TO BE REAL: SEXUAL IDENTITY POLITICS IN TORT LITIGATION*

ANNE BLOOM**

Tort litigation plays a role in constructing what we perceive to be "real" about sexual identity. It does so by assuming that sexual identity is naturally binary (male/female), even in cases which pose a challenge to the credibility of that assumption. Thus, to be "real" in tort litigation is to have a sexual identity which appears to be naturally binary, even if you are not. Individuals who challenge this conception may find it difficult to obtain compensation for their injuries or, worse, may not be permitted to sue at all. These practices have important political effects. The most important of these is that tort litigation makes binary sexual difference appear more natural than it is. Since this outcome is at odds with lived experience, this Article argues that tort litigation should take a more pragmatic approach to sexual identity issues, by making space for competing conceptions of sexual identity.

"I wish just once they'd look at me and see me.... Just really see me."[1]

** Associate Professor of Law, The University of the Pacific/McGeorge School of Law. Thanks to Aaron Caplan, Brietta Clark, Lochlann Jain, Alexandra Natapoff, Katie Pratt, Jennifer Rothman, and Dayna Scott for their comments on earlier drafts of this Article. Thanks also to the faculties of Loyola Law School of Los Angeles and Northern Kentucky University Salmon P. Chase College of Law for their comments during workshops and to the editors of the North Carolina Law Review, whose insightful suggestions improved the work considerably.

1. TRANSAMERICA (The Weinstein Co. & IFC Films 2005) (quoting Bree Osbourne, the lead transsexual character in the film). I am indebted to Katie Pratt for bringing this line to my attention.

INTRODUCTION

This Article is about the difficulty of being real about sexual identity in tort litigation. It explores the challenges of being real in a culture that demands certain physical indicia of "realness" for purposes of sexual identity, and it argues that law is not neutral in responding to these demands. More radically, this Article claims that tort litigation plays an important role in constructing what we

perceive to be "real" about sexual identity, by enforcing particular understandings about what sexual identity should look like.[2]

The title is also a nod to *Paris is Burning*, Jennie Livingston's documentary of the Harlem drag circuit of the 1980s, which features Cheryl Lynn's 1979 disco hit, *Got to Be Real*, as part of the soundtrack.[3] In the drag balls shown in the film, contestants compete to be the most "real" in a variety of categories, ranging from "butch queen" and "school boy" to "military," "preppie," and "executive realness."[4] "Realness" is judged by how well the contestant is able to "pass" as authentically belonging to the particular category.[5]

Although the contestants are judged on how "real" they look, there are no illusions at the drag balls. Everyone knows that they are watching a performance and that "realness" in this context necessarily involves a certain amount of artificiality. As one of the ball contestants puts it, everyone knows that "you're not really an executive but you're looking like one."[6] At the same time, there is also an understanding that, at least in some instances, the performances correspond with the contestants' own understandings of their identities.[7] Put differently, drag balls acknowledge that "realness" is a contested term.[8]

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2. My use of the word "real" to convey different meanings in this paragraph is deliberate, as it is throughout the Article. This Article argues that the cultural standards for "realness" in sexual identity are at odds with real-life lived experiences with sexual identity. For example, for many individuals, there is a divide (and sometimes a conflict) between one's internal sense of sexual identity and the body's external indicators of "realness," which sometimes fail to live up to cultural expectations about what sexual identity should look like. To indicate the distinction between external expectations of "realness" and real-life experiences with sexual identity, I use quotations around references to cultural expectations about what it means to be "real."

3. DAVID FOSTER, DAVID PAICH & CHERYL LYNN, *Got to Be Real* (Columbia Music 1978), *in* PARIS IS BURNING (Prestige Films 1990).

4. PARIS IS BURNING, *supra* note 3. In some instances, the contestants are performing a particular expression of sexual identity; in others, the contestants are attempting to convince the audience that they are members of a particular social class, like a business executive or a member of the military. *Id.*

5. *See id.* Passing is a strategy for appearing to belong to an identity category in a way that seems "real" but may not be. *See generally* Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145 (2001) (describing passing as a "deception").

6. PARIS IS BURNING, *supra* note 3 (quoting drag ball contestant Dorian Corey).

7. *See id.* Many contestants, for example, say that they feel that they could belong to the category that they purport to represent in "real-life," if society would simply give them the opportunity. *See id.* (referring to comments by drag ball contestant Dorian Corey).

8. *See* Esther Newton, *Selection from* MOTHER CAMP, *in* THE TRANSGENDER STUDIES READER 121, 124 (Susan Stryker & Stephen Whittle eds., 2006). Contestants who compete in categories emphasizing femininity, for example, may feel there is nothing "mannish" about them, even though society views them as "males." *See* PARIS IS BURNING, *supra* note 3 ("I don't feel that there's anything mannish about me, except

Ultimately, however, the winners at the drag balls are those who are able to pass more successfully than others in their category.[9] In other words, even though "realness" is understood as a contested term, cultural expectations of "realness" still matter for purposes of winning. When a contestant competes in a category, an announcer asks the audience, "Does she look like a *real* woman?"[10] Awards are distributed on the basis of how well contestants are able to pass in terms of external criteria for "realness," regardless of how the contestants feel inside.[11]

Something similar happens in tort litigation. In tort cases, litigants do not compete to be the most "real," but tort plaintiffs routinely attempt to successfully convince a judge or a jury of the "realness" of their injuries.[12] And when the "realness" of a plaintiff's injury is in doubt, it will be more difficult for her to recover compensation. Moreover, as in the drag balls, the "realness" of an individual's sexual identity is also often at issue in tort litigation.[13]

Like judges at drag balls, judges and juries in tort litigation look for evidence that litigants are able to successfully "pass" as a member of the sexual identity category that they purport to represent. And, as with their assessment of a plaintiff's injury, if the "realness" of a litigant's sexual identity is in doubt, it will be more difficult for the plaintiff to recover compensation for her injuries.[14] In other words, it

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maybe what I might have between me down there, which is my little personal thing." (quoting drag queen Venus Xtravaganza)). For these contestants, drag balls present an opportunity to express an identity that more closely corresponds to how they feel inside. *See* Newton, *supra* at 124 (discussing the significance of drag generally). For others, drag balls may be an opportunity to compete in categories with which the contestants may *not* identify, but which they, nevertheless, perform quite successfully. *Id.* ("At the most complex, [drag] is a double inversion that says 'appearance is an illusion.' ").

9. For a general description of how drag balls work, see Guy Trebay, *Paris is Still Burning: Legends of the Ball*, VILLAGE VOICE, Jan. 18, 2000, at 29. Further discussion is available in Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 835 n.2 (1995).

10. PARIS IS BURNING, *supra* note 3.

11. *Id.*

12. 1 DAN B. DOBBS, THE LAW OF TORTS § 1, at 1 (2000) ("Much of formal tort law is an attempt to define what counts as a legal wrong in particular settings."). Nelson P. Miller, *The Attributes of Care and Carelessness: A Proposed Negligence Jury Instruction*, 39 NEW ENG. L. REV. 795, 798–99 (2005) ("[Tort law] comes into play only when a real injury has occurred under real circumstances.").

13. As will be discussed further in this Article, sometimes one's sexual identity is an element of a tort, and sometimes it is a factor that the judge and jury consciously, or unconsciously, consider. *See infra* Part II.B.

14. *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (concluding the plaintiff could not bring wrongful death claim on behalf of her deceased husband because she was not a "real" woman), *cert. denied*, 531 U.S. 872 (2000); *see also* Brief for Harry

is difficult to qualify as a viable legal subject in tort litigation, unless your sexual identity appears to be "real."[15]

"Realness" in tort litigation, however, is judged by a different set of criteria than "realness" in the drag balls. In the drag balls, the "realness" of the contestants' sexual identities is assessed in terms of how well they are able to "pass" as the sexual identity they purport to represent.[16] It does not matter if the successful performance of "realness" is achieved through artifice.[17] In tort litigation, however, "realness" requires evidence that your sexual identity is "natural," not faked.[18]

"Natural," however, does not have a stable meaning in tort litigation. Sometimes it means that your body should display the biological indicators of the sexual identity that you were born with.[19] When this is the case, "natural" means "unaltered." Other times, artificial alterations, such as breast implants and other types of faking,

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Benjamin Int'l Gender Dysphoria Ass'n as Amicus Curiae Supporting Plaintiff-Appellant at 2, Brandon v. County of Richardson, 624 N.W.2d 604 (Neb. 2001) (No. S-00-0022) ("[T]he trial court's finding of contributory negligence may be based on the disturbing misconception that Brandon was somehow at fault simply for existing and interacting with others as a transgender person—*i.e.*, for presenting himself as male rather than female.").

15. In this respect, the Article follows in the footsteps of Martha Chamallas's pathbreaking work on the impact of gender ideology on tort law. *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 815 (1990). It also draws heavily on the insights of queer legal theory. *See* Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139, 1141 (1998); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994).

16. *See* PARIS IS BURNING, *supra* note 3; *see also* Trebay, *supra* note 9 (discussing the various performance categories within balls and the way contestants match their attire and movements to each theme).

17. As a result, drag is sometimes described as a "denaturalizing" performance. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX 128 (1993) [hereinafter BUTLER, BODIES THAT MATTER]. Drag is "denaturalizing" because the performance exposes that what appears "natural" (e.g., biological sex) is, in fact, artificial. *Id.*

18. *See Littleton*, 9 S.W.3d at 231 (noting that the plaintiff was required to provide evidence that she was naturally a woman). "Natural" is in quotes here to emphasize the disconnect between what real bodies experience as natural and cultural expectations about what bodies *should* look like naturally. The distinction matters because of how law treats some artificial body parts, like implants to replace a body part lost to disease, as "natural," even when they are clearly artificial. Conversely, some natural body parts, like cleft palates, are not considered "natural" even when the condition has existed since birth. In tort litigation, for example, plaintiffs who are perceived as replacing "natural" parts tend to receive greater compensation than those who are perceived as interfering with nature. *See* Susan Dennehy, *Mirror, Mirror, on the Wall*, TRIAL, Aug. 2006, at 54, 54 (explaining that juries penalize litigants who have altered or enhanced a natural feature of their bodies).

19. *See Littleton*, 9 S.W.3d at 231.

are permitted, if they are judged to be done for purposes of reconstructing a natural body part or creating body parts that tort litigation assumes should have existed naturally.[20] When this is the case, "natural" means "normal," as defined by a set of cultural criteria which tort litigation helps to define.

"Realness" in tort litigation also requires that sexual identities be conveyed in immutable, binary terms. A prospective litigant should be either a male or a female.[21] It is not permissible to be both (or neither) and once a body is designated, it is ordinarily not permissible to change back and forth.[22] Thus, to be "real" in tort litigation is to be naturally, that is, biologically, male or female, and to remain fixed in that identity, absent extraordinary circumstances.[23] Individuals who mess with nature may find it difficult to obtain compensation for their injuries or, worse, not be permitted to sue at all.[24]

This is so despite the fact that tort litigation often exposes how much artificial help people need to successfully pass as male or female. Breast implants,[25] vaginoplasty,[26] penile implants,[27] testicular implants,[28] erectile dysfunction medication,[29] electrolysis,[30] and weight

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20. *See, e.g.*, Artiglio v. Superior Court of San Diego County, 27 Cal. Rptr. 2d 589, 592 (Cal. Ct. App. 1994) (suggesting that breast implant recipients who were replacing a natural breast might be able to recover under a theory of strict liability but those who underwent implantation for strictly cosmetic purposes could not); *see also* Dennehy, *supra* note 18, at 54 (describing how juries punish plaintiffs "who chose to tamper with nature").

21. *See, e.g.*, MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA 194–95 (H.R. McIlwaine ed., Va. State Library 2d ed. 1979) (1629) (reporting the case of *Thomas/Thomasine Hall* and inquiring into whether the defendant was a male or a female) [hereinafter VIRGINIA COLONIAL MINUTES]; *see also infra* Part III (discussing the requirement that individuals choose either to be male or female).

22. *Cf.* Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 15–18, 23–28 (2003) (detailing the difficulties that accompany legally changing one's gender). *But see* VIRGINIA COLONIAL MINUTES, *supra* note 21, at 194–95 (ordering the defendant to dress as both a man and a woman).

23. *See Littleton*, 9 S.W.3d at 231; *see also infra* Part II (discussing the effect on litigation when people who have altered their physical appearance sue under tort law).

24. *See Littleton*, 9 S.W.3d at 231; *see also infra* Part II (discussing the barriers to tort litigation and damage awards).

25. *See* Anne Bloom, *Rupture, Leakage, and Reconstruction: The Body as a Site for the Enforcement and Reproduction of Sex-based Legal Norms in the Breast Implant Controversy*, COLUM. J. GENDER & L., No. 2, at 85, 89 (2005) (describing the breast implant litigation).

26. *See* Browning v. Burt, 613 N.E.2d 993, 993–94 (Ohio 1993) (medical malpractice claim involving vaginoplasty); Just v. Misericordia Hosp., 213 N.W.2d 369, 371 (Wis. 1974) (same).

27. *See In re* Am. Med. Sys., Inc., 1996 FED App. 0049P, ¶ 3 (6th Cir.), 75 F.3d 1069, 1074 (class action involving allegedly defective penile implants).

28. *See* Goldsmith v. Mentor Corp., 913 F. Supp. 56, 57 (D.N.H. 1995) (allegedly defective testicular implant).

loss drugs[31] (to help bodies look more "female") are just a few of the many techniques for the construction or amplification of binary sexual identity that have become the subject of tort litigation. When these products and treatments fail, the ensuing litigation reveals the extent to which sexual identity is *not* completely natural.

Even in the absence of faking, tort litigation reveals that many bodies naturally possess attributes that defy a rigid, binary classification. Men with breasts, women with facial hair, women without breasts, and intersex individuals, to give just a few examples, evidence the incredible complexity of natural, sexual difference in the real world. When an individual's body lacks one or more of the expected markers of binary sexual differentiation, the individual may undergo surgery or other treatments in an attempt to artificially construct the expected indicators of a binary sexual identity.

Not all of the treatments are successful. Sex assignment surgeries fail,[32] doctors commit malpractice,[33] sexual identity enhancing drugs cause unexpected side effects,[34] and, sometimes, the treatment is simply not very convincing.[35] When tort litigation is filed, it exposes both the failure of the treatments and the underlying gap between real bodies and the expectation of binary sexual difference.

Tort litigation nevertheless demands that we act as if sexual identity is wholly natural and naturally binary. We can see this most clearly in cases involving post-operative transsexuals, who may be denied standing to sue in their post-operative sexual identity.[36] But it

29. *See* Keller v. Pfizer, Inc., No. 105650/07, 2008 WL 351001, at *1 (N.Y. Sup. Ct. Feb. 8, 2008) (malpractice action involving the erectile dysfunction drug Viagra).

30. *See* Lenhart v. Naccarato, No. 2164, 1990 WL 371771, at *1 (Pa. Ct. Com. Pl. Sept. 27, 1990) (electrolysis).

31. *See In re* Diet Drug Prods. Liab. Litig., 220 F. Supp. 2d 414, 414 (E.D. Pa. 2002) (weight loss drug litigation).

32. *See, e.g.*, JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL, at xiv (2000) (reporting on the failed attempt to reassign David Reimer as a female).

33. *See, e.g.*, Weinberg v. Geary, 686 N.E.2d 1298, 1298 (Ind. Ct. App. 1997).

34. *See, e.g.*, *Keller*, 2008 WL 351001, at *1 (alleging in a malpractice action that the erectile dysfunction drug Viagra caused vision loss).

35. *See, e.g.*, Toppino v. Herhahn, 673 P.2d 1297, 1299 (N.M. 1983) (malpractice claim for improperly sized breast implants).

36. *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000). The term "transsexual" has taken on different meanings in different discourses. *See* Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 51 n.1 (2006). At one time, the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") used the term "transsexualism" to refer to a desire to live in a different sex. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261–62 (3d ed. 1980). The most recent edition uses the same language but now labels the category "Gender

is also true in products liability lawsuits, where the expectation that sexual identity is, or should be, naturally binary comes into play in more subtle ways.[37] The most obvious example of this is in the differential treatment of plaintiffs who sue after undergoing surgery to replace a natural body part (that was lost, for example, during a mastectomy) and those who undergo surgery for what many courts call "purely cosmetic" purposes (i.e., amplification of one's "natural" sexual identity).[38] In cases like these, tort litigation exposes the artificiality of binary sexual identity but also attempts to re-naturalize it, through damage awards and other practices which make it more difficult for litigants whose "realness" is questioned to bring a successful claim.[39]

Conversely, tort law protects doctors who artificially construct the bodily markers of binary sexual identity on intersex infants.[40] Thus, post-operative transsexuals are less "real" under the law after their surgeries while intersex infants become more "real" after undergoing similar treatments. Together, the outcomes send a message that "real" sexual identity is, or should be, binary and, where possible, determined on the basis of natural bodily markers observed at birth.

One important political effect of this is that individuals who cannot comply with these demands are excluded from obtaining the benefits that tort litigation provides. A somewhat more insidious political effect involves the impact of the cases on our political consciousness: tort litigation helps make binary sexual difference

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Identity Disorder." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576–77 (4th ed. 1994) [hereinafter DSM-IV]; Ben-Asher, *supra*, at 51 n.1. I use "transsexual" here to refer broadly to individuals who identify with a sexual identity that is different from a sexual identity with which they have been designated in the past, while recognizing that the term is undergoing active re-signification.

37. *See* Dennehy, *supra* note 18, at 54; *see also infra* Part I.B (discussing the consequences jurors impose against tort litigants who received breast implants for cosmetic reasons).

38. *See* Dennehy, *supra* note 18, at 54.

39. *See* Bloom, *supra* note 25, at 110–11.

40. *See infra* Part III.B.2; *see also* Julie A. Greenberg, *Legal Aspects of Gender Assignment*, 13 ENDOCRINOLOGIST 277, 285 (2003) [hereinafter Greenberg, *Legal Aspects of Gender Assignment*] ("No legal liability can result from providing parents with full information and allowing them to make an informed decision."). Experts estimate that between one and four percent of the population is born intersex. *See, e.g.*, ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 51 (2000) (1.7% of the population); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 267 (1999) [hereinafter Greenberg, *Defining Male and Female*] (reporting an estimate of 1–4%).

appear more natural than it is. This is because, when a court decides a case, it necessarily adopts some version of the litigants' stories about the underlying realities which gave rise to the lawsuit and provides legal support for a particular political outcome. Put differently, legal rulings provide both legitimacy and authority for what "realness" means outside the courthouse doors. In the context of sexual identity, this means that tort litigation helps shape our understandings of what is culturally and politically permissible.

Tort litigation is not alone, of course, in playing this role. Medical practices, scientific beliefs, and religious values also play important parts in constructing what we believe to be "real" about sexual identity. Because tort litigation is uniquely concerned with bodily injury, however, it plays a particularly important role as both a translator of different views about sexual identity and an enforcer of the normative boundaries that they create.

This Article argues that courts need to be more real about the role of tort litigation in sexual identity politics. It claims that to do so courts must first become more attentive to the ways in which law influences how non-legal actors view the world. Drawing on the pragmatic realism of Oliver Wendell Holmes,[41] this Article also argues that tort litigation can become more real about sexual identity by paying greater attention to real-life experiences with sexual identity. "Realness" in this framework is assessed not by reference to a set of normative principles about what sexual identity should be but, rather, by reference to ongoing real-life lived experiences with sexual identity. Following Holmes and the realist tradition, this approach does not eschew categories of sexual identity completely but recognizes them as contingent hypotheses that must undergo continuous evaluation and reworking in light of changing understandings of how sexual identity is experienced.[42]

The remainder of this Article is divided into four parts. Part I surveys a variety of tort cases to show how tort litigation can raise questions about the "realness" of sexual identity. In these cases, courts confront cultural, medical, and scientific practices that expose the artificiality, or socially constructed aspects, of sexual identity. The cases also expose courts to competing narratives of "realness" in

41. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897); *see also* Susan Haack, *On Legal Pragmatism: Where Does "the Path of the Law" Lead Us?*, 50 AM. J. JURIS. 71, 71 (2005) (describing Holmes's relationship to pragmatism).

42. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little Brown 1881) ("The life of the law has not been logic: it has been experience.").

sexual identity, including narratives which suggest a conflict between the experience of sexual identity and cultural expectations about what sexual identity should look like.

Part II argues that when faced with this evidence in tort litigation, courts do not take a neutral approach toward considering and weighing the credibility of competing narratives. Instead, courts privilege narratives which treat sexual identity as if it were naturally binary, even as the cases in front of them suggest the opposite. In this respect, courts treat sexual identity quite differently than gender identity.[43] While gender identity is understood as a cultural phenomenon, which may have elements of artificial construction, you've "got to be real," (i.e., naturally binary), when it comes to sexual identity.

Part III argues that the privileging of one narrative of sexual identity above others in tort litigation has political implications that go well beyond the denial of the benefits of tort litigation to particular classes of people. The most important of these political effects is the impact of the litigation on our political consciousness and our perceptions of what is possible. When legal narratives, such as those produced in tort litigation, echo those that are expressed outside the courtroom, the law provides political and cultural legitimacy for dominant sexual identity narratives and delegitimizes others.

Using insights from Holmes and other pragmatic realists, Part IV argues that tort litigation can and should be more responsive to competing narratives about sexual identity, including narratives which recognize that sexual identity is, at least in part, socially constructed.[44] Special attention is paid to the role of medical and scientific opinion in tort cases and the highly influential role that experts play in constructing cultural expectations about the bodily indicators of sexual identity. This Article maintains that, rather than privileging

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43. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1–2 (1995) (describing how courts treat sex and gender differently); *see also* Greenberg, *Defining Male and Female*, *supra* note 40, at 292–93 (discussing how courts attempt to determine "sex").

44. *See generally* JUDITH BUTLER, GENDER TROUBLE (1990) [hereinafter BUTLER, GENDER TROUBLE] (discussing the distinction between sex and gender and the theories behind what gender is and how it is formed). As Butler notes, it is of questionable utility to distinguish between "sex" and "gender." *Id.* at 7. In Butler's words, "perhaps this construct called 'sex' is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all." *Id.* In this Article, I use "sex" to emphasize the role of the body in the social construction of sexual identity. I do not mean to suggest a clear delineation between "sex" and "gender."

these expert views, courts should accord them no greater or lesser weight than other cultural narratives on sexual identity.

More specifically, this Article calls for practices in tort litigation which emphasize the importance of lived experience in evaluating questions that relate to sexual identity. With this type of approach, legal understandings of sexual identity would be inferred from observations and reflection upon diverse human experience, rather than deduced from propositions about what sexual identity should look like. In short, this Article calls for a "bottom-up," rather than "top-down" approach to sexual identity, which is constantly recalibrating in response to the changing realities of everyday human experience.

I. TORT LITIGATION RAISES QUESTIONS ABOUT THE "REALNESS" OF SEXUAL IDENTITY

> Snips and snails, and puppy-dogs' tails,
> That's what little boys are made of.
> . . . .
> Sugar and spice, and everything nice,
> That's what little girls are made of.[45]

This well-known rhyme, a staple of children's literature in the United States, provides poetic expression to some of our most deeply held cultural beliefs about sexual difference. First published in 1820, the rhyme continues to have cultural resonance. In the contemporary cartoon *The Powerpuff Girls*, for example, the fictional Professor Utonium tries to create the "perfect little girl" using a mixture of "sugar, spice, and everything nice."[46]

No one believes that little girls are *really* made of "sugar and spice," of course. Some people might even object to a characterization of sexual difference along these lines. Still, the rhyme remains popular because it effectively articulates two important cultural assumptions: boys and girls are "made" differently and these differences divide along binary lines. This emphasis on how boys and

45. ROBERT SOUTHEY, WHAT FOLKS ARE MADE OF (1820), *reprinted in* MOTHER GOOSE: FROM NURSERY TO LITERATURE 175–76 (Gloria T. Delamar ed., McFarland 1987).

46. *See The Powerpuff Girls: Insect Inside / Powerpuff Bluff* (Cartoon Network television broadcast Nov. 25, 1998). For further information on *The Powerpuff Girls* television show, see The Powerpuff Girls: Full Episodes and Free Games from the TV Show, http://www.cartoonnetwork.com/tv_shows/ppg/ (last visited Jan. 2, 2010).

girls are "made" also tracks closely with conventional understandings about the nature of binary sexual identity as biologically based.

Courts share these assumptions. In discrimination law, for example, the perceived "realness" of sexual difference excuses some types of discriminatory conduct.[47] Differential treatment based on cultural assumptions about "gender," on the other hand, is routinely struck down.[48]

Sex-based distinctions are more "real," these cases suggest, because they rest on biology.[49] "Gender" distinctions, in contrast, are less "real" because they are products of historically contingent cultural beliefs.[50] In other words, most legal decisions assume that sexual identity is both "naturally" binary and immutable.[51] A number of contemporary theorists, however, contest these assumptions and argue that sex and sexual identity are inextricably linked with culture.[52] If this is true, then sexual identity is not rooted in biology and "fixed" at birth but, rather, highly mutable and, on occasion,

47. *See, e.g.*, Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981) (holding that biological differences between boys and girls provided an adequate justification for sex-based differences in California's statutory rape law); *see also* Nguyen v. INS, 533 U.S. 53, 73 (2001) (upholding different rules for attainment of citizenship by children born abroad out of wedlock, depending on whether the mother or the father was the American, on the grounds that "basic biological differences" between men and women affect parent-child relationships in meaningful ways); Rostker v. Goldberg, 453 U.S. 57, 79 (1981) (upholding sex-based differences in federal draft law on grounds that males and females are "not similarly situated" for combat (quoting *Michael M.*, 450 U.S. at 469)); Tracy E. Higgins, *"By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1550–54 (1995) (arguing that assumptions about biological difference continue to guide much legal decision-making, particularly in sex discrimination jurisprudence).

48. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 210 (1976) (striking down sex-based beer consumption law on the ground that it relied upon impermissible stereotypes about differences in male and female behavior); J.E.B. v. Alabama *ex rel.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in the judgment) ("[O]ur case law does reveal a strong presumption that gender classifications are invalid.").

49. *See, e.g.*, *Michael M.*, 450 U.S. at 469 (emphasizing biological differences between boys and girls); *see also Nguyen*, 533 U.S. at 73 (emphasizing biological differences between men and women); Higgins, *supra* note 47, at 1550–54 (arguing that assumptions about biological difference continue to guide much legal decision-making, particularly in sex discrimination jurisprudence).

50. *See generally* Franke, *supra* note 43 (describing the difference between gender-based and sex-based characteristics).

51. *See id.* at 9 (explaining common assumptions about sex-based and gender-based distinctions).

52. *See, e.g.*, BUTLER, GENDER TROUBLE, *supra* note 44, at 7 (arguing that there is no distinction between sex and gender); *see also* Halley, *supra* note 15, at 504 ("[T]he postmodern critique of liberal explanations of the self posits that culture, not human nature, gives humans their sexual orientations.").

constructed through artificial means.[53] Many tort cases provide support for this alternative understanding about the mutability and nature of sexual identity.

One of the earliest American cases to directly address questions about sexual identity is the case of Thomas/Thomasine Hall, which came before the courts of Virginia in 1629.[54] The precise legal basis for the proceeding is unclear. There is nothing in the record to indicate the cause of action. A review of the facts, however, suggests that the *Hall* case was very likely a tort case and that the particular cause of action under consideration was the tort of wrongful seduction.[55]

According to court records, Hall was a servant who had worked for a number of people in the area, including a Mr. Richard Bennets and Mr. John Tyos.[56] The legal proceedings seem to have been initiated after a member of the Tyos household reported that Hall "did ly with a maid of Mr. Richard Bennets called great Besse."[57] Although these facts hint at some sort of assault, Hall does not appear to have been charged with a crime, and there is no evidence of an inquiry into whether Besse was, in fact, assaulted.[58] Instead, the entire focus of the proceeding was on determining whether Hall had committed some sort of deception in the presentation of his sexual identity with other servants.[59]

This emphasis on deception and, in particular, on the possibility of a sexual deception involving a servant is consistent with a judicial inquiry into whether Hall's actions gave rise to what was then the tort of seduction.[60] Although defined somewhat differently today (in those jurisdictions where the tort still exists), at the time, the tort of

53. BUTLER, GENDER TROUBLE, *supra* note 44, at 9; *see also* NANCY LEVIT, THE GENDER LINE 30 (1998) ("Biological differences cannot be separated from the cultural process of assigning meaning to differences.").

54. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 194–95.

55. *See* 2 DOBBS, *supra* note 12, § 443, at 1252. Historically, common law permitted a father to bring a claim for seduction for both medical expenses and the loss of his daughter's services. *Id.* The precise elements of the claim are unclear but the claim seems to have focused primarily on the misrepresentation involved in obtaining sexual consent. *See id.* at 1252 n.27.

56. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 194–95.

57. *Id.* at 194.

58. *Id.* at 195; *see also* Laurel Thatcher Ulrich, *Cloth, Clothing and Early American Social History*, 18 DRESS 39, 45 (1991) (noting that Hall does not appear to have been charged with a crime).

59. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 195.

60. *See generally* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit' ": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 382–83 (1993) (describing the origins of the action for seduction).

seduction typically involved some sort of deception and the loss of services.[61] In an ordinary case, a father would bring a case on behalf of his daughter.[62] In the absence of a father, however, the tort of seduction could be brought by a guardian who took the father's place in terms of lost services.[63]

In the *Hall* case, the court record indicates that the case was brought to the court's attention by men responding to a report from the Tyos household, for whom Hall had worked as a servant.[64] Although an allegation involving "great Besse" would have been more properly brought by her own employer (Mr. Richard Bennets), the employers likely shared the same concerns about Hall.[65]

Besse might also have brought the case in her own capacity in the form of a libel claim. Although contemporary libel claims focus primarily on harm to reputation, this was not always the case.[66] At the time of the *Hall* case, the tort of libel also seems to have included claims for misrepresentation, particularly in the context of sex.[67] Under this theory, Besse would have been able to pursue a tort claim on her own, in the form of libel.

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61. *Id.* at 383. This was because the tort emerged from property law as a means of compensating fathers for the lost services of their daughters after a seduction occurred. *Id.* at 382–83. In this respect, the tort of seduction, in its early form, operated in much the same way that masters could sue for injuries to their servants. *Id.* at 382. Today, individuals may bring the tort of seduction in their own right. *See* 2 DOBBS, *supra* note 12, § 443, at 1252. Although the tort has been specifically abolished in a few jurisdictions, it is still recognized in others. *Compare* M.N. v. D.S. 616 N.W.2d 284, 286 (Minn. Ct. App. 2000) ("The Minnesota legislature has abolished the civil actions for seduction . . . .") *with* Breece v. Jett, 556 S.W.2d 696, 708 (Mo. Ct. App. 1977) (maintaining an action for seduction).

62. Larson, *supra* note 60, at 383.

63. *Id.* at 383 n.28 (citing M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQ. 33, 36–37, 41–45 (1987)).

64. VIRGINIA COLONIAL RECORDS, *supra* note 21, at 195.

65. As her employer in what was likely an arrangement of indentured servitude, Bennets would have effectively served as Besse's guardian. Under these circumstances, it would have been appropriate for him to bring the tort of seduction on Besse's behalf. *See generally* Larson, *supra* note 60, at 382–83 (describing the circumstances under which an action for seduction was brought).

66. *See* Kif Augustine-Adams, *Defamed Women: Salve Deus Rex Judaeorum*, 22 HARV. WOMEN'S L.J. 207, 209 (1999) (describing defamation claims in the early modern era as sometimes revolving around questions of sexual honesty). In any event, reputation does not appear to have been directly at issue in the *Hall* case. *See* VIRGINIA COLONIAL RECORDS, *supra* note 21, at 195.

67. For an example of a libel case, see Patricia Crawford & Sara Mendelson, *Sexual Identities in Early Modern England: The Marriage of Two Women in 1680*, 7 GENDER & HIST. 362, 364–65 (1995), discussing the case of Arabella Hunt, who sought to annul her marriage to James Howard, on the ground that James Howard was actually Amy Poulter, who was already legally married to someone else. The gist of Hunt's complaint was that her husband had misrepresented both his prior marital status and his sexual identity. *Id.*

Whether the case sounded in seduction, libel, or some other legal theory, the main focus of the *Hall* proceeding was on the more fundamental question of whether Hall was a man or a woman.[68] According to members of the community, Hall's sexual identity was unclear.[69] Hall testified that she was christened Thomasine (a "female" name).[70] Hall presented herself in public, however, as both a man and a woman, depending on the circumstances.[71]

Upon physical examination, some experts initially declared Hall a man.[72] But Hall urged a second exam and claimed that, in addition to an apparent penis, she also had "a peece of an hole."[73] In response, the court ordered a second physical exam.[74] Following this exam, the court concluded that Hall was both "a man and a woeman."[75]

The court then devised an interesting remedy. After concluding that Hall was both male and female, the court ordered Hall to dress in a fashion that conveyed this dual status.[76] Specifically, Hall was ordered to dress "in mans apparell, only his head to bee attired in a Coyfe and Croscloth with an Apron before him."[77]

Hall appears to be one of the first known cases involving a litigant who challenged the assumption that sexual identity divides naturally along binary lines.[78] It is particularly interesting because the

68. VIRGINIA COLONIAL RECORDS, *supra* note 21, at 194. This question would have been key to deciding the case if it had been brought as either a seduction or a libel claim (or both). If Hall was "really" a man and presented himself as a woman, as the facts seem to suggest, then the plaintiffs would have been able to establish the misrepresentation element of their claim(s). *See* Larson, *supra* note 60, at 382–83 (describing the tort of seduction as "an act of intentional, harmful misrepresentation"); *see also* SELECT CASES ON DEFAMATION TO 1600, at xxvi–xli (R.H. Helmholz ed., 1985) (setting out the requirements for a libel claim at that time).

69. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 194–95.

70. *Id.*

71. *Id.* at 195. When serving as a soldier, for example, Hall presented as a male; but when Hall was looking for work in the "needle trades" or as a maid-servant, Hall presented as a female. *Id.* Hall is also speculated to have switched back to a male identity for purposes of travel, even when generally presenting as a female. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* Some contemporary courts have upheld similar requirements in cases involving pre-operative transsexuals. *See, e.g.*, Doe v. Boeing Co., 846 P.2d 531, 538 (Wash. 1993) (upholding a Boeing requirement that a male-to-female transsexual dress in "unisex" clothing until her operation).

78. FAUSTO-STERLING, *supra* note 40, at 111–12. Another early case involved an attempt by Levi Suydam to vote in an 1843 election in Connecticut. *Id.* at 30. The opposing party objected on the ground that Suydam was female (and at that point, females had not yet been granted the right to vote). *Id.* After an examination by a physician,

court's ruling acknowledges that Hall could not be fairly classified as either a man or a woman. But *Hall* also exposes the mutability of sexual identity, which the court acknowledges but does not tolerate.[79]

Before the court's order, Hall's practice had been to switch back and forth between male and female, depending on the needs of the moment.[80] This moving between sexual identities was actually somewhat consistent with broader cultural practices at the time. Many young boys dressed in female clothing, primarily as a means of demarcating their lower social status, before becoming men.[81] And popular songs told stories of women dressing in men's clothing to serve in combat.[82]

Like female combatants and young boys dressing as women before puberty, Hall used clothing to help construct different sexual identities.[83] What seemed to trouble the community in Hall's case, however, was how well Hall "passed." When Hall dressed as a female, Hall seemed like a "real" female; the same was true when Hall dressed like a male. Indeed, Hall's performances of the two sides of binary sexual identity were so successful that the community was forced to ask for legal help in designating Hall with a fixed sexual identity.

Hall is one of the few recorded cases involving an intersex individual. This aspect of the case, as well as the fact that it raised issues concerning the artificiality and mutability of sexual identity, make it a good example of how tort litigation can raise questions about the assumption that "real" sexual identity is binary.[84]

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however, Suydam was declared "male" and permitted to vote. *Id.* A few days later, the physician discovered that Suydam also had female attributes. *Id.* It is unknown whether the vote was revoked. *Id.*

79. VIRGINIA COLONIAL RECORDS, *supra* note 21, at 195 (holding that Hall is both a man and a woman and ordering that Hall should now "goe Clothed" in both men's and women's apparel).

80. *Id.* at 194–95 (describing how Hall dressed in women's apparel "to get a bitt for my Catt" and to work in the needle trade but wore men's apparel for other purposes, including travel).

81. Ulrich, *supra* note 58, at 46.

82. *Id.*

83. *See* VIRGINIA COLONIAL MINUTES, *supra* note 21, at 194–95 (describing how Hall dressed in women's apparel when wishing to appear as a woman and men's clothing when wishing to appear as a man).

84. There are no recent cases like *Hall* involving intersexed adults, probably because medical treatments now aim at assigning binary sexual identity, through surgery or otherwise, at a very early age. *See, e.g.*, Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488, e491 (2006) ("Expediting a thorough . . . decision is required."). These practices, along with the secrecy surrounding the treatment of intersex infants, effectively make the intersex population disappear,

Like *Hall*, many cases today challenge conventional assumptions about sexual identity. These challenges revolve around three key issues: (1) whether sexual identity is really binary; (2) whether sexual identity is really immutable; and (3) whether sexual identity is really natural. The most obvious examples in tort litigation involve transsexuals. As in the *Hall* case, contemporary tort litigation involving transsexuals challenges the assumption that sexual identity is fixed. More fundamentally, the cases expose the artificiality of binary sexual identity.

A. Tort Claims Involving Transsexuals

One of the most cited tort cases involving a transsexual is *Littleton v. Prange*.[85] Christie Littleton underwent sex reassignment surgery in adulthood to appear physically as a woman.[86] A few years later, she married Jonathan Littleton and lived with him until his death.[87] The legality of this marriage was not questioned until after Jonathan Littleton died.[88] After Jonathan Littleton died, Christie Littleton filed a wrongful death claim against her husband's doctor in her capacity as the surviving spouse.[89] The doctor argued that the case should be dismissed because Christie Littleton was not a "real" woman and therefore could not be the surviving spouse of Jonathan Littleton.[90] The trial court agreed and entered summary judgment for the doctor.[91]

On appeal, an intermediate court emphasized that the key question before the court was whether "Christie [is] a man or a woman?"[92] In attempting to answer this question, the court acknowledged that Christie Littleton currently had the "anatomical and genital features" of a female and that she had "the capacity to

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sometimes even to themselves. *See* Claude J. Migeon et al., *46,XY Intersex Individuals: Phenotypic and Etiologic Classification, Knowledge of Condition, and Satisfaction with Knowledge in Adulthood*, 110 PEDIATRICS e32, e32 (2002) (noting that many intersexed individuals are not well informed about their medical and surgical history and may even be unaware that they underwent surgery).

85. 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000).

86. *Id.* at 224.

87. *See id.* at 225.

88. *See* Petition for Writ of Certiorari at 10, Littleton v. Prange, 531 U.S. 872 (2000) (No. 00-25) (noting, among other things, that the legality of the Littleton's marriage was recognized by the Attorney General of Texas who required Christie Littleton to pay child support for Jonathan Littleton's children from an earlier marriage).

89. *Littleton*, 9 S.W.3d at 225.

90. *Id.*

91. *Id.*

92. *Id.*

function sexually as a female."[93] The court also acknowledged that some physicians would consider her a female.[94] For the court, however, the most important question was not what Christie Littleton looked like now, but whether Christie Littleton was "created and born a male."[95] Because Christie Littleton's female anatomy was "all man-made,"[96] the court reasoned she was not a real woman.[97] As a result, her marriage to Jonathan Littleton was illegal, and she could not recover as his surviving spouse.[98]

The dissent objected on many grounds, including the fact that a Texas court had previously altered Christie Littleton's birth certificate to reflect her changed sexual identity.[99] "If Christie's evidence that she was female was satisfactory enough" to amend her birth certificate, one judge asked, why was it not satisfactory enough to satisfy the court in this case?[100] For the dissent, the appropriate test was not the sexual identity assigned to Christie Littleton at birth, but the identity Christie Littleton embraced herself and had successfully presented to the community for many years.[101]

Although the court ultimately rejected the legitimacy of Christie Littleton's post-operative sexual identity, the case exposes both the mutability of sexual identity and its artificiality. Like *Hall*, *Littleton* forced the court to confront a litigant who had successfully changed her sexual identity, even as the court's own working assumptions about sexual identity insisted that sexual identity could not be changed. And, like *Hall*, *Littleton* also exposed how difficult it can be to determine an individual's "natural" sexual identity.

Other tort cases involving transsexuals have similar effects. Medical malpractice claims by prisoners seeking to initiate or complete gender reassignment surgery, for example, expose the mutability and artificiality of sexual identity.[102] These cases charge

93. *Id.* It is unclear exactly what the court meant when it concluded that Littleton had "the capacity to function sexually as a female." *Id.* However, it seems likely that the court meant that, as a result of her surgery, she was capable of receiving a penis vaginally. *See id.*

94. *Id.* at 231.

95. *Id.*

96. *Id.* This is the court's language, which apparently was not intended to indicate the sex of the surgeon.

97. *Id.* at 230.

98. *Id.* at 231.

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

100. *Id.*

101. *Id.* at 232.

102. *See, e.g.*, Praylor v. Tex. Dep't of Criminal Justice, 430 F.3d 1208, 1209 (5th Cir. 2005) (holding the prisoner was not entitled to hormone treatment to treat transsexualism); Brown v. Zavaras, 63 F.3d 967, 970 (10th Cir. 1995) (holding the prisoner

prison doctors and prisons with improper conduct in refusing to effectuate changes in prisoners' sexual identities.[103] That prisoners could even make such a claim highlights the fact that sexual identity can be changed and artificially reconstructed.

But these cases also challenge the assumed linkage between biology and "real" sexual identity. This is because, in order to prove their case, the plaintiffs must present testimony that they have been diagnosed with "gender identity disorder," for which sex reassignment surgery is a recommended treatment.[104] A diagnosis of gender identity disorder, however, hinges on a doctor's conclusion that the patient's body is at odds with the individual's "real" sexual identity[105]—a conclusion that directly challenges the assumption that "real" sexual identity can be determined by reference to biology.

Tort litigation aimed at protecting the privacy interests of post-operative transsexuals also exposes the mutability and artificiality of sexual identity. To make out a claim, the plaintiffs must establish that they had a reasonable expectation of privacy with respect to the fact

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may be entitled to hormone treatment for transsexualism); Kosilek v. Maloney, 221 F. Supp. 2d 156, 162 (D. Mass. 2002) (seeking injunctive relief requiring medical treatment for gender identity disorder); *see also* Rebecca Boone, *Idaho Settles Transgender Suit*, SPOKESMAN-REV. (Spokane, Wash.), Aug. 7, 2009, at A8, *available at* http://www.spokesman.com/stories/2009/aug/07/idaho-settles-transgender-suit.htm (describing a recent settlement in which the state of Idaho agreed to change its policies regarding medical treatment for transsexuals seeking treatment). *See generally* Alvin Lee, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447 (2008) (discussing applications of trans models in the prison health care context and the evolution of Eighth Amendment protections for transsexual prisoners).

103. *See, e.g.*, *Praylor*, 430 F.3d at 1209; *Brown*, 63 F.3d at 970; *Kosilek*, 221 F. Supp. 2d at 162.

104. *See, e.g.*, *Kosilek*, 221 F. Supp. 2d at 184 (discussing significance of the plaintiff's diagnosis of gender identity disorder to her claim); *see also* DSM-IV, *supra* note 36, at 577 (defining gender identity disorder); THE HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 18 (6th ed. 2001), *available at* http://www.wpath.org/Documents2/socv6.pdf (setting out the recommended treatments). Prisoners suing for failure to provide medical treatment related to the initiation or completion of transsexual surgery may proceed under an ordinary medical malpractice theory against the physicians involved or under constitutional tort theories against the institution. *See* Bivens v. Six Unknown Officers, 403 U.S. 388, 395 (1971) (recognizing a cause of action in tort for constitutional violations). Most cases, however, have proceeded under constitutional tort theories. *See, e.g.*, *Praylor*, 430 F.3d at 1209; *Brown*, 63 F.3d at 970; *Kosilek*, 221 F. Supp. 2d at 162. With respect to the initial evaluation of the medical treatment involved, however, the issues are the same. *See* Estelle v. Gamble, 429 U.S 97, 104 (1976) (holding that deliberate indifference to a serious medical condition constitutes a constitutional violation).

105. *See, e.g.*, *Kosilek*, 221 F. Supp. 2d at 163; *see also* DSM-IV, *supra* note 36, at 581 (setting out the diagnostic criteria for gender identity disorder).

that they underwent surgery to change their sexual identity.[106] In *Diaz v. Oakland Tribune, Inc.*,[107] for example, a post-operative transsexual filed an invasion of privacy claim, when her pre-operative sexual identity was revealed without her consent.[108] The defendant newspaper attempted to defend against the claim on the ground that publication of the plaintiff's sex change was privileged under the First Amendment because the information was a matter of legitimate public concern.[109] Specifically, the newspaper argued that their publication of the plaintiff's sex change was newsworthy because the plaintiff had been the first female president of the student body at her college.[110]

A jury found for the plaintiff and awarded over $250,000 in damages.[111] On appeal, the defendant again argued that plaintiff's sexual identity was newsworthy as a matter of law.[112] The court rejected this argument, however, and held that the jury was the best arbiter of whether the plaintiff's transsexual status was newsworthy.[113]

The court's conclusion is significant because it acknowledges the mutability and artificiality of the plaintiff's sexual identity but still allows the jury to punish the defendant for making those facts public. In other words, the message from the court is that real sexual identity is, in fact, mutable and artificial, but a jury may conclude that it is best for everyone to pretend that it is not. In short, like other claims involving transsexuals, invasion of privacy litigation that is brought on behalf of post-operative transsexuals exposes the mutability and artificiality of sexual identity. At the same time, these claims also affirm the cultural importance of keeping this information secret in any given case.[114]

The success of such claims also suggests that courts are now dealing with the mutability of sexual identity in a different way. In the *Hall* case, the court ordered Hall to present a "dual" sexual identity that was, in the court's view, consistent with Hall's biology as both

106. *See* Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 771 (Cal. Ct. App. 1983).

107. 188 Cal. Rptr. 762 (Cal. Ct. App. 1983).

108. *Id.* at 764; *see also* Doe v. Blue Cross & Blue Shield of R.I., 794 F. Supp. 72, 75 (D.R.I. 1992) (holding that a transsexual plaintiff had the right to sue under a fictitious name when litigating claims stemming from sex change surgery).

109. *Diaz*, 188 Cal. Rptr. at 767–68.

110. *Id.* at 766.

111. *Id.* at 765.

112. *Id.* at 765–66.

113. *Id.* at 773.

114. *See id.* at 771 (noting that while the plaintiff's gender was clearly a matter in the public domain, the fact that she had undergone surgery was a secret and not a matter of legitimate public concern).

"man and woeman."[115] In contemporary invasion of privacy cases, however, courts seem to be sending a different message. As advances in sex assignment surgery make it easier to fake sexual identity, courts now seem more willing to provide protection to those who conceal the faking.

Slander claims involving allegations of intersexuality raise different issues. As compared to cases involving transsexuals, these cases highlight the fragility of the assumption that sexual identity is binary. In *Malone v. Stewart*,[116] for example, a court held that an allegation that the plaintiff was a "hermaphrodite" constituted defamation per se.[117] For the court to hold that an allegation of intersexuality poses a threat to one's reputation, however, the court must at least tacitly concede that, in some cases, there are insufficient indicators to clearly identify someone within the binary categories. Otherwise, there would be no need for the lawsuit, as the statements would be considered so outlandish that they are incapable of having a defamatory meaning or effect.[118]

B. *Tort Claims Involving Products Used to Amplify and Construct Sexual Identity*

In *Hall*, *Littleton*, and other cases involving transsexuals or allegations of intersexuality, the question of sexual identity is directly

115. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 195.

116. 15 Ohio 319 (1846) (in bank).

117. *See id.* at 321 (involving allegations that Stewart had falsely referred to Malone as a "hermaphrodite"). There are no recent slander cases involving intersex allegations. It is interesting to note, however, that current law is split on whether calling someone a "homosexual" is defamation per se. *See, e.g.*, Hayes v. Smith, 832 P.2d 1022, 1023 (Colo. Ct. App. 1991) (holding that an accusation of homosexuality is not susceptible of defamatory meaning); Callahan v. First Congregational Church of Haverhill, 808 N.E.2d 301, 304 (Mass. 2004) (holding that an accusation of homosexuality may be "reasonably susceptible to defamatory meaning"); Gray v. Press Commc'ns, LLC, 775 A.2d 678, 684 (N.J. Super. Ct. App. Div. 2001) (same); Key v. Ohio Dep't of Rehab. & Corr., 598 N.E.2d 207, 209 (Ohio Ct. Cl. 1990) (holding that an accusation of homosexuality is not defamation per se, though the plaintiffs could recover for proved damages).

118. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 57 (1988) (holding that parody does not state a claim for libel when it cannot reasonably be understood to be referring to actual facts); Ward v. Zelikovsky, 643 A.2d 972, 979 (N.J. 1994) (noting that even vulgar name-calling is not normally actionable as defamation because it is not understood to be making statements of fact). The justification for not permitting defamation claims to be brought in such cases is that the statements are not widely understood to be referring to a factual state of affairs. *Hustler*, 485 U.S. at 57. To allow defamation claims for the statement that someone is a "hermaphrodite," in contrast, suggests that the statement is capable of being understood as referring to a factual state of affairs. *See Malone*, 15 Ohio at 321. In other words, to allow such claims is to acknowledge that there are, in fact, some individuals who are intersexed and therefore fall outside a binary sexual categorization.

at issue. Other tort cases also challenge assumptions about the immutable and naturally binary qualities of sexual identity, but in more subtle ways. Cases involving products that are used to amplify or construct the bodily indicators of sexual identity provide good examples of this. As in cases involving transsexuals, these cases expose the artificiality of sexual identity in a very dramatic fashion by demonstrating the large numbers of people engaged in artificial sexual identity construction.

Perhaps the best known litigation involving a product that is used to amplify and construct a key indicator of sexual identity is the breast implant litigation.[119] Like genitalia, breasts symbolize the differentiation of binary sexual identity.[120] Medical literature describes breasts of an appropriate size and shape as "essential to a woman's mental health . . . and well being."[121]

Individuals with breasts that are deemed too small are diagnosed with a condition called "micromastia" and, along with those who have lost breasts due to mastectomy, are recommended for surgery to amplify or replace breasts with artificial implants.[122] Others choose to undergo implantation surgery so as to "emphasize something specifically *female* about themselves."[123]

Much like sex reassignment surgery, breast implantation practices expose the artificiality of sexual identity.[124] This is because breast implants provide a means by which individuals can "fake" a bodily attribute that is typically associated with natural or biological sexual difference. This is true regardless of the reasons for the "faking." The implants used by transsexuals and individuals who have lost their breasts to cancer are the same. In both instances, the resulting performance of femininity is, at least in part, artificially achieved.[125]

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119. *See generally* Bloom, *supra* note 25 (examining breast implant litigation to reveal how the legal system artificially constructs society's sex categorizations).

120. *See, e.g.*, Jan Gehorsam, *Women Feeling Pressured to Sculpt a Perfect Body*, ATLANTA J.-CONST., Mar. 29, 1992, at A1 (noting that being a woman means being "sexy" and "sexy means breasty").

121. Julie M. Spanbauer, *Breast Implants as Beauty Ritual: Woman's Sceptre and Prison*, 9 YALE J.L. & FEMINISM 157, 182 (1997) (internal quotation marks omitted) (quoting Rebecca Weisman, *Reforms in Medical Device Regulation: An Examination of the Silicone Gel Breast Implant Debacle*, 23 GOLDEN GATE U. L. REV. 973, 990 (1993)).

122. *Id.* at 183.

123. Charlotte Allen, *Jurisprudence of Breasts*, STAN. L. & POL'Y REV., Spring 1994, at 83, 83–84.

124. Bloom, *supra* note 25, at 104.

125. This is not to say that individuals without breasts or individuals who undergo breast implantation are "fake" women. The point here is simply that, in some instances,

To the extent that implantation surgery is successful and the artificial breasts seem "real" to all observers, breast implantation practices help individuals designated as "female" to "pass" as women. At the same time, surgical implantation practices reveal a gap between the expectation of "natural" binary sexual identity and the physical experience of being male or female.[126]

For years, the most popular breast implants were made of silicone.[127] In the early 1970s, however, some silicone implant recipients began to sue implant manufacturers, complaining that the implants were rupturing and leaking.[128] Some individuals also alleged serious health effects associated with ruptured and leaking implants.[129] By the 1990s, hundreds of thousands of litigants had filed suit.[130] In the process, the widespread practice of artificial sexual identity construction through the use of breast implants was exposed.

On a global level, the breast implant litigation exposed the large number of individuals undergoing artificial sexual identity construction. Newspapers reported regularly on the litigation and the number of individuals affected.[131] What these reports revealed was that a large majority of the implant recipients were not seeking to replace a breast lost to cancer but rather were attempting to amplify their natural bodies so as to emphasize something more "female" about them.[132]

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law and medicine treat them as incomplete and therefore in need of artificial help to pass as women. Put differently, breasts do not make you a woman, but, from the perspective of law and medicine, they are a key indicator of female sexual identity.

126. *See* BUTLER, BODIES THAT MATTER, *supra* note 17, at 10 ("[S]ex acquires its naturalized effect, and, yet it is also by virtue of this reiteration that gaps and fissures are opened up as the constitutive instabilities in such constructions, as that which escapes or exceeds the norm, as that which cannot be wholly defined or fixed by the repetitive labor of that norm.").

127. H.J. Berkel, *Breast Augmentation: A Risk Factor For Cancer?*, 326 NEW ENG. J. MED. 1649, 1649 (1992).

128. Bloom, *supra* note 25, at 101 n.83.

129. *Id.* at 100.

130. *See* Barnaby J. Feder, *Dow Corning's Bankruptcy: The Impact on Implant Suits*, N.Y. TIMES, May 21, 1995, at F9.

131. *See, e.g.*, Tamar Lewin, *As Silicone Issue Grows, Women Take Agony and Anger to Court*, N.Y. TIMES, Jan. 19, 1992, at A1 (describing the onslaught of lawsuits against the manufacturers of breast implants after the Food and Drug Administration imposed a "moratorium on silicone implants"); Feder, *supra* note 130 ("[B]etween 650,000 and one million women received silicone breast implants during the 1970s and 1980s . . . .").

132. *See, e.g.*, Lewin, *supra* note 131 (reporting on the decision of Brenda Toole to undergo implantation for larger breasts); Judy Mann, *Implanting Corporate Responsibility*, WASH. POST, Feb. 21, 1992, at E3 (noting in her column that of the estimated one million American women who had received silicone implants, only about twenty percent were reconstructing breasts lost to cancer while eighty percent were seeking larger breasts);

The litigation also exposed particular individuals who had engaged in artificial sexual identity construction through the use of breast implants. Individuals necessarily revealed their identities and histories of artificial sexual identity construction simply by filing suit or seeking compensation through class action settlements.

Although the breast implant litigation received greater attention from the media, penile and testicular implant recipients filed similar cases, alleging many of the same problems with their implants.[133] Many penile implant recipients also alleged that the implants failed to operate properly.[134] Like the breast implant litigation, the penile and testicular implant litigation involved very large numbers of people, exposing widespread practices of artificial sexual identity construction, on both the global and personal levels.[135]

The facts of these cases closely tracked the stories of plaintiffs in the breast implant litigation. Like breasts, penises and testicles are widely perceived as "natural" indicators of male sexual identity. As with breast implant recipients, some penile and testicular implant recipients used the implants to artificially reconstruct body parts that were lost to injury or disease.[136] Others, however, sought to amplify bodies in their previously unaltered condition.[137] In both cases, the practices revealed the importance of artificial measures in the construction of binary sexual difference.

The individuals who underwent penile and testicular implant surgeries did so as a means of artificially constructing and/or emphasizing a key cultural indicator of masculinity and "natural"

More than Her Bust Gets a Boost, USA TODAY, Sept. 28, 1993, at 4D (describing one woman's decision to get breast implants to increase her self-esteem).

133. *See, e.g.*, *In re* Am. Med. Sys., Inc., 1996 FED App. 0049P, ¶ 3 (6th Cir.), 75 F.3d 1069, 1074 (considering class certification for an action involving allegedly defective penile implants); Goldsmith v. Mentor, 913 F. Supp. 56, 57 (D.N.H. 1995) (alleging defective testicular implant).

134. *See, e.g.*, *In re Am. Med. Sys., Inc.*, 1996 FED App., ¶ 25 n.14, 75 F.3d at 1081 n.14; *Goldsmith*, 913 F. Supp. at 57.

135. Shari Roan, *Silicone Implants: Men's Turn to Worry*, L.A. TIMES, Oct. 26, 1993 at E1 (estimating that approximately 28,000 individuals receive penile implants each year). The number of individuals alleging injury for their use was sufficiently large to result in a class action. *See In re Am. Med. Sys. Inc.*, 1996 FED App., ¶ 23, 75 F.3d at 1079–80.

136. *See* Jim McCartney, *Implanting Self-Image: Mentor Corp. Hopes the Reintroduction of Gel-Filled Artificial Testicles Will Help Restore Emotional Health to Men Who've Experienced Cancer or Other Trauma*, ST. PAUL PIONEER PRESS, Aug. 7, 2005, at 1D; *see also* John C. Gleason, *Failed Penile Implant Sufferers Seek Legal Remedy*, ORLANDO SENTINEL, July 12, 1993, at B1 (citing testosterone deficiencies, arterial constrictions, nerve disorders, and diseases such as diabetes as causes of impotence in men who obtain penile implants).

137. *See* McCartney, *supra* note 136.

sexual difference. When the implants failed, they exposed the fact that, in some instances, this difference is not only not "natural" but also that some individuals were employing artificial help to more successfully construct a "male" identity.

Litigation over breast, penile, and testicular implants directly exposed the role of artificial products in constructing binary, sexual identity. The fen-phen litigation, in contrast, provides an example of how tort litigation involving a product that was not ostensibly linked to sexual identity may also expose the artificiality of sexual identity construction. Fen-phen was a weight loss drug, which studies now link with heart valve damage.[138] The combination of drugs which constituted fen-phen, however, was never approved by the Food and Drug Administration.[139] Despite this, many doctors prescribed the drug, sometimes to help people lose as little as ten pounds.[140] The fen-phen litigation sought to hold manufacturers liable for encouraging and ignoring these off-label uses.[141] A nationwide class action settlement resulted, which provided compensation for those injured by fen-phen and heart screening for individuals at risk for future problems.[142]

In the course of the litigation, it became clear that some six million Americans had used fen-phen for weight loss.[143] Most of these individuals were women.[144] Although fen-phen worked the same on

138. *See In re* Diet Drug Prod. Liab. Litig., 220 F. Supp. 2d 414, 416 (E.D. Pa. 2002) (fen-phen litigation). Fen-phen is an abbreviation for the combination of the drugs fenfluramine and phentermine. John T. Evans & Robert L. Kerner, Jr., *A Primer on Fen-Phen Litigation: Allegations & Defenses*, 65 DEF. COUNS. J. 353, 353 (1998).

139. *See* Evans & Kerner, Jr., *supra* note 138, at 353. The Food and Drug Administration had approved each drug separately but not in combination. *Id.* Because of this, uses of fen-phen are frequently referred to as "off-label" uses. *See id.*

140. *See* Caren A. Crisanti, Comment, *Product Liability and Prescription Diet Drug Cocktail, Fen-Phen: A Hard Combination to Swallow*, 15 J. CONTEMP. HEALTH L. & POL'Y 207, 209–10, 242–43 (1998) (noting that physicians prescribed fen-phen for women to lose between ten and twenty pounds).

141. *See In re Diet Drug Prod. Liab. Litig.*, 220 F. Supp. 2d at 424.

142. *See* David J. Morrow, *Fen-Phen Maker to Pay Billions in Settlement of Diet-Injury Cases*, N.Y. TIMES, Oct. 8, 1999, at A1; *see also* Amended and Restated AHP Settlement Trust Agreement, *In re* Diet Drugs, 2:99-cv-20593-HB (E.D. Pa. July 1, 2005), *available at* http://www.settlementdietdrugs.com/pdfs/Exhibit2_Amended_and_Restated_AHP_Settlement_Trust_Agreement.pdf (laying out the final amended settlement agreement to provide compensation to qualified class members).

143. *See* Morrow, *supra* note 142.

144. *See* Apryl A. Ference, *Rushing to Judgment on Fen-Phen and Redux: Were the FDA, Drug Manufacturers, and Doctors Too Quick to Respond to Americans' Infatuation with a Cure-All Diet Pill for Weight Loss?*, 9 ALB. L.J. SCI. & TECH. 77, 102 (1998); Crisanti, *supra* note 140, at 209–10, 242–43.

everyone, doctors prescribed it primarily to women.[145] Doctors justified this dangerous off-label use by citing its importance in helping the individuals involved to feel "more female."[146]

These cases reveal the increasing use of sometimes dramatic artificial measures to amplify and construct binary sexual difference. When the products and practices work, the individuals "pass" more successfully as members of their designated sex. Because the cases expose these products and practices as artificial, however, the cases necessarily raise questions about the "realness" of the markers of binary sexual identity. The next Part argues that when faced with this evidence in tort litigation, courts privilege narratives which treat sexual identity as if it were naturally binary, even as the cases in front of them suggest the opposite.

II. TORT LITIGATION PRIVILEGES NARRATIVES OF SEXUAL IDENTITY WHICH STATE THAT SEXUAL IDENTITY IS, OR SHOULD BE, IMMUTABLE, NATURAL, AND BINARY

This Part aims to expose the often subtle ways in which assumptions about sexual identity are both repeated and enforced in tort litigation. The cases are organized around three central themes. The first is the notion that sexual identity is, or should be, *immutable.* The second focuses on the claim that sexual identity is, or should be, *natural*, meaning evidenced by biological indicators existing at birth. The third theme explores how tort litigation says that sexual identity is, or should be, *binary*. The discussion utilizes the cases discussed in Part I but also introduces several new cases and emerging areas of litigation involving sex assignment surgery on intersex children.

A. *Tort Litigation Sends a Message that Sexual Identity Is, or Should Be, Immutable*

Despite evidence from the key litigants in both *Hall* and *Littleton* that their sexual identity had undergone change, the courts in both cases found that sexual identity is immutable.[147] Of the two cases, *Hall* is perhaps the most interesting in this regard. There, the court

145. Ference, *supra* note 144, at 102.

146. *See id.* (noting that fen-phen was primarily prescribed to women as a means to promote the " 'Barbie-like' image" that society idolized).

147. *See* VIRGINIA COLONIAL MINUTES, *supra* note 21, at 195 (describing Hall's practice of changing sexual identities depending on the circumstances); Littleton v. Prange, 9 S.W.3d 223, 224 (Tex. Ct. App. 1999) (noting that Littleton had undergone sex reassignment surgery to perfect her female sexual identity), *cert. denied*, 531 U.S. 872 (2000).

acknowledged that Hall was, in fact, "both a man and a woeman" but insisted that Hall preserve the immutability of this status by dressing as both a man and a woman at all times and not switching back and forth, as Hall had done in the past.[148]

For the court, requiring Hall to dress as a man and a woman was ostensibly about preventing Hall from committing any sort of fraud or deception in future dealings with individuals who might otherwise be confused about Hall's sexual identity.[149] But, of course, there would be no possibility of deception without the cultural expectation that sexual identity is, or should be, fixed. When confronted with Hall's more fluid practice of sexual identity, the court was faced with a choice: recognize the reality of Hall's capacity for a mutable sexual identity (at least within the confines of a binary sexual identity regime) and allow it to continue unregulated or, alternatively, enforce the dominant understanding of sexual identity in the community, which said that sexual identity should not change.[150] By choosing the latter, the court placed the community's narrative of sexual identity (at least with respect to immutability) in a legally privileged position, while at the same time ensuring that Hall's alternative performance of sexual identity would be effectively silenced in the future.[151]

Littleton, too, emphasized the fundamental immutability of sexual identity, in the face of compelling evidence to the contrary. The court in *Littleton* heard uncontroverted evidence that Littleton had the "anatomical and genital features" of a female and that she had "the capacity to function sexually as a female."[152] Indeed, the parties agreed and submitted two affidavits both stating that she "is medically a woman" (whatever that meant to the affiants).[153] Nevertheless, the court concluded that Christie Littleton's post-operative female identity was not sufficiently "real" to qualify her for marriage to a male and, ultimately, recovery of wrongful death benefits as his surviving spouse.[154]

148. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 195.

149. *See id.*

150. *See id.*

151. *Id.* In fact, it is not clear that Hall was actually stopped from switching between (and perhaps among) identities. There is no further record of Hall after this case. *See* Ulrich, *supra* note 58, at 45–46. Hall may have moved to a different part of the country, where there may have been less possibility of detection. *See id* at 46.

152. *Littleton*, 9 S.W.3d at 225.

153. *Id.* at 224–25.

154. *Id.* at 231. In a bizarre legal twist, the Attorney General of Texas apparently reached the opposite conclusion. As Littleton's attorneys noted, the Attorney General considered Ms. Littleton sufficiently "real" to be required to pay child support for Mr.

According to the court, Littleton could not be a "real" female because she was "created and born a male."[155] Even though Littleton was, according to the court, anatomically and physically no longer a male, the court insisted that her sexual identity, having once been designated male on her original birth certificate, could not change.[156] To acknowledge the transition as "real" would require the court also to acknowledge that sexual identity is, in fact, mutable. In the court's words: "The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"[157]

Christie Littleton's very existence, of course, provides an answer to this question. By all appearances, including the medical evidence in the case, her sexual identity did change successfully.[158] The only issue was the court's unwillingness to accept the evidence of this change. This refusal did more than simply deny Christie Littleton the right to sue for her husband's wrongful death. By insisting that sexual identity is immutable, the court endorsed a particular narrative of sexual identity that is at odds with human experience.

In doing so, the court sent a clear message that, in its own words, had both "philosophical" and "legal" implications.[159] This message states that sexual identity is "immutably fixed by our Creator at birth."[160]

B. *Tort Litigation Sends a Message that Sexual Identity Is, or Should Be, Natural*

In the *Littleton* case, the evidence that Littleton was not a "real" woman was not limited to the apparent mutability of the bodily indicators of Littleton's sexual identity.[161] The court was also concerned with the artificiality of Littleton's sexual identity construction.[162] The fact that Littleton's female anatomy was "all man-made" was viewed as highly significant and key to its conclusion

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Littleton's children from a prior marriage, when Mr. Littleton was ill and unemployed. *See* Petition for Writ of Certiorari at 11, Littleton v. Prange, 531 U.S. 872 (2000) (No. 00-25).

155. *Littleton*, 9 S.W.3d at 231.

156. *Id.*

157. *Id.* at 224.

158. *Id.* at 225.

159. *Id.* at 224.

160. *Id.* In light of the references to "our Creator," the court's ruling seems to have had religious implications as well. *See id.*

161. *See id.* at 230–31.

162. *Id.*

that Littleton was not a "real" female.[163] But the court also relied on chromosomes to determine Littleton's "real" sexual identity.[164] This was necessary because, for the physicians testifying in the case, Ms. Littleton's present physical anatomy was the key indicator of her sexual identity.[165]

The court did not actually receive evidence of Ms. Littleton's chromosomal status, however; nor did it receive evidence of her husband's chromosomes.[166] Instead, the court assumed that both Ms. Littleton and her husband had "male" (or XY) chromosomal structures at birth based on their initial designations as male on their birth certificates.[167] In fact, many individuals who appear "male" at birth do not have an XY chromosomal structure.[168] Although it is likely that Christie Littleton's chromosomes indicated an XY status, the fact that the court assumed this information without receiving evidence on the point is significant because it suggests the extent to which the court's understanding of "natural" sexual identity rests more on cultural expectations than medical or scientific fact.

Once it decided to determine Ms. Littleton's sexual identity, the court had the option of choosing among any number of variables, both "natural" and artificial to assist in its decision.[169] For the physicians testifying in the case, Ms. Littleton's present physical

163. *Id.* at 231.
164. *Id.* at 230.
165. *Id.* at 224–25.
166. *Id.* at 231.
167. *Id.*
168. *See generally* Ben-Asher, *supra* note 36 (discussing cultural understandings of gender and sex distinctions as applied by courts); Ute Thyen et al., *Deciding on Gender in Children with Intersex Conditions: Considerations and Controversies*, 4 TREATMENTS IN ENDOCRINOLOGY 1 (2005) (noting the cultural influences in making medical decisions for intersex children). This is because chromosomal structure is considerably more variable than a simple XX equals female and XY equals male classification. *See* Karen Gurney, *Sex and the Surgeon's Knife: The Family Court's Dilemma . . . Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 AM. J.L. & MED. 625, 625–30 (2007). Some individuals, for example, have some cells that are XX and others that are XY. *Id.* at 628 ("[C]lear genital ambiguity, such as hermaphroditism, involv[es] mosaicism in which some cells are XY and others are XX."). Others are born with an extra X or Y or only one X. *Id.* at 629; *see also* Ben-Asher, *supra* note 36, at 52 n.2 (describing the chromosomal composition of intersex individuals). Also, some people develop physical and/or personality traits that do not correspond with what is expected for individuals with their chromosomal structure. *See* Ben-Asher, *supra* note 36, at 85. Some XX individuals, for example, have both ovaries and external genitalia that appear "male." *Id.* Because of this variation, some medical experts consider the appearance of external genitalia as potentially more important than chromosomes in determining sexual identity. *Id.*
169. *See Littleton*, 9 S.W.3d at 227; *see also In re* Estate of Gardiner (*Gardiner I*), 22 P.3d 1086, 1110 (Kan. Ct. App. 2001) (considering an array of factors in a case raising similar issues), *aff'd in part, rev'd in part*, 42 P.3d. 120, 137 (2002).

anatomy and other factors outweighed her presumed chromosomal status.[170] Despite this evidence, the court treated Ms. Littleton's presumably male chromosomes as definitive evidence that Ms. Littleton was "biologically" a male.[171] This emphasis is indicative of the court's own view that sexual identity is, or should be, natural.[172] Perhaps more important is the fact that the court took this stance in opposition to the testimony of medical experts.[173] For the court to do so shows that it was determined to send a message that "real" sexual identity is "natural," regardless of what the medical community or others had to say about it.

Like *Littleton*, the *Hall* case sent a message that "real" sexual identity is natural but, in the *Hall* case, with a significantly different outcome. Because Hall's sexual identity appeared, upon physical inspection, to have biological indicators consistent with the expectations for both males and females, the court ordered Hall to wear clothing and display a sexual identity that reflected Hall's natural dual status.[174] The outcome is interesting because it suggests the extent to which the court deemed it more important to emphasize a natural presentation of sexual identity than one which was rigidly binary.

Although Hall does not appear to have been charged with a crime, the court's order had the air of punishment about it.[175] To present as something other than one's natural self was considered a deception that the *Hall* court considered intolerable.[176] Something similar has taken place in more contemporary tort cases involving litigants who presented their sexual identity in ways that the court did not consider sufficiently "natural." In these cases, courts have punished the presentation of "faked" sexual identity with findings of contributory negligence and smaller damage awards.

Perhaps the most troubling example of this involves the civil litigation that followed in the wake of the murder of Brandon Teena, whose story was popularized in the Academy Award-winning film *Boys Don't Cry*.[177] Teena, a transgender[178] male, was murdered after

170. *Littleton*, 9 S.W.3d at 225.
171. *Id.* at 230.
172. *See id.* at 230–31.
173. *See id.* at 224–25.
174. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 195.
175. Ulrich, *supra* note 58, at 45 (noting that the case came up on ambiguous charges).
176. *Id.* at 45–48.
177. BOYS DON'T CRY (Killer Films/Hart-Sharp Entertainment 1999).
178. *See id.* The term "transgender" typically signifies an individual's rejection of traditional concepts of gender. *See* Susan Stryker, *(De)Subjugated Knowledges: An*

reporting a rape to the local sheriff's department.[179] Teena's mother then sued the county for his wrongful death, alleging negligence and intentional infliction of emotional distress.[180]

At trial, the court found that the county had been negligent and estimated damages at approximately $80,000.[181] However, the court then went on to reduce the amount of the award by eighty-five percent because of the actions of the killers, and by one percent for the contributory negligence of Teena.[182] Although the court did not detail its findings with respect to the contributory negligence holding, the clear message of the ruling was that Teena's transgender status was itself a form of negligence, justifying reduction of the award under the local comparative fault statute.[183]

The lower court's finding that Teena had been contributorily negligent in his own death may also have been rooted in Teena's refusal to continue to answer the questions of a local sheriff, whose behavior included referring to Teena as "it."[184] On appeal, the Nebraska Supreme Court found the sheriff's behavior to be "extreme and outrageous" as a matter of law and judged Teena's response of refusing to continue the conversation as reasonable under the circumstances.[185]

The significance of the Nebraska Supreme Court's ruling for legal understandings of sexual identity is unclear. On the one hand, it might be argued that the court's characterization of the sheriff's behavior suggested a willingness on the part of the court to recognize a fluidity in sexual identity that the sheriff was not. It seems more likely, however, that the court's reaction was aimed more at the sheriff's refusal to designate Teena with a pronoun that corresponded with a binary sexual identity regime. By referring to Teena as "it," the sheriff suggested that Teena's sexual identity (and perhaps Teena

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Introduction to Transgender Studies, *in* THE TRANSGENDER STUDIES READER, *supra* note 8, at 1, 4. The term "transsexual," in contrast has historically referred to individuals who desire to change their bodily sex characteristics. *Id.* The distinction between the two terms, however, is eroding. *Id.* at 8–10.

179. Brandon v. County of Richardson, 624 N.W.2d 604, 604 (Neb. 2001).

180. *Id.*

181. *Id.*

182. *Id.*

183. *See* Brief for Harry Benjamin Int'l Gender Dysphoria Ass'n as Amicus Curiae Supporting Plaintiff-Appellant, *supra* note 14, at 2 ("[T]he trial court's finding of contributory negligence may be based on the disturbing misconception that Brandon was somehow at fault simply for existing and interacting with others as a transgender person—*i.e.*, for presenting himself as male rather than female.").

184. *Brandon*, 624 N.W.2d at 621.

185. *Id.* at 604.

himself) was not cognizable. Under other circumstances, some courts have found similar statements to constitute defamation per se.[186] Had Teena been referred to as "her" or "him," it is unlikely that the Nebraska Supreme Court would have responded in the way it did.

In any event, it is clear that the lower court did not agree.[187] Instead, it seems that, for the lower court, the sheriff's behavior toward Teena was an understandable response to Teena's transgender status, which the lower court seems to have found intolerable. More troubling, the lower court's finding of contributory negligence by Teena suggests that the court blamed Teena, in part, for his own death. In this respect, the lower court's conclusion in *Brandon* echoes that of the court in *Hall*. In *Hall*, dressing sometimes as a woman and other times as a man was prohibited when Hall's natural body seemed to indicate a dual identity.[188] Similarly, the lower court in *Brandon* seemed to consider it unreasonable (and a form of negligence) for Teena to present himself as a male when his natural body indicated a female identity.[189] As in *Hall*, the court concluded that sexual identity should be natural and when it is faked, a legal party should be held accountable or punished in some way.

More dramatic and widespread evidence of how individuals who fake sexual identity may be indirectly punished in tort litigation can be found in litigation over products for sexual identity construction or amplification. In the silicone gel breast implant litigation, summarized in Part I, hundreds of thousands of individuals filed suit for injuries[190] following surgeries to make their bodies appear more "female."[191] In the litigation that followed, both legal rulings from the bench and juror outcomes distinguished between those who underwent surgery to replace a natural breast and individuals who underwent surgery for so-called "purely cosmetic" reasons.[192] Individuals who underwent

186. *See supra* note 117 and accompanying text.

187. *See Brandon*, 624 N.W.2d at 604.

188. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 195.

189. *See* Brief for Harry Benjamin Int'l Gender Dysphoria Ass'n as Amicus Curiae Supporting Plaintiff-Appellant, *supra* note 14, at 2.

190. Feder, *supra* note 130.

191. *See* Emily C. Aschinger, Note, *The Selling of the Perfect Breast: Silicone, Surgeons, and Strict Liability*, 61 UMKC L. REV. 399, 407 (1992) (discussing the promotion of breast implants through the American Society of Plastic and Reconstructive Surgeons' ("ASPRS") declaration that small breasts are "deformities" causing a "disease" and requiring surgery for a woman's "well-being" (quoting Gehorsam, *supra* note 120) (internal quotation marks omitted)).

192. In *Turner v. Dow Corning Corp.*, for example, a topless dancer who underwent surgery for "cosmetic" purposes lost her case against Dow after the defense suggested that her decision to undergo breast augmentation was part of a frivolous lifestyle. *See Colorado*

surgery to replace a natural breast were more likely to succeed in their cases and to receive higher damage awards.[193] The explanation for this difference in verdicts and awards was that jurors "tend to be more sympathetic" to women who underwent breast implant surgery to replace a natural breast.[194] It was not just jurors who were more sympathetic, however. In early litigation over whether a claim for strict liability might be available as a potential cause of action for implant recipients, some defendants argued that the claim should not be available to those who underwent surgery for reasons other than replacing a natural breast.[195]

The reasoning underlying this argument was that a strict liability claim should not be available to these individuals because, like Teena, they were partly at fault and contributed to their injuries by attempting to fake sexual identity.[196] Ultimately, this argument was rejected and implant recipients were permitted to bring strict liability based claims, without regard to the implant recipients' motivations for obtaining the implants.[197] For some courts, though, there remained a clear difference between using breast implants for purposes of "restoring the body to natural form" and using them to "enhance esteem and add to life's enjoyment."[198]

On the face of it, this distinction makes no sense. The breast implants and implantation practices used in all cases were, for practical purposes, identical and therefore equally artificial. Because

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Jury Returns Defense Verdict in Lawsuit by Topless Dancer, [Jan.–June] Prod. Safety & Liability Rep. (BNA), at 662–63 (June 25, 1993); Jennifer Mears, *Dancer Loses Implant Lawsuit: Dow Corning Says Damage Unproven*, DETROIT FREE PRESS, June 12, 1993, at 6A; *see also* Lee v. Baxter Healthcare Corp., 721 F. Supp. 89, 91–96 (D. Md. 1989) (noting Lee's surgery was for "breast augmentation" and utilizing technical arguments to defeat her claim for strict liability), *aff'd*, 898 F.2d 146 (4th Cir. 1990).

193. Dennehy, *supra* note 18, at 54 (describing how juries punish plaintiffs "who chose to tamper with nature").

194. Cindy Collins, *Litigation Alert*, INSIDE LITIG., Oct. 1997, at 10, 11.

195. *See, e.g.*, Artiglio v. Superior Court of San Diego County, 27 Cal. Rptr. 2d 589, 592 (Cal. Ct. App. 1994) (considering and rejecting the view that a strict liability claim should not be available to those who underwent implantation for reasons other than replacing a breast lost to mastectomy).

196. *See* 2 DOBBS, *supra* note 12, § 353, at 974–75. The availability of strict liability in cases involving defectively designed products is premised on the notion that neither party is at fault. *See id.*

197. *Artiglio*, 27 Cal. Rptr. 2d at 592. It is perhaps not insignificant that the precedent relied upon by the court to treat all breast implant recipients the same was a penile implant case, in which the court had determined that it was "irrelevant" whether the patient had "obtained a penile prosthesis for procreation, alleviation of an impotency problem or cosmetic purposes." Hufft v. Horowitz, 5 Cal. Rptr. 2d 377, 383 n.9 (Cal. Ct. App. 1992).

198. *Artiglio*, 27 Cal. Rptr. 2d at 592.

of this, there is no apparent reason to distinguish between implant recipients who used a silicone implant to replace a breast lost to mastectomy and someone with small breasts who wanted access to the implants to look more feminine. In both cases, the risks and benefits of the surgery are the same; each faces the same array of potential health problems and, if the surgery is successful, both will enjoy the same social and economic benefits that accompany the successful performance of "femininity," in a culture that equates female sexual identity with breasts of a particular size and shape.

By treating the two groups differently, however, tort litigation sends a message that sexual identity is, or should be, natural. Moreover, by valuing the claims differently, the law sends an implicit message that it is wrong to "mess with nature," for purposes other than reconstructing a "natural" state of affairs (e.g., reconstruction after mastectomy).[199] In short, as in the cases involving transgender and transsexual individuals, the breast implant litigation privileges a narrative which states that "real" sexual identity is, or should be, natural, even while simultaneously exposing its artificiality.

C. *Tort Litigation Sends a Message that Sexual Identity Is, or Should Be, Binary*

The preceding discussion shows how tort litigation demands that sexual identity is, or should be *immutable* and *natural.* These same cases send a third message about sexual identity: it is, or should be, *binary.*

As *Littleton* illustrates, many tort claims, including wrongful death, alienation of affection, loss of consortium, and negligent infliction of emotional distress, rely upon the existence of a marital relationship for the plaintiff to establish a claim.[200] When that relationship comes into question, then the claim itself may be in jeopardy. In the case of transsexuals, for those courts which refuse to recognize a marriage between a transsexual and an individual of the same birth sex, tort litigation of this kind is not an option for the recovery of damages stemming from negligent or intentional conduct

199. *See* Dennehy, *supra* note 18, at 54.

200. *See* Anne Bloom, *Regulating Middlesex*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 137, 150 (David M. Engel & Michael McCann eds., 2009) [hereinafter FAULT LINES] (citing Bume v. Catanne, No. 184985 (Cal. Super. Ct. July 21, 1971) in which the court "reject[ed] . . . claims brought by a male-to-female transsexual wife").

which had an impact on the marriage.[201] This sends a message that sexual identity is, or should be, immutable.

At the same time, cases like *Littleton* also send a message that sexual identity is, or should be, binary. This is because cases like *Littleton* raise questions about the legal status of two other groups of people who may find it challenging to fit within the confines of a strictly binary regime: individuals whose sex does not fit easily into a binary classification at birth and those whose external genitalia and/or sexual identification undergo change during puberty. Under the *Littleton* court's framework, you are born either male or female and, once designated, this identity is fixed for life.[202] Some individuals, however, do not fit squarely within a binary classification of sexual identity, even at birth.[203] Under the court's ruling in *Littleton* and under the logic of other cases employing similar reasoning, these individuals are precluded from bringing tort claims that rely upon the existence of a marriage between two individuals whose sexual identity classifies them as members of the "opposite" sex at birth.

In most instances involving intersex children, a binary classification is quickly perfected, through surgery and other means.[204] Although the practice has come under some dispute, it was and remains standard practice for doctors to perform binary sex

201. *See* Phyllis Randolph Frye & Katrina C. Rose, *Responsible Representation of Your First Transgendered Client*, 66 TEX. B.J. 558, 560 (2003) (noting that the validity of the marriage is a threshold issue for transsexuals bringing marriage-based claims); *see also* Randi E. Frankle, *Does Marriage Really Need Sex? A Critical Analysis of the Gender Restriction on Marriage*, 20 FORDHAM URB. L.J. 2007, 2037 (2003) (noting that a marriage could be successfully challenged if one person is unknowingly intersex).

202. *See* Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000).

203. *See* FAUSTO-STERLING, *supra* note 40, at 51. Many individuals, for example, are born intersex. *See id.* (estimating that 1.7% of the population is intersexed); *see also* Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 159 (2000) (estimating that between one and two in a thousand people have bodies which differ from the standard traits of a male or female); Greenberg, *Defining Male and Female*, *supra* note 40, at 267 (reporting an estimate of 1–4%).

204. *See* Lee et al., *supra* note 84, at e491; Thyen et al., *supra* note 168, at 3; *see also* Anne Tamar-Mattis, Editorial, *What Is a Person's "Legal Sex?"*, ENDOCRINE TODAY, May 1, 2009, http://endocrinetoday.com/view.aspx?rid=39668 [hereinafter Tamar-Mattis, ENDOCRINE TODAY]. Although ambiguous genitalia usually pose no physical health risk, the birth of a child with ambiguous genitalia is considered by many medical experts to be a "social emergency" that requires immediate medical attention. Am. Acad. Pediatrics, *Evaluation of the Newborn with Developmental Anomalies of the External Genitalia*, 106 PEDIATRICS 138, 138 (2000). In 2006, this policy was superseded by a new policy where the language referring to a "social emergency" was replaced by references to parental anxiety. *See* Lee et al., *supra* note 84, at e491.

assignment operations on children with ambiguous genitalia.[205] Because the binary sex assignments take place at such an early age, there are usually no legal records indicating intersex identities at birth. Instead, birth certificates typically indicate the binary identities that are subsequently constructed by doctors.[206] As a result, these individuals are not blocked from pursuing tort claims that require evidence of a binary sexual identity at birth.

Many intersex infants, however, later adopt sexual identities that are at odds with the designations made in infancy.[207] Like transsexual adults, they may then undergo surgery to realign their bodies to match their identities. Similarly, some children designated "male" at birth have undergone sex reassignment surgery following severe genital injuries.[208] For all of these individuals, evidence of a changed birth certificate may pose legal difficulties if they attempt to pursue claims based on the existence of a post-operative heterosexual marriage.[209] Put differently, tort litigation does not consistently recognize these individuals as viable legal subjects.

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205. *See* Carolyn Chi, Henry Chong Lee & E. Kirk Neely, *Ambiguous Genitalia in the Newborn*, 9 NEOREVIEWS e78–e84 (2008); Lee et al., *supra* note 84, at e491–92 (discussing surgery on infants as part of the American Academy of Pediatrics' policy on the "management" of intersex conditions); *see also* Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 2–3 (2000) [hereinafter Beh & Diamond, *An Emerging Ethical and Medical Dilemma*] (noting that surgeries continue to be performed).

206. *See* Thyen et al., *supra* note 168, at 3; Tamar-Mattis, ENDOCRINE TODAY, *supra* note 204 (noting that some doctors think that surgery is necessary to assign a legal sex).

207. *See* Froukje M.E. Slijper et al., *Long-Term Psychological Evaluation of Intersex Children*, 27 ARCHIVES SEXUAL BEHAV. 125, 134–36 (1998) (reporting that thirteen percent of the individuals interviewed in one study later developed a sexual identity at odds with the surgical designation).

208. *See* Susan J. Bradley et al., *Experiment of Nurture: Ablatio Penis at 2 Months, Sex Reassignment at 7 Months, and a Psychosexual Follow-up in Young Adulthood*, 102 PEDIATRICS e9, e10 (1998) (reporting on a case where infant was reassigned to female sex following injury during circumcision). The existence of these practices was made more visible by the publication of John Colapinto's book on the story of David Reimer. COLAPINTO, *supra* note 32, *passim*. Reimer suffered a traumatic injury to his penis during a botched circumcision in infancy. *Id.* at xiii. On the advice of medical experts, Reimer's parents decided that the appropriate course of action was to reconstruct Reimer as a girl. *Id.* Over the next several years, Reimer underwent several surgeries to remove his testes and what remained of his penis. *Id.* Somewhat later, he took estrogen and grew breasts. *Id.* at 129. Reimer suffered severe psychological problems, however, and ultimately decided to become a male again, at the age of fourteen. *Id.* at 274. Some time later, he committed suicide. John Colapinto, *Gender Gap: What Were the Real Reasons Behind David Reimer's Suicide?*, SLATE, June 3, 2004, http://www.slate.com/id/2101678/.

209. *See* Spade, *supra* note 22, at 16–17. The binary regime also does not make space (in tort litigation or elsewhere) for those who wish to live outside it. *See id.* at 17–18

This can be seen in cases like *Littleton* but also in cases that have not been brought. Sex assignment or reassignment surgery on children is almost never medically necessary.[210] It is typically performed to alleviate the anxiety of parents and to prevent assumed psychological harm to children who may perceive themselves as different.[211] But, in fact, there is little evidence that the benefits of the surgery outweigh the risks.[212] Because of this, there is a growing specter of potential litigation against the surgeons who perform the surgery.[213]

At the moment, however, such litigation would likely be precluded by legal doctrines in U.S. tort law that protect doctors from liability when the medical procedures are consistent with the custom of the profession and where they have obtained the patient's consent.[214] In other jurisdictions, however, courts have challenged doctors who have performed, or are attempting to perform, similar operations. In 1995, the Constitutional Court of Colombia (Colombia's highest court) heard the claims of a young Colombian man who sued his doctors after they performed a surgical sex reassignment on him as an infant, following a traumatic injury to his penis.[215] In a precedent-setting ruling, the Colombian court held that the doctor should not have performed the surgery even though the parents consented.[216] Instead, the court found decisions about surgery should, in most instances, be delayed until the child has an

(discussing the legal challenges of post-operative transgendered people with regards to providing evidence of their sex change).

210. *See* Kate Haas, *Who Will Make Room for the Intersexed*, 30 AM. J.L. & MED. 41, 42 (2004).

211. *See id.*; *see also* Lee et al., *supra* note 84, at e491 ("Initial gender uncertainty is unsettling and stressful for families.").

212. Beh & Diamond, *An Emerging Ethical and Medical Dilemma*, *supra* note 205, at 21–27. Among other things, the surgeries pose risks of sexual dysfunction. *Id.* at 21.

213. *See* Greenberg, *Legal Aspects of Gender Assignment*, *supra* note 40, at 277 ("[T]he current dominant treatment protocol may impair the legal rights of the intersex child as well as lead to legal liability for the treating physicians.").

214. Tim Cramm et al., *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 703–04 (2002). In most instances, a defendant's compliance with professional custom (i.e., what other doctors do) provides a complete defense to a claim for medical malpractice in the United States. *See id.* at 705. Parental consent doctrines provide similar protection. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 604 (1979) (according great deference to parental medical decisions).

215. Sentencia No. T-477/95 (Corte Constitucional, 1995) (Colom.), *available at* http://www.isna.org/node/110. For an English summary of this case and subsequent related rulings from the Colombian court, see Haas, *supra* note 210, at 49–54.

216. Sentencia No. T-477/95.

opportunity to comprehend the nature of the surgery and give meaningful consent.[217]

The Colombian court's reasoning sheds light on how the U.S. doctrines of informed consent and professional custom in medical malpractice cases prevent U.S. courts from seriously considering the issues that are raised by such cases. In the Colombian case, the court questioned the cultural expectations that were at the heart of the decision to subject the Colombian child to surgery in the first place.[218] Specifically, the court noted that the surgery might have been motivated by societal intolerance of bodies that do not live up to cultural expectations about binary sexual difference.[219] And, if that were the case, the court reasoned, it would constitute discrimination for the court to place its imprimatur on this intolerance by allowing the practices to go unchallenged.[220]

Cases raising similar issues have also been brought in Australia, with similar results.[221] As a result, a court order may now be necessary before a physician may perform sex reassignment surgery in Australia.[222]

United States courts, in contrast, have not challenged similar practices in tort litigation. Although no cases have been brought, it is generally expected that courts would defer to the opinions of doctors and parents.[223] This deference is facilitated by legal doctrines which require a plaintiff to meet special standards when attempting to sue a

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* This reasoning led the Colombian court to rule in favor of the individual who had already undergone such surgery and to conclude that the consent given by his parents was insufficient. *Id.* In two other cases, the Constitutional Court of Colombia subsequently employed the same reasoning to issue rulings restricting the ability of parents to consent and doctors to perform the surgeries. *See* Sentencia No. Su-337/99 (Corte Constitucional, 1999) (Colom.), *available at* http://www.isna.org/node/166; Sentencia No. T-551/99 (Corte Constitucional, 1995) (Colom.) *available at* http://www.isna.org/node/126.

221. *See* Lily Bragge, *Choosing the Right Gender*, THE AGE (Austl.), Feb. 1, 2005, at A3, *available at* http://www.theage.com.au/articles/2005/01/31/1107020318710.html (describing the case of Tony Briffa, who is attempting to sue his doctors for medical malpractice in surgically reassigning him as female at age seven).

222. *In re* A (A Child) (1993) 16 Fam. L. R. 715, 715–16 (Austl.) (requiring a court order to reassign a child to a different sex in a case involving genital injury after birth).

223. *See* Lee et al., *supra* note 84, at e497 (explaining in a special appendix on "legal issues" that the medical profession sets standards of care "on the basis of prevailing custom" and that "US courts assume that parents know what is best for their child"); *see also* Parham v. J.R., 442 U.S. 584, 602–04 (1979) (according great deference to parental medical decisions); Cramm et al., *supra* note 214, at 703–04 (explaining professional custom standard in medical malpractice cases).

doctor who has performed surgery on a child.[224] Under the professional custom standard that is employed in most medical malpractice cases in the United States, for example, a plaintiff must show that a doctor's actions have deviated from the actions that are customary among other doctors in the field.[225]

This deference to professional custom in medical malpractice cases is a departure from how custom is treated in other negligence actions, where custom typically is relevant but provides no protection from liability.[226] Doctors are treated differently because it is assumed that the medical profession is so complex that the average juror does not have the knowledge to determine what is objectively reasonable.[227] As a practical matter, the doctrine operates to preclude a plaintiff from bringing a medical malpractice action in the United States, unless a doctor is willing to testify that the defendant's actions violated the customs of the medical profession.[228] In the intersex surgery context, it would be extremely difficult for a plaintiff to be able to find a doctor to testify to this because medical protocols clearly identify surgery as a customary "treatment" for intersex children.

The parental consent doctrine effectively precludes judicial review for similar reasons. Judicial deference is defended on the ground that parents are more appropriate decision-makers for their children than courts because parents know their children better than judges and can, in most instances, be trusted to make more appropriate judgments about medical treatments for them.[229] In other contexts, courts have the authority to intervene and prevent a parent from consenting to surgery for their children if the court determines

224. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 186–89, § 33, at 193–96 (5th ed. 1984) (explaining how the professional custom standard of care for medical negligence allows physicians to set their own standards of conduct). Some U.S. courts have abandoned the professional custom standard for a "reasonable physician" test. *See, e.g.*, Vassos v. Roussalis, 625 P.2d 768, 772 (Wyo. 1981) (holding that the standard of care for malpractice cases is that a physician must exercise the care that would reasonably be exercised under similar circumstances by members of the profession in good standing and in the same line of practice).

225. *See* Cramm et al., *supra* note 214, at 703–04.

226. KEETON ET AL., *supra* note 224, § 33, at 193–96.

227. Cramm et al., *supra* note 214, at 703–04. A second argument for treating doctors differently is the presumption that, as professionals, they will also place the patient's welfare first. *Id.* at 703.

228. KEETON ET AL., *supra* note 224, § 32, at 188.

229. *See* Beh & Diamond, *An Emerging Ethical and Medical Dilemma*, *supra* note 205, at 38–39.

that it is not in the child's best interest.[230] When the parents' interests are seen as conflicting with those of the child, for example, courts sometimes step in and limit the parents' authority to make medical decisions for the child.[231] But there is no indication yet that courts will take this approach in cases involving intersex children.[232]

In sum, both legal doctrines (professional custom and parental consent) encourage courts to defer to the practices of doctors and parental preferences in this context.[233] As the Constitutional Court of Colombia noted, however, the views of doctors and parents are heavily influenced by cultural intolerance of sexual identities that fall outside a binary classification.[234] For the Colombian court, it was important to respond to this intolerance with a legal stance that actively interrogated the assumptions underlying this cultural intolerance. United States courts, in contrast, incorporate this intolerance into their legal decision-making.

A slander case involving an allegation of intersexuality makes this point in a particularly graphic way.[235] After concluding that it is

230. *See, e.g.*, Bonner v. Moran, 126 F.2d 121, 123 (D.C. Cir. 1941) (overruling parental consent to skin removal and other treatments to assist burned cousin); *see also In re* Richardson, 284 So. 2d 185, 187 (La. Ct. App. 1973) (declining to approve parental consent to child's participation in organ donation procedure); *In re* Guardianship of Pescinski, 226 N.W.2d 180, 182 (Wis. 1975) (same). This authority to second guess parental judgment, however, is often exercised to *require* surgery over parental objection, rather than to prevent it. *See, e.g.*, *In re* Sampson, 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970) (ordering surgery over parental objection). Some states also prohibit sterilization of mentally disabled children without court approval by statute. *See, e.g.*, CAL. PROB. CODE § 1958 (West 2002). Secondary sterilizations, such as those caused by sex assignment surgery on intersex infants, however, are generally not prohibited. *See, e.g.*, § 1968.

231. *See, e.g.*, *In re* A.W., 637 P.2d 366, 370 (Colo. 1981) (holding that parents may not consent to the sterilization of mentally disabled children); *In re* McCauley, 565 N.E.2d 411, 413 (Mass. 1991) (overruling parental decision to deny medical treatment based on religious beliefs).

232. Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 80–81 (2006) [hereinafter Tamar-Mattis, *Exceptions to the Rule*]. *But see id.* at 107–08 (suggesting ways to authorize judicial involvement in genital-normalizing surgery, such as by enacting a statute or, more plausibly, having doctors take the initiative by bringing this issue before the courts); Hazel Glenn Beh & Milton Diamond, *David Reimer's Legacy: Limiting Parental Discretion*, 12 CARDOZO J.L. & GENDER 5, 21–27 (2005) [hereinafter Beh & Diamond, *David Reimer's Legacy*] (arguing against deferring to parental consent in the context of surgery on intersex children).

233. Sara A. Aliabadi, Note, *You Make Me Feel Like a Natural Woman: Allowing Parents to Consent to Early Gender Assignment Surgeries for Their Intersexed Infants*, 11 WM. & MARY J. WOMEN & L. 427, 454–56 (2005).

234. Sentencia No. T-477/95 (Corte Constitucional, 1995) (Colom.), *available at* http://www.isna.org/node/110.

235. *See* Malone v. Stewart, 15 Ohio 319, 319 (1846) (in bank) (involving allegations that Stewart had falsely referred to Malone as a "hermaphrodite").

slander per se to falsely accuse someone of being intersexed, the court explained that making such an allegation "unsexes" the victim and "converts her into a monster, whose very existence is shocking to nature."[236] As a result, the court concluded, damage to plaintiff's reputation could be presumed.[237]

An allegation of intersexuality only "unsexes" an individual, however, if the court assumes that there is no possibility of sexual identity outside of a binary classification. Similarly, the existence of intersexed people is only "shocking" because of the court's own presumptions about the binary sexual qualities of "nature." To incorporate these views into legal opinions affecting the availability of tort remedies displays how tort cases incorporate cultural intolerance into tort law itself. It also shows how tort litigation indirectly sends a message that sexual identity is, or should be, binary.[238]

III. SEXUAL IDENTITY NARRATIVES IN TORT LITIGATION INFLUENCE DEBATES OUTSIDE THE COURTROOM

When the *Littleton* court insisted that Christie Littleton was not a female in the face of uncontroverted physical evidence which suggested otherwise, it allowed the court to exclude Littleton and others from exercising important legal rights and remedies, including wrongful death claims for the negligent loss of a spouse.[239] Although the decision focused on the claim of a post-operative transsexual, the legal and political implications of *Littleton* go well beyond the denial of the benefits of tort litigation to post-operative transsexuals who marry someone with the same designated birth sex. Under the court's logic, intersex individuals, and virtually anyone whose current sexual identity is not the same as the one that appears on their original birth certificate, are not viable legal subjects for purposes of marriage or

236. *Id.* at 320.

237. *Id.*

238. *See* Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000). The protection that tort litigation provides to doctors who perform sex assignment and sex reassignment surgeries might also be viewed as evidence of the courts' tacit recognition in these (unfiled) cases that sexual identity is indeed mutable. *See* Melvin M. Belli, *Transexual Surgery: A New Tort?*, 239 JAMA 2143, 2145 (1978). But the approach in these cases more closely resembles that of courts in the breast implant litigation, where the surgery is viewed as "corrective" in the sense of restoring the body to its natural state or, in some instances, constructing a natural state that the body *should* have had. *Id.* at 2146. Alternatively, the seeming tolerance of mutability in this instance may also reflect a more general sensibility that preserving a notion of sexual identity as naturally binary is more important than conveying its immutability.

239. *Littleton*, 9 S.W.3d at 231.

making marriage-related tort claims.[240] Much more broadly, the court's ruling provides political and cultural legitimacy for views that are advocated outside the courthouse doors.

An example of this can be seen in how the legal narratives of the *Littleton* case provided political legitimacy to opponents of same-sex marriage. Not long after *Littleton*, Texas newspapers reported on an attempt by two lesbians, one of whom was a male-to-female transsexual, to marry.[241] Somewhat surprisingly, the president of the Texas Conservative Coalition, which ordinarily opposes same-sex marriage, did not oppose the marriage.[242] As he explained, this was because (under *Littleton*) the lesbians were "legally a man and a woman."[243]

This direct use of a legal narrative to justify a political decision is a classic example of how law can shape political and cultural debates surrounding sexual identity in important ways. As this example illustrates, the legal narrative in *Littleton* shaped the political consciousness of an anti-gay marriage activist by providing legitimacy for a position that seemed to be at odds with his organization's typical stance on these issues.[244] Specifically, the legal ruling in *Littleton* seems to have played a role in constructing this individual's views about what constitutes a "real" man and "real" woman for purposes of heterosexual marriage.[245]

More broadly, the example illustrates how law plays a role in constructing social meaning. Especially in the context of sexual identity, we expect law to reflect and enforce other cultural narratives. But law does more. Legal narratives do not simply reflect

240. *See id.* at 225–26. The Littletons were able to marry because Christie Littleton had successfully changed her birth certificate following her surgery. *Id.* When Christie Littleton later attempted to rely on this change in her birth certificate, however, the court focused on what the birth certificate said at the time of birth, rather than its current designation. *Id.* at 231. For further discussion of the Littletons' marriage, see *supra* notes 85–101 and accompanying text.

241. *See* Rick Casey, Column, *I Now Pronounce You Wife and Wife*, SAN ANTONIO EXPRESS NEWS, Aug. 30, 2000, at 3A; Polly Ross Hughes, *Lesbians' Plans to Wed Look Legal*, HOUSTON CHRON., Aug. 31, 2000, at 1A.

242. The political agenda of the Texas Conservation Coalition can be found on their Web site: http://www.txcc.org. This agenda includes opposition to same-sex marriage. *See* Tex. Conservative Coal., Traditional Values, http://www.txcc.org/content/traditional-values-0 (last visited Jan. 2, 2010). Currently, for example, the Web site lists passage of a Senate Bill opposing same-sex civil unions as a "victory." *See id.*

243. Michelle Kurtz, *Lesbian Wedding Allowed in Texas by Gender Loophole*, SEATTLE POST-INTELLIGENCER, Sept. 7, 2000, at A3.

244. *See* Hughes, *supra* note 241; Kurtz, *supra* note 243.

245. *See id.*

the culture of which they are a part.[246] Like other cultural narratives, legal rulings shape our perceptions of political and cultural reality.[247] In the context of sexual identity, this means that legal narratives influence and, indeed, help to construct, our beliefs about what it means to be "real" for purposes of sexual identity.[248]

Legal rulings are, of course, not the only narratives playing this role. Our beliefs about sexual identity are organized and shaped by a variety of narratives, including, importantly, the narratives that are produced by medical and scientific experts. Because of its focus on the body, however, narratives in tort litigation may play a particularly influential role in shaping broader social discourses about sexual identity.[249]

The remainder of this Part looks at how tort litigation influences broader cultural narratives in two particular areas: (A) the nature of marriage, including same-sex marriage; and (B) the nature of binary sexual identity.

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246. *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 87 (10th ed. 2006) ("Law thus defines, while seeming only to reflect, a host of social relations."); *see also* David M. Engel & Michael McCann, *Introduction*, *in* FAULT LINES *supra* note 200, at 1, 1 ("[T]ort law plays a role in constituting the very cultural fabric in which it is embedded."). This is particularly easy to see in areas of the law, like tort litigation, which rely on the common law as their primary authority. In common law cases, the judge cites and repeats the dominant narrative, as precedent, in each decision. This citation of the dominant narrative then both produces the law and establishes the priority of certain cultural and legal norms. BUTLER, BODIES THAT MATTER, *supra* note 17, at 225. In doing so, the legal narratives in the case inevitably play a role in the structuring of social relations by privileging certain narratives over others. LÓPEZ, *supra*, at 86 ("[L]aw is not limited to direct, coercive, behavior-controlling means .... It also operates on the level of constitutive ideology.").

247. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 184 (1983). Clifford Geertz referred to this relationship between narratives and political consciousness as the role of discourse in "imagining the real." *Id.*; *see also* SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS 9 (1990) (discussing the increasing "flow of influence outward from the courts" to the general population).

248. *See* ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARDS A CONSTITUTIVE THEORY OF LAW 316 (1993) (arguing that law helps to construct the objects which it seeks to regulate); Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117, 118 (Keith O. Boyum & Lynn Mather eds., 1983).

249. *See* SARAH S. LOCHLANN JAIN, INJURY: THE POLITICS OF PRODUCT DESIGN AND SAFETY LAW IN THE UNITED STATES 7 (2006). As Jain notes, injury laws "including their human (lawyers, plaintiffs, judges, clerks) and nonhuman participants (amicus briefs, complaints, texts, restatements)—are key actors in the cultural reproduction of material difference." *Id.*

A. *How Legal Narratives About Sexual Identity in Tort Litigation Influence Views About Marriage*

As we have already seen, court decisions like *Littleton* play into broader debates about same-sex marriage. For the *Littleton* court, Christie and Jonathan Littleton did not have a "real" marriage because, in the court's view, Christie Littleton did not qualify as a "real" woman.[250] Texas is not alone in this conclusion. Other jurisdictions have also refused to recognize marriages between transsexuals and individuals with the same designated sex at birth.[251] Because of this, post-operative transsexuals who seek to marry an individual who shares the same designated sex at birth will not only be denied the right to marry but will also be denied the right to pursue marriage-related tort litigation.

At least one jurisdiction in the United States, however, has explicitly recognized the right of a post-operative transsexual to marry an individual of the same designated birth sex.[252] And in many other jurisdictions, post-operative transsexuals are permitted to change the designation of their birth sex by statute.[253] In these jurisdictions, it would seem that post-operative transsexuals could

250. *See* Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000).

251. *See In re* Estate of Gardiner (*Gardiner II*), 42 P.3d 120, 137 (Kan. 2002); Gajovski v. Gajovski, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991); *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987); *see also* Corbett v. Corbett, [1971] P 108 (Eng. 1970) (invalidating marriage between a post-operative transsexual and an individual of the same designated birth sex). *See generally* Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 LAW & SEXUALITY REV. 87 (2003) (discussing how American courts have used the *Corbett* decision to declare that gender is determined solely by chromosomes and that marriage is determined by sexual intercourse).

252. *See* M.T. v. J.T., 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 364 A.2d 1076 (N.J. 1976); *see also* Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 7, 34–35 (upholding the right of transsexuals to marry); Kevin v. Attorney-General (2001) 165 F.L.R. 404, 476 (Austl.) (same).

253. *See, e.g.*, ALA. CODE § 22-9A-19(d) (LexisNexis 2006); ARIZ. REV. STAT. ANN. § 36-337(A)(3) (2009); ARK. CODE ANN. § 20-18-307(d) (2005); CAL. HEALTH & SAFETY CODE §§ 103425–103430 (West 2006 & Supp. 2009); COLO. REV. STAT. § 25-2-115(4) (2008); D.C. CODE § 7-217(d) (2008); GA. CODE ANN. § 31-10-23(e) (2009); HAW. REV. STAT. § 338-17.7(4)(B) (1993); 410 ILL. COMP. STAT. ANN. 535/17-1(d) (West 2005 & Supp. 2009); IOWA CODE ANN. § 144.23 (West 2005), *amended by* Act of Apr. 29, 2005, ch. 89, § 12, 2005 Iowa Acts 249; LA. REV. STAT. ANN. § 40:62 (2001); MASS. ANN. LAWS ch. 46, § 13 (LexisNexis Supp. 2008); MICH. COMP. LAWS ANN. § 333.2831 (West 2001); MISS. CODE ANN. § 41-57-21 (West 2007); MO. ANN. STAT. § 193.215 (West 2004); NEB. REV. STAT. § 71-604.01 (Supp. 2008), *amended by* Act of May 22, 2009, LB 195, § 67, 2009 Neb. Laws ___; N.J. STAT. ANN. § 26:8-40.12 (West 2007); N.M. STAT. ANN. § 24-14-25 (West 2003); N.C. GEN. STAT. § 130A-118 (2007); OR. REV. STAT. § 432.235 (2007); UTAH CODE ANN. 26-2-11 (2007); VA. CODE. ANN. § 32.1-269 (2009); WIS. STAT. § 69.15 (2002).

pursue tort litigation arising out of a marriage relationship with a person who shares the same designated sex at birth.

As *Littleton* illustrates, however, marriage per se is not always sufficient for purposes of recognizing marriage-related tort claims.[254] In *Littleton*, Christie Littleton's birth certificate had been changed to reflect her post-operative sexual identity as a female.[255] This evidence was deemed sufficient by Texas authorities to permit her to enter into a marriage with her husband, but insufficient for purposes of pursuing tort-related legal claims, such as wrongful death and survivor claims, on his and her behalf.[256]

This result suggests that, for the *Littleton* court, and perhaps other courts as well, marriage involves something more than legal proof that the parties are legally designated as oppositely sexed. Because of this, the legal ruling plays into a much broader set of narratives about marriage. These narratives go far beyond a simple opposition to same-sex marriage and embrace an understanding about marriage that involves a particular type of sexual activity and the production of offspring.

As noted above, the court's ruling in *Littleton* employed presumptions about sexual identity that would exclude not only post-operative transsexuals but intersex individuals and others whose current sexual identity is not the same as the one that appears on their original birth certificate from pursuing wrongful death and other marriage-related tort claims.[257] Other courts reaching similar conclusions in cases involving post-operative transsexuals have employed presumptions about sexual identity that exclude even more people by linking binary sexual identity closely with reproductive capacity.[258]

The Kansas Supreme Court, for example, instructed trial courts that a " 'male' is defined as 'designating or of the sex that fertilizes the ovum and begets offspring' " and " 'female' is defined as

254. *See Littleton*, 9 S.W.3d at 231. The Littletons were able to marry because Christie Littleton had successfully changed her birth certificate following her surgery. *Id.* When Christie Littleton later attempted to rely on this change in her birth certificate, however, the court focused on what the birth certificate said at the time of birth, rather than its current designation. *Id.*; *see also supra* Part I.A. (discussing the Littleton's ability to marry).

255. *Littleton*, 9 S.W.3d at 231.

256. *Id.*

257. *Id.*

258. *See, e.g.*, *In re* Estate of Gardiner (*Gardiner II*), 42 P.3d 120, 135 (Kan. 2002).

'designating or of the sex that produces ova and bears offspring.' "[259] Under these definitions, a male-to-female post-operative transsexual cannot qualify as a female because the "ability to 'produce ova and bear offspring' does not and never did exist."[260] But the definitions employed by the court exclude many more people than post-operative transsexuals from the benefits of the law. If we take the court seriously, individuals who cannot fertilize an ovum or ovulate do not qualify as either male or female and are also precluded from enjoying any of the legal rights and benefits associated with heterosexual marriage, including obtaining remedies for the wrongful death of a spouse.

This seems like a preposterous conclusion except for the fact that it echoes earlier legal rulings, and broader cultural discourses, about marriage. Many opponents of same-sex marriage, for example, justify their opposition on the ground that marriage exists primarily for sexual relations related to producing children.[261] Case law and statutory provisions echo this sentiment.[262] Similarly, an incapacity for heterosexual intercourse is often grounds for annulment.[263] According to these narratives, marriage involves not only opposing binary identities but also a particular type of sexual activity with the goal of reproduction.

When courts, like the one in *Littleton* and the Kansas Supreme Court, define binary sexual identity in terms of the ability to produce ova and bear offspring, they reinforce and provide legitimacy for these particular marriage narratives. And, in doing so, they influence how we conceptualize what a "real" marriage should look like. The

259. *Id.* (quoting WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 674, 1090 (2d ed. 1970)).

260. *Id.* (quoting WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 674, 1090 (2d ed. 1970)).

261. *See, e.g.*, Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 796–99 (2001) (arguing against same-sex marriage on procreation grounds); *see also* Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Same Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 20 HARV. J.L. & GENDER 462, 489–92 (2007) (describing how procreation and related arguments have played a role in same-sex marriage debates).

262. *See, e.g.*, Melia v. Melia, 226 A.2d 745, 747 (N.J. Super. Ct. Ch. Div. 1967) ("First among [the purposes of marriage] is procreation of the human race."); OHIO REV. CODE ANN. § 3105.31(F) (LexisNexis 2008) (listing failure to consummate a marriage as grounds for annulment).

263. *See, e.g.*, Singer v. Singer, 74 A.2d 622, 624 (N.J. Super. Ct. Ch. Div. 1950) (granting an annulment where wife's vagina was too small to permit full penetration of her husband's penis); *see also* 4 AM. JUR. 2D *Annulment of Marriage* § 27 (2007) (stating that physical inability to have sexual intercourse can be grounds for annulment).

implications of this are quite clear for debates over same-sex marriage. Since such marriages are not typically characterized by sexual activity aimed at reproduction, same-sex marriage cannot, under this logic, ever qualify as a "real" marriage.[264] But the logic would also seem to exclude post-menopausal women, impotent men, and any number of other individuals who either lack reproductive capacity or are otherwise uninterested in sexual activities aimed at reproduction.

B. How Legal Narratives About Sexual Identity in Tort Litigation Influence Views About Sexual Identity

Legal narratives also influence narratives about sexual identity.[265] Legal narratives in tort litigation, for example, provide important cues about what sexual identity should look like.[266] These cues, in turn, influence how doctors, litigants, and others define what is "real" in the realm of sexual identity and, more precisely, how they believe sexual identity should (or must) be categorized. The legal rulings in the *Brandon* and *Hall* cases, for example, likely influenced how the surrounding community viewed the "realness" of the sexual identities of the individuals involved. In the *Brandon* case, this influence was likely magnified by the fact that the case became the subject of a major motion picture.

Perhaps the most compelling (and disturbing) illustration of how legal narratives may influence how we think about sexual identity, however, is in the relationship between medical protocols for intersex children and tort doctrines. In this relationship, tort doctrines appear to defer to medical expertise in this area but, in fact, reinforce cultural expectations about sexual identity.[267]

Under the terms of this collaboration, doctors develop medical protocols in response to legal demands for binary sexual identity. The

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264. *See* Wardle, *supra* note 261, at 780–81; *see also* Anderson v. King County, 138 P.3d 963, 1002 (Wash. 2006) (Johnson, J., concurring) (citing the state's interest in procreation in support of limitation on marriage to different sex couples).

265. *See* Bloom, *supra* note 25, at 90–91 (describing how the breast implant litigation worked to construct cultural norms about what breasts should look like). For further discussion of the manner in which legal narratives influence the image of sexual identity, see *supra* Part II.

266. *See* Bloom, *supra* note 25, at 90–91.

267. *See* LEVIT, *supra* note 53, at 3. The relationship between tort litigation and medicine in this area is characteristic of a broader collaboration between law and science, which operates to enforce dominant cultural narratives about binary sexual identity. *See id.* ("Law collaborates with other institutions in the creation and maintenance of gender differences, constructing and legitimizing both the separation of the sexes and the conception of gender in naturalistic terms.").

law then provides doctors with protection from liability for the surgeries and other treatments that they employ to perfect binary classifications on bodies that do not fully comply with the expectations of binary sexual difference.[268]

In other words, medicine has created binary sexual identities, in part, because law has demanded it. Law, in turn, provides protection for these medical practices. This sub-Part illustrates this collaboration by looking more closely at how medical protocols for intersex children work in conjunction with the practices of tort litigation to both encourage and provide protection for medical practices aimed at perfecting binary sexual identity on intersex children. It also takes a second look at the breast implant litigation to show how that litigation also served to reinforce dominant cultural narratives about the "nature" of binary sexual identity. Finally, it reflects more broadly on the role that science plays in tort litigation.

1. How Law Shapes Medical Protocols for Intersex Children

Medical protocols for intersex infants have undergone significant change in the last decade. Until a few years ago, the American Academy of Pediatricians guidelines described the birth of an intersex infant as a "social emergency," requiring immediate medical attention.[269] More recently adopted protocols abandoned the "social emergency" language but still emphasize the psychological significance of the event and the need to act quickly to provide the child with a binary sex classification as soon as possible.[270]

The theory underlying this approach embodies two fundamental principles. The first principle is that it is essential to designate all babies as either "male" or "female" as quickly as possible.[271] The second is that children cannot develop "proper gender identity" unless their bodies exhibit traits that "validate" or "affirm" their designated biological sex.[272]

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268. *See* Tamar-Mattis, *Exceptions to the Rule*, *supra* note 232, at 81–84 (describing generally the authority of doctors to set the standard of care in cases involving intersex infants and criticizing that authority).

269. Am. Acad. Pediatrics, *supra* note 204, at 138.

270. Lee et al., *supra* note 84, at e491 ("Expediting a thorough assessment and decision is required."). Moreover, although the guidelines acknowledge that intersex status rarely poses any risks to the child's physical health, it is still described as a "disorder." *Id.* at e488.

271. *See* Thyen et al., *supra* note 168, at 3 ("Following delivery of a newborn with ambiguous genitalia, parents as well as health professionals feel that assignment to the male or female sex must be determined as soon as possible."); *see also* Chi et al., *supra* note 205, at e82 ("The assessment and treatment of newborns who have ambiguous genitalia requires urgency and sensitivity.").

272. LEVIT, *supra* note 53, at 240.

Medical protocols on the appropriateness of transsexual surgery for adults follow essentially the same principles.[273] For adults, however, the assumption is that the individuals have already developed a "proper gender identity" and need surgery to help their bodies comply.[274] Because of this, sex reassignment surgery is recommended for adults only when the individual has a demonstrated history of identifying clearly as either a male or female.[275] Individuals who espouse a more ambiguous sexual identity do not qualify.[276]

In short, medical protocols currently operate on the assumption that sexual identity is, or perhaps should be, binary.[277] Because ambiguous genitalia usually pose no physical health risk to the child, protocols which require a binary classification to be made as quickly as possible are increasingly defended on cultural and related psychological grounds.[278] As one bioethicist summarized the situation, the problem is that "a physician cannot, in good conscience, assure" that our "present sex and gender systems [will] make space for those who do not conform to the present norms."[279]

For many physicians, one of the key sex and gender systems that will not "make space for those who do not conform to present norms" is the law.[280] A recent medical article cites an early legal case to illustrate the dilemma:

> The law depends upon precise definitions and is obliged to classify its material into exclusive categories. It is a binary system designed to produce conclusions of the yes or no type.

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273. THE HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, *supra* note 104, at 9.

274. *Id.* at 20.

275. *Id.*

276. *See* Spade, *supra* note 22, *passim.*

277. *See* Thyen, *supra* note 168, at 3; *see also* Tamar-Mattis, ENDOCRINE TODAY, *supra* note 204 ("Some [doctors] seem to think that surgery in cases of genital ambiguity is necessary in order to assign a legal sex."). This view is adopted even by those experts who counsel against early surgery on infants. *See, e.g.*, Milton Diamond, *Biased-Interaction Theory of Psychosexual Development: "How Does One Know if One Is Male or Female?"*, 55 SEX ROLES 589, 596 (2006) ("[Sex should be declared] based on the most likely outcome.").

278. *See* Aliabadi, *supra* note 233, at 447–48 (noting the "dubious scientific foundation" for current medical protocols but defending current approaches as less risky culturally).

279. Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 ANNALS HEALTH L. 195, 228 (2002).

280. *Id.*; *see also* Dasarai Harish & B.R. Sharma., *Medical Advances in Transsexualism and the Legal Implications*, 24 AM. J. FORENSIC MED. & PATHOLOGY 100, 103–04 (2003) (describing the legal aspects of gender re-assignment procedures for a transsexual from a physician's perspective); Tamar-Mattis, ENDOCRINE TODAY, *supra* note 204 (quoting a surgeon who believed that sex assignment surgery was necessary to assign a legal sex to a child).

> Biologic phenomenon, however, cannot be reduced to exclusive categories so that medicine often cannot give yes or no answers.[281]

Doctors, in other words, do not themselves believe that sexual identity "can be reduced to exclusive [binary] categories."[282] They do, however, perceive the legal system as *requiring* such classifications.[283] Along with cultural expectations, this legal requirement for binary classification provides the core justification for contemporary medical protocols which require intersex infants to be classified as male or female as quickly as possible and authorize surgery as a means of perfecting the categorization.[284]

As compared to even five years ago, however, doctors are increasingly reluctant to perform sex assignment (or reassignment) surgery on children.[285] There are two reasons for this. One is the rulings of Colombian and Australian courts holding that surgeons may not perform these surgeries until the child is old enough to give "meaningful consent."[286] Although courts in the United States have yet to follow this approach, the decisions sent shockwaves through the medical community, and many doctors are now concerned about the possibility of medical malpractice liability for performing sex assignment or reassignment surgery on infants.[287]

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281. Harish & Sharma, *supra* note 280, at 104 (quoting Roger Ormrod, *The Medico-legal Aspects of Sex Determination*, 40 MEDICO-LEGAL J. 78, 78 (1972)) (Harish and Sharma misquote Ormrod, though the substance of the quotation is accurate.) Ormrod, who wrote the opinion in *Corbett v. Corbett*, [1971] P. 83 (Eng. 1970), discussed that decision in his later article on the subject of that lawsuit. *See* Roger Ormrod, *The Medico-legal Aspects of Sex Determination*, 40 MEDICO-LEGAL J. 78, 85 (1972).

282. Harish & Sharma, *supra* note 280, at 104.

283. *See id.* at 103–04.

284. *See* Am. Acad. Pediatrics, *supra* note 204, at 138 (emphasizing the social aspects of gender assignment surgery); *see also id.* at 142 ("[The] diagnosis and prompt treatment [of newborns with ambiguous genitalia] require[s] urgent medical attention. It is important to arrive at a definitive diagnosis so that an appropriate treatment plan can be developed . . . .").

285. *See, e.g.*, Paul McHugh, *Surgical Sex*, 147 FIRST THINGS 34, 37 (2004). For example, Johns Hopkins Hospital, the first hospital in the nation to perform sex change operations, no longer performs them. *See id.* (explaining why Hopkins stopped performing the surgeries).

286. *See In re* A (A Child) (1993) 16 Fam. L. R. 715, 715–16 (Austl.); Sentencia No. T-477/95 (Corte Constitucional, 1995) (Colom.), *available at* http://www.isna.org/node/110; *see also* Beh & Diamond, *David Reimer's Legacy*, *supra* note 232, at 25–28 (discussing the Colombian and Australian cases).

287. *See* Lee et al., *supra* note 84, at e497 (discussing, in an appendix on "Legal Issues," the position taken in the Colombian case on surgery on infants); *see also* Greenberg, *Legal Aspects of Gender Assignment*, *supra* note 40, at 282 (noting that recent developments may pose future liability risks for surgeons).

A second, related, reason for doctors' concern is the growing criticism within the medical community of the surgical practices.[288] The main critique is that there is little to no evidence to support the claim that the psychological benefits of the surgeries outweigh the substantial risk of harm that the surgeries pose (among other things, the surgeries pose risks of sexual dysfunction, such as loss of sensation).[289] As these critics note, intersex individuals "can have satisfying and rewarding lives without surgical alteration."[290]

The internal critiques of the surgeries within the medical profession have made many doctors more concerned about performing sex assignment surgery.[291] This is because a doctor's defense to a medical malpractice claim depends upon her ability to show that the treatments were consistent with professional custom.[292] If enough doctors no longer consider the surgery wise, then the custom will effectively change, potentially subjecting doctors who continue to perform the surgery to the prospect of liability.

At the moment, most physicians appear to be deferring to parents.[293] The view is that, despite the risks, surgery is still the better choice, "[i]f parents maintain a strong prejudice in favor of surgery despite a complete education about its potential risks."[294] Post-treatment studies suggest that physicians also have a strong influence on parental consent in this context.[295]

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288. Beh & Diamond, *An Emerging Ethical and Medical Dilemma*, *supra* note 205, at 23–27.

289. *Id.*

290. Beh & Diamond, *David Reimer's Legacy*, *supra* note 232, at 23.

291. Beh & Diamond, *An Emerging Ethical and Medical Dilemma*, *supra* note 205, at 23–27; *see also* McHugh, *supra* note 285, at 37 (explaining that Johns Hopkins stopped performing sex assignment surgeries because a child's genetic makeup dictates how his or her hormones contribute to growth and assigning a sex different from what a child's hormones dictate disrupts sexual identity development).

292. KEETON ET AL., *supra* note 224, § 32, at 189.

293. *See* Tamar-Mattis, *Exceptions to the Rule*, *supra* note 232, at 78–79 (describing the current process of decision-making for intersex children).

294. Erica A. Eugster, *Reality v. Recommendations in the Care of Infants with Intersex Conditions*, 158 ARCHIVES PEDIATRIC & ADOLESCENT MED. 426, 429 (2004).

295. Alice Domurat Dreger, *"Ambiguous Sex"—or Ambivalent Medicine?: Ethical Issues in the Treatment of Intersexuality*, HASTINGS CTR. REP., May–Jun. 1998, at 24, 33. The well-known story of David Reimer illustrates this quite well. Reimer's parents followed the recommendations of expert John Money to surgically and socially reassign David as a female, almost without question. COLAPINTO, *supra* note 32, at 50 (noting that Reimer's mother looked up to the expert "like a god"). Studies also show that when parents did not ask for detailed information, doctors did not volunteer it. Dreger, *supra*, at 33. As Alice Dreger has noted, "ethical guidelines that would be applied in nearly any other medical intervention are, in cases of intersexuality, ignored." *Id.* In recent years, some experts have begun to call for more informed consent to sex assignment and

From a legal perspective, deferring to parental consent provides doctors with significant protection against a potential medical malpractice (or battery) claim somewhere down the line for having performed the surgery.[296] In most instances, parental consent doctrines effectively preclude judicial review because parents are allowed wide latitude in making decisions about the appropriate medical treatments for their children.[297] In the context of sex assignment surgery, however, this deference may not be warranted.

Like medical protocols, parental decision-making in this context is heavily influenced by cultural and legal intolerance.[298] This often manifests itself in the form of anxiety about raising a child whose body looks different from cultural expectations.[299] But parents also feel a sense of urgency to determine the sex of their newborn child for a whole host of social and legal reasons, including the need to identify the sexual identity of the child in binary terms on legal documents.[300]

Legal narratives, then, shape medical decision-making about sex assignment surgery on children and the related issue of classification into binary categories, on both ends of the analysis. On the one end, doctors develop medical protocols in response to perceived cultural and legal demands for binary sexual identity.[301] On other end, doctors are provided with protection from liability for the surgeries and other treatments that they employ to perfect a binary classification on bodies that do not naturally comply.[302] In both instances, law "collaborates" with scientific and other cultural discourses to help make binary sexual identity appear more "natural" than it really is.[303]

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reassignment surgeries on children. *See* Beh & Diamond, *David Reimer's Legacy*, *supra* note 232, at 9.

296. *See* Danny R. Veilleux, Annotation, *Medical Practitioner's Liability for Treatment Given Child Without Parent's Consent*, 67 A.L.R. 4th 511, § 2(a) (1989).

297. *See id.*

298. *See* Beh & Diamond, *David Reimer's Legacy*, *supra* note 232, at 10.

299. *See id.* at 5–7.

300. *See id.* at 15–16 (noting the social desire to announce the birth of a boy or a girl); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 735 (2008) (noting the demands of legal documents).

301. *See, e.g.*, Beh & Diamond, *David Reimer's Legacy*, *supra* note 232, at 10 (noting that medical science mirrors western society more generally in assuming that binary sexual identity is normal, while deviations from it are abnormal).

302. *See supra* note 224–33 and accompanying text.

303. LEVIT, *supra* note 53, at 3.

2. How Legal Narratives Shape Other Medical Decisions Related to Sexual Identity

Another example of how legal narratives influence how we view the "nature" of binary sexual identity can be found in the response of the Food and Drug Administration ("FDA") to the breast implant litigation. After several years of litigation, the FDA called for a moratorium on the implantation of silicone gel implants because of questions about the implants' safety.[304] The FDA's call for a moratorium, however, applied only to the use of implants for purely cosmetic purposes.[305] The agency decided to keep implants on the market for purposes of reconstructing breasts lost to mastectomy, citing the unique physical and psychological need of these individuals.[306] In other words, the FDA's views on breast implants tracked the legal narratives of the breast implant litigation, which also distinguished between purely cosmetic uses of the implants and using them to replace a natural breast.

From a safety perspective, however, the FDA's decision is difficult to understand.[307] If there was a problem with the safety of silicone implants, then the agency should have pulled silicone implants from the market for all purposes, especially since alternatives to silicone implants, such as saline implants and prostheses, were readily available.[308] Despite this, however, the FDA privileged those who sought access to the implants for purposes of reconstructing a biological breast. It is also clear that one of the key reasons for continuing to make the silicone implants available for this limited group of people was that the non-silicone alternatives did not provide women with breasts that, in the FDA's view, appeared sufficiently "natural."[309]

As is the case with medical decisions affecting intersex children, medical and regulatory decisions about breast implants intersected with cultural and legal narratives to reinforce dominant sexual identity narratives. In the breast implants context, doctors and other experts pointed to cultural expectations about the bodily indicators of

304. Malcolm Gladwell, *FDA Will Allow Limited Use of Silicone-Gel Breast Implants*, WASH. POST, Apr. 17, 1992, at A2.

305. *Id.*

306. *Id.*

307. *See* Bloom, *supra* note 25, at 102 ("[T]he FDA acknowledged that it had no proof of the implants' safety.").

308. *See* Benson Yang, *The Breast Implant Controversy: A Prism for Reform*, 12 RISK 123, 123–24 (2001).

309. David A. Kessler, *The Basis of the FDA's Decision on Breast Implants*, 326 NEW ENG. J. MED. 1713, 1714 (1992).

sexual identity to prescribe silicone implants for individuals who lose one or more breasts to mastectomy or who are diagnosed with "micromastia" (flat-chestedness).[310] The law, in turn, provided legal protection to these "medical" judgments through professional custom standards, which precluded liability so long as the surgical recommendations and procedures were consistent with the customary practices of other physicians.[311]

3. The Role of Experts in Tort Litigation

Medical decisions about sex assignment surgery on children and breast implantation practices provide two examples of how law and science collaborate to emphasize the binary "nature" of sexual identity. In both instances, tort litigation provided some protection to customary medical practices, even when they seemed to rest more on cultural assumptions than scientific principles. Part of the reason for this deference has to do with the role of experts in tort litigation. Most tort cases, particularly those involving products liability or medical malpractice claims, cannot be litigated successfully without expert testimony.[312]

Under the federally-based *Daubert* test for the admission of expert testimony,[313] and under many similar state-based standards for expert testimony,[314] an expert's testimony must comply with a set of

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310. *Id.*

311. KEETON ET AL., *supra* note 224, § 32, at 189.

312. *Id.*; *see also* Wall v. Noble, 705 S.W.2d 727, 730–31 (Tex. App. 1986) (finding that the breach of standard of care was sufficiently established through testimony of an expert witness supporting the jury verdict); Versteeg v. Mowery, 435 P.2d 540, 542–43 (Wash. 1967) (holding that the jury may determine the standard of care necessary in a medical malpractice case based on expert testimony).

313. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–95 (1993); *see also* 2 DOBBS, *supra* note 12, § 360, at 993 (noting that *Daubert* has made it more difficult for some plaintiffs to get expert testimony admitted on scientific matters in federal trials).

314. Although *Daubert* is a federal standard, many states have adopted *Daubert* or some variation of *Daubert* for use in state courts. *See, e.g.*, State v. Coon, 974 P.2d 386, 386 (Alaska 1999); State v. Porter, 698 A.2d 739, 739 (Conn. 1997); Bell Sports, Inc. v. Yarusso, 759 A.2d 582, 588 (Del. 2000); Mitchell v. Kentucky, 908 S.W.2d 100, 101 (Ky. 1995); State v. Ledet, 00-1103, p.17 (La. App. 5 Cir. 7/30/01); 792 So. 2d. 160, 161; State v. McDonald, 1998 ME 212, ¶ 7, 718 A.2d 195, 198; State v. Moore, 885 P.2d 457, 470 (Mont. 1994); Dow Chem. Co. v. Mahlum, Inc., 970 P.2d 98, 107–08 (Nev. 1999); State v. Anderson, 881 P.2d 29, 36 (N.M. 1994); State v. Goode, 341 N.C. 514, 527, 461 S.E.2d 631, 639 (1995); Miller v. Bike Athletic Co., 687 N.E.2d 735, 740 (Ohio 1998); State v. Ouattrocchi, 681 A.2d 879, 884 n.2 (R.I. 1996); State v. Hofer, 512 N.W.2d 482, 494 (S.D. 1994); McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 262 (Tenn. 1997); E.I. du Pont Nemours & Co. v. Robinson, 923 S.W.2d 549, 554 (Tex. 1995); State v. Brooks, 643 A.2d 226, 229 (Vt. 1993); Wilt v. Buracker, 443 S.E.2d 196, 196 (W. Va. 1993); Bunting v. Jamieson, 984 P.2d 467, 467 (Wyo. 1999).

guidelines which purport to guarantee the validity of the scientific research which gives rise to the medical practices.[315] One of the key indicators of validity is publication in a peer review journal.[316]

Peer review journals, however, often reflect the biases of the times. Again, the case of sex assignment surgery on children provides a powerful illustration of this point. The key research underlying the medical protocols authorizing such surgeries was published in peer review journals some time ago and focused on an allegedly successful conversion of a male infant to a female, following a traumatic injury to the child's genitals.[317] The research was widely reported as an unequivocal "success" in both critically acclaimed articles published in peer review journals and highly publicized media accounts that concealed the child's name.[318] Several years later, however, the individual exposed the surgeries as a tragic failure in a best-selling memoir.[319]

Although the research noted above has now been widely criticized, doctors in the United States continue to rely on medical protocols citing this research to perform sex change operations on infants and children.[320] This is largely because there is still a perceived need to identify the child as either male or female and surgery is one means of perfecting the categorization.[321] Moreover, since the research supporting these practices was published in a peer review

315. *Daubert*, 509 U.S. at 580.

316. *Id.* at 592–93; *see also* Susan Haack, *Peer Review and Publication: Lessons for Lawyers*, 36 STETSON L. REV. 789, 790–91 (2007) (describing the role of peer review in *Daubert*). Not everyone agrees with an interpretation of *Daubert* that places such emphasis on peer review publications. *See generally* Paul C. Gianelli, Daubert *"Factors,"* CRIM. JUST., Winter 2009, at 42 (discussing the *Daubert* factors and the limitations of peer review). Under *Daubert*, other key factors for consideration in determining evidentiary reliability include whether the theory or technique has been tested, the known or potential rate of error, the standards controlling the operation of the technique, and "general acceptance." *Daubert*, 509 U.S. at 593–94 (internal quotation marks omitted).

317. *See* John Money, *Ablatio Penis: Normal Male Infant Sex-Reassigned as a Girl*, 4 ARCHIVES SEXUAL BEHAV. 65, 65–71 (1975).

318. *See* COLAPINTO, *supra* note 32, at xiii, 68; *see also* Money, *supra* note 317, at 65–71 (discussing David Reimer's sex reassignment surgery).

319. COLAPINTO, *supra* note 32, at xiv.

320. *See* Beh & Diamond, *David Reimer's Legacy*, *supra* note 232, at 17; Chi et al., *supra* note 205, at e83; Lee et al., *supra* note 84, at e491–92 (listing surgery on infants as part of the American Academy of Pediatrics' policy on the "management" of intersex conditions).

321. *See* Beh & Diamond, *David Reimer's Legacy*, *supra* note 232, at 16; *see also* Lee et al., *supra* note 84, at e491–92 (noting that the child's sex is one of the first questions asked and describing surgical techniques for sex assignment in newborns).

journal, it still qualifies under the *Daubert* standard for evidentiary reliability and is therefore still admissible in legal proceedings.[322]

Until relatively recently, it would have been very difficult to even challenge such testimony. This is because, in the early years following initial publication of the research, critics who questioned whether the surgery was truly a success were unable to get published in peer review journals.[323] As a practical matter this means that, until relatively recently, no expert could qualify in medical malpractice or other litigation to challenge expert testimony that was based on the initial research, at least in those jurisdictions following *Daubert.*

The fact that, until recently, medical texts described the birth of a child with ambiguous genitalia as a "social emergency"[324] is indicative of the extent to which medical experts are cognizant that the situation poses more of a cultural, rather than medical, dilemma. The situation was said to constitute a "social emergency" because it revealed a gap between the cultural demand that sexual identity be binary and the reality of human experience. Although ambiguous genitalia usually pose no threat to the physical health of the child, surgical reconstruction and other treatments are typically employed almost immediately to literally construct binary sexual difference onto bodies that do not comply on their own. With this move, doctors expose their own roles in the construction of sexual identity by, among other things, delineating and reconstructing bodies to fit within normative expectations.

By deferring to these experts and the particular cultural narratives about sexual identity that they employ, tort law helps to maintain certain cultural beliefs about sex and gender, even when those beliefs are at odds with physical experience. In doing so, the law goes beyond constraining certain types of behavior and provides important legitimacy for particular, cultural understandings about what it means, physically, to have a sexual identity. Put differently, by privileging narratives that emphasize "natural" and binary sexual

322. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–95 (1993). A court may still consider criticism of these views and allow the jury to reach a conclusion about which expert is more persuasive. *Id.* at 596 (noting that cross-examination, presentation of contrary evidence, and jury instructions may still be utilized to attack testimony that is admissible under a *Daubert* analysis).

323. COLAPINTO, *supra* note 32, at 210–11 (describing how Milton Diamond's early research on gender reassignment was rejected by the *New England Journal of Medicine*).

324. *See* Am. Acad. Pediatrics, *supra* note 204, at 138.

difference, tort litigation helps to constitute the categories of binary difference.[325]

IV. TORT LITIGATION CAN AND SHOULD BE MORE REAL ABOUT SEXUAL IDENTITY BY ALLOWING SPACE FOR COMPETING SEXUAL IDENTITY NARRATIVES

Tort litigation is facilitating the political hegemony of particular narratives of sexual identity which emphasize that sexual identity is largely immutable and naturally binary. To be "real" for purposes of sexual identity in tort litigation is to have a body which is "naturally" male or female and remains fixed in its designated identity. In real life, however, people experience sexual identity in far more complex ways. As a practical matter, this means that tort litigation is helping to maintain and produce norms and expectations that do not adequately reflect or acknowledge the diversity of human experience with sexual identity.

Tort litigation need not play this role. Instead, tort litigation can and should be more real about sexual identity by allowing more space for competing narratives. Tort litigation is, admittedly, a particularly challenging arena to make space for competing sexual identity narratives because, as compared to other areas of the law (such as civil rights litigation), individual rights have always come second to community norms in tort litigation.[326] That said, tort litigation also has a strong tradition of evolving in response to changing community values.[327]

This Part argues that by drawing on this tradition and, in particular, on the pragmatic realism of Oliver Wendell Holmes,[328] tort

325. *See* HUNT, *supra* note 248, at 3 (describing how law plays a role in constituting social practices).

326. *See* Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 379–90 (1990).

327. VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 3 (2d ed. 1999) (describing how the rules of tort law have evolved in response to changing societal needs); *see also* Peter H. Schuck, *Introduction: The Context of the Controversy* in TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE 17, 18 (Peter H. Schuck ed., 1991) ("Tort liability, more than most areas of law, mirrors the economic, technological, ideological, and moral conditions that prevail in society at any given time."); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2119–24 (2007) (describing the migration of the community values recognized in civil rights law to tort law).

328. *See* Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 556–57 (1988). *See generally* John T. Valauri, *Peirce and Holmes*, *in* PEIRCE AND LAW: ISSUES IN PRAGMATISM, LEGAL REALISM, AND SEMIOTICS, 187, 187–99 (Roberta Kevelson ed.,

litigation can become more real about sexual identity by paying greater attention to lived experiences with sexual identity. Pragmatic realism and Holmes's jurisprudence, in particular, are uniquely well-suited for this project because of the emphasis these theories place on the importance of lived experience in legal decision-making.[329] As Holmes wrote famously, "The life of the law has not been logic: it has been experience."[330]

But pragmatic realism is also an appropriate tool for rethinking our approach to sexual identity issues in tort litigation because of its commitment to interrogating categories which purport to represent the "real."[331] For Holmes, and other pragmatists during his time, reality could not be determined solely by observation.[332] Instead, they claimed that what we understand to be "real" is, in fact, a product of *both* the physical world *and* how your mind sees it.[333] Put differently, Holmes and his pragmatist contemporaries maintained that you cannot separate what you see from what prior "cognitions" have led you to expect to see.[334] As a result, Holmes, like other pragmatists and realists who followed him, argued against judicial decision-making which relied too much on "admitted axioms."[335]

In more contemporary versions of pragmatism, this commitment has been understood in terms of "antifoundationlism" or a refusal to justify legal decisions on the basis of certain widely accepted foundational beliefs.[336] This view of reality shares many things in common with postmodern conceptions of the "real."[337] But Holmes and other early pragmatists differed from postmodernists in one important respect: most postmodernists reject any notion of objective

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1991) [hereinafter PEIRCE AND LAW] (discussing Holmes's and Peirce's early contributions to pragmatism). Although he rejected the label himself, Holmes is widely viewed as a pragmatist. He is also viewed as one of the earliest forerunners of "realism." *See* Thomas C. Grey, *Modern American Thought*, 106 YALE L. J. 493, 496–500 (1996).

329. Holmes, *supra* note 41, at 460–61.

330. HOLMES, *supra* note 42, at 1.

331. Hantzis, *supra* note 328, at 556–57.

332. *Id.*

333. *Id.*

334. *Id.*

335. Holmes, *supra* note 41, at 460–61; *see also* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases.").

336. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 305 (1997).

337. *See, e.g.*, Robert W. Benson, *Peirce and Critical Legal Studies*, *in* PEIRCE AND LAW, *supra* note 328, at 15, 17. Some of pragmatism's claims also resonate closely with the performativity related claims of contemporary queer theory. *See id.* at 49 ("[T]he meaning of a physical object is given by the complete specification of its behavior.").

or pre-political realities.[338] The early pragmatists, in contrast, did believe in an objective reality but were skeptical about our capacity to transcend our own consciousness enough to grasp it.[339]

This distinction matters for purposes of how courts might approach sexual identity in tort litigation because a Holmesian version of pragmatic realism, unlike postmodernism or contemporary versions of pragmatism, allows us to both acknowledge the possibility of "realness" and interrogate dominant conceptions of what it means to be "real" at the same time.[340] In other words, Holmes's beliefs about the nature of reality (and the impossibility of ever fully grasping reality) suggest the need for a certain humility in judicial decision-making.[341] Good legal practices might advance our understanding of the "real" but no individual, not even a judge, has an absolute handle on the truth.

Holmes also emphasized that a judge should be attentive to the ways in which law itself plays a role in constructing how we (and judges, in particular) view the world.[342] Put differently, Holmes recognized what Part III of this Article argued in the context of sexual identity in tort litigation: that legal practices help to constitute our understanding of reality.[343] For all of these reasons, Holmes's legal philosophy has much to teach us about how to approach sexual identity in tort litigation.

A. Pragmatic Realism Makes Space for Competing Sexual Identity Narratives

This sub-Part argues that Holmesian pragmatism suggests three important principles that can be applied to questions about the

338. Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the* Teague *Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1047 (1994) ("Postmodernism rejects the very possibility of essences, cores or foundations.").

339. Catharine Pierce Wells, *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, 63 BROOK. L. REV. 59, 71 (1997).

340. *See id.*

341. *See id.* at 84. It is difficult to speak of "humility" in decision-making with respect to Holmes without acknowledging some of his more arrogant opinions, including *Buck v. Bell*, 274 U.S. 200 (1927), in which he ruled in favor of a state sterilization law with the infamous line, "three generations of imbeciles are enough." *Buck*, 274 U.S. at 207.

342. Wells, *supra* note 339, at 73 ("[Holmes's view was that] a judge's particular viewpoint is itself constructed from the concepts of the common law and heavily influenced by the judge's own immersion in legal culture.").

343. *See* Holmes, *supra* note 41, at 461. Holmes's famous declaration that law is what the courts "do in fact" captures this sentiment well. *Id.* Peirce's framing states it more directly: "we are active participants in 'the creation of the universe.' " Richard J. Bernstein, *The Lure of the Ideal*, *in* PEIRCE AND LAW, *supra* note 328, at 29, 42.

"realness" of sexual identity in tort litigation: (1) the importance of interrogating categories of any kind, even those that seem to be "real"; (2) the value of human experience in understanding what is "real"; and (3) the benefits of hearing a plurality of perspectives on what constitutes "realness."[344] Applying these principles in the context of sexual identity issues in tort litigation yields a more flexible jurisprudence, which is skeptical about categories for ordering sexual identity and looks carefully at how well they fit with the diverse array of human experiences. In other words, Holmesian pragmatism allows us to acknowledge the close relationship between tort law and cultural values, while simultaneously providing us with the tools to interrogate that relationship.

1. The Importance of Interrogating Categories

Holmes maintained that "[n]o concrete proposition is self-evident."[345] Because of this, we cannot take categories for granted.[346] Instead, we must evaluate the historical conditions which created the categories and evaluate how well the categories meet with real world experience.[347] If experience defies categorization, then the categories are problematic and need to be refined.[348] Thus, categories, viewed properly, are essentially hypotheses that must continue to be evaluated and refined in light of human experience. Pragmatic realism, then, calls for utilizing categories in a contingent way.

Applying this insight to the question of sexual identity in tort litigation, pragmatic realism teaches us to be more attentive (and responsive) to evidence which suggests that the categories are problematic. When real world experience suggests that the categories of sexual identity are problematic, pragmatic realism tells us that we must attempt to refine the categories to account for the ways in which human experience is currently at odds with the categorical

344. These three categories represent the author's own interpretation of how Holmes's (and other pragmatists of his time) views might be employed in the context of sexual identity.

345. Holmes, *supra* note 41, at 466.

346. *See* Haack, *supra* note 41, at 88. Both Peirce and Holmes especially disfavored categories which claimed sharp distinctions. *See id.* (quoting Rideout v. Knox, 19 N.E. 390, 392 (Mass. 1889) and citing 2 CHARLES SANDERS PEIRCE, COLLECTED PAPERS ch.2, §§ 102–03 (Charles Hartshorne, Paul Weiss & Arthur Burks eds., Harvard Univ. Press 1960) (1892)).

347. *See* Haack, *supra* note 41, at 82–83; *see also* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453–54 (1930) (stating that a realistic approach to a new problem requires considering if the existing set of concepts accurately categorizes data in a manner that advances a true solution).

348. *See* Haack, *supra* note 41, at 82–83; Llewellyn, *supra* note 347, at 453–54.

definitions.[349] When confronted with evidence that sexual identity is not always immutable or binary, for example, judges should refine the categories of sexual identity to allow for more fluidity.

The Kansas ruling in the *Gardiner* cases[350] provides an example of how a court might take this approach in practice.[351] The case involved a male-to-female transsexual who, after sex reassignment surgery, married a biological male.[352] After her husband died, her husband's son from another marriage sought to disinherit her from her husband's estate on the ground that the marriage was invalid because both parties had been born "male."[353] Although the case did not involve a tort, the court's approach provides a model for how courts addressing similar questions about sexual identity in tort litigation might analyze the issues.

In attempting to adjudicate the case, the Kansas Court of Appeals noted the difficulty in determining what constitutes a male or female and considered an array of factors employed by medical experts, including appearance of the genitalia and chromosomes.[354]

Ultimately, however, the court concluded that it could not rely on only one factor because the question of sexual identity was "far more complex" than could be captured with a single factor.[355] The court also noted that it might make more sense to abandon an approach that relies on a binary conception of sexual identity.[356]

The court's ruling was ultimately reversed by the Kansas Supreme Court.[357] Nevertheless, it provides a good example of how pragmatism might help us to be more real about sexual identity. Consistent with pragmatist teachings about the importance of interrogating categories, the Kansas Court of Appeals compared real world experience with the binary categories of sexual identity and found them lacking.[358] It then attempted to refine those categories, with indicators that allowed for more fluidity in the classifications of binary sexual identity and ultimately raised questions about the utility

349. *See* Haack, *supra* note 41, at 82–83; Llewellyn, *supra* note 347, at 453–54.

350. *In re* Estate of Gardiner (*Gardiner I*), 22 P.3d 1086, 1091 (Kan. Ct. App. 2001), *rev'd* 42 P.3d 120, 135 (Kan. 2002) (*Gardiner II*). For further discussion of this case, see *supra* notes 258–62 and accompanying text.

351. *See Gardiner I*, 22 P.3d at 1091.

352. *Id.*

353. *Id.* at 1090.

354. *Id.* at 1094.

355. *Id.* at 1110.

356. *Id.* (quoting Greenberg, *Defining Male and Female*, *supra* note 40, at 278–79).

357. *In re* Gardiner (*Gardiner II*), 42 P.3d 120, 135 (Kan. 2002).

358. *Gardiner I*, 22 P.3d at 1094.

of any sort of attempt to maintain such sharp categorical distinctions along binary lines.[359]

In the Kansas case, the court of appeals interrogated the categories for evidence of how well they fit with human experience. But a pragmatic approach to sexual identity might do even more. For pragmatists, categories should be interrogated carefully because of the inherent difficulty in separating what you think you see from what your mind has trained you to see.[360] One way to try to sort out what is "real" from what is not is to compare the categories against evidence of human experience.[361] Another way to interrogate the categories is to examine their underlying assumptions in light of their particular historical, political, and social contexts.[362]

In conducting this type of analysis, our current understanding of sexual identity reveals an important fact. While contemporary accounts of sexual identity rely heavily on scientific narratives that categorize sexual identity along binary lines, science did not always categorize sexual identity in this way.[363] Instead, in the medieval era, scientists and doctors in the Western world spoke of sexual identity in terms of one sex, rather than two.[364] And, at other points in history, Western scientists viewed sex along a continuum.[365] Moreover, scientific beliefs about the key *indicators* of binary sexual difference have also undergone change over time. In the pre-modern era, for example, Aristotle maintained that sex could be determined by "the

359. *Id.* at 1110.

360. *See* Haack, *supra* note 41, at 82–83; Llewellyn, *supra* note 347, at 453–54.

361. *See* Haack, *supra* note 41, at 82–83; Llewellyn, *supra* note 347, at 453–54.

362. *See* HOLMES, *supra* note 42, at 1. Thus, Holmes placed particular emphasis on understanding "[t]he felt necessities of the time, the prevalent moral and political theories, . . . even the prejudices which judges share with their fellow-men" as influential in the law. *Id.*

363. *See* THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 11 (1990). Laqueur argues, for example, that the conceptualization of sex as binary is a relatively recent cultural phenomenon that took place in the late seventeenth and eighteenth centuries. *Id.* This reinterpretation of bodies took place in tandem with other political and cultural developments, including the rise of evangelical religion, Lockean ideas of marriage as a contract, and post-revolutionary feminism, all of which led to greater emphasis on binary sexual differentiation. *Id.* Others present a somewhat more complex historical view of the development of contemporary understandings of binary sexual difference while still acknowledging the important role of culture in shaping these views. *See generally* JOAN CADDEN, MEANINGS OF SEX DIFFERENCE IN THE MIDDLE AGES: MEDICINE, SCIENCE, AND CULTURE (1993) (describing the historical origins of medieval views on sex differences and attempting to integrate the era's scientific and medical understandings with its cultural notions of sex).

364. LAQUEUR, *supra* note 363, at 134.

365. *Id.* at 135–36.

heat of the heart."[366] It was not until the nineteenth century that reproductive capacity and the appearance of genitalia became the primary means of sexual designation.[367] In other words, when we interrogate the categories of binary sexual identity, we can see how contemporary understandings of sexual identity, and the binary categories themselves, are not "real" in the sense of firm, unchangeable concepts which relate to some objective "reality" outside of culture. Instead, they are products of particular historical and cultural contexts.[368]

2. The Value of Human Experience

Pragmatism emphasizes "the importance of experience in determining meaning."[369] This view stems in part from a suspicion of categories.[370] Holmes and other pragmatists believed strongly that, to understand the world, we cannot detach from it by using abstractions, like categorical assumptions.[371] Instead, we must evaluate the abstractions we employ in light of human experience.[372]

In the sexual identity context, an emphasis on experience might prompt us to take a different approach in cases involving doubts about sexual identity. Instead of relying solely on experts, for example, we might consider accepting the probative value of subjective experience. Thus, in cases involving transsexuals and intersex individuals, the subjective experience of sexual identity of the individuals involved would have relevance for the case.

An emphasis on experience in the context of sexual identity might also prompt us to consider testimony from members of the community about their own experiences, as they relate to the case. In determining whether a post-operative transsexual qualifies as a spouse for purposes of a wrongful death claim, for example,

366. FAUSTO-STERLING, *supra* note 40, at 33.

367. *Id.* at 36–37.

368. Suzanne J. Kessler & Wendy McKenna, *Toward a Theory of Gender*, *in* THE TRANSGENDER STUDIES READER, *supra* note 8, at 165, 176.

369. Valauri, *supra* note 328, at 188. Pragmatism also emphasizes the role that categories play in structuring meaning. *Id.*

370. *Id.* at 195 (noting that, for Holmes, rules or categorical distinctions in the law should be viewed as constructs from practical experience, rather than deductions from general propositions).

371. *See* Haack, *supra* note 41, at 102. Peirce was particularly critical of the Cartesian notion of intuitive certainty and described himself as "ready to dump the whole cartload of his beliefs the moment experience is against them." *Id.* (quoting 1 CHARLES SANDERS PEIRCE, COLLECTED PAPERS ch. 1, § 5 (Charles Hartshorne, Paul Weiss & Arthur Burks eds., Harvard Univ. Press 1960) (1892)).

372. *See* Valauri, *supra* note 328, at 191–97.

pragmatism suggests that we would be interested in hearing testimony on whether others in the community viewed them as married.

This was, in fact, the approach of the court in the early *Hall* case.[373] Following the community's standards for sex identification, this court indicated that "sex had two possible determinants. One was physical: the nature of one's genitalia. The other was cultural: the character of one's knowledge and one's manner of behaving."[374] Because of this, the court considered the testimony of members of the community and how they perceived Hall to be relevant in determining Hall's sexual identity.[375]

Similarly, a pragmatic approach might also place more value on obtaining opinions based on actual experience with sexual identity in cases involving sex assignment or reassignment surgery. In cases involving children, for example, the court might hear evidence about the experiences of intersex adults, both those who have undergone surgery and those who have not. Such experiential evidence seems particularly important to obtain in cases, like those involving surgery on intersex children, where the decision-makers may not be able to fairly evaluate the relative costs and benefits.[376] This is because it is not intuitive for most individuals to imagine living outside a binary sex classification.

As critical disability scholars have emphasized, concepts of what constitutes physical normality are socially constructed.[377] As a practical matter this means that most parents and physicians are deeply influenced by dominant cultural norms and expectations in determining the best interests of the child. Under these circumstances, what seems "normal" to a non-affected parent may not seem "normal" to the affected child and vice versa.[378]

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373. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 194–95.

374. Katrina C. Rose, *A History of Gender Variance in Pre-20th Century Anglo-American Law*, 14 TEX J. WOMEN & L. 77, 96 (2004) (quoting MARY BETH NORTON, FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY 194–95 (1996)) (internal quotation marks omitted).

375. *See* VIRGINIA COLONIAL MINUTES, *supra* note 21, at 194–95.

376. *See* Tamar-Mattis, *Exceptions to the Rule*, *supra* note 232, at 86–89. Another problem is that the long-term costs and benefits are not clear. *See generally* Beh & Diamond, *David Reimer's Legacy*, *supra* note 232 (arguing that the benefits of infant surgery do not outweigh the risks). *But cf.* Aliabadi, *supra* note 233, at 449–50 (arguing that the cultural benefits of the surgeries are a clear benefit to the child).

377. *See* Paul Miller, *Toward Truly Informed Decisions About Appearance-Normalizing Surgeries*, *in* SURGICALLY SHAPING CHILDREN: TECHNOLOGY, ETHICS, AND THE PURSUIT OF NORMALITY 211, 219 (Erik Parens ed., 2006); *see also* Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1304–05 (describing how cultural norms construct notions of disability).

378. Miller, *supra* note 377, at 219–21.

Evidence of this can be seen in the different approaches of affected and non-affected parents in allowing "normalizing" treatments on their affected children. Many adults with physical differences oppose "normalizing" treatments for children, such as limb-lengthening surgeries and cochlear implants.[379] This is because, from the perspective of the "affected" adult, there is nothing that needs "fixing."[380] Non-affected parents, in contrast, are more likely to choose the treatments for their affected children.[381] Because it is likely that parents' understanding of what is best for their child is shaped by their own experiences, there is good reason to question whether the experiences of doctors and parents who do not have the same physical difference are sufficient to allow a court to issue an order permitting normalizing surgeries, such as sex assignment (or reassignment) surgery on children.[382]

A similar principle would apply in cases involving product liability claims. In these cases, pragmatism would place some value on hearing testimony about the value of sexual identity amplification devices in real-life experience. To determine whether breast implant recipients should be treated differently on the basis of whether they underwent implantation for purposes of replacing a biological breast, for example, the court might hear testimony from different implant recipients on whether this difference caused them to experience the devices differently. A pragmatic approach might also value evidence on the social and economic benefits that accompany the successful performance of binary sexual identity.

3. The Benefits of Hearing a Plurality of Perspectives

Holmes has been described as a pragmatic pluralist because of his dedication to hearing a variety of viewpoints.[383] Holmes's commitment to hearing different voices on an issue stemmed, in large part, from his belief that one's perspective with regard to a particular case colored his or her view of it.[384] Holmes especially valued the voices of legal "outsiders," and saw them as critical to advancing his

379. *Id.* at 216.
380. *Id.*
381. *Id.*
382. *See* Beh & Diamond, *David Reimer's Legacy*, *supra* note 232, at 25–26. Indeed, it is precisely these types of concerns that prompted the Constitutional Court of Colombia to hold that sex assignment and reassignment surgeries on children must be delayed until the children themselves are old enough to understand the costs and benefits of the treatments and give meaningful consent. *See* Haas, *supra* note 210, at 49–54.
383. Wells, *supra* note 339, at 78–79.
384. *Id.*

own understanding.[385] Applying these insights to sexual identity issues, Holmes's pragmatism teaches the importance of hearing from multiple perspectives on the issues raised.[386] And, perhaps, more importantly, pragmatism argues for giving more voice to those whose views are not privileged by those in power.[387]

In the *Hall* case, the views of members of the community and Hall's own testimony were considered highly relevant in determining Hall's sexual identity.[388] Since that time, science and courts have come to rely more on biologically verifiable characteristics of sexual identity.[389] As a result, physicians and scientists have displaced members of the community (and even judges) as the "primary arbiters" of sexual designation.[390] Pragmatism emphasizes the relevance of all of these voices. Especially in light of the culturally constructed aspects of sexual identity, there is no apparent need to privilege expert opinions above others; they should be given the same weight as other experiences.

In some areas of tort law, there are signs that the law is already moving in this direction. The *Restatement (Third) of Torts*, for example, now permits recovery in emotional distress cases, for a victim's "family" members, even if they are not biologically or legally related to the victim.[391] In taking this approach, the *Restatement* implicitly acknowledges that people experience "family" differently and that tort law should allow for this diversity in its mechanisms for recovery. Although this change is limited to cases involving bystander claims for emotional distress,[392] a similar approach could be taken in wrongful death cases, which would allow for recovery by individuals who are not legally married or permitted to marry.[393]

More fundamentally, the change in how tort law addresses bystander recovery in emotional distress cases illustrates how pragmatism can make space for competing conceptions of "realness" more broadly, while continuing to utilize contested legal categories

385. *Id.* Many readers may find this difficult to square with Holmes's infamous language in *Buck v. Bell* that "three generations of imbeciles is enough." Buck v. Bell, 274 U.S. 200, 207 (1927).

386. *See* Wells, *supra* note 339, at 70–72.

387. *See id.* at 78–79.

388. VIRGINIA COLONIAL MINUTES, *supra* note 21, at 194–95.

389. FAUSTO-STERLING, *supra* note 40, at 40.

390. *Id.*

391. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 47 cmt. e (Tentative Draft No. 5, 2007).

392. *See id.*

393. I am indebted to an external reviewer for bringing this point to my attention.

for purposes of recovery. In this case, the contested legal category is that of "real" family members. By continuing to interrogate that category in light of changing human experience, tort law, through the *Restatement*, was able to make space for a broader array of perspectives about what "real" family means. To be sure, the resulting reconstruction of the category still excludes many relationships that many would consider to be indicative of "real" family.[394] Pragmatism calls for continuing to interrogate and reconstruct the category, however, while continuing to listen to a plurality of perspectives on what "realness" means in this and other contexts.

In sum, pragmatism calls for a "bottom-up" rather than "top-down" approach to sexual identity in litigation, which is constantly re-calibrating, in response to the realities of human experience, as interpreted by a variety of viewpoints. With this approach, courts can become more real about sexual identity by making space for greater attention to lived experiences with sexual identity. Tort litigation need not adopt all of the narratives that such an approach might reveal. It should, however, make space for them to be articulated.

B. Why Being Real About Sexual Identity Does Not Mean Taking Sexual Identity out of Tort Law

At the moment, tort litigation does not allow for the possibility that sexual identity can be understood in anything other than binary terms. This is true even when courts are confronted with compelling evidence that undermines a binary classification. This Article argues that the appropriate response to this state of affairs is to employ a more pragmatic jurisprudence which makes more space for competing narratives of sexual difference. One response to this proposal might be to argue that it would be better to simply take sexual identity completely out of the picture of tort litigation.

Doing so would arguably have the effect of focusing more on the details of the particular claim at issue. By removing sexual identity from the analysis, for example, a court might focus more on the quality of the relationship of the person seeking to bring a wrongful

394. *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 391, § 47 cmt. e. For example, the *Restatement Third* does not allow recovery for individuals who do not live in the same household, even though many people may consider some people who do not live in the same household to be "real" family. *See id.* For further discussion of cultural perspectives on family relationships, see generally C. Quince Hopkins, *Variety in U.S. Kinship Practices, Substantive Due Process Analysis and the Right to Marry*, 18 BYU J. PUB. L. 665 (2004).

death claim on someone else's behalf.[395] Similarly, rather than considering the sexual identity of an individual seeking or using prosthetic devices or other products to construct or amplify sex, a jury might be instructed to ignore this aspect of the case and focus solely on whether the product failed. And, in cases involving surgery on infants, the analysis could focus on medical need, rather than attempting to determine the sexual identity of the child before or after surgery.

The problem with this response is that it ignores the significance of sex in our culture and the many social and economic benefits it bestows. It also ignores that the injuries in these cases are "sexed" injuries, in that much of the pain and suffering associated with the failure of the product, a botched surgery, or even a lost spouse, stems from injuries that have to do with identifying (or seeking to identify) within the binary sexual identity regime. In short, the failure of sex performance has real costs and the tort system should not ignore these real-life experiences.

Tort litigation exposes the fact that the question of binary sexual identity is a true "Catch-22." On the one hand, the categories of sexual identity do not completely comport with lived experience. On the other hand, it is difficult to imagine a meaningful identity without the binary categories.[396] Under these circumstances, it makes more sense for tort law to consider more narratives of sexual difference while recognizing the powerful role that sexual identity categories currently play, than to pretend in the law or elsewhere that the categories do not exist. Ultimately, the question is not whether we can get rid of binary sexual identity, but rather which cultural narratives about sexual identity become hegemonic and why.

CONCLUSION

This Article examines the role of tort law in maintaining categories of sex and gender. It argues broadly that tort law helps to construct the culture of which it is a part.[397] More radically, it posits

395. This seems to be the approach, for example, that is taken by the *Restatement Third* on bystander recovery for emotional distress. *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 391, § 47, cmt e.

396. *See* JUDITH BUTLER, UNDOING GENDER 8 (2004) ("In the same way that a life for which no categories of recognition exist is not a livable life, so a life for which those categories constitute unlivable constraint is not an acceptable option."); *see also* Valauri, *supra* note 328, at 195 ("Both Peirce and Holmes insisted on the importance and necessity, but not the sufficiency, of [general propositions] for inquiry and adjudication.").

397. Engel & McCann, *supra*, note 246, at 1.

that tort law helps to produce and maintain certain cultural beliefs about sex and gender, even when those beliefs are at odds with physical experience.[398] In this respect, the politics of sexual identity in tort litigation share much in common with drag balls. Tort litigation, like drag balls, is deeply influenced by cultural beliefs about what signifies "real" sexual identity. And, like contestants in drag balls, tort litigants must attempt to convince a court of the "realness" of their sexual identity to succeed. Thus, tort law, like drag, reproduces and enforces dominant cultural norms about what it means to be male or a female.

Ultimately, however, it is far more problematic for tort law to play this role than drag balls. This is because, when courts base legal rulings on invalid assumptions about sexual identity, they provide political legitimacy for those assumptions in ways that the politically and culturally marginalized world of the drag balls cannot. Put differently, what courts say about the "realness" of binary sexual identity is far more influential in the political realm than any cultural messaging that takes place in conjunction with drag balls.

Moreover, in contrast to the drag balls, there is little to no recognition in tort litigation that the "realness" of sexual identity is contested territory. Instead, tort litigation continues to treat sexual identity as if it were naturally binary and immutable, even in the face of significant evidence to the contrary. In doing so, tort law does not simply play a powerful role in the construction and enforcement of those norms; it also obfuscates its own role in this important aspect of sexual identity politics.

Tort law is not unique in the role that it plays in this process.[399] Like other legal narratives, tort litigation narratives both reflect and contribute to broader cultural meanings. Cultural norms about sexual difference may be particularly important in tort litigation, however, because of the way in which tort doctrines operate to explicitly draw upon dominant cultural norms. It is also significant that tort litigation, more than other areas of the law, is particularly concerned with physical injury to body.[400] As Professor Jain notes, in tort litigation, the body seems to act as "a material repository of culture."[401]

398. *See* JAIN, *supra* note 249, at 7.

399. *See* Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1368 (1997).

400. *See* Chamallas, *supra* note 327, at 2144 (describing how civil rights law and tort law differ, in part, because of tort law's emphasis on physical injury).

401. JAIN, *supra* note 249, at 6.

Pragmatic realism acknowledges this close relationship between tort law and culture, even as it makes space for challenging cultural assumptions about what is "real" about sexual identity. To be real, pragmatic realism teaches us, is to recognize that reality appears differently to different people and our best shot at grasping it is to adopt principles and rules of law on a contingent basis, while continuing to make space for a variety of viewpoints and recalibrating our rules in response. Thus, we need not abandon cultural, scientific, and legal narratives about sexual difference. Indeed, pragmatism teaches us that it would be impossible for us to do so. Rather, the narratives must continue to be analyzed and adapted in response to human experience.

In hearing and interpreting these narratives, it is important to recognize that tort law may never truly free itself from cultural expectations about sexual identity. But, with a pragmatic approach, sexual identity categories in the law can and should become more fluid in its response to those cultural expectations.