

# GENITAL EXCEPTIONALISM HAS NO PLACE IN THE LAW: IMPROVING TRANSGENDER AND INTERSEX RIGHTS IN THE 21ST CENTURY

## INTRODUCTION

Sex exceptionalism—also referred to as sexuality or sexual exceptionalism—is a concept that has recently been developed and explored in feminist legal scholarship. Sex exceptionalism “refers to the way our culture, including law, treats ‘sex differently [than] other activities,’” often in a way that is extreme—either extremely well or extremely poorly.<sup>1</sup> Over the past decade, legal scholars have pointed to sex exceptionalism to explain why courts refuse to enforce contracts involving sexual obligations,<sup>2</sup> why intellectual property law treats sexual content with unjust disfavor,<sup>3</sup> and why the law declines to hold employers vicariously liable for sexual abuse committed by employees.<sup>4</sup>

Although sex exceptionalism and its effects have received a fair amount of academic discussion, the notion of *genital* exceptionalism remains relatively unexplored in the scholarly world.<sup>5</sup> This Note defines genital exceptionalism as the importance that society places on genitalia as the determinative variable in establishing an individual’s gender, regardless of the individual’s identity and gender performance. So understood, genital exceptionalism assumes a strict binary view of gender and insists that all genitalia must conform to what society deems “normal” for a male or a female. If a person identifies as a woman, dresses as a woman, and tells the world that she is a woman, genital exceptionalism would say she is still a male so long as she has male genitalia. Genital exceptionalism has no room for those who identify with a gender outside the male-female binary, such

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1. Susan Ekberg Stiritz & Susan Frelich Appleton, *Celebrating Masters & Johnson’s Human Sexual Response: A Washington University Legacy in Limbo*, 53 WASH. U. J.L. & POL’Y 71, 74 n.12 (2017) (quoting Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL’Y REV. 119, 120 (2012)).

2. See Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 355–56 (2014).

3. See Rothman, *supra* note 1, at 121.

4. See Martha Chamallas, Lecture, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 136–37 (2013).

5. Nonetheless, genital exceptionalism may be gaining interest in legal scholarship. See, e.g., Stephen R. Munzer, *Examining Nontherapeutic Circumcision*, 28 HEALTH MATRIX 1, 17–18 (2018). While discussing the idea that “genital salience” makes nontherapeutic circumcision a questionable practice, Munzer states that “[a]ll else being equal, interfering with a child’s genitals is generally worse than interfering with other parts of the child’s body.” *Id.* It should be noted, however, that Munzer’s article appears to subscribe to, rather than question, genital exceptionalism.

as genderqueer.<sup>6</sup> Much like sex exceptionalism, which views non-normative sex and sexuality with disdain, genital exceptionalism treats non-normative genitalia with contempt. Thus, genitalia that are outside of the norm—either because they are ambiguous, as is the case for intersex people,<sup>7</sup> or because they are the genitalia society associates with the sex opposite of that which the person is presenting—is bad and wrong, and should be discouraged by the law.

The reverence society pays to normative genitalia through genital exceptionalism is notable even among the cisgender populations. For example, vaginal cosmetic surgery, which is typically aimed at tightening the vaginal muscles and/or altering the shape and size of the labia, originally targeted older populations and those who had given birth.<sup>8</sup> Recently, however, it has become popular among teenagers.<sup>9</sup> In fact, between 2015 and 2016 labiaplasty procedures performed worldwide increased by 45 percent.<sup>10</sup> In a somewhat similar vein, 25 percent of American men say they would pursue penis enlargement procedures if money were no object.<sup>11</sup>

Although genital exceptionalism is pervasive among all populations, this Note argues that when genital exceptionalism underlies decisions in law and policy-making, the transgender and intersex communities suffer the most. This Note will first highlight three areas of the law that best example the negative, destructive aspects of genital exceptionalism: (1) in laws that require transgender individuals to use the public restroom designated for persons with the genitalia possessed by the individual at birth, regardless of the individual's actual gender identity; (2) in laws that require transgender individuals to undergo sex reassignment surgery in order to change their gender marker on identity documents, such as driver's licenses or birth certificates; and (3) in the absence of legal prohibitions on performing

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6. The term “genderqueer” refers to a person who “experience[s] their gender identity and/or gender expression as falling outside the categories of man and woman.” *Glossary of Terms—Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/MTP4-QBS8>].

7. The term “intersex” refers to an individual with “variations in sex characteristics, such as ambiguous external genitalia, ambiguous internal reproductive organs, or uncommon chromosomal patterns.” Ryan L. White, Note, *Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson*, 37 *FORDHAM INT'L L.J.* 777, 782 (2014).

8. Roni Caryn Rabin, *More Teenage Girls Seeking Genital Cosmetic Surgery*, N.Y. TIMES (Apr. 25, 2016, 3:13 PM), <https://well.blogs.nytimes.com/2016/04/25/increase-in-teenage-genital-surg-ery-prompts-guidelines-for-doctors/> [<https://perma.cc/89QF-TVLY>]. Although often done for cosmetic reasons, it should be noted that labiaplasties may also be performed for non-cosmetic reasons. *Id.*

9. *Id.*

10. Katie Forster, *Labiaplasty: Vaginal Surgery 'World's Fastest-Growing Cosmetic Procedure,' Says Plastic Surgeons*, INDEP. MINDS (July 12, 2017), <https://www.independent.co.uk/news/health/labiaplasty-vagina-surgery-cosmetic-procedure-plastic-study-international-society-aesthetic-plastic-a7837181.html> [<https://perma.cc/YQC9-4BGX>].

11. Peter Moore, *1 in 4 Americans Want Plastic Surgery*, YOU GOV (Sept. 25, 2015, 8:47 AM), <https://today.yougov.com/topics/lifestyle/articles-reports/2015/09/24/1-in-4-want-plastic-surgery> [<https://perma.cc/A5KV-SQFT>].

genital-normalizing surgery on infant and minor intersex children. This Note will then argue that when genital exceptionalism is given a place in the U.S. legal system, the natural and unavoidable consequences are violations of constitutional rights, emotional and physical harm, and economic losses that society as a whole must bear.

Finally, this Note will propose the following solution: because genital exceptionalism is the root of much of the harm that is inflicted upon both the transgender and intersex communities in the United States, it would be beneficial for activists from each of the two groups to join forces in advancing their causes. These activists should work together to educate lawmakers and members of the judiciary on genital exceptionalism and why it is so harmful. Ultimately, the goal of these activists should be to alter the U.S. legal framework so that it no longer promotes genital exceptionalism, by (1) overturning the discriminatory transgender bathroom laws; (2) no longer requiring proof of sex reassignment surgery in order to change the gender markers on identity documents; and (3) passing legislation that forbids the performance of genital-normalizing surgery on children before they are legally capable of providing consent.

## I. HISTORY

### A. *Transgender Bathroom Laws*

The explosive debate over the use of public restrooms by transgender individuals traces back to 1887, when Massachusetts passed the first law in the United States segregating workplace restrooms by sex.<sup>12</sup> In the thirty years that followed, every other state in the country passed similar laws.<sup>13</sup> However, these laws were not passed because of the “basic biological differences” between men and women, but rather for the purpose of “protecting” women who were entering workplaces and the public sphere for the first time in history.<sup>14</sup> Because lawmakers considered women to be the weaker sex, women-only bathrooms were designed to create a “protected haven in this dangerous public realm.”<sup>15</sup>

Nearly one hundred years after the last state in the country passed a law segregating restrooms by sex,<sup>16</sup> North Carolina passed the first law in the

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12. Brian S. Barnett, Ariana E. Nesbit & Renée M. Sorrentino, *The Transgender Bathroom Debate at the Intersection of Politics, Law, Ethics, and Science*, 46 J. AM. ACAD. PSYCHIATRY L. 232, 233 (2018).

13. *Id.*

14. Maya Rhodan, *Why Do We Have Men's and Women's Bathrooms Anyway?*, TIME (May 16, 2016), <http://time.com/4337761/history-sex-segregated-bathrooms> [<https://perma.cc/5C2E-NDHT>].

15. *Id.*

16. Within thirty years of Massachusetts passing legislation to segregate bathrooms by sex, all other states had adopted similar laws. Barnett, Nesbit & Sorrentino, *supra* note 12, at 233.

country that required transgender individuals to use the public restroom that corresponds to the biological sex assigned to them at birth.<sup>17</sup> The bill effectively overturned any local ordinances in the state that allowed transgender individuals to use the bathroom of their choice, regardless of the appearance of their genitalia.<sup>18</sup> The bill was met with extraordinary and swift backlash,<sup>19</sup> as businesses pulled out of the state and protests erupted.<sup>20</sup> Almost exactly one year later, the North Carolina legislature repealed portions of the bill that prohibited transgender individuals from using the bathroom that corresponds with their gender identity.<sup>21</sup> However, the state left in place provisions that prevented cities within the state from passing their own anti-discrimination legislation with respect to transgender individuals until 2020.<sup>22</sup>

Despite its disastrous consequences for the state's image and reputation, North Carolina's so-called "bathroom bill" paved the way for nearly two dozen other states to follow suit; as of April 2019, discriminatory legislation that limits access to public restrooms based on how one's genitalia appeared at birth has been introduced in twenty states.<sup>23</sup> On the other end of the spectrum, eighteen states and the District of Columbia have legislation in place that protects the rights of transgender individuals in places of public accommodation.<sup>24</sup>

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17. The bill, known as the Public Facilities Privacy & Security Act, was signed into law on March 23, 2016. Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/index.html> [<https://perma.cc/DDL3-XUGD>].

18. *Id.*

19. Those who opposed the bill argued that the legislation would "stigmatize and marginalize transgender North Carolinians by pushing ugly and fundamentally untrue stereotypes" about transgender people. *Id.*

20. Elena Schneider, *The Bathroom Bill that Ate North Carolina*, POLITICO (Mar. 23, 2017), <http://www.politico.com/magazine/story/2017/03/the-bathroom-bill-that-ate-north-carolina-214944> [<https://perma.cc/VY74-LKXF>]; see also Sandhya Somashekhar, *Backlash Builds Against N.C. Law on Transgender Bathroom Use*, WASH. POST (Mar. 24, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/03/23/north-carolina-passes-bill-blocking-lgbt-protections/?utm\\_term=.f6a1fed4df18](https://www.washingtonpost.com/news/post-nation/wp/2016/03/23/north-carolina-passes-bill-blocking-lgbt-protections/?utm_term=.f6a1fed4df18) [<https://perma.cc/VK4J-YHME>].

21. Camila Domonoske & James Doubek, *North Carolina Repeals Portions of Controversial 'Bathroom Bill'*, NPR (Mar. 30, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/30/522009335/north-carolina-lawmakers-governor-announce-compromise-to-repeal-bathroom-bill> [<https://perma.cc/c43Z3-G36W>].

22. *Id.*

23. The states are Alabama, Arkansas, Illinois, Indiana, Kansas, Kentucky, Minnesota, Missouri, Montana, New Jersey, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming. Barnett, Nesbit & Sorrentino, *supra* note 12, at 233; Diana Ali, *The Rise and Fall of the Bathroom Bill: State Legislation Affecting Trans & Gender Non-Binary People*, NASPA (Apr. 2, 2019), <https://www.naspa.org/rpi/posts/the-rise-and-fall-of-the-bathroom-bill-state-legislation-affecting-trans-ge> [<https://perma.cc/49JX-7Q2U>]. The pace began to slow in spring 2019, with only one new state—Indiana—introducing a bathroom bill.

24. The states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. Barnett, Nesbit & Sorrentino, *supra* note 12, at 233.

Proponents of bathroom bills typically argue that such legislation is necessary to prevent children and women from being sexually assaulted or exposed to opposite-sex genitalia while using restroom facilities.<sup>25</sup> South Dakota State Senator David Omdahl made headlines in 2016 when he described bathroom bills as being aimed at “protecting the kids” from transgender individuals who are “so twisted” and in need of mental health treatment.<sup>26</sup> Similarly, Virginia lawmaker Robert G. Marshall supported the introduction of a bathroom bill in his state, describing the legislation as necessary because “[s]ome guys will use anything to make a move on some teenage girls or women.”<sup>27</sup> In the months leading up to a 2018 statewide referendum in Massachusetts on whether to keep nondiscrimination measures for transgender individuals, opponents of the legislation ran an ad designed to stoke fear for women’s lives.<sup>28</sup> In the thirty-second ad, a blonde-haired adolescent girl enters a women’s locker room.<sup>29</sup> As she stands in front of a locker and begins removing her shirt, a man dressed in jeans and a hoodie watches her through a crack in the bathroom stall.<sup>30</sup> She looks up and gasps in horror as he slowly opens the stall door before the screen ominously cuts to black.<sup>31</sup>

Arguments from individuals like Senator Omdahl and the organization behind the Massachusetts ad campaign are premised on the idea that transgender individuals are prone to sexual deviancy, mental illness, and violence. However, not only does this premise lack support, it has been entirely disproven by scientific research.<sup>32</sup> The most recent comprehensive study on the topic revealed there is no connection between transgender

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25. See *infra* notes 26–29 and accompanying text.

26. Barnett, Nesbit & Sorrentino, *supra* note 12, at 234.

27. Laura Vozzella & Moriah Balingit, *Virginia Lawmaker Proposes a ‘Bathroom Bill’ to Restrict Public Bathroom Use by Transgender People*, WASH. POST (Jan. 5, 2017), [https://www.washingtonpost.com/local/virginia-politics/virginia-lawmaker-proposes-a-bathroom-bill-to-restrict-public-bathroom-use-by-transgender-people/2017/01/04/a01580e2-d2a4-11e6-9cb0-54ab630851e8\\_story.html?utm\\_term=.823e2a80a517](https://www.washingtonpost.com/local/virginia-politics/virginia-lawmaker-proposes-a-bathroom-bill-to-restrict-public-bathroom-use-by-transgender-people/2017/01/04/a01580e2-d2a4-11e6-9cb0-54ab630851e8_story.html?utm_term=.823e2a80a517) [https://perma.cc/CY2Q-56YM]. Despite Marshall’s scare tactics, the bill did not pass. Less than a year later, Marshall lost his seat to Danica Roem, an openly transgender woman. Jen Kirby, *Virginia Elects Danica Roem, its First Openly Transgender State Legislator*, VOX (Nov. 7, 2017, 8:44 PM), <https://www.vox.com/2017/11/7/16621664/virginia-danica-roem-transgender-state-legislator> [https://perma.cc/GB9V-4WK2].

28. Chris Johnson, *Massachusetts Anti-Trans Ad Renews Fear-Mongering over Bathroom Use*, WASH. BLADE (Sept. 20, 2018, 7:18 PM), <http://www.washingtonblade.com/2018/09/20/massachusetts-anti-trans-ad-renews-fear-mongering-over-bathroom-use/> [https://perma.cc/SF7D-KGA3]. Massachusetts voters decided to keep the measures protecting transgender individuals. Faith Karimi & Emanuella Grinberg, *Massachusetts Voters Uphold Transgender Rights Protections*, CNN (Nov. 7, 2018, 9:38 AM), <http://www.cnn.com/2018/11/07/politics/massachusetts-upholds-transgender-protections/index.html?r> [https://perma.cc/5TR4-LGET].

29. Keep Massachusetts Safe Committee, *No on 3, Keep MA Safe*, YOUTUBE (Sept. 19, 2018), [https://www.youtube.com/watch?v=ZT4UZ\\_ILIio](https://www.youtube.com/watch?v=ZT4UZ_ILIio).

30. *Id.*

31. *Id.*

32. See, e.g., *infra* notes 33–36 and accompanying text.

individuals using the bathroom of their choice and crime in bathrooms.<sup>33</sup> The study collected data in Massachusetts before and after the state passed a nondiscrimination law<sup>34</sup> that protects the rights of transgender people in a variety of spheres, including public restrooms.<sup>35</sup> Amira Hasenbush, the study's lead author, found incidents of women and children being attacked in public restrooms to be "rare and unrelated to the laws" that prohibit discrimination in public restrooms.<sup>36</sup>

In fact, it is actually transgender—not cisgender—individuals who report experiencing harrowing encounters when trying to use public restrooms. A 2013 survey conducted by the Williams Institute at UCLA School of Law found that 70 percent of transgender respondents had been "denied access, verbally harassed, or physically assaulted in public restrooms."<sup>37</sup> Thus, bathroom bills only serve to inflict harm on the transgender community without providing any benefit for society.

### *B. Legislation Requiring Proof of Sex Reassignment Surgery to Change Gender Marker on Identity Documents*

When transgender individuals go through the process of transitioning, they are faced with complex emotional hurdles.<sup>38</sup> This highly fraught process is made even more difficult for individuals who reside in states that require documentation that the individuals have gone through sex reassignment surgery (SRS)<sup>39</sup> in order to obtain new identity documents—usually a driver's license or birth certificate—with accurate gender markers.

SRS is a highly invasive process that may require multiple procedures.<sup>40</sup> In order to receive SRS, the individual often must attend therapy, undergo

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33. Julie Moreau, *No Link Between Trans-Inclusive Policies and Bathroom Safety, Study Finds*, NBC NEWS (Sept. 19, 2018, 11:33 AM), <https://www.nbcnews.com/feature/nbc-out/no-link-between-trans-inclusive-policies-bathroom-safety-study-finds-n9111106> [<https://perma.cc/6FM9-EWL4>].

34. MASS. GEN. LAWS ANN. ch. 272, § 92A (West 2016) ("An owner . . . of any place of public accommodation, resort or amusement that lawfully segregates or separates access . . . based on a person's sex shall grant all persons admission to, and the full enjoyment of, such place of public accommodation or portion thereof consistent with the person's gender identity.").

35. Moreau, *supra* note 33.

36. *Id.*

37. Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 65 (2013).

38. See, e.g., Katherine Schreiber, *Why Transgender People Experience More Mental Health Issues*, PSYCHOL. TODAY (Dec. 6, 2016), <https://www.psychologytoday.com/us/blog/the-truth-about-exercise-addiction/201612/why-transgender-people-experience-more-mental-health> [<https://perma.cc/97LC-72PW>] (reporting nearly half of all transgender individuals experience depression and/or anxiety, far surpassing the rates among the general population).

39. Sex reassignment surgery may sometimes be referred to as "gender reassignment surgery." *What is Gender Reassignment Surgery?*, INT'L SOC'Y FOR SEXUAL MED., <https://www.issm.info/sexual-health-qa/what-is-gender-reassignment-surgery> [<https://perma.cc/6623-YPWT>]. This Note will use the terms "sex reassignment surgery" and "SRS" exclusively.

40. *Id.*

hormonal treatment, and live as the sex the person is transitioning to for at least one year before surgery.<sup>41</sup> For males transitioning to females, SRS usually involves removing the individual's penis and testicles and then using tissue from either or both to create a vagina, a clitoris, and a labia.<sup>42</sup> Post-surgery, the individual must use vaginal dilators to prevent the vagina from closing up.<sup>43</sup> For females transitioning to males, the process is even more intensive.<sup>44</sup> The breasts, ovaries, and uterus are removed, and the vagina is sewn shut.<sup>45</sup> The physician will construct a penis and scrotum, sometimes using implants to create the desired shape.<sup>46</sup>

Like all surgeries, SRS can be risky, especially for individuals with certain health conditions, such as diabetes or hypertension.<sup>47</sup> While some may feel SRS is important enough to their transition that they are willing to brave the odds, others may be more risk averse. Furthermore, because of the harms associated with operating on individuals who are overweight or obese, most surgeons will refuse to perform SRS on anyone with a BMI above the "normal" range.<sup>48</sup> If an individual suffers from a condition that makes it extremely difficult or impossible to lose weight, such as polycystic ovary syndrome<sup>49</sup> or thyroid cancer,<sup>50</sup> this can mean the individual will likely never be able to have SRS.

Beyond the fact that SRS may be unavailable or undesirable for some individuals due to their physical limitations, the procedure can also be unattainable for others due to the financial cost. While the specific dollar amount varies depending on a number of factors including geographical

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41. Doran Shemin, *My Body is My Temple: Utilizing the Concept of Dignity in Supreme Court Jurisprudence to Fight Sex Reassignment Surgery Requirements for Recognition of Legal Sex*, 24 AM. U. J. GENDER SOC. POL'Y & L. 491, 497 (2016).

42. *What is Gender Reassignment Surgery?*, *supra* note 39.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *General Anesthesia*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/anesthesia/about/pac-20384568> [<https://perma.cc/977T-T9tf>] (discussing various conditions associated with an increased risk for surgical complications).

48. *See, e.g., Too Fat to Transition* (TLC television broadcast Dec. 29, 2016). While it should be noted that many in the scientific community agree that BMI is a fairly inaccurate indicator of health, it is still widely used by physicians. *See, e.g., Keith Devlin, Top 10 Reasons Why the BMI Is Bogus*, NPR (July 4, 2009, 8:00 AM), <https://www.npr.org/templates/story/story.php?storyId=106268439> [<https://perma.cc/GVC2-Y5PN>]. This use may result in the exclusion of healthy individuals who desire sex reassignment surgery but are outside of the "healthy" BMI range.

49. *Can Polycystic Ovary Syndrome Make You Gain Weight?*, CLEVELAND CLINIC (Sept. 22, 2016), <https://health.clevelandclinic.org/can-polycystic-ovary-syndrome-make-gain-weight> [<https://perma.cc/W5CH-8R29>] (explaining that polycystic ovary syndrome "might make women gain weight more easily than others").

50. Seo Young Sohn et al., *Weight Changes in Patients with Differentiated Thyroid Carcinoma During Postoperative Long-Term Follow-up Under Thyroid Stimulating Hormone Suppression*, 30 ENDOCRINOLOGY & METABOLISM 343, 343 (2015) (reporting that certain types of treatment for thyroid cancer can result in significant long-term weight gain).

location, number of surgeries performed, and types of surgeries performed, the total cost for SRS can be upwards of \$100,000.<sup>51</sup> Although the majority of insurance companies offer coverage for medically-necessary sex reassignment surgeries,<sup>52</sup> less than half of employers offer sex reassignment coverage to their employees<sup>53</sup> and only eighteen states and the District of Columbia have Medicaid policies that explicitly cover healthcare related to SRS.<sup>54</sup> Moreover, the potential for insurance coverage is naturally of little consolation for those lacking adequate health insurance in the first place.<sup>55</sup> Data from 2017 indicated that 31 percent of transgender Americans do not have regular access to healthcare.<sup>56</sup>

In addition to the price of the surgical procedures, there are also potential secondary expenses associated with SRS. Depending on the individual, these expenses may include the cost of childcare while the individual is away from the home, lost wages from time spent recovering from surgery,<sup>57</sup> the loss of a job altogether if the individual's employer refuses to approve such a lengthy absence from work, and the costs associated with traveling—in some cases, internationally<sup>58</sup>—to receive SRS.

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51. Chris Taylor, *Transgender Surgery Can Cost More than \$100,000*, MONEY (Oct. 29, 2015), <http://money.com/money/4092680/transgender-surgery-costs/> [https://perma.cc/5RFF-B2K2].

52. Five insurance companies—WellPoint, CIGNA, Aetna, Humana, and United Healthcare—insure roughly half of the insured population. Amanda Baltazar, *The Big Five Health Insurance Companies*, VERYWELL HEALTH (Aug. 31, 2018), <https://www.verywellhealth.com/the-big-five-health-insurance-companies-2663838> [https://perma.cc/QZ69-BE57]. All of these five insurance companies provide coverage for SRS. *Transgender Insurance Medical Policies*, TRANSCEND LEGAL, [https://transcendlegal.org/health-insurance-medical-policies?items\\_per\\_page=All](https://transcendlegal.org/health-insurance-medical-policies?items_per_page=All) [https://perma.cc/4X78-GS4L] (providing links to the WellPoint, CIGNA, Aetna, Humana, and United Healthcare policies on SRS coverage).

53. See Bruce Japsen, *More Employers Cover Transgender Surgery as Politics Shift*, FORBES (May 17, 2016, 8:01 AM), <https://www.forbes.com/sites/brucejapsen/2016/05/17/as-transgender-politics-shift-more-employers-cover-gender-surgery/#27769f0010db> [https://perma.cc/S8C9-XUFZ].

54. The eighteen states are: California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *Healthcare Laws and Policies: Medicaid Coverage for Transition-Related Care*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/img/maps/citations-medicaid.pdf> [https://perma.cc/GFC4-5C44] (last updated Apr. 5, 2019).

55. By the end of 2018, the percentage of uninsured Americans reached 13.7 percent—the highest level since coverage under the Affordable Care Act went into effect in 2014. Dan Witters, *U.S. Uninsured Rate Rises to Four-Year High*, GALLUP (Jan. 23, 2019), [https://news.gallup.com/poll/246134/uninsured-rate-rises-four-year-high.aspx?g\\_source=link\\_NEWSV9&g\\_medium=NEWSFEED&g\\_campaign=item\\_&g\\_content=U.S.%2520Uninsured%2520Rate%2520Rises%2520to%2520Four-Year%2520High](https://news.gallup.com/poll/246134/uninsured-rate-rises-four-year-high.aspx?g_source=link_NEWSV9&g_medium=NEWSFEED&g_campaign=item_&g_content=U.S.%2520Uninsured%2520Rate%2520Rises%2520to%2520Four-Year%2520High) [https://perma.cc/VV47-MZ2M].

56. Neda Ulaby, *Health Care System Fails Many Transgender Americans*, NPR (Nov. 21, 2017, 4:29 PM), <https://www.npr.org/sections/health-shots/2017/11/21/564817975/health-care-system-fails-many-transgender-americans> [https://perma.cc/AHE6-TDNS].

57. See Chettawut Tulayaphanich, *How to Successfully Recover After Sex Reassignment Surgery*, CHETTAWUT PLASTIC SURGERY CTR., <http://www.chet-plasticsurgery.com/recovery-after-sex-reassignment-surgery/> [https://perma.cc/3XPH-BMWD].

58. Jason Gale, *How Thailand Became a Global Gender-Change Destination*, BLOOMBERG (Oct. 26, 2015, 5:55 PM), <https://www.bloomberg.com/news/features/2015-10-26/how-thailand-became-a>



Thus, while SRS can have an enormously positive outcome for some transgender individuals,<sup>59</sup> others may choose to not undergo SRS for a myriad of physical, emotional, personal, and financial reasons. For transgender individuals who live in the twenty-two states that require proof of SRS in order to change the gender marker on identity documents,<sup>60</sup> this choice, which should be solely their own, becomes even more complicated.

### C. Genital-Normalizing Surgery

While transgender issues have surged to the forefront of American political discussions in recent years, issues affecting intersex individuals have been generally ignored. The term “intersex” refers to an individual with “variations in sex characteristics, such as ambiguous external genitalia, ambiguous internal reproductive organs, or uncommon chromosomal patterns.”<sup>61</sup>

In the 1950s, physicians began regularly performing “genital-normalizing” surgeries on intersex infants.<sup>62</sup> A surgery is classified as “genital-normalizing” if performed with the purpose of “correcting” ambiguous genitalia—that is, making the genitalia appear either more masculine or more feminine.<sup>63</sup> This practice was legitimized and brought into widespread acceptance for many physicians following research published by Dr. John Money in his 1969 book *Transsexualism and Sex Reassignment*.<sup>64</sup> Dr. Money argued that individuals’ gender identity and

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global-gender-change-destination [https://perma.cc/9CR8-7ATU] (describing Thailand as “the most popular overseas destination for patients seeking [SRS]”).

59. See, e.g., Ana Sandoiu, *Transgender Surgery Can Improve Life for Most, Study Confirms*, MED. NEWS TODAY (Mar. 19, 2018), https://www.medicalnewstoday.com/articles/321258.php [https://perma.cc/VF3U-V5EE].

60. The twenty-two states that require proof of sex reassignment surgery in order to change the gender marker on identity documents are: Alabama, Arkansas, Colorado, Florida, Georgia, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Virginia, West Virginia, Wisconsin, and Wyoming. *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, https://www.lambdalegal.org/know-your-rights/article/transchanging-birth-certificate-sex-designations [https://perma.cc/GWP3-4KHN] (last updated Sept. 17, 2018). Two states (Ohio and Tennessee) do not allow the gender marker to be changed regardless of whether the individual has had SRS. Trudy Ring, *Kansas to Allow Gender Marker to Change on Birth Certificates*, ADVOCATE (June 24, 2019, 5:34 PM), https://www.advocate.com/transgender/2019/6/24/kansas-allow-gender-marker-change-birth-certificates [https://perma.cc/86FA-Y8EP]. Fourteen states and the District of Columbia require some type of “medically appropriate” treatment before the gender marker can be changed. *Changing Birth Certificate Sex Designations*, *supra* note 60.

61. White, *supra* note 7, at 782.

62. Alison Davidian, *Beyond the Locker Room: Changing Narratives on Early Surgery for Intersex Children*, 26 WIS. J.L. GENDER & SOC’Y 1, 5 (2011).

63. Kishka-Kamari Ford, “First, Do No Harm”—*The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants*, 19 YALE L. & POL’Y REV. 469, 469 (2001).

64. Benedict Carey, *John William Money, 84, Sexual Identity Researcher, Dies*, N.Y. TIMES (July 11, 2006), https://www.nytimes.com/2006/07/11/us/11money.html [https://perma.cc/DGQ4-5JC]

sexual identity is not based on the appearance of one's genitalia alone but rather shaped by "social and environmental cues" in addition to the individual's genes and hormones.<sup>65</sup> Basing his argument on the premise that gender identity can be shaped entirely by how an individual is raised, Dr. Money claimed that genital-normalizing surgeries were an appropriate standard of care for intersex children because genital alteration "allows the child to develop a gender identity that matches the sex chosen by the surgeon."<sup>66</sup> Essentially, Dr. Money believed that a child's gender identity was not imparted at birth but instead was malleable. A boy would become a boy so long as (1) he had phallic-looking genitalia and (2) he was raised being told he was a boy. The same logic applied for girls.<sup>67</sup>

Dr. Money's hypothesis was not supported by any longitudinal research but rather by a single anecdotal case study known as the "John/Joan" case.<sup>68</sup> The case followed a boy named Bruce Reimer, who was born with his identical twin brother Brian in 1965. At eight months old, Bruce was the victim of a botched circumcision, during which his penis was cauterized.<sup>69</sup> Following the advice and encouragement of Dr. Money, Bruce's parents gave their consent to have Bruce undergo genital-normalizing surgery that would feminize his genitalia.<sup>70</sup> They also renamed him "Brenda."<sup>71</sup> Bruce was raised as a girl and did not learn he was born with male genitalia until age fourteen.<sup>72</sup> After following Bruce's behavior throughout his childhood, Dr. Money reported Bruce had fully accepted his gender identity as female.<sup>73</sup>

Unfortunately, this happy ending was far from the truth. In the late 1980s, researchers attempted to follow up with Bruce.<sup>74</sup> To their surprise, they found Bruce had changed his name to David, telling the researchers he

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2]. See also White, *supra* note 7, at 786 (stating that "[Dr. Money's] theory serves as the rationale for genital-normalizing surgery on intersex children").

65. Carey, *supra* note 64. While this hypothesis could have positive uses within the transgender community (such as to bolster understanding for why transgender individuals identify with a gender that is different from the one assigned to them at birth), it ultimately proved devastating for many intersex individuals. See *infra* notes 118–120 and accompanying text.

66. White, *supra* note 7, at 785.

67. See *id.* at 785–86.

68. Phil Gaetano, *David Reimer and John Money Gender Reassignment Controversy: The John/Joan Case*, EMBRYO PROJECT ENCYCLOPEDIA (Nov. 15, 2017), <https://embryo.asu.edu/pages/david-reimer-and-john-money-gender-reassignment-controversy-johnjoan-case> [<https://perma.cc/CEJ4-K3HH>].

69. *Id.*

70. White, *supra* note 7, at 785. During this surgery, physicians removed Bruce's penis and constructed a vagina in its place. Gaetano, *supra* note 68.

71. White, *supra* note 7, at 786.

72. *Id.* at 786–87.

73. Carey, *supra* note 64.

74. Davidian, *supra* note 62, at 6.

had never accepted his identity as a female.<sup>75</sup> David underwent a number of surgeries in an attempt to restore his penis once more.<sup>76</sup> Tragically, however, David committed suicide in 2004 at age thirty-eight.<sup>77</sup>

The ultimate outcome of this case reportedly left Dr. Money “mortified,” but the damage was done.<sup>78</sup> Although nationwide data on the prevalence of genital-normalizing surgeries does not exist,<sup>79</sup> since Dr. Money published his research promoting genital-normalizing surgery as the appropriate standard of care for intersex children, physicians in the United States have performed these medically-unnecessary procedures on a regular basis for almost half a century.<sup>80</sup>

As understanding of the harmful consequences associated with genital-normalizing surgery grew, legal advocacy groups like interACT began fighting back.<sup>81</sup> With the assistance of interACT and the Southern Poverty Law Center,<sup>82</sup> the constitutionality of such surgeries ended up in the court system for the first time in U.S. history in 2013.<sup>83</sup> The case, *M.C. v. Aaronson*,<sup>84</sup> was brought by the adoptive parents of M.C., an eight-year-old child that was born with “both male and female internal reproductive structures.”<sup>85</sup> As an infant, M.C. was placed under the care of the state of South Carolina.<sup>86</sup> At sixteen months old, while still under the care of the state, physicians at a state hospital performed genital-normalizing surgery on M.C.<sup>87</sup> His phallus was reduced to the size of a clitoris, his testicular tissue was removed, and labia were constructed.<sup>88</sup> Despite M.C.’s feminized genitalia, his adoptive parents alleged he had shown “strong signs of

75. *Id.* at 6–7.

76. *Id.* at 7.

77. *Id.*

78. Carey, *supra* note 64.

79. HUMAN RIGHTS WATCH & INTERACT, “I WANT TO BE LIKE NATURE MADE ME:” MEDICALLY UNNECESSARY SURGERIES ON INTERSEX CHILDREN IN THE US 48 (2017), <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us> [https://perma.cc/4R3R-A49H].

80. *Id.* (quoting an endocrinologist who works with intersex children as saying “surgery is happening on almost 100 percent of these kids” and noting data from 2014 that indicates two types of genital-normalizing surgeries were performed nearly 600 times that year).

81. Learn more about interACT (formerly “Advocates for Informed Choice”) at [interactadvocates.org](http://interactadvocates.org).

82. Complaint, *M.C. v. Aaronson*, No. 2:13-cv-01303 (D.S.C. May 14, 2013), 2013 WL 1961775 [hereinafter *M.C. Complaint*].

83. Tim Smith & David Dykes, *Hospitals, South Carolina Sued over Child’s Sex Surgery*, USA TODAY (May 15, 2013, 2:37 PM), <https://www.usatoday.com/story/news/nation/2013/05/15/child-sex-assignment-surgery/2161941/> [https://perma.cc/S4YE-CR3H].

84. *M.C. v. Aaronson*, No. 2:13-cv-01303-DCN, 2013 WL 11521881, at \*6 (D.S.C. Aug. 29, 2013).

85. *M.C. Complaint*, *supra* note 82, ¶¶ 2–3.

86. *Id.* ¶ 2.

87. *Id.* ¶ 5–6.

88. *Id.* ¶ 5.

developing a male gender” since a young age and was living as a boy at the time of the complaint.<sup>89</sup> M.C.’s adoptive parents decried defendants’ actions as “caus[ing] emotional trauma, stress, physical pain and confinement, and loss of bodily integrity, permanently impact[ing] M.C.’s potential to function sexually and permanently destroy[ing] M.C.’s potential male reproductive function.”<sup>90</sup> The suit argued the decisions made by the physicians and Social Services’ employees—all of whom were government employees—resulted in violations of M.C.’s Fourteenth Amendment rights to substantive and procedural due process.<sup>91</sup> After four years of discovery, the case settled for \$440,000 in 2017,<sup>92</sup> leaving many wondering how the case would have been resolved if it had gone to trial. Although the outcome was not what plaintiffs and the intersex community as a whole had been vying for, the fact that the case survived defendants’ Motion to Dismiss served to buoy the hopes of those fighting for intersex rights.<sup>93</sup>

Today, small but encouraging steps toward recognizing intersex rights under the law continue. While still not forbidding the practice, the American Academy of Pediatrics (APA) changed its recommendations in 2006 regarding the treatment of intersex children.<sup>94</sup> The APA no longer describes the existence of an intersex child as a “social emergency”<sup>95</sup> and now suggests that when a genital-normalizing surgery is performed, the physician’s focus should be on improving genital function rather than changing the aesthetic appearance.<sup>96</sup> Nevertheless, this recommendation has no legal force, as medical providers are not required to follow APA recommendations.<sup>97</sup> Furthermore, there are currently no laws on the books prohibiting or limiting genital-normalizing surgeries.<sup>98</sup>

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89. *Id.* ¶ 7.

90. *Id.* ¶ 52.

91. *Id.* ¶ 12.

92. Kristina Marusic, *Couple Settle Landmark Lawsuit Against Hospital for Performing Surgery on Their Intersex Son*, NEWNOWNEXT (Aug. 1, 2017), <http://www.newnownext.com/intersex-surgery-lawsuit/08/2017> [<https://perma.cc/U2L9-ZRM4>].

93. *M.C. v. Aaronson*, No. 2:13-cv-01303-DCN, 2013 WL 11521881, at \*6 (D.S.C. Aug. 29, 2013) (denying the Motion to Dismiss because “[i]t is plain that M.C. has sufficiently alleged that defendants violated at least one clearly established constitutional right—the right to procreate—when they recommended, authorized, and/or performed the sex assignment surgery”). On appeal, however, the Fourth Circuit reversed, finding the defendants had successfully pled the defense of qualified immunity because they lacked “fair notice that they were violating M.C.’s right to bodily integrity by performing [the surgery].” *M.C. v. Amrhein*, 598 F. App’x 143, 148 (4th Cir. 2015). Nonetheless, the court was careful to couch its decision in terms of what a reasonable government official would have known at the time—in 2006—not what a reasonable government official would know today. *Id.* at 149.

94. HUMAN RIGHTS WATCH & INTERACT, *supra* note 79, at 26–27.

95. *Id.*

96. Davidian, *supra* note 62, at 9–10.

97. *Id.* at 11.

98. See Afshan Jafar, *The Thin Line Between Surgery and Mutilation*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/opinion/fgm-ruling-intersex-surgery.html> [<https://perma.cc/8TKC-6W6Y>] (noting California would be “the first state to ban non-medically necessary genital surgeries

However, more substantial legal progress may be on the horizon. In August 2018, California became the first state in the country to legally recognize the harms of genital-normalizing surgeries when it passed a non-binding resolution calling on members of the medical profession to “foster the well-being of children born with variations of sex characteristics . . . through the enactment of policies and procedures that ensure individualized, multidisciplinary care that . . . defers medical or surgical intervention, as warranted, until the child is able to participate in [sic] decisionmaking.”<sup>99</sup> While lacking legal force, this resolution is beneficial for the intersex community because it supports the bodily autonomy of intersex youth and may provide the foundation for future legislation that carries stronger force.<sup>100</sup> Indeed, activists in California have attempted to capitalize on this momentum by putting forth a bill that would require consent from the child—not the child’s parent(s)—before medically-unnecessary genital surgeries are performed.<sup>101</sup> However, the bill was quickly shelved until January 2020 after facing mounting criticism from lobbyist groups for physicians in the state.<sup>102</sup> Outside of California, legislators introduced similar—albeit less expansive—legislation in Indiana in 2016,<sup>103</sup> as well as Texas<sup>104</sup> and Nevada in 2017,<sup>105</sup> although none of the bills ultimately passed.

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on intersex children and minors” if its bill to prohibit genital-normalizing surgery passed). However, genital-normalizing surgery should not be confused with female genital mutilation (FGM), which is prohibited in the majority of states. *See FGM Legislation By State*, AHA FOUNDATION, <https://www.theahafoundation.org/female-genital-mutilation/fgm-legislation-by-state> [https://perma.cc/CD2P-MEW5]. FGM refers to “all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.” *Female Genital Mutilation*, WORLD HEALTH ORG. (Jan. 31, 2018), <http://www.who.int/en/news-room/fact-sheets/detail/female-genital-mutilation> [https://perma.cc/65X6-VRVM].

99. S. Con. Res. 110, 115th Cong., Reg. Sess., at 4 (Cal. 2018); *see also SCR-110: California’s Intersex-Affirming Resolution*, INTERACT, <https://interactadvocates.org/scr-110/#scr> [https://perma.cc/NNA9-EMGM].

100. *See Intersex Legislation & Regulation*, INTERACT, <https://interactadvocates.org/intersexlegislation-regulation> [https://perma.cc/D9MA-Z5EA] (explaining that interACT, a group which fights for the rights of intersex people, helped write the resolution).

101. *California’s Legislative Fight to Protect Intersex Children From Nonconsensual Genital Surgeries Pushed to 2020*, INTERACT, <https://interactadvocates.org/sb201-2020/> [https://perma.cc/42G8-8YKP].

102. Melody Gutierrez, *Bill to Ban Cosmetic Genital Surgeries on Intersex Infants Delayed. Doctors Opposed It*, L.A. TIMES (Apr. 8, 2019, 11:46 AM), <https://www.latimes.com/politics/la-pol-ca-intersex-genital-surgery-20190408-story.html> [https://perma.cc/28VV-BACW].

103. H.B. 1242, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016). Specifically, the bill provided that no person may consent to the performance of a medically unnecessary genital-normalizing surgery on behalf of an intersex child. *Id.* However, the bill only extended to circumstances in which the child was in the custody of the state. *Id.*

104. S.B. 1342, 85th Leg. (Tex. 2017). This bill would have forbidden physicians from performing genital-normalizing surgeries on children under age twelve who are in foster care. *Id.*

105. S.B. 408, 79th Sess. (Nev. 2017). The bill provided that a physician must receive the child’s consent, in addition to the parent’s consent, before the physician may perform medically unnecessary genital-normalizing surgery on the child. *Id.*

## II. ANALYSIS

While certainly not identical, each of these three areas of the law—bathroom bills, laws that require evidence of SRS in order to change one’s gender marker, and the lack of legal prohibitions on genital-normalizing surgery for non-consenting minors—share an important commonality: genital exceptionalism. When the principles of genital exceptionalism are allowed to dictate the U.S. legal framework, both through the enactment of laws as well as the failure to provide legal protections, there are three detrimental consequences: (1) intersex and transgender individuals are physically and emotionally harmed; (2) the constitutional rights of those same individuals are violated; and (3) society as a whole shoulders a needless financial burden.

### A. *Physical and Emotional Harm*

Laws based on genital exceptionalism wreak havoc on the intersex and transgender communities by causing physical and emotional harm. In the weeks after the discriminatory bathroom bill in North Carolina was signed into law,<sup>106</sup> calls to Trans Lifeline—a suicide hotline for transgender people in crisis—nearly doubled.<sup>107</sup> Operators at the Trevor Project, the largest suicide prevention and crisis intervention organization for LGBTQ youth, also saw a spike when similar legislation was proposed in Texas.<sup>108</sup> Once enacted, the harmful effects of these bills do not dissipate. Transgender individuals who are not allowed to use the bathroom of their choice may restrict their water and food intake in order to avoid using a public restroom altogether, which can cause or exacerbate medical problems.<sup>109</sup> The unwelcome attention that often accompanies a transgender minor’s use of a

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106. See *supra* discussion in Part I.A.

107. Samantha Allen, *After North Carolina’s Law, Trans Suicide Hotline Calls Double*, DAILY BEAST (Apr. 20, 2016, 1:00 AM), <https://www.thedailybeast.com/after-north-carolinas-law-transsuicide-hotline-calls-double> [<https://perma.cc/BRE3-6TRS>].

108. Alia E. Dastagir, *Young, Transgender and Fighting a Years-Long Battle Against Suicidal Thoughts*, USA TODAY (Apr. 8, 2019, 4:38 PM), <https://www.usatoday.com/in-depth/news/investigations/surviving-suicide/2018/11/28/transgender-suicide-how-lgbt-person-copes-suicidal-thoughts/2135541002> [<https://perma.cc/76MU-U9GU>] (quoting the CEO of the Trevor Project as stating, “In Texas, when they were trying to keep transgender people from using the restroom that matches their gender identity, we saw a spike in trans and non-conforming people in Texas calling the lifeline”).

109. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 747 (E.D. Va. 2018) (explaining one consequence of the school’s bathroom policy was that the transgender plaintiff “avoided water intake to avoid needing to use the restroom, thereby exacerbating medical issues”); see also *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1040–41 (7th Cir. 2017). In *Whitaker*, the transgender plaintiff had been diagnosed with vasovagal syncope, a condition that made plaintiff “more susceptible to fainting and/or seizures if dehydrated.” *Id.* at 1041. Because the school’s policy required him to use the girls’ bathroom or the gender-neutral bathroom in the school office, plaintiff restricted his water intake and consequently suffered fainting and dizziness. *Id.* at 1040–41.

public bathroom can also lead to psychologically harmful—and potentially even deadly—bullying from peers.<sup>110</sup>

For transgender individuals in states that require SRS in order to change their gender markers on identity documents, the physical and emotional consequences can be dire. To begin with, SRS takes a serious physical toll on the body.<sup>111</sup> While the exact length of recovery time may vary depending on the procedures performed and the occurrence of complications, the period of time required to recover from SRS is extensive.<sup>112</sup> Those who undergo SRS may be unable to work full-time for one to three months, depending on the level of stress and amount of manual labor associated with the job.<sup>113</sup>

Even after recovery is complete, detrimental physical effects of SRS can be lifelong. While alternative methods of becoming a parent are, of course, possible for transgender individuals, SRS permanently destroys any chance the individual may have for procreating sans medical intervention.<sup>114</sup> For some transgender individuals, the decision to put off SRS until after the individual has started a family is the choice that makes the most sense.<sup>115</sup> For those who choose to not go through SRS but live in a state that requires the procedure in order to change gender markers, the result is regular harassment, anguish, and embarrassment as the individual is forcibly

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110. See, e.g., Melissa Sterling, *To Pee or Not to Pee? “Where” Is the Question: Transgender Students and the Right to Use Public School Restrooms*, 21 *CARDOZO J.L. & GENDER* 757, 765–66 (2015) (describing an incident in which a transgender teenager was subjected to bullying as a result of being compelled to use the staff-only private bathroom); Rokia Hassanein, *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescents*, *HUM. RTS. CAMPAIGN* (Sept. 12, 2018), <https://www.hrc.org/blog/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescen> [<https://perma.cc/8SS8-F3WG>] (reporting that a 2018 study conducted by the American Academy of Pediatrics found “alarming” levels of suicide attempts among transgender youth. More than half of transgender male teen respondents and 29.9 percent of transgender female teen respondents said they had attempted suicide at some point in their lives).

111. See *supra* discussion in Part I.B.

112. Tulayaphanich, *supra* note 57.

113. See *id.*

114. Paul De Sutter, *Gender Reassignment and Assisted Reproduction: Present and Future Reproductive Options for Transsexual People*, 16 *HUM. REPROD.* 612, 612 (2001) (describing the hormonal and surgical treatments that transgender individuals go through as “lead[ing] to irreversible loss of . . . reproductive potential”).

115. Some may remember the headline-grabbing story of Thomas Beatie, touted as “The World’s First Pregnant Man.” Mr. Beatie is a transgender man who kept his ovaries when he transitioned. In 2008, he became pregnant through a sperm donor after his wife was unable to conceive. Guy Trebay, *He’s Pregnant. You’re Speechless.*, *N.Y. TIMES* (June 22, 2008), <https://www.nytimes.com/2008/06/22/fashion/22pregnant.html> [<https://perma.cc/ZF6M-ATUT>].

“outed”<sup>116</sup> every time he or she is required to show an ID with a gender marker that does not match the one the individual is presenting.<sup>117</sup>

The harms to intersex children who have been subjected to genital-normalizing surgery are both physical and psychological. A 2013 report from the United Nations describes intersex individuals who underwent genital-normalizing surgery as being left with “permanent, irreversible infertility and . . . severe mental suffering.”<sup>118</sup> The operation(s) can leave the child dependent upon hormone replacement therapy for the rest of his or her life, and can cause “pain, nerve damage, and scarring.”<sup>119</sup> The psychological and emotional effects are burdensome as well. A product of genital-normalizing surgery for many intersex individuals is shame and embarrassment, due to the silence and secrecy that often shrouds the surgeries.<sup>120</sup>

### B. Constitutional Violations

Laws based on genital exceptionalism not only cause physical and emotional harm but also violate transgender and intersex individuals’ constitutional rights to privacy, procreation, and equal protection.

The right to privacy, though not explicitly stated in the Constitution, was articulated for the first time in Supreme Court jurisprudence in *Griswold v. Connecticut*.<sup>121</sup> Peering into the “penumbras” and “emanations” of the Bill of Rights, the Court found a right to privacy—that is, a right to be free from governmental intrusion—which made a Connecticut law banning the use of contraceptives unconstitutional.<sup>122</sup> When the U.S. legal infrastructure is centered around upholding the ideals of genital exceptionalism, the government violates the fundamental right to privacy in two major ways: (1) it infringes upon the right to make autonomous medical decisions (in other words, the right to bodily autonomy)<sup>123</sup> and (2) it requires transgender

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116. “Outing” refers to the “act of publicly declaring . . . or revealing another person’s sexual orientation or gender identity without that person’s consent.” *Outing*, GLOSSARY OF TERMS—LESBIAN/GAY/BISEXUAL/QUEER, GLAAD, <https://www.glaad.org/reference/lgbtq> [<https://perma.cc/KB4A-JU4L>].

117. See, e.g., Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 101–103, *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015) (No. 2:15-cv-11834-NGE-EAS) [hereinafter *Love Complaint*].

118. HUMAN RIGHTS WATCH & INTERACT, *supra* note 79, at 9.

119. *Id.* at 6.

120. Davidian, *supra* note 62, at 8–9 (explaining that intersex people have been known to suffer psychologically due to the secrecy that surrounds the surgical procedures).

121. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

122. *Id.* at 483–85.

123. See *Roe v. Wade*, 410 U.S. 113, 152–53, 164–65 (1973) (determining that the right to privacy as established in *Griswold v. Connecticut* includes the right to bodily autonomy with respect to choosing abortion prior to the third trimester of pregnancy).



individuals to involuntarily divulge sensitive, personal details regarding the appearance of their genitalia. First, by allowing parents to consent on behalf of their infant children to irreversible, life-altering surgical procedures,<sup>124</sup> and by coercing transgender individuals into undergoing expensive, dangerous, and potentially life-threatening sex reassignment surgeries, the government infringes on its citizens' right to privacy and bodily autonomy. Second, because bathroom bills and the process for changing gender markers on identity documents require transgender individuals to divulge information regarding the appearance of their genitalia at birth and/or at the time of the encounter, these laws infringe on the same constitutional rights to privacy and bodily autonomy.<sup>125</sup>

In addition to the right to privacy and bodily autonomy, transgender and intersex individuals—like all other Americans—have a right to procreate. The Supreme Court established the existence of this right in *Skinner v. Oklahoma*.<sup>126</sup> While the bathroom bills do not affect this right to procreate, both genital-normalizing surgery on intersex infants and laws that require proof of sex reassignment surgery to obtain a correct gender marker on identity documents do.

In *Skinner v. Oklahoma*, the Supreme Court deemed procreation a “basic civil right[ ]” which is “fundamental to the very existence and survival of the [human] race.”<sup>127</sup> In finding the right to procreate fundamental, the Court determined that laws mandating sterilization should be subject to strict scrutiny.<sup>128</sup> In order to survive strict scrutiny the law must be “narrowly tailored” to further “compelling governmental interests.”<sup>129</sup> If a law that is subject to strict scrutiny cannot pass the test, the law will be struck down for violating the Equal Protection Clause of the Fourteenth Amendment.<sup>130</sup> Examples of laws that have failed to pass strict scrutiny include a ban on interracial marriage,<sup>131</sup> segregation in public schools,<sup>132</sup> and, as the Court in *Skinner v. Oklahoma* concluded, forced sterilization for habitual criminals.<sup>133</sup> Nonetheless, the strict scrutiny test is not always fatal

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124. See White, *supra* note 7, at 813–20 (discussing the constitutional harms associated with genital-normalizing surgery on intersex infants).

125. See, e.g., Complaint for Declaratory and Injunctive Relief ¶¶ 106–107, Corbitt v. Taylor, No. 2:18-cv-00091 (M.D. Ala. Feb. 6, 2018) [hereinafter Corbitt Complaint] (arguing, inter alia, that an Alabama law which required proof of sex reassignment surgery for gender marker correction was unconstitutional on privacy grounds).

126. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

127. *Id.*

128. *Id.*

129. *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

130. U.S. CONST. amend. XIV, § 1.

131. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

132. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

133. 316 U.S. at 536.

for the government.<sup>134</sup> For example, in 2016, the University of Texas at Austin's affirmative action program survived the rigorous inquiry.<sup>135</sup> Thus, in order to determine whether a law violates the right to procreate, the court will look at whether the law is narrowly tailored to further compelling government interests.

As previously discussed, sex reassignment surgery permanently destroys an individual's ability to conceive through traditional means of procreation.<sup>136</sup> With this in mind, some transgender individuals may go forward with sex reassignment surgery after concluding they do not want to become a parent. Others may elect to undergo the surgery as well, with plans of becoming a parent through alternative means, such as adoption or surrogacy. However, for others, the desire to conceive children naturally—whether due to individual preference, financial concerns,<sup>137</sup> or any other personal reason—may outweigh the desire to have sex reassignment surgery. While laws that require proof of sex reassignment surgery in order to change the gender marker on an identity document fall short of the compulsory sterilization that was at stake in *Skinner v. Oklahoma*,<sup>138</sup> these state laws still involve a strong coercive element. Because of the extraordinarily high rates of violence against transgender individuals, and the negative social stigma associated with transgender status, the decision of whether to undergo sex reassignment surgery may truly be life or death.<sup>139</sup> either the individual undergoes sex reassignment surgery and loses

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134. See generally Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1247 (2010) (arguing that the Supreme Court has “diluted” the strict-scrutiny test in recent years by giving “a strong dose of deference to the government” such that the test is no longer “fatal in fact” (footnote omitted)).

135. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214 (2016) (finding that the University's affirmative action admissions program did not violate the Equal Protection Clause because a nonracial approach would not promote a diverse educational experience to the same extent as a racial approach).

136. See *supra* discussion in Part II.A.

137. Adoption and surrogacy—the two primary alternatives to natural conception—both pose significant financial obstacles. In 2017, the average cost for a private domestic adoption was around \$40,000. Rebecca Lake, *Average Cost of Adoption in the U.S.*, BALANCE (Mar. 29, 2019), <https://www.thebalance.com/average-cost-of-adoption-in-the-u-s-4582452> [<https://perma.cc/X7BL-7RUJ>]. The cost of domestic surrogacy can vary based on a number of factors including whether the surrogate uses in vitro fertilization and whether an agent is involved, but generally ranges between \$70,000 and \$146,500. *How Much Does Surrogacy Cost?*, SENSIBLE SURROGACY, <https://www.sensible-surrogacy.com/surrogacy-costs> [<https://perma.cc/9F6H-KAJC>]. Meanwhile, the median household income in the United States was \$61,372 in 2017. U.S. CENSUS BUREAU, P60-263, INCOME AND POVERTY IN THE UNITED STATES: 2017 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf>.

138. The statute challenged in *Skinner* exacted compulsory sterilization upon any person who had been convicted of at least two “felonies involving moral turpitude” anywhere in the United States. 316 U.S. at 536.

139. In 2017, at least twenty-nine transgender people in the United States were violently killed. *Violence Against the Transgender Community in 2018*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2018> [<https://perma.cc/8WBL-7FGQ>]. The Human Rights Campaign, which tracks this data, stated, “[I]t is clear that fatal violence

the ability to procreate, or the individual forgoes surgery and inevitably is subjected to higher rates of violence,<sup>140</sup> discrimination, and fewer job opportunities.<sup>141</sup> The dire consequences associated with the discovery that an individual is transgender (which is inevitable if the transgender person does not have sex reassignment surgery and therefore does not have accurate gender markers on their identity documents) demonstrate impermissible government interference with the procreative rights of transgender people. Because there is no “compelling” reason why the government must know the appearance of its constituents’ genitalia, these laws cannot survive strict scrutiny.

Like sex reassignment surgery, genital-normalizing surgery on intersex individuals has the potential to interfere with procreative abilities.<sup>142</sup> Genital-normalizing surgery is irreversible and often results in the buildup of scar tissue in the genital area, as well as the removal of reproductive tissue and/or reproductive organs.<sup>143</sup> By permitting the parents of intersex children to provide medical consent on behalf of the child for these cosmetic surgeries, the government violates the procreative rights of intersex children. While the government may argue that its “compelling” reason for permitting these surgeries to take place is to allow parents to decide what is best for their children and/or to maintain the binary gender system, the reality is that genital-normalizing surgeries can still be performed later in life, once the child is able to make their own decision.<sup>144</sup> Furthermore, a

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disproportionately affects transgender women of color, and that the intersections of racism, sexism, homophobia and transphobia conspire to deprive them of employment, housing, healthcare and other necessities, barriers that make them vulnerable.” *Id.* Moreover, transgender deaths by fatal violence have increased every year since 2015. Marina Pitofsky, “Epidemic of Violence”: 2018 is Worst for Deadly Assaults Against Transgender Americans, USA TODAY (Sept. 28, 2018), <https://www.usatoday.com/story/news/2018/09/26/2018-deadliest-year-transgender-deaths-violence/1378001002> [<https://perma.cc/MGA3-EKH7>].

140. Pitofsky, *supra* note 139.

141. Shabab Ahmed Mirza et al., *The State of the LGBTQ Community in the Labor Market: Pre-June 2018 Jobs Day Release*, CTR. FOR AM. PROGRESS (July 5, 2018, 9:01 AM), <https://www.americanprogress.org/issues/economy/news/2018/07/05/453094/state-lgbtq-community-labor-market-pre-june-2018-jobs-day-release/> [<https://perma.cc/6ASF-GCYA>] (citing multiple studies that found a job applicant was more likely to receive a callback when the applicant’s resume did not indicate the applicant was transgender, gay, or queer).

142. See, e.g., White, *supra* note 7, at 807–12 (discussing the *M.C. v. Aaronson* case and explaining that “[g]enital-normalizing surgery . . . robbed M.C. of the opportunity to live naturally as a male and denied his right to procreate with his natural reproductive organs”).

143. HUMAN RIGHTS WATCH & INTERACT, *supra* note 79, at 89.

144. See, e.g., Samantha S. Uslan, *What Parents Don’t Know: Informed Consent, Marriage, and Genital-Normalizing Surgery on Intersex Children*, 85 IND. L.J. 301, 318 (2010) (advocating for a “wait and see” approach for genital-normalizing surgery on intersex children); Raina Delisle, *Intersex: When a Baby Isn’t Quite Boy or Girl*, TODAY’S PARENT (Mar. 28, 2018), <https://www.todayparent.com/baby/baby-health/intersex-when-a-baby-isnt-quite-boy-or-girl/> [<https://perma.cc/CN36-LWRF>] (quoting the executive director of interACT as advising the parents of an intersex child to “wait and see how your child adjusts, get a better grip on what their gender identity is and let them decide what to do with their own body”).

desire to maintain the antiquated status quo does not rise to the level of being a “compelling” reason, as the strict scrutiny test demands. As such, the government’s action in allowing parents to consent on behalf of their children to genital-normalizing surgery violates the right to procreation.

### C. Financial Costs

Laws based on genital exceptionalism are not only costly in terms of the physical and emotional effects on transgender and intersex individuals; they also result in costly litigation and the loss of economic opportunities.

One year after the North Carolina bathroom bill debacle, an Associated Press analysis estimated the bill would cost the state at least \$3.76 billion in lost business over the following twelve years.<sup>145</sup> This calculation was based on the cancellation of “relocations, conventions, projects, concerts and sporting events” in the state, with the largest loss stemming from scrapped plans for a \$2.66 billion PayPal facility in Charlotte.<sup>146</sup> The PayPal project would have created approximately 400 new jobs in the city of Charlotte alone.<sup>147</sup> When Texas attempted to pass a similar bill, an impact study revealed the legislation could cost the state \$3.3 billion in annual tourism revenues and result in the loss of 35,600 full-time jobs.<sup>148</sup> Citing the massive economic losses caused by the legislation in North Carolina, more than 650 businesses spoke out against the Texas bill, from small businesses to Fortune 500 companies doing business in Texas, such as Facebook, Apple, and Amazon.<sup>149</sup>

The economic costs associated with sex reassignment surgery laws are similarly high. Numerous lawsuits, many of them led by well-funded civil rights activist groups like the ACLU and Lambda Legal, have been filed against states with laws requiring proof of sex reassignment surgery to correct the gender marker on identity documents.<sup>150</sup> In defending against

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145. Camila Domonoske, *AP Calculates North Carolina’s ‘Bathroom Bill’ Will Cost More Than \$3.7 Billion*, NPR (Mar. 27, 2017, 4:28 PM), <https://www.npr.org/sections/thetwo-way/2017/03/27/521676772/ap-calculates-north-carolinas-bathroom-bill-will-cost-more-than-3-7-billion> [<https://perma.cc/CGZ2-EG9Q>].

146. *Id.*

147. *Id.*

148. Alexa Ura, *New Study Renews Fears About Bathroom Bill’s Financial Impacts*, TEX. TRIB. (Apr. 17, 2017), <http://www.kut.org/post/new-study-renews-fears-about-bathroom-bills-financial-impacts> [<https://perma.cc/EJE2-CYGR>].

149. David Montgomery, *Texas Transgender Bathroom Bill Falters amid Mounting Opposition*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/us/time-is-running-out-on-texas-bathroom-bill.html> [<https://perma.cc/6W5R-MXSR>].

150. The ACLU served as counsel for plaintiffs in cases such as *Love v. Johnson* and *Corbitt v. Taylor*, which challenged a Michigan law and an Alabama law, respectively, that made sex reassignment surgery a prerequisite to changing one’s gender marker. See *Love Complaint*, *supra* note 117 (challenging the Michigan law); *Corbitt Complaint*, *supra* note 125 (challenging the Alabama law). After Lambda Legal sued Kansas for refusing to correct gender markers on birth certificates, Kansas

these lawsuits, states expend precious financial resources provided by the taxpayers. Moreover, federal law requires the United States to pay reasonable attorney's fees and legal costs for parties who prevail on claims that the government has violated a constitutionally protected right.<sup>151</sup>

The financial repercussions of intersex surgery on taxpayers appear, at first blush, to be less onerous on society than those associated with the aforementioned transgender issues of sex reassignment surgery and bathroom bills. After all, the *M.C. v. Aaronson* case was the first of its kind and no similar cases have since been filed against the government.<sup>152</sup> However, instead of serving as a wholly unique case, *M.C. v. Aaronson* may instead be opening the floodgates for future similar cases. If this prediction turns out to be accurate, the nearly half a million dollars paid to settle *M.C. v. Aaronson* will be only a drop in the bucket.<sup>153</sup>

### III. PROPOSAL

Genital exceptionalism is at the root of many of the issues causing hardship for both transgender and intersex individuals. By placing excessive importance on having genitalia that is not only “normal” in appearance but that also clearly matches the individual's gender identity and gender performance, society causes devastating harm to itself and its transgender and intersex populations. In order to effect the greatest amount of change, it would serve activists of both the intersex and transgender communities to join together in fighting back against genital exceptionalism. By pooling their resources and getting to the source of the problem, activists will improve their chances of dismantling the harmful system of genital exceptionalism.

Beyond just coming together, activists must advocate for putting legal mechanisms into place that will help better protect the transgender and intersex communities from the harms associated with genital exceptionalism. One option would be to seek—on both the state and federal level—congressional approval of a non-binding resolution<sup>154</sup> (similar to the

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agreed to repeal its policy and allow transgender people to correct their gender markers without proof of surgery. Consent Judgment, *Foster v. Andersen*, No. 18-02552-DDC-KGG (D. Kan. June 21, 2019), ECF No. 33.

151. 28 U.S.C. § 2412 (2012).

152. Jessica Mason Pieklo, *Historic Lawsuit Claims Doctors Performed Unnecessary Surgery on Intersex Child*, REWIRE NEWS (May 20, 2013, 3:04 PM), <https://rewire.news/article/2013/05/20/historic-lawsuit-claims-doctors-performed-unnecessary-surgery-on-intersex-child> [<https://perma.cc/Q5B3-MVSY>] (describing the case as the first of its kind).

153. Marusic, *supra* note 92 (stating the settlement amount for the case).

154. In early 2019, the House passed a resolution condemning white supremacy in response to inflammatory comments by Representative Steve King. Susan Davis, *House Overwhelmingly Condemns GOP Rep. Steve King for White Supremacy Remarks*, NPR (Jan. 15, 2019, 11:11 AM), <https://www.npr.org/2019/01/15/685494939/top-house-republican-leader-calls-on-rep-steve-king-to-resign> [<https://per>

one passed in California regarding genital-normalizing surgery)<sup>155</sup> that (1) identifies what genital exceptionalism is so the public can become aware; (2) explains why genital exceptionalism leads to a legal framework that harms the transgender and intersex communities; and (3) declares that the government no longer intends to use genital exceptionalism to form the U.S. legal framework. This type of resolution would send a strong message that genital exceptionalism is no longer acceptable in this country. Ultimately, however, the goal should be to change the U.S. legal framework to avoid promoting genital exceptionalism by (1) overturning the discriminatory transgender bathroom laws; (2) no longer requiring proof of sex reassignment surgery in order to change the gender markers on identity documents; and (3) passing legislation that forbids genital-normalizing surgery on children before they are capable of providing consent.

#### CONCLUSION

Because of the numerous problems that arise when the legal system is based on genital exceptionalism, it is time lawmakers and members of the judiciary take a stand against this harmful ideology. Whether a person's genitalia are "normal" in appearance or match the person's gender identity and gender performance should be given no priority when it comes to lawmaking. It is time to ban needless, invasive bathroom bills and stop requiring transgender individuals to show proof of sex reassignment surgery in order to obtain accurate identity documents. It is time society puts an end to the harm inflicted on the intersex community through the non-consensual alteration of intersex children's genitalia. It is time to recognize genital exceptionalism has no place in a progressive, just legal system.

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ma.cc/L5XW-NFJU]. A similar resolution condemning genital exceptionalism would be an appropriate first step for legislators to take.

155. S. Con. Res. 110, 115th Cong., Reg. Sess. (Cal. 2018).

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