

FOREWORD

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This symposium continues the discussion we began in Volume 80 (2017), on sex in different institutional settings.¹ Like sport, which was the first in the series, law is particularly concerned with sex in this period. Both its definition and proper uses are the subject of a global, high-stakes, highly polarized debate.² In the American context, this debate is being had in all three branches of the federal government and in state legislatures and executive offices across the country.

Since 2016, the legislative, judicial, and executive branches of the federal government have been actively engaged with the questions whether “sex” continues to mean biological or reproductive sex, or whether it should instead mean gender, gender identity, sex stereotype, or the set of sex-linked physical traits we know as primary and secondary sex characteristics; and, whether and on what terms society’s remaining sex classifications—however sex is defined—are viable. Lawmaking activity has accelerated since 2019 when the House of Representatives first passed the Equality Act,³ the Supreme Court decided *Bostock v. Clayton County*,⁴ and the Biden Administration replaced the Trump Administration’s administrative guidance on these questions with his own.⁵ For the President in particular, doing so was a “Day One” commitment: he signed his related executive order following the inaugural on January 20, 2021.⁶

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1. See Doriane Lambelet Coleman & Kimberly D. Krawiec, 80 *LAW & CONTEMP. PROBS.*, no. 4, 2017 (discussing the topic of sex in sport).

2. For an excellent description of the place of the topic in the national discourse, see generally Edward Schiappa, *THE TRANSGENDER EXIGENCY: DEFINING SEX AND GENDER IN THE 21ST CENTURY* (2021) (explaining that “[a]t no other point in human history have the definitions of ‘woman’ and ‘man,’ ‘male’ and ‘female,’ ‘masculine’ and ‘feminine,’ been more contentious than now.”).

3. Equality Act, H.R. Res. 5, 116th Cong. (2019); see also Equality Act, H.R. Res. 5, 117th Cong. (2021) (omitting the traditional definition of “sex” as “biological sex” from its definition, prohibiting without exception all distinctions on the basis of sex in all federal programs and public accommodations, and rejecting the law’s traditional brick-and-mortar definition of the latter). The 2019 legislation was not taken up by the Senate. It was refiled and re-passed by the House in 2021, and as of this writing it is pending in the Senate.

4. 140 S.Ct. 1731 (2020) (case brought under Title VII in which the Court retained the traditional definition of sex as “biological sex” and held that firing a transgender woman because she is transgender is unlawful discrimination “on the basis of [biological] sex” since her employer took it into account in its decision.).

5. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (announcing that “because of sex” in federal law “prohibit[s] discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”).

6. *Id.*

Resistance has been strong across the political spectrum to the various moves on the questions presented, to the point where they have become national election issues for both parties.⁷

In 2018, California became the first state “to require all publicly held domestic or foreign corporations whose principal executive offices are located in California to have at least one female director on their boards by December 31, 2019, either by filling an open seat or by adding a seat. One or two more female directors would be required, depending upon the size of the publicly held corporation by December 31, 2021.”⁸ The movement to desegregate conscription is reaching a tipping point, with the National Commission on Military, National, and Public Service announcing in 2020 that “the time is right to extend Selective Service System registration to include men and women, between the ages of 18 and 26.”⁹ Educational institutions around the country are grappling with a combination of claims from men’s and transgender rights groups in connection with their remaining sex segregated programs and opportunities;¹⁰ and women’s colleges have been engaged in a years-long reevaluation of their missions in light of these and related movements.¹¹

Scholars from across the disciplines including law have been engaged with these issues throughout. True to the mission of the journal, the volume addresses a decidedly contemporary legal problem from diverse normative and

7. See, e.g., Lauren Gambino, *Republicans Aim to Sow Outrage, Trump-style, with an Eye on 2022 Midterms*, THE GUARDIAN (Jan. 1, 2022), <https://www.theguardian.com/us-news/2022/jan/01/republicans-sow-outrage-trump-style-2022-midterms-house-senate> [https://perma.cc/Z8NZ-8KUZ]; Alyce McFadden, *GOP Takes Aim at Trans Rights as Equality Act Heads to Senate*, OPEN SECRETS (Mar. 12, 2021), <https://www.opensecrets.org/news/2021/03/equality-act-heads-to-senate-gop-takes-aim-at-trans-rights/> [https://perma.cc/G73W-X2KK]; Laura Bult, *Why LGBTQ Rights Hinge on the Definition of ‘Sex,’* VOX (Oct. 29, 2020), <https://www.vox.com/videos/21539087/lgbtq-rights-definition-sex-discrimination-election-2020> [https://perma.cc/9RDB-EWF5].

8. *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC (E.D. Cal. Apr. 20, 2020) (litigation involving the constitutionality of California’s Women on Boards law).

9. The National Commission on Military, National, and Public Service, *INSPIRED TO SERVE: THE FINAL REPORT OF THE NATIONAL COMMISSION ON MILITARY, NATIONAL, AND PUBLIC SERVICE 8* (Mar. 2020), available at <https://www.volckeralliance.org/sites/default/files/attachments/Final%20Report%20-%20National%20Commission.pdf> [https://perma.cc/2SXX-LCD5].

10. See, e.g., Jo Yurcaba, *Two Transgender Children Sue Tennessee over School Bathroom Law*, NBC NEWS (Aug. 3, 2021), <https://www.nbcnews.com/nbc-out/out-news/two-transgender-children-sue-tennessee-school-bathroom-law-rcna1558> [https://perma.cc/6QVY-WTKA]; Teresa Watanabe, *Women-Only STEM College Programs under Attack for Male Discrimination*, L.A. TIMES (Aug. 20, 2019), <https://www.latimes.com/california/story/2019-08-20/women-only-science-programs-discrimination-complaints> [https://perma.cc/Z49N-EMGS]; R. Shep Melnick, *The Strange Evolution of Title IX*, NAT’L AFF. (Summer 2018), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix> [https://perma.cc/XZB6-2DTE].

11. See, e.g., Sandra E. Garcia, *Morehouse College, a Traditionally Black All-Male School, Says It Will Accept Transgender Men*, N.Y. TIMES (Apr. 14, 2019), <https://www.nytimes.com/2019/04/14/us/morehouse-college-transgender.html> [https://perma.cc/SU2L-49NN]; Paul G. Lannon, *Transgender Student Admissions: The Challenge of Defining Gender in a Gender Fluid World*, 59 BOSTON BAR J. (Spring 2015), available at <https://bostonbarjournal.com/2015/04/22/transgender-student-admissions-the-challenge-of-defining-gender-in-a-gender-fluid-world/> [https://perma.cc/8DXM-N5AE]; Kiera Feldman, *Who Are Women’s Colleges For?*, N.Y. TIMES (May 24, 2014), <https://www.nytimes.com/2014/05/25/opinion/sunday/who-are-womens-colleges-for.html> [https://perma.cc/2UJY-AUCG].

disciplinary perspectives, including those that are critical to informing ongoing debates: rhetoric and communications, analytical philosophy, science, medicine, history, sociology, and, of course, law.¹²

The first set of essays tackles the definitional and linguistic part of the project, focusing on the plain meaning of the word sex and related sex-linked terms, including male and female and man and woman. In the process, they (re)situate related terms including gender, gender identity, and sex stereotype. Their authors also touch on sex classifications and how boundaries are or should be set given their underlying rationales, and they reflect on how their analyses can inform the meaning and utility of sex in law. All four essays in this first set use or at least comment on what Edward Schiappa calls “the transgender exigency”, but because exceptional cases generally work to elucidate our understanding of the integrity of categories and of policies dependent on norms, and because the transgender rights movement has challenged us to think deeply about our broader commitments to sex, they also make significant contributions beyond that exigency.

Edward Schiappa is the John E. Burchard Professor of the Humanities at the Massachusetts Institute of Technology, where he conducts research in argumentation, persuasion, media influence, and contemporary rhetorical theory. One of his longtime scholarly projects has been the question “what is ‘x’?” He brings this expertise to bear on the question “what is ‘sex’” here, as he does in his 2021 book, *THE TRANSGENDER EXIGENCY: DEFINING SEX AND GENDER IN THE 21ST CENTURY*. His essay for this volume *Defining Sex* “describes some of the challenges involved with defining ‘sex’ as a means of categorizing humans,” “identifies scientific and sociopolitical factors contributing to the current definitional ‘rupture,’” and argues that “a pragmatic approach [to the definitional project] is the most useful in matters of law and public policy in general and with the construction of regulations regarding ‘sex’ in particular.”¹³

Kathleen Stock was most recently Professor of Philosophy at the University of Sussex. An analytical philosopher, her scholarly focus over the years has been on fiction and feminism. She has brought this background and her disciplinary tools to bear on the question whether the category and word “woman” are limited to natal females or whether they also include transgender women. Her essay for this volume *The Importance of Referring to Human Sex*

12. We were not able to include every discipline that touches importantly on this subject. Among others, although these topics are covered by some of our authors, missing are essays directly from evolutionary biology, religion, and political science. For a sense of the contributions scholars from these disciplines have made to the conversation, see, e.g., Carol Hooven, T: THE STORY OF TESTOSTERONE, THE HORMONE THAT DOMINATES AND DIVIDES US (2021); Lynn Garrett, *Let's Talk About Sex (and Religion)*, PUBLISHERS WKLY. (Sept. 21, 2018), <https://www.publishersweekly.com/pw/by-topic/industry-news/religion/article/78120-let-s-talk-about-sex-and-religion.html> [<https://perma.cc/555H-JBLK>]; Karen Celis et al., *Introduction: Gender and Politics: A Gendered World, a Gendered Discipline*, in *THE OXFORD HANDBOOK OF GENDER AND POLITICS* 1–27 (Georgina Waylen et al. eds., 2013).

13. 85 LAW & CONTEMP. PROBS., no. 1, 2022, at 9.

in Language revisits some of the arguments in her 2021 book *MATERIAL GIRLS: WHY REALITY MATTERS FOR FEMINISM*, and it newly focuses on the nature of linguistic concepts and the work they are designed to do.¹⁴ Specifically, she makes the case here from analytical philosophy and gender critical feminism for retaining the traditional understanding of biological concepts of sex and the language necessary to convey them: “Abandoning orthodox biology-based understandings of ‘woman’, ‘man’, ‘girl’, and ‘boy’”, she argues, “deprives language-users with immensely valuable tools to analyse and explain the material and social world.”

Joshua Safer is Professor of Medicine at the Icahn School of Medicine at Mount Sinai, Executive Director of the Mount Sinai Center for Transgender Medicine and Surgery, and the inaugural president of the United States Professional Association for Transgender Health (USPATH). He serves on both the Standards of Care revision and Global Education Initiative committees of the World Professional Association for Transgender Health (WPATH). His 2019 paper in the *NEW ENGLAND JOURNAL OF MEDICINE* *Caring for Transgender Persons: What Clinicians Should Know* is the standard guidance for clinicians working in this space. In his essay for this volume *A Current Model of Sex Including All Biological Components of Sexual Reproduction*, Safer details the scientific case for the twin propositions that gender identity or “brain sex” is biologically based, and that it is part of the set of characteristics that make up “biological sex.”¹⁵ He argues that what sex means otherwise—including in law—should depend on the sex characteristic most relevant to the setting, and he concludes that outside of medicine, this should mostly be gender identity.

Anne Goldstein is Professor of Law at Western New England School of Law. A scholar and a litigator, her work in both contexts has focused on law and homosexuality, including LGBTQ rights. Her scholarly writing over the years has touched on politics, literature, and history, themes to which she returns in her essay for this volume *Organizing and Arguing Sex and Gender*.¹⁶ In this essay, she explains that “[o]rganizing or litigating for any group involves defining and explaining its members to themselves and to others”, and that this work is always difficult because “[t]he group members’ individual, idiosyncratic, fluid, and occasionally internally inconsistent, senses of their own identities are continually in tension with the need for group cohesion.” She examines “the choice whether to present a group’s distinctive qualities as inborn or shaped by society and culture” through an historical lens, reflecting on the work of Mary Wollstonecraft, Karl Friedrich Ulrichs, and Michel Foucault, each of whom, she argues, “made strikingly original contributions to understanding the connection between ideas about sex and ideas about gender.”

14. 85 *LAW & CONTEMP. PROBS.*, no. 1, 2022, at 25.

15. 85 *LAW & CONTEMP. PROBS.*, no. 1, 2022, at 47.

16. 85 *LAW & CONTEMP. PROBS.*, no. 1, 2022, at 57.

The second set of essays focuses particularly on the relationship among sex, sex stereotype, and gender. The traditional understanding of the three was conceptually and definitionally distinct: Sex referred to biology, stereotype to assumptions about individuals' aptitudes and orientations based upon that biology, and gender to socially constructed roles associated with sex. These understandings have changed over time so that today, many use the terms sex and gender synonymously, and others move from there to the proposition that, like gender, sex is also socially constructed. Related work is focused on the idea that all or almost all of sex is stereotype, or at least that—like sex and gender—the two are so inextricably linked that a focus on the latter in law and policy is essential to the full development of rights for women and gender nonconforming people. The two authors in this set take up these themes from history and law.

Richard Chused is Professor of Law at New York Law School where he specializes in—among other things—gender and law in American history. A prolific scholar who was for decades on the faculty at the Georgetown University Law Center, he has published innumerable books, articles, and teaching texts in his areas of expertise. This includes his co-authored book with Wendy Williams *GENDERED LAW IN AMERICAN HISTORY*, which explores the myriad ways gender has been used and often abused as a baseline for regulatory authority since the founding days of the republic. His essay for this volume *Sex, Stamina, and Politics* uses Donald Trump's challenge to Hillary Clinton's stamina during the 2016 presidential campaign as the basis to reflect on the fascinating history—and resilience—of sex-related assumptions about the physical capacities of females, and their ability healthily and effectively to participate in civic, including political, life.¹⁷

Anthony Kreis is Assistant Professor of Law at Georgia State College of Law. His research uses qualitative empirical methods and doctrinal analysis to assess how social change and the law interact, with a focus on the law's treatment of vulnerable persons, especially lesbian, gay, bisexual, and transgender individuals. He is also active in law reform efforts including in civil rights litigation and related legislative initiatives. His article for this volume *Unlawful Genders* focuses on the decision in *Bostock v. Clayton County*, arguing that “there was a real cost” to the Court's formalistic mode of analysis.¹⁸ Specifically, he argues that this mode choice caused the Court to miss a crucial opportunity to explain, through historical analysis and stereotype theory, that discrimination on the basis of sex, sexual orientation, and gender identity are “non-severable.” He goes on to do this work himself in support of his thesis that “the animus projected at LGBTQ persons is fundamentally about gender.” He concludes that going forward, *Bostock* “can and must serve as a springboard . . . to recognize an anti-stereotyping principle for equal protection doctrine and assess constitutional claims of LGBTQ discrimination as sex discrimination.”

17. 85 *LAW & CONTEMP. PROBS.*, no. 1, 2022, at 81.

18. 85 *LAW & CONTEMP. PROBS.*, no. 1, 2022, at 103.

The third and final set of essays looks at several institutional settings in which sex continues to be an important formal or informal taxonomy, as well as the rationales for and challenges associated with its use in each setting. From public bathrooms, to competitive sports, to firms, to feminism, and finally to law, each of the authors in this set draws on their expertise to explore how one or another of the conceptual, definitional, linguistic, clinical, political, and philosophical ideas developed in the earlier essays implicate their respective domains. In the process, together they suggest a framework for thinking through different applications—for example the military and educational settings—not covered in the volume.

Wickliffe Schreve is the Faculty and Scholarly Services Librarian and a Senior Lecturer at Duke Law School. He teaches first-year legal research and advanced courses in administrative legal research. With Doriane Coleman, he designed and taught a class called *Sex in Law*, analyzing how sex and gender have been historically positioned as legal categories during a time of particularly significant legislative activity affecting the LGBT community. His essay for this volume *Stall Wars: Sex and Civil Rights in the Public Bathroom* details the history of race and sex segregation in public bathrooms before turning to the history of regulations designed to restrict access to gay men.¹⁹ He describes how—differently from black, female, and transgender people—gay men came to use the public space (bathrooms) as a locus of sexual intimacy because the law denied them access to the private space (the home). He details the health and safety regulations that were designed to exclude them from that public space too, and the rich culture and community that developed as a result of these twin exclusions. He concludes with reflections on the implications of *Lawrence v. Texas* on this culture and community.

Joanna Harper is a medical physicist and PhD student at Loughborough University in its School of Sport. Her research objective is to obtain data on changing athletic attributes as trans athletes transition, with a focus on transgender women and the extent to which their male sex-linked performance advantages are mitigated by gender affirming hormones—specifically by testosterone suppression. Her 2019 book *SPORTING GENDER* details the long history of sex classifications in elite competitive sport and the athletes who have been implicated by their boundaries, and argues that eligibility rules for the female category should include transgender women and intersex athletes who have mitigated their male sex-linked advantages. Her essay for this volume *Transgender Athletes and International Sports Policy* updates the state of the science and the policy options being debated within elite sport, including the 2021 revised guidance out of the International Olympic Committee (IOC), and argues that one year of testosterone suppression remains the best way for the governing bodies to be both fair to the field and inclusive of transgender women and athletes with differences of male sex development.²⁰

19. 85 *LAW & CONTEMP. PROBS.*, no. 1, 2022, at 127.

20. 85 *LAW & CONTEMP. PROBS.*, no. 1, 2022, at 151.

June Carbone holds the Robina Chair in Law, Science, and Technology at the University of Minnesota Law School. An expert in—among other things—family law, medicine and bioethics, and feminist jurisprudence, she has written widely on women’s issues including on sex discrimination law. Her most recent work, with co-authors, has included a focus on sex, gender, and inequality in the workplace. Her article for this volume *Board Diversity: People or Pathways?* is part of the latter project.²¹ Here, she uses the Wells Fargo scandal as a case study to “untangle the relationship between management practices and gender diversity.” She assesses the status of women in corporate management at the firm, the role of sex and gender in implementing competitive practices designed to maximize shareholder profits, and the implications for diversity policies. She shows that “simply adding selected women to corporate boards or upper management” – the solution du jour for both inequality and reform advocates – is unlikely to be effective toward either ends. She concludes that the focus instead should be on systematic monitoring for and management of competitive practices designed to maximize shareholder value, practices that operate in tandem to limit opportunities for women and to corrupt operations.

Madeleine Pape is a sociologist and Postdoctoral Researcher at the University of Lausanne where she is affiliated with the Institute of Sports Sciences, Gender Studies Center, and STSLab. Her work examines “how the scientific pursuit of ‘biological sex’ takes place within particular institutional and political contexts.” Specifically, she examines “how policymakers, scientists, and (certain) feminists seek to enact ‘sex,’” and works to “show how ‘it’ emerges as elusive and ambiguous and always entangled with gender, race, nation, and other socially meaningful forms of difference.” In her essay for this volume *Feminism, Trans Justice, and Speech Rights: A Comparative Perspective*, she moves beyond her earlier focus on sports to examine the institution that is feminism.²² She describes the internecine war among feminists and feminisms over the relevance of sex to the feminist project, including as it has appeared in different forms in the United Kingdom and the United States, and reflects on the recent turn in the debates from a focus on that substantive question to a focus on process questions about the nature and scope of academic freedom and free speech rights. In the process, she discusses the strategic use and impacts of open discourse and cancel culture, concluding that “[i]f gender equality is ultimately the goal,” especially given our polarized political climate, it is not as likely to be “served by pursuing the ‘truth’ of sex” as it would be by “other conversations” not focused on biology.

Doriane Coleman is Professor of Law at Duke Law School. Her scholarship, generally focused at the intersection of law, medicine, and ethics, has further concentrated on the remaining relevance of sex to institutions including competitive sport, medicine, and law. Her 2017 article *Sex in Sport* examined the basis for and merits of the taxonomy in that arena in light of

21. 85 LAW & CONTEMP. PROBS., no. 1, 2022, at 167.

22. 85 LAW & CONTEMP. PROBS., no. 1, 2022, at 215.

evolving attitudes about sex, and she does a version of the same for law here.²³ Her essay *Sex Neutrality* closes out this volume with “reflections on the normative question whether it would be best on balance if the law could not see or act on the basis of sex, and if it prohibited regulated institutions from doing the same.”²⁴ She summarizes the history of sex in law and the reforms of the nineteenth and twentieth centuries before turning to the current moment in which the debates featured in this volume are taking place. She describes and then counters arguments from the right and the left in favor of sex neutrality, “on the grounds that sex is real, it is significant for individuals and the society in ways that matter to good governance, and it is precisely the law’s role to take such taxonomies into account in the fulfillment of its institutional mission.” She concludes with “an effort to settle the terms on which differently motivated groups might agree to pursue commonly held objectives.”

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We want to close with an expression of gratitude to the students who helped edit this volume after a number of editors and journal members resigned from the board or refused to work on it, for reasons explained in their statement on the masthead page. This includes the research assistants of individual authors, who did work that would normally have been completed by the student board, as well as Duke Law students who volunteered their time without pay or institutional credit to produce the rest. Among the latter, we especially want to recognize Meredith Criner who acted as de facto editor-in-chief even as she also did a lot of the below-the-line work normally reserved for junior members of the student board.

23. 80 LAW & CONTEMP. PROBS., no. 4, 2017, at 63.

24. 85 LAW & CONTEMP. PROBS., no. 1, 2022, at 241.