

DEFINING SEX

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I

INTRODUCTION

This essay describes some of the challenges involved with defining “sex” as a means of categorizing humans. The question “What is the definition of ‘sex?’” may seem simple enough, but in fact any answer requires a commitment to a specific definitional practice. This essay describes three approaches to the practice of definition— lexical, real, and pragmatic—in order to explain why a pragmatic approach is the most useful in matters of law and public policy in general and with the construction of regulations regarding “sex” in particular. The essay identifies scientific as well as socio-political factors contributing to the current definitional “rupture” over how to define sex. Examples of specific contexts in which a pragmatic approach to definition is necessary are discussed including single-sex schools and places of incarceration.

II

A SHORT PRIMER ON DEFINITIONS¹

Lexical definitions—sometimes called nominal definitions—are what are found in dictionaries. In theory, dictionaries provide the latest empirical record of how words are actually used. Common dictionary definitions describe the most popular usage of words by language-users in general, while specialized or technical dictionaries—such as law dictionaries—report how those in a particular language community have used a word.

Real definitions are attempts to delineate what something really is. Socrates, as portrayed by Plato and Xenophon, formulated the *ti esti* question “What is it?”, which is more commonly referred to as the “What is X?” question. Plato’s dialogues often portray the characters trying to provide what would later be called real definitions to answer such questions as “What is Justice?” “What is Piety?” and “What is Rhetoric?” To answer questions of the form “What is X?” implies that we can identify X’s nature or essence—those attributes without which an X would not be an X. Aristotle is credited for the standard defini-

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1. This section draws from EDWARD SCHIAPPA, *DEFINING REALITY: DEFINITIONS AND THE POLITICS OF MEANING* (2003); RICHARD ROBINSON, *DEFINITION* (1950); and Anil Gupta, *Definitions*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Summer 2021 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/sum2021/entries/definitions> [<https://perma.cc/D4Q9-7BFE>].

tional form involving genus and difference: An X is (a kind of) class name that has such-and-such attributes.

Real definitions typically are involved when someone posits a question of the form “What is X?” or attempts to offer a definition based on what he or she believes X really or truly is. This can be described as a purported fact of essence. Lexical definitions, by contrast, describe a purported fact of usage.

Language users typically do not stop to think about the difference between facts of usage and facts of essence with respect to definitions. We assume the two are coterminous. People use “bachelor” to describe unmarried men because, after all, that is what bachelors really are. The often unspoken and unexamined belief that definitions unproblematically refer both to the nature of X and to how the word X is used—that is, the assumption that facts of usage and facts of essence about X are the same—is what can be called the “natural attitude” toward definitions.

Most of the time, the natural attitude toward definition works just fine. Indeed, it would be hard to imagine how a language community could communicate successfully if we constantly doubted the congruence of facts of usage and facts of essence. There are, however, important occasions when there is a breakdown in the natural attitude, and to understand such occasions we need to distinguish between definitional gaps and definitional ruptures.

A definitional gap occurs when someone hears or reads a word they don’t recognize and need to look up the definition, such as someone hearing reference to a “shingle” haircut or hearing someone describe a political belief as “antediluvian.” Such gaps are typically easy to fill under most circumstances. Even if several definitions of the same word are listed in a dictionary, an experienced language user normally can consider the context in which the word appears and correctly identify the relevant definition.

A definitional rupture occurs when a break occurs between facts of usage and facts of essence such that process of definition itself becomes an issue. Questions about why we are defining a term in a particular context become salient, as well as the question of how we define words. Such ruptures may be prompted by various factors, including technological, political, and social change. Two examples can illustrate the point.

Consider how the legal definition of “death” changed in the 1970s and 1980s.² Prior to the change, the standard definition used to declare a person “dead” was the cessation of cardio-respiratory activities. As technology changed such that patients could have their cardio-respiratory activities maintained with the aid of machines, the standard definition became one of the cessation of brain activities—so-called “brain death.” The legal change was important because there were patients who could be considered alive under one definition but dead under another, and indeed the widely-noted case of Tucker

2. See Schiappa *supra* note 1, at Chapter 3.

v. Lower³ saw wrongful death charges brought against a doctor for harvesting organs for transplant before the patient was considered dead by the applicable law.⁴

Also consider the changes in most jurisdictions' definitions of "rape." For centuries, coerced sex within a marriage was not considered rape. As recently as the 1999 edition of *Black's Law Dictionary*, the first definition for rape was still "unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will."⁵ Most states prior to 1975 had some sort of exemption based on marital status. In large part due to the growing political efficacy of the women's movement, the so-called marital rape exemption was eliminated such that today it is a crime in all fifty states for a husband to rape his wife.⁶ During the period of time these laws were changing, the same act might be defined as rape in one jurisdiction but not-rape in another.

These two examples highlight an important aspect of definitional ruptures; namely, that the changes in definition ultimately were motivated by a choice between competing values. There is no way to decide in the abstract what counts as "really" dead. Defining death as the cessation of cardio-respiratory activities represented a union of fact of essence and fact of usage for centuries. It worked. It was only when medical advancements disrupted the natural attitude toward "death" that we were forced to reckon with competing definitions, and as a society make the value choice that ultimately what is most important is brain activity. It was also a matter of changing values that led to the elimination of the marital rape exemption, as second wave feminism fueled the value preference that what matters for proscribed unwanted sexual activity is consent, regardless of marital status or previous familiarity with the rapist.

When a definitional rupture occurs, the question shifts from the traditional "What is X?" question to the pragmatic question "How ought we use this term given our needs and interests in this context?" In matters of life and death, for example, there are serious consequences to declaring someone dead, from filing criminal charges of murder in some cases to being permitted to harvest organs to transplant in another. What is needed can be described as a definitional rule of the form "X counts as Y in context C." We need a shared understanding of when a particular person counts as live or dead in order to meet all sorts of needs and interests—religious, legal, medical, familial, etc.

What I am describing as a pragmatic approach to definition is quite common in matters of law and public policy. Most laws involving complex matters must stipulate definitions of key terms. Such stipulative definitions are informed but not constrained by previous usage of the terms, nor are they dependent on

3. Tucker v. Lower, 1 Va. Cir. 124 (Ct. Law & Eq., Richmond, Va., 1972).

4. Ronald Converse, *But When Did He Die?: Tucker v. Lower and the Brain-Death Concept*, 12 SAN DIEGO L. REV. 424 (1975).

5. Rape Definition, BLACK'S LAW DICTIONARY at 1267 (7th ed., 1999) (emphasis added).

6. Kelly C. Connerton, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALBANY L. REV. 237, 240 (1997).

some sort of ultimate determination of what the true nature of X (“death,” “rape,” etc.) really is. Thus, a pragmatic approach is distinct from the purely lexical or real approaches to definition.

Certain definitions set forth in law or public policy can be described as regulatory definitions, understood as stipulative definitions that function to regulate some aspect of human behavior.⁷ Regulatory definitions can be found in a wide array of contexts, not all of which involved the law, but generally have two elements in common. First, from the standpoint of linguistic behavior, regulatory definitions advance “denotative conformity.” That is, learning the definitional rule that “X counts as Y in context C” improves the odds that we understand and describe aspects of our reality in a common manner. We want to be able to observe a phenomenon and agree that X is a Y. We don’t always manage to agree, but the goal of regulatory definitions is that we use language to describe a situation in a predictable and shared manner. Thus, an important goal of regulatory definitions is denotative conformity.

Second, regulatory definitions are formulated and authorized by recognized organizations or institutions, such as a state legislature or, to use a nongovernmental example, a professional sports organization such as Major League Baseball. Who decides what X counts as Y in context C is in a position of power. Outside of the purview of those organizations or institutions, the rules potentially have no authority. Regulatory definitions always depend on the backing of some sort of recognized entity that has been empowered to regulate a particular domain of human activity. Within the relevant contexts, specific individuals typically are empowered by the regulating entities to decide whether X counts as Y or not in any given instance, from an umpire declaring a balk to a medical professional declaring a patient dead to a jury deciding whether a life-ending act counts as murder or manslaughter.

Definitional disputes happen all the time. Sometimes a disagreement about denoting a specific phenomenon leads to an explicit question of definition. Such questions as “Is person X a patriot or a terrorist?” “Is Pluto a planet?” “Are Robert Mapplethorpe’s X portfolio of photographs art or obscenity?” lead to a demand for definitional clarity: What counts as a terrorist? What counts as a planet? What counts as art? A pragmatic approach sets aside the unanswerable philosophical question of what is X really and instead focuses on such questions as: What is our purpose in defining in this context? What values and interests are advanced by competing definitions? What are the practical implications of identifying certain attributes as definitive? Who should have the authority to define and the power to decide when X counts as Y in context C?

7. EDWARD SCHIAPPA, *THE TRANSGENDER EXIGENCY: DEFINING SEX AND GENDER IN THE 21ST CENTURY* (2022), chapter 1.

III

WHAT HAS SEX GOT TO DO WITH IT?

As we enter the third decade of the 21st century, how we define sex--male and female, women and men--is entering a stage one can describe as a definitional rupture. In the 1970s in the United States, second wave feminists launched an important critique of the constraints imposed on women by dominant cultural norms. A key step in feminist theory was to draw a distinction between sex as a biological category and gender as a social category. The traditional belief that men and women have essentially different natures, rooted in biology, has dominated thinking about sex roles throughout much of human history. Thus, drawing a distinction between biological sex and psychological gender was an important step for feminists challenging the legacy of biological essentialism that has been used to justify discrimination against women.⁸ The word gender “was rapidly popularized in feminist political discourse as a tool to intervene in arguments against biology.”⁹ It did not take long for it to become standard in college textbooks in the humanities and social sciences to distinguish between sex as biological and gender as cultural/psychological.

For example, the glossary of a popular introductory textbook in sociology in 1981 noted: “Sex (male and female): Refers to the division of the human species into the biological categories of male and female” and “Gender: Refers to social conceptions about what personality trait and behavior are appropriate for members of each sex.”¹⁰ A textbook in psychology noted that “Femininity and masculinity are socially defined terms that are added to the biologically determined sex class of the individual. Gender defines the social and cultural meanings brought to each anatomical sex class; that is, children learn how to ‘pass as’ and ‘act as’ members of their assigned sexual categories.”¹¹

The distinction between biological sex and cultural/psychological gender continues to be influential. In a representative book on gender and sport, one finds “sex ‘refers to a person’s biological status’ and can be identified by ‘sex chromosomes, gonads, internal reproductive organs, and external genitalia’ while gender refers to ‘the attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex’.”¹² The result of this dichotomy—sex as biological, gender as cultural/psychological—can be described as related but independent sets of definitional rules. For sex, the definitional rule would be along the lines of Person X counts as M/F based on biology. For gender: Person

8. SANDRA LIPSITZ BEM, *THE LENSES OF GENDER* (1993); ANNE FAUSTO-STERLING, *THE MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN* (1985).

9. Anne Fausto-Sterling, *On the Critiques of the Concept of Sex*, 27 *DIFFERENCES* 189, 197 (2016).

10. IAN ROBERTSON, *SOCIOLOGY*, 2nd ed. (1981), 629–33.

11. ALFRED R. LINDESMITH, ANSELM L. STRAUSS, & NORMAN K. DENZIN, *SOCIAL PSYCHOLOGY* 16 (8th ed., 1999).

12. Leslee A. Fisher, Susannah K. Knust, Alicia J. Johnson, *Theories of Gender and Sport*, in *GENDER RELATIONS IN SPORTS* (2013), 21, quoting the American Psychological Association.

X counts as masculine/feminine/androgynous/gender-nonconformist based on cultural norms. When definitions are widely shared and stable, definitional gaps are relatively straightforward to resolve, so we typically do not have difficulty knowing who is male or female, or describing people's perceived gender preferences.

There are two factors contributing to the current definitional rupture—one scientific, one sociopolitical. The first is a growing awareness that a nontrivial number of humans defy the traditional biological ways of defining male and female. It is not uncommon to view the number and type of sex-related genes and chromosomes as determining our sex (XX for women, XY for men), and we assume our genes determine external genitalia, internal reproductive anatomy (such as the uterus in females), sex hormone levels produced by the body (such as testosterone level), and the type of gonads (ovaries or testicles). But the situation is more complicated than that. The SRY (sex determining region Y) gene is found on the Y chromosome. The protein produced by this gene initiates processes that cause a fetus to grow male gonads and stop the development of female reproductive body parts (uterus and fallopian tubes). However, it is possible for a SRY gene to end up on an X chromosome and thus for someone with XX chromosomes to grow male characteristics including testes. This is called “46,XX testicular disorder” and occurs in .005% of births (1 in 20,000).¹³ Alternatively, it is possible for a person with XY chromosomes to develop typical female external genitalia, a condition known as the Swyer Syndrome, which is estimated to occur in 1 in 80,000 births. Furthermore, as many as .005% of XY males (2 to 5 per 100,000) experience androgen insensitivity, where their bodies do not respond to certain male sex hormones, known as androgens, and have mostly female external sex characteristics or “signs of both males and female sexual development.”¹⁴ Other sorts of genetic variations are possible as well. In short, even if we define male and female strictly according to the science of genetics, not every human neatly falls into one or the other category.

Just how many people are born with such Differences in Sexual Development (DSD) is a matter of some controversy. Because there is no systematic record kept of DSD births, some of the physical traits covered by broader definitions may not be discovered until puberty, attempts are made to conceive a child, or through genetic tests. Nonetheless, scientists have generated estimates based on the available data. Not surprisingly, how many DSD individuals there are depends on how one defines “intersex” or DSD. Using a narrow definition limited to cases where chromosomal sex is inconsistent with phenotypic sex (observable body parts), or in which the phenotype is not classifiable simply as ei-

13. Statistics in this paragraph are drawn from the National Center for Biotechnology Information's resource, Gene Reviews, available at <https://www.ncbi.nlm.nih.gov/books/NBK1116/> [<https://perma.cc/LHM7-ETWF>].

14. U.S. National Library of Medicine, MedlinePlus: Androgen insensitivity syndrome, <https://medlineplus.gov/genetics/condition/androgen-insensitivity-syndrome/> [<https://perma.cc/3TLL-86EG>].

ther male or female, one estimate is as low as .018%.¹⁵ Using a broader definition of any deviation from the prototypical male/female categories at the chromosomal, genital, gonadal, or hormonal level, biologist Anne Fausto-Sterling estimates the figure could be as high as 1.7%.¹⁶ More recent estimates of the number of people described as having DSD have a similarly broad range. Medical conditions “in which an individual’s anatomical sex seems to be at odds with their chromosomal or gonadal sex” are quite rare—one in 4,500 or .02%, a figure similar to Sax’s estimate.¹⁷ Some scientists feel that definition is too narrow. Eric Vilain, a clinician and former director of the Center for Gender-Based Biology at the University of California, Los Angeles, for example, points out that the “most inclusive definitions point to the figure of 1 in 100 people having some form of DSD.”¹⁸

In any event, the point is that defining male and female in strictly biological terms is more complex than it seems at first glance. Developmental biologist Rebecca R. Helm, for example, posted a widely circulated series of tweets in December 2019 stressing how complicated the idea of biological sex can become.¹⁹ She notes, for example, that a person can be born with XY chromosomes but if the SRY gene appears on the X chromosome instead of the Y, that person could be physically female, chromosomally male, and genetically female. So which attribute should be considered definitive? In personal correspondence, Helm noted that, “as a developmental biologist, I define male/female as organisms producing sperm/eggs.” For the purposes of research as a develop-

15. Leonard Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. OF SEX RESEARCH 174 (2002).

16. Anne Fausto-Sterling, *The Five Sexes, Revisited*, THE SCIENCES, July/August, 19. Fausto-Sterling’s oft-cited figure of 1.7% is based on a research review conducted with her students and reported in Melanie Blackless, et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. OF HUMAN BIOLOGY 151 (2000). Carrie L. Hull, *Letter to the Editor* 15 AM. J. OF HUMAN BIOLOGY 112 (2003) accuses Blackless, et al. of a variety of serious errors and suggests a figure of .37%. Sax’s figure, supra note 15, of .018% is based on a definition that only “counts” congenital adrenal hyperplasia (CAH) and complete androgen insensitivity syndrome (CAIS) as DSD conditions. Conditions that Sax excludes but Fausto-Sterling includes are Late-Onset Congenital Adrenal Hyperplasia, Vaginal Agenesis, and any sex chromosome combinations other than XX or XY (including but not limited to Klinefelter syndrome 47,XXY, Turner syndrome 45X, XXX, XYY, and other “less frequent arrangements”). Sax’s explanation for the exclusion of these categories is that they do not cause ambiguous genitalia or, he believes, “any confusion regarding sexual identity” (supra note 15, at 177). He notes that 88% of those whom Fausto-Sterling classifies as “intersex” (DSD) are those with Late-Onset Congenital Adrenal Hyperplasia or non-classic CAH (LOCAH). Hull makes a similar argument (supra, 113). Sax claims: “From a clinician’s perspective, however, LOCAH is not an intersex condition. The genitalia of these babies are normal at birth, and consonant with their chromosomes: XY males have normal male genitalia, and XX females have normal female genitalia” (supra note 15, at 176). See also ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY*, rev. ed., 324–26 (2020).

17. Claire Ainsworth, *Sex Redefined: The Idea of 2 Sexes is Overly Simplistic*, SCIENTIFIC AM., (Oct. 22, 2018), <https://www.scientificamerican.com/article/sex-redefined-the-idea-of-2-sexes-is-overly-simplistic1> [<https://perma.cc/5H8V-4X92>].

18. *Id.*

19. Biologist Explains Biological Sex, Geek X Girls (Jan. 29, 2020), geekxgirls.com/article.php?ID=12697 [<https://perma.cc/5PL8-PHS3>].

mental biologist, production of sperm or eggs (gametes) is “the key feature of biological sex.” However, Helm is quick to note that, in other contexts, using gametes as the definitive attribute for biological sex for categorizing humans “would be extremely problematic.”²⁰

Relatedly, historian and philosopher of science Sarah S. Richardson argues against binary essentialist conceptions of sex and advocates what she describes as “sex contextualism” for the study of sex-related biological variables in basic, preclinical biomedical research. She argues that there are multiple ways to define or “pragmatically operationalize” sex in biomedical research, especially in a laboratory context where the focus might be on hormone levels or chromosomes, for example, or involve “laboratory-tailored materials and technologies.”²¹ Inferences about humans may be based on other species with quite different sex-related processes, such as roundworms known as *Caenorhabditis elegans*. Difference in hormone levels at different ages of mice indicates the most useful interpretation of the data would posit 4 sex categories, not just two. In short, Richardson’s analysis of a series of laboratory studies concludes that the definition/operationalization depends on the specific research context and purpose, so sex should be understood contextually.

Societies have long recognized the fact that some people are born, for example, with both male and female genitalia, and for centuries such individuals would be described as “hermaphrodites.” Today, a person whose body varies from the statistical norm for males and females in one or more of the areas described above may be categorized as “intersex” or as having a DSD. Nonetheless, public awareness of DSD has increased to the point that it is increasingly common to see headlines such as “Sex Redefined: The Idea of 2 Sexes is Overly Simplistic” followed with the subtitle “Biologists now think there is a larger spectrum than just binary female and male.”²² While facially valid in light of research on people with DSD, there are some who infer from such headlines that the ideas of male and female are biological stereotypes. An equally valid headline could read: “The Idea of 2 Biological Sexes is Accurate for 98%+ of the population.” That is, because the vast majority of humans have an anatomy, hormones, cells, and chromosomes that are consistently male or female, most of the time and in most contexts, people use the words “female” and “male” accurately (with a high degree of denotative conformity) without confusion or fear of contradiction. Once we add the idea of gender identity, of course, matters become more complicated.

Indeed, the second factor contributing to the definitional rupture is the rise of what I describe as the transgender exigency.²³ Despite the fact that transgender history is far from new, the visibility and salience of transgender is-

20. Personal Correspondence with the author, Mar. 4, 2020.

21. Sarah S. Richardson, *Sex Contextualism*, PHILOSOPHY, THEORY, & PRACTICE IN BIOLOGY (forthcoming). Available at <https://j.mp/366WuwN> [<https://perma.cc/DEJ6-QVC2>].

22. Ainsworth, *supra* note 17.

23. Schiappa, *supra* note 7.

sues has increased dramatically in the 21st Century.²⁴ The resulting exigency has amplified the rupture over how sex and gender are defined. On one end of the spectrum, those who can be described as biological determinists argue that biological sex determines one's gender and thus both are evident at birth or earlier, and that one's medical designation should determine a host of legal and societal constraints based on one's recorded sex. On the other end of spectrum, those who might be called autonomous nominalists or advocates of "self-identification" or "first-person authority" contend that sex/gender identity is independent of biology and is a purely personal decision and, as such, should be respected and never regulated or discriminated against. I use the construction sex/gender because, for an increasing number of people, the two ideas are fused: When a transgender woman says "I am a woman" or a transgender man says "I am a man," most of the time such claims entail a desire to be recognized as a man or as a woman in all respects, including (for example) with official ID that carries a designation by sex. In most social settings, a live and let live philosophy suggests that people ought to be able to identify themselves as they wish. But what happens in specific contexts in which sex segregation is practiced? How do we define "sex" in those contexts? To begin to answer these questions, we must return to the concept of regulatory definitions.

IV

REGULATORY DEFINITIONS & SEX

As noted earlier, regulatory definitions can be thought of as definitional rules of the form "X counts as Y in context C." The simplest way to describe self-identification as a regulatory definition would be: Anyone who self-identifies at the moment as a woman/man (X) counts as a women/man (Y) in this context (C). Note that there is no temporal requirement of duration stipulated. Some contexts, such as bathrooms in states without so-called bathroom bills, function with an implicit regulatory definition: People perceived as a male/female (X) count as a man/woman (Y) in the context of public bathrooms and changing facilities (C). In many non-institutional settings, the only definitional "requirement" is that one passes.

It is harder to "pass" in some contexts than in others. As we move into the third decade of the 21st century, there are contexts that traditionally have been segregated by sex that are now wrestling with how to define women and men in a manner that advances the needs and interests relevant to that context, and as a result additional definitive attributes are implemented beyond self-identification "at the moment."

Many contexts stipulate what can be described as a durational requirement. Such a requirement can be based on the past or on future intentions. For example, most single-sex schools that accept transgender applicants have a policy

24. JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES* (2002); SUSAN STRYKER, *TRANSGENDER HISTORY* (rev. ed.) 2017.

that can be formulated as “Anyone who consistently lives and identifies as a man/women (X) counts as a man/women (Y) in the context of applying to this institution (C).” “Lives as” is somewhat open-ended, but in the context of a single-sex school, one’s future intentions are salient, and presumably one must transition socially, including using gender-specific pronouns and names. The core value that seems to inform the changing policies is a commitment to the cause of feminism, which includes an acknowledgement that women have long endured discrimination. Priya Kandaswamy, a faculty member at Mills College who was on the subcommittee that drafted their new transgender policy, is quoted as saying “We strongly identify with our original mission, but we do think that women’s colleges were originally founded to make education more accessible for those who were discriminated against based on gender and today that includes transgender.”²⁵ In a public letter by Wellesley College’s President and Chair of the Board of Trustees announcing the decision to consider any applicant who “lives as a woman and consistently identifies as a woman,” it was noted that the origin of Wellesley was an important social-political accomplishment: “The creation of Wellesley College was a revolutionary act, challenging and confounding entrenched views about the roles and capacities of women.”²⁶

Single-sex schools have dealt with the question of admitting transgender applicants by setting a relatively low bar for their regulatory definition. It may be useful to consider a context where the bar is set higher; namely, jails and prisons.

V

DEFINING SEX: THE CASE OF INCARCERATION

Jails and prisons are an important context that is normally segregated by sex. Historically, transgender people have been housed by their recorded sex at birth, and it has not gone well for them. According to the U.S. Transgender Survey of 2015, 23% of transgender inmates reported experiencing physical assault from prison staff or other prisoners in the previous year, and one in five (20%) were sexually assaulted. Compared with the general U.S. prison population, transgender prisoners are 5 more times likely to be sexually abused by prison staff and 9 times more likely to be sexually assaulted by other inmates.²⁷ Accordingly, the segregation of prisoners by sex has put transgender prisoners, a group expanding in number and estimated as at least 4,890 individuals to-

25. Quoted in Deana Mitchell, *Mills College takes on the nuances of transgender admits* (Oct. 2, 2014), <https://oaklandnorth.net/2014/10/02/mills-college-takes-on-the-nuances-of-transgender-admits/> [<https://perma.cc/GF5X-6WHB>].

26. Laura Daignault Gates & H. Kim Bottomly, *Reaffirmation of Mission and Announcing Gender Policy* (2014), <https://www.wellesley.edu/news/gender-policy/communityletter> [<https://perma.cc/S2JB-ERNA>].

27. SANDY E. JAMES, ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY*, 211–12 (2016).

day—1,097 people self-reported as transgender among 141,500 prisoners (0.7%) in Texas alone—in an awkward and often unsafe situation.²⁸ In 2007, a study of California prisons conducted by the University of California, Irvine’s Center for Evidence-Based Corrections found that transgender women housed in male prisons were 13 times (59%) more likely to experience sexual offenses than cisgender inmates (4.4%).²⁹ Data from multiple years compiled by the Bureau of Justice Statistics found that nearly 40% of transgender prisoners experienced sexual abuse in federal and state prisons, as opposed to 4% of the general incarcerated population.³⁰

Jurisdictions vary widely in terms of how they define women and men in carceral settings. On one end of the spectrum, some jurisdictions rely exclusively on inmates’ assigned sex at birth. For example, state prisons in Texas house transgender inmates based on their “sex at birth.”³¹ Thus: A prisoner whose assigned sex at birth is male/female (X) counts as a man/woman (Y) in the context of the state prison (C).

Some jurisdictions make it possible for a transgender person to “count” as the sex opposite of their assigned sex at birth, but require additional documentation beyond self-identification. In May, 2018, for example, Connecticut became the first state to enact a policy requiring the state Department of Correction to house prisoners according to their gender identity. The law only applies to those who are “diagnosed with gender dysphoria or had their gender marker legally changed.”³² The key definitive attribute informing Connecticut’s regulation of housing transgender prisoners is documentation: A prisoner whose legally- or diagnostically-documented gender is male/female (X) counts presumptively as a man/woman (Y) in the context of Connecticut prisons (C).

Massachusetts General Laws Title XVIII, c.127 § 32A amended by the Criminal Justice Reform Act of 2018 stipulates that transgender inmates “with or without a diagnosis of gender dysphoria or any other physical or mental health diagnosis” shall be addressed and if requested, housed in a manner consistent with their gender identity, unless the commissioner certifies that such

28. Kate Sosin, *Transgender women are nearly always incarcerated with men. That’s putting many in danger*. NBCNews.com, (Feb. 26, 2020), <https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1141681> [<https://perma.cc/D8HU-FCUC>].

29. Valerie Jenness, Cheryl L. Maxson, Kristy N. Matsuda, & Jennifer Macy Sumner, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (May 16, 2007), https://ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf [<https://perma.cc/8WHS-EBWK>].

30. ALLEN J. BECK, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-2012*, U.S. Dept. of Justice (Dec. 2014).

31. Lauren McGaughy, *After transgender inmate was raped, beaten, Texas agrees to clarify LGBTQ prisons policies*, DALLAS MORNING NEWS (May 15, 2018), <https://www.dallasnews.com/news/2018/03/15/after-transgender-inmate-was-raped-beaten-texas-agrees-to-clarify-lgbt-prisoner-policies/> [<https://perma.cc/UVG3-NGSA>].

32. John Riley, *Connecticut will now house transgender inmates according to gender identity*, METRO WEEKLY (May 28, 2018), <https://www.metroweekly.com/2018/05/connecticut-house-transgender-inmates-according-gender-identity/> [<https://perma.cc/T4TR-FWQM>].

placement would not ensure prisoners' safety or would present management or security concerns. Such an approach empowers inmates' own sense of identity as the presumptive criterion for inmate placement decisions. Only when inmates' own preferences pose security risks would the default decision based on identity be challenged. Similarly, California passed legislation, signed into law in September 2020, requiring that transgender inmates "Be housed at a correctional facility designated for men or women based on the individual's preference" in all situations unless there are "management or security concerns".³³ In such jurisdictions, the regulatory definition reflected by these policies therefore would be: A prisoner whose self-identified gender identity is male/female (X) counts presumptively as a man/woman (Y) in the context of the relevant jail or prison (C), and that presumption is rebutted only if it can be shown that there are meaningful management or security concerns.

One sign of a definitional rupture is a breakdown of denotative conformity, and that is clearly the situation when it comes to different state regulatory definitions regarding sex segregation in the context of incarceration. The same person "counts" as a man in one jurisdiction but would count as a woman in another.

Justice Louis Brandeis famously said that states may "serve as a laboratory" to "try novel social and economic experiments."³⁴ As states experiment with different definitional policies with regard to transgender inmates, undoubtedly data will emerge to show the relative strengths and weaknesses of different definitional approaches. For example, there have been allegations that a policy of placement based on self-identification is being abused in one county facility in the state of Washington, and that at least one inmate incarcerated for a sex offense arrived "from a male facility" and raped a female in the women's prison soon after.³⁵ *The Los Angeles Times* reports that "A transgender woman at a men's prison, who asked not to be identified for fear of retaliation, said that she knows at least five inmates who have applied to transfer under false pretenses and that staffers have asked her to help identify such inmates."³⁶ True or not, such allegations raise fears of cisgender male inmates trying to game the system to get placed in women's facilities.³⁷

33. Cal. SB-132, sec. 4 (2020).

34. *New State Ice Co. v. Liebmann*, 285 U.S. 311 (1932).

35. Dori Monson, *DOC employee reports men are claiming to be women to transfer prisons*, (Mar. 10, 2021), mynorthwest.com/2666243/ [<https://perma.cc/3VWH-XBHT>].

36. Leila Miller, *California prisons grapple with hundreds of transgender inmates requesting new housing*, L.A. TIMES (Apr. 5, 2021), <https://www.latimes.com/california/story/2021-04-05/california-prisons-consider-gender-identity-housing-requests> (last accessed Jan. 8, 2022).

37. See, e.g., Abigail Shrier, *Male Inmates in Women's Prisons*, WALL STREET J. (May 31, 2021), <https://www.wsj.com/articles/male-inmates-in-womens-prisons-11622474215> (last accessed Jan. 7, 2022).

VI

CONCLUSION

Regulatory definitions in contexts in which segregation by sex is desired for various reasons, such as single-sex schools, bathrooms, locker rooms, competitive sports, and women's shelters, constitute a historic break from assuming that a straightforward biological definition provides a one-size-fits-all approach to defining sex. On one hand, a too-narrowly tailored biological definition erases transgender, nonbinary, gender-fluid, and DSD people and perpetuates biological essentialism—a key source of sexist prejudice throughout much of history. On the other hand, pure autonomous nominalism—gender-fluid self-identification unfettered by time or place—denies the possibility of legitimate concerns in specific sex-segregated contexts.

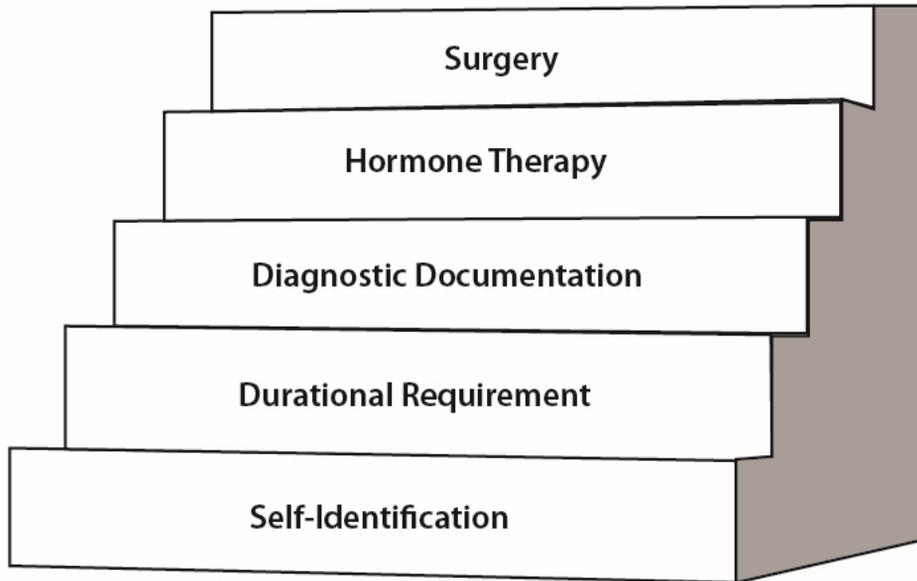
So how should such regulatory definitions be crafted? To state the obvious: Very carefully. Once we set aside the need for a one-size-fits-all set of definitions, then we are able to look at pragmatic issues such as who should have the power to define, whose interests are being served, and above all the purpose a given definition is serving in a specific context. In an earlier book on definitions, I argued that when we are faced with a definitional rupture the “What is X?” question needs to be replaced with questions such as, “How ought we use the word X given our needs and interests?” “What is the purpose of defining X?,” and “What should count as X in context C?” I advocated a pragmatic approach that sees definitions as made not found, and treats the definitional process as one involving important ethical questions of values, interests, and power.³⁸

Applying such a pragmatic approach to defining sex/gender, one can envision a series of steps of required definitional attributes to “count” as a man or woman according to context-specific regulatory definitions. At the bottom is simply self-identification as a man or a woman: A self-declaration is the sufficient attribute. While self-identification or first-person authority should be presumptive whenever and wherever possible, there are important contexts in which something more than a potentially ephemeral self-identification is justifiable. That is, there are contexts of human interaction that have been segregated by sex for credible reasons, and the reasons should be matched up with appropriate regulatory definitions. Think of a shelter for battered women, a scholarship program to encourage girls to seek a STEM education, medical trials for breast cancer treatment, a cloistered convent, a women-only train car, single-sex schools, locker rooms, competitive sports, and prisons, as examples. What sort of context-specific regulatory definitions would be appropriate? I suggest that the further definitional criteria move away from self-identification the more compelling the justification for segregation by sex needs to be.

Thus the next step would be a durational requirement, such as the requirement by some women's colleges that applicants live and identify as women. Such a durational requirement might be prospective—that is, a young person

38. Schiappa, *supra* note 1.

starting college intends to live as a woman—or it may be retrospective—that is, a person has lived as a woman or man for a specified length of time. A purely durational requirement generally assumes a minimum of social transitioning, such as a change in pronouns, name, and manner of self-presentation, but such a social transition may or may not be specifically required.



Requiring a documented diagnosis of gender dysphoria or transgender identity would be the next step, since it would require action by a health professional that, unlike purely durational criteria, go beyond the affected person's immediate control. Similarly, the next step involves gender-affirming hormone therapy, which also normally requires the cooperation of health professionals. In this hypothesized graduated series of required definitional attributes, the top step would be gender affirmation surgery, including so-called “top” and “bottom” surgery.

Currently, different regulatory contexts impose different definitional requirements to “count” as female or male. Changing the sex listed on one's birth certificate is regulated by states. Most states require either that one has undergone gender affirmation surgery or have a doctor's letter indicating the person has changed sex/gender without requiring surgery.

In athletic competition, typically segregated by sex, one finds self-identification as the sole definitional attribute required in some states (such as Connecticut), while to compete in events sanctioned by the NCAA, transgender women athletes must first complete one calendar year of testosterone suppression treatment. The International Olympic Committee has changed their re-

quired definitional attributes for transgender athletes over time. The IOC's Executive Board in 2004 included durational, legal, anatomical (surgical) and hormonal definitional criteria. They then revised those criteria in 2015 to focus on duration and hormonal (testosterone) levels.³⁹ Yet another approach that may recommend diluting the hormonal requirement is pending.⁴⁰

One could envision the steps of required definitional attributes as requiring increasingly compelling justification provided by the defining authority as one moves up it, as provided in the graphic.⁴¹ Not unlike the concept of “levels of scrutiny” in U.S. constitutional law, the greater the burden on the individual to comply, the more compelling the justification should be, with the strictest scrutiny reserved for the most onerous requirement—surgery.

The definitional ruptures I have described are likely to continue. Currently the rupture is so great that even within a shared context of human activity (say, housing inmates in carceral settings, or high school athletics), the variety of regulations across different jurisdictions result in the assessment that the same person “counts” as male in one jurisdiction and female in another. Such cross-jurisdictional ruptures eventually will be reconciled by the courts, one might reasonably assume, though the practice of having distinct required definitional attributes in different activities is likely to remain.

Some argue for a one-size fits all approach to transgender men and women, claiming that if a person is recognized in one context as a woman or man, then it becomes a “rights issue” that person be so recognized in *all* contexts.⁴² Such a claim begs the question at hand and ignores the importance of context. There are other concepts that have an ordinary meaning that require specificity in certain contexts. Consider the word “adult.” The word has an ordinary meaning, but in practice means something different to a biologist (sexual maturity), with respect to alcohol laws or voting eligibility, and in contexts where a person may be “tried” as an adult.⁴³ Similarly, while there is controversy over the concept of transracialism, it seems uncontroversial that racial self-identification is unproblematic in some contexts but is an inadequate definitive attribute in the context, for example, of reparations efforts.⁴⁴ In short, context matters, especially in a conceptual domain as contested as sex/gender, and we need to do the tough work of figuring out how and when different definitional attributes matter and when they do not.

39. See Joanna Harper's essay in this issue and Schiappa, *supra* note 1, Chapter 7.

40. See *id.*

41. The author is grateful to Andrew Whitacre for his work developing the graphic.

42. See, e.g., Rachel McKinnon's comments in Scott Gleeson and Erik Brady, *These transgender cyclists have Olympian disagreement on how to define fairness*, USA TODAY, Jan. 11, 2018, <https://www.usatoday.com/story/sports/olympics/2018/01/11/these-transgender-cyclists-have-olympian-disagreement-how-define-fairness/995434001/> [<https://perma.cc/Z8HM-PS8L>].

43. See, e.g., Maria Cramer, *When are you really an adult?*, N.Y. TIMES, Jan. 19, 2020, at A17.

44. WILLIAM DARITY & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* (2020).

As the famed philosopher W. V. O. Quine noted, “Our patterns of thought or language have been evolving, under pressure of inherent inadequacies and changing needs, since the dawn of language; and, whether we help guide it or not, we may confidently look forward to more of the same.”⁴⁵ As our understanding of and attitudes about sex and gender continue to evolve, we can expect our definitional habits to need to evolve as well.

45. W.V.O. QUINE, *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 24 (1969).