA players

[435] Although Title IX is primarily seen through the lens of athletic participation, it in fact impacts all areas of education.

[436] Kosofsky, *Toward Gender Equality in Professional Sports*, 4 HASTINGS WOMEN'S L.J. 209, 218 (1993).

[437] National Pro Fastpicth, http://profastpitch.com/ (last accessed Oct. 16, 2012).

[438] Jim Memmott, *U.S. Women's Stars Hope, Cautiously, that a New Pro League will form*, NY TIMES (Sept. 1, 2012) (available at http://www.nytimes.com/2012/09/02/sports/soccer/us-womens-soccer.html?_r=0).

[439] David Woods, *Equal Pay? Not on the Basketball Court*, USA TODAY (May 15, 2012) (available at http://usatoday30.usatoday.com/sports/basketball/story/2012-05-19/nba-wnba-basketball-salary-disparity/55079608/1).

[440] *Id.*

is $878,000.[441] There may be a myriad of reasons for the discrepancy that range from the profitability of the two leagues to their age (the NBA has been around for 50 more years). The point remains that there are fewer opportunities for female athletes and fewer incentives to participate even when those opportunities exist. The incentive to put in the time and effort necessary to become a professional athlete is far higher for male athletes than for female athletes because they can obtain significantly higher salaries.

Although individual sports present a fairer picture for female athletes, discrepancies remain. Female tennis did not provide equal payouts in major events until 2007 when Wimbledon first provided equal prizes for female and male athletes.[442] The PGA tour total prize money is $256 million, while the LPGA tour total prize money is $50 million.[443]

The social and economic conditions associated with female participation in athletics impacts the success of female athletes. Female athletes have participated in organized sports for far fewer years than their male counterparts. Female athletes have fewer opportunities to participate in professional sports. Even when those opportunities exist, they are often paid less. The result is fewer opportunities and fewer incentives for females who do participate in sports, to take the time and training to attain the same athletic performance of male athletes. When younger females are presented with the opportunity to participate in sports they may not have the same level of desire to play at an elite level as males. The social and economic realities of female sports may be in part

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[441] *Id.*

[442] Women's Sports Foundation, *Pay Inequality in Athletics*, http://www.womenssportsfoundation.org/home/research/articles-and-reports/equity-issues/pay-inequity (last accessed Oct. 16, 2012).

[443] *Id.*

responsible for the relative underperformance of female athlete as compared to male athletes.

SECTION 3.

Conclusion

Sex testing in sports is primarily directed at ensuring fair play and eliminating any advantages that certain female athletes or male athletes masquerading as females may have in participating in female athletic events. The push for fairness has resulted in two unforeseen consequences. First, many transsexual and intersex athletes have been excluded from participating in female sports even though they were considered female in other aspects of life. The sports community has taken steps to attempt to broaden participation by recognizing that some intersex and transsexual athletes may not possess advantages associated with male biology. Nonetheless, certain intersex and transsexual athletes are still excluded because they are perceived to possess those advantages. The persistent view about these advantage leads to the second consequence. Female athletes under this mechanism are treated as disadvantaged or less-than male athletes. This view is problematic for two reasons: (1) female athletes do have some physical advantages over male athletes, but most sports prize male athletic ability, and (2) social and economic conditions have created decades of advantages for male athletes that are not present for female athletes. The presence of transsexual and intersex athletes highlights these two issues and further illustrates the problems with perceptions of sex as fixed and divided.

CHAPTER 3.

CONSIDERATIONS IN ASSIGNING SEX TO INTERSEX CHILDREN

When a child is born, it is generally assigned to one of two sexes: male or female. Sex designation is required and monitored by the United States Department of Health and Human Services through the Center for Disease Control and Prevention's National Center for Health Statistics. The National Center for Health Statistics (NCHS) collects statistics pertinent to the health and wellbeing of all people under United States jurisdiction. In the United States, the legal authority for registering vital statistics, including birth certificates, "resides individually with the 50 States, two cities (Washington, DC, and New York City), and five territories (Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands)."[444] To ensure that vital statistics are properly maintained and consistent the NCHS coordinates collection with state agencies. "Since the inception of a national vital statistics system, the states and the federal government have worked together cooperatively to promote standards and consistency among state vital statistics systems."[445] To this end, the NCHS produces standard birth certificates as "the principal means of promoting uniformity in the data collected by the states."[446] United States birth certificates provide three designations: male, female, or not yet determined. If a child's sex is designated not yet determined, the hospital is instructed that the "[i]tem must be completed. If the record is filled with an N code [not yet determined], send the record to

[444] Centers for Disease Control and Prevention, *About the National Vital Statistics System*, http://www.cdc.gov/nchs/nvss/about_nvss.htm

[445] Centers for Disease Control and Prevention, *Birth Edit Specifications for the 2003 Proposed Revision of the US Standard Certificate of Birth*, (2012) http://www.cdc.gov/nchs/data/dvs/birth_edit_specifications.pdf

[446] *Id.*

NCHS but query the hospital until a determination of the infant's sex is made. Send the updated record to NCHS with the updated file."[447]

Sex designation is made at birth primarily for statistical purposes, but also because traditionally this is when a child's sex is identified. Sex statistics are used in making pertinent medical, social, and economic decisions. It is with this information that everything from stratification and wage disparities to sex-differentiated disease trajectories can be identified and tracked. Delay in identifying a child's sex is discouraged both for logistical reasons and because research shows that genital reconstruction is the least biologically traumatizing when done prior to age one.[448]

The majority of children are designated as either male or female at birth. But, an estimated 1.7% to 4% of children are born intersex.[449] Intersex is a term referring to a wide variety of individuals who are not easily identifiable as either male or female at birth, including those who have chromosomal abnormalities (such as Klinefelter's syndrome[450]) or ambiguous genitalia.[451] Given the social desire to categorize individuals as either male or female, various policies and approaches have been pursued with the goal of placing an intersex person into either the female or male category.

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[447] *Id.*

[448] American Academy. of Pediatrics, *Timing of Elective Surgery on the Genitalia of Male Children with Particular Reference to the Risks, Benefits, and Psychological Effects of Surgery and Anesthesia*, 97 PEDIATRICS 590, 590 (1996).

[449] There is some dispute in the medical community about the precise list of conditions that constitute the category of intersex. In addition, the desire to select a sex at birth makes tracking the actual incidence of intersex difficult.

[450] Klinefelter's syndrome is a genetic disorder where a Y chromosome is present and at least one extra X chromosome is present. This is a deviation from the standard human male karyotype where there are only 46 chromosomes and the sex chromosomes are X and Y.

[451] Not all individuals categorized as Intersex have ambiguous genitalia and some conditions leading to categorization as intersex are even difficult to diagnose at birth. For example, Non-classical Adrenal Hyperplasia or Late-onset Congenital Adrenal Hyperplasia often manifests conditions at or after puberty.

In this Chapter explores various approaches to categorizing intersex children as either male or female. I also explore the way each of these approaches reifies sex dimorphism and the relationship between sex and gender.

SECTION 1.

The Need for Perinatal Sex Identification

Maintaining statistics on sex can be important for addressing sex linked health issues and for tracking sex-based discrimination. Statistical information about sex is important for effective health intervention when there are differences between the sexes in the manifestation of a disease and its treatment. Heart disease is one often-cited health difference between females and males. "The exclusion of females from studies on heart disease is noted as one of the reasons heart disease is often misunderstood for female patients. Until recently, women have been under-represented in many studies that have set the standard for detection and treatment of heart disease. In addition, women with heart disease may have different symptoms than men, and different diagnostic tests may be less accurate in women."[452] The National Institutes of Health (NIH) Women's Health Initiative was launched because of the general underrepresentation of females in health studies and with the goal of providing better and more accurate treatment for females.[453] A wide variety of theories exist about the differences in heart disease between the sexes including differences in symptoms and physical characteristics of the cardiovascular

[452] Hope Ricciotti, *Heart Disease - Differences Between Men and Women* (2003), http://www.bidmc.org/CentersandDepartments/Departments/Medicine/Divisions/CardiovascularMedicine/YourHeartHealth/TipsforHeartHealth/HeartDiseaseDifferencesBetweenMenandWomen.aspx

[453] National Institutes of Health, *Women's Health Initiative Background & Overview*, http://www.nhlbi.nih.gov/whi/background.htm

system.[454] Determining sex is important for maintaining statistics on health differences between males and females, ensuring that there is equal representation in health studies and ensuring for adequate care when sex differences matter.

Sex identification is also important for monitoring and diagnosing sex-linked genetic disorders. Some genetic disorders are linked to the X chromosome but are recessive, so they only manifest in males. "Examples of such disorders include Duchenne muscular dystrophy and Becker muscular dystrophy (both of which are neuromuscular disorders), fragile X syndrome (a type of mental retardation), and some types of leukodystrophy (a group of disorders that affect the central nervous system)."[455] Identifying the sex of the child may lead to faster and more accurate diagnosis of male children and avoid unnecessary testing of female children.

In considering sex discrimination, trends must be identified. Such trends can only be identified among sex groups, because of sex classification. Without having a pool of people designated as male and a separate group designated female, disparate treatments, patterns, and practices could not be addressed. A claim of discrimination may be supported by demonstrating disparate treatment or a pattern or practice of discrimination.[456] A disparate treatment claim cannot be based on statistical differences in treatment between females and males but statistical evidence of an imbalance in treatment may help to establish discriminatory intent.[457] A pattern and practice claim, on

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[454] Riccioti, supra note 451.

[455] Leslie Pray, *Sex-linked Diseases: the Case of Duchene Muscular Dystrophy (DMD)*, 1 NATURE EDUC. 1, 1 (2008).

[456] Lex K. Larson, Employment Discrimination (2013).

[457] *Id.*

the other hand, can be supported by demonstrating statistical imbalance.[458] In a pattern or practice claim "the evidence establishes that the discriminatory actions were the defendant's regular practice, rather than an isolated instance."[459] A pattern or practice claim requires statistical support to demonstrate that discrimination is not isolated or motivated by other factors. "A 'pattern or practice' means that the defendant has a policy of discriminating, even if the policy is not always followed."[460] Gross statistical markers of discrimination may be sufficient on their own to demonstrate that discrimination has occurred on its face.[461] To capture whether sex based differences impact employment opportunities or pay, a determination of sex and aggregation of the distinctions in treatment on the basis of sex is necessary.

Finally, our seemingly intractable link between sex and gender makes early identification of sex important to a child's psychosocial development. Development of gender identity begins before age three.[462] Children early on begin the process of distinguishing genders. "By the age of 2 1/2 or 3 years, most children can answer correctly the question 'Are you a boy or a girl?' but it is not until several years later that children attain gender constancy, that is, understand that their sex remains invariant across time and changes in surface appearance (e.g., hair length)."[463] The development of a gender identity steadily progresses through early and middle childhood. "It is apparent

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[458] *Id.*

[459] United States Department of Justice, *A Pattern or Practice of Discrimination*, http://www.justice.gov/crt/about/hce/housing_pattern.php

[460] *Id.*

[461] Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

[462] Carol Lynn Martin et al., *Cognitive Theories of Early Gender Development*, 128 PSYCHOLOGICAL BULLETIN 903, 910 (2002).

[463] Susan K. Egan & David G. Perry, *Gender identity: A Multidimensional Analysis with Implications for Psychosocial Adjustment*, 37 DEVELOPMENTAL PSYCHOLOGY 451, 451 (2002).

that by middle childhood children have developed fairly stable conceptions of (a) the degree to which they typify their gender category, (b) their contentedness with their gender assignment, (c) whether they are free to explore cross-sex options or are compelled to conform to gender stereotypes, and (d) whether their own sex is superior to the other."[464]

The development of gender identity is a critical component in psychosocial development. "These dimensions of gender identity are not strongly related to one another, yet all relate to psychosocial adjustment."[465] Once children are aware of their gender, they can still borrow from the opposite sex and can more competently relate psychosocially to their peers, since they have a perspective from which to relate. In fact, knowledge of a gender identity appears important for self-identity but gender identity does not lead to total gender role adherence. "It indicates that self-perceptions of gender typicality do not necessarily reflect an unhealthy gender-role straight jacket that undermines well-being; rather, they appear to contribute positively and directly to a healthy sense of self."[466]

Pressure to adhere completely to gender lines may be negative. "Clearly, it is felt pressure for gender conformity, not a perception of the self as gender typical, that is harmful."[467] Gender identity can provide a point of reference for children in developing an identity. Harm occurs when the child no longer has the ability to explore his/her gender identity and is instead pressured or coerced by parents or others to act in a particular gendered manner. "Thus, children's adjustment is optimized when they (a) are

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[464] *Id.* at 459.
[465] *Id.*
[466] *Id.*
[467] *Id.*

secure in their conceptions of themselves as typical members of their sex yet (b) feel free to explore cross-sex options when they so desire."[468] Some researchers thus conclude that allowing children to form a gender identity is positive as long as the child is given some flexibility in adhering to that identity. "Parents and educators might strive to instill in children a sense that they are free to investigate other-sex options, but these adults should also be respectful of children's need to feel that they are typical and adequate members of their own gender."[469] Failing to select a sex, and consequently denying gender identity formation, may result in psychosocial adjustment issues.

One highly publicized attempt at separating sex and gender is the case of Sasha.[470] Sasha was born a biological boy and not intersex.[471] Nonetheless, Sasha's parents decided they did not want to raise him with a gender until they were forced to when he entered school at five years-old.[472] Before this period Sasha's parents did not use gendered pronouns.[473] They did not reveal their child's sex to others, including other family members.[474] Sasha's parents felt that gendering him would preclude him from having more meaningful interactions and force him into materialized, socially constructed versions of his gender.[475]

The intertwined dimorphism of sex and gender is often difficult to tease out from our socialized interaction. Sasha's parents' actions betray their own views of gender and

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[468] *Id.*

[469] *Id.*

[470] Piper Weiss, *Couple Finally Reveals Child's Gender, Five Years After Birth*, YAHOO! SHINE, Jan. 20, 2012, http://shine.yahoo.com/parenting/couple-finally-reveals-childs-gender-five-years-birth-180300388.html

[471] *Id.*

[472] *Id.*

[473] *Id.*

[474] *Id.*

[475] *Id.*

their desire to socialize Sasha under their assumptions of proper gender roles. Sasha was allowed to wear any clothing he wanted, "except hyper masculine clothing like shirts with skulls on them."[476] Sasha was also not allowed to play with Barbie "because yuck, she's horrible."[477] His parents also make him wear a girl's blouse to school with his uniform but not because he chooses to dress that way but instead because of his parent's gender predilections.[478] "I don't think I'd do it if I thought it was going to make him unhappy, but at the moment he's not really bothered either way. We haven't had any difficult scenarios yet."[479] Sasha's case illustrates the difficulty in living a life devoid of gender, in a world where gender roles still matter. The decision to raise Sasha as genderless also worked against the gender identity he was forming as part of his self-identity. Sasha was not allowed to wear the clothing he desired. Instead those decisions were made for him. He was not allowed to wear certain masculine clothing and was forced to wear feminine clothing. These steps clearly denied Sasha his self-identity. The form of pressure Sasha experienced was not conformity to the aligned sex and gender, but it was pressure nonetheless, specifically pressure not to align his sex and gender.

Denying the existence of gender identity is difficult in a world that is gendered. Sasha's parents illustrate the difficulty in raising a child androgynously when identity and socialization are in part gender linked. A more effective manner of challenging gender identity and its link to sex is to allow for gender identity formation and then permitting and encouraging opposite sex behavior or identity when it is desired. Permitting children

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476 *Id.*
477 *Id.*
478 *Id.*
479 *Id.*

to form identities that move beyond their initial gender identity is more constructive than establishing pressure against the current gender norms.

Notably, if, as a society, we were able to decouple sex and gender, sex identification at birth would become less significant. Although early sex identification would continue to have health benefits, the statistical needs could be reduced and the psychosocial needs might be diminished.

SECTION 2.

Perinatal Sex Assignment by Physical Attributes

Sex identification is most pressing with children who are born with ambiguous genitalia. The first major wave of treatment for children born with ambiguous genitalia involved surgical intervention at or near birth.[480] At this time, surgical intervention was the best practice; this was not challenged until the early 1990s.[481] Under this model, surgical intervention was often dictated by the proximity of the genitalia to the norm.[482] Perceptions of this norm are generally based on the size of clitoris/penis and the desire for alteration to move the genitalia to fit as closely within the norm as possible.[483]

The size of the external genitalia holds some importance. It impacts the ability to engage in penetrative sex after puberty.[484] Another factor in the analysis is the function

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[480] Elizabeth Weil, *What if It's (Sort of) a Boy and (Sort of) a Girl?*, N.Y. Times, Sept. 24, 2006 (Magazine), at 48;

[481] Intersex Society of North America, *What's the history behind the intersex rights movement?*, http://www.isna.org/faq/history

[482] Weil, supra note 479.

[483] *Id.* Some studies indicated that a clitoris ought not be larger than 0.9 centimeters at birth. Suzanne J. Kessler, Lessons from the Intersexed, (1998). The desired outcome for a male is to have a penis that will be at least 1 inch at the time of puberty. *Id.*

[484] Weil, supra note 479.

of the genitalia for urinating.[485] For a male, surgical intervention may be immediately pursued when the urinary tract or the genitalia do not permit standing while urinating.[486] Depending on the size and shape of the external genitalia, a physician would alter the genitalia and designate the child as either male or female.[487] Because a Vaginoplasty is often seen as an easier and more accurate surgery, many children born with ambiguous genitalia are designated female and are surgically altered to have more normal female genitalia.[488] These operations first began before there was wide recognition of intersex children and the operation was conducted with or without the consent of the parents. Intervention was seen as prudent by many surgeons to allow a child to live as either a male or female. Surgical intervention at an early age was deemed to limit physical trauma caused by surgery, as well as psycho-social inconsistencies.[489]

When greater acknowledgement of intersex children began in the 1950s, psychologist John Money moved to the forefront in establishing a medical framework for gender development and intersex treatment.[490] Money recommended early intervention in assigning sex.[491] He indicated that surgeons, with the consent of parents, ought to

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[485] Kristin Zeiler & Anette Wickström, *Why Do 'We' Perform Surgery on Newborn Intersexed Children?: The Parental Experience of Having a Child with Intersex Anatomies*, 10 FEMINIST THEORY 359, 365 (2009).

[486] *Id.*

[487] Weil, supra note 479.

[488] John Money, *Sex Assignment in Anatomically Intersexed Infants*, *in* HUMAN SEXUALITY: A HEALTH PRACTITIONER'S TEXT, 136-49 (Richard Green ed., 2nd ed. 1979).

[489] Surgical intervention between 6 and 12 months is ideal because it reduces the potential for psychological and social issues such as aggressive or regressive behavior, night terrors, and anxiety. American Academy. of Pediatrics, supra note 448, at 590.

[490] Milton Diamond, *Sex, Gender, and Identity over the Years: A Changing Perspective*, 13 CHILD & ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AMERICA 591, 591 (2004).

[491] John Money, *Sex assignment in Anatomically Intersexed Infants*, *in* Human Sexuality: A Health Practitioner's Text, 136-49 (Richard Green ed., 2nd ed. 1979).

make a decision as early as possible to intervene and surgically assign a sex at or near birth.[492]

Money had several reasons for arriving at these conclusions. First, Money contended that surgical intervention was necessary to allow a child to obtain gender normalcy.[493] The goal was to provide a clearly "sexed individual" and avoid issues with sex ambiguity.[494] Money argued that gender was more important than sex in healthy psychological interactions.[495] Money felt that parents would bond more quickly and effectively with a child that had a defined sex and gender.[496] In part, Money based his theory on the view that parents had a hard time bonding with a child that has a congenital defect.[497] In addition, Money theorized that a strong gender identity was necessary for healthy psychological development because it allowed for the child to identify with others and explore self-identity.[498] Second, Money contended that gender was socially constructed (not hormonally dependent) and that even surgical alteration of a biological male or female to make him or her a member of the opposite sex could be successful as long as there was sufficient gender normalizing.[499] Third, Money contended that early intervention facilitated parent child bonding.[500] Money argued that bonding was more

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[492] *Id.*

[493] *Id.*

[494] *Id.*

[495] John Money & Anke A. Ehrhardt, Man & Woman, Boy & Girl: Gender Identity from Conception to Maturity, (1996).

[496] *Id.*

[497] American Academy of Pediatrics, supra note 488, at 590.

[498] Money & Ehrhardt, supra note 50; *see also* Kenneth I. Glassberg, Editorial, *Gender Identity and the Pediatric Urologist*, 161 J. UROLOGY 1308, 1308–09 (1999).

[499] Money, supra note 46.

[500] *Id.*

effective when parents have a gender identity to socialize toward.[501] Thus, Money argued that a doctor and parent ought to make a decision early on about the preferred sex of the child, conduct an operation to conform the child to that sex, and socialize the child in the gender aligned with the selected sex immediately.[502]

Under this form of treatment, parents are frequently instructed not to reveal intervention or the intersex status to the child.[503] The goal of aligning the child's sex and gender is best met by nondisclosure because "any doubt may undermine development of a gender identity concordant with the assigned sex of rearing."[504]

Early intervention alone is not always sufficient; often times, even those with early intervention often require further operations or treatment to normalize sex.[505] As the body moves toward and through puberty, various interventions may be necessary to maintain the assigned sex.[506] These interventions may include hormone therapy and other operations to alter physical appearance, such as breast reduction or augmentation. Even with these interventions, some doctors continue to counsel against revealing the child's sex ambiguity and the earlier intervention because the child may not have the cognitive or psychosocial capabilities to fully comprehend his/her situation.[507] A

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[501] *Id.*

[502] *Id.*

[503] *Id.*

[504] Bruce E. Wilson & William G. Reiner, *Management of Intersex: A Shifting Paradigm*, 9 J. CLINICAL ETHICS 360, 362 (1998).

[505] *See e.g.*, Sarah M. Creighton et al., *Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood*, 358 LANCET 124, 124(2001).

[506] *Id.*

[507] *See e.g.*, American Academy of Pediatrics, *Committee on Pediatrics AIDS. Disclosure of Illness Status to Children and Adolescents with HIV Infection*, 103 PEDIATRICS 164, 164-66 (1999).

recommendation for gradual disclosure with increasing levels of sophistication is recommended to parallel cognitive and psychosocial development.[508]

The success of early intervention is not clear. There are few studies examining the success of socialization and early intervention in the gender and sex identity health of children. In addition, early intervention based on morphological aspects of the genitalia may lead to functional issues as the child grows and enters puberty. These issues include, but are not limited to, differences between the appearance of the genitalia and their reproductive capacity[509] and the impacts of hormone increases at puberty on other aspects of physical appearance.[510]

Further complicating the early intervention socialization model advocated by Money was the 1997 revelation of the failed socialization of David Reimer.[511] Reimer, referred to in medical literature as John, suffered a severe injury to his genitalia as an infant.[512] Reimer's genitalia was altered because doctors determined that the construction of female genitalia would be more successful.[513] Reimer was then raised as a girl.[514] Money traced Reimer's progress.[515] When Reimer turned 10 and hit puberty, Money pronounced Reimer's intervention a success.[516] But later, follow up by journalists and

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[508] John Money, Sex Errors of the Body and Related Syndromes: A Guide to Counseling Children, Adolescents, and Their Families, (2nd ed., 1994).

[509] For example, in John Money's intervention with David Reimer, David was operated to make his genitalia female but he still had the ability to reproduce as a male. After the surgical intervention he no longer could reproduce. Diamond, supra note 489.

[510] Puberty results in the release of hormones that alter physical appearance. A child assigned a sex opposite of the sex hormones that are released at puberty could see physical changes such as the development of breast tissue or facial hair growth that does not align with their assigned sex.

[511] Diamond, supra note 489, at 595.

[512] *Id.*

[513] *Id.*

[514] *Id.*

[515] *Id.* at 560.

[516] *Id.*

scholars, revealed that Reimer's intervention was unsuccessful.[517] At 16, Reimer decided to live as a man.[518] He explained that he had felt he was a man for years and even had suicidal ideations resulting from these thoughts.[519]

Several studies report some number of early intervention patients rejecting their assigned sex.[520] Speculation about the cause of rejection varies. Some researchers contend that there is a neurobiological connection to gender identity.[521] Other researchers contended that certain intersex conditions are prone to later rejection[522] while others do not lead to rejection.[523]

Money's early intervention model is notable because, while he acknowledges that gender is socially conditioned, he contends that sex can be altered as long as the conditioned gender is aligned with that sex.[524] This view moves away from the theory that gender is an innate result of the hormones and other biological conditions of sex. Nonetheless, Money's early intervention model pre-supposes the need for sex and gender to be aligned and dimorphic for a person to live a healthy well-adjusted life. Money

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[517] *Id.*

[518] *Id.*

[519] *Id.*

[520] *See e.g.*, Morgan Holmes, *Rethinking the Meaning and Management of Intersexuality*, 5 SEXUALITIES 159, 169–70, 172 (2002).

[521] Paula Jean Manners, *Gender Identity Disorder in Adolescence: A Review of the Literature*, 14 CHILD & ADOLESCENT MENTAL HEALTH 62, 62–68 (2009).

[522] Sheri A. Berenbaum, *Management of Children with Intersex Conditions: Psychological and Methodological Perspectives*, 19 GROWTH, GENETICS, & HORMONES 1, 1 (2003).

[523] Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488, e491 (2006) ("More than 90% of patients with 46,XX CAH and all patients with 46,XY CAIS assigned female in infancy identify as females." Meanwhile, "Approximately 60% of 5-α-reductase (5αRD2)-deficient patients assigned female in infancy and virilizing at puberty (and all assigned male) live as males.")

[524] *See e.g.*, John Money & Patricia Tucker, Sexual Signatures on Being a Man or a Woman, (1975).

contended that children are born psychosexually neutral.[525] The physical appearance of a child can be altered and then the gender is determined by rearing. The need to align sex and gender is desirable for the child to feel normal.[526]

The Money model does not move away from the view that sex and gender are connected and dimorphic. Instead Money and others contend that gender is more important and sex can be made to align with gender.

SECTION 3.

The Consensus Statement on the Management of Intersex Disorders

In 2006 a major review of medical intervention on intersex children was conducted by the Lawson Wilkins Pediatric Endocrine Society and the European Society for Pediatric Endocrinology.[527] The review was prompted by, "progress in diagnosis, surgical techniques, understanding psychosocial issues, and recognizing and accepting the place of patient advocacy."[528] Based on research conducted by 50 international experts including a series of literature reviews and myriad of questionnaires and investigations, a protocol for intervention was released called *The Consensus Statement on the Management of Intersex Disorders* (Consensus Statement).[529] The new protocol advances a more holistic approach to intervention, including examining social issues,

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[525] Diamond, supra note 489, 595-96.

[526] *Id.*

[527] Lee et al., supra note 520, at e488.

[528] *Id.*

[529] *Id.* Among other conclusions, the group determined that there is controversy surrounding the use of the term "intersex" and instead advocated for the use of "disorders of sex development." The controversy surrounded the term being "perceived as potentially pejorative by patients" and resulting in confusion among practitioners and parents. Given the continued pervasive use of the term "intersex" in the literature and the use of the term by those who are intersex, deference is given to that term in this dissertation.

genital appearance, reproductive function, sexual sensitivity, and psychology, among others.[530] The Consensus Statement advocates a five step model to intervention.[531]

First, "gender assignment must be avoided before expert evaluation in newborns."[532] Expert evaluation requires team intervention: "Ideally, the team includes pediatric subspecialists in endocrinology, surgery, and/or urology, psychology/psychiatry, gynecology, genetics, neonatology, and, if available, social work, nursing, and medical ethics."[533] The first step rejects surgical intervention on the basis of a physician's assessment of the physical genitalia alone because it was an inadequate measure of the child's health and best interests.[534] It also rejects physician intervention at the behest of parents.[535] Instead, the protocol requires expert evaluation of all aspects of the child's sex.[536] The evaluation includes identification of the intersex condition, assessment of the potential reproductive health and function of the child, the potential sexual health of the child, and psychological consequences of intervention, among other things.[537] This approach was intended to be an improvement over previous methodologies that either examined too few dimensions of sex in making an assessment to assign sex or gave too much deference to the parent's desire for an immediate medical resolution.

Second, "evaluation and long-term management must be performed at a center with an experienced multidisciplinary team."[538] A multidisciplinary team can help address all of the medical, psychological, and social issues a child and his/her parents

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530 *Id.* e490.
531 *Id.*
532 *Id.*
533 *Id.*
534 *Id*
535 *Id.*
536 *Id.*
537 *Id.*
538 *Id.*

may face.[539] The second step further emphasizes the need to examine potential issues for an intersex child on the various aspects that may impact health in both the short- and long- term. In addition, the second step requires long-term involvement. Research has indicated that although early intervention was often predicated on the emergency of a child being intersex and the psychological trauma of sex ambiguity, little continued assistance or monitoring was provided to the parent or the child.[540] In part, the failure to provide continued assistance and intervention was based on the desire to establish the normalcy of the child's assigned sex and gender.[541] Continued medical intervention would imply to the child that there was something wrong with him/her and doctors wanted to avoid sending that message.[542] Additionally, many doctors believed that surgical intervention was sufficient to resolve the medical crisis and further intervention was unnecessary.[543] The new protocol rejects that view and instead requires continued intervention as vital for the physical and psychological health of the child and for the management of the parents' relationship with the child.[544] The continued presence of a medical team helps ensure that both parent and child have a healthy and effective approach to the child's status as intersex.

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[539] *Id.*; *see also* American Academy of Pediatrics, Council on Children with Disabilities, *Care Coordination in the Medical Home: Integrating Health and Related Systems of Care for Children with Special Health Care Needs*, 116 PEDIATRICS1238, 1238-1244 (2005).

[540] Peter A. Lee, *A Perspective on the Approach to the Intersex Child Born with Genital Ambiguity*, 17 J. PEDIATRIC ENDOCRINOLOGY & METABOLISM133, 133-40 (2004); Suzanne Cashman et al., *Developing and Measuring Progress Toward Collaborative, Integrated, Interdisciplinary Health Teams*, 18 J. INTERPROFESSIONAL CARE183, 183-96 (2004).

[541] Diamond, supra note 489, 595-96.

[542] *Id.*

[543] *Id.*

[544] Lee et al., supra note 520, at e490.

Third, "all individuals should receive a gender assignment."[545] The protocol does not require immediate intervention at or near birth, although it encourages intervention as early as possible. The Consensus Statement recommends early intervention because "[i]nitial gender uncertainty is unsettling and stressful for families."[546] Children are also less traumatized when surgical intervention occurs early.[547] In addition, early intervention is often necessary for healthy physical development.[548] Even if early surgical intervention is avoided, the new protocol strongly encourages gender assignment. The need for gender assignment is based on a desire to provide healthy psychological development both in bonding with parents and socializing with others.[549] The protocol ascribes significant psychological benefit to gender assignment, even if surgical intervention is postponed.[550] The protocol also presents probability estimates on the success of gender assignment based on the intersex condition.[551] Thus, while it

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[545] *Id.*

[546] *Id.* at e491.

[547] *Id.*; *see* American Academy of Pediatrics, Section on Urology, *Timing of Elective Surgery on the Genitalia of Male Children with Particular Reference to the Risks, Benefits, and Psychological Effects of Surgery and Anesthesia*, 97PEDIATRICS 590, 590-94 (1996).

[548] Lee et al., at e491-92. For example, the Consensus Statement argues that separation of the urethra and vagina in newborns is medically appropriate because "the beneficial effects of estrogen on tissue in early infancy, and the avoidance of potential complications from the connection between the urinary tract and peritoneum via the Fallopian tubes." *Id.* at e492.

[549] *Id.* at e490 ("The initial contact with the parents of a [intersex child] is important, because first impressions from these encounters often persist. A key point to emphasize is that [an intersex child] has the potential to become a well-adjusted, functional member of society.")

[550] *Id.* e490-93.The Consensus Statement in part focuses on early assignment because gender identity develops early. "Gender identity development begins before the age of 3 years, but the earliest age at which it can be reliably assessed remains unclear. The generalization that the age of 18 months is the upper limit of imposed gender reassignment should be treated with caution and viewed conservatively." *Id.* at e492 The Consensus Statement acknowledges that intersex children are more prone to "atypical gender-role behavior" but caution that such behavior is not necessarily indicative of a need to reassign gender or sex. *Id.* at e492. The Consensus Statement indicates that if the view is persistent than a specialist should be called in an reassignment ought to be considered. *Id.*

[551] For example, the Consensus Statements offers that, "More than 90% of patients with XX congenital adrenal hyperplasia and all patients with XY complete androgen insensitivity syndrome assigned

rejects emergency intervention and presents a more holistic approach to assignment than the model advocated by Money and other predecessors, it nonetheless continues to see the vital importance of early assignment of a gender role.

The final two steps place emphasis on the interrelationship between the child and the parents and the need to encourage dialogue and respect the views of the patient and his family. Fourth, "open communication with patients and families is essential, and participation in decision-making is encouraged."[552] Fifth, "patient and family concerns should be respected and addressed in strict confidence."[553]

The Consensus Statement and its protocol address advancements in understanding of intersex children and the various conditions that may result in a child being intersex. The Consensus Statement also takes a more holistic view and provides more options for the child and the parents. Nonetheless, even under the new protocol emphasis is placed on maintaining coherence between gender and sex. The goal remains closely aligning sex and gender to ensure healthy psychological development and social integration.

SECTION 4.

Delayed Gender Assignment Model

In response to concerns about sex identification, a new strategy has emerged. Recently, the approach has been to deny any need to assign sex during early childhood development and instead allow the child to make gender decisions as the child matures.

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female in infancy identify as females." *Id.* at e491.Given this evidence the Consensus Statement recommends raising children with either of these conditions as female. *Id.*

[552] *Id.* at e490

[553] *Id.*

Advocates of this model insist that children ought to be given the right to give informed consent about their sex assignment.

The Intersex Society of North America (ISNA) embraces many of the improvements in the treatment of intersex children under the Consensus Statement.[554] ISNA contends that, although the protocol indicated by the Consensus Statement is a step in the right direction, more emphasis ought to be placed on the decision of the child and that the child's consent is necessary for surgical intervention.[555] Informed consent is advocated to preserve two interests: "bodily integrity and self-determination."[556]

The informed consent model has been embraced by a series of scholars with varying approaches to the decisions as to when or if to designate a gender. Some scholars advocate a child being raised with an intersex assignment,[557] others advocate that a child should have a fluid assignment elected by the child,[558] others advocate the child have no gender assignment until the child can make an informed decision about the gender assignment,[559] still others advocate a legal mechanism for childhood intervention.[560] Under all of these options the decision for surgical intervention is avoided until puberty, but no consensus about the appropriate approach until surgical intervention has emerged.

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554 The Intersex Society of North America, Our Mission, http://www.isna.org/

555 *Id*.

556 Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment on Infants with Ambiguous Genitalia?*,7 MICH. J. GENDER & L. 1, 34 (2000).

557 The Intersex Society of North America, supra note 552.

558 Karen Gurney, *Sex and the Surgeon's Knife: The Family Court's Dilemma . . . Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 Am. J.L. & Med. 625, 625-661 (2007).

559 Beh & Diamond, supra note 554, at 34-63.

560 Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER & L. & JUSTICE 59, 98-101 (2006).

Another issue with a consent-based theory on sex and gender selection is that puberty may set in before a child has made a decision about the sex and gender he/she wants to live in. Puberty normally sets in as early as seven for girls and nine for boys.[561] An eight or nine year old may still have difficulty making a decision about what sex and gender he/she would like to live in. Some have advocated the use of puberty delaying medication to stop the onset of puberty until a child makes a decision.[562] But, the use of puberty delaying drugs is controversial. Many doctors believe that the use of these medications may have negative health implications for children. The delay of puberty may impact healthy development and increase the likelihood of certain ailments including cancers.[563] In addition, the fact that medical intervention is necessary for a child to be able to have time to select a sex and gender is indicative to some that the decision should be made through the holistic medical-based approach advocated by the Consensus Statement with an emphasis on earlier assignment and intervention. Plus, it is unclear how long it may take for a child to be secure in making a decision about his/her sex and gender. If eight is not old enough, why would twelve or fourteen be old enough?

Even under a system that embraces consent and advocates for later gender and sex assignment, the focus remains on aligning sex and gender. The choice to delay puberty is based on the increased physical manifestations of sex. The desire is to allow the child to remain in the more sex identity-neutral body that exists before puberty. When puberty occurs, sex identity becomes more central and the congruence between sex and gender is

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561 Deanna Adkins & Dennis Clements, *When Is Puberty Too Early?*, DUKE HEALTH (April 13, 2011).

562 The Intersex Society of North America, Congenital Adrenal Hyperplasia (CAH) Medical Risks, http://www.isna.org/faq/medical_risks/cah

563 Kimberley Zagoren, What are the Pediatric Side Effects of Lupron?, (Sept. 2, 2010) LiveStrong, http://www.livestrong.com/article/228935-what-are-the-pediatric-side-effects-of-lupron/

more relevant. Thus, a consent-based model does little to challenge the dimorphic view of sex.

SECTION 5.

Conclusion

Birth certificates provide two options for a child's sex: male or female. Intersex children with ambiguous genitalia are difficult to categorize. Although models for categorizing intersex children have evolved and changed, they still embrace a dimorphic model. Although early intervention is still favored, sex is not assigned based on morphology alone. Nonetheless, the view that sex and gender must be aligned persists. Finally, there has been some advocacy for delaying sex and gender selection until a child can consent to medical intervention. But even under this revised approach of leaving the decision to the child, the dimorphic model persists.

Two considerations should be made in determining policy on perinatal sex identification. First, the biological needs of the child should be assessed. Surgical intervention should occur as early as possible to allow for the child to have reproductive viability if possible. But, the second and more significant policy demand is for proactive steps to be made to decouple sex and gender.

CHAPTER 4.

ETHICAL DIMENSIONS OF SEX SELECTION AND A FRAMEWORK FOR ANTICIPATORY GOVERNANCE

Technological development provides cause for both hope and concern. Hope arises from the promise of the technology resolving issues and alleviating suffering. Concern arises from negative externalities and ethical quandaries. The more technology directly interacts with humans, the more hope and concern are produced. Thus, human enhancement technology is an area of particular concern for many.

Ethical debates about human enhancement technologies tend to vacillate between two poles. There are those who are opposed to human enhancement technologies because they believe technological developments interfere with human nature (humans playing god) and lead to eugenics.[564] This group generally sees human technological advancement as either therapeutic or enhancing. Therapy cures disease and restores health; enhancements alter human nature. They believe that therapy should be pursued and enhancement should be legislated or discouraged.

On the other end of the spectrum are technological libertarians who insist that individuals have freedom over their own bodies and can choose any modification.[565] Technological libertarians contend that restrictions on human enhancement deny individual liberty, and thus they advocate against legislation. "For some, nanotechnology

[564] *See e.g.*, The President's Council on Bioethics, Beyond Therapy, (2003); Francis Fukuyama, Our Posthuman Future (2002).

[565] *See e.g.*, Ronald Bailey, Liberation Biology: The Scientific and Moral Case for the Biotech Revolution (2005); James Hughes, Citizen Cyborg, (2004).

holds the promise of making us superhuman; for others, it offers a darker path toward becoming Frankenstein's monster."[566]

Recently, the ethical debate over human enhancement has also seen a middle ground, where attempts are made to merge these theories, into a more nuanced and holistic approach to human enhancement technologies. One such approach is anticipatory governance.

Anticipatory governance involves engaging in a multidisciplinary approach and developing capacity to address issues before they become concerns.[567] The goal is not to limit development or application, but to understand potential consequences and address the issues that underlie them.[568] Anticipatory governance does not necessarily require government action but may manifest in a wide variety of actions including, "the implementation of licenses and other kinds of restrictions, the use of liability and indemnification, the application of intellectual property rights, the execution of treaties, the development of standards, testing regimes, and codes of conduct, and public action in various forms ranging from education to protest."[569]

The approach focuses on developing a "broad-based capacity extended through society that can act on a variety of inputs to manage emerging . . . technologies while such management is still possible."[570] To obtain this goal requires multidisciplinary examination of issues from the perspective of various people who may be impacted by

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[566] Patrick Lin & Fritz Allhof, *Nanoethics and Human Enhancement: A Critical Evaluation of Recent Arguments*, 2 NANOTECHNOLOGY PERCEPTIONS 47, 47 (2006).

[567] David H. Guston, *The Anticipatory Governance of Emerging Technologies*, 19 J. KOREAN VACUUM SOC. 432, 432-34 (2010).

[568] *Id.*

[569] *Id.* at 434.

[570] Daniel Barben et al., *Anticipatory Governance of Nanotechnology: Foresight, Engagement, and Integration*, *in* The Handbook of Science and Technology Studies, 992 (E.J. Hackett et al. eds., 2008).

these technologies. "Anticipatory governance comprises the ability of a variety of lay and expert stakeholders, both individually and through an array of feedback mechanisms, to collectively imagine, critique, and thereby shape the issues presented by emerging technologies before they become reified in particular ways."[571] The approach requires more interaction between scientists and social scientists in examining the ethical, social, and political consequences of technological advancement. "Competent social scientists should work hand-in-hand with natural scientists, so that problems may be solved as they arise, and so that many of them may not arise in the first instance."[572]

The goal of these interactions is to better understand issues and how to address them before they arise or when they arise. "Anticipatory governance implies that effective action is based on more than sound analytical capacities and relevant empirical knowledge: It also emerges out of a distributed collection of social and epistemological capacities."[573] Functionally, anticipatory governance involves "describing and analyzing plausible, intended and potentially unintended outcomes of an implications associated with research and its development, be these economic, social, environmental or otherwise. . . to surface issues and explore possible impacts and implications that may otherwise remain uncovered and little discussed."[574]

The need for an anticipatory governance frame and multidisciplinary approach is seen as important for governing development. The National Science Foundation (NSF) acknowledges the need to examine the societal implications of advancing technologies.

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[571] *Id.* at 992-93

[572] Detlev W. Bronk, *The National Science Foundation: Origins, Hopes, and Aspirations*, 188 Science 409, 413 (1975).

[573] 991-92.

[574] Richard Owen et al., Responsible Innovation: Managing the Responsible Emergence of Science and Innovation in Society, 1 (2013).

The NSF has noted that "[e]xamining the ethical and other social implications of these societal interactions is necessary, in order to understand their scope and influence and to anticipate and respond effectively to them."[575] The NSF has also recognized a need for a "long-term vision for addressing societal, ethical, environmental and educational concerns" surrounding emerging technologies.[576]

Despite the potential benefits of the anticipatory governance approach, critics remain. Critics of anticipatory governance often argue that it is speculative ethics.[577] The approach is criticized for imagining problems and then imagining approaches to solve those problems. It is seen as engaging in science fiction rather than engaging in ethical, social, political, and scientific concerns that are contemporary.

In this Chapter, I will use the anticipatory framework to examine sex selection practices. These practices are historical, contemporary, and prospective. By examining an issue that is not merely speculative through the anticipatory governance framework it is my hope to both illuminate why the approach is helpful and to more fully understand the issue of sex selection itself.

Sex selection presents profound ethical controversy revolving around existing technologies and developing technologies. I will examine sex selection and various ethical approaches to sex selection before offering an anticipatory governance framework grounded in sex equality to address some of these ethical issues.

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[575] National Science Foundation, *Nano-scale Science and Engineering: Program Solicitation for Fiscal Year 2005*, (2004) http://www.nsf.gov/pubs/2004/nsf04043/nsf04043.htm.

[576] *Id.*

[577] Alfred Nordmann, *If and Then: A Critique of Speculative NanoEthics*, 1 NANOETHICS 31, 31-46 (2007).

SECTION 1.

Sex Selection

Selecting the sex of a child is not necessarily a new concept. Sex selective abortion has been a practice in some countries for many years. When a society prizes one sex over another, having a child of the preferred sex may provide significant benefits. Scientific and technological improvements permit parents to know the sex of the fetus earlier in developmental stages. Although scientific improvements have enabled sex selection to occur in early fetal stages, sex selection of infants has been practiced since pre-history.

Some prehistoric societies engaged in infanticide as a method of population control. Infanticide was often committed to ensure that the (reduced) population could be fed and defended. Infanticide often focused on the weaker infants who were thought to be a particular liability to the group. "Infanticide has been practiced on every continent and by people on every level of cultural complexity, from hunter gatherers to high civilizations, including our own ancestors. Rather than being an exception, then, it has been the rule."[578]Rates of infanticide for this time are estimated to be between 15% and 50% of all live births.[579] Most infanticides were committed by simple exposure or refusal to provide nourishment.[580] The rates of infanticide are thought to have been higher for females than for males[581]

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[578] Laila Williamson, *Infanticide: An Anthropological Analysis*, *in* INFANTICIDE AND THE VALUE OF LIFE 61, 61 (Marvin Kohl ed., 1978).

[579] Joseph B. Birdsell, *Some Predictions for the Pleistocene Based on Equilibrium Systems among Recent Hunter-Gatherers*, *in* MAN THE HUNTER 229, 239 (Richard Lee & Irven De Vore Eds. 1986).

[580] *Id.* at 229-240.

[581] Peter Hoffer & N.E.H. Hull, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND AMERICA, 1558-1803, 3 (1981).

The move from hunter-gatherer and prehistoric societies to agrarian societies reduced infanticide rates in most cultures. But, the practice persisted across many cultures, dictated primarily by strains on resources. As societies continued to modernize, infanticide rates plummeted and nearly disappeared.

Sex-selective abortion practices replaced infanticide in certain cultures. Sex-selective abortion is in part possible because of prenatal testing.

Traditional techniques for determining sex involve ultrasonography, either transvaginally or transabdominally, which is used to identify phenotypic sex markers.[582] Ultrasounds can be performed between 65 and 69 days from fertilization (week 12 of gestational age).[583] Early stage testing results in sex identification in 90% of cases, with a 75% rate of accuracy.[584] Ultrasounds performed 70 days from fertilization (at week 13 of gestational age) are nearly 100% accurate in identifying sex.[585]

Sex identification techniques have improved, and there are now DNA tests available that can identify sex much earlier in gestation and with greater accuracy.[586] DNA analysis conducted after the seventh week of pregnancy is accurate 98.6% of the time when the test identifies a sex.[587]

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[582] Vincenzo Mazza, et al., *Sonographic Early Fetal Gender Assignment: A Longitudinal Study in Pregnancies after In Vitro Fertilization*,17 ULTRASOUND IN OBSTETRICS & GYNECOLOGY17513, 513–6 (2001).

[583] *Id.*

[584] *Id.*

[585] *Id.*

[586] Stephanie A. Devaney, *Noninvasive Fetal Sex Determination Using Cell-Free Fetal DNA*, 306 JAMA 627, 635-36 (2011).

[587] *Id.*

The presence of sex-selective abortion is highly correlated with large socio-economic stratification, marked by severe poverty and strongly paternalistic cultures.[588] These forces are often most pronounced in East and South Asia.[589] The preference for male children in certain cultures is based on the advantages conferred by maleness.[590] In these cultures males are wage earners.[591] When they are married, they hold the expectation of taking care of their parents.[592] They are heirs not only to the family name but to any accumulated wealth.[593] In cultures with a dowry system, parents of female children are additionally burdened by having to provide extra money or goods when their daughter is married.[594] Male children are thus assets, and female children are burdens.[595] The asset and burden system is exacerbated when limits are placed on the number of children that a family can sustain, either through policy (such as China's One Child Policy) or through circumstances (such as extreme poverty and the resulting inability to feed all children).

Sex-selective abortion is less about the sex of the child and more about gender roles. The stricter the adherence to traditional gender roles the more likely sex-selective abortion is to occur. Sex matters only in as much as it is bound to gender. Males are assets because they are wage earners, heirs, and heads of family. Females are burdens

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[588] Daniel Goodkind, *Should Prenatal Sex Selection be Restricted?: Ethical Questions and Their Implications for Research and Policy*, 53 POPULATION STUDIES 49, 49-61 (1999).

[589] Monica Das Gupta, *Explaining Asia's "Missing Women": A New Look at the Data*, 31 POPULATION AND DEVELOPMENT REVIEW 529, 529-35 (2005).

[590] Goodkind, *supra* note 5.

[591] *Id.*

[592] *Id.*

[593] *Id.*

[594] Ramaswami Mahalingam, *Beliefs about Chastity, Machismo, & Caste Identity: A Cultural Psychology of Gender*, 56 SEX ROLES 239, 239-49 (2007).

[595] *Id.*

because they may require dowries, cannot hold property, and are additional mouths to feed. But these characteristics are not innately tied to sex but are the conditions of the society's construction of gender and the tie of gender to sex.

While widespread sex-selective abortion is primarily based on issues of asset vs. burden, sex-selective abortion may also be done for medical reasons. Sex selection may be related to X chromosome linked recessive disorders.[596] Certain disorders are linked to genetic abnormalities in the X chromosome.[597] These disorders will only manifest in male children.[598] Female children can only be carriers.[599] Mothers who are carriers may want to select female children to avoid passing the X chromosome linked recessive disorder to a male child.

But, sex selection is not limited to abortion. Sex selection can also occur by manipulating fertilization or gestation.

In the 1970s Dr. Ronald J. Ericsson developed a method for sorting sperm to select for sex.[600] Sperm either contain an X chromosome or a Y chromosome.[601] The Ericsson method separates X chromosome and Y chromosome sperm by passing them through human serum albumin.[602] Y chromosome sperm are lighter than X chromosome

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[596] Arthur F. Haney, *Choosing the Sex of Children: Current Technology and Practice*, The President's Council on Bioethics (Oct. 17, 2002), *available at*http://bioethics.georgetown.edu/pcbe/transcripts/oct02/session1.html.

[597] *Id.*

[598] *Id.*

[599] The recessive dominant theory of X chromosome disorders is challenged by researchers who note that there are a variety of instances where genetic disorders that are X chromosome recessive manifest in females. *See* William B. Dobyns et al., *Inheritance of most X-linked traits is not dominant or recessive, just X-linked*, 129 Am. J. Genetics 136, 136-43 (2004).

[600] F.J. Beernink et al., *Sex Preselection through Albumin Separation of Sperm*,59 FERTILITY& STERILITY382, 382-86 (1993).

[601] *Id.*

[602] *Id.*

sperm.[603] When sperm is filtered through human serum albumin, the differences in mass between the X and Y chromosomes result in the two sperm types separating.[604] The end result is separated layers of concentrated X chromosome and Y chromosome sperm.[605] The resulting layers have higher concentrations of X chromosome or Y chromosome sperm but are not pure.[606] The Y chromosome concentrated layer is used for insemination if a male is desired and is effective 70-75% of the time.[607] The X chromosome concentrated layer is used for insemination if a female is desired and is effective 70-72% of the time.[608]

Other, potentially more accurate, sperm sorting systems are in development. The MicroSort System has been approved for use on livestock and is now under FDA testing for approval in humans. The foundation of the MicroSort System is the same as the Ericsson test. It functions because the X chromosome has 2.8% more DNA material than the Y chromosome.[609] The sperm is stained with a fluorescent that attaches to DNA.[610] "The stained spermatozoa are analyzed one by one by a flow cytometer, where cells go through a laser that makes the stain attached to the DNA fluoresce. The spermatozoa containing the X chromosome (which have more DNA and therefore more stain) will

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[603] *Id.*

[604] *Id.*

[605] *Id.*

[606] *Id.* The success of the Ericsson method is disputed. *See* Arthur F. Haney, *Choosing the Sex of Children: Current Technology and Practice*, The President's Council on Bioethics (Oct. 17, 2002), *available at*http://bioethics.georgetown.edu/pcbe/transcripts/oct02/session1.html.

[607] Gender Select, *Gender Selection Ericsson Method*, http://www.gender-select.com/gender_selection/ericsson-method/ (last visited March 10, 2013).

[608] *Id.*

[609]MicroSort, *The Process*, http://www.microsort.com/?page_id=271 (last visited March 10, 2013).

[610]*Id.*

have a bigger shine than the spermatozoa containing the Y chromosome."[611] The sperm are then sorted and a choice can be made between using X chromosome or Y chromosome sperm.[612] The purity levels range from 91-93% for females and 74-82% for males.[613]

Another method involves in vitro fertilization and prenatal genetic diagnosis.[614] Ovum are removed from the mother and fertilized.[615] The ovum are then separated and cultivated.[616] When the ovum has developed six to eight cells, DNA can be removed for genetic diagnostic testing.[617] The testing can provide information for any genetic abnormalities and can also identify if the fertilized ovum contains a Y chromosome.[618] The ovum that contains the selected sex can then be implanted.[619] The process is more precise than the Ericsson method because the implanted ovum has been identified as either containing or not containing a Y chromosome.[620]

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611 *Id.*

612 *Id.*

613 MicroSort, *Purity & Results*, http://www.microsort.com/?page_id=453 (last visited March 10, 2013).

614 Tugce Pehlivan et al., *Impact of Preimplantation Genetic Diagnosis on IVF Outcome in Implantation Failure Patients*, 6 REPRODUCTIVE BIOMEDICINE ONLINE 232, 232-37 (2003); Emmanuel Kanavakis & Joane Traeger-Synodinos, *Preimplantation Genetic Diagnosis in Clinical Practice*, 39 J. MED. GENETICS 6, 6-11 (2002).

615 *Id.*

616 *Id.*

617 *Id.*

618 *Id.*

619 *Id.*

620 *Id.*

SECTION 2.

The History of Ethical Approaches to Sex Selection

A series of multidisciplinary groups have examined the ethical dimensions of sex selection. Reviewing these ethical approaches provides a fuller understanding of the current moral frameworks and the way anticipatory governance and sex equality can provide depth to the ethical debate.

A. *The Hastings Group*

In 1979, the New England Journal of Medicine published *Guidelines for the Ethical, Social and Legal Issues in Prenatal Diagnosis — A Report from the Genetics Research Group of the Hastings Center, Institute of Society, Ethics and the Life Sciences*.[621] This collaborative project focused on the bioethical concerns associated with prenatal diagnosis including sex. The interdisciplinary team included scholars from the fields of biology, genetics, law, medicine, philosophy, and theology. The group concluded that prenatal sex diagnosis was justifiable in an effort to prevent genetic disorders, but was guarded about sex selection more broadly. The group cautioned against "making diagnosis of sex and selective abortion a part of ordinary medical practice and family planning."[622] Yet they recommended against legal restrictions on prenatal sex diagnosis. "We think such restrictions would be ineffective and impossible to administer, would lead to subterfuge and, more important, would violate our objective of noninterference with parental choice, even when we disagree with that choice."[623]

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[621] Tabitha M. Powledge & John Fletcher, *Guidelines for the Ethical, Social and Legal Issues in Prenatal Diagnosis — A Report from the Genetics Research Group of the Hastings Center, Institute of Society, Ethics and the Life Sciences*, 300 NEW ENG. J. MED. 168, 168-72 (1979).

[622] *Id.*

[623] *Id.*

The Hastings Group settled on a position that placed an emphasis on individual liberty. In particular the Hastings Group focused on the liberty of the parents to make choices about diagnosis and the sex of their child. The Hastings Group placed their position in a "moral framework favoring the protection of individual choice and the autonomy of parents, even when we disagree with their courses of action."[624] The liberty framework took center stage in their argument. They did not engage in a larger analysis of the ethical situation surrounding sex diagnosis or selection.

B. *The President's Commission for the Study of Ethical Problems of Medicine*

In 1983 Morris B. Abram Chairman of the President's Commission for the Study of Ethical Problems of Medicine, wrote *Screening and Counseling for Genetic Conditions: The Ethical, Social, and Legal Implications of Genetic Screening, Counseling, and Education Programs*.[625] The paper focused on various approaches to pre- and post-natal genetic testing and the ethical implications of engaging in this type of testing, including whether these practices ought to be precluded or if there ought to be ethical guidelines for practice. As part of the larger paper, the Commission focused on the ethics of using amniocentesis[626] for purposes of sex selection.

The Commission generally favored a liberty-based pluralistic view of genetic screening. "Nowhere is the need for freedom to pursue divergent conceptions of the

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[624] *Id.*

[625] President's Commission for the Study of Ethical Problems of Medicine, *Screening and Counseling for Genetic Conditions: The Ethical, Social, and Legal Implications of Genetic Screening, Counseling, and Education Programs*, (1983).

[626] Amniocentesis is a medical procedure used to conduct prenatal diagnosis of chromosomal abnormalities. The test involves sampling amniotic fluid containing fetal cells and then testing the DNA for chromosomal abnormalities. Amniocentesis can also reveal the sex of the child by determining whether a Y chromosome is present.

good more deeply felt than in decisions concerning reproduction."[627] The Commission nonetheless was concerned that social pressures may influence a parent to terminate a pregnancy if a fetus were diagnosed with a genetic disorder. So, the Commission urged caution: "It would be a cruel irony, therefore, if technological advances undertaken in the name of providing information to expand the range of individual choice resulted in unanticipated social pressures to pursue a particular course of action. Someone who feels compelled to undergo screening or to make particular reproductive choices at the urging of health care professionals or others or as a result of implicit social pressure is deprived of the choice-enhancing benefits of the new advances."[628] But, the Commission took occasion to specifically examine the "special case of sex selection." The Commission outlined "several reasons that using amniocentesis and abortion for this purpose is morally suspect."[629]

First, the Commission was concerned with perpetuating sex discrimination when sex equality was of particular concern. They feared that sex selection may lead to more parents opting to have males and thus increasing inequality. The explanation for the resulting inequality was, "the selection of sons in preference to daughters would be yet another means of assigning greater social value to one sex over the other and of perpetuating the historical discrimination against women." [630]

Notably, this objection appears to have switched the causal arrows. The presence of inequality and bias would cause the preference for males over females. The choice itself would be a manifestation of that bias in the preference of males.

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627 *Id.* at 56.
628 *Id.* at 56.
629 *Id.*
630 *Id.* at 57.

Second, the Commission concluded that sex selection runs counter to the need for parents to love their child unconditionally. Sex-selective abortion is "incompatible with the attitude of virtually unconditional acceptance that developmental psychologists have found to be essential to successful parenting."[631] The argument centers on the need to develop parents who are committed to the well-being of their child regardless of the child's sex. "For the good of all children, society's efforts should go into promoting the acceptance of each individual—with his or her particular strengths and weaknesses—rather than reinforcing the negative attitudes that lead to rejection."[632] The argument underpins a position that moves toward a sex-equality position. Regardless of a child's sex a parent ought to love the child. If a parent is selecting the child's sex, the parent is indicating that they would love a child of the selected sex more than a child of the opposite sex. Although the Commission does not fully connect these dots, the underlying assumption in their position is that a parent who would select one sex over another is more likely to be unfit because that choice indicates that the parent might not unconditionally love the child. But, the second objection also contains a kernel of the real issue underlying sex selection-- that a child, regardless of sex or gender, ought to be accepted as an individual.

Third, the Commission contends that sex selection may be a slippery slope to selecting a myriad of other identifiable genetic characteristics. The Commission expressed fears that sex selection "may also rest on the very dubious notion that virtually any characteristic of an expected child is an appropriate object of appraisal and

631 *Id.* at 57.
632 *Id.*

selection."[633] The slippery slope would lead to designer children with each attribute selected based on preferences and socially desirable attributes. "Taken to an extreme, this attitude treats a child as an artifact and the reproductive process as a chance to design and produce human beings according to parental standards of excellence, which over time are transformed into collective standards."[634]

Two criticisms are wed in this position. First, genetic selection procedures could take over the natural genetic selection process, an argument tantamount to doctors "playing god." Second, genetic selection leads to the production of children based on desired attributes, a concern referential to Nazi Germany's desire to produce genetically superior children.

The Commission felt that genetic screening could be divided into two categories, "a distinction can be made between seeking genetic information in order to correct or avoid unambiguous disabilities or to improve the well-being of a fetus, and seeking such information merely to satisfy parental preferences that are not only idiosyncratic but also unrelated to the good of the fetus."[635] The Commission concluded that "sex selection appears to fall in the latter class."[636] The Commission refrained from concluding that all sex selection was a cause for "serious moral concern." The Commission instead concluded that, "although individual physicians are free to follow the dictates of conscience, public policy should discourage the use of amniocentesis for sex selection."

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633 *Id.*

634 *Id.* at 58.

635 *Id.* at 58.The view has been largely imported by many into debates about human enhancement technology; specifically the attempts to distinguish therapy and enhancement, where therapy is desirable and enhancement is not.

636 *Id.*

The Commission disfavored a legal prohibition because it would be ineffective, would require invasions of privacy, and could lead to coercive practices.

C. *The American College of Obstetricians and Gynecologists*

In 1996, the American College of Obstetricians and Gynecologists (ACOG) through their Committee on Ethics issued an opinion on the use of prenatal sex diagnostic techniques and sex selection. [637] The ACOG determined that sex selection was only permissible to avoid sex-linked genetic disorders. It opposed diagnosis for any sex selection purposes or for family planning. The ACOG was concerned that sex selection would perpetuate sex discrimination. They have reaffirmed their position on two subsequent occasions and expanded the position to assert that, "[w]here systematic preferences for a particular sex dominate, there is a need to address underlying inequalities between the sexes."[638] Nonetheless, the ACOG does not advocate legal mechanisms to stop these practices and even notes that doctors are not responsible for the conduct of patients who indicate non-sex-selection reasons to obtain sex diagnosis and sex selection procedures (such as diagnosis for genetic abnormalities).[639] In addition, the ACOG does not develop a framework or strategy for combating the underlying sexism they believe is at the heart of sex selection.

D. *The International Federation of Gynecology and Obstetrics*

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[637] The American College of Obstetricians and Gynecologists Committee on Ethics, *Committee Opinion: Sex Selection*, 56 Int. J. Gynecologists & Obstetricians 1999, 199-202 (1997).

[638] The American College of Obstetricians and Gynecologists Committee on Ethics, *Committee Opinion Number 360: Sex Selection*, (2007) http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Ethics/Sex_Selection

[639] *Id.*

In 1997 the International Federation of Gynecology and Obstetrics (FIGO) rejected sex-selection abortion contending that "no fetus should be sacrificed because of its sex alone."[640] But FIGO held a different view regarding preconception sex selective practices. "[P]reconceptional sex selection can be justified on social grounds in certain cases for the objective of allowing children of the two sexes to enjoy the love and care of parents."[641] In subsequent years FIGO has altered this position.[642] The most recent guideline notes that preconception sex selection through practices such as in vitro fertilization and prenatal genetic diagnosis or sperm separation "can also result in [sex] discrimination, in this respect they are not ethically different from those means used in ongoing pregnancy."[643]

FIGO goes further than other quasi-governmental bodies and advocates for some level of regulatory practices. FIGO indicates that "[p]rofessional societies must ensure that their members and their members' staff are accountable for the employment of techniques for sex selection only for medical indications or purposes that do not contribute to social discrimination on the basis of sex or gender."[644]

FIGO's advocacy goes beyond a desire for self-regulation among practitioners by advocating legal mechanisms to regulate conduct. "Where a regional area has a marked sex-ratio imbalance, the professional societies should work with their governments to ensure that sex selection is strictly regulated to contribute to the elimination of sex and

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[640] FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health, *Ethical Issues in Obstetrics and Gynecology*, (1997).

[641] *Id.*

[642] FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health, *Ethical Issues in Obstetrics and Gynecology*, (2012), http://www.figo.org/files/figo-corp/English%20Ethical%20Issues%20in%20Obstetrics%20and%20Gynecology.pdf

[643] *Id*. at 11.

[644] *Id.* at 12.

gender discrimination."[645] FIGO retains a liberty-based view of reproduction noting, "Procreative liberty warrants protection, except when its exercise results in sex discrimination. The individual right to procreative liberty needs to be balanced by the communal need to protect the dignity and equality of women and children."[646]

FIGO's position attempts to balance a liberty approach with a desire to combat sexism. The concerns that they raise are directed toward sex selection as an act of discrimination and a need to preclude that act. FIGO does however acknowledge that rooting out sex discrimination is important. FIGO emphasizes that "all health professionals and their societies are under an obligation to advocate and promote strategies that will encourage and facilitate the achievement of gender and sex equality."[647] The statement appears to be broader than merely precluding sex selective practices, but it is unclear what the process may entail.

E. *The American Society for Reproductive Medicine*

In 1999 the American Society for Reproductive Medicine (ASRM) issued a report critical of the use of prenatal genetic diagnosis as part of sex diagnosis and selection processes.[648] ASRM outlined a series of reasons prenatal genetic diagnosis of sex was problematic: "issues of gender discrimination, the appropriateness of expanding control over nonessential characteristics of offspring, and the relative importance of sex selection when weighed against medical and financial burdens to parents and against multiple

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[645] *Id.*

[646] *Id.*

[647] *Id.*

[648] The Ethics Committee of the American Society of Reproductive Medicine, *Sex Selection and Preimplantation Genetic Diagnosis*, 72 FERTILITY & STERILITY 595, 595-98 (1999).

demands for limited medical resources."[649] These arguments are connected to a series of consequences that may arise in the context of sex diagnosis, "such as risk of psychological harm to sex-selected offspring (i.e., by placing on them too high expectations), increased marital conflict over sex-selective decisions, and reinforcement of gender bias in society as a whole . . . an overall change in the human sex ratio detrimental to the future of a particular society." [650]

Despite these concerns, the ASRM noted that the use of prenatal genetic diagnosis was permissible if the process were used to identify serious genetic diseases because, "It is not inherently gender biased, bears little risk of consequences detrimental to individuals or to society, and represents a use of medical resources for reasons of human health."[651] ASRM discourages the use of prenatal genetic diagnosis for sex selection purposes. They caution that in vitro fertilization and prenatal genetic diagnosis may also provide sex information as a byproduct of selecting out genetic abnormalities.

ASRM discourages the use of prenatal genetic diagnosis, arguing that a prenatal genetic diagnosis that provides sex information could be used for sex selection. If information about a child's sex can be obtained as a byproduct of other testing, such testing "should not be encouraged."[652] ASRM struggles with establishing a clear line between what is objectionable and what is not objectionable. In part, there is hesitation because ASRM supports individual liberty in reproductive health. "It must be recognized, of course, that individuals and couples have wide discretion and liberty in

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649 *Id.* at 596.
650 *Id.*
651 *Id.* at 598.
652 *Id.*

making reproductive choices, even if others object."[653] ASRM also acknowledges the possibility that there may be nonbiased reasons for sex selection, but maintains a view that bias may underpin these desires. "For example, desires for family gender balance or birth order, companionship, family economic welfare, and the ready acceptance of offspring who are more 'wanted' because their gender is selected may not in every case deserve the charge of unjustified gender bias, but they are vulnerable to it."[654] Given ASRM's cautious approach, they recommend against legislative limits on prenatal genetic diagnosis or sex selection. "However, because it is not clear in every case that the use of PGD and sex selection for nonmedical reasons entails certainly grave wrongs or sufficiently predictable grave negative consequences, the Committee does not favor its legal prohibition."[655]

F. *The President's Council on Bioethics*

In 2001 President George W. Bush formed the President's Council on Bioethics. The Council was formed "to advise the President on bioethical issues related to advances in biomedical science and technology. In connection with its advisory role, the Council undertakes fundamental inquiry into the human and moral significance of developments in biomedical and behavioral science and technology, with the aim of fostering greater understanding and public discussion of bioethical issues."[656] As part of the greater project of examining bioethical concerns, the Council examined questions surrounding

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653 *Id.* at 597.

654 *Id.*

655 *Id.* at 598.

656 The President's Council on Bioethics, *The Changing Moral Focus of Newborn Screening*, xvii (2008), http://bioethics.georgetown.edu/pcbe/reports/newborn_screening/Newborn%20Screening%20for%20the%20web.pdf

sex selection. They released a staff working paper on the issues entitled *Ethical Aspects of Sex Control*. [657]

The Council argued that sex selection was not grounded in reproductive liberty concerns. The Council explains that a liberty-based view seeks to establish sex selection as a choice between the binary of male or female. "But the binary choice among highly natural and familiar types hardly makes the choice a trivial one."[658] From the perspective of the Council the decision has a significant meaning. Male or female makes an indelible mark on the child, a decision that should not be taken lightly. "[H]aving one's sex foreordained by another is different from having it determined by the lottery of sexual union."[659] The contention appears to be that there is a distinction between the natural selective process, where a child's sex is determined by sexual intercourse where either the sperm that fertilizes the egg contains an X or a Y chromosome, and the process of unnatural sex selection, which includes practices like sperm sorting, prenatal genetic diagnosis, and sex-selective abortion. The difference is sufficient to reject an argument that the decision to permit sex selection should be founded on reproductive liberty. "There is thus at least a prima facie case for suggesting that the power to foreordain or control the nature of one's child's sexual identity is not encompassed in the protected sphere of inviolable reproductive liberty."[660]

The Council also rejects a critique of sex selection based on sex discrimination. The Council categorizes these arguments as "a movement toward a more genuinely genderless (or androgynous) society, one in which our socially constructed human

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[657] The President's Council on Bioethics, *Ethical Aspects of Sex Control*, (2003), http://bioethics.georgetown.edu/pcbe/background/sex_control.html#endnote10

[658] *Id.*

[659] *Id.*

[660] *Id.*

identities overwhelm the mere biology of sexual differentiation."[661] The view is then rejected as incoherent. "But in the perfectly genderless society, it would presumably make no difference whether you are a girl or boy, a woman or a man. And thus the choice of parents of a boy rather than a girl, or vice versa, would have no negative implications of gender stereotyping and would not threaten the equality of the sexes."[662] The Council argues that a sex- or gender-based argument does not make sense because if the sex of a child does not matter, then sex selection should be permissible. If the sex of the child does not matter, than selecting one sex over the other should not matter.

The issue with this argument is that it fails to explain why a parent would want to select a particular sex, if sex no longer matters. Presumably, if sex were no longer a societal issue, the sex of your child would not be relevant, and thus, no one would want to select a child's sex. Ironically, the Council holds the position that if sex were irrelevant, then the decision would be based on aesthetic preference. "In the genderless utopia, the choice between a girl and a boy is purely an aesthetic choice – a choice between pink and blue."[663] The problem with this position is that the assumption that a child belongs in pink or blue is a profoundly gendered view. Not only is the view gendered that male children belong in blue and female children belong in pink, but it also assumes that sex and gender are inherently linked. Nonetheless, the Council argues that from a sex-equality position this would render sex selection more permissible. "And who could then object to letting parents choose that [between blue and pink]? The very logic and language of gender equality would seem to soften opposition to sex control."[664]

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[661] *Id.*
[662] *Id.*
[663] *Id.*
[664] *Id.*

The Council's view is that a sex-equality perspective is either unhelpful or counterproductive. The Council argues that sex is fixed and meaningful. In addition, their argument also rests on the view that sex and gender are bound and dimorphic. "Humanity exists as a sexually differentiated species; it is constituted in part by the sexual differentiation."[665] The Council believes that a sexed body is real and important. "[O]ne must say something like this if one takes seriously the body as integral to our humanity. There is not some generic or androgynous human self to which is added, then, as a kind of accidental addition, either a female or a male body."[666] From this perspective sex matters and identity stems from sex. "Were that the case [the existence of a generic or androgynous human self], sexual identity really would be 'nonessential' or 'inessential' to our self. It would not in any sense help to constitute a person's identity."[667] The presumption is that sex is an essential component of identity. "Every cell of the body marks us as either male or female, and it is hard to imagine any more fundamental or essential characteristic of a person. It is surely odd, to say the least, to deny the importance of sexual identity in the very activity of initiating a life!"[668]

The view that sex is fundamental to the identity of a child may appear to be a point of advocacy for sex selection. But the Council believes that the high importance of sex is precisely why sex selection should be discouraged or prohibited. Sex is so fundamental that even when parents do not want to know about the sex of their child, it is indicative of the important role the child's sex will play. "Many prospective parents will say quite honestly that they don't care whether their baby is a boy or a girl; they'll be

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665 *Id.*
666 *Id.*
667 *Id.*
668 *Id.*

happy to have either. That attitude is desirable not because the sex of the child is a matter for indifference but because it counts for so much."[669] Sex is so important that human intervention is inappropriate. Sex counts for "[f]ar too much to be seen as [the parents'] responsibility to determine."[670] Sex selection challenges the natural order and undermines the very fabric of procreation. "The salient fact about human procreation in its natural context is that children are not *made* but *begotten*. By this we mean that children are the issue of our love, not the product of our wills."[671] The Council also understands sex selection as the first step down a slippery slope to eugenics, a eugenics program that is just as dangerous in the hands of private individuals as government. "It should be noted as well that sex control may be a step down the road of eugenics and 'designer children.' It is a short step, logically and psychologically if not technologically, from choosing the sex of our children to choosing their eye color, or skin color, or height, or sexual orientation, or IQ."[672]

The Council's hearings over these issues placed further emphasis on the indecency in sex selection. The emphasis of many of the comments was on the undesirable rule of acting like god in interfering with sex selection. Michael J. Sandel commented, "[T]he disposition or the character of the desire to control, to choose the sex of one's offspring . . . Maybe the short label is the hubris objection, something objectionable in the stance of the person who has the desire and acts on the desire to control the sex, to choose the sex of his or her offspring."[673] The moral culpability in Sandel's view is with the parent who believes they have the right to select a child's sex. Council Chairmen Leon Kass takes

669 *Id.*
670 *Id.*
671 *Id.*
672 *Id.*
673 *Id.*

the argument a step further than Sandel. He noted, "[O]ne worries really about what it means not just to pray for a child of a certain sex, which doesn't necessarily produce the result because the Good Lord doesn't necessarily give you what you want, but there's a difference between that and actually having exercised the control over it and have the parents be responsible to the child for the choice made."[674]

SECTION 3.

A Sex Equality Anticipatory Governance Model for Sex Selection

The traditional ethical perspectives on sex selection focus on two main issues: reproductive liberty interests and the composite dangers of sex selection. The few approaches that treat sex selection as related to sex discrimination tend to focus on sex selection as an act of discrimination. The various multidisciplinary groups examined above are taking anticipatory governance steps but are limiting themselves with the scope of governance strategies that they pursue. An anticipatory governance model ought to be open to various approaches and strategies to dealing with ethical dilemmas in science and technology.

An anticipatory governance approach can address issues in a manner that attempts to resolve the issue from multiple vantage points. In this case, the root concern, and the underlying issue with sex selection is a concern that the practice is sexist. Even when the decision is made for personal reasons, the decision is predicated on a preference for certain sex and gender attributes. If we can eliminate the attributes associated with a

[674] *Id.*

particular sex or gender than we reduce those sex and gender related reasons for engaging in sex selection.

A more direct solution to issues with sex selection can be obtained by focusing on the causes of sex selection. One can see that the stronger the gender roles and the more connected they are with sex, the more likely parents are to favor one sex over the other. In the vast majority of cases, this results in favoring male children over female children. Combating the process of sex selection, rather the technology or the moral ambiguities of using the technology, ought to focus on the sex and gender discrimination that results in these biases.

First, we need to address sex biases. By eliminating sex-based barriers to entry into various occupations, we can increase opportunities for females and reduce inequity. The greatest strides can be made in the developing world where restrictions may include the right to own property or the right to work a wide variety of jobs. But, such discrepancies also exist in the developed world. In the United States, for example, females were excluded from combat positions until 2013. Even with the change in policy, the military is only opening up some positions to both sexes for now. By reducing the number of professional and financial obstacles in place for females, we will reduce the financial burden of having female children.

Opening up more positions is not sufficient. We must also work to obtain pay equity. A system that ensures equal wages for equal work will further reduce the economic disparity between having a female or male child. While we may imagine sex discrimination as being far removed for contemporary reality, unfortunately these issues

persist. Lilly Ledbetter's case highlighted the persistence of unequal pay.[675] After she lost her case before the United States Supreme Court she continued to work for legal remedies for pay discrimination until the Lilly Ledbetter Fair Pay Act was passed in 2009.[676]

Second, we need to work on societal shifts in the gender roles foisted on males and females. Providing females the opportunity to work in military combat positions is insufficient, if it is not accompanied with the view that women can serve in such positions. For example, a higher percentage of women than men graduate with a bachelor's degree in the United States,[677] the same is true of a doctoral degree,[678] but women are still underrepresented and underpaid in the hard sciences and engineering.[679]

In addition, we need to work to eradicate limiting gender roles. The view that the man is the provider and bread winner and women are meant to stay at home limits the opportunities for women to become financially independent. The possibility of financial independence for women will reduce the view that male children are necessary to ensure the financial success of a family. In a similar vein, eliminating dowry systems and male inheritance systems will also reduce the benefit of having a male child and the burden of having a female child.

Reducing sex and gender discrimination will reduce the need for sex selection, because the sex of a child becomes less relevant if a child is not limited by their sex. By combating both sex and gender discrimination we can also work to decouple sex and

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[675] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).
[676] Pub. L. No. 111-2, 123 Stat. 5.
[677] Tamar Lewin, *At Colleges, Women Are Leaving Men in the Dust*, NY TIMES (July 9, 2006), http://www.nytimes.com/2006/07/09/education/09college.html?pagewanted=all&_r=0
[678] Caludio Sanchez, *Women Outnumber Men Earning Doctoral Degrees*, NPR (Sept. 15, 2010), http://www.npr.org/templates/story/story.php?storyId=129874290
[679] Helen Shen, *Inequality Quantified: Mind the Gender Gap*, NATURE (March 6, 2013), http://www.nature.com/news/inequality-quantified-mind-the-gender-gap-1.12550

gender and further erode the perceived need for sex selection. Eliminating this dimorphic connection and reducing disparities between males and females is essential to reducing the need and desire for sex selection.

Embracing the various approaches to regulating or restricting sex selection also illuminates the important role that anticipatory governance can take in addressing scientific innovation. The various models presented highlight why examining the ethical, social, and political dimensions of technology is important. Analyzing this work helps to highlight where governance may be needed and the ways in which regulation is ineffective and ill-conceived. The anticipatory governance framework provides a way to analyze issues more fully and examine various approaches to eliminating issues that advancing technologies may raise in the future.

BIOGRAPHICAL SKETCH

John Parsi earned his Bachelor's of Science in Political Science and his Bachelor's of Arts in Sociology at Arizona State University in May of 2002. After working as an Assistant Director in Milan, Italy with documentary film company Quattro-Terzi, John returned to Arizona State University to continue his studies in Political Theory. He earned his Master's of Arts in Political Science at Arizona State University in May 2006. John immediately began pursuing his Doctorate in Political Science at Arizona State. During this time, he also worked with the Center for Nanotechnology in Society, publishing the chapter "Anticipating the Ethical and Political Challenges of Human Nanotechnologies" with Dr. David Guston and Justin Tosi in Allhof, Lin, Moor, and Weckert's *NanoEthics: Examining the Societal Impact of Nanotechnology*, which was published in 2007. In May 2007, John left Arizona behind and began his Juris Doctorate at the University of Michigan. While at Michigan, John was a Note Editor on the Editorial Board of the Michigan Law Review. In addition to his legal studies, John began his work on his dissertation. John completed his Juris Doctorate at the University of Michigan in December 2009. A version of his first Chapter of this dissertation was published in the University of Michigan Law Review in June 2010. John continues to explore the intersection of politics, law, and technology.