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**Bye, Bye, Binary: Updating
Birth Certificates to Transcend the
Binary of Sex**

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I. INTRODUCTION

Conceptions of identity are in the midst of a radical transformation. The manner in which the United States has long been categorized is proving inadequate and deeply problematic. Gender and law continually interface, and the ramifications of this interaction are burgeoning to the surface of the Nation’s collective consciousness. Part of the dilemma is that the spectrum-like¹ nature of gender is in tension with the categorical male/female binary of sex.² The birth certificate, focused as it is on establishing the sex and dictating the gender of newborn children, is a representation of both the impact legal distinctions have on gender identities and the conflict that emerges between the fluidity of gender and the rigidity of sex. It is the first legal document that is bestowed on most children; yet, as those children grow into their unique identities, the document leaves many feeling constrained or altogether erased by harsh binaries.³

1. The determination of sex also exists upon a spectrum encompassing the interaction between chromosomes, gonads, genitals, and hormones. See Robin Marantz, *How Science Is Helping Us Understand Gender*, NAT’L GEOGRAPHIC (Jan. 2017), <https://www.nationalgeographic.com/magazine/2017/01/how-science-helps-us-understand-gender-identity/> [<https://perma.cc/JT3M-8XVA>]. Though most subscribe to either the category of male or female, “the frequency of deviation . . . may be as high as 2% of live births.” Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 151 (2000).

2. “Sex” corresponds to biological differences in chromosomes, genitalia, and reproductive functions between men and women. RYAN B. BLACKWELL, BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer ed., 2007). On the contrary, “gender” extends beyond the male-female paradigm to also include a wide range of self-determined labels such as genderqueer, transgender (female to male, FTM; male to female, MTF), intersex, and androgynous. See ANN OAKLEY, *SEX, GENDER AND SOCIETY* 21-24 (1972); Jack Harrison, Jaime Grant, & Jody L. Herman, *A Gender Not Listed Here: Genderqueers, Gender Rebels, and Otherwise in the National Transgender Discrimination Survey*, 2 LGBTQ POL’Y J. HARV. KENNEDY SCH. 13-14 (2011).

3. A survey of individuals between eighteen and thirty-four found that *half* believe that gender should not be limited to the categories of male and female, and fifty-seven percent of female millennials and forty-four percent of male millennials believe in the spectrum-like nature of gender. See *January 2015 Survey of Millennials*, BENSON STRATEGY GROUP (2015), <https://fusiondotnet.files.wordpress.com/2015/02/fusion-poll-gender-spectrum.pdf> [<https://perma.cc/G489-K8N5>]; see also Jorge Rivas, *Half of Young People Believe Gender Isn’t Limited to Male and Female*, SPLINTER (Feb. 3, 2015), <https://splinternews.com/half-of-young-people-believe-gender-isnt-limited-to-mal-1793844971> [<https://perma.cc/6LRZ-6DHH>].

For many, the birth certificate is not just a piece of paper buried in long forgotten drawers. Lacking documentation⁴ that matches one's gender identity can lead to violence and discrimination in employment, education, and housing.⁵ The birth certificate is often required as the basis for establishing one's identity in order to obtain documentation, such as a driver's license, since only about forty-two percent of Americans have a passport.⁶ As such, there is a need for a nuanced, inclusive, and liberating update to the birth certificate in which the binary of sex is removed from its four corners.

At birth, each newborn is effectively sorted into a category that continues on with them forever. Historically, those that were born not conforming to the binary experienced the medicalization of their sex firsthand.⁷ Yet, such medicalization contradicts the fluidity of gender and ultimately leaves complex and deeply personal decisions to the discretion of the judiciary rather than the individual. Accordingly, the magnitude of the moment of birth cannot be understated—once the “sex” is assigned, it immediately becomes the assumed gender identity. For many, the male or female demarcation of sex will morph into their assumed gender identity. However, what if the preliminary decision was the wrong one? What if it was misinformed or uninformed? Time and experience provide perspective and facilitate a more holistic sense of self, but because one's assigned “sex” is legally binding, deviating from it may present serious challenges.

4. Of the primary identification documents in the United States, this Article specifically focuses upon changes to birth certificates but suggests for future work to consider similar amendments to drivers' licenses and passports.

5. See Lisa Mottet, *Modernizing State Vital Statistics Statute and Policies to Ensure Accurate Gender Markers on Birth Certificate: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 392-99 (2013) (“[The] inspection of one's birth certificate (or documents it generates) can lead directly to discrimination and even violence, especially when a situation involves interactions with security officers, employment, or access to sex-segregated facilities.”).

6. Owen Amos, *Is It True Only 10% of Americans Have Passports?*, BBC NEWS (Jan. 9, 2018), <http://www.bbc.com/news/world-us-canada-42586638> [<https://perma.cc/39DJ-4R7R>].

7. “Medicalization” is defined as the intense focus on surgery in order for genitalia to fit what is deemed the “norm.” The *Diagnostic and Statistical Manual of Mental Health Disorders*, Fifth Edition (DSM-5) is effectively the “bible for diagnosing mental illness” within psychiatry in the United States. Francine Russo, *Where Transgender Is No Longer a Diagnosis*, SCL. AM. (Jan. 6, 2017), <https://www.scientificamerican.com/article/where-transgender-is-no-longer-a-diagnosis/> [<https://perma.cc/BP9V-UPMR>]. In 2013, DSM-5 removed “gender identity disorder” as a way of diagnosing transgender individuals and replaced it with the term “gender dysphoria,” which reflects “distress at the mismatch between their identities and their bodies.” *Id.* The change in terminology “shifted the emphasis in treatment from fixing a disorder to resolving distress over the mismatch.” *Id.*

Presently, LGBTQ individuals are increasingly at risk of discrimination and prejudice. A 2018 survey revealed that acceptance of the queer community is in decline, and that an increased number of LGBTQ individuals are experiencing discrimination due to their gender identity or sexuality.⁸ Moreover, States are not providing congruent protections for their diverse citizenry as they adopt many approaches when individuals seek to change the sex designated on their birth certificates. In some states one cannot make the change at all—Ohio forbids changes to sex on one’s birth certificate, and Tennessee explicitly forbids changes to the sex section of a birth certificate regardless of hormone therapy or gender reassignment surgery.⁹ In other states, the only way to change the sex listed on identification documents is to obtain a doctor’s assessment and proof of reassignment surgery.¹⁰ Ultimately, this incongruous patchwork of state laws leaves individuals fractured and in disarray.

One overarching question remains: If we are divided at birth, how can we be united as a Nation? This Article advocates for a solution that ensures *all* individuals are entitled to live a life in alignment with their gender identity and able to enjoy the fullest extent of their bodily integrity and autonomy. This Article recognizes that we are on the brink of

8. See GLAAD, ACCELERATING ACCEPTANCE 2018 EXECUTIVE SUMMARY (2018), <https://www.glaad.org/files/aa/Accelerating%20Acceptance%202018.pdf> [<https://perma.cc/9L3W-AFWY>] (finding that forty-nine percent of non-LGBTQ respondents identified as “allies” in 2017 compared to fifty-three in 2016 and that fifty-five percent of LGBTQ respondents reported anti-queer discrimination in 2017 compared to forty-four percent in 2016). Whether this decline in acceptance and increase in discrimination is connected to the Trump Administration’s recent slew of actions (including limiting the protections afforded to transgender students by Title IX and attempting to ban transgender individuals from the U.S. military) will not be the focus of this Article.

9. See Janell Ross, *How Easy Is It to Change the Sex on Your Birth Certificate?*, WASH. POST (May 18, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/18/the-next-frontier-in-the-bathroom-law-debate-changing-birth-certificates/?utm_term=.ced2a3dbcd81 [<https://perma.cc/655C-QQJU>]. Some state statutory provisions claim that the Division of Vital Statistics lacks authority to change sex on birth certificates, thus requiring individuals to file claims against the State’s Department of Health. See, e.g., Petition for Judicial Review of a Decision of the Kansas Department of Health and Environment, *Mott v. Kansas Dep’t Health & Env.*, No. 2016-CV-000150 (Feb. 29, 2016), http://transgenderlawcenter.org/wp-content/uploads/2016/02/Petition-for-Judicial-Review-2-19-16-file-stamped_Redacted.pdf [<https://perma.cc/J2ZU-ZCWS>].

10. See K.B., *Never Quite the Woman that She Wanted to Be: How State Policies Transform Gender Marker Identification into a Scarlet Letter*, 15 *DUKEMINER AWARDS* 1, 6 (2016) (thirty-one states require reassignment surgery as a prerequisite to amending birth certificates, while sixteen states and the District of Columbia allow amendments with a doctor’s affidavit or therapist’s approval); see also *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> [<https://perma.cc/3X5K-4Z62>] (last updated Sept. 17, 2018).

launching a “Gender Rights Movement”¹¹ and seeks to facilitate the improvement of gender dynamics within the United States. Undeniably, this Article may seem ambitious, but it is merely shedding light on a critical issue and offering an incremental step in addressing it. Indeed, radical movements like this are necessary in the fight to attain the equality the Constitution promises in the phrase “We the People.”¹²

Part II establishes a background to illuminate the nuances of sex and gender, delves into a brief history of birth certificates in the United States, and then turns to challenges judges experience in trying to draw lines within the binary of sex and between sex and gender. Part III then provides an analysis of why the right to choose one’s gender identity needs to be recognized as well as the momentum generated by recent state changes to birth certificates and lawsuits filed by transgender individuals for the ability to amend the sex designation on their government identification documents. Finally, Part IV proposes removing the category of “Sex” and the male/female binary from birth certificates and replacing it with the category of “Gender” and “X” as the sole option at birth. As a result, “Gender X” will serve as the universal gender marker until the individual exercises their right to choose a gender identity for themselves.

II. BIRTH CERTIFICATES & COURTS: IMPROPERLY CATEGORIZING SEX AND GENDER

No matter how neat a category may look on its face, the reality is anything but. The sex an individual is assigned on their birth certificate is effectively a legally binding category. However, when the sex designation fails to accurately reflect the individual’s gender identity, a cascade of consequences commences. Thus, the seemingly innocent “M” or “F” on an individual’s birth certificate undermines both the purpose of an identity document (accurate identification) and the individual’s sense of autonomy, liberty, and choice. Ultimately, those incorrectly sorted or unable to identify with the binary are bound by a construct—an antidote for entropy providing an artificial sense of organization—that limits human experience and tarnishes the nuance of the fabric that makes us whole.

11. Much like the Civil Rights and Women’s Rights Movements, the Gender Rights Movement is conceived of as the newest frontier of attaining equality among all citizens.

12. U.S. CONST. pmb. The preamble suggests that after the American Revolution, the Framers sought for the United States to be “a government created by the people, not one existing independently of them, or, in some respect, over them.” Donald L. Doernberg, *“We the People”*: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 CAL. L. REV. 52 (1985).

A. *The Ambiguities of Sex and Gender*

Sex is rooted in the physical—biological and anatomical—differences between male and female.¹³ Nevertheless, variation in hormone levels, genitalia, and chromosomes give rise to more than two sexes.¹⁴ To compensate for the inadequacy of the male–female binary and create a framework beyond it, the concept of “gender” arises as a term that encompasses multiple broad concepts that are a product of culture and the inherent fluidity of masculinity and femininity.¹⁵ The World Health Organization recognizes that the failure to subscribe and conform to the norms and roles flowing from the sex binary can adversely impact health outcomes.¹⁶ In this sense, gender is malleable and cannot be reduced to either biological or environmental determinism.¹⁷ Arguably, however, one’s sex cannot be reduced to two categories either.¹⁸ This Article uses the definitions of “gender” and “sex” with specificity rather than interchangeably and seeks to provide sufficient nuance to accurately portray individual identities while avoiding ambiguity. After all, “[o]rganisms flow across the bounds of any category we construct. In biology, nature abhors a category.”¹⁹

Furthermore, research indicates that societal pressures encouraging individuals to adhere to the constructed notions of masculinity and femininity lead to diminished self-esteem, violence, bullying, and health problems because the gendered expectations trigger anxiety, emotional repression, and withdrawal.²⁰ Technically, the birth certificate only

13. RYAN B. BLACKWELL, BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer ed., 2007).

14. ANNE FAUSTO-STERLING, *SEX/GENDER: BIOLOGY IN A SOCIAL WORLD* (2012).

15. OAKLEY, *supra* note 2, at 21–24.

16. *Gender, Equity and Human Rights*, WORLD HEALTH ORG. (Aug. 2015), <https://www.who.int/gender-equity-rights/understanding/gender-definition/en/>.

17. LAURA PALAZZANI, *GENDER IN PHILOSOPHY AND LAW* 75 (2012).

18. Although males and females typically have XY and XX chromosomes, individuals may also have chromosomal compositions such as XXY, XXX, XO, XX males, and XXYY. See Blackless et al., *supra* note 1, at 152.

19. JOAN ROUGHGARDEN, *EVOLUTION’S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE* 14 (2013).

20. *Girls Feel They Must ‘Play Dumb’ to Please Boys*, WARWICK (Aug. 5, 2014), https://www2.warwick.ac.uk/newsandevents/pressreleases/girls_feel_they/; see also Marcie Bianco, *Study Finds Something Disturbing Happens to Kids Forced into Traditional Gender Roles*, MIC (Aug. 9, 2014), <https://mic.com/articles/95824/study-finds-something-disturbing-happens-to-kids-forced-into-traditional-gender-roles#rqXI44qSb>; Tara Culp-Ressler, *Forcing Kids to Stick to Gender Roles Can Actually Be Harmful to Their Health*, THINKPROGRESS (Aug. 7, 2014), <https://thinkprogress.org/forcing-kids-to-stick-to-gender-roles-can-actually-be-harmful-to-their-health-34aef42199f2/> (providing insight into researcher Maria do Mar Pereira’s book *Doing Gender in the Playground*).

records “sex” rather than gender identity. However, as soon as a newborn’s sex is determined, the child is already subscribed to a set of societal expectations and norms.

In the early 1900s, Sigmund Freud asserted that gender identity and sexuality are determined by biology.²¹ In the years following, this notion has pervasively spread through culture and the law. By seeking to create order, what is perceived to be disorderly is placed into groups or categories. This restrictive division, however, is an oversimplification that inevitably excludes a subset of society. A 2013 study reveals that over two-thirds of individuals from the age of fourteen to thirty-four do not believe sex defines a person in the manner it used to.²² Moreover, in a National Health Interview Survey of LGBTQ+ individuals, eighteen percent selected “other” as their sexual identity and fifty-seven percent selected “something else” as their gender identification.²³ Critically then, gender expression requires embracing “fluidity” rather than any single rigid marker. Gender identity often forms a crucial part of one’s personhood, and since “the personal is political,”²⁴ care must be taken to ensure every individual is provided the opportunity for unrestricted gender expression.

The ambiguities of sex and gender are especially profound in the context of neuroscience and the transgender identity. Although the transgender identity is generally defined as a “cross-gender identification,” transgender individuals also go beyond the male/female paradigm and embrace “genderqueer” and “gender non-conforming” identities.²⁵ Approximately one third of transgender individuals do *not* identify as either male or female.²⁶ This latter point emphasizes that contrary to assumptions about the trans community, neither surgery nor hormone therapy to transition across the binary is definitive or all-

21. SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (1905).

22. Lidia Jean Kott, *For These Millennials, Gender Norms Have Gone out of Style*, NPR (Nov. 30, 2014), <http://www.npr.org/2014/11/30/363345372/for-these-millennials-gender-norms-have-gone-out-of-style>.

23. Michele J. Eliason & Carl G. Streed, *Choosing ‘Something Else’ as a Sexual Identity: Evaluating Response Options on the National Health Interview Survey*, 4 LGBT HEALTH 376, 376-79 (2017), <http://online.liebertpub.com/doi/pdfplus/10.1089/lgbt.2016.0206?src=recsys>.

24. See Carol Hanisch, *The Personal Is Political*, in NOTES FROM THE SECOND YEAR: WOMEN’S LIBERATION (Schulamith Firestone & Anne Koedt eds., 1970).

25. RANDI ETTNER, STAN MONSTREY & ELI COLEMAN, PRINCIPLES OF TRANSGENDER MEDICINE AND SURGERY 137 (2016).

26. Harrison et al., *supra* note 2, at 13-14.

encompassing within it.²⁷ One's gender identity simply does not always map onto a desire to categorically identify with a particular sex.

Intriguingly, neuroscience provides both confusion and clarity for the task of understanding sex and gender. On one hand, it complicates our ability to draw rigid distinctions between male and female, but on the other, it reveals that transgender individuals respond in ways mirroring their gender identity rather than their biological sex. Several recent neuroscience studies have discovered that the brains of transgender individuals more closely resemble their gender identity rather than their biological sex.²⁸

Scientists have also found that the brain's anatomy may play a role in one's gender identity.²⁹ Furthermore, research suggests that the brains of transgender individuals mirror the functional responses of the gender with which they identify rather than that of their biological sex. A 2014 study found that adolescent boys and girls identifying as transgender responded to an odorous chemical substance in a manner that reflected their experienced gender rather than their sex assigned at birth.³⁰ The point here is that identification with a gender contrary to one's biological sex has physiological roots. Thus, the transgender identity challenges the binary in and of itself: if archaic understandings of biology were regarded as the basis for the binary, modern understandings revealing the spectrum-

27. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA'AYAN ANAFI, NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 7 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>; see also Katy Steinmetz, *Obsessing About Caitlyn Jenner's Surgery Is Part of a Larger Problem* (Apr. 22, 2017), <http://time.com/4745641/caitlyn-jenner-surgery-memoir-2020/>.

28. See, e.g., Yasunari Yokota et al., *Callosal Shapes at the Midsagittal Plane: MRI Differences of Normal Males, Normal Females, and GID*, 3 CONF. PROC. IEEE ENG. MED. BIOLOGY SOC'Y 3055e8 (2005) (finding that the patten of corpus callosum shape in transgender individuals more closely resembles their gender identity than their biological sex); Giuseppina Rametti et al., *The Microstructure of White Matter in Male to Female Transsexuals Before Cross-Sex Hormonal Treatment. A DTI Study*, 45 J. PSYCHOL. RES. 199, 199-204 (2011) (finding that a part of the brain's white matter microstructure in female to male transgender individuals prior to cross-sex hormone treatment were more closely aligned with the male control group than the female control group).

29. Eileen Luders et al., *Increased Cortical Thickness in Male-to-Female Transsexualism*, 2 J. BEHAV. BRAIN SCI. 357, 357-62 (2012) (finding that the regional thickness in the cerebral cortex of male-to-female individuals was more closely associated with the experienced gender than biological sex prior to cross-sex hormone treatment).

30. Sarah M. Burke et al., *Hypothalamic Response to the Chemo-Signal Androstadienone in Gender Dysphoric Children and Adolescents*, 5 FRONTIERS ENDOCRINOLOGY 1, 1-10 (2014) (the odorous chemical substance was one known to produce a sexually dimorphic response, i.e., males and females respond differently to it).

like nature of gender destroy it and reveal that gender is ripe with ambiguity, crossover, and flexibility.

B. A History of Birth Certificates

The birth certificate serves rather paradoxical purposes: on one hand the document proves citizenship and reinforces identity, yet on the other it is the government's tool of control over identity categories. For those looking to change their sex upon their birth certificates or other government-issued identification document, this document becomes the primary battleground. Looking to the history of this document provides insight into how society has come to conceive of sex and gender today and suggests that perhaps the problem with using birth certificates to capture identity is that identity simply cannot be distilled or adequately encompassed by a single sheet of paper.

In 1902, Congress established the Bureau of Census as an agency to standardize the birth registration system.³¹ There have been twelve revisions to the birth certificate, and the number of questions referring to specific identity indicators has grown from thirty-three in 1990 to over sixty in 2003.³² The fact that there have been revisions almost every ten years suggests that the birth certificate is a malleable document. The initial content in the early 1900s included the mother's age and race, legitimacy, the names and ages of the child's parents, whether the mother previously had children, date, and address.³³ In 2003, the child's parents could finally identify themselves as being multiracial.³⁴ Curiously, one of the changes recommended in 1915 was to change "Sex" to "Boy or Girl" to reduce confusion, bolster accuracy, and prevent underreporting.³⁵ One doctor lamented that this issue was a "stumbling block for midwives, physicians and local registrars" because midwives were puzzled by the meaning of the word "sex" and consequently omitted the answer to that question.³⁶

States are given the option of following the periodically updated format, but there is no federal law requiring everyone to have a birth certificate. The U.S. Department of Health issues the Model State Vital Statistics Act, but it only provides nonbinding recommendations to the

31. Heather L. Brumberg et al., *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. PERINATOLOGY 407, 407-11 (2012).

32. *Id.*

33. *Id.* at 408.

34. *Id.* at 409.

35. *Id.* at 408-09.

36. W.A. Plecker, *A Standard Certificate of Birth*, 5 AM. J. PUB. HEALTH 1044, 1045 (1915).

states.³⁷ One of its goals is to facilitate national statistics through greater uniformity across states.

Birth certificates themselves only gained salience in the 1940s, when they became central to proving citizenship.³⁸ When European immigration reached its height, approximately one-third of working-age adults did not have birth certificates. Since defense-related plants would only hire U.S. citizens, the absence of a birth certificate became fatal to employment, and Americans frantically sought to obtain paperwork that would confirm their citizenship.³⁹

When the birth certificate had real implications—such as the inability to obtain a job or receive health services—Americans took action. Ironically, the same dilemma is happening today. However, now it is not the absence of a birth certificate, but rather the presence of an inaccurate one that is causing a stir. In March of 2018, U.S. Magistrate Judge Candy Dale ruled that the Idaho Department of Health and Welfare violated the Equal Protection Clause of the U.S. Constitution and must provide “an avenue to obtain a birth certificate with a listed sex that aligns with an individual’s gender identity.”⁴⁰ Another lawsuit was just filed by the American Civil Liberties Union (ACLU) in Ohio upon the same grounds, which is one of the final states that bars amendments to sex on a birth certificate.⁴¹ More likely than not, in the next few years, courts will recognize an individual’s right to change the sex on their birth certificate to reflect their gender identity. However, while this is a major win for those that fall into the male/female binary, this is only the beginning of a legal battle for those that are outside it.

37. ALICE M. HETZEL, NAT’L CTR. FOR HEALTH STAT., U.S. VITAL STATISTICS SYSTEM: MAJOR ACTIVITIES AND DEVELOPMENTS, 1950-95, at 6 (1997), <https://www.cdc.gov/nchs/data/misc/usvss.pdf> (most states follow the recommendations of the Model State Vital Statistics Act, so this could be one source of implementing change).

38. Victoria Case, *Why You Need a Birth Certificate*, GOOD HOUSEKEEPING, Sept. 1942, at 32.

39. Erin Blakemore, *The History of Birth Certificates Is Shorter Than You Might Think*, HISTORY (Aug. 8, 2017), <http://www.history.com/news/the-history-of-birth-certificates-is-shorter-than-you-might-think>.

40. See *F.V. v. Barron*, No. 1:17-CV-00170-CWD, 2018 U.S. Dist. LEXIS 36550, at *31 (D. Idaho Mar. 5, 2018).

41. Julie Carr Smyth, *4 Transgender People Sue for Changes to Birth Certificates*, U.S. NEWS (Mar. 29, 2018), <https://www.usnews.com/news/us/articles/2018-03-29/aclu-sues-ohio-to-allow-gender-changes-on-birth-certificates>.

C. *How Courts Rigidly and Inconsistently Construe Sex and Gender*

Judges have struggled to define “maleness” and “femaleness”—and, in doing so, to grapple with the definitions of and differences between sex and gender—for decades. An example of this struggle surfaced in *Littleton v. Prange*, where the plaintiff was born male but underwent a sex change operation.⁴² Subsequently, she married a man, lived with him for seven years and upon his death filed a medical malpractice suit under the wrongful death statute as the surviving spouse.⁴³ Her physicians at trial testified that she was medically a woman, but the physician being sued asserted that she was a man and challenged her status as the proper wrongful death beneficiary.⁴⁴ This left one key determination for the court: whether the plaintiff was a male as a matter of law, since same-sex marriage was prohibited.⁴⁵

In his opinion, Judge Hardberger declared, “This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes.”⁴⁶ Herein, the “legal question” was framed as whether a physician could “change the gender of a person with a scalpel, drugs and counseling” or whether “a person’s gender [is] immutably fixed by our Creator at birth.”⁴⁷ In light of this framework, the court unsurprisingly held that amendments to a birth certificate were not binding on the court, and the plaintiff was biologically “still a male.”⁴⁸ The dissent carefully noted, however, that this decision hinged on a “simplistic approach” failing to recognize that the determination of sex at birth is not always “an accurate record of gender.”⁴⁹ Notably, the dissent underscored that the designation of sex at birth is “memorialized by a certificate of birth, without an examination of the child’s chromosomes or an inquiry about how the child feels about their sexual identity.”⁵⁰

The majority’s holding in *Littleton* was the norm at the time, as courts refused to recognize the sex of male to female transgender individuals as female. No level of surgical or hormonal change could sway courts as

42. 9 S.W.3d 223, 224 (Tex. App. 1999), *cert. denied*, 531 U.S. 872, 121 S. Ct. 174 (2000).

43. *Id.* at 225.

44. *Id.* at 224-25.

45. *Id.* at 225.

46. *Id.* at 223.

47. *Id.* at 224.

48. *Id.* at 230.

49. *Id.* at 233 (Lopez, J., dissenting).

50. *Id.*

they continued to find that because sex chromosomes remained unchanged, the first anatomical examination at birth was the arbiter of sex.⁵¹ As alluded to in *Littleton*, there is an inevitable tension when the judiciary is tasked with understanding an individual's gender identity and fitting it within strict yet vague and inconsistent legal parameters. This tension is also apparent in the context of sex discrimination claims under Title IX of the Civil Rights Act of 1964⁵² and has given rise to divergent judicial approaches⁵³ as courts inconsistently define and differentiate sex and gender. Undeniably, the legal classifications of sex and gender are troublingly unclear and fail to provide adequate protections for individuals with gender identities beyond the binary of sex.

III. THE RIGHT TO CHOOSE ONE'S GENDER IDENTITY

Bright-line categorizations simply do not work in the context of sex and gender and fail to bolster efficiency and administrability. Nevertheless, although the judiciary has struggled to cohesively address the interplaying complexities of sex and gender,⁵⁴ the time is ripe for individuals to seize control of their gender identities and prevent government identification documents from curtailing or undermining the totality of their livelihoods. Recently, the United States Supreme Court has relayed a respect for individual liberties.⁵⁵

51. See *In re Ladrach*, 32 Ohio Misc. 2d 6, 513 N.E.2d 828 (Ohio Probate Ct. 1987); *Anonymous v. Anonymous*, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). But see *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204, 205 (1976) (holding that there is "no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent the persons' identification at least for purposes of marriage to the sex finally indicated").

52. 20 U.S.C.A. § 1681 (West 2019).

53. In *Hopkins v. Baltimore Gas & Electric Co.*, the Court noted that "[w]hile it may be useful to disaggregate the definition of "gender" from "sex" for some purposes, in this opinion we make no such effort . . ." 77 F.3d 745, 749 n.1 (4th Cir. 1996). However, in *Ulane v. Eastern Airlines, Inc.*, District Court Judge Grady initially found that "sex is not a cut-and-dried matter of chromosomes . . . and should be reasonably interpreted to include among its denotations the question of sexual identity." 581 F. Supp. 821, 825 (N.D. Ill. 1983). The Seventh Circuit Court of Appeals ultimately reversed the decision. See 742 F.2d 1081 (7th Cir. 1984). Other Circuits maintain that a "new definition [of sex] must come from Congress." See, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (recognizing only biological sex regardless of gender identity). Nevertheless, in *Price Waterhouse*, the Supreme Court expanded Title VII protections to protect against sex stereotyping by acknowledging the role of gender in discrimination. See *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 239-41 (1989). Additionally, the Eleventh Circuit found that discrimination due to a transgender individual's gender-nonconformity is sex discrimination. See *Glenn v. Brumby*, 663 F.3d 1312, 1314, 1316-17 (11th Cir. 2001).

54. See *supra* Part II.

55. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015) (holding that same-sex couples have a right to marry); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating the law criminalizing same-sex sexual intercourse); *Roe v. Wade*, 410 U.S. 113, 152 (1973).

These Supreme Court decisions have centered around the interaction between sex, gender, and society and focused upon delineating the rights granted by the Due Process Clause of the Fourteenth Amendment. In addition, the Court has recognized a “dynamic” interpretive approach⁵⁶ that incorporates evolving societal norms and a change of circumstances since the Constitution’s founding.⁵⁷ Thus, while the judiciary is the sole realm that can recognize an individual’s right⁵⁸ to choose their gender identity as the law of the land, amendments to birth certificates and other government-issued identification should be transformed into a simple administrative update outside of the litigation context and the judiciary as a whole.

A. *A Vibrant Change in Circumstances*

Demographics are radically changing when it comes to gender identity. The Williams Institute found that about 1.4 million Americans identify as transgender.⁵⁹ Further, if given the choice, thirty-five percent of transgender individuals would not subscribe to either a male or female gender designation.⁶⁰ Of millennials, a 2017 study found that twelve percent do not identify as male or female.⁶¹ However, those identifying as nonbinary still feel pressure to conceal their identity in the workplace. Of those polled, twenty-three percent deliberately hide their nonbinary status, while of those open about their identity, ninety percent believe they have experienced some form of anti-transgender bias—including verbal harassment, physical and sexual violence, or active steps taken to deter their transition.⁶² Yet, despite these drastic changes and the clear need for

56. See, e.g., Andrew Coan, *Living Constitutional Theory*, 66 DUKE L.J. 99 (2017).

57. To be clear, dynamic interpretation and evolving norms are by no means the law of the land *generally*. However, the primary, modern precedent in the area of equal protection is largely guided by dynamic interpretation.

58. This Article advocates for the recognition of a “right,” because launching efforts to amend the Constitution would likely be unsuccessful. Take, for example, the Equal Rights Amendment that failed to be ratified by the states even after passing Congress. See MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN’S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* (1988).

59. ANDREW R. FLORES, JODY L. HERMAN, GARY J. GATES & TAYLOR N.T. BROWN, *THE WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

60. JAMES ET AL., *supra* note 27, at 45.

61. GLAAD, *ACCELERATING ACCEPTANCE 2017* (2017), http://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf [<https://perma.cc/R6Z7-8FVH>].

62. Harrison et al., *supra* note 2, at 22.

a more expansive understanding of gender, binary-focused birth certificates continue to rule.

The classic “Dead Hand Problem” of constitutional theory questions why the Nation should be governed today by the remnants of a bygone era.⁶³ Principally, this theory asks whether the “ancient” Constitution should maintain authority across generations that “amounts to dead generations governing the living.”⁶⁴ The Court has underscored that “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom”⁶⁵ and that “[w]hen new insight reveals discord between the Constitution’s central protections and a received legal structure, a claim to liberty must be addressed.”⁶⁶ Undoubtedly, the Framers’ narrow and patriarchal views of sex markedly differed from our understanding and conception of it today. Thus, it makes little sense to continue to implement arcane notions in a context that has been radically transformed by scientific and medical advancements.

Constitutional protection for the right to choose one’s gender identity originates in the Equal Protection Clause of the Fourteenth Amendment. Therein, the Constitution declares that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”⁶⁷ Quite recently, the Idaho District Court found that the State’s “policy of categorically and automatically denying applications submitted by transgender individuals to change the sex listed on their birth certificates is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.”⁶⁸ While this regards a policy prohibiting any amendment to sex on birth certificates, it is not a stretch to extend this to benefit those that do not subscribe to the male/female sex binary.

63. See Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 609 (2008).

64. *Id.* The corollaries from the “Dead Hand” problem are three-fold: (1) “it is feasible for the living to depart from arrangements indicated by the Constitution”; (2) “our generation participated in little of the process responsible for the text”; and (3) “the Constitution is otherwise imperfect for our time.” *Id.*

65. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003). [not in last five]

66. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

67. U.S. CONST. amend. XIV.

68. *F.V. v. Barron*, No. 1:17-CV-00170-CWD, 2018 U.S. Dist. LEXIS 36550, at *5 (D. Idaho Mar. 5, 2018).

B. Battling Oppressive State Practice: Embracing the Pathways of the Transgender Rights Litigation Battles

Bringing the fight for the right to choose one's gender to combat oppressive state rules and policies may simultaneously impose pressure upon state legislatures and agencies to implement reform and upon federal courts to carve out a new constitutional right. Since each State individually determines the information it collects on birth certificates, litigation to change those certificates should be aggressively pursued on a state-by-state basis as it has been with the Transgender Rights Movement. Although constitutional arguments have been made on behalf of transgender individuals to obtain a right to choose their sex designation,⁶⁹ none have been made for an overarching and universal right to choose one's gender. In effect, however, this right would provide a powerful symbol of personal autonomy and foster a collective understanding and respect for *all* gender identities. The fight for this right should in no way be perceived as a means of marginalizing the efforts of transgender rights advocates. On the contrary, it will reinforce and advance their work, and ultimately create a more empathetic culture in which transgender individuals will feel welcome and thrive.

Transgender rights advocates have largely pushed for "Definitional Expansionism" to increase the acceptance of a diversity of gender-identities.⁷⁰ But this has the potential to undermine the movement if regarded as the ultimate goal.⁷¹ Arguably, expanding the definitions of gender "re-entrenches the primacy and necessity of gender for valid identity documents . . . as essential to the law and to effective

69. See, e.g., *id.*

70. See M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 947 (2015) (arguing that progress in transgender rights will require "the courts to gain a clear understanding of who transgender people are using the latest medical science, which recognizes . . . [that] gender identity must be given the most weight because it is, in fact 'biological' and considered the primary determinant of an individual's sex"); see also Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex*, 9 HARV. L. & POL'Y REV. 241, 242 (2015) (finding that despite progress in the context of public awareness, "the law remains largely blind to the subtleties of sex and gender identity, and persists in trying to assign individuals legal and social identities . . . [that] are uninformed assumptions and stereotypes"); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 267 (1999) ("The law . . . operate[s] under the assumption that the terms 'male' and 'female' are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true.").

71. See Anna James Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491 (2016).

governance . . . [and] uncritically accepts government officials as proper arbiters of sex.”⁷² In essence, this “ignores the idea that gender should not only be self-defined but also self-controlled, a personal matter to be shared with people of one’s own choosing, and neither assumed nor announced by others, especially not the state.”⁷³ Without a doubt, having accurate identification documents is critical for the safety of transgender or nonbinary individuals.⁷⁴ These dangers are also widespread as over two-thirds of transgender individuals have *not* found a way to update all of their identification documents to align with their gender identity.⁷⁵

Given the implications on one’s livelihood, it is critically important that the individual have the right to choose their gender, particularly when they do not fall into the male/female sex binary. No State should be allowed to impose a label and then subsequently police its citizenry for deviating from it. Such State practices have been previously struck down. In *K.L. v. Alaska*, the Supreme Court of Alaska held that failing to have a policy allowing transgender individuals to change their sex on a driver’s license impermissibly interfered with the right to privacy under Alaska’s constitution.⁷⁶ Likewise, in *Love v. Johnson*, the Eastern District Court of Michigan held that the Fourteenth Amendment’s Due Process Clause was implicated by an overly restrictive policy for changing sex on a driver’s license.⁷⁷ Ultimately, these holdings support the notion that individuals currently lack equal protection and due process since their genders were chosen without their consent and now they lack a means to remedy it.

There is also an incredible amount of momentum generated by cities and states providing individuals with expanded options for their gender on government-issued documents. For example, New York City was the first

72. *Id.* at 501.

73. *Id.*; see also Tiq Milan, *Why Should a Government Agency Tell Me Who I Am?*, N.Y. Times (Oct. 19, 2014), <https://www.nytimes.com/roomfordebate/2014/10/19/is-checking-the-sex-box-necessary/why-should-a-government-agency-tell-me-who-i-am> [<https://perma.cc/65BT-5LYE>].

74. See Mottet, *supra* note 5, at 393-99. For further insight into how the law can evolve to recognize nonbinary gender identities, see Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019).

75. JAMES ET AL., *supra* note 27, at 9.

76. No. 3AN-11-05431 CI, 2012 WL 1141650 (Sup. Ct. Alaska 2012).

77. No. 15-11834 (E.D. Mich. Aug. 23, 2016).

to issue an “intersex” birth certificate.⁷⁸ In 2017, Oregon⁷⁹ and the District of Columbia⁸⁰ gave individuals the opportunity to self-report their gender markers as well as the choice of a gender-neutral “X” for gender on their driver’s license. In 2016, the Multnomah County Circuit Court in the State of Oregon made the first U.S. state court order recognizing “non-binary” as a legal identifier. Judge Amy Holmes Hehn wrote a two-paragraph opinion in which she declared that the sex was “hereby changed from female to non-binary.”⁸¹ Similarly, California will provide an additional gender option in 2019⁸² and in 2017 became the first state to legally recognize nonbinary genders on state-issued ID documents.⁸³ Meanwhile, Washington state was the latest to offer “X” as a gender designation on birth certificates and remove the prior rule requiring a doctor’s letter for changing designations on birth certificates.⁸⁴

IV. THE REALM OF GENDER X

For years, transgender individuals battled to gain the freedom to change the sex on their birth certificates to reflect their gender identity. As reflected in Part III, the legal challenges on behalf of transgender individuals provide a robust foundation and framework for launching the Gender Rights Movement. Part IV takes the litigation strategies and

78. “Intersex” is not a clinical term but an identity that varies in definition by individual. Generally, it is used to describe a range of conditions wherein the anatomy does not subscribe to male/female definitions. See Susan Scutti, *The Protocol of the Day Was to Lie: NYC Issues First US ‘Intersex’ Birth Certificates*, CNN (Jan. 2, 2017), <http://www.cnn.com/2016/12/30/health/intersex-birth-certificate/index.html> [https://perma.cc/VD5B-RUNQ].

79. Casey Parks, *Oregon Becomes First State to Allow Nonbinary on Drivers License*, OREGONLIVE, https://www.oregonlive.com/portland/index.ssf/2017/06/oregon_becomes_first_state_to.html [https://perma.cc/BKN7-3CLL] (last updated Aug. 3, 2017).

80. Rachel Sadon, *Non-Gender License Option Will Start Next Week*, DCIST (June 21, 2017), http://dcist.com/2017/06/non-binary_gender_license_option_wi.php [https://perma.cc/2KB8-ANPT].

81. General Judgment of Sex Change at 1, *In re the Sex Change of Jamie Shupe*, No. 16CV13991 (Or. Cir. Ct. Multnomah Cty. 2016); see also Faith Karimi & Dani Stewart, *Army Veteran Legally Not Male or Female, Judge Rules*, CNN (June 12, 2016), <http://www.cnn.com/2016/06/11/us/jamie-shupe-non-binary/index.html> [https://perma.cc/3NDZ-NN6M].

82. Melody Gutierrez, *Nonbinary Designation OKd for Californians: Gov. Brown Signs Milestone Law*, S.F. CHRON. (Oct. 16, 2017), <http://www.sfgate.com/politics/article/Gov-Brown-signs-milestone-gender-recognition-12281097.php> [https://perma.cc/Z5CS-88PN] (noting that California’s forthcoming legislation, SB179, removes the state law requirement of requiring a physician attest to the individual’s gender change in a sworn statement).

83. S.B. No. 179 (Ca. 2017), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB179.

84. Emanuella Grinberg, *Washington State Offers Third Gender Option on Birth Certificates*, CNN (Jan. 4, 2017), <https://www.cnn.com/2018/01/04/health/washington-state-gender-neutral-birth-certificate/index.html> [https://perma.cc/U35W-YRU9].

efforts of the transgender rights movement to their logical conclusion: the fundamental right to choose one's gender identity and the removal of the sex binary from birth certificates altogether. As discussed in Part III, hurdles remain in some States regarding the freedom to change the marker on birth certificates. However, this leaves open the question: Why should birth certificates hinder anyone's ability to live a life with identification documents reflecting their gender identity?

This Article argues for the removal of the binary of sex from birth certificates altogether. When the birth certificate is first issued, an individual's gender identity has not yet crystallized. As research indicates, only by the age of about two, "most children develop the ability to label gender groups and to use gender labels in their speech."⁸⁵ This Article cannot singlehandedly dismantle the gendered socialization processes,⁸⁶ but it can draw an intuitive conclusion: Birth is far too early to impose a gender identity on an individual that will be legally binding thereafter. Thus, this Article proposes a framework supported by two central elements: (1) attaining the recognition of the fundamental right to choose one's gender identity and (2) removing the binary of sex from birth certificates and replace it with a uniform "Gender X" demarcation.

A. Remove and Replace the Binary: "X" Marks the Spot

Given the malleability of birth certificates, the time is now to issue a much-needed update. Namely, the removal of sex from birth certificates altogether. Traditionally, birth certificates have categorized individuals based on sex and limited sex to the male/female binary. This Article does not advocate for the removal of gender identity on birth certificates entirely because it may lead to a sense of erasure. Further, rather than expanding the number of categories, birth certificates should only have a "Gender" designation with "X" serving as the exclusive marker of gender on all birth certificates. There is simply something fundamentally right about the symbolism of beginning our lives on equal grounds. After all, regardless of where we fall on the spectrum of gender, all of us have the X chromosome. So, why not embrace the common thread of humanity and choose to begin our lives in unity?

Prior literature advocating for the abolition of the binary focused upon the notion that "abolition, not expansion of the gender binary will

85. Carol Lynn Martin & Diane N. Ruble, *Patterns of Gender Development*, 61 ANN. REV. PSYCHOL. 353, 356 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3747736/pdf/nihms-504918.pdf>.

86. *Id.* at 355-56.

achieve true freedom of gender identity and gender expression” and will be inclusive of those not identifying within the binary.⁸⁷ Critically, by making “X” the standard, rather than a third category, this solution avoids the possibility of subjecting individuals in the new category to prejudice and exclusion as the “other.”⁸⁸ Instead, all are a part of “Gender X,” and the binary of sex is not reinforced. For gender expression to be free and entirely within an individual’s rights, the sex binary cannot continue to serve as the structure and spine holding together the conception of gender in the United States. Thus, this proposed amendment to the birth certificate ensures that every individual may exercise their constitutional right to choose their gender identity.

The uniform mark on birth certificates will serve as a placeholder that reserves the opportunity to amend it as the individual chooses and implicitly incorporates and works in tandem with the right to choose one’s gender identity. Without an individual’s freedom to exercise choice, the marker cannot accurately reflect one’s gender identity. In essence, “Gender X” is an umbrella encapsulating a wide diversity of gender identities.⁸⁹ Individuals can keep this nonbinary marking, switch to traditional male and female markers, or substitute another label that resonates with them more poignantly. Regardless of the choice, there is substantial value in mobilizing a community around a shared-identity, and the fundamental equality of Gender X can become the unifier of the Gender Rights Movement.

B. *So, What Now?*

Several dimensions of the right to choose one’s gender identity must be addressed in turn. First, the right to choose belongs solely to the individual. No one, not even a parent, can impose a gender identity upon the individual. Second, about *when* the choice must be made, the answer is none other than, “it depends.” There are two pathways by which an individual would make the choice in gender identity: (1) to confirm or change the “X” on their birth certificate to a marker of their choice; or

87. Wipfler, *supra* note 71, at 498.

88. Arguably, among the many divisions in the world that are “constructs created by human agency . . . the boundary based on sex creates the most fundamental social divide” since such “constructs not only order social existence, but they also hold the capacity to create serious inequalities, generate conflicts, and promote human suffering.” See Cynthia Fuchs Epstein, *Great Divides: The Cultural, Cognitive and Social Bases of the Global Subordination of Women*, 72 AM. SOC. REV. 1 (2007).

89. This is likely why “X” has gained appeal as a third gender category across several states.

(2) to amend an older birth certificate issued with the binary of sex to reflect their gender identity.

Developments in the realm of gender development research provide insight into temporal variations of the developmental process and “how gender is experienced.”⁹⁰ These advancements and studies can perhaps inform the best age *range* within which an individual can decide, but a bright-line rule should be avoided because of the individualized nature of the choice. While there should *not* be a set amount of time to wait *before* making one’s choice in gender identity, there *should* be a finite period of time one must wait *after* making the initial choice to make another change. This distinction hinges on two rationales. First, to emphasize the importance and potency of the right to self-identify and live a life uninhibited by an inaccurate categorization. And, second, to avoid undermining the administrability of state agencies with an unmanageable volume of requested declarations and amendments.

While perhaps radical on its face, recognizing the right to choose one’s gender identity and accompanying it with a modification of the birth certificate will not disrupt society to its detriment.⁹¹ For example, take three contexts—parenting, affirmative action in universities, and employment discrimination—each corresponding to distinct pockets of time in an individual’s life. Although the right to choose one’s gender identity is limited to the individual, parents will not suffer an infringement on their parenting rights. Having an “X” on a child’s birth certificate instead of an “F” or “M” will simply not remove the ability to raise a child as a parent chooses. Perhaps the added emphasis on the fluidity of gender will enable parents to be more accepting and supportive of their child’s gender identity, but they can raise their child as they see fit—stereotypically gendered, gender neutral, or anything in between.

By the time an individual chooses to go to college or enter the workforce, they will likely be prepared to choose their gender identity.⁹² Additionally, an expanded recognition of the diversity of gender identities is nothing new for selection committees. Recently, during the 2016-2017 admissions cycle, the standardized Common Application—accepted by over 600 colleges—was amended to ask for the “sex assigned at birth,” rather than “sex,” and to provide applicants with an open text field to

90. See Martin & Ruble, *supra* note 85, at 367.

91. It is worth noting that the Civil Rights or Women’s Rights movements could also be regarded as a disruption to the status quo, yet today we are collectively better for it as a nation.

92. See Martin & Ruble, *supra* note 85, at 355 (finding that “more recent studies have moved the age of understanding gender identity and labeling” to less than thirty months).

discuss their gender identity.⁹³ With regard to sex discrimination, Title VII provides a broad ambit of protection that shows potential for further expansion by the courts.⁹⁴

Insofar as an individual's biological sex continues to be an important factor in the medical profession, it should be preserved in the medical record. One's biological sex is not altogether irrelevant, but the birth certificate is not the place for its designation. The birth certificate is an outward facing document that has the potential to pervasively impact an individual's life ever after without serving a concrete and compelling government interest. In light of the advent of fingerprints, facial recognition, DNA sampling, and retinal scans, rationales for sex serving a crucial identification function are drastically diminished.⁹⁵ Nevertheless, biological sex on one's medical record serves several legitimate purposes. Data gathered from the registration of births is "one of the foundations of public health" influencing "clinical practice, health policies, and efficient resource allocation."⁹⁶ Furthermore, physicians benefit from having comprehensive insight into their patients, and their ability to provide adequate patient care and informed diagnoses warrants the disclosure of a patient's biological sex from the onset⁹⁷ as well as one's gender identity once the choice is made.

93. Alex Reed, *America's Most Popular College Application Is Now Trans-Friendly*, TAKEPART (Apr. 29, 2016), <http://www.takepart.com/article/2016/04/29/college-applications-now-include-gender-identity-questions> [<https://perma.cc/3N6T-6PT9>].

94. 42 U.S.C. § 2000e (2012); *see, e.g.*, *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2018 WL 1040820, at *13-14, *20, *23 (2d Cir. Feb. 26, 2018) (holding that "sexual orientation discrimination is an actionable subset of sex discrimination . . . [as it] necessarily involves discrimination based on gender stereotypes" and noting that there is "something of a revolution in American law respecting gender and sex").

95. *See* James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368, 370 (2009).

96. Brumberg et al., *supra* note 31, at 407.

97. Hospitals should still seek to determine and record the newborn's biological sex with the greatest accuracy feasible. This is worth noting because birth certificates were often wrong or incomplete within medical sections. *See, e.g.*, Theodore E. Montgomery, Arline Lewis & Laurel Hammes, *Live Birth Certificates—Evaluation of Medical and Health Data in California*, 96 CAL. MED. 190, 190 (1962); David C. Gore et al., *Unreliable Medical Information on Birth Certificates*, 47 J. REPROD. MED. 297 (2002) (cautioning with extrapolating generalized conclusions but finding that the medical information on the birth certificates in a Florida county "was discrepant from that abstracted directly from the patients' medical record"). A more informed reflection of biological sex can be attained by testing for the Y-chromosome, as well as obtaining an endocrinologist's assessment of the hormonal conditions and a gynecologist's physical examination. *See* Melonyce McAfee, *Am I Not a Woman?*, SLATE (Aug. 19, 2009), <https://slate.com/news-and-politics/2009/08/how-to-perform-a-gender-test.html> [<https://perma.cc/2KE7-9RVB>] (explaining how "gender verification" tests are administered in the context of the International Association of Athletics Federations).

The conflation of sex and gender is not at issue in the context of medicine in the same way as in legal and social contexts. Given the standards established in the medical profession by Congress's enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), individuals have substantial privacy protections.⁹⁸ Additionally, the medical record is relatively easy to update during a regular checkup with one's physician and does not require going through a government agency. As a result, this approach should not have harmful effects on the individual's gender identity. If an individual's gender identity changes, they will simply have a conversation with their physician. Thus, biological sex will be limited to a narrow medical context, whereas birth certificates will be stripped of the binary of sex altogether.

Uniformity across States in the implementation of "Gender X" should be aspired to so as to provide all individuals with equal protection under the law, and to unify the United States in a potently symbolic move. Implementing the birth certificate modification retroactively also should not present problems because of the right to choose one's gender identity. In effect, if the birth certificate does not align with an individual's gender identity, they may exercise their right to choose and make the necessary amendment.⁹⁹ Thus, by having the dual approach of both birth certificate modification and the right to choose, *all* individuals will have the opportunity to embrace the gender identity that best reflects their sense of self.

V. CONCLUSION

Put simply, newborns have not yet formed gender identities, but from the very first moment of their existence in this world, they are placed into a binding, binary sex category that may or may not be true to them. A better approach is to create a universal and unifying gender identity until individuals are able to exercise their right to choose it themselves. There is no harm in making this relatively simple change. The replacement of an "M" or "F" with an "X" will not topple the administrative state or bring the government as a whole into a state of disarray.¹⁰⁰ The ultimate goal is

98. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

99. Presumably there could be a new subdivision within state agencies that is directly responsible for making the relatively simple change since the courts will no longer need to intervene in changes of sex on birth certificates.

100. Numerous countries have already expanded their categories of sex to include "X" as a third category. See Tom Lawson, *Female, Male or X? Canada Becomes the Tenth Country to Introduce Gender Neutral Passports*, POSITIVE.NEWS (Sept. 8, 2017), <https://www.positive.news/>

uniformity across *all* birth certificates so as to prevent the propagation of divisive categories and arbitrary lines. Instead of welcoming children into the world with a prepackaged construction of who they ought to be, society would benefit from affording individuals more time to embrace their nuances and choose a gender identity that is true to them.

society/female-male-x-canada-becomes-tenth-country-introduce-gender-neutral-passports/; *see also* Sirin Kale, *Germany Introduces a Third Gender Category on Official Documents*, BROADLY (Dec. 14, 2018), https://broadly.vice.com/en_us/article/59vq78/germany-introduces-a-third-gender-category-on-official-documents (Germany became the first country in Europe to approve a third gender—“divers” translating to “other”—for official documents). However, solely adding a third category raises the possibility of reinforcing the pervasive effects of the binary.