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Monkey Cage Analysis

Transgender sports bans raise an awkward question: Why categorize healthcare and sports by sex at all?

Here's how American forms, policies, and regulations push citizens to think about gender in culturally specific ways.



FILE PHOTO: A person holds up a flag at City Hall in New York City, N.Y., October 24, 2018. (REUTERS/Brendan McDermid/File Photo)

By Heath Fogg Davis

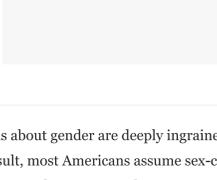
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April 8, 2021 at 7:00 a.m. EDT

On Tuesday, the Arkansas legislature [overrode](#) Governor Asa Hutchinson's veto of a bill banning doctors from providing [gender-affirming healthcare](#) to transgender teens. Last month, Hutchinson signed into law a bill that bans [trans girls from playing on girls' sports teams](#).

Arkansas is not alone. Across the country, state legislatures have been introducing – and sometimes passing – similar bills. [LGBTQ and civil rights groups](#) have been objecting, arguing that “every kid deserves to play sports consistent with their gender identity.”

But why does the U.S. segregate sports – or administer healthcare -- by sex in the first place? In [my research](#) and consulting work, I examine how gender options are presented to Americans on forms and in policies, and how this “choice architecture” -- a term taken from behavioral economics -- nudges us to think about our own and others' gender in particular ways.

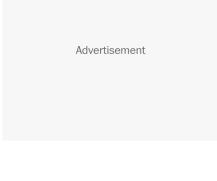


That matters. Ideas about gender are deeply ingrained in Western traditions. As a result, most Americans assume sex-classification policies are necessary and innocuous. The companies and organizations I work with are often surprised to learn about their sex-classification choice architecture, and how it enables discrimination against transgender and non-binary people.

[\[Biden said he'll work to advance transgender rights. Here are 4 things to know.\]](#)

Should anti-sex discrimination laws be used to challenge sex and gender classifications entirely?

As political scientist [Paisley Currah](#) and legal scholar [Dean Spade](#) have shown in their separate research, sex-classification policies play a major role in disadvantaging people who don't conform to what philosopher [K. Anthony Appiah](#) calls “identity scripts” -- the social rules for how girls and boys, men and women should appear and behave. Without naming it as such, the Supreme Court used the concept of gender scripts when in 2020 it decided the landmark LGBT case [Bostock v. Clayton County](#). The Court ruled that firing an employee for being transgender or “homosexual” violates the 1964 Civil Rights Act's Title VII, which covers employment, because it punishes those employees for “traits [the employer] would not have questioned in members of a different sex.”

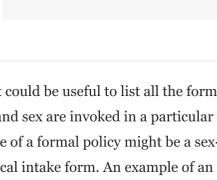


In [Bostock](#), the Court expanded the group of people covered by Title VII -- and presumably also the Civil Rights Act's Title IX, which covers educational programs receiving federal funding. But there's a larger question. Should such laws against sex discrimination be used to scrutinize the constitutionality of policies that classify and sort people by sex and gender at all -- whether male, female, trans, or the newer categories of non-binary and gender non-conforming?

Such classifications can trigger discrimination by gender -- including discrimination against transgender people -- because they authorize administrative agents to use their own judgments about someone's gender to harass and exclude those who deviate from standard gender scripts. For instance, if there were no men's or women's restrooms, just restrooms, authorities and individuals couldn't ban or harass someone needing a toilet from using the “wrong” bathroom. Such judgments are always subjective, because as [feminist biologist Anne Fausto-Sterling](#) points out, “there is no single biological measure that unassailably places every human into one of two categories -- male or female.”

[\[Biden reversed Trump's ban on transgender people serving in the military. Expect backlash in the states.\]](#)

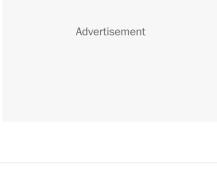
What would an alternative look like?



To consider this, it could be useful to list all the formal and informal ways that gender and sex are invoked in a particular workplace or school. An example of a formal policy might be a sex-classification question on a clinical intake form. An example of an informal policy might be using gendered pronouns in meetings and in emails.

The next step might be to evaluate whether the gender policy is necessary. To do this, someone would first need to determine the policy's goal. What is the organization trying to accomplish, and is the sex-classification policy necessary to achieve the goal? If the answer is no, then perhaps gender can be deleted from the policy. If the answer is yes, then perhaps gender can be kept in the policy but redesigned in a way that includes a wider array of self-designations.

Gender-specific dress codes might be an example of an unnecessary sex-classification policy. An employer might have a legitimate interest in requiring employees to dress “professionally,” or a school might wish its students to wear uniforms. But there is no reason to sort articles of clothing into “men's” and “women's” options: pants, dresses, and skirts can all simply be clothing options.

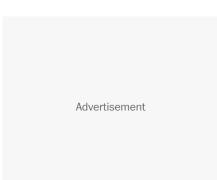


At other times, sex classification policies are tied to legitimate goals, but are not designed in ways that would achieve those goals efficiently. For instance, healthcare providers administering covid 19 testing and vaccinations have a legitimate interest in collecting sex classification data. Such data enables public health authorities to determine whether there are statistically significant differences between “male” and “female” bodies' symptoms and responses, which could be relevant for medical research and healthcare procedures.

But if the surveys to collect these data are inconsistent, public health authorities won't be gathering actionable data. Some providers require individuals to check a male or female box and explain that they are asking for birth sex designation; other forms explain that what is being asked for is “legal sex,” or the sex on a driver's license or passport; and others present binary sex boxes with no definition of sex. For a transgender person these questions may yield different responses -- which could skew public health data for transgender people and others.

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If public health authorities wanted more consistent data, they could work with providers to examine the sex-classification question's goal -- and then make the wording and presentation consistent across the healthcare system.



Title IX calls for gender integration in classrooms but allows sex segregation in sports. Most people, including progressives and conservatives, celebrate Title IX for increasing opportunities for girls and women in sports. But as political scientist [Elizabeth Sharrow](#) points out, neither side of the political aisle has acknowledged the role that “separate but equal” sports plays in “stabilizing gender hierarchies” and reinforcing stereotypes that harm not just transgender and non-binary people, but cisgender girls and women, too. In the near term, Sharrow proposes opening men's athletic programs to women while keeping women's teams closed to cisgender men. Over the longer term, she proposes organizing sports by weight class, body size, or participant skill level rather than gender. This might better level the playing field and reveal sports as a way to challenge gender stereotypes instead of presenting them as natural.

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