

TRANSGENDER ATHLETE BANS AND THE ANATOMY OF ANTI-TRANSGENDER POLITICS

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I. INTRODUCTION

In an interview with transgender actress Laverne Cox, *Time* magazine proclaimed that 2014 was the “tipping point” for transgender rights and visibility in the United States.¹ This journalistic language lingered in popular consciousness into the following decade and continues to color perception of modern transgender history.² In the following years, the terrain of LGBTQ+ rights activism shifted radically in response to the countrywide legalization of same-gender marriage, which for years had dominated the priorities and legal reform efforts of activist circles at the expense of other issues like antidiscrimination laws, health care access, youth homelessness, and the unique interests of groups who did not fit into the “assimilationist” image that marriage activists relied on for success—including bisexual and transgender

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1. Katy Steinmetz, *The Transgender Tipping Point*, TIME MAG. (May 29, 2014, 6:08 AM), <https://time.com/135480/transgender-tipping-point>.

2. See, e.g., Laurie Penny, *What the Transgender Tipping Point Really Means*, NEW STATESMAN (June 24, 2014), <https://www.newstatesman.com/politics/welfare/2014/06/laurie-penny-what-transgender-tipping-point-really-means>; Samantha Allen, *Whatever Happened to the Transgender Tipping Point?*, DAILY BEAST (Apr. 10, 2017, 2:01 PM), <https://www.thedailybeast.com/whatever-happened-to-the-transgender-tipping-point>.

people.³ With access to marriage apparently resolved by *Obergefell v. Hodges*, attention was freed up to focus on new problems and fresh attempts at legal reform.⁴ At the same time, this new liberty of focus generated new risks and battles.

The label of the “transgender tipping point” is certainly true in a sense. The visibility of transgender people vastly expanded over the past decade, resulting in an uptick and expansion of activism, theory, and media that demanded more nuanced and realistic understandings of transgender life—not as deviant, clownish, or shameful, but as a worthy and complex part of the tapestry of humanity.⁵ However, as Michel Foucault observed in a different context, “visibility is a trap.”⁶ Increased visibility also brings increased scrutiny.⁷ In this context, increased scrutiny manifested in various executive and legislative branch attacks by right-wing political actors as well as certain segments of feminist activists.⁸

One form of attack that generates abundant media fervor is banning transgender athletes, particularly transgender girls, from participating in women’s sports because of their assigned sex at birth.⁹ In Idaho, for example, the “Fairness in Women’s Sports Act” created a variety of standards around participation in school sports for girls.¹⁰ Teams or competitions designated for women or girls were unilaterally unavailable for those assigned male at birth (“AMAB”), while the inverse was not true.¹¹ The Act also established a private cause of action for any student “deprived of an athletic opportunity” by a violation of the preceding section, and allowed an unidentified class of persons to dispute a student’s sex and verify

3. Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 107, 126–27 (2014).

4. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

5. June Thomas, *Great News: More Americans Personally Know Someone Who’s Transgender*, SLATE (Mar. 31, 2016, 2:06 PM), <https://slate.com/humaninterest/2016/03/more-americans-know-someone-whos-transgender-thats-important.html>.

6. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH 200* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

7. *Id.*

8. Heron Greenesmith, *A Room of Their Own: How Anti-Trans Feminists are Complicit in Christian Right Anti-Trans Advocacy*, POL. RSCH. ASSOC. (July 14, 2020), <https://www.politicalresearch.org/2020/07/14/room-their-own>.

9. David Chen, *Transgender Athletes Face Bans from Girls’ Sports in 10 U.S. States*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/article/transgender-athlete-ban.html>.

10. IDAHO CODE § 33-6202 (2021).

11. *Id.*; IDAHO CODE § 33-6203 (2021).

their genitalia, hormone profile, and birth certificate.¹² These three elements—barring transgender girls from participating in girls' sports, establishing a private cause of action, and establishing a sex verification process—are the core components of existing athletic bans in many states.¹³

Transgender participation in sports also generated two major lawsuits that illustrate how the issue ballooned into an apparent culture war.¹⁴ *Hecox v. Little* and *Soule v. Connecticut Association of Schools, Inc.* arose through nearly opposite circumstances.¹⁵ *Hecox* was a lawsuit by a coalition of transgender and cisgender female athletes challenging the aforementioned Idaho Act.¹⁶ *Soule*, by contrast, was brought on behalf of cisgender female students by their parents, challenging the district's permittance of transgender girls' participation in women's sports divisions on the grounds that it produces a competitive disadvantage and violates Title IX of the Education Amendments of 1972.¹⁷ The plaintiffs in *Soule* were motivated largely by the success of two transgender girls in track.¹⁸ Both cases are currently awaiting appeal after being resolved—by preliminary injunction and motion to dismiss, respectively—in favor of the more “trans-friendly” side.¹⁹ These two cases, in conjunction with the legislative bans, are at the center of the political and legal debates around transgender rights in sports.²⁰

Focusing on youth athletics might seem like an oddly hyper-specific method for repressing transgender and queer people, since adolescent transgender athletes are presumably a small proportion of an already comparatively small population.²¹ But curiously, these

12. IDAHO CODE §§ 33-6205, 33-6203 (2021).

13. See, e.g., FLA. STAT. § 1006.205 (2021) (incorporating all three components); W. VA. CODE § 18-2-25d (2021) (establishing private cause of action and determining participation in athletics based on assigned sex); TENN. CODE ANN. § 49-6-310 (2021) (determining participation in athletics based on assigned sex).

14. *Hecox v. Little*, 479 F. Supp. 3d 930, 944 (D. Idaho 2020); *Soule by Stanescu v. Connecticut Ass'n of Sch., Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021).

15. *Hecox*, 479 F. Supp. 3d at 931.

16. *Id.* at 944.

17. *Soule*, 2021 WL 1617206, at *1–2.

18. *Id.*

19. *The Coordinated Attack on Trans Student Athletes*, AM. C.L. UNION (Feb. 26, 2021), <https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=2677&context=honorsthesis>.

20. *Id.*

21. *Id.*

bans on transgender women from participating in women's sports proved radically more successful in legislatures than other similar legislation focused on transgender people.²² For instance, the athletic bans found wider reach than bans on gender-affirming health care for adolescents, discrimination in the use of public facilities like bathrooms or locker rooms, and explicit exclusion from insurance coverage for particular kinds of gender-affirming care.²³

This legislative success is especially clear in 2021, which saw a flood of anti-transgender legislation in which the sports bans outperformed similarly conceived bills.²⁴ For example, although a ban on transgender youth from accessing gender-affirming health care prevailed despite a gubernatorial veto in Arkansas,²⁵ similar bills died in committee in a variety of other states,²⁶ and Arkansas' widely criticized statute is the only one currently codified.²⁷ By contrast, athletic bans exist in nine states, including Arkansas, eight of which were first proposed and then quickly passed in 2021.²⁸ Additionally, even states without this type of legislation receive guidance from state athletics associations that often set discriminatory requirements for transgender participation, whether that be a surgery requirement or a birth certificate

22. Katelyn Burns, *The Massive Republican Push to Ban Trans Athletes, Explained*, VOX (Mar. 26, 2021, 12:51 PM), <https://www.vox.com/identities/22334014/trans-athletes-bills-explained>.

23. See generally *Snapshot: LGBTQ Equality by State – Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/equality-maps> (Feb. 15, 2021).

24. Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (Apr. 15, 2021, 9:46 AM), <https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html>.

25. Samantha Schmidt, *Arkansas Legislators Pass Ban on Transgender Medical Treatments for Youths, Overriding Governor's Veto*, WASH. POST (Apr. 6, 2021, 6:37 PM), <https://www.washingtonpost.com/dc-md-va/2021/04/06/arkansas-transgender-ban-override-veto/>.

26. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2164 (2021).

27. Compare ARK. CODE ANN. § 20-9-1502 (2021), with, e.g., Vulnerable Child Compassion and Protection Act, S.B. 10 (Ala. 2021) (died in the House), and Youth Health Protection Act, S.B. 514 (N.C. 2021) (failed to advance through the legislature).

28. IDAHO CODE §§ 33-6202, 6203, 6205 (2021); MONT. CODE ANN. §§ 20-7-1305–1307 (2021); FLA. STAT. § 1006.205 (2021); W. VA. CODE § 18-2-25d (2021); TENN. CODE ANN. § 49-6-310 (2021); ARK. CODE ANN. § 16-129-104 (2021); MISS. CODE ANN. § 37-97-1 (2021); ALA. CODE § 16-1-52 (2022). Mississippi has yet to categorize its ban within the statutory code. South Dakota promulgated its policy through executive order.

change.²⁹ This is something of a curiosity: what is it about sports and transgender people, particularly transgender women and girls, that made these bills a success where similarly minded legislation failed?

Certain liberal critiques of the athletics bans fail to grasp their fundamental purpose.³⁰ For instance, some point out that there are not actually any “out” transgender women attempting to compete with cisgender women in the jurisdictions that pass these bills, while others observe that transfeminine athletes do not make up a large enough portion of the general population to actually put cisgender women at risk of losing out en masse to their transgender counterparts.³¹ Both approaches regard the bans on transgender athleticism as forms of distraction or obfuscation, a manufactured response to a non-issue.³²

There may be a certain truth to this assessment; yet this attitude implicitly suggests that if transgender women were a larger and more prevalent population, either generally or in the sports world, then the fearmongering and doomsaying of conservatives and trans-antagonistic feminists would actually be valid and justified. A trans-feminist perspective is therefore necessary to unpack the full implications and problems of these laws.³³

Through the trans-feminist lens, legislative attacks on transgender athletes are part of a joint project between conservative evangelicals and trans-hostile feminists to regain control over the

29. Chris Mosier, *High School Policies*, TRANSATHLETE, <https://www.transathlete.com/k-12> (last visited Mar. 18, 2022).

30. Ashley Schwartz-Lavares, *Trans Women Targeted in Sports Bans, But Are They Really at an Advantage?*, ABC NEWS (Apr. 7, 2021, 7:13 PM), <https://abcnews.go.com/US/trans-women-targeted-sports-bans-advantage/story?id=76909090>.

31. See, e.g., Jeremy W. Peters, *Why Transgender Girls are Suddenly the G.O.P.’s Culture-War Focus*, N.Y. TIMES (May 3, 2021), <https://www.nytimes.com/2021/03/29/us/politics/transgender-girls-sports.html>; David Crary & Lindsay Whitehurst, *Lawmakers Can’t Cite Local Examples of Trans Girls in Sports*, ASSOCIATED PRESS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports>; Zoe Christen Jones, *The Bans on Transgender Athletes – 6 Facts*, CBS NEWS (June 7, 2021, 1:00 PM), <https://www.cbsnews.com/news/transgender-athlete-bans-facts>.

32. Jones, *supra* note 31.

33. The core principles of trans-feminist philosophy are bodily autonomy and the social mutability and historical flexibility of gender and sex. Talia Mae Bettcher, *Trans Feminism: Recent Philosophical Developments*, PHIL. COMPASS, at 1 (2017). These two principles are extended into a variety of different political and epistemological commitments. For primers or examples of trans-feminist philosophy, see Talia Mae Bettcher, *Full-Frontal Morality: The Naked Truth About Gender*, 27 HYPATIA 319, 319 (2011) [hereinafter *Full-Frontal Morality*]; THE TRANSGENDER STUD. READER (Susan Stryker & Stephen Whittle eds., 2006); C. RILEY SNORTON, BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY (2017); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990).

social meaning of gender and sex.³⁴ Whether the bills actually impact a substantial amount of real people or not is something of a tangential issue because the broader but more indirect social consequences are ultimately more important.³⁵ Sports are a lingering area where assigned sex is believed to have a non-arbitrary and non-socially contingent effect on one's personhood and capabilities.³⁶ Protecting that belief is vital for protecting the whole artifice of gender.³⁷ What makes the transgender sports bans particularly successful is that they shore up this ideological project with minimal blowback.³⁸

In Section II, this Comment reviews basic trans-feminist definitions and assumptions that are critical in order to understand the substantive character of the arguments. Section III identifies the main arguments of the anti-LGBTQ+ political project as expressions of three tendencies: delineating cisgender women as inferior, painting transgender women as deviant, and affirming the worldview of the patriarchal family. It achieves this through a blend of case and statutory analysis and political-philosophical critique, drawing influence from gender studies. Finally, in Section IV, this Comment looks to the future of equitable sports policy and LGBTQ+ liberation activism.

II. BACKGROUND AND TERMINOLOGY

Attitudes towards transgender rights and liberation are highly contingent on one's background assumptions about what gender is within a given society.³⁹ As such, it is prudent to clarify the

34. See Katelyn Burns, *The Rise of Anti-Trans "Radical" Feminists, Explained*, VOX (Sept. 5, 2019, 11:57 AM), <https://www.vox.com/identities/2019/9/5/20840101/terfs-radical-feminists-gender-critical>; see also H el ene Barth el emy, *Christian Right Tips to Fight Transgender Rights: Separate the T from the LGB*, S. POVERTY L. CTR. (Oct. 23, 2017), <https://www.splcenter.org/hatewatch/2017/10/23/christian-right-tips-fight-transgender-rights-separate-t-lgb>.

35. Peter Hayes, *Transgender Athlete Fight to Heat Up as Legislatures Return*, BLOOMBERG L. (Oct. 7, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/transgender-athlete-fight-to-heat-up-as-legislatures-return>.

36. See, e.g., Raymond Grant, Note, *Equal Rights Amendment v. Title IX: Should Male-Student Athletes Be Allowed to Compete on Female Athletic Teams?*, 47 SUFFOLK U. L. REV. 845, 859 n.28 (2014).

37. Birgit Braum uller et al., *Gender Identities in Organized Sports—Athletes' Experiences and Organizational Strategies of Inclusion*, 5 FRONTIERS IN SOCIO. 1, 3 (2020).

38. Peters, *supra* note 31.

39. Zawn Villines, *What to Know About Gender Bias in Healthcare*, MED. NEWS TODAY (Oct. 25, 2021), <https://www.medicalnewstoday.com/articles/gender-bias-in-healthcare>.

underlying assumptions of this Comment as well as the terminological decisions that have gone into it.

Traditionally, the terms “sex” and “gender” are taken to be synonymous.⁴⁰ Talia Bettcher describes this worldview as “the natural attitude,” a form of common sense that under scrutiny turns out to be neither truly common nor particularly sensible.⁴¹ The natural attitude, which might also be labeled biological essentialism, holds that “two (mutually exclusive) sexes exist, every human being is ‘naturally’ one or the other, and exceptions to this division may be dismissed as ‘unnatural.’”⁴² This appeal to nature is not merely descriptive but a form of normative “moral order” that structures how bodies are understood and treated.⁴³

Feminist theory and activism in the twentieth century inaugurated a distinction between gender and sex.⁴⁴ This distinction is a conceptual tool which argues that sex is a dimorphic set of observable biological qualities, including reproductive organs, chromosomes, and hormone profiles.⁴⁵ Gender, on the other hand, is a constructed phenomenon, the set of cultural and sociopolitical assumptions imposed on the aforementioned biological differences, often referred to within feminist literature as “sexual difference.”⁴⁶ The sex-gender distinction’s utility for feminist activism is that it undermined an essential feature of patriarchal thought and social practice: that women were subordinate because of their bodies and not because of the values and norms societies impose on those bodies.⁴⁷

40. Lauran Neergaard, *Science Says: Sex and Gender Aren't the Same*, AP NEWS (Oct. 23, 2018), <https://apnews.com/article/politics-science-health-gender-identity-biology>.

41. *Full-Frontal Morality*, *supra* note 33, at 320.

42. *Id.*; see also Robin Dembroff, *Beyond Binary: Genderqueer as Critical Gender Kind*, 20 PHILOSOPHERS' IMPRINT 1, 15 (2020) (identifying the four axes of dominant Western gender ideology: binary, biology, teleology, and hierarchy).

43. *Full-Frontal Morality*, *supra* note 33, at 320.

44. Debra Bergoffen & Megan Burke, *Simone de Beauvoir*, STAN. ENCYC. PHIL. (Mar. 27, 2020), <https://plato.stanford.edu/entries/beauvoir/#SecoSexWomaOthe> (“The most famous line of *The Second Sex* [by Simone de Beauvoir] is credited by many as alerting us to the sex-gender distinction. Whether or not Beauvoir understood herself to be inaugurating this distinction, whether or not she followed this distinction to its logical/radical conclusions, or whether or not radical conclusions are justified are currently matters of feminist debate.”).

45. SALLY HASLANGER, *RESISTING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE* 184 (2012).

46. *Id.*

47. Kathleen Lennon, *Feminist Perspectives on the Body*, STAN. ENCYC. PHIL. (Sept. 21, 2019), <https://plato.stanford.edu/entries/feminist-body>.

Other thinkers and actors would go even further and argue that sexual difference itself is ideological or normative, since assigning a body a “sex” is also imposing a gendered value onto it, and some bodies—particularly those with intersex characteristics—do not meet the dimorphic standard laid out within the sex-gender distinction.⁴⁸ In other words, sex is not objective while gender is constructed; both are products of human meaning-making, and their “objectivity” only emerges within a given social landscape.⁴⁹ It is this latter assumption, that “sexual difference” is not above epistemological critique as a category, that guides this Comment.

Those who live and understand themselves as basically fitting to the gender socially associated with the sex they were assigned at birth are contemporarily referred to as “cisgender.”⁵⁰ However, some people find themselves incapable of adjusting to the “natural attitude” and its moral order.⁵¹ “Transgender” is a contemporary umbrella term for people whose gender expression conflicts with the predominant values and traits associated with assigned sex by the society in which they live, and who understand themselves as such.⁵² This recognition of self-consciousness is critical to separate out transgender existence from gender nonconformity—a sometimes related, but non-identical, phenomenon.⁵³ Likewise, defining “transgender” as a particular way of life within a highly gendered society disrupts the prevailing psycho-medical model of transgender life, which treats transgender existence as a medical aberration to be solved through “treatment.”⁵⁴ Instead, this definition embraces a more complex

48. *E.g.*, JUDITH BUTLER, GENDER TROUBLE 3 (1990).

49. *Gender and Health*, WORLD HEALTH ORG., https://www.who.int/healthtopics/gender#tab=tab_1 (last visited Mar. 5, 2022).

50. *Cisgender*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/cisgender> (last visited Mar. 5, 2022).

51. See Talia Bettcher, *Feminist Perspectives on Trans Issues*, STAN. ENCYC. PHIL. (Sept. 21, 2020), <https://plato.stanford.edu/entries/feminism-trans>.

52. *Transgender People, Gender Identity and Gender Expression*, AM. PSYCH. ASS'N (2014), <https://www.apa.org/topics/lgbtq/transgender>.

53. *Id.*

54. Aviva Stahl, *Prisoners, Doctors, and the Battle Over Trans Medical Care*, WIRED (July 8, 2021), <https://www.wired.com/story/inmates-doctors-battle-over-transgender-medical-care>.

sociological account that considers a broader range of social factors and lived experiences.⁵⁵

Much of transgender existence is tethered to forms of medical pathology.⁵⁶ The most famous of which is “gender dysphoria,” a psychiatric diagnosis of suffering or discomfort with one’s assigned sex.⁵⁷ The medical model results in common expectations that all trans people must undergo the same kinds of hormone treatments and surgeries and must explain or understand themselves in identical terms or narratives.⁵⁸ This model further assumes that dysphoria is a purely internal process rather than a dialogue with the external qualities of a highly gendered, patriarchal society.⁵⁹

Yet, actual transgender life does not, and need not, comply with these sorts of reductive narratives, and transgender people might pursue a more limited biomedical intervention or avoid biomedicine altogether.⁶⁰ To be transgender is a social status within a particular type of society, not a disease state.⁶¹ This is particularly necessary to remember in the context of the sports industry, which places a variety of medical gatekeepers in the path of transgender and intersex athletes and often demands that they undergo hormone therapy, invasive surgeries, or other forms of sex verification in order to compete with dignity.⁶²

This Comment frequently uses the term “transfeminine” as an adjective to describe people who were assigned male at birth but live and understand themselves as nonbinary or as trans women. While this term has certain limitations at capturing the full range of experiences and gender expression within that group of people, the

55. See Lloyd Minor, *Nature, Nurture, Sex, and Gender*, STAN. MED., <https://stanmed.stanford.edu/2017spring/sex-gender-nature-and-nurture-stanford-school-of-medicine-dean-lloyd-minor.html#> (last visited Mar. 5, 2022).

56. See, e.g., Guy T’Sjoen et al., *Endocrinology of Transgender Medicine*, 40 ENDOCRINE REV. 97, 97, 112–13 (2019).

57. Robin Dembroff, *Moving Beyond Mismatch*, 19 AM. J. BIOETHICS 60, 60 (2019).

58. Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, in BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 221 (1991).

59. Austin H. Johnson, *Rejecting, Reframing, and Reintroducing: Trans People’s Strategic Engagement with the Medicalization of Gender Dysphoria*, 41 SOCIO. HEALTH & ILLNESS 517, 517 (2019).

60. Stone, *supra* note 58.

61. Lisa R. Miller & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 SOCIO. F. 809, 809 (2015).

62. See generally Florence Ashley, *Gatekeeping Hormone Replacement Therapy for Transgender Patients is Dehumanising*, 45 J. MED. ETHICS 1 (2019).

term is less unwieldy than other descriptors and most accurately captures the kinds of people targeted by athletics bans.⁶³

These various definitional considerations are worth discussing because one function of the athletics bans and their associated rhetoric is to flatten transgender experience in a variety of ways.⁶⁴ That kind of flattening, likewise, is often deployed in well-intentioned attempts to defend the rights and interests of transgender people.⁶⁵ The goal of the above discussion, however, is to consider the broad diversity among transgender people and use that diversity to show the ultimate dangers of the anti-LGBTQ legal coalition.

III. ANALYSIS

As argued elsewhere, there are reasons—like promoting transgender and queer participation in athletics—to support the participation of transgender girls in sports, regardless of whether or not the anti-LGBTQ coalition is correct in its arguments.⁶⁶ However, the function of this Comment is not a review of relevant endocrinological science in order to disprove disagreeable claims about transgender athletes.⁶⁷ Nor does this Comment accept the basic truth of the claims for the sake of argument while offering alternative conclusions and implications.⁶⁸ Instead, the goal here is to clarify why the claims are being made in the first place.

63. See, e.g., Ali Durham Greey, *It's Just Safer When I Don't Go There': Trans People's Locker Room Membership and Participation in Physical Activity*, 2022 J. HOMOSEXUALITY 1, 1.

64. See, e.g., Isabel Lohman, *Farragut Student Files Federal Lawsuit to Overturn Tennessee's Transgender Sports Law*, TENNESSEAN (Nov. 4, 2021, 4:23 PM), <https://www.tennessean.com/story/sports/high-school/2021/11/04/tennessee-transgender-sports-law-farragut-student-sues-overturn/6281150001> (“To have the legislature pass a law that singled out me and kids like me to keep us from being part of a team, that crushed me, it hurt very much. I just want to play, like any other kid.”).

65. E.g., Meghan Mangrum, *Metro Nashville School Board Refuses to Update Policy Under State's New Transgender Student-Athlete Ban*, TENNESSEAN (Nov. 29, 2021, 7:07 AM), <https://www.tennessean.com/story/news/education/2021/11/29/nashville-school-board-refuses-update-policy-under-transgender-athlete-ban/6365041001> (declining to update school district policy in order to defend rights of transgender students).

66. See Seth Barry-Hinton, *Transgender Women in Sports: Sexual Difference and Fairness*, WAKE FOREST J.L. & POL'Y: DE NOVO (Dec. 18, 2020), <https://wfulawpolicyjournal.com/2020/12/18/transgender-women-in-sports-sexual-difference-and-fairness>.

67. See, e.g., Roslyn Kerr & C. Obel, *Reassembling Sex: Reconsidering Sex Segregation Policies in Sport*, 10 INT'L J. SPORT POL'Y & POL. 305, 305 (2018).

68. See Barry-Hinton, *supra* note 66.

The attacks on transgender athletes, and the justifications that are proffered as an explanation, serve a variety of social and ideological functions for the anti-LGBTQ+ coalition at this particular historical moment.⁶⁹ First, these bills perpetuate the widely accepted notion that people assigned female at birth (“AFAB”) are innately physically weaker and, by extension, more vulnerable and inferior.⁷⁰ Second, these attacks continue a political program also embodied by bathroom bills and youth health care bans of positioning transgender people as deviants and thereby unworthy of participation in public life.⁷¹ Third, upholding myths of “male” superiority and “female” inferiority reaffirms an ideology called reproductive futurism, a worldview that seeks to protect abstract ideas of “Children” (rather than specific, extant children) within the family unit in order to preserve a distinctly patriarchal-capitalist society and civilization.⁷² This ideology is the unifying characteristic of the anti-LGBTQ+ worldview towards gender and sex,⁷³ and thus has similar explanatory power when it comes to other queer and women’s liberation issues.

There are three different lines of social and legal argument offered to justify bans on transgender, and specifically transfeminine, athletes from competing in the appropriate gender division.⁷⁴ The first argument expresses concerns about privacy and personal safety, particularly safety from malicious actors.⁷⁵ This line of reasoning is the weakest—it fails to appear in the text of many of the athletics bans at all, unlike the other two arguments.⁷⁶ In many ways, this concern is a repackaging of other panics and anxieties about transgender people, as well as gay people, existing and participating in public life.⁷⁷

The second and more superficially persuasive argument is that allowing transfeminine athletes to participate in women’s

69. *Id.*

70. *Id.*

71. See generally JAY JAXEN JONAH, YOUTHREX RSCH. & EVALUATION EXCH., TRANS YOUTH AND THE RIGHT TO ACCESS PUBLIC WASHROOMS (2016), <https://www.issuelab.org/resources/33746/33746.pdf>.

72. See generally LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE (2004).

73. *Id.*

74. See Jon Pike, *Safety, Fairness, and Inclusion: Transgender Athletes and the Essence of Rugby*, 48 J. PHIL. SPORT 155 (2020); Barry-Hinton, *supra* note 66.

75. See, e.g., Pike, *supra* note 74.

76. See, e.g., W. VA. CODE § 18-2-25D (2022).

77. See Jonah, *supra* note 71.

sports undermines principles of fairness and substantive equality, due to trans women's supposed natural superiority in physical ability compared to cisgender women (regardless of current hormone profile, individual skill and training, or specific sport).⁷⁸ In pursuing this argument, conservatives essentially imply that transgender women and cisgender women's interests are primarily conflicting, rather than aligned.⁷⁹

The third line of reasoning criticizes the supposed redefinition of "sex" to encompass more contemporary understandings of gender in a way that purportedly collides with the statutory intent of Title IX.⁸⁰ This argument is typified by the conservative backlash to Justice Gorsuch's majority opinion in *Bostock v. Clayton County*.⁸¹ Each of these legal arguments contain serious weaknesses, but they also betray some of the core intentions behind the attacks on transgender athletes and why that class of people is perceived as a viable target for the anti-queer ideological project.⁸²

A. The Myths of Female Inferiority and the Ideological Function of Sex-Segregated Sport

The belief that AFAB people are naturally and metaphysically predestined to be biologically weaker, slower, and fundamentally less capable in sports and other physical activities compared to their AMAB counterparts is arguably the core thesis of the bans on transgender athletes from sex-segregated competition.⁸³ For example, one attorney with the Alliance Defending Freedom ("ADF"), a Christian conservative organization representing the plaintiffs in *Soule v. Connecticut*, stated that AMAB people unilaterally and innately have a variety of physiological

78. See Barry-Hinton, *supra* note 66.

79. *Id.*

80. *Id.*

81. See, e.g., Rena M. Lindevaldsen, *Bostock v. Clayton County: A Pirate Ship Sailing Under a Textualist Flag*, 33 REGENT U. L. REV. 39, 69–70 (2021). Author's note: Lindevaldsen is an attorney with Liberty Counsel, an evangelical legal nonprofit. She is currently being sued by the Southern Poverty Law Center for allegedly helping her ex-lesbian-turned-evangelical client kidnap the client's child to Nicaragua in order to avoid giving custody to the child's other mother. Interpret that as you will.

82. See Barry-Hinton, *supra* note 66.

83. See, e.g., IDAHO CODE § 33-6202 (2021); see also Alistair Magowan, *Transgender Women in Sport: Are They Really a 'Threat' to Female Sport?*, BBC (Dec. 18, 2018), <https://www.bbc.com/sport/46453958>.

advantages, including “greater explosive power.”⁸⁴ The argument goes that sexual difference is clear-cut and leads directly to athletic advantage for AMAB people and disadvantage for AFAB people.⁸⁵ Permitting transfeminine athletes to participate alongside cisgender women would, therefore, rob the latter of their ability to excel in sports because the former would naturally rise to the top.⁸⁶

Yet, the internal logic of this claim is highly spurious. Examining its inner workings suggests that the real purpose of the athletics bans is to maintain an association between being AFAB and being physically weaker, vulnerable, and in need of protection by men from gender deviance.⁸⁷ Men’s sports are constructed as “categorically superior,” thus, making it an already highly volatile ideological landscape.⁸⁸ Of course, men’s sports were also designed with men in mind.⁸⁹

Yet, at least part of the “gender gap” in sports and physicality is not merely biological, but social.⁹⁰ Iris Marion Young, in her work of feminist phenomenology entitled “Throwing Like a Girl,” asserts that one explanation of the differences between cisgender men and cisgender women is that the latter are objectified and disempowered through stereotypes and cultural norms imposed by a patriarchal society.⁹¹ When a person is told from birth that her body is more fragile, more vulnerable, and overall weaker than others, those social messages—received from family, education, and politics—can be internalized as inescapable biological reality and affect the way that she manipulates her body.⁹²

This offers some explanation of cisgender women who reject the idea that they have common interests with transgender women: “the woman lives her space as confined and enclosed around her at

84. Aallyah Wright, *Families Say Athletic Bans Would Exact Toll on Rural Transgender Youth*, PEW (Mar. 24, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/03/24/families-say-athletic-bans-would-exact-toll-on-rural-transgender-youth>.

85. *See id.*

86. *See id.*

87. *See id.*

88. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Ethics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 10 (2011).

89. *See id.*

90. *See* Iris Marion Young, *Throwing Like a Girl: A Phenomenology of Feminine Body Comportment Motility and Spatiality*, 3 HUM. STUD. 137, 141–53 (1980).

91. *See id.*

92. *See id.*

least in part as projecting some small area in which she can exist as a free subject.”⁹³ When oppression is seen as a fact of biological reality, how can it be resisted—and who in their right mind would want to adopt the signifiers of that biological reality? Yet, transgender women often try to comport themselves in similar ways that cisgender women do to gain social acceptance or “pass,” prompted by social convention to adopt forms of disempowerment in order to pass unnoticed and unhindered through a misogynistic society.⁹⁴ In other words, both cis and trans women are subjected to misogynistic social forces that affect their bodily comportment.⁹⁵

Anne Fausto-Sterling makes a similar argument through the lens of biology rather than political philosophy and phenomenology.⁹⁶ One common claim by the anti-LGBTQ coalition, for instance, is that AMAB people’s “denser bones” puts them at a distinct athletic advantage and that this is a product of *being* AMAB.⁹⁷ Fausto-Sterling, however, observes that a variety of things contribute to bone density—including a society that encourages or coerces sex-segregated forms of labor and imposes sex-segregated standards of diet and exercise on preadolescent or adolescent AFAB children.⁹⁸ These kinds of double standards can shape physiology on an individual and collective level.⁹⁹ Thus, while complex physiological differences between a variety of sexes do exist, the cultivation of those differences and the imposition of values like “weakness” or “strength” onto those differences is social.¹⁰⁰

The ideas put forward by Young and Fausto-Sterling—that the physiological differences resulting from so-called “sexual difference” are at least partly socially contingent and influenced by repressive gender norms—are further affirmed when looking at the history of sex-segregated sport.¹⁰¹ There is a certain curiosity to the

93. *Id.* at 154.

94. See Katie Kirkland, *Feminist Aims and a Trans-Inclusive Definition of “Woman,”* 5 FEMINIST PHIL. Q. 1, 19 (2019).

95. *See id.*

96. Anne Fausto-Sterling, *The Bare Bones of Sex: Part 1 – Sex and Gender*, 30 SIGNS 1491, 1491 (2005).

97. Ray Hacke, *Girls Will Be Boys and Boys Will Be Girls: The Emergence of the Transgender Athlete*, 25 SPORTS L.J. 57, 61 (2018).

98. Fausto-Sterling, *supra* note 96, at 1514–15.

99. *Id.*

100. Not just the imposition of values onto sexual difference, but the concept of sexual difference itself is a form of valuation.

101. Buzuvis, *supra* note 88, at 4.

notion that sex-segregated sport was a kind of symbolic or material victory for women.¹⁰² In reality, the creation of sex-segregated sport was not introduced as a form of fair play for cisgender women, but instead was dictated and directed by men who wanted to prevent women from adopting “masculine traits” and keep men from being “feminized” through mutual association of the sexes.¹⁰³ The ideal was not fairness of competition but separating the sexes to cultivate their respective gendered virtues—what the legal sphere usually calls sex-stereotypes.¹⁰⁴ This cultivation played out on the very structure of the field; certain sports like softball and six-player basketball were invented entirely for the sake of sex-segregation, the emphasis was on leisure and fitness rather than competition, and the attire was more restrictive and “modest.”¹⁰⁵ There is likely continuity between this history of sex-segregated sport as a form of arbitrary patriarchal power and the contemporary attempt to assert control over transgender athletes.

The assumption that sex-segregation was created for women’s benefit seems partly like a conflation of Title IX, which *does* have women’s educational and material interests in mind and seeks to protect their right to sport, with the history of sex-segregated sport, which did not.¹⁰⁶ In fact, some school districts even argued that AFAB people’s supposedly immutable and predetermined physical weakness should preclude them from participating in sport altogether or disallow them from participating on all-male sports teams where no alternatives were available—arguments that did not often hold up to judicial scrutiny after Title IX.¹⁰⁷ In fact, the reason that these defenses against

102. See, e.g., Brianna January & Brennan Suen, *As Trans Americans Face Record Violence, Right-Wing Media Has Been Flooded with Stories Attacking Trans Athletes*, MEDIA MATTERS FOR AM. (Oct. 30, 2019, 10:07 AM), <https://www.mediamatters.org/facebook/trans-americans-face-record-violence-right-wing-media-have-been-flooded-stories-attacking>.

103. Buzuvis, *supra* note 88, at 4.

104. *Id.*

105. *Id.*; see also EILEEN McDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORT* 167–77 (2009).

106. Compare Julie Tamerler, *Transgender Athletes and Title IX: An Uncertain Future*, 27 JEFFREY S. MOORAD SPORTS L.J. 139 (2021) (arguing that Title IX allowed the rapid expansion of women’s educational opportunities), and Erin E. Buzuvis, *Challenging Gender in Single-Sex Spaces: Lessons from a Feminist Softball League*, 80 L. & CONTEMP. PROBS. 155, 160 (2017) (explaining that many early sports programs for women were paternalistically constructed to focus on “leisure” sports and ensure participants were untainted by masculinity).

107. *Saint v. Neb. Sch. Activities Ass’n*, 684 F. Supp. 626, 629 (D. Neb. 1988); *Lantz v. Ambach*, 620 F. Supp. 663, 665 (S.D.N.Y. 1985); see also Scott Skinner-Thompson & Ilona

discrimination claims failed is because they relied on broad generalizations about physical differences between boys and girls without consideration of the individual and how they might deviate from an average person.¹⁰⁸ The parallels to transgender women are clear.

It is also worth observing that, of the two sex-segregated classes of sport, women's divisions and teams are more heavily gatekept than men's divisions.¹⁰⁹ Many of the athletics bans have explicit carveouts for AFAB people to participate in men's teams or competitions.¹¹⁰ It is similarly clear from the character of the lawsuits and surrounding rhetoric that the main targets of the bans are transgender girls who want to participate in girls' and women's sports.¹¹¹ If the belief in sex-segregated sport was purely justified on safety and fairness concerns produced by sexual difference, and not transphobic and misogynist attempts to control a narrative, there would likely be more concern about transgender boys and men participating and competing in men's divisions.¹¹² Yet, this talking point has remained conspicuously absent.¹¹³ In fact, when transgender boys and men who participate in sports are subjected to similar criticism, it is not on the grounds of their safety but seemingly on the grounds that cisgender boys and men are discomfited by the thought of losing to transgender competitors.¹¹⁴

These myriad contradictions all point to an effort to preserve a status quo rather than a genuine concern about fairness. That status quo is one in which "womanhood" is associated with weakness and inferiority.¹¹⁵ Transgender women do not even

M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 274–76 (2013).

108. Buzuvis, *supra* note 88, at 7.

109. See *Hecox v. Little*, 479 F. Supp. 3d 930, 944 (D. Idaho 2020).

110. *Id.*

111. Buzuvis, *supra* note 88, at 14–15.

112. Tamerler, *supra* note 106, at 153–54.

113. See, e.g., Rebekah Harding, *Mack Beggs is Still Grappling with Ignorance*, MEN'S HEALTH (Sept. 16, 2020), <https://www.menshealth.com/trending-news/a33984383/mack-beggs-transgender-wrestler-interview>; Samuel Braslow, *Boxer Patricio Manuel, a Transgender Pioneer, is Still Looking for His Next Fight*, ESPN (June 22, 2021), https://www.espn.com/boxing/story/_/id/31662608/boxer-patricio-manuel-transgender-pioneer-looking-next-fight; see also Buzuvis, *supra* note 88, at 7.

114. Harding, *supra* note 113; Braslow, *supra* note 113; see also Buzuvis, *supra* note 88, at 7.

115. Susan M. Cruea, *Changing Ideals of Womanhood During the Nineteenth-Century Woman Movement*, 2005 BOWLING GREEN ST. U. GENERAL STUD. WRITING FAC. PUBL'N 188, 189.

necessarily escape being painted with that brush since some argue that they only seek to participate in women's sports because they could not succeed in men's sports.¹¹⁶ This illustrates the second goal of the anti-LGBTQ+ coalition: pushing transgender people out of public life.

B. The Control of Public Space and the Justifications for Sport

The desire to preclude transgender people from public life is best represented by “Promise to America’s Children” (“Promise”), an anti-LGBTQ coalition made up of conservative politicians, the ADF, the Family Policy Alliance, the Heritage Foundation, and other similar right-wing Christian organizations.¹¹⁷ Promise seeks to promote federal and state legislation in accordance with a variety of principles.¹¹⁸ Two of those principles are to prevent the provision of gender-affirming health care—like puberty blockers to minors—and to prevent the participation of transgender girls in girls’ sports.¹¹⁹

The irony, of course, is that by trying to ban or repress gender-affirming health care for transgender girls, these anti-queer forces would force them to undergo the painful, depressing, and alienating experience of a testosterone-based puberty that they actively seek to avoid or delay.¹²⁰ Then, they claim that any physiological differences brought by testosterone-based puberty preclude transgender girls from athletic participation unless they are willing to suffer further alienation and repression on a boys’

116. Alan Dawson, *The Biggest Thing Critics Continually Get Wrong About Transgender Athletes Competing in Women’s Sports*, BUS. INSIDER (Apr. 17, 2019), <https://www.businessinsider.com/what-critics-get-wrong-about-transgender-athletes-in-womens-sports-2019-4>.

117. Heron Greenesmith, *New Anti-Trans Promise*, POL. RSCH. ASSOC. (Feb. 12, 2021), <https://www.politicalresearch.org/2021/02/12/new-anti-trans-promise>.

118. *Id.*

119. *Id.*

120. *Puberty Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC (Feb. 19, 2022), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075>.

team.¹²¹ As with other forms of misogyny, there is a gendered double bind at work here.¹²²

That double bind is a part of what this Comment refers to as the control of public space.¹²³ Under the anti-LGBTQ+ coalition's legal regime, it would be ideal for transgender people to remain an aberration without legal protections, public visibility, or social success.¹²⁴ For instance, institutionalized sport is perceived as an opportunity to rise through the ranks of American class hierarchy.¹²⁵ That illustrates both why the issue is so emotionally charged for parents, as in *Soule*, and what the political function or implication of shutting transgender people out of sport is.¹²⁶ The message, effectively, is that by precluding transgender people from participating in sports in a dignified way, they are also deprived of all the intrinsic and extrinsic virtues of sport, including financial gain.¹²⁷

Sports do not solely exist for the individual; they are facilitated by our society in part because they serve broad public goals.¹²⁸ Some of those goals are noble or commendable: the promotion of virtues like teamwork or self-actualization, the aesthetic appreciation of someone who has mastered or honed a particular skill or talent, and the surpassing of personal

121. Kim Elsesser, *What Makes an Athlete Female? Here's How the Olympics Decide*, FORBES (July 27, 2021), <https://www.forbes.com/sites/kimelsesser/2021/07/27/what-makes-an-athlete-female-heres-how-the-olympics-decide/?sh=7b10ea794f9c>.

122. For further discussion of the double binds placed on transgender women—and women in general—see Kirkland, *supra* note 94, at 10, 12.

123. See *supra* Section II.B.

124. See generally Ramón Spaaij, *Changing People's Lives for the Better? Social Mobility through Sport-Based Intervention Programmes: Opportunities and Constraints*, 10 EUR. J. FOR SPORT & SOC'Y 53, 54 (2013) (stating that “sport provides the poor and underprivileged with a means for upward social mobility through mechanisms such as increased occupational and income status, educational attainment and symbolic capital”).

125. See generally *Legislation Affecting LGBTQ Rights Across the Country 2021*, AM. C.L. UNION, <http://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2021> (last visited Mar. 4, 2022) (identifying Anti-Trans Bills that “target transgender people, limit local protections, and allow the use of religion to discriminate”).

126. See *Soule*, *supra* note 17, at 1 (exemplifying how parents both pursue and defend against civil actions regarding transgender participation in sports on behalf of their children).

127. See Patrick S. Shin, *Sex and Gender Segregation in Competitive Sport: Internal and External Normative Perspectives*, 80 L. & CONTEMP. PROBS. 47, 48 (2017) (explaining that sports offer both “internal” and “external” values to the participant).

128. See *id.* at 49 (stating that competitive sports have an “institutional character” which is intertwined with public rules and social values).

limitations.¹²⁹ Some of those goals are more ethically dubious: the promotion of nationalism and other arbitrary group identities, the accumulation of capital by corporate entities, and, of course, the reinforcement of gender hierarchy.¹³⁰

But regardless of whether any particular value of sport is good or bad, what the athletics bans accomplish by shutting transgender people out of sport is depriving them of all these various forms of public life.¹³¹ The message is effectively that transgender people cannot participate in these sorts of public virtues.¹³² They are not welcome to rise through the ranks of the American class system or act as representatives of the nation.¹³³ Nor are they worthy of praise for the hard work and self-actualization that cisgender athletes deserve, as all of their accomplishments are reduced down to biology, hormone therapy, or a psychological defect.¹³⁴ They are effectively marked off as “Other.”¹³⁵ It is the same driving motivation behind discouraging transgender people from using public facilities like bathrooms,¹³⁶ or discouraging

129. See, e.g., *id.* at 52 (noting sports values include the “ideals of fair competition, the abilities and traits necessary for excellence, winning and setting records, and general notions of what is ‘good for the sport’”).

130. See, e.g., *id.* at 55 (explaining how sex segregation in sports has been criticized as enforcing a gender hierarchy by “perpetuat[ing] harmful societal prejudices about the inferior status of women”).

131. See *id.* at 48–49 (stating that competitive sports correlate to many areas of public life including public recognition, money, social status, social esteem, well-being, and social mobility).

132. See generally Julie Kliegman, *Lawmakers Say Trans Athlete Bans Are About Protecting Women’s Sports . . . So Why Are These Three States Targeting Boys and Men?*, SPORTS ILLUSTRATED (Jan. 25, 2022), <https://www.si.com/golf-archives/2022/01/25/luc-esquivel-trans-sports-ban-boys-and-mens-teams-daily-cover> (quoting Chris Mosier’s words: “It’s about banning trans people and limiting our access to our everyday activities . . . erasing trans people from public view”).

133. See generally *id.* (revealing that “trans people are often overlooked in sports”).

134. See generally *id.* (relating the experience of Luc Esquivel, a transgender boy who was banned from playing in high school men’s golf in the state of Tennessee, despite his willingness to demonstrate his abilities).

135. See generally *Transgender Exclusion in Sports: Suggested Discussion Points With Resources to Oppose Transgender Exclusion Bills*, AM. PSYCH. ASS’N, <https://www.apa.org/pi/lgbt/resources/policy/issues/transgender-exclusion-sports> (last visited Feb. 27, 2022) (stating that excluding transgender athletes “can encourage divisiveness and compromise group cohesion, undermining the benefits . . . from team sports”).

136. See generally Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 7 (2017) (discussing how transgender bathroom bans “effectively criminalize the status of being trans”).

transgender adolescents from self-identifying and seeking gender-affirming medical care until it is past a point of no return.¹³⁷

Now that womanhood has been painted with different colors of inferiority—either biological weakness or exclusion from public life and its benefits—the whole project of athletics bans begins to crystallize into something darker.

C. Reproductive Futurism and the Social Meaning of Sex

Reproductive futurism is a concept coined by Lee Edelman that describes a particular way of viewing the world and, particularly, the future.¹³⁸ In Edelman's critical account, all politics center around fighting for a better future for children with the idea being that a structure should be built or maintained that can then be transferred like a possessory interest to future generations.¹³⁹ All political parties and positions seem to act on behalf of "the Child" and its future, which is not necessarily the future of actual living, breathing children, but a symbolic future in which an idealized, hypothetical child is the beneficiary of any possible political action.¹⁴⁰ As a hollow vessel that can be filled with any possible political content, the Child can stoke moral outrage or justify all kinds of atrocity or discrimination in its defense.¹⁴¹ Reproductive futurism need not manifest to that level of extremity, of course, but its fundamental attitude towards children is nevertheless dehumanizing and abstract.

In the transgender athletics context, for instance, both sides frame the ban in terms of the devastating effect on children.¹⁴² The anti-LGBTQ coalition claims that "[w]hen we ignore biological

137. See generally Eliza Chung, *Trans Adults Deserve a Right to Sue for Gender-Affirming Care Denied at Youth*, 24 CUNY L. REV. 145, 148 (2021) (discussing how "discriminatory animus or a wanton disregard for science that supports gender transition as a valid medical treatment" delays the transition process and causes more complications for the transgender individual).

138. EDELMAN, *supra* note 72, at 2–3.

139. *Id.*

140. Katherine Mason, "Won't Someone Think of the Children?": *Reproductive Futurism and Same-Sex Marriage in US Courts, 2003-2015*, 15 SEXUALITY RSCH. SOC. POL'Y 83, 89 (2018).

141. See generally *id.* (suggesting that the Child has been used as an argument for both promoting and opposing same-sex marriage).

142. Compare Wright, *supra* note 84 (stating "barring transgender kids from school sports would jeopardize their mental and physical health and increase their isolation"), with Hacke, *supra* note 97, at 129 (stating that "including [transgender female] athletes denies opportunities to, or arguably endangers, biological females").

reality . . . girls get hurt,”¹⁴³ and Arkansas’ sports ban bears the darkly comical title of “Gender Integrity Reinforcement Legislation For Sports Act” (“GIRLS Act”).¹⁴⁴ Defenders of transgender athletes often use similar kinds of language to make their case but extend a more inclusive coverage to the category of “girl.”¹⁴⁵

Reproductive futurism, however, is not a generic political ideology appropriate to all political environments at all times.¹⁴⁶ It is characteristic of the capitalist mode of production, which requires regular reintroduction of new workers into the labor market and therefore, encourages the formation of a private family unit in which a father acts as boss, a mother pulls double duty as human resources department and gestational vessel, and a child serves as property to be shaped and molded into either the role of father or mother: a “productive member of society.”¹⁴⁷ “Fighting to create a future for our children” is therefore a subtle way of directing people into particular kinds of family units and governing those family units in particular ways.¹⁴⁸

The concept of reproductive futurism helps explain the disparity in success and reception of the bans on transgender youth athletes and the bans on gender-affirming health care for adolescents.¹⁴⁹ When Arkansas Governor Asa Hutchinson vetoed the latter, he rationalized it as a form of “legislative interference

143. Wright, *supra* note 84.

144. Paige Cushman, *Arkansas AG Introduces Bill to Ban Transgender Athletes from Girls’ Sports*, SINCLAIR BROAD. GRP., INC. (Feb. 22, 2021), <https://katv.com/news/local/arkansas-ag-introduces-bill-to-ban-transgender-athletes-from-girls-school-sports>.

145. See generally Wright, *supra* note 84.

146. See generally SOPHIE LEWIS, *FULL SURROGACY NOW: FEMINISM AGAINST FAMILY* 164–65 (Verso, 2019).

147. See generally *id.* at 126, 128–30; see also Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Rethinking the “Beneficial Family” and Marriage-Centric Corporate Benefit Programs*, 14 COLUM. J. GENDER & L. 1, 3–4, 19–22, 28 (2005) (“during the mid-twentieth century, the corporate order underwrote a version of consumer citizenship, branding the ideal typical American social and consumer unit as a white, middle-class, nuclear family.”).

148. For a discussion about how competing paradigms of family structures have been formed through media and corporate influences, see Ponte & Gillan, *supra* note 147, at 20–22.

149. See Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS NEWSHOUR (Apr. 16, 2021, 5:00 PM), <https://www.pbs.org/newshour/politics/new-poll-shows-americans-overwhelmingly-oppose-anti-transgender-laws> (showing a breakdown in how the polling data changes whether the proposed law in question deals with transgender athletes and transgender healthcare issues).

with physicians and parents.”¹⁵⁰ The children’s desires and goals are not mentioned—they exist to be governed and overridden by the whims of parents and doctors.¹⁵¹ It is likely that Hutchinson wished to avoid establishing a precedent of state governments heavily intervening in parental medical decision-making, because in many other situations—such as abortion or conversion therapy—the anti-LGBTQ coalition would be more than happy to give parents unlimited rein to control their children.¹⁵²

Thus, when the anti-LGBTQ coalition argues that AFAB people are naturally weaker, more vulnerable, and less capable at physical activities, or that transgender women and girls should be deprived of the public benefits of sport in order to protect cisgender women and girls from them, it does not matter whether any such people actually exist in their jurisdictions.¹⁵³ The idea is to conjure a specter, “the fascism of the baby’s face,” which can justify a need to maintain and assert control over the social meanings of sex and gender at a time when they seem to be conceptually slipping.¹⁵⁴ The attack on transgender athletes is an attack on bodily autonomy in a field where bodily autonomy is seen as largely irrelevant, and thus can more easily be rationalized.¹⁵⁵

IV. CONCLUSION

The core argument of this piece is that sexual difference and its meaning within the context of sports must be reevaluated and that the preservation of ideological forms of sexual difference is a central goal of anti-LGBTQ politics and the athletics bans. However, there are a variety of other considerations—like what the

150. Andrew DeMillo, *Arkansas Governor Vetoes Transgender Youth Treatment Ban*, ASSOCIATED PRESS (Apr. 5, 2021), <https://apnews.com/article/arkansas-legislature-us-news-legislation-asa-hutchinson-83d07a502678f9745bb00f91aa4865f6>.

151. *See id.* (“The bill is over broad, extreme and does not grandfather those young people who are currently under hormone treatment,” he said, ‘in other words, the young people who are currently under a doctor’s care will be without treatment when this law goes into effect.’”).

152. *Id.*

153. *See generally* Thomas O’Donnell, *Opinion: Can Transgender Females Destroy Girls Sports? Here’s What the Numbers, Science and Common Sense Say*, DES MOINES REG. (Mar. 4, 2022, 10:31 AM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-news/2022/03/04/transgender-girls-wont-destroy-girls-sports-follow-science/9356140002>.

154. EDELMAN, *supra* note 72, at 75.

155. Jennifer Finney Boylan, *Abortion Rights and Trans Rights Are Two Sides of the Same Coin*, N.Y. TIMES (Oct. 10, 2021), <https://www.nytimes.com/2021/10/10/opinion/trans-abortion-rights.html>.

values of sport are in the first place—that are rarely broached during this conversation.¹⁵⁶ What follows are some considerations from two perspectives: priority recommendations for LGBTQ+ activism and policy recommendations based on the values of sports.

The picture painted above is bleak for LGBTQ+ activism, in some ways, because it suggests that transphobia is not simply a matter of irrational understanding or fear of the different. Rather, like other modes of oppression, it is an ideological outgrowth of social systems that code bodies differently for the sake of upholding the powerful.¹⁵⁷ What is necessary, then, is for gay and transgender liberation activists to focus on a politics of bodily autonomy, as the central value which unites feminist and LGBTQ+ liberationist struggles, including transgender athleticism.

Policy recommendations should therefore be grounded not just on the particular values of sport but the values of including transgender people within sport and promoting their bodily autonomy. Lindsay Hecox, the plaintiff in *Hecox v. Little*, succinctly described the value of sports beyond personal victory when she wrote, “I, like all athletes, participate in sports for the same reasons as my peers: to challenge myself, to improve my fitness, to engage socially, and to be a part of a team.”¹⁵⁸ To that end, Connecticut’s policy model, which allows self-identification as the determination for which sports team or division a youth participates in, is one possible solution.¹⁵⁹

Another possibility is to pursue the end of sex-segregation in sport altogether on the grounds that it is harmful; not just for transgender people, but for everyone.¹⁶⁰ One possibility is to blend together the Paralympics system, which has divisions based on individual physical capability,¹⁶¹ with weight class divisions already

156. See *supra* Section II.A.

157. See generally Karissa Provenza, *Operating within Systems of Oppression*, 18 HASTINGS RACE & POVERTY L.J. 295, 306, 311 (2021).

158. Lindsay Hecox, *Anti-Trans Laws Are Preventing Trans Women From Playing on Women’s Sports Teams*, TEEN VOGUE (May 14, 2020), <https://www.teenvogue.com/story/anti-trans-law-women-sports>.

159. Catherine Jean Archibald, *Transgender and Intersex Sports Rights*, 26 VA. J. SOC. POL’Y & L. 246, 257 (2019).

160. *Id.*; Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health Issue*, 40 CARDOZO L. REV. 1813, 1844–45 (2019).

161. *What Is Classification?*, WORLD PARA ATHLETICS, <https://www.paralympic.org/athletics/classification> (last visited Mar. 3, 2022).

used within sex-segregated sport.¹⁶² This would likely be even more controversial as a strategy than simply incorporating transgender people into the prevailing system of sex-segregated sport. However, it would also allow for nonbinary and intersex people to participate in sport with fewer forms of difficulty and may help undo some of the ways in which sex-segregation harms and restricts both cisgender and transgender women by coding their bodies and athletic abilities as lesser.¹⁶³

162. Jacob Queen, *What Is a Weight Class?*, WISEGEEK (Feb. 13, 2022) <https://www.wise-geek.com/what-is-a-weight-class.htm>.

163. Jessica L. Adair, *In a League of Their Own: The Case for Intersex Athletes*, 18 SPORTS L.J. 121, 135–37 (2011).