

# The Scientific Gaze in American Transgender Politics: Contesting the Meanings of Sex, Gender, and Gender Identity in the Bathroom Rights Cases

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In this article, I examine how conflicts over transgender bathroom rights have ignited debates concerning the fundamental nature of transgender identity. Through an institutional and discursive analysis of North Carolina’s House Bill 2 or “bathroom bill,” the Title IX case in *Gloucester County School Board v. G. G.*, and similar federal court cases, I explore how and why forces both on the right and in the LGBTQ movement have come to rely on scientific expertise to legitimate their conceptions. As conservatives have marshaled evidence to challenge notions that transgender identity is innate, LGBTQ and transgender organizations as well as the American Civil Liberties Union have crafted a “born this way” biopolitical construction of transgender identity. I find that at their core, these conflicts are over the meanings of gender and sex in relation to transgender identity. Conservatives posit sex as biologically rooted and gender as a psychological phenomenon, whereas transgender advocates subsume gender identity into the definition of sex in arguing that constitutional and federal civil rights law must recognize gender identity as a biologically constitutive element of sex. I conclude by

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noting the limits of a liberal assimilationist and litigation-centric transgender politics and by exploring alternatives to this biopolitical form of transgender political identity.

**Keywords:** Transgender politics, gay and lesbian politics, LGBTQ politics, biopolitics, American political development, public law

In this article, I investigate how and why many proponents of transgender rights — particularly those working within liberal litigation-oriented political organizations — have come to express transgender identity through the logic and discourse of biodeterminism, which posits that brain structure, fetal development, and other biological factors play the most determinative role in establishing transgender identity.<sup>1</sup> Prior to this conception, the broadly queer umbrella notion of the term “transgender” that emerged in the 1990s aimed to encompass all sorts of genderqueer, intersex, and transsexual persons, as it challenged the rigid policing of gender identity and sex and sought to think of gender outside the bounds of science and medicine (Stone 1987). Contrary to the expectation that developments in transgender politics would reflect this rethinking of gender as fluid and less constrained by assumptions about a variety of differences based on sex, the past several years have seen the “T” in “LGBTQ” come to signify a narrower “born this way” identity that comports closely with the way in which gay and lesbian identities have come to be articulated since the popularization and politicization of the gay brain and gay genetics studies of the 1990s.

Today, the mainstream discourse regarding transgender identity has instead manifested most notably in Caitlyn Jenner’s statements about having a “female brain” (Sawyer 2015) and Katie Couric’s National Geographic Channel (2017) special that focused in large part on the scientific origins of gender identity in biological phenomena.<sup>2</sup> These

1. I use the term “transgender political identity” to refer to the biodeterministic version of transgender identity that circulates most prominently in mainstream liberal discourse and in the courts. It is a conception of trans identity that is skewed along racial and class lines and is based in a more binary-inflected, gender-normative transsexuality-as-transgender-identity form rather than something fluid, contingent, and possibly influenced by social relations or environmental factors. In contrast, I use the term “trans” to indicate when I am speaking of the larger umbrella of trans persons who do not all see themselves in this biologically-based mold (though some very well might).

2. POC (person of color) transgender celebrities and activists such as Janet Mock and Laverne Cox have enjoyed recent mainstream visibility as well, but, as I will explore in this article, the “born this way” discourse is generally tied to white — as well as gender-normative — persons (who often have expanded access to a variety of hormonal, physical, and cosmetic treatments, too). However, the racial element here should not be overstated, as those such as the young POC transgender cultural figure Jazz Jennings have made remarks about having a “girl brain” and being “born into the wrong body,” which has been a hallmark of essentialist ideas about transgender identity. There are most likely a variety of reasons why bioessentialist discourses appear to skew white among trans spokespeople, but possible answers might include the mainstream LGBTQ movement’s historically

pronouncements by celebrities and the media are buttressed by experts in endocrinology, psychology, neuroscience, and related fields who characterize transgender identity with reference to genetic and neuroanatomical features that result in a “mismatch” of gender and sex (Olson 2017). Although scholars have written on how those seeking hormone therapies and surgical treatments have historically needed to represent themselves according to a highly medicalized script (Stryker 2017; Valentine 2007) that might encourage this kind of biological rhetoric, a complete understanding of this turn to a biodeterministic discourse requires attention to the ways in which legal, political, and scientific actors and institutions have worked to produce this grounding for transgender identity claims.

As in other conflicts over minority rights, proponents of transgender political rights have had to reckon with opponents on the right who have exercised influence over the discourses and venues in which trans persons have been forced to defend themselves (Fetner 2008). Just as the gay rights movement mobilized narratives from nature and biology to defend against the right’s rhetoric of “choice,” transgender activists, too, have been forced to guard against various hostile voices, including reparative therapists who advocate against gender-confirming treatment as well as state legislators and governors and their conservative Christian allies who equate the call for transgender rights with opening the doors of public restrooms to sexual predators (Bryant 2006). Trans litigator and scholar Shannon Price Minter (2017) noted that a core feature of the right’s strategy has been to appeal to a mix of science and “common sense” that sex — defined generally by reference to a person’s genitals — establishes important *natural* differences between men and women that necessitate sex-segregated bathrooms, locker rooms, and other facilities to protect women and children from predatory men. Thus, as transgender persons have become more visible in American political culture, opponents have advanced discriminatory laws and administrative policies barring access to public restrooms on the bases that transgender persons simply do not “exist,” that trans identity is the product of liberal myths and faulty science, and that civil rights law and constitutional protections regarding sex ought to be based on a narrow genitals- or chromosomal-based conception of sex.

white character and the fact that POC trans figures often highlight the murder rate of transwomen or other sociological elements of trans life in their advocacy, whereas those like Jenner seem to be more predisposed to speak to their own personal identity and struggles.

For these reasons, political scientist and trans activist Paisley Currah (2006) remarked that transgender groups and their allies have been pushed to assert that gender identity is immutable and, accordingly, deserves heightened constitutional protection under the equal protection clause.<sup>3</sup> However, pinning the reach for biology entirely on a defensive response begs the question of how proponents were able to assemble the legal and scientific arguments that feature so prominently in transgender rights cases today. To comprehend the historical and institutional origins of this approach, one must look back to the gay and lesbian movement's reliance on such biodeterministic claims, especially in the 1990s, when the American Civil Liberties Union (ACLU) and gay rights litigators relied on "gay gene" and "gay brain" researchers such as Dean Hamer (Hamer et al. 1993) and Simon LeVay (1991) to argue for the immutability of sexual orientation in cases such as *Romer v. Evans* (Keen and Goldberg 2000).<sup>4</sup> The ACLU, the Human Rights Campaign, and other gay rights organizations during this period also canvassed potential supporters for military inclusion and same-sex marriage with instructions to inform the public about the supposedly fixed biological nature of a person's sexuality (ACLU 2003; Military Freedom Project 1993; Lancaster 2003).

As political scientist Zein Murib (2015, 2017) has shown, this was also the moment in which the modern LGBTQ movement was being built through semiannual meetings of various gay, lesbian, bisexual, and transgender organizations to develop a coordinated front on sexual and gender identity issues and identities. Murib (2015, 393) has argued that, through the work of those such as the trans group GenderPAC's congressional lobbying, "[w]hat began as a broad identity category to capture many different iterations of gender identity came to be represented in politics as a subset of sexual orientation in order to maximize political opportunities." Accordingly, I argue that as transgender identity has been incorporated into what is now referred to as the LGBTQ movement, liberal proponents of transgender rights have come to rely on biodeterministic, single-axis articulations of transgender identity (Crenshaw 1989), and as a result, sympathetic members of the public and political institutions alike are becoming increasingly receptive to such

3. Although some dispute how central immutability is to equal protection clause jurisprudence, the gay and lesbian movement has often interpreted it as requiring a biological form of immutability.

4. *Romer v. Evans*, 517 U.S. 620 (1996).

biological framings and thus have come to rely on the biodeterministic logic in their expressions of support (Garretson and Suhay 2016).

Following American political development and sexuality scholar Stephen Engel's (2016, 7) call to think about citizenship with reference to how institutions subject a person to "the state's sight or recognition, identification, and classification," I focus here on the ways in which ideas about what constitutes transgender citizenship and rights have become increasingly construed in *biopolitical* terms in the realm of the law and courts especially (Foucault 1990, 2010). I draw from Thomas Lemke's (2011, 98) concept of biopolitical citizenship, which aids in the analysis of the "systematic connection between medical knowledge, concepts of identity, and modes of political articulation." Though typical works in this field tend to focus on conflicts within medical bureaucracies a bit removed from the terrain of more traditional social movements (Epstein 2007; Petryna 2002), the LGBTQ movement's adoption of gay genetics and a "born this way" discourse has demonstrated that certain contemporary identity-based interest groups have begun to make biopolitical claims to citizenship in an even broader sense.

What we are seeing now in these transgender political identity battles is an expansion of that previous biopolitical conflict in which medical and scientific expertise was cultivated, mobilized, and deployed by nearly all sides in gay rights struggles. Transgender identity is beginning to be interpreted through a "modality of recognition" by state institutions and private forces (here meaning scientific and medical ones) in the same way that gay and lesbian political actors have used the courts to attain dignity and the rights of citizenship through "public and equal recognition" despite once being considered anathema to public morality and order (Engel 2016, 27; King and Smith 2005). For instance, as far back as the 1995 case *Brown v. Zavaras*,<sup>5</sup> the Tenth Circuit Court of Appeals drew connections between the scientific studies and expert witnesses in gay rights cases and the subsequent identity claims of transgender activists, which allowed courts to reconsider transgender identity as immutable in contrast to the older judicial theory that transgender identity was malleable by its very nature and namesake.<sup>6</sup> Immutability, too, has featured prominently in same-sex marriage briefs

5. *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995).

6. See cases such as *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977), and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), in which courts ruled transsexuality to be distinct from sex.

filed by the ACLU, the Human Rights Campaign, and the National LGBTQ Task Force.<sup>7</sup> Justice Anthony Kennedy's majority opinion in the landmark 2015 case *Obergefell v. Hodges* speaks of immutability twice, indicating that legal institutions continue to be primed to "see" and to legitimate gay and lesbian — and now transgender — identities with reference to biomedical authority and evidence of the innate.<sup>8</sup>

What is perhaps even more revealing of the gay and lesbian movement's biopolitical influence is the fact that the most recent cases featuring biodeterminist arguments come on the heels of earlier federal circuit and state court cases in which free expression and "sex stereotyping" claims delivered wins. In *Doe v. Yunits*, the Massachusetts Superior Court ruled in 2000 in favor of a transgender student's right to dress in feminine attire based on her right to free expression under the U.S. Constitution's First Amendment.<sup>9</sup> Federal appellate courts for the Sixth and Eleventh Circuits and the District of Columbia also ruled in favor of transgender plaintiffs who argued that they were guaranteed Title VII protections based on a 1989 U.S. Supreme Court decision that ruled sex stereotyping (e.g., discriminating against a woman for displaying masculine traits or a man for wearing feminine clothing) to be a form of sex discrimination.<sup>10</sup> It is important to note as a caveat that legal scholar Kimberly Yuracko (2016, 173) has contended that sex discrimination jurisprudence regarding gender and sex stereotyping has not been concerned primarily with free gender expression, but rather "[g]ender nonconformists have increasingly won protection under Title VII [and Title IX as well] by convincing courts that their nonconformity is not a matter of personal choice or taste but a product of necessity — a core aspect of their being, demanded not by their physical sex but by their psychological gender." What is key, however, is that jurisprudentially, trans plaintiffs were winning cases with pronouncements that the equal protection clause and civil rights law protected not only transgender but also gender nonconforming persons in schools and the workplace. At least nominally, this provided discursive potential to expand protections

7. Brief for the Leadership Conference on Civil and Human Rights et al. as Amici Curiae in Support of the Petitioners, *James Obergefell v. Richard Hodges, Valeria Tanco v. Bill Haslam, April DeBoer v. Ricky Snyder, Gregory Bourke v. Steve Beshear*, Nos. 14-556, 14-562, 14-571, and 14-574 (U.S.) (March 6, 2015).

8. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

9. *Doe v. Yunits et al.*, No. 00-10060A, 2000 WL 33162199 (Mass. Super., October 11, 2000).

10. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See also *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004); *Glenn v. Brumby et al.*, 724 F. Supp. 2d 1284 (N.D. Ga. 2010), aff'd, 663 F.3d 1312 (11th Cir. 2011); and *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

to an array of gender expressions. While constitutional and statutory sex classifications inherently provide an incentive to argue that discrimination against transgender persons is always on the basis of sex, this shift to a biodeterministic frame did not occur until mainstream LGBT, transgender, and civil rights organizations began litigating recent cases.

Accordingly, I show in this article that political and legal claims regarding transgender personhood and citizenship are now largely within the domain of scientific and medical authority, and thus each side has mobilized its own experts to decide whose rights and identities are to be respected under the law. This is contrary to what many legal scholars believed would be the case as those such as legal scholar Nancy Knauer (2003) warned that the 1990s and early 2000s gay and lesbian movement's reliance on biodeterminism would produce a homonormative white gay identity and leave out those like transgender persons (Duggan 2002). To the contrary, transgender identity has been integrated into both the legal apparatus and the gay and lesbian movement by taking on a "transnormative" character that is skewed along race, class, and gender-normative lines (Aizura 2006; Aultman and Currah 2017, 36). In the context of recent bathroom access cases, for instance, the plaintiffs generally have been white and gender normative, and they have had access to the medical care and documentation necessary to meet the biomedical criteria for who is considered transgender and thus deserving of legal protection. So, while transgender identity has recently begun to benefit from the gay and lesbian movement's cultivation of a biodeterministic approach to the law, the result has been a reductive form of transgender identity representing only a single axis of identity — and therefore protecting some trans persons while abandoning others — as it has been pushed into a narrow conception of sex.

Although there are still activists and organizations committed to a radical trans ideal of deconstructing and subverting gender (Sycamore 2008; Wilchins 1997), mainstream liberal institutions such as the Human Rights Campaign, the ACLU, and others are, at least for the moment, the most vocal and influential champions of transgender identity. The indebtedness of these organizations to narrow and constrained biological conceptions explains sociologist Rogers Brubaker's (2016, 415) observation that we have witnessed "[i]nstead of a shift from given to chosen identities, as posited by theories of reflexive modernity, we see a sharpened tension — in everyday identity talk, public discourse, and

even academic analysis — between idioms of choice, autonomy, subjectivity, and self-fashioning on the one hand and idioms of givenness, essence, objectivity, and nature on the other.” Even in the face of new neuroscience research that emphasizes the plasticity of the human mind and eschews hard-line arguments about neuroanatomical structures and innate identities, sexed brain research continues — with important exceptions (Fine 2011; Jordan-Young 2011; Pitts-Taylor 2016; Richardson 2013) — to posit regressive assumptions about the nature of male and female brains, which are recurrently transformed into a political and legal transgender identity. As a caveat, I do not mean to suggest that there is no role for science and medicine in crafting political approaches to transgender identity; rather, I intend to demonstrate how biodeterminism and liberal identity politics have coproduced (Jasanoff 2006) a “born this way” transgender identity that is often skewed along race, class, and gender lines and has served the project of liberal inclusion at the expense of trans visions of gender fluidity, an expanded realm of autonomy, a rejection of sexist scientific assumptions about male and female brains, and a destabilization of the idea that medicine and science ought to wield *the* authority to define transgender identity and existence.

### TRANSGENDER BATHROOM DISCRIMINATION CASES AND THE SHIFTING MEANINGS OF GENDER AND SEX

By 2016, it had become nearly impossible to find a discussion in mainstream political discourse in which transgender identity and rights were not accompanied by mentions of “bathroom bills.” Though North Carolina’s infamous bathroom bill, known as House Bill (HB) 2,<sup>11</sup> appeared to usher in a new political fight, conservative opponents of trans rights had begun targeting the ability of trans persons to use the restroom of their choice at least as far back as 2008, when the group Citizens for Good Public Policy ran a campaign against a Gainesville, Florida, ordinance by characterizing it as an open invitation for sex predators to assault young girls in public restrooms (Schilt and Westbrook 2015). Sociologists Kristin Schilt and Laurel Westbrook (2014) have argued that these new gender panics over trans rights are in

11. “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations,” Session Law 2016-3, House Bill 2, March 23, 2016, <http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf> (accessed March 20, 2017).



large part “penis panics,” in which conservatives frame any accommodation to trans people as presenting a sexual and violent threat to average citizens. It is significant that young, white, gender-normative plaintiffs are the faces of these high-profile legal cases, as this illuminates how grounded the science and biopolitics of transgender identity (and related themes of sexuality) have been in the figure of the child (Sedgwick 1991). For opponents, the child provides a foil against which “deviants” pose a threat, while for proponents, the child allows a site on which to inscribe theories of immutability, which serve as a defensive posture and a basis on which citizenship claims can be made.

The bathroom issue’s salience was boosted by the Barack Obama administration’s expansion of federal civil rights law to include transgender and gender identity under Title VII and Title IX protections against sex discrimination. Over several years, the Equal Employment Opportunity Commission<sup>12</sup> and the U.S. Departments of Justice and Education (U.S. Office of the Attorney General 2014, 2016; DOE 2016) issued rulings and directives expanding the notion of sex to include, among other things, the right of trans persons to use the restroom at work and in public places of accommodation that best suits them. The most recent of these directives, the May 13, 2016, “Dear Colleague” letter issued by the Department of Education’s Office for Civil Rights and rescinded by the Donald Trump administration in February 2017, explicitly demanded that Title IX be interpreted to provide transgender persons access to their preferred restrooms at educational facilities receiving federal dollars (DOJ 2017). This was a central factor in high-profile federal court cases concerned with such issues of access and antidiscrimination protection.

Along with being the most visible contestations in contemporary transgender politics, cases centered around bathroom access at the local, state, and national levels have come to constitute a new arena in which transgender political identity is being contested and constructed. For this reason, I have considered the ways in which proponents and opponents of transgender rights have advanced their claims regarding the nature of transgender identity in political, legal, and scientific terms throughout these cases. Accordingly, I have selected cases litigated by transgender, LGBTQ, and allied civil rights organizations to ensure that my claims about the ways in which identity is being contested here are not

12. *Macy v. Holder*, EEOC Appeal No. 0120120821 (2012); *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (2015).

representing merely the tactics of one organization such as the ACLU but instead encompass a diversity of LGBTQ groups such as the Transgender Law Center, the Lambda Legal Defense and Education Fund, and the National Center for Lesbian Rights (NCLR).

As I show in the HB 2 case, biopolitical notions of transgender identity have become so pervasive that even the Obama Department of Justice (DOJ) relied on them in its briefs. In taking this broad view, I have found that these organizations have adopted similar approaches to science and the law and have in many cases shared scientific resources (e.g., research reports and expert testimonies) with one another. Ultimately, I find that at the heart of all these cases is a fundamental conflict over the meanings of gender (and gender identity) and sex in which conservatives have deployed scientists to argue that sex is biologically rooted whereas gender is a social construct, while liberal proponents have tended to subsume gender identity into the meaning of sex, arguing that “sex” under federal civil rights law and constitutional law ought to follow the dominant assumptions of scientists who believe that genitals, chromosomes, *and* gender identity are biologically constitutive elements of one’s sex.

### **NORTH CAROLINA AND THE BATHROOM BILL: MARSHALING SCIENTIFIC AUTHORITY**

Looking first to the North Carolina bathroom bill, HB 2, Republican governor Pat McCrory signed the antitransgender legislation following a special legislative session on March 23, 2016, to counter a new ordinance in Charlotte that would have protected gay and transgender persons from various forms of discrimination. HB 2 quickly became a matter of national political controversy as Attorney General Loretta Lynch announced in May 2016 that the federal government was suing North Carolina for violations of civil rights law. Lynch notably referred to the restrictions on bathroom rights as an instance of “state-sponsored discrimination” that imposed hardship on persons for “something they cannot control.”<sup>13</sup> Conservative-dominated statehouses returned fire with both a countersuit coming out of North Carolina as well as two separate lawsuits joined by nearly two dozen states challenging the Obama administration for its expansive reading of Title IX that required schools

13. U.S. Department of Justice, “Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Complaint against the State of North Carolina to Stop Discrimination Against Transgender Individuals,” May 9, 2016, <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint> (accessed June 11, 2018).

(including the University of North Carolina) receiving federal funding to allow students to use the bathroom of their choosing (Balingit 2017).<sup>14</sup> In both lawsuits, the states cast sex as a biological category, determined by one's anatomy and genes, and gender identity as a malleable psychological quality unprotected by legal and constitutional prohibitions against sex discrimination.

The DOJ's May 2016 lawsuit against North Carolina thrust the federal government into a conflict that would center around the science of gender identity and its bearing on the interpretation of sex under federal civil rights and constitutional law. In its claims that North Carolina had violated Title VII, Title IX, and the Violence Against Women Reauthorization Act, the DOJ argued in a section titled "Gender Identity and Its Relationship to Sex" that "[a]n individual's 'sex' consists of multiple factors, which may not always be in alignment. Among those factors are hormones, external genitalia, internal reproductive organs, chromosomes, and gender identity, which is an individual's internal sense of being male or female."<sup>15</sup> The DOJ further stated that "[a]lthough there is not yet one definitive explanation for what determines gender identity, biological factors, most notably sexual differentiation in the brain, have a role in gender identity development."<sup>16</sup>

The first legal challenge to HB 2, however, did not come from the federal government but instead from a suit filed immediately upon its passage by an ACLU-led coalition of LGBTQ and civil rights organizations.<sup>17</sup> In March 2016, the ACLU sued North Carolina on behalf of two transgender men (and one lesbian employee), one of whom was a student at the University of North Carolina and the other an employee. The ACLU advanced an even more biodeterministic argument than the DOJ in its statement that "[g]ender identity is the primary determinant of sex."<sup>18</sup> Using scientific evidence to combat the idea that gender identity is a condition or a choice that can be "cured," the ACLU argued that "[t]here is a medical consensus that gender identity is innate and that efforts to change a person's gender identity are

14. Defendants' and Intervenor-Defendants' Brief in Opposition to the United States' Motion for Preliminary Injunction, *United States of America v. State of North Carolina et al.*, No.1:16-cv-00425-TDS-JEP (August 17, 2016).

15. *United States of America v. State of North Carolina, et al.*, No. 1:16-cv-00425 (M.D.N.C. 2016), at 7.

16. *United States v. North Carolina*, at 7.

17. *Joaquín Carcaño et al. v. North Carolina Governor Patrick McCrory et al.*, No. 1:16-cv-236 (M.D.N.C. 2016).

18. *Carcaño*, at 8.

unethical and harmful to a person's health and well-being."<sup>19</sup> In advocating for heightened protections for those discriminated against based on their gender identity, the ACLU noted that "[g]ender identity generally is fixed at an early age and highly resistant to change through intervention."<sup>20</sup> This language comes from a new current in gender identity clinics in which researchers and clinicians emphasize gender identity as something that is located in neuroanatomical structures and therefore highly resistant to change after infancy (Brill and Pepper 2008).<sup>21</sup> The strategy is to assert the identity's innateness and inalterability; the political legitimation, then, is less about free gender expression or the questioning or deconstruction of a gender binary but instead about assumptions of biological fixity.

In support of the ACLU-led litigation, the NCLR and GLBTQ Legal Advocates and Defenders filed an amicus brief that was joined by a coalition of trans groups including the National Center for Transgender Equality, the Transgender Law and Policy Institute, and the Trans People of Color Coalition.<sup>22</sup> In this brief, the biological immutability argument concerning the equal protection clause is more developed and prominent than in either the DOJ or ACLU lawsuits. In accordance with case law for achieving suspect classification under the equal protection clause, the NCLR argued that transgender identity deserves the strongest protection of the courts because of transgender persons' long history of discrimination, their equal ability in contributing to society compared with nontransgender persons, their position as a small and politically vulnerable group, *and* their exhibiting of an immutable characteristic, which makes them a "discrete and insular minority."<sup>23</sup>

In making its immutability claim, the NCLR cited an article titled "Evidence Supporting the Biologic Nature of Gender Identity" published in 2015 in the journal *Endocrine Practice* by endocrinologists

19. Carcaño, at 8.

20. Carcaño, at 38.

21. Although the diagnosis of "gender dysphoria" in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* is less pathological than the "gender identity disorder" that preceded it, the diagnosis continues to be pitched in terms such as "persistent, insistent and consistent," focused heavily on children, and emphatically *not* concerned with gender nonconformity.

22. Brief for National Center for Lesbian Rights, GLBTQ Legal Advocates & Defenders, National Center for Transgender Equality, Forge, Transgender Law & Policy Institute, and Trans People of Color Coalition as Amici Curiae Supporting Reversal on Behalf of Plaintiffs-Appellants, *Joaquín Carcaño, et al. v. North Carolina Governor Patrick McCrory et al.*, No. 1:16-cv-236 (M.D.N.C. 2016) (October 25, 2016).

23. Brief for Plaintiffs-Appellants, *Carcaño*, at 3–14.

Aruna Saraswat and Joshua D. Safer and transgender health advocate and medical student Jamie D. Weinand. The article, a meta-study of various inquiries into possible hormonal, neuroanatomical, and genetic sources of gender identity, concludes that transsexual brain studies provide the most convincing evidence for a biological etiology of transgender identity. The NCLR brief goes on to cite several legal cases that linked the legal and constitutional claims for increased judicial protection of gay identities to transgender ones.<sup>24</sup> As in 1990s gay rights cases such as *Romer v. Evans*, in which pro-gay rights geneticists and neuroscientists provided expert testimonies to establish that gay identity had a scientifically discoverable natural origin (Keen and Goldberg 2000, 68–73), these immutability claims have relied on scientific studies published in part by political advocates themselves to aid in their struggle to achieve heightened judicial protection.

North Carolina's response to the DOJ lawsuit and the subsequent actions of various LGBTQ organizations reveals the ways in which a scientific debate over the meanings of sex and gender came to characterize this conflict. In defending HB 2, Governor McCrory employed biostatistician Lawrence Mayer to testify on behalf of the law based on research that Mayer had written with his coauthor and Johns Hopkins University colleague, psychiatrist Paul McHugh (Ennis 2016). In their article "Sexuality and Gender Findings from the Biological, Psychological, and Social Sciences," Mayer and McHugh (2016) reviewed several decades of research and came to the conclusions that biological sex is innate whereas gender identity is more of a culturally determined social construct and that current treatments for gender dysphoria in children are inappropriate because they assume that transgender identity is innate and therefore mistreat many "confused" children who would otherwise grow out of their nonconformity.

Mayer and McHugh also took aim at the 1990s gay brain and genetics studies, claiming that many respected geneticists and biologists had not been able to replicate the original studies. This was a strategic move in that some of the most famous studies of this era were indeed debunked; by highlighting this fact, these scientists could take aim at what they referred to as the "born this way" hypothesis for transgender identity as well (Mayer and McHugh 2016, 13–58). It is important to note that the article appeared in the *New Atlantis*, which, rather than being a respected peer-reviewed scientific journal, is an appendage of the Ethics

24. Brief for Plaintiffs-Appellants, *Carcaño*, at 12–13.

and Public Policy Center, a conservative Christian think tank that has in the past defended anti-LGBTQ issues such as the Defense of Marriage Act and the military's exclusionary don't ask, don't tell policy. Still, Mayer and McHugh's positions as sexual behavior researchers and clinicians at Johns Hopkins University School of Medicine gave them at the least the veneer of scientific legitimacy. Overall, these appeals to a variety of scientific and medical authorities throughout the litigation over HB 2 demonstrate how both opponents and proponents of transgender rights have challenged the credibility of either side's science based on the belief that winning in this domain will lead to victories in court battles and with the public.

### **GAVIN GRIMM AND TRANSGENDER IDENTITY BEFORE THE SUPREME COURT**

In addition to the ongoing controversy over North Carolina's bathroom bill, a variety of other salient transgender bathroom rights cases have been making their way through federal and state courts. The most well known of these is *Gloucester County School Board v. G. G.*, a case brought by the ACLU on behalf of Gavin Grimm, a transgender student who was denied the use of the men's room at his Virginia high school.<sup>25</sup> Grimm's case garnered national attention in 2016 when the U.S. Supreme Court agreed to hear the school board's appeal after the Fourth Circuit Court of Appeals ruled in favor of Grimm's rights on Title IX grounds. In the Fourth Circuit's ruling, the question of gender identity and its relation to sex was slightly eclipsed by an administrative law dispute over how controlling the Obama Department of Education's "Dear Colleague" letter was over the interpretation of "sex" under Title IX. The Fourth Circuit ultimately sided with Grimm, citing a precedent from the administrative law case *Auer v. Robbins*, which granted broad deference to a bureaucratic entity in interpreting the law it has been charged with enforcing.<sup>26</sup>

However, an examination of sources such as Grimm's statements to his school board, the ACLU's litigation in the case, and amicus briefs filed in support of either party before the Supreme Court demonstrates that debates over the scientific meaning of sex and gender identity have been central to this case. In an address to the school board publicized by the ACLU and

25. *G. G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. 2016).

26. *Auer v. Robbins*, 519 U.S. 452 (1997).

LGBTQ media outlets, Grimm demanded that his rights be respected because the innateness of transgender identity is a “scientific fact” and “[people do] not choose to have cancer like I didn’t choose to be born transgender” (Grimm 2016). The ACLU’s petition for Grimm backed up this assertion by citing the Saraswat, Weinand, and Safer (2015) study to make its equal protection clause argument for Grimm.<sup>27</sup> Arguing against the school board’s suggestion that gender identity is in any way “subjective,” the ACLU stated that “[g]ender identity’ is an established medical concept, referring to one’s sense of oneself as belonging to a particular gender. It is an innate and immutable aspect of personality, with biological roots.”<sup>28</sup>

In a later brief solicited by the court asking each party to argue whether and how the case should continue after the Trump administration rescinded the Obama administration’s “Dear Colleague” letter, the ACLU invoked medical expertise and diagnostic criteria to alleviate fears that Grimm’s case would open doors to sexual predators being given access to women’s restrooms.<sup>29</sup> The language here was as follows:

Gavin has never argued that the Board should accept his “mere assertion” that he is transgender. He has provided ample corroboration from his doctors, his parents, and his state identification documents. He is following a treatment protocol from his healthcare providers in accordance with widely accepted standards of care for treating gender dysphoria.<sup>30</sup>

This language, combined with this brief’s restatement that “research indicates that gender identity has a biological component,”<sup>31</sup> illustrates how central this biodeterministic argument was to the most high-profile Title IX transgender rights case in the country. Such discourse was used not only to argue for Grimm’s rights under Title IX and the equal protection clause but also to draw a boundary of exclusion between the figure of the sexual predator and transgender persons. Yet, in doing so, the claim to protection was in a very Foucauldian biopolitical sense legitimated by the clinician’s authority over the meaning of Grimm’s body and conception of his gender identity.

27. Brief in Opposition, *Gloucester County School Board v. G. G., By His Next Friend and Mother, Deirdre Grimm*, No. 16-273 (September 2016), at 4.

28. Brief in Opposition, *Gloucester County School Board v. G. G.*, at 4.

29. Brief of Respondent, *Gloucester County School Board v. G. G., By His Next Friend and Mother, Deirdre Grimm*, No. 16-273 (February 2017).

30. Brief of Respondent, *Gloucester County School Board v. G. G.*, at 24.

31. Brief of Respondent, *Gloucester County School Board v. G. G.*, at 3.

According to this argument, it is not enough to ask Grimm whether he is transgender; rather, his identity is always subject to reevaluation, as evidenced in the brief's guarantee that "[i]f school administrators have legitimate concerns that a person is pretending to be transgender, a letter from the student's doctor or parent can easily provide corroboration."<sup>32</sup> If Grimm had won his case based on this logic, he and other transgender students would still be constantly at risk of being asked to "show one's papers" in quite a literal sense. The essence of biopolitical citizenship lies in the fact that "mere assertions" of transgender identity are privileged far less by the state than clinical pronouncements and medical papers. As Paisley Currah and Lisa Jean Moore (2009) have argued, this stems in part from the state's shift in the past few decades from a concern with trans people committing gender "fraud" to a concern with transgender identity's "permanence," which can be certified by medical professionals. Accordingly, the ACLU and its scientific allies have attempted to guarantee that permanence by reassuring the state and the public that Grimm's identity is so fixed that it is written into his biological being.

The amicus briefs filed with the Supreme Court in the Gloucester County case illustrate this strange new terrain in which liberal proponents have turned to hard-line arguments from nature, while some conservative opponents have gone as far to couch their attacks on trans rights in postmodern references to gender as a distinct phenomenon from sex. In their brief in support of the school board, McHugh, Mayer, and pediatric endocrinologist Paul Hruz argued that the Fourth Circuit had erred in subsuming gender identity into both legal and scientific categories of sex because sex is innate, fixed, and binary, whereas gender is a socially constructed entity.<sup>33</sup> Citing gender theorist Judith Butler's *Gender Trouble*, these conservative scientists stated that "*gender* is a fluid concept with no truly objective meaning," and is, therefore, something entirely distinct from sex.<sup>34</sup> While this comically misrepresents Butler's theory of performativity and sex/gender, the distinction is part of a conservative strategy that refers to gender identity as "fuzzy and mercurial" and without stable meaning.<sup>35</sup> For these scientists (and the

32. Brief of Respondent, *Gloucester County School Board v. G. G.*, at 24.

33. Brief for Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D. as Amici Curiae Supporting Petitioner, *G. G. v. Gloucester County School Board*, No. 16-273, (January 10, 2017), at 3–4.

34. Brief of McHugh et al.; see also Butler (2006).

35. Brief of McHugh et al., at 9.



school administrators and parent-and-student groups opposed to transgender rights for whom they speak), sex is a much more stable referent — an “innate and immutable”<sup>36</sup> quality “determined fundamentally by one’s chromosomal constitution, and ultimately by clearly defined reproductive capacities”<sup>37</sup> — and it is more amenable to legal classification than gender identity.

### EXPERT TESTIMONIES AND TRANSGENDER IDENTITY IN THE FEDERAL DISTRICT COURTS: SCIENTIFIC AUTHORITY AND THE REMAKING OF SEX DISCRIMINATION JURISPRUDENCE

Grimm’s case is one of several challenges made against discriminatory school boards across the country by transgender students, who argue that their Title IX and equal protection clause rights have been abrogated. Examples from the following cases highlight the similarities in how various organizations have litigated these cases. They also demonstrate how scientific experts have been used at the federal district court level in ways that have begun to transform the meaning of sex in Title IX and equal protection clause cases, making the category capacious enough to include this biomedically legitimated version of transgender identity. These cases brought by Lambda Legal, the NCLR, and the Transgender Law Center signal that there is a consensus among mainstream liberal LGBTQ and transgender organizations regarding the biological approach. In the face of conservative arguments from groups such as the Alliance Defending Freedom and coalitions of perennially “concerned” parents and school administrators, transgender proponents have mobilized scientific allies and discourses here, too.

The organizations in these cases have engaged in a long tradition in pro-gay rights and LGBTQ politics of inviting scientific experts to give testimony at the trial level. Diane Ehrensaft, a Gender Spectrum board member and the director of mental health at the Child and Adolescent Gender Center in San Francisco, has been a frequent expert in these district-level cases. In *Evancho v. Pine-Richland School District*,<sup>38</sup> Lambda Legal brought in Ehrensaft to testify on the nature of transgender identity and against Pine-Richland School District’s reversal

36. Brief of McHugh et al., at 7.

37. Brief of McHugh et al., at 6.

38. *Juliet Evancho et al. v. Pine-Richland School District et al.*, No. 2:16-cv-01537 (W.D. Pa. 2017).

of a policy that had originally allowed its trans students access to their preferred bathroom. Ehrensaft explained in her declaration to the court,

There is a medical consensus that gender identity is innate and that efforts to change a person's gender identity are unethical and harmful to a person's health and well-being. Biological factors, most notably sexual differentiation in the brain, have a role in gender identity development. Gender identity is the most important and determinative factor in establishing a person's sex.<sup>39</sup>

Ehrensaft did not merely state that previous notions of sex that focused more narrowly on chromosomal or hormonal factors were misguided. Instead, gender identity was presented here as *the* most constitutive element of a person's sex; Ehrensaft described it as a biological phenomenon with roots somewhere in the anatomy of the brain. Though Ehrensaft strategically argued that physical characteristics are less determinative of sex than gender identity in a move against the opponents of transgender rights who focus more on genitals, chromosomes, and secondary sex characteristics as the defining markers of the sex binary, she fundamentally rested her conception on a narrow form of transgender identity that both privileges gender identity over all other biological components of sex while also reading gender identity back into biological sex.<sup>40</sup>

The NCLR also brought in Ehrensaft to testify against a discriminatory Ohio school board in the case *Board of Education of the Highland Local School District v. U.S. Department of Education et al.*<sup>41</sup> In both this case and the Lambda Legal one, Ehrensaft testified that gender identity ought to be legally protected because of its origins in early childhood and the futility of reparative therapeutic attempts to alter it. Ehrensaft argued that “[g]ender identity — a person's internal sense of their own gender — is the primary factor in determining a person's sex. It is a deeply felt and core component of human identity.”<sup>42</sup> The U.S. District Court for the Southern District of Ohio cited Ehrensaft's testimony — especially on the immutable nature of gender identity — in its decision granting a preliminary injunction against the local school board. In this decision, the court indicated that a future ruling on the transgender student's Title

39. Memorandum of Law Supporting Plaintiffs' Motion For Preliminary Injunction, *Juliet Evancho et al. v. Pine-Richland School District et al.*, No. 2:16-cv-01537-MRH (W.D. Pa. 2017) (October 20, 2016), at 2–3.

40. Memorandum, *Evancho*, at 23.

41. *Board of Education of the Highland Local School District v. U.S. Department of Education et al.*, No. 2:16-cv-00524 (S.D. Oh. 2016).

42. Memorandum, *Evancho*, at 2–3.

IX and equal protection clause would likely succeed on these grounds.<sup>43</sup> Importantly, Ehrensaft's argument was not simply that gender identity is something that is so deeply felt that it is cruel to expect one to reorient it; rather, she argued that such a disposition toward one's gender identity is a product of biology.

Whereas Ehrensaft served as the voice of science for the NCLR and Lambda cases, the Transgender Law Center relied on Dr. R. Nicholas Gorton, a physician who has served on the research committee of the World Professional Association for Transgender Health, the medical advisory board of the University of California, San Francisco Center of Excellence for Transgender Health, and the American Medical Association's LGBT Advisory Committee. In his declaration in the case *Whitaker v. Kenosha Unified School District No. 1 Board of Education*,<sup>44,45</sup> Gorton made many similar arguments regarding biological immutability as well as arguments against using sex chromosomes entirely to define a person's sex. Toward the end of his testimony, Gorton made a telling reference to the role of scientific and medical expertise in defining and legitimating transgender identity when he stated that "[a] physician's role is to assist the person in transitioning to living in accordance with their true sex."<sup>46</sup> Although one might interpret Gorton's statement to mean that the physician's role is to assist a transgender person into living a life according to the dictates of one's own autonomous will, the entirety of his testimony suggests that Gorton was instead referencing both the biological nature of gender identity (what he termed "true sex") and the medical expert's unique role in helping *find* and *treat* that identity. Gender identity is once again subsumed into the biological category of sex, and thus transgender identity becomes an essentialized biodeterministic category.

Turning to an example of a recent federal district court decision, it is clear that these scientific arguments are providing wins for trans litigants, and therefore they will likely come to define the legal and constitutional approach to transgender identity for the foreseeable future. Writing for

43. *Board of Education v. U.S. Department of Education*, at 3–4.

44. *Whitaker v. Kenosha Unified School District No.1 Board of Education*, No. 16-CV-943-PP (E.D. Wi. 2016).

45. The Seventh Circuit in this case has also been receptive to the biopolitical conception of transgender identity as evidenced in its language that "[t]his is not a case where a student has merely announced that he is a different gender. Rather, Ash [the plaintiff] has a medically diagnosed and documented condition." *Whitaker v. Kenosha Unified School District No.1 Board of Education*, No 16-3522 (2017), at 24.

46. Declaration of Dr. R. Nicholas Gorton, M.D. (Exhibit 3), *Whitaker v. Kenosha* (2016).

the U.S. District Court for the Western District of Pennsylvania, Judge Mark Hornak relied heavily on Lambda's scientific evidence and arguments to justify his issuing of a preliminary injunction against Pine-Richland School District. In light of Grimm's then-pending Supreme Court case, which had come to focus on a Title IX claim, Hornak directed his attention to the Pine-Richland students' equal protection clause claim, and particularly how to adjudicate this claim based on the scientific evidence introduced by both parties. Ultimately, Hornak was persuaded by Ehrensaff's testimony, as evidenced by a positive citation to the psychologist's quote that "being transgender is not a 'preference,' that being transgender has a medically-recognized biological basis, and that it is an innate and non-alterable status."<sup>47</sup>

In siding with the scientific conception of gender identity as a constitutive component of sex, Hornak moved beyond evaluating transgender identity claims using the rational basis approach to the equal protection clause and instead employed the more protective intermediate scrutiny test, giving the students here additional judicial protections than most previous case law had.<sup>48</sup> Whereas courts in some earlier cases had considered transgender identity to be akin to sex for matters of antidiscrimination, Hornak was moving his own district court beyond its previously low protections for this identity to a higher one based on sex classification.<sup>49</sup> In conceptualizing this discrimination as based on sex rather than transgender or transsexual identity more narrowly, the Pine-Richland students were granted more constitutional protection than a similar case heard by the same court two years prior.<sup>50</sup> Hornak wrote that the decision in that case "acutely recognized that cases involving transgender status implicate a fast-changing and rapidly-evolving set of issues that must be considered in their own factual contexts."<sup>51</sup> Hornak indicated in his equal protection clause analysis that the "factual context" here included scientific evidence regarding the immutable nature of the transgender students' identities.<sup>52</sup> Considering this alongside Hornak's acknowledgment of the idea that "gender identity is entirely akin to 'sex' as that term has been customarily used in equal protection analysis," Lambda's twin arguments regarding the

47. *Evancho*, at 8–9.

48. *Evancho*, at 20–35.

49. *Evancho*, at 22.

50. *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).

51. *Evancho*, at 24.

52. *Evancho*, at 26.

immutability of transgender identity and the premise that gender identity is constitutive of sex were determinative in the final ruling of the court affording heightened scrutiny for transgender persons here.<sup>53</sup>

## CONCLUSION: ALTERNATIVES TO A BIOPOLITICAL TRANSGENDER POLITICS

In the foregoing analysis, I have shown how the reliance on medical and scientific expertise has engendered a trans politics that protects far too few by crafting a biopolitical transgender identity that rests primarily on the authority of physicians, clinicians, judges, and state officials and bureaucrats to legitimate a person's gender identity in repeated — sometimes daily — interactions. Thus far, courts have presented as inadequate institutions for a more expansive notion of trans politics; though they undoubtedly provide necessary legal redress for those unduly harmed, as in instances of bathroom rights discrimination, statutory and constitutional law has provided transgender advocates an incentive to rely on reductive scientific research in their pursuits to fit transgender identity into the legal category of sex. Additionally, while the integration of transgender identity into the gay and lesbian movement has led to expanded access to formal civil rights as well as increased cultural and political visibility for (certain) trans persons, this construction of transgender identity has many limitations. It is skewed along racial and class lines and ultimately rests on a logic of gender normativity, casting transgender identity not in terms of gender fluidity, free expression, or liberation from the constraints of false notions about the sex binary but instead as a biomedical condition.

Fortunately, there are legal and political alternatives to this “born this way” liberal assimilationist style of politics. Political theorist Heath Fogg Davis (2017), for example, has argued powerfully that removing sex classifications entirely from administrative records would reduce the medical authority over defining a person's sex or gender (administrative law tends to conflate these categories). Davis's claim is that nearly all sex classifications lack a rational governing purpose, and therefore they are legally and constitutionally impermissible. This approach would drastically improve the lives of not only many trans people but also any cis person who is perceived to be transgressing gender norms (Davis 2017, 142) or a trans person targeted by immigration authorities for

53. *Evancho*, at 27.

having incongruent sex/gender markers on their state and federal identification documents (Spade 2015, 90). The administrative focus, too, promises to fold intersex persons more meaningfully into a LGBTQ+ politics, which could then strengthen the call against “corrective surgery” that tends to harm and erase and instead promote the idea that it is perfectly natural to sit outside misleading textbook versions of “properly sexed” bodies (Davidson 2007; Davis 2015). If activists and advocates do continue to pursue legal and constitutional remedies, they ought to work on expanding the theory of sex stereotyping in sex discrimination jurisprudence so that it does not rely so heavily on medical expertise to legitimate a person’s deviation from gender norms. Rather, the legal prohibition against sex stereotyping should be interpreted as protecting an expanded universe of gender expression and nonconformity.

Whatever path forward a more representative trans politics takes, it will necessitate an inclusive social movement approach that attends to the diversity of the trans population. It is my hope that future political and legal work might destabilize the role of state and expert authorities over the current biopolitical nature of transgender identity and that this might produce a world of expanded autonomy, protection, and power to those who fall outside our state and society’s visions of gender, gender identity, and sex.

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