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LAW

Judge: Gender Laws Are at Odds With Science

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Mar 08, 2017

IDEAS

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A person's biological sex seems simple but is deceptively complex. It appears to be binary: An XX chromosomal pair is female, and an XY chromosomal pair is male. Doctors look at a newborn's genitalia, pronounce the baby a boy or a girl, and the birth certificate reflects that sex assignment.

Deep-seated religious beliefs, cultural constructs, the regulation of sports (such as the rules confronted by Texas high-school wrestler Mack Beggs) and recent laws are premised on the bedrock belief that each of us is either a man or a woman. Yet the reality is that today in the United States alone there are approximately one million people who — from the moment of birth — cannot clearly be defined as either male or female.

This physiological truth is unrelated to whether someone is straight, gay or transgender. Many individuals are born with sex chromosome, endocrine or hormonal irregularities, and their birth certificates are inaccurate because in the United States birth records are not designed to allow doctors to designate an ambiguous sex. Countless people likely have no idea that they fall into this group. The more we learn about our DNA, the more that biological sex — from the moment of conception — looks like an intricate continuum and less like two tidy boxes. This understanding makes it virtually impossible for judges to consistently apply a law that permits or prohibits conduct based on whether someone is a man or a woman.

Controversial pieces of legislation enacted in the last two decades rely on a clear-cut interpretation of sex. In 1996, the Defense of Marriage Act (DOMA) defined marriage as the union of one man and one woman, and it allowed states to refuse to recognize same-sex marriage; the federal law has since been deemed unconstitutional by the Supreme Court. On March 23, 2016, North Carolina passed the Public Facilities Privacy and Security Act (HB2), a law that requires individuals to use public restrooms and changing facilities according to the individual's "biological sex" assigned at birth, as stated on their birth certificate.

The Obama Administration rejected the logic of HB2, and last year it sent a guidance letter to states asserting that if public schools did not want to risk the loss of federal funding, transgender students must be allowed to use bathrooms "congruent with" their gender identity. On February 22, the Trump Administration reversed the Obama policy. Since President Trump was elected, Alabama, Illinois, Kansas, Kentucky, Minnesota, Missouri, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wyoming lawmakers have introduced

legislation that would determine access to public restrooms and changing rooms based on one's assigned sex at birth.

The most prominent case that has been in the crosshairs of this debate is *G.G. v. Gloucester County School Board* ("*Grimm*"), which challenges a Virginia school board's policy that requires students to use bathrooms according to biological sex. The plaintiff in *Grimm* is a transgender teen , Gavin Grimm. The United States Supreme Court was scheduled to hear oral arguments in *Grimm* later this month but sent the case back to the U.S. Fourth Circuit Court of Appeals to reconsider the case in light of the Trump Administration's reversal of the Obama Administration's policy. In its earlier decision, the Fourth Circuit ruled in favor of Grimm being able to use the boy's room at his high school and noted in its ruling that the word "sex" is ambiguous: It could be interpreted to mean either anatomy or identity.

Enacting a law is just the beginning of the legal process. The executive branch must handle law enforcement. In North Carolina, for example, police officers and district attorneys must determine whether to arrest and prosecute someone for using a public bathroom that is inconsistent with the "perpetrator's" sex based on their birth certificate. A law cannot be vague — a person of ordinary intelligence must know what conduct the law requires or forbids, and judges must be able to consistently apply the law in a non-discriminatory manner. There is no room for ambiguity.

Many people share the ubiquitous notion that biological sex falls into two, mutually exclusive categories. In 2009 my perspective changed when I read an article written by a woman who learned shortly after marriage that she and her husband couldn't have biological children because she had an XY chromosomal pairing. While she looked like a woman, and she and her parents had always believed she was female, from a genetic standpoint she was a man. The article was published the year after California passed Prop 8, a version of DOMA.

As Prop 8 wound its way through the courts, I thought about that article often. The legal briefs that were filed in both state and federal courts largely focused on equal protection for the LGBT community. Lawyers debated due process and the separation of church and state with a sprinkling of right-to-privacy arguments. But I wondered how that woman and her husband fit into the analysis.

I was curious whether her situation was an obscure medical anomaly that was statistically and legally irrelevant. It wasn't. A regularly cited 1991 study of nearly 35,000 newborn children found that 1 in 426 did not have strictly XX or XY chromosomes. In addition, the World Health Organization reports that 1 in every 2,000 births worldwide are visibly intersex, because the child's genitals are either incomplete or ambiguous, which equates to five newborn Americans a day. This represents a sizable U.S. population that cannot be ignored by the law.

If such individuals have the right to equal protection, to privacy and to use a public restroom, what clear and science-based legal principle can our judiciary employ to determine whether they lawfully used the correct bathroom? Reliance on a birth certificate might appear to be a legitimate method to establish sex. But birth certificates are surprisingly fluid documents. They are amended regularly to add or remove parents due to adoption or because DNA results reveal paternity that is inconsistent with the original record. They are also amended to address biology. In 2016, I received a request from parents seeking to change the name and sex of their baby's birth certificate. The parents were initially informed they gave birth to a daughter. Genital irregularities and months of additional tests revealed that from a chromosomal and hormonal standpoint their child was, while not strictly genetically male, more "properly" categorized as a son. I granted their request to modify the birth certificate to designate the child as male. The new birth certificate replaced the original, yet neither was precisely accurate from a biological perspective.

The United States' stringent adherence to a two-sex paradigm is inconsistent with science and incongruous with the historic and modern understanding of sex throughout many regions of the world. Dating back to 2000 B.C., three or more sexes can be found in classical Greek, Sanskrit and Hindu texts. Currently, numerous countries recognize a third or indeterminate sex including Australia, Canada, Germany, India, Japan, Nepal and New Zealand. If the bill introduced into the California state legislature in January 2017 passes, California will be the first state in the U.S. to recognize a third, non-binary gender, for birth certificates and driver's licenses.

Neither DOMA nor HB2 reference gay or transgender individuals, but there is little doubt that both laws were designed with those populations in mind. When the Obama Administration announced its opposition to HB2, several states swiftly voiced disapproval. Then Oklahoma Attorney General Scott Pruitt (now the Administrator of the EPA) sent a letter to the U.S. Department of Education stating, "Your determination thus elevates the status of transgender students over those who would define their sex based on biology and who would seek to have their definition honored in the most private of places." The Trump Administration guidance letter reversing the Obama Administration's policy referenced the ruling of a federal district court in Texas that "held that the term 'sex' unambiguously refers to biological sex."

Ironically, Trump's and Pruitt's arguments are perhaps the most compelling ones against HB2 and similar sex- and gender-based legislation. Our biological variability means that a two-bathroom, based on two-sex approach is inadequate — and that's before judges ever get to the issue of gender identity.

In the United States, judges are obligated to see the world through a secular lens. They must apply the law without the influence of any religious construct or political agenda. If modern science recognizes that sex has countless natural permutations, and if birth certificates, physical observation and even chromosomal testing cannot reliably categorize every individual as either male or female, then our judiciary cannot be required to make gender findings antithetical to that reality. When legislators blur the lines of church and state and enact laws that permit or prohibit conduct based on biologic gender as only male or female — whether it is for the purpose of authorizing marriage or designating the use of public bathrooms — they place an impossible burden on our judiciary, and ultimately on our country and all of its people.

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