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BIRTH CERTIFICATE GENDER CORRECTIONS:

The Recurring Animus of Compulsory Sterilization Targeting Transgender Individuals

Jon Ostrowsky

ABSTRACT

Nearly a century ago, the Supreme Court sanctioned compulsory sterilization in *Buck v. Bell*, echoing eugenicists and reasoning that “[i]t is better for all the world . . . [if] society can prevent those who are manifestly unfit from continuing their kind.” In addition to this eugenics-based rationale, compulsory sterilization in the early twentieth century also sought to punish and stigmatize LGBTQ persons, who were called “sexual deviants.” Today, at least fourteen states and one territory continue to—in effect—involuntarily sterilize transgender individuals. In these states, transgender individuals must undergo sex-reassignment surgery before they can correct the gender on their birth certificates. This Article argues that like many of America’s early sterilization laws targeting LGBTQ individuals, today’s surgical requirement laws seek to advance three forms of animus that are separate from eugenics. First, these laws seek to deny transgenderism. Second, these laws seek to punish or stigmatize perceived deviance. Third, the laws impose a view of heteronormative sexual ethics, which seeks to define what sexual conduct is tolerable in society. As transgender rights advocates mount a new wave of legal challenges, they should challenge laws requiring surgery to change one’s gender on a government-issued birth certificate. Such laws violate the fundamental right of bodily autonomy to choose and refuse medical treatment because they are not narrowly tailored to a compelling state interest. Instead, surgical requirement laws advance animus against transgender persons. These laws also echo the historical animus against LGBTQ individuals that motivated compulsory sterilization during the *Buck* era in the early twentieth century. Thus, litigation challenging surgical requirement laws presents an opportunity for the Court to definitively overturn *Buck*.

ABOUT THE AUTHOR

J.D., 2020, UCLA School of Law; B.A., Brandeis University. I thank Julie Cantor for her helpful comments and feedback, and I am grateful to the editors and staff of the *UCLA Women's Law Journal* for their excellent editing assistance. All errors are mine alone.

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INTRODUCTION

The Model State Vital Statistics Act (MSVSA) provides a blueprint to guide states in maintaining birth and death records.¹ In 1977, the MSVSA proposed that to change the gender listed on one's birth certificate, a person must prove that their sex "has been changed by surgical procedure."² Many states adopted a version of the MSVSA's proposed language.³ As a result, fourteen states and one territory currently require sex-reassignment surgery to change the gender on a government-issued birth certificate.⁴ The MSVSA was considered progressive in 1977,⁵ and remains so when compared to states that completely bar changing the gender listed on one's birth certificate.⁶ Yet mandating sex-reassignment surgery constitutes compulsory sterilization.⁷ Thus, surgical requirement laws

1. For a discussion of the Model State Vital Statistics Act (MSVSA), see *infra* text accompanying notes 53–54.

2. NAT'L CTR. FOR HEALTH STAT., MODEL STATE VITAL STATISTICS ACT § 21(e) (1977).

3. See Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 400 (2013) (noting that in 2013, thirteen jurisdictions used the verbatim language of the MSVSA and ten jurisdictions had a surgical requirement law with different language than the MSVSA). Today, at least fourteen states and one territory have surgical requirement statutes. See *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT (Oct. 25, 2019), https://www.lgbtmap.org/equality-maps/identity_document_laws [<https://perma.cc/T3NG-DTE2>]. Although the relevant state statutes were adopted at different times, many were passed shortly after the MSVSA. See, e.g., VA. CODE ANN. § 32.1-269(E) (1979); LA. STAT. ANN. § 40:62(A) (1979); N.C. GEN. STAT. § 130A-118(b) (1983). Others were passed years later. See, e.g., KY. REV. STAT. ANN. § 213.121(5) (West 1990); NEB. REV. STAT. § 71-604.01 (1994). For discussion about the *administrative* rationale of the MSVSA and lack of legislative history about the surgical requirement provision, see *infra* notes 52–54 and accompanying text.

4. MOVEMENT ADVANCEMENT PROJECT, *supra* note 3; Samantha Allen, *It's Not Just Japan. Many U.S. States Require Transgender People Get Sterilized*, DAILY BEAST (Mar. 22, 2019), <https://www.thedailybeast.com/its-not-just-japan-many-us-states-require-transgender-people-get-sterilized> [<https://perma.cc/KAW7-KBCS>]. See, e.g., NEB. REV. STAT. § 71-604.01 (1994) ("Upon receipt of a notarized affidavit from the physician that performed sex reassignment surgery on an individual born in this state and a certified copy of an order of a court of competent jurisdiction changing the name of such person, the department shall prepare a new certificate of birth. . . .").

5. Mottet, *supra* note 3, at 413.

6. MOVEMENT ADVANCEMENT PROJECT, *supra* note 3 (listing Ohio and Tennessee as the two states that do not allow changes to a person's sex on birth certificates).

7. See Chloë De Roo et al., *Fertility Options in Transgender People*, 28

violate the fundamental right of bodily autonomy to choose and refuse medical treatment because they are not narrowly tailored to a compelling state interest.

Surgical requirement laws advance government-sanctioned animus against transgender persons in three distinct ways. First, the laws seek to deny transgenderism. Second, they seek to punish or stigmatize perceived deviance. Third, the laws impose a view of heteronormative sexual ethics, which seeks to define what sexual conduct is tolerable in society. Although courts typically consider animus when analyzing equal protection claims, courts may also look to whether animus exists when analyzing fundamental rights in substantive due process claims.⁸

Challenging these state laws also presents an opportunity for the Supreme Court to definitively overrule *Buck v. Bell*,⁹ the landmark eight-to-one ruling that echoed eugenics reasoning and sanctioned compulsory sterilization.¹⁰ Historians studying compulsory sterilization often focus on eugenics and the movement's goal of controlling human reproduction.¹¹ Focusing only on eugenics, however, overlooks a second force driving the compulsory sterilization of LGBTQ individuals in the early twentieth century: the desire to control, punish, and stigmatize "sexually deviant" conduct, including same-sex relationships and intimacy.¹² This lesser-explored

INT'L J. PSYCHIATRY 112, 113 (2016) ("Penectomy and orchidectomy [gender reconstructive surgery] in transgender women leads to irreversible sterility."); *id.* ("Hysterectomy with bilateral oophorectomy [gender reconstructive surgery] leads to irreversible sterility [in transgender men.]); Philip J. Cheng et al., *Fertility Concerns of the Transgender Patient*, 8 TRANSLATIONAL ANDROLOGY & UROLOGY 209, 209 (2019) ("Gender-affirming surgery (GAS) that includes hysterectomy and oophorectomy in transmen or orchiectomy in transwomen results in permanent sterility."). Hormone therapy may also result in sterility. *Id.* at 210. Thus, any law requiring a specific form of medical treatment—even if not surgical—may result in sterilization.

8. See discussion *infra* at Subpart III.B.2.

9. *Buck v. Bell*, 247 U.S. 200 (1927).

10. *Id.* at 207 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."). Justice Butler dissented but did not write an opinion.

11. See PHILIP R. REILLY, *THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES* 2 (1991), ("Between 1907 and 1960 more than sixty thousand [persons with intellectual disabilities] and mentally ill persons were sterilized without their consent, all victims of programs designed to cut off the flow of allegedly defective genes into the nation's gene pool.").

12. See WENDY KLINE, *BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM* 34 (2001), ("Strategies most effective in regulating female sexual and moral behavior—in particular, sterilization—gained legitimacy . . . and discharges [from institutions] were

history remains relevant because the Court has yet to directly overrule *Buck*. And as explored in this Article, *Buck*'s effects and rationale—animus against a vulnerable community—still linger today in the form of surgical requirement laws, which involuntarily sterilize transgender individuals. These laws, like those at issue in the *Buck* era, use sterilization to stigmatize perceived “sexually deviant” conduct. Thus, challenges to surgical requirement laws present an opportunity to overrule *Buck* and remedy the painful, lingering history of sterilization targeting LGBTQ individuals.

This Article proceeds in three Parts. In Part I, I detail the stigmatic and punitive motives for compulsory sterilization of LGBTQ individuals during the early twentieth century. I also provide an overview of modern state laws that require proof of sex-reassignment surgery to change a person's gender on their birth certificate. Part II explains the legislative motives and public attitudes supporting these laws, along with the rationales articulated in the case law. I group these motives, attitudes, and rationales into three categories: (1) denying transgenderism; (2) punishing perceived deviance; and (3) regulating sexual conduct or ethics. In Part III, I explain why advocates should challenge, and courts should strike down, these laws as a form of unconstitutional compulsory sterilization motivated by the three forms of animus described above.

This Article differs from other scholarship on surgical requirement laws in three ways.¹³ First, I focus on the link between

touted as scientific evidence of the efficacy of eugenics in negotiating a new, reproductive morality.”). For examples of primary sources documenting the link between sexual deviance and sterilization, see Everett Flood, *Notes on the Castration of Idiot Children*, 10 AM. J. PSYCHOL. 296, 297 (1899) (“Castration in cases of sexual perversion and for habitual criminals has been revived. . . .”); *Sterilizing at Girls' School Raises a Stir*, ASSOC. PRESS, Oct. 23, 1937 (“Sterilization [of sexual perverts] was done as a punishment, rather than for any special good for society.”), quoted in Jonathan Ostrowsky, *Evolving Public Attitudes: The Rise and Fall of Compulsory Sterilization of the Intellectually Disabled in the United States* 45 n.140 (May 2013) (unpublished B.A. thesis, Brandeis University) (on file with Brandeis University Library), <http://bir.brandeis.edu/bitstream/handle/10192/25070/OstrowskyThesis2013.pdf?sequence=1&isid=low=y> [<https://perma.cc/3SRS-7Q5K>].

13. A. J. Lowik, for example, argues that the “sterilization/surgical requirements are examples of a eugenic strategy deployed against trans people, justified by the eugenically-motivated argument that it would not be in the best interest of children to have a trans parent.” A. J. Lowik, *Reproducing Eugenics, Reproducing While Trans: The State Sterilization of Trans People*, 14 J. GLBT FAM. STUD. 425, 426 (2018). Others have written about the “sexual function” rationale for surgical requirement laws. See Harper Jean Tobin, *Against the Surgical Requirement for Chance of Legal Sex*, 38 CASE W. RES. J. INT'L L. 393, 417 (2007). Many others have written about the potential substantive due process challenges to surgical requirement laws, including challenges under a similar

compulsory sterilization in the twentieth century and coercive sterilization today. I also examine the topic through the lens of punishing LGBTQ individuals and regulating sexual conduct, rather than through a lens focused on eugenics and controlling reproduction.¹⁴ Second, I examine why states have maintained and defended surgical requirement laws, highlighting public comments, statements from legislators, and judicial reasoning.¹⁵ Third, I analyze why the Court should overturn *Buck v. Bell* in the process of invalidating compulsory sterilization of transgender individuals. Such sterilization laws violate the substantive due process right of bodily autonomy to choose and refuse medical treatment because of their historic and modern animus.¹⁶

I. AN OVERVIEW OF EUGENICS AND BIRTH CERTIFICATES: TWENTIETH AND TWENTY-FIRST CENTURY STERILIZATIONS OF LGBTQ INDIVIDUALS

Between 1907 and 1960, U.S. states sterilized more than 60,000 individuals without their consent.¹⁷ A well-documented history frames compulsory sterilization as driven by the eugenics movement, which advocated preventing or limiting the reproduction of certain groups of people.¹⁸ The movement aimed to redesign the human race by rooting out hereditary defects and breeding supposedly superior traits.¹⁹ As Justice Oliver Wendell Holmes wrote for

bucket of fundamental rights: *See, e.g., Id.* at 427 (analyzing surgical requirement laws as violation of right to bodily integrity); Kyle C. Velte, *Mitigating the LGBT Disconnect: Title IX's Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 AM. U. J. GENDER SOC. POL'Y & L. 193, 236–39 (2019).

14. *See* Lowik, *supra* note 13, at 426.

15. Related to, but separate from Tobin, *supra* note 13, I rely on public comments and analyze other sources revealing a broader, and distinct, “sexual ethics” motive. *See infra* notes 124–26 and accompanying text.

16. Although Velte’s constitutional law analysis is similar to mine and, like others, cites the same string of substantive due process cases as mine, *see infra* Subpart III.B, my analysis differs by: (1) providing new explanations and evidence about the underlying *rationales* of such laws, which factor in at the narrow tailoring stage; and (2) contextualizing the issue of birth certificate sex changes within the broader history of American compulsory sterilization and the significance of *Buck v. Bell*.

17. REILLY, *supra* note 11, at 2.

18. *See id.* at 1 (“As the perception that such persons [degenerates] constituted a social menace spread, efforts to control and limit their reproduction emerged. The campaign received its ultimate expression in involuntary sterilization.”).

19. *See* FRANCIS GALTON, INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT 1 (1883) (“My general object has been to take note of the varied

the Court in *Buck* in 1927,²⁰ “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”²¹

Compulsory sterilization sought to do more than sterilize, and prevent the reproduction of, people with disabilities. The sterilization movement also targeted and forcibly sterilized LGBTQ persons. A century ago, American society considered LGBTQ individuals and others “sexual deviants.” From the earliest days of the sterilization movement, doctors, legislators, and scientists sterilized young men and women to condemn and control various forms of “sexually deviant” conduct, including same-sex intimacy,²² masturbation,²³ and promiscuity.²⁴ Even the often-cited term “feeble-minded” regularly referred to sexually promiscuous behavior.²⁵ The laws that targeted LGBTQ individuals and “sexual deviants” sought to advance two goals, each distinct from the hereditary rationale of the eugenics movement. First, the laws sought to deny,

hereditary faculties of different men, and of the great differences in different families and races, to learn how far history may have shown the practicability of supplanting inefficient human stock by better strains. . . .”)

20. *Buck v. Bell*, 274 U.S. 200 (1927).

21. *Id.* at 207.

22. See PETER BOAG, *SAME-SEX AFFAIRS: CONSTRUCTING AND CONTROLLING HOMOSEXUALITY IN THE PACIFIC NORTHWEST* 206–16 (2003) (describing the *punitive* and *stigmatic* purpose of sterilization laws targeting gay men); MARK A. LARGENT, *BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES* 20–21 (2008); Ostrowsky, *supra* note 12, at 12.

23. See LARGENT, *supra* note 22, at 20–21.

24. See KLINE, *BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM*, *supra* note 12, at 32–33 (describing sterilization as a strategy to impose standards of sexual morality); Mike Anton, *California Confronts Its Eugenics History*, CHI. TRIB. (July 17, 2003), <https://www.chicagotribune.com/news/ct-xpm-2003-07-17-0307170342-story.html> [<https://perma.cc/XTH8-4TAW>] (describing how girls as young as eleven sent to a state institution because of their promiscuity could not leave until they were sterilized).

25. See ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* 16 (2016) (“In the case of young women, [feeble-minded] often meant exhibiting what was regarded as an excessive or inappropriate interest in sex.”); *infra* note 166 (discussing *Buck* as a case about perceived sexual deviance). Comstock laws also revealed states’ desire to regulate sexual conduct and ethics—what one scholar called “a media sensation . . . targeting feminists in a culture war over obscenity and birth control.” Annalee Newitz, *The 19th-Century Troll Who Hated Dirty Postcards and Sex Toys*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/opinion/sunday/mens-rights-activists-comstock.html> [<https://perma.cc/79SG-F927>].

punish, and stigmatize LGBTQ individuals,²⁶ thereby defining who could and could not legitimately belong in American society. Second, the laws permitting sterilization sought to deter, incentivize, and control sexual conduct. The laws aimed to impose a vision of sexual ethics on American society—about what sexual relations should and should not be—separate from a concern about the hereditability of sexual deviance.²⁷

Today, a transgender person who wants to change the gender on their birth certificate will confront a patchwork of state laws with different requirements.²⁸ At least fourteen states and one territory currently require sex-reassignment surgery.²⁹ The majority

26. See Hugh Ryan, *How Eugenics Gave Rise to Modern Homophobia*, WASH. POST (May 28, 2019), <https://www.washingtonpost.com/outlook/2019/05/28/how-eugenics-gave-rise-modern-homophobia> [https://perma.cc/Y8ER-8T4S] (describing eugenicists who “taught people that homosexuality existed and that they should despise it”).

27. Wendy Kline, *A New Deal for the Child: Ann Cooper Hewitt and Sterilization in the 1930s*, in POPULAR EUGENICS: NATIONAL EFFICIENCY AND AMERICAN MASS CULTURE IN THE 1930S 36 (Susan Currell & Christina Cogdell eds., 2006) (“Sterilization advocates were no longer required to provide proof of hereditary deficiency; questionable sexual behavior was justification enough for sterilization. The determining question was no longer, will she spread her genetic defect to children? . . . This change paved the way for widespread use of sterilization as a way to regulate motherhood.”). Although Kline refers to “regulat[ing] motherhood,” she does so in a stigmatic, not eugenic, sense. Here, the state focused on condemning certain sexual behaviors. *But see* Ryan, *supra* note 26 (quoting eugenicist R. W. Shufeldt, that the United States would “continue to breed millions of sexual perverts and invert—psychopathic types—just so long as any ignorant priest, justice of the peace or other party, is permitted to give people permission to breed them”).

28. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 3. The federal government, however, allows changes to the gender on a person’s passport and Social Security ID without surgery. See U.S. DEP’T OF STATE, CHANGE OF SEX MARKER (last visited Nov. 3, 2019), <https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html> [https://perma.cc/ARJ4-Q8VJ] (requiring only “appropriate clinical treatment” or being “in the process of transition,” as determined by a physician, and not requiring surgery, to change gender); SOCIAL SECURITY ADMINISTRATION, HOW DO I CHANGE MY GENDER ON SOCIAL SECURITY’S RECORDS? (last updated Jan. 30, 2019), <https://faq.ssa.gov/en-us/Topic/article/KA-01453> [https://perma.cc/FC7G-U5A4] (same).

29. MOVEMENT ADVANCEMENT PROJECT, *supra* note 3. These states are Maine, New Hampshire, Virginia, North Carolina, Georgia, Alabama, Arizona, Louisiana, Arkansas, Kentucky, Missouri, Iowa, Wisconsin, Nebraska, North Dakota, and Michigan. Guam and the Northern Mariana Islands also require surgery. *Id.* Although the Iowa statute on its face does not appear to require sex-reassignment surgery, see IOWA CODE § 144.23 (2020) (requiring notice that “by reason of surgery or other treatment by the licensee, the sex designation of the person has been changed”), reporting from 2003 indicates that it does. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 768 n.187 (2007);

of surgeries result in sterilization.³⁰ Although some transgender individuals seek sex-reassignment surgery, others may decline it because of age,³¹ cost or lack of insurance coverage,³² attendant health risks, availability of other treatments, or general disinterest.³³

The ability to amend one's birth certificate matters for several reasons.³⁴ First, the birth certificate provides the means for obtaining

Mottet, *supra* note 3, at 400 n.109. For examples of clear surgical requirement provisions, see NEB. REV. STAT. § 71-604.01 (1994) ("Upon receipt of a notarized affidavit from the physician that performed sex reassignment surgery on an individual born in this state and a certified copy of an order of a court of competent jurisdiction changing the name of such person, the department shall prepare a new certificate of birth. . . ."); N.C. GEN. STAT. § 130A-118(b) (1983) ("A new certificate of birth shall be made by the State Registrar when: . . . [a] written request from an individual is received by the State Registrar to change the sex on that individual's birth record because of sex reassignment surgery. . . ."); MICH. COMP. LAWS § 333.2831 (1996) ("The request shall be accompanied by an affidavit of a physician certifying that sex-reassignment surgery has been performed.").

30. See De Roo et al., *supra* note 7; Cheng et al., *supra* note 7.

31. See Anemona Hartocollis, *The New Girl in School: Transgender Surgery at 18*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/17/nyregion/transgender-minors-gender-reassignment-surgery.html> [https://perma.cc/S76R-49M4] ("No law prohibits minors from receiving sex-change hormones or even surgery, but insurers, both private and public, have generally refused to extend coverage for these procedures to those under 18.").

32. See Emanuella Grinberg, *To Be Herself, She Needs to Change Her Body. But First, Comes the Battle With Insurers*, CNN (May 31, 2018), <https://www.cnn.com/2018/05/31/health/transgender-surgery-insurance/index.html> [https://perma.cc/6W88-RTBJ]. In May 2019, the Trump Administration proposed a regulation that would reverse the Obama Administration's rule defining discrimination "on the basis of sex" as including gender identity. Under the new proposed rule, "health care workers would be free to object to performing procedures like gender reassignment surgery, and insurers would not be bound to cover all services for transgender customers." Abby Goodnough, *Trump Administration Proposes Rollback of Transgender Protections*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/us/politics/donald-trump-transgender-protections.html> [https://perma.cc/UFH8-TTMD].

33. German Lopez, *Myth #5: All Trans People Medically Transition*, VOX (Nov. 14, 2018), <https://www.vox.com/identities/2016/5/13/17938114/transgender-people-transitioning-surgery-medical> [https://perma.cc/9NK8-FH-DW] ("While some undergo medical transitions for cosmetic, psychological, or health reasons, many won't because they can't afford it, face some other obstacle, or simply don't want to.").

34. Although public attention has focused on changes to birth certificates, advocates are also confronting barriers with noting a person's gender identity on their death certificate. *E.g.*, Samantha Allen, *This Arizona Bill Ensures the Correct Gender is Listed on Transgender Death Certificates*, DAILY BEAST (Feb. 4, 2019), <https://www.thedailybeast.com/this-arizona-bill-ensures-the-correct-gender-is-listed-on-transgender-death-certificates> [https://perma.cc/2TRZ-LEVS].

or changing a range of other government documents.³⁵ Opponents of transgender rights recognize the birth certificate's significance as a foundational document. Indeed, some states—including North Carolina and Michigan—still require surgery to change birth certificates,³⁶ despite allowing changes to driver's licenses and other IDs.³⁷ In these states, the birth certificate is what allows individuals to vindicate other rights.³⁸ For example, the recent battle over access to bathrooms in North Carolina stemmed from a requirement that people use the bathroom consistent with the gender on their birth certificates.³⁹ Second, transgender persons face elevated rates of discrimination and hate crimes, and an inaccurate birth certificate can “out” them as transgender, putting their lives or livelihoods at risk.⁴⁰ This also makes American communities less safe.

35. See OFFICE OF INSPECTOR GENERAL, DEP'T OF HEALTH & HUM. SERVS., BIRTH CERTIFICATE FRAUD i (1988), <https://oig.hhs.gov/oei/reports/oei-07-99-00570.pdf> [<https://perma.cc/K8T9-HHU6>] (“While originally intended for the sole purpose of birth registration, birth certificates are now used extensively for employment purposes and to obtain benefits or other documents used for identification.”).

36. N.C. GEN. STAT. § 130A-118(b) (1983); MICH. COMP. LAWS § 333.2831 (1997).

37. See Brad Devereaux, *Transgender People Can Now Change Gender Marker on Michigan ID Without Surgery*, MICHIGAN LIVE (Mar. 18, 2016), https://www.mlive.com/news/2016/03/transgender_people_can_now_cha.html [<https://perma.cc/D7MW-6XG9>] (explaining that gender on a passport—which does not require surgery to change—can be used to change the gender on a driver's license) (last updated Jan. 19, 2019). See also N.C. DIV. OF MOTOR VEHICLES, SEX DESIGNATION FORM (2019), <https://www.ncdot.gov/dmv/downloads/Documents/DL-300.pdf> [<https://perma.cc/XEK4-3F9A>] (providing a signed statement that the “sex designation . . . accurately reflects my gender identity and is not for any fraudulent or other unlawful purpose” is sufficient grounds to change sex on birth certificate).

38. See Jenna Johnson, Comment, *Minnesota (Trans)Gender Markers: State Statutes and Policies on Amending Identity Documents*, 41 WM. MITCHELL L. REV. 213, 217 (2015) (“[A] birth certificate operates as one form of ‘breeder’ document, an ID from which other identity documents are created.”).

39. See Dan Levin, *North Carolina Reaches Settlement on ‘Bathroom Bill’*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/us/north-carolina-transgender-bathrooms.html> [<https://perma.cc/7EWS-25DZ>] (describing how North Carolina's House Bill 2 “required transgender people in government and public buildings to use the bathroom that corresponds with the gender on their birth certificate.”).

40. See *Foster v. Andersen*, No. 18-2552-DDC-KGG, 2019 WL 329548, at *2 (D. Kan. Jan. 25, 2019) (citing recent cases and finding plaintiff's fears “that disclosing his transgender status will subject him to discrimination, harassment, and violence . . . are justified.”). As Nyla Foster, a transgender woman living in Kansas, explained, “It's a piece of documentation that subjects me to discrimination. It outs me by having to present a document that I can't change.” Chris McGreal, *For Trans People, The Birth Certificate Battle Is a Fight Against*

Third, the inability to change a government document and define one's identity is stigmatizing; it sends a message that transgender individuals cannot, and ought not, change their sex or gender.

A handful of cases in the twentieth and early twenty-first centuries have addressed gender changes on birth certificates, including cases in which transgender persons underwent surgery.⁴¹ Some courts held that, absent statutory guidance, they lacked the jurisdiction or authority to permit a gender change.⁴² None of the early cases, however, invalidated surgical requirement laws themselves.

Recent successful litigation brought by the American Civil Liberties Union (ACLU), among others, in Kansas,⁴³ Puerto Rico,⁴⁴

Discrimination, THE GUARDIAN (July 26, 2019, 2:00 AM) <https://www.theguardian.com/society/2019/jul/26/for-trans-people-the-birth-certificate-battle-is-a-fight-against-discrimination> [<https://perma.cc/CAE2-YD3R>]. Transgender individuals, particularly women of color, continue to suffer violence at alarming rates. See Alanna Vagianos, *At Least 22 Transgender People Were Killed in 2019. Here Are Their Stories.*, HUFFINGTON POST (Nov. 20, 2019, 8:15 AM), https://www.huffpost.com/entry/at-least-22-transgender-people-were-killed-in-2019-here-are-their-stories_n_5dd40648e4b03b969717f3d7 [<https://perma.cc/UNQ6-RKWN>]. The American Medical Association called the violence against transgender people in the United States an “epidemic.” Rick Rojas & Vanessa Swales, *18 Transgender Killings This Year Raise Fears of an ‘Epidemic’*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/transgender-women-deaths.html> [<https://perma.cc/DJ9Q-VKY4>] (last updated Sept. 30, 2019).

41. See, e.g., *In re Heilig*, 816 A.2d 68 (Md. 2003) (holding that court had jurisdiction to determine whether a transgender woman's gender was female for purposes of changing birth certificate, but plaintiff had burden of providing sufficient medical evidence); *In re* Petition for Change of Birth Certificate, 22 N.E.3d 707 (Ind. Ct. App. 2014) (holding that transgender man—who, in addition to presenting other evidence, had undergone sex-reassignment surgery—made adequate showing to amend gender on his birth certificate); *In re* Anonymous, 293 N.Y.S.2d 834 (Civ. Ct. 1968) (holding that city must allow gender change on birth certificate for transgender woman who had male organs surgically removed).

42. See, e.g., *K. v. Health Div., Dep't Human Res.*, 560 P.2d 1070 (Or. 1977) (holding that plaintiff who had sex reassignment surgery could not change gender on Oregon birth certificate unless legislature passed new statute); *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966) (denying request for an order to change plaintiff's birth certificate from male to female despite fact that she underwent surgery).

43. See, e.g., Dion Lefler & Jonathan Shorman, *Kansas to Allow Transgender People to Change Their Gender on Birth Certificates*, WICHITA EAGLE (June 24, 2019, 2:17 PM), <https://www.kansas.com/news/politics-government/article231903843.html> [<https://perma.cc/JW2L-DWCS>]. See also Consent Judgment at 3, *Foster v. Andersen*, No. 18-02552-DDC-KGG (D. Kan. June 21, 2019), ECF No. 33 (declaring that Kansas must “provide certified copies of birth certificates to transgender individuals that *accurately* reflect their sex, consistent with their *gender identity*”) (emphasis added).

44. *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R.

and Idaho⁴⁵ has focused not on the sex-reassignment surgery provisions specifically, but on states that prohibit *any* changes to the gender on a person's birth certificate. Cases in Ohio⁴⁶ and Tennessee⁴⁷ are still pending, and Idaho passed a new law in March 2020, thus inviting a second lawsuit.⁴⁸ Deciding courts have generally focused on applying equal protection and substantive due process doctrines to the lack of any process to change a birth certificate. The resulting remedies have not required sex-reassignment surgery to change a birth certificate. In Michigan, the ACLU brought a lawsuit challenging a surgical requirement in order to change one's gender on driver's licenses, but not birth certificates.⁴⁹ Prior to a settlement which rendered the case moot,⁵⁰ the district court applied

2018) (holding that forcing transgender individuals to have identifying gender change marks on birth certificates violated their constitutional rights to "decisional privacy and informational privacy").

45. See *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018). See, e.g., Julie Moreau, *Idaho Must Allow Transgender People to Change Birth Certificate Sex*, *Court Rules*, NBC NEWS (Mar. 8, 2018, 7:36 AM), <https://www.nbcnews.com/feature/nbc-out/idaho-must-allow-transgender-people-change-sex-birth-certificate-court-n854811> [<https://perma.cc/C8JV-BDGX>]. Despite the court victory in 2018, Idaho enacted a new law in March 2020 that prohibits changing the gender on one's birth certificate. Associated Press, *Idaho's Transgender Birth Certificate Ban Goes Back to Court*, NBC NEWS (Apr. 17, 2020, 7:16 AM), <https://www.nbcnews.com/feature/nbc-out/idaho-s-transgender-birth-certificate-ban-goes-back-court-n1186141> [<https://perma.cc/59NG-CNHD>]. In August 2020, a federal court ruled that the new law violated the 2018 order. Associated Press, *Anti-transgender Birth Certificate Law Violates Order, Judge Rules*, NBC NEWS (Aug. 11, 2020, 9:39 AM), <https://www.nbcnews.com/feature/nbc-out/anti-transgender-birth-certificate-law-violates-order-judge-rules-n1236369> [<https://perma.cc/K7DY-KDHX>].

46. Opinion and Order, *Ray v. Himes*, No. 2:18-CV-00272-MHW-CMV (S.D. Ohio Sept. 12, 2019), ECF No. 47 (denying motion to dismiss lawsuit against Ohio for lack of procedure to change gender on birth certificate).

47. Complaint, *Gore v. Lee*, No. 3:19-CV-00328 (M.D. Tenn. Apr. 23, 2019), ECF No. 1.

48. See *Idaho's Transgender Birth Certificate Ban Goes Back to Court*, *supra* note 45.

49. See Order and Opinion Granting Defendant's Converted Motion for Summary Judgment, *Love v. Johnson*, No. 15-11834 (E.D. Mich. Aug. 23, 2016). See also Devereaux, *supra* note 37. Legislation has been filed to remove the surgical requirement for changes to birth certificates. See H.B. 4720, 100th Leg., Reg. Sess. (Mich. 2019).

50. Order and Opinion Granting Defendant's Converted Motion for Summary Judgment, *Love v. Johnson*, No. 15-11834 (E.D. Mich. Aug. 23, 2016); see Kristen Jordan Shamus & Tresa Baldas, *New Michigan Rules Allow Transgender People To Easily Change Gender on Driver's License*, DETROIT FREE PRESS (Nov. 18, 2019), <https://www.freep.com/story/news/local/michigan/2019/11/18/transgender-drivers-license-michigan-gender-identity/4203325002> [<https://perma.cc/D6R4-G325>] ("[P]eople who would like to correct the sex designation

a substantive due process analysis and denied the state's initial motion to dismiss.⁵¹

New litigation will challenge surgical requirement laws directly. Understanding the legislative, public, and judicial motives and rationales upholding these laws will help advocates succeed in overturning them. Part II explores this reasoning.

II. THE REASONS FOR REQUIRING SEX-REASSIGNMENT SURGERY

The original rationale for enacting surgical requirement laws differs markedly from today's rationale of refusing to amend them. Beginning in 1977, many states adopted the sample language in the MSVSA, which suggested that changing the sex on one's birth certificate should require a court order "indicating [that] the sex of an individual . . . ha[d] been changed by surgical procedure."⁵² Mundane rationales of administrative convenience and uniformity supported the language in the MSVSA.⁵³ At the time, the MSVSA provision reflected a progressive idea—that transgender persons could change the gender on their birth certificate at all.⁵⁴

on their driver's license or ID card . . . will no longer need to provide a birth certificate, passport or court order, as was required under the old policy.”)

51. *Love v. Johnson*, 146 F. Supp. 3d 848, 857 (E.D. Mich. 2015).

52. See NAT'L CTR. FOR HEALTH STAT., *supra* note 2.

53. See CTRS. FOR DISEASE CONTROL & PREVENTION, MODEL STATE VITAL STATISTICS ACT AND REGULATIONS (1992) (“The Model Act and Regulations serve to promote uniformity among States in definitions, registration practices, disclosure and issuance procedures, and in many other functions that comprise a State system of vital statistics.”); *In re Heilig*, 816 A.2d 68, 82 (Md. 2003) (“[N] either the Department of Health and Human Services (HHS)—the successor agency to HEW—nor the Library of Congress appear to have any records relating to the development of § 21(e) of the Model Act”); *Id.* (describing how Maryland law requiring surgery to change gender on birth certificate “was enacted in 1995 as part of a more comprehensive revision of the laws relating to vital records. . . .” and “derives, almost verbatim, from § 21(e) of a Model State Vital Statistics Act”); *The Importance of Vital Records and Statistics for the Obstetrician-Gynecologist*, 132 ACOG COMMITTEE OPINION NO. 148 (American College of Obstetricians and Gynecologists, Washington, D.C.), Aug. 2018 at 79, <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/08/the-importance-of-vital-records-and-statistics-for-the-obstetrician%E2%80%93gynecologist> [<https://perma.cc/MF9C-HNFB>] (“The vital records system faces many challenges, including its decentralized nature, a lack of standardization of terms and procedures, and slow transitions to electronic systems.”).

54. See Mottet, *supra* note 3, at 376, 380 (describing the MSVSA's incorporation of a procedure for changing the sex on a birth certificate as a “forward-thinking model” and “quite remarkable,” given the era).

Below, I explore the explicit and implicit reasons legislators, private citizens, and judges have used to defend the continued existence of surgical requirement laws. Other than the value of uniform recordkeeping and administrative convenience, there is scarce legislative history illuminating why states adopted the MSVSA's proposed language. Thus, to understand the motives and rationales supporting surgical requirement laws, I evaluate how supporters defend these statutes today. I also look at public opinion because constituent views may motivate and inform legislative decision-making,⁵⁵ and because public opinion can reflect societal prejudice that informs a constitutional analysis.⁵⁶

First, the defenses offered suggest that the legislators want to preserve surgical requirement laws in order to deny the existence of transgenderism. Second, when that goal fails, they recognize but aim to punish or shame transgenderism. Third, legislators permit the transition, but only if it conforms—or at least retains the potential to conform, through the appearance and function of physical body parts—to heteronormative sexual behavior. These three underlying rationales also appear in twentieth-century court opinions.⁵⁷ I first examine legislative motives and public opinion before discussing legal opinions.

55. Of course, public opinion is not equivalent to legislative motives. But particularly for legislation passed with animus—when explicit discrimination may not be apparent—public opinion can be informative of legislative decisionmaking. See, e.g., James M. Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 891 n.19 (1930) (“[T]he then state of public opinion can furnish . . . the direction of legislative purpose.”); *Lapina v. Williams*, 232 U.S. 78, 89 (1914) (immigration bill enacted because it was “demanded by the consensus of enlightened public opinion” (internal quotation and citation omitted)); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1012 (D.C. Cir. 1977) (explaining that when “legislative history sheds little light on th[e] question,” a “statutory purpose” can be inferred in part from public opinion). Courts can also look to public opinion in attempting to discern, or rule out, legislative motives. See, e.g., *United States v. Moore*, 486 F.2d 1139, 1186 (D.C. Cir. 1973) (“[P]ublic opinion does not allow us to foreclose recourse to the criminal process as part of the overall approach of government to this tangled problem.”); *W. Indian Co. v. Gov't of Virgin Islands*, 844 F.2d 1007, 1022 (3d. Cir. 1988) (finding that with “no legitimate public purpose” behind the law, “[t]he only circumstance that has arguably changed since 1982 is the force of public opinion”).

56. See *infra* notes 184–85, 211–16 and accompanying text.

57. Unlike the legislative motives and public opinion, such judicial rationales do not directly inform the outcome of the modern constitutional analysis examined in Part III. But understanding the earlier judicial rationales provides helpful context for advocates and courts analyzing these laws today and looking at the importance (or relevance) of what courts in other jurisdictions have done. Moreover, seeing judges use the same rationales as legislators and private citizens to defend surgical requirement laws bolsters the case that these

A. *Legislative Motives and Public Opinion*

Surgical requirement laws require *de facto* sterilization. In other words, the text of the laws does not require sterilization, but the procedures required typically result in sterilization.⁵⁸ The purpose of these surgical requirement provisions, however, extends far beyond eugenics. At their core, the surgical requirement laws advance one or more of the following motives: (1) to deny transgenderism exists; (2) to recognize transgenderism, but stigmatize, punish, and ostracize transgender persons; and (3) to promote heteronormative sexual conduct and ethics: notions of what people in power believe sex should, and should not, look like. These motives are strikingly similar to those animating compulsory sterilization of LGBTQ persons in the twentieth century: a desire to deny their mere existence; to recognize, but punish; and to advance heteronormative sexual conduct or “sexual ethics.”⁵⁹

1. Transgenderism Denial

Legislative thinking in Colorado illustrates the transgenderism denial motive. Colorado removed its surgical requirement law in 2019,⁶⁰ after a legal challenge.⁶¹ Years of fierce legislative opposition to the change⁶² reflects a desire to deny the existence of

rationales were, and are still, prevalent.

58. See Lowik, *supra* note 13, at 425–426.

59. See *infra* text accompanying note 92.

60. COLO. REV. STAT. § 25-2-113.8 (2019) (removing surgical requirement to change gender on birth certificate and permitting minor children to show proof of “other treatment appropriate . . . for the purpose of gender transition”). The old law required “an order of a court of competent jurisdiction indicating that the sex of an individual . . . has been changed by surgical procedure.” COLO. REV. STAT. § 25-2-115(4) (2018). In addition to the surgical procedure requirement, transgender individuals also criticized the process of having to appear before a judge to obtain a court order. See Jennifer Brown, *The Legislature Denied Them Four Times, So Transgender People Found Another Way to Rewrite Colorado Law on Birth Certificates*, COLORADO SUN (Dec. 14, 2018), <https://coloradosun.com/2018/12/14/birth-certificate-rules-transgender-coloradans> [<https://perma.cc/42G6-FQCT>] (“I will never put my child in a position where he has to walk into a courtroom and stand in front of a judge and explain himself.”); see also Spade, *supra* note 29, at 734 (“Because of the long history linking transgender identity with medical authority and popular cultural beliefs that changing gender involves surgical procedures, some may assume that achieving gender reclassification requires presenting medical evidence to an appropriate administrative or judicial decisionmaker.”).

61. Complaint, *B.D. v. State of Colorado, et. al.* (Denver County, Colo. 2018) (alleging that surgical requirement to change gender on birth certificate amounted to sterilization and violated minor’s constitutional rights).

62. See Brown, *supra* note 60 (describing how proposed legislation to eliminate surgical requirement was “killed in committee” for four consecutive

transgender persons.⁶³ Beginning in 2015, advocates for transgender rights lobbied the Colorado legislature to eliminate the surgical requirement provision.⁶⁴ Legislators opposing the reform often “questioned the legitimacy of changing a document created upon a person’s birth, comparing it to rewriting history”⁶⁵ and voiced concerns about fraud.⁶⁶ As State Senator Owen Hill explained, “I don’t see how it’s our task to change [the birth certificate] after the fact . . . [A] birth certificate reflects a past event.”⁶⁷ State Representative Gordon Klingenschmitt wanted to prevent the government from sanctioning the “confusion”⁶⁸ that transgender persons face: “I pray for the sake of the . . . confused people themselves that this never passes.”⁶⁹ Referring to gender as “a past event” and the “confusion” of transgender persons implies that transgenderism does not exist.

An effort to restrict who can change the sex on their birth certificate in Idaho also exemplified transgenderism denial. In April 2018, a federal district court ordered Idaho to permit gender changes on a person’s birth certificate.⁷⁰ In May 2019, the Idaho Depart-

years). Although Republican legislators opposed the legislation, executive branch state officials testified in support of it. *Id.*

63. *See supra* Part I.

64. *See* Brown, *supra* note 60.

65. Brown, *supra* note 60.

66. *See* Marianne Goodland, *Transgender Coloradans Hope Third Time’s the Charm for Change in Birth Certificate Law*, COLO. INDEP. (Mar. 3, 2017), <https://www.coloradoindependent.com/2017/03/03/transgender-birth-certificate-law> [<https://perma.cc/5NS9-UMUT>]; *see, e.g.,* *Hearing on H.B. 17-1122*, 71st Gen. Assemb., Reg Sess. (Colo. 2017) (statement of Stephanie C., Family Policy Alliance), http://coga.prod.acquia-sites.com/sites/default/files/html-attachments/h_jud_2017a_20170309t133343z1__hearing_summary/17HouseJud0309AttachD.pdf [<https://perma.cc/EZ3F-QWJW>] (“The proposed law would simply allow any individual to request a change without verifying their identity and this compromises the security of such an important breeder document.”).

67. Goodland, *supra* note 66.

68. J. Adrian Stanley, *Trans People Want to Change the Gender on Their Birth Certificates*, COLO. SPRINGS INDEP. (Mar. 30, 2016), <https://www.csindy.com/coloradosprings/trans-people-want-to-change-the-gender-on-their-birth-certificates/Content?oid=3701564> [<https://perma.cc/8KZR-9YXX>].

69. *Id.*

70. *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) (holding that Idaho violated the Equal Protection Clause by failing to provide an avenue for transgender people to amend the sex listed on their birth certificates). This order reflects the recent trend in transgender rights birth certificate litigation: rather than attacking states that allow for changing gender on a birth certificate only via surgical procedure, advocates are forcing states that previously did not allow for any changes to provide a process for changing one’s gender (and ensuring that process does not require proof of a surgical procedure).

ment of Health and Welfare issued a temporary rule⁷¹ that required those under the age of eighteen to get consent from medical personnel before changing the gender on their birth certificates.⁷² The public comments on the temporary rule illustrate societal attitudes for prohibiting gender changes for anyone, not just minors.⁷³ Public commenters sought to deny the legitimacy of a person's gender identity in the first instance and specifically conflate gender identity with sexual orientation. The repeated emphasis on a person's sexuality and the need to condemn their "confusion" demonstrates a societal attitude focused on disbelief and denial:

"I share concern for those who are suffering confusion regarding their sexual identity."⁷⁴

"They need to be counseled to reconcile their sexual identity with their biological sex."⁷⁵

"At the age of 18 many are still confused about sexual issues and this causes further confusion."⁷⁶

In March 2020, the Idaho governor signed a bill that bans any gender changes on Idaho birth certificates. Not surprisingly, legislators like Republican State Senator Lee Heider mentioned the same transgenderism denial rationale reflected in the public comments above: "Boys are boys and girls are girls. No doctor, no judge, no Department of Health and Welfare is going to change that reality."⁷⁷ These explanations illustrate the prevalence of transgenderism denial from both private citizens and public officials.

71. The temporary rule was vacated. *Idaho Board Axes Birth Certificate Gender Rule*, ASSOCIATED PRESS (Nov. 18, 2019), <https://idahobusinessreview.com/2019/11/18/idaho-board-axes-birth-certificate-gender-rule> [<https://perma.cc/V2TZ-KRER>].

72. See Keith Ridler, *Idaho Makes It Harder to Change Gender on Birth Certificates*, ASSOCIATED PRESS (Oct. 24, 2019), <https://apnews.com/dc535a4b-404c447c96b7328c54a08e72> [perma.cc/8448-LHF4].

73. See, e.g., Georgia Ryan, Comment on Rule Docket 16-0208-1901 (Sept. 19, 2019), https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/16.02.08_SeptemberComments.pdf [<https://perma.cc/F3DJ-FHUT>] ("As an Idaho citizen, I REQUEST THAT YOU DO NOT ALLOW THIS CHANGE to a person's birth certificate.").

74. Jesse Sumpter, Comment on Rule Docket 16-0208-1901 (Sept. 18, 2019), https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/16.02.08_SeptemberComments.pdf [<https://perma.cc/2MV8-XUNY>].

75. Kenneth Harris, Comment on Rule Docket 16-0208-1901 (Sept. 18, 2019), https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/16.02.08_SeptemberComments.pdf [<https://perma.cc/LP6H-SSHN>].

76. Corinne Miles, Comment on Rule Docket 16-0208-1901 (Sept. 21, 2019), https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/16.02.08_SeptemberComments.pdf [<https://perma.cc/G924-64MM>].

77. Katelyn Burns, *As the Coronavirus Pandemic Deepens, Idaho's*

2. Punishment, Stigmatization, and Ostracization

A second motive for preserving surgical requirement laws (or opposing birth certificate changes at all) aims to punish or stigmatize transgender individuals. This punitive motive reflects even stronger animus than transgenderism denial. While campaigning in 2017, U.S. Congressman and physician Mark Green said, “[i]f you poll the psychiatrists, they’re going to tell you that transgender[ism] is a disease.”⁷⁸

Several 2019 public comments in Idaho also revealed punitive and stigmatic animus:

“The gender God gave them is what needs to stay on the birth certificate, otherwise, why have them in the first place?”⁷⁹

“You are playing with fire when you make such changes to the laws on birth certificates. You will be opening a myriad of problems that even a plethora of additional laws won’t fix. Don’t make the *abnormal* and the exception the rule of the day.”⁸⁰

“The State does not have the right to lie nor does it have the right to endorse the *mental illness* manifested in this form of thinking.”⁸¹

These comments—describing transgender persons as “abnormal” and “mentally ill”—advance a stigmatic and punitive purpose. And labeling transgender individuals as “abnormal” echoes the “sexual deviant” classification employed in the twentieth-century sterilizations of LGBTQ individuals.⁸² As applied to LGBTQ per-

Governor Signs 2 Anti-trans Bills Into Law, Vox (Mar. 31, 2020), <https://www.vox.com/2020/3/18/21184941/idaho-coronavirus-anti-trans-bills-birth-certificate> [<https://perma.cc/FK43-FS7S>].

78. Helene Cooper & Maggie Haberman, *L.G.B.T. Advocates Criticize Nominee for Army Secretary*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/mark-green-army-secretary-nominee-lgbt-criticism.html> [<https://perma.cc/AV6F-UPTZ>].

79. Lynda Fioravanti, Comment on Rule Docket 16-0208-1901 (Sept. 8, 2019), https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/16.02.08_SeptemberComments.pdf [<https://perma.cc/U9LN-B5XC>].

80. Elaine King, Comment on Rule Docket 16-0208-1901 (Sept. 24, 2019), https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/16.02.08_SeptemberComments.pdf [<https://perma.cc/ZEK2-ZE65>] (emphasis added).

81. Paul D. Van Noy, Comment on Rule Docket 16-0208-1901 (Sept. 18, 2019), https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/16.02.08_SeptemberComments.pdf [<https://perma.cc/UZ2K-B7J5>] (emphasis added).

82. *Cf.* HOME OFFICE, REPORT OF THE INTERDEPARTMENTAL WORKING GROUP ON TRANSSEXUAL PEOPLE, REPORT, 2000, 46 (U.K.). (“[T]hose states in which there are sterility requirements . . . are generally those where, in the past, negative eugenics (the forced sterilization of unfit, asocial, groups of people) was accepted medical practice.”); *see also* Tobin, *supra* note 13, at 423 n.81

sons, the twentieth-century sterilizations focused on condemning and punishing “sexually deviant” conduct—not just eugenics.⁸³ As noted, the architects of American eugenics led efforts to castrate or sterilize those who engaged in masturbation, sexually promiscuous behavior, and same-sex intimacy.⁸⁴

3. Heteronormative Sexual Ethics

In Idaho, public opposition to changing the gender on one’s birth certificate exemplifies the heteronormative sexual conduct and ethics motive behind maintaining surgical requirement laws. As one resident explained, despite surgery or medical treatment, a transgender woman “will never have . . . a functional penis so she could never impregnate another woman.”⁸⁵ One resident argued for prohibiting a sex change designation absent an “an actual verifiable, unchanging, chromosomal anomaly affecting their sexuality.”⁸⁶ Another resident rattled off physical and mental health issues affecting “non-heterosexuals.”⁸⁷ Someone else described the ability to change a person’s sex on their birth certificate as “a platform of the sexual revolution and . . . gender manipulation.”⁸⁸

In Utah, an affirmative effort to prevent sex changes on birth certificates provides further evidence of the sexual ethics motive behind preserving the laws. In January 2019, a Republican state representative filed H.B. 153, which defines a male as “an individual with testes who is confirmed before or at birth to have external anatomical characteristics that appear to have the purpose of performing the natural reproductive function of providing and delivering sperm to a female recipient.”⁸⁹ The impact

(2007) (quoting Home Office Report).

83. See Kline, *A New Deal for the Child*, *supra* note 27, at 36.

84. See *supra* notes 22–23 and accompanying text.

85. Clayton Carter, Comment on Rule Docket 16-0208-1901 (Sept. 22, 2019), https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/16.02.08_SeptemberComments.pdf [<https://perma.cc/EM7Y-W7XP>].

86. Norma White, Comment on Rule Docket 16-0208-1901 at Lewiston, Idaho Public Hearing (Sept. 19, 2019), <https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/LewistonPublicHearing.pdf> [<https://perma.cc/4WVK-9HJT>].

87. Jim Schmelic, Comment on Rule Docket 16-0208-1901 at Coeur d’Alene, Idaho Public Hearing (Sept. 20, 2019),

<https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/CDA-PublicHearing.pdf> [<https://perma.cc/3W8A-4U3Q>].

88. Gene Lawley, Comment on Rule Docket 16-0208-1901 at Twin Falls, Idaho Public Hearing (Sept. 24, 2019), <https://healthandwelfare.idaho.gov/Portals/0/AboutUs/Newsroom/TwinFallsPublicHearing.pdf> [<https://perma.cc/53LN-FTF6>].

89. H.B. 153, 63rd Leg., (Utah 2019).

of this language extends beyond prohibiting nonprocreative sexual intercourse. Rather, the language indicates that the representative sought to prohibit any sexual conduct that does not fit within a perceived heteronormative framework.⁹⁰

Public opposition to the legislative reform in Colorado⁹¹ provides further support of animus rooted in heteronormative sexual ethics. One commenter objected to the “government’s and many private groups’ embrace of a new sexual ethic” and the need to reaffirm marriage as “the union of a man and a woman.”⁹² The connotation of “a new sexual ethic,” linked to opposition to same-sex marriage, embraces systemic and deeply rooted animus. First, the comment wrongly assumes that transgender persons have a certain sexual orientation.⁹³ Second, it takes an argument about identity, defined by gender or sex, and turns the debate into one about sexual activity.⁹⁴ Third, the “sexual ethic” argument creates a hierarchy between heteronormative sexual activity and LGBTQ sexual activity.⁹⁵ Fourth, maintaining the surgical requirement reinforces heteronormative stereotypes for those who do seek the change. It

90. Cf. Brief of Amici Curiae Scholars of History and Related Disciplines in Support of Respondents, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, and 14-574), 2015 WL 1384101, at *18 (“Infertile marriages between individuals of opposite sex also advance the institution’s central procreative purposes by strengthening the *social norm that sexual relationships between men and women*—which in general, though not every case, can produce offspring—should be channeled into marital unions.”) (emphasis added).

91. See *supra* notes 60–64.

92. Goodland, *supra* note 66.

93. See Stephanie Gazzola & Melanie Ann Morrison, *Cultural and Personally Endorsed Stereotypes of Transgender Men and Transgender Women: Notable Correspondence or Disjunction?*, 15 INT’L J. TRANSGENDERISM 76, 82 (“[T]he finding that transgender individuals are conceptualized as gay (transgender women) and lesbian (transgender men) reflects participants’ continued reliance on the gender identity assigned at birth in reference to transgender women’s and men’s sexual orientations.”); German Lopez, *Myth # 2: Sexual Orientation Is Linked to Gender Identity*, Vox (Nov. 14, 2018), <https://www.vox.com/identities/2016/5/13/17938096/transgender-people-sexual-orientation-gender-identity> [perma.cc/W35H-DK4F].

94. Cf. Catharine Crocker, *Ginsburg Explains Origins of Sex, Gender*, L.A. TIMES (Nov. 21, 1993), <https://www.latimes.com/archives/la-xpm-1993-11-21-mn-59217-story.html> [https://perma.cc/CKL2-37LK] (quoting Justice Ginsburg’s recollection that her secretary urged her to use “gender” instead of “sex” when litigating Supreme Court cases because “those nine men—they hear that word [sex], and their first association is not the way you want them to be thinking[.] Why don’t you use the word gender? . . . [I]t will ward off distracting associations”).

95. See Tobin, *supra* note 13, at 418 n.151 (describing the “conflation of authentic gender with heterosexuality” and the role of homophobia in perception of transgender individuals).

also creates a barrier for those who want to transition but choose not to have the surgery. The harm extends far beyond the administrative record of a birth certificate. It can lead to psychological harm, discrimination, and even physical violence, if outing a person for their transgender status.⁹⁶

This campaign to regulate perceived “sexual deviance” embodies the same antiquated rationales of twentieth-century sterilization.⁹⁷ The twentieth-century sterilizations of LGBTQ persons focused not only on eugenics;⁹⁸ they also sought to regulate a wide range of sexual acts that did not fall under the umbrella of socially acceptable, heteronormative behavior.⁹⁹ Twenty first-century sterilizations threaten to impose a similar type of sexual ethics and sexual regulation on American society.

B. *Judicial Rationales*

Next, I examine how courts analyze birth certificate amendment laws. Cases challenging the gender designation on birth certificates reach courts in a variety of contexts. Some states require that a person obtain a court order before changing the gender on their birth certificate. Other states lack legislation either permitting or denying a birth certificate sex change. Much of the common law precedent arose from cases determining a person’s gender before the legalization of same-sex marriage; plaintiffs turned to courts to certify their heterosexual marriage after one spouse transitioned.¹⁰⁰

Courts have adopted reasoning echoing legislative and public rationales used to defend surgical requirement laws. First, in many early cases, courts expressed skepticism about the validity of transgenderism itself, arguing that one cannot change his or

96. See *supra* notes 35–42 and accompanying text.

97. Cf. HOME OFFICE, REPORT OF THE INTERDEPARTMENTAL WORKING GROUP ON TRANSSEXUAL PEOPLE, *supra* note 82, at 48 (“[T]hose states in which there are sterility requirements . . . are generally those where, in the past, negative eugenics (the forced sterilization of unfit, asocial, groups of people) was accepted medical practice.”); see also Tobin, *supra* note 13, at 423 n.81 (2007) (quoting UK Home Office Report).

98. See Kline, *A New Deal for the Child*, *supra* note 27, at 36.

99. Cf. *Bowers v. Hardwick*, 478 U.S. 186, 215 (1986) (Stevens, J., dissenting) (“The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy. Indeed, at one point in the 20th century, Georgia’s law was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited between heterosexuals.”); *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (describing colonial English sodomy bans as applying to both homosexual and heterosexual relations).

100. See *infra* text accompanying notes 125–27.

her gender.¹⁰¹ Second, courts that did recognize transgenderism sought to punish and stigmatize it.¹⁰² Third, courts advanced a version of the sexual ethics thesis—either deciding to recognize or deny a person's gender based on their ability to participate in heteronormative sexual conduct.¹⁰³ Lastly, modern cases striking down surgical requirement provisions, or laws preventing a sex change on a birth certificate altogether, provide helpful analysis. Their reasoning shines a light on the transgenderism denial, punishment, and sexual ethics arguments.¹⁰⁴

1. Transgenderism Denial

Historically, courts sought to deny the existence of transgenderism. *Matter of Anonymous v. Weiner* was the first known case of a requested change to the sex on a person's birth certificate.¹⁰⁵ In *Weiner*, a plaintiff, born male, sought to both change the sex on his birth certificate to female and amend his name.¹⁰⁶ In 1966, the New York state court rejected the plaintiff's claim.¹⁰⁷ Although the court noted "the public interest for protection against fraud"¹⁰⁸ and grounded its decision in administrative law principles of deference,¹⁰⁹ it emphasized the relevant medical testimony at the time: "male-to-female transsexuals are still chromosomally males while ostensibly females," and changing birth certificates would be "used as a means to help psychologically ill persons in their social

101. *See infra* Subpart II.B.1.

102. *See infra* Subpart II.B.2.

103. *See infra* Subpart II.B.3. A common thread throughout the case law is also framed in terms of the institutional competence of courts to act absent legislative action or guidance. *See In re Taylor*, No. 03CA1753, 2003 WL 22382512, at *5 (D.C. Super. Ct. Mar. 17, 2003) ("[W]hat is clear from the previous case law is that it is the legislature that is responsible for deciding whether or not a post-surgery transsexual should be permitted to have their sex changed on their birth certificate."). Of course, judicial interpretation of ambiguous legislative language, or in the absence of legislative instruction at all, reveals other rationales of public policy and societal attitudes.

104. *See infra* Subpart II.B.4.

105. *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966); *see also In re Taylor*, 2003 WL 22382512, at *3 (describing *Anonymous v. Weiner* as "[t]he first case in the United States to deal with transsexualism" and one that "involved a petition for a change of sex on a birth certificate").

106. *Weiner*, 270 N.Y.S.2d at 320.

107. *Id.* at 324.

108. *Id.* at 322.

109. *See Id.* ("The proper scope of the judicial role . . . is greatly restricted. Primary jurisdiction to formulate and implement the City's policy with regard to the records of 'birth, fetal deaths and deaths' is vested in the Board of Health.").

adaptation.”¹¹⁰ Such reasoning emphasized that even with surgery, transgenderism ought not exist because it was not possible to change one’s sex. Many courts continued to advance this rationale well into the twenty-first century.¹¹¹

The transgenderism denial rationale also appeared in the marriage context, in which courts had to determine what criteria defined men and women. For example, in *In re Estate of Gardiner*,¹¹² the Kansas Supreme Court held that a transgender woman could not marry a man and declined to recognize the woman’s female gender after sex-reassignment surgery. Despite the plaintiff’s “long and difficult road,” including “electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery . . . after all that, [the plaintiff] remains a transsexual and a male for purposes of marriage. . . .”¹¹³ Or, as the Texas Court of Appeals said in another case, “Christie was created and born a male There are some things we cannot will into being. They just are.”¹¹⁴ These references to transgenderism denial in court opinions demonstrate that judges, like private citizens and legislators, shared similar sentiments.

2. Punishment, Stigmatization, and Ostracization

Courts interpreting surgical requirement laws have issued decisions that serve to ostracize and punish transgender individuals for their existence. The terminology used in early cases addressing changes to birth certificates exemplifies this animus. Courts have equated transgenderism with illness, describing transgender persons as “psychologically ill”¹¹⁵ and referring to transgenderism as an “illness.”¹¹⁶ Indeed, the American Psychiatric Association still refers to transgenderism as “gender dysphoria”¹¹⁷ and until 2013,

110. *Id.*

111. *See, e.g.,* *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (“Some-one eager to undergo this mutilation [sex-reassignment surgery] is plainly suffering from a profound psychiatric disorder.”); *In re Heilig*, 816 A.2d 68, 76 (Md. 2003) (“Transsexualism was once regarded as a form of sexual or psychological deviance and, in some quarters, is still considered so today.”).

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

113. *Id.* at 137. The court’s reasoning reflects a view that no action can override genetics.

114. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), *superseded by statute*, TEX. FAM. CODE ANN. § 2.005 (Westlaw through 2019 Reg. Sess.); *see id.* at 230–31 (holding that a transgender woman could not bring a wrongful death and survival action because she lacked a woman’s “internal sexual organs”).

115. *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (N.Y. Sup. Ct. 1966).

116. *G. B. v. Lackner*, 145 Cal. Rptr. 555, 557 (Ct. App. 1978).

117. Roy Richard Grinker, *Being Trans Is Not a Mental Disorder*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/opinion/>

called it “gender identity disorder.”¹¹⁸ An Oregon court describing transgenderism in 1977 referred to transgenderism as an “obsession to belong to the opposite sex.”¹¹⁹ This view of transgenderism as an abnormality and a form of deviance sought to punish and stigmatize it.

3. Heteronormative Sexual Ethics

Courts have also advanced a sexual ethics rationale when upholding surgical requirement laws. In 1968, in *In re Anonymous*,¹²⁰ a New York state court granted a petition to change the sex on the plaintiff’s birth certificate. The court emphasized the importance of the sex-change operation — “all male organs were removed,”¹²¹ — thereby advancing a sexual conduct or sexual ethics rationale. The court began by quoting contemporary medical authorities who explained that, unlike “the transvestite, [who] is content to dress in the clothing of the opposite sex,” “the transsexual . . . will be satisfied only if he can become converted into a sexually functioning person of the opposite sex.”¹²² The court continued to highlight the importance of the operation’s sexual consequences and heterosexual norms: “There is no chance that this petitioner will ever again function as a male either procreatively or sexually. The petitioner is now capable of having sexual relations as a woman although unable to procreate.”¹²³ Other courts continued to advance the same sexual ethics rationale for granting a sex change on the birth certificate.¹²⁴

The sexual ethics rationale also appeared in the sex-reassignment marriage cases. Whether a court referenced sexual conduct to affirm or deny a person’s gender transition is irrelevant. The court’s focus on a person’s sexual conduct in the first instance proves that a court finds a person’s sexual conduct a form of legitimate inquiry.

trans-gender-dysphoria-mental-disorder.html [https://perma.cc/3QXG-7B2V].

118. Editorial Board, *The Quest for Transgender Equality*, N.Y. TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/04/opinion/the-quest-for-transgender-equality.html> [https://perma.cc/23KB-67TL].

119. *K. v. Health Div., Dep’t Human Res.*, 560 P.2d 1070, 1072 n.5 (Or. 1977) (quoting *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236, 236 (1971)).

120. *In re Anonymous*, 293 N.Y.S.2d 834, 838 (Civ. Ct. 1968).

121. *Id.* at 836.

122. *Id.* (quoting Leo Wollman, *Surgery for the Transsexual*, 3 J. SEX RES. 145, 145 (1967)).

123. *Id.*

124. *See In re Heilig*, 816 A.2d 68, 87 (Md. 2003) (“[I]f the person has undergone sex reassignment surgery, the change has been effected, in that at least . . . the person’s external genitalia have been brought into consistency with that indicative of the new gender and with other determinants of gender.”).

In *M.T. v. J.T.*,¹²⁵ a New Jersey state court held that for purposes of marriage, when sex-reassignment surgery gave a person “the full capacity to function sexually as a male or female . . . we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person’s identification at least for purposes of marriage.”¹²⁶ Just six years earlier, in *Corbett v. Corbett*,¹²⁷ an English court struck down a marriage between a transgender woman and a man, in part because the sexual intercourse was not “ordinary and complete intercourse.”¹²⁸

The phrase “sexual function” is misleading because courts were not actually focused on whether the sex reassignment surgery produced fully functioning genitalia.¹²⁹ Rather, the earliest opinions addressing this issue emphasized the importance of prohibiting certain forms of unethical sexual conduct—a rationale rooted in biblical notions of “unnatural acts”¹³⁰ and antiquated notions of marriage and annulment.¹³¹ Given the scarcity of caselaw on the

125. *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

126. *Id.* at 210–11; *see also* Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999), (holding that a transgender woman, as the surviving spouse, could not bring a wrongful death and survival action because despite being “made to look like a woman, including female genitalia and breasts,” sex-reassignment surgery “does not create the *internal sexual organs* of a women [sic]”) (emphasis added).

127. *Corbett v. Corbett* (1970) 2 All R 33 (PD) (Eng.).

128. *Id.* at 49. Courts denying legal recognition of a sex change, despite sex-reassignment surgery, may simultaneously advance transgenderism denial, punitive, and sexual ethics rationales. After reasoning that the surgery would still make it impossible to engage in “ordinary and complete intercourse” (sexual ethics rationale), the *Corbett* court advanced a transgenderism denial rationale: “[T]he biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.” *Id.* at 47.

129. For a framing and description of the “sexual function” rationale, *see* Tobin, *supra* note 13, at 417.

130. *Cf.* Brief of Professors of History et al. as Amici Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152350 at *5 (“When the term ‘sodomy’ was first emphasized by medieval Christian theologians in the eleventh century, they applied it inconsistently to a diverse group of nonprocreative sexual practices [T]he term was notoriously confused with ‘unnatural acts’ . . .”).

131. For example, a nineteenth-century English case used the identical term, “ordinary and complete intercourse,” to analyze specific sexual acts as the basis for marriage. *D v. A* (1844) 163 E R 1039 (KB) at 1045 (Eng.) (“Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse I can never think that the true interest of society would be advanced by retaining within the marriage bonds *parties driven to such disgusting practices.*”) (emphasis added). Ultimately, courts expressed the most concern not with the actual functionality or procreativity of sex, but with banning

topic, recent rulings from foreign courts provide helpful context. Some continue to advance the same arguments grounded in heteronormative views of sexual conduct. In 2019, Japan's Supreme Court upheld a sterilization requirement for gender changes to birth certificates. The law required the removal of a person's reproductive organs so that the body "appears to have parts that resemble the genital organs."¹³² Media reports also cited the opinion's reference to "reduc[ing] confusion in families and society," which indicates a conflation of both sexual ethics and transgenderism denial rationales.¹³³

Judicial arguments regulating a particular form of sexual conduct reflect strikingly similar reasoning to decisions upholding the sterilization of LGBTQ individuals in the early twentieth century. For example, in 1929, in *Davis v. Walton*,¹³⁴ the Utah Supreme Court reversed an order to sterilize an inmate because it doubted whether the procedure would "relieve [the inmate] from his abnormal sexual desire"—alleged sodomy.¹³⁵ Although the court reversed the sterilization order, its comparison of sodomy to an "abnormal sexual desire" reveals that judges labeled LGBTQ individuals as sexual deviants.¹³⁶ In a concurring opinion, Justice Supreme Daniel N. Straup made this point clear by describing the sodomy allegation as a "revolting act," which "shows such moral depravity as to justify

perceived immoral conduct, based largely on heteronormative stereotypes. *See* Tobin, *supra* note 13, at 418.

132. Associated Press, *Japan's Supreme Court Upholds Transgender Sterilization Requirement*, (Jan. 25, 2019, 11:54 AM), <https://www.nbcnews.com/feature/nbc-out/japan-s-supreme-court-upholds-transgender-sterilization-requirement-n962721> [<https://perma.cc/6F2S-SQ66>].

133. For examples of other international jurisdictions, *see* Tobin, *supra* note 13, at 418 n.148 (citing Australian and New Zealand courts' references to the functionality of sex after sex-reassignment surgery).

134. *Davis v. Walton*, 276 P. 921 (Utah 1929).

135. *Id.* at 925.

136. For discussion of other cases beyond the sterilization context targeting LGBT individuals as sexual deviants and their relevance today, *see* Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667 (2017); Jessica A. Clarke, *Past Cases Have Labeled LGBTQ People as Deviants. Will the Supreme Court Move Beyond That Now?*, L.A. TIMES (Oct. 7, 2019, 3:00 AM), <https://www.latimes.com/opinion/story/2019-10-07/supreme-court-lgbtq-case-oral-arguments> [<https://perma.cc/XG82-F876>]. For a nineteenth-century view about the perceived deviance of transgender persons—long before society recognized or spoke about transgenderism—*see* Sean Trainor, *Lessons of the Bearded Lady*, THE ATLANTIC (Dec. 5, 2015), <https://www.theatlantic.com/national/archive/2015/12/lessons-of-the-bearded-lady/418038> [<https://perma.cc/HZ5P-JA9D>] (describing lawsuit by circus customer who alleged false advertising and claimed that bearded lady "was a man in woman's clothing").

his asexualization.”¹³⁷ By only supporting reversal for a lack of evidence and factual findings, the opinion leaves little doubt about the stigmatic and punitive purpose of sterilization as applied to LGBTQ persons—a desire to punish “abnormal” sexual behavior.¹³⁸

4. Recent Cases Rejecting Transgenderism Denial, Punishment, and Sexual Ethics

A recent string of cases striking down surgical requirement laws or prohibitions on changes to birth certificates further highlights the underlying rationales of transgenderism denial and sexual ethics. In Puerto Rico, a district court ruled that the “forced disclosure of plaintiffs’ transgender status”—permitting name, but not sex, changes on birth certificates—violated their “constitutional right to decisional privacy.”¹³⁹ In contrast to earlier decisions, the court expressly affirmed the existence of transgenderism, declaring, “[t]he right to identify our own existence lies at the heart of one’s humanity They . . . took the steps to the courthouse to demand what is due: their right to exist, to live more and die less.”¹⁴⁰

In *F.V. v. Barron*,¹⁴¹ a federal district court in Idaho applied a similar rationale when it held that the state’s policy of not allowing birth certificate gender changes violated the Equal Protection Clause. The court found that “gender identity . . . is the intrinsic sense of being male, female, or an alternative gender.”¹⁴² This thinking was a marked shift from the legislature and public’s denials of transgenderism¹⁴³: referring to transgender individuals as “confused”¹⁴⁴ and refuting the ability of a person to change their gender. In contrast to transgenderism denial, the federal district court explained, “providing an avenue to obtain a birth certificate with a listed sex that aligns with an individual’s gender identity promotes the health, well-being, and safety of transgender people without

137. *Davis v. Walton*, 276 P. at 926 (Straup, J., concurring).

138. Cf. Patricia Szobar, *Telling Sexual Stories in the Nazi Courts of Law: Race Defilement in Germany, 1933 to 1945*, 11 J. HIST. SEXUALITY 131, 131 (2002) (arguing that proponents of Nazi eugenics focused on need to prevent relations with “Jews and blacks, who were deemed figures of pathological and *deviant sexuality* . . .”) (emphasis added).

139. *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018).

140. *Id.* at 334.

141. *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018).

142. *Id.* at 1136.

143. See *supra* notes 74–77.

144. See *supra* notes 74–77.

impacting the rights of others.”¹⁴⁵ This explanation recognized the legitimacy and significance of a person’s gender identity.

Other recent opinions from U.S. courts reflect a similar shift in attitudes toward transgender individuals.¹⁴⁶ In *Love v. Johnson*,¹⁴⁷ for example, a federal district court held that Michigan’s policy of denying gender changes on driver’s licenses or state identification cards implicated a substantive due process right to privacy. It thus denied the state’s motion to dismiss.¹⁴⁸ The court acknowledged the “harassing conduct that transgender persons often live through when forced to produce an ID document that fails to match their lived gender” and declared that such “allegations cut at the ‘*very essence of personhood*’ protected under the substantive component of the Due Process Clause.”¹⁴⁹ The court’s conception of “lived gender” and its central importance to transgender individuals evinces a new set of judicial attitudes.

Several other countries have since followed suit as well—specifically rejecting a sterilization mandate, and in effect, both transgenderism denial and sexual ethics rationales. Austria invalidated mandatory sex reassignment surgery in 2009,¹⁵⁰ and Germany did the same in 2011.¹⁵¹ Sweden and Norway also prohibited actu-

145. *Barron*, 286 F. Supp. 3d at 1145–46.

146. *See, e.g.*, Consent Judgment at 3, *Foster v. Andersen*, No. 18-02552-DDC-KGG (D. Kan. June 21, 2019), ECF No. 33 (declaring that Kansas must “provide certified copies of birth certificates to transgender individuals that *accurately* reflect their sex, consistent with their *gender identity*”) (emphasis added); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (“[B]y requiring Plaintiffs to disclose their transgender status, the Policy directly implicates their fundamental right of privacy.”); *cf. In re Beatie*, 333 P.3d 754, 759 (Ariz. Ct. App. 2014) (holding that transgender man and wife could get divorce despite state’s same-sex marriage ban and finding “no apparent basis in law or fact for the proposition that in the event [the husband] gave birth after having modified his gender designation, it would have abrogated his ‘maleness,’ as reflected upon the amended birth certificate.”); *Lewis v. Harris*, 875 A.2d 259, 286 (N.J. App. Div. 2005), *aff’d as modified*, 188 N.J. 415, 908 A.2d 196 (2006) (Collister, J., dissenting) (“Constitutional rights should not be limited by genitalia or the ability to engage in a particular form of sexual intimacy.”).

147. *Love*, 146 F. Supp. 3d at 848.

148. *Id.* at 857.

149. *Id.* at 855 (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998)) (emphasis added).

150. Liam Stack, *European Court Strikes Down Required Sterilization for Transgender People*, N.Y. TIMES (Apr. 12, 2017), <https://www.nytimes.com/2017/04/12/world/europe/european-court-strikes-down-required-sterilization-for-transgender-people.html> [<https://perma.cc/S4NR-9C6V>].

151. *Id.* In 2017, Germany also ruled that parents must have the option of designating a third gender category on birth certificates. The court’s reasoning explicitly rejected transgenderism denial: “The assignment to a gender

al sterilization requirements.¹⁵² Scotland recently announced a proposal to remove a requirement of providing “medical and psychiatric evidence to a judicial panel” in order to change one’s gender on a birth certificate.¹⁵³ And in 2017, the European Court of Human Rights ruled that a sterilization requirement to change the name and gender on a person’s birth certificate violated Article Eight of the European Convention on Human Rights—“the right to respect for [a person’s] private and family life, his home, and his correspondence.”¹⁵⁴ The court specifically rejected transgenderism denial, referring to a transgender person’s “right to self-determination” and “the freedom to define one’s sexual identity.”¹⁵⁵ It noted that France’s sterilization or surgical requirement provisions “amount[ed] to a failure by the . . . State to fulfil its positive obligation to secure their right to respect for their private lives.”¹⁵⁶ These recent opinions provide a roadmap for how courts can repudiate the transgenderism denial, punishment, and sexual ethics motives and rationales behind surgical requirement laws.

III. A SUBSTANTIVE DUE PROCESS CHALLENGE TO COMPULSORY STERILIZATION

In this Part, I explain why advocates should challenge these laws as a form of unconstitutional compulsory sterilization motivated by the three forms of animus I identified and discussed in Part II.

is of paramount importance for individual identity; it typically occupies a key position both in the self-image of a person and how the person is perceived by others.” Melissa Eddy & Jessica Bennett, *Germany Must Allow Third Gender Category, Court Rules*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/world/europe/germany-third-gender-category-vanja.html> [<https://perma.cc/FU44-HGBC>].

152. STACK, *supra* note 150.

153. Molly Millar, *Scotland Mulls Law to End ‘Nightmare’ Rules for Changing Gender*, REUTERS (Dec. 17, 2019), <https://www.reuters.com/article/us-britain-lgbt-scotland/scotland-mulls-law-to-end-nightmare-rules-for-changing-gender-idUSKBN1YL2E0> [<https://perma.cc/9PVG-SDBT>].

154. *A.P., Garçon, and Nicot v. France*, 121 Eur. Ct. H.R. 27 (2017); Stack, *supra* note 150. The relevant French law in *A.P., Garçon, and Nicot* was very similar to many U.S. state laws in that its text did not facially require sterilization but rather that a transgender person prove the “irreversible nature of the change in appearance,” which the court interpreted to mean “sterilisation surgery or . . . treatment which, on account of its nature and intensity, entailed a very high probability of sterility.” *A.P., Garçon, and Nicot*, 121 Eur. Ct. H.R. at 34–35.

155. *Id.* at 28.

156. *Id.* at 39.

A. Addressing *Buck v. Bell*

Previous articles on this topic have noted the compulsory sterilization challenge to surgical requirement laws, under *Skinner v. Oklahoma*,¹⁵⁷ but often only briefly.¹⁵⁸ These articles may imply that *Skinner*, which struck down a statute sterilizing one class of criminal but not another, overturned *Buck v. Bell*.¹⁵⁹ But neither *Skinner*'s holding nor reasoning overruled *Buck*.¹⁶⁰ The Court continues to cite *Buck* as good law, though not for the purpose of justifying sterilization.¹⁶¹ Lower courts also continued to cite *Buck* to justify sterilization well into the second half of the twentieth century.¹⁶²

In *Buck*, the Court rejected a substantive due process challenge to state-sanctioned sterilization by articulating the state's police power rationale.¹⁶³ The Court upheld the sterilization of Carrie Buck, who was sterilized for her "feble-mindedness." Historical records show that Buck's "feble-mindedness" alluded to her purported "sexual promiscuity." While unmarried, she became

157. *Skinner v. State of Okla. ex rel Williamson*, 316 U.S. 535 (1942).

158. See, e.g., Velte, *supra* note 13 at 239 n.194 ("[T]here is a substantive Due Process right to be free from sterilization.") (citing *Skinner*). Outside of the birth certificate amendment context, others have noted that the Court has not yet overruled *Buck*. E.g., Lisa Powell, Note, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y REV. 481 (2002).

159. *Buck v. Bell*, 274 U.S. 200 (1927).

160. Powell, *supra* note 158, at 502 ("*Buck v. Bell* . . . has never been overturned, and it is arguably still good law.>").

161. The Court cited *Buck* in *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 369 n.6 (2001), but solely for a description of historical practices—not as support for its holding or reasoning. See also *Tennessee v. Lane*, 541 U.S. 509, 534 (2004) (Souter, J., concurring) (citing *Buck* to describe history of eugenics); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1786 (2019) (Thomas, J., concurring) (same); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 463 (1985) (Marshall, J., concurring in part) (same).

162. See *In re Cavitt*, 159 N.W.2d 566, 567 (Neb. 1968) ("*Buck v. Bell* answered the question [whether] in no circumstances can an order of sterilization be provided."); *Cook v. State*, 495 P.2d 768, 771 (Or. App. 1972) (upholding involuntary sterilization order and citing *Buck*'s reasoning that "[s]terilization was considered beneficial to the patient and to society because it allowed people to be discharged from state institutions, to return to the community, and to become self-supporting."); *N. C. Ass'n for Retarded Child. v. State of N.C.*, 420 F. Supp. 451, 459 (M.D.N.C. 1976) (upholding compulsory sterilization statute). See also *Town of Ball v. Rapides Par. Police Jury*, 746 F.2d 1049, 1056 n.22 (5th Cir. 1984) (citing *Buck* in a footnote).

163. The Court also rejected an Equal Protection Clause challenge to the statute. See *Buck*, 274 U.S. at 208.

pregnant after being raped.¹⁶⁴ The Court adopted a broad view of the state's power to control social conduct, reasoning that if "the public welfare may call upon the best citizens for their lives," then surely it can regulate "those who already sap the strength of the State."¹⁶⁵ After *Buck*, the Court continued to label "feeble-minded" persons¹⁶⁶ as "degenerate," "incompetent," "manifestly unfit," and "imbecil[es]."¹⁶⁷ The Court advanced a eugenics theory to limit reproduction of people seen as "feeble-minded," but it also sanctioned a punitive sterilization theory¹⁶⁸—the broad regulation of inferior, abnormal, degenerate citizens to support "the public welfare."¹⁶⁹

Although *Skinner* narrowed *Buck*, it did not explicitly overrule it. Unlike *Buck*, *Skinner's* holding rested on the Equal Protection Clause, not substantive due process.¹⁷⁰ The Court held

164. See Dan Barry, *Giving a Name, and a Dignity, to a Disability*, N.Y. TIMES (May 7, 2016), <https://www.nytimes.com/2016/05/08/sunday-review/giving-a-name-and-dignity-to-a-disability.html> [<https://perma.cc/4PSZ-E4NN>].

165. *Buck*, 274 U.S. at 207.

166. Although the Court described Carrie Buck as "feeble-minded," "[i]n the case of young women, it often meant exhibiting what was regarded as an excessive or inappropriate interest in sex." COHEN, *supra* note 25, at 16.

167. *Buck*, 274 U.S. at 207. For examples of cases using this language after *Buck*, see, e.g., *In re Cavitt*, 159 N.W.2d at 566 (referring to the feeble-minded plaintiff); *Matter of C. D. M.*, 627 P.2d 607, 608 (Alaska 1981) ("This appeal raises the question of whether the superior court has the authority to order the sterilization of a mental incompetent."); *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) (referring to "a feeble-minded or mental [sic] incompetent" person).

168. Cf. Robert J. Cynkar, *Buck v. Bell: 'Felt Necessities' v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1431–32 (1981) (describing *Buck* as "the result of twenty years of legal experimentation, consisting of efforts to balance the three motives for sterilization—the punitive, the eugenic, and the therapeutic"); J. H. Landman, *Human Sterilization Movement*, 24 J. CRIM. L. & CRIMINOLOGY 400, 402 (1933) ("Eugenic and therapeutic sterilization is distinctly a modern movement, though it had been employed as a punitive measure as remote as the civilizations of the ancients."). By punitive sterilization, I mean sterilization designed to convey a message of societal disapproval and abnormality—closely related to, but distinct from, the *criminal* punitive theory that drove the sterilization movement early in the twentieth century. See Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 113 (2005) ("[B]y 1922 the eugenic sterilization movement generally conceded the invalidity of sterilization imposed for punitive purposes."). Even if not punitive in a criminal sense, sterilization laws in the 1920s and 1930s, as applied to sexual deviants, sent a punitive or stigmatic message.

169. *Buck*, 274 U.S. at 207. Cf. Lowik, *supra* note 3, at 428. ("In addition to concerns over genetics, heredity, and racial purity, eugenicists have historically been concerned with upholding normative notions of sex, gender, and sexuality.").

170. *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942)

that sterilization of one class of criminals, but not others, when both essentially committed the same type of offense, violated the Constitution: “[T]he law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other.”¹⁷¹ In fact, the Court in *Skinner* specifically referred to the *Buck* law’s “saving feature”—it allowed persons confined in an institution to reenter free society after undergoing sterilization.¹⁷² In some respects, *Skinner*’s rationale actually reaffirmed the state’s power to sterilize and regulate in certain circumstances, so long as it does not draw arbitrary lines.

Skinner does not imply that today’s surgical requirement provisions are unconstitutional.¹⁷³ A frequently-cited line from *Skinner* addressing “legislation which involves one of the basic civil rights of man” and operating from the premise that “[m]arriage and procreation are fundamental to the very existence and survival of the race”¹⁷⁴ focuses on *societal*, not *individual*, interests. The harm of sterilization extends beyond “procreation” and “survival of the race.” Sterilization also inflicts a dignitary and stigmatic injury. It erodes an individual’s sense of autonomy and control. Although the Supreme Court has never directly overturned *Buck*, challenges to surgical requirement laws would provide the Court with the opportunity to do so. But why does overturning *Buck* matter? And why does it matter in this specific context of challenges to surgical requirement laws? The answer is two-fold.

First, in overruling *Buck*, the Court can repudiate not only the eugenics motivation, but also the punitive one¹⁷⁵ grounded in same-sex intimacy (or here, transgenderism) denial, punitive, and sexual ethics rationales. Overruling *Buck* would invite the Court to

(“[T]he instant legislation runs afoul of the equal protection clause.”). *But see* *Obergefell v. Hodges*, 576 U.S. 644, 674 (2015) (“[I]n *Skinner v. Oklahoma ex rel. Williamson*, the Court invalidated under both principles [equal protection and due process] a law that allowed sterilization of habitual criminals.”).

171. *Skinner*, 316 U.S. at 541.

172. *Id.* at 542.

173. Even the concurring opinions in *Skinner* did not directly repudiate the core premise and rationale of *Buck*. Chief Justice Stone grounded his objections in *procedural*, not substantive, due process. He explicitly conceded that “the state may protect itself from the demonstrably inheritable tendencies of the individual which are injurious to society.” *Id.* at 545 (Stone, C.J., concurring). Justice Jackson’s concurrence stood alone in recognizing the “limits to the extent to which a legislatively represented majority may conduct biological experiments at the dignity and personality and natural powers of a minority,” but also noted that he would “reserve judgment” on this question because it did not arise in the case. *Id.* at 546–47 (Jackson, J., concurring).

174. *Id.* at 541.

175. *See supra* note 168.

analyze and declare that the ultimate evil of the compulsory sterilization movement extended far beyond interference with rights to marriage and procreation and into core conceptions of *individual* autonomy and liberty.

Second, overturning *Buck* would advance federal uniformity. The current varied state landscape of birth certificate amendment laws shares much in common with the compulsory sterilization laws during the eugenics era of the early twentieth century. The eugenics movement weakened and the sterilizations ended, not from Supreme Court, or even lower court, intervention, but from shifting public attitudes and legislative repeal.¹⁷⁶ That process, however, took decades, with some states continuing sterilizations through the 1970s.¹⁷⁷ Without a Supreme Court mandate, the current birth certificate laws will remain in a patchwork framework, with protection of constitutional rights varying from state to state.

B. *Challenging Surgical Requirement Laws*

To overrule *Buck*, the Supreme Court needs to hear an on-point challenge. Thus, advocates must pursue a legal strategy that results in an on-point case moving its way through the courts. To date, advocates have focused on challenging the most restrictive state laws that prohibited changing the gender on one's birth certificate altogether—not on state laws that permit changes only under a surgical requirement standard.¹⁷⁸ And as part of the remedies crafted through these lawsuits, litigants and courts have approved solutions that permit changes to a birth certificate without requiring surgery.¹⁷⁹

But the next wave of litigation should focus specifically on striking down the surgical requirement provisions and overturning *Buck*. Under a substantive due process analysis, if a surgical requirement provision implicates a fundamental right, the state must show the law is narrowly tailored, or necessary, to advance a compelling state interest.¹⁸⁰ The Court already has the tools and precedent to: (1) declare the fundamental right at stake, including

176. See generally Ostrowsky, *supra* note 12.

177. *Id.* at 6.

178. See *supra* text accompanying notes 43–47.

179. See, e.g., Consent Judgment at 3, *Foster v. Anderson*, No. 18-02552-DDC-KGG (D. Kan. June 21, 2019), ECF No. 33.

180. See, *Love*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (“Where, as here, state action infringes upon a fundamental right, such action will be upheld under the substantive due process component of the Fourteenth Amendment only where the governmental action furthers a compelling state interest, and is narrowly drawn to further that state interest.”) (internal citation and quotation marks omitted).

by recognizing the role that animus may play in identifying a fundamental right, and (2) convey that the state's true reasons for requiring surgery to change a gender designation are motivated by animus and thus, the surgical requirement is not a necessary means of advancing a compelling state interest.¹⁸¹ Moreover, even under a less stringent standard of review, the animus driving these laws helps demonstrate why they violate the Constitution.

1. Fundamental Right of Bodily Autonomy: Choosing and Refusing Medical Treatment

The first step in a substantive due process inquiry requires identifying the fundamental right at stake.¹⁸² Below I outline the contours of the fundamental right of bodily autonomy to choose and refuse medical treatment. I explain why this right encompasses a protection against compulsory sterilization.¹⁸³ The specific descriptions of a substantive due process right, however, also share in common a "rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."¹⁸⁴ Animus—whether expressed through transgenderism denial, punishment and stigmatization, or discriminatory sexual ethics—epitomizes the "purposeless" motives that strict judicial review must take note of and condemn.¹⁸⁵

181. *Id.*

182. *Id.*

183. Under an equal protection analysis, *Skinner* declared the right to procreation as "fundamental." *Skinner v. State of Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942). This supports the case that the compulsory sterilization mandated by surgical requirement laws implicates a fundamental right (even under substantive due process). I still provide a thorough analysis of the right to bodily autonomy to argue that compulsory sterilization implicates multiple, related fundamental rights.

184. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)); *Roe v. Wade*, 410 U.S. 113, 169 (1973) (Stewart, J., concurring) (same); *Washington v. Glucksberg*, 521 U.S. 702, 790 (1997) (Breyer, J., concurring in the judgments) (same).

185. *Cf. United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) ("An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy . . . [and] the reach of majorities. . . .').

The Constitution protects the fundamental right to freedom from physical contact in the medical setting.¹⁸⁶ In *Cruzan v. Director, Missouri Department of Health*,¹⁸⁷ the Court upheld a Missouri state law providing a clear and convincing evidence standard for a guardian's desire to remove a patient's life support.¹⁸⁸ The Court grounded its holding on the right to refuse medical treatment¹⁸⁹ in the concept of an unwanted, nonconsensual state touching, citing a string of similar cases recognizing that the right to refuse medical treatment fell within the Due Process Clause. It cited *Jacobson v. Massachusetts*,¹⁹⁰ which held compulsory vaccination implicated "an individual's liberty interest."¹⁹¹ It cited *Washington v. Harper*,¹⁹² which held that "prisoners possess 'a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause.'"¹⁹³ It cited *Vitek v. Jones*¹⁹⁴ for the proposition that "mandatory behavior modification treatment" undergone after a hospital transfer implicated the Due Process Clause.¹⁹⁵ And it cited *Parham v. J.R.*,¹⁹⁶ in which the Court declared a "substantial liberty interest in not being confined unnecessarily for medical treatment."¹⁹⁷

In *Cruzan*, the Court also cited the ancient common law protection against battery and the right to refuse government-sanctioned bodily intrusion.¹⁹⁸ For centuries, courts have cited the principle that neither a state actor nor a private citizen can touch you or coerce you to submit to the touching of another without your consent.¹⁹⁹ *Cruzan* and its reasoning provide a roadmap for

186. For other discussion on the right to bodily autonomy, see Velte, *supra* note 13, at 239.

187. *Cruzan v. Dir., Miss. Dep't of Health*, 497 U.S. 261 (1990).

188. *Id.* at 284.

189. *Id.* at 278 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.")

190. *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905).

191. *Cruzan*, 497 U.S. at 278.

192. *Washington v. Harper*, 494 U.S. 210 (1990).

193. *Cruzan*, 497 U.S. at 278 (quoting *Harper*, 494 U.S. at 221–22).

194. *Vitek v. Jones*, 445 U.S. 480 (1980).

195. *Cruzan*, 497 U.S. at 278.

196. *Parham v. J.R.*, 442 U.S. 584 (1979).

197. *Cruzan*, 497 U.S. at 278–79 (quoting *Parham*, 442 U.S. at 600).

198. *Id.* at 269 ("At common law, even the touching of one person by another without consent and without legal justification was a battery.")

199. See, e.g., *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 252 (1891) ("To compel anyone, and especially a woman, to lay bare the body . . . without lawful authority, is an indignity, an assault, and a trespass"); *id.* at 251 ("No right is held more sacred, or is more carefully guarded by the common law, than the right of

plaintiffs challenging surgical requirement laws: the right to bodily autonomy is grounded in the state's infliction of physical and dignitary harm.

The physical harm *and* the dignitary harm that result from implicating interests of reproductive choice shape the contours of the right against compulsory sterilization. The well-documented right to "physical autonomy, including the right to refuse unwanted medical treatment"²⁰⁰ applies with particular force here because it implicates both physical and dignity harm.²⁰¹

First, the surgical requirement laws inflict physical harm because they amount to compulsory sterilization. Although the laws do not, on their face, require surgery, when applied to transgender individuals, they do. A transgender person wishing to change his or her birth certificate cannot do so without obtaining the surgery. Thus, the surgery itself is an act made compulsory, not merely one coerced, by the state.²⁰² And the procedure involves a severe physical intrusion into the body, one that certainly implicates the fundamental right to bodily autonomy.

Second, surgical requirement laws implicate dignitary harm for the same reason: they result in compulsory sterilization. The right to maintain one's reproductive abilities "rest[s] not simply on the common-law right to refuse medical treatment, but—at

every individual to the *possession and control of his own person*. . . ."); *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914), *abrogated* by *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault. . . ."); *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (Ct. Com. Pl. 1978) ("For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual. . . ."). *See also* *Canterbury v. Spence*, 464 F.2d 772, 786 (D.C. Cir. 1972) ("The patient's *right of self-decision* shapes the boundaries of the duty to reveal.") (emphasis added).

200. *Washington v. Glucksberg*, 521 U.S. 702, 742 (1997) (Stevens, J., concurring in the judgment); *see also* *Vacco v. Quill*, 521 U.S. 793, 800 (1997) ("*Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment. . . .").

201. *See, e.g.*, *Steinkruger v. Miller*, 612 N.W.2d 591, 597 (S.D. 2000) ("Psychotropic drugs intervene in the deepest functions of personhood. . . . Defining one's own 'concept of existence' rests at the 'heart of liberty.'" (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992))).

202. *Cf. Velte, supra* note 13, at 244 ("The unconstitutional conditions doctrine provides that 'even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly coerce, pressure, or induce the waiver of constitutional rights.'" (quoting Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988)).

least implicitly—on the even more fundamental right to make this ‘deeply personal decision.’”²⁰³ Sterilization takes a deeply personal decision away from an individual and places it in the hands of the state.²⁰⁴ As Justice Stevens wrote in his concurrence in the judgment in *Washington v. Glucksburg*,²⁰⁵ under the Due Process Clause, “freedom embraces not merely a person’s right to refuse a particular kind of unwanted treatment, but also her interest in dignity.”²⁰⁶ The right to bodily autonomy, which protects against compulsory sterilization, vindicates dignitary harm.

While surgical requirement laws certainly implicate the right to bodily autonomy, they also implicate other fundamental rights protected under the Due Process Clause. For example, a line of other substantive due process cases not explored here—detailing the contours and application of privacy and liberty rights in the sexual and reproductive health setting—bolsters the dignity interest at stake in mandating sterilization.²⁰⁷ In sum, since *Cruzan* and the Court’s substantive due process doctrine stand for the proposition that a person has a constitutional right to refuse medical treatment,

203. *Glucksberg*, 521 U.S. at 744 (Stevens, J., concurring in the judgment).

204. *Cf. Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”). Although the Court in *Eisenstadt* grounded its holding in the Equal Protection Clause—differential treatment for married versus unmarried persons—the reasoning invokes the right to privacy (and substantive due process doctrine) applied in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

205. *Glucksberg*, 521 U.S. at 702.

206. *Id.* at 743; *id.* at 744 (“Whatever the outer limits of the concept may be, it definitely includes protection for matters ‘central to personal dignity and autonomy.’” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992))).

207. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) for example, the Court reasoned that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* at 851. *See e.g., Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333–34 (D.P.R. 2018) (holding that Puerto Rico must allow transgender individuals to correct their birth certificates, citing *Casey*, and declaring that, “The right to identify our own existence lies at the heart of one’s humanity.”). *See also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”); *id.* at 572 (“[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”). In *Lawrence*, the Court specifically took issue with the rationale behind the Texas statute, noting that it sought to label gay men as criminals. *Id.* at 571–72.

coerced surgery represents a particularly egregious violation of that right.²⁰⁸

2. Animus and the Lack of Narrow Tailoring to a Compelling State Interest

Because surgical requirement laws implicate a fundamental right, courts must analyze whether these laws are narrowly tailored to serve a compelling state interest.²⁰⁹ States generally cite administrative concerns about document fraud as the compelling state interest to defend surgical requirement laws or oppose efforts to amend birth certificates in the first instance.²¹⁰ The motives preserving the laws at issue—transgenderism denial, punishing perceived abnormality, and promoting heteronormative sexual ethics—undermine the compelling nature, or narrow tailoring, of the state's purported administrative interests. Animus, not administrative convenience, drives the legislature's refusal to amend these laws.

Although animus is usually considered when analyzing equal protection claims, courts can also look to whether animus exists when analyzing fundamental rights under substantive due process.²¹¹ In either case, animus or prejudice indicates a lack of narrow

208. See 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”). In *Cruzan*, the Court noted two types of violations of fundamental rights: (1) cases based on the *physical* touching of the medical treatment; and (2) “a general liberty interest in refusing medical treatment.” *Cruzan by Cruzan v. Dir., Miss. Dep’t of Health*, 497 U.S. 261, 278 (1990).

209. See, e.g., *Love*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015).

210. See, e.g., Devan Cole, *Idaho Legislature Sends Bill Prohibiting Transgender People from Altering Birth Certificates to Governor for Approval*, CNN (Mar. 18, 2020, 7:16 PM), <https://www.cnn.com/2020/03/18/politics/idaho-transgender-birth-certificate-changes/index.html> [https://perma.cc/JSU4-42MQ] (quoting Republican State Representative Julianne Young, the sponsor of Idaho H.B. 509, which prohibits changing the gender on a person’s birth certificate as saying “safeguarding the accuracy of our vital records is a vital part of preserving the ability of the state to protect the public health and safety”).

211. Cf. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) (explaining that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”); *Lawrence*, 539 U.S. at 575 (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887, 924 (2012) (explaining how *Lawrence* “recognized the principle that laws criminalizing homosexual conduct in fact criminalized homosexual identity, and that bare moral disapproval of a social group based upon identity was an impermissible purpose for legislation”); *id.* at 922 (“Laws criminalizing sodomy—whether all acts of

tailoring.²¹² Indeed, in *Lawrence v. Texas*,²¹³ the Court noted the state's animus to strike down a sodomy ban under substantive due process. The Court reasoned that the Due Process Clause enables "later generations [to] see that laws once thought necessary and proper in fact serve *only to oppress*,"²¹⁴ referring to a law's improper animus motive. In addition, courts already weigh the relevance of animus in the equal protection narrow tailoring inquiry.²¹⁵ And the mere presence of animus provides ample support to declare surgical requirement laws unconstitutional, even under a less stringent standard of review.²¹⁶

Of particular importance here, applying the narrow tailoring inquiry to surgical requirement laws presents courts with an opportunity to reject the sexual ethics rationale that sanctioned the sterilization of LGBTQ individuals in the early twentieth century and continues to sanction the forced sterilization of transgender individuals today. Courts have an opportunity to reject the transgenderism denial and punitive rationales by noting that the state cannot sanction stigmatic views in the realm of individual privacy.²¹⁷ The motives—from legislators and private citizens—documented in Part II provide courts with evidence to discern the key purpose of surgical requirement laws: different manifestations of animus. When looking at why these laws still exist today, the historical prejudice that led to sterilizing LGBTQ individuals continues to drive

sodomy or only homosexual sodomy—can be seen as laws that give effect to purely private moral preferences, which are not properly the subject of public legislation.”).

212. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (“The purpose of the narrow tailoring requirement is to ensure that ‘the means chosen “fit” th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.’” (alteration in original) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989))).

213. *Lawrence*, 539 U.S. at 558.

214. *Id.* at 579.

215. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (finding that in an equal protection analysis of racial discrimination, “[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified”).

216. See *id.*; *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) (explaining that the mere presence of “animus or ill-will” as a motivation for government action makes a statute unconstitutional, even under rational basis review).

217. Another view, articulated by Justice Thomas, would directly refute the existence of a right to privacy in the first instance. See *Lawrence*, 539 U.S. at 558 (Thomas, J., dissenting) (“I can find neither in the Bill of Rights nor any other part of the Constitution a general right of privacy, or as the Court terms it today, the ‘liberty of the person both in its spatial and more transcendent dimensions.’” (internal citations, quotation marks, and alterations omitted)).

modern day animus. As in *Lawrence*, surgical requirement laws continue to “serve only to oppress.”²¹⁸ Whether that oppression manifests in transgenderism denial, punishment, or regulating sexual ethics, the narrow tailoring must take note of it.

Beyond animus, two additional reasons highlight why surgical requirement laws are not narrowly tailored to a compelling state interest. First, the fact that other states and the federal government do not require surgery refutes the necessity of a state requiring it.²¹⁹ And, as more states remove their surgical requirement provisions without enduring fraud, security risks, or other concerns, the necessity of such provisions becomes strikingly obsolete.

Second, states have an array of measures, including certifications and other procedures, to ensure birth certificates are accurate.²²⁰ Indeed, the very existence of the birth-assigned gender on a document indicates its inaccuracy.²²¹ As the district court explained in *Love v. Johnson*, “[i]n this way, the Policy undermines Defendant’s interest in accurately identifying Plaintiffs to ‘promote law enforcement.’”²²² Moreover, states require far less intrusive procedures to correct a misspelled name or to change a person’s name through a court order.²²³ Why should states view name changes as routine but gender changes as extraordinary?

218. *Lawrence*, 539 U.S. at 579.

219. See *Love v. Johnson*, 146 F. Supp. 3d 848, 857 (E.D. Mich. 2015) (“The Court seriously doubts that these states have any less interest in ensuring an accurate record-keeping system.”).

220. Cf. *In re Brown*, 770 S.E.2d 494, 498 (Va. 2015) (“As there is no evidence in the record of a fraudulent purpose or that this name change would infringe upon the rights of others, the trial court was required to order the change of name [of the inmate].”). Moreover, as a local Idaho editorial board wrote in response to one state representative’s campaign against birth certificate gender changes, “It’s estimated that the last Census undercounted Idaho’s population by 31,000, for example. If [Representative] Young’s true motive is a fervent dedication to accurate population statistics, there are much better ways to spend her time.” Editorial, *Doesn’t Rep. Young Have Something Better to Do?*, Lewiston Trib. (Dec. 17, 2019), https://lmtribune.com/opinion/post-register-editorial-doesn-t-rep-young-have-something-better-todo/%20article_d2326798-12a0-506d-9a56-97e22f73ba2c.html [<https://perma.cc/K29B-VA6Z>].

221. Cf. Andy Newman, *Male, Female or ‘X’: The Push for a Third Choice on Official Forms*, N.Y. Times (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/nyregion/gender-neutral-birth-certificate.html> [<https://perma.cc/3BTF-G87S>] (“You can’t keep accurate records if you don’t have an accurate representation of someone.”).

222. *Love*, 146 F. Supp. 3d at 856.

223. See, e.g., CAL. DEP’T OF PUBLIC HEALTH, AMENDING A BIRTH CERTIFICATE AFTER A COURT ORDER NAME CHANGE (2020), <https://www.cdph.ca.gov/Programs/CHSI/Pages/Amending-a-Birth-Certificate-After-a-Court-Order-Name-Change.aspx> [<https://perma.cc/F73G-YX6C>].

In sum, surgical requirement laws violate the Constitution because they amount to compulsory sterilization. Such sterilization infringes on the fundamental right of bodily autonomy, which includes choosing and refuse medical treatment. And such sterilization does not advance a compelling state interest. Even if it did, it is not narrowly tailored. Compulsory sterilization of LGBTQ individuals historically, and today, advances animus and prejudice.

CONCLUSION

Nearly a century after the Court sanctioned compulsory sterilization in *Buck v. Bell*, at least fourteen states and one territory effectively still involuntarily sterilize transgender individuals. Just as states stigmatized LGBTQ individuals and others as “sexual deviants” at the turn of the twentieth century, today’s surgical requirement laws similarly harm transgender persons. These laws advance or sanction transgenderism denial, punishment of perceived “deviance,” and promotion of heteronormative sexual ethics. As advocates mount a new wave of legal challenges, they should attack—and courts should strike down—laws requiring surgery to change the gender on one’s birth certificate. Such laws reflect animus and violate the fundamental right of bodily autonomy to choose and refuse medical treatment. The vast majority of Americans will probably never think about the gender on their birth certificates. But for 1.4 million transgender individuals, an inaccurate gender designation can cause stigmatic harm, mental anguish, and physical violence.

